

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**YEGAL ROSEN**

Plaintiff

- and -

**BMO NESBITT BURNS INC.**

Defendant

Proceeding under the *Class Proceedings Act, 1992*

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**FACTUM OF CLASS COUNSEL**  
**SETTLEMENT APPROVAL MOTION AND FEE APPROVAL MOTION**  
**RETURNABLE JULY 21, 2016**

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## TABLE OF CONTENTS

	PAGE
<b>PART I - OVERVIEW .....</b>	<b>1</b>
<b>PART II - THE FACTS.....</b>	<b>4</b>
<b>A. Background of the Class Action .....</b>	<b>4</b>
<b>B. Certification .....</b>	<b>4</b>
(i) Common Issues .....	5
(ii) Class Definition .....	6
(iii) The Settlement Class Members .....	6
<b>C. Settlement Agreement .....</b>	<b>8</b>
(i) Allocation.....	9
(ii) Trainee Group .....	11
(iii) Non-Trainee Group .....	12
<b>D. Objections and Support.....</b>	<b>14</b>
<b>E. Net Settlement Fund .....</b>	<b>15</b>
<b>PART III - ISSUES AND THE LAW .....</b>	<b>16</b>
<b>A. The Settlement Is Fair, Reasonable And In The Best Interests     Of The Class .....</b>	<b>16</b>
(i) Test for settlement approval under s. 29 of the CPA.....	16
<b>B. Factors Weighing in Favour of Approving the Settlement .....</b>	<b>17</b>
(i) Simple and Purposefully Designed Distribution Procedure .....	17
(ii) Late Stage of Proceeding .....	18
(iii) Substantial and Comparable Quantum to US Settlements.....	20
(iv) Liability and Litigation Risks .....	21
(v) Damage Risks .....	23
<b>C. Fee Approval .....</b>	<b>24</b>
(i) Test for Fee Approval .....	24
(ii) Risk Undertaken.....	25
(iii) Success Achieved.....	26
(iv) Contingency Fee Request is Equivalent to Other Cases.....	27

(v) No Objections to Fee and the Representative Plaintiff Approves of Fee.....	27
<b>D. Honorarium Payment to Mr. Rosen.....</b>	<b>27</b>
<b>PART IV - CONCLUSION.....</b>	<b>28</b>
<b>SCHEDULE "A" LIST OF AUTHORITIES.....</b>	<b>30</b>
<b>SCHEDULE "B" RELEVANT STATUTES.....</b>	<b>31</b>

## PART I - OVERVIEW

1. This is a late stage settlement in a novel case, with an excellent result for the class. This action was the first and only misclassification overtime class action to be certified in Canada on a contested basis and upheld on appeal. The central issue of whether a commission based investment advisor is entitled to overtime has not been litigated in Canada and obtaining such a declaration would be novel and uncharted territory. This litigation has been fiercely contested for over 6.5 years and through extensive discovery productions, including over 2.1 million documents. The last timetable in this action called for a trial in April, 2017. Given the novel nature, unique risks, late stage of proceeding and excellent result, the proposed settlement should be approved.

2. The plaintiff moves before this Honourable Court in two separate motions seeking 1) approval of the settlement with the defendant for \$12 million; (the "Settlement" and "Settlement Fund")<sup>1</sup> and 2) approval of a contingency fee of 25%.

3. The Settlement will provide substantial compensation to Settlement Class Members without the need for members to prove or even identify specific overtime hours. The \$12 million Settlement Fund is completely non-reversionary and will be distributed by way of a non-contested and confidential distribution scheme. There is no claims process. The Settlement Fund is comparable to similar US overtime settlements for investment advisors and similar financial professionals, which are the only comparator settlements. This settlement provides substantial benefits to the settlement class and falls squarely within the zone of reasonableness.

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<sup>1</sup> Exhibit "B" to the Affidavit of David Rosenfeld, sworn July 7, 2016 ("Rosenfeld Affidavit"), Settlement Agreement with Nesbitt, Motion Record, Tab 3(B), pp. 66-99.

4. The parties were fully informed of the strengths and weaknesses of the case and in a good position to assess the merits and risks of the claims. The parties had the benefit of a comprehensive and very extensive discovery process involving the production of 2.1 million documents, including a complete vertical chain of email custodians going up to the Co-Head and Executive Vice President of Nesbitt (the very top of Nesbitt). The parties also had the benefit of extensive evidence and cross-examinations from the certification motion, including evidence from IAs located across Ontario, Branch Managers, Division Managers and the Co-Head and Executive President of Nesbitt. The evidence spans the entire class period, is from across Ontario and covers the hierarchy of Nesbitt from the branch level IAs to the head office of Nesbitt and their most senior executive employees.<sup>2</sup>

5. The Settlement provides for payment by Nesbitt of \$12 million into a completely non-reversionary Settlement Fund, plus the payment by Nesbitt of up to \$500,000 in third party administration costs. Settlement class members are not required to make a claim for specific hours or prove any hours to establish eligibility. The only eligibility requirement is that someone be a member of the Settlement Class and confirm their address to the administrator to receive a distribution.<sup>3</sup>

6. The Settlement is the result of lengthy and hard fought negotiations during and after a full 2 days of mediation.

7. The Settlement Class is divided between two groups for purposes of allocation of the Settlement Fund: 1) Trainees; and 2) Non-Trainees. Trainees consist of those IAs who went

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<sup>2</sup> Rosenfeld Affidavit, paras. 14, 23 and 25-31, Motion Record, Tab 3, pp.22, 26 and 27-30.

<sup>3</sup> Rosenfeld Affidavit, para. 48, Motion Record, Tab 3, p. 36.

through the Nesbitt Trainee Program and the six month period of close supervision ("Trainees"). The Non-Trainees consist of senior IAs who went through the training program prior to 2002 or IAs who were hired laterally into Nesbitt, generally with existing practices and clients ("Non-Trainees").<sup>4</sup>

8. The allocation of the Settlement Fund reflects the litigation risks faced by each of the two distinct groups above. Trainees are generally rookies in the investment industry who are required to go through a common training period, including 6 months of "close supervision". Non-Trainees are more senior IAs with substantial existing books of clients and with incomes as much as \$750,000. Such IAs have greater autonomy, discretion and flexibility in their work arrangements, relative to the Trainees who during the close supervision period are closely supervised by Nesbitt.<sup>5</sup> The Non-Trainees have a significantly weaker case relative to the Trainees.

9. This Settlement is a first in Canada for investment advisors and has already served to provide behaviour modification. Nesbitt has advised that it has now, for the first time, implemented an overtime policy that covers overtime payment in respect of the 6 month period of close supervision for Trainees.<sup>6</sup> The Settlement is an excellent result in a late stage of this proceeding after 6.5 years of hard fought litigation and should be approved. In addition, given all of the above factors, the fee requested by Class Counsel is fair and reasonable compensation and should be approved.

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<sup>4</sup> Affidavit of Yegal Rosen, affirmed July 11, 2016 ("Rosen Affidavit"), paras 15-18, Motion Record, Tab 4, p. 419.

<sup>5</sup> Rosen Affidavit, para 18, Motion Record, Tab 4, p. 418.

<sup>6</sup> Affidavit of Constanza Pauchulo, sworn July 11, 2016 ("Pauchulo Affidavit"), para. 49.

## PART II - THE FACTS

### A. Background of the Class Action

10. This action was commenced by Mr. Yegal Rosen on February 8, 2010, by way of a Statement of Claim (the "Action"). A Fresh as Amended Statement of Claim, amended February 15, 2011, was subsequently served and filed (the "Claim").<sup>7</sup>

11. Mr. Rosen alleged in the Claim that while he was employed as an Investment Advisor by Nesbitt, he was improperly classified as ineligible for overtime, along with all other proposed class members. In summary, the Claim alleged that Nesbitt was in violation of the class members' contracts of employment and/or the *Employment Standards Act, 2000* by failing to:

- (a) ensure class members were properly classified as entitled to overtime;
- (b) record class members' hours of work; and
- (c) compensate class members for their work.<sup>8</sup>

### B. Certification

12. Nesbitt vigorously contested certification with an extensive record of evidence. Nesbitt filed affidavits from 20 affiants, including 3 experts, the plaintiff filed affidavits from 4 affiants, including 2 experts. Nesbitt cross-examined all of the plaintiff's affiants.<sup>9</sup>

13. Nesbitt's affiants included multiple high-level employees with overarching control of Nesbitt. Nesbitt's evidence covered the entire class period from across Ontario. Nesbitt's evidence included affidavits from:

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<sup>7</sup> Rosenfeld Affidavit, para. 7, Motion Record, Tab 3, p. 20; Exhibit "C" to the Rosenfeld Affidavit, Fresh As Amended Statement of Claim, Motion Record, Tab 3(C), pp.101-113.

<sup>8</sup> Rosenfeld Affidavit, paras. 8-9, Motion Record, Tab 3, p. 20; Exhibit "C" to the Rosenfeld Affidavit, Fresh As Amended Statement of Claim, Motion Record, Tab 3(C), pp. 101-113.

<sup>9</sup> Rosenfeld Affidavit, para. 13, Motion Record, Tab 3, p. 22.



- (a) the Co-Head and Executive Vice-President of Nesbitt;
- (b) another Vice-President of Nesbitt who worked with the Co-Head;
- (c) the Senior Manager, Employee Relations for BMO Financial Group;
- (d) three Branch Managers at different branches, one Divisional Manager and an IA who worked as an Assistant Branch Manager; and
- (e) Nesbitt IAs from across Ontario, including IAs from Dryden, Thunder Bay, Guelph, Kitchener-Waterloo, Thornhill, Scarborough, London, Bellville, Sudbury, Ottawa and multiple different Toronto branches.<sup>10</sup>

14. In addition to the extensive affidavit evidence at the certification motion, documentary material filed through undertakings and document production requests included all applicable overtime polices and extensive confidential/sealed employee data related to tenure, income and employment history.

15. The certification motion required 3 days on February 12, 13 and April 5, 2013. The Action was certified as a class proceeding by order dated August 20, 2013. Leave to appeal the certification order was denied December 17, 2013.<sup>11</sup>

(i) **Common Issues**

16. The threshold common issue in this case asked whether the class members were entitled to overtime pursuant to the *Employment Standards Act, 2000* (“ESA”) or their contracts. In particular, the threshold issue asked whether the class members were exempt from overtime as managers by virtue of their autonomy and/or the great right and benefit exemption in the ESA. In

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<sup>10</sup> Rosenfeld Affidavit, para. 15, Motion Record, Tab 3, p. 23.

<sup>11</sup> Rosenfeld Affidavit, paras. 16-17, Motion Record, Tab 3, p. 23.

summary, the common issues focused on whether the class members were managers or enjoyed a greater right or benefit relative to overtime compensation.<sup>12</sup>

**(ii) Class Definition**

17. At certification the class was 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:

- (i) held the position of Branch Manager; or
- (ii) held the position of Assistant Branch Manager; or
- (iii) held the position of Divisional Manager; or
- (iv) were Investment Advisors on a team that had one or more Associate IAs or Sales Assistants assigned to them.<sup>13</sup>

(the "Certification Class" or "Certification Class Members")

**(iii) The Settlement Class Members**

18. The Certified Class definition excluded any "Investment Advisors on a team that had one or more Associate IAs or Sales Assistants assigned to them." (the "Team Exclusion"). The plaintiff and Nesbitt did not agree on how the Team Exclusion is to be applied, which was to be adjudicated at a later date. As part of the Settlement, payment is to be made to all potential Certification Class Members without regard to possible exclusion under the Team Exclusion (the "Settlement Class").

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<sup>12</sup> Rosenfeld Affidavit, para. 19, Motion Record, Tab 3, pp. 24-25; Exhibit "D" to the Rosenfeld Affidavit, Certification Order, Motion Record Tab 3(D), pp.117-118 .

<sup>13</sup> Certification Order, Exhibit "D" to the Rosenfeld Affidavit, Motion Record Tab 3(D), p. 117.

19. Nesbitt's position on the Team Exclusion was that the method to determine who was excluded was to trace whether an IA directed any portion of their commissions to an AIA or Sales Assistant, in other words, "paid for" part of or all of an assistant.<sup>14</sup> If an IA directed any portion (no matter how small) of their commission to an AIA or Sales Assistant in a given quarter of the class period, they would be excluded under the Team Exclusion from the Certified Class. As a result, the Team Exclusion as interpreted and applied by Nesbitt excluded possible Certification Class Members in two ways:

(a) The Team Exclusion excluded *portions* of employment tenure for Certification Class Members. For example, while Mr. Rosen was employed for 47 months in total, for 12 of his 47 months some portions of his commissions were directed to a Sales Assistant. If the Court accepted the Nesbitt approach Mr. Rosen would be excluded for a full year of his employment. Mr. Rosen, and others like him, would remain Certification Class Members, but their potential damages would be limited given the exclusion of large tenures of their employment.

(b) The Team Exclusion also operated to exclude the *entire* work tenure of certain employees. For example, Nelson Liang, who was the only other employee affiant for the plaintiff at certification, was entirely excluded from the Certified Class under Nesbitt's interpretation of the Team Exclusion. Mr. Liang was a senior IA and a lateral hire. For the entire duration of his employment, part of Mr. Liang's commissions were directed to a Sales Assistant. This meant that under Nesbitt's interpretation, Mr. Liang and others like him were entirely excluded from the Action.

20. The plaintiff did not agree with the more restrictive approach taken by Nesbitt with respect to the Team Exclusion. For the purposes of the Settlement, the parties have agreed that all potential class members would be included and eligible for payment without regard to the Team Exclusion. Given the nature of the exclusion, the difficulty, risk and expense of litigating

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<sup>14</sup> Nesbitt's position was also that even this method of commission tracing was not necessarily 100% accurate based on the available records and manner in which commission were redirected between IAs.

it, it is in the best interests of the class to include all potential Certification Class Members, without regard to the Team Exclusion, to share in the Settlement.

21. The removal of the Team Exclusion does not impact the majority of Certification Class Members, because compensation in the Settlement is based solely on class membership, *not duration* of membership. The majority of Class Members, like Mr. Rosen, always had a portion of employment in the Class, regardless of how the Team Exclusion was interpreted.

22. Notwithstanding that the scope and application of the Team Exclusion was contested, all of the potential Certification Class Members were provided notice of certification nonetheless, the right to opt out and notice of the fairness hearing. Notice of the Settlement Approval motion also advised all such Class Members that they would be included in the proposed Settlement by virtue of the proposed Settlement Class definition.<sup>15</sup>

### **C. Settlement Agreement**

23. The Settlement in this Action provides a fixed guaranteed distribution to all Settlement Class Members, in a confidential manner. Settlement Class Members are not required to establish work hours and Nesbitt cannot challenge the entitlement of Settlement Class Members. These key features are exceptionally valuable in the plaintiff's view. The only threshold for entitlement under the Settlement is membership in the Settlement Class.<sup>16</sup>

24. The key terms of the Settlement include:

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<sup>15</sup>Exhibits "B", "C" and "D" to the Affidavit of Elizabeth Scullion, sworn July 7, 2016 ("Scullion Affidavit"), Publication and Long Form Notices, Motion Record, Tabs 6(B, C, and D) pp. 439-458 .

<sup>16</sup> Rosenfeld Affidavit, para. 46, Motion Record, Tab 3, p.35.

- (a) a non-reversionary settlement fund of \$12,000,000 (the "Settlement Fund");
- (b) there is no need for a class member to provide any evidence or any certification of hours worked to establish their entitlement to the distribution;
- (c) the administration of the distribution will be undertaken by a neutral third party and Nesbitt will pay for the cost (up to \$500,000 for administration expenses, which is unlikely to be exceeded) **in addition to the Settlement Fund**;
- (d) the third party administrator will ensure confidentiality of those receiving the distribution, including current employees of Nesbitt who may receive compensation;
- (e) the third party administrator will undertake a series of searches to locate class members to ensure that class members receive notice and their compensation, including:
  - (f) cross-referencing addresses of former employee against the National Change of Address database;
  - (g) searching names of former employees on the IIROC<sup>17</sup> Investment Advisor registry, the Canadian Securities Administrators National Registration Search and the Ontario Securities Commission Registration Database; and
  - (h) engaging a skip tracing company in respect of former employees whose mailing is returned as undeliverable, and with the cooperation of Nesbitt providing the skip tracer with dates of birth, SIN numbers and last known addresses to locate current contact information.<sup>18</sup>

(i) **Allocation**

25. The Settlement divides the Settlement Class into two categories:

- (i) all IAs who participated in the Nesbitt Trainee Program, approximately **705 Settlement Class Members** ("Trainee Group"); and
- (ii) all IAs who did **not** participate in the Nesbitt Trainee Program during the class period. This would include established IAs who were lateral hires into Nesbitt and more senior Nesbitt IAs who participated in the Trainee Program prior to 2002. This category consists of approximately **1,136 Settlement Class Members** (the "Non-Trainee Group").<sup>19</sup>

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<sup>17</sup> Investment Industry Regulatory Organization of Canada.

<sup>18</sup> Rosenfeld Affidavit, para. 48, Motion Record, Tab 3, p. 36.

<sup>19</sup> Rosenfeld Affidavit, para. 52, Motion Record, Tab 3, p. 38.

26. The division of the Settlement Fund is in the following gross proportions:

- (i) \$10 million to the Trainee Group; and
- (ii) \$2 million to be divided between all Settlement Class Members.<sup>20</sup>

27. The estimated gross distribution amounts per Settlement Class Member payments are as follows, depending on take-up rate:<sup>21</sup>

<b>TRAINEE GROUP</b>	
<b>Take-up rate</b>	<b>Gross Amount (per person)<sup>22</sup></b>
100.00%	\$ 15,270.76
85.00%	\$ 17,965.60
75.00%	\$ 20,361.02
50.00%	\$ 30,541.53

<b>NON-TRAINEE GROUP</b>	
<b>Take-up rate</b>	<b>Gross Amount (per person)</b>
100.00%	\$ 1,086.37
85.00%	\$ 1,278.08
75.00%	\$ 1,448.49
50.00%	\$ 2,172.73

28. The allocation between the two groups is fair based upon the litigation risks faced by each of the two groups and their likelihood of succeeding at trial.

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<sup>20</sup> Rosenfeld Affidavit, para. 53, Motion Record, Tab 3, p. 38.

<sup>21</sup> Rosenfeld Affidavit, para. 108, Motion Record, Tab 3, pp. 57-58.

<sup>22</sup> Subject to deductions for fees, taxes, disbursements and Class Proceedings Fund levy.

(ii) **Trainee Group**

29. Membership in the Trainee Group is based upon a Settlement Class Member having participated in the Nesbitt Trainee Program and the 6 month period of close supervision during the class period. This group captures individuals from all parts of the Settlement Class, including with former and current employees. If a Settlement Class Member went through the Trainee Program and participated in the mandated close supervision during the class period, they qualify for this group.<sup>23</sup>

30. Participation in the Nesbitt Trainee Program generally includes common elements for the group's members, which supports the strength of their common case, including:

- (a) Trainees are typically new IAs and start at the bottom of the Nesbitt employment hierarchy without established investment clientele;
- (b) Trainees are typically compensated on a mix of commission and salary and are transitioned gradually to a 100% commission based compensation;
- (c) Trainees generally cannot negotiate their starting terms, salaries or commissions and are hired on common terms;
- (d) the income of Trainees in their first year as they attempt to build a business to generate commissions generally ranges from \$30,000-\$60,000;
- (e) after the completion of the Trainee Program, Trainees will generally go on to become a regular IA or an AIA at Nesbitt, should they successfully complete the Trainee Program;
- (f) in combination with class room training, IA Trainees usually work during the Training Program marketing their services, prospecting for clients and serving clients of Nesbitt;
- (g) Trainees are generally subject to a regulated 6 month period of "close supervision" required by IIROC;
- (h) the common period of "close supervision" means Trainees are usually subjected to a high level of oversight, usually including but not limited to:
  - (i) pre-approval to send outside correspondence;

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<sup>23</sup> Rosenfeld Affidavit, para. 55, Motion Record, Tab 3, p. 38.

- (ii) all buy and sell orders must be reviewed promptly, by the following business day at the latest;
- (iii) all client accounts must be reviewed on a monthly basis;
- (iv) all trading activity must be reviewed on a daily basis;
- (v) marketing and prospecting documents must be pre-approved; and
- (i) generally all Trainees have a mentor they engage with to keep abreast of their client prospecting.<sup>24</sup>

31. By virtue of the 6 month period of imposed "close supervision", Settlement Class Members who participated in the Trainee Program and close supervision generally share the above common favorable factors.

**(iii) Non-Trainee Group**

32. The Non-Trainee Group is materially different from the Trainee Group. The extensive discovery process in this action has reinforced some of the key differences.

33. The Non-Trainee groups consists of two types of Settlement Class Members:

- (a) more senior IAs who were hired and completed the Trainee Program prior to 2002 at Nesbitt; and
- (b) senior established IAs who made a lateral transfer to Nesbitt from another investment house.<sup>25</sup>

34. The Non-Trainees' employment conditions generally differ from those in place during Nesbitt's Trainee Program and close supervision period. Some key differences between the Non-Trainee Group and the Trainee Group, could include but are not limited to:

- (a) lateral hires and senior IAs are generally not new IAs and many have an established client base which generates higher income for them;

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<sup>24</sup> Rosenfeld Affidavit, para. 57, Motion Record, Tab 3, p. 39; Rosen Affidavit, paras. 6-9, Motion Record, Tab 4, pp. 415-416; Affidavit of Chris Rugel, affirmed July 7, 2016 ("Rugel Affidavit"), para. 6, Motion Record, Tab 5, pp. 422-423.

<sup>25</sup> Rosenfeld Affidavit, para. 60, Motion Record, Tab 3, p.40.



- (b) lateral hires and senior IAs can make substantial income, for example many sole practitioner IAs at Nesbitt make in excess of \$400,000 a year and some make up to \$750,000;
- (c) some lateral hires negotiate certain terms of their employment, including a signing bonus in excess of \$100,000;
- (d) lateral hire and senior IAs are generally not subjected to the same common overriding supervision as part of the 6 month "close supervision" period applicable to Trainees;
- (e) given the more established client base of lateral hires and senior IAs, some are able to self-direct their activities to a greater degree relative to Trainees; including:
  - (i) vacation dates;
  - (ii) location of work;
  - (iii) selection of individuals they wish to work with; and
  - (iv) negotiation of general compensation.<sup>26</sup>

35. As described in the affidavit of Mr. Yegal Rosen and Mr. Chris Rugel, IA Trainees are generally rookies in the investment industry. Lateral hires and senior IAs generally have more established businesses and can generate substantial income.<sup>27</sup>

36. The differences between Mr. Rosen and Mr. Liang are illustrative of the distinction between Trainees and Non-Trainees. Mr. Rosen and Mr. Liang worked at the same branch during the same time period. Mr. Liang was a lateral hire into Nesbitt and a supervising mentor to Mr. Rosen. Mr. Liang's signing bonus of \$84,000 was over 2.5 times Mr. Rosen's average yearly income of \$31,680.<sup>28</sup> Mr. Liang's average yearly income (not including the signing bonus) averaged \$111,660. Under the Settlement Mr. Liang is a Non-Trainee and Mr. Rosen is a Trainee.

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<sup>26</sup> Rosenfeld Affidavit, para. 61, Motion Record, Tab 3, pp.40-41; Rosen Affidavit, paras. 15-18, Motion Record, Tab 4, p.418; Rugel Affidavit, paras. 13-16, Motion Record, Tab 5, p.424.

<sup>27</sup> Rosenfeld Affidavit, para. 57, Motion Record, Tab 3, p. 39; Rosen Affidavit, paras. 15-18, Motion Record, Tab 4, p.418; Rugel Affidavit, paras. 13-16, Motion Record, Tab 5, p.424.

<sup>28</sup> Rosenfeld Affidavit, paras. 63-64, Motion Record, Tab 3, p. 41.

37. Indicators of the independence exercised by some lateral hire and senior IAs can be found in the negotiated terms of their contracts. Their contracts can include signing bonuses, agreements to pay for assistants, loan agreements and many other benefits which generally Trainees, as initial hires, cannot negotiate.<sup>29</sup> Senior IAs with a tenure of 6 years or more, generally earn over \$100,000, with some earning as much as \$750,000.<sup>30</sup>

#### **D. Objections and Support**

38. Class Counsel has received 1 objection as of July 11, which does not concern the substance of the settlement or fee request.<sup>31</sup> Correspondence from Settlement Class Members has been positive, for example one Settlement Class Member wrote:

- Thank you so much for your prompt response. I appreciate that this is just an estimate and there are still many twists and turns until settlement and that surprises both good and bad, may still happen.  
Saying that I just wanted to say thank you and the team at Koskie Minsky so much for all your hard work and diligence, You and your team are now officially all my new BFF's . Thank you so much. Have a great summer.

#### **Fee Sought**

39. Class Counsel is seeking a fee of \$2,736,138.20, plus taxes and disbursements. The fee is in accordance with the retainer negotiated by Mr. Rosen, and represents a 25% contingency fee on the \$12 million Settlement Fund, with a credit to the class of \$263,861.80 for costs awards

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<sup>29</sup> Rosenfeld Affidavit, paras. 65-67, Motion Record, Tab 3, pp. 41-42; Exhibit "L" to the Rosenfeld Affidavit, Report of Robert Low (under seal), Brief of Confidential Exhibits, Tab L.

<sup>30</sup> Rosenfeld Affidavit, paras. 68-69, Motion Record, Tab 3, p. 43.

<sup>31</sup> Exhibit "E" to the Scullion Affidavit, objection of David Hogg, Motion Record, Tab 6(E), p. 461.

previously received and applied to Class Counsel fees.<sup>32</sup> The costs were recovered in respect of the certification and leave motions.<sup>33</sup>

40. As of June 6, 2016 Class Counsel had devoted at total of **4, 393 hours**<sup>34</sup> of lawyer, student and clerk time, at a value of **\$1,814,607**. This time was necessary in light of the extensive work required in advancing the action to this late stage, including certification, cross-examinations, leave to appeal, successive rounds of extensive documentary discovery and mediation. In addition, Class Counsel has incurred \$129,514 in disbursements (including taxes and amounts paid by the Class Proceedings Fund), which it is now seeking repayment of.<sup>35</sup>

**E. Net Settlement Fund**

41. The following chart depicts the deduction of all requested fees, taxes, expenses, disbursements, costs and CPC Levy, which produces the Net Settlement Fund, if the fees as sought are granted:

<b>Gross Settlement</b>	<b>\$12,000,000.00</b>
Fees (25%) minus fee credit from cost awards	\$2,736,138.20
Taxes on Fee	\$355,697.97
Disbursements	\$129,514.00
Honorarium	\$10,000.00
Notice costs	paid by BMO
Administration costs	paid by BMO
Pre-levy net	\$8,768,649.83
CPF Levy (10%)	\$876,864.98
<b>Net Settlement Fund</b>	<b>\$7,891,784.85</b>

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<sup>32</sup> Rosenfeld Affidavit, para. 103, Motion Record, Tab 3, p. 56.

<sup>33</sup> Rosenfeld Affidavit, para. 103, Motion Record, Tab 3, p. 56.

<sup>34</sup> 3,419 hours of KM LLP and 974.16 hours of Mr. Elizer Karp.

<sup>35</sup> Rosenfeld Affidavit, paras. 101 and 113, Motion Record, Tab 3, pp. 56 and 59.

### PART III - ISSUES AND THE LAW

#### A. The Settlement Is Fair, Reasonable And In The Best Interests Of The Class

42. The Settlement in this case is an excellent settlement and ought to be approved. In particular:

(a) It is a late stage settlement, wherein the plaintiff has a clear picture of absolute risks for the class and relative risks between groups of class members;<sup>36</sup>

(b) the compensation is substantial and an excellent recovery given the risk and uncertainty of continued litigation;<sup>37</sup>

(c) the Settlement is non-reversionary, with a streamlined confidential distribution process that does not require a class member to prove overtime hours worked; and

(d) the settlement quantum is comparable to the only available comparators, being US overtime settlements for financial professionals.

##### (i) Test for settlement approval under s. 29 of the CPA

43. The test on a motion for settlement approval is “whether the settlement is fair, reasonable and in the best interests of the class as a whole” and “not whether it meets the demands of a particular member”. The settlement must fall within the range of reasonableness in order to obtain court approval: it need not be ‘perfect’.<sup>38</sup>

44. To be approved, a proposed settlement must simply fall within a “zone or range of reasonableness”. The applicable test of whether a particular settlement is fair or reasonable must be based upon the realities of negotiation, compromise and the spectre of continued litigation:

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<sup>36</sup> *Clegg v. HMQ Ontario*, 2016 ONSC 2662 at para 35, Plaintiff’s Authorities, Tab 3; *Middlemiss v. Penn West Petroleum Ltd.*, 2016 ONSC 3537 at para 12, Plaintiff’s Authorities, Tab 11; See also: *Ramdath v. George Brown College of Applied Arts and Technology*, 2016 ONSC 3536 at para 8, Plaintiff’s Authorities, Tab 14.

<sup>37</sup> *O’Neill v. General Motors of Canada Ltd.*, 2014 ONSC 4742 at para 19, Plaintiff’s Authorities, Tab 12; *Fulawka v. Bank of Nova Scotia*, 2016 ONSC 1576 at para 17, Plaintiff’s Authorities, Tab 8; *Roveredo v. Bard Canada Inc.*, 2013 ONSC 6979, at para 12, Plaintiff’s Authorities, Tab 17.

<sup>38</sup> *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 69, Plaintiff’s Authorities, Tab 13.

“[a]ll settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation”.<sup>39</sup> [emphasis added]

45. The “zone or range of reasonableness” is not a static valuation test but one that permits for a whole host of variations depending upon the subject matter of the litigation and the nature of damages for which the settlement is intended to provide compensation.<sup>40</sup>

## **B. Factors Weighing in Favour of Approving the Settlement**

### **(i) Simple and Purposefully Designed Distribution Procedure**

46. Any claims procedure which delays, denies or complicates the delivery of compensation to the class should be avoided. The Settlement in this case has no claims procedure. The only threshold Settlement Class Members must pass is being a member of the Settlement Class and confirming their address. There is no requirement to claim or prove hours worked. The distribution procedure will also be undertaken by a third part in a confidential manner, to avoid any perceived concerns by former or current employees.<sup>41</sup> These key negotiated procedural benefits are exceptionally valuable in this case.

47. The within distribution mirrors the multiple US overtime settlements, some of the only comparator settlements.<sup>42</sup> As noted in the US settlements, the "nearly universal" avoidance of a process which has a claims procedure to prove hours worked avoids serious pitfalls, which would exist if there were a claims process in this case, namely:

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<sup>39</sup> *Dabbs v. Sun Life Assurance Company of Canada* [1998], O.J. No. 2811 at para. 30 (Gen.Div.), Plaintiff's Authorities Tab 4.

<sup>40</sup> *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70, Plaintiff's Authorities, Tab 13.

<sup>41</sup> Rosenfeld Affidavit, paras. 49-50, Motion Record, Tab 3, p. 37.

<sup>42</sup> Rosenfeld Affidavit, paras. 76-78, Motion Record, Tab 3, pp.45-46.

"...a plan that invites class members to estimate their damages must also provide a procedure for challenging estimates that are excessive or fraudulent, but such a procedure would increase the cost of administering the settlement and might delay payments to the class."<sup>43</sup>

48. There are no records of hours worked for the Settlement Class Members over a 14 year period. If there were a claims process, many class members would likely not be able to establish such hours and such claims could be denied.<sup>44</sup>

49. The structure of the distribution in this Settlement will similarly avoid the complications which occurred in the contested claims procedure in the *Fulawka v. Bank of Nova Scotia* settlement.<sup>45</sup>

50. The Settlement in this case has been tailor made for the particular circumstances applicable to overtime class actions, with attention given to the procedural pitfalls and success of other US and Canadian settlements. As a result, the distribution procedure in this case is a valuable benefit and marker of reasonableness given it has been crafted to reflect "...the unique circumstances of the class members".<sup>46</sup>

#### **(ii) Late Stage of Proceeding**

51. This action has been fiercely litigated over 6.5 years, involving the production of 2.1 million documents. Evidence from the most senior employees at Nesbitt, as well as many junior employees and investment advisors employed at different times in different offices across the

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<sup>43</sup> Exhibit "O", to the affidavit of David Rosenfeld, declaration of James F. Clapp, *Bahramipour v. Citigroup Global Markets Inc.*, Motion Record, Tab 3(O); Rosenfeld Affidavit, para. 77, Motion Record, Tab 3, p. 213.

<sup>44</sup> Rosenfeld Affidavit, paras. 38-39, Motion Record, Tab 3, p. 33.

<sup>45</sup> *Fulawka v. Bank of Nova Scotia* 2016 ONSC 1576, at paras. 2-3, Plaintiff's Authorities, Tab 8.

<sup>46</sup> *Dolmage v. HMQ Ontario*, 2013 ONSC 6686, at para. 30, Plaintiff's Authorities, Tab 5.

province has been obtained and considered. This is a late stage settlement, which mitigates in favor of approval.<sup>47</sup>

52. As noted by Justice Belobaba in *Clegg v. HMQ Ontario*, 2016 ONSC 2662:

"Most class action settlements materialize just before or just after certification. In most of the cases, documents have not been exchanged, discoveries have not taken place and class counsels' information or knowledge about the risks and rewards of going further is, to say the least, at a minimum."<sup>48</sup>

53. The Settlement in this Action is the opposite of the above description of an early stage settlement, given that:

- (a) 6.5 years of litigation have occurred;
- (b) 2.1 million documents have been produced;
- (c) documentary productions cover:
  - (i) the entire class period;
  - (ii) multiple custodians in a complete hierarchal chain of up to the highest executive of Nesbitt; and
  - (iii) multiple locations across Ontario.
- (d) cross-examinations were conducted on 20 affiants of Nesbitt:
  - (i) including multiple IAs from across Ontario;
  - (ii) Branch Managers, Division Managers and Senior Managers of Employee Relations; and
  - (iii) the Co-Head and Executive Vice-President of Nesbitt.
- (e) the records produced have included branch records, head office records, all overtime policies and extensive detailed data on individual class members.<sup>49</sup>

54. Given the extensive evidence to date, Class Counsel have been able to formulate a clear understanding of the absolute risks to the class and relative risks between groups of class

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<sup>47</sup> *Clegg v. HMQ Ontario*, 2016 ONSC 2662 at para 35, Plaintiff's Authorities, Tab 3; *Middlemiss v. Penn West Petroleum Ltd.*, 2016 ONSC 3537 at para 12, Plaintiff's Authorities, Tab 11; See also: *Ramdath v. George Brown College of Applied Arts and Technology*, 2016 ONSC 3536 at para 8, Plaintiff's Authorities, Tab 14.

<sup>48</sup> *Clegg v. HMQ Ontario*, 2016 ONSC 2662, at para. 26, Plaintiff's Authorities, Tab 3.

<sup>49</sup> Rosenfeld Affidavit, paras. 13-15 and 23-31. Motion Record, Tab 3, pp.22-23 and 26-30.

members. The settlement reflects this informed understanding and warrants a finding of reasonableness.

**(iii)Substantial and Comparable Quantum to US Settlements**

55. The only available comparator settlements for misclassified investment advisors and similar financial professionals are in the US. The per month compensation ranges in comparable US settlements range from \$28.11 - \$149 per month of eligible employment, on a net basis.<sup>50</sup> The within Settlement Fund when divided by the total eligible months equates to \$64.93 - \$129.86 per month of eligible employment,<sup>51</sup> on a **net** basis, depending on the ultimate take-up rate.<sup>52</sup>

56. This Settlement falls squarely in the range of reasonableness, and closer to the higher end of that range, established by similar US settlements. The settlement quantum is an excellent result.

57. The availability of substantial, certain compensation that can be distributed expeditiously was found in the second revised *Fulawka*(2016) settlement to justify judicial approval, given that "the overall benefit to class members of an immediate and substantial payout, without further delay or uncertainty, is significant and justifies judicial approval."<sup>53</sup> The same holding should apply to this Settlement.

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<sup>50</sup> Rosenfeld Affidavit, paras. 81 and 87. Motion Record, Tab 3, pp.X.

<sup>51</sup> \$129.86 if the take-up rate is 50% and \$64.93 if the take-up rate was 100%, using the number of applicable months under the Settlement Class Definition.

<sup>52</sup> Rosenfeld Affidavit, paras. 85-86, Motion Record, Tab 3, pp.47-49 and 51.

<sup>53</sup> *Fulawka v. Bank of Nova Scotia*, 2016 ONSC 1576, at para. 13, Plaintiff's Authorities, Tab 8.



**(iv) Liability and Litigation Risks**

58. The risk of loss, delay and uncertainty in continued litigation weighs heavily in favour of the reasonableness of a settlement and approval.<sup>54</sup>

59. This proceeding has been litigated over the last 6.5 years and the trial was tentatively scheduled for April, 2017.<sup>55</sup> This class action is at a very late stage of litigation, providing the plaintiff a full understanding of the risks.

**(a) Novel Case**

60. The threshold common issue in this case is whether all the class members are managerial under the *ESA*. The size of the class, length of class period and novel issues posed immense risks in proceeding to trial. The plaintiff's burden at trial in this case would be to establish that over 1,800 class members, whose employment spans 14 years and 69 offices from Thunder Bay to Toronto, were not managerial employees.<sup>56</sup>

61. There has never been a common issues trial relating to employment misclassification in Canada. Similarly, the issue of whether a pure commission based investment advisor, such as the class members, are non-managerial employees and entitled to overtime in Canada is novel.<sup>57</sup>

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<sup>54</sup> *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743 at paras 4 and 16, Plaintiff's Authorities, Tab 7; *O'Neill v. General Motors of Canada Ltd.*, 2014 ONSC 4742 at para 19, Plaintiff's Authorities, Tab 12; *Fulawka v. Bank of Nova Scotia* 2016 ONSC 1576 at para 17, Plaintiff's Authorities, Tab 8; *Roveredo v. Bard Canada Inc.*, 2013 ONSC 6979, at para 12, Plaintiff's Authorities, Tab 17.

<sup>55</sup> Rosenfeld Affidavit, para. 32, Motion Record, Tab 3, pp.30-31.

<sup>56</sup> Rosenfeld Affidavit, para. 33, Motion Record, Tab 3, p.31.

<sup>57</sup> Rosenfeld Affidavit, para. 33, Motion Record, Tab 3, p. 31.

**(b) Defendant May Succeed on Managerial Question**

62. The class members are regulated professionals who work in an entrepreneurial environment. Some class members can make over \$750,000 a year.<sup>58</sup> Nesbitt's position is that

IAs are able to:

- (a) direct their own business to the extent of selecting clients to target and how to market and advertise their services;
- (b) decide whether or not to partner with other IAs and to employ and supervise AIAs and SAs as subordinates who would follow instructions in providing client service and be paid by the IA;
- (c) decide whether to acquire existing books of clients or build a client base from scratch;
- (d) select their hours of work in terms of when and how many hours to commit to their practice;
- (e) manage and direct the performance of subordinates, including hiring and firing of subordinates; and
- (f) dictate their own vacation schedules with the only requirement being to advise a branch manager.<sup>59</sup>

63. The income of almost all IAs after 6 years of employment is in excess of \$100,000 and ranges up to \$750,000. Many IAs have the assistance of a Sales Assistant, or AIAs, for whom the IA directs a portion or all of his/her salary from their commission. There was a genuine risk for trial that some or all of class members would be found to be managerial or independent in nature and excluded from entitlement or overtime under the *ESA*.<sup>60</sup>

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<sup>58</sup> Rosenfeld Affidavit, para. 34, Motion Record, Tab 3, p. 32.

<sup>59</sup> Rosenfeld Affidavit, para. 34, Motion Record, Tab 3, p. 32.

<sup>60</sup> Rosenfeld Affidavit, para. 36, Motion Record, Tab 3, pp. 32-33.

**(c) Delays Associated with Trial and Appeals if Successful**

64. If the action proceeded to trial, it would still be years before any recovery could be obtained. The class could face a further 2-3 years until a final determination of the common issues trial, and further time for any individual issues hearings.<sup>61</sup>

**(d) Non-Trainees Pose Greatest Risk**

65. The greatest risk in this action was faced by the Non-Trainee Group, which consists of senior and lateral hire IAs. The liability risks in respect of the Non-Trainee Group are fourfold:

(a) the risk the defendant could establish that the Non-Trainee Group has divergent characteristics within it, such as unique contracts and varying work arrangements, making a common determination in their favor harder to establish;

(b) the risk the defendant could establish that as a result of the divergent characteristics the action should be decertified for these individuals;

(c) the risk the defendant could establish some characteristics, such as seniority, higher income and the related greater control and autonomy, support the defendant's position regarding managerial determination; and

(d) the members of the Non-Trainee group generally make substantial incomes of over \$100,000 and up to \$750,000 in many instances. The defendant could seek to establish that the overtime protections of the *ESA* are non-applicable to such high earners.<sup>62</sup>

**(v) Damage Risks**

66. Success on the common issues of liability would not necessarily mean success on damages. Aggregate damages were not a certified common issue. There are no records of the hours of work of class members. Even if the plaintiff was entirely successful on the threshold common issue of managerial classification, it is very possible that mini-trials, or some form of

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<sup>61</sup> Rosenfeld Affidavit, paras. 42-44, Motion Record, Tab 3, pp. 34-35.

<sup>62</sup> Rosenfeld Affidavit, para. 70, Motion Record, Tab 3, p. 43.

summary individual procedure, would be required to assess the quantum of damages and extent of overtime worked.<sup>63</sup>

67. The class members would have to establish hours worked with circumstantial evidence or available memory, in some cases dating back 14 years. Many would likely not be able to prove such hours given the absence of records. The defendant would also advance limitation period defences for a significant portion of the class. The damages phase of this case would take a significant amount of time and pose significant individual risk for each class member.

### **C. Fee Approval**

68. Class Counsel is requesting a fee of \$2,736,138.20, along with taxes and reimbursement for disbursements in accordance with the retainer agreement. The fee request represents a 25% contingency fee on the Settlement Fund, with a credit deduction to the class for cost awards totalling \$263,861.80, which were applied to Class Counsel fees at the time they were awarded.<sup>64</sup>

#### **(i) Test for Fee Approval**

69. The retainer agreement is the starting point for the approval of contingency fees. The court determines whether the fees and disbursements as provided for in the retainer agreement are fair and reasonable, failing which, the court has discretion to determine the amount owing to Class Counsel for fees and disbursements.<sup>65</sup>

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<sup>63</sup> Rosenfeld Affidavit, para. 38, Motion Record, Tab 3, p. 33.

<sup>64</sup> Rosenfeld Affidavit, paras. 103, 110-111 and 113, Motion Record, Tab 3, pp.56 and 58-59.

<sup>65</sup> *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s.32(2) and (4), Plaintiff's Factum, Schedule B, Tab B; *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at para. 58, Plaintiff's Authorities, Tab 1.

70. In most cases, “fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and do it well”.<sup>66</sup> In this case, the 25% contingency fee negotiated by the representative plaintiff in the retainer is on lower end of contingency fee arrangements, which range from 25-33%, that are regularly approved in the class action context.<sup>67</sup>

71. In *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, Justice Belobaba approved a contingency of 33% and held that “contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable”.<sup>68</sup> In this case, the contingency arrangement of 25% is very reasonable and was fully understood and accepted by the representative plaintiff.

**(ii) Risk Undertaken**

72. Risk for Class Counsel is measured from the commencement of the action and as it continued: “[i]t would be wrong to use hindsight to give different weight to that risk than the lawyers and clients gave to it at the outset.”<sup>69</sup>

73. Given the novel nature of this case and its unique place in Canadian jurisprudence, the risk was very high at the outset. The case got progressively riskier as the case advanced due to the release of numerous class action decisions which made it significantly more difficult to certify and succeed in a misclassification case, including:

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<sup>66</sup> *Gagne v. Silcorp. Ltd.*, [1998] O.J. No. 4182 at para. 14 (C.A.) [*Gagne*], Plaintiff’s Authorities, Tab 9.

<sup>67</sup> *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at paras. 2-3 and 12, Plaintiff’s Authorities, Tab 2; Rosenfeld Affidavit, para. 112, Motion Record, Tab 3, p. 59.

<sup>68</sup> *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at para 8, Plaintiff’s Authorities, Tab 2.

<sup>69</sup> *Gagne*, at para. 16, Plaintiff’s Authorities, Tab 9.

(a) *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445 wherein the court of appeal overturned the lower court and denied certification; and

(b) *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377,<sup>70</sup> wherein the Superior Court, Divisional Court and Court of Appeal denied certification to a class of financial analysts and investment advisors.

74. Furthermore, this case is at a later stage in proceeding, resulting in increased cost and therefore risk to Class Counsel.

**(iii) Success Achieved**

75. The success achieved in this case is significant for the Settlement Class Members. This case is the first of its kind in Canada and for all the reasons above, the settlement represents an excellent outcome for the class. Furthermore, there has been behaviour modification as Nesbitt has confirmed it has for the first time implemented an overtime policy for Trainees in respect of the 6 month period of close supervision.<sup>71</sup>

76. The Settlement is also success for the class when considered against the risks involved. The common issues trial would have involved a complex contest of establishing overtime eligibility across a 14 year period, for over 1,800 individuals located in 69 offices across Ontario. The class consisted of regulated professionals, many of whom earned substantial incomes and possessed significant autonomy. Even if the plaintiff succeed entirely on liability, the risk and delay in establishing individual damages, without records of hours over a 14 year period, was significant.

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<sup>70</sup> denial of certification upheld on appeal at *Brown v. Canadian Imperial Bank of Commerce*, 2013 ONSC 1284 (Div. Ct.); and *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677.

<sup>71</sup> Pauchulo Affidavit, para 49.

**(iv) Contingency Fee Request is Equivalent to Other Cases**

77. The requested fee is consistent with the retainer agreement and should be approved when considering the success achieved and risks undertaken. The percentage sought is also well within the range of fees approved in other Ontario decisions.<sup>72</sup>

**(v) No Objections to Fee and the Representative Plaintiff Approves of Fee**

78. The representative plaintiff was actively involved in this litigation and supports Class Counsel's fee request.<sup>73</sup> In this context, courts have considered this to be a significant factor in favour of approving requested fees.<sup>74</sup> Finally, there have been no objections to the fees from Settlement Class Members who were provided direct notice by mail and indirectly through the Globe and Mail of the fee being requested.<sup>75</sup>

**D. Honorarium Payment to Mr. Rosen**

79. Class counsel seeks an honorarium payment of \$10,000 for Mr. Rosen, to be paid from the Settlement Fund, as is customary when such payments are approved.

80. Honorarium payments are based on a plaintiff's active and necessary assistance in the preparation of the case and contribution to the success of the action. Among other factors, courts may consider the plaintiffs' involvement in the "initiation of the litigation and retainer of counsel"; "significant personal hardship or inconvenience in connection with the prosecution of

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<sup>72</sup> *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at para 8, Plaintiff's Authorities, Tab 2.

<sup>73</sup> Rosen Affidavit, para. 10 and 20, Motion Record, Tab 4, pp. 416-417 and 419.

<sup>74</sup> *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 at paras. 29 and 38 (S.C.J.), Plaintiff's Authorities, Tab 15.

<sup>75</sup> Scullion Affidavit, paras. 5-8, Motion Record, Tab 6, pp. 428-429.

the litigation”; and; “participation at various stages in the litigation, including discovery, settlement negotiations and trial”.<sup>76</sup> Almost all of these factors are met in this case, including:

- (a) review of the Statement of Claim and swearing of affidavit for the certification motion;
- (b) cross-examined in advance of the certification motion;
- (c) maintained direct contact with a small dedicated group of additional class members who could be consulted and provide guidance;
- (d) numerous meetings and phone calls with Class Counsel after certification and review of all materials;
- (e) attending 2 days of mediation and continuing negotiations after mediation; and
- (f) involvement in every step of the settlement and mediation process, including review and input on numerous written materials.

81. This case was, lengthy, involved the disclosure of personal financial and employment information from the representative plaintiff and he was actively involved at every important step for 6.5 years. The quantum of the honorarium requested is appropriate and in line with other cases in which honorariums have been granted, including *Fulawka v. Bank of Nova Scotia* in which a \$15,000 honorarium was granted.<sup>77</sup>

#### PART IV - CONCLUSION

82. The Settlement in this case is an excellent result in a novel proceeding. The distribution procedure is confidential and efficient, with no requirement for proof of overtime hours. The distribution is procedurally tailor fit to the particularities of overtime class actions and provides substantial compensation relative to the litigation risk faced by Trainees and Non-Trainees.

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<sup>76</sup> *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-43, Plaintiff's Authorities, Tab 16.

<sup>77</sup> *Healey v. Lakeridge et al.* and *Horgan v. Lakeridge et al.*, 2014 ONSC 5209, at paras. 42 and 57, Plaintiff's Authorities, Tab 10; *Frank v. Caldwell*, 2014 ONSC 1484, at paras. 34-40, Plaintiff's Authorities, Tab 6; *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743, Plaintiff's Authorities, Tab 7.



When compared to available US settlements, the Settlement Fund is better comparable and falls squarely within the zone of reasonableness. The Settlement Agreement as whole provides valuable and guaranteed benefits through a non-reversionary Settlement Fund and should be approved.

83. The fee request of Class Counsel should be approved. Class Counsel took on significant risk in this case, and achieved significant success to obtain a Settlement that provides class members with fair compensation that reflects their risks at trial and individual assessments. The requested contingency fee is well within the range of contingency fees approved by the Court. The representative plaintiff supports Class Counsel's fee request, and no objections were received from the class.

84. Mr. Rosen has committed 6.5 years of his life to this case and exposed to the public some of the most private aspect of his employment. An honorarium is appropriate recognition of Mr. Rosen's dedication, which has been made on behalf of over 1,800 other class members.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11 day of July, 2016.



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Class Counsel

Lawyers for the plaintiff

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Clegg v. HMQ Ontario*, 2016 ONSC 2662
2. *Middlemiss v. Penn West Petroleum Ltd.*, 2016 ONSC 3537
3. *Ramdath v. George Brown College of Applied Arts and Technology*, 2016 ONSC 3536
4. *O'Neill v. General Motors of Canada Ltd.*, 2014 ONSC 4742
5. *Fulawka v. Bank of Nova Scotia*, 2016 ONSC 1576
6. *Roveredo v. Bard Canada Inc.*, 2013 ONSC 6979
7. *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.)
8. *Dabbs v. Sun Life Assurance Company of Canada*, [1998], O.J. No. 2811
9. *Dolmage v. HMQ Ontario*, 2013 ONSC 6686
10. *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743
11. *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105
12. *Gagne v. Silcorp. Ltd.*, [1998] O.J. No. 4182 (C.A.)
13. *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686
14. *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 (S.C.J.)
15. *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911
16. *Healey v. Lakeridge et al. and Horgan v. Lakeridge et al.*, 2014 ONSC 5209
17. *Frank v. Caldwell*, 2014 ONSC 1484

**SCHEDULE "B"**  
**RELEVANT STATUTES**

**Class Proceedings Act, 1992, S.O. 1992, CHAPTER 6, ss. 29 and 32**

**Discontinuance, abandonment and settlement**

**29. (1)** A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

**Settlement without court approval not binding**

**(2)** A settlement of a class proceeding is not binding unless approved by the court.

**Effect of settlement**

**(3)** A settlement of a class proceeding that is approved by the court binds all class members.

**Notice: dismissal, discontinuance, abandonment or settlement**

**(4)** In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

....

**Fees and disbursements**

**32. (1)** An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

**Court to approve agreements**

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

**Priority of amounts owed under approved agreement**

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

**Determination of fees where agreement not approved**

(4) If an agreement is not approved by the court, the court may,

- (a) determine the amount owing to the solicitor in respect of fees and disbursements;
- (b) direct a reference under the rules of court to determine the amount owing; or
- (c) direct that the amount owing be determined in any other manner.

**YEGAL ROSEN**  
Plaintiff

**BMO NESBITT BURNS INC.**  
and  
Defendant

Court File No: CV-10-39668500CP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**FACTUM OF THE MOVING PLAINTIFF**  
**(SETTLEMENT APPROVAL MOTION AND FEE**  
**APPROVAL MOTION**  
**RETURNABLE JULY 21, 2016)**

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