CITATION: Rosen v. BMO Nesbitt Burns Inc., 2013 ONSC 2144
COURT FILE NO.: CV- 10-396685CP
DATE: 20130820

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding under the Class Proceedings Act, 1992

BETWEEN:	)	
	)	
Yegal Rosen	)	*Jonathan Ptak, Jody Brown and Eli Karp* for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
	)	*Peter Griffin, Monique Jilesen and Hugh Christie* for the Defendant
BMO Nesbitt Burns Inc.	)	
	)	
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** February 12 and 13; April 5, 2013

CERTIFICATION DECISION

Justice Edward Belobaba:

Introduction

[1] The plaintiff, a former investment advisor with BMO Nesbitt Burns Inc. ("Nesbitt"), seeks to certify a class action against Nesbitt for unpaid overtime. He says that he and his fellow IAs are entitled to overtime under the provincial employment

standards law. Nesbitt denies any such entitlement. It argues that IAs fall within the exemptions set out in the legislation.

[2] For the reasons set out below, I am satisfied that the action should be certified as a class proceeding. It is important to remember, however, that the certification of a class action is a procedural measure that allows matters to proceed to a trial where the common issues will be adjudicated. Certification has nothing to do with the merits of the dispute. Whether or not the current and former Nesbitt IAs are statutorily entitled to overtime is a matter that will be decided in the common issues trial.

Background

[3] Like many investment advisors working in the financial services industry, the IAs at Nesbitt put in long hours. Many work 60 hours or more per week. They do so to grow their client base, generate more revenues and thus earn larger commissions.

[4] Because the IAs' compensation is based on commissions earned, not hours worked, the latter is not tracked or recorded by Nesbitt and IAs are not paid overtime. Indeed, Nesbitt's overtime policy has always excluded IAs because they are commission-based employees. Most of the IAs accept the overtime policy because the upside of the job – the autonomy and work-schedule flexibility, and the potential to earn a high income – more than makes up for not being paid overtime.

[5] Under the provincial *Employment Standards Act,*[1] however, even commission-paid employees are statutorily entitled to overtime.[2] This employment standard cannot be waived contractually.[3] An employee will be exempted from the overtime protection provided in the ESA in only two situations that pertain herein: one, if his or her work is

---

[1] *Employment Standards Act, 2000*, S.O. 2000, c. 41 ["ESA"].

[2]Commission-based employees, even those that have considerable control over their work and income, are accorded the protection of the overtime provisions in the ESA: see *Dominick Corporation of Canada* (1975), E.S.C. 248; *Knox Insurance Brokers Ltd. (Re)*, [1996] O.E.S.A.D. No. 5; and *Isomeric Inc.*, [2000] O.E.S.A.D. No. 194 (OLRB).

[3]ESA, s. 5(1).

"supervisory or managerial in character"[4] or two, if the employee falls within the "greater benefit" exemption.[5]

[6] The overtime provisions of the ESA continue to apply to all Nesbitt employees because, unlike the parent, Bank of Montreal, that falls within federal jurisdiction, its subsidiary, Nesbitt Burns, falls under provincial jurisdiction. In 2006, the federal *Labour Code*[6] was amended to make clear that its overtime provisions would not apply to "commission-paid sales people" working in the federally-regulated banking sector.[7] The provincial ESA, however, has not been similarly amended. Thus, if an unhappy Nesbitt IA (or an Associate IA or a Trainee IA) sues Nesbitt for unpaid overtime, Nesbitt will be obliged to pay overtime under the ESA unless it can establish one of the two above-noted exemptions: that is, the 'managerial' exemption or the 'greater benefit' exemption.

[7] This is why a proposed class action for unpaid overtime allegedly owing to investment advisors, most of whom never even thought about overtime claims because of the opportunity to earn high incomes, may nonetheless be legally tenable.

[8] Nesbitt acknowledges that being paid by commission is not a recognized exemption under the ESA, but argues that its IAs are nonetheless exempt because they fall within one or both of the two applicable exemptions: (i) they manage their own business; and (ii) their overall autonomy and potential for high earnings provides them with a greater benefit than overtime pay.

[9] Mr. Rosen's response, put simply, is that neither exemption applies.

---

[4] O. Reg. 285/01, s. 8(b): "[the statutory protection does not apply to] ... a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis."

[5] Section 5(2) of the ESA provides as follows: "If one or more provisions in an employment contract … that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract … apply and the employment standard does not apply." The "greater benefit" exemption requires Nesbitt to show that the provisions in the IA's employment contract relating to hours worked provide more benefit to the employee than the ESA's overtime protection. I will return to this issue later in these reasons.

[6] *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 174 [*Labour Code*].

[7] The 2006 exemption is set out in the *Banking Industry Commission-paid Salespeople Hours of Work Regulations*, S.O.R./2006-92, s. 1.

The proposed class action

[10] Yegal Rosen worked as an IA at the Nesbitt Burns branch in Thornhill, Ontario, from June 2002 to April 2006. He started as an IA Trainee and then became a licensed IA. Like most IAs working in the investment industry, the IAs at Nesbitt enjoy considerable autonomy in how they develop their business and service their clients. They engage in marketing activities and host social, entertainment and sporting events (at their own expense) to build a client base that will increase their book of business and the commissions they earn.

[11] I pause to note that the IAs are not completely independent. Mr. Rosen's evidence is that branch managers or assistant branch managers supervise IAs in several key areas such as in the design of marketing material, the opening of new accounts and the recommendations made to clients. They also supervise the IAs' overall trading activity. Nonetheless, IAs do have considerable autonomy in how they work, where they work and when they work. But, to be really successful and be paid at a higher level on the compensation "grid", long hours are required. According to Mr. Rosen, overtime hours were not only expected by the Nesbitt management but explicitly encouraged.

[12] Mr. Rosen estimates that he worked about 60 to 80 hours per week, well over the 44 hour provincial standard. Because he was a commission-based employee, he never asked for and was not paid overtime. Mr. Rosen now believes that under the ESA, he and his fellow IAs should have been paid overtime.

[13] Mr. Rosen moves to certify this proceeding as a class action on behalf of a class composed, in essence, of all current and former Nesbitt employees in Ontario who worked as "Investment Advisors", "Associate Investment Advisors" or "Investment Advisor Trainees" from 2002 to date. Based on the data provided by Nesbitt, there are about 1614 potential class members consisting of:

- 263 *Trainees* – New investment advisors start as Trainees, just as Mr. Rosen did. They complete a uniform six-week intensive in-class training program and then continue as "trainees" for 18 months. Trainees are compensated with a guaranteed monthly salary. Trainees also receive a percentage of commissions during the training period. At the conclusion of the training period, Trainees shift to a 100% commission based compensation schedule.

- 284 *Associate IAs* –Associate IAs work under one or more IAs and help them service their clients. Associate IAs attend the same training program as IAs and are required to be licensed in the same manner as IAs. Associate IAs are typically remunerated with part salary and part commissions.

- 1057 *IAs* – Once trained and licensed, IAs are largely left on their own to build a book of business. They cannot hire or fire. They need their manager's approval for marketing ideas, to open new accounts or to make recommendations to clients. But, they still enjoy a considerable degree of autonomy in how and when they work. The IAs are paid in accordance with a 'compensation grid' which is based on commissions earned.

[14] All three categories of IAs are subject to the management and oversight of the branch managers. All three categories are also excluded from overtime under the Nesbitt overtime policy because they are paid in whole or in part on commission.

The decision in *Brown v. CIBC*

[15] This action against Nesbitt follows three other overtime cases in the banking sector. *Fulawka*[8] and *Fresco*[9] were "off the clock" cases, where the plaintiffs said they were eligible for overtime but the overtime was not recognized and paid by their employer. *Brown*[10] was a misclassification case, where the plaintiffs said they were wrongly classified as being ineligible for overtime. *Fulawka* and *Fresco* were certified. *Brown* was not.[11]

[16] The case before me is a misclassification case. Both sides agree that the decision in *Brown*, which involved analysts and IAs working for CIBC World Markets, a provincially regulated subsidiary of the parent bank, is relevant. The defendant argues that *Brown* is determinative. The plaintiff says the decision is helpful but distinguishable.

[17] Justice Strathy refused to certify the class action in *Brown* because he was not satisfied that there was a sufficient commonality or similarity in job functions. The proposed IA class in *Brown* did not only include sole-practitioner IAs. It also included

---

[8] *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148, 101 O.R. (3d) 93, aff'd 2011 ONSC 530, 337 D.L.R. (4th) 319 (Div. Ct.), aff'd 2012 ONCA 443, 111 O.R. (3d) 346, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 326.

[9] *Fresco v. Canadian Imperial Bank of Commerce* (2009), 71 C.P.C. (6th) 97 (S.C.J.), aff'd 2010 ONSC 4724, 103 O.R. (3d) 659 (Div. Ct.), rev'd on other grounds 2012 ONCA 444, 111 O.R. (3d) 501, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 379.

[10] *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377, 24 C.P.C. (7th) 251 (S.C.J.), aff'd 2013 ONSC 1284, 34 C.P.C. (7th) 270 (Div. Ct.).

[11] The denial of certification has been appealed to the Court of Appeal.

IAs who were branch managers with obvious managerial responsibilities and team leaders who supervised other IAs, associate IAs or sales assistants that were on their team. The key question in *Brown* – whether or not a person had managerial responsibilities, a question that was "critical" to the determination of overtime eligibility under the ESA – could not be determined on a common basis.[12]

[18] When *Brown* was appealed to the Divisional Court, the class definition was revised by the plaintiffs to exclude the branch managers and team leaders.[13] However, the revised class still included IAs and Associate IAs who were classified by CIBC "as level 6 or higher." The Divisional Court interpreted this proviso (in my view, incorrectly) to mean that only team leaders who had "level 6 or higher" Associate IAs working for them were excluded from the class definition. Thus, Ms. Timms, who had several "level 4" Associate IAs on her team and was clearly "exercising supervisory and managerial functions", was not excluded.[14] The Divisional Court noted that this again underscored "the ongoing problem the appellant has in coming up with a suitable class definition" and dismissed the appeal.[15]

[19] The Divisional Court also concluded that the revised class definition did not resolve the fundamental difficulty identified by the motions judge:

> In the context of overtime entitlement under the *ESA* there are many factors to consider in determining whether a person is performing managerial or supervisory functions. The inquiry is much broader than simply looking at whether the person supervises or controls the work of others. *The determination of the issue for any individual must take into account the employee's authority, autonomy, level of responsibility, degree of control over his or her hours of work and where and how that work is done* ... Eligibility of IAs and AIAs for overtime compensation can only be determined on an individual case by case basis. Without a determination on the key issue of eligibility at the common issues trial, the rest of the action collapses as a class proceeding.[16]

---

[12] *Brown* (S.C.J.), *supra* note 10, at para. 6.

[13] *Brown v. Canadian Imperial Bank of Commerce*, 2013 ONSC 1284, 34 C.P.C. (7th) 270 (Div. Ct.), at para. 7.

[14] *Brown* (Div. Ct.), *ibid.*, at para. 16.

[15] *Brown* (Div. Ct.), *supra* note 13, at para. 16.

[16] *Brown* (Div. Ct.), *supra* note 13, at para. 25 (Emphasis added).

[20] I am of course bound by the decision of the Divisional Court, to the extent that it applies on the facts herein. However, the class definition before me is different from the one that was before the Divisional Court in *Brown*. Here, the class definition has been revised to exclude IAs that are branch managers, assistant branch managers, division managers or team leaders – that is any IAs that, according to the plaintiff, do managerial or supervisory work. Nor is there mention of job "levels" or grades. Here, the revised class definition, corrected for grammar, reads 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, exclusive of any time period for which they:
>
> (a) held the position of Branch Manager; or
>
> (b) held the position of Assistant Branch Manager; or
>
> (c) held the position of Divisional Manager; or
>
> (d) were Investment Advisors on a team that (i) had an Associate IA or Sales Assistant assigned to them; and (ii) the majority of that Associate IA's or Sales Assistant's compensation was paid by that Investment Advisor.

[21] During the certification hearing I pressed plaintiff's counsel to explain why it was necessary to add the "compensation" subpart (d)(ii). In my view, subpart (d)(ii) was unnecessarily distracting, added little of substance and could easily be deleted without compromising the integrity of the proposed class definition. Plaintiff's counsel initially resisted but eventually agreed that subpart (ii) could indeed be removed. The revised class definition will therefore remain as set out above, but subpart (d)(ii) will be deleted in its entirety and (d), as amended, will now read as follows:

> (d) were Investment Advisors on a team that had one or more Associate IAs or Sales Assistants assigned to them.

[22] Returning to the Divisional Court's decision in *Brown*, I note that the Court's concern about the need to "take into account the employee's authority, autonomy, level of responsibility, degree of control over his or her hours of work and where and how that

work is done"[17] does not arise on the evidence before me. Here, there is evidence and thus "some basis in fact" for the plaintiff's submission that each of these sub-issues is the *same* or *very similar* for every IA in the revised class.

[23] In other words, unlike in *Brown*, here the plaintiff has some basis in fact for its submission (tracking the language used by the Divisional Court) "that the proposed class members' job functions [under the revised class definition just quoted] are sufficiently similar that eligibility could be decided on a class-wide basis."[18] I will expand upon this point when I consider the Common Issues.

The decision herein

[24] I agree with counsel for the plaintiff that the analytical problems that confronted the two courts in *Brown* have been substantially eliminated in the case at bar, and that the revised class definition can support the proposed class action.

[25] I am satisfied that the action should be certified as a class proceeding. The plaintiff's proposed list of common issues is attached in the Appendix. For the reasons that follow, I am prepared to certify all of the proposed issues except (d), which deals with aggregate damages.

The certification analysis

[26] Under s. 5(1) of the *Class Proceedings Act, 1992* ("CPA"), the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[27] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim. The question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be pursued as a class proceeding. Although s. 5(1) of the CPA, as just noted, requires the plaintiff to satisfy five prerequisites, the bar for certification is

---

[17] *Brown* (Div. Ct.), *supra* note 13, at para. 25.

[18] *Brown* (Div. Ct.), *supra* note 13, at para. 26.

actually quite low. The plaintiff only has to establish a plausible cause of action under the first prerequisite and "some basis in fact" for each of the remaining four prerequisites.[19]

[28] Indeed, the Supreme Court has made it clear that the CPA should be construed generously. An overly restrictive approach must be avoided in order to realize the benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause harm. The Court underlined the particular importance of keeping this principle of interpretation in mind at the certification stage.[20]

(a) Cause of action

[29] The first question is whether the plaintiff has a cause of action. The test under s. 5(1)(a) of the CPA is the same as that under Rule 21 of the *Rules of Civil Procedure*, i.e. that the claim should be permitted to proceed unless it is "plain and obvious" that it cannot succeed.[21] This is obviously a very low hurdle.

[30] In this case, the plaintiff asserts claims for breach of express or implied terms of contract and unjust enrichment. The plaintiff claims that the minimum entitlements pursuant to the ESA, in particular with respect to hours of work, overtime pay and retention of records are, by fact or law, express or implied terms of the contracts of the class members.

[31] Furthermore, the plaintiff claims that the defendant owed and breached contractual duties including a duty of good faith to: (a) ensure that class members are properly classified as entitled to overtime pay; (b) advise class members of their entitlement to overtime pay; (c) ensure that the class members' hours of work are accurately recorded; and (d) ensure that class members are appropriately compensated for overtime hours worked.[22]

---

[19] For a summary of the oft-repeated principles and citations, see *Arora v Whirlpool Canada*, 2012 ONSC 4642, 24 C.P.C. (7th) 68, at paras. 120 to 124, or indeed almost any recent certification decision. For my part, I will resist the temptation to copy and paste pages of case law that is well known to class action counsel.

[20] *Hollick v City of Toronto*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 14-16, McLachlin C.J.C.

[21] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93.

[22] ESA, s. 15(1).

[32] The defendant does not contest the plaintiff's assertion that the provisions of the ESA with respect to hours of work, overtime pay and the retention of records are implied terms of the employment contracts in question. Both sides agree that, if certified, the case will turn on whether Nesbitt can show that the class-members fall within the managerial and/or greater benefit exemptions. This will be the main focus of the common issues trial.

[33] The plaintiff also pleads that the defendants have been unjustly enriched because they have received the benefit of uncompensated overtime hours worked by the class. The pleading meets the requirement of a claim for unjust enrichment as set out in *Garland v. Consumers' Gas*.[23]

[34] In short, I am satisfied that the first hurdle is cleared. Indeed, Nesbitt does not contest that the plaintiff has a cause of action.

(b) Identifiable Class

[35] The next hurdle, s. 5(1)(b) of the CPA, requires that there be an identifiable class of two or more persons that would be represented by the representative plaintiff. The "two person" requirement is satisfied because both Mr. Rosen and Mr. Nelson Liang,[24] another former Nesbitt IA with similar job functions, have filed affidavits documenting their complaints. The more pressing question, however, is class definition.

[36] Class definition is important because it describes the persons entitled to relief, those who will be bound by the decision and those who are entitled to notice of certification.[25] Class membership must be determinable by stated, objective criteria.[26] And, there must be a rational relationship between the class and the common issues.[27]

---

[23] *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at paras. 30-47. Also see *Kerr v. Baranow,* 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 75.

[24] Mr. Liang worked as a Nesbitt IA at the defendant's Highway 7 and Leslie Street branch from 2001 to 2004. His evidence is that all of the IAs in his branch performed the same duties that he did and all had to work overtime to meet the demands of management.

[25] *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Gen. Div.), at para. 10.

[26] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534.

[27] *Pearson v. Inco Ltd.*, (2006), 78 O.R. (3d) 641 (C.A.), at paras. 3 and 44, rev'g (2004), 44 C.P.C. (5th) 276 (Div. Ct.), which had aff'd (2002), 33 C.P.C. (5th) 264 (S.C.J.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 1. at para. 57.

[37] As already noted, the plaintiff proposes a class definition that in essence includes all Ontario current and former Nesbitt employees who, since 2002, exclusive of any time period for which they held the position of branch Manager, assistant branch manager, divisional manager or team leader,

a. held the position of Investment Advisor, or

b. performed the same or similar job functions under a different or previous Nesbitt job title.

[38] In my view, the defined class is readily determinable by stated and objective criteria. The covered time period is precise. The class members (IAs, Associate IAs and Trainee IAs) are identified by job titles that are used every day by the defendant. The excluded IAs (branch managers, assistant branch managers, division managers and team leaders) are also identified by job titles that are used by the defendant. Nesbitt also adds that it has kept records documenting the IA positions held and time periods worked by each of the class members.

[39] Nesbitt takes issue with the use of the word "team" in the exclusionary portion of the class definition. Nesbitt argues that "team" is not an identifiable term that can be used in the class definition. Frankly, I do not understand this submission. The evidence before me is replete with references to investment advisor "teams". For example, Richard Mills, the Co-Head and Executive Vice-President of the Private Client Division of Nesbitt, devotes a heading of his affidavit to "Investment Advisor Teams", and states that "many investment advisors work in teams of Investment Advisors".

[40] The usage of "team" is a standardized term used on the website profiles for Nesbitt IAs. The website profile for Mr. Peeble's team invites the public to "contact the team" and "meet our team", referring to the Peeble's Wealth Management team and the Associate IAs who work with him. Other websites of Nesbitt IAs use the exact same format and language. The webpage for the "Banon Wealth Advisory Team", for whom James Butler worked as an Associate IA, invites the public to "Contact the team, or view members' profiles". The "Wilson Flick" webpage invites the public to "contact the team" and "meet our team". Furthermore, the evidence is that Associate IAs will be assigned to an IA or a team of IAs. The evidence indicates that records of teams exist and can be produced.

[41] In short, there is extensive evidence supporting the plaintiff's position that the proposed class is readily identifiable. It is objectively determinable and completely workable. In any event, there is at the very least "some basis in fact" for this submission, which is all that is needed to satisfy s. 5(1)(b) of the CPA.

(c) Common Issues

[42] Section 5(1)(c) of the CPA requires that the claims of class members raise common issues of fact or law that will move the litigation forward. This certification prerequisite typically draws the most fire from defending counsel.

[43] Here, as I have already noted, Nesbitt will probably be obliged to pay overtime to the IA class members unless it can show that they fall within the 'managerial' or 'greater benefit' exemptions set out in the ESA. For every IA that continues with this class action, these same two questions will have to be answered. But, do they qualify as "common issues"?

[44] One of the most important principles in the common issues analysis is that a common issue cannot depend upon individual findings of fact that have to be made with respect to each individual claimant.[28] In other words, if the common questions that arise herein – whether the class member IAs fall within the managerial or greater benefit exemptions of the ESA – depend on individual findings of fact about each individual IA, then these questions cannot be certified as common issues. As this court noted in *Risorto*[29]: "If an issue is one that the court at trial could decide only by reference to the facts relating to the claim of each class member, it lacks commonality."

[45] Nesbitt argues that here, just as in *Brown*, individual determinations are necessary to decide whether the managerial and greater benefit exemptions apply.[30] Nesbitt argues that one can only decide if the managerial exemption applies by considering each IA individually, taking into account his or her independence and autonomy, the design and management of the book of business, the nature of the relationships with clients and whether there is any supervision of employees. Similarly, Nesbitt argues that determining the applicability of the greater benefit exemption is an individual assessment based upon both the compensation (including bonuses) earned and the work environment of each individual investment advisor.[31]

---

[28] *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, at para. 39, aff'd (2001), 17 C.P.C. (5th) 103 (Div. Ct.), aff'd 226 D.L.R. (4th) 112 and [2003] O.J. No. 1161 (C.A.); *Fehringer v. Sun Media Corp.* (2002), 27 C.P.C. (5th) 155 (S.C.J.), aff'd (2003), 39 C.P.C. (5th) 151 (Div. Ct.).

[29] *Risorto v. State Farm Mutual Automobile Insurance Co.* (2007), 38 C.P.C. (6th) 373 (S.C.J.), at para. 45.

[30] *Brown* (S.C.J.), *supra* note 10, at paras. 144 and 175.

[31] See e.g. *Track*-Corp *Equipment Ltd.*, [2007] O.E.S.A.D. No. 353 (OLRB).

[46] I do not agree with Nesbitt's submissions. On the evidence herein, both the managerial and greater benefit exemptions can be decided as common issues. Individual determinations are not required. Let me deal with each of these exemptions in turn.

The managerial exemption

[47] For many judges and legal commentators the word "managerial" suggests the following: (a) the supervision of other employees; (b) having the power to hire, fire and/or discipline other employees; (c) having the ability to make decisions on behalf of the company; (d) exercising discretion and independent judgment in management affairs; and (e) performing a leadership or administrative role as opposed to an operational role.[32] To qualify as a manager or supervisor, the preponderance of one's work must be managerial or supervisory in nature. [33]

[48] The determination of whether a person exercises supervisory or managerial functions generally requires a fact-based analysis of the work actually performed by the employee. As Strathy J. noted in *Brown*, independence and authority are key considerations:

> The employee's job title and position in the management chain are not relevant considerations. What counts is what the employee actually does, how they do it, and how much independence and authority they exercise in the environment in which they work.[34]

[49] And here, says Nesbitt, all of the IAs are potentially "managers" because they manage themselves and their books of business. However, continues Nesbitt, one cannot determine the nature and extent of these managerial features and whether they predominate over mere operational tasks without conducting individual assessments.

[50] But is this in fact the case? Consider the following. Here, unlike in *Brown*, all of the Nesbitt IAs involved in management or supervisory work as conventionally understood, i.e. branch managers and team leaders, have been excluded from the class

---

[32] *Singer v. McMaster University*, [2001] O.E.S.A.D. No. 242 (OLRB), at para. 13 [*Singer*]; *Tri Roc Electric Ltd v. Butler*, [2003] O.E.S.A.D. No. 1002 (OLRB), at para. 24 [*Tri Roc Electric*]; *Re Alladin Motor Sales Ltd* (1989, unreported), cited in *Re 724435 Ontario Inc (c.o.b. The Donut Den)*, [1992] O.E.S.A.D. No. 66 (OLRB), at para. 3 (Q.L.); *Isaac v. Listuguj Mi'gmaq First Nation*, [2004] C.L.A.D. No. 287, at para. 164, (A.E. Bertrand).

[33] *Singer*, *ibid.*, at para. 13; *Tri Roc Electric*, *ibid.*, at para. 24.

[34] *Brown* (S.C.J.), *supra* note 10, at para. 80.

definition. The IAs that remain in the class[35] are the stand-alone, sole practitioner IAs, including resident IAs working in the defendant's branch offices. All of these IAs appear, on the evidence, to have the *same* or *very similar* job functions – they are relatively independent and autonomous, they market their services and develop business, they review and research investment recommendations and they manage client investment portfolios.

[51] The fact that each IA's job functions are more than just similar and almost identical is illustrated by the affidavits filed by several Nesbitt IAs:

> *David Dinkha*: "As an investment advisor, I am responsible for, among other things, researching and reviewing investment products, making investment recommendations, business development and marketing, and managing client investment portfolios."
>
> *Elizabeth Knudde*: "As an investment advisor, my responsibilities include reviewing investment products, making investment recommendations to clients, and managing the investment portfolios of the clients that I service."
>
> *David Hare*: "As a resident investment advisor, my role and responsibilities are generally the same as those of an investment advisor in that I am responsible for, among other things, researching and reviewing investment products, making investment recommendations, business development, marketing and managing client investment portfolios."
>
> *Daniel MacMillan*: "As a resident investment advisor, my role and responsibilities are generally the same as those of an investment advisor in that I am responsible for, among other things, researching and reviewing investment products, making investment recommendations, business development, marketing and managing client investment portfolios."

[52] In short, each of the class-member IAs appear to have a common core of duties or functions. The uncontroverted evidence of the plaintiff is that the so-called, sole practitioner IAs all do the same basic job, although they may have different work routines and client rosters and are paid at different compensation levels. They are given a high degree of autonomy and independence to go out and build a book of business, generate revenues for their employer and earn potentially high commissions. Putting the same

---

[35] There is no serious suggestion that Associate IAs or Trainees fall within the managerial exemption.

point somewhat differently, there is, at the very least, some basis in fact for the plaintiff's submission that all of the class members perform "sufficiently similar job functions."[36]

[53] In this case the defendant's own affiants have sworn to identical duties in many cases, with cut-and-paste verbatim descriptions of their duties. Recall as well the evidence of Messrs. Rosen and Liang that all of the IAs in their respective branches had the same responsibilities and pretty much did the same thing – business development, investment research and client portfolio management. And they were all encouraged to work overtime if they wanted to move up the compensation grid.

[54] In my view, there is certainly some basis in fact for the plaintiff's submission that if any "managerial" functions were performed, they were performed by all of the IAs in the revised class. To use the Nesbitt language, they all managed themselves and they all managed their book of business. The managerial exemption question can therefore be posed as a common issue because of the common job functions.

The greater benefit exemption

[55] Recall that s. 5(2) of the ESA provides as follows:

> If one or more provisions in an employment contract … that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract … apply and the employment standard does not apply.

[56] Nesbitt argues that the class members, as a group, are not entitled to overtime because as IAs their terms of employment provide for a "greater right or benefit" than overtime, and therefore meet the exemption in s. 5(2) of the ESA. Nesbitt's most senior witness, Richard Mills, put the "greater benefit" argument as follows:

> The equal opportunity for investment advisors to earn a high income and long term financial benefits, combined with flexibility and independence in schedules, is viewed by investment advisors as a greater benefit than overtime compensation.

[57] I pause to note that there is case law supporting the plaintiff's position that s. 5(2) does not even apply here because there is no provision in the IA's employment agreement

---

[36] *McCracken v. Canadian National Railway Co*., 2012 ONCA 445, 111 O.R. (3d) 745, at para. 104.

that "directly relates" to the same subject matter as the employment standard in the ESA. The claim is that "the opportunity … to earn a high income and long term financial benefits, combined with flexibility and independence in schedules" (to use the Nesbitt language just quoted) is not the same subject matter as the statutory entitlement to overtime. One is comparing apples to oranges, says the plaintiff, and this is not permitted.[37]

[58] For my part, I do not have to deal with this case law or make any ruling in that regard. This is exactly what the common issues trial judge will have to consider and he or she will do so on a common basis.

[59] The question for me is whether the plaintiff has shown some basis in fact on the evidence before me that the so-called 'greater benefit' exemption is common to all of the class members and should be certified as a common issue.

[60] In my view, Mr. Rosen has done so. I say this for two reasons:

(i) One must look to "the face" of the employment contract to decide the 'greater benefit' question.[38] The case law is clear that the analytical focus is not *ex post*, but *ex ante*. The determination of "greater benefit" depends on the terms of the initial employment contract, not on individual assessments made months or years into one's employment (as argued by Nesbitt).

(ii) The core terms (i.e. the expectations and responsibilities) in every class member's employment agreement upon becoming an IA (whether the terms were oral or in writing) were essentially the same. There was no dispute the core terms were that employees should work hard, enjoy their independence and autonomy, build up a book of business and get paid based on the business they bring in.

[61] In short, the greater benefit exemption can be determined as a common issue. If one can overcome the "apples and oranges" hurdle posed by the plaintiff and legitimately ask, by looking at the standard employment contracts, whether "the equal opportunity to earn a high income and long term financial benefits, combined with flexibility and

---

[37] See, e.g. *Hotels/Restaurants and UFCW Canada Local 1933*, *Re*, [2008] O.L.A.A. No. 281, at para. 2.

[38] *Zehrs Markets v. United Food and Commercial Workers Union, Local 1977 (Statutory Holiday Pay Grievance)* [2009] O.L.A.A. No. 63, at para. 13 (C. Albertyn), and cases cited therein; aff'd 2010 ONSC 110, [2010] O.J. No. 13 (Div. Ct.).

independence in schedules" is a greater benefit than overtime pay, then in my view that question qualifies as a common issue applicable to all class members.

[62] Nesbitt's "policy" argument – that IAs should be excluded from overtime pay because their commission-based remuneration is "not consistent" with overtime compensation and would have a detrimental impact on the financial services industry at large – applies to all class members equally and is therefore eminently suitable for a common determination.

[63] In short, I am satisfied on the evidence before me that the two key questions at the base of this dispute – the applicability of the managerial and greater benefit exemptions – are questions that can be answered in common.

The certified common issues

[64] I am therefore prepared to certify Revised Common Issues (a), (b), (c) and (e) but not (d):

- Common Issue (a) is certified, including subparts (i) and (ii), for the reasons outlined above. The issue can be answered on a class-wide basis and will definitely move the litigation forward.

- Common Issue (b) is certified. If the class members are found to be eligible for overtime pay under the ESA, then it follows on the admitted evidence herein that whether these listed statutory and contractual duties were owed and were breached are questions that can be answered as common issues on a class-wide basis. This issue will also move the litigation forward.

- Common Issue (c) is certified. Although I question the utility of pleading unjust enrichment given the reach of the contractual remedy, I am prepared to certify this issue because it can be easily determined on a common, class-wide basis.

- Common Issue (d) is not certified. I generally prefer to leave questions relating to damages or measures of damage to the common issues trial judge. These are obvious questions that will be addressed by the trial judge as and when needed. Strictly speaking, the concern about damages being awarded on an aggregate basis is not a shared or common issue. To track the language in *Hollick*, aggregate damages are not "a substantial ingredient of each class member's claim."[39]

---

[39] *Hollick*, *supra* note 20, at para. 18.

However, I recognize, given recent case law, that I have the discretion to certify an aggregate damages issue,[40] but here I decline to do so.

- Common Issue (e) is certified. The plaintiff claims that the defendant breached the express or implied contractual terms by improperly misclassifying class members as ineligible for overtime pay, failing to monitor and keep track of the overtime hours worked by the class members and requiring and/or permitting the class members to work overtime hours without compensation. In my view, punitive damages, although rarely awarded, are well-suited for determination in a class proceeding. Both liability and quantum can be determined on a class-wide basis because both issues depend on the conduct of the defendant and are not affected by individual concerns.[41] The question about punitive damages is certified as a common issue.

[65] To sum up: four of the five proposed common issues are certified. However, as I have already noted, the dispute remains centered on the two claimed exemptions.

(d) Preferable Procedure

[66] Section 5(1)(d) of the CPA requires that a class proceeding be the "preferable procedure for the resolution of the common issues." The analysis must consider whether a class proceeding is a "fair, efficient and manageable method of advancing the claim" as a whole.[42] Preferability is to be broadly construed and is meant to capture two ideas: (i) whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (ii) whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation or any other means of resolving the dispute.

[67] Here, in my view, a class proceeding would be the preferable procedure and would provide a fair, efficient and manageable method of advancing the claim. In *Fulawka*, this court observed that misclassification cases are appropriate for certification where there is

---

[40] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, leave to appeal to SCC refused, [2012] S.C.C.A. No. 326.

[41] *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para 34, McLachlin C.J.C.

[42] *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.), at para. 67.

a "commonality of the employment functions and common treatment by the employer."[43] Here there is such commonality and the question for the common issues judge is whether the employees' duties entitle them to overtime within the meaning of the applicable statutes and regulations. This can be assessed without examining individual claims. "Success for one does indeed mean success for all."[44]

[68] A class proceeding in overtime-claim cases will generally be more effective than individual claims under the ESA, where there are strict time-limits and caps on recovery.[45] A class proceeding also provides class members with a less expensive and more efficient litigation vehicle and the advantage of anonymity, which in turn avoids employees' fear of reprisals.[46]

[69] One would still need individual damage assessments if the common issues are resolved in favour of the class members. However, this does not detract from the overall preferability of the class action. In any event, s. 6(1) of the CPA makes clear that the court shall not refuse certification just because individual damage assessments will be needed after the conclusion of the common issues trial.

[70] Mr. Rosen's best estimate is that he is owed about $22,000 per year in overtime compensation. His total claim could be as high as $80,000. According to Mr. Rosen, about 40% of the IAs he trained with quit after three years because of the overtime hours that were required and expected. In short, even if most of the IA s currently employed at Nesbitt decide to opt-out, a potentially large class would remain. It is true that Mr. Rosen and others like him could pursue individual claims under the Simplified Rules. But would this be an efficient or sensible use of judicial resources? In my view, it would be much more sensible and certainly more efficient to have the common issues decided at one common issues trial, or via a summary judgment motion, than having dozens, if not hundreds, of duplicate individual trials even under the Simplified Rules.

[71] The fact that the current Nesbitt IAs have not openly complained about not being paid overtime, or that they appear to accept the no-overtime reality because "they view themselves as entrepreneurs who are prepared to work long hours to build a book of

---

[43] *Fulawka*, *supra* note 8, at para. 145.

[44] I agree with these observations of Lax J. in *Fresco*, *supra* note 9, at para. 54.

[45] *Kumar v. Sharp Business Forms Inc.*, 5 C.P.C. (5th) 128 (S.C.J.), at paras. 40-43, Cumming J.

[46] *Fulawka*, *supra* note 8, at paras. 168-71; *Fresco*, *supra* note 9, at paras. 92-98.

business from which they will benefit in the long term"[47] is irrelevant. As I have already noted, even commission-based employees cannot contract out of the protections provided by the ESA.[48] And, certification motions are not determined through a referendum or polling of the class members.[49] Whether the current or former IAs are exempt from the ESA's overtime provisions is not a matter of individual choice but a common legal question that should be decided by the common issues trial judge.

[72] In short, the preferability prerequisite is satisfied.

(e) Suitable representative plaintiff

[73] Finally, under s. 5(1)(e) of the CPA, the court must be satisfied that there is a representative plaintiff who (i) would fairly and adequately represent the interests of the class, (ii) has produced a workable litigation plan and (iii) does not have a conflict of interest with any of the other class members. The proposed representative need not be 'typical' of the class, but must be 'adequate' in the sense that he or she will vigorously prosecute the claim.[50]

[74] Mr. Rosen has been extremely involved and committed to this proceeding. He has undertaken all the essential steps of a class representative in litigating this action, including reviewing evidence served to date, retaining and instructing class counsel, providing evidence and being cross-examined. He shares common interests with the other class members and, in my view, is a suitable representative plaintiff. I note, as well, that both he and Mr. Liang have attended all of the court sessions.

[75] I also note that the plaintiff has produced a litigation plan which sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding. It contains a detailed description of all steps in the litigation of the class action through a common issues trial, including notification to class members, as well as method for determining any remaining individual issues and the distribution of damages.

---

[47] *Brown* (S.C.J.), *supra* note 10, at para. 201.

[48] *Supra*, note 2.

[49] *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*, (2002) 62 O.R. (3d) 535 (S.C.J.), at para. 32, Winkler J. (as he then was).

[50] *Campbell v. Flexwatt*, 98 B.C.A.C. 22 (C.A.), at paras. 75-76, leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 13.

[76] The "suitable representative plaintiff" prerequisite is satisfied.

[77] Indeed, all five prerequisites under s. 5(1) of the CPA have been satisfied. Mr. Rosen's action against Nesbitt is certified as a class proceeding.

Disposition

[78] The motion for certification is granted. Mr. Rosen is appointed representative plaintiff.

[79] Counsel are directed to prepare an order in the form contemplated by s. 8. If any questions arise in this regard, please advise me.

[80] The representative plaintiff is entitled to his costs. If costs cannot be resolved by the parties, I would be pleased to receive brief written submissions within 14 days from Mr. Rosen and within 10 days thereafter from Nesbitt.

[81] I am obliged to counsel for their assistance and for the quality of their advocacy.

"Justice Edward Belobaba"

Belobaba J.

Released: August 20, 2013

APPENDIX

Plaintiff's Revised Common Issues

[Common issues (a), (b), (c) and (e) have been certified but not (d).]

Breach of Contract and Statutory Claim

a. Are the Class Members eligible for overtime pay pursuant to the *Employment Standards Act, 2000* ("ESA") and their contracts?
In particular,

i. Are Class Members whose primary function is not supervising or managing other employees exempt under the managerial exemption in section 8(b) of ESA Ontario Regulation 285/01, either on the basis of the degree of autonomy in the manner in which Class Members conduct their job functions, or for some other reason? and
ii. Are Class Members exempt under the greater right or benefit exemption in section 5(1)(2) of the ESA?

b. If Class Members are eligible for overtime pay pursuant to the ESA and their contracts,
   iii. Does the Defendant owe contractual duties, and/or a duty of good faith and/or statutory duties to:
      1. properly classify and advise Class Members of their entitlement to overtime pay for hours worked in excess of 44 hours per week which the employer required or permitted?
      2. ensure that the Class Members' hours of work were monitored and accurately recorded?
      3. ensure that, where the Defendants required or permitted class members to work overtime, such time was appropriately compensated?
      4. If so, did the Defendant breach any of these duties? If so, how?

Unjust Enrichment

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

Aggregate Damages

d. If the Defendant breached its duties to the Class or was unjustly enriched, can damages be assessed on an aggregate basis? If so, in what amount?

Punitive Damages

e. Are the Class Members entitled to an award of aggravated, exemplary or punitive damages based on the Defendant's conduct? If so, in what amount?

***

CITATION: Rosen v. BMO Nesbitt Burns Inc., 2013 ONSC 2144
COURT FILE NO.: CV- 10-396685CP
DATE: 20130820

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding under the Class Proceedings Act, 1992

BETWEEN:

Yegal Rosen

Plaintiff

- and -

BMO Nesbitt Burns Inc.

Defendant

REASONS FOR JUDGMENT

BELOBABA J.

Released: August 20, 2013