CITATION: Cunningham v. RBC Dominion Securities Limited, 2023 ONSC 4316
COURT FILE NO.: CV-20-00643720-00CP
DATE: 20230724

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
LEIGH CUNNINGHAM Plaintiff	)	*David F. O'Connor, Stephen J. Moreau, Daniel Lublin, J. Adam Dewar,* and *Christopher Perri* for the Plaintiff
- and -	)	
RBC DOMINION SECURITIES LIMITED / RBC DOMINION VALEURS MOBILIERES LIMITEE and RBC DOMINION SECURITIES INC. / RBC DOMINION VALEURS MOBILIERES INC. Defendants	)	*Jeremy Devereux* and *Ted Brook* for the Defendants
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: July 13, 2023

PERELL, J.

REASONS FOR DECISION

A. Introduction and Overview

[1] After a certification motion pursuant to the *Class Proceedings Act*, 1992,[1] Justice Belobaba died before he could settle the Certification Order. In his Reasons for Decision dated December 29, 2022,[2] Justice Belobaba certified the Plaintiff Leigh Cunningham's action against (a) RBC Dominion Securities/RBC Dominion Valeurs Mobilieres Limitée and (b) RBC Dominion Securities Inc./RBC Dominion Valeurs Mobilieres Inc., collectively "RBC Dominion", as a national class action excluding British Columbia and Alberta. Ms. Cunningham and RBC Dominion have not been able to settle the terms of the Certification Order.

[2] The parties disagree about two issues. The first issue concerns the class period and the class

[1] S.O. 1992, c. 6.
[2] *Cunningham v. RBC Dominion Securities*, 2022 ONSC 5862.

2023 ONSC 4316 (CanLII)

definition and the operation of the limitation periods in the provinces or territories (excluding British Columbia and Alberta) of the Class Members. The second issue concerns whether a common issue about unjust enrichment was certified by Justice Belobaba.

[3] Although the parties disagree about these two issues, they agree that the motion now before the court to settle the Certification Order is a motion pursuant to rule 59.04(14) of the *Rules of Civil Procedure*[3] and not a motion pursuant to rule 59.06(1), which is designed to amend judgments where the judge made a slip or error that is clerical, mathematical, or due to misadventure or oversight.

[4] The competing drafts of the Certification Order are set out later in these Reasons for Decision. The dispute between the parties concerns paragraphs 1, 2, and 5 of their respective drafts of the Certification Order.

[5] Applying rule 59.04(14), although there are parts of the drafts with which I agree, I disagree with either party's draft of the Certification Order.

[6] For the reasons that follow, I settle the Certification Order as follows:

> […]
>
> 1. THIS COURT ORDERS that this action is certified as a class proceeding pursuant to s. 5 of the CPA with respect to the claims and causes of action of breach of contract, negligence, breach of fiduciary duty and unjust enrichment relating to vacation and to public holiday pay as set out in the Amended Statement of Claim.
>
> 2. THIS COURT ORDERS that the Class is defined as:
>
> > All former and current employees of either Defendant who are or were employed as an Investment Advisor, wealth advisor, portfolio manager, or similar or predecessor title, whose job responsibilities include (or included) providing clients with investment advice and/or growing the Defendants' client base and include those who provide (or provided) assistance to those who provide (or provided) such advice, including Associates and Assistants, and who were employed in a Province or Territory of Canada (other than British Columbia or Alberta):
> >
> > > (i) in Québec from March 15, 2017 to the Notice Date;
> > >
> > > (ii) in Nunavut, Northwest Territories, and Prince Edward Island from July 9, 2014 to the Notice Date;
> > >
> > > (iii) in Yukon from March 27, 2014 to the Notice Date;
> > >
> > > (iv) in Saskatchewan, Ontario, New Brunswick, and Nova Scotia from July 9, 2005 to the Notice Date; and
> > >
> > > (v) in Manitoba and Newfoundland & Labrador from July 9, 1990 to the Notice Date.
>
> […]
>
> 5. THIS COURT ORDERS that the following proposed common issue is certified:
>
> > 1. Are the Defendants liable in contract, negligence, breach of fiduciary duty, and, or unjust enrichment to take reasonable steps to ensure that the Class members were properly

[3] R.R.O. 1990, Reg. 194.

2023 ONSC 4316 (CanLII)

> compensated with vacation and public holiday pay, and to pay vacation and public holiday pay that was owing to the class members?

B. Legal Background

1. Settling a Deceased Judge's Order

[7] The parties agree that Justice Belobaba's order for his Reasons for Decision dated December 29, 2022 should be settled pursuant to rule 59.04(14) and not by rule 59.06(1), which is designed to amend judgments containing a slip or error, *i.e.*, errors which are clerical, mathematical, or due to misadventure or oversight.

[8] Rule 59.04(14) states:

> *Ceasing to Hold Office or Incapacity*
>
> (14) If a judge ceases to hold office or becomes incapacitated after making an order but before it is signed, another judge may settle and sign it.

[9] Similar to the approach of a registrar settling an order of a judge, pursuant to rule 59.04(14), the judge settling an order that he or she did not make, will review the competing drafts of the order and determine whether the formal order corresponds with the decision in the endorsement or reasons for decision of the judge that made the decision.[4]

[10] Where the endorsement or the reasons for decision of the judge that made the decision reveal that he or she has adjudicated an issue, then the judge settling the order cannot vary the decision, unless a motion is also made under rule 59.06(1) to amend, set aside, or vary the order, which rule has a narrow ambit that does not extend to correcting substantive errors, which can only be corrected by appeal.[5]

[11] Where the endorsement or the reasons for decision of the judge that made the decision reveal that he or left an issue for further argument and adjudication, the judge or associate judge settling the order may determine that issue.[6] In other words, where the judge deciding the matter left a recipe or formula as to how the order should be settled, the settling judge can complete the task.

[12] In *Men at Work General Contractors Ltd. v. MacDonald*,[7] the scope of rule 59.04(14) (then rule 59.04(3)) was considered. In this procedurally peculiar case, in a construction lien action reference, the Master awarded the plaintiff $15,000 in damages without costs. The applicant, who had originally sought damages of $60,000 and costs brought a motion before Justice Ellen Macdonald to oppose the confirmation of the Master's report. Justice Macdonald treated the motion as an appeal and granted the appeal with costs on a partial indemnity basis without clarifying what precisely that meant to the plaintiff's damages and lien claim, although it appeared to the defendant that the plaintiff had succeeded in achieving a $60,000 judgment. The defendant,

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[4] *Sblendorio v. 2002537 Ontario Ltd*., [2004] O.J. No. 3001 (S.C.J.); *Perkins-Aboagye v. Chadwick*, [2002] O.J. No. 1248 (S.C.J.).
[5] *Men at Work General Contractors Ltd. v. MacDonald*, 2015 ONSC 383 (Div. Ct.), refusing leave to appeal 2014 ONSC 4176; *Sblendorio v. 2002537 Ontario Ltd*., [2004] O.J. No. 3001 (S.C.J.).
[6] *Men at Work General Contractors Ltd. v. MacDonald*, 2015 ONSC 383 (Div. Ct.), refusing leave to appeal, 2014 ONSC 4176.
[7] 2014 ONSC 4176, leave to appeal to Div. Ct. ref'd 2015 ONSC 383 (Div. Ct.).

2023 ONSC 4316 (CanLII)

however, did not appeal but sought clarification from Justice Macdonald. However, she had retired.

[13] The defendant then brought a motion pursuant to s. 123(4) of the *Courts of Justice Act* for an order that the matter be reheard, which motion was heard by Regional Justice Morawetz, as he then was. Justice Morawetz dismissed the motion for a rehearing, and he treated the motion as a motion to settle Justice Macdonald's order after her retirement pursuant to what is now rule 59.04(14).

[14] Justice Morawetz settled Justice Macdonald's order by determining the plaintiff's quantum of costs on a partial indemnity basis for the reference and the appeal, which Justice Macdonald had directed about costs but had not quantified. Justice Morawetz noted that he could not grant other relief to the defendant because that relief would only be available to the defendant by appeal[8] or within the limited jurisdiction of 59.06(1) to correct slips or errors.

[15] The defendant then unsuccessfully sought leave to appeal to the Divisional Court the order made by Justice Morawetz. In dismissing the leave motion, Justice Lederer explained the scope of the various rules about settling a judge's order. Justice Lederer also made the important point that the rules do not permit the judge settling another judge's order the right to look behind the substance of the other judge's decision. At paragraph 38 of his judgment, Justice Lederer stated:

> 38. […] R. 59.06(1) deals with orders where there has been an accidental slip or omission, or an amendment is required in respect of any particular on which the court did not adjudicate. [Justice Morawetz] determined that Madam Justice Macdonald did adjudicate "on the issue". Similarly, r. 59.04(3) provides that, where a judge ceases to hold office after making an order but before it is signed, another judge may settle and sign the order. In the end, that is what [Justice Morawetz] did […]. Neither of the rules to which he was referred allowed the Regional Senior Judge to look behind the substance of the order made by Madam Justice Macdonald. If she failed in some way to carry out the appropriate procedure, it may be that this was an error in law. If so, that is the subject for an appeal of the order made by her, but not that of [Justice Morawetz]. […]

[16] It may be taken from the *Men at Work General Contractors Ltd. v. MacDonald* and from the other cases that where a judge is settling another judge's order that the settling judge can complete work that was meant to be finished by the other judge, but the settling judge cannot second guess, correct, or go behind the other judge's substantive decision and can amend or alter the order only pursuant to rule 59.06(1), which has a limited scope.

2. Provincial and Territorial Limitation Periods

[17] As I shall describe further below, Justice Belobaba directed that the class definition have a start date to determine class membership. Justice Belobaba directed that Class Counsel use the limitation statutes of the provinces and territories (whose employment law statutes were engaged by Ms. Cunningham's close to national class action) to formulate the class definition and to provide a start date. For present purposes, the following information is necessary to follow Justice Belobaba's directions.

[18] All the provinces and territories have limitation period statutes.[9]

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[8] After the hearing before Justice Morawetz the defendant brought a motion for an extension of time to appeal Justice Macdonald's order.

[9] Yukon – RSY 2002, c. 139.

2023 ONSC 4316 (CanLII)

[19] Saskatchewan, Manitoba, Ontario, New Brunswick, Newfoundland & Labrador, and Nova Scotia have statutes that utilize both a basic limitation period and also an ultimate limitation period.

a. For the claims in the immediate case, the basic limitation period is two years in Saskatchewan, Manitoba, Ontario, New Brunswick, Newfoundland & Labrador, and Nova Scotia.

b. For the claims in the immediate case, the basic limitation period is three years in Québec.

c. For the claims in the immediate case, the basic limitation period is six years in Yukon, Nunavut, Northwest Territories, and Prince Edward Island.

[20] The basic presumptive limitation period commences when the plaintiff "discovers" that he, she, or it has a claim. The notion of "discovery" or "discoverability" is a codification and modification of the discovery principle recognized by the Supreme Court of Canada in *Kamloops (City) v. Nielsen*,[10] and in *Central Trust Co. v. Rafuse*.[11] The notion of discovery is that a limitation period does not begin to run until the plaintiff knows or ought to know that he or she has a claim or cause of action.

[21] In response to the Covid-19 pandemic, the legislatures in Yukon, Ontario, Quebec, New Brunswick, and Newfoundland & Labrador retroactively suspended the running of basic limitation periods. The retrospective dates respectively were: Yukon - March 27, 2020; Ontario - March 16, 2020; Québec - March 15, 2020; New Brunswick - March 19, 2020; and Newfoundland & Labrador - March 14, 2020.

[22] Subject to the fraudulent concealment doctrine, the ultimate limitation period is a drop-dead limitation or absolute limitation period after which regardless of whether the plaintiff has discovered or could have discovered the claim, the claim becomes statute-barred.

[23] The ultimate limitation period is fifteen years in Saskatchewan, Ontario, New Brunswick, and Nova Scotia.

[24] The ultimate limitation period is thirty years in Newfoundland & Labrador.

[25] Before September 21, 2022, the ultimate limitation period in Manitoba was thirty years[12]

Nunavut - RSNWT 1988, c. L-8.
Northwest Territories – RSNWT (Nu) 1988, c. L-8.
Saskatchewan – SS. 2004, c. L-16.1.
Manitoba - CCSM, c. L150.
Ontario - SO 2002, c. 24, Sch. B.
Québec - CQLR, c. CCQ-1991
New Brunswick – SNB 2009, c. L-8.5
Newfoundland & Labrador – SNL 1995, c. L-16.1.
Nova Scotia – SNS 2014, c. 35.
Prince Edward Island – RSPEI 1988, c S-7.

[10] *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2.

[11] *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147.

[12] *The Limitation of Actions Act*, C.C.S.M., c. L150, s. 7(5). This is the version in effect as of 2020, incorporating amendments to the consolidated version (S.M. 2002, c. 5, s. 3; S.M. 2013, c. 46, s. 46).

2023 ONSC 4316 (CanLII)

and after that date it became fifteen years.[13]

[26] Yukon, Nunavut, Northwest Territories, Québec, and Prince Edward Island have basic limitation periods but do not have an ultimate limitation period.

C. Factual Background

[27] On June 9, 2020, Ms. Cunningham commenced her proposed class action against RBC Dominion.

[28] The central allegation against RBC Dominion is that it has failed to pay Class Members vacation and public holiday pay on their commissions as required by the statutory employment law of Yukon, Nunavut, Northwest Territories, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Newfoundland & Labrador, and Prince Edward Island.

[29] Ms. Cunningham advanced claims in breach of contract, negligence, breach of fiduciary duty, and unjust enrichment.

[30] On **June 20, 2022**, the certification motion commenced.

[31] The certification hearing was not completed in June, and at Justice Belobaba's direction, the hearing was adjourned, and the parties re-attended on **September 28, 2022**, **October 27, 2022**, and **November 16, 2022** with additional materials and submissions.

[32] Over the course of the four hearing dates of the certification motion, the parties exchanged lengthy factums and eight sets of written submissions.

[33] Justice Belobaba reserved judgment, and on **December 29, 2022**, he released his Reasons for Decision. For present purposes the following paragraphs of Justice Belobaba's decision are pertinent:

> *The certification requirements*
>
> *Section 5(1)(a): cause of action*
>
> 30. The defendant does not take issue with any of the pleaded causes of action namely breach of contract, negligence, breach of fiduciary duty and unjust enrichment. Each of these causes of action have been held to satisfy the reasonable cause of action requirement in numerous class proceedings alleging breaches of the ESAs [*Employment Standards Act*].[14]
>
> *Section 5(1)(b): class definition*
>
> 31. The proposed class definition covers Investment Advisors, Associates and Assistants in all provinces and territories (with the exception of B.C. or Alberta[15]) who were paid in whole or in part in commissions. Several thousand potential class members may be impacted. The defendant has indicated that in each of the recent years it has employed between 1,288 and 1,423 Investment Advisors and between 1,845 and 2,090 Associates and Assistants.
>
> […]

[13] *The Limitations Act*, S.M. 2021, c. 44 [now C.C.S.M., c. L150], ss. 1(b) and 10(1).
[14] *Baroch v. Canada Cartage*, 2015 ONSC 40. The most recent discussion of the relevant case law can be found in *Curtis v Medcan Curtis v. Medcan Health Management Inc*., 2022 ONSC 5176 (Div. Ct.).
[15] The proposed class action does not include British Columbia or Alberta where the ESAs contain an exemption not requiring vacation and public holiday pay for investment advisors.

2023 ONSC 4316 (CanLII)

33 There is, however, one deficiency in the class definition that should be corrected. There is no start date for the plaintiff's claim. The claim as it stands can reach back many decades making the class proceeding "unmanageable".[16] In *Amyotrophic Lateral Sclerosis Society of Essex*,[17] the Court of Appeal solved this problem by imposing a start date based on the 15-year ultimate limitation period in s. 15(2) of the Ontario *Limitations Act, 2002*.[18] I adopt this approach and do the same here. The defendant may certainly advance other and much shorter limitation defences at trial but at this point for the purposes of the notice requirements it is reasonable to base the start date on the various provincial and territorial ultimate limitation periods.

34. Otherwise, the plaintiff has satisfied the identifiable class requirement set out in s. 5(1)(b) of the CPA. The proposed class definition: (i) establishes objective criteria for class membership; (ii) is not merit-based; and (iii) is not overly-inclusive as it could not be narrowed further without arbitrarily excluding from the class persons who share the same interest in the resolution of the common issues.

35 The identities of the class members will be known to the defendant. Nothing in the record suggests otherwise. Also, I note that on cross-examination, the defendant's CAO confirmed that they have maintained an electronic database containing information relating to the class members' compensation.

36. The class definition requirement is satisfied.

Section 5(1)(c): common issues

37. I have already discussed *Fulawka* and *Brown* and why at a minimum the commonality requirement has been satisfied.

38. The defendant advanced several "individual" issue submissions but none of them were able to dislodge the systemic commonality observation made in *Fulawka* and *Brown.* […]

[…]

40. During the hearing, I suggested that the plaintiff simplify the proposed common issues. The plaintiff did so and has proposed the following for consideration:

> 1. Did the defendant have a duty (in contract, equity, tort or otherwise) 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?
>
> 2. Did the defendant breach those duties?
>
> 3. If the answer to any of the foregoing common issues is "yes", what remedies are the class members entitled to? Without limiting the generality of the foregoing, are the class members entitled to an aggregate assessment of damages? If so, in what amount?

41. I am prepared to certify proposed common issues 1 and 2. The trial judge's decision on these first two questions will go far to determine liability and will significantly advance the litigation. I am not prepared to certify proposed common issue 3. In my view, the judge hearing the merits of this dispute on a more complete record is in a much better position to address and resolve the "remedies" issue, the availability of statistical sampling, and in particular the question of aggregate

[16] *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City),* 2015 ONCA 572, at para. 42.
[17] *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City),* 2015 ONCA 572, at para. 42.
[18] S.O. 2002, c. 24, Sch. B.

2023 ONSC 4316 (CanLII)

damages.[19] The damages issues are deferred to the trial judge or the judge hearing a summary judgment motion.

[34] The parties were unable to agree as to the style and content of the Certification Order that would reflect Justice Belobaba's Reasons for Decision. Sadly, he passed away before he could settle the terms of the Certification Order.

[35] As noted above, the parties disagree about the content of paragraphs 1, 2, and 5 of the Certification Order. The competing versions of the Order are set out below.

Plaintiff's Draft Order	**Defendants' Draft Order**
THIS COURT ORDERS that this action is certified as a class proceeding pursuant to s. 5 of the CPA with respect to the claims and causes of action (i.e. breach of contract, negligence, breach of fiduciary duty and unjust enrichment) relating to vacation and public holiday pay as set out in the Amended Statement of Claim.	1. THIS COURT ORDERS that this action is certified as a class proceeding pursuant to s. 5 of the CPA with respect to the claims and causes of action of + relating to statutory vacation and public holiday pay, as set out in the Amended Statement of Claim, in respect of commissions paid by either Defendant to members of the Class while employed by either Defendant at any time: (i) in Manitoba, New Brunswick, Newfoundland & Labrador, Nova Scotia, Ontario or Saskatchewan from July 9, 2005 to the Notice Date; (ii) in the Northwest Territories, Nunavut, Prince Edward Island or Yukon from July 9, 2014 to the Notice Date; (iii) in Québec from July 9, 2017 to the Notice Date.
2. THIS COURT ORDERS that the Class is defined as: All former and current employees of either Defendant who are or were employed as an Investment Advisor, wealth advisor, portfolio manager, or similar or predecessor title, whose job responsibilities include (or included) providing clients with investment advice and/or growing the Defendants' client base and include those who provide (or provided) assistance to those who provide (or provided) such advice, including Associates and Assistants, and who were employed in a Province or Territory of Canada (other than British Columbia or Alberta) at any time: (i) in Manitoba, from July 9, 1990 to the date of the first distribution of the Notice of Certification of this action (the "Notice Date"); (ii) in New Brunswick, from March 19, 2005 to the Notice Date; (iii) in Newfoundland & Labrador, from March 14, 1990 to the Notice Date;	2. THIS COURT ORDERS that the Class is defined as: All former and current employees of either Defendant who are or were employed as an Investment Advisor, wealth advisor, portfolio manager, or similar or predecessor title, whose job responsibilities include (or included) providing clients with investment advice and/or growing the Defendants' client base and include those who provide (or provided) assistance to those who provide (or provided) such advice, including Associates and Assistants, who are (or were) remunerated either fully or partially based on commissions, at any time: (i) in Manitoba, New Brunswick, Newfoundland & Labrador, Nova Scotia, Ontario or Saskatchewan from July 9, 2005 to the Notice Date; (ii) in the Northwest Territories, Nunavut, Prince Edward Island or Yukon from July 9, 2014 to the Notice Date; (iii) in Québec from July 9, 2017 to the Notice Date.

[19] See the discussion in *Robertson v Ontario*, 2022 ONSC 5127, at para. 92.

2023 ONSC 4316 (CanLII)

(iv) in Ontario, from March 16, 2005 to the Notice Date; (v) in Prince Edward Island, Yukon, Northwest Territories and Nunavut, from [July 9, 1990 OR July 9, 2005] to the Notice Date; (vi) in Quebec, from [March 15, 1990 OR March 15, 2005] to the Notice Date; (vii) in Saskatchewan and Nova Scotia, from July 9, 2005 to the Notice Date; and, (viii) in Yukon, from [March 27, 1990 OR March 27, 2005] to the Notice Date; and who are (or were) remunerated either fully or partially based on commissions.	

2023 ONSC 4316 (CanLII)

[36] As may be observed, subject to the matter of a revision of the start date of the Class Period to reflect the Covid-19 extensions, the parties agree that the ultimate limitation period would bar claims: (a) before July 9, 2005 for Class Members from Saskatchewan, Ontario, New Brunswick, and Nova Scotia and (b) before July 9, 1990 for Class Members from Newfoundland &Labrador.

[37] With respect to Class Members from Manitoba, subject to the matter of revision of the start date to reflect the Covid-19 extensions, RBC Dominion submits that claims before July 9, 2005 be statute-barred and Ms. Cunningham proposes that the claims before July 9, 1990 be statute-barred.

[38] With respect to Class Members from Yukon, Nunavut, Northwest Territories, Québec, and Prince Edward Island, subject to the matter of revision of the start date to reflect the Covid-19 extensions, Ms. Cunningham proposes a 1990 or a 2005 date for the ultimate limitation period.

[39] With respect to Class Members from Yukon, Nunavut, Northwest Territories, Québec, and Prince Edward Island, subject to the matter of revision of the start date to reflect the Covid-19 extensions, RBC Dominion would make the ultimate limitation period the equivalent of the statutory limitation period; visualize: (a) July 9, 2014 for Yukon, Nunavut, Northwest Territories, and Prince Edward Island; and (b) July 9, 2017 for Québec.

D. Justice Belobaba's Reasons for Decision

[40] It is not necessary to go behind Justice Belobaba's Reasons for Decision to determine the fundamental terms of his intended Certification Order.

a. Justice Belobaba decided that all five certification criteria were satisfied.

b. He decided that all four of the proposed causes of action (contract, negligence, fiduciary duty, and unjust enrichment) were certified.

c. He directed that a start date be imposed in the class definition based on the ultimate limitation period and he used Ontario's fifteen-year ultimate limitation period as an example but he said that "for the purposes of the notice requirements, it is reasonable to base the start date on the various provincial and territorial ultimate limitation periods." I emphasize that Justice Belobaba intended to use the start date for notice purposes. He was not using the start date to determine who was eligible for compensation, if any, or was he

prejudging RBC Dominion's limitation period defences, which have yet to be pleaded.

d. Justify Belobaba did not certify any common issues questions about remedies, damages, or aggregate damages, but certified the liability common issues; i.e., the liability issues about the four certified causes of action.

[41] It is also not necessary to go behind Justice Belobaba's Reasons for Decision to appreciate that he was leaving entitlements and the application of the anticipated limitation period defence for later determination.

E. Settling the Class Definition

[42] Justice Belobaba left a recipe or formula for settling the terms of the Certification Order. Applying that formula yields the form of order that I have set out in paragraph 6 of these Reasons for Decision. The explanation for that form of order follows.

[43] The parties do not dispute that in accordance with Justice Belobaba's formulization, the ultimate limitation period be used for the start date for the Class Members from Manitoba, but in light of the change of Manitoba's ultimate limitation period from thirty years to fifteen years, the parties disagree whether the start date should be July 9, 1990 or July 9, 2005.

[44] I settle this dispute about the start date in Manitoba by specifying the date as July 9, 1990. In this regard, it should be appreciated that the start date just defines class membership for notice purposes, but it does not determine entitlements and it does not determine what is the applicable ultimate limitation period for Manitoba.

[45] RBC Dominion's primary defence will be that the Class Members from Manitoba discovered or ought to have discovered their claims within the two-year limitation period and if that defence, which is an individual issue, fails it will be open to RBC Dominion to argue that the ultimate limitation period is fifteen years. For the purposes of using the ultimate limitation period for a start date, it is appropriate to use the thirty-year date for Manitoba.

[46] The next dispute to settle is the dispute between the parties about adjusting the start date for the Class Members from the Yukon, Ontario, Québec, New Brunswick, and Newfoundland & Labrador in light of the suspension of the running of basic limitation periods during the Covid-19 pandemic.

[47] As I interpret Justice Belobaba's Reasons for Decision, there is no reason to make such an adjustment in the provinces that have an ultimate limitation period. The suspension of the running of limitation periods had no impact on the ultimate limitation periods. Rather, the suspension was designed to cope with the exigencies of commencing an action during a pandemic. It follows that for the provinces with ultimate limitation periods there should be no adjustment to the start date on account of the Covid-19 pandemic.

[48] Having settled the matter of the start date for Manitoba and having settled the matter of there being no adjustment to ultimate limitation dates, there is now no dispute between the parties that for the provinces with ultimate limitation periods, the start dates are:

a. in Saskatchewan, Ontario, New Brunswick, and Nova Scotia from July 9, 2005 to the Notice Date; and

b. in Manitoba and Newfoundland & Labrador from July 9, 1990 to the Notice Date.

2023 ONSC 4316 (CanLII)

[49] The next dispute to settle is the matter of the start date for the provinces that have just a basic limitation period.

[50] As I understand, Justice Belobaba's formula for determining the start date for these provinces, the ultimate limitation period is contiguous with the basic limitation period for those provinces, i.e., three years for Québec, and six years for Yukon, Nunavut, Northwest Territories, and Prince Edward Island.

[51] I see no basis for creating by judicial fiat an ultimate limitation period for these provinces and there is certainly no basis to do so using a procedural statute like Ontario's *Class Proceedings Act, 1992*.

[52] It follows that the basic limitation period should be used for the start date for Class Members from Yukon, Nunavut, Northwest Territories, Québec, and Prince Edward Island. I would, however, adjust the start dates for the Yukon and Québec having regard to their Covid-19 suspensions of the running of the basic limitation period.

[53] The result is that the start dates for the provinces without a legislated ultimate limitation period are:

a. in Québec from March 15, 2017 to the Notice Date;

b. in Nunavut, Northwest Territories, and Prince Edward Island from July 9, 2014 to the Notice Date;

c. in Yukon from March 27, 2014 to the Notice Date;

[54] Before turning to the matter of settling the dispute between the parties about the common issues, I conclude by pointing out to RBC Dominion that the parties are free to agree to a fifteen or thirty year start date for Yukon, Nunavut, Northwest Territories, Québec and Prince Edward Island which from RBC Dominion's perspective would be desirable should the matter settle or be adjudicated favourably for it because otherwise these putative Class Members will remain putative and not be bound by the outcome which would discharge RBC Dominion's liability to whoever is a class member. (One of the ironies of class proceedings is that after certification, the parties' respective views about class size and membership often change entailing motions to recertify a class action for settlement purposes with a different class definition.) I, however, am not brokering a class definition. I am only settling the Certification Order in accordance with Justice Belobaba's Reasons for Decision.

F. Settling the Common Issues

[55] As mentioned above, in his Reasons for Decision, Justice Belobaba was prepared to certify two of the three common issues that had been drafted by Class Counsel, that is:

> 1. Did the defendant have a duty (in contract, equity, tort or otherwise) 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?
>
> 2. Did the defendant breach those duties?

[56] In other words, Justice Belobaba was prepared to certify as a common issue the question of whether RBC Dominion was liable for breach of contract, negligence, breach of fiduciary duty

2023 ONSC 4316 (CanLII)

or unjust enrichment, which are the four causes of action that he had concluded satisfied the cause of action criterion and that he mentioned had been certified in other employment law class actions.

[57] The liability common issue can precisely and compendiously be stated as follows:

> 1. Are the Defendants liable in contract, negligence, breach of fiduciary duty, 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?

[58] So restated, it is unnecessary to include the redundant question 2 nor is it necessary to add a particular common issue question for unjust enrichment. It is clear that limited to liability and not remedies, Justice Belobaba directed that the common issues judge determine RBC Dominion's liability, if any, for four causes of action.

G. Conclusion

[59] For the above reasons, I settle the Order as set out in the Introduction and Overview.

[60] Given the divided success, there shall be no Order as to costs of this motion.

Perell, J.

Released: July 24, 2023

2023 ONSC 4316 (CanLII)

CITATION: Cunningham v. RBC Dominion Securities Limited, 2023 ONSC 4316
COURT FILE NO.: CV-20-00643720-00CP
DATE: 20230724

2023 ONSC 4316 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LEIGH CUNNINGHAM

Plaintiff

- and –

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

Defendants

REASONS FOR DECISION

PERELL J.

Released: July 24, 2023