

CJ-10-396685
00CP

Court File No

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

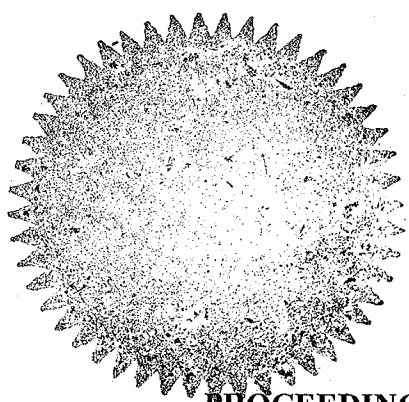
YEGAL ROSEN

Plaintiff

-and-

BMO NESBITT BURNS INC.

Defendant



PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. 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 Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, 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 PLAINTIFF'S CLAIM, and \$5,000.00 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 Plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

Date: Feb ⁿ 8 2010

Issued By:



Local Registrar

M. Sagaria
Registrar

Address of court office: 393 University Avenue, 10th Floor
Toronto, Ontario M5E 1G6

TO: BMO Nesbitt Burns Inc.
1 First Canadian Place
Toronto, Ontario M5X 1H3

AND

TO: **Gowlings LLP**
1 First Canadian Place
100 King Street West
Suite 1600
Toronto, Ontario
M5X 1G5

Bruce Smith
Tel: (416) 369-4616
Fax: (416) 369-7250
Email: Bruce.smith@gowlings.com

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;
- b. an order, pursuant to s. 24 of the *Class Proceedings Act, 1992*, directing an aggregate assessment of damages;
- c. \$100 million in general damages for the Class, or such other sum as this Honourable Court deems just;
- d. an interlocutory and a final mandatory order directing that Defendant comply with the Ontario *Employment Standards Act* (“the Act”), and, in particular, to accurately record all hours worked by Class Members, and to pay Class Members their statutory entitlement for all hours that they worked in excess of the applicable threshold for overtime pay entitlement under applicable Provincial legislation (the “Overtime Threshold”) at a rate of time and a half their normal hourly rate;
- e. an order pursuant to s. 23 of the *Class Proceedings Act, 1992*, admitting into evidence statistical information, including statistical information concerning hours of work performed by members of the Class, and an order directing Defendant to preserve, and disclose to the plaintiff, all records (in any form) relating to the hours of work performed by Class Members;

- f. in the alternative to the claim for damages in (b) and (c) above, an order directing the Defendant to account to each Class Member for the hours he/she worked in excess of the applicable Overtime Threshold , and an order requiring Defendant to disgorge to the Class Members all amounts withheld by it in respect of such unpaid overtime;
- g. in the alternative to (c), (f), a declaration that Defendant has been unjustly enriched, to the deprivation of members of the Class, by the value of the work performed by members of the Class and an order requiring Defendant to disgorge to the Class Members all profits earned by Defendant as a result of the hours worked by the Class Members in excess of the applicable Overtime Threshold for which the Class Members have not been paid (restitution), or in the alternative a declaration that Defendant has been unjustly enriched to the deprivation of the Class Members in the amount of overtime pay due to the Class Members that has not been paid by Defendant;
- h. pre-judgment and post-judgment interest on the amounts payable pursuant to subparagraphs (c), (f), and (g) pursuant to the *Courts of Justice Act*;
- i. punitive, aggravated and exemplary damages in the amount of \$10 million, or such other amount as to this Honourable Court deems just;
- j. a declaration that Defendant has breached its contracts of employment with each member of the Class;

- k. a declaration that Defendant has breached its obligation to act in good faith in the performance of its contracts of employment with the Class by failing to comply with its statutory obligations toward its employees and by failing to adhere to statutory requirements respecting the payment of wages for hours worked beyond the applicable Overtime Threshold, and by retaining for itself amounts due to the Class in respect of the wages for these hours;
- l. a declaration that Defendant breached its statutory obligations under Part VIII, Section 22(1) of the *Act*;
- m. a declaration that Defendant has breached its statutory obligations under Part VII, Section 17 (1)(b) of the *Act*;
- n. costs of this action on a substantial indemnity basis plus Goods and Services Tax;
- o. the costs of administering the plan of distribution of the recovery in this action in the sum of \$5 million or such other sum as this Honourable Court deems appropriate; and
- p. such further and other relief as may be required by the *Class Proceedings Act, 1992*, or as this Honourable Court may deem just.

PARTIES

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

3. The Defendant is a North American full-service investment firm.
4. According to its website, BMO NBI is one of North America's leading 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.

THE CLASS

5. The Plaintiff brings this action on his own behalf and on behalf of all persons resident in Canada who between 2002- and the date of judgment in this action (the "Class Period") :
 - a. were (or still are) employed by Defendant in Ontario, in the role of :
 - b. Investment Advisor or Financial Representative or Investment Consultant, or those that performed job duties similar thereto; and
 - c. did not receive payment for the hours they worked in excess of the applicable Overtime Threshold in accordance with section 22(1) of the *Act*, as a result of being treated as being ineligible for Overtime by the Defendant; and
 - d. who claim that they are not exempted from sections 22(1) or section 17 (1)(b) of the *Act* under applicable exemptions prescribed by Regulations to the *Act*.

The Employee Environment for IAs at BMO NBI

6. The atmosphere and working conditions of all of BMO NBI's branches are relatively similar and uniform across the country.

7. The Plaintiff, an Ontario Securities Commission licensed salesperson began working as an employee of BMO NBI in June 2002 as a trainee to become an Investment Advisor.
Investment Advisors provide investment advice to BMO NBI clients on investment matters.
8. Clients of BMO NBI pay fees to Defendant for having their financial assets managed by BMO NBI Investment Adviser employees. The fees paid to BMO NBI are geared to and based on a percentage of assets under management. Clients may also pay fees to BMO NBI when they make trades or otherwise have activity in their account.
9. Being that Defendant and other like investment firms derive their profits from the fees paid by the firm's investment clients, Defendant, like other investment firms, provide financial incentives to their branch managers based on the level of, and/or applicable increase in, assets "under management" at specific branches, and geared to the level of fees paid to Defendant by its investment clients derived from fees and commissions generated at specific branches.
10. As a result of the above-described compensation structure for Defendant's Managers, Defendant's respective Branch Managers urge their Investment Adviser employees to work ever harder to increase the "assets under management" at their particular branches, and to generate commission income from trades, sales of IPOs and Funds, and other like account activity, so that the Branch and Branch Managers may benefit from the financial incentives offered by Defendant and not decline in the global BMO NBI Branch rankings.

11. Defendant also provides its Branch Managers with target goals for bringing in new assets under Defendant's management, and for fees and commission levels to be generated by the particular advisers under the oversight of the Branch Managers.
12. Accordingly, Branch Managers were financially and otherwise incentivized to increase the "assets under management" in their particular branches, and to attempt to meet target goals for increased assets and commission levels.
13. In order to meet those goals, and to achieve the financial incentives offered by Defendants, Branch Managers would provide Plaintiff and other employees at Defendant's branches with goals and targets of increased "assets under management", and increased commission levels.
14. Management was aware that in order for the Plaintiff and the other employees to achieve the goals, and meet the targets set and urged by Defendant and Management, Plaintiff and other Class Members were required to work overtime hours to complete their job requirements and expectations.
15. Furthermore, Plaintiff's and other IAs' income was geared to a portion of their "Production", based on a formula set relative to production amounts (i.e., marginal fees and commissions generated by new "assets under management"), known as the "Grid".
16. IAs' would earn a larger portion of the commissions and fees they generated (collectively, the fees and commissions are the IAs' "Production"), i.e., a higher "grid level" directly translating to a higher "grid amount" based on higher levels of Production.

17. The “grid level” for IAs was set by the Defendant and changed yearly based on Defendant’s own and proprietary determination of an appropriate grid level, and without input by the IAs.
18. Once an IA would “slip down a ‘grid level’”, i.e., earn a lower amount of the fees generated by his/her Production (because that IA’s Production was not as high as set or expected by Defendant’s Management), the IA would remain frozen at the lower grid level for the upcoming year.
19. Thus, an IA who did not increase but rather only maintained his/her Production amount in accordance with Defendant’s targets for growth could earn less in a subsequent year, than a previous year, based on Defendants arbitrary grid allocation for a particular production amount.
20. Further, because the compensation system for IAs is strictly commission based, IAs risk losing commission if they go on vacation as they risk missing new IPO’s, road shows for new IPO’s and trading fees, all of which would affect the IAs Grid Level.
21. Thus, the pressure created and imposed by the Defendant on every IA to increase Production levels so as to maintain or increase their applicable grid amount was overwhelming, ubiquitous, and pervasive and forced all IAs to work ever harder and additional hours in excess of the Overtime and Permissible thresholds in Ontario.
22. The Defendant is /was aware of the pressures of the grid, and the appurtenant hours expended by IAs as a result of their compensation structure.
23. Presumably, Defendant was unconcerned with the work pressures of its IAs as it refused or failed to pay its IAs Overtime Pay in accordance with the *Act*, or at all.

24. It is standard knowledge in the Investment Industry that in order to be successful, and achieve the goals set by Defendant's Management and Defendant, IAs are required to work between 60-70 hours per week or even more.
25. Accordingly, BMO NBI knew or should have known, or as it directed or permitted, Class Members are routinely required to work hours in excess of the applicable provincial Overtime Threshold, and the applicable Permissible Threshold in order to complete their employment responsibilities.
26. Branch Managers and Defendant encouraged the Plaintiff and other employees to work overtime hours, telling them they "needed to build their own practice", and other like statements designed to lead the Plaintiff and the other employees to believe that the work that they were performing on behalf of Defendant, under the supervision of the Branch managers was like that of specific Professionals that are exempted from the Overtime provisions under the *Act*, or were working for themselves.
27. Furthermore, IAs were pressured to work ever harder and increase production due to the nature and pressure of the grid compensation structure.
28. Additionally, from time to time IAs were strongly encouraged in both an implicit and explicit fashion by their supervisors to work longer hours in the office or outside the office, in excess of the applicable provincial Overtime threshold, selling or soliciting to sell investment products to Defendant's clients or cold calling potential clients to canvas interest in becoming clients by offering a "second opinion" of their investments currently held at another brokerage firm and or to purchase financial products from the Defendant for the

purpose of attracting new clients and their assets thereby increasing “Assets Under Management” and “Production”.

29. BMO NBI management also circulated a performance list every month throughout the office which ranked each and every IA’s monthly “Production” performance against the others in his office. Moreover, such a list was likewise kept and published at the corporate level covering the top producing employees throughout the country.
30. Accordingly, Defendant’s IA employees were in a competitive race encouraged by managers to work overtime hours.
31. However, Defendant never tracked the Plaintiff’s or the Class Members’ hours and their pay was never tied to hours worked, contrary to the provisions in the *Act*.
32. The Plaintiff pleads that while he was employed with the Defendant he was not aware that he was entitled to Overtime Pay under the *Act*, and that the Defendant’s conduct and representations misled him to believe that he was not entitled to same.
33. The Plaintiff pleads that Defendant’s conduct was designed to mislead him and to conceal from other Class Members their right to receive Overtime Pay under the *Act*.
34. In the alternative, the Plaintiff pleads that the Defendant was unaware that he and other employees were entitled to Overtime Pay, and thus, inadvertently misled the Class Members as to their rights to receive Overtime Pay under the *Act*.

Plaintiff’s Employment History with the Defendant

35. Plaintiff's starting employment agreement with the Defendant provided that the Plaintiff's starting salary as an IA for each of the first six (6) months of his employment commencing June 3, 2002 (start date) was a guaranteed draw of \$4,000 per month.
36. His salary was later reduced by \$250 per quarter during the next 12 month period.
37. After 18 months from his start date, the Plaintiff was paid entirely on commission pursuant to the Grid filter, as unilaterally determined by the Defendant from time to time.
38. Plaintiff was required and encouraged to work, and did in fact work, between 65-70 hours a week for the duration of his employment with a view to achieve the goals set for him by Management and Defendant.
39. Defendant's Management was aware of hours worked by the Plaintiff, and encouraged it, telling him he was "building his business/practice," and that the hard work was required to avoid him and the branch dropping in the pay-out grid and rankings.

The Act mandates that Plaintiff and the other Class Members are entitled to Overtime Pay

40. Plaintiff claims that pursuant to the sections of the *Act* cited above, Defendant is obligated to pay him, and the Class Members, Overtime Pay, at one and half times his usual rate, for the hours he and the Class Members worked in excess of their applicable Overtime Threshold in their province.
41. In addition, Plaintiff claims that Defendant breached the *Act* by requiring him and the Class Members, or in the alternative permitting him and the Class Members, to work hours in excess of the applicable Permissibility Threshold.

42. Plaintiff pleads that Defendant derives large profits from its policy of requiring or permitting its applicable employees to work longer hours than permissible under applicable legislation, and by denying the employees their rightful overtime pay.
43. Plaintiff pleads that as a result, Defendant should be penalized with Punitive Damages, and the same should be awarded to the Class Members.
44. Plaintiff claims that he is not exempt from any of the requirements of the *Act* relating to Overtime Thresholds, and/or Permissibility Thresholds.
45. The exact number of hours that Plaintiff and the Class Members worked in excess of the applicable Overtime Threshold, and the applicable Permissibility Threshold, is or should be in the knowledge of Defendant, as under applicable provisions in the *Act*, Defendant is required to accurately record the hours of its employees.
46. However, Plaintiff claims that he averaged around 80-90 overtime hours per month during the course of his employment with Defendant.
47. Pursuant to O. Reg. 285/01 the Plaintiff does not fall into any exempted category of employee from the payment of Overtime Pay. Specifically, the Plaintiff's work is not supervisory or managerial in character, nor is he a salesperson registered under the *Real Estate and Business Brokers Act, 2002*.
48. The Plaintiff pleads that although his pay was commission based for portions of his employment, he was an employee of the Defendant for the duration of his employment, and was never an independent contractor.

The Overtime Claims of Class Members Have Common Issues of Fact and Law

49. The policies and practices of BMO NBI which affect the conditions of employment and Defendant's decision whether to pay Overtime Pay in accordance with the *Act* to the Class Members at Defendant's headquarters and branch and other offices are relatively uniform and consistent throughout Defendant's operations.
50. The Plaintiff pleads that the Defendant developed its own proprietary Overtime policy under which certain of its employees are deemed exempt from Overtime Pay, and that Defendant categorically does not pay Overtime Pay to such employees in accordance with its Policy.
51. Plaintiff further pleads that Defendant's Overtime Policy violates the *Act* in that it deems as exempt from Overtime Pay certain employees that are not exempted under the *Act*.
52. Plaintiff alleges that the pressure to work over-time at Defendant's branches and in its many business areas was pervasive, and that employees that did not work over-time as required for their employment responsibilities, and/or meet "Production" commission quotas where applicable were pushed out by Defendant or by the pervasive pressures of the grid designed by the Defendant.
53. Thus, Defendant's internal policies implicitly required under pain of dismissal, or other disciplinary action, that certain of their employees work more hours than is permissible under the *Act*, and Defendant did not pay Overtime Pay as required under the *Act* or at all.
54. Plaintiffs aver that Defendant has no systemized means to record the Class Members' hours of work and thus no efficient or coordinated means to record Class Members' over-time

hours as required under the *Act*. This is particularly the Defendant's doing, and Plaintiffs aver a declaration of Defendants responsibility under the *Act*.

Applicable Provincial Legislation

55. BMO NBI is a company incorporated and organized under the laws of Ontario, with operations around the country. It is therefore required to comply with the minimum conditions set out in the *Act* with respect to such matters as wages, hours of employment, and rights to vacation. The minimum standards contained in the *Act* including those relating to overtime pay, seek, among other things, to protect vulnerable employees from undue exploitation by employers who may seek to take advantage of superior economic and bargaining power in setting unlawfully onerous terms and conditions of employment.

56. Section 17 of the *Act* provides that:

(1) Subject to subsections (2) and (3), no employer shall require or permit an employee to work more than,

(a) eight hours in a day or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in his or her regular work day; and

(b) 48 hours in a work week.

(2) An employee's hours of work may exceed the limit set out in clause (1) (a) if the employee has made an agreement with the employer that he or she will work up to a

specified number of hours in a day in excess of the limit and his or her hours of work in a day do not exceed the number specified in the agreement.

(3) An employee's hours of work may exceed the limit set out in clause (1) (b) if,

(a) the employee has made an agreement with the employer that he or she will work up to a specified number of hours in a work week in excess of the limit;

(b) the employer has received an approval under section 17.1 that applies to the employee or to a class of employees that includes the employee; and

(c) the employee's hours of work in a work week do not exceed the lesser of,

(i) the number of hours specified in the agreement, and

(ii) the number of hours specified in the approval.

57. Section 22 of the *Act* further provides that:

(1) An employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each week or, if another threshold is prescribed, that prescribed threshold

58. Section 15(1) of the *Act* obliges an employer to accurately record and maintain records of its employees' hours of work each day and each week under paragraph 4. However Section 15(3) provides that an employer is not required to record the information described in paragraph 4 of subsection (1) with respect to an employee who is paid a salary if,

(a) the employer records the number of hours in excess of those in his or her regular work week and,

(b) *the number of hours in excess of eight that the employee worked in each day, or*

(c) *if the number of hours in the employee's regular work day is more than eight hours, the number in excess.*

59. Accordingly, pursuant to the requirements of the *Act*, Defendant must retain employee employment records that show the numbers of hours they worked in the week in excess of the applicable Overtime Threshold, and must pay employees overtime pay in accordance with the above provisions.

Breach of Contract

60. The Plaintiff claims that:

- a) provisions in applicable legislation governing the Class Members' employment and pay are implied terms of contract that are incorporated into all the Class Members' employment contracts;
- b) the Defendant has breached his and all the members of the Class' employment contracts, and
- c) as a result, he and the Class Members have suffered damages and are entitled to declaratory relief.

Defendant has been Unjustly Enriched by its Wrongful "Overtime Policy"

61. Defendant has been unjustly enriched as a result of receiving the benefit of the services of the Plaintiff and the other members of the Class, and not having paid them their applicable statutory Overtime Pay.

62. The Class has suffered a corresponding Deprivation, and there is no juristic reason for the enrichment of Defendant.

Restitution

63. The plaintiff further claims that he and the Class Members are entitled to restitution of the profits and or revenues earned by the Defendant as a result of the Defendant's failure to pay Overtime Pay to the Class Members in breach of applicable legislation and the Class Members' employment contracts.

Breach Of Employer's Duty Of Good Faith

64. Being non-management employees, members of the Class are in a position of vulnerability in relation to the Defendant. As a result, Defendant owes a duty to act in good faith towards its employees, in particular towards the Class, and to honour its statutory and contractual obligations towards them.

65. Defendant has breached its duty of good faith by, *inter alia*:

- a. failing to pay for the additional hours of work of the Class Members despite permitting such work to be performed;
- b. failing to advise the Class Members of their right to recover for such additional hours, and in fact misleading them as to their rights;
- c. directing employees to not record additional hours or the actual hours worked;
- d. failing to maintain accurate records of all actual hours worked by the Class Members;

- e. creating a working environment and circumstances in which, non-management and or non excluded employees are compelled to work additional hours in order to carry out the duties assigned to them;

A Class Proceeding Is Appropriate

66. The Class Members as individuals risk losing their jobs if they pursue individual claims and are unable to match Defendant's resources. Furthermore, the individual claims of each Class member would not be economical to pursue as separate lawsuits, and therefore the Class Members would be denied access to justice in the absence of a Class Proceeding.

67. It is unlikely that an individual could or would seek prospective relief to deter future overtime misconduct by BMO NBI. Moreover, the Defendant is sufficiently large and well resourced that an individual lawsuit would unlikely have any significant impact on its behavior. A class proceeding in this instance will presumably induce a voluntary change of behavior by the Defendant and many other companies involved in similar practices.

Damages

68. As a result of BMO NBI's breach of its implied conditions of employment and its unjust enrichment, as set out above, the Plaintiff, and members of the Class, have consequently suffered damages. This is an appropriate case for the class proceedings judge to admit statistical evidence of the Class Members' losses, and to award damages on the basis of an aggregate assessment.

69. Members of the Class therefore also claim aggravated, exemplary and punitive damages in the amount of \$10 million as a result of the arbitrary, callous and highhanded actions of BMO NBI as set out above.

70. The Plaintiff pleads and relies upon the following statutes on behalf of himself and the Class Members:

- (a) *Employment Standards Act, 2000*, S.O. 2000, c. 41;
- (b) *Class Proceedings Act 1992*, S.O. 1992 c. 6.

71. The plaintiff proposes that this action be tried in the City of Toronto.

JUROVIESKY AND RICCI LLP

8 Feb - 2010

Henry Juroviesky (LSUC # 53233S)
Eliezer Karp (LSUC # 54317P)

Barristers and Solicitors
4950 Yonge Street, Suite 904
Toronto, Ontario
M2N 6K1
Tel: (416) 481-0718
Fax: (416) 352-1378

Yegal Rosen
Plaintiffs

BMO Nesbitt Burns Inc.
Defendants

CU-10-396685-004

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

STATEMENT OF CLAIM

Juroviesky & Ricci LLP
Barristers and Solicitors
4950 Yonge Street
Suite 904
Toronto, Ontario, Canada
M2N 6K1

Henry Juroviesky (LSUC# 53233S)
Eliezer Karp (LSUC# 54317P)

Tel: (416) 481-0718
Fax: (416) 352-1378

Solicitors for the Plaintiffs