

THE SECURITIES ACT) Order No. 3327
)
Subsections 8(1) and 19(5)) May 9, 2001

BMO Nesbitt Burns Inc. and Thomas Waitt

WHEREAS:

(A) On May 7, 2001, The Manitoba Securities Commission (the "Commission") issued a Notice of Hearing (the "Notice") giving notice of its intention to hold a hearing (the "Hearing") to consider whether or not it was in the public interest to grant an order pursuant to subsections 8(1) and 19(5) of The Securities Act (the "Act") with respect to Thomas Waitt ("Waitt") and BMO Nesbitt Burns Inc. ("Nesbitt Burns");

(B) Staff of the Commission, Nesbitt Burns and Waitt entered into a Settlement Agreement (a copy of which is attached as Schedule "A") dated May 7, 2001 (the "Settlement Agreement"), which proposed settlement of the proceedings initiated by the Notice, subject to the approval of the Commission;

(C) Nesbitt Burns and Waitt have consented to the issuance of this Order and has waived each of their rights to a full hearing;

(D) The Commission has reviewed the Settlement Agreement and is of the opinion that it is in the public interest to make this Order.

IT IS ORDERED:

1. **THAT** the Settlement Agreement, Schedule "A", be and the same is hereby approved.
2. **THAT** Nesbitt Burns and Waitt will make a one time payment of \$100,000 to the Treasury of the Province of Manitoba.
3. **THAT** Nesbitt Burns will make a payment of \$60,000 as its contribution to the Commission's costs with respect to the investigation of this matter and the costs to the hearing.
4. **THAT** a written reprimand be placed in the registration files of each of Nesbitt Burns and Waitt.

BY ORDER OF THE COMMISSION

Director, Legal and Enforcement

**In the Matter of the Securities Act,
S.M. 1988, c. S50 as amended**

- and -

**In the Matter of BMO Nesbitt Burns Inc.
and Thomas Waitt**

SETTLEMENT AGREEMENT

A INTRODUCTION

A.1 Staff of the Commission ("Staff") has advised BMO Nesbitt Burns Inc. ("Nesbitt Burns") and Thomas Waitt of the intention of the Manitoba Securities Commission (the "Commission") to issue a Notice of Hearing and a Statement of Allegations (collectively the "Notice of Hearing") giving notice of its intention to hold a hearing under the Securities Act (the "Act") to consider:

(a) whether or not it is in the public interest to order, pursuant to subsection 8(1) of the Act, that the registration of Nesbitt Burns as a broker and investment dealer under the Act be suspended or cancelled

(b) whether or not it is in the public interest to order, pursuant to subsection 8(1) of the Act, that the registration of Waitt as a salesman under the Act be suspended or cancelled;

(c) whether or not it is in the public interest to order, pursuant to subsection 19(5) of the Act, that subsections 19(1) and 19(3) of the Act do not apply to Nesbitt Burns or Waitt with respect to such of the trades referred to in those sections and that subsection 19(2) of the Act does not apply to Nesbitt Burns and Waitt with respect to such of the securities referred to in that section;

(d) whether or not it is in the public interest to order that Nesbitt Burns or Waitt or both pay the costs of and incidental to the hearing; and

(e) whether or not it is in the public interest to make any other order or orders.

A.2 Discussions have been held amongst Nesbitt Burns, Waitt and Staff in an effort to settle all issues in connection with the matters set out in the Notice of Hearing (the "Proceedings") and this Agreement. A Settlement (the "Settlement") has been reached based on the terms and conditions set forth in this Agreement (the "Settlement Agreement").

A.3 Pursuant to the Settlement, Staff agrees to recommend to the Commission that the Proceedings initiated against Nesbitt Burns and Waitt be resolved and disposed of in accordance with the terms and conditions of this Settlement Agreement as set forth below. Nesbitt Burns and Waitt consent to the Settlement and to the making of the Consent Order referred to in subparagraph D1 below, on the terms and conditions set forth in this Settlement Agreement.

B STATEMENT OF FACTS

B.1 Nesbitt Burns and Waitt agree with the facts set out in this Part B.

Nesbitt Burns

B.2 Nesbitt Burns is a wholly owned subsidiary of BMO Nesbitt Burns Corporation Limited. Nesbitt Burns carries on business as a brokerage firm throughout Canada. The Head Office of Nesbitt Burns is located in Toronto, Ontario.

B.3 Nesbitt Burns is registered with the Commission as an investment dealer and has a branch office in Winnipeg, Manitoba (the "Branch").

Thomas Waitt

B.4 Waitt commenced employment with Burns Fry, a predecessor of Nesbitt Burns, in 1978. Waitt worked as an Investment Advisor with Burns Fry at its Winnipeg branch and also held management positions.

B.5 In 1994, Nesbitt Thomson Deacon Ltd. merged with Burns Fry to form Nesbitt Burns. Waitt continued as an employee of Nesbitt Burns. In the fall 1994, Waitt became the Co-Branch Manager of the Winnipeg Branch. He has remained a manager since that date. Waitt is registered as a salesman under the Act.

Nesbitt Burns' Compliance Program

B.6 At all material times, the Branch and the Compliance Department had roles in the monitoring of client accounts and Investment Advisors in the Branch. These roles are set out by Nesbitt Burns in its Sales Administration Manual and are designed to ensure compliance with the Regulations and By-Laws of the Investment Dealers Association (the "IDA") and sound business practices.

B.7 The monitoring by the Branch included reviewing New Account Application Forms, reviewing daily and monthly trading and making inquiries of Investment Advisors with respect to potential problems identified by those reviews, and investigating client complaints.

B.8 The monitoring by the Compliance Department included reviewing daily and monthly trading and making inquiries of Investment Advisors or the Branch Manager with respect to potential problems identified by those reviews, and investigating client complaints. The Compliance Department also provided assistance to branches on compliance matters and conducted periodic compliance audits of branches.

Randy McDuff

B.9 In May 1990, Randy McDuff commenced employment as an account executive at the Winnipeg Branch of Nesbitt Thomson Deacon Inc., another predecessor to Nesbitt Burns. At the time that he joined Nesbitt Thomson, McDuff had been an investment advisor with another brokerage firm for approximately three years.

B.10 In 1994, when Nesbitt Burns was formed, McDuff continued to work as an investment advisor with Nesbitt Burns at its Winnipeg Branch until he went on a medical leave of absence on June 13, 2000. McDuff's registration as a salesman under the Act was suspended as of June 13, 2000 and remains suspended as of the date of this Settlement Agreement.

B.11 Throughout McDuff's employment with Nesbitt Burns, the Branch Manager and the Compliance Department in Toronto carried out the reviews required by Nesbitt Burns' internal policy and by IDA regulations.

B.12 During the latter 1990s, McDuff had approximately 1,000 clients and more than \$50,000,000 under administration. He worked with a team of assistants and, for a time, a partner, under the name "The McDuff Group". In the years 1994 to 1997, McDuff's accounts had yielded annual returns of approximately 23% on average.

B.13 Prior to 1996, Nesbitt Burns and Waitt were satisfied that any concerns with respect to McDuff that were identified could be resolved without the need for disciplinary action being taken against McDuff.

B.14 In 1996, reviews by Waitt and the Compliance Department raised some questions about the suitability from a risk perspective of some investments in some of McDuff's client accounts, notwithstanding the strong rates of return. Waitt asked McDuff to review his accounts and the account documentation and to update it where appropriate. McDuff agreed to do so.

B.15 In 1997, reviews by Waitt and the Compliance Department raised some questions about the level of commissions generated by the trading in some of McDuff's client accounts. Waitt recommended that McDuff pursue a fee-based approach with his clients, where the amount of trading, up to a specified maximum, does not affect the fees. As requested, McDuff did pursue that approach with his clients. Waitt also questioned McDuff about the use of margin in some of McDuff's client accounts. McDuff agreed to review with his clients the use of margin in their accounts. McDuff's clients' accounts continued to have strong rates of return.

B.16 In early 1998, the Compliance Department identified McDuff as an investment advisor who required particular monitoring due to questions about the suitability of some investments in some of his client accounts. Therefore, Waitt increased the level of local supervision of McDuff and the Compliance Department increased the level of monitoring of his accounts.

B.17 During 1998, the returns in many of McDuff's client accounts began to drop, due to the unexpectedly poor performance of a number of securities in his clients' accounts and a sharp drop in the stock market.

B.18 McDuff was absent from the office from August 24 to September 14, 1998 for medical reasons. During this time members of the McDuff Group who were registered under the Act dealt with his clients.

B.19 When McDuff returned to work, Waitt asked him to encourage his clients to move away from the unsuitable investments and into mutual funds or one of Nesbitt Burns' managed account products. McDuff agreed to do so.

B.20 Waitt and the Compliance Department continued to carry out reviews of the daily and monthly trading in McDuff's accounts. McDuff responded to daily and monthly queries from Waitt and the Compliance Department. McDuff assured Nesbitt Burns and Waitt that he was (1) effectively addressing the issues raised by Nesbitt Burns and (2) dealing with his clients in an effective and timely fashion. It appeared to Nesbitt Burns and Waitt that McDuff was improving his performance.

B.21 Waitt spoke with many of McDuff's clients, by telephone and in person. Through these conversations, Waitt believed that the clients were aware of the activity in their accounts, including the losses. The clients contacted by Waitt also generally expressed confidence in McDuff.

B.22 In November 1998, McDuff was removed from the list of investment advisors who required particular monitoring.

B.23 In the spring of 1999, Nesbitt Burns learned that McDuff had been conducting trades in the account of a U.S. resident without being licensed in the United States. McDuff acknowledged the problem, agreed to pay a fine to Nesbitt Burns and to be responsible for losses in the account.

B.24 Due to the previous suitability questions, and as a result of this recent infraction, the Compliance Department suggested that McDuff should be dismissed from the firm.

B.25 Waitt believed that McDuff could and would improve his performance and should not be dismissed. Waitt had continued to speak with clients of McDuff who continued to express their confidence in him. Waitt and Nesbitt Burns had received very few complaints from McDuff's clients. McDuff continued to respond to daily and monthly queries. Therefore, Nesbitt Burns decided not to dismiss McDuff but instead increased the level of monitoring of McDuff's client accounts by the Compliance Department and the Branch. McDuff was placed back on the list of investment advisors who required particular monitoring. As part of that monitoring, Waitt required McDuff to obtain authorization from Waitt or Branch Compliance before carrying out trades.

B.26 In early 2000, Nesbitt Burns discovered that McDuff had offered a settlement to a client without advising the firm. McDuff acknowledged this infraction and agreed to re-write the Conduct and Practices Handbook examination. He passed that examination. Nesbitt Burns required McDuff to pay the client the amount he had previously offered to him.

B.27 By early June 2000, the Branch had started to receive a large number of complaints from McDuff's clients. In spite of McDuff's assurances to Waitt, Waitt concluded that McDuff's performance had not sufficiently improved. Furthermore, Waitt came to believe that McDuff's difficulty dealing with stress was a serious medical problem that prevented him from effectively

dealing with client accounts. Nesbitt Burns and Waitt concluded that McDuff could no longer carry out his duties.

B.28 On June 15, 2000, McDuff began an extended medical leave of absence which continues to this day.

McDuff's Accounts

B.29 As of June 15, 2000, McDuff had approximately 1,000 clients with 1,122 accounts. The assets in these accounts totalled approximately \$53,000,000.

B.30 After McDuff went on leave, Nesbitt Burns received a larger number of complaints from his clients. Nesbitt Burns retained outside counsel and experts to conduct a review of each client complaint.

B.31 As a result of these reviews and additional information received during meetings with clients, Nesbitt Burns learned that there were serious problems of (1) suitability, (2) concentration and (3) use of margin in a number of client accounts, as well as possible instances of discretionary trading. The number and scope of the problems were far greater than Nesbitt Burns' previous inquiries had indicated.

B.32 In addition, Nesbitt Burns learned, for the first time, that McDuff had encouraged certain clients to borrow money from third parties to invest through McDuff in securities that were not suitable for the clients. This fact had not been disclosed in any documentation on file with Nesbitt Burns and had not been disclosed to Waitt by McDuff during his monitoring of McDuff.

B.33 Nesbitt Burns has offered settlements to clients where its review has revealed a problem with the account. Nesbitt Burns has also co-operated with the Commission in its investigation of clients' concerns.

Michael Sidiropoulos

B.34 Michael Sidiropoulos was an Investment Advisor with Nesbitt Burns' Winnipeg Branch until his resignation in July 1998. The Commission suspended Sidiropoulos' registration as of the date of his resignation. His registration subsequently expired on April 7, 1999 and he is not registered under the Act.

B.35 The Commission investigated Sidiropoulos. A hearing took place in October 1999. On December 30, 1999, the Commission issued a decision in which it held that, with respect to a client, Sidiropoulos provided unsuitable advice, failed to advise of risks, failed to have acted in the client's best interest, violated section 69(2) of the Act in making statements as to the future value of the client's account, failed to diversify appropriately, traded excessively, churned with an annual turnover rate of 17.8 times equity during the period 1994 to 1997, carried out unauthorized trades and invested the client in unsuitable securities. The Commission ordered that Sidiropoulos not be entitled to use any of the exemptions contained in sections 19(1), 19(2) and 19(3) of the Act for an indefinite period.

Charles Edward Griffith

B.36 Charles Edward Griffith was an Investment Advisor with Nesbitt Burns' Winnipeg Branch from May 1992 until his termination in January 1999.

B.37 Nesbitt first raised a concern with Griffith in 1993 with regard to his purchasing a newly issued security into a client's account and selling the same security out of the client's account within a limited period of time ("flipping"). Griffith was warned that such actions were contrary to Nesbitt Burns' policy.

B.38 In late 1996, Waitt became aware that Griffith had flipped a new issue of securities in a client account. Griffith was again told that such actions were contrary to Nesbitt Burns' policy.

B.39 In July, September and October 1997 and April 1998, Waitt again warned Griffith about this practice. Waitt warned Griffith that his position with the firm was in jeopardy. In April 1998, Waitt pointed out the losses in some of Griffith's client accounts and demanded an explanation.

B.40 Griffith objected to Nesbitt Burns' position on the flipping of new issues. In June 1998, he retained his own counsel to provide an opinion on this issue. In July 1998, Griffith again flipped a new issue security.

B.41 By January 8, 1999, Nesbitt Burns had received three client complaints alleging Griffith had been involved in discretionary trading. Nesbitt Burns investigated the complaints and subsequently terminated Griffith.

C ACKNOWLEDGMENTS OF NESBITT BURNS AND WAITT

C.1 Nesbitt Burns and Waitt admit that the following actions were contrary to the public interest:

(a) the failure by Nesbitt Burns and Waitt to detect on a timely basis the extent of unsuitable securities, over-concentration of securities and the unacceptable use of margin in certain of McDuff's clients' accounts;

(b) the failure by Nesbitt Burns and Waitt to detect on a timely basis the inappropriate actions of Sidiropoulos;

(c) the failure of Nesbitt Burns and Waitt to act quickly enough and in an effective manner when potential problems regarding McDuff's accounts, Sidiropoulos' accounts and Griffith's accounts were identified ; and

(d) the decision by Waitt not to dismiss McDuff and Griffith as Investment Advisors at an early date.

C.2 Staff acknowledges that Nesbitt Burns and Waitt have co-operated and assisted in the investigation of these matters.

D TERMS OF SETTLEMENT

D.1 Staff seek an Order (the "Consent Order") from the Commission consistent with the terms contained in section D2 of this Settlement Agreement, pursuant to provisions of the Act.

D.2 The Consent Order sought by Staff is as follows:

- (a) that this Settlement Agreement be approved;
- (b) Upon approval of this settlement, Nesbitt Burns and Waitt will make a one time payment of \$100,000 to the Treasury of the Province of Manitoba;
- (c) Upon approval of this settlement, Nesbitt Burns will make a payment of \$60,000 as its contribution to the Commission's costs with respect to the investigation of this matter and the costs to the hearing; and
- (d) a written reprimand be placed in the registration files of each of Nesbitt Burns and Waitt.

E PROCEDURE

E.1 The approval of this Settlement Agreement shall be sought at a public hearing.

E.2 If this Settlement Agreement is approved by the Commission, and if a Consent Order issues in accordance with this Settlement Agreement, this Settlement Agreement will constitute the entirety of the evidence to be submitted to the Commission in connection with the Proceedings and, upon the making of the order contemplated by this Settlement Agreement, Nesbitt Burns and Waitt waive their right to a full hearing and appeal of this matter.

E.3 Notwithstanding any other provision of this Settlement Agreement, if, for any reason whatsoever, this Settlement Agreement is not approved by the Commission or the Consent Order referred to in section D above is not made by the Commission, Staff will be entitled to proceed with whatever steps it is entitled by law to take, including but not restricted to, the commencement of a hearing before the Commission, unaffected by this Settlement Agreement or the settlement discussions. In the event that such steps are taken, Nesbitt Burns and Waitt shall have all of the usual rights of a person subject to such proceedings.

E.4 If the Settlement Agreement is not approved or the Consent Order set out in section D above is not made by the Commission, the terms of this Settlement Agreement shall remain confidential and shall not be raised in this or any other proceeding, and any admissions contained in this Settlement Agreement shall be considered as without prejudice communications and furtherance of settlement discussions which will not be binding upon the parties and which will be inadmissible in any proceeding whatsoever.

E.5 If this Settlement Agreement is approved by the Commission and the Consent Order made upon the terms set out in this Settlement Agreement, this Settlement Agreement will be a public document.

E.6 Nesbitt Burns and Waitt agree that, if this Settlement Agreement is approved by the Commission and the Consent Order is made upon the terms set out in this Settlement Agreement, Nesbitt Burns and Waitt will not raise as a basis for attack on the Order this Settlement Agreement or the negotiation or process of approval of this Settlement Agreement, alleged bias, alleged unfairness, or any such other challenges to the validity of the Consent Order.

E.7 Nesbitt Burns and Waitt further agree, if this Settlement Agreement is approved by the Commission and the Consent Order is made upon the terms set out in this Settlement Agreement, Nesbitt Burns and Waitt agree not to make any statements inconsistent with the terms of this agreement.

Dated at Toronto, Ontario this "3rd" day of May 2001

BMO NESBITT BURNS INC.

Per: "Gilles Ouellette"

Dated at Winnipeg, Manitoba this "4th" day of May 2001

THOMAS WAITT

Per: "Thomas Waitt"

Dated at Winnipeg, Manitoba this "7th" day of May 2001

STAFF OF THE MANITOBA
SECURITIES COMMISSION

Per: "DouglasR. Brown"