

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE) TUESDAY, THE 20th
MR. JUSTICE BELOBABA) DAY OF AUGUST, 2013

B E T W E E N:

YEGAL ROSEN

Plaintiff

- and -

BMO NESBITT BURNS INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION for certification brought by the plaintiff, was initially heard on February 12th and February 13th, 2013 at Osgoode Hall, 130 Queen St. West, Toronto, Ontario, and was continued on April 5th, 2013 at Osgoode Hall, 130 Queen St. West, Toronto, Ontario following delivery by the Plaintiff on February 13th, 2013 of a revised list of common issues and a revised definition of the proposed class, judgment having been reserved to this day.

ON READING the motion records, the facts of the parties, the revised list of common issues and revised definition of the proposed class served by the Plaintiff on February 13th, 2013, the subsequent written submissions of the parties, and all other written submissions and materials filed by the parties, and on hearing submissions of counsel,

1. **THIS COURT ORDERS** that this action be and hereby is certified as a class proceeding.

Class Definition

2. **THIS COURT ORDERS AND DECLARES** that the Class Members are defined as:

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.

Common Issues

3. **THIS COURT ORDERS AND DECLARES** that the common issues be and hereby are certified as:

Breach of Contract and Statutory Claim

- 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,
 - iii. 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?

Unjust Enrichment

- c. Was the Defendant unjustly enriched by failing to compensate Class Members with overtime pay for hours worked in excess of the Overtime Threshold?

Punitive Damages

- 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?

Representative Plaintiff and Class Counsel

4. **THIS COURT ORDERS AND DECLARES** that Yegal Rosen be and hereby is appointed as the representative plaintiff for the Class and that Koskie Minsky LLP and Mr. Eli Karp be and hereby are appointed as class counsel ("Class Counsel").

Relief Sought and Nature of Claims Asserted

5. **THIS COURT ORDERS AND DECLARES** that the Class seeks damages, declarations and orders related to claims of breach of contract, breach of the duty of good faith, breach of the *Employment Standards Act, 2000* and unjust enrichment.

Notice of Certification

6. **THIS COURT ORDERS** that the form of notice of this certification order, the manner of giving notice and all other related matters shall be determined by further order of this Court.

Class Member Information

7. **THIS COURT ORDERS** that the Defendant shall provide to Class Counsel the most current or last known contact information, including, to the extent such information is available, first, middle and last names, mailing address(es), E-mail address(es) and phone number(s), associated with all individuals identified as potential class members by the defendant, as necessarily modified by the class definition contained in paragraph 2 of this Order, within the Excel spreadsheets marked as Exhibits 1-9 at the cross-examination of Mr. Robert Low held on November 21, 2012, updated to the date of this Order, within ninety (90) days of the entry of this Order, and provide the basis for the determination of class members.

8. **THIS COURT ORDERS** that:

- (a) if necessary, the defendant may return to this Court to seek further directions with respect to the identification of individuals as potential class members as required by paragraph 7 of this Order; and
- (b) If necessary, the parties may seek further directions with respect to the basis for class member determinations made under paragraph 7 of this Order and with respect to identification of any further class members.

Costs

9. **THIS COURT ORDERS** that the Plaintiff is entitled to the costs of the certification motion and the quantum thereof shall be dealt with by further order of this Court.

STATE OF NEW YORK
COUNTY OF ...
DEPT. OF ...
SEP 27 2018
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...
...

Elev. Helobah J.

YEGAL ROSEN
Plaintiff

BMO NESBITT BURNS INC.
Defendant

and

Court File No: CV- 10-396685CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

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ORDER

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