

CITATION: Ngan v. The Bank of Nova Scotia, 2025 ONSC 2354
COURT FILE NO.: CV-22-00691702-00CP
DATE: 20250416

SUPERIOR COURT OF JUSTICE – ONTARIO

B E T W E E N:

RE: JUSTIN NGAN, Plaintiff

AND

THE BANK OF NOVA SCOTIA, Defendant

BEFORE: Leiper J.

HEARD: April 8, 2025

COUNSEL: *W. Cory Wanless, Jonathan Schachter and Randi Ali*, Lawyers for the Plaintiff

Sarah Whitmore, Lisa Talbot, Alexandra Lawrence and Hudson Manning, Lawyers
for the Defendant

ENDORSEMENT

Introduction

[1] The plaintiff brought a motion to partially discontinue his claim, to amend his pleadings and for certification of this class proceeding. The defendant consents to the plaintiff's motion. I grant the orders requested.

Background

[2] In brief, this action involves the defendant's treatment of variable amounts of pay, such as incentive pay, when calculating its employees' holiday and vacation pay. The plaintiff contends that in doing so, the defendant has breached the *Canada Labour Code*. The defendant has consented to certification of the claim as a class proceeding, while maintaining that it will defend the claim.

The Issues on the Motion

[3] There are three issues on the motion:

- (a) Should the plaintiff be granted leave to partially discontinue his claim with respect to unused and expired vacation days?
- (b) Should the plaintiff be granted leave to file a Fresh as Amended Statement of Claim to give effect to the partial discontinuance?
- (c) Should the plaintiff's freshly amended claim, and the proposed agreed-upon common issues set out in the Amended Notice of Motion, be certified as a class proceeding?

Analysis of the Issues

Issue (a): Discontinuance of Part of the Claim under the *Class Proceedings Act*

[4] Section 29(1) of the *Class Proceedings Act, 1992* (the "CPA") provides that a class proceeding may only be discontinued with approval of the Court. If a discontinuance is approved, s. 29(2) requires the Court to consider whether notice of the discontinuance should be given to the proposed class.

[5] The policy rationales for court approval to discontinue a class proceeding include:

- (i) deterring plaintiffs and class counsel from abusing the class action procedure by bringing a meritless class proceeding to extract a payment as the price of discontinuing the class proceeding; and
- (ii) providing an opportunity to ameliorate any adverse effect of the discontinuance on class members who might be prejudiced by the discontinuance: *Davidson v. Stableview Asset Management Inc. et al.*, 2022 ONSC 895 at para. 8.

[6] The central consideration on a motion for leave to discontinue is whether the dismissal will prejudice the interests of putative class members. Unlike with a settlement of a class action, the discontinuance does not have to be beneficial or in the best interests of the putative class members: *Johnson v. North American Palladium Ltd.* at para. 15.

[7] The court should scrutinize a motion for discontinuance and ascertain whether: (i) the proceeding was commenced for an improper purpose; (ii) if necessary, there is a viable replacement party so that putative class members are not prejudiced; or (iii) the defendant will be prejudiced by the discontinuance: *Raponi v. Olympia Trust Company*, 2021 ONSC 6761 at para. 7.

[8] Here, the portion of the claim which the plaintiff seeks to discontinue involves a subset of the claim related to unused and expired vacation days. It narrows the scope of the original claim. During its investigation and preparation for the certification motion, class counsel concluded that this issue was unique to the plaintiff and related to his short-term disability leave. Any failures by the defendant to compensate employees for unused and expired vacation days was not widespread,

and where there were possible issues among the class members, those were in individualized circumstances.

[9] Counsel submitted that approximately 96% of the original membership in the class will remain after the unused/expired vacation days portion of the claim is discontinued. Further, counsel proposes a notice plan to the class which will inform the class that claims relative to unused and expired vacation days are not proceeding in this action.

[10] The proposed discontinuance is the product of arms' length negotiations between the parties based on counsel's investigations. It has led to the remaining portions of the claim being certified on consent. There is no suggestion or evidence to suggest that the plaintiff is taking this step for any oblique motive, or that this aspect of the claim was asserted for any improper purpose. The reason for the request to discontinue this part of the claim is logical and reasonable.

[11] Given the evidence that the discontinued portion deals with highly individualized claims, I am satisfied that the remainder of the class could have been prejudiced by continuing with the claims relative to unused and expired vacation days. Given the relative proportions of class members affected by the proposal, there is correspondingly less potential prejudice to the interests of those class members who will be affected by approving discontinuance. Those members with individualized claims relative to unused vacation days will be able to pursue those claims outside of the class proceeding.

[12] I am satisfied that the motion for partial discontinuance should be granted and the notice plan approved. Given that the plaintiff has not yet retained a notice administrator, the order shall require that this step be finalized by way of a motion in writing to appoint a notice administrator, brought no later than September 2, 2025.

Issue (b): Amendments to the Plaintiff's Pleading

[13] According to Rule 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court "shall grant leave to amend a pleading on such terms are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[14] Amendments ought to be approved in accordance with r. 26.01, unless they disclose no cause of action or are shown to be scandalous, frivolous, vexatious or an abuse of the court's process: *Schembri v. Way*, 2012 ONCA 620 at paras. 25 and 44; *Andersen Consulting v. Canada (Attorney General)* (2001), 107 ACWS (3d) 759 at para. 37.

[15] As noted above, the plaintiff's proposed amendment seeks to discontinue the part of the claim related to unused and expired vacation days. It narrows the scope of the original claim and is based upon counsel's investigation and discussions with putative class members, which reveals that the issue was unique to the plaintiff and related to his short-term disability leave. Any failures by the defendant to compensate employees for unused and expired vacation days was not

widespread, and where there were possible issues among the class members, those were in individualized circumstances.

[16] I conclude that in these circumstances, including the consent of the defendant, that leave should be granted to the plaintiff to file a fresh as amended statement of claim in the form filed in the motion materials.

Certification of a Class Proceeding

[17] The test for certification is set out in s. 5 of the *Class Proceedings Act* as follows:

5 (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c.6, s.5 (1);2020, c. 11, Sched. 4, s. 7 (1).

[18] At the certification stage, the focus is not on whether the action is likely to succeed, but whether a class action is a fair, efficient, and manageable method of advancing the litigation, bearing in mind the three overarching goals of class proceedings legislation: access to justice, behaviour modification, and judicial economy. The test for certification is applied in a purposive and generous manner: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158 at paras. 15-16; *Western Canadian Shopping Centres Inc v. Dutton*, 2001 SCC 46, [2001] 2 SCR 534 at paras. 26-29.

[19] The proposed amended class definition is:

All persons who were employed by The Bank of Nova Scotia in Canada, excluding home financing advisors (formerly known as mortgage development managers), officers, directors, and C-suite executives, during the Class Period, where the Class Period is defined from December 14, 2020, until the date of certification of this action, who received incentive awards or other forms of variable compensation in addition to their hourly wages or salary pursuant to the terms of the incentive plans listed at Appendix “A” or pursuant to the terms of The Bank of Nova Scotia Restricted Share Unit (“RSU”) Plan, applicable during the Class Period (“Class Members”).

[20] I will review, in brief, each of the criteria and my findings on each in support of the overall conclusion that the action as amended meets the test for certification.

(i) *The freshly amended pleadings disclose a cause of action: 5(1)(a)*

[21] The test under s. 5(1)(a) is met unless after assuming that the facts as pleaded are true, it is ‘plain and obvious’ that the plaintiff’s claim cannot succeed: *Hollick v. Toronto (City)* at para 25; *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959 at page 980.

[22] The plaintiff’s Fresh as Amended Statement of Claim asserts a cause of action in breach of contract. The narrowed claim against the defendant alleges that contrary to the minimum standards on vacation pay under the Canada Labour Code, the defendant failed to include employees’ incentive awards and other variable compensation pursuant to the plans listed in the Fresh as Amended Statement of Claim in its calculations of vacation pay and holiday pay. The claim alleges that the defendant incorporated minimum standards regarding vacation pay and holiday pay under the CLC into its employees’ employment contracts through its vacation policy. Thus, by failing to include incentive awards and other variable compensation in its calculation of statutory holiday and vacation pay, the plaintiff alleges the defendant breached its employment contracts with the members of the class.

[23] The defendant disputes that there was such a breach but does not dispute that the pleading discloses a cause of action.

[24] I am satisfied that the pleading discloses a cause of action in breach of contract. This aspect of the test is satisfied.

(II) *THERE IS AN IDENTIFIABLE CLASS: 5(1)(B)*

[25] Section 5(1)(b) of the *CPA* requires that plaintiffs demonstrate that there is an identifiable class of two or more persons.

[26] The class definition, reproduced above, is clear, and objectively stated. Membership in the class can be readily determined by the defendant and putative class members based on whether the

latter participated in an incentive plan or in the RSU plan during the class period, and whether they are excluded.

[27] As required, the proposed class is plainly “circumscribed by [its] defining criteria” and there is a straightforward rational connection between the proposed class definition and the proposed common issues.: *Cloud v. Canada (Attorney General)* (2004), 73 OR (3d) 401 at para. 47; *Western Canadian Shopping Centres Inc v. Dutton*, 2001 SCC 46, [2001] 2 SCR 534 at para. 38.

[28] The defendant’s records will allow it to ascertain who the class members are. Further, the objective criteria which define the class will allow class members to self-identify.

[29] The proposed class definition is not overly broad or overly narrow. The start date of the proposed class period is December 14, 2020. This is two years prior to the commencement of this action, reflecting the two-year limitation period applicable to proceedings in Ontario.

[30] The plaintiff estimates that the size of the class is approximately 44, 996 persons.

[31] I am satisfied that the claim has an identifiable class of two or more persons.

(iii) The claim raises common issues: s. 5(1)(c)

[32] The parties propose the following common issues be certified in this action:

General

Are the incentive awards and other variable compensation paid by the Defendant to the Class Members pursuant to the terms of the plans listed below in Appendix “A” (other than Restricted Share Units) “wages” within the meaning of the *Canada Labour Code*, RSC, 1985, c L-2 (“*CLC*”)?

Are Restricted Share Units (“RSUs”) granted by the Defendant to the Class Members pursuant to the RSU Plan “wages” within the meaning of the *CLC*?

Breach of Contract

Did the terms of the Defendant’s employment contracts incorporate the minimum standards under the *CLC* for:

- i) annual vacation;
- ii) vacation pay;
- iii) holiday pay?

Do the terms of the Defendant’s incentive plans listed in Appendix “A” that deem incentive awards and other variable compensation to be inclusive of vacation pay and holiday pay

violate the *CLC* and thereby breach the Defendant's employment contracts with the Class Members?

If the answer to Common Issues (1) and (4) is "Yes", or the answer to Common Issue (2) is "Yes", did the Defendant fail to pay vacation pay and holiday pay, including through vacation pay adjustments under the Defendant's Vacation Policy, calculated on the incentive awards and other variable compensation pursuant to the plans listed in Appendix "A" or on RSUs paid to Class Members during the class period in breach of the Defendant's employment contracts with the Class Members?

Remedies

If the answer to Common Issue (4) or (5) is "Yes", is the Defendant liable to the Class for damages for breach of contract? If so, in what amount?

If the answer to either of Common Issues (4) or (5) is "Yes", does the conduct of the Defendant justify an award of punitive damages? If so, in what amount?

[33] The plaintiff submits that the common issues are constructed to determine whether the incentive awards and variable compensation pursuant to the plans listed at Appendix "A" and/or RSUs paid to class members are "wages" within the meaning of the *Canada Labour Code* and, if so, whether they were included in the defendant's calculations of vacation pay and holiday pay. The plaintiff submits that the following decisions support certifying class actions concerning the calculation of vacation and holiday pay: *Singh v. RBC Insurance Agency Ltd*, 2023 ONSC 1439; *Lee v. Allstate Insurance*, 2023 ONSC 8; *Curtis v. Medcan Health Management Inc.*, 2022 ONSC 5176 (Div. Ct); *Cunningham v. RBC Dominion Securities*, 2022 ONSC 5862; *Cheetham v. Bank of Montreal*, 2023 BCSC 1319.

[34] I am satisfied that there are underlying common issues relating to the employment contracts and calculation of holiday/vacation pay and the issue of how variable compensation was treated for the purpose of those calculations, and whether such variable compensation was "wages" as defined by the CLC.

[35] Further, the breach of contract issues can be established on a class-wide basis. The plaintiffs assert that it is not disputed that the bank's vacation policy, which guarantees the CLC's minimum standards, is incorporated in employees' employment contracts.

[36] While the plaintiff acknowledges that there are many incentive award plans, he alleges that the treatment of the applicable incentive awards is identical, because in each case vacation pay and holiday pay are deemed to be included in the incentive awards. Class counsel submits that the relevant wording in each incentive award plan document is similar or identical to the others. There is only one RSU plan document.

[37] Turning to the damages sought, there is common aspect to the remedies sought, arising from the assertion that the damages should be paid by recalculating vacation pay and holiday pay

with a formula that includes incentive awards and other variable compensation. While the inputs can be expected to vary from class member to class member, the formula and the underlying theory for its application would be common to the class on the theory of the plaintiff.

[38] On the issue of assessment of punitive damages, this inquiry would require determinations into whether the defendant had acted in a high-handed, malicious, arbitrary, or reprehensible way that departs to a marked degree from ordinary standards of decent behaviour, thus justifying an award of punitive damages. If so, would the punitive damages awarded be no greater than necessary to rationally accomplish their non-compensatory purposes of retribution, deterrence, and denunciation? This amounts to applying the test from *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 SCR 595 at para. 96.

[39] I agree. There are issues in common, both in respect of liability and damages. The plaintiff has satisfied this aspect of the test.

(IV) A CLASS PROCEEDING IS THE PREFERABLE PROCEDURE: SS. 5(1)(D) AND 5(1.1)

[40] The preferability test under s. 5(1)(d) requires the court to consider the advantages available by a class proceeding. The court should consider whether the class proceeding would be a fair, efficient, and manageable method of advancing the claim: *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69.

[41] The proceeding should be preferable to other available procedures, including joinder, test cases, consolidation and other means of resolving disputes. The court should consider the common issues in the context of the entire claim: *Markson* at para. 69.

[42] In the amendments to s. 5(1.1) of the *CPA*, the legislature added this guidance on the preferability procedure step:

In the case of a [plaintiff's certification motion], a class proceeding is the preferable procedure for the resolution of common issues under clause (1)(d) only if, at a minimum,

- (a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and
- (b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

[43] Perell, J. discussed the 5(1.1) requirement in *Banman v Ontario*, 2023 ONSC 6187 at para. 320:

If the first three [preferability] criteria are satisfied, then the recent amendments to the *Class Proceedings Act, 1991* require that the preferable procedure analysis be more rigorous and involve determining: (a) whether the design of the class action is manageable as a class action; (b) whether there are reasonable alternatives; (c) whether the common issues predominate over the individual issues; and (d) whether the proposed class action is superior (better) to the alternatives. This analysis is accomplished by comparing the advantages and disadvantages of the alternatives to the proposed class action through the lens of judicial economy, behaviour management, and access to justice.

[44] I am satisfied that in applying these criteria to the case at bar, the class proceeding will be fair, efficient, and manageable. The essence of liability is common to every class member: whether the incentive awards and other variable compensation pursuant to the various incentive plans the RSUs are “wages” under the *CLC* for the calculation of statutory vacation and holiday pay. The alternative would mean thousands of individual claims, either tried separately, or consolidated. Either prospect is unwieldy.

[45] Further, if the common issues are resolved in favour of the plaintiff, the individual issues stage involves a recalculation of vacation and holiday pay entitlements for each employee during the class period. The plaintiff’s position is that this is a manageable process as the defendant will have records and employment records for each class member.

(b) A class proceeding is preferable to other means of resolving the dispute

[46] Further, as amended, a class proceeding is the preferable procedure to resolve an employment standards claim: *Medcan* at para. 54. The class has over 40,000 class members. Judicial economy and access to justice are served by the class action procedures.

[47] And, given that many class members are current employees of the defendant, there may be a reluctance to commence claims against their employer because of consequences to their employment conditions or advancement: *Lee v. Allstate Insurance* at para. 36; *Curtis v. Medcan Health Management Inc.* at paras. 39-40; *Cunningham v. RBC Dominion Securities* at paras. 44-45.

[48] I am satisfied that the action meets the superiority and predominance requirement under the amended certification test in the *CPA*. By way of its consent, the defendant does not oppose this finding. Through the lens of judicial economy, access to justice and behaviour modification, I conclude that a class proceeding is preferable.

(v) ***There is a suitable representative plaintiff: s. 5(1)(e)***

[49] Pursuant to s. 5(1)(e) of the *CPA*, a representative plaintiff must fairly and adequately represent the class, have a workable plan for the proceeding, and must not have a conflict with the class on the common issues.

[50] I find that the proposed representative plaintiff, Mr. Ngan, is a suitable representative for the class. He is prepared to represent the interests of class members, and his interest in the action is shared with all other class members.

[51] The litigation plan provides a workable method for advancing the proceeding. Following certification, the litigation plan sets out proposed steps in respect of notice of certification, optouts, documentary discovery, oral discovery, and the conduct of the trial.

[52] Given that a substantial percentage of the class remain employed by the defendant, their contact information is available to provide them with direct notice.

[53] I approve the litigation plan and the representative plaintiff, on consent.

Conclusion

[54] Accordingly, I grant the relief sought by the plaintiff. By agreement of counsel there will be no order as to costs.

Leiper J

Released: April 16, 2025