

AMENDED THIS Feb 15/11 PURSUANT TO
MODIFIÉ CE _____ CONFORMÉMENT À _____

RULE/LA RÉGLE 26.02 (A)

THE ORDER OF _____
L'ORDONNANCE DU _____
DATED / FAIT LE _____

Court File No. CV-10-39668500CP

LOCAL REGISTRAR / GREFFIER LOCAL _____ **ONTARIO**
SUPERIOR COURT OF JUSTICE / COUR SUPÉRIEURE DE JUSTICE _____ **SUPERIOR COURT OF JUSTICE**

BETWEEN:

YEGAL ROSEN

Plaintiff

-and-

BMO NESBITT BURNS INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. 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 plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, 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.

IF YOU PAY THE PLAINTIFFS' CLAIM, and \$500,000 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiffs' claim and \$400.00 for costs and have the costs assessed by the court.

Date Feb 8, 2010

Issued by

M. Sagarica

Local registrar

Address of court office 393 University Avenue,
10th Floor,
Toronto, Ontario

TO: **LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**

Mr. Peter Griffin
Suite 2600
130 Adelaide Street West
Toronto, ON M5H 3P5

AND

TO: **GOWLING LAFLEUR HENDERSON LLP**

Mr. Hugh Christie
Suite 1600
1 First Canadian Place
100 King Street West
Toronto, ON M5X 1G5

CLAIM

1. The Plaintiff claims:
 - (a) an order certifying this proceeding as a class proceeding and appointing the Plaintiff as representative plaintiff for the Class (defined below);
 - (b) \$100 Million in general damages for the Class, or such other sum as this Honourable Court deems just;
 - (c) a declaration that the provisions of the *Employment Standards Act, 2000* (“*ESA*”), as applicable, are express or implied terms of the contracts of employment of the Class Members (defined below);
 - (d) a declaration that the Defendant breached the Class Members’ contracts of employment and duty of good faith owed to the Class Members by:
 - (i) failing to ensure that Class Members were properly classified as entitled to overtime pay;
 - (ii) failing to advise Class Members of their entitlement to overtime pay for hours worked in excess of 44 hours per week (the “Overtime Threshold”);
 - (iii) failing to ensure that the Class Members’ hours of work were monitored and accurately recorded; and
 - (iv) requiring and/or permitting the Class Members to work overtime hours but failing to compensate the Class Members as required for hours worked in excess of the Overtime Threshold.
 - (e) in the alternative to (d), a declaration that the Defendants violated the terms of the *ESA* by:
 - (i) failing to ensure that Class Members were properly classified as entitled to overtime pay;

- (ii) failing to advise Class Members of their entitlement to overtime pay for hours worked in excess of the Overtime Threshold;
 - (iii) failing to ensure that the Class Members hours of work were monitored and accurately recorded; and
 - (iv) requiring and/or permitting the Class Members to work overtime hours but failing to ensure that Class Members were compensated for hours worked in excess of the Overtime Threshold.
- (f) an interlocutory and a final mandatory order for specific performance directing that the Defendant comply with the contracts of employment with the Class members, in particular, to:
 - (i) ensure that Class Members are properly classified as entitled to overtime pay;
 - (ii) advise Class Members of their entitlement to overtime pay for hours worked in excess of the Overtime Threshold;
 - (iii) ensure that the Class Members hours of work are monitored and accurately recorded; and
 - (iv) ensure that Class Members are appropriately compensated for hours worked in excess the Overtime Threshold.
- (g) a declaration that the provisions of any applicable overtime policy which may purport to exclude the Class Members from eligibility for overtime pay are void and unenforceable;
- (h) a declaration that the Defendant was unjustly enriched, to the deprivation of the Class Members, in that they received the value of the overtime hours worked by the Class Members without providing the necessary compensation, and an order requiring the Defendant to disgorge to the Class all amounts withheld by them in respect of such unpaid hours;

- (i) an order, pursuant to s. 24 of the *Class Proceedings Act, 1992*, directing an aggregate assessment of damages;
- (j) an order directing the Defendant to preserve and disclose to the Plaintiff all records (in any form) relating to the hours of overtime work performed by Class Members;
- (k) an order pursuant to s. 23 of the *Class Proceedings Act, 1992*, admitting into evidence statistical information;
- (l) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*;
- (m) punitive, aggravated and exemplary damages in the amount of \$10 million, or such other amount as this Honourable Court deems just;
- (n) costs of this action on a substantial indemnity basis, together with applicable *HST*, or other applicable taxes, thereon;
- (o) the costs of administering the plan of distribution of the recovery in this action; and
- (p) such further and other relief as this Honourable Court may deem just.

THE PARTIES

2. The Plaintiff, Yegal Rosen (“Rosen”), resides in Thornhill, Ontario. He was a non-management employee of BMO Nesbitt Burns Inc. (“Nesbitt”) from June 2002 until April 2006. Rosen worked as an Investment Advisor at a Nesbitt branch in Thornhill, Ontario.

3. Nesbitt is a company incorporated pursuant to the laws of Ontario. It is a full-service investment firm.

4. Nesbitt is one of North America's largest investment firms with offices in over 100 Canadian cities, in addition to Chicago, New York and London. It annually generates revenues of hundreds of millions of dollars. None of its employees are unionized.

5. Nesbitt is provincially regulated and governed by the *ESA*.

THE CLASS

6. The Plaintiff brings this action pursuant to the *Class Proceedings Act, 1992* on his own behalf and on behalf of the following class of persons:

“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.”

(the “Class” or “Class Members”)

7. The duties performed by the Class Members did not involve the management of other employees and were not supervisory or managerial in character. In particular, the Class Members did not:

- (a) supervise other employees;
- (b) have the power to hire, fire and/or discipline other employees;
- (c) have the ability to make decisions on behalf of the company;
- (d) exercise discretion and independent judgment in management affairs; or
- (e) perform a leadership or administrative role as opposed to an operational role.

8. At all material times, the primary place of business for the Class Members was the Nesbitt branches or offices in which they were employed.

CLASS MEMBERS' CONTRACTS OF EMPLOYMENT – OVERTIME

9. The provisions of the *ESA* are implied terms, in fact or by law, as minimum terms of the contracts of the Class Members.

10. The contracts of the Class Members expressly or impliedly provide that Class Members shall be compensated at one and one half times their regular rate for every hour worked per week in excess of 44 hours per week as mandated by the *ESA*, plus vacation pay, thereon.

CONTRACTUAL DUTIES OWED TO CLASS MEMBERS

11. As non-management employees, the Class Members relied on the Defendant to advise them properly regarding their eligibility for overtime pay, and to fulfill their contractual and statutory employment responsibilities to keep track of and pay the Class Members for such overtime worked. As a result of their position of power and influence over the Class Members as their employer, and as a result of the vulnerable position of the Class Members *vis-a-vis* the Defendant as non-management employees, the Defendant owes a contractual duty of good faith to the Class Members.

12. The Defendant's contractual duties, including its duty of good faith, require the Defendant to:

- (a) ensure that Class Members are properly classified as entitled overtime pay;
- (b) advise Class Members of their entitlement to overtime pay for hours worked in excess of the Overtime Threshold;
- (c) ensure that the Class Members hours of work are monitored and accurately recorded; and
- (d) ensure that Class Members are appropriately compensated for hours worked in excess of the Overtime Threshold.

PLAINTIFF'S EMPLOYMENT HISTORY – HOURS OF WORK

13. From June 2002 until April 2006, Rosen worked at Nesbitt as an Investment Advisor at a Nesbitt branch in Thornhill.

14. Rosen's duties and responsibilities as an Investment Advisor included:

- (a) advising Nesbitt clients on suitable investments;
- (b) researching and understanding clients' family dynamics, financial goals and objectives;
- (c) researching investments that would be appropriate to recommend to clients based on their risk tolerances;
- (d) meeting and signing new clients and growing assets under management;
- (e) initiating marketing and sales efforts;
- (f) proposing and recommending Nesbitt securities and other financial products to clients for purchase; and
- (g) initiating the purchasing of securities or financial products on clients' behalves.

15. Rosen did not manage any employees, and his work was not supervisory or managerial in character. Rosen's duties and lack of management responsibilities are consistent with the responsibilities of all Investment Advisors in the Class.

16. At all materials times, Rosen performed his duties and responsibilities primarily in and from the Defendant's offices in Thornhill.

17. When Rosen commenced employment with Nesbitt he was informed that he was expected to be continually prospecting for new clients, servicing existing clients, and working overtime after regular business hours.

18. Nesbitt regularly scheduled seminars, client call sessions and employee meetings before or after regular business hours, which the Investment Advisors were required and/or encouraged to attend.

19. As an Investment Advisor, Rosen worked between 60-80 hours per week including weekends. The Defendant was aware of, and encouraged Rosen's overtime hours which were necessary in order to accomplish the duties he was assigned. The Defendant required and/or permitted Rosen to work overtime and failed or refused to provide him compensation as required.

20. The Defendant required Rosen to work hours in excess of the Overtime Threshold without overtime pay, contrary to his contractual terms.

21. Rosen relied on the Defendant in good faith and was unaware while working for the Defendant or afterwards that he was entitled to overtime pay for the hours he worked in excess of the Overtime Threshold while an employee of the Defendant. At the time, Rosen relied on the Defendant to properly advise him regarding his entitlement to overtime and was misled by the Defendant that he was not entitled to overtime pay.

22. Rosen did not become aware that he was eligible for overtime because the Defendant had continually misrepresented to him his actual eligibility for, and entitlement to, such overtime pay.

23. Rosen pleads that he is owed approximately \$22,000.00 per year of service, plus accrued interest and applicable vacation pay, for hours worked in excess of the applicable standard hours of work at the rate of one and one-half his regular rate.

CLASS MEMBERS HOURS OF WORK

24. The Defendant systematically required and/or permitted the Class Members to regularly work hours in excess of the Overtime Threshold to perform their job responsibilities.

25. The Defendant was aware that the Class Members relied on the Defendant to advise them properly regarding eligibility for overtime pay, and to fulfill their contractual and statutory employment responsibilities to keep track of and pay the Class Members for such overtime worked.

26. Contrary to the Defendant's duties, the Defendant failed to monitor or accurately record the actual hours worked by Class Members.

27. The Defendant exerted pervasive pressure on Class Members to work hours in excess of the Overtime Threshold. If Class Members did not work the overtime as required to complete their employment responsibilities, such Class Members were 'pushed out' or otherwise disciplined by the Defendant.

SYSTEMIC BREACH OF CONTRACT AND BREACH OF DUTY OF GOOD FAITH

28. The Defendant systematically breached the contracts with the Class Members and the contractual duty of good faith owed to the Class Members by:

- (a) improperly and arbitrarily misclassifying the Class Members as ineligible for overtime pay;
- (b) misrepresenting to the Class Members that the Class Members were not entitled to overtime pay;
- (c) failing to monitor and keep track of the overtime hours worked by the Class Members;
- (d) incorrectly stating on payroll records that the Class Members worked fewer hours than the Class Members actually worked; and
- (e) requiring and/or permitting the Class Members to work overtime hours but failing to compensate the Class Members as required for hours worked in excess of the Overtime Threshold.

29. The Class Members did not perform managerial functions. There was no legitimate basis for the Defendant's arbitrary exclusion of the Class Members for eligibility for overtime pay, which was contrary to the employees' express or implied terms of contract with the Defendant. Such exclusion is contrary to the terms of the *ESA*, which are incorporated as express or implied terms of the contracts.

30. Such breaches were ongoing and continuous in respect of the Class Members since at least 2002.

BREACH OF THE ESA

31. The Defendant has systemically breached the provisions of the *ESA* with respect to all Class Members by :

- (a) failing to ensure that Class Members were properly classified as entitled to overtime pay;
- (b) failing to advise Class Members of their entitlement to overtime pay for hours worked in excess of the applicable standards hours of work;
- (c) failing to ensure that the Class Members hours of work were monitored and accurately recorded; and
- (d) requiring and/or permitting the Class Members to work overtime hours but failing to ensure that Class Members were compensated for hours worked in excess of the Overtime Threshold.

32. Nesbitt's misclassification and denial of overtime pay to class members is in violation of the *ESA* and is unlawful. To the extent that any internal Nesbitt policy purports to exclude the Class Members from eligibility for overtime pay, such provisions are void and unenforceable.

UNJUST ENRICHMENT

33. The Defendant has been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the Class Members in excess of the Overtime Threshold.

34. The Class Members have suffered a corresponding deprivation, in the form of the overtime wages for the hours worked in excess of the Overtime Threshold.

35. There is no juristic reason for the Defendant's unjust enrichment and the Class Members' corresponding deprivation. The systematic exclusion of the Class Members from eligibility for overtime is unlawful.

36. The Defendant's unjust enrichment has been continuous and ongoing since at least 2002.

DAMAGES

37. As a result of the Defendant's breaches of contract, breaches of the *ESA* and/or unjust enrichment, Class Members have been denied appropriate compensation for the hours they worked in excess of the Overtime Threshold, for which the Defendant is liable to the Class Members.

38. Furthermore, the Defendant's arbitrary and incorrect misclassification of the employees as being excluded from overtime pay, coupled with the Defendant's requirement of the Class Members to work overtime, was high handed and callous. The Defendant was in a position of power over vulnerable employees and owed them a duty of good faith which the Defendant flagrantly breached to increase its profits at the expense of the Class Members. Such conduct warrants an award of punitive damages.

39. The Plaintiff pleads and relies on upon the following statutes and regulations:

(a) *Employment Standards Act, 2000*, S.O. 2000, Chapter 41;

(b) *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

40. The Plaintiff proposes that this action be tried in Toronto.

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and
Defendant

Court File No: CV-10-39668500CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

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**FRESH AS AMENDED
STATEMENT OF CLAIM**

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