

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA  
**Cite as:** *Mercier v. BMO Investments Inc* 2014 NSSM 9

**Claim:** SCCH 419067  
**Registry:** Halifax

**Between:**

Tammy Mercier

Claimant

v.

BMO Investments Inc

Defendant

**Adjudicator:** Augustus Richardson, QC

**Heard:** January 14, 2014

**Appearances:** Erin Cain for the Claimant  
Bradley Proctor for the Defendant

**By the Court:**

1[] This a claim for wrongful dismissal.

2[] The claimant was employed by the defendant BOM Investments Inc (“BOMI” or “the Employer”) as a financial planner. She was dismissed without notice on July 26, 2013. BOMI was of the opinion that she had acted in a conflict of interest and dismissed her for that reason. The claimant denies that there were grounds for discipline. In the alternative, she says that if there was grounds for discipline termination without notice was too severe a penalty.

**Preliminary Objection**

3[] The claimant commenced her action in this court on August 30, 2013. She filled out the Notice of Claim as follows:

“I worked for BMOFG [BOM Financial Group] for +/- 9 yrs. My avg Annual Salary while at BMO in last 3 yrs was \$75,000. I was fired with JUST CAUSE WRONGLY”

4[] She claimed “loss of wages + special damages” in the total amount of \$24,100.00 plus costs, and identified Jay Washington as her counsel. (Mr Washington is with the same firm as Ms Cain, the claimant’s counsel of record in these proceedings.) The matter was set for hearing for October 1, 2013.

5[] The defendant BOMI retained counsel. On September 20, 2013 he requested particulars of the claim against BOMI. On September 27<sup>th</sup> counsel for the claimant responded that she would be “in touch in the next week to further discuss and hopefully clarify some of the particulars regarding Ms Mercier’s claim.” She also agreed to an adjournment for a hearing on a special date. Counsel for BOMI replied that he would await receipt of those particulars before filing a defence.

6[] By agreement the matter was removed from the October 1<sup>st</sup> docket. A special hearing date of December 17<sup>th</sup> was eventually agreed upon. At this time there had still been no particulars provided, and no defence filed.

7[] On November 27<sup>th</sup> counsel for the claimant wrote to counsel for BOMI to advise that she did not “have instructions to make any changes to the Notice of Claim; therefore we must ask that your client’s Notice of Defence be provided as soon as possible.”

8[] Counsel for BOMI was of the view that (as he wrote in submissions to his court dated December 5<sup>th</sup>) he “reviewed the matter and do not feel that the claim adequately particularizes the allegations our client for us to prepare a reasonable Defence. As such, we have instructions to insist upon particulars of the claim.”

9[] Counsel for the claimant did not have instructions to agree to any further delay in the proceedings. She did have instructions to abandon the claim for special damages (as set out in correspondence dated December 6<sup>th</sup>). Counsel for BOMI accordingly wrote to the court advising that he intended to make a motion on December 12<sup>th</sup>

- a. for an order for further and better particulars of the claim, and
- b. seeking an adjournment of the hearing to a later date.

10[] The motions came on before me on December 12<sup>th</sup>.

11[] With respect to the issue of particulars, counsel for BOMI submitted that the practice of counsel in the city when significant small claims court claims were involved was often to request—and to provide—more particularized claims than one generally finds in Small Claims court proceedings. Counsel for the claimant agreed that that was the practice, and agreed that her office had, at least initially, advised that further particulars would be provided.

12[] These submissions put the court in an awkward position.

13[] On the one hand, Notices of Claim in this court are expected to be brief and cursory. They are intended to be completed by lay people who, as parties to a dispute, generally have a very good idea of what the claim is all about—and why it is disputed. Lay people involved in a dispute have generally been at the matter for some time before a claim is filed. The defendant generally knows why the claimant is making the claim that he or she is making. The claimant generally knows why the defendant is not willing to pay. In short, there is usually no need for anything more than a one line claim, or for a one line defence that sets out the reason for the defence. To impose a requirement for “further and better particulars” would simply encourage the kind of “meta disputes” over the pleadings of a dispute, rather than its merits, that one often finds in the superior courts.

14[] The lack of a need for particulars is all the more apparent when one is dealing with a wrongful dismissal claim. The legal issues in such claims are clear and well-established. Termination of the employment relationship requires notice unless there is cause. An employer who has dismissed an employee for cause knows why it has taken the step that it has. It generally needs no particulars in order to defend such a claim.

15[] With these points in hand I would ordinarily not have agreed that particulars were necessary for BOMI to file a defence—or to know what evidence and what defence it needed to mount against the claim. Given this court’s duty to ensure that claims are heard in an expeditious

fashion, especially in cases of wrongful dismissal, and given that the BOMI had had notice of the claim since August, I would have been inclined to dismiss both motions. I did not—and do not—think that particulars are in ordinary course necessary to the filing of a defence to a claim in this court for wrongful dismissal. I would accordingly in ordinary course have proceeded with the hearing on the merits on December 17<sup>th</sup>.

16[] However, and on the other hand, there is the fact of the practice in larger Small Claims Court cases of counsel seeking—and giving—particulars. In my opinion counsel ought always to be encouraged to talk to each other prior to a hearing. It facilitates the possibility of settlement. It may facilitate streamlining the hearing in the event settlement is not possible. More importantly, counsel for the claimant had led counsel for the defendant to believe that particulars would be provided. It was not until late in the day that counsel for the claimant advised that she would not provide any further particulars.

17[] Counsel for the claimant could in my view have refused the request for particulars in September the moment it was made. As noted, particulars in a case of wrongful dismissal in this court are not in normal course necessary. But that is not what happened. Instead, counsel was advised that the request was being considered and that further particulars might be forthcoming. It was not until late in the game that counsel advised that her instructions were that no further particulars were necessary.

18[] It was because of this late notice that I decided to grant the adjournment that I did—not because particulars were needed for the defendant to defend, but to acknowledge that the practice of counsel speaking to each other was a good one—and that reliance on that practice in this case had put counsel for the defendant at a disadvantage.

19[] I should emphasize here that I found no fault in the conduct of counsel for the claimant on this point. Her initial response—in effect that she would seek instructions from her client—was in line with the practice. The problem arose only because it took so long to obtain those instructions from her client. I note too that counsel for the claimant quite candidly and quite honourably acknowledged that the facts in this case put counsel for BOMI in a difficult position. She did not in any way seek to capitalize on it.

20[] The matter was accordingly put over to January 14<sup>th</sup>, 2014.

## **Place of Hearing and Order of Evidence**

21[] Counsel for BOMI wanted to arrange for evidence from a witness (its investigator, Mr Gravel) who lived in Quebec. Counsel for the claimant was agreeable. By agreement between the counsel, this court agreed to a hearing at the offices of the solicitor for the defendant.

22[] At the commencement of the hearing there was some discussion as to the order of witnesses. In ordinary course one would expect the claimant to go first. However, in a case of dismissal for cause the central issue—and the central facts—are those going to the employer's decision that there was cause to terminate without notice. It made sense then to suggest that the defendant go first, with a right of rebuttal if necessary. Counsel agreed to this approach.

23[] I then heard the evidence of the following witnesses:

- a. Amy Hocklin, a financial services manager with the defendant, who worked in the same branch on Quinpool as the claimant (though was not her supervisor);
- b. Brian Wood, an investment sales manager with the defendant, and the claimant's direct supervisor, though located at the George Street branch;
- c. Bernard Gravel, an investigator (corporate security) for the defendant, who operates out of Quebec;
- d. Ms FA, a business woman and client/customer of the defendant (whose name I have hidden for reasons of privacy);
- e. Connie Scott, a former employee of the defendant who had worked as a lending specialist at its investment lending centre; and
- f. the claimant Tammy Mercier.

24[] Mr Gravel's evidence was given by way of teleconference.

25[] I also received into evidence a number of documents.

26[] Before proceeding I note that the defendant BMO Investments Inc (“BOMI”) is technically a separate entity from the Bank of Montreal (“BOM”). However, the operations of the two overlap and intermingle to some degree. (For example, the BOMI’s termination letter was printed on BOM letterhead: Ex. D1, Tab 10.) For purposes of what follows then I will use the term “the defendant” or “BOM” or “BOMI” or “the bank” interchangeably, save where it is technically necessary to distinguish BOMI as the actual defendant.

### **Background Facts**

27[] Ms Mercier was terminated by BOMI on July 26, 2013 on the grounds that she had “breached the Bank’s Conflict of Interest policy by engaging an existing customer to co-sign a personal loan for you.” Ex.D1, Tab 10. That customer was Ms FA. The defendant was also of the view that “during the internal investigation ... [Ms Mercier was] deemed less than forthright and honest in your responses.” *ibid*. On the basis of these two points the defendant concluded that Ms Mercier had breach the defendant’s “First Principles–Our Code of Business Conduct and Ethics; BMO’s Conflict of Interest policy, abused your position and placed the Bank’s reputation at risk.” *ibid*. The defendant concluded that it had “lost all trust and confidence in your ability to act with honesty and integrity.” *ibid*. The events leading up to the defendant’s decision are set out below.

28[] Ms Mercier was hired by BOMI as a financial planner in August 2010. She was paid a combination of salary and commission. She has worked in the financial services field since 1993. She is divorced, and has two young daughters.

29[] Ms Mercier’s role as a financial planner was to bring in business, and to encourage customers of BMO to invest in plans and securities managed or offered by BOMI. As a planner she had a number of clients she serviced. She operated out of a BOM branch. She advised them with respect to their investment portfolio. She was not responsible for loans, or for personal or commercial lines of credit, loans or other banking operations. Those matters were dealt with by BOM, not by BOMI.

30[] Ms FA is a business woman. She owns and operates a construction and rental property company. She had co-owned the company with her husband for 36 years up until his death about five or six years ago. She has continued to operate the company since that time. During all that time she has dealt and deals with a number of banks in the city. She has dealt with BMO for “a long time.” She also has business and personal dealings with the CIBC, RBC and the TD Bank, although the majority of her business is with the BOM.

31[] Ms FA and Ms Mercier met some time ago. Ms Mercier knew Ms FA’s late husband from her days working at Nesbitt Burns. After Mr FA’s death Ms Mercier and Ms FA became closer. Ms Mercier helped Ms FA with her son, who needed direction and guidance following the death of his father. She introduced him to a local entrepreneur who operated a boxing club. She and Ms FA shared the experience of being single parents and mothers of young children, and became friends.

32[] A meeting between Ms FA and Ms Mercier in July 2011 subsequently became an issue of concern for the defendant.

33[] Part of Ms FA’s company’s investment/saving portfolio at the BMO included GICs that renewed from time to time. In 2011 she received a call from the bank indicating that the company GICs were up for renewal, and that her signature was required on the renewal forms. Ms FA went in to sign the forms and there met Ms Mercier. Ms FA stressed in her testimony that that was “the only dealings I had with her.” However, they also, in Ms FA’s words had “hit it off” right from the start. They went out for lunch from time to time, either with other bank employees or just the two of them, and they became friends.

34[] Ms Mercier also testified as to the circumstances of the 2011 meeting. She explained that Ms FA’s company account was a commercial account, which was not within her area of responsibility. However, as a financial planner she could sometimes get better interest rates. Because of that the commercial account managers were encouraged to pass GICs that were up for renewal on the financial planners to see if they could get better rates. Indeed, sometimes the commercial account managers would use the codes allocated to financial planners for the purpose of getting those better rates. On those occasions Ms Mercier as the financial planner

would not even meet the customer, but because her code was being used she was expected to sign the renewal form.

35[] On this occasion the commercial account manager who dealt with Ms FA and her company's GICs met with Ms FA. She told her that she would try to get a better rate through Ms Mercier, which in fact is what happened. Ms Mercier signed the forms for two GIC renewals for Ms FA's company, as did Ms FA, and the GICs were renewed: see Ex.D1, Tab1. And as Ms Mercier explained, she "never did anything else for Ms FA."

36[] Moving forward to the spring of 2013, Ms Mercier found herself in some financial difficulty. She had a house that was mortgaged, and a number of debts, one of which was a high interest (10%) debt owed to a local lawyer. She felt that if she could consolidate the various loans into one she could more easily manage her finances and her life. She applied to BOM for a consolidation loan. It was turned down.

37[] Shortly after Ms Mercier was turned down for the loan she had lunch with Ms FA. She discussed her financial issues with Ms FA, and asked for her advice. Ms FA testified that she was shocked at the interest rate being charge by the lawyer. She said that was "too much." She told Ms Mercier that she was currently making arrangements for a loan, and that once that came through she would lend the money to Ms Mercier. Ms Mercier told her that she could not wait that long. Ms FA then offered to co-sign a loan for Ms Mercier. The latter accepted the offer. In making this offer Ms FA testified that she "never thought it was a conflict [of interest], it was just helping a friend I care about." She was also adamant that Ms Mercier "never came to me to ask me to loan her the money ... she never did ... she never asked me to co-sign a loan." She repeated that Ms Mercier "never asked me for money, she never solicited me ... I said I would help her ... there was nothing sinister about it."

38[] Ms Mercier then called Ms Scott, saying that she wanted to initiate an application for a loan for \$45,000.00. Ms Scott at the time was working at the bank's lending centre as a lending specialist. Ms Scott testified that they were only allowed to deal with (that is, consider loans to) the bank's investors, and that Ms Mercier as a financial planner with BMOI was one of those people she was permitted to deal with. She testified that she received a call from Ms Mercier saying that she wanted to apply for a consolidation loan. Ms Scott testified that Ms Mercier told her that she had been turned down once before; that this time she had a co-signor for the loan;



and that the co-signer was Ms FA and that she (Ms FA) was a BMO customer. Ms Mercier was, according to Ms Scott, “right up front about it.”

39[] Ms Scott testified that she stopped Ms Mercier at that point, and said that she would have to speak to one of her co-workers, a senior lender who also acted as manager when the manager was absent. Ms Scott told him the situation, and his response was that he did not know whether they could accept a BMO customer as a co-signor of a BMOI employee. He in turn apparently spoke to other people in the bank’s credit department. Both Ms Mercier and Ms FA were customers of the bank and so were entitled to be considered for a loan, but the general consensus was that there was some concern about one customer co-signing for another. One of the more senior staff then asked Ms Scott to “proceed very carefully ... just make sure to ask Ms Mercier if she has business dealings with the bank customer [*i.e.*, Ms FA].” Ms Scott testified that she called Ms Mercier back and said that she “had to ask if she has any business dealings with the client, and she said ‘absolutely not’.” On that basis Ms Scott took the application and keyed it into the bank’s system, and proceeded to process the loan: see also Ex. D1, Tab 5. pp.2-3 (computer notes dated June 17<sup>th</sup> and 19<sup>th</sup>).

40[] At the same time as this was going on Ms FA was also arranging for a \$20,000 line of credit to finance her daughter’s wedding. She met with Ms Hocklin. As part of the application process Ms Hocklin accessed the bank’s computer system. She noticed that an application in which Ms FA was named, and Ms Mercier was the primary applicant, was already in the system. She asked Ms FA about it and she acknowledged the application, saying that she was trying to help a friend. After Ms FA left the office Ms Hocklin contacted a colleague in the regional credit office “to get his opinion on the ethics of the request.” He told her that the application should be handed over to Ms Scott. She then contacted Ms Scott and “explained the situation; she advised that she was aware of the possible ethics issue but that she was documenting the information about the relationship in the history text of the application & had also contacted Credit department to see if she should proceed with the application/get advice.” see her notes at D1, Tab 6. Ms Hocklin recommended to Ms Scott that it ought to be made a condition of the loan that Ms FA obtain independent legal advice: *ibid.*

41[] A few days after her meeting with Ms FA Ms Mercier approached Ms Hocklin. The latter noted that Ms Mercier had approached her

“wanting to talk about the situation. She asked if this was a conflict of interest. I was careful not to say yes or no as I have to refer business to Tammy & work with her but my opinion was that it could certainly be perceived as a conflict to someone looking at the application. I did not specifically provide Tammy with advice as I was unaware of her current personal or business relationship with Ms FA as well as the fact that I have to maintain a professional relationship with Tammy.” Ex. D1, Tab 6.

42[] Ms Scott and her managers continued to have some concerns about the situation. On the one hand, Ms Mercier and Ms FA were both customers of the bank and so entitled to be considered. On the other hand, one was co-signing for the other, with technically meant that their interests were in conflict. Ms Scott called Ms FA. She explained that she “had to make sure that she [Ms FA] understood that she would be responsible for the loan if it was not repaid and Ms FA said she understood.” She asked Ms FA for some financial documents, which she received. However, Ms Scott then received another call from Mr McVale in the credit department, who advised her that he had decided they would not go ahead with the loan. He told her that he was not comfortable with the situation. Ms Scott testified that she said “fine.” She then communicated that decision to Ms Mercier, suggesting to her at the same time that she might have better luck with another bank. She also called Ms FA to tell her the same thing.

43[] On or about June 24<sup>th</sup> Ms Mercier applied to the RBC for a loan. Mr Hickey, a friend of Ms Mercier’s former husband, knew Ms Mercier. He became aware of the loan—though how was unclear. Mr Hickey subsequently provided an interview to RBC’s financial investigator, an audio copy of which was copied onto a CD. No copy of the CD, or of a transcript, was introduced at the hearing. What we had was Mr Gravel’s notes of what he had heard when listening to the CD. (I should note here that Mr Gravel is French Canadian, and it was apparent that English was not his first language. That, together with the fact that Mr Hickey’s “evidence” was double-hearsay, means that Mr Hickey’s apparent evidence concerning what transpired has to be treated with extreme caution.) According to Mr Gravel’s notes of Mr Hickey’s interview on the CD, Ms Mercier wanted to apply for a \$50,000.00 loan from RBC. She told the bank that it was to be co-signed by a friend who was also a BMO client. Mr Hickey was reported to have spoken to Ms FA, “who told him that she wanted to help out her friend so she would not lose her house, this friend was her Financial Planner at BMO.” Ex. D1, Tab 8, p.4. Mr Hickey is reported to have told Ms FA “that he had concerns about ethics and told her he could not go any farther with the

loan request.” *ibid.* Mr Hickey then reported the application to RBC compliance, and then next day informed Ms Mercier “about the loan refusal and the Ethics issue:” *ibid.*

44[] I note here that Mr Wood, Ms Mercier’s direct supervisor, became aware of Ms Mercier’s application because he became involved at some point in the discussions within the credit department. Both Ms Scott and Mr Wood testified to this effect. Mr Wood testified that he became aware of it when the loan application was sent to the credit department. According to him, “the man who reviewed it got in touch with my supervisor, the regional vice-president, to make me aware that it looked inappropriate when an employee of the bank applied for a loan with a customer of the bank as co-signor.” Mr Wood reviewed the computer notes on the loan application and noted that “it had quotations that Ms Mercier said she had no dealings with Ms FA, and that Ms Scott had said there was no conflict because of that.”

45[] Mr Wood at some point formed the opinion that Ms Mercier had not been truthful in saying that she had no business dealings with Ms FA. In his view the 2001 incident involving the GIC renewals meant that Ms Mercier “had had financial dealings with the customer before this [the loan application] ... she had processed an investment for the client in the name of her business.”

46[] Mr Wood then prepared a letter dated June 27, 2013 suspending Ms Mercier with pay pending BOM’s investigation “into her activities regarding an attempted joint loan application with a well known commercial client of her branch:” Ex. D1, Tab 3; see also Tab 2. He later told the BOM’s investigator, Mr Gravel, that Ms Mercier had responded on June 27<sup>th</sup> that

“she (Tammy) had asked the client (Ms FA) for her advice as Ms FA was a successful business woman. Tammy informed Ms FA that she was having financial difficulty and that BMO was not going to approve her for a debt consolidation loan. Tammy contended that at this point that [Ms FA] offered to co-sign a loan so that Tammy could be approved. Tammy accepted this offer and got [Ms FA] in touch with the lender at the Specialized Lending Centre who did the original loan to add [Ms FA] as the co-signor:” Ex. D1, Tab 3.

47[] Mr Gravel is the bank's security investigator for the Atlantic Region. He reviewed the file on July 2, 2013. He spoke to Mr Wood, and received an email dated July 2<sup>nd</sup> from him setting out his understanding: Ex. D1, Tab 3.

48[] Mr Gravel then came to Halifax on July 10<sup>th</sup> and conducted interviews of Ms Mercier, Ms FA, Ms Scott and Ms Hocklin on July 10, 2013. His report and his interview notes were introduced as an exhibit: D1, Tabs 4-8.

49[] The interview with Ms FA that was conducted by Mr Gravel was reduced to a handwritten statement prepared by Mr Gravel and signed by Ms FA. As noted above, English is not Mr Gravel's first language. Nor is it Ms FA's first language. In this regard I note that Ms FA's English, although good, was not perfect. Mr Gravel testified that his normal practice is to have witnesses prepare their own statements, but Ms FA had asked him to write her's out. He then read it out to her and she signed it. Given that neither spoke English fluently, and given that Mr Gravel was the one preparing the statement, I am reluctant to place as much weight on the statement as I am prepared to place of Ms FA's direct testimony before me at the hearing.

50[] In the statement prepared by Mr Gravel Ms FA repeated that she had offered to help Ms Mercier, and that she had offered to co-sign a loan for \$45,000.00. She stated that the loan had been refused, and that she had then received a call from Mr Hickey. She stated that "he is the one who told me it was a conflict of interest, he also told me that the loan request was for \$50,000.00." Ms FA testified before me that she was not concerned about the apparent different in the amounts because (as noted as well in the statement), no actual amount had been agreed at the time she offered to co-sign, and (since no loan application had actually been signed by her) at some point it would come back to her and she would have authorized the amount or not: Ex. D1, Tab 7.

51[] Ms Hocklin met Ms FA in passing at the branch on July 22<sup>nd</sup>. Ms Hocklin reported this conversation in a letter dated July 23, 2013 in part as follows:

"She [Ms FA] proceeded to tell me how concerned she was for Tammy, and that she was losing sleep thinking about it every night. She stated that after she met with Tammy and the loans officer at RBC, she was told by the officer that he was

no comfortable processing the application, and that he would be reporting the activity to the proper authorities.

“(This next part of the conversation Ms FA never really completed her sentences but trailed them off) Ms FA told me she did not realize that this was a big deal, and did not know it was wrong of Tammy (to approach her) until the gentleman from RBC told her this. She continued to say that she covered for Tammy as she did not want Tammy to lose her job; that she had lied (in her conversation with Bernard [Gravel]) so that she would not lose her job.” Ex. D1, Tab 6.

52[] Ms FA confirmed aspects of this evidence in her testimony. She testified that she asked Ms Hocklin about Ms Mercier and told her that she “was really upset, I said I was losing a lot of sleep, I wish in a way I knew it was a conflict of interest.” However, denied that she told Ms Hocklin that she had lied to Mr Gravel. Rather, she said that she had said that she “wished Tammy had not lied to me about it not being a conflict of interest.”

53[] Mr Gravel prepared a report dated July 23, 2013. He testified that its purpose was to collect the facts and present them to Human Resources who would then decide what course of action to take. He was not asked his opinion as to what should happen to Ms Mercier’s employment. It was up to management to decide what to do.

54[] There are two aspects of the report’s conclusion that are particularly relevant to this matter. The first is the following:

“It has been confirmed that Tammy Mercier is not doing presently any kind of BMO business for Ms FA; only three years ago she had renewed a GIC for Ms FA. Tammy Mercier declared that Ms FA first offered to lend her money to her, but Tammy Mercier refused and proposed Ms FA to become her co-signor. They were friends, this whole incident has been initiated by Ms FA and she feels bad about how it ended.” Ex. D1, Tab 8, p.5.

55[] The second relevant passage from the conclusion is the following:

“This file initially has also been referred to use because it was alleged by Mr Evan Hickey that Tammy Mercier had raised the amount from \$45,000.00 to \$50,000.00 unbeknownst to Ms FA. This is denied by Tammy Mercier. We haven’t found any documentation to sustain it. Ms FA confirmed that this is what Mr Hickey told her about; she replied that there was no amount agreed, it was at the feasibility stage and she would have made a decision eventually. Ccaps BMO [the computer system notes] indicates the request for a personal loan as \$45,000.00.” Ex. D1, Tab 8, p.5

56[] Three days after receiving this report Mr Wood, in consultation with Human Resources, terminated Ms Mercier’s employment for cause (as noted at the beginning of this section).

### **The BMOI’s and BMO’s First Principles and Rules of Conduct**

57[] Several corporate policies were put into evidence:

- a. Corporate Policy: *FirstPrinciples*, Our Code of Business Conduct and Ethics: Ex. D1, Tab 11;
- b. BMO Mutual Funds Compliance, Process and Guidelines, BMOI Guidelines of Conduct: Ex. D1, Tab 13;
- c. BMO Mutual Funds Compliance, RISR Responsibilities, RISR–Permitted and Restricted Activities: Ex. D1, Tab 14; and
- d. Mutual Fund Dealers Association of Canada, Staff Notice, Personal Financial Dealings with Clients: Ex. D1, Tab 15.

58[] It was not disputed that Ms Mercier was aware of all of these codes; or that she was expected to and did review them (particularly the First Principles) at least on an annual basis: see, for e.g., Ex. D1, Tab 12.

59[] The codes all deal with a variety of matters. They also all deal with conflicts of interest.

60[] Principle 5 of the First Principles states that employees should “avoid conflicts of interest,” saying that they must “ensure that your personal and business affairs do not conflict—or appear to conflict—with our interests or the interests of our current or prospective customers and suppliers.” Employees are advised that if they become aware of a conflict of interest they should “promptly report it to management.”

61[] The BMOI Guidelines of Conduct are similarly concerned with conflicts of interest. These are defined to arise “when an employee’s position or responsibilities with BMOI present an opportunity for personal gain apart from the normal rewards of employment. They also occur when an employee’s personal interests are inconsistent with those of BMOI or its clients. In such circumstances, employees ... may not become involved in any situation or activity in which their personal interests may conflict or appear to conflict with those of BMOI or its clients.” The Guidelines go on to state that if the employee is “still unclear whether a proposed course of action would be a conflict, call BMOI Compliance for assistance.”

62[] As a mutual fund dealer, Ms Mercier was prohibited from, amongst other things, engaging in “personal financial dealings with clients, including lending your own money to or borrowing money from clients (other than your own family):” Ex. D1, Tab 14.

63[] The MFDA notice regarding personal financial dealings with clients states, amongst other things, that “[a]ny conflict or potential conflict of interest that arises must be immediately disclosed in writing to the client prior to the Member proceeding with the proposed transaction giving rise to the conflict or potential conflict:” Ex. D1, Tab 15.

64[] I accept that a bank or other financial institution is entitled to expect a high degree of ethical conduct of its employees, particularly with respect to conflicts or potential conflicts of interest between them and the employer’s customers. For that reason I am not surprised that in the cases relied upon by BMO in the case before me the termination of employees for conflicts of interest was upheld: *Teti v. CIBC* [2010] CLAD No. 392 (Monteith), where the employee interfered with the investigation of a complaint filed by her sister and counselled her sister to make representations to the employer; *Lokanc v. BOM* [2012] CLAD No. 114 (Howes), where the employee instructed other employees to reverse service charges on accounts belonging to her and her husband; *Marshall v. Pacific Coast Savings Credit Union* [1995] BCJ No. 289, where

the employee lied about the state of his debt loan in response to direct questions from his supervisor; *Ennis v. CIBC* [1986] BCJ No. 1742, where the employee borrowed money from clients and had knowingly submitted inaccurate loan applications to his employer; *Stock v. Bank of Nova Scotia* [1988] BCJ No. 1110, where the employee approved, contrary to his employer's policies, unsecured loans to a customer for stock market investments, which loans were never repaid; and *Patterson v. Bank of Nova Scotia* [2011] BCJ No. 1120, where the employee took up a second job as a realtor, and then refused to give the second job up after her employer learned about it.

65[] However, not every conflict of interest amounts to grounds for termination, though it may justify discipline: see, for e.g., *Roda v. BOM* 2012 CanLII 42061 (CALA). Moreover, a failure to perceive or avert a *potential* conflict of interest may be an error of judgment, but not one that necessarily goes to the heart of the employment relationship: see, for e.g., *Ogden v. CIBC* 2014 BCSC 285.

66[] The question here is whether there was a conflict of interest and, if there was, whether Ms Mercier disclosed the conflict to her employer.

67[] There were two potential areas of conflict between the interests of Ms Mercier as a BOMI employee and those of a customer of a bank (that is, Ms FA).

68[] The first lay with the 2011 transaction in which Ms Mercier signed off on the GIC renewal for Ms FA's company. BOMI appears to have interpreted this one incident as meaning that Ms FA was and remained a client of Ms Mercier up to and including 2013. That interpretation, had it been true, might have justified the concern that BOMI placed on what it perceived to be a conflict of interest.

69[] However, in my opinion, and having heard all the evidence, I am satisfied that if this was BOMI's interpretation it was incorrect. I accept the evidence of both Ms FA and Ms Mercier that that was the only "business" transaction that Ms Mercier conducted for Ms FA; that it happened only once in 2011; and that it did not happen again. This indeed appears to have been the conclusion of the bank's own investigator, Mr Gravel, as above noted at para.54. I am also satisfied that Ms Mercier, as she testified at one point, simply forgot about the 2011 renewal



because she did so many of them, because it was done as much to help her co-employee as it was part of her own work, and because she had no business with Ms FA after that point.

70[] To the extent then that Ms Mercier and Ms FA had an ongoing relationship after that point, it was purely personal. Ms FA's business with the bank was conducted with other departments and other employees, not with Ms FA. So while Ms FA was a customer of the bank in 2013, she was not a customer or client of Ms Mercier at that time. (Indeed, I have some doubt that the single GIC renewal in 2011 would on the evidence (none of which was contradicted by the bank) have made Ms FA a client of Ms Mercier at that time either.) I am accordingly satisfied that Ms Mercier truthfully answered Ms Scott (subject to her having forgotten about the 2011 renewal) when she told her that she did no business for Ms FA.

71[] I am accordingly satisfied that the only conflict—or potential conflict—of interest that existed in 2013 lay in the fact that Ms FA was a customer of the bank who was offering to co-sign a loan for Ms Mercier. On the face of it, that put them in a conflict, inasmuch as Ms Mercier's personal interest lay in obtaining a loan, and Ms FA's offer to co-sign that loan put her own interests at risk if Ms Mercier defaulted.

72[] Having said that, I am also satisfied (and again there was no evidence from the bank to contradict this) that Ms Mercier revealed this potential conflict to the bank right from the very beginning. She told Ms Scott that she wanted to apply for a loan, and that the co-signer was a customer of the bank.

73[] Conflicts of interest once revealed do not always or necessarily bar or forbid a particular transaction from taking place. Conflicts of interest are commonly handled in one of two ways:

- a. sometimes a lender may consider the conflict too close or too problematic, and refuse to proceed with the transaction; but
- b. other times the lender will ask for independent legal advice to ensure that the person whose interest is being put at risk is fully aware of the risk and has decided to accept the risk with a mind free from undue influence or duress.

74[] In this case the evidence was clear that Ms FA, an experienced business woman in her own right, was aware of the risk associated with co-signing a loan. Ms Scott explained the risks to her, and was satisfied that Ms FA understood them. It appears from the evidence of both Ms Hocklin and Ms Scott that, at least in the initial stages of the loan application, the bank was considering following the second approach. However, as was its right, it eventually decided to adopt the first option—that is, to elect not to proceed.

75[] I note too that there is nothing in any of the policies introduced into evidence that expressly states that one customer of the bank (whether BMO or BMOI) cannot under any circumstances co-sign a loan for another customer. In the absence of an express prohibition employees of the bank who were also customers were left to feel their way to an appropriate result, a result dictated (as it generally must be) by the particulars facts of each case. In the case before me that indeed is what the bank's credit department appears to have done, considering, exploring and eventually deciding against the loan.

76[] The other point of course is that the potential conflict was not so clear as to result in an immediate rejection of the request. Ms Scott's testimony that she sought advice from others in her department, and that while some concern was expressed the process was allowed to continue for some time, suggests that no one in the bank had a clear idea of what the proper course of action was. But if it was not clear to many in the bank how can it be said that Ms Mercier ought to have known right from the start that the proposed transaction was or would be prohibited? Ms Mercier was surely entitled to ask, as long as she placed all her cards on the table. She did that, and in doing that I am of the view that she committed no breach of her employer's policies.

77[] In this case the bank was exercised about the fact that Ms Mercier had not initially gone to her supervisor to seek his opinion on whether it was appropriate to have Ms FA as a co-signor. And it is true that she did not. But it was not clear to me that failure to advise a supervisor of something that one does advise the loan department about amounts to a wilful ignoring of the bank's policies. Indeed, on the bank's evidence her supervisor, based on the information she openly provided when applying for the loan, would have done no differently that what the credit department eventually did—and for the same reason. At best then Ms Mercier's failure to go to her supervisor was an error of judgment. It might have warranted discipline, or an educational session—it did not warrant termination.

78[] The bank was also concerned about Mr Hickey's allegation that Ms Mercier had asked for \$50,000.00 rather than \$45,000.00. Mr Gravel noted that there was no documentary support for this allegation. Ms Mercier denied it. Without having the benefit of actually hearing the statement on the CD that Mr Gravel listened to, I am not prepared to accept that that is what in fact actually happened. There was in any event no prejudice to Ms FA. Whatever amount was discussed was just that—an amount. Ms FA was not bound to anything until a completed form was placed before her for her signature.

79[] Finally, with respect to Ms Hocklin's evidence, having heard Ms FA's speech (by which I mean her less-than-perfect command of English), and her testimony, I am satisfied that she did not say she had lied to Mr Gravel. I am satisfied that at the time of her conversation with Ms Hocklin she was operating under the understanding that Ms Mercier had committed a serious breach of ethics by letting her go along with something that constituted a conflict of interest. That understanding was based on the statements made to her by Mr Hickey—statements that, I have found, were not supported by the facts. Ms FA's concern about this, as it was throughout, was not that she thought that Ms Mercier had done anything wrong. Rather, it was with what she understood would be its impact on Ms Mercier's employment and future. I am satisfied that throughout Ms FA was acting simply out of a desire to help a friend. Her regret was that by accepting her offer to co-sign Ms Mercier appeared to have put her job in jeopardy. That is what Ms FA regretted. That is what she meant when she said that she wished Ms Mercier had not "lied" to her about a possible conflict of interest. What I find she meant was that she wished Ms Mercier had known and understood—and hence told her—that simply to suggest what was being proposed by Ms FA would put her friend in what her employer would consider to be a conflict of interest and, moreover, a position that her employer would visit with such dire consequences.

80[] For the above reasons I am satisfied that BOMI lacked cause to terminate the claimant. Given that she had worked for the defendant for almost three years as of the date of her termination, and given her age and experience in the industry, I am of the opinion that she was entitled to four months notice. I leave it to the parties to calculate the equivalent of four month's remuneration, subject to the usual withholding. If they cannot arrive at the appropriate amount they may return to me for a decision with respect to the proper amount.

DATED at Halifax, Nova Scotia  
this 11<sup>th</sup> day of March, 2014

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Augustus Richardson, QC