

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

YEGAL ROSEN

Plaintiff

and

BMO NESBITT BURNS INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF DEFENCE

1. Except as expressly admitted herein, the Defendant, BMO Nesbitt Burns Inc. (“the “Defendant” or “BMO NBI”) denies each of the allegations in the Fresh as Amended Statement of Claim and puts the Plaintiff to strict proof thereof.

The Parties

2. BMO NBI is a corporation incorporated pursuant to the laws of Ontario. BMO NBI carries on business in Ontario, and elsewhere across Canada. BMO NBI offers a full range of investment and wealth advisory services.

3. BMO NBI is a wholly-owned subsidiary of the Bank of Montreal. The Bank of Montreal is a chartered bank under the *Bank Act*, S.C. 1991, c. 46.

4. BMO NBI is composed of two independent divisions: the Capital Markets Division, which operates in the area of institutional investment, mergers and acquisitions, and underwriting; and the Private Client Division, which operates all of BMO NBI's retail investing business lines.

5. The Plaintiff, Yegal Rosen, was employed by BMO NBI as an Investment Advisor between approximately June 2002 and April 2006.

6. Unless otherwise stated expressly or implied by the context, all of the materials facts and conclusions of law pleaded in this Statement of Defence apply to the time period between 2002 and through the date on which this Statement of Defence is served.

The Class

7. The Plaintiff brings this action against BMO NBI as representative plaintiff on behalf of a class of current and former employees of BMO NBI (collectively, the "Class Members").

8. This action was certified as a class proceeding by Order of the Honourable Justice Belobaba dated August 20, 2013 (the "Order").

9. Pursuant to the Order, the Class Members are defined as follows:

All Ontario current and former Nesbitt employees who, since 2002, held the position of Investment Advisor, or who performed the same or similar job functions under a different or previous Nesbitt job title, exclusive of any time period for which they:

- (a) held the position of Branch Manager; or
- (b) held the position of Assistant Branch Manager; or
- (c) held the position of Divisional Manager; or
- (d) were Investment Advisors on a team that had one or more Associate IAs or Sales Assistants assigned to them.

10. The set of Class Members defined pursuant to the Order is materially different from and smaller than the class of persons described in paragraph 6 of the Fresh as Amended Statement of Claim.

11. While the Class Members as certified lists three distinct sets of current and former employees of BMO NBI:

- (a) Investment Advisors;
- (b) Associate Investment Advisors; and
- (c) Trainee Investment Advisors,

BMO NBI denies that the Class Members, as defined by the Order, constitute a readily identifiable class of persons.

The Common Issues

12. The Common issues certified by the Order are as follows:

- (a) Are the Class Members eligible for overtime pay pursuant to the *Employment Standards Act, 2000* (“ESA”) and their contracts?

In particular,

- (i) Are Class Members whose primary function is not supervising or managing other employees exempt under the managerial exemption in section 8(b) of ESA Ontario Regulation 285/01, either on the basis of the degree of

autonomy in the manner in which Class Members conduct their job functions, or for some other reason? and

- (ii) Are Class Members exempt under the greater right or benefit exemption in section 5(2) of the ESA?
- (b) If Class Members are eligible for overtime pay pursuant to the ESA and their contracts,
- (i) Does the Defendant owe contractual duties, and/or a duty of good faith and/or statutory duties to:
 - (1) properly classify and advise Class Members of their entitlement to overtime pay for hours worked in excess of 44 hours per week which the employer required or permitted?
 - (2) ensure that the Class Members' hours of work were monitored and accurately recorded?
 - (3) ensure that, where the Defendants required or permitted class members to work overtime, such time was appropriately compensated?
 - (4) If so, did the Defendant breach any of these duties? If so, how?
- (c) Was the Defendant unjustly enriched by failing to compensate Class Members with overtime pay for hours worked in excess of the Overtime Threshold?

- (d) Are the Class Members entitled to an award of aggravated, exemplary or punitive damages based on the Defendant's conduct? If so, in what amount?

Investment Advisors' Roles and Responsibilities

13. Investment Advisors are responsible for marketing to and recruiting clients, researching and reviewing investment products, providing investment related advice and recommendations to their clients, and managing and monitoring client investment portfolios.

14. Investment Advisors are registrants with the Ontario Securities Commission and are required to be approved by the Investment Industry Regulatory Organization of Canada (IIROC).

15. In addition to being registered representatives, Investment Advisors can choose to apply for other professional designations, such as a Wealth Advisor or a Portfolio Manager. The decision to do so is entirely within the Investment Advisor's discretion.

16. Investment Advisors enjoy a high degree of flexibility and autonomy in the course of their employment, subject to regulatory oversight. In particular, Investment Advisors:

- (a) have autonomy as to how they build a client base, including what clients they market to and what steps they take to market to those clients;
- (b) decide what communities they wish to serve;
- (c) decide what investment recommendations to make to clients;
- (d) have control over the arrangements that they make with clients with respect to fees and commissions charged;

- (e) control their hours of work, including how many hours they work in any given week and what particular hours they work in any given week. Investment Advisors are not required to work a certain number of hours or any particular hours;
- (f) when and how long they take vacation; and
- (g) decide where to do their work. Investment Advisors have control over whether to work at their office, at home, or in locations throughout their communities, depending on how those Investment Advisors choose to serve clients.

Investment Advisors' Work Arrangements

- 17. The structure of Investment Advisors' work arrangements differ.
- 18. Some Investment Advisors:
 - (a) work on large teams with several Associate Investment Advisors and sales assistants, often with one senior Investment Advisor as the team leader;
 - (b) work collaboratively by dividing tasks such as business development or market research among the team members;
 - (c) manage their own book of business without the involvement of other Investment Advisors or Associate Investment Advisors, supported by one or more dedicated sales assistants who work only for them;
 - (d) share sales assistants with one or more Investment Advisors;

- (e) work with individuals other than Associate Investment Advisors or sales assistants, such as marketing assistants or cold-callers; or
- (f) work in teams with other financial professionals within the BMO NBI family, such as wealth planners, estate advisors or insurance brokers.

19. The term “team” is used generically in this Statement of Defence to describe an arrangement whereby an Investment Advisor and at least one other person work collaboratively to provide financial services to one or more clients. The concept of a team is often used as a marketing concept by Investment Advisors and other employees of BMO NBI. Teams are not a uniform generalized structure within BMO NBI.

20. BMO NBI does not track teams, nor does BMO NBI set restrictions on when Investment Advisors or other employees can form teams or how those teams operate, subject to regulatory requirements.

21. How members of teams are compensated depends on the arrangements between team members and BMO NBI.

22. Some Investment Advisors working on teams may carry out the following functions, all with branch oversight and approval:

- (a) hire and fire team members;
- (b) supervise other team members;
- (c) exercise discretion and independent judgment in structuring and managing the team;

- (d) negotiate compensation packages with other team members; and
- (e) award bonuses, in their sole discretion, to team members.

23. Some Investment Advisors act as “resident investment advisors” at Bank of Montreal branches. In these circumstances, employees of Bank of Montreal refer clients seeking investment and financial advice to the Investment Advisor, and the investment advisor refers clients to the Bank of Montreal for banking services.

24. A resident Investment Advisor is physically located in the Bank of Montreal branch. As a result, the nature of the practice, the hours devoted to the business and the compensation structure of resident Investment Advisors differ from those of non-resident Investment Advisors.

Investment Advisor Compensation

25. Compensation for Investment Advisors is calculated according to the Investment Advisor Payout Grid (the “Grid”), which forms part of their employment contract. Pursuant to the Grid, Investment Advisors are paid a percentage of the revenue generated by the client base that they build and serve. The percentage of revenue that an Investment Advisor receives pursuant to the Grid depends on, among other things, the investment advisor’s annual gross production, and the trade product or type of transaction in question.

26. The commission and fee based income that Investment Advisors receive pursuant to the Grid is supplemented by other forms of compensation offered by BMO NBI, including asset gathering bonuses, incentive-based rewards, deferred compensation and retirement plans.

27. BMO NBI does not compensate Investment Advisors based on the number of hours that they work.

28. Given the structure of Investment Advisors' compensation to their knowledge, work undertaken by Investment Advisors to market their services and build a client base in the course of a particular week can yield income for many years into the future.

29. As Investment Advisors become more senior, they typically earn higher incomes while working fewer hours than they did in their initial years as an Investment Advisor.

30. Investment Advisors are aware of the opportunity to earn substantial incomes while working relatively few hours at the time they agree to become Investment Advisors with BMO NBI. Individuals specifically choose to become Investment Advisors because of, among other things, the opportunity described above.

Associate Investment Advisors

31. Associate Investment Advisors work with one or more Investment Advisors and/or other Associate Investment Advisors, usually in a team-like structure. Associate Investment Advisors are responsible for working with the Investment Advisor to build and service a client base.

32. The responsibilities of an Associate Investment Advisor vary depending on the structure of the team. Some Associate Investment Advisors fulfill a succession planning role and are being groomed to assume responsibility for the clients serviced by the Investment Advisors with whom they work.

33. Associate Investment Advisors are registrants with the Ontario Securities Commission and are required to be approved by the Investment Industry Regulatory Organization of Canada (IIROC).

34. In addition to being registered representatives, Association Investment Advisors can choose to apply for other professional designations, such as a Wealth Advisor or a Portfolio Manager. The decision to do so is entirely within the Associate Investment Advisor's discretion.

35. The manner in which Associate Investment Advisors are compensated differs depending upon the structure of the team on which they work. The Investment Advisors and Associate Investment Advisors within the team negotiate the compensation arrangements amongst themselves directly.

36. Associate Investment Advisors benefit from the flexibility and autonomy that Investment Advisors enjoy.

Investment Advisor Trainees

37. New Investment Advisors employed at BMO NBI begin as Investment Advisors Trainees.

38. Investment Advisors Trainees enroll in BMO NBI's training program. During the training period, Trainees participate in in-class and in-branch training. BMO NBI's training program provides Investment Advisor Trainees with training necessary to build and appropriately serve a client base.

39. During the training period, Trainees are required to:

- (a) ensure that they have completed the Canadian Securities Course;

- (b) complete the Conduct and Practices Handbook Examination; and
- (c) obtain registration as a Registered Representative.

40. Investment Advisor Trainees take steps to build and serve a base of clients during the training period.

41. Investment Advisor Trainees benefit from the flexibility and autonomy that investment advisors have as described above.

42. Trainees are paid a guaranteed monthly salary, plus a percentage of commissions earned and asset gathering bonuses.

43. Following completing of the training period, Investment Advisor Trainees become Investment Advisors or Associate Investment Advisors.

Class Members' Hours of Work

44. BMO NBI specifically denies that it required and/or permitted Class Members to regularly work hours in excess of 44 hours per week to perform their job responsibilities.

45. Class Members are professionals who have autonomy and flexibility over their hours of work, subject to regulatory requirements. Class Members decide how many hours per week they will work, depending on their own personal objectives.

Class Members are Managers

46. BMO NBI denies that the Class Members are entitled to overtime pay pursuant to the *Employment Standards Act, 2000* (the "ESA").

47. Class Members are exempt from the requirement under the *ESA* to be paid overtime pay pursuant to s. 8(b) of Ontario Regulation 285/01, *Exemptions, Special Rules and Establishment of Minimum Wage*, being a regulation enacted pursuant to the *ESA*. That provision provides as follows:

Part VIII of the Act does not apply to,

[...]

(b) a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis;

48. Class Members are self-managers. Class Members are self-directed and have substantial control over how they do their work, subject to regulatory oversight.

49. Class Members build and serve a base of clients in much the same way as a business owner would build and serve their business. Class Members decide independently, based on their personal career goals and financial objectives, how to best to structure their business, subject to regulatory oversight.

50. Class Members are not generally accountable to anyone else for the manner in which they complete their duties or the hours they devote to their work, subject to BMO NBI's general priorities and regulatory oversight.

Class Members Receive a Greater Right or Benefit than Overtime Pay

51. Class Members are exempt from the requirement under the *ESA* to be paid overtime pay pursuant to s. 5(2) of the *ESA*. That provision provides as follows:

5(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment

standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

52. Through the express and implied terms of their contracts of employments with BMO NBI,

Class Members benefit from:

- (a) flexibility and autonomy over how many hours they work in a given week, subject to regulatory oversight;
- (b) flexibility and autonomy over what particular hours they work in a given week, subject to regulatory oversight;
- (c) discretion over how much vacation they take and when they take vacation;
- (d) substantial current and future compensation pursuant to the Grid, as well as asset gathering bonuses, incentive-based rewards, deferred compensation and retirement plans;
- (e) the opportunity to generate substantial income and work relatively few hours in the future based on work performed at one point in time.

53. Those benefits are each directly related to the entitlement under the *ESA* relating to the provision of overtime pay.

54. The benefits set out above are, individually and when taken together, a greater benefit for Class Members than they would have received if they had received overtime pay pursuant to the *ESA*.

Breach of Contract

55. BMO NBI denies that it owed Class Members the contractual duties alleged by the Plaintiff at paragraphs 11 and 12 of the Fresh as Amended Statement of Claim.

56. In the alternative, to the extent that BMO NBI did owe Class Members some or all of the contractual duties alleged by the Plaintiff at paragraphs 11 and 12 of the Fresh as Amended Statement of Claim, BMO NBI did not breach any of those duties.

Breach of the ESA

57. BMO NBI denies that it breached the *ESA* as alleged in paragraphs 31 and 32 of the Fresh as Amended Statement of Claim.

No Unjust Enrichment

58. BMO NBI denies that the Plaintiff has pleaded any material facts that would give rise to a cause of action for unjust enrichment.

59. In any event, BMO NBI denies:

- (a) that BMO NBI was enriched; and
- (b) that Class Members suffered a corresponding deprivation.

60. In the alternative, to the extent that BMO NBI was enriched and Class Members suffered a corresponding deprivation, the Class Members' contracts of employment with BMO NBI provided a juristic reason for such alleged enrichment and deprivation.

Individualized Inquiries Necessary

61. In the alternative, BMO NBI pleads that some Class Members are exempt from the requirement to be paid overtime pay on the basis that some or all of the factual statements and legal conclusions set out above are applicable with respect to those Class Members.

62. Individualized inquiries are then needed for each Class Member to determine whether they are required to be provided overtime pay pursuant to the *Employment Standards Act*

Damages and other relief sought

63. BMO NBI denies that the Plaintiff is entitled to any of the relief sought in paragraph 1 of the Fresh as Amended Statement of Claim.

64. In particular, and without loss of generality, BMO NBI:

- (a) pleads that the losses and damages claimed are excessive and too remote;
- (b) denies that an aggregate assessment of damages can be made;
- (c) denies that it has engaged in any conduct that would warrant the orders for specific performance sought in paragraph 1(f) of the Fresh as Amended Statement of Claim;
and
- (d) denies that it has engaged in any conduct that would warrant an award of punitive, aggravated or exemplary damages.

Some Class Members' Claims are Statute-Barred

65. Class Members, including Mr. Rosen, knew or ought to have known of the matters that give rise to this action, as pleaded in the Fresh as Amended Statement of Claim, prior to February 8, 2008.

66. BMO NBI pleads that this action is statute-barred with respect to all or portions of the claims of many Class Members.

67. BMO NBI pleads and relies upon the *Limitations Act*, R.S.O. 1990, c. L.15, the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, the *Class Proceedings Act, 1992*, S.O. 1992, c.6, and the *ESA*.

68. The Defendant asks that this action be dismissed with costs.

March 27, 2014

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