

**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*

**STATEMENT OF DEFENCE**

1. Except as expressly admitted herein, the Defendants, RBC Dominion Securities Limited and RBC Dominion Securities Inc. (collectively, “RBC DS”) deny each and every allegation in the Amended Statement of Claim.

2. In particular, contrary to the allegations in the Amended Statement of Claim, RBC DS did not fail or refuse to pay the Plaintiff or the Class Members compensation for statutory vacation pay or statutory holiday pay to which they were entitled. In fact, as set out in detail below, the Plaintiff and each of the Class Members received vacation and holiday pay greater than their statutory minimum entitlement.

### **The Parties and the Class Members**

3. RBC Dominion Securities Inc. (“RBC DS”) is a corporation amalgamated pursuant to the laws of Canada. RBC DS is a full-service securities broker/dealer, registered with the Canadian Investment Regulatory Organization (“CIRO”) and provincial securities regulators.

4. RBC DS operates across Canada to provide an array of wealth management services to individuals and institutions.

5. These services are provided by employees, including the Class Members, who are registered with CIRO (formerly known as the Investment Industry Regulatory Organization of Canada, and before that as the Investment Dealers Association of Canada).

6. The Plaintiff, Leigh Cunningham, is a former employee of RBC DS. She commenced employment with RBC DS as an Investment Advisor in the Winnipeg branch in or around April 1992 and remained employed as an Investment Advisor with RBC DS until on or about November 20, 2017.

7. The Class Members include current and former Investment Advisors, Associates and Assistants employed by RBC DS, in every province except Alberta and British Columbia, who were paid fully or partially based on “commissions”, as explained in detail in this Defence. The Class as certified is defined as follows:

All former and current employees of either Defendant who are or were employed as an Investment Advisor, wealth advisor, portfolio manager, or 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 Assistants, and who were employed in a Province or Territory of Canada (other than British Columbia or Alberta):

- (i) in Québec from March 15, 2017 to the Notice Date;
- (ii) in Nunavut, Northwest Territories, and Prince Edward Island from July 9, 2014 to the Notice Date;
- (iii) in Yukon from March 27, 2014 to the Notice Date;
- (iv) in Saskatchewan, Ontario, New Brunswick, and Nova Scotia from July 9, 2005 to the Notice Date; and,
- (v) in Manitoba and Newfoundland & Labrador from July 9, 1990 to the Notice Date,

and who are (or were) remunerated either fully or partially based on commissions.

8. The Plaintiff and the Class Members (with the exception of new Investment Advisors, who had a specialized compensation program for up to the first 57 months of employment) worked in teams consisting of employees with different responsibilities and compensation. There are three basic types of team members in the Class, with variation in the titles for these roles over time.

- (a) The first type of team member is an Investment Advisor (“Advisor”). Advisors are licensed as Registered Representatives with CIRO. For each client account with RBC DS there is at least one responsible Advisor. Those Advisors are assigned one or more Investment Advisor codes or “IA codes” that are used to track those accounts.
- (b) The second type of team member is an Associate, of which there are two kinds. Those Associates who are licensed with CIRO as Registered Representatives are able to perform all the duties of an Advisor. Those Associates who are licensed with CIRO as Investment Representatives are able to buy or sell securities based on client instructions but cannot provide advice to clients.

- (c) The third type of team member is an Assistant. They are generally licensed as Investment Representatives and are able to buy or sell securities based on client instructions but cannot not provide investment advice to clients.

9. There are teams of Class Members as small as one Advisor and one Assistant (who may also assist one or more other Advisors). There are teams that consist of several Advisors, several Associates and several Assistants. Between those two extremes there is a large variation in the size and make up of teams. The team in which Ms. Cunningham worked as an Advisor consisted of her and generally two Associates and one Assistant.

10. The use of teams to advise clients, execute trades, and otherwise provide services to clients means that, when one or more Class Members on a team is off work for vacation or otherwise, other Class Members on the team continue to provide advice and/or assistance to clients. In Ms. Cunningham's case, during at least the last five years of employment, almost all the work servicing the accounts was done by members of the team other than her.

### **Client Account Revenue**

11. The principal types of revenue (also referred to as "production") generated by the work of the Class Members is as follows.

12. Account fees are the largest component of revenue generated in respect of accounts. The majority of RBC DS client accounts are fee-based accounts, which pay fees on a monthly or quarterly basis based on the value of the assets in the account, and which are not charged commissions for the purchase and sale of securities. Account fees were approximately 78.5% of total revenue in 2020, which is similar to other years and to the account fee revenue of the team in which Ms. Cunningham worked. The amount of account fees generated by a team and received

by the firm was not affected by one or more Class Members in the team having taken time off – for vacations, holidays, or otherwise – during the period covered by the fee.

13. Accounts that are not set up as fee-based accounts may hold securities such as mutual funds that pay periodic “trailer fees” or “trailers” based on the value of the mutual fund holdings. Trailer fees were approximately 8.5% of total revenue in 2020, which is similar to other years and to the account revenues of the team in which Ms. Cunningham worked. The amount of trailer fees generated by the team and received by the firm was not affected by one or more Class Members in the team having taken time off – for vacations, holidays, or otherwise – during the period covered by the fee.

14. Accounts that are not set up as fee-based accounts are charged commissions for the purchase or sale of certain securities. Transaction-based commissions were approximately 13.0% of total revenue in 2020, which is similar to other years and to the account revenues of the team in which Ms. Cunningham worked. Given that purchases and sales of securities can be entered by different members of a team, the amount of commissions generated by the team and received by the firm in a given period was not affected by one or more Class Members in the team having taken time off for vacations, holidays, or otherwise.

### **The Class Members’ Compensation**

15. The compensation of Class Members varied depending on their position and compensation arrangements.

#### *(a) Advisors*

16. Advisors, other than new Advisors, did not receive a salary. Their compensation was calculated as follows.

17. Each month, RBC DS calculated the revenue (primarily account fees, trailer fees and commissions) received by the firm for the work of the members of each team. As set out above, the amount of revenue (account fees, trailer fees and commissions) generated by a team and received by the firm was not affected by one or more Class Members in the team having taken time off – for vacations, holidays, or otherwise – during the period covered by the fee.

18. A percentage “payout” from the gross revenue – ranging from 20% to 50%, as specified by RBC DS’ compensation program – was allocated under the IA Code or Codes assigned to the responsible Advisor. The amount of revenue allocated to the IA Code or Codes was not affected by one or more of the team members having taken time off during that month for vacations, holidays, or otherwise.

19. Any agreed-upon percentages of revenue payable to Associates and/or Assistants on the team were then deducted and paid to those Associates and/or Assistants. The amounts paid from revenue to an Associate and/or Assistant were not affected by the Associate or Assistant or any of the other team members having taken time off during that month for vacations, holidays, or otherwise.

20. The balance, after any other expenses, was then paid to the responsible Advisor. The amount paid from revenue to the responsible Advisor was not affected by the Advisor or any of the other team members having taken time off during that month for vacations, holidays, or otherwise.

21. RBC DS provided a Paysheet Detail Report to each Advisor each month that showed, for the previous month, the amount of the payout to the IA Code or Codes assigned to the Advisor, the amounts of revenue paid to each Associate and/or Assistant, any amounts deducted from the

payout for expenses, and the amount paid to the Advisor. Advisors were expected to review the information set out in their Paysheet Detail Reports.

*(b) Associates*

22. Many but not all Associates received an annual salary paid on a bi-monthly basis. The amount of the salary was decided upon by RBC DS branch management and did not vary based on account revenue. Those Associates who did not receive an annual salary received a percentage (which varied from team to team) of the revenue generated by the team.

23. Many but not all of those Associates who received an annual salary also received a percentage (which varied from team to team) of revenue generated by the team.

24. As set out above, the amounts paid to each Associate from revenue was not affected by the Associate or any of the other team members having taken time off during that month for vacations, holidays, or otherwise.

*(c) Assistants*

25. Assistants received an annual salary paid on a bi-monthly basis. The amount of the salary was decided upon by RBC DS branch management and did not vary based on account revenue.

26. Many but not all Assistants who received an annual salary also received a percentage (which varied from team to team) of the revenue generated by the team. As set out above, the amounts paid to Assistants from revenue was not affected by the Assistant or any of the other team members having taken time off during that month for vacations, holidays, or otherwise.

*(d) New Advisors*

27. New Advisors had a specialized compensation program for up to the first 57 months which

provided for a period of salary plus certain payouts from account revenue. The compensation structure varied based on the length of time the new Advisor had been working and the amount of gross production under the IA code. A new Advisor also had the ability to opt to move to the regular compensation program applicable to other Advisors.

### **Statutory Vacations and Holidays of the Class Members**

28. The Plaintiff and each of the Class Members received time off work for vacations and holidays equal to or greater than their statutory minimum entitlement. The Plaintiff in particular took time off far in excess of her statutory minimum entitlement.

29. The Plaintiff and all the Class Members were encouraged by RBC DS to take, and did take, regular vacations. The amount of vacation time provided by RBC DS to the Plaintiff and the Class Members under its policies and practices was at least equal to the applicable statutory requirements, and in many cases was significantly greater.

30. Advisors were given latitude to take more vacation than RBC DS' guideline amounts, provided that client needs were being met and other team members were providing coverage. Advisors were not required to obtain approval from their Branch Manager before taking vacation.

31. Some Associates and Assistants had arrangements that allowed them to take more vacation time than RBC DS' guideline amounts.

32. RBC DS branches are closed on statutory holidays. The Plaintiff and the Class Members were not required or expected to work on those days. RBC DS branches are also closed for more days than the statutorily designated holidays. For example, RBC DS branches in Ontario are closed for Simcoe Day which is not a statutory holiday. The Plaintiff and the Class Members were



not required or expected to work on those additional closure days either.

### **Statutory Vacation and Holiday Pay of the Class Members**

33. Contrary to the allegations in the Amended Statement of Claim, the Plaintiff and each of the Class Members received vacation and holiday pay greater than their statutory minimum entitlement. The Plaintiff in particular received vacation and holiday pay far in excess of her statutory minimum entitlement

34. The payouts from account revenue to the Plaintiff and Class Members, described above, included any required statutory vacation and holiday pay with respect to that compensation. RBC DS' compensation program documents that were provided to the Plaintiff and Class Members, and which were at all times available to Class Members, specified that vacation and statutory holiday pay was included in all payout rates.

35. Contrary to the allegations in the Amended Statement of Claim, the compensation program documents did not contain any misrepresentations regarding statutory vacation and holiday pay.

36. The Plaintiff and the Class Members were at all times aware, or reasonably ought to have been aware: (a) of their statutory minimum entitlements under the applicable employment standards legislation, (b) of the compensation program documents, and (c) that the payouts they received from account revenue included any required statutory vacation and holiday pay with respect to that compensation.

37. In addition to the statutory vacation and holiday pay that was included in the payouts of account revenue to the Plaintiff and the Class Members, the Plaintiff and the Class Members received substantial additional vacation and holiday pay in three forms.

38. First, those Class Members who received salaries, namely, Associates and Assistants, continued to receive their salaries while off work for vacations, for statutory holidays, and for other days when their branch was closed and they were not required to work. Given that many of those Class Members received vacations and days off in excess of their statutory minimum entitlements, those Class Members received vacation and holiday pay through salary continuance that was greater than their statutory minimum entitlement to vacation and holiday pay in respect of salary.

39. Second, the Plaintiff and each Class Member continued to receive their share of the account revenue that was generated by their team and received by the firm while they were off work for vacations, for statutory holidays, and for other days when their branch was closed.

40. Third, the Plaintiff and each Class Member were permitted to use vacation time from their first day of employment with RBC DS, rather than having to wait until after one year of continuous employment as required by applicable employment standards legislation. As a result, many Class Members received one additional year of vacation entitlement more than the minimum vacation entitlement prescribed by applicable employment standards legislation.

41. As explained above, the amount of revenue (primarily account fees, trailer fees and commissions) generated by a team and received by the firm was not affected by one or more Class Members in the team having taken time off – for vacations, holidays, or otherwise – during the period covered by the fee. The amount of revenue allocated to the IA Code or Codes of the team was not affected by one or more of the team members having taken time off during that month for vacations, holidays, or otherwise. And, the amounts paid from revenue to a team member (Advisor, Associate or Assistant) were not affected by the team member, or any of the other team members, having taken time off during that month for vacations, holidays, or otherwise.

42. The effect of this is that the Plaintiff and the Class Members were paid a share of account revenue in respect of their time off for vacation and holidays that was not generated by or tied to work that they did or had previously done. The share of revenue generated while the Plaintiff and or Class Member was on vacation or holidays (and paid to the Plaintiff and or Class Member) was therefore vacation and holiday pay, just like the payment of salary to employees during time off for vacations and holidays which is also vacation and holiday pay.

43. In the alternative, if the share of revenue paid to the Plaintiff and the Class Members in respect of their time off for vacation and holidays that was not generated by or tied to work that they did or had previously done, is not vacation and holiday pay, then such revenue constitutes an equal or greater benefit under applicable employment standards legislation and RBC DS is entitled to set off such amounts against any liability for vacation and holiday pay, which is denied.

44. Furthermore, the amounts that continued to be paid to the Plaintiff and the Class Members while off work for vacations or holidays in respect of account revenue (and salary if applicable) were greater than or at least equal to their statutory minimum entitlement to vacation and holiday pay. Therefore, even if the Plaintiff's assertion that the payouts to her and the Class Members did not include statutory vacation and holiday pay were correct, which it is not, no amounts would be owing to her or the Class Members for statutory vacation or holiday pay.

#### **IA Business Succession Plans**

45. Many Advisor Class Members entered into Eligible IA Agreements with RBC DS at the end of their careers under RBC DS' IA Business Succession Program. The Program provided an eligible Advisor (referred to as the "Eligible IA") with a framework to transfer the management of client relationships to another RBC DS Advisor (referred to as the "Assuming IA"). The Eligible

IA received an agreed-upon salary and/or retiring allowance payments from RBC DS in recognition of their assistance with the transition.

46. In many cases the Assuming IA already knew the clients, in which case the Eligible IA generally did little or no work assisting in the transfer and retention of clients. Where the Assuming IA did not know the clients, the Eligible IA generally did more work to assist with the transition, but much of that work would be done by the Eligible IA prior to the effective date of the Agreement, when the Eligible IA was still an active employee receiving their usual share of account revenue. Eligible IAs may in some cases have provided some assistance after the effective date of the Agreement, such as having calls or meetings with clients. However, that assistance would be sporadic and would generally total no more than a few days' worth of work. After the effective date, Eligible IAs were essentially retired.

47. Given that Eligible IAs were at most required to work only a small percentage of the days covered by the payments under Agreements, the Eligible IAs received payment for a large number of days on which they were not required to and did not work. If Eligible IAs were entitled to vacation and holiday pay during the term of the Agreements, which RBC DS denies, the payments in respect of the many days on which the Eligible IAs were not required to and did not work more than cover any such statutory vacation and holiday pay minimum entitlement.

48. Furthermore, in the Agreements, each Eligible IA agreed that the Total Departing Payment was in lieu of notice of termination otherwise and that by entering into the Business Succession Program, the Eligible IA waived any claims and rights they might otherwise have against RBC DS with respect to the termination of their employment.

49. Those Class Members who entered into Eligible IA Agreements have thus waived any

rights to seek payments from RBC DS in respect of statutory vacation and holiday pay in this action, or at all.

50. If the Eligible IA Agreements do not result in an Advisor having waived their right to seek payments from RBC DS in respect of statutory vacation and holiday pay in this action, and any amounts are owing to that Class Member for statutory vacation and holiday pay, then the payments made under the Eligible IA Agreement in respect of days on which the Eligible IA did not work should be set off against any such amounts owing.

### **Severance Agreements**

51. Those Class Members who entered into severance agreements other than Business Succession Plans entered into binding agreements that settled and released all of the claims they had relating to their employment with RBC DS. If those Class Members had any claims with respect to statutory vacation or holiday pay, which RBC DS denies, those claims have been released and cannot be pursued in this action or at all.

### **No Civil Cause of Action for Breach of Employment Standards Legislation**

52. The Plaintiff and the Class Members have no direct cause of action to enforce the provisions of employment standards legislation, including the provisions described in the Amended Statement of Claim. In any event, RBC DS did not breach any of those provisions.

### **No Breach of Contract**

53. RBC DS denies the Plaintiff's allegations that the provisions of employment standards legislation described in the Amended Statement of Claim are terms of contract of the Plaintiff and the Class Members.

54. RBC DS denies having breached any contracts with the Plaintiff or the Class Members. At

all times, RBC DS fully complied with the express and implied terms of its employment agreements with the Plaintiff and the Class Members.

**No Breach of a Duty of Good Faith**

55. RBC DS denies having breached any duties of good faith owed to the Plaintiff and the Class Members. Without limiting the foregoing, RBC DS denies that it or any employer had an obligation to advise the Plaintiff and the Class Members of the provisions of employment standards legislation regarding vacation and holiday pay, which were publicly available to the Plaintiff and the Class Members.

**No Negligence**

56. RBC DS denies that it was negligent in respect of ensuring that the Plaintiff and the Class Members received all minimum statutory entitlements, as alleged or at all.

**No Breach of Fiduciary Duty**

57. RBC DS denies that it owed fiduciary duties to the Plaintiff and the Class Members with respect to the payment of statutory vacation pay and public holiday pay.

58. In the alternative, RBC DS denies that it breached any fiduciary duties it owed to the Plaintiff and the Class Members.

**No Unjust Enrichment**

59. RBC DS denies that it was unjustly enriched, as pleaded or at all. RBC DS was not enriched and Plaintiff and the Class Members did not suffer a corresponding deprivation. The Plaintiff and each of the Class Members received vacation and holiday pay greater than their statutory minimum entitlement.

### **No Breach of Trust**

60. RBC DS denies that any of the Plaintiff and the Class Members have valid trust claims against RBC DS.

61. In the alternative, if the Plaintiff and the Class Members have valid trust claims, RBC DS denies that it has committed any breach of trust in the handling of the statutory vacation and holiday pay.

### **No Damages Suffered and No Reason for Any Disgorgement**

62. RBC DS denies that the Plaintiff and the Class Members have suffered damages as alleged, or at all, and puts the Class Members to the strict proof thereof.

63. RBC DS denies that an aggregate assessment of damages pursuant to s. 24 of the *Class Proceedings Act, 1992* is feasible or appropriate in this case in event of a finding of liability. The entitlement of each Class Member could not be determined without an individual assessment of the circumstances of that class member. .

64. RBC DS denies that the Plaintiff and the Class Members are entitled to disgorgement.

65. Further, and in the alternative, the damages claimed by the Plaintiff and the Class Members are excessive and remote.

66. RBC DS expressly denies that the Plaintiff and the Class Members are entitled to punitive, aggravated or exemplary damages.

### **Limitations**

67. Each Class Member received regular paystubs during the course of their employment setting out their compensation for the corresponding pay period. As pleaded in paragraph 19

above, each Advisor also received a Paysheet Detail Report each month that showed, for the previous month, the amount of the payout to the IA Code or Codes assigned to the Advisor, the amounts of revenue paid to each Associate and/or Assistant, any amounts deducted from the payout for expenses, and the amount then paid to the Advisor.

68. Each Class Member was aware at the time of the amount of vacation days and holidays that they took off work.

69. The Class Members therefore knew or ought to have known each time they were paid all of the facts on which the claims in this action are based. The claims of the Plaintiff and each of the Class Members are thus statute-barred in whole or in part because these claims were brought outside the prescribed statutory limitation periods in the provincial legislation applicable to those claims. RBC DS pleads and relies on the *Limitations Act, 2002*, SO 2002, c 24, Sch B and corresponding statutes in other Canadian provinces and territories, and the doctrine of laches.

70. RBC DS asks that this action be dismissed with costs.



January 15, 2024

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***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced a Toronto

**STATEMENT OF DEFENCE**

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