

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BARRY SKOPIT

Plaintiff

- and -

BMO NESBITT BURNS INC.

Defendant

Proceedings commenced under the *Class Proceedings Act*, 1992 S.O. 1992, c. C.6

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 service 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.

December 16, 2002

Issued by:

"B. Maxwell"
Local Registrar

Address of Court House:
393 University Avenue
Toronto, Ontario
MSG 1B6

TO: BMO NESBITT BURNS INC.
1 First Canadian Place
5th Floor
Toronto, Ontario
MSX 1H3

CLAIM

1. The plaintiff claims on his own behalf and on behalf of all of the members of the class of persons ("Class") as defined herein:

- (a) an order certifying this proceeding as a class proceeding and appointing the plaintiff as representative plaintiff for the Class and any appropriate subclass thereof;
- (b) an accounting with respect to the defendant's Currency Conversion Revenue (as defined below);
- (c) compensation for breach of fiduciary duty;
- (d) general damages in the amount of \$500,000,000.00;
- (e) special damages in the amount of \$10,000,000.00;
- (f) exemplary punitive and aggravated damages in the amount of \$5,000,000.00;
- (g) restitution of the Currency Conversion Revenue (as defined below) to the plaintiff and the Class;
- (h) compensation for unjust enrichment in the amount of \$500,000,000.00;
- (i) an order declaring that the defendant holds the Currency Conversion Revenue (as defined below) as constructive trustee for the plaintiff and the Class and judgment for said amount;
- (j) prejudgment and post judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. 43, as amended where applicable;

- (k) costs of this action on a substantial indemnity basis together with any applicable Goods and Service Taxes payable pursuant to the *Excise Tax Act*, R.S.C. 1990, C. E-15; and
- (l) such other relief as counsel may advise and this Honourable Court may deem just.

PARTIES

2. The plaintiff is an individual who resides in the Greater Toronto Area in the Province of Ontario.

3. The defendant, BMO Nesbitt Burns Inc. ("Nesbitt") is a company incorporated pursuant to the laws of Canada and carries on business in the City of Toronto in the Province of Ontario.

AGENCY AGREEMENT

4. In or about 1999 the plaintiff entered into an agreement with Nesbitt by which Nesbitt agreed to act as his agent to buy and sell securities on his behalf and accounts were established.

5. The agreement referred to in paragraph 4 above and the account opened as a result will hereinafter be referred to as the "Agency Agreement" and the "Account", respectively.

CONVERSION OF FOREIGN CURRENCY LEADING TO UNDISCLOSED REVENUE FOR THE DEFENDANT

6. At the plaintiff's request the defendant purchased and/or sold one or more foreign securities in the Account on the plaintiff's behalf (the "Trades"). The purchase or sale of foreign securities required that the defendant either purchase or sell foreign currency on behalf of the plaintiff.

7. As part of each of the Trades the defendant converted Canadian currency to foreign currency for the purchase of foreign securities or converted foreign currency to Canadian currency for the deposit of sale proceeds into the Account (the "Currency Conversions").

8. In order to accomplish the Currency Conversions the defendant purchased Canadian and foreign currency for the plaintiff. In the alternative, companies affiliated with the defendant and/or sub agent and/or alter ego purchased the currency necessary to conduct the Currency Conversions, and then transferred it to the defendant on behalf of the plaintiff. (The exchange rates obtained by the defendant, its affiliated companies,

sub-agents and alter egos are hereinafter referred to as the "Brokers' Currency Exchange Rate").

9. The defendant and/or companies affiliated with it and/or its sub-agents and/or its alter egos did not pass on to the plaintiff the benefit of the exchange rates they obtained. Instead, they unilaterally established different rates which were more expensive to the plaintiff and the Class (the "Clients' Currency Exchange Rate").

10. The Brokers' Currency Exchange Rate was a more favourable exchange rate than the Clients' Currency Exchange Rate. Therefore, the plaintiff paid a premium for the purchase or sale of foreign currency and the defendant received revenue from the difference or spread between the Brokers' Currency Exchange Rate (the "Currency Conversion Revenue").

11. The defendant, at all material times, acted as the plaintiff's agent.

12. The Agency Agreement contains no express or implied terms giving authority to the defendant to take the Currency Conversion Revenue and the plaintiff was not aware that the defendant took the Currency Conversion Revenue.

DEFENDANT'S DUTIES

13. The defendant, as agent and pursuant to the Agency Agreement, owed a fiduciary duty to the plaintiff and the Class, including the duty to:

- (a) deal with them fairly, honestly and in good faith;
- (b) to make complete, fair and honest disclosure of, and obtain in advance express agreement for, all fees, commissions, charges, profits and advantages taken by them or their associated, related or affiliated companies, sub-agents and alter egos;
- (c) to keep accounts of all monies paid and received on behalf of the plaintiff and to account to the plaintiff
- (d) to disclose whenever associated, affiliated or related companies, subagents or alter egos earned revenues in the course of the Currency Conversion.

14. Further, it was an express or implied term of the Agency Agreement that the defendant would deal in good faith with the plaintiff.

15. The defendant was at all material times a member of the Investment Dealers' Association of Canada (IDA) which required it to adhere to the standards of conduct set out in its bylaws (the "IDA Bylaws"), including:

- (a) bylaw 29.1, which provides that the defendant shall observe high standards of ethics, and conduct and shall not engage in any business conduct or practice, which is unbecoming or detrimental to the public interest; and
- (b) by-law 29.8 which provides that the defendant shall not impose on any customer or deduct from the account of any customer any service fee or service charge relating to services provided by the defendant for the administration of the customer's account unless written notice shall have been given to the customer on the opening of the account or not less than 60 days prior to the imposition or revision of the fee or charge.

16. The IDA Bylaws are an express or implied term of the Agency Agreement.

17. Furthermore, Rule 31-505 of the Ontario Securities Commission Rules, provides that the defendant must deal fairly, honestly and in good faith with the plaintiff. Similar rules and regulations have been promulgated in other provinces in which the defendant does business.

18. The Ontario Securities Commission Rules additionally require that the price at which a security is purchased and sold, the total cost of the purchase or the total proceeds of the sale, the commissions and fees charged for the purchase or sale, whether the registered dealer was acting as principal or agent, and whether the registered dealer used another dealer as its agent to effect the purchase or sale must be disclosed to the

client. Similar rules and regulations have been promulgated in other provinces in which the defendant does business.

19. The defendant was at all material times subject to the Ontario Securities Commission Rules and similar statutes and regulations existing in other provinces (the "Securities Laws") all of which, as referred to above, are an express or implied term of the Agency Agreement.

DEFENDANT'S BREACH OF DUTIES

20. In breach of the Agency Agreement, incorporating the Securities Laws and the IDA Bylaws, its fiduciary duties and its duty of good faith contractual dealings, the defendant:

- (a) failed to disclose that it was taking the Currency Exchange Revenue;
- (b) failed to obtain the plaintiff's consent to take the Currency Exchange Revenue;
- (c) failed to disclose the manner in which the Currency Conversions took place;
- (d) failed to disclose and acted in conflict of interest in dealing with or acting in concert with affiliated companies, sub-agents or alter egos who were principals;

- (e) entered into the Currency Conversions purportedly as a principal and failing to disclose to the plaintiff and the Class that it had entered into the Currency Conversions as a principal in breach of the aforesaid duties set out in paragraphs 13 and 14 above;
- (f) failed to deal fairly, honestly, in good faith and in the best interests of its clients, the plaintiff and the Class;
- (g) permitted its own interests to conflict with its duties to the plaintiff;
- (h) conducted the Currency Conversions unreasonably at other than the best available rate;

21. The plaintiff has sustained loss and damage and, in addition, the defendant and/or its associated, related or affiliated companies, sub-agents, or alter egos were unjustly enriched and received secret revenues, fees, commissions, benefits and profits that should be repaid to the plaintiff.

22. The defendant holds the Currency Conversion Revenue as constructive trustee for the plaintiff.

23. The plaintiff Class are all those who, since January 1, 1990, have conducted securities trades through the defendant and/or its predecessor companies in which conversion of currencies occurred. The Class includes all such persons or entities

wherever resident for whom the defendant executed trades in Canada (other than British Columbia).

24. The plaintiff proposes that this action be tried at the City of Toronto, in the Province of Ontario.

December 16, 2002

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Solicitors for the plaintiff

BMO NESBITT BURNS INC.

and

Plaintiff

Defendant

Court file no.

(Title of proceeding)

**ONTARIO
SUPERIOR COURT OF JUSTICE**
Proceeding commenced at Toronto

STATEMENT OF CLAIM

(Form 40 under the Rules)
DYE & DURHAM CFS

Name, address, telephone and fax numbers of solicitor or party

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