

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

AMENDED STATEMENT OF CLAIM

Notice of Action issued on July 9, 2020

AMENDED THIS June 14, 2021 PURSUANT TO
MODIFIÉ CE 2021 CONFORMÉMENT À
☒ RULE/LA RÈGLE 26.02 ("A")
☐ THE ORDER OF _____
L'ORDONNANCE DU _____
DATED / FAIT LE _____
M. Wallace M. Wallace
REGISTRAR GREFIER Registrar
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

CLAIM

1. The Plaintiff, on her own behalf and on behalf of all Class Members seeks:
 - (a) An order certifying this action as a class proceeding and appointing the Plaintiff as the representative plaintiff;
 - (b) A Declaration that the Defendants have breached the terms (express, implied or otherwise) of their contracts with the Class Members, and violated applicable provincial and territorial Employment Standards Legislation, by failing to provide Class Members with vacation pay and public holiday pay;
 - (c) A Declaration that the Defendants have a system and pay practices that fail to properly record, monitor, audit, calculate, segregate, detail/enumerate, and actually pay the Class Members for vacation and holiday pay, in part or in whole;
 - (d) A Declaration that the Defendants had and owed common law duties to the Class Members, breached same, and were negligent;
 - (e) A Declaration that the Defendants had and owed fiduciary duties to the Class Members and breached same;
 - (f) A Declaration that, as a result of the actions, conduct and omissions as set out herein, the Defendants breached their contractual duty of good faith to Class Members, breached the duty of care owed to the Class Members, and breached the fiduciary duties to the Class Members, including by:

- (i) failing to comply with their contractual obligations towards Class Members;
 - (ii) failing to comply with applicable provincial and territorial Employment Standards Legislation;
 - (iii) implementing and maintaining a system that fails to properly record, monitor, audit, calculate, segregate, detail/enumerate, and actually pay the Class Members for vacation and holiday pay, in part or in whole; and/or,
 - (iv) failing to disclose to the Class Members, and/or otherwise by concealing from the Class Members, that vacation and holiday pay were not properly being calculated and paid;
- (g) A Declaration that the Defendants have been unjustly enriched, to the deprivation of Class Members by the value of unpaid vacation pay and public holiday pay owed to Class Members, and an order requiring the Defendants to disgorge to Class Members all amounts withheld by it in respect of such unpaid vacation pay and public holiday pay under applicable provincial and territorial Employment Standards Legislation, in respect of which it has been unjustly enriched;
- (h) An interim, interlocutory and final Order or injunction directing that the Defendants comply with the provisions of the aforesaid contracts, the duty of good faith, and with the applicable provincial and territorial Employment

Standards Legislation, and, in particular, pay Class Members vacation pay and public holiday pay in accordance with such contracts and legislation;

- (i) An interim, interlocutory and final Order or injunction directing that the Defendants are prohibited from employing a system that fails to properly record, monitor, audit, calculate, segregate, detail/enumerate, and actually pay the class members for vacation pay and holiday pay;
- (j) Damages, disgorgement or restitution remedies for the Class based on, or equivalent to, unpaid vacation pay and public holiday pay wrongfully withheld from class members up to the date of trial;
- (k) \$750 million in general damages for the class, or such other amounts as to this Honourable Court seems just;
- (l) Punitive damages in the amount of \$50 million;
- (m) An order, pursuant to s. 24 of the *Class Proceedings Act, 1992*, SO 1992, c 6 directing an aggregate assessment of damages;
- (n) prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (o) post judgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (p) Costs pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6 and the *Courts of Justice Act*, RSO 1990, c C. 43;

- (q) Costs of administration of a plan of distribution of the recovery in this action pursuant to section 26(9) of the *Class Proceedings Act, 1992*, SO 1992, c 6 plus applicable taxes; and,
- (r) Such further and other relief as may be requested by the Plaintiff or as required, or as this Honourable Court may deem just.

A. DEFINED TERMS

2. In this Statement of Claim, the terms noted below have the following meanings:

- (a) "Class" or "Class Members" means, collectively, all former and current employees of one or more of the Defendants who are or were employed,
 - (i) as an investment advisor, wealth advisor, portfolio manager, or a similar or predecessor title, whose job responsibilities include (or included) providing clients with investment advice and/or growing the Defendants' client base and include those who provide (or provided) assistance to those who provide (or provided) such advice, including associates and associate advisors (hereafter collectively referred to at times as "Investment Advisor" or "Investment Advisors"),
 - (ii) in a Province or Territory of Canada other than British Columbia or Alberta;

- (iii) at any time up to the date of first distribution of the notice of certification of this Action as a class proceeding (the "Class Period");¹ and,
 - (iv) who are (or were) remunerated either fully or partially based on commissions.
- (b) "Claims/Damages Period" for any Class Member means the period during which they should have been paid vacation pay and public holiday pay, which period continues up to, if applicable for any Class Member, the trial of this Action; and,
- (c) "Employment Standards Legislation" means: the *Labour Standards Act*, RSNL 1990, c L-2; the *Labour Standards Code*, RSNS 1989, c 246; the *Labour Standards Act*, RSNWT (Nu) 1988, c L-1; the *Employment Standards Act*, RSY 2002, c 72; the *Employment Standards Act*, SNB 1982, c E-7.2; the *Employment Standards Act*, RSPEI 1988, c E-6.2; the *Employment Standards Act*, SNWT 2007, c 13; the *Employment Standards Act*, 2000, SO 2000, c 41; the *Act respecting labour standards*, CQLR c N-1.1; the *Civil Code of Québec*, CQLR c CCQ-1991; the *Employment Standards Code*, CCSM c E110; and the *Saskatchewan Employment Act*, SS 2013, c S-15.1.

¹ The Class Period and corresponding membership in the class, as asserted and pleaded in this Statement of Claim and Action, includes anyone employed "at any time" up to the distribution of the certification notice (regardless of any other reference in, or interpretation of, the Notice of Action as it relates to class membership).

B. THE DEFENDANTS

3. The Defendants [hereafter "RBC DS"] are a full-service brokerage, investment, and wealth management firm headquartered in Toronto, with over 100 offices across Canada.

4. RBC DS employs and employed Investment Advisors.

5. RBC DS is required to comply with the Employment Standards Legislation applicable in the respective Provinces and Territories where Class Members work (or worked). The minimum standards set out in the Employment Standards Legislation are intended, among other things, to protect vulnerable employees from the superior economic and bargaining power exerted by employers.

6. RBC DS has unilaterally attempted to assert that the vacation pay and holiday pay otherwise owing to the Class Members under Employment Standards Legislation is somehow incorporated into their overall compensation or their commission structure or rates.

7. Without limiting the generality of the allegations herein, the Plaintiff asserts that RBC DS has in fact failed or refused to pay the Class Members the vacation pay and holiday pay that was and is properly owing or accruing to them on their total compensation. Such compensation includes commissions paid to the Class Members while they were actively advising clients (or assisting those actively advising clients) and while they continued to earn wages, salary or compensation pursuant to a business succession plan, business succession agreement, or other severance agreement (as discussed further below).

8. The Plaintiff further asserts, as particularized below, that any attempts by RBC DS to dictate or assert that vacation pay and holiday pay are somehow incorporated into total compensation are not effective, binding, or enforceable as against the Class Members.

C. THE PLAINTIFF

9. The Plaintiff, Leigh Cunningham, is an individual residing in Winnipeg, Manitoba. She worked as an Investment Advisor for RBC DS in Winnipeg from April 1, 1992 until November 30, 2017.

10. The Plaintiff's compensation and wages from RBC DS were made up largely by commission, but RBC DS likewise contributed amounts to her income as "IA Guarantee[s]". RBC DS also enrolled the Plaintiff in benefits programs during the course of her employment.

11. Under Manitoba's employment standards legislation, the Plaintiff was entitled to two (2) weeks of vacation pay during her first four years of employment and three (3) weeks of vacation pay during her fifth and subsequent years of employment.

12. Under Manitoba's employment standards legislation, the Plaintiff was entitled to public holiday pay in respect of eight (8) public holidays. For each such holiday, and given the variability in the Plaintiff's income, the Plaintiff was entitled to an amount as public holiday pay calculated at five (5%) PER CENT of the pay she received in the four week period preceding the particular public holiday.

D. THE CLASS

13. The Class Members perform and performed substantially the same work at various locations across Canada. For the sake of clarity, to the extent that some Class Members perform or performed materially different work from others, statutory vacation pay and holiday pay were in any event owing to the Class Members.

14. Class Members in each of the applicable Provinces and Territories are and were remunerated based in full or in part on commissions at set rates (unless and until they were paid salary, wages or compensation under a business succession agreement or severance agreement). Like the Plaintiff, Class Members received from RBC DS other forms of remuneration and/or benefits.

15. The commissions are and were calculated based on criteria related to production, such as sales. The commission calculation formula for the Class Members is and was, at any given point in time during the Class Period, the same or materially the same.

E. EMPLOYMENT STANDARDS LEGISLATION

16. The terms of employment for Class Members incorporated, and/or are and were subject to, the Employment Standards Legislation in force in the relevant Provinces and Territories within Canada.

17. With some minor variation, each of the applicable provincial and territorial Employment Standards Legislation requires the payment of vacation pay and public

holiday pay based on an employee's total wages, including commissions. Such payments are in addition to an employee's regular wages.

18. RBC DS failed to properly pay Class Members their vacation pay or public holiday pay based on their total wages, including commissions, as required by the Employment Standards Legislation.

19. Like all Class Members, while employed with RBC DS, the Plaintiff was remunerated with commissions calculated based on criteria related to production, such as sales. During her employment, From the date her employment commenced until the date RBC DS made its last payment to the Plaintiff pursuant to its business succession plan or its business succession agreement entered into with the Plaintiff, the Plaintiff was not properly paid any additional compensation in the form of vacation pay or public holiday pay. On or about December 1, 2020, RBC DS made the last salary payment to the Plaintiff pursuant to her business succession agreement with RBC DS dated effective December 1, 2017.

19A. The RBC DS business succession plan(s) and the specific business succession agreements entered into between Class Members and RBC DS (including the agreement entered into with the Plaintiff), consistently failed to refer to, or provide for, the vacation pay or public holiday pay owing on the salary, wages and compensation payable thereunder. No vacation pay or public holiday pay was in fact paid by RBC DS on the compensation owing and paid to the Plaintiff or any other Class Member during the currency of their business succession agreements.

20. Further, at no time during her employment did RBC DS maintain, nor did Plaintiff ever receive, a record or statement tracking her entitlement to vacation or public holiday pay. Similarly, RBC DS never actually recorded or advised Class Members how much or what percentage of the compensation they received was purportedly on account of vacation pay or public holiday pay. While any such recording or advising would not have cured the actual failure to properly pay vacation pay and holiday pay owing, the fact that no such recording or advising occurred further establishes, evidences, and confirms the failure.

21. RBC DS's pay practices for commissions (or otherwise) were uniform and did not provide for any variations based on the amount of vacation pay or public holiday pay a Class Member was entitled to receive under the applicable Employment Standards Legislation. RBC DS's uniform pay practices did not likewise vary commissions paid to account for a Class Member's length of service when length of service plays a crucial role in all Employment Standards Legislation in determining the amount of vacation pay an employer must pay.

22. RBC DS employed Class Members of differing tenure at any given time whose employment was governed by eleven (11) different statutory regimes when it comes to calculating vacation pay and public holiday pay, yet RBC DS set its commission compensation in a uniform fashion.

23. Despite bald assertions in certain documents or policies unilaterally created by RBC DS at any time that vacation pay and public holiday pay was somehow included in the commissions or total compensation received by the Plaintiff and some of the other

Class Members, RBC DS failed in fact to properly calculate, record, account for and incorporate such additional statutory entitlements into the compensation paid to Class Members.

24. Moreover, such assertions and unilateral documents do not form part of the enforceable contracts of employment with the Class Members, and the terms thereof purporting to assign a portion of overall compensation as additional vacation pay and holiday pay otherwise owing (in addition to that overall compensation) are ineffective in law and should otherwise be found to be unenforceable, ineffective and unconscionable.

F. BASIS FOR THE CLAIM

25. RBC DS owes and owed the Plaintiff and Class Members statutory duties under the Employment Standards Legislation and contractual and other duties at common law.

26. RBC DS has breached those duties causing the Plaintiff and Class Members to suffer damages for which RBC DS is liable.

(i) Breach of Employment Standards Legislation and Breach of Contract

27. The applicable provincial and territorial Employment Standards Legislation forms either an express or implied term of the contracts of employment of the Plaintiff and other Class Members.

28. As the employer of the Plaintiff and the Class, RBC DS has and had a legal duty to provide both the Plaintiff and Class Members with their minimum statutory entitlements under Employment Standards Legislation, including:

- (a) Providing vacation pay in addition to commissions (and wages or compensation under business succession agreements or plans or under severance agreements) and calculated based on their total wages, including commissions earned;
- (b) Maintaining an accurate record of vacation pay entitlements;
- (c) Providing public holiday pay in addition to commissions and calculated based on their total wages, including commissions earned;
- (d) Maintaining an accurate record of public holiday pay entitlements;
- (e) Monitoring and auditing its vacation and holiday practices to ensure that Class Members were properly compensated as required under the Employment Standards Legislation; and,
- (f) In the case of most Class Members, treating accrued and unpaid vacation pay as trust monies.

29. RBC DS breached these duties owed to the Plaintiff and Class Members by failing to provide all of the entitlements above, by failing to comply with minimum Employment Standards Legislation requirements related to maintaining accurate records of such entitlements, and by adopting a system and pay practices in contravention of those requirements.

30. In addition to the damages suffered as a result of such failures to provide vacation pay and public holiday pay for the entire Claims/Damages Period, each Class Member is

entitled to nominal damages for breach of contract (and for the other breaches of duties as set out below).

(ii) Breach of Duty of Good Faith

31. As employees, the Plaintiff and Class Members could expect that RBC DS would abide by a duty to act in good faith and to honour, and not frustrate, its statutory and contractual obligations.

32. RBC breached its duty of good faith by, *inter alia*:

- (a) failing to advise Class Members of their entitlements under Employment Standards Legislation;
- (b) misrepresenting to Class Members that vacation pay and public holiday pay entitlements were properly included and accounted for in the calculation of their commissions, when they were not;
- (c) failing to pay Class Members vacation pay under Employment Standards Legislation;
- (d) failing to pay Class Members public holiday pay under Employment Standards Legislation;
- (e) failing to record and retain records of Class Members' vacation pay and public holiday pay entitlements;

- (f) failing to monitor and audit its vacation and holiday practices to ensure that Class Members were properly compensated as required under the Employments Standards Legislation;
- (g) otherwise adopting, implementing and maintaining a system and pay practices that fail to properly record, monitor, audit, calculate, segregate, detail/enumerate, and actually pay the Class Members for vacation pay and holiday pay, and frustrated and concealed their entitlements thereto; and,
- (h) failing to abide by the trust rules in effect in most of the affected provinces and territories with respect to vacation pay.

(iii) Negligence

33. RBC DS owed a duty of care to Class Members to take reasonable steps to ensure that they received all minimum statutory entitlements under Employment Standards Legislation. It breached its duty to Class Members by, *inter alia*:

- (a) failing to advise Class Members of their entitlements under Employment Standards Legislation;
- (b) misrepresenting to Class Members that vacation pay and public holiday pay entitlements were properly included and accounted for in the calculation of their commissions, when they were not;
- (c) failing to pay Class Members vacation pay under Employment Standards Legislation;

- (d) failing to pay Class Members public holiday pay under Employment Standards Legislation;
- (e) failing to record and retain records of Class Members' vacation pay and public holiday pay entitlements;
- (f) failing to monitor and audit its vacation and holiday practices to ensure that Class Members were properly compensated as required under the Employments Standards Legislation;
- (g) otherwise adopting, implementing and maintaining a system and pay practices that fail to properly record, monitor, audit, calculate, segregate, detail/enumerate, and actually pay the Class Members for vacation pay and holiday pay, and frustrated and concealed their entitlements thereto; and,
- (h) failing to abide by the trust rules in effect in most of the affected provinces and territories with respect to vacation pay.

34. Damages were suffered by Class Members as a result of RBC DS's negligence as set out above. Those damages include but are not limited to the loss of minimum vacation pay and public holiday pay under Employment Standards Legislation.

(iv) *Fiduciary Duty*

35. RBC DS owed fiduciary duties to Class Members. RBC DS was in a special relationship with the Class Members, who were vulnerable to, reliant upon, and influenced

by the representations and superior knowledge, sophistication, and power of RBC DS. It breached its fiduciary duties to Class Members by, *inter alia*:

- (a) failing to advise Class Members of their entitlements under Employment Standards Legislation;
- (b) misrepresenting to Class Members that vacation pay and public holiday pay entitlements were properly included and accounted for in the calculation of their commissions, when they were not;
- (c) failing to pay Class Members vacation pay under Employment Standards Legislation;
- (d) failing to pay Class Members public holiday pay under Employment Standards Legislation;
- (e) failing to record and retain records of Class Members' vacation pay and public holiday pay entitlements;
- (f) failing to monitor and audit its vacation and holiday practices to ensure that Class Members were properly compensated as required under the Employments Standards Legislation;
- (g) otherwise adopting, implementing and maintaining a system and pay practices that fail to properly record, monitor, audit, calculate, segregate, detail/enumerate, and actually pay the Class Members for vacation pay and holiday pay, and frustrated and concealed their entitlements thereto; and,

- (h) failing to abide by the trust rules in effect in most of the affected provinces and territories with respect to vacation pay.

36. Damages were suffered by Class Members as a result of RBC DS's breach of fiduciary duty. Those damages include but are not limited to the loss of minimum vacation pay and public holiday pay under Employment Standards Legislation.

(v) *Unjust enrichment*

37. RBC DS has been unjustly enriched as a result of retaining money that is rightfully owed to the Plaintiff and other Class Members in the form of vacation pay and public holiday pay.

38. The Plaintiff and Class Members have suffered a corresponding deprivation in the form of loss of vacation pay and public holiday pay.

39. There is no juristic reason for this unjust enrichment. RBC DS's failure to pay the Plaintiff and other Class Members vacation pay and public holiday pay is unlawful.

40. Although RBC DS's failure to pay is unlawful in respect of each Class Member, the absence of a juristic reason for this unjust enrichment is particularly so in those provinces and territories where a trust or deemed trust is applied to vacation pay owed to the Class.

G. AGGRAVATED, PUNITIVE AND EXEMPLARY DAMAGES

41. The Plaintiff pleads that RBC DS's conduct as pleaded above is unlawful, high-handed and carried out in bad faith.

42. RBC DS's conduct constitutes a disregard for the minimum statutory employment rights and interests of Class Members.

43. RBC DS's conduct in failing to pay Class Members vacation pay and public holiday pay, while at the same time misrepresenting that such payments were received, warrants awards of aggravated, exemplary and punitive damages.

H. RELEVANT LEGISLATION

44. The Plaintiff pleads and relies upon the Employment Standards Legislation and the following statutes:

- (a) the *Class Proceedings Act*, 1992, SO 1992, c 6;
- (b) the *Courts of Justice Act*, RSO 1990, c C.43.

I. PLACE OF TRIAL

45. The Plaintiff proposes that this Action be tried in Toronto.

August 7, 2020

CAVALLUZZO LLP

474 Bathurst Street, Suite 300
Toronto ON M5T 2S6

Stephen J. Moreau, LSO# 48750Q
Christopher Perri, LSO# 59033M
Genevieve J. Cantin, LSO# 69073S

Tel: 416-964-1115
Fax: 416-964-5895

ROY O'CONNOR LLP

200 Front Street West
Suite 2300
Toronto, ON M5V 3K2

David F. O'Connor, LSO #33411E
J. Adam Dewar, LSO #46591J

Tel: 416-362-1989
Fax: 416-362-6204

WHITTEN & LUBLIN PC

Employment Lawyers
141 Adelaide Street West, Suite 1100
Toronto, ON M5H 3L5

Daniel Lublin, LSO#51549F
Tel: 416-640-2667
Fax: 416-644-5198

LEIGH CUNNINGHAM
Plaintiff

-and- **RBC DOMINION SECURITIES LIMITED et al.**
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CAVALLUZZO LLP
474 Bathurst Street, Suite 300
Toronto ON M5T 2S6

Stephen J. Moreau, LSO# 48750Q
Christopher Perri, LSO# 59033M
Genevieve J. Cantin, LSO# 69073S
Tel: 416-964-1115
Fax: 416-964-5895

ROY O'CONNOR LLP
200 Front Street West
Suite 2300
Toronto, ON M5V 3K2

David F. O'Connor, LSO#
Tel: 416-362-1989
Fax: 416-362-6204

WHITTEN & LUBLIN PC
Employment Lawyers
141 Adelaide Street West, Suite 1100
Toronto, ON M5H 3L5

Daniel Lublin, LSO#
Tel: 416-640-2667
Fax: 416-644-5198

Lawyers for the Plaintiff