

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**LEIGH CUNNINGHAM**

Plaintiff

and

**RBC DOMINION SECURITIES LIMITED / RBC DOMINION VALEURS MOBILIERES  
LIMITEE and RBC DOMINION SECURITIES INC. / RBC DOMINION VALEURS  
MOBILIERES INC.**

Defendants

**PROCEEDING UNDER the *Class Proceedings Act*, 1992**

**REPLY**

1. The Plaintiff denies all of the allegations contained in the Statement of Defence (hereinafter referred to at times as the “**Defence**”) on behalf of herself and the other Class Members. The Plaintiff and the Class Members<sup>1</sup> repeat and rely upon the allegations in the Amended Statement of Claim (hereinafter referred to at times as the “**Claim**”).

2. Without limiting the generality of the foregoing, the Defendants’ general assertion in its Defence that vacation and holiday pay were somehow “included” in the “payout rates”, “percentage payout” or “percentages of revenue” owing and payable to the Class Members or any of them (e.g. see paragraphs 34 and 36 in the Defence) is simply wrong in fact and law. Further, any such assertion upends the rights of these vulnerable employees and the obligations of the

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<sup>1</sup> The references to Class Members herein after paragraph 1 refer to the Plaintiff and all other Class Members.

Defendants as employers. The Defendants simply failed to pay the Class Members the vacation pay and public holiday pay that was calculable based on, and owing in addition to, their total compensation from the so-called payout or commissions<sup>2</sup>.

3. The Defendants' express and/or implied assertions at certification and again in its Defence that vacation and public holiday pay owing in addition to the Class Members' commission wages was somehow provided to those Class Members because they may have taken time off work for vacations or public holidays and did not have their commissions reduced or withheld by the Defendants because time off work was taken are similarly erroneous and flawed. Not unilaterally reducing the wages to which employees are entitled in any event (which itself would be a breach of their contracts) – in this case, commission wages that are payable based on a metric not tied to or contingent upon hours or time at work (e.g. commissions payable based on a percentage of production or revenues) – does not amount to payment of vacation and holiday pay owing on those very wages. Further, the Defendants have never in fact reported, recorded or treated, or represented to or advised the Class Members, that the vacation and holiday pay owing to them in addition to the commissions was somehow paid or satisfied based on Class Members simply taking time off work without their wages being somehow unilaterally reduced by the Defendants.

4. Moreover, and belying any suggestion that the Defendants paid the required vacation and public holiday pay – let alone some greater benefit – the Defendants:

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<sup>2</sup> The terms “commissions” and “commission” (as used by the Plaintiff in this proceeding) include the Defendants' so-called “payout rates” and “percentage payout” and “percentage of revenues”, account fees, trailer fees/trailers, transaction based commissions (as those forms of variable compensation or commission are described or referred to in the Defence), any bonuses, and any other variable compensation (regardless whether the Defendants considered, described or reported such compensation as commissions to the Class or otherwise) that would be considered as, or deemed to be, wages or compensation on which vacation pay and/or holiday pay may be owing or owed under the Employment Standards Legislation. For clarity, “commission(s)” exclude any salary payable to certain members of the Class.

- (a) had no system to track the vacation and public holidays taken off work by each Class Member;
- (b) in fact failed to track if and when such time off was taken by each Class Member;
- and,
- (c) failed to verify if each Class Member did not actually work or perform work during any so-called vacations or public holidays.

5. Simply paying an employee the wages that they were promised and to which they were in any event entitled (whether they took vacation or public holidays off work or not) does not amount to paying the employee the additional vacation and holiday pay which is calculated on, and payable in addition to, the commission wages themselves as required under the Employment Standards Legislation (as defined in the Claim). Among other things, the Defendants conflate the entitlement to vacation and public holiday time off with the obligation to pay the Class Members an amount – for vacation pay and public holiday pay – in addition to the amounts to which they were already entitled as their commission wages.

6. The Defendants' approach, procedures (or lack thereof), and system with respect to vacation and public holiday pay were and are flawed and resulted in Class Members simply not being paid the vacation and public holiday pay required pursuant to the Employment Standards Legislation, let alone any greater right or benefit as the Defendants allege. In the latter regard, and furthermore, the approach, procedures (or lack thereof) and system as alleged in the Defence do not and cannot amount in fact or law to a greater right or benefit to the statutory vacation pay standards or holiday pay standards for the Class Members. Further, the Defendants have no right or entitlement to any sort of set-off in that regard or otherwise.

**A. Response to the Limitations and Laches Pleas Generally**

7. In response to paragraphs 67 – 69 of the Defence, the Plaintiff specifically denies that the Class Members' claims are barred by the *Limitations of Actions Act 2002*, S.O. 2002, c. 24 and corresponding statutes in other Provinces and Territories, or barred by the doctrine of laches.

8. Without limiting the generality of the paragraph 7 above, the Plaintiff:

- (a) denies that the Class Members (or any of them) knew or ought to have known that the Defendants had failed to properly pay them vacation and public holiday pay or that the Defendants otherwise engaged in the actions, omissions and misconduct resulting in their liability or justifying the remedies as alleged in the Claim;
- (b) denies that, contrary to what is alleged in the Defence, the Class Members knew or ought to have known any or all of the facts on which the claims in this action are based each time the Class Members were paid or received a paystub, paysheet detail report (as referred to in the Defence), or any other documents;
- (c) pleads and relies on the doctrine of discoverability as set out in sections 4 and 5 of the *Limitations of Actions Act 2002*, S.O. 2002, c. 24 and sections in corresponding statutes in other Provinces and Territories;
- (d) pleads that the claims in this action and the facts underlying same (including the breaches and liability in connection with vacation and public holiday pay, and the systemic failures and systemic liability relating thereto) were neither discoverable nor discovered, including but without limiting the generality of the foregoing by

virtue of the fact that the Class Members did not know or reasonably ought not to have known that:

- (i) injury, loss or damage had occurred;
- (ii) any injury, loss or damage was caused or contributed by any act or omission;
- (iii) any act or omission was that of the Defendants; and/or
- (iv) having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it;

or, alternatively, the Defendants wilfully concealed or failed to disclose the existence of a claim, the foregoing facts (and each or any of them) and/or the entitlement to vacation and holiday pay in addition to commissions, or wilfully misled the Class Members as to the existence of a claim or the appropriateness of a proceeding to remedy any injury, loss or damage, from the Class Members resulting in the suspension of any or all limitation periods (including both the presumptive or standard limitation periods and ultimate limitation periods);

- (e) pleads that the Defendants fraudulently concealed the causes of action, the existence of the claim, the appropriateness of a proceeding and/or the facts underlying the claim, or fraudulently concealed the right of action by virtue of the manner in which vacation and holiday pay was not properly recorded, reported and paid, where such fraud is not confined to the parameters of a common law action for fraud and would include equitable fraud and other circumstances where (as here) it is unconscionable for the Defendants to rely on any limitation period,

particularly given the Defendants' conduct and their superior and/or special relationship with the vulnerable employee Class;

- (f) denies that a legal proceeding would be an appropriate means for any of Class Member, as a current employee or even a former employee of the Defendants who were or are vulnerable, to seek to remedy the injury, loss or damage alleged in the Claim, particularly but not exclusively given that any such individual proceeding would be known or become known to the Defendants and other employers (in this relatively small investment advisory industry and elsewhere) and could lead to potential negative repercussions or reprisals, and otherwise potentially negatively influence the careers, prospects, perceived loyalty, perceived value, employability or hireability of such individuals the Defendants, or within and outside the industry;
- (g) pleads that the claims advanced in the Claim are based on continuous acts or omissions, and the day such acts or omissions take place are deemed to be the day on which such acts or omissions ceased (which acts and omissions continued up to and after the commencement of the action);
- (h) pleads that the claims advanced in the Claim are based on a series of acts of omissions in respect of the same obligation(s), and the day such acts or omissions take place are deemed to be the day on which the last act or omission in the series occurred (which act or omission continued up to and after the commencement of the action); and,
- (i) pleads that, with respect to the trust or deemed trust obligations on the Defendant as referred to in the Claim:

- (i) the breach of those obligations and any claim for resulting damages or recovery of such trust property could not occur or arise prior to the demand or claim in the Claim for recovery of those damages and the amounts impressed with a trust and/or prior to the Defendants' subsequent denial or refusal to pay over such amounts as set out in the Defence; and,
- (ii) further, and/or in the alternative, prior to the issuance of the Claim and/or the delivery of the Defence, the Class Members were not aware (fully or otherwise), and ought not to have been reasonably aware, of the Defendants' failure or refusal to pay over such amounts or honour their trust obligations, or of the conversion of such trust funds for the Defendants' own use.

9. Further, and without limiting the generality of paragraph 7 above, the Plaintiff pleads that the doctrine of laches has no applicability to the claims advanced in the Claim or, in the alternative, the doctrine may only be potentially applicable to such claims that are equitable.

10. To any claims which may potentially be subject to the doctrine of laches, a matter which the Plaintiff does not admit but expressly denies, it is inappropriate to apply the doctrine of laches to the claims of the Class Members because, in addition to the facts and allegations referred to above:

- (a) there has been no undue delay by the Plaintiff or the Class Members (or any of them) in seeking relief, equitable or otherwise;

- (b) there has been no acquiescence on the part of the Class Members (or any of them) to the breaches and other conduct (or omissions) on the part of the Defendants as pleaded in the Claim;
- (c) the Defendants in no way relied on any actions of the Class Members (or any of them) or the passage of time until this action was commenced, and/or altered a position taken or otherwise suffered any prejudice as a result of such reliance or passage of time;
- (d) the prosecution of this action and the claims of the Class Members is reasonable; and/or,
- (e) it would be unjust in the circumstances to apply the doctrine of laches and/or otherwise bar the prosecution of this action on behalf of the vulnerable employee Class Members on the basis of laches.

**B. Further Assertions or Particulars Concerning Limitation Periods and Laches**

11. At all material times, the Class relied on the Defendants to properly calculate, record, monitor, audit, segregate, detail/enumerate, and actually pay vacation and public holiday pay owed to them pursuant to provincial and territorial employment standards legislation.

12. At all material times, the Defendants were in a special relationship with the employee Class and the Defendants possessed superior knowledge and/or expertise concerning the rights and obligations relating to vacation and statutory holiday pay owed to Class Members pursuant to provincial and territorial employment standards legislation.



13. Without limiting the generality of paragraph 12 above, the Defendants in part possessed the superior knowledge and expertise through, among other things, its and the Royal Bank of Canada's various executives, employees (including lawyers), consultants and agents, as well as its and the Royal Bank of Canada's internal or external legal, human resources and employment relations consultants or departments. The Defendants further possessed but failed to reveal and/or provide information and details to the Class regarding the commissions owing and paid to the Class and how the Defendants approached (or, more accurately, failed to approach or pay) vacation and holiday pay in relation thereto.

14. The Defendants represented (or, more accurately, misrepresented) that, by paying commissions owed and payable to Investment Advisors within the Class, they were somehow properly and lawfully calculating and paying to the entire Class (or any of them) the additional vacation and statutory holiday pay owing on such commissions pursuant to provincial and territorial employment standards legislation.

15. Such representations (misrepresentations) were included in statements in compensation plans that vacation pay and statutory holiday pay were somehow "included" in the rates and other bases on which commissions were owed and paid. The Defendants repeat this misrepresentation in their Defence and rely on the misrepresentation that vacation pay and statutory holiday pay were "included" in the rates used to calculate the Class Members' compensation as a defence to the Action.

16. The Defendants have also represented to Class Members in *Codes of Conduct* or other documents (published by the Royal Bank of Canada and/or the Defendants) that the Defendants and their policies, practices and procedures comply with the law. Further, the Defendants have

also represented to Class Members in the *Codes of Conduct* or other documents that the Defendants did, and would, pay or compensate employees fairly and appropriately.

17. The Class Members could and did reasonably rely on the aforesaid representations, which concealed information from, or misled, Class Members as noted above. Class Members did not have any reason to - and in fact did not - doubt that the Defendants were or had been properly and lawfully paying vacation and holiday pay.

18. Until the commencement of the present Action, it would not have been reasonable or appropriate to expect Class Members to even consider that they were not being paid vacation and holiday pay or to expect Class Members to commence proceedings against the Defendants concerning the non-payment of vacation and statutory holiday pay.

**C. Response to Plea Concerning Business Succession Plans and Other Severance Agreements**

19. For those Class Members who entered into the Business Succession Plans or Other Severance Agreements, as these are pled by the Defendants, any claim arising from the non-payment of vacation and statutory holiday pay was excluded from, not covered by or preserved under the terms of such Business Succession Plans or Other Severance Agreements on their face or as properly interpreted in a manner most amenable or leading to the preservation of the rights and interests of these vulnerable employees.

20. Without limiting the generality of the plea at paragraph 19 above, the wording of the terms of those Plans or Agreements would have included language:

- (a) declaring that vacation and statutory holiday pay had been properly paid;

- (b) undertaking to pay vacation and statutory holiday pay; and/or,
- (c) undertaking compliance with provincial and territorial legislation governing employment.

If a Business Succession Plan or Other Severance Agreement contained provisions purportedly permitting or excusing the Defendants from not having paid, not paying or failing to pay vacation or statutory holiday pay, such provisions are and were null, void, ineffective, inequitable, unconscionable and unenforceable because, among other things:

- (i) they amount to prohibited and unlawful attempts to contract out of or waive the vacation and public holiday pay standards of provincial and territorial employment standards legislation in question (e.g. section 5(1) of the *Employment Standards Act, 2000*, SO 2000, c 41, as amended, and the similar or equivalent provisions in other Employment Standards Legislation (as defined in the Claim)) which neither amount to nor constitute, in fact or law, a greater right or benefit for the employee Class Members as compared to the vacation pay legislative standards and holiday pay legislative standards, and are void and unenforceable to the extent that they attempt or purport to waive or contract out of those standards;
- (ii) they result from the Defendants concealing, misleading, misrepresenting or failing to disclose the true state of affairs to the vulnerable employee Class Members as it relates to the entitlements to, calculation of and payment of vacation and public holiday pay;

- (iii) they result from a unilateral understanding and mistake on the part of the Class Members of which the Defendants were or should have been aware, and which the Defendants fostered or represented, which unilateral understanding and mistake by the Class was that they had received their vacation and holiday pay as required;
- (iv) if the Defendants truly believed that they had paid vacation and holiday pay to the Class by virtue of their approach or system in respect of vacation and holiday pay (which belief is denied), they thus result from a mutual or common mistake as between the Class and the Defendants that the Class Members had in fact received the required vacation and holiday pay;
- (v) they were entered into in circumstances of undue pressure or duress, without adequate time to consider same, and without independent advice, including advice based on the true state of affairs regarding vacation and holiday pay;
- (vi) they were contracts of adhesion, ambiguous and/or ought to be interpreted narrowly in favour of the rights and interests of the vulnerable employee Class; and/or,
- (vii) they are otherwise unconscionable and inequitable in the circumstances.

21. Further, or in the alternative, while entering into Business Succession Plans or Other Severance Agreements, the Defendants also undertook in its *Code of Conduct* or other documents to comply with the law and that they complied with the law, this undertaking formed a term of the

Business Succession Plans and Other Severance Agreements and overrides or renders void or unenforceable any attempt to waive or release claims to vacation and public holiday pay.

## **Legislation**

22. In addition to the Legislation pleaded and relied upon in her Claim, the Plaintiff pleads and relies upon the following statutes on behalf of herself and the other Class Members:

- (a) *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B, sections 4, 5 and 15;
- (b) *The Limitation of Actions Act*, RSM 1987, c. L150, as amended, sections 2, 5 and 14, and/or further or in the alternative *The Limitations Act*, CCSM, c LI50, sections 6, 7, 8, 10(1), 11(1) and 17;
- (c) *Civil Code of Québec*, CQLR c CCQ-199, sections 2925 and 2931;
- (d) *The Limitations Act*, SS 2004, c L-16.1, sections 5, 6, 7 12(1)(b), 12(2), and 17;
- (e) *Statute of Limitations*, RSPEI 1988, c S-7, sections 2(e), 2(g), 3, 42, and 43;
- (f) *Limitation of Actions Act*, SNB 2009, c L-8.5, sections 5, 6 and 16;
- (g) *Limitation of Actions Act*, SNS 2014, c 35 sections 8, 9, and 17;
- (h) *Limitations Act*, SNL 1995, c L-16.1 sections 5-7, 13, 14 and 22;
- (i) *Limitation of Actions Act*, RSY 2002, c 139 sections 2 and 3;
- (j) *Limitation of Actions Act*, RSNWT 1988, c L-8 s. 2 and 3; and

(k) *Limitation of Actions Act*, RSNWT (Nu) 1988, c L-8. s. 2, and 3.<sup>3</sup>

January 26, 2024

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<sup>3</sup> As well as any applicable transition provisions in the legislation listed in the subparagraphs of this paragraph 22.

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**LEIGH CUNNINGHAM**  
Plaintiff

**-and-**

**RBC DOMINION SECURITIES LIMITED et al.**  
Defendants

Court File No. CV-20-00643720-00CP

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