CITATION: Deacon v. Bank of Nova Scotia, 2026 ONSC 1793
COURT FILE NO.: CV-23-00702820-00CP
DATE: 20260331

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
NATHALIE DEACON and GAIL OUELLETTE Plaintiffs	*Odette Soriano*, *Lindsay Scott*, *Paul Davis* and *Sonia Patel* for the Plaintiffs
– and –	
THE BANK OF NOVA SCOTIA Defendant	*Linda Plumpton*, *Lisa Talbot*, *Sarah Whitmore*, *Alexandra Lawrence* and *Michelle Kuah*, for the Defendant
	HEARD: February 2-3, 2026

LEIPER J.

REASONS FOR DECISION

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

Introduction

[1] The plaintiffs, Nathalie Deacon and Gail Ouellette, seek an order certifying this action pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ("*CPA*"). The defendant, Bank of Nova Scotia, submits that the plaintiffs' motion should be dismissed because they have not met the criteria for certification.

Background

[2] The plaintiffs allege that the defendant, Bank of Nova Scotia ("Scotiabank" or the "Bank") breached its obligations under the *Canada Labour Code* R.S.C. 1985, c. L-2 (*CLC*) to pay vacation and statutory holiday pay to its home financing advisors (the "Advisors" or the "HFAs").

[3] Scotiabank HFAs earn commissions and bonuses on their sales of mortgages and insurance policies for Scotiabank. They do not receive a base salary, and thus they do not enjoy time off

with pay. Thus, they must have their vacation and holiday pay added to their compensation, to account for their reduced earnings when they take time off.

[4] The plaintiffs allege that Scotiabank represented to them that it was paying vacation and holiday pay and misleadingly allocated a portion of their commission compensation as vacation and holiday pay. The plaintiffs allege that Scotiabank "reverse engineered" their earned commissions and failed to adequately disclose to them that this was how Scotiabank intended to meet its obligations under the *CLC*.

[5] The plaintiffs allege that because Scotiabank failed to disclose that this was how their remuneration worked, they were denied their vacation and statutory holiday pay and therefore, their pensionable earnings were understated to their detriment.

[6] The plaintiffs assert claims in breach of contract, negligence, breach of trust, and unjust enrichment.

[7] Scotiabank submits that there is no basis in fact to certify this class proceeding. First, a group of HFAs complained to Employment and Social Development Canada ("ESDC"), about Scotiabank's compensation methods. The ESDC decided that the employee complaints about the vacation and holiday pay calculations were unfounded. Scotiabank submits that the rationale and the findings of the ESDC undermine the plaintiffs' motion for certification. Scotiabank submits that class action proceedings are not preferable to the alternatives, which include the ESDC process and individual claims by HFAs.

[8] Scotiabank submits that the evidence tendered on the certification motion reveals that it adequately disclosed its calculations of vacation and holiday pay to the HFAs. Scotiabank relies on its employee earnings statements, commission statements and the annual pay guides which explain the HFA remuneration in detail.

[9] Scotiabank further submits that this action does not raise common issues. Instead, Scotiabank submits that the plaintiffs' claim rests on individual HFAs and their subjective confusion over the bank's pay practices. This will mean the trial process will be overwhelmed by the trial judge having to conduct individual inquiries into the understanding of each HFA. In these circumstances, a class action is not preferable to other available procedures.

[10] As a preliminary matter, Scotiabank sought a ruling on portions of the plaintiffs' expert report (the "de Gray Report") which Scotiabank submits contains inadmissible material.

Issues

[11] The issues on the certification motion are:

a. Should portions of the de Gray Report be found to be inadmissible?

b. Have the plaintiffs established the grounds for certification under the *CPA*?

Summary of Findings

[12] At the hearing of the certification motion, I granted Scotiabank's motion to exclude portions of the de Gray Report. My reasons for doing so are included within the reasons for certification.

[13] I conclude that the plaintiffs have met the test for certification within s. 5 of the *Act*.

The Admissibility of Portions of the de Gray Report

[14] Expert opinion evidence is admissible in a proceeding where it meets the following criteria:

a. The evidence is logically relevant;

b. The evidence is necessary to assist the trier of fact;

c. The evidence is not subject to an exclusionary rule**;** and

d. The expert is properly qualified, meaning that the expert can provide the court with impartial, independent and unbiased evidence.

If these criteria are met, the court will weigh the risks and benefits posed by admitting the evidence to determine whether the evidence should be admitted: *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23, [2015] 2 S.C.R. 182, at paras. 23-24; *R. v. Abbey*, 2017 ONCA 640, 140 O.R. (3d) 40, at para. 48.

[15] Mr. de Gray is an expert in business valuation and damages quantification. Scotiabank does not challenge his credentials. He produced a report, dated August 30, 2024, and was cross-examined on August 11, 2025.

[16] The plaintiffs retained Mr. de Gray to provide an opinion about a methodology that he would use to quantify the financial loss, if any, suffered by the proposed class. In the report, Mr. de Gray lists the material he reviewed to inform his opinion. These materials included:

i. The parties' pleadings;

ii. The *CLC;*

iii. The 2011 Scotiabank Pension Plan; and

iv. Advisor compensation documents including:

a. Paystubs (or "earnings statements"), provided to Advisors, and prepared by Scotiabank's Payroll department;

b. Commission statements, provided to Advisors and prepared by Scotiabank's Mortgage Compensation Analyst (MCA) Compensation team; and

c. Compensation Guides (or the "Compensation Program"), published by Scotiabank to describe the compensation to be paid to Advisors for the applicable fiscal year.

[17] Mr. de Gray's report is divided into seven sections. The defendant submits that para. 4.13 in section 4.0 of the report, contain inadmissible evidence. Sections 1-3 provide an introduction, an executive summary and an overview of the statutory framework under the *CLC*.

[18] I summarize section 4, with impugned section. 4.13 next (with footnotes omitted):

> **4.0 Background -** This section describes the representative plaintiff, the elements of Scotiabank's compensation program, and includes Mr. de Gray's observations of sample commission statements and earnings statements for several of the representative plaintiffs' pay periods. The report sets out his understanding of what is meant by these terms at para. 4.12:
>
> a. "Commission Statements" – the bi-weekly statements that set out the commissions and bonuses earned by the [HFA] during the period. These reports are titled 'Commission and Bonus Summary Report' or 'Summary Statement'.
>
> b. "Earnings Statements" – statements that set out the current pay period compensation amount by type (e.g. commissions, volume bonus, etc.) and year to-date ("YTD") amount earned by the [HFA].
>
> **4.13** We have been provided with sample Commission Statements and Earnings Statements for Ms. Deacon and Ms. Ouellette for several pay periods during the Class Period. Our analysis of the sample statements is detailed in Appendix A. Our summary comments are set out below:
>
> a. The Commission Statements and Earnings Statements provide the payroll data necessary for us to calculate the Financial Loss including, among other things, the Class Member's income by source by pay period, including commission income, volume bonuses, and the amounts Scotiabank attributed to Vacation Pay and Holiday Pay amounts. Our review of the Commission Statements and Earnings Statements supports our conclusion that data is available in Scotiabank's records to prepare the Financial Loss calculations for the Class.
>
> b. Comparing the presentation of HFA compensation between the Commission Statements and Earnings Statements, we note:
>
> - The Commission Statements either: (i) make no reference to Vacation Pay and Holiday Pay; or, (ii) report a total 'gross' commission

amount payable to the HFA from which Vacation Pay and Holiday Pay are deducted (not added) to arrive at a net commission amount payable. This presentation is inconsistent with the formulas set out in the CLC and Payout Grid whereby Vacation Pay and Holiday Pay are to be calculated by grossing up the base commission amount.

- The Earnings Statements report Vacation Pay and Holiday Pay as additions to the commission and bonus amounts payable to arrive at total compensation. The Earnings Statement presentation is inconsistent with the Commission Statement presentation.

- The amount reported as commissions (or net commissions) on the Commission Statement reconciles to the total compensation payable inclusive of Vacation Pay and Holiday Pay as reported on the Earnings Statement.

- The amounts that Scotiabank designates as Vacation Pay and Holiday Pay appear to be apportioned from the total compensation earned by the HFA. The total commission payable (per the Commission Statement) appears to be adjusted to deduct an implied Vacation Pay and Holiday Pay amount as reported on the Earnings Statement.

- The presentation of the Commission Statements changed during the Class Period.

c. The Gross-Up Factors implied by the Earnings Statements changed during the Class Period and the changes are inconsistent with the Payout Grid and the calculation methodology set out in the Statement of Defence.

d. Further to subparagraph (c), we calculate the implied Gross-Up Factors from Ms. Deacon's Earnings Statements using the following formula: [Calculation Tables Omitted].

We summarize the Gross-Up Factors implied by Ms. Deacon's Earnings Statements below. Samples have been ordered chronologically [Calculation Table Omitted].

We observe that samples 1 through 4 imply Gross-Up Factors of 6.67% and 4.44% for Vacation Pay and Holiday Pay, respectively which are consistent with the Payout Grid. Sample 5 implies Gross-Up Factors of 7.50% and 4.99% for Vacation Pay and Holiday Pay, respectively. The Gross-Up Factor for sample 5 is inconsistent with the Payout Grid and the Statement of Defence which states that Gross-Up Factors of 6.67% and 4.44% were applied until May 28, 2022 when they were increased to 8.08% and 4.62% for Vacation Pay and Holiday Pay, respectively.

Examining sample 5, we observe that Gross-Up Factors of 7.50% and 4.99% are consistent with a calculation of Vacation Pay and Holiday Pay where the total commission amount (per Scotiabank) is simply multiplied by 6.67% and 4.44% rather than grossed-up. For

> example, Ms. Deacon's Commission Statement for sample 5 reports a total commission of $7,297. It appears that Scotiabank calculated the Vacation Pay amount on the Earnings Statement by multiplying the total commission by 6.67% to arrive at Vacation Pay of $487. Scotiabank appears to have simply allocated the total commission amount per the Commission Statement to Vacation Pay and Holiday Pay for sample 5 – this is not a gross up as described by Scotiabank. Scotiabank's calculations of Vacation Pay and Holiday Pay were inconsistent between years during the Class Period and were inconsistent with the Payout Grid formula and Statement of Defence.[1]

[19] Mr. de Gray was cross-examined on the scope of his opinion. He confirmed that his opinion was confined to the question in para. 1.5 of his report:

> You have retained KSV Soriano Inc. ("KSV") as independent experts in the field of damages quantification and business valuation to describe the methodology and processes that we would employ to quantify the Financial Loss, if any, suffered by the Class. You have also requested that we list the additional financial and other data that we would request should we subsequently be instructed to undertake this analysis.

[20] During his cross-examination, Mr. de Gray agreed that:

a. the factual or legal issues in dispute, including whether Scotiabank failed to pay vacation pay or holiday pay to the proposed class members as alleged by the plaintiffs, is a matter for determination by the Court;

b. the interpretation of the Statement of Claim or the Statement of Defence is a matter for determination by the Court; and

c. the *CLC* and employee contracts and their respective interpretation is a matter for determination by the Court.

[21] Mr. de Gray was not tendered as an expert in pay documentation nor on the *CLC*. The defendant submits that he does not have the expertise, nor was he asked, to provide opinions on the Bank's earnings statements, calculations of vacation and holiday pay, commission statements or the consistency between the Bank's pleaded defences and the pay records.

[22] Scotiabank submits that Mr. de Gray improperly gave opinions beyond the scope of his mandate in para. 4.13 of his report, and in the calculations found in Appendix "A" referred to in para. 4.13. In particular, Scotiabank submits that the following portions of the expert report are inadmissible:

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[1] Appendix A, as mentioned in para. 4.13 is entitled, "KSV Analysis of the Sample Commission Statements and Earnings Statements for Ms. Deacon and Ms. Ouellette." The impugned summary statements in para. 4.13 are repeated within Appendix A, with highlighted examples of the sample statements.

a. the presentation of HFA compensation on the commission summary statements is "inconsistent with the formulas set out in the *CLC* and the Payout Grid whereby Vacation Pay and Holiday Pay are to be calculated by grossing up the base commission amount";

b. the "Earnings Statement presentation is inconsistent with the Commission Statement presentation";

c. the "amounts that Scotiabank designates as Vacation Pay and Holiday Pay appear to be apportioned from the total compensation earned by the HFA;

d. The total commission payable (per the Commission Statement) appears to be adjusted to deduct an implied Vacation Pay and Holiday Pay amount as reported on the Earnings Statement";

e. the "Gross-Up Factors implied by the Earnings Statements changed throughout the Class Period and the changes are inconsistent with the Payout Grid and the calculation methodology set out in the Statement of Defence";

f. "Scotiabank's calculations of Vacation Pay and Holiday Pay were inconsistent between years during the Class Period and were inconsistent with the Payout Grid formula and Statement of Defence";

g. the "Earnings Statement presentation suggests that Vacation Pay and Holiday Pay are added to the commission and bonus amounts payable";

h. the "actual amounts that Scotiabank designates as Vacation Pay and Holiday Pay appear to be reverse engineered by reducing the total commission payable to deduct the implied Vacation Pay and Holiday Pay amount".

[23] Scotiabank submits that these paragraphs amounted to a "platform to illustrate the plaintiffs' case" and are therefore, impermissible advocacy: *1815212 Ontario Inc. et al. v. Enbridge Gas Distribution Inc. et al.*, 2025 ONSC 1243 at para. 42.

[24] The plaintiffs submit that much of the content in para. 4.13 and Appendix A is simply unobjectionable fact evidence. In their submission, where Mr. de Gray discusses the lack of any reference to vacation or holiday pay in commission statements, and the inconsistency with the CLC formulas, he is not offering a legal conclusion but a quantification. The plaintiffs rely on Mr. de Gray's acknowledgement in his cross-examination that he was not giving an opinion on the *CLC*. The plaintiffs further submit that para. 4.13 contains necessary background and context.

[25] I agree with Scotiabank that portions of para. 4.13 and the related portions of Appendix A go beyond the opinion provided as to a damages methodology. Appendix A sets out an analysis of how Scotiabank presented pay on the representative plaintiffs' pay documents. Mr. de Gray's comments on inconsistencies in the pay information reads like opinion evidence that he was not

qualified to provide and which exceeded his mandate. The report repeats the allegation from the statement of claim that "the actual amounts that Scotiabank designates as Vacation pay and Holiday Pay appear to be reverse engineered by reducing the total commission payable to deduct the implied Vacation Pay and Holiday Pay amount." This content is more than just facts, background or context.

[26] I conclude that the impugned portions of Appendix A and para. 4.13 amount to opinion outside the scope of Mr. de Gray's expertise. I find that the quoted passages in a. through h. above, as they appear in either the body of the report or in Appendix A, and the calculations used to support those statements of opinion, are inadmissible.

Certification

[27] Pursuant to s. 5(1) of the *CPA* the court shall certify a class proceeding if:

a. the pleadings or the notice of application disclose a cause of action;

b. there is an identifiable class of two or more persons that would be represented by the representative plaintiff;

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 who would fairly and adequately represent the interests of the class, has produced a workable plan for the proceeding, and does not have an interest in conflict with the interests of other class members.

[28] The question of preferability is also subject to s. 5(1.1) of the *CPA* which provides:

> 5 (1.1) In the case of a motion under section 2, 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.

[29] Pursuant to s. 6 of the *CPA*, the court shall not refuse to certify a proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
2. The relief claimed relates to separate contracts involving different class members;
3. Different remedies are sought for different class members;
4. The number of class members or the identity of each class member is not known; and
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

Section 5(1)(a): The pleadings disclose a cause of action.

[30] Certification will be denied under s. 5(1)(a) if it is plain and obvious that the pleadings disclose no cause of action: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 63.

[31] The principles to be applied on a motion to strike a pleading also apply under s. 5(1)(a):

> a. No evidence is admissible;
>
> b. All allegations of fact pleaded are assumed to be true unless they are patently ridiculous, manifestly incapable of proof, or amount to bald conclusory statements unsupported by material facts;
>
> c. Cases that are unique or novel, that involve matters of law that are unsettled, or that require a detailed analysis of the evidence should not be resolved without a full factual record;
>
> d. The pleading must be read generously to allow for drafting deficiencies and the plaintiff's lack of access to key documents and discovery information. The court should err on the side of permitting an arguable claim to proceed to trial;
>
> e. A plaintiff cannot rely on the possibility that new facts may be discovered; it must plead the material facts upon which it relies; and
>
> f. The pleading will be struck only if it is plain and obvious that the plaintiff cannot succeed or, in other words, if the claim has no reasonable prospect of success. [Citations omitted.]
>
> *Wright v. Horizons ETFS Management (Canada) Inc*., 2020 ONCA 337, 448 D.L.R. (4th) 328, at para. 58

[32] The plaintiffs submit that they have adequately pleaded a cause of action in breach of contract relative to Scotiabank's alleged failure to pay vacation and holiday pay as required by the

CLC. Scotiabank does not challenge this aspect of the cause of action criteria. I agree that the statement of claim adequately pleads a cause of action in breach of contract.

[33] I have grouped the remaining issues raised by Scotiabank under s. 5(1)(a) by cause of action, with Scotiabank's position first, then the plaintiffs' response, followed by my findings on each objection.

(a) **Breach of Contract Based on Pension Entitlements:** Scotiabank submits that the cause of action in breach of contract for reduced pension entitlements is deficient. It submits that the pleadings fail to state how the pension plan was breached or the material facts in support of that claim;

Plaintiffs Response: Read generously and taking into account that discovery has not yet taken place, including all details of the pension plans, the plaintiffs submit that they meet the pleading standard by asserting that "Scotiabank's policy of failing to provide vacation pay and statutory holiday pay understates the [Salary (defined in the Plan)] of the plaintiffs and the other Class Members under the Pension Plan" and thus is a breach of contract.

Analysis and Ruling: The plaintiffs have pleaded the pension breach of contract adequately, by connecting the loss to the alleged failure to pay vacation and holiday pay, to the pension valuation and the plan. They have pleaded the contract, which is the pension plan. This is simple, but sufficient on a generous reading of the pleading.

(b) **Negligence:** Scotiabank submits that the plaintiffs have failed to plead a duty of care relative to the employment agreements, nor have they pleaded a novel duty of care under the *Anns/Cooper* test. Scotiabank submits that for pure economic loss claims, an action in tort will give way to the private ordering of rights and duties under contract: *Heller v. Uber*, 2021 ONSC 5518, 73 C.C.E.L. (4th) 45, at paras. 159-168[2]; *Davis v. Amazon Canada Fulfillment Services, ULC*, 2023 ONSC 3665, at paras. 225-230.

Plaintiffs' Response: The plaintiffs submit that Scotiabank has misconceived the plaintiffs' action in negligence. The plaintiffs have pleaded a duty of care to ensure that the class members received their statutory entitlements. Paragraph 64 of the claim reads: "Scotiabank owes the plaintiffs and other class members duties under the *CLC* to provide vacation pay and statutory holiday pay and systematically breached those duties by failing to comply with their statutory obligations."

[2] Perell J. found at paras. 167-168 of *Heller*: "Put somewhat differently, just as there is no duty of care in negotiating a contract, there is no duty of care in how to perform it. Rather, there is strict liability in contract (without considering the standard of a care of a reasonable contracting party), if the contract is breached. Moreover, any claim in negligence would be redundant and cumbersome and would not satisfy the preferable procedure criterion. I conclude that the negligence claim does not satisfy the cause of action criterion."

Paragraph 65 of the claim reads: "Scotiabank owes the plaintiffs and the other class members a duty of care "to take reasonable steps to ensure that the plaintiffs and the other class members received all of their statutory entitlements under the *CLC."*

The plaintiffs submit that a claim in negligence may be brought against an employer for failing to comply with employment standards legislation: *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148, 101 O.R. (3d) 93, at para. 83, aff'd, 2011 ONSC 530 (Div. Ct.), rev'd in part on other grounds, 2012 ONCA 443, leave to appeal denied, [2012] S.C.C.A. No. 326; *Bozsik v. Livingston international Inc*., 2016 ONSC 7168, 38 C.C.E.L. (4th) 43, at para. 217; *Baroch v. Canada Cartage*, 2005 ONSC 40, 66 C.P.C. (7th) 72, at para. 21.

Analysis and Ruling: The allegation in *Fulawka* involved a breach of a duty owed in contract or otherwise, by Scotiabank to its employees as informed by the requirements of the *CLC*. The motion judge distinguished the allegations from a cause of action arising from a breach of a statute*: The Queen v. Saskatchewan Wheat Pool* [1983] 1 S.C.R. 205, [1983] S.C.J. No. 14, 143 D.L.R. (3d) 9. In *Fulawka*, the motion judge found that the pleading in negligence was sufficient in that it alleged a duty on the part of the employer to ensure that the class was properly compensated for all hours the members worked. The draft pleading at issue in *Fulawka* particularized the breaches of the duty by Scotiabank "by, among other things:

(a) creating a working environment in which [class members] were required to work overtime to carry out their duties, dissuaded from reporting overtime and from claiming compensation;

(b) failing to take reasonable steps to monitor and record their hours worked;

(c) failing to take reasonable steps to ensure that they were properly compensated; and

(d) imposing an unlawful overtime policy."

The plaintiffs' claims in negligence in the case at bar are for pure economic loss. The duty of care for the purpose of the adequacy of the pleading, found in *Fulawka* can be said to flow from the proximate relationship between an employer and an employee. A proximate relationship is one of the relevant categories for a finding of a duty of care in claims for economic loss: *1688782 Ontario Inc. v. Maple Leaf Foods*, 2020 SCC 35, [2020] 3 S.C.R. 504, at paras. 17-23.

I conclude that the plaintiffs have adequately pleaded a claim in negligence which is not certain to fail given the relationship between the employer and its employees. Para. 65 of the plaintiffs' claim is like the pleading in *Fulawka*. The Court of Appeal in *Fulawka* upheld the motion judge's decision finding that the negligence claim as pleaded met the plain and obvious test, because the duties owed by Scotiabank in negligence "can be

informed by the provisions of the *Code*": 2012 ONCA 443 at paras. 50-51, 172. Based on this authority, I decline to strike the pleading in negligence.

(c) **Breach of Trust:** Scotiabank submits that there is no basis in fact for a finding that the *CLC* creates a trust relationship over vacation or holiday pay owed, in contrast to provincial legislation which was found to support a trust finding in *Curtis v. Medcan Health Management Inc.*, 2021 ONSC 4584, 72 C.C.E.L. (4th) 250, at paras. 58-59 and in *Singh v. RBC* 2023 ONSC 1439, 87 C.C.E.L. (4th) 171, at para. 71.[3]

Plaintiffs' Response: The plaintiffs rely on the reasoning in *Latham v. Brown & Morrissey Trucking* 2006 CarswellNat 6710. In *Latham*, Referee E.K. Slone considered the provisions of the *CLC* (which does not have an explicit trust provision) and Nova Scotia's employment standards legislation (which does have an explicit trust provision), finding that: "In the absence of a consistent and transparent practice of which the Appellants were clearly aware, permitting the Employer to satisfy its vacation pay obligations in this way, the Employer is bound to do as the *Canada Labour Code* (and provincial legislation) dictates: vacation pay is to be accumulated, held in a trust or a trust-like arrangement, and paid to the employee annually, or perhaps less often by mutual agreement" *Latham v. Brown & Morrissey Trucking* at para. 26. [Emphasis added]. The plaintiffs submit that this case was cited with approval in *Kinch v. Dufferin Communications Inc.*, 2015 ONSC 1742 at para. 9 (rev'd on other grounds *Kinch v. Dufferin Communications Inc. c.o.b. as Evanov Radio Group*, 2015 ONSC 6610 (Div. Ct.)). Thus, the plaintiffs submit that this cause of action is not certain to fail and it should not be struck.

Analysis and Ruling: As noted in *Kinch v. Dufferin Communications c.o.b. as Evanov Radio Group*, 2015 ONSC 6610, at para. 15: *"*the Supreme Court of Canada has made it clear that the purpose of the *CLC* is to protect employees and to encourage employers to meet their minimum obligations under the *CLC*. In this regard, the Supreme Court of Canada explicitly recognized that non-unionized employees do not have the bargaining power or the information necessary to achieve more favourable contract provisions with their employers." The Referee in *Latham* found a "trust-like arrangement" in place under federally regulated employment standards. That decision was cited by the motion judge and the Divisional Court in *Kinch*. Scotiabank has provided no jurisprudence to the contrary. Therefore, although there is not an explicit trust provision within the CLC, I cannot conclude that this aspect of the claim is doomed to fail. This is because the nature and purpose of the legislation and the obligations owed to workers by employers for vacation and holiday pay have the same purpose as the provincial legislation. This legislation aims to correct for similar power imbalances. At this stage, the plaintiffs' claim in breach of trust could succeed, although Scotiabank could also defeat the trust claim. I decline to strike the breach of trust claim.

[3] The trust relied on in *Singh* is created by virtue of s. 20 of the *Employment Standards Act, 2000*, S.O. 2000 c. 41.

(d) **Unjust Enrichment**: Scotiabank argues that the plaintiffs' claim for unjust enrichment fails, because the claim is based in contract. This Court has found that "class members are not entitled to restitutionary relief for unjust enrichment because compensation in damages is already available under the breach of contract claim": *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288, 66 C.C.E.L. (4th) 244, at paras. 9-10; *Windisman v. Toronto College Park Ltd.*, 28 O.R. (3d) 29.

Plaintiffs' Response: *Fresco* is a summary judgment decision on damages following certification proceedings in which unjust enrichment was found to be a valid cause of action. The court found that the defendant bank had been unjustly enriched. The plaintiffs submit that Scotiabank is relying on a portion of the decision which deals with the issue of remedy and whether class members were entitled to restitutionary relief for unjust enrichment in addition to damages for breach of contract. Similarly, in *Curtis*, the plaintiffs advanced three causes of action, including breach of contract and unjust enrichment. This Court found that the claim "discloses several causes of action all of which are certifiable." The plaintiffs submit that the courts routinely certify breach of contract claims and claims for unjust enrichment, including in cases which allege unjust enrichment based on an employer having violated employment standards legislation: *Singh v. RBC Insurance Agency Ltd*., 2023 ONSC 1439, 87 C.C.E.L. (4th) 171, at paras. 72-73.

Analysis and Ruling: I agree with the comprehensive analysis of Glustein, J. in *Singh v. RBC* as support for finding that a cause of action in unjust enrichment may be certified alongside a cause of action in breach of contract. At paras. 71 and 72 of their statement of claim, the plaintiffs have pleaded a deprivation, a corresponding enrichment and no juristic reason given the provisions of the *CLC*. I decline to strike this cause of action.

Section 5(1)(b): There is an identifiable class of two or more persons that would be represented by the representative plaintiff.

[34] In determining whether there is an identifiable class, the court asks whether the plaintiff has defined the class by reference to objective criteria. This ensures that class members can identify themselves without reference to the merits of the claim. The class must not be unnecessarily broad, and it must relate to the common issue: *Drynan v. Bausch Health Companies Inc*., 2021 ONSC 7423, at para. 212, citing *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 38.

[35] The plaintiffs propose that the class be defined as follows:

> All individuals employed by Scotiabank as Home Financing Advisors at any time between November 1, 2009 and the date of certification (the "Class Period"). For greater certainty, the Class does not include the proposed class in the action styled as *Justin Ngan v. The Bank of Nova Scotia*, Court File No. CV-22-00691702-00CP in the Ontario Superior Court of Justice in Toronto.

[36] The plaintiffs submit, and Scotiabank does not dispute, that the proposed class definition meets the statutory requirement because it is defined by objective criteria. Scotiabank estimates the proposed class includes 2,629 former and current HFAs.

[37] The proposed class definition does not rely on the outcome of the litigation. I agree that the plaintiffs have met the test in s. 5(1)(b) of the *CPA*.

Section 5(1)(c): The claims raise a common issue.

[38] I apply the following well established principles to the proposed common issues:

> (a) There must be "some basis in fact" to establish that the claim raises a common issue, a test which can be met on some "minimal evidence";
>
> (b) Certification is decidedly not a "merits" test: it focuses on the form of the action and not on whether it will succeed, or even whether there is a prima facie case;
>
> (c) The certification judge need not resolve conflicting facts and evidence, although the court must exercise a gatekeeping function;
>
> (d) A common issue will be a "substantial ingredient" of each claim if its resolution will move the litigation forward and is able to be extrapolated to all class members; and
>
> (e) The court must take a purposive approach to s. 5(1)(c) to further the objectives of the *CPA*;
>
> See: *Price v. Smith & Wesson Corporation,* 2025 ONCA 452, 178 O.R. (3d) 597, at para. 99*; Richard v. Canada (Attorney General),* 2025 ONCA 713 at para. 49*, Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 46; *Pro-Sys Consultants Ltd. v. Microsoft Corp*., 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 99; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 16; *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718, 84 C.C.L.I. (5th) 124, at para. 86.

[39] The plaintiffs' position on the common issues is that Scotiabank purported to adopt an "all-inclusive of commissions" holiday and vacation pay compensation model for its HFAs. They allege that Scotiabank did not adequately disclose to the class members that this was how Scotiabank proposed to meet its obligations to pay vacation and statutory holiday pay, as required by the Divisional Court in *Kinch v. Dufferin Communications Inc. c.o.b. as Evanov Radio Group*, 2015 ONSC 6610.

[40] In *Kinch,* the Divisional Court considered whether a federal employer was required to pay vacation pay in addition to "gross" commission. The employer's policy purported to include

vacation pay in the employee commission payments and described this arrangement in an employment agreement. The Divisional Court concluded that the employer had failed to satisfy its obligation to provide vacation pay under the *CLC*. In finding in favour of the employee, the Court set out a two-part test for employers to meet their obligations under the *CLC* by including vacation pay in gross commission income:

> Thus, an employer who seeks to satisfy its obligations to pay vacation pay by taking that pay out of commission sales must, at a minimum, demonstrate that the employee is aware of her vacation pay entitlements under the *CLC* and, that by agreeing to such an arrangement, she is receiving a benefit that is either equal to or greater than those entitlements.
>
> *Kinch,* at para. 16.

[41] The *CLC* requires federally regulated employers to provide paid vacation to their employees annually. As Referee Slone explained in *Latham*: "Vacation pay and mandated vacation entitlements are a social benefit prescribed by legislation, with the clear intention of allowing workers to take time off while being paid ... [I]t would defeat the system if workers were presented with vacation time but had to forego taking any time off because of the lack of income to cover basic living expenses: *Latham,* at p. 13.

[42] The *CLC* prescribes the minimum duration of vacation time, depending on the length of the employee's tenure with their employer: *CLC* s. 184-184.01. The difference between employees paid a salary and those on commission (also described as variable compensation) is that salaried employees take vacation time and continue to receive their salary. A commission-only paid employee, such as the plaintiffs, only earn commission on the sales of products. As a result, commissioned employees rely on receiving vacation pay, usually paid as a portion of their earnings throughout the year, to allow them to take time off from work without an overall loss in pay.

[43] The *CLC* provides for vacation pay rates of 4%, 6%, or 8% of wages depending on how long an employee has been with their employer*: CLC* s. 184.01. There are similar provisions for statutory holidays.

[44] The *CLC* defines wages to include "every form of remuneration for work performed but does not include tips and other gratuities": s. 166. Wages include commission payments: *Kinch*, at para. 3.

[45] The plaintiffs tendered evidence to show that there is some basis in fact for their allegation of inadequate disclosure by the Bank. They rely on the Compensation Guides, paystubs and commission statements distributed to HFAs. The plaintiffs allege these compensation materials are confusing and inconsistent, thus the materials obscure how vacation and statutory holiday pay is calculated with respect to commission earnings.

[46] For example, employee earnings statements (or "paystubs") do not clarify the calculations of vacation and statutory holiday pay. Since 2017, Scotiabank's commission statements began to use the terms "net" and "gross" to describe commission payments. Yet, in other pay documents, Scotiabank uses the terms "base" and "total" commission payments. The plaintiffs allege these terms compound the confusion.

[47] The HFA paystubs do not refer to commissions as being "net", "gross", or "base". Instead, the paystubs refer to "comm" for "commission." The confusing pay information as to how HFA pay and vacation/holiday entitlements were calculated and communicated is the central question for trial.

[48] Scotiabank submits that its calculations were capable of being understood by the HFAs if HFAs simply compared their commission statements to their paystubs. Scotiabank submits that this is a very different case from other decisions which found employers had inadequately disclosed compensation models in which employers included vacation and statutory holiday pay in employee total compensation. For example, in *Cheetham v. Bank of Montreal*, 2025 BCCA 374, 8 B.C.L.R. (7th) 34, the common issue resulted from evidence of:

1. paystubs received by class members which did not consistently set out itemized payments for vacation and holiday pay,

2. compensation plans that were silent on the fact that commissions were inclusive of vacation and holiday pay, and

3. a calculation methodology used by the Bank of Montreal that was not reflected in the compensation plans and/or used a rate that was lower than that prescribed by the *CLC* (5% rather than 6%).

[49] Scotiabank also distinguishes its compensation documents from those in *Singh v. RBC Insurance Agency Ltd.*, 2023 ONSC 1439, where the employer's calculation grid did not show that it included any calculation of vacation and holiday pay within the employee commission payments. The employer plan in *Singh* purported to use an inclusive payment calculation.

[50] In another action, *Cunningham* v. *RBC Dominion Securities*, 2022 ONSC 5862, the Court certified the action because "no information was ever provided to (wholly or partly) commissioned employees in their standardized earning statements or pay stubs about the calculation and payment of vacation or statutory holiday pay": at para. 10.

[51] Scotiabank distinguishes its compensation disclosure from all of the circumstances in *Cunningham, Singh* and *Cheetham*, because it "consistently disclosed to [the] HFAs, Scotiabank's inclusive compensation method," Scotiabank submits that the HFA paystubs consistently disclosed the vacation pay and holiday pay calculations (showing both the method and the quantum of vacation pay and holiday pay). Scotiabank submits while class members may not have agreed with this pay structure, they were aware of it.

[52] I do not agree. Counsel for both parties took the better part of an hour 'walking the court" through sample paystubs, commission statements and the compensation guide booklet on the question of Scotiabank's disclosure of its vacation and holiday pay calculations and the relationship of these payments to HFA commissions. That material reveals several areas of potential confusion which meet the low "some basis in fact" test that supports certification of a common issue relative to Scotiabank's liability to pay vacation and statutory holiday pay.

[53] For example, in Earnings Statements filed with the court, there are amounts designated as "Vacation Pay Commission", and "Stat. Hol. Pay Commission". A separate amount is shown as "Comm.- Insurance sales" and "Comm-Sales Pay" for mortgage sales. As the plaintiffs have pointed out, Scotiabank calculated total commissions using the commission rates, and then subtracted the percentages required to allocate those for vacation and statutory holiday pay. Thus, the number shown for "Comm" on the paystubs was considered a "base" commission to which the vacation and statutory holiday percentages were added, amounting to what Scotiabank submits was a "Total Commission." "Total" commission and "basic" commission are not terms used on employee paystubs. An example paystub can be seen here:

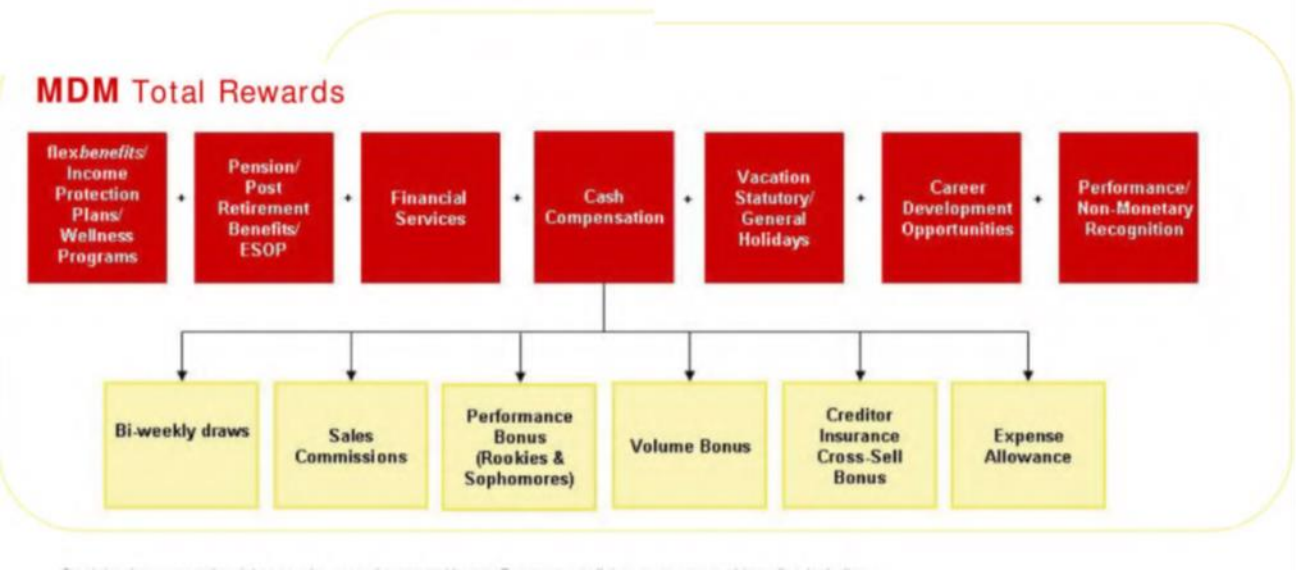
EARNINGS STATEMENT

Employee Number: [redacted]			Province of Tax: Alberta		
Name: Nathalie Deacon			Pay date: 12/31/2020	Cost Center: 56176	
Position: HOME FINANCING ADVISOR			Period: 12/21/2020 to 01/03/2021		
Description	**Hrs**	**This Pay**	**YTD**	**Description**	**This Pay**	**YTD**
Earnings				**Deductions**		
Expense Allowance			4,800.00	Income tax/regular	1,874.33	33,605.87
Comm-Insurance Sales		88.89	1,377.79	Income tax/non-per.		74.78
Salary Adjustment			917.98	CPP Employee Contribution		2,898.00
Comm Sales Pay		6,397.85	87,183.83	EI Employee Premiums		856.36
Comm.- Volume			22,168.04	Claim		7.39
Vacation Pay Commission		486.74	8,308.78	ESOP Commission		3,429.09
Stat Hol Pay Commission		324.01	5,530.85	ML Opt Child Life Insur		8.40
Award Gross-Up			90.01	ML FLEX ER-RETRO		-1.20
TB / WBA- Active			395.28	ML LTD		755.38
TB/Fed Grp Life/AD&D			154.64			
ML FLX TB-Fed RET			3.54			
Award			200.00			

[54] The plaintiffs submit that the bank failed to reveal to its employees how it was calculating their vacation and holiday pay in the manner that it produced commission statements to HFAs. Those records did not show vacation or holiday pay between 2009-2017, but only an all-inclusive commission amount paid to the HFAs. After January of 2017, the commission statement used the terms "Gross" commission and "Net" commission. Those terms are not present on the employee

paystubs as discussed above. Thus, there is some basis in fact to find that the paystubs and commission statements read together were confusing and/or required HFAs to make assumptions.

[55] The plaintiffs have also demonstrated that the Compensation Guides contributed to the confusion. In the 2009 Compensation Guide for HFAs, the first visual depiction of the components of an HFA's earnings is seen in a flowchart showing MDM (the former descriptor of Advisors or HFAs) "Total Rewards".[4] The Guide begins with a visual depiction of HFA Cash Compensation (flowing from the centre box in the top row down to six boxes below in the second row) with vacation and statutory holiday pay shown in a separate box sitting to the right side of the "Cash Compensation" box:



[56] Scotiabank submits that the rest of the Compensation Guide provides the necessary clarification that commissions paid include HFAs vacation and statutory holiday pay. For example, there is more information at page 3 of the guide which describes again the HFA compensation in a different chart than the first chart shown above. The second chart at page 3 has a series of yellow boxes which show that HFAs receive no base salary, but instead receive commissions, performance bonuses, volume bonuses, flat fees for selling insurance products and an expense allowance for purchasing cell phones and/or laptops. The chart does not treat vacation and holiday pay entitlements consistently. Rather than showing those payments as an entitlement in a yellow box, the commission and bonus items have asterisks which direct the reader to a footnote below the chart which reads in smaller font, "Includes vacation and statutory holiday pay as outlined on page 10."

[57] The Compensation Guide continues this practice of using small font, and footnotes to advise employees in several places throughout the Guide that bonuses and commissions "include vacation and statutory holiday pay." This information is demonstrably inconsistent with the first flowchart with the red and yellow boxes. It is also given reduced prominence from other

[4] HFAs were formerly known as Mortgage Development Managers, or MDMs.

remuneration information. Although not absent or "buried", the visual presentation of the statutory holiday and vacation pay treatment information is notably muted. It is certainly open to a submission that the reader could overlook this information or find the inconsistencies difficult to reconcile.

[58] Appendix A to the Compensation Guide for 2009 includes an "illustrative" grid to show vacation and holiday payout calculation. Similar grids were included in every Compensation Guide published by the Bank until 2021. As Scotiabank explained, the HFAs could see that their total commission in the right-hand column was comprised of "base commission" figure with vacation and holiday pay added to that base number to arrive at a number called "Total Commission or Bonus Paid." As noted above, this terminology ("Base Commission" and "Total Commission") did not appear on employee paystubs or in the Commission Statements. This is yet another potential source of confusion.

[59] The upper third of the grid in Appendix A to the 2009 Compensation Guide appears as follows:

Appendix A – Vacation and Statutory Holiday Payout Grid

For illustrative purposes, amounts are rounded to 2 decimal places. Actual calculations will use 11.11%.

Base Commission or Bonus (bps)	Vacation Pay	Statutory Holiday Pay	Total Commission or Bonus Paid (bps)
1.0	0.067	0.044	1.11
2.0	0.134	0.088	2.22
2.5	0.168	0.110	2.78
3.0	0.201	0.132	3.33
3.8	0.255	0.167	4.22
4.0	0.268	0.176	4.44
4.1	0.275	0.180	4.56
4.2	0.281	0.185	4.67
5.0	0.335	0.220	5.56
5.3	0.355	0.233	5.89
5.7	0.382	0.251	6.33
6.0	0.402	0.264	6.67
6.1	0.409	0.268	6.78
6.3	0.422	0.277	7.00
7.5	0.503	0.330	8.33
8.0	0.536	0.352	8.89
8.2	0.549	0.361	9.11
8.5	0.570	0.374	9.44
9.0	0.603	0.396	10.00
9.1	0.610	0.400	10.11
9.5	0.637	0.418	10.55
10.0	0.670	0.440	11.11

[60] I conclude that the pay documents provided to Scotiabank's HFAs may attract legitimate arguments that they are inconsistent and confusing. The Compensation Guide included flowcharts that could be read to suggest that vacation and holiday pay is added to commissions. The footnotes suggest otherwise, and Scotiabank relies on those notes which state that vacation and holiday pay is included. The sample pay out grid used in the Compensation Guides shows amounts dedicated to proportions of commission and holiday/vacation which can only be understood by reading the grid from right to left and not left to right. The commission statements and the paystubs use different terminology from one another. Taken altogether, I find there is sufficient evidence of confusing disclosure to merit certifying the common issue sought by the plaintiffs. As certification judge, it is not my role to take a "deep dive" into the issues and decide whether the bank's compensation documents did in fact breach the *CLC.*

[61] At this stage, the plaintiffs need not show they will prevail at trial, nor even that they can establish a *prima facie* case. They need only show some basis in fact for the causes of action to proceed based on some minimal evidence. They have done so.

The 2023 ECDC Complaints by HFAs

[62] In further support of its position that there is no basis in fact for the common issues sought to be certified, Scotiabank relies on findings made by the ESDC in its favour after complaints by 20 HFAs. ESDC administers the Labour Standards Program under the *CLC*.

[63] Section 251.01(1) of the *CLC* provides that "[a]ny employee may make a complaint in writing to the [Head of Compliance and Enforcement] if they believe that the employer has contravened (a) any provision of this Part [which includes the provisions with respect to vacation and statutory holiday pay]".

[64] The ESDC ruled in favour of Scotiabank on the question of its compliance with the *CLC* vacation and holiday pay provisions. Two HFA witnesses who gave evidence on this motion, described issues with the complaint process including procedural fairness and allegations of bias on the part of the Labour Affairs Officer assigned to consider the complaints from HFAs outside of Quebec.

[65] Scotiabank submits that the action in the case at bar is an improper attempt to indirectly appeal, review or undermine the ESDC complaint process and its outcome. Scotiabank submits that any procedural complaints about that process belong in an appeal from the ESDC decision. Scotiabank also submits this is akin to a collateral attack on those findings: *Yan v. Hutchinson*, 2023 ONCA 97.

[66] I disagree. Several HFAs complained to the ESDC and did not achieve success. However, the representative plaintiffs were not among that group. Scotiabank has not pleaded that the ESDC findings are a collateral attack, or that this is a case of issue estoppel. Finally, this action seeks a broader timespan of remedies and includes causes of action which are outside the jurisdiction of the ESDC.

[67] Scotiabank is free to make the same arguments at trial that it did during the ESDC process. If I considered the ESDC findings and applied similar logic to the common issues, at this stage, that would be an impermissible merits analysis. That is the role of the trial judge.

[68] I find that this employment class action for alleged unpaid compensation is well-suited for certification as a class proceeding. The common issues arise from the disclosure and calculation of vacation and holiday pay for a class of persons who share a common employer, uniform compensation guides and a common method of calculating their compensation.

[69] I consider next the objections to the common issues. The first cluster of common issues arises from the plaintiffs' alleged entitlement to statutory vacation and holiday pay and the related impact of any underpayments on employee pension entitlements. The plaintiffs have framed those common issues in liability under the *CLC* as follows:

The Liability Common Issues – Proposed Common Issues A, B, & G

> A. Is Scotiabank required under the *Canada Labour Code* to provide vacation pay and statutory holiday pay to HFAs in addition to their other compensation?
>
> B. Is Scotiabank liable in breach of contract, negligence, unjust enrichment, and/or breach of trust as a result of failing to provide vacation pay and statutory holiday pay as required under the *Canada Labour Code*?
>
> …
>
> G. Did Scotiabank breach the Pension Plan by failing to calculate retired HFAs' benefits at full compensation, rather than excluding amounts for vacation pay and statutory holiday pay?

[70] Scotiabank concedes that the *CLC* requires an employer to pay vacation pay and statutory holiday pay to HFAs. As a result, Scotiabank submits that Proposed Common Issue ("PCI") A is unnecessary. I disagree. This is a threshold question which will aid the trial judge in their analysis. The body of case law interpreting similar issues, including *Kinch*, is likely to inform the contours for the common issues trial. There is no prejudice in including this question as a logical starting point. I certify PCI A.

[71] PCI B is likewise capable of being certified based on my findings above as to the evidence tendered, including the compensation documentation. The plaintiffs have pleaded these causes of action adequately and shown there is some basis to argue that HFAs were inadequately informed as to how their vacation and holiday pay entitlements would be calculated and paid.

[72] PCI G relates to a subsidiary cause of action related to class members' pension benefits. The plaintiffs allege that retired HFAs who did not have the benefit of their full compensation, received underfunded pensions under the Scotiabank Pension Plan.

[73] Since November 1, 2009, Scotiabank has offered a pension plan for HFAs. Scotiabank has pleaded that the Pension Plan offers three types of pension benefits to members depending on the employee's date of hire:

i a defined benefit pension (for employees hired before January 1, 2016);

ii a hybrid pension arrangement (for employees hired between January 1, 2016 and April 30, 2018); and

iii a defined contribution pension (for employees hired after April 30, 2018).

[74] For each pension benefit arrangement, Scotiabank has determined HFAs' pension entitlements with reference to the salary they earned while working. "Salary" is defined in the Pension Plan as the "annual rate of compensation where the annual rate of compensation

for this purpose is determined as the sum of the Member's applicable annual compensation plan earnings in the three preceding complete consecutive calendar years, divided by three." The Pension Plan states that "Salary" is determined from Scotiabank's employment records.

[75] As Scotiabank has included vacation and statutory holiday pay within the total HFA "compensation plan earnings" the plaintiffs allege that Scotiabank understated the salaries of HFAs and reduced the overall value of their pension benefits at retirement.

[76] Scotiabank submits that there is no common issue that should be certified for pension benefits, because pension benefits are a matter of contract, and do not depend on the bank's *CLC* obligations. The Bank submits that because there is no requirement under the *CLC* to create a pension plan, there is no common issue relative to pension benefits. Scotiabank also tendered evidence that it has taken direct action to include statutory holiday and vacation pay under its method of calculations as part of the pension benefits, retroactive to 2009.

[77] This is a separate issue from that asserted by the plaintiffs. The basis for the pension common issue is straightforward. The plaintiffs' claim is linked to whether the plaintiffs can show that Scotiabank is liable under PCI B related to payment of *CLC* entitlements. If that is established, PCI C will require the trial judge to determine whether sufficient compensation plan earnings were included for the purposes of pension benefits as established under contract with HFAs by Scotiabank. I certify PCI C.

[78] I move next to consider the arguments for and against the proposed common issues in damages.

The Damages Common Issues – Proposed Common Issues C, D, E, and F.

[79] Proposed Common Issues C, D, E, and F read:

> PCI C: If the answer to common issue (B) is yes, are the class members entitled to damages, restitution, and/or disgorgement for the defendant's breach of contract, negligence, unjust enrichment, and/or breach of trust, and if so, in what amount?
>
> PCI D: Are the class members entitled to punitive damages, and if so, in what amount?
>
> PCI E: Are class members entitled to pre-judgment interest or the time value of an award at:
>
> a. the internal rate of return that the defendant received, compounded monthly;
> b. the rate of return they would have achieved on a reasonably prudent investment, compounded monthly;
> c. the rate under the *Courts of Justice Act*, compounded monthly; or
>
> d. at the rate under the *Courts of Justice Act*?

> PCI F: Are the claims for vacation pay of HFAs who were employed at Scotiabank on or after June 14, 2021 timely by virtue of section 188 of the *Canada Labour Code*?
> …
>
> PCI H: If the answer to common issue (g) is yes, are class members entitled to damages, restitution, and/or disgorgement, and if so, in what amount?

[80] Scotiabank submits that if the proposed common issues on liability are not certified then it follows that the damages common issues are not capable of being certified. Given my findings above, I would certify PCIs D, E, F and H. These remedies ask what damages flow from the findings of liability at trial. The plaintiffs have tendered a tenable methodology via the de Gray report for quantifying damages based on Scotiabank's records and without needing proof from individual class members.

The Limitations common issue – PCI F

[81] The plaintiffs submit that the sixth proposed common issue asks whether the claims for vacation pay of HFAs who were employed at Scotiabank on or after June 14, 2021, are timely by virtue of s. 188 of the *CLC*.

[82] Section 188 of the *CLC* requires employers to pay an employee's entire accrued and unpaid vacation pay entitlement within 30 days of the end of their employment. Thus, the date of this claim, which is 2 years and 30 days from June 14, 2021, will set the time post for the question of limitations.

[83] Scotiabank's position is that this question is not capable of being certified if the liability proposed common issues are not certified. Given that I have found that the proposed common issues as to liability may be certified, I certify PCI F.

Aggregate Damages

[84] Section 24(1) of the *CPA* provides for aggregate damages in class proceedings as follows:

> Aggregate assessment of monetary relief
>
> 24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[85] The plaintiffs submit that a common issue in aggregate damages is supported by the nature of the claim, and the proposed methodology provided in the de Gray opinion. If the trial judge makes findings in favour of the plaintiffs, then Scotiabank's data and known inputs as to years of employment, commissions paid, and amounts owed under the *CLC* can be determined in the aggregate as a matter of calculation.

[86] Scotiabank submits that there are individual questions of fact for each class member. This cannot support a finding of aggregate damages. Scotiabank also submits that the plaintiffs raised the issue of aggregate damages belatedly.

[87] Aggregate damages are a frequent consideration on certification motions. As the Supreme Court of Canada observed in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 134:

> The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the CPA should be available is one that should be left to the common issues trial judge. Further, the failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking the provisions if considered appropriate once liability is found. [Emphasis added.]

This reasoning gives important context to the question of whether to certify an aggregate damages question. As the Supreme Court of Canada has recognized in *Pro-Sys*, the trial judge has the power to consider aggregate damages whether or not I certify that question.

[88] In *Singh*, at para. 182, Glustein, J. certified a common issue in aggregate damages based on allegations of failure to pay holiday and vacation pay, reasoning that, "In the present case, if liability is established, the only remaining issue would be the quantum of damages. It is the defendants who have the evidence of alleged damages, based on their payroll records."

[89] I agree with, and apply this reasoning. The plaintiffs have proposed a formula and a theory for their damages methodology which is common to the class. The fact that the inputs for the class members are not identical does not displace the availability of aggregate damages in these circumstances. As was the case in *Singh*, Scotiabank has the evidence required to calculate damages in its own records.

[90] I certify the proposed question in aggregate damages.

Section 5(1)(d): A class proceeding is the preferable procedure.

[91] The court must be satisfied that a class proceeding would be the preferable procedure for the resolution of the common issues. This inquiry is directed at whether the class proceeding would be a fair, efficient, and manageable way to advance the claim, and whether the class proceeding would be preferable to other procedures for resolving the common issues. The analysis is conducted with reference to judicial economy, access to justice and behaviour modification: *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423, at para. 369; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 48; *Hollick* at paras. 27-28.

[92] Further, *CPA* s. 5(1.1) requires that the court find that "at a minimum" a class proceeding is

> (a) …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

[93] The plaintiffs submit that this claim is "fair, efficient and manageable" as a class proceeding, because the questions of liability relate to a single defendant's conduct relative to a defined class of plaintiffs. Scotiabank has the necessary records from the beginning of the proposed class period.

[94] Scotiabank submits that the trial judge will need to conduct individual inquiries into whether class members were confused by Scotiabank's pay records and calculations. I disagree. The focus will be on whether Scotiabank objectively met its obligations under the *CLC* in its pay records and communications, as defined by the test set out in *Kinch.* The trial judge will need to consider the adequacy of the disclosure to the class members by Scotiabank to determine the question of liability. That analysis will not need to decide each individual class member's understanding of the compensation records and materials.

[95] Scotiabank submits that a class proceeding does not represent a preferable procedure because there are viable alternatives for the class members to obtain access to justice. These include individual actions under the simplified procedure or the *CLC* complaint process, which some HFAs have already attempted.

[96] As noted above, there are limitations to the *CLC* complaint process in terms of scope and timing. There is also an access to justice issue which applies to any individual claim or complaint process. Individual class members who are employed at Scotiabank may be deterred from putting their names on a complaint or lawsuit, because they fear professional repercussions.

[97] Strathy J. (as he then was) considered this issue in considering the viability of individual complaints by employees of Scotiabank in *Fulawka*, at para. 162: "Those employees would have

a justifiable concern, in my view, that they would not be perceived as "team players". A class proceeding can offer them a degree of anonymity, and they will be protected by the court's supervision of the claims process."

[98] I am satisfied that a class proceeding is superior to the reasonably available alternatives for members of this class. I adopt and apply the reasoning in *Fulawka*. I have considered the broader availability of remedies for the causes of action that the plaintiffs have pleaded and conclude that a class proceeding is clearly superior to the complaints process established under the *CLC*. The size of the class alone, at over 2,000 members, can be predicted to potentially overwhelm the administrative procedures in place under the *CLC*.

[99] I am also satisfied the common issues predominate over individual issues. The question of the bank's liability flows from its conduct and whether it fulfilled its statutory duties. That question, once determined, will resolve the findings that apply to over 2,000 of the bank's employees. It is an efficient way of resolving the common complaint. Employment claims of this nature are routinely certified.

[100] I find that the plaintiffs have established that they meet the criteria for preferability under s. 5(1)(d) and under s. 5.1(1).

Section 5(1)(e): There is an adequate representative plaintiff.

[101] A proposed plaintiff must be able to fairly and adequately represent the class. They must have developed a plan for proceeding and not have a conflict with the class. They must be prepared and able to vigorously represent the interests of the class: *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144, 9 C.C.E.L. (4th) 315, at para. 73: *CPA*, s. 5(1)(e).

[102] The proposed representative plaintiffs are Nathalie Deacon and Gail Ouellette. Ms. Deacon is a current employee of Scotiabank, who has been an HFA since March 5, 2007. Ms. Ouellette is a former HFA employed by Scotiabank from July 8, 1999, until her retirement on August 7, 2018.

[103] Ms. Deacon and Ms. Ouellette tendered affidavits confirming that they understand and are committed to their roles and responsibilities as representative plaintiffs. They have been involved with the proceeding to date. They have a shared interest with the other members of the proposed class. They have retained experienced class counsel and have filed a litigation plan for the action.

Conclusion

[104] The criteria set out in s. 5(1) of the *CPA* are met. I grant the plaintiffs' motion and certify this action as a class proceeding pursuant to the *CPA*.

[105] Ms. Deacon and Ms. Ouellette are appointed representative plaintiffs of the class pursuant to s. 5 of the *CPA*.

[106] If the parties are unable to agree as to costs, they may propose a timetable for making brief submissions, in writing.

Leiper J.

Released: March 31, 2026

Schedule "A"

Common Issues

A. Is Scotiabank required under the Canada Labour Code to provide vacation pay and statutory holiday pay to HFAs in addition to their other compensation?

B. Is Scotiabank liable in breach of contract, negligence, unjust enrichment, and/or breach of trust as a result of failing to provide vacation pay and statutory holiday pay as required under the Canada Labour Code?

C. If the answer to common issue (b) is yes, are the class members entitled to damages, restitution, and/or disgorgement for the defendant's breach of contract, negligence, unjust enrichment, and/or breach of trust, and if so, in what amount?

D. Are the class members entitled to punitive damages, and if so, in what amount?

E. Are class members entitled to pre-judgment interest or the time value of an award at:

   i the internal rate of return that the defendant received, compounded monthly;

   ii the rate of return they would have achieved on a reasonably prudent investment, compounded monthly;

   iii the rate under the Courts of Justice Act, compounded monthly; or

   iv at the rate under the Courts of Justice Act?

F. Are the claims for vacation pay of HFAs who were employed at Scotiabank on or after June 14, 2021, timely by virtue of section 188 of the Canada Labour Code?

G. Did Scotiabank breach the Pension Plan by failing to calculate retired HFAs' benefits at full compensation, rather than excluding amounts for vacation pay and statutory holiday pay?

H. If the answer to common issue (g) is yes, are class members entitled to damages, restitution, and/or disgorgement, and if so, in what amount?

I. If common issue (g) is answered in the affirmative, can the amount of loss or damages suffered by the Class members be determined on an aggregate basis, and if so, in what amount?

CITATION: Deacon v. Bank of Nova Scotia, 2026 ONSC 1793
COURT FILE NO.: CV-23-00702820-00CP
DATE: 20260331

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

NATHALIE DEACON and GAIL OUELLETTE

Plaintiffs

– and –

THE BANK OF NOVA SCOTIA

Defendant

REASONS FOR DECISION

Leiper J.

Released: March 31, 2026