

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**KENNETH GREG HUNTER**

Plaintiff

- and -



**BMO TRUST COMPANY and BMO INVESTORLINE INC.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

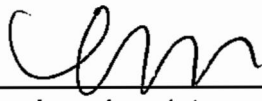
IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date MARCH 30, 2022 Issued by   
Local registrar

Address of court office: 330 University Avenue, 8<sup>th</sup> Floor  
Toronto, ON M5G 1R7

TO: **BMO Trust Company**  
1 First Canadian Place  
100 King Street West  
Toronto, ON M5X 1A1

AND TO: **BMO InvestorLine Inc.**  
100 King Street West, 21<sup>st</sup> Floor  
Toronto, ON M5X 1A1

**CLAIM**

1. The plaintiff claims on his own behalf and on behalf of the other Class Members:<sup>1</sup>
  - (a) an order certifying this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA");
  - (b) an order appointing the plaintiff as representative plaintiff on behalf of the Class pursuant to the CPA;
  - (c) an order defining the Class as set out in paragraph 12;
  - (d) costs of providing notice to the Class Members in respect of this action;
  - (e) a declaration that the defendants are liable for breach of trust, breach of fiduciary duty, and/or breach of contract for unauthorized withdrawals from the Class Members' Registered Retirement Income Fund ("RRIF") accounts pursuant to the Policy;
  - (f) disgorgement and/or equitable compensation and/or damages in the amount the Court finds appropriate at the trial of the common issues, or at a reference, arising from the defendants' unauthorized withdrawals from the Class Members' RRIF accounts pursuant to the Policy;
  - (g) costs of distributing the proceeds of any judgment and/or order to the Class Members;

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<sup>1</sup> Capitalized terms not defined in paragraph 1 are defined below.

- (h) a permanent injunction prohibiting the defendants from making unauthorized withdrawals from the Class Members' RRIF accounts pursuant to the Policy;
- (i) pre-judgment and post-judgment interest at the average rate of return generated in the Class Members' RRIF accounts, compounded monthly, or, in the alternative, the rate of return that would have been achieved in another reasonably prudent investment, compounded monthly, or, in the further alternative, compounded at the rate provided under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "CJA");
- (j) costs of this action; and
- (k) such further and other relief as this Court considers just.

**A. The Plaintiff**

- 2. The plaintiff, Kenneth Greg Hunter, is an individual residing in Stevensville, Ontario.
- 3. The plaintiff is retired.
- 4. The plaintiff saved for his retirement using a registered retirement savings plan ("RRSP").
- 5. Like many Canadians, when he retired, the plaintiff converted his RRSP into a RRIF.



6. The plaintiff's RRIF was maintained with the defendants until 2020, as described below.

**B. The Defendants**

7. The defendants, BMO Trust Company ("BMO Trust") and BMO InvestorLine Inc. ("InvestorLine"), are part of the BMO Financial Group. BMO Financial Group includes BMO Bank of Montreal, a chartered bank.
8. BMO Trust is a trust company organized pursuant to the *Loan and Trust Companies Act*, S.C. 1991, c. 45 (the "LTCA"). BMO Trust is a wholly-owned subsidiary of BMO Bank of Montreal.
9. InvestorLine is organized under the laws of Canada. It is an indirect subsidiary of BMO Bank of Montreal.
10. InvestorLine is a registered investment dealer in all provinces of Canada.
11. BMO Trust and InvestorLine offer registered accounts, including RRIFs.

**C. The Class**

12. The plaintiff brings this action pursuant to the *CPA* on behalf of the following class (the "Class" and "Class Members"):

All individuals resident in Canada for tax purposes who held and/or hold one or more RRIFs with BMO Trust and InvestorLine, and (i) who received more than one withdrawal from their RRIF during a year in addition to the

Minimum Amount,<sup>2</sup> and (ii) where at least one of those withdrawals in addition to the Minimum Amount was for less than \$15,000.

**D. RRIFs**

13. A RRIF is a tax planning account in accordance with section 146.3 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) ("*Income Tax Act*") which permits deferral of taxes.
14. The purpose of RRIFs is to provide retirees regular payments from their savings and to allow tax-sheltered growth of their investments to support those payments during their retirement.
15. Typically, when individuals retire their RRSPs are converted to RRIFs.
16. RRIFs can only be opened and maintained with licensed or authorized carriers such as trust companies, and they must be registered with the Minister of National Revenue.
17. Under the *Income Tax Act*, the plaintiff and the other Class Members are the "annuitant" and BMO Trust and/or InvestorLine are the "carrier".

**E. Features of RRIFs**

18. RRIFs may hold qualified investments under the *Income Tax Act*. The annuitant is not required to pay tax on capital gains, dividends, interest, or other income received in the RRIF.

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<sup>2</sup> The "Minimum Amount" is defined in paragraph 20 below.

19. The annuitant cannot make new contributions to a RRIF. Once the account is established, it can only grow through returns on investments held in the RRIF. However, annuitants can buy and sell investments held in the RRIF.
20. Pursuant to the *Income Tax Act*, the annuitant is required to receive an annual minimum amount (the "Minimum Amount") from the RRIF. The Minimum Amount is a payment out of the RRIF. The quantum of the Minimum Amount is calculated as of January 1 of the year based on (i) the age of the annuitant, or, in some circumstances, the age of the annuitant's spouse, and (ii) the total amount in the RRIF.
21. In addition to the Minimum Amount, the annuitant may elect to receive additional withdrawals from the RRIF during the course of a year.
22. The annuitant may elect to receive either or both of the Minimum Amount and additional withdrawals periodically or in a lump sum.

**F. Tax withholding from RRIF withdrawals**

23. The *Income Tax Act* defines whether and how carriers must withhold taxes from withdrawals from a RRIF.
24. Paragraph 153(1)(l) of the *Income Tax Act* provides:

Every person paying at any time in a taxation year

...

a payment out of or under a registered retirement income fund ...

shall deduct or withhold from the payment the amount determined in accordance with prescribed rules and shall, at the prescribed time, remit that amount to the Receiver General on account of the payee's tax for the year under this Part or Part XI.3, as the case

may be, and, where at that prescribed time the person is a prescribed person, the remittance shall be made to the account of the Receiver General at a designated financial institution.

25. Paragraph 103(6)(d.1) of the *Income Tax Regulations*, C.R.C., c. 945 (the "*Regulations*") provides that (a) the Minimum Amount is not subject to withholding tax, and (b) any other withdrawal from a RRIF is subject to withholding by the carrier in the same manner as a lump sum payment from an employer to an employee pursuant to subsection 103(4) of the *Regulations*.
26. Other than the Minimum Amount, carriers are required to withhold taxes on a withdrawal from a RRIF as follows under subsection 103(4) of the *Regulations*:

Subject to subsections (4.1) and (5), where a lump sum payment is made by an employer to an employee who is a resident of Canada,

(a) if the payment does not exceed \$5,000, the employer shall deduct or withhold therefrom, in the case of an employee who reports for work at an establishment of the employer

(i) in Quebec, 5 per cent,

(ii) in any other province, 7 per cent, or

(iii) in Canada beyond the limits of any province or outside Canada, 10 per cent,

(iv) to (xiv) [Repealed, SOR/2001-221, s. 3]

of such payment in lieu of the amount determined under section 102;

(b) if the payment exceeds \$5,000 but does not exceed \$15,000, the employer shall deduct or withhold therefrom, in the case of an employee who reports for work at an establishment of the employer

(i) in Quebec, 10 per cent,

(ii) in any other province, 13 per cent, or

(iii) in Canada beyond the limits of any province or outside Canada, 20 per cent,

(iv) to (xiv) [Repealed, SOR/2001-221, s. 3]

of such payment in lieu of the amount determined under section 102; and

(c) if the payment exceeds \$15,000, the employer shall deduct or withhold therefrom, in the case of an employee who reports for work at an establishment of the employer

(i) in Québec, 15 per cent,

(ii) in any other province, 20 per cent, or

(iii) in Canada beyond the limits of any province or outside Canada, 30 per cent,

(iv) to (xiv) [Repealed, SOR/2001-221, s. 3]

of such payment in lieu of the amount determined under section 102. [Emphasis added.]

27. The *Regulations* thus require carriers to calculate withholding taxes separately on each "payment" to an annuitant under a RRIF.
28. Each withdrawal from a RRIF is a separate "payment" under s. 103(4) of the *Regulations*.
29. Specifically, when the annuitant elects to receive a withdrawal from the RRIF in addition to the Minimum Amount, the carrier must calculate the withholding tax based on the amount of the withdrawal. When the annuitant elects to receive a second withdrawal from the RRIF in addition to the Minimum Amount during a year, the carrier must separately calculate the withholding tax based on the amount of the second withdrawal. The percentage withheld in respect of taxes from each withdrawal is driven by the amount of each payment separately pursuant to the *Regulations*.
30. The percentage withholding tax applicable to the first withdrawal above the Minimum Amount may differ from the percentage applicable to the second

withdrawal above the Minimum Amount. This is because the withholding taxes on each withdrawal must be calculated separately from other withdrawals above the Minimum Amount.

31. As described below, the defendants improperly calculate withholding taxes on withdrawals from RRIFs. Rather than calculate the withholding taxes separately on each withdrawal as provided in the *Regulations*, the defendants calculate withholding taxes on the total amount withdrawn from the RRIF during a year.
32. The defendants' approach to calculating withholding taxes unlawfully erodes the value of annuitants' RRIFs. Specifically:
  - (a) The defendants systematically withdraw amounts in respect of withholding taxes in excess of the required withholdings under the *Regulations*.
  - (b) The systematic excess amounts withdrawn prematurely erode the annuitants' RRIFs, which reduces the tax-sheltered capital.
  - (c) Even if the annuitants receive tax refunds from the Canada Revenue Agency in respect of the defendants' excessive and unlawful withdrawals, the amounts cannot be restored to the RRIF because annuitants cannot contribute to RRIFs.
  - (d) Accordingly, the defendants' unlawful approach to calculating withholding taxes permanently reduces annuitants' RRIFs.

**G. RRIFs are trusts**

33. BMO Trust and InvestorLine offered RRIFs to the public.

34. BMO Trust is carrier of the RRIFs pursuant to the *Income Tax Act*.
35. RRIFs are structured as trusts.
36. BMO Trust is and/or was trustee of the RRIFs of the plaintiff and the other Class Members.
37. BMO Trust delegates certain trustee functions to InvestorLine as agent.
38. InvestorLine is and/or was also trustee of the RRIFs of the plaintiff and the other Class Members pursuant to BMO Trust's delegation.
39. The defendants owe the plaintiff and the other Class Members trust and fiduciary duties in respect of the RRIFs, including duties to:
  - (a) act with the utmost good faith;
  - (b) act in the best interests of the plaintiff and the other Class Members; and
  - (c) not take amounts out of trust without the authorization of the plaintiff and the other Class Members.
40. The plaintiff and the other Class Members entered into Trust Agreements with the defendants to govern the RRIFs.
41. The Trust Agreements are standard form contracts of adhesion which were drafted by the defendants or their affiliates.
42. Pursuant to the Trust Agreements, the defendants are required to operate the RRIFs in accordance solely with the instructions of the Class Members.

43. The defendants are only permitted to withdraw funds from Class Members' RRIFs in accordance with their instructions and pursuant to the Trust Agreements.
44. The Trust Agreements provide that the defendants may only withdraw amounts for taxes that are "charged to the Plan" (i.e., the RRIF):

... The Trustee may, without instructions from the Planholder, apply any cash held in the Fund for the payment of fees or expenses or taxes, penalties and interest charged to the Plan. Where there is insufficient cash in the Fund at any time, the Trustee or the Agent shall make reasonable requests for instructions from the Planholder regarding which assets of the Fund to liquidate in order to realize sufficient cash to make the payment. ... [Emphasis added.]

45. Amounts in respect of withholding taxes are only "charged to the Plan" where they are required to be paid pursuant to the *Income Tax Act* and the *Regulations*.
46. The defendants engaged in breach of trust, breach of fiduciary duty, and/or breach of contract when they withdrew amounts from the RRIFs unilaterally that were not authorized by the plaintiff and the other Class Members.

#### **H. The plaintiff's RRIF**

47. The plaintiff held a RRIF with the defendants until in or around 2020.
48. In or around January 2019, the plaintiff requested a withdrawal from the defendants from his RRIF in addition to the Minimum Amount. Like many annuitants, the plaintiff requested that the withdrawal and his Minimum Amount be paid in monthly instalments.
49. In or around the spring of 2019, the plaintiff purchased a car. He determined that he required additional money to meet his monthly expenses.



50. In or around June 2019, the plaintiff requested a further withdrawal from his RRIF from the defendants. The June 2019 request was the plaintiff's second request for a withdrawal that year that was in addition to the Minimum Amount. He requested that this payment be made in monthly instalments in addition to his existing withdrawal.

***I. The defendants withdrew amounts from the plaintiff's RRIF without authorization***

51. In or around September 2019, the defendants increased the amounts they were withdrawing from the plaintiff's RRIF which the defendants asserted were in respect of withholding taxes.

52. The defendants improperly calculated the withholding tax based upon the total amount withdrawn from the plaintiff's RRIF above the Minimum Amount over the course of 2019, rather than properly calculate the withholding taxes separately for (i) the plaintiff's first request for a withdrawal from his RRIF above the Minimum Amount for 2019, and (ii) his second request for a withdrawal from his RRIF above the Minimum Amount for 2019.

53. The result was that the defendants unilaterally withdrew amounts from the plaintiff's RRIF in an amount greater than the withholding tax "charged to the Plan". The amount was greater than the required amount under the *Regulations*.

54. The plaintiff did not authorize the defendants to withdraw amounts from his RRIF in respect of withholding taxes in excess of the amount required under the *Income Tax Act* and *Regulations*.

55. The Trust Agreement did not authorize the defendants to withdraw amounts from his RRIF in respect of withholding taxes in excess of the amount required under the *Income Tax Act* and *Regulations*.
56. The defendants' unauthorized withdrawals from the plaintiff's RRIF: (i) unnecessarily eroded the value of the plaintiff's tax-sheltered RRIF, and (ii) required the plaintiff to liquidate investments, which, in turn, resulted in fees for the defendants and further eroded the value of the plaintiff's RRIF.

**J. *The Unlawful Policy***

57. The plaintiff contacted the defendants to inquire about the increased withdrawals.
58. The defendants advised the plaintiff that they were withholding taxes in accordance with an internal policy under which they calculate the withholding taxes payable based on the total amount withdrawn from the RRIF during a year (the "Policy").
59. The defendants have never provided a copy of the Policy to the plaintiff or the other Class Members.
60. The Policy is contrary to the *Income Tax Act* and *Regulations* which require withholding be calculated separately based on each withdrawal from the RRIF, as described above.

**K. *The defendants are liable to the Class***

61. BMO Trust and InvestorLine may only withdraw funds from the Class Members' RRIFs in accordance with the Trust Agreement.

62. The Trust Agreement does not permit withdrawals in respect of withholding taxes except where those taxes are required by law to be paid.
63. Pursuant to the Policy, the defendants withdraw funds from the Class Members' RRIFs without authorization.
64. Withdrawals pursuant to the Policy are:
- (a) contrary to the *Income Tax Act* and *Regulations*; and
  - (b) contrary to the Trust Agreement.
65. The defendants have engaged in breach of trust, breach of fiduciary duty, and/or breach of contract by taking amounts out of the RRIFs of the plaintiff and the Class Members pursuant to the Policy in excess of the required withholding taxes under the *Regulations*.
66. Accordingly, the defendants are liable to the Class Members for withdrawals from their RRIFs made by the defendants in accordance with the Policy in excess of the required withholding taxes under the *Regulations*.
- L. Class Members suffer losses due to the Policy**
67. As set out at paragraphs 13-17, the purpose of RRIFs is to permit tax-sheltered growth of Class Members' savings to provide income during their retirement.
68. In accordance with this purpose, Class Members rely on their RRIFs for investment returns. They cannot restore amounts withdrawn from their RRIFs without authorization and therefore are denied tax-sheltered investment returns.

69. By withdrawing funds without authorization pursuant to the Policy, the defendants caused the value of Class Members' RRIFs to erode in the amount of the funds unlawfully taken out of trust.
70. The defendants further denied the Class Members investment returns in their RRIFs because the unauthorized withdrawals pursuant to the Policy artificially reduced value of their RRIFs.
71. Class Members suffered losses in the amount that the defendants unlawfully and prematurely eroded the value of their RRIFs and consequently, in the amount of their lost tax-sheltered investment returns.
72. The Class Members are entitled to equitable compensation and/or damages in the amount of their losses.
73. The defendants charged the Class Members fees when they were forced to prematurely liquidate investments for the defendants' unlawful withdrawal of funds from their RRIFs pursuant to the Policy. The Class Members are entitled to disgorgement and/or equitable compensation and/or damages in the amount of those fees they paid to the defendants.
74. To restore Class Members' RRIFs, it is necessary and appropriate to compound the disgorgement and/or equitable compensation and/or damages and/or interest to reflect the time value of the Class Members' losses.
75. Class Members require the disgorgement and/or equitable compensation and/or damages and/or interest thereon calculated at:

- (a) the average rate of return generated in the Class Members' RRIF accounts, compounded monthly;
- (b) in the alternative, the rate of return that would have been achieved in another reasonably prudent investment, compounded monthly; or
- (c) in the further alternative, compounded at the rate provided in the CJA.

**M. *Legislation and place of trial***

- 76. The plaintiff and the Class Members plead and rely on the CPA, CJA, LTCA, *Income Tax Act*, and *Regulations*.
- 77. The plaintiff and the Class Members propose that this action be tried in the City of Toronto.

March 30, 2022

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-and- **BMO TRUST COMPANY et al.**  
Defendants

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO  
*Proceeding under the Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

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