

TAB 3

Court File No. CV-10-396685CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

YEGAL ROSEN

Plaintiff

- and -

BMO NESBITT BURNS INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**SUPPLEMENTARY AFFIDAVIT OF YEGAL ROSEN
(affirmed January 26, 2011)**

I, YEGAL ROSEN, of the City of Toronto, in the Province of Ontario AFFIRM AND SAY:

1. I am the proposed representative plaintiff in this action and as such I have knowledge of the matters deposed to herein, except where I have been informed of such facts, in which case I have stated the source of such facts and I hereby state that I believe such facts to be true.
2. I affirm this supplementary affidavit in support of the motion to certify the within action as a class proceeding and to clarify and expand on the evidence in my previous affidavit affirmed July 2, 2010. This affidavit is to be read in conjunction with my previous affidavit.
3. I have repeated my evidence from the previous affidavit only where it is necessary to place the new information herein in proper context or for background.

History of Employment with BMO Nesbit Burns

4. As indicated in my first affidavit, I worked as an Investment Advisor with BMO Nesbitt Burns Inc. ("Nesbitt") at the Thornhill branch located at Highway 7 and Leslie from June 2002 until April 2006. Attached as **Exhibit "A"** is a copy of the Record of Employment I received from Nesbitt dated May 29, 2006.

5. When I started with Nesbitt I was considered an Investment Advisor Trainee for the first eighteen (18) months of my employment. Attached as **Exhibit "B"** is a copy of the letter of offer I received from Nesbitt to become an Investment Advisor Trainee dated May 15, 2002. Additionally, I was required to execute an Investment Advisor Trainee Agreement. Attached as **Exhibit "C"** is a copy of the Investment Advisor Trainee Agreement dated June 15, 2002.

6. At the completion of the eighteen (18) month Investment Advisor Trainee Agreement, I became a licensed Investment Advisor. I do not recall executing any other agreement relating to the terms and conditions of my employment as an Investment Advisor after the trainee period ended.

Job Tasks and Description

7. As an Investment Advisor with Nesbitt, I solicited new clients and advised Nesbitt clients on building suitable portfolios of investments to meet client needs within their risk tolerances. My specific job duties 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.
8. I did not perform any managerial functions. In particular, I 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 Nesbitt;
 - (d) participate in managerial meetings;
 - (e) communicate with Nesbitt head offices;
 - (f) have the ability to influence the compensation structure of Investment Advisors;
 - (g) exercise discretion and independent judgment in management affairs; or
 - (h) perform a leadership or administrative role as opposed to an operational role.
9. I spent the majority of my time working in the office. To satisfy client service expectations, I would also meet with clients, before or after market hours, at their home or business. I would typically have such meetings early in the mornings, or in the evenings, outside of market hours.
10. Other Investment Advisors at my branch performed the same job duties as I did and did not perform any managerial functions. I understand that all of the other Nesbitt branches operate in the same fashion.

My Remuneration

11. My remuneration as an Investment Advisor at Nesbitt was based on 100% commissions on the fees generated by the sale of securities and other financial products I placed for Nesbitt clients and as a percentage of the asset management fees paid by clients who had managed accounts.

12. Attached as **Exhibit "D"** is a copies of "Pay Advice Statements" that I received from BMO dated November 9, 2004 and April 11, 2006.

13. The level of commission income an Investment Advisor would make was based on the BMO Nesbitt Burns Investment Advisor Payout Grid (the "Grid"). The Grid was a formula devised by Nesbitt, and which applied to all Investment Advisors, that dictated what percentage of the fees generated would be paid to the Investment Advisor as remuneration. I do not have a copy of the Grid that was in place while I was employed at Nesbitt. Attached as **Exhibit "E"** is a copy of a sample commission Grid that was in place at Nesbitt in 1999. The attached Grid is similar in structure to the Grid that was in effect for me during my employment, however the percentages for commissions and production targets may differ.

14. The Grid was split into levels, with each level having a corresponding production target and corresponding pay-out percentage. Productions are the fees and commissions paid by clients on sales and/or management fees. Should an Investment Advisor reach their target production level they would be paid a percentage of their productions based on the corresponding pay-out level on the Grid.

15. At the beginning of every year, an Investment Advisor would be assigned a level on the Grid which would determine his/her production targets and pay-out percentages.

16. The Grid was periodically changed by Nesbitt. For example, the productions targets for each level on the Grid were increased by BMO resulting in a higher level of minimum sales or assets under management to produce a similar level of income for the Investment Advisor, thereby requiring greater work to produce the same level of income in each year. Similarly, the pay-out percentages were periodically changed to affect the percentage pay out for each level of productions.

17. For example, between 1999 and November 2007 a Level 4 production target increased from \$275,000-\$325,000 to \$350,000-\$400,000, and the corresponding pay-out percentages for Ticket Size A, reduced from 25-27 to 16-21. Attached as Exhibit "F" is a copy of a sample commission Grid from Nesbit effective November 1, 2007.

18. While the Grid was periodically changed by Nesbitt, it was a single document which applied to all Investment Advisors at all material times.

Requirement to Work in Excess of Standards Hours

19. As a result of the pressures from management and the remuneration scheme, I along with other Investment Advisors were required to work hours well in excess of the standard hours of work (37.5 hours per week) to perform our job duties.

20. The pressure and expectations of management that Investment Advisors work in excess of the standard hours of work were pervasive and constant. Management encouraged all Investment Advisors to "do what it takes" to sign new clients and increase assets under Nesbitt management by working overtime hours.

21. During our training, which I understand to be standard for all Investment Advisors at Nesbitt, we were constantly advised that it was "our business", it was our "book of clients" and that we were expected to be constantly prospecting for new clients, including after regular business hours.

22. The Grid compensation structure similarly fostered a workplace environment where an Investment Advisor needed to work overtime to constantly meet and sign new clients and grow assets under management to meet the expectations of management and maintain the same income level.

23. At the end of each month a chart would be prepared ranking all the Investment Advisors in the branch, increasing the work expectations of the Investment Advisors.

24. As well, we were regularly provided with "Investment Advisor Status Reports", which set out an individual Investment Advisor's productions levels, production targets, variance

from targets and Investment Advisor ranking. Attached as **Exhibit "G"** is a copy of my "Investment Advisor Status Report" dated December 31, 2005,

25. As an Investment Advisor, we were required each morning to participate in the morning call, which occurred 30 minutes before the market opened. Management expected our participation in the morning call.

26. As an Investment Advisor, we also had regular call sessions (also known as "Pizza Nights") scheduled after regular business hours, where groups of Investment Advisors would call prospective clients from the office seeking one-on-one appointments to sign them up as Nesbitt clients. Management was aware of, and encouraged such call sessions. Nesbitt paid for dinner which was provided during the after-hours call sessions. The call sessions would last approximately 1-1.5 hours and occur usually on Tuesdays or Thursdays at about 6:30 pm. Management expected and encouraged participation in these call sessions.

27. As an Investment Advisor at Nesbitt I also serviced clients in Quebec. I was required to travel to Quebec regularly to meet face to face with clients, in accordance with industry rules and guidelines and to ensure compliance with the clients' financial goals and objectives. I would be required to travel on the weekends and after regular business hours. Nesbitt was aware that I was required to, and did travel to Quebec outside of regular business hours to meet with clients but Nesbitt did not record the overtime hours or provide me any overtime compensation for the additional time spent. I am aware of other Investment Advisors who serviced clients outside of Ontario, who were similarly required to travel to meet those clients outside of regular business hours and who were not compensated for such overtime work.

28. As an Investment Advisor at Nesbitt, we were also regularly required to attend information seminars about new products, investments and initial public offerings. Such seminars often occurred during lunch hours or after regular business hours, usually between 6:00 p.m. and 8:00 pm, and regularly occurred once per week. Management expected and encouraged participation in these seminars.

29. Given the demands of my duties as an Investment Advisor, it would often be necessary for me to return to the office after dinner, and after putting in a full work day.

Attached as **Exhibit "H"** is an excerpt of one of my 407 ETR bills during my employment as an Investment Advisor which is an example of my re-attendances at the office to complete my duties after regular business hours.

30. As well, to satisfy client service expectations, I would often meet with clients at their home or business. I would regularly have to schedule meetings in the mornings (before the regular work day began) or in the evenings.

31. Attached as **Exhibit "I"** is a chart I prepared outlining the typical tasks I performed as an Investment Advisor each week, including tasks performed during overtime hours.

32. As an Investment Advisor I worked between 60-80 hours per week including weekends, which was required to perform my job duties, and of which management was aware.

33. To my knowledge, it was typical for all Investment Advisors at Nesbitt to work overtime in order to meet the demands of management and to complete the duties of Investment Advisors. Management was aware of such overtime hours and encouraged it for all Investment Advisors, including in Nesbitt's training program for new recruits.

34. Despite Management being generally aware of the hours that I worked, management never tracked or recorded my overtime hours worked.

35. Based on my experience, a vast majority of Investment Advisors in their first few years didn't meet the onerous targets set by Nesbitt despite the overtime hours they worked.

36. If Investment Advisors, despite their overtime hours, were unable to meet their minimum targets, they would not be able to obtain a level of income sufficient to support themselves and their families. Many would quit due to the long overtime hours they were required and expected to work, which were not properly compensated.

37. The Investment Advisors who quit Nesbitt were typically not permitted to take their clients with them. Therefore, those clients, which had been obtained by the Investment Advisors, and those clients' assets under management would be kept by Nesbitt. The Nesbitt model included overworking junior Investment Advisors who would increase the Nesbitt

book of business, many of who would ultimately quit Nesbitt leaving the new Nesbitt customers behind.

38. For example, a "Developing I.A. Report" as of November 2005, which sets out the production rankings of the Investment Advisors whom I began my training with in June 2002, shows that 10 of the 25 trainees (40%) who began the training with me in June 2002 were no longer Investment Advisors at Nesbitt in November 2005, three years later. Attached as Exhibit "J" is a copy of such "Developing I.A. Report" as of November 2005.

Misclassification as being Ineligible for Overtime

39. I do not have a copy of any written Nesbitt overtime policy which may have been in place while I was employed.

40. While an Investment Advisor, eligibility for overtime pay was never discussed with me or any other Investment Advisor that I am aware of. No one at Nesbitt ever advised me that I may be entitled to overtime pay or that there was an overtime policy.

41. I do not recall seeing any forms at Nesbitt to apply for overtime pay nor was I advised there were any.

42. The prevailing attitude, expectations and encouragement of management was such that I, and other Investment Advisors were not entitled to receive overtime pay for the hours we worked in excess of the standard hours.

43. At the time, I was misled by Nesbitt and was not aware that I may have been entitled to overtime pay. I therefore did not pursue any such claim while I was an Investment Advisor or thereafter.

44. As an Investment Advisor, I was not required to record the hours I worked. I am not aware of Nesbitt retaining any records of the hours I worked. Similarly, I do not believe that any other Investment Advisor was required to record the hours they worked nor did BMO retain records of their hours of work.

45. It is my understanding that Nesbitt did not pay overtime pay to any Investment Advisors.

The Value of My Claim for Overtime Pay as an Investment Advisor

46. I believe that my claim for unpaid overtime as an Investment Advisor is valued at approximately \$22,000 per year.

47. This estimate is based on my average hourly overtime rate of approximately \$21.00 per hour (calculated based on an average annual pay of approximately \$32,000 per year over my career at BMO multiplied by 1.5) at an average of 20 hours per week unpaid overtime.

Revised Definition of the Class

48. I am advised by counsel that since I affirmed my first affidavit, the description of the class has been revised slightly, to be as follows:

“All Ontario current and former Nesbitt employees who, since 2002, held the position of Investment Advisor, or who performed the same or similar job functions under a different or previous Nesbitt job title.”

49. I am a class member and fully prepared to act as a representative plaintiff for the revised class in this matter.

Class Size


50. I estimate that there are in excess of 500-1000 of class members. Nesbitt will likely have the most accurate figures in this regard.

Revised Litigation Plan

51. Since I affirmed my last affidavit, the litigation plan has been revised by my counsel to provide further detail about the manner in which the class action can be litigated. It is attached as **Exhibit “K”**. I believe, based on my counsel’s advice, that it provides a workable method of advancing the action on behalf of the class members and in notifying the class members of the proceeding.

52. I make this supplementary affidavit in support of the certification of this action as a class proceeding and for no other purpose.

Affirmed BEFORE ME at the City of Toronto, in the Province of Ontario on January 26, 2011.



Commissioner for Taking Affidavits

D. Rosenfeld



YEGAL ROSEN

TAB E

JAN-13-1999 17:17

NESBITT BURNS PCO

BONUSES

NESBITT BURNS PAYOUT GUIDE
Payout Levels with 2% Asset Bonus

Ticket Size

	A	B	C	D	E	F	G
	\$50 - \$100	\$100 - \$200	\$200 - \$300	\$300 - \$400	\$400 - \$500	\$500 - \$1000	> \$1000
LEVEL 1 0 - \$200m	20-22	20-22	20-22	22-24	23-25	24-28	25-27
LEVEL 2 - Developing I.A.'s - \$0m - \$200m	20-22	31-33	33-35	35-37	36-38	37-39	38-40
LEVEL 3 \$200m - \$275m	23-25	34-36	36-38	38-40	38-41	40-42	41-43
LEVEL 4 \$275m - \$325m	25-27	36-38	38-40	40-42	41-43	42-44	43-45
LEVEL 5 \$325m - \$400m	27-29	38-40	40-42	42-44	43-45	44-46	45-47
LEVEL 6 \$400m - \$500m	28-30	39-41	41-43	43-45	44-46	45-47	46-48
LEVEL 7 \$500m - \$750m	29-31	40-42	42-44	44-46	45-47	46-48	47-49
LEVEL 8 \$750m - \$1 mil	30-32	41-43	43-45	45-47	46-48	47-49	48-50
LEVEL 9 \$1 mil - \$1.5 mil	31-33	42-44	44-46	46-48	47-49	48-50	49-50
LEVEL 10 \$1.5 mil - \$2 mil	32-34	43-45	45-47	47-49	48-50	48-50	50-50
LEVEL 11 > \$2 mil	33-35	44-46	46-48	48-50	49-50	50-50	50-50

* Maximum Bonus Earnable Between Levels

This is Exhibit e referred to in the
affidavit of Kejal Rasesh
sworn before me, this 26th
day of January 20 11

J. Primm
A COMMISSIONER FOR TAKING AFFIDAVITS