COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bank of Montreal v. Cheetham,*
2025 BCCA 374

Date: 20251031
Dockets: CA49312; CA49805

2025 BCCA 374 (CanLII)

Between:

Bank of Montreal

Appellant
(Defendant)

And

Paul Cheetham

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Harris
The Honourable Justice Winteringham
The Honourable Justice MacNaughton

On appeal from: Orders of the Supreme Court of British Columbia, dated July 28, 2023 and March 12, 2024 (*Cheetham v. Bank of Montreal*, 2023 BCSC 1319 and 2024 BCSC 419, Vancouver Docket S201733).

Counsel for the Appellant:	F.A.J. McLaughlin B.K. Kain M.D. Fimiani
Counsel for the Respondent:	R.S. Wallia A. Monkhouse A.H. Monkhouse
Place and Date of Hearing:	Vancouver, British Columbia June 19, 2025
Place and Date of Judgment:	Vancouver, British Columbia October 31, 2025

Written Reasons by:
The Honourable Justice MacNaughton

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Justice Winteringham

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Summary:

The appellants appeal an order certifying a class proceeding under the Class Proceedings Act, R.S.B.C. 1996, c. 50, in breach of contract and breach of a duty of good faith. The class proceeding alleges that the Bank of Montreal (BMO) systematically underpaid Private Wealth Consultants and Mortgage Specialists, their entitlement to vacation pay (s. 184.01) and holiday pay (s. 196) as required by the Canada Labour Code, R.S.C., 1985, c. L-2. The BMO included these CLC entitlements within a variable compensation pay structure based on commissions and bonuses in addition to the employee's base salary. The certification judge certified the class proceeding in breach of contract and in breach of duty of good faith. The appellants appeal both orders. They also appealed certified common issues, and the findings that a class action is a preferable procedure and that the class period can begin before 2014.

Held: Appeal allowed in part. The pleadings support the certification of a claim in breach of contract, but not one in breach of a duty of good faith. The certification judge did not err in reformulating and then certifying the common issues, or in her conclusion that a class action would be the preferrable procedure. She properly weighed the individual issues against the common ones. The final issue about the class period cannot ground a finding from this Court due to insufficient submissions and is to be dealt with at the common issues trial.

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Reasons for Judgment of the Honourable Justice MacNaughton:

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Introduction

[1] Paul Cheetham, as the representative plaintiff, filed a class proceeding on behalf of two groups of BMO employees, Private Wealth Consultants (“PWCs”) and Mortgage Specialists (“MSs”) (collectively the “Class Members”). The Class Members work throughout Canada but regardless of their work location, PWCs and MSs were compensated in the same fashion by BMO. The class proceedings were certified by the chambers judge as a national class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*].

[2] The Class Members are federally regulated BMO employees and entitled to the minimum benefits and protections provided by the *Canada Labour Code*, R.S.C., 1985, c. L-2 [*CLC*]. Those benefits include vacation pay (s. 184.01) and statutory holiday pay (s. 196). In these reasons, I will refer to these two benefits collectively as “Statutory Pay”.

[3] The Class Members are among BMO’s employees who receive “variable compensation”, which is not fixed, but depends on business and personal performance. Variable compensation includes commissions, bonuses, and other incentive awards, in addition to a base salary. Variable compensation employees were not paid Statutory Pay separately; instead, it was included as part of their variable compensation.

[4] Mr. Cheetham commenced this class proceeding on February 11, 2020. His notice of claim was amended during the course of the certification proceedings. Mr. Cheetham’s core allegation is that by including Statutory Pay in the Class Members’ variable compensation, BMO breached their employment contracts and acted in bad faith.

[5] BMO submits that because no civil claim may be brought for breach of the *CLC*, Mr. Cheetham has tried to “shoehorn” his claim into one for breach of contract and breach of the duty of good faith. In doing so, BMO says that the class

proceeding lacks a core of commonality. The Class Members' contracts consisted of their offer letters and job-specific compensation plans, which differed over the nine-year class period. BMO says that these differences in the contracts mean that whether the contracts incorporated *CLC* Statutory Pay is not a common issue that can be determined on a class-wide basis and will give rise to conflicts of interest. As a result, a class proceeding would not be a preferable method of advancing the claims.

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The Pleadings

Notice of Civil Claim

[6] BMO, one of Canada's largest banks, is federally incorporated and regulated. It employs approximately 30,000 employees throughout Canada, most of whom are federally regulated under the *CLC*. BMO's employees work within seven general business segments, some of which are further sub-divided into specific lines of business.

[7] A significant number of BMO's employees receive some form of variable compensation as part of their compensation package. The types of variable compensation available to employees, and the criteria used to calculate them, differ significantly across employment roles and have also changed over the proposed class period of January 1, 2010 to December 31, 2018 (the "Class Period"). The types of variable compensation provided to employees during the proposed Class Period included commissions, cash bonuses, team bonuses, short-term incentive awards, equity, and deferred compensation.

[8] Mr. Cheetham lives in British Columbia. He was a BMO employee. When he resigned in July 2017, he was a PWC with the BMO Harris Private Banking group. At all material times, he was paid an annual base salary of about $45,000, plus variable compensation, including compensation based on commissions and bonuses, that in some years exceeded $200,000.

[9] PWCs and MSs earn all, or a significant portion of their wages, in variable compensation. Mr. Cheetham alleges that BMO's PWCs and MSs were systemically underpaid their Statutory Pay.

[10] Mr. Cheetham alleges that BMO maintained pay policies for variable compensation employees that govern, among other things, the calculation and payment of the compensation each employee is entitled to receive for Statutory Pay ("Pay Policies"). Mr. Cheetham alleges that, despite BMO's promises to the Class Members that it would pay Statutory Pay as required by the *CLC*, BMO has not done so, and its Pay Policies violate:

a) s. 184.01 of the *CLC*, which requires that employees be paid additional vacation pay above and beyond their regular pay;

b) s. 196 of the *CLC*, which requires that employees be paid additional holiday pay above and beyond their regular pay; and

c) s. 168(1) of the *CLC*, which provides that no employee may opt out of a benefit in the *CLC* unless the employee receives a greater benefit.

[11] The Fresh as Amended Notice of Civil Claim (the "FANOCC") claims damages for Class Members who were underpaid Statutory Pay, together with costs and interest.

Response to Civil Claim

[12] Throughout the proposed Class Period, the compensation structure for PWCs and MSs was defined by the terms of their offer letters ("Offer Letters"), and, in some cases, by a compensation plan specific to the PWC or MS roles ("Compensation Plans").

[13] The Compensation Plans set out the types of variable compensation available to the employee, the eligibility criteria used to calculate the type of variable compensation, and any base pay. Some Compensation Plans also referenced vacation and/or holiday pay. While the terms, if any, relating to Statutory Pay varied

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for PWCs and MSs, and as between the two, they generally provided that these amounts were included in the payout for variable, and in some cases base compensation.

[14] Throughout the proposed Class Period, the Compensation Plans were revised periodically, and changes were communicated directly to employees, or published on BMO's intranet.

[15] At all material times, the Compensation Plans provided that BMO could unilaterally amend, suspend, withdraw or terminate all or part of their terms at any time, with or without notice. BMO had discretion to make case-by-case exceptions to the Compensation Plans. BMO was also permitted to "claw back" or reverse variable compensation previously paid to employees where they engaged in misconduct, or when the business they generated was not ultimately consummated.

[16] As with the Compensation Plans, the PWC and MS Offer Letters differ, and changed throughout the Class Period. In many cases, PWCs and MSs have transitioned between roles within BMO, resulting in individuals receiving multiple Offer Letters and/or Compensation Plans over the course of their employment and throughout the Class Period.

The Certification Proceedings

[17] As set out, the class proceeding for which Mr. Cheetham sought certification asserts that the *CLC* Statutory Pay requirements formed part of the employment contracts of each Class Member, through express incorporation into the compensation plans for both PWCs and MSs, and that BMO breached the contractual standards for vacation pay and, until at least 2016, if not later, for holiday pay, by treating the Class Members' variable compensation as inclusive of these amounts.

[18] The certification judge rendered two decisions with respect to the certification of this class action.

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First Decision

[19] The certification judge's first decision was released on July 28, 2023, and is cited at *Cheetham v. Bank of Montreal*, 2023 BCSC 1319 (the "First Decision"). The terms of Mr. Cheetham's PWC employment contract were contained in a May 3, 2012 offer letter, and a Private Wealth Consultant Total Cash Compensation Program ("PWC Plan") that was attached to his Offer Letter (collectively referred to as the "Employment Contract").

[20] Under the PWC Plan, Mr. Cheetham's compensation consisted of an annual base salary plus variable compensation in the form of commissions and performance bonuses. The variable compensation portion of Mr. Cheetham's employment income was significant, and, per the PWC Plan, it was inclusive of Statutory Pay.

[21] Mr. Cheetham left BMO on July 19, 2017. In November of that year, he wrote to BMO asserting that there had been an oversight with respect to the Statutory Pay he was owed during his employment as a PWC. BMO responded that his Employment Contract provided for total compensation inclusive of Statutory Pay. BMO acknowledged its commitment to adhere to the *CLC*, stating that, the "terms of your employment agreement, our policy on compensation and our practice adhere to the applicable labour legislation."

[22] In about March 2018, Mr. Cheetham filed a formal complaint under the *CLC*, alleging that he had not received the vacation pay to which he was entitled. He withdrew his complaint before it was adjudicated.

[23] In February 2020, Mr. Cheetham commenced this class proceeding and sought certification.

[24] BMO opposed certification. Mr. Cheetham filed an Amended Notice of Civil Claim [ANCC] on February 22, 2022, in which he alleged that the requirement to pay Statutory Pay formed part of the employment contracts of Variable Compensation Employees.

[25] Mr. Cheetham claimed damages for breach of contract and breach of the duty of good faith. He alleged that:

a) the requirement to pay Statutory Pay under the *CLC* is part of the employment contracts of BMO's Variable Compensation Employees;

b) BMO systematically underpaid Variable Compensation Employees their Statutory Pay;

c) pursuant to the employment contracts, BMO was required to, but failed to pay, the Class Members' holiday pay based on their total compensation (base salary and variable compensation);

d) pursuant to the employment contracts, BMO was required to, but failed to pay, the Class Members' vacation pay in accordance with the *CLC*;

e) BMO failed to keep required records under s. 24 of the *Canada Labour Standards Regulations*, CRC, c. 986 [*CLC Regulations*], to show that it paid vacation pay in accordance with s. 184 of the *CLC*;

f) BMO has maintained and implemented an implied or explicit policy of not paying the full statutory vacation pay to PWCs and MSs, despite a contractual commitment to do so;

g) BMO violated its duty of good faith to the Class Members by failing to properly calculate their Statutory Pay; and

h) BMO hid its non-compliance with the *CLC* and its contracts of employment, advising employees that its calculations were correct.

[26] BMO does not suggest on appeal that the certification judge inaccurately set out the applicable law in the First Decision; rather, it says that she misapplied it.

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Did the Pleadings Disclose a Cause of Action Under s. 4(1)(a) of the CPA?

Claim in Breach of Contract

[27] At paragraphs 59–63 of the First Decision, the certification judge considered whether the pleading disclosed a claim in breach of contract that would satisfy s. 4(1)(a) of the *CPA*. She concluded that it did, accepting Mr. Cheetham's argument that he was not alleging a free-standing cause of action for breach of the *CLC*, a claim that is barred by this Court's decision in *Macaraeg v. E Care Contact Centres Ltd.*, 2008 BCCA 182, leave to appeal ref'd [2008] S.C.C.A. No. 293. The certification judge distinguished *Macaraeg* on the basis that Mr. Cheetham asserted that BMO specifically incorporated Statutory Pay obligations under the *CLC* into the Class Members' employment contracts.

[28] The certification judge also rejected BMO's argument that the breach of contract claim did not satisfy the requirements of s. 4(1)(a): First Decision at para. 95. BMO submitted that it cannot be in breach of contract when it did the very thing the Compensation Plans provided for—include Statutory Pay within variable compensation.

[29] The certification judge concluded that BMO was wrong in law. She noted that the presence of seemingly contradictory contractual provisions does not mean that the claim is bound to fail: First Decision at paras. 96–98. She determined that the issue raised by BMO went to the merits of the Class Action, which was not the issue on a certification application, but was a matter for determination at a common issues trial.

[30] Finally, the certification judge determined that there was "ample basis" in the pleadings, given the required generous reading on a certification application, to find that Mr. Cheetham adequately pleaded the contract and the terms that were alleged to have been breached: at paras. 98, 100–101 and 135.

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Claim in Breach of Duty of Good Faith

[31] Mr. Cheetham alleged that BMO breached the duty of good faith in contract. At paragraphs 103–106 of the First Decision, citing *Bhasin v. Hrynew*, 2014 SCC 71 at para. 93, the certification judge said that there was no independent cause of action for the breach of the duty of good faith; it is a duty of honest performance of matters directly linked to the contract, applicable to all contracting parties: *Bhasin* at para. 73.

[32] The certification judge agreed with BMO that Mr. Cheetham had not pleaded sufficient facts to support a claim for breach of a duty of good faith. First, she said that a bad faith claim based on breach of the statutory obligations was bound to fail under the reasoning in *Macaraeg* and other cases. Second, the plaintiff had not connected the assertion that BMO's hiding of its non-compliance amounted to a breach of a duty of good faith.

[33] Even if hiding non-compliance could support an allegation of breach of the duty of good faith, the certification judge found that it was bound to fail based on the pleadings: First Decision at paras. 122–124. The certification judge also found that the assertion and supporting pleadings suggesting that BMO told employees that its calculations of Statutory Pay were "correct" could not ground a claim for a breach of the duty of good faith: First Decision at paras. 125–126.

[34] While the certification judge determined that the pleadings, as they then stood, were insufficient to support a claim for breach of the duty of good faith, she permitted Mr. Cheetham to amend his pleadings. She suggested an alternative formulation that would be capable of certification, bearing in mind the developing jurisprudence around the duty of good faith: at paras. 131–134 and 136.

***Is there an Identifiable Class under s. 4(1)(b) of the CPA*?**

[35] BMO did not challenge the certification judge's findings that the proposed class definition, as amended by the plaintiff, set out an identifiable class of two or more persons.

[36] However, it disputed the start date for the claim period. It submitted that an appropriate start date was 2014 because there was no basis in fact that the issues could be resolved on a class-wide basis between 2010–2013, as BMO did not have the relevant payroll records before 2014. The certification judge determined that this issue was more appropriately addressed under the common issues and preferability analysis: First Decision at para. 141. She said that there was some uncertainty about when BMO implemented its Statutory Pay policy, but there was some evidence that it may have been implemented for PWCs and MSs as early as 2009: at para. 142.

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Do the Claims Raise Common Issues Under s. 4(1)(c) of the CPA?

[37] Mr. Cheetham set out five common issues that he sought to have certified:

> 1. Were the requirements to pay [Statutory Pay] under Part III of the [*CLC*] part of the employment contracts of the [C]lass [M]embers;
> 2. Were the [C]lass [M]embers underpaid and are thus owed Vacation Pay in respect of their total compensation in accordance with the *CLC* by [BMO];
> 3. Were the [C]lass [M]embers underpaid and are thus owed General Holiday Pay in respect of their total compensation in accordance with [the *CLC*] by [BMO];
> 4. Whether [BMO] failed to keep records in accordance with s. 252(1) of the [*CLC*] and s. 24 of the *CLC* Regulations;
> 5. If liability is established, are aggregate damages available;
>
> i. If the answer is yes, what is the quantum of aggregate damages owed to Class Members or any part thereof.

[38] BMO submitted that all five of Mr. Cheetham's common issues failed to meet the requirements of s. 4(1)(c) of the *CPA.*

[39] The certification judge addressed each common issue in turn.

Common Issue 1: Were the requirements to pay [Statutory Pay] under Part III of the [CLC] part of the employment contracts of the [C]lass [M]embers?

[40] BMO submitted that there was no common employment contract among Class Members and that the PWCs and MSs contracts shared no commonality.

At paragraph 162 of the First Decision, the certification judge recognized the general reluctance of courts to certify common contract-based issues unless they are based on a uniform contract, citing this Court's decision in *Lam v. University of British Columbia*, 2010 BCCA 325, at paras. 55–58, leave to appeal to SCC ref'd [2020] S.C.C.A. No. 345 and *Asp v. Boughton Law Corporation*, 2014 BCSC 1124 at para. 59.

[41] The certification judge found that Mr. Cheetham's reliance on s. 168(1) of the *CLC* to support his claim that this issue could be determined on a class-wide basis was inconsistent with his position that his claim was for breach of express contractual terms, and was contrary to *Macaraeg*: First Decision at para. 164.

[42] The certification judge determined that the class definition was specific to the roles of PWCs and MSs and that there was some basis in fact, particularly in the first affidavit of David Keith, BMO's Managing Director for Employee Relations, that, during the class period, BMO used standardized compensation plans for the compensation structure for both roles—the PWC Plan and the MS Plan; the compensation plans for each role were referenced in Offer Letters setting out an employee's compensation; and revisions to the plans were communicated to the employees directly, or by publication on BMO's intranet: First Decision at paras. 166–168.

[43] The certification judge separately reviewed the evidence about the MS Plans and the PWC Plans: First Decision at paras. 170–181.

[44] The certification judge concluded that the references to Statutory Pay in the MS Plans referred to the *CLC*: First Decision at paras. 171–172. She found that there was some basis in fact to conclude that, for the years 2013 to 2018, BMO had contractually agreed with the MSs that it would pay them Statutory Pay, but she was unable to reach this conclusion from 2019 onwards: First Decision at paras. 182–184.

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[45] The certification judge concluded that there was some basis in fact to find that the PWC Plans formed part of the employment contracts for PWCs and that they were revised periodically. She also found that the evidence suggested relevant similarities in the PWC Plans in 2009, 2010, 2011 and 2016. She relied on an email sent to all PWCs in August 2017, which said that the Total Compensation Program applicable to all PWCs, effective fiscal 2009, was inclusive of Statutory Pay: First Decision at paras. 185–199.

[46] The certification judge concluded that, despite variations in how Statutory Pay was calculated for PWCs and MSs, there was some evidence that employees within a particular role were impacted by the same policies and shared the same compensation structure during the relevant period. While there may have been additional contractual provisions contained in individual Offer Letters or other communications with BMO, there was some evidence that all PWCs and MSs were treated the same regarding the issues of Statutory Pay; it was included in their total compensation: First Decision at paras. 201–202.

[47] The certification judge also concluded that, while individual Offer Letters may have varied between employees, there was some basis in fact that the Statutory Pay policy was universal and that all PWCs and MSs were treated the same with respect to it. Further, while the Compensation Plans incorporated into the Offer Letters may have said different things about the *CLC* and Statutory Pay, and had changed over time, that did not prevent a conclusion that a common issue existed in relation to the question of whether BMO contractually agreed to pay Statutory Pay in accordance with Part III of the *CLC* for each role, during certain periods of time: First Decision at paras. 204–208.

[48] However, the certification judge determined that the evidence supported this common issue for only some of the years during the class period, and that the variations between the PWCs’ and MSs’ employment contracts may vary between the two roles. As a result, she bifurcated common issue 1 and made some adjustments to the class period: First Decision at paras. 209–210.

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[49] As to the wording of common issue 1, the certification judge found it was too broad, as it did not allow for the differences between the PWC and MS Compensation Plans. She suggested reframing the common issue to address that concern and granted leave to Mr. Cheetham to propose revisions: First Decision at paras. 216–224.

Common Issues 2 and 3: Were the [C]lass [M]embers underpaid and thus owed Vacation Pay and General Holiday Pay in respect of their total compensation in accordance with the CLC by [BMO]?

[50] Mr. Cheetham argued that BMO breached its contractual obligations to PWCs and MSs by not paying Statutory Pay at all, or by miscalculating the payments.

[51] BMO argued that common issues 2 and 3 would not significantly advance the litigation; would be dependent on individual findings of fact; could not be resolved on a class-wide basis before 2014 due to insufficient records; and that there was no basis in fact that a common issue relating to holiday pay from and after 2016 actually exists.

[52] The certification judge accepted that, if the common issues trial on common issue 1 determined that the Class Members' employment contracts incorporated Statutory Pay, the court could determine whether BMO fulfilled its contractual duties or duties of good faith in the way it calculated the Class Members' Statutory Pay, significantly advancing the litigation. She concluded that there was some evidence that BMO subsumed Statutory Pay into the total compensation paid to the Class Members during the class period which would breach BMO's contractual commitment to pay Statutory Pay. The judge also found that there was some evidence that BMO used an incorrect formula for *CLC* vacation pay: First Decision at paras. 235–241.

[53] However, the judge concluded that common issues 2 and 3, as drafted, were inadequate for several reasons: First Decision at paras. 242–246.

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[54] At paragraphs 247–249, the certification judge said that the real question was whether BMO's methodology used in calculating Statutory Pay violated BMO's contractual obligations to the Class Members. She suggested wording and granted Mr. Cheetham leave to resubmit common issues 2 and 3. She permitted BMO to provide submissions on the revised common issues.

Common Issues 4 and 5: Did [BMO] fail to keep records in accordance with s. 252(1) of the [CLC] and s. 24 of the CLC Regulations? If liability is established, are aggregate damages available? If aggregate damages are available, what is the quantum?

[55] With respect to common issue 4, the certification judge concluded that Mr. Cheetham had not pled, and had not asserted at the hearing, that keeping required records under s. 252(1) of the *CLC* or s. 24 of the *CLC Regulations* was incorporated as a term of the Class Members' employment contracts. Further, the proposed common issue did not materially advance the issues as the pleadings did not seek any relief because of BMO's failure to keep records. The judge concluded that this claim could not be saved by redrafting: First Decision at paras. 256–259.

[56] With respect to common issue 5, the availability and quantum of aggregate damages, the certification judge agreed with BMO that both of Mr. Cheetham's theories of damages required individual assessments. Additional individual issues could also arise.

[57] As a result, the certification judge determined that this issue 5 was not suitable for certification under s. 4(1)(c) of the *CPA.*

Is a Class Action the Preferable Procedure Under s. 4(1)(d) of the CPA?

[58] The certification judge set out the plaintiff's obligation to demonstrate that a class proceeding is the preferable procedure under s. 4(1)(d) of the *CPA*.

[59] The certification judge found that, once common issues 1–3 were revised, as suggested in her First Decision, they could significantly advance the litigation: First Decision at paras. 284–285. She found that common issues 1–3 could narrow

the issues for the individual issues at trial. As a result, s. 4(2)(a) weighed heavily in favour of certification: First Decision at paras. 285 and 289.

[60] The certification judge concluded that s. 4(2)(b) of the *CPA* did not weigh against certification because the evidence did not establish that there were significant numbers who wished to bring separate lawsuits. Individuals who wished to do so, or those with large claims for Statutory Pay, could opt out of the class proceeding: First Decision at paras. 290–291.

[61] The certification judge reached the same conclusion with respect to s. 4(2)(c) of the *CPA* as there was no evidence that there were other individual or class proceedings in Canada involving the same issues. She found a basis in fact that there are many Class Members who would prefer proceeding on a class basis over filing complaints under the *CLC*: First Decision at paras. 293–294.

[62] Turning to the factors set out in s. 4(2)(d) and (e) of the *CPA*, the certification judge concluded that the two alternative processes suggested by BMO—claims under the *CLC* complaint process or individual court actions in provincial or supreme court—did not meet the goals of judicial economy, behaviour modification, and access to justice: First Decision at paras. 295–298. She also found that the *CLC* adjudicator lacked jurisdiction for some issues: First Decision at paras. 309–312.

[63] The certification judge also considered, and rejected, the feasibility of individual actions: First Decision at paras. 314–316.

[64] She concluded that the proposed class proceeding met the preferability analysis as it related to behaviour modification and access to justice: First Decision at para. 318.

Is there an Adequate Representative Plaintiff under s. (4)(1)(e) of the CPA?

[65] BMO did not challenge the certification judge's finding that Mr. Cheetham was an adequate representative. She concluded that the litigation plan was sufficient at

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that stage of the proceeding and met the requirements of s. 4(1)(e)(ii) of the *CPA*: at paras. 322–325.

Second Decision

[66] Following the First Decision, Mr. Cheetham revised Common Issues #1–3 (which he reformulated as Common Issues #1–4), and the pleadings. After the certification judge identified technical defects in his materials, Mr. Cheetham filed an amended notice of application seeking certification on February 2, 2024. BMO made written submissions on both rounds of revisions.

[67] On March 12, 2024, the certification judge released a second decision on the proposed revisions cited as *Cheetham v. Bank of Montreal*, 2024 BCSC 419 (the "Second Decision"). She concluded that Mr. Cheetham's proposed pleading revisions satisfied s. 4(1)(a) of the *CPA* and the revised Common Issues #1–4 satisfied s. 4(1)(c). She certified the class proceeding, subject to Mr. Cheetham filing an amended pleading, which he did on March 25, 2024, as the FANOCC.

<u>Issues on Appeal</u>

[68] BMO submits that the certification judge erred in finding that:

a) the pleadings disclose a cause of action under s. 4(1)(a) of the *CPA*;

b) there are common issues that satisfy s. 4(1)(c) of the *CPA*;

c) a class action is the preferable procedure under s. 4(1)(d) of the *CPA*; and

d) a class period that begins before 2014 can meet ss. 4(1)(c)-(d) of the *CPA*.

[69] For the reasons that follow, I would allow the appeal in part. I will deal with each of the issues on appeal in turn.

Did the pleadings disclose a cause of action under s. 4(1)(a) of the *CPA?*

Standard of Review

[70] It is well-settled that the question of whether pleadings disclose a cause of action under s. 4(1)(a) of the *CPA* is a pure question of law reviewable for correctness: *Situmorang v. Google, LLC*, 2024 BCCA 9 at paras. 50–52.

[71] As that standard applies here, assuming the facts pleaded by Mr. Cheetham to be true, the judge must correctly determine whether those facts arguably disclose a cause of action in breach of contract and breach of the duty of good faith. These are questions of law.

The Arguments on Appeal

Is there a reasonable basis in the pleadings for a claim for breach of contract?

[72] BMO submits that there is no reasonable claim under s. 4(1)(a) of the *CPA* for breach of contract. Whether the FANOCC "discloses a cause of action" in breach of contract as required by s. 4(1)(a) of the *CPA* is assessed on the same standard that applies to a motion to strike pleadings under R. 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 169/2009.

[73] As Justice Griffin wrote in *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198:

> [56] The question under R. 9-5(1)(a) and s. 4(1)(a) of the *CPA* is whether it is "plain and obvious", based on the respondent's Notice of Civil Claim alone, assuming the facts as pleaded are true, that the pleading discloses no reasonable cause of action. Another way of putting it is whether the claim as pleaded has "no reasonable prospect of success". The novelty or complexity of a claim is not a basis for striking it, unless it is plainly doomed to fail: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980 [*Hunt*]; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at paras. 18–19 [*Atlantic Lottery*]; *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142 at paras. 48–55 [*H.M.B. Holdings*].

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[74] The court should read the claim generously and accommodate inadequacies that are the result of drafting deficiencies when assessing its sufficiency: *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 22. Evidence may not be considered in determining whether the cause of action requirement in s. 4(1)(a) of the *CPA* is met: *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para. 34.

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[75] No free-standing cause of action exists for breach of the *CLC*. In *Macaraeg*, a case dealing with overtime pay, this Court held that unpaid benefits under B.C.'s *Employment Standards Act*, R.S.B.C. c. 13 [*ESA*], could not be claimed in a civil action, either directly or on the basis that employment standards benefits were an implied term under an employment contract. The Court reached that conclusion because the *ESA*—like the *CLC*—creates a comprehensive remedial regime for employment standards complaints. In such cases, an employee "is obliged to rely exclusively on the enforcement mechanism in the legislation": at paras. 73–78, 84–97 and 100–103.

[76] *Giza v. Sechelt School Bus Service Ltd.*, 2012 BCCA 18 at para. 52 reached a similar conclusion as it related to *ESA* statutory holiday pay. This Court held that *Macaraeg* barred the plaintiff in this case from bringing a free-standing civil action for statutorily entitled holiday pay.

[77] Mr. Cheetham did not dispute that there is no free-standing cause of action for breach of the *CLC.* The certification judge agreed and said that "on the strength of *Macaraeg*, there is no avenue in BC for a finding that the provisions of the *CLC* are implied into the employment contracts as a matter of law": First Decision at para. 89.

[78] However, the certification judge distinguished *Macaraeg* on the basis that, here, Mr. Cheetham pled that the *CLC* Statutory Pay requirements were "explicitly incorporated into the contracts as a matter of fact", and that a claim for breach of contract was therefore disclosed: First Decision at para. 90.

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[79] BMO submits that this was an error in law. Based on the FANOCC, BMO argues that it could not have breached its employment contracts by including Statutory Pay in variable compensation. BMO submits that the FANOCC pleads that the same contractual documents, the Compensation Plans, that explicitly incorporate the *CLC* requirements into the employment contracts for PWCs and MSs, also explicitly permit BMO to include vacation and holiday pay within the variable compensation.

[80] BMO argues that, as a result, there is no cause of action for breach of contract, because the contracts authorized BMO to do the very thing that Mr. Cheetham pleads to be the breach. BMO submits that the pleaded cause of action is barred by *Macaraeg* on the basis that it is, at its core, centered on a free-standing breach of the *CLC*.

[81] I disagree and would conclude that the certification judge did not err in law in the circumstances of this case.

[82] It is fundamental to a pleading for breach of contract that the contract has in fact been breached: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 91, per Karakatsanis J. (dissenting in part on other grounds).

[83] For this element of a pleading to be made out, a plaintiff cannot simply plead the legal conclusion that a contract has been breached. As this Court has said, the plaintiff must plead the material facts that support the breach: *Basyal v. Mac's Convenience Stores Inc.,* 2018 BCCA 235 at paras. 39–43.

[84] The material facts pled in the FANOCC are that the contracts created by certain Compensation Plans promise to pay PWCs and MSs their *CLC* minimum entitlements to Statutory Pay, and that this would be done through the inclusion of Statutory Pay in their variable or total compensation. In particular:

> 8. … The Pay Policies govern, among other things, the calculation and payment of compensation each Variable Compensation Employee is entitled to receive in connection with contractually and statutorily owed vacation pay ("Vacation Pay"). Since on or around 2009, BMO has indicated to its Variable

> Compensation Employees through the Pay Policies that their compensation is inclusive of Vacation Pay… Holiday Pay… .
>
> …
>
> 12. Since on or around 2009 until on or around 2011, the Pay Policy for Private Wealth Consultants stated that "your total cash compensation consisting of Base pay, Commission and BHPB Year-end Performance Bonus includes the statutory holiday pay, overtime pay and vacation pay to which you may be entitled for that period." Following 2011, the Pay Policy makes no mention of Vacation or Holiday Pay.
>
> 13. The Pay Policy for Mortgage Specialists regularly stated that Vacation Pay and Holiday Pay are "included in the payout for base pay and the variable incentives" paid to Mortgage Specialists.
>
> [Emphasis added.]

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[85] Mr. Cheetham then pleads the legal conclusion that BMO "breached the contract of employment with the members of the Proposed Class.": FANOCC at paras. 40(e) (and 34, 36). The material facts Mr. Cheetham pleads in support of the breach are that "[p]rior to 2016, BMO treated the variable compensation of Variable Compensation Employees as inclusive of Holiday Pay", and that "BMO has treated and continues to treat the variable compensation of [PWCs and MSs] as inclusive of vacation pay".

[86] In essence, Mr. Cheetham pleads that BMO did not do what it contractually committed to do: include his entitlement to Statutory Pay in his compensation based on the entirety of his variable compensation.

[87] BMO argues that the "breach" of contract pleaded by Mr. Cheetham is that BMO carried out the express contractual terms it had put in place.

[88] I am of the view that this misreads the pleadings and the question that was certified in the First Decision.

[89] The FANOCC pleads that the same contractual documents, the Compensation Plans, explicitly incorporate the *CLC* requirements into the employment contracts for PWCs and MSs, while explicitly permitting BMO to include Statutory Pay within the variable compensation. The pleaded cause of action cannot be characterized as a free-standing claim with respect to a breach of the *CLC*—it

alleges a breach of an express contractual term (the calculation of Statutory Pay within variable compensation).

[90] If the *only* breach disclosed by the pleadings was that the contracts themselves, by allowing for the inclusion of Statutory Pay in variable compensation, violated the *CLC,* then this claim is barred by *Macaraeg.* But the contracts in this case did more than include Statutory Pay as part of variable compensation—they did so while also promising that such pay would be paid *in accordance with* the *CLC.*

[91] The certification judge rejected the argument that BMO made on the point of *Macaraeg*. She did so on the basis that the plaintiff merely pleaded "inconsistent provisions in [the] contract[s] — or ambiguities" which needed to be interpreted at trial, in "that one part of the employment contract promises that the workers will receive what they are owed under the *CLC*; the other part (either directly or indirectly through the practices of BMO) allows for an underpayment": First Decision at paras. 96–97.

[92] On reviewing a notice of claim in a class action proceeding, the certification judge is required to read the pleading, in this case the FANOCC, "as a whole when analyzing whether it is plain and obvious the claims are bound to fail": *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at para. 39.

[93] While the FANOCC does not plead inconsistent provisions or allege any ambiguities, I am satisfied that it pleads the miscalculation of Statutory Pay—i.e., one that is calculated on the base salary alone: FANOCC at para. 34. A potential miscalculation of an amount payable under contract is an issue to be decided at trial.

[94] The certification judge considered the paragraphs in the FANOCC that plead that the variable compensation contracts were breached because they included

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vacation and holiday pay calculated on base pay instead of on total compensation through their practice of including both in variable compensation:

> 18. …[A]s a result of BMO creating and implementing the aspects of the Pay Policies governing Holiday Pay, these employees and former employees have been deprived of significant compensation.
>
> …
>
> 32. …[A]s a result of BMO creating and implementing the aspects of the Pay Policies governing Vacation Pay, these employees and former employees have been deprived of significant compensation.
>
> …
>
> 39. Pursuant to section 184.01 of the *CLC*, employees must be paid additional Vacation Pay above and beyond their regular pay. The Pay Policies violate this requirement.
>
> 40. Pursuant to section 196 of the *CLC*, employees must be paid additional Holiday Pay above and beyond their regular pay. Until at least 2016, if not later, the Pay Policies violated this requirement.

[95] It is the Pay Policies themselves, incorporated into the employment contracts, that are alleged to be in breach of the *CLC*. The Pay Policies can, on the one hand incorporate (as terms of the contract), and on the other, violate (through the inclusion of Statutory Pay in variable compensation), the *CLC* provisions. This includes, for instance, s. 168(1) of the *CLC,* which renders contracts which provide for less favourable benefits than the *CLC* ineffective.

[96] I would not accede to this ground of appeal as it relates to the certification of Mr. Cheetham's breach of contract claim.

Is there a reasonable basis in the pleadings for a breach of a duty of good faith?

[97] The certification judge certified a claim based on a breach of the duty of good faith.

[98] Paragraph 34 of the FANOCC sets out the plaintiff's allegation with respect to the duty of good faith:

> 34. BMO contracted with the Variable Compensation Employees to comply with the CLC requirements for [Statutory Pay]. BMO from time to time issued statements in its Pay Policies that asserted or re-affirmed its

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> commitment to ensuring compliance with its statutory obligations under the CLC. BMO asserted that the calculations it made for [Statutory Pay] were correct, such that BMO had complied with the contractual obligations that it had agreed to fulfill, and the employees were entitled to rely on the assertions by their employer who was a large and respected financial institution and had access to legal resources to understand the correct calculations. When BMO made the assertion that it had correctly calculated the employees' pay, it knew or ought to have known that the calculations were incorrect, and therefore was not acting in good faith when it made those assertions.

[99] There are several difficulties with this pleading. First, the pleading that BMO "ought to have known" that its Statutory Pay calculations were incorrect is an allegation of negligence, not of bad faith. To amount to bad faith, an employer's conduct must be more than sloppy or careless. There must be some level of intent, malice or blatant disregard for the employee: *Porcupine Opportunities Program Inc. v. Cooper*, 2020 SKCA 33 at para. 33 and, to similar effect, *Magnan v. Brandt Tractor Ltd.*, 2008 ABCA 345 at paras. 27–29. Although both of those cases arose in the context of a claim for increased damages for bad faith in the manner in which the plaintiffs were dismissed, misunderstandings as to legal obligations did not amount to bad faith in either context.

[100] I agree with Justice Belobaba's comments in *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 75, at paras. 88–90, aff'd, 2022 ONCA 115:

> [90] I can find on the evidence that CIBC was careless and indifferent, indeed negligent, about its obligation to comply with the requirements of the [*CLC*]. I can also find that the bank should have known better. It is a multi-billion-dollar financial institution with an able legal staff that can easily advise on the requirements of federal labour law. For some reason this didn't happen. The bank dropped the ball, to be sure. But I cannot find on the evidence before me that the defendant bank lied or knowingly misled its employees about the legality of its overtime policies. The "breach of good faith" allegation does not succeed.

[101] Further, the pleading that BMO "knew" that its Statutory Pay calculations were incorrect lacks material facts as to how BMO lied to or intentionally deceived the Class Members. The *CLC* Referee in *Lavin v. Bank of Montreal,* 2015 CanLII 8423 (C.A.L.A.) approved the calculations that are in issue. BMO would have no reason to know they were incorrect as alleged.

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[102] The certification judge ordered that "the claim for breach of the duty of good faith must be amended as per paras. 126 through 134 of these Reasons, in order to satisfy the requirement of s. 4(1)(a)": First Decision at para. 330. In the order granted after application, the certification judge granted Mr. Cheetham leave to further amend the ANCC for this purpose. The certification judge approved the amendment: Second Decision at paras. 18 and 33–34.

[103] In my view, the amendments do not assist and the pleading does not establish a reasonable basis for a claim in breach of the duty of good faith. I would accede to this ground of appeal.

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Were There Common Issues That Satisfy s. 4(1)(c) of the *CPA*?

[104] BMO asserts that the certification judge erred in concluding that the following common issues satisfy s. 4(1)(c) of the *CPA*:

> 1. Were the requirements to pay [Statutory Pay] under Part III of the [*CLC*] part of the employment contracts of the [C]lass [M]embers?
> 2. Were the [C]lass [M]embers underpaid and are thus owed Vacation Pay in respect of their total compensation in accordance with the *CLC* by [BMO]?
> 3. Were the [C]lass [M]embers underpaid and are thus owed General Holiday Pay in respect of their total compensation in accordance with [the *CLC*] by [BMO]?
> 4. Whether [BMO] failed to keep records in accordance with s. 252(1) of the [*CLC*] and s. 24 of the *CLC* Regulations?

Standard of Review

[105] The standard of review applicable to other certification issues depends on whether the judge's impugned findings are rooted in an exercise of discretion. When such findings are discretionary in nature, they are reviewed on a highly deferential standard: *NHK Spring Co. Ltd. v. Cheung*, 2024 BCCA 236 at para. 59, citing *Jiang v. Peoples Trust Company,* 2017 BCCA 119 at para. 37.

[106] However, where the impugned findings of the certification judge are rooted in a question of law, the applicable standard of review is correctness: *NHK Spring Co.* at para. 59.

[107] Apart from whether the pleadings disclose a cause of action, the other challenged parts of the certification order are all discretionary decisions attracting a deferential standard.

Common Issues 1–2

[108] Section 4(1)(c) of the *CPA* states that for a class proceeding to be certified, the claims of the class members must raise common issues, whether or not those common issues predominate over issues affecting only individual members.

[109] BMO argues that the certification judge erred in law by not adequately addressing the potential for conflicts among the Class Members in common issues 1–2, as required by s. 4(1)(c). In particular, BMO submits that the certification judge did not adequately address the principle that, for a question to be common, success for one member must not result in failure for another: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45.

[110] The certification judge acknowledged the differences that exist between the situations of the PWCs and the MSs, despite sharing common issues: First Decision at paras. 201, 204, 209. She concluded that "variations between the PWC employment contracts and MS employment contracts means that while they may share the same overarching common issue, the answer may vary as between the two employment roles": First Decision at para. 209, and ultimately, that there was no conflict: First Decision at para. 223. These findings are consistent with the Supreme Court of Canada's decision in *Vivendi*: that a common question can exist even if the answer given to the question might vary from one member of the class to another (at para. 45).

[111] BMO argues that the certification judge did not consider that "success for some class members will mean failure for others <u>if it is based on language which is present in only some of the plans</u>": Appellant Factum at para. 39 [emphasis added]. But the *possibility* for conflict does not mean that success for one member necessarily results in the failure for another, as laid out in *Vivendi.* Indeed, conflicts may emerge between group members and those can be addressed at that time:

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Burnell v. Canada (Fisheries and Oceans), 2014 BCSC 1071 at paras. 56–57, citing *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401 at para. 59, 2004 CanLII 45444 (Ont. C.A.) and *Rumley v. British Columbia*, 2001 SCC 69. The certification judge's failure to apply the *Vivendi* principle—that success for some class members means the failure for others—was therefore not an error in law.

[112] BMO also submits that the certification judge misconceived the evidence before her in concluding that the Offer Letters shared the underlying thread of the Statutory Pay policy, and that all PWCs and MSs were treated the same with respect to the issue of Statutory Pay. BMO points to the lack of evidence provided by Mr. Cheetham on this issue.

[113] In reaching these conclusions, the certification judge analyzed the evidence before her. She relied on the evidence of David Keith to find that the compensation plans for each role were referenced in Offer Letters setting out the employee's compensation, and that BMO used standardized compensation plans for the compensation structure for both roles: First Decision at paras. 166–167. She went on to independently analyze the MS and PWC plans and concluded that both shared the common issue of the treatment of Statutory Pay: First Decision at paras. 182–184, 195–199 and 201–202. She sufficiently recognized the differences between the PWC Plans and the MS Plans, which is why she suggested bifurcating the issue and adjusting the class period: First Decision at paras. 209–210 and 216–217. I see no legal error and her conclusions are owed deference.

[114] Finally, BMO argues that the certification judge incorrectly relied on its August 2017, post-contractual email, and, in doing so disregarded the principle of contractual interpretation that post-contractual conduct may only be admitted to interpret an ambiguous contract (and only if the ambiguity does not arise from the post-contractual conduct itself): *Wade v. Duck,* 2018 BCCA 176. The certification judge concluded that this email provided "some evidentiary basis that BMO had contracted with all PWCs that it would pay vacation pay under Part III of the *CLC*, from 2009 onwards to at least 2017": First Decision at para. 197.

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[115] This finding, as is the case with the certification analysis generally, is not an interpretation of the contract on its merits: *Hollick v. Toronto (City),* 2001 SCC 68 at para. 16. Before determining the admissibility of the August 2017 email to interpret a contract, a court would have to determine whether the contract was ambiguous and where the post-contractual conduct sits within the factual matrix: *Wade* at para. 31. This was not the role of the certification judge. She committed no legal error in raising the August 2017 email as relevant to the discrete issue of certification.

Common Issues 3–4

[116] BMO argues that the certification judge made an error in law in “reformulating” Issues 3–4 to instead ask whether BMO’s “methodology of subsuming the *CLC* [Statutory Pay] into the total compensation payment” was “in breach of a contractual commitment to pay [Statutory Pay]”: First Decision at paras. 237 and 240. The certification judge held that the “question framed in that manner, which focuses on the methodology — rather than individual findings of underpayment — would satisfy the common issues criterion”: First Decision at para. 247. BMO alleges that this reformulation failed to consider whether individual inquiries would be required. But the certification judge was alive to this issue, and indeed, it was one of the questions that she sought to address in ultimately reaching the reformulation: First Decision at paras. 229–230 and 235.

[117] BMO also argues that this reformulation amounted to a breach of the certification judge’s duty of procedural fairness. In the First Decision, the certification judge suggested different formulations of common issues 1–3 that she said would satisfy s. 4(1)(c), and granted the plaintiff leave to amend his pleadings to conform with her reasons. BMO submits that the certification judge did so, on her own initiative, before allowing BMO to make submissions about the reformulations, and that while she later permitted BMO to make submissions on the revisions, doing so served little purpose as she had already decided that her suggested revisions would satisfy s. 4(1)(c).

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[118] The reformulation was a permitted conclusion to the certification judge's analysis of the deficiencies of the inquiry as it stood: *WN Pharmaceuticals Ltd v. Krishnan,* 2023 BCCA 72 at para. 79. While certification judges should proceed with caution when suggesting how a class action pleading might be amended to address the certification judge's concerns, I do not conclude that doing so in this case was a reviewable error.

[119] I would not accede to this ground of appeal.

Is a Class Action the Preferable Procedure Under s. 4(1)(d) of the *CPA*?

[120] BMO argues that, in her preferability analysis under s. 4(1)(d) of the *CPA*, the certification judge erred in ignoring the significance of the individual issues that will remain after the common issues are resolved. BMO asserts that the certification judge did not adequately consider that the individual liability inquiries will go beyond the question of damages and as such, will predominate.

[121] BMO also argues that, beyond the question of damages, the individual issues raise substantive defences to liability, and that the certification judge recognized this by acknowledging that the individual issues "include matters such as the applicable limitation periods…waiver [and] estoppel": First Decision at paras. 273 and 288.

[122] Further, BMO argues that the assessment of damages itself is highly individualized, a fact which it alleges the certification judge failed to adequately consider in her preferability analysis.

[123] The certification judge conducted a sound preferability analysis: First Decision at paras. 280–318. The certification judge acknowledged the existence of the individual issues that will remain after the common issues (as revised) are resolved, and in so doing, considered BMO's arguments about the complexity of the individual issues: First Decision at paras. 280–286. She found that, nonetheless, common issues predominate: First Decision at para. 286. She acknowledged that this is the case despite the existence of remaining issues centered on but not limited to damages: First Decision at para. 288. The balancing of the remaining individual and

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common issues and in determining which issues will predominate is a function of discretion. I see no legal error in her conclusions.

[124] BMO also alleges that the certification judge erred in concluding that a class action was preferable to the alternatives suggested by BMO, such as individual complaints under the *CLC*, individual small claims actions, or fast-tracked litigation. BMO alleges that the certification judge misinterpreted the *CLC* in terms of its limitation period, jurisdiction, and access to justice barriers. BMO also alleges that the certification judge relied on caselaw where other processes were rejected for defects not present in the *CLC* complaint process, thereby misinterpreting the common law.

[125] The certification judge considered the alternatives suggested by BMO: First Decision at paras. 295–318. It was open to her to exercise her discretion in considering the effectiveness of BMO’s proposed alternatives. She found that complaints under the *CLC* would be highly inefficient and limited in terms of process and jurisdiction: First Decision at paras. 305–312. She referred to concerns about limitations in the *CLC* process, including the adjudicator’s jurisdiction, an inability to compel the adjudicator to address system-wide issues, and *CLC* limitation periods, which meant that many Class Members would not be able to access the *CLC* process. She found that the individual litigation option was not feasible for several reasons that she set out: First Decision at paras. 314–318. I see no legal error in the certification judge’s weighing of the alternatives proposed by BMO.

[126] Specifically with respect to the alleged legal error in misinterpreting the caselaw—of course, a case can be meaningfully different in facts from the case at bar while still being informative. BMO did not make submissions on how the defects in these cases meaningfully undermined the certification judge’s reliance on them.

[127] I would not acceded to this ground of appeal.

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Can a Class Action That Begins Before 2014 Meet ss. 4(1)(c)–(d) of the *CPA*?

[128] In one paragraph of its factum, BMO argues that the certification judge did not adequately address the fact that it does not have relevant payroll records from before 2014, and that the lack of records means that the common issues 3 and 4 should not have been certified prior to 2014.

[129] The certification judge acknowledged BMO's submission, that the common issues "cannot be resolved on a class-wide basis for the period prior to 2014, because BMO lacks relevant payroll records from this time": First Decision at para. 228. She suggested that this issue was better dealt with under the preferability analysis. However, she did not specifically address it during her preferability analysis.

[130] BMO did not provide oral submissions on this issue.

[131] I accept that a judge's failure to address relevant matters may constitute a material error justifying appellate intervention: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 125. However, given the brevity of the argument in the factum, and the lack of supplemental oral submissions on the issue, I cannot find that, in this case, the certification judge's failure to address the issue amounted to the type of error inviting appellate intervention. BMO's lack of payroll records before 2014, noted here for the record, can be addressed at the common issues trial.

Disposition

[132] I would allow the appeal in part and set aside the order certifying the breach of a duty of good faith.

“The Honourable Justice MacNaughton”

I AGREE:

“The Honourable Mr. Justice Harris”

I AGREE:

“The Honourable Justice Winteringham”

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