

Ontario Court Gives Another Overtime Class Action the Green Light



A recent Ontario court decision has confirmed what many already knew: overtime class actions are alive and well in Canada. In ***Rosen v. BMO Nesbitt Burns Inc.*** (PDF), a Superior Court judge allowed such a class action, brought on behalf of a group of investment advisors, to proceed.

Background

Yegal Rosen, a former Investment Advisor (IA) with BMO Nesbitt Burns Inc. (Nesbitt) in Thornhill, Ontario, asked the court to certify a class action for unpaid overtime brought against Nesbitt.

Like many employed in the financial services industry, Mr. Rosen and other Nesbitt IAs work long hours. He said he often worked in excess of 60 hours per week, well over the provincial standard of 44 hours. Because IAs are compensated based on commission earned and not on hours worked, their hours are not tracked by Nesbitt. They are not paid overtime premium pay. In fact, Nesbitt's overtime policy explicitly excludes IAs because they are commission-based employees. Most IAs accept this policy. The other aspects of their job – autonomy, work schedule flexibility, and potential to earn a high income – are generally considered to make up for not being paid overtime pay.

Mr. Rosen argues that he and his fellow IAs are entitled to be compensated for overtime hours, pursuant to Ontario's *Employment Standards Act* (the Act). The Act provides that even commission-based employees are entitled to overtime premium pay, unless they fall within an exemption. The relevant exemptions may be that the work is supervisory or managerial in character; or that the employment contract provides a greater benefit to the employee, in a clause that relates to the same subject matter.

Nesbitt acknowledges that the IAs are not exempt simply because they are paid by

commission. But it argues that IAs are still excluded from overtime pay because they fall within one or both of the exemptions mentioned above. They manage their own businesses; and their overall autonomy and potential for high earnings provides them with a greater benefit than overtime pay.

Proposed Class Action

Mr. Rosen moved to certify the proceeding as a class action on behalf of all current and former Nesbitt employees in Ontario who worked as Investment Advisors, Associate Investment Advisors, or Investment Advisor Trainees from 2002 to today. This amounts to 1,614 potential class members.

In Ontario, a court will certify a class proceeding if certain circumstances are met: (1) the pleadings disclose a cause of action, (2) there is an identifiable class, (3) the claims of the class members raise common issues of fact or law, (4) a class proceeding would be the preferable procedure, and (5) 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.

Motion for Class Certification Granted

Justice Belobaba of the Superior Court ruled that each of the elements required to certify a class proceeding was satisfied in this case. The action against Nesbitt was allowed to proceed. Nesbitt's motion for leave to appeal this decision was later denied.

Take-away for Employers

This case is an important reminder to employers to ensure that overtime practices and procedures are up to date and comply with the applicable employment standards laws.

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Hannah also has extensive volunteer involvement locally and abroad. Most recently, she worked with a group of human rights lawyers in Accra, Ghana and organized workshops on health and social issues in Mombasa, Kenya. In recognition of her contribution to the local community, Hannah was awarded the Dean Michael Wylie Social Responsibility Award upon graduation from law school.[/author]