CITATION: Chiang v. The Toronto Dominion Bank, 2026 ONSC 2013
COURT FILE NO.: CV-23-00704166-00CP
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SUPERIOR COURT OF JUSTICE - ONTARIO

BETWEEN: JASON CHIANG, Plaintiff

AND:

THE TORONTO DOMINION BANK, Defendant

BEFORE: Justice Glustein

COUNSEL: *David F. O'Connor, J. Adam Dewar, Stephen J. Moreau, and Daniel Lublin*, for the plaintiff

Sarah J. Armstrong, Paul Martin, Tala Khoury, Pavel Sergeyev, and Vlad Muresan, for the defendant

HEARD: March 4-6, 2026

REASONS FOR DECISION

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REASONS FOR DECISION

NATURE OF THE MOTION AND OVERVIEW

[1] The plaintiff, Jason Chiang ("Chiang"), brings this motion under s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*") to certify the proposed class action. The defendant, The Toronto Dominion Bank ("TD"), opposes certification.

[2] Chiang alleges that TD failed to pay vacation and holiday pay to Mobile Mortgage Specialists ("MMSs")[1] for variable compensation earned by commissions, incentive bonuses, and ancillary forms of variable compensation, contrary to the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("*CLC*").

[3] MMSs were not salaried employees of TD. They were paid only by variable compensation.

[4] Chiang alleges that under the *CLC*, the variable compensation earned by each MMS is considered as "wages"[2], and as such, vacation and holiday pay are to be calculated based on the full amount of the variable compensation. For example, if an MMS earned $100,000 per year in commissions and bonuses (and other ancillary variable compensation),[3] Chiang alleges that at minimum, each MMS would be entitled to:

(i) under s. 184.01(a) of the *CLC*, $4,000 for vacation pay (based on 4% for two weeks' wages)[4] and

(ii) under s. 196(2) of the *CLC*, approximately $4,000 for holiday pay[5] (based on the calculation of one sixtieth of the previous 12-week period for each of the ten general holidays, which also constitutes approximately 4% of wages).

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[1] The proposed class includes alleged functional equivalents to MMSs such as a Sales Manager, Manager, or Commercial Manager of Residential Mortgages.

[2] Under s. 166 of the *CLC*, wages include "every form of remuneration for work performed but does not include tips and other gratuities".

[3] This amount is consistent with the evidence that the average MMS earned over $100,000 annually in 2023 and 2024.

[4] This is the minimum for vacation pay under s. 184.01(a) of the *CLC* for employees who have completed at least one year of employment.

[5] Under s. 196(2) of the *CLC*, if the $100,000 in commission and wages were earned equally over a 12 month period, then the weekly wages over 52 weeks would be $1,923.08 which would total $23,076.96 for the 12 week period prior

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[5] Consequently, at minimum, Chiang alleges that each MMS was underpaid vacation and holiday pay of approximately $8,000 per year. Applying that amount to an estimate of 1,000 MMSs across Canada,[6] TD would have failed to pay at least $8 million for each year of class membership.

[6] Chiang also claims damages for TD's alleged failure to pay greater amounts of vacation pay under its "vacation" or "Time Away From Work" policies (collectively, the "Vacation Policies"). For example, if an MMS was entitled to four weeks' vacation under a Vacation Policy, but only two weeks under s. 184.01(a) of the *CLC*, then the MMS would be entitled to the greater amount (approximately $8,000 for vacation pay instead of $4,000).

[7] Chiang also submits that TD failed to pay MMSs the additional compensation owed for working on public holidays.

[8] Finally, Chiang submits that TD breached its obligations under the *Canada Labour Standards Regulations*, C.R.C., c. 986, to keep proper records for vacation and holiday pay.

[9] TD disputes all the claims against it in the proposed class action. TD submits that vacation and holiday pay were "included" or "baked in" as part of the commissions and bonuses paid. For example, an MMS who earned $100,000 in variable compensation would receive only that amount; under TD's approach, the $100,000 amount would be comprised of $92,592.59 for the commissions and bonuses component, with an 8% "top-up" of $7,407.41, being the collective component for vacation (4%) and holiday (4%) pay, This would bring total pay to $100,000.

[10] Under TD's approach, the same $100,000 would be paid regardless of entitlement under the *CLC* to vacation and holiday pay. Consequently, if an MMS was entitled under s. 184.01(b) of the *CLC* to three weeks of vacation pay (approximately 6%) as an employee with at least five years of service with TD, that MMS would earn less for the wages (i.e. the variable compensation) component than an MMS with only one year of employment. The MMS with more than five years of employment with TD would earn the same $100,000, but only $90,909.09 for the commissions and bonuses component, with the 10% "top-up" of $9,090.91 being the collective component for vacation (6%) and holiday (4%) pay.

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to every holiday. One-sixtieth of that amount (the calculation required under s. 196(2)) would be $384.62 and since there are 10 general holidays under the *CLC*, total holiday pay would be $3,846.20.

[6] While there is no evidence in the record as to the current number of MMSs in Canada, an estimate of 1,000 (as proposed by Chiang at the hearing) is reasonable based on the evidence that there were 225 MMSs in the "Pacific Region" of British Columbia and the Yukon as of February 6, 2025 when Mr. Gurinder Aulach (Associate Vice President, Real Estate Secured Lending, Mobile Mortgage Specialist at TD) affirmed his affidavit.

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[11] TD further submits that (i) the additional vacation days under the Vacation Policies did not apply to MMSs, and (ii) TD maintained proper records.

[12] On a certification motion, it is not the role of the court to determine the merits of the parties' positions. The only issue is whether the test for certification is met under s. 5(1) of the *CPA*.

[13] Chiang relies on numerous cases from this court and the British Columbia courts which certified class actions against employers for alleged failures to pay vacation and holiday pay on variable compensation: see (i) *Cunningham v. RBC Dominion Securities*, 2022 ONSC 5862, leave to appeal dismissed 2023 ONSC 5346, (ii) *Lee v. Allstate Insurance*, 2023 ONSC 8, (iii) *Bank of Montreal v. Cheetham*, 2023 BCSC 1319 ("*Cheetham* SC") and *Bank of Montreal v. Cheetham*, 2025 BCCA 374 ("*Cheetham* CA"), and (iv) *Singh v. RBC Insurance Agency Ltd.*, 2023 ONSC 1439 ("*Singh* 1"), leave to appeal dismissed 2024 ONSC 2836.

[14] TD raises 12 objections to certification. TD challenges all the s. 5(1) requirements except s. 5(1)(b).[7] In brief, TD submits:

(i) None of the claims[8] disclose a reasonable cause of action under s. 5(1)(a) except for breach of contract based on factual terms.

(ii) There is no basis in fact under s. 5(1)(c) for the commonality of the proposed common issues ("PCIs") related to liability and corresponding remedies, aggregate damages, or punitive damages claims.[9]

(iii) Under s. 5(1)(d), Chiang has failed to satisfy the new "predominance" test under s. 5(1.1)(b) of the *CPA*, which was not applicable in the earlier certification cases relied upon by Chiang. As such, the proposed class action is not the preferable procedure for the resolution of the PCIs.

[7] TD acknowledges that the proposed class is identifiable. On TD's evidence from Rose Thomson ("Thomson"), Associate Vice President, North American Payroll Delivery, "TD estimates that it has employed 4,589 MMS between January 1, 2003 and August 31, 2024".

[8] These six objections under s. 5(1)(a) correspond to the claims made by Chiang for (i) breach of an implied contractual term, (ii) negligence, (iii) breach of fiduciary duty, (iv) breach of trust, (v) unjust enrichment, and (vi) breach of the duty of good faith.

[9] TD raises three objections under s. 5(1)(c), arising from each of these submissions.

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(iv) An alternative objection under s. 5(1)(d) is that even if Chiang satisfied the predominance test under s. 5(1.1)(b), the class definition must be revised to exclude those class members whose claims are presumptively statute barred.

(v) Chiang is not an appropriate representative plaintiff under s. 5(1)(e) because his action is presumptively statute barred.

[15] I do not accept the objections raised by TD, except that there is no basis in fact for a punitive damages claim. Consequently, I certify the proposed class action.

FACTS

The parties

[16] TD is a "Schedule 1" bank under the *Bank Act*, S.C. 1991, c.46, headquartered in Toronto, Ontario. TD offers its customers a range of financial products and services across Canada and internationally. Such financial products and services include residential mortgages and home equity lines of credit ("HELOCs").

[17] Chiang is a former TD employee who worked as an MMS in Vancouver, British Columbia, from January 2003 until October 2015. While employed, he was remunerated only by commissions and volume bonuses.

The role of an MMS

[18] To market its mortgages and related products to Canadian consumers, TD employs both in-branch mortgage advisors and MMSs.

[19] MMSs are tasked with identifying and securing customers who want to enter mortgages, HELOCs and other similar products. MMSs often work outside of regular business hours, networking and meeting clients remotely or at various locations, including their homes, to address their borrowing needs. MMSs can and do work on public holidays and during their vacations.

[20] MMS compensation is entirely performance-based, consisting of commissions, volume bonuses, and other forms of variable compensation.

[21] The role of an MMS is entrepreneurial and flexible. MMSs are free to decide how, when, where, and to whom they market and sell these products. While in-branch mortgage advisors are salaried employees who typically work 37.5 hours per week, MMSs have no predetermined work hours, schedules, or work locations.

[22] Given the nature of the role, TD exercises limited direction over MMSs' sales strategies or work schedule. Further, there is no requirement for MMSs to work during business hours, or to work any specific number of days or hours. Rather, each MMS is generally free to structure their time as they like and can generally take as much time away from work as they choose.

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The proposed class

[23] The proposed class consists of:

(i) all former and current employees of TD who are or were employed by TD in Canada as an MMS (or their functional equivalents and/or, in their stead, their estates/estate representatives or trustees);

(ii) who are or were remunerated based on variable compensation (including but not limited to commissions, volume bonuses and annual incentive awards);

(iii) who were employed at any time during the following periods:

(a) within any applicable express statutory ultimate limitation period in each province or territory for which the applicable limitation statute refers to such ultimate limitation period or such similar concept; and,

(b) in those provinces or territories for which the applicable limitation legislation does not refer to an ultimate limitation period, within the 15 years preceding the issuance of the Notice of Action; and

(iv) who were employed 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").

[24] Chiang estimates that the proposed class consists of several thousand people. TD employed 4,589 MMSs between January 1, 2003 and August 31, 2024.

[25] Class membership is limited by the ultimate limitation period or a 15-year delimiter. However, the class seeks damages for periods that predate the 15-year delimiter. The class relies on s. 188 of the *CLC*, which provides that vacation pay owing to an employee is to be paid "within 30 days after the day on which the employee ceases to be employed".

Agreements between TD and the MMSs

Employment agreements

[26] TD created generic employment agreements for MMSs. The agreements generally tell the MMSs that they are ineligible for paid vacation and/or state that the amounts they earn are inclusive of the vacation and holiday pay owed pursuant to the *CLC*. Some of the earliest employment agreements are silent on vacation and holiday pay. The employment agreements changed over time.

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Compensation plans

[27] For many, if not most years, TD published a document for MMSs (at various times called the MMS Compensation Matrix, MMS Compensation Plan, or MMS Incentive Plan), which purportedly outlined compensation terms applicable to all MMSs. Under these documents, MMSs typically received a commission of 50 basis points ("50 bps")[10] whenever they sold a mortgage at the rate advertised by TD to a customer the MMS sourced. Different commission rates apply for HELOCs, other products, and for customers that were not sourced by MMSs.

[28] The compensation plans also explain that MMSs are entitled to, in addition to the commissions, volume bonuses on a fixed formula (i.e. once they achieve certain established thresholds of total mortgage dollar volume each year). If the target is met, the bonus is paid. Metrics (or formulas) are used to calculate other performance incentives paid to MMSs.

MMS pay statements

[29] Before 2012, TD's payroll system did not report anything about holiday or vacation pay to MMSs on their pay statements (called "pay advices"): the pay advices set out the total commissions, bonuses, and other amounts paid without suggesting that vacation or holiday pay was included in any of those payouts.

[30] Starting in 2012, TD introduced two lines or footnotes at the bottom of its pay advices, purporting to indicate how much of the commission payment (but not the bonus or other incentives) should be considered vacation pay (but not holiday pay). There was no suggestion that any part of the commission related to holiday pay. There was also no suggestion or quantification that any part of bonuses constituted vacation or holiday pay.

[31] In 2022,[11] TD changed the pay advices to state that commissions now included holiday pay "if applicable". In 2023, TD added a line to the effect that bonuses – hitherto never mentioned in pay advices – now included vacation pay (but not holiday pay).

[32] In April 2025, after changing its payroll software, TD started to set out in pay advices a dollar amount for statutory holiday pay allegedly included in the commissions while not reporting

[10] 50 bps is equivalent to a 0.5% commission rate.

[11] Chiang notes that this change in drafting by TD occurred after class actions relating to unpaid vacation and holiday pay owing on commissioned/variable compensation had been commenced and courts had released decisions on various motions in those cases. On this certification motion, there is no evidence as to the reason for the change.

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any amount for holiday pay in bonuses. Thomson testified in cross-examination that statutory holiday pay was not included in bonus pay because bonuses were discretionary.[12]

Vacation Policies

[33] There is a dispute between the parties as to whether the additional vacation time set out in the Vacation Policies applies to MMSs. While that issue is a matter of merits which I do not determine, the positions of the parties are as follows:

(i) Chiang submits that the Vacation Policies apply to MMSs. As such, TD cannot rely on "fine print" language (where it existed) to exclude commissioned employees from the benefits of the Vacation Policies while still making the commissioned employees subject to the other terms of the Vacation Policies. In any event, the Vacation Policies before 2018 did not have the "fine print" language.

Further, every Code of Conduct TD produced from 2012 to 2024 states that all TD policies (which Chiang submits include the Vacation Policies) form terms and conditions of employment. The MMS employment contracts state that MMSs are to abide by and follow Codes and/or TD policies. Moreover, the Vacation Policies expressly set out the vacation entitlements of, and payments that will be made to, employees.

(ii) TD submits that none of the policies expressly purport to confer contractual rights. Those from 2018 onwards expressly state that they do not. The policies contain varying language pertaining to vacation time, vacation pay, and holiday pay entitlements of commissioned employees, such as MMSs. None expressly provides that MMSs are entitled to vacation pay in accordance with a progressive scale or metric based on their tenure and job level. There is also no evidence about whether, when, or how any MMS was provided with — or assented to — the terms of TD's vacation policies.

The Code of Conduct

[34] Every Code of Conduct TD produced from 2012 to 2024 states that all TD policies form terms and conditions of employment. The Code of Conduct is attested to every year by every MMS, with a warning that breaches may result in discipline, up to termination.

[12] At the hearing, TD's counsel advised the court that TD's position was that statutory holiday pay was included in bonus pay. Chiang did not accept that such a "correction" was proper, submitting that Thomson was put forward as a representative of TD and that as such TD remained bound by her initial response.

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[35] In addition, the employment contracts require MMSs to abide by and follow Codes of Conduct and/or TD policies. Each Code of Conduct incorporated a requirement to comply with the law.

[36] Under the Code of Conduct, TD advised MMSs that:

(i) "every business decision and every action taken on TD's behalf must be assessed in light of whether it is right, legal and fair";

(ii) the Code "govern[s] the way we deal with each other";

(iii) "Every employee and director of TD is expected and required to assess every business decision and every action on behalf of the organization in light of whether it is right, legal and fair. This applies at all levels of the organization, from major decisions made by the Board of Directors to day-to-day business transactions"; and

(iv) "Concern for what is right should be our first consideration in all business decisions and actions, and that includes compliance with the law."

TD's statements about how it treats vacation and holiday pay

[37] TD's statements about how it treats vacation and holiday pay varied at different times. By way of examples:

(i) a 2000 contract said nothing about vacation or holiday pay;

(ii) a 2003 MMS contract referred to commissions (but not bonuses) including vacation and holiday pay, while the 2007 vacation policy stated that MMSs were ineligible for paid time off altogether (albeit that they received vacation pay – but not holiday pay – on their commissions, but not their bonuses);

(iii) the 2008 vacation policy referred to a full entitlement to a paid vacation, but provided no indication of how much vacation or holiday pay an MMS was to receive (and whether or not it is included in their commissions and/or bonuses);

(iv) the 2010-2013 compensation plans referred to commissions (but not bonuses) including vacation pay (but not holiday pay), whereas the vacation policy stated that both commissions and bonuses included both vacation and holiday pay; and,

(v) by 2015, an MMS contract stated that the MMS is ineligible for paid time off while the compensation plans and vacation policies at the same time stated that all their pay (commissions, bonuses, and other incentives) included holiday and vacation pay.

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Overall MMS compensation

[38] MMS compensation varied widely depending on factors unique to each MMS, such as their motivations, circumstances, strategies, target markets, territories, available resources, competitors, and other factors.

[39] The compensation structure has also varied over time. While all plans provide for a mix of commissioned earnings and volume bonuses or other incentive awards, the commission rates for different products have varied, as have the available bonuses and awards, and the structure of such awards. Commission rates could also be varied at the discretion of management or reduced or reversed if products were discharged shortly after funding.

[40] While earnings varied, most MMSs were and are relatively high-income earners, with the average MMS earning over $100,000 during each of 2023 and 2024.

Complaints about vacation pay calculation and releases

[41] TD led evidence that it received at least four complaints (either in surveys, to *CLC* enforcement, or by email to TD) in which an MMS raised concerns about the vacation pay being incorporated into the commission rate.

[42] TD also led evidence that 21 class members signed releases in lawsuits brought by former MMSs for damages allegedly arising from their employment at TD. The settlements required those MMSs to relinquish any other claims for unpaid wages that they may have had against TD. TD submits that the effect of those releases is that the employee is barred from claiming entitlements to any form of compensation, including vacation pay.

ANALYSIS

[43] As I discussed above, TD raised 12 objections to certification, challenging each requirement under s. 5(1) except for s. 5(1)(b). I address each of the objections below.

Objections under s. 5(1)(a)

[44] I first consider the applicable law under s. 5(1)(a) of the *CPA* and then consider the objections raised for the various causes of action.

<u>The applicable law</u>

[45] The task for the court under s. 5(1)(a) is determining whether the defendant has established it is “plain and obvious” that the claim will fail. Unless that high threshold is met, the court must find that the cause of action is disclosed. It is not the role of the court to resolve competing legal interpretations.

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[46] TD relies on *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420. In *Atlantic Lottery*, the Supreme Court of Canada affirmed that courts can address novel claims, even if they raise complex issues of law and policy: at para. 19. However, in making this decision, the Court did not alter the existing law that claims should not be struck unless it is plain and obvious that the claim will fail.

[47] I addressed the role of the court on a s. 5(1)(a) analysis in *Gilani v. BMO Investments Inc.*, 2021 ONSC 3589 (leave to appeal dismissed 2021 ONSC 5906 (Div. Ct.)). I held, at paras. 66-80:

> **The applicable test**
>
> The test under s. 5(1)(a) is the same as on a motion to strike: the "plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed": *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 63.
>
> A claim should not be dismissed unless the court is satisfied "beyond reasonable doubt" that the claim cannot succeed: *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, at 980.
>
> The inquiry is into the legal adequacy of the causes of action pled, not the evidence for or against those causes of action: *Brozmanova v. Tarshis*, 2018 ONCA 523, at para. 25.
>
> "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": *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337, at para. 58(b).
>
> "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": *Wright*, at para. 58(d).
>
> No evidence is admissible: *Wright*, at para. 58(a). However, the court can assess documents incorporated by reference into the pleading in evaluating the legal tenability of the claim: *Das v. George Weston Limited*, 2018 ONCA 1053, at para. 74, leave to appeal ref'd [2019] S.C.C.A. No. 69.
>
> Consequently, the threshold for satisfying the cause of action requirement is "very low": *McLaren v. Stratford (City)*, [2005] O.J. No. 2288 (S.C.), at para. 21.

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The effect of the *Atlantic Lottery* decision

BMO Investments submits that the recent decision of the Supreme Court of Canada in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, constitutes a "culture shift" to the law on a pleadings motion. I do not agree.

In *Atlantic Lottery*, the Court struck the waiver of tort claim brought by the respondent as an independent cause of action for disgorgement. The claim was novel, and the court reviewed the pleadings and law thoroughly to conclude that it was plain and obvious that such a claim could not succeed.

BMO Investments relies on paras. 18 and 19 from the reasons of Brown J.:

> [S]ince *Microsoft* was decided, this Court has recognized in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 the need for a culture shift to promote "timely and affordable access to the civil justice system" (para. 2). **Where possible, therefore, courts should resolve legal disputes promptly, rather than referring them to a full trial** (paras. 24-25 and 32). **This includes resolving questions of law by striking claims that have no reasonable chance of success** (S. G. A. Pitel and M. B. Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014), 43 Adv. Q. 344, at pp. 351-52). Indeed, **the power to strike hopeless claims is "a valuable housekeeping measure essential to effective and fair litigation"** (*Imperial Tobacco*, at para. 19).
>
> **Of course, it is not determinative on a motion to strike that the law has not yet recognized the particular claim. The law is not static, and novel claims that might represent an incremental development in the law should be allowed to proceed to trial** (*Imperial Tobacco*, at para. 21; *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 73; see also *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654, at p. 670). **That said, a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present "no legal justification for a protracted and expensive trial"** (*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19). **If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve**

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> **complex questions of law and policy** (see e.g. *Imperial Tobacco*; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Syl Apps*; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261). [Emphasis added.]

I do not agree that the above paragraphs constitute a culture shift on motions to strike pleadings.

The court in *Atlantic Lottery* affirms the principles established throughout its jurisprudence (as the Court discusses at para. 19) that (i) a claim cannot be permitted to proceed merely because it is novel; (ii) a court may be able to resolve "complex issues of law and policy" based on the pleadings; and (iii) the court must review the existing law and the pleadings to determine whether a novel claim can proceed.

The court in *Atlantic Lottery* affirms the principles established throughout its jurisprudence (as the Court discusses at para. 19) that (i) a claim cannot be permitted to proceed merely because it is novel; (ii) a court may be able to resolve "complex issues of law and policy" based on the pleadings; and (iii) the court must review the existing law and the pleadings to determine whether a novel claim can proceed.

However, the "plain and obvious" test remains the same. In *Atlantic Lottery*, Brown J. stated that a court should not permit a claim to proceed "simply because it is novel" (at para. 19). Nevertheless, Brown J. maintained the test that a claim (novel or not) should not be struck unless it is "hopeless" (at para. 18), consistent with the settled test in *Hunt* and recently affirmed in *Wright*.

The court on a certification motion is not asked to determine whether the plaintiff will succeed on any particular claim. Instead, the court must only determine whether it is "plain and obvious", on the pleaded facts and applicable law, that the claim cannot succeed. Unless the court finds that the defendant meets that high threshold, the merits of the pleaded cause of action are to be addressed at trial or, if applicable, on summary judgment.

[48] In *Carcillo v. Ontario Major Junior Hockey League*, 2025 ONCA 652, the Court of Appeal recently summarized the s. 5(1)(a) test, at para. 19:

> Under section 5(1)(a) of the *Class Proceedings Act*, **the cause of action requirement is satisfied so long as it is not *plain and obvious* that the pleaded facts cannot support a viable claim. The purpose of this requirement is simply to weed out claims that are legally hopeless — those that are bound to fail as a matter of law — rather than to evaluate the factual strength of the case.** At this preliminary stage, the pleadings must be read generously even if they are not a

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> model of clarity, making allowances for mere drafting deficiencies. As well, all pleaded facts must be assumed to be true, regardless of whether they may ultimately be proven at trial. The only exceptions are allegations that are merely bald conclusions, pure legal assertions, or claims that are patently absurd or incapable of proof: *Bowman v. Ontario*, 2022 ONCA 477, 162 O.R. (3d) 561, at paras. 38-41; *Gratton-Masuy Environmental Technologies Inc. v. Ontario*, 2010 ONCA 501, 101 O.R. (3d) 321, at paras. 99-102; *728654 Ontario Inc. v. Ontario* (2005), 2005 CanLII 36159 (ON CA), 202 O.A.C. 4 (C.A.), at paras. 3, 7. [Emphasis added; italics in original.]

Objection 1: No cause of action for breach of contract based on the *CLC* being an implied term in the employment contract

[49] Chiang advised the court that he is not bringing a direct claim for breach of the *CLC*. Instead, he is bringing a claim for breach of contract on the basis that the provisions in the *CLC* were incorporated into the employment contracts between the MMSs and TD, as an implied term as a matter of both law and fact. TD does not challenge that there is a cause of action for breach of contract based on the *CLC* being incorporated as a matter of fact.

[50] Consequently, the issue before me is whether it is plain and obvious that the *CLC* cannot be incorporated as an implied term in the employment contracts as a matter of law.

[51] At paragraphs 28 to 33 of his Statement of Claim, filed September 8, 2023 (the "Claim"), Chiang pleads that TD has and had a legal duty, rooted in the class members' employment contracts and the *CLC*, to provide Chiang and class members with their vacation and general holiday pay on the class members' total variable compensation, and to maintain a reasonable system in respect thereof (including proper reporting, recording, monitoring, and maintaining accurate records of vacation pay and general holiday pay and entitlements).

[52] TD submits that the *CLC* forms a complete code with its own enforcement mechanism. TD submits that this court does not have the jurisdiction to find that the *CLC* was incorporated into the employment agreement as a matter of law.

[53] TD asks the court to adopt the approach of the British Columbia Supreme Court and Court of Appeal in *Cheetham* SC and *Cheetham* CA. The courts refused to certify a cause of action which claimed that the *CLC* vacation and holiday pay provisions were implied terms as a matter of law (however, the court noted that "there is nothing preventing this Court from finding that the terms in question are explicitly incorporated into the contracts as a matter of fact"): *Cheetham* SC, at paras. 89-90 (emphasis in original). In *Cheetham* CA, the Court held, at paras. 75, 77, and 90:

> No free-standing cause of action exists for breach of the *CLC*. **In *Macaraeg*, a case dealing with overtime pay, this Court held that unpaid benefits under B.C.'s *Employment Standards Act*, R.S.B.C. c. 13 [*ESA*], could not be claimed in a civil action, either directly or on the basis that employment standards**

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> **benefits were an implied term under an employment contract.** The Court reached that conclusion because the *ESA*—like the *CLC*—creates a comprehensive remedial regime for employment standards complaints. In such cases, an employee "is obliged to rely exclusively on the enforcement mechanism in the legislation": at paras. 73–78, 84–97 and 100–103.
>
> …
>
> Mr. Cheetham did not dispute that there is no free-standing cause of action for breach of the *CLC*. **The certification judge agreed and said that "on the strength of *Macaraeg*, there is no avenue in BC for a finding that the provisions of the *CLC* are implied into the employment contracts as a matter of law"**: First Decision at para. 89.
>
> …
>
> **If the *only* breach disclosed by the pleadings was that the contracts themselves, by allowing for the inclusion of Statutory Pay in variable compensation, violated the *CLC*, then this claim is barred by *Macaraeg*.** But the contracts in this case did more than include Statutory Pay as part of variable compensation—they did so while also promising that such pay would be paid *in accordance with* the *CLC*. [Emphasis added.]

[54] In Ontario, however, courts have consistently held the *CLC* can be implied into an employment contract as a matter of law.

[55] In *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, ("*Fulawka* CA"), the Court of Appeal held that the issue of whether the *CLC* requirements for overtime pay were included in employment contracts as an implied term as a matter of fact or law was for the trial judge to determine, based on the evidence at trial. Winkler C.J.O. stated, at para. 149:

> **Of course, it remains for the trial judge to determine if the terms of the Code are implied into the contracts and, if necessary, to determine whether the terms are implied as a matter of fact or a matter of law**: see *Haldane v. Shelbar Enterprises Ltd.* (1999), 1999 CanLII 9248 (ON CA), 46 O.R. (3d) 206, [1999] O.J. No. 3847 (C.A.), at paras. 14-15. [Emphasis added.]

[56] In the above passage, Winkler C.J.O. relied on the decision of the Court of Appeal for Ontario in *Haldane*, in which Doherty J.A. held that terms could be implied into a contract as a matter of law, when such terms are "a legal incident of a particular kind of contract" and "necessary in a practical sense to the fair functioning of the agreement". Doherty J.A. held, at paras. 14-15:

> In addition to implying terms into a contract through custom and usage, or to accord with the presumed intention of the parties, **a term may be implied into a contract as a matter of law. This kind of implication does not depend on evidence but**

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> **is seen as a legal incident of a particular kind of contract. Terms are implied into a contract by law where they are "necessary in a practical sense to the fair functioning of the agreement**": *Machtinger v. H.O.J. Industries Ltd., supra*, per McLachlin J., in dissent, at p. 1010.
>
> **In recent years, considerable jurisprudence has developed over the extent to which terms should be implied as a matter of law into employment contracts**: e.g., see *Machtinger v. H.O.J. Industries Ltd.*, supra; *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1; *Malik v. BCCISA*, [1997] 3 All E.R. 1 (H.L.); S.K. O'Byrne, "Bad Faith -- Contexts of Employment -- Wallace v. United Grain Growers Ltd." (1998), 77 Can. Bar Rev. 492. **The special relationship created by employment contracts and the power imbalance between the parties renders these contracts particularly susceptible to the implication of terms as a matter of law.** [Emphasis added.]

[57] In the *Machtinger* case relied upon in *Haldane*, McLachlin J. (as she then was) held, at pp. 1009-10:

> The final category of implied terms considered in *CP Hotels, supra*, is the one applicable in the present case. **These are terms implied not on the basis of presumed intention, but "as legal incidents of a particular class or kind of contract, the nature and content of which have to be largely determined by implication**" (p. 776). These correspond to Treitel's category of terms implied in law. [Emphasis added.]

[58] Furthermore, Ontario courts in numerous employment standards certification decisions have held that a claim for an implied contractual duty arising from employment standards legislation discloses a cause of action: *Bozsik v. Livingston International Inc.*, 2016 ONSC 7168, at para. 154; *Baroch v. Canada Cartage*, 2015 ONSC 40, at para. 26; *Berg et al. v. Canadian Hockey League et al.*, 2019 ONSC 2106, at para. 57; *Ngan v. The Bank of Nova Scotia*, 2025 ONSC 2354 at para. 22; *Cunningham*, at para. 30.

[59] TD asks the court to adopt *Cheetham* as law in Ontario, even though there is considerable law in Ontario supporting Chiang's position that the court can imply provisions in the *CLC* as contractual terms as a matter of law. Consequently, I find that it is not plain and obvious that Chiang's claim will fail at trial.

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[60] For the reasons above, I find that Chiang's breach of contract claim based on the *CLC* being incorporated into the employment agreements as a matter of law discloses a cause of action.[13]

Objection 2: No cause of action for negligence

[61] At paragraphs 36-37 of the Claim, Chiang pleads that TD breached the duty of care it owed the class members and therefore is liable in tort. Chiang submits that TD did not take reasonable steps to ensure that class members received their entitlements because TD failed to advise class members of their entitlements, misrepresented to class members that their vacation and general holiday pay entitlements were properly included in their commissions, and failed to pay class members their vacation and general holiday pay.

[62] Again, TD asks the court to follow one line of cases, though another line of cases supports the opposite approach.

[63] TD relies on the decisions of Perell J. in *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518, at paras. 161-68, and *Davis v. Amazon Canada Fulfillment Services, ULC*, 2023 ONSC 3665, at para. 226. In both cases, Perell J. denied the certification of negligence claims in proposed class actions relating to the class members being misclassified as independent contractors rather than employees.

[64] In *Heller*, Perell J. held that "tort claims for pure economic losses are available only in rare circumstances": at para. 161. Justice Perell relied on policy reasons for restricting pure economic loss as set out in *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, where Justices Iaccobucci and Major stated at para. 37:

> In *Rivtow* and subsequent cases it has been recognized that in limited circumstances damages for economic loss absent physical or proprietary harm may be recovered. The circumstances in which such damages have been awarded to date are few. To a large extent, this caution derives from the same policy rationale that supported the traditional approach not to recognize the claim at all. First, economic interests are viewed as less compelling of protection than bodily security or proprietary interests. Second, an unbridled recognition of economic loss raises the spectre of indeterminate liability. Third, economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance. Finally, allowing the recovery of

[13] As I discuss above, I note that in any event, as in *Cheetham*, the impugned cause of action based on an implied term is not dispositive of the contract claim since TD acknowledges that the Claim discloses a breach of contract claim on the basis that the *CLC* provisions were incorporated as a matter of fact into the contracts with the MMSs.

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> economic loss through tort has been seen to encourage a multiplicity of inappropriate lawsuits.

[65] Justice Perell then reviewed the five established categories where recovery for pure economic loss is permitted in negligence, namely: (i) negligent misrepresentation, (ii) negligence of public authorities, (iii) negligent performance of a service, (iv) supply of shoddy goods or structures, and (v) relational economic losses. Justice Perell held that none of these recognized categories were available on the facts of the case: *Heller*, at para. 163, citing *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021.

[66] Justice Perell concluded that a negligence claim could not arise because "[i]n my opinion, the case at bar, is one of the cases where tort liability does yield to the principle of private ordering in contract": *Heller*, at para. 166.

[67] In *Davis*, Perell J. relied on his analysis in *Heller* and held that the negligence claim did not disclose a cause of action: at paras. 227-28.

[68] However, in contrast to *Heller* and *Davis*, there are numerous decisions where negligence claims have been certified on the basis that provisions in the *CLC* or other employment standards legislation were breached. I review this case law below.

[69] In *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148, 101 O.R. (3d) 93 ("*Fulawka* SC"), the plaintiff pleaded that the defendant bank owed a duty of care to its employees to properly pay overtime under the *CLC*. Justice Strathy (as he then was) held that the plaintiff's negligence claim disclosed a cause of action. Justice Strathy stated, at paras. 82-83:

> Following the decision in *Fresco*, the plaintiff delivered a draft amended statement of claim that includes a claim in negligence. **The draft pleading alleges that Scotiabank owed a duty of care to the Class to ensure that they were properly compensated for all hours worked at the appropriate rates and that it breached this duty by, among other things**:
>
> (a) creating a working environment in which they 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. [page118]

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> The plaintiff relies on *Anns v. Merton London Borough Council*, [1978] A.C. 728, [1997] 2 All E.R. 492 (H.L.) and *Cooper v. Hobart*, 2001 SCC 79 (CanLII), [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76.
>
> I **accept the plaintiff's submission that the claim meets the "plain and obvious" test under s. 5(1)(a) of the CPA […] Moreover, I conclude that the duties owed by Scotiabank can be informed by the provisions of the *Code*** […] [Emphasis added.]

[70] Following Strathy J.'s decision, the defendant bank obtained leave to appeal the decision to the Divisional Court on several issues, including whether the motions judge erred in finding that "the terms of the *Code* … may form the content of implied duties of good faith **or duties of care in negligence**" [Emphasis added.]: *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 2645 (Div. Ct.), at para. 34 ("*Fulawka* Div. Ct. 1").

[71] The Divisional Court upheld the cause of action for negligence: *Fulawka v. Bank of Nova Scotia*, 2011 ONSC 530, 337 D.L.R. (4th) 319, at paras. 55-76 ("*Fulawka*, Div. Ct. 2"). Justice Harvison Young (as she then was) noted that the court had to determine whether a negligence claim could be made under the *Anns* test. When making this assessment, in the context of a certification hearing, Justice Harvison Young held: "courts should be very circumspect about striking claims on the basis of the second stage of the Anns test [relating to residual policy considerations] at preliminary stages in the absence of full evidentiary records": *Fulawka*, Div. Ct. 2, at para. 72.

[72] On appeal to the Court of Appeal, the defendant bank did not appeal from the s. 5(1)(a) conclusions of Strathy J., which the Divisional Court upheld: *Fulawka* CA, at paras. 40-41, 71.

[73] The certification of the negligence claim in *Fulawka* has been followed in numerous class actions certifying employment standards claims: *Bozsik*, at para. 217; *Baroch*, at para. 21; *Cunningham*, at para. 30; and *Cervantes v. Pizza Nova Take Out Ltd.*, 2026 ONSC 713 (Div. Ct.), at paras. 31-34, 73-79.

[74] Moreover, in *Davis*, although Perell J. commented that the plaintiff relied on *Fulawka* to support a cause of action in negligence, he did not address *Fulawka* in the remaining paragraphs of his negligence analysis: at paras. 227-30.

[75] Finally, it is not plain and obvious that a claim in negligence cannot be supported by the general principles underlying claims for pure economic loss as set out in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, [2020] 3 S.C.R. 504. The Supreme Court of Canada cautioned lower courts not to focus on established categories, but rather on whether a relationship of proximity could be established under the *Anns* test. The Court held, at para. 22:

> **In other words, what matters is whether the requirements for imposing a duty of care are satisfied — and, in particular, whether the parties were at the time**

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> **of the loss in a sufficiently proximate relationship.** Where they are, it may be because the relationship falls within a previously established category of relationship in which the requisite qualities of closeness and directness were found, or is analogous thereto (*Livent*, at para. 26; see also *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15; *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 5). **Or, a plaintiff may seek to establish a "novel" duty of care after undertaking a full *Anns/Cooper* analysis.** [Emphasis added.]

[76] Based on the above case law and the pleadings before the court, it is not plain and obvious that a negligence claim would fail at trial. A trial judge, with a full evidentiary record, may be able to find a relationship of proximity and reliance under the *Anns* test.

[77] Consequently, I find that the negligence claim discloses a cause of action.

Objection 3: No cause of action for breach of fiduciary duty

[78] At paragraphs 39-40 of the Claim, Chiang pleads that TD owed a fiduciary duty to the class members in relation to the payment of their vacation and holiday pay. He submits that TD was in a special relationship with the class members who were vulnerable to, reliant upon, and influenced by the representations, superior knowledge, sophistication, and power of TD.

[79] Chiang pleads that TD breached its fiduciary duties by, among other reasons, failing to advise class members of their entitlements under the *CLC* and misrepresenting to class members that their vacation and general holiday pay entitlements were properly included and accounted for in the calculation of their commissions and bonuses.

[80] Chiang does not suggest that the entire employment relationship between TD and the MMSs was fiduciary in nature. His submission is that TD owed class members a fiduciary duty in relation to vacation and holiday pay. A fiduciary duty can arise for a specific purpose or aspect of a relationship and does not necessarily have to arise across the entire relationship: *Boal v. International Capital Management Inc.*, 2023 ONCA 840, 169 O.R. (3d) at para. 50; *The Manufacturers Life Insurance Company v. Ward*, 2007 ONCA 881, 288 D.L.R. (4th) 733, at para. 26.

[81] TD submits that the Claim fails to disclose a cause of action for breach of fiduciary duty because no facts are pleaded to establish (i) any undertaking by TD to act solely in the class members' interests, and/or (ii) that TD had scope to exercise any "discretionary power" over the class members' interests in the legally relevant sense. TD relies on *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 and *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 27.

[82] TD further submits that a statute must use clear language when it imposes an undertaking on a party: *Sharp v. Royal Mutual Funds Inc.*, 2020 BCSC 1781, at para. 68.

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[83] TD further submits that the *CLC* does not impose any statutory undertaking; statutory undertakings only arise when a statute imposes discretionary power on the alleged fiduciary: *Elder Advocates*, at para 45.

[84] For the reasons that follow, I find that it is not plain and obvious that the *CLC* cannot impose (i) an undertaking to act in the best interests of MMSs when paying vacation and holiday pay, and (ii) a discretionary power over the class members which takes them outside the standard employer-employee relationship grounded in contract.

[85] The decision in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, sets out the principle that a statute can serve as the basis of a fiduciary duty. Dickson J. (as he then was) held, at p. 384:

> I do agree, however, that **where by statute**, agreement, or perhaps by unilateral undertaking, **one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.** Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct…[Emphasis added.]

[86] In *Hodgkinson v. Simms*, [1994] 1 S.C.R. 377, the Court held that the existence of a contract does not preclude the recognition of a fiduciary duty. La Forest J. held, at p. 407:

> Finally, I note that the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, **the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty**. [Emphasis added.]

[87] Additionally, the employer/employee relationship may result in the employee "relying on the superior knowledge and expertise of [the employer]". Class members could have "reasonably relied on the Bank's misrepresentations that its overtime policies complied with federal law": *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115, 160 O.R. (3d) 173, at paras. 99-101 ("*Fresco* CA").

[88] Similarly, in *Mustaji v. Tjin*, 1995 CarswellBC 136 (SC), aff'd 1996 CanLII 1907 (BCCA), the lower court held, at para. 30: "…it is undeniable that fiduciary obligations arise in employment relationships in appropriate circumstances…".

[89] Given the above case law, there are several examples of employment standards class actions in which fiduciary claims were certified: *Navartnarajah v FSB Group Ltd.*, 2021 ONSC 5418, at paras. 16, 20; *Cunningham*, at para. 30.

[90] While TD submits in its factum that "courts have routinely struck [fiduciary duty] claims on the basis that the employment relationship is an inherently commercial one in which each party recognizes and accepts that the other is acting in its own self-interest", the case law relied upon by TD does not support such a broad conclusion. The Ontario case cited by TD, *Boyd v. Wright Environmental Management Inc.*, 2008 ONCA 779, 303 D.L.R. (4th) 747, is not a case where the

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court “struck” the claim on a pleadings motion. Rather, the court dismissed the claim after trial: at para. 1.

[91] The pleadings in the present case can support a claim for breach of fiduciary duty. Chiang pleads material facts to support the conclusion that TD exercised discretion and took advantage of the power imbalance with employees by:

(i) purporting that vacation and holiday pay were included in payments,

(ii) purporting that this practice complies with the *CLC* (in doing so, Chiang submits that TD effectively gave advice based on its superior knowledge and expertise, upon which the class members were intended to rely),

(iii) designing and implementing a flawed vacation and holiday pay system and engaging in problematic practices when setting or revising compensation rates/formulas, reserving discretion to resolve disputes about commissions, purporting to assign unknown amounts or percentages of compensation rates to vacation or holiday pay (without, for example, calculating amounts for holiday pay), and

(iv) failing to record and/or report on holidays and vacation worked, the payments owing, and the formulas applied.

[92] The pleadings further support an allegation that the class members reasonably relied on the sophistication, advice and representations of TD as to the propriety of its practices and its compliance with the *CLC*. It is not plain and obvious that a fiduciary duty claim would fail based on the allegation that TD exercised its discretion and power unilaterally and impacted the legal or practical interests of vulnerable class members (i.e. by withholding, reducing and/or failing to disclose the compensation to which they were entitled).

[93] For the above reasons, the claim for breach of fiduciary duty discloses a cause of action.

Objection 4: No cause of action for unjust enrichment

[94] At paragraphs 41 to 43 of the Claim, Chiang pleads a claim in unjust enrichment. He alleges that:

(i) TD has been unjustly enriched as a result of retaining money that is rightfully owed to Chiang and the other class members in the form of vacation pay and public holiday pay.

(ii) Chiang and the other class members have suffered a corresponding deprivation in the form of loss of vacation pay and public holiday pay.

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(iii) There is no juristic reason for this unjust enrichment. TD's failure to pay Chiang and the other class members vacation and public holiday pay is unlawful.

[95] TD submits that the claim in unjust enrichment does not disclose a cause of action. I do not agree.

[96] TD relies on *Spina v. Shoppers Drug Mart Inc.*, 2024 ONCA 642 ("*Spina* CA"), in which the court adopted the concession by class members that "there is no room for unjust enrichment if the claim falls under the contract, which it does": at paras. 121-22.

[97] However, the decision in *Spina* arose by way of summary judgment; the court already made a finding that the class was entitled to contractual relief, and as such, no unjust enrichment claim was available. *Spina* was not at the certification stage.

[98] In the present case, an unjust enrichment claim may arise if the court (i) accepts TD's submission that vacation and holiday pay were included in variable compensation under the employment agreements, and (ii) accepts Chiang's position that such a contract is unenforceable, unlawful, or void. In these circumstances, the three requirements of an unjust enrichment claim could be met: there would be deprivation of the plaintiff, corresponding enrichment of the defendant, and no juristic cause for the enrichment.

[99] Given that an unjust enrichment claim could arise on the merits, the class cannot be prevented from pursuing equitable remedies at the certification stage.

[100] TD also relies on the decisions in *Heller* and *Davis* in which Perrell J. held that no claim for unjust enrichment could arise since the relationship between the class members and the defendant was governed by contract.

[101] In *Davis*, Perell J. held, at para. 216:

> The point is subtle and difficult, but the presence of a contract may preclude a claim in unjust enrichment. If the contract is legal and not being breached, it may provide the juristic reason to dismiss the unjust enrichment claim altogether. If the contract between the parties is legal and being breached, and the plaintiff's impoverishment (the plaintiff's direct or indirect transfer of wealth to the defendant), is equal to the plaintiff's breach of contract claim, then there is no concurrent claim in restitution. This is not a matter of redundancy of the unjust enrichment claim, it is a matter that there is no unjust enrichment claim at all.

[102] Justice Perell took a similar approach in *Heller*, at para. 156:

> I agree with the Defendants' submission in paragraph 197 of their Responding Factum:

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> 197. Unjust enrichment claim should be struck. The plaintiffs' case rises and falls on whether the services agreement violates the ESA. If it does, the proposed class will be entitled to contractual remedies for the defendants' breach of the employment contract. There is no basis for unjust enrichment in this pleading. This is because any "remedial consequences for breach of contract are typically captured by the law of contract." Put simply, "restitutionary relief is not available if the claimant possesses a right to contractual relief." When the parties' relationship is governed by contract, so too are their remedies.

[103] However, in contrast to *Davis* and *Heller*, there are several decisions involving employment standards legislation in which the courts certified claims in unjust enrichment. These cases are consistent with Chiang's position that where a contract is found to be void or unenforceable, an unjust enrichment claim could exist.

[104] In *Fulawka* SC, Strathy J. held that an unjust enrichment claim based on an overtime claim under the *CLC* disclosed a cause of action: at para. 146.

[105] In *Cunningham*, Belobaba J. certified an unjust enrichment claim based on the alleged failure of the employer to pay vacation and public holiday pay to commissioned employees in breach of provincial and territorial employment standards laws: at paras. 1 and 30.

[106] In both *Baroch*, at para. 21, and in *Bozsik*, at para. 217, the courts certified an unjust enrichment claim in an overtime based employment class action.

[107] Consequently, there is sufficient authority to support a claim in unjust enrichment. At this preliminary stage, I find that it is not plain and obvious that an unjust enrichment claim would fail at trial.

[108] I find that the unjust enrichment claim discloses a cause of action.

Objection 5: No cause of action for breach of trust

[109] Chiang pleads at paragraph 38 of the Claim that the unpaid vacation and holiday pay owed to class members "are trust funds or should be deemed to be held in trust" because of (i) "the superior knowledge and superior trained staff of [TD]", (ii) "the fiduciary duties that [TD] had and owes to the Class", and because (iii) "[TD] has failed to pay, release or transfer such trust funds to the Class Members while they were employed with [TD] or thereafter".

[110] Chiang submits that s. 188 of the *CLC* gives rise to a trust relationship. Section 188 requires an employer to pay the employee any vacation pay owing to them in respect of any prior completed year of employment upon the cessation of the employee.

[111] TD submits that the Claim does not disclose a cause of action for breach of trust.

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[112] Chiang relies on the decision in *Curtis v. Medcan Health Management Inc.*, 2021 ONSC 4584 ("*Curtis* SC"), in which the Court found that the breach of trust claim for failure to pay overtime on variable compensation disclosed a cause of action: at para. 61.[14] However, in *Curtis*, the trust for vacation and holiday pay arose because it was statutorily imposed under s. 40(1) of the *Employment Standards Act, 2000*, S.O. 2000, c. 41. Perell J. held, at para. 59, "the alleged breach of the trust provisions of the *Employment Standards Act, 2000*, are a breach of the employment contract or a breach of trust."

[113] Similarly, in *Singh* 1, the court held that the trust claim under the provincial employment standards legislation disclosed a cause of action, at para. 71:

> With respect to the breach of trust claims, the trust provisions of the ESL are pleaded, and a breach is pleaded since the plaintiff alleges that the P&C Advisors were not paid vacation and public holiday pay on top of the variable compensation. Consequently, a cause of action for breach of trust is pleaded: see *Curtis* (2021), at paras. 58-60.

[114] TD distinguishes the above cases on the basis that no such statutory trust is imposed under s. 188, or any other provision, of the *CLC*. TD submits that while an employer has an obligation to pay all vacation pay accrued over each class member's years of employment on cessation of employment under s. 188, that statutory obligation does not automatically convert the funds into the objects of a trust.

[115] TD relies on case law that requires "clear, explicit wording creating the [statutory] trust and the rights of the beneficiaries": *Annable v Devencore Company Ltd.*, 2024 BCSC 1503, at para. 86, aff'd 2025 BCCA 389; *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225, at paras. 93-94.

[116] TD submits that in the absence of an express statutory trust under the *CLC*, Chiang must plead facts that establish TD intended to hold the amounts at issue for the exclusive benefit of the proposed class members: *Rubner v. Bistricer*, 2019 ONCA 733, at para. 49, leave to appeal ref'd 2020 CanLII 22069 (SCC). TD submits that no such intention can be established, as the vacation and holiday pay amounts were included in the MMSs' variable compensation payments.

[117] However, the Court of Appeal in *Ward* held that obligations to pay vested commissions were "akin to a trust". This supports Chiang's position before the court. Weiler J.A. held, at para. 26:

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[14] The court did not certify the action due to the finding that the preferable procedure requirement was not met. That aspect of the decision was reversed by the Divisional Court at 2022 ONSC 5176 ("*Curtis* Div. Ct.").

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> […] The trial judge found that, despite Ward's termination, Manulife was obligated to continue paying vested commissions in that block of business. We have upheld that finding. **Manulife's role in relation to the vested renewal commissions was akin to that of a trustee and in this narrow respect a fiduciary duty existed.** … Manulife breached its fiduciary duty to Ward in freezing his vested commission account. [Emphasis added.]

[118] Therefore, the payment obligation in *Ward* may be akin to the payment obligations under s. 188 of the *CLC*. Given the uncertainty in the law as discussed above, I do not find that it is plain and obvious that the analysis in *Ward* could not be applied to the present case.

[119] For the above reasons, I find that the Claim discloses a cause of action for breach of trust.

Objection 6: No cause of action for breach of duty of good faith

[120] Chiang pleads that TD breached its duty of good faith when exercising its discretion, including by misleading class members through misrepresentations and/or omissions.

[121] Chiang pleads that TD acted in bad faith by: (i) failing to advise class members of their entitlements, (ii) misrepresenting to class members that vacation and general holiday pay entitlements were properly included and accounted for in the calculation of their commissions and bonuses when they were not, (iii) failing to pay class members vacation pay and holiday pay, and (iv) failing to maintain a reasonable system for, among other things, reporting, recording, monitoring and appropriately paying class members' vacation and general holiday pay entitlements.

[122] Chiang further pleads that "[TD] owed and was required to abide by a duty to act in good faith and to honour, and not frustrate or evade, its statutory and contractual obligations." Chiang pleads that TD's conduct as set out above is unlawful, high-handed and carried out in bad faith, and that TD's conduct constitutes a disregard for the minimum statutory employment rights and interests of Class Members.

[123] TD submits that the claim for breach of duty of good faith does not disclose a cause of action. I do not agree.

[124] In *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 49, *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, [2021] 1 S.C.R. 32, and *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, [2020] 3 S.C.R 908, the Supreme Court confirmed that the concept of good faith is an organizing principle that underlies contractual performance. It also gives rise to a specific duty of honesty.

[125] If TD represented itself as complying with the *CLC* in the employment agreements, but in practice, did not do so in bad faith, this may amount to a breach of the duty of good faith.

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[126] Chiang's breach of the duty of good faith claim is inextricably tied to his breach of contract claim. If on the merits, the court finds that TD breached the contract and acted in bad faith, this could ground an award for additional or other damages and remedies for breach of the duty of good faith.

[127] TD provided no case law where the court refused to certify a claim for breach of the duty of good faith when an employer allegedly failed to comply with its obligations under employment standards legislation.

[128] Conversely, Chiang provided the court with numerous cases where courts certified claims for the breach of the duty of good faith in employment standards class actions.

[129] In *Baroch*, Belobaba J. certified the breach of duty of good faith claim based on an overtime claim under the *CLC*. He held, at paras. 38-39 (references omitted):

> The fourth and fifth common issues ask whether Canada Cartage owed class members a duty ("in contract or otherwise") of good faith, candour and honesty in respect of its overtime obligations, and if so, whether this duty was breached.
>
> The legal basis for these questions is not in dispute. Contractually implied good faith obligations in the context of employment agreements have been recognized by this court, and a common law duty of honesty in contractual performance generally was recently endorsed by the Supreme Court in *Bhasin*.

[130] In *Fulawka* SC, Strathy J. certified the breach of duty of good faith claim based on an overtime claim under the *CLC*. He reviewed the position of the parties at paras. 75-76:

> The plaintiff pleads that "the class members are in a position of vulnerability in relation to the defendant. As a result, the defendant owes a duty to the class members to act in good faith, which includes a duty to honour its statutory and contractual obligations to them." It pleads that Scotiabank breached this duty by failing to pay for all hours worked, failing to advise the Class of their right to recover payment, retaining the benefit to itself, creating a work environment in which overtime was required and imposing an unlawful overtime policy on them. The prayer for relief in the statement of claim includes a claim for a declaration that Scotiabank "has breached its obligation to act in good faith in the performance of its contracts with class members . . .".
>
> In response to the defendant's objection that there is no free-standing cause of action for breach of the duty of good faith (relying on *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 2003 CanLII 9923 (ON CA), 68 O.R. (3d) 457, [2003] O.J. No. 4656 (C.A.)), the plaintiff says that the duty is not independent, but rather is inherent in the employment relationship: *Wallace v. United Grain Growers Ltd.*, 1991 CanLII 352 (SCC), [1997] 3 S.C.R. 701, [1997] S.C.J. No. 94 ("Wallace"), at paras. 91-98.

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[131] Justice Strathy conducted a review of the case law and held, at paras. 78, 80-81:

> The duty of good faith and fair dealing in the employment relationship is a feature of the contractual relationship and not an independent cause of action. It is not confined to the termination of the relationship and arises from the recognition of the vulnerability of the employee and the importance of work in personal fulfillment and financial security (see *Wallace*, above, at para. 93. The employees in this case are in a position of particular vulnerability, as they do not have the protection of a union and they are not members of management. They are responsible for the sale of Scotiabank's products and they are no doubt encouraged to maximize sales. The nature of their work, which requires that they respond to the unpredictable demands of customers, makes the necessity to work overtime a real possibility. The understandable need for managers to control overtime costs and the pre-approval requirement in the policy create institutional impediments to claims for overtime pay. It seems to me that there is, at the very least, an argument that the duty of good faith and fair dealing requires the employer to pay for overtime work necessarily required or permitted by the employer, whether or not the overtime has been approved in advance.
>
> …
>
> The duty of good faith could also require that the employer take measures to ensure that overtime work of Class Members is properly recorded and properly compensated. Scotiabank's vice president, Ms. Russell, suggested that it would be demeaning to require employees to punch a time clock or to keep track of their hours. If Ms. Fulawka's assertions are correct, it would be more demeaning for Class Members to work overtime without compensation. Moreover, in this age when most bank employees log into a computer at the beginning of the work day and log out at the end, it is hard to imagine that Scotiabank could not devise a time-tracking system that would be effective and automatic and that would allow managers, and their superiors, to track, regulate and fairly compensate overtime.
>
> These components of the duty of good faith do not derive from the Code, but their content is informed by the Code. I am satisfied that the claim for breach of the duty of good faith, viewed as a part of Scotiabank's contractual duties, discloses a cause of action.

[132] Similar breach of duty of good faith claims were certified in overtime cases under the *CLC* or provincial employment standards legislation: *Omarali v. Just Energy*, 2016 ONSC 4094 at paras. 58 and 85, and *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144, at paras. 31 and 34.

[133] Based on the above case law, I find that the breach of good faith claim discloses a cause of action.

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Objections under s. 5(1)(c)

[134] TD makes three objections under the s. 5(1)(c) certification requirement. TD submits that:

(i) There is no basis in fact that Chiang's claims for liability and associated remedies can be determined in common (PCIs A and B).

(ii) There is no basis in fact for Chiang's claim for aggregate damages (PCI C).

(iii) There is no basis in fact for Chiang's claim for punitive damages (PCI D).[15]

[135] I first consider the applicable law to determine commonality under s. 5(1)(c) and then I review the three objections raised by TD.

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The applicable law

[136] In *Carcillo*, the Court of Appeal set out the following summary of the test to meet the common issues requirement under s. 5(1)(c), at paras. 39-41:

> Section 5(1)(b) [*sic*] of the *Class Proceedings Act* requires that certification promote efficiency by ensuring that "allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis": *Pioneer Corp*, at para. 104. An issue is considered common where (1) it does not inevitably break down into individual issues, and (2) it represents a substantial and necessary component of each class member's claim, such that resolving it would meaningfully advance those claims: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, , 112 O.R. (3d) 346, at para. 81, leave to appeal refused, [2012] S.C.C.A. No. 326; *Canada v. Greenwood*, 2021 FCA 186, [2021] 4 F.C.R. 635, at para. 180, leave to appeal refused, [2021] S.C.C.A. No. 377.
>
> The common issues threshold is intentionally low. As this court explained in *Cloud v. Canada (Attorney General)*, proposed issues may qualify even if they form only "a very limited aspect of the liability question," and even where many individual issues will remain: at paras. 52-53. They need not predominate over individual questions, nor must they completely determine each class member's claim: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 39.

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[15] TD also submits that there is no cause of action pleaded for the punitive damages claim under s. 5(1)(a) of the *CPA* but I address that submission as part of the s. 5(1)(c) objection to the punitive damages claim.

> The evidentiary standard — "some basis in fact" — reflects this low bar. This standard requires only minimal evidence showing that the proposed common issues exist and could be addressed class-wide. The appellants need not demonstrate a prima facie case or establish the likelihood of trial success, and the court cannot weigh the evidence or evaluate the merits at certification: *Lilleyman v. Bumble Bee Foods LLC*, 2004 ONCA 606, 173 O.R. (3d) 682, at paras. 67-72, leave to appeal refused, [2024] S.C.C.A. No. 406.

[137] In light of the above test, "[t]here can be many individual issues which remain after the determination of the common issues": *Cunningham*, at para. 38.

[138] Even a significant level of difference among class members does not preclude a finding of commonality: *Hodge v. Neinstein*, 2017 ONCA 494, 136 O.R. (3d) 81, at para. 114.

Objection 7: There is no basis in fact that Chiang's claims for liability and corresponding remedies can be determined in common (PCIs A and B)

[139] Chiang only proposes four PCIs. PCIs A and B relate to liability and corresponding remedies:

> A. Is the Defendant liable in contract (including breach of duty of good faith), negligence, breach of fiduciary duty, breach of trust and/or unjust enrichment to take reasonable steps to ensure that the Class Members were properly compensated with vacation and public holiday pay, and to pay vacation and public holiday pay that was owing to the Class Members?
>
> B. If the answer to Common Issue A is "yes", what remedies are the Class Members entitled to?

[140] PCI A is framed generally and summarily to align with the simplified common issues requested and ultimately certified by Belobaba J. in *Cunningham*, another class action alleging systemic unpaid vacation and holiday pay: at para. 40. I take no issue with this framing, which I discuss in greater detail below.

[141] TD submits that individual trials would be required to determine liability, with idiosyncratic results for each class member. I do not agree.

[142] With regards to TD's position that the MMSs' employment agreements varied, I note that in *Cunningham*, Belobaba J. relied on the systemic nature of the overtime claim as a basis for the commonality requirement. He held, at para. 9, that "the case turns on the systemic employment policies and operations of the defendant employer and does not require an analysis of any individual employee's personal conduct". PCIs A and B in the present case similarly address the systemic nature of TD's position that vacation and holiday pay were included in variable compensation, and TD's alleged failure to record MMSs' vacation and holiday pay.

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[143] To the extent that different employment agreements (and ancillary documents) would have to be considered by the court, this is not an obstacle to certification under s. 5(1)(c). In *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, the Court held, at paras. 45-46:

> **Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another.** Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.
>
> *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, **the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.** [Emphasis added.]

[144] In *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, the defendant submitted that the commonality requirement could not be met since the standard of care varied over time, thereby requiring individual trials. The Court did not accept this submission, and held, at para. 32: "[t]hat the standard of care may have varied over the relevant time period simply means that the court may find it necessary to provide a nuanced answer to the common question."

[145] In comparison to the changing standard of care in *Rumley*, the present case only requires consideration of the terms that may have applied to the employment agreements. The answer to liability for one group of class members will not conflict with the answer for another group.

[146] TD's core position remains that it was obligated under the *CLC* to pay, and did pay, vacation and holiday pay as a part of MMSs' variable compensation. Consequently, all class members require a common determination of this core issue – that is, whether TD satisfied its vacation pay (s. 184.01) and holiday pay (s. 196(2)) obligations through the "it's included" approach it adopted. This core question affects all class members, regardless of whether TD disclosed this approach, or set it out in an employment agreement, pay advice, or other document between the parties.

[147] TD also submits that Chiang's claim to enforce the greater of the minimum vacation entitlements from the *CLC* and the vacation entitlements under the Vacation Policies creates a conflict for the class members since:

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> [S]ome class members (i.e., those with stronger claims to a "greater benefit" based on TD's vacation policies) would be motivated to deemphasize or dispute the enforceability of language supporting the Statutory Minimums Claim whereas other class members (i.e., those with weaker claims to any "greater benefit" based on a vacation policy) would need to rely upon that same language to support any claim. In other words, this is precisely the kind of case in which success for one could mean failure for another.

[148] I do not agree. If the "greater amount" claim is successful, class members will receive the greater entitlement applicable for their relevant years of service. The core question remains the same – did TD meet its statutory obligations with regards to holiday and vacation pay. No conflict arises.

[149] The s. 5(1)(c) requirement of commonality has been affirmed in numerous employment standards class actions, including those relating to vacation and holiday pay on variable compensation. In each case, there was a common employer who imposed a systemic policy and then allegedly failed to comply with applicable employment standards legislation. This, alongside the possibility of greater contractual entitlements for certain class members, raise issues that are "a necessary and substantial ingredient in the resolution of each class member's claim".

[150] There are several examples of employment class actions that were certified and specifically related to unpaid vacation/holiday pay (including for commissioned employees) and breaches of the *CLC*. There are also cases where an aggregate damages PCI was certified: see *Berg v. Canadian Hockey League*, 2017 ONSC 2608; *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271; *Montaque v. Handa Travel Student Trip Ltd.*, 2020 ONSC 6459; *Rallis v. Approval Team Inc.*, 2020 ONSC 4197; *Cunningham*; *Ngan*; and *Cheetham* CA.

[151] Similarly, *Fresco* CA, *Fulawka* CA, and *Bozsik* dealt with class actions which alleged that the defendants' policy of pre-approving overtime was contrary to s. 174 of the *CLC*. These class actions were certified even though individual issues existed, including routine pre-approvals and certain class members who were instructed not to record overtime hours.

[152] The fundamental facts before the court on this motion are uncontested and are much less complex than many other employment cases which have been certified. Those facts include: (i) generic employment agreements and compensation documents that either state that MMSs have no entitlement to paid vacation or state that vacation and sometimes general holiday pay are included in commissions and/or bonuses, (ii) evidence that vacation and holiday pay were not calculated and added as a "top-up" to commissions and bonuses, and (iii) a result that longer-tenured employees would receive a lower commission (since higher vacation and holiday pay would be "included" or "baked in" to their fixed variable compensation).

[153] While the analysis below is not intended to be an assessment of the merits of the parties' positions, the commonality of the core issue is supported by case law which has considered similar positions to TD's on the merits and held them to be "absurd".

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[154] In *Kinch v. Dufferin Communications Inc. c.o.b. as Evanov Radio Group*, 2015 ONSC 6610, the Divisional Court overturned a summary judgment award that held the appellant (a commissioned sales representative) was not entitled to vacation pay in addition to her regular commissions. As in the present case, the employment relationship was governed by the *CLC*. In *Kinch*, the parties had entered into an employment agreement that provided:

> You will be paid commission at a rate set out in Schedule B (Commissions). This amount includes statutory amounts for vacation/holiday pay as well as statutory pay.

[155] The Court in *Kinch* held that, assuming the practice of including vacation pay in commission payments is permissible, the question is whether the compensation arrangement (i) included the pay, and (ii) complied with the *CLC*. The Court noted, among other things, that the employer did not produce any evidence to demonstrate that it had conducted any vacation pay calculations for the employee or adjusted her commission rates upwards to reflect that her vacation pay was "included": at paras. 16-18.

[156] The Court noted that during the year 2008, when the employee's seniority required an increase of vacation pay entitlement from 4% to 6%, no increase in her commission rate followed. The result was that the employee's effective commission rate decreased in 2008 to account for the increase in her vacation entitlement. The Court concluded that such a result would be "absurd": *Kinch*, at paras. 18-19.

[157] The British Columbia Supreme Court reached a similar conclusion in *VCR Print Company Ltd. v. Employment Standards Tribunal*, 2003 BCSC 442, at paras. 64-66, in which Romilly J. held that "using an employee's commission to satisfy the vacation pay requirements of the Act produces an 'absurd result'": citing *Atlas Travel Service Ltd. v. British Columbia (Director of Employment Standards)*, 1994 CanLII 2331 (BCSC), 99 B.C.L.R. (2d) 37.

[158] In *Singh* 1, the Court certified a class action based on the same claims of failure to pay vacation and holiday pay on variable compensation under an agreement which provided that "[a]ll Variable Compensation components of the Plan have been established at a level that includes both Vacation Pay and Statutory Holiday Pay": at para. 2.

[159] The Court in *Singh* 1, at paras. 64-65, relied on *Kinch*:

> The defendants do not challenge that the Claim discloses a cause of action for breach of the ESL. In *Kinch v. Dufferin Communications Inc. (c.o.b. Evanov Radio Group)*, 2015 ONSC 6610, 342 O.A.C. 18 (Div. Ct.), the court held that a variable compensation policy that included vacation and public holiday pay was not valid since the employer had not satisfied the court that (i) the employee was aware of vacation pay entitlements under the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the "*CLC*") and (ii) by agreeing to the arrangement, the employee was receiving a benefit that was either equal to or greater than those entitlements: at paras. 9, 16.

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> In *Kinch*, the court, at para. 19, relied on the decision of the British Columbia Supreme Court in *Atlas Travel Services Ltd. v. Director of Employment Standards* (1994), 1994 CanLII 2331 (BC SC), 99 B.C.L.R. (2d) 37, in which the court considered a similar variable compensation policy and held, at para. 9, that the defendant employer's interpretation would lead to an "absurd" result since employees who work longer would, in effect, be paid less variable compensation (before ESL vacation and public holiday pay) then their colleagues with less seniority.

[160] As I set out above, the analysis in *Kinch*, *VCR*, *Atlas*, and *Singh* 1 is not being used to determine on the merits whether TD will successfully establish that the "it's included" language complied with the *CLC*. However, the above caselaw is relevant to the issue of certification because it demonstrates that a common determination can be made on this issue, which is relevant to all class members, regardless of the terms in their employment contracts. These issues of liability and remedies (as set out in PCIs A and B) are common to all class members, even if there may (but not necessarily) be a nuanced answer depending on the specific contractual language governing an individual employee.

[161] Similarly, the Court in *Cheetham* CA held that variances in BMO's documentation concerning how it dealt with vacation and holiday pay for different sets of employees made no difference to the commonality test, since it could not be said that success for some class members meant the failure for others: at paras. 108-11.

[162] Other common issues arise on the record and will be resolved as part of PCI A. They include:

(i) Chiang submits that TD systematically failed to calculate holiday pay before April 2025. Consequently, PCI A includes a common issue of whether holiday pay was properly included in the rates and/or even paid.

(ii) The issue of whether bonuses are "discretionary", as Thomson stated in her cross-examination, and thus not "wages" subject to *CLC* holiday pay requirements.[16]

(iii) Before 2012, TD did not record in pay advices what part of MMSs' pay was made up of the "included" vacation and/or holiday pay. Additionally, TD did not record holiday pay after 2011. Consequently, PCI A raises a common issue of whether there is a systemic finding that no vacation or holiday pay was paid.

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[16] See footnote 12 above.

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[163] Further, Chiang alleges that there is some basis in fact that vacation and holiday pay is owed on "ancillary" variable compensation falling outside the commissions and volume bonuses. Since TD acknowledged that it will not argue that the terms/conditions governing such ancillary income are different, another common issue arises as to whether TD's practice for the ancillary income complied with the *CLC*. Determining whether 15 years' worth of ancillary pay was paid legally will substantially advance the action.

[164] A common issue could also arise based on the Code of Conduct which, in every version produced by TD (between 2012 to 2024), states that all TD policies form terms and conditions of employment and every MMS agrees this is so. This raises the common issue of whether the Vacation Policies were incorporated into MMS employment agreements through the Code of Conduct.

[165] Each Code of Conduct is attested to every year by every MMS, with warning that breaches may result in discipline, up to termination. The contracts state that TD employees must abide by and follow Codes and/or TD policies. Vacation Policies expressly set out the vacation entitlements of, and payments that will be made to, employees, subject to some exemption language for commissioned employees which was included by TD from time to time.

[166] Finally, as I noted above, TD objected to the "general" nature of PCI A, even though a similar PCI was certified in *Cunningham*. I accept the approach taken by Belobaba J. in *Cunningham*. Chiang raised the specific issues in his motion record, Claim and factums, and those issues were largely addressed by TD in its motion record and factum.

[167] If required, a more detailed list of specific PCIs can be clarified on examination for discovery based on the pre-trial production. If the parties disagree on the appropriateness of a particularized PCI, they can address that issue before a common issues judge or before this court in its case management capacity. However, a full detailed list is not necessary at this stage.

[168] Consequently, I find that there is a basis in fact that Chiang's claims for liability and corresponding remedies can be determined in common. I certify PCIs A and B.

Objection 8: There is no basis in fact to certify the aggregate damages claim (PCI C)

[169] Chiang seeks to have PCI C certified on the issue of aggregate damages:

> If the Class Members are entitled to an award of monetary damages, can damages be assessed on an aggregate basis for all or part of the Class? If "yes",
>
> i. What is the most efficient method to assess those aggregate damages? Without limiting the generality of the foregoing, can aggregate damages be assessed in whole or part on the basis of statistical evidence, including statistical evidence based on random sampling?

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ii. What is the quantum of aggregate damages owed to Class Members or any part thereof?

iii. What is the appropriate method or procedure for distributing the aggregate damages award to Class Members?

[170] I first review the applicable law on the availability of aggregate damages. I then apply the law to the present case.

(i) The applicable law

[171] Section 24(1) of the *CPA* provides:

> (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.

[172] In *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921, 392 D.L.R. (4th) 490, the Court of Appeal endorsed the use of aggregate damages where the criteria under s. 24(1) are met. Feldman J.A. stated, at para. 76:

> I endorse the trial judge's view that it is desirable to award aggregate damages where the criteria under s. 24(1) are met in order to make the class action an effective instrument to provide access to justice. I also agree with his focus, at para. 47, on the legislature's choice of a 'reasonableness' standard for determining aggregate liability and with the three criteria he sets out to ensure that both sides are treated fairly by the assessment:
>
> > 1) whether the non-individualized evidence presented by the plaintiff is sufficiently reliable;
> >
> > 2) whether use of the evidence will result in unfairness or injustice to the defendant, such as overstatement of its liability: see *Healey v. Lakeridge Health Corp*., 2010 ONSC 725, 72 C.C.L.T. (3d) 261, at para. 284, affirmed 2011 ONCA 55, 103 O.R. (3d) 401; and […]

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> 3) whether the denial of an aggregate approach will result in a "wrong eluding an effective remedy" and a denial of access to justice: see *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 at para. 42, leave to appeal refused [2007] S.C.C.A. No. 346. ….

[173] To certify aggregate damages, a plaintiff must show that it is reasonably likely or possible that the pre-conditions in s. 24(1) of the *CPA* can be satisfied for all or some part of the damages claimed by some or all class members, without the necessity of proof by individual class members: *Fulawka* CA, at paras. 111, 141; *Bernstein v. Peoples Trust Company*, 2017 ONSC 752, at paras. 111-15; *Good v. Toronto Police Services Board*, 2016 ONCA 250, 130 O.R. (3d) 241, at paras. 81-82; *Thompson-Marcial v. Ticketmaster Canada LP*, 2024 ONSC 2305, at paras. 392-409.

[174] A plausible or credible methodology is required, and there must be some evidence that the data underlying the methodology is available. Resolving conflicts between experts is not an issue to be engaged with on a certification motion. The evidentiary threshold is low: *Ticketmaster*, at paras. 396-99, 408; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at paras. 118-19, 126.[17]

[175] Certification is not the time for finely calibrated assessments of the expert opinions. No tangible demonstration of the proposed methodology is required. Its actual merit is to be tested at trial: *MacKinnon v. Volkswagen Group Canada Inc.*, 2022 ONSC 5501, 163 O.R. 3(d) 721, at paras. 34-35, 42-43.

[176] In *Singh* 1, the Court certified the aggregate damages PCI in a claim for vacation and holiday pay on variable compensation. After reviewing the applicable law, the court held, at paras. 182-83 (footnotes omitted):

> 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.
>
> Consequently, there is a reasonable possibility that a common issues judge could determine aggregate damages without proof of individual claims for at least those claims within the statutory limitation period, and possibly for the other class members if they can toll the limitation period based on discoverability.

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[17] See also: *Richard v. The Attorney General of Canada*, 2024 ONSC 3800 at paras. 356-370; *Farrell v. Attorney General of Canada*, 2023 ONSC 1474 at paras. 324-333; *Nelson v. Telus Communications Inc. (Part 3)*, 2021 ONSC 24 at paras. 78- 90.

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[177] Similarly, both levels of court in *Fresco* certified an aggregate damages PCI: *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288 ("*Fresco* SC 1"), at paras. 34-45; *Fresco* CA, at paras. 60-77. In his decision, which was affirmed by the Court of Appeal, Belobaba J. relied on the evidence of the expert, Mr. Boedeker,[18] that "[i]f the time-stamped data reveals gaps in the evidence, where complete data cannot be obtained, then statistical sampling or extrapolation (back-casting and forecasting) would be used to fill in the gaps" : *Fresco* SC 1, at para. 36.

(ii) Expert evidence before the court

[178] At the hearing, the parties did not dispute the applicable principles governing the certification of PCIs seeking aggregate damages. Instead, the dispute focused on the evidence of the plaintiff's experts. TD submitted that Chiang (through the experts) failed to establish a plausible or credible methodology for determining aggregate damages.

[179] For the reasons that follow, I find that Chiang has met the test for certification of an aggregate damages PCI. I now review the expert evidence before the court.

[180] Chiang filed reports from two experts: forensic accountant Errol Soriano on the question of whether vacation/holiday pay can be individually calculated; and statistician Stefan Boedeker, on the question of whether an aggregate assessment is reasonably possible.

[181] Mr. Soriano confirmed that individual damages calculations can be made by applying the statutory calculations for vacation and holiday pay to the available records. He further concluded that an aggregate assessment could be used where not all information is available. He concluded:

> I am of the view that the Unpaid Entitlements can be determined on an individual basis or on an aggregate basis (via statistical sampling). The relevant data can be provided, and I do not expect any insurmountable challenges in performing the analysis.

[182] Mr. Boedeker confirmed that (i) statistical methodologies exist to perform an aggregate assessment based on a review of TD's records and (ii) statistical sampling can be used to fill in any historical data gaps and/or to simplify or reduce the cost of damages calculations. He concluded:

> I am of the view that the Unpaid Entitlements can be determined on an individual basis or on an aggregate basis (via statistical sampling). The relevant data can be

[18] Mr. Boedeker is the same expert retained by Chiang in the present case.

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> provided, and I do not expect any insurmountable challenges in performing the analysis.
>
> If complete data was available, then no statistical methods would necessarily have to be applied to compute damages. In the case of complete data, the method described in the Soriano Report could be directly applied to the complete data. However, even in instances with complete data, the use of statistical sampling may be necessary or appropriate if, for example, data are only available in hardcopy format, or if data are available on different systems or in in archived formats and the retrieval of data may be cumbersome or time consuming, or if data retrieval or analysis is otherwise cumbersome or time consuming.

[183] Mr. Boedeker did not conclude as to which statistical method would be most appropriate "if payroll data and records documenting the wage information or records indicating the identity of each class member (MMS employee) going back for all years relevant in these proceedings are incomplete or missing".

[184] Instead, Mr. Boedeker reviewed "well-established and widely accepted statistical methods that are available to address gaps in records and/or missing records with references to the relevant statistical literature".

[185] On cross-examination, Mr. Boedeker stated that any decision as to the appropriate method would depend on what documents were available and what documents were missing after TD made documentary disclosure.

[186] TD responded with the report of a business valuator, Bradley Heys. Mr. Heys criticized Mr. Boedeker's aggregate damages methodology because, among other things, Mr. Heys believed that TD might have some of the missing data which would have been the subject of Mr. Boedeker's statistical analysis.

[187] For example, Mr. Heys noted that data about mortgage funding was needed because commissions were only "'earned" for the purposes of calculating holiday pay when a mortgage was funded by TD.

[188] Following the delivery of Mr. Heys' report, Chiang's counsel enquired whether TD would produce information about the data available in its records, given Mr. Heys' comments about potentially available data. TD subsequently delivered the supplementary Thomson affidavit.

[189] In her supplementary affidavit, Thomson confirmed that almost all the data that Mr. Heys speculated would or might not be available was available from TD's stored records (including the funding date data) for many years historically. For the much earlier years, the affidavit confirmed that the data may be stored in an aggregated form (requiring disaggregation).

[190] Mr. Heys did not serve an amended or revised report following receipt of the supplementary Thomson affidavit. On cross-examination, Mr. Heys maintained that the

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subsequent disclosure of the available data did not alter, or require him to revisit, the opinions expressed in his report.

[191] Following receipt of the supplementary Thomson affidavit, Messrs. Boedeker and Soriano delivered reply reports that reaffirmed, with reference to the confirmed available data, that their damages assessments were sound. Mr. Boedeker's reply report described in some detail his responses to Mr. Heys' criticisms in light of Thomson's confirmation of the available data.

(iii) Analysis of whether PCI C seeking aggregate damages should be certified

[192] Chiang submits that PCI C should be certified. I agree.

[193] I do not accept TD's criticisms that Mr. Boedeker failed to identify which methodology he would use to address any gaps in TD's documentary production.

[194] To the contrary, Mr. Boedeker properly set out the various statistical methodologies he could use to address any documentary gaps, and he properly did not predetermine which methodology would work best. As set out in his reports, and as confirmed throughout his cross-examination, Mr. Boedeker established a basis in fact for the court to find that there are plausible methodologies (including statistical sampling) that can be used to fill in gaps in TD's records or otherwise simplify the aggregate assessment process. These statistical processes include (i) Regression Analysis, (ii) Time Series Analysis, (iii) Bootstrap Sampling, and/or (iv) Monte Carlo Simulations.

[195] Mr. Boedeker concluded, at paras. 85 and 89 of his reply report:

> The approach outlined in the 2024 Boedeker Report is grounded in established statistical methodology, and the outline given is a logical and appropriate framework. The final model selection can and will be specified fully once exploratory data analysis has been completed, following standard statistical procedures. Appendix 1 describes in detail the specific statistical methodology that can or will be applied. Testing these methodologies against the actual data will guide the final choice of models based on the principles of the predictive power of the models to impute missing or incomplete data. The recent clarifications on data availability in the Supplementary Thomson Affidavit substantially reinforce the feasibility and accuracy of the proposed analysis, demonstrating that any residual data gaps can be effectively addressed through standard statistical techniques such as extrapolation and statistical sampling.
>
> …
>
> In light of the above, I reaffirm that the 2024 Boedeker Report presents a methodologically sound and practical approach to estimating class-wide damages. It offers a structured means of addressing complex or incomplete data while maintaining analytical rigor. Based on the current data disclosures (particularly the

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> Supplementary Thomson Affidavit) and the points addressed in this Reply Report, I remain of the view that the Boedeker methodology enables a reliable estimation of what is owed to the MMS class, thereby assisting the Court in resolving the aggregate damages issue in a principled manner. I am confident that, moving forward, the implementation of the 2024 Boedeker Report's methodology will validate its reliability and provide the clarity and accuracy that the situation demands.

[196] On cross-examination, Mr. Boedeker remained steadfast that he had selected the correct methodologies but would only be able to determine the correct approach following documentary production. Chiang established the reasonable possibility of an aggregate assessment of damages in this case.

[197] I also find that TD's reliance on the decision in *Spina* CA is misplaced.

[198] TD submits that, based on *Spina*, aggregate damages cannot be ordered where questions of fact relating to the determination of each class member's damages remain to be determined, or where there is no available data to determine what individual class members were owed.

[199] However, each decision must depend on the facts of the case. In *Spina* CA, the court considered an appeal from a summary judgment motion in which full evidence was led on the merits of the issues before the court, including the appropriateness of an aggregate damages award. In contrast, the "some basis in fact" threshold for certifying a PCI is much lower.

[200] Further, *Spina* involves a commercial dispute arising from a series of complex agreements, each of which contained different contingencies. Consequently, the contracts had the potential to have differing effects on each class member. In contrast, all that is required to assess aggregate damages in the present case is a method to "fill in" any missing information (through one of the statistical methodologies proposed by Mr. Boedeker) and then apply the minimum vacation and holiday pay rates to total variable compensation.

[201] In *Spina v. Shoppers Drug Mart*, 2023 ONSC 1086 ("*Spina* SC"), Perell J. reviewed the evidence in detail and concluded that the proposed aggregate assessment methodology could not account for the complexities arising from the various contracts and agreements: at paras. 658-68.

[202] Moreover, in *Spina*, the data from which the plaintiff's expert calculated aggregate damages was itself aggregated for the entire class (not broken down by individual class members, as would be required) and an aggregate assessment was an "inherent impossibility": *Spina* CA, at paras. 194, 210.

[203] Unlike *Spina*, the evidence before the court in the present case does not support an idiosyncratic assessment of damages. The present case is an employment matter for payment of vacation and holiday pay on variable compensation. Damages will be assessed using a straight-forward mathematical exercise, based on stipulated percentages of vacation and holiday pay that would be added to the wages earned by MMSs through commissions and bonuses.

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[204] Consequently, *Spina* is not a reasonable comparator on the issue of whether aggregate damages can be ordered in the present case. *Spina* did not change the law relating to aggregate assessments but instead dealt with a materially different set of facts.

[205] I find that the decision in *Singh* 1 certifying aggregate damages is a reasonable comparator, as it addresses a virtually identical issue before this court, albeit under provincial employment standard legislation.

[206] TD also opposes certification of an aggregate damages PCI on the grounds that all necessary records may not be available. Not only is this submission contrary to Mr. Boedeker's evidence on the statistical methods available to address evidentiary gaps, it is also contrary to the supplementary Thomson affidavit.

[207] For the above reasons, I find that there is a basis in fact for the aggregate damages claim.

Objection 9: There is no basis in fact to certify the punitive damages claim

[208] Chiang seeks to certify PCI D, which asks whether the class is entitled to an award of aggravated, exemplary, or punitive damages.

[209] TD submits that (i) the Claim does not disclose a cause of action for punitive damages (a s. 5(1)(a) objection), and (ii) there is no basis in fact for a punitive damages claim (a s. 5(1)(c) objection). I address these objections collectively.

[210] In the Claim, Chiang pleads that TD is a "sophisticated" employer who, despite the personnel and resources at its disposal, systematically violated MMSs' rights to statutory minimum payments.

[211] Chiang further pleads that:

> The Plaintiff pleads that the Defendant's conduct as set out above is unlawful, high-handed and carried out in bad faith. The Defendant's conduct constitutes a disregard for the minimum statutory employment rights and interests of Class Members. The Defendant'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.

[212] In *Carroll v. Oracle Canada ULC*, 2025 ONSC 4889, Koehnen J. held that punitive damages could be ordered to sanction a corporate employer for failing to provide statutory rights: at paras. 59-76. He held, at para. 66:

> Courts have been prepared to award punitive, aggravated and moral damages in favour of employees based on the circumstances surrounding the termination of employment. **Such awards have been made where the employer's conduct is "unfair or is in bad faith by being, for example, untruthful, misleading** or

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> unduly insensitive" **or where the employer's "conduct is meant to deprive the employee of a pension benefit or other right**. [Emphasis added.]

[213] In similar class actions for vacation pay or holiday pay claims (where the employer used a systemic process to deny *CLC* or provincial employment entitlements), punitive damages claims were certified: see *Fulawka* SC, at para. 152, *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 75 ("*Fresco* SC 2"), at page titled Appendix: Certified Common Issues; *Ngan*, at para. 38.

[214] Applying this analysis to the case at bar, if the court determines that TD acted in bad faith (as pleaded) by designing a system that violated the *CLC* and deprived MMSs of statutory minimums, such a conclusion could lead to a finding of bad faith and an award of punitive damages.

[215] Consequently, it is not plain and obvious the punitive damages claim will fail and, as such, the claim discloses a cause of action under s. 5(1)(a).

[216] Even if the punitive damages claim were found not to disclose a cause of action, I would grant leave to amend to particularize the pleading.

[217] However, with regards to TD's s. 5(1)(c) objection, I do not find that there is a basis in fact for the punitive damages claim.

[218] Under the *Carcillo* test, only minimal evidence is required on certification to show that the proposed common issues exist and could be addressed class-wide. However, even that low threshold is not met on the evidence before the court.

[219] There is no evidence that TD engaged in "'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency", or that TD engaged in misconduct "that represents a marked departure from ordinary standards of decent behaviour": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 36, citing *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196.

[220] Assuming that TD breached the *CLC* by failing to pay vacation and holiday pay as a "top-up" on variable compensation, there is no evidence TD knew that its systemic practice was improper.

[221] Consequently, I do not certify PCI D, although such order is without prejudice to Chiang if he seeks to certify the punitive damages issue upon subsequent evidence (through the discovery process or otherwise).

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Objections under s. 5(1)(d)

Objection 10: The proposed class action is not the preferable procedure under s. 5(1)(d)

(i) Overview

[222] The present action was issued after the 2020 amendments to the *CPA*, and as such, s. 5(1.1) applies to the s. 5(1)(d) requirement that a plaintiff must establish some basis in fact that a class proceeding would be the preferable procedure for the resolution of the common issues.

[223] Section 5(1.1) provides:

> (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.

[224] TD does not challenge the "superiority" requirement under s. 5(1.1)(a). TD acknowledges, for the purposes of the certification motion, that a class action would be superior to all reasonable available means for determining the entitlement of class members to relief.

[225] The issue before the court is whether the common questions of fact and law "predominate over any questions affecting only individual class members" under s. 5(1.1)(b). Put differently, the court is asked to consider the application and interpretation of the "predominance" test under s. 5(1.1)(b).

[226] The parties engaged in a vehement debate on the appropriate "predominance" test. TD submitted that the court should apply the stricter predominance test that has been adopted in the United States, and which I discuss in further detail below. Chiang submitted that the court should follow the arguably less strict predominance test as set out in *Banman v. Ontario*, 2023 ONSC 6187, which I also review below.

[227] I do not determine whether the *Banman* test should be rejected in favour of the predominance test adopted in the US. On the facts of this case, the predominance requirement is satisfied regardless of which test is used, as I explain below.

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[228] In these circumstances, it is not appropriate for the court to engage in a hypothetical, *obiter* analysis of what the appropriate predominance test should be, and I decline to do so.

(ii) The debate over the appropriate test

(a) TD seeks a US based approach

[229] TD submitted that a US based predominance test should be applied to s. 5(1.1)(b) of the *CPA*. TD submitted that the test is a stand-alone assessment that does not consider any factors relating to the core purposes of the *CPA* (i.e. judicial economy, behavior modification and access to justice). TD submitted that these "purpose" factors should only be considered under s 5(1.1)(a) when assessing if a class action is the superior procedure.

[230] TD relied on the recent decision in *Martin v. Wright Medical Technology Canada Ltd.*, 2024 ONCA 1, 492 D.L.R. (4th) 294, in which the Court, while considering the applicable transition law for a discontinuance, made the following comments about the modified certification test, at paras. 22 and 23 (references omitted):

> But tellingly, there are two significant differences between the Report and the amended Act. The first is that the amended Act stiffened the certification criteria even though the Commission had recommended against doing so, and specifically recommended against adopting rule 23 of the U.S. *Federal Rules of Civil Procedure*, noting at p. 47:
>
> > Some stakeholders made the suggestion that Ontario adopt certification criteria akin to that of the United States. It is widely believed that the US test for certification is considerably more stringent than that of Ontario. Recent statistics suggest that the success rate at contested certification hearings is now approximately 64%. The LCO evaluated the US certification test and concluded that there is no reason to adopt it.
>
> In the amended Act, the Legislature plainly rejected this recommendation by the Commission. Instead, amended section 5(1.1) moves Ontario class actions closer to the American certification rule, as commentators note: "As of October 1, 2020, the preferable procedure portion of Ontario's certification test has been made more rigorous and now largely reflects US Rule 23.

[231] In its factum, TD proposed the following US based test for predominance:

> Considering this history, it is clear that the Legislature intended for US jurisprudence to inform the content of the *CPA*'s predominance requirement. That jurisprudence confirms that the predominance inquiry is an inherently pragmatic and comparative exercise—it requires courts to consider how a trial on the merits would actually play out, and "whether the common, aggregation-enabling issues in

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> the case" would be more "prevalent," "important" and "substantial" than the non-common, aggregation-defeating, individual issues." This standard is "far more demanding" than commonality, and requires "more than a common claim".

[232] The focus of the test, as proposed by TD, is that the court must consider the "architecture of the case" [19] from the perspective of whether, on a qualitative basis, the common questions of fact and law predominate over the individual questions, without taking into account the goals of the *CPA*, which are instead to be considered under the superiority analysis under s. 5(1.1)(a).

(b) Chiang proposes that the *Banman* test be followed

[233] Chiang proposes that the test set out by the court in *Banman* should be adopted. In that case, Perell J. reviewed the legislative history and Hansard references to the amended *CPA*, and concluded, at para. 317: "the emphasis placed [in s. 5(1.1)] by 'the only if, at a minimum language' and the debates in the Legislature reveals that the purpose of the amendment was to raise the threshold, heighten the barrier, or make more rigorous the challenge of satisfying the preferable procedure criterion".

[234] Chiang relied on the comments of Attorney General Downey in the Extracts from Debate on Bill 161, Smarter and Stronger Justice Act, 2020, 2019 Ontario, Legislative Assembly, Official Reports of Debates (Hansard), 42nd Parl., 1st Sess., No. 143 (19 February 2020), at pp. 6970-72. In those comments, the Attorney General stated:

(i) When determining "what exactly 'predominance' means", "[w]e envision this to be a qualitative and not a quantitative standard."

(ii) The predominance test is not intended to "have [the] chilling effect" of the test under Rule 23 of the US *Federal Rules of Civil Procedure*.

(iii) Instead, the purpose of the predominance test is to "ensure that if a class action does proceed to trial on the common issues, the common issues meaningfully advance the cases of the class members" such that "the determination of the issues that can be resolved on a classwide basis won't leave the class members with daunting individual issues to be resolved."

(iv) "[T]he fundamental goal of class actions and class-action legislation in Canada is to promote access to justice, judicial economy and behaviour modification." However, "[t]he American class action regime arose in a different legal context"

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[19] The reference to the "architecture" of the class action is taken from the reasons of Perell J. in *Banman*, at para. 319, which I discuss in more detail below.

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and that "[w]hen the courts consider Ontario's proposed amendments to the preferable procedural analysis, they will continue to have these three paramount considerations in mind".

(v) "[T]he ability of a defendant to defeat certification on a predominance or superiority standard may be circumscribed as compared to the regimes south of the border" and "[w]ith the foregoing in mind, it is a false assumption that our proposed change will have a negative effect on class actions in Ontario."

[235] TD asks the court to discount the Hansard comments. It relies on the decision in *R. v. Khill*, 2021 SCC 37, [2021] 2 S.C.R. 948, where the Court held, at para. 111:

> Moreover, extrinsic evidence is not more important than the legislative text. Extrinsic aids are just that, and their role should not be overstated. This Court has repeatedly warned against placing too much weight on Hansard evidence (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 508-9; *Rizzo & Rizzo Shoes*, at para. 35; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [206] 1 S.C.R. 715, at para. 39 *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40; [2014] 2 S.C.R. 135, at paras. 44-47; *MediaQMI inc. v. Kamel*, 2021 SCC 23, para. 37). This is even more important where general statements from Parliamentary debates are relied on to override specific text in legislation. In this case, the extrinsic evidence at issue amounts to little more than general statements about the continuing relevance or applicability of the previous jurisprudence. These statements were made with reference to s. 34(2) as a whole and cannot be used to ignore Parliament's decision to introduce a new and much broader phrase in s. 34(2)(c).

[236] Under the approach in *Banman*, the court is required to consider the purposes of the *CPA* when assessing whether the common issues predominate over the individual issues. Justice Perrell held, at para. 321:

> The purpose of determining whether the common issues predominate over the individual issues is to ensure that the common issues - taken together - advance the objective of judicial economy and sufficiently advance the claims of the class members to achieve access to justice.

[237] The above approach in *Banman* has been followed in several recent class actions which were subject to the predominance test under s. 5(1.1)(b): *Head v. 859530 Ontario Inc.*, 2025 ONSC 4817, at para. 167; *Lockhart v. Attorney General of Canada*, 2024 ONSC 6573, at para. 264; and *Richard v. The Attorney General of Canada*, 2024 ONSC 3800, at para. 374, aff'd 2025 ONCA 713.

(iii) Analysis

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[238] TD urged the court to review the above two positions and conclude that the US-based test should be followed. Chiang urged the court not to decide the appropriate test in *obiter* because the predominance requirement in s. 5(1.1)(b) would be met regardless of which test is used. I agree with Chiang's proposed approach.

[239] On the facts of this case, the predominance test is met regardless of which test is used, given (i) the critical importance of the common issues to be decided (on the validity of TD's systemic approach to vacation and holiday pay for variable compensation), (ii) the existence of significant claims within the prescribed limitation period, (iii) the ease of damages calculations and (iv) the lack of significant individual issues from a qualitative perspective.

[240] It is not the role of the court to comment on the proposed tests when the result of such analysis would be *obiter*, having no bearing on the case.

[241] In *Banman*, at para. 322, Perell J. used a "football game metaphor" to assist in considering the predominance test. I apply that metaphor to the present case. Even if the proposed US based test were applied, the football would not only be moved significantly down field as a result of the common issues, but the determination of the common issues would likely end the game (at least for class members whose claims are not presumptively statute barred).[20]

[242] A decision by the courts on the common issues of liability would leave class members with a binding decision. If the class members are successful, the amounts owing to them will be determined through an arithmetic calculation or an aggregate damages assessment. There will be virtually no further steps for class members to take.

[243] Even those class members with presumptively statute barred claims would move the football well down the field, and possibly over the goal line. All that would remain is a determination on whether the class members' limitation period could be tolled if they were permitted to rely on TD properly paying vacation and holiday pay.

[244] In such a case, the football game could be over, even for presumptively statute barred claims, subject to TD establishing that the presumptively barred class members had actual knowledge of the claim or signed releases (21 releases have been produced to date).

[245] Even if it were necessary for the court to consider whether each class member relied on TD's statements (which may not be necessary if the limitation period is tolled, as I discuss above), such an "architecture" would require, at most, a short process where the presumptively barred class

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[20] Based on the calculations set out at paras. 4 and 5 above, even a determination limited to claims of 1,000 class members within the two-year limitation period would result in a judgment of approximately $8 million annually for a total of $16 million.

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members lead evidence on reliance. The limitation period issue would be relatively straightforward and would pale in significance to the qualitative importance of the liability issues. The release issue would be even easier to address.

[246] The present case is not like other class actions where the football may not be moved sufficiently downfield through the determination of a common issue. By way of example, in a complex proposed medical malpractice class action, the damages and limitation issues might be overwhelming, and predominate over liability issues. That is not the situation in the present case, which has no complex limitations or damages issues.

[247] For the above reasons, I find that a class action is the preferable procedure. I do not comment on whether *Banman* should be followed or instead replaced with the US test on predominance.

Objection 11: If the court finds that a class action is the preferable procedure, the class definition must be revised to exclude those claims which are presumptively statute barred

[248] TD submits that if the court finds that the class action is the preferable procedure (which I have found), then the class definition should be revised to exclude former employees whose claims are presumptively statute barred because any common liability issue would not predominate for them. I do not agree.

[249] TD relies on US jurisprudence in which class definitions are often revised to exclude individuals whose claims are presumptively statute barred. That approach has not been adopted in Ontario.

[250] In *Singh* 1, at paras. 89-114, the court reviewed the applicable law and held that the class definition should not exclude presumptively statute barred claims if there is a basis in fact that the discoverability principle is engaged. I summarize the key conclusions in *Singh* 1 as follows:

(i) Restricting the starting date of class definition to the presumptive start of a statutory limitation period constitutes a substantive decision that no class members outside the presumptive limitation period could rely on the discoverability principle. Unless there is no basis in fact to inquire into the applicability of the discoverability principle, such an approach is inconsistent with the "purposive and generous" approach to certification "to give effect to the goals of class actions; namely: (1) providing access to justice for litigants; (2) encouraging behaviour modification; and (3) promoting the efficient use of judicial resources": *Singh* 1, at para. 91, citing *Price v. H. Lundbeck A/S*, 2018 ONSC 4333, at para. 81.

(ii) In *Fresco* CA, the Court affirmed the conclusion of Belobaba J. that a limitation period would not begin to run when the defendant bank made "repeated misrepresentations throughout the 16-year class period that the bank's overtime policies complied with federal labour law": *Singh* 1, at paras. 101-03.

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(iii) In *Evangelista v. Number 7 Sales Ltd.*, 2008 ONCA 599, 240 O.A.C. 389, the Court of Appeal affirmed the lower court decision ordering payment of public holiday and vacation pay since 1996. The court upheld the trial judge's decision that the limitation period did not run until the employee became aware of his entitlement: *Singh* 1, at paras. 104-05.

(iv) In *Omarali*, the Court dismissed the defendant's submission to restrict the class to those persons employed within the presumptive limitation period, "where the defendants themselves were continually representing to the sales agents through words and actions (e.g. pay slips) that they were ICs and not employees": *Singh* 1, at paras. 104-08.

(v) I reviewed the decisions of the courts in *Fulawka* CA, at para. 22; *Heller*, at paras. 175-79; *Le Feuvre v. Enterprise Rent-A-Car Canada Co.*, 2022 ONSC 4136, at paras 21-22; *Navartnarajah*, at paras. 11-12; and *Lee*, at para. 29. All these decisions certified the classes in employment standards legislation cases and did not limit the starting date for class definitions because the employers represented that their systemic practices complied with legislation: *Singh* 1, at paras. 109-14.

[251] In the present case, as in *Singh* 1, there is a basis in fact to inquire into the application of the discoverability principle. In the employment agreements, Code of Conduct, and pay advices, TD repeatedly advised MMSs that TD's payment of vacation and holiday pay complied with the *CLC*. Further, even if a class member did not read any of the representations, the role of TD as an employer who must comply with the *CLC* also provides a basis in fact to toll the limitation period.

[252] Consequently, I dismiss this objection. I follow the settled law and I do not revise the class definition to exclude those whose claims are presumptively statute barred.

Objection under s. 5(1)(e)

Objection 12: Chiang is not a suitable representative plaintiff

[253] TD submits that Chiang is not a suitable representative plaintiff because his claim is presumptively statute barred. I have addressed this issue above and rely on my analysis in *Singh* 1 that a class can include presumptively statute barred claims when there is a basis in fact for discoverability.

[254] I also rely on my analysis in *Singh v. RBC Insurance Agency Ltd.*, 2023 ONSC 6721 ("*Singh* 2") that a representative plaintiff can proceed under s. 5(1)(e) unless it is "definitively shown" that the claim is in fact statute-barred.

[255] TD's argument rests on its assertion that because Chiang, in cross-examination, could not recall if he reviewed MMS Compensation Plans, he cannot prove reliance on TD's representations and therefore his claim is statute barred.

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[256] TD cites QQ 231-232 from Chiang's cross-examination transcript for this "no reliance" argument. However, a reading of all the relevant questions (QQ 225-232) establishes that Chiang was explaining that he could not recall if he had read the MMS Compensation Plans (i.e. he may have read them). Chiang's inability to recall if he read the compensation plans does not resolve factual questions of discoverability.

[257] There is evidence that Chiang signed contractual documents in which TD made representations of compliance with the *CLC*. Consequently, Chiang's reliance could flow not only from the fact that TD is a sophisticated employer, but also from TD's direct representations that it was complying with applicable laws.

[258] Further, under TD's Code of Conduct, the bank undertook that all its actions complied with all laws. Every MMS received the Code of Conduct and was required to acknowledge compliance with it.

[259] In any event, Chiang's evidence is clear that, regardless of any TD representation he may or may not have read, he relied on TD to comply with all applicable laws governing his vacation and holiday pay. Chiang did not challenge TD's payments to him until he became aware of another employment standards class action years after his employment ended.

[260] I set out the following evidence on the discoverability issue, quoted verbatim from Chiang's affidavit:

> (i) When I was employed at TD, I expected and trusted that TD was paying me accurately and in accordance with any legal requirements that applied.
>
> (ii) At all times while I was with TD, I never turned my mind, and I was never asked to turn my attention or mind, to vacation and/or public holiday pay.
>
> (iii) While with TD, I had no reason to question TD's payments to me or its pay practices generally. From my observations, TD was a very sophisticated employer with many departments (including a human resources department and legal department) and individuals that I understood were supposed to ensure compliance with any applicable laws and regulations, including with respect to wages and any other compensation owing to employees. I always understood from what TD told its employees and others that TD took all appropriate steps to ensure that it was acting and conducting itself in accordance with any applicable laws. I expected and assumed that TD knew what it was doing and was paying me properly and presenting me accurate information about my pay and what I was owed under the applicable employment laws at all times. I did not understand at any point that I had somehow waived or agreed to forego vacation or public holiday pay that was owing to me as an employee of TD under the applicable employment laws. I always relied on TD to accurately calculate and record my pay, and to follow the law and pay me any and all amounts owed to me as an employee.

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(iv) In the Fall of 2022, I read something on the internet about a class action involving the nonpayment of vacation and holiday pay to commissioned employees working for the Royal Bank of Canada Dominion Securities. At that point, I first wondered whether what I was reading might apply to me because I had earned commissions at TD and, more specifically, whether I was owed vacation and holiday pay on top of my commissions and bonuses while with TD.

(v) Although I read my Statements of Earnings and pay statements to confirm that the commissions listed on them were correct and accurate (i.e. that I was receiving the commissions tied to the sales I made), I relied upon and trusted TD to ensure that all payments to me were accurate, complete and in accordance with any applicable laws.

(vi) I recall reading an article or media report later (in early 2023) about the Dominion Securities class action and about how it had been approved or certified as a class action by a court. I noticed that the lawyers managing that class action were referred to in the article I read. I searched for those lawyers. Without waiving any privilege, I can advise that, it was from reading this article, I first made contact with my current legal counsel in this case.

[261] Thus, there is some basis in fact that Chiang relied on TD's compliance with the *CLC*. There is nothing in the record which "definitively" shows that Chiang had actual knowledge of non-compliance (if such non-compliance is found on the merits, which TD denies), and chose not to take action. Consequently, TD has not definitively shown that Chiang's action is statute barred (as required under *Stone v. Wellington County Board of Education* , 1999 CanLII 1886 (Ont. C.A.), at para. 10, leave to appeal ref'd, [1999] S.C.C.A. No. 336).

[262] TD relies on *Singh* 1. In that case, the Court held that the representative plaintiff, Mr. Trivedi, could not prove reliance because he admitted actual knowledge that his employer was acting unlawfully. Mr. Trivedi had repeatedly challenged his employer in that regard. That is not this case.

[263] However, in *Singh* 2, at paras. 61-66, I held that the plaintiff need only show "some basis in fact" that his claim may not be statute barred. I found that the defendant had not definitively shown that the claim of the subsequent proposed plaintiff was statute barred. Consequently, in *Singh* 2, I held that the proposed representative plaintiff had met the requirements under s. 5(1)(e). This is in contrast to *Singh* 1, which is an example of how s. 5(1)(e) will not be satisfied when the defendant has "definitively shown" that the plaintiff did not rely on the misrepresentations.

[264] TD submits that Chiang had "constructive knowledge" of his claim because he should have or could have read small print at the bottom of his later pay advices that referred to "Vacation as part of Commission for this pay period $X".

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[265] However, such language in a pay advice does not necessarily demonstrate knowledge, constructive or otherwise, that TD was not paying the vacation pay as required under the *CLC*. Further, the pay advice does not address holiday pay at all. Chiang's affidavit and cross-examination evidence is clear that he had no reason to challenge TD's calculation of vacation and holiday pay.

[266] For the above reasons, I dismiss this objection and find that Chiang is an adequate representative plaintiff under s. 5(1)(e).

ORDER AND COSTS

[267] For the above reasons, I certify the proposed class action claim except for the punitive damages claim for which I grant leave to the plaintiff to seek certification upon additional evidence.

[268] If the parties cannot agree on costs, Chiang shall provide written costs submissions of no more than five pages (not including a costs outline) by May 8, 2026. TD shall deliver responding written costs submissions of no more than five pages (not including a costs outline) by May 22, 2026. If necessary, Chiang may deliver reply costs submissions of no more than two pages by May 29, 2026.

GLUSTEIN J.

Date: 20260410

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CITATION: Chiang v. The Toronto Dominion Bank, 2024 ONSC 2013
COURT FILE NO.: CV-23-00704166-00CP
DATE: 20260410

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JASON CHIANG

Plaintiff

AND:

THE TORONTO DOMINION BANK

Defendant

REASONS FOR DECISION

Glustein J.

Released: April 10, 2026