IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cheetham v. Bank of Montreal*,
2023 BCSC 1319

Date: 20230728
Docket: S201733
Registry: Vancouver

Between:

Paul Cheetham

Plaintiff

And

Bank of Montreal

Defendant

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for the Plaintiff:	Andrew Monkhouse Alexandra Monkhouse
Counsel for the Defendant:	Frank McLaughlin Brandon Kain Marco Fimiani
Place and Dates of Hearing:	Vancouver, B.C. September 12-16, 2022 October 28, 2022
Place and Date of Judgment:	Vancouver, B.C. July 28, 2023

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I. Overview

[1] Paul Cheetham worked at the Bank of Montreal ("BMO" or the "Employer") as a private wealth consultant. His compensation varied based on his performance. It consisted of a base salary, plus commissions and bonuses. At the conclusion of his employment with BMO, Mr. Cheetham sought payment of vacation pay and holiday pay. BMO refused, stating that they owned no further monies to him, as Mr. Cheetham's variable compensation was inclusive of vacation and holiday pay.

[2] In this proposed class proceeding, Mr. Cheetham seeks to represent a class of non-unionized, variable compensation employees who worked for BMO from January 1, 2010, onwards, as either a Private Wealth Consultant or Mortgage Specialist (referred to separately as "PWC" or "MS"; and collectively as "Variable Compensation Employee"). Through this action, Mr. Cheetham hopes to seek redress for vacation pay and holiday pay which he says is contractually owed by the Employer under Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2 [*CLC*].

[3] BMO does not dispute that the *CLC* requires it to pay vacation and holiday pay. However, BMO argues that it complied with the *CLC* and met its obligation by including vacation and holiday pay within the variable compensation payments.

[4] The Defendant resists certification on three key grounds. First, it argues that claims for unpaid benefits under employment standards legislation lie outside the jurisdiction of this Court. Second, even if this Court had jurisdiction, the claims of the class members are individual rather than common, such that determination of the question raised cannot produce answers that are capable of extrapolation to each member of the class. Third, if certification is denied, the *CLC* provides the proposed class members with a realistic alternative avenue through which to pursue their claims.

II. Background

[5] The parties provided evidence from the following affiants in this proceeding:

a) Mr. Cheetham[1] and the following putative class members:

i. Stephen Haynes,[2] an alternative representative plaintiff and a member of the putative class who worked as a PWC;

ii. Stephen Strong[3], who worked as a PWC;

iii. Lauraine Rychlik,[4] who worked as a Mortgage Specialist;

iv. Nancy Bruno-Romeo,[5] who worked as a Mortgage Specialist;

v. Rodney Biggar,[6] who worked as a Mortgage Specialist; and

b) David Keith,[7] the Managing Director for Employee Relations at BMO.

[6] The central facts of this case are uncontroverted. I have addressed any disputes in the evidence which are material to the issues before me, as they arise.

A. The Proposed Representative Plaintiff

[7] Paul Cheetham resides in Vancouver, B.C. At all material times he was employed by the Defendant. Over the course of his employment with BMO, Mr. Cheetham worked in three different roles. The dispute arises in relation to his compensation for his latter most role as a PWC.

[8] Mr. Cheetham began working for BMO as an Investment Fund Specialist on June 25, 2009. He transferred into the role of Financial Planner on June 4, 2010, where he was governed by the Financial Planners Compensation Plan. Under this plan, Mr. Cheetham was eligible to be part of the Vacation Pay Reconciliation Program (“VPR Program”).

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[1] Affidavit #1 of P. Cheetham, made September 11, 2020, and Affidavit #2 of P. Cheetham made March 26, 2021.
[2] Affidavit #1 of S. Haynes, made April 1, 2021.
[3] Affidavit #1 of S. Strong, made April 1, 2021.
[4] Affidavit #1 of R. Rychlik, made April 1, 2021.
[5] Affidavit #1 of N. Bruno-Romeo, made April 1, 2021.
[6] Affidavit #1 of R. Biggar, made April 1, 2021.
[7] Affidavit #1 of D. Keith, made March 5, 2021, and Affidavit #2 of D. Keith, made October 22, 2021.

[9] The VPR Program involves an annual reconciliation of eligible employees' earned vacation pay entitlements against the value of their statutory vacation entitlement.

[10] Part III of the *CLC* sets out the minimum standards for vacation pay and holiday pay (referred to separately as "*CLC* VP" and "*CLC* HP"; collectively referred to as "Statutory Pay") which are applicable to both unionized and non-unionized employees in the federal sector. A "holiday" refers to the general holidays which are mandated by statute, such as New Year's Day, Canada Day, and Labour Day. A "vacation" refers to paid time off that is available to an employee over and above the general holiday. The *CLC* sets out the Statutory Pay entitlement due to each employee.

[11] Under BMO's VPR Program, in February of each year, eligible BMO employees were paid the difference between what they received under BMO's vacation policy and any greater entitlement under the *CLC.*

[12] Mr. Cheetham received reconciliation payments through the VPR Program in February 2011, and February 2012.

[13] On May 22, 2012, Mr. Cheetham assumed the position of a PWC. The terms of Mr. Cheetham's employment contract as a PWC were contained in his offer letter dated May 3, 2012, and a Private Wealth Consultant Total Cash Compensation Program Compensation Plan ("PWC Plan). The PWC Plan was attached to his offer letter (collectively referred to as the "Employment Contract").[8]

[14] Under the PWC Plan, Mr. Cheetham's compensation consisted of a base salary of about $45,000 per year, plus variable compensation (i.e. commissions and performance-based bonuses). The variable compensation portion of Mr. Cheetham's employment income was significant, and in some years, exceeded $200,000.

[8] Affidavit #1 of D. Keith at para. 44.

According to the PWC Plan, Mr. Cheetham's commission and bonus payments were inclusive of Statutory Pay. Consequently, he was not eligible for the VPR Program.

[15] Mr. Cheetham left his employment with BMO on July 19, 2017.

[16] On November 28, 2017, Mr. Cheetham sent a letter to BMO asserting that there had been an oversight with respect to Statutory Pay owed to him for the period May 22, 2012, to July 19, 2017. BMO responded by letter on February 26, 2018, and denied that any further payments were owing for Statutory Pay. BMO took the position that pursuant to his Employment Contract, Mr. Cheetham was subject to the rules of the PWC Plan which provided for total compensation inclusive of Statutory Pay (the "Total Compensation Program"). In the same letter, BMO acknowledged its commitment to adhere to the applicable labour legislation, stating that, the "terms of your employment agreement, our policy on compensation and our practice adhere to the applicable labour legislation."[9]

[17] Around March 2018, Mr. Cheetham filed a formal complaint to Labour Canada, alleging that he had not received the vacation pay to which he was entitled under Part III of the *CLC*. Mr. Cheetham withdrew the complaint on July 19, 2018, prior to its adjudication.

[18] Mr. Cheetham commenced this proceeding in February 2020.

B. Alternative Representative Plaintiff

[19] Mr. Stephen Haynes has volunteered to act as a representative plaintiff if this Court finds Mr. Cheetham to be unsuitable. Mr. Haynes worked as a PWC for BMO from on or around November 1, 2010, to on or around August 25, 2017. He resides in Saskatoon, Saskatchewan.

C. The Class

[20] The proposed class is as follows:

[9] Affidavit #1 of P. Cheetham, Exhibit ("Ex"). E.

> All non-unionized Variable Compensation Employees who worked for Bank of Montreal since January 1, 2010 to the date of certification of this action and who are federally regulated in the roles of Private Wealth Consultants and Mortgage Specialists (the "Class" or "class members).

[21] The class as it is defined would include only those workers under the jurisdiction of the *CLC.*

[22] The original class definition which was plead referred to those employees who were eligible for vacation pay and holiday pay under ss. 184.01 and 196, respectively, of the *CLC*. The Plaintiff has amended the class definition to include only those employees who earned variable compensation in the PWC or MS roles.

[23] For the purposes of this action, variable compensation is pay that varies with performance. It includes but is not limited to commissions, sales incentives, bonuses, short-term incentive plan (STIP) awards, equity-based awards, deferred compensation, and any other variable compensation set out in the compensation plans for such employees.

[24] The proposed class spans across Canada. Regardless of their location, the PWCs and Mortgage Specialists have been compensated in the same fashion.

[25] BMO agrees with the Plaintiff that the class size numbers in the thousands. Based on the original pleadings, Mr. Keith estimated that there are approximately 80,200 employees and former employees who may be members of the original proposed class. Of these, about 28,700 are current employees and 51,500 are former employees (of which 8,400 were terminated involuntarily).[10]

[26] However, during oral submissions counsel for BMO advised the Court that based on the amended class definition, which is considerably narrower than the original one, BMO estimates the class size for the period between 2010–2020, to be

[10] Affidavit #1 of D. Keith at para. 2.

approximately 2,678 individuals. This is further broken down into approximately 2,561 Mortgage Specialists, and 117 PWCs.

D. The Defendant

[27] The Bank of Montreal is a Schedule I Bank in Canada. It is a federally incorporated and federally regulated company. Employing approximately 30,000 employees across the country, it is one of the largest banks and employers in Canada.

[28] BMO operates seven general business segments, some of which are further sub-divided into specific lines of business. While some BMO employees are provincially regulated, the large majority (about 28,700 at present) are federally regulated by the *CLC*.

[29] For any given employment role, the compensation structure is set out in an offer letter, and may also include a formal compensation plan document.[11] Updates and, or revisions to the compensation structure are provided through various mediums, depending on the business segment in which the person is employed.

[30] A significant number of BMO's federally regulated employees receive a form of variable compensation as part of their compensation package. Variable compensation consists of compensation that is not fixed (as on the basis of time). This form of compensation varies with performance, and may include commissions, sales incentives, bonuses, STIP awards, equity-based awards and deferred compensation. The types of variable compensation available to employees, and the criteria used to calculate them, differs across employment roles.

[31] BMO compensates PWCs and Mortgage Specialists largely or entirely through variable compensation.

[32] Throughout the relevant period, BMO maintained the VPR Program for many of its employees. Some employees are excluded from the VPR Program because

[11] Affidavit #1 of D. Keith at para. 8.

"their compensation structure provides that their total compensation, including variable compensation, was inclusive of vacation pay entitlements".[12] This list of excluded employees has changed over the relevant period.

[33] PWCs in Canada are paid according to the PWC Plan. Mortgage Specialists in Canada are paid according to the Mortgage Specialist Compensation Guide ("MS Plan").

[34] While Mortgage Specialists and PWCs have different compensation plans, they are currently both excluded from the VPR Program. This was not always the case. For some time, PWCs and Mortgage Specialists were part of the VPR Program, such that their vacation pay was reconciled with their *CLC* entitlement on an annual basis.

E. The Claim

[35] The Amended Notice of Civil Claim was filed February 22, 2022 ("Amended Claim").[13] In it, the Plaintiff alleges that the requirement to pay Statutory Pay forms part of the employment contracts of Variable Compensation Employees. Included in his pleadings are the specific pay policies that he says were breached.

[36] The Plaintiff claims damages for breach of contract and breach of duty of good faith. It is alleged that:

a) The requirements to pay vacation pay and holiday pay under the *CLC* are part of the employment contracts of Variable Compensation Employees;

b) BMO systematically underpaid Variable Compensation Employees their Statutory Pay;

[12] Affidavit #1 of D. Keith at para. 32.
[13] All references in these Reasons to specific paragraphs in the Amended Claim, are taken from the "Fresh as Amended Notice of Civil Claim", made July 14, 2021, which contains different numbering for the paragraphs than the original Amended Claim.

c) Pursuant to the employment contracts, BMO was required to pay the class members statutory holiday pay based on their total compensation, including base salary and variable compensation, which it failed to do;

d) Pursuant to the employment contracts, BMO was required to pay the class members vacation pay in accordance with the *CLC*. Until 2018, this was to be calculated at 6% of the total compensation earned. Following amendments to the *CLC* in 2018, BMO was required to increase the vacation pay to 8% for employees completing a minimum number of consecutive years of employment. BMO failed to pay the amounts due, including failing to make adjustments to comply with the *CLC* amendments;

e) BMO failed to keep any records showing that it paid statutory vacation pay with respect to variable compensation for the number of weeks of vacation to which the employee was entitled under s. 184 of the *CLC*, which it was obliged to do under s. 24 of *the Canada Labour Standards Regulations*, C.R.C. c. 986 [*CRC* Regulations];

f) BMO has maintained and implemented an implied or explicit policy of not paying the full statutory vacation pay to PWCs and Mortgage Specialists, despite a contractual commitment to do so;

g) BMO violated its duty of good faith to the members of the proposed class by failing to properly calculate their Statutory Pay; and

h) BMO hid its non-compliance with the *CLC* and contracts of employment and stated to employees that the calculations were correct;

[37] Consequently, the Plaintiff seeks damages for each class member equal to the Statutory Pay that they ought to have received during their employment with the Defendant.

III. Test for Certification

[38] Pursuant to s. 2 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], a resident of BC who is a member of a class of persons, may commence a court proceeding on behalf of the members of that class.

[39] Section 4(1) of the *CPA* requires the court to certify a class proceeding if each of the following requirements are met:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> > (i) would fairly and adequately represent the interests of the class;
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
> >
> > (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[40] The Plaintiff bears the onus of satisfying each of these five certification requirements.

[41] Section 6 provides for the creation of subclasses, as follows:

> **Subclass certification**
>
> **6**(1) Despite section 4 (1), if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court must not certify the proceeding as a class proceeding unless there is, in addition to the representative plaintiff for the class, a representative plaintiff who:
>
> (a) would fairly and adequately represent the interests of the subclass;

> (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and
>
> (c) does not have, on the common issues for the subclass, an interest that is in conflict with the interests of other subclass members.

[42] Section 7 sets out the following issues that are not a bar to certification:

> **Certain matters not bar to certification**
>
> **7** The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[43] If the court refuses to certify a class proceeding, it may nevertheless permit the proceeding to continue as between different parties, as follows:

> **Refusal to certify**
>
> 9 If the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for that purpose, the court may
>
> (a) order the addition, deletion or substitution of parties;
>
> (b) order the amendment of the pleadings; and
>
> (c) make any other order that it considers appropriate.
>
> If the court decides to certify, then the certification order must set out the following: **Contents of certification order**
>
> **8**(1)A certification order must
>
> (a) describe the class in respect of which the order was made by setting out the class's identifying characteristic;
>
> (b) appoint the representative plaintiff for the class;

> (c) state the nature of the claims asserted on behalf of the class;
>
> (d) state the relief sought by the class;
>
> (e) set out the common issues for the class;
>
> (f) state the manner in which and the time within which a class member may opt out of the proceeding; and
>
> (g) [Repealed 2018-16-7.]
>
> (h) include any other provisions the court considers appropriate.
>
> (2) If a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the certification order must include the same information in relation to the subclass that, under subsection (1), is required in relation to the class.
>
> (3) The court, on the application of a party or class member, may at any time amend a certification order.

[44] Pursuant to s. 10, the court may amend the certification order at any time:

> **If conditions for certification not satisfied**
>
> 10 (1) Without limiting section 8 (3), at any time after a certification order is made under this Part, the court may amend the certification order, decertify the proceeding or make any other order it considers appropriate if it appears to the court that the conditions mentioned in section 4 or 6 (1) are not satisfied with respect to a class proceeding.
>
> (2) If the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties and may make any order referred to in section 9 (a) to (c) in relation to each of those proceedings.

[45] The first requirement under s. 4(1)(a) focuses on whether, assuming all the facts pleaded are true, it is plain and obvious that the claim has no reasonable prospect of success: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 63 (“*Pro-Sys*”).

[46] The remaining four criteria under ss. 4(1)(b) to (e), require the Plaintiff to show “some basis in fact” that the criteria for certification are met. There is no assessment of the claim on its merits, and the court should not weigh the evidence or try to resolve conflicting facts and evidence at this stage. The question is whether

there is some basis in fact to establish each of the individual requirements for certification, not whether there is some basis in fact for the claim itself: *Lewis v. WestJet Airlines Ltd*., 2021 BCSC 228 at para. 39 ("*Lewis BCSC 2021*"), rev'd in part 2022 BCCA 145 ("*Lewis BCCA 2022*").

[47] At a certification hearing, the court is not concerned with the merits of the action. Rather, the focus is on the form of the pleading and whether the action can properly proceed as a class action: *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16, 25; *Pro-Sys* at paras. 99–105.

[48] In *Thorburn v. British Columbia*, 2012 BCSC 1585, aff'd 2013 BCCA 480 ("*Thorburn BCCA*"), the Court noted the important gate-keeping role that is to be exercised by the certification judge:

> [117] …The goal of the *CPA* is to be fair to both plaintiffs and defendants… "it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency."

[49] In *Krishnan v. Jamieson Laboratories Inc*., 2021 BCSC 1396 ("*Krishnan BCSC*"), aff'd *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72 ("*Krishnan BCCA*"), Justice Branch noted that "the CPA must be construed generously in order to achieve its objectives of access to justice, judicial economy, and behaviour modification": at para. 42.

[50] I turn now to addressing each of the certification criteria.

A. Do the Pleadings Disclose a Cause of Action?

[51] The first requirement under s. 4(1)(a) of the *CPA* is that the pleadings must disclose a cause of action. This is assessed on the same test applicable on a motion to strike pleadings under Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, [*Rules*]. The court must ask whether, assuming that the facts pleaded are true, it is plain and obvious that each of the plaintiff's pleaded claims are bound to fail: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 14 ("*Atlantic Lottery*").

[52] A pleading should not be struck out unless it is "plain and obvious" that no cause of action exists: *Kirk v. Executive Flight Centre Fuel Services Ltd*., 2019 BCCA 111 at para. 19, leave to appeal to SCC ref'd, 38678 (17 October 2019).

[53] The threshold is a low but meaningful one. In *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361, Justice Dickson explained the task of the court in determining this threshold issue, as follows:

> [15] The court performs an important gatekeeping function on a certification application. Although the merits of the claim are not determined and competing evidence is not weighed, certification operates as a meaningful screening device to ensure that only claims in the common interest of class members are advanced. …[F]or an action to be certified the s. 4(1) requirements must be met "to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of [the requirements] not having been met". While the threshold at the certification stage is low, merely symbolic scrutiny of the claim will not suffice…

[54] The pleadings should be read generously, "permitting novel but arguable claims and accommodating inadequacies in form to the extent reasonable by allowed for amendments to cure deficient drafting": *Escobar v. Ocean Pacific Ltd.,* 2021 BCSC 2414 at para. 7, citing *Sherry v. CIBC Mortgage Inc.,* 2020 BCCA 139 at para. 24.

[55] The court must consider the claims as they are, or as they may be amended: *Krishnan BCSC* at para. 45, citing *Sharp v. Royal Mutual Funds Inc.,* 2020 BCSC 1781 at para. 22.

[56] In applying this test, the facts plead must be assumed to be true. However, the court can consider if the facts are manifestly incapable of being proven or widely speculative: *Lewis v. WestJet Airlines Ltd.,* 2017 BCSC 2327 at para. 33 ("*Lewis BCSC 2017")*, aff'd 2019 BCCA 63 (*"Lewis BCCA 2019*"), leave to appeal to SCC ref'd, 38600 (18 July 2019).

[57] The primary concern for the Court at this stage, is the adequacy of the record, which will vary from case to case. Consequently, each case must be decided on its own facts: *Hollick v. Toronto (City),* 2001 SCC 68 at para. 23.

1. Breach of Contract

[58] There is no dispute that a breach of contract is an independent cause of action which can ground a civil claim. Writing for the minority in *Atlantic Lottery*, Justice Karakatsanis provided the following summary on the elements required to establish a breach of contract:

> [91] The elements of a cause of action for breach of contract are the existence of a contract and the breach of a term of that contract. In order to strike the claim for breach of contract, ALC and the third parties must demonstrate either that a necessary fact is not pleaded or that there is a legal reason why no contractual term existed or could be breached…

[59] The Amended Claim alleges that the Employer (1) failed to provide Statutory Pay, which was incorporated into the employment contracts of the class members; and (2) that the Employer improperly deducted the amount of Statutory Pay owing from the compensation payments, and then returned those amounts to the employees by designating them as *CLC* HP and *CLC* VP. The remedy sought is the amount of Statutory Pay that ought to have been paid pursuant to the contract, and is ostensibly based on specific formulas set out in the *CLC*.

[60] The Defendant submits that the claim for breach of contract is grounded entirely in the *CLC*. Consequently, it is plain and obvious the action cannot succeed as framed because the Plaintiff is not permitted to enforce statutory rights that are provided for under the *CLC* by way of a civil action.

[61] In support, the Defendant relies on the Court of Appeal's decision in *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, leave to appeal to SCC ref'd, 32704 (9 October 2008).

[62] The Plaintiff does not dispute that there is no free-standing cause of action for breach of the *CLC*. However, the Plaintiff submits that this action is not to enforce

any statutorily-conferred rights. Rather, it is to enforce contractual rights that flow from the employment contract. The Plaintiff submits that BMO was bound by the contracts of employment to pay vacation pay and holiday pay in accordance with the *CLC*. It failed to do so, and thus breached the employment contracts. It is this alleged breach of contract that the proposed class action seeks to redress. The Plaintiff relies on the appeal decision in *Lewis BCCA 2019*, as well as *Dominguez v. Northland Properties Corporation,* 2012 BCSC 328.

[63] In my view, the principles enunciated in the Court of Appeal's decision in *Macaraeg* do not bar this claim. In *Macaraeg*, the plaintiff sought damages for wrongful dismissal and non-payment of overtime hours that she and the proposed class members had allegedly worked. It was common ground that in the absence of a provision in the employment contract, compensation for overtime is not payable at common law: *Macaraeg* at paras. 2–4.

[64] The contract of employment in *Macaraeg* was silent on the question of overtime pay. The issue before the Court was "whether the mandatory overtime provisions of the *Employment Standards Act*…[*ESA*] are incorporated as a matter of law as terms of non-union employment contracts and whether entitlement to overtime in accordance with such provisions can be pursued by civil court action": *Macaraeg* at para. 1.

[65] The Court of Appeal concluded that the chambers judge had erred by finding that payment for overtime in accordance with the *ESA* was an implied term of the plaintiff's employment contract, and that the *ESA* does not preclude pursuing such a claim through a civil court action: *Macaraeg* at paras. 77, 84.

[66] In coming to this conclusion, the Court of Appeal noted the "general rule that rights conferred by statute are to be enforced in the statutory regime" unless the legislators intend that civil action be available. The Court of Appeal found that the *ESA* provided a complete and effective administrative scheme for granting and enforcing employee rights, with no intention that these rights could be enforced in a civil action: *Macaraeg* at paras. 45, 101–103.

[67] The important distinction between this case and *Macaraeg*, is that in *Macaraeg* the plaintiff sought to import the statutory obligations from the *ESA* into the employment contract, which was admittedly silent on the question of overtime pay. The issue before the Court was thus a question of law. In the case at bar, the Plaintiff has plead facts that support the assertion that the Employer specifically incorporated Statutory Pay obligations under the *CLC*, into the employment contracts of Variable Compensation Employees.

[68] *Macaraeg* was distinguished on similar grounds in the *Lewis* line of authorities. In *Lewis BCSC 2017*, the plaintiff wished to bring a class action on behalf of former and current female flight attendants who were entitled to benefit from an “anti-harassment promise”. The “promise” was expressly set out in the contract of employment: *Lewis BCSC 2017* at paras. 1, 8.

[69] The defendant (WestJet) brought an application to strike out the civil claim pursuant to Rule 9-5(1) of the *Rules*. Some of the grounds for the application were that the claim did not disclose a reasonable cause of action, was unnecessary, and that it should be brought before an administrative tribunal: *Lewis BCSC 2017* at paras. 2–3. The chambers judge (Justice Humphries) found that it was not plain and obvious that the claim was bound to fail or did not disclose a reasonable cause of action: *Lewis BCSC 2017* at para. 56.

[70] Justice Humphries held at para. 50, that insofar as the plaintiff was advancing a claim for personal injury or damages for discrimination, those claims ought to be brought under the *Workers’ Compensation Act,* R.S.B.C. 1996, c. 492, and the *Canada Human Rights Act*, R.S.C. 1985, c. H-6, respectively. However, the remainder of the claim could stand, as the *Macaraeg* case was not applicable to the circumstances: para. 56. While it may not have been a “model of clarity”, Justice Humphries concluded that the plaintiff’s claim, at it’s core, was for breach of contract – not for a statutory right or claim of discrimination *per se*: at paras. 30, 50, 55.

[71] In *Lewis BCCA 2019,* the Court of Appeal dismissed WestJet's appeal. The Court of Appeal set out some broad principles relevant to the question of jurisdiction, as follows:

> [20] In addressing the issue of jurisdiction, it is important to keep certain principles in mind. First, some statutes deal expressly with jurisdictional issues by conferring exclusive jurisdiction on one forum at the expense of another. For example, the British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244, ss. 99-100, allocates jurisdiction either to the Labour Relations Board or the Court of Appeal depending on the nature of the issue. The *CLC*, as a further example, confers exclusive jurisdiction on arbitrators to adjudicate disputes arising from the interpretation and application of collective agreements: *CLC*, ss. 57-60. Exclusive jurisdiction is important for the discussion of the "essential character" test, which I discuss below.
>
> [21] Second, the same facts may be the source of different legal rights or legal rights sounding in different causes of action. Courts are familiar with concurrent causes of action, such as in contract and tort, which may have different substantive legal consequences yet arise from the same facts. Here, the plaintiff's suggestion is that the contract of employment is a source of legal rights even if those rights overlap or replicate her statutory rights under the *CLC* and the *CHRA*.
>
> [22] Third, as a general rule, if a right arises solely from statute, a claimant will have to look to the mechanisms provided for, or contemplated, by the statute to vindicate those rights: *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 at para. 73. *Macaraeg* involved an attempt to enforce statutorily conferred rights through a civil action. In those circumstances, this Court held that a civil action for relief based on a breach of the statutory obligation could not be maintained because doing so would frustrate legislative intention.

[72] The Court of Appeal rejected the argument advanced by WestJet that "if the 'essential character' of a dispute…arises from within a statutory jurisdiction outside of the Courts, the claim should be struck": at para. 24. It held that the claim advanced was for breach of contractual rights and not breaches of a statutory obligation. The Court provided the following reasons:

> [26] First, a contract is a recognized source of legal rights grounding remedies for breach in the courts. It is no answer to say, as suggested by WestJet, that the common law does not recognize the tort of discrimination. This is so because the plaintiff alleges a breach of contract not a tort. Here, there is no dispute that the relationship between WestJet and its employees is governed by contracts of employment that incorporate terms and conditions relating to harassment and discrimination. Indeed, WestJet acknowledges that it relies on these contracts to enforce discipline, sanction employees, and, where necessary, justify dismissal for cause. It is not merely

> a fictitious argument to contend that, although the alleged facts involve discrimination and harassment, the wrong alleged is a breach of contractual rights not breaches of statutory obligation. The underlying subject matter may be the same, but gives rise to different legal wrongs and arguably different relief.
>
> [27] In this respect, the plaintiff's case does not appear to me to be different from a case in which one party agrees to convey property that meets legislated building code standards, but fails to do so. The building code standards have been expressly incorporated into the contract, the standards have not been complied with, but the claim still sounds in contract. The alleged wrong remains the breach of the agreement.
>
> [28] Perhaps more relevant are cases of constructive dismissal. WestJet accepts that the courts have jurisdiction to address alleged breaches of contract amounting to constructive dismissal even though the facts pertinent to that issue engage discrimination or harassment within the meaning of human rights legislation. It says that these cases are simply an exception to the general propositions it advances. I do not agree. In my opinion, a constructive dismissal case is a particular type of a breach of contract claim. I see no distinction in principle between this case and a constructive dismissal case over which the courts have jurisdiction.
>
> …
>
> [30] …The plaintiff's civil action, in this case, is not based directly on the breach of statutory rights like *Seneca* or *Macaraeg*; the plaintiff does not argue that WestJet's failure to fulfil the Anti-Harassment promise is, in and of itself, a discriminatory act.

[73] Similar to the Court's decision in *Lewis BCCA 2019,* I find that *Macaraeg* does not bar the claim advanced by the Plaintiff. The Plaintiff's claim is for breach of contract – not breach of statutory duty. As in *Lewis*, the relationship between BMO and the Variable Compensation Employees is governed by contracts of employment that, it is alleged, incorporated terms relating to statutory holiday pay and vacation pay: *Lewis BCCA 2019* at para. 26. This is not mere speculation – the record provides some basis in fact to support these assertions.

[74] As was found in *Lewis BCCA 2019,* the case at bar raises claims that fall within the jurisdiction of the Court, as well as alleging facts that could ground a complaint under the *CLC.*

[75] Indeed, in *Lewis BCCA 2019* the Court considered the implications of a situation where the facts of a case establish jurisdiction in the civil court as well as an administrative tribunal:

> [32] Accepting that the plaintiff is pleading a case in breach of contract that is a recognized independent cause of action and an independent source of rights, the question becomes whether the court's jurisdiction has been ousted by the enactment of the *CHRA*. It is here that WestJet relies on [*Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners,* 2000 SCC 14] because the case raises an issue about choice of forum and, accordingly, engages the "essential character" test.
>
> [Citation added.]

[76] The Court of Appeal explained that the essential character test, upon which WestJet relied, is to be used in cases "where there is a clear jurisdictional contest between competing fora": at para. 34. The Court of Appeal did not accept that the circumstances of the *Lewis* case gave rise to an exclusive jurisdiction choice of forum issue: *Lewis BCCA 2019* at para. 33.

[77] The Court of Appeal explained the law on jurisdiction and the essential character test, in this way:

> [40] The essential character test is applicable where there is a jurisdictional contest between statutorily created bodies, as in *Regina Police* or between the courts and a statutory adjudicator, as in [*Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929]. The jurisdictional conflict arises from the competing exclusive jurisdictions. In those circumstances, the test is deployed to assign jurisdiction to one exclusive forum or another. The purpose of the test is not to oust jurisdiction but to assign jurisdiction to one of the mutually exclusive fora. The existence of a jurisdictional contest must be demonstrated before the test is applicable. It is not a means to create a contest.
>
> [Citation added.]

[78] Where the facts of a case establish jurisdiction in the civil court as well as an administrative tribunal, the Court in *Lewis BCCA 2019,* noted that the following considerations apply:

> [43] This is not a case of exclusive jurisdiction. It does not involve competing statutory jurisdiction like *Regina Police*. It does not involve mandatory arbitration under a collective agreement like *Weber* and *Ferreira*. It no longer involves issues within the exclusive jurisdiction of the Workers' Compensation Board. The cases relied on by WestJet do not demonstrate that the combined effect of the *CLC* and *CHRA* is to oust the jurisdiction of the courts in relation to an otherwise recognized cause of action (breach of contract) either expressly or by necessary implication. Nor do they support the proposition that where the court's jurisdiction is not ousted, and no necessary jurisdictional issue is raised, the court should nevertheless treat a

> breach of contract claim as if it is in reality an attempt to enforce statutory rights.
>
> [44] This case involves a claim that, given its substantive legal character, falls within the jurisdiction of the courts as well as alleging facts that could ground a complaint before the Canadian Human Rights Tribunal. The issue then is whether there is some basis to infer that the *CHRA* ousts the jurisdiction of the courts.
>
> [45] I am unable to discern a basis to oust the jurisdiction of the courts in a case alleging breach of an employment contract engaging discrimination or harassment. Neither statute has an exclusive jurisdiction clause applicable to this case. The breach of contract claim could be advanced even if the *CHRA* was never enacted. If Parliament intended the *CHRA* to oust the court's jurisdiction over matters otherwise subject to its jurisdiction, I would expect it to do so expressly. It has not.
>
> [46] Further, I am not persuaded that it is plain and obvious that the *CHRA* ousts the jurisdiction of the courts by necessary implication. Recognizing that the legislation creates an administrative regime that is intended to be flexible, efficient, and expeditious, suggests that Parliament intended to create statutory rights capable of being vindicated by an administrative tribunal. Alone, this is not enough in my view to support an argument that by creating such a scheme Parliament intended to deprive plaintiffs of access to the courts they would otherwise enjoy.
>
> [47] While I am sympathetic to the argument that WestJet finds itself subject to the court's jurisdiction because it has incorporated its statutory human rights obligations into its employment contracts, that does not avoid the fact that these obligations are now terms of the contracts and can be relied on as such both by WestJet and its employees. Nor can I see that recognizing the general principle that a plaintiff can choose his or her forum frustrates the statutory objectives of the statutory human rights scheme.

[79] In this case, there is no statutory provision that gives exclusive jurisdiction to the *CLC* in relation to the issues raised. Nor do the authorities indicate exclusive jurisdiction under the *CLC:* see *Lewis BCCA 2019* at para. 43. Indeed, the authorities lead to the opposite conclusion.

[80] In *Fulawka v. The Bank of Nova Scotia*, 2010 ONSC 1148 ("*Fulawka ONSC*")[14] Justice Strathy (as he then was) certified a class proceeding against the Bank of Nova Scotia. The plaintiff, who had been an employee of the bank, alleged that the defendant had breached the employment contract, the *CLC*, and the duty of

[14] Affirmed by the Divisional Court in 2011 ONSC 530 (*"Fulawka DC"*) which was reversed in part by the Ontario Court of Appeal in 2012 ONCA 443 ("*Fulawka ONCA"*), leave to appeal to SCC ref'd, 34932 (20 March 2013).

good faith, by requiring employees to work overtime without pay, in order to fulfill the demands of their jobs. Additional claims were advanced for negligence and unjust enrichment.

[81] Similar to s. 4 of our own *CPA*, s. 5 of the *Ontario Class Proceeding Act,* 1992, S.O. 1992, c. 6 requires the plaintiff to meet five criteria for certification (cause of action, identifiable class, common issues, preferable procedure, and representative plaintiff). The application for certification in *Fulawka ONSC* was primarily opposed on two grounds: under s. 5(1)(a) for advancing an impermissible cause of action, and s. 5(1)(c) for failure to have common issues.

[82] Justice Strathy provided the following overview of the *CLC*, noting the specific circumstances in which the *CLC*'s privative clause operates:

> [97] Viewed as a whole, the Code evidences a parliamentary intention to enact a comprehensive body of legislation applicable to employees in the federally regulated private sector. Part I of the Code deals with labour relations and establishes a labour relations regime enforced by the Canada Industrial Relations Board and labour arbitrators who interpret and apply collective agreements. The statute contains a privative clause that protects the CIRB and arbitrators from judicial review (s. 22(1) and (2) and s. 58). Part II of the Code contains provisions dealing with health and safety matters in federally regulated workplaces. Again, a privative clause protects decisions of administrative tribunals that supervise and enforce Part II (s. 146.3 and s. 146.4). Similarly, Part III of the Code, setting out minimum standards applicable to both unionized and non-unionized employees in the federal sector, contains privative clauses (s. 243 and s. 251.12(6) and (7)).

[83] Justice Strathy agreed that the plaintiff did not have a direct cause of action based on the *CLC*. However, in what the Defendant said is a departure from the *Macaraeg* decision, the Court held that the *CLC* could inform the duties owed to the plaintiff, either in contract or good faith, as follows:

> [103] I find that the plaintiff has no direct cause of action based on the Code and that the pleadings in the statement of claim asserting a cause of action under the Code should be struck. This decision was made easier by the fact that the plaintiff disclaims any intention to assert such a cause of

> action. I am not prepared, however, to strike the pleading that the requirements of the Code and its regulations (including the duties to pay overtime for hours worked and to keep accurate records of hours worked) were implied terms of the contracts of the Class Members. I come to this conclusion because, in my view, the provisions of the Code may well inform the contractual duties, including the duty of good faith and fair dealing that Scotiabank owes to its employees. I am therefore not prepared to conclude that it is plain and obvious that these claims should be struck.

[84] Justice Strathy's decision granting certification was upheld in a unanimous decision by the Divisional Court in *Fulawka DC*. The matter was then appealed to the Ontario Court of Appeal in *Fulawka ONCA*. On appeal, the defendant did not dispute that the claims for breach of contract and unjust enrichment were properly plead. The Ontario Court of Appeal upheld the decision to allow certification, though the appeal was allowed in part in relation to common issues.

[85] Chief Justice Winkler, writing for the Court, held that if the contracts of employment incorporated the terms of the *CLC*, then the Court has jurisdiction under s. 261 to enforce that contractual obligation: at para. 148.

[86] Section 261 of the *CLC* provides as follows:

> **261** No civil remedy of an employee against his employer for arrears of wages is suspended or affected by this Part.

[87] Chief Justice Winkler went on to say that "it remains for the trial judge to determine if the terms of the *CLC* 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": at para. 149.

[88] In *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, leave to appeal to SCC ref'd, 34987 (20 March 2013), which was released at the same time as *Fulawka ONCA*, the Court of Appeal came to a similar conclusion at para. 82.

[89] In contrast to the Ontario authorities, the BC Court of Appeal in *Macaraeg*, held that the terms of the *ESA* were not implied into the contracts of employment as

a matter of law. The same logic extends to the *CLC*, meaning 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. Given the different approaches in Ontario and BC, the Plaintiff submits that application of *Macaraeg* would create an untenable situation, and explains it thus:[15]

> 67. A finding that there is no cause of action would cause considerable tension between this case, if so decided, and the Ontario jurisprudence in *Fulawka.* Given that the *CLC* is the same legislation, governed by the same common law in both provinces, the law should be the same. This class action covers both British Columbian residents and Ontario residents, including likely residents of every province in Canada. Given this, the analysis of *Fulawka* should be heeded and a cause of action found. A finding that there is no cause of action in British Columbia for these types of actions create conflict within the law and would disadvantage residents of British Columbia as compared to residents of other provinces, creating unfairness based on where Canadian citizens live.

[90] However, in my view, this concern does not arise in this case. When *Macaraeg* is read together with the *Lewis* decisions, there is nothing preventing this Court from finding that the terms in question are explicitly incorporated into the contracts as a matter of fact. In this case, the Plaintiff argues that the *CLC* provisions regarding vacation pay and holiday pay were explicitly incorporated, as a matter of fact, into the employment contracts of the PWCs and Mortgage Specialists.

[91] I also disagree with the Defendant that the effect of the *CLC* is to oust the jurisdiction of the courts in relation to an otherwise recognizable cause of action (breach of contract).

[92] In *Escobar v. Ocean Pacific Ltd*., 2021 BCSC 2414, the plaintiff sought certification of a class proceeding on behalf of past employees at the Pan Pacific Hotel who had been terminated during the pandemic. The claim was for wrongful dismissal, breach of duty of good faith and honest performance in contract, unjust enrichment relating to failure to pay *ESA* termination benefits, and punitive damages: *Escobar* at para. 1. The plaintiff also sought at the hearing to “amend to plead damages for breach of the contractual duty of good faith and honest

[15] Plaintiff’s Written Submissions.

performance as well as disgorgement of unpaid group termination benefits measured in accordance with s. 64 of the *ESA* based on unjust enrichment": *Escobar* at para. 12.

[93] Similar to the case at bar, there was an allegation in *Escobar* that the employer had a scheme in place to avoid obligations under an employment standards statute. Justice Mathews denied certification, holding that regardless of how the claim had been framed, it was in substance a claim for breach of the employment standards legislation itself, which was barred by *Macaraeg*: *Escobar* at paras. 63–64.

[94] In my view, *Escobar* is distinguishable from the facts of this case. In *Escobar*, the Court found that the plaintiff had not plead incorporation of the *ESA* provisions into his contract allowing him to sue on the s. 64 provision: *Escobar* at para. 56. In Mr. Cheetham's case, those facts have been plead. Further, as noted elsewhere, the broad legislative intent that permits a civil claim can be found in s. 261 of the *CLC*.

[95] I also reject the Defendant's argument that the breach of contract claim cannot stand because "a contract cannot be in breach of itself". The argument is summarized as follows:[16]

> 90. It is plain and obvious on the face of the NOCC that this claim for breach of an express contractual term cannot succeed. This is because the same documents that the Plaintiff pleads give rise to the express contractual term – the Compensation Plans – are the ones that the Plaintiff pleads contravene the CLC. As such, the "breach" pleaded by the Plaintiff cannot be of an express contractual term, but only of the CLC itself. The Plaintiff's claim is therefore barred by Macaraeg.
>
> 91. The material facts that the NOCC pleads for the express contractual term are grounded in the Compensation Plans:
>
> > 8. … ***The Pay Policies govern, among other things,*** the calculation and payment of compensation each Variable Compensation Employee is entitled to receive in connection with ***contractually and statutorily owed vacation pay ("Vacation Pay").*** …
> >
> > 9. The requirements to pay ***Vacation Pay and Holiday Pay under the Canada Labour Code***, RSC 1985, c L-2 (the "CLC") ***are part of***

[16] Defendant's Written Submissions.

> ***the employment contracts*** of Variable Compensation Employees. BMO issues a new Pay Policies each year. In some years, the ***Pay Policies included a statement that BMO is committed to ensuring that employees receive their entitlements to vacation pay under the CLC***.
>
> 10. ***The Pay Policy*** for Mortgage Specialists ***regularly stated that*** "BMO FG is committed to ensuring that employees receive no less than their minimum entitlement to vacation pay under the Canada Labour Code" and that "BMO FG is committed to ensuring that employees in the MS role ***receive their entitlement to statutory holiday pay under the Canada Labour Code***." [*emphasis added*]
>
> 92. The NOCC goes on to plead the legal conclusion that BMO "breached the contract of employment", but the material facts it asserts for this breach flow from the Compensation Plans themselves. The NOCC alleges that the Compensation Plans – despite being the same documents on which it relies for the express contractual term – are contrary to the CLC, because they provide that the variable compensation of PWCs and MSs is inclusive of vacation and holiday pay…
>
> 93. A contract cannot be in breach of itself. On the face of the pleadings, there is either ***no*** breach, because BMO did the very thing the Compensation Plans provide (i.e., it included vacation and holiday pay within variable compensation), or any breach is of the ***CLC***, because the Compensation Plans are contrary to it. Neither theory satisfies s. 4(1)(a).

[96] There are several problems with this position taken by the Defendant. First, the Defendant is wrong in law. Just because there are inconsistent provisions in a contract – or ambiguities – does not mean that the Plaintiff's claim is bound to fail. Ambiguities in contracts are routinely litigated, as are provisions of contracts which seem to contradict themselves. There are principles that guide the court in such circumstances. These principles have been established to address situations where the terms of a contract may be unclear, vague, ambiguous, or contradictory.

[97] Second, the Defendant's argument on this issue is merit based. It requires the court to do a detailed assessment of the facts, and apply to them to the law. That is not the role of the court in this application. In this case, there is no dispute that there are terms of the alleged employment contract that do not agree with each other. It is the Plaintiff's assertion that one part of the employment contract promises that the workers will receive what they are owed under the *CLC*; the other part (either directly or indirectly through the practices of BMO) allows for an underpayment. Determining

the terms of the contract, and whether or not a breach occurred, is a matter for the court at a common issues trial.

[98] Third, I disagree with the Defendant's assertion that the pleadings do not set out a cause of action. As noted elsewhere, the pleadings are to be read generously. In this case, there is ample basis in the pleadings themselves, to find that the Plaintiff has adequately plead the contract and the terms which are alleged to have been breached.[17]

[99] It may be that the Defendant ultimately succeeds in its position that the terms of the contract regarding Statutory Pay were not breached, that such terms did not exist, or that the contract is invalid as a contract cannot breach itself. However, coming to those conclusions requires an in-depth analysis of the facts within this case, and an application of the law to those facts. That is a task for the judge who will ultimately hear the class proceeding.

[100] The task before me is to determine if it is plain and obvious that the claim is bound to fail or does not disclose a reasonable cause of action. In my view, this is not plain and obvious.

[101] I conclude that the pleadings disclose a cause of action in contract, and the criteria under s. 4(1)(a) of the *CPA* has been met.

2. Breach of Duty of Good Faith

[102] I turn now to the claim alleging a violation of the duty of good faith in contract. The parties agree that at common law, there is no independent cause of action for breach of duty of good faith.

[103] In *Bhasin v. Hrynew*, 2014 SCC 71 the Court summarized at para. 93, the principles that apply to the duty of good faith:

> (1) There is a general organizing principle of good faith that underlies many facets of contract law.

[17] For example, see the Amended Claim at paras. 9, 34, 38.

> (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.
>
> (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

[104] The duty to act honestly in the performance of contractual obligations means "that the parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract": *Bhasin* at para. 73.

[105] In *Bhasin* at para. 74, the Court explained that the duty of good faith should not be thought of as an implied term. Rather, it should be seen as a "general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance". It went on to say:

> [The duty of good faith] operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.

[106] In *Atlantic Lottery* the Supreme Court of Canada noted the limited availability of an actionable good faith claim, as follows:

> [65] As this Court explained in *Bhasin*… not every contract imposes actionable good faith obligations on contracting parties. While good faith is an organizing principle of Canadian contract law, it manifests itself in specific circumstances. In particular, its application is generally confined to existing categories of contracts and obligations….

[107] Indeed, the law surrounding the duty of good faith in contractual performance is still developing: *Bhasin* at para. 66. The organizing principle of good faith described by the Court in *Bhasin* was intended to "correct the "piecemeal" approach to good faith in the common law, which the Court found too often failed to take a consistent or principled approach to similar problems. The Court's intention was to develop the law in this area in a "coherent and principled way": *CM. Callow Inc v. Zollinger,* 2020 SCC 45 at para. 44, citing *Bhasin* at paras. 59, 64. The Court was clear that this standard, however, does not constitute a "free-standing rule".

[108] It is settled law that the duty of good faith can arise in an employment context, particularly with respect to the termination or suspension of employment: *Bhasin* at para. 73; *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10.

[109] However, the duty of good faith is not restricted to the end of the employment relationship. The court can examine the employment relationship retrospectively: *Matthews v. Ocean Nutrition Canada Ltd*., 2020 SCC 26 at para. 82.

[110] The duty of good faith arises from the recognition of the vulnerability of the employee and the significant role that work plays in a person's personal and financial fulfillment: *Fulawka ONSC* at para. 78; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 1997 CanLII 332 (S.C.C.) at paras. 93–95.

[111] In *Fulawka ONSC* the Court held that a claim alleging the Defendant had breached the duty of good faith could stand, even if it was informed by the *CLC*. Inherent in this finding was the Court's view that the employees were particularly vulnerable as they did not have the protection of a union and were not members of management*: Fulawka ONSC* at para. 78. The pleading in *Fulawka ONSC* was detailed, and included reference to the particular vulnerability of the class members; the duty on the employer to honour its statutory obligations; and the breach of the duty by failing to pay for the hours worked, failing to advise the employees of their right to recover payment, retaining the benefit to itself, imposing an unlawful overtime policy on the workers, and creating a work environment in which overtime was required: at para. 75.

[112] In *Fulawka ONCA*, the Court of Appeal held that the certification judge did not err in finding that the claims for breach of duty of good faith and negligence disclosed causes of action: see paras. 40–49.

[113] In this case, the Defendant submits that the Plaintiff has not plead any material facts to support breach of a duty of good faith. While the Plaintiff has sought a declaration that "BMO violated its duty of good faith to the members of the Proposed Class by failing to properly calculate their Vacation Pay, or their Holiday

Pay", it is submitted that no material facts are plead to support the breach. Nor, it is argued, has the Plaintiff explained how the duty of good faith can fit within an established good faith category.

[114] In support, the Defendant relies on *Atlantic Lottery* where the Court refused to certify the claim for breach of duty of good faith, on the grounds that the alleged contract did not fit within any of the established good faith categories; nor was any argument advanced for expanding those recognized categories: *Atlantic Lottery* at paras. 64–65.

[115] In *Bhasin*, at paras. 49–56, the Court outlines some "established" common law doctrines that manifest a "general organizing principle" of good faith. They are:

a) Duty of cooperation between the parties to achieve the objects of the contract;

b) Duty to exercise contractual discretion in good faith;

c) Duty not to evade contractual obligations in bad faith; and

d) Duty of honesty in contractual performance (newly recognized in *Bhasin*).

[116] These were confirmed in *C.M. Callow Inc v. Zollinger,* 2020 SCC 45 at para. 3, and *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District,* 2021 SCC 7 at para. 128 (Justices Rowe and Brown in dissent).

[117] The Court in *Bhasin,* at paras. 54–56, also recognized the following duties which were implied in specific contexts:

a) employment context – the existence of an implied term of good faith governing the manner of termination;

b) insurance context – the duty of insurers to deal with claims fairly, and requiring that insureds must act in good faith by disclosing facts material to insurance policy; and

c) tendering of contract context – a company tendering a contract is bound by a duty of fairness to consider the submitted bids.

[118] Finally, the Court in *Bhasin* held that:

> [66] [g]enerally claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs".

[119] I turn then to the pleadings. I agree with the Defendant that the pleadings relating to breach of the duty of good faith leave much to be desired. Mr. Cheetham points to the pleadings contained at paras. 35 and 36 of the Amended Claim, to support the breach of the duty of good faith allegation. Those paragraphs state:

> 35. At all material times, in connection with Mr. Cheetham and the other Variable Compensation Employees, BMO failed to keep any records showing that it paid Vacation Pay with respect to variable compensation for the number of weeks of vacation to which the employee was entitled under section 184 of the *CLC,* as required under section 24 of the *Canada Labour Standards Regulations,* CRC, c 986 ***("CLC Regulations").***
>
> 36. At all material times, BMO hid its non-compliance with the *CLC* and contracts of employment and stated to employees that the calculations were correct, and thus the issue was not discoverable.

[120] There are a number of challenges with these pleadings. First, the pleading at para. 35 is solely grounded in the statutory obligations imposed on the Defendant by the *CLC*. Unlike the breach of contract claim relating to the *CLC* HP and *CLC* VP, there is no assertion in the Amended Claim that the Defendant had contracted with the Plaintiff to keep the records in accordance with s. 184 of the *CLC*. Thus, insofar as the claim for breach of the duty of good faith is based solely on the statutory obligations, it is bound to fail pursuant to the principles enunciated in *Macaraeg* and the *Lewis* decisions.

[121] Second, in neither the Amended Claim, nor in his submissions, does the Plaintiff actually connect the assertion at para. 36 of "hiding of non-compliance" with

the *CLC*, in relation to the breach of a duty of good faith. This is connected solely to the statute of limitations arguments regarding discoverability.[18]

[122] Even if I were to find that the “hiding of non-compliance” alleged at para. 36 of the Amended Claim could support the allegation of breach of the duty of good faith, this aspect of the claim is bound to fail.

[123] The relevant portions of the Amended Claim are as follows:

> 8. At all material times BMO has maintained pay policies for Variable Compensation Employees across Canada **("Pay Policies").** The Pay Policies govern, among other things, the calculation and payment of compensation each Variable Compensation Employee is entitled to receive in connection with contractually and statutorily owed vacation pay **("Vacation Pay").** Since on or around 2009, BMO has indicated to its Variable Compensation Employees through the Pay Policies that their compensation is inclusive of Vacation Pay, statutory holiday pay **("Holiday Pay")** and overtime.
>
> 9. The requirements to pay Vacation Pay and Holiday Pay under the *Canada Labour Code,* RSC 1985, c L-2 (the **"CLC")** are part of the employment contracts of Variable Compensation Employees. BMO issues a new Pay Policies each year. In some years, the Pay Policies included a statement that BMO is committed to ensuring that employees receive their entitlements to vacation pay under the *CLC.*
>
> 10. The Pay Policy for Mortgage Specialists regularly stated that "BMO FG is committed to ensuring that employees receive no less than their minimum entitlement to vacation pay under the Canada Labour Code" and that "BMO FG is committed to ensuring that employees in the MS role receive their entitlement to statutory holiday pay under the Canada Labour Code."
>
> 11. Since on or around 2009 until on or around 2011, the Pay Policy for Private Wealth Consultants stated that "your total cash compensation consisting of Base pay, Commission and BHPB Year-end Performance Bonus includes the statutory holiday pay, overtime pay and vacation pay to which you may be entitled for that period." Following 2011, the Pay Policy makes no mention of Vacation or Holiday Pay.
>
> 12. The Pay Policy for Mortgage Specialists regularly stated that Vacation Pay and Holiday Pay are "included in the payout for base pay and the variable incentives" paid to Mortgage Specialists.
>
> [emphasis in original]

[18] See for example, paras. 81 and 302 of the Plaintiff’s Written Submissions,

[124] Thus, it is the Plaintiff's position that the Employer advised the Variable Compensation Employees, through its pay policies, that Statutory Pay would be included in the compensation, rather than paid separately. Assuming this fact plead is true, then BMO could not possibly be said to have "hid" from the Plaintiff, its non-compliance with the *CLC* and contracts of employment.

[125] However, there is a second assertion advanced at para. 36 of the Amended Claim, which is that the Defendant told the employees that its calculations were "correct". During oral arguments, counsel expanded on this notion by referring to the following relief sought at para. 38(d) of the Amended Claim:

> A declaration that BMO violated its duty of good faith to the members of the Proposed Class by failing to properly calculate their Vacation Pay, or their Holiday Pay;

[126] In my view, this allegation, along with the submissions made by counsel at the hearing, does provide a basis upon which a claim for a breach of the duty of good faith could succeed.

[127] In *Wallace*, the Court noted the power imbalance in the employer-employee relationship which "informs virtually all facets of the employment relationship". This, coupled with the importance which our society attaches to employment, makes employees a particularly vulnerable group: *Wallace* at paras. 92–93.

[128] The concern of vulnerability is heightened in the case of non-unionized employees. As noted by K. Swinton in "Contract Law and the Employment Relationship: The Proper Forum for Reform", in B. J. Reiter and J. Swan, eds., *Studies in Contract Law* (1980), 357, at p. 363, "[i]ndividual employees lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer": *Wallace* at para. 91.

[129] There is a significant power imbalance in this case, which heightens the concerns about vulnerability of the Variable Compensation Employees. Added to this, the Employer is one of Canada's largest banks and employs approximately

45,000 people across the country;[19] the proposed class of employees are all non-unionized people; and there may operate a general duty of good faith in the employment relationship which requires honest dealings in the performance of the employment contract: *Bhasin* at para. 54.

[130] I agree with the Plaintiff that there is room in the jurisprudence for a court to find that the good faith duty continues through the life of the employment contract: *Matthews* at para. 85.

[131] The allegations as evidenced in the Amended Claim are that: (1) the Employer contracted with the Variable Compensation Employees to comply with the *CLC* requirements for vacation pay and holiday pay; (2) from time to time the Employer issued statements in its Pay Policies that asserted or re-affirmed its commitment to ensuring compliance with its statutory obligations under the *CLC*; (3) the Employer asserted that the calculations it made for statutory holiday pay and vacation pay were correct, such that the Employer had complied with the contractual obligations that the Employer had agreed to fulfill; and (4) when the Employer made this latter assertion, it was not acting in good faith, as the calculations were incorrect and did not conform with the contractual obligations. Framed in this way, it is possible that the alleged duty of good faith could fall into the established category of the duty not to evade contractual obligations in bad faith.

[132] Bearing in mind that the law surrounding the duty of good faith in an employment context is still developing, and that pleadings should be read generously to permit novel but arguable claims, I am satisfied that the claim that the Employer breached a duty of good faith, if framed in this way, is not bound to fail. However, I note that the arguments advanced at the hearing are not articulated in the pleadings.

[133] Without pleading the legal basis and assertions noted above, the pleadings as they currently stand, are insufficient to support a claim for breach of the duty of

[19] Amended Claim at para. 2.

good faith. However, the Plaintiff has articulated a manner in which the claim can be framed to disclose a proper cause of action for a breach of the duty of good faith.

[134] In the circumstances, I find that it is appropriate to permit the Plaintiff an opportunity to amend his pleadings to plead breach of the duty of good faith.

3. Conclusion on the Causes of Action

[135] I find that the cause of action for breach of contract is adequately plead, and meets the first requirement for certification.

[136] The cause of action for breach of the duty of good faith has not been adequately plead, and must be amended to satisfy the requirement under s. 4(1)(a) of the *CPA*. Leave is hereby granted to the Plaintiff to make the necessary amendments to conform with these Reasons.

B. Is there an Identifiable Class?

[137] Section 4(1)(b) of the *CPA* requires that there be an identifiable class of two or more persons.

[138] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 ("*Dutton*"), the Court noted at para. 38 that to meet the identifiable class requirement of the certification test, "the class must be capable of a clear definition". The Court elaborated as follows:

> [38] … Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.
>
> [Citations omitted.]

[139] The class definition is intended to assist in identifying those persons who have potential claims; defining the parameters of the lawsuit; and describing who is

entitled to notice: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 57.

[140] The amended class definition put forward by the Plaintiff is:

> All non-unionized Variable Compensation Employees who worked for Bank of Montreal since January 1, 2010 to the date of certification of this action and who are federally regulated in the roles of Private Wealth Consultants and Mortgage Specialists (the "Class" or "class members").

[141] The Defendant does not dispute that the proposed class definition sets out an identifiable class of two or more persons, and only takes issue with the start date for the claim. The Defendant submits that an appropriate start date is 2014. It is argued that there is no basis in fact that these issues can be resolved on a class-wide basis during 2010–2013, as the Defendant lacks the relevant payroll records for this period. In my view, this objection is more appropriately addressed under the common issues and preferability analyses.

[142] As noted by the Court in *Fairview Donut Inc. v. The TDL Group Corp*., 2012 ONSC 1252 at para. 223, aff'd 2012 ONCA 867, leave to appeal to SCC ref'd, 35207 (16 May 2013) it is not unreasonable to pick a definitive, if arbitrary, start date, in absence of clear evidence as to when a policy began. In this case, there is uncertainty as to when the Defendant implemented its Statutory Pay policy, though the Plaintiff has provided some evidence that the Total Compensation Program may have been implemented as early as 2009 for PWCs, and Mortgage Specialists.[20]

[143] In summary:

a) I have no difficulty in concluding that there is some basis in fact that there is an identifiable class of two or more people – the Plaintiff has put forward supporting affidavits from five class members in addition to himself.

[20] Affidavit of L. Rychlik, Ex. A at 224–228; Affidavit of N. Bruno-Romeo, Ex. A at 251, Ex. B at 254.

b) I am also satisfied that the amended class definition clearly defines the persons that could have potential claims – the members of the class would be identifiable based on BMO's records.

c) I also find that the class is rationally connected to the common issues – it includes those employment roles for which the Plaintiff has shown some basis in fact that their contracts incorporated the *CLC* provisions regarding vacation pay and holiday pay, and some basis in fact that these were underpaid.

[144] Consequently, the Plaintiff has met this part of the certification test.

C. Do the Claims Raise Common Issues?

[145] The proposed common issues are as follows:

1. Were the requirements to pay Vacation Pay and Holiday Pay under Part III of the *Canada Labour Code* part of the employment contracts of the class members?

2. Were the class members underpaid and are thus owed Vacation Pay in respect of their total compensation in accordance with the *Canada Labour Code* by the Defendant;

3. Were the class members underpaid and are thus owed General Holiday Pay in respect of their total compensation in accordance with *Canada Labour Code* by the Defendant;

4. Whether Bank of Montreal failed to keep records in accordance with s. 252(1) of the *Canada Labour Code* and s. 24 of the *Canada Labour Standards Regulations*, CRC c. 986;

5. If liability is established, are aggregate damages available;

    i. If the answer is yes, what is the quantum of aggregate damages owed to class members or any part thereof;

[146] The Defendant submits that all of the above issues fail to meet the requirements of s. 4(1)(c).

[147] Section 4(1)(c) of the *CPA* requires that the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members.

[148] This criterion has been described as a "low bar": *203874 Ontario Ltd. v. Quizno's Canada Restaurant Corp.,* [2009] O.J. No. 1874 at para. 31, 2009 CanLII 23374 (O.N.S.C.D.C.), aff'd 2010 ONCA 611, leave to appeal to SCC ref'd, 33865 (3 February 2011).

[149] The central question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis": *Dutton* at para. 39.

[150] An issue is "common" where its resolution is necessary in order to resolve the claim of each individual class member: *Hollick* at para. 18.

[151] The common issue must advance the litigation towards a resolution, although it does not need to be determinative: *Warner v. Smith & Nephew Inc.,* 2016 ABCA 223 at para. 30.

[152] An overly broad common issue runs the risk of not yielding answers that will advance the litigation in a meaningful way, which inevitably breaks down into individual proceedings*: Thorburn BCCA* at para. 39.

[153] If resolution of an issue depends on individual findings of fact that must be made for each class member, it fails to meet s. 4(1)(c) as this does not avoid the duplication that the common issues criteria seeks: *Thorburn BCCA* at para. 42.

[154] The onus is on the Plaintiff to provide sufficient evidence to establish the existence of the common issues on a "some basis in fact" standard: *Dutton* at para. 27. The "some basis in fact" standard is much less stringent than the "balance of probabilities" test: *Hollick* at paras.16–26.

[155] This requires the Plaintiff to provide some evidence showing that: (a) there is in fact a common issue; and (b) the issue can be answered in common across the class: *Krishnan BCSC* at para. 115.

[156] Put another way, the answer to the common issue must be capable of extrapolation to each member of the class, and in the same manner: *Charlton v. Abbott Laboratories, Ltd*., 2015 BCCA 26 at para. 85.

[157] In *Pro-Sys* at para. 108, the Court set out the following principles which apply to a s. 4(1)(c) analysis:

> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated vis-à-vis the opposing party.
>
> (4) It [is] not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify [a class proceeding]. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[158] In relation to the fifth principle, the Court clarified in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45, that while success for one class member does not necessarily have to result in success for all, success for one class member must not mean failure for another: see also *Krishnan BCSC* at para. 114.

[159] Consequently, a class action should not be certified if there is a conflict of interest between the class members: *Dutton* at para. 40; *Trotman v. WestJet Airlines Ltd*., 2022 BCCA 22 at para. 56.

1. Common Issue 1

[160] The Plaintiff proposes the following as common issue 1:

> Were the requirements to pay Vacation Pay and Holiday Pay under Part III of the *Canada Labour Code* part of the employment contracts of the class members?

[161] The Defendant argues that there is no basis in fact to establish that the common issue actually exists such that it can be answered in common across the class. Specifically, it is submitted that there is no common contract of employment between the different class members. Thus, even if the Plaintiff succeeds in the litigation, it will not be possible to extrapolate from his outcome to the other members of the class.

[162] The Defendant is correct in noting that there is a general reluctance by the courts to certify contract-based common issues, unless they are based on a uniform contract. A claim that requires the court to consider individual representations or contractual term is unlikely to be certified: *Lam v. University of British Columbia*, 2010 BCCA 325, at paras. 55–58, leave to appeal to SCC ref'd, 33855 (17 February 2011); see also *Asp v. Boughton Law Corporation*, 2014 BCSC 1124 at para. 59.

[163] In support of his claim that common issue 1 can be determined on a class-wide basis, the Plaintiff relies on: (1) s. 168(1) of the *CLC*; and (2) the text of various compensation plans and email communications made by BMO to the class members.

[164] Section 168 of the *CLC* does not assist the Plaintiff in advancing its argument in relation to common issue 1. This provision prohibits employers from modifying the rights granted to employees under Part III by contract, unless the employees receive rights more favourable than the *CLC*. Insofar as the Plaintiff relies on s. 168(1) to infer a contractual term into the employment contracts of the class members, this is inconsistent with the Plaintiff's position that the claim here is for breach of express contractual terms. This argument also goes contrary to *Macaraeg*. To the extent that the Plaintiff relies on s. 168(1) to establish a minimum standard against which to measure whether the class members' employment contracts were breached, it is more appropriately considered when discussing common issue 2.

[165] I turn then to the documents relied on by the Plaintiff to support his contention that common issue 1 meets the requisite criteria under s. 4(1)(c) of the *CPA*.

[166] The class definition is specific to the job roles of Mortgage Specialists and PWCs. There is some basis in fact that during the class period: BMO used standardized compensation plans to stipulate the compensation structure for persons that were employed within each specific job category; PWCs were governed by the PWC Plan and Mortgage Specialists were governed by the MS Plan; the compensation plans specific to each role were referenced in Offer Letters which set out the employee's compensation; and revisions made to the compensation plans were communicated to employees directly, or by publication on BMO's intranet.[21]

[167] Mr. Keith provides the following information about the compensation plans:[22]

> 14. Employees' Compensation Plans contain the compensation structure for the specific roles covered by the particular plan. This includes information regarding Employees' base pay, the types of variable compensation and incentive and equity awards available to Employees in that position, as well as the eligibility criteria and/or formulae or criteria used to calculate the different types of pay. Some, but not all, of these Compensation Plans also include information regarding vacation and/or holiday pay and how those are accounted for in relation to those Employees' variable compensation (typically providing that all variable compensation is inclusive of vacation and holiday pay). …
>
> [Emphasis added.]

[168] The Defendant argues that despite this, there is no commonality between the contracts of employment of Mortgage Specialists and PWCs, and there are also variations within each of those roles that make common issue 1 uncertifiable.

[169] I will first consider the compensation plans for each role separately, before undertaking a holistic comparison.

[21] Affidavit #1 of D. Keith at paras. 8, 11, 14.
[22] Affidavit #1 of D. Keith.

a) MS Plan

[170] The MS Plan published in November 2009[23] notes that the employees' vacation pay is "included in the payout rates for commissions, volume bonuses and creditor insurance payments at 6%." The document also provides that the employees' "statutory holiday pay is included in the payout rates for commissions, volume bonuses and creditor insurance payments at 4%."

[171] The Plaintiff argues that as there is no common law right to *CLC* HP and *CLC* VP, the only vacation and holiday pay which the 2009 MS Plan could have referred to is what was statutorily required by the *CLC*: *Macaraeg v. E Care Contact Centers Ltd.*, 2006 BCSC 1851 at para. 66. The Defendant disagrees that this inference can be made on a class wide basis, and submits that this language in the 2009 MS Plan could refer to other contractual rights separate and apart from the *CLC*. However, there is no evidence to support this assertion by the Defendant.

[172] I agree with the Plaintiff that the absence of a common law right to *CLC* VP and *CLC* HP, provides some basis for this Court to conclude that the reference to vacation and holiday pay in the 2009 MS Plan is to the provisions of the *CLC*.

[173] However, missing from the record is some evidence supporting the notion that the 2009 MS Plan or plans with similar wording were part of the contracts of employment for Mortgage Specialists for the years 2010 to 2012. No plans were provided for any of those years. Nor is there otherwise any evidence as to the terms of the vacation pay and holiday pay provisions of the MS Compensation Plans in 2010 to 2012.

[174] According to the record, in July 2013, Mortgage Specialists were advised that they would be subject to a new compensation plan.[24] The Defendant argues that the terms of the 2013 MS Plan are captured in Ex. A attached to Ms. Rychlik's affidavit, which makes no mention of *CLC*, vacation pay or holiday pay. However, Ex. A is not

[23] Affidavit # 1 of D. Keith, Ex. A at 72.
[24] Affidavit of L. Rychlik at para. 6.

a copy of the actual plan, rather, as is clearly noted thereon, it is a summary document which directs the reader to another document for more detailed information.[25]

[175] A copy of the MS Plan produced in 2013 is not included in the record. However, an email sent to Mortgage Specialists around August 7, 2013, references the 2013 MS Compensation Guide (i.e., the 2013 MS Plan) and sets out further details of the compensation plan in relation to holiday and vacation pay entitlement. Specifically, this email notes that BMO was paying holiday pay and vacation pay in compliance with the *CLC*:[26]

> …
>
> **Subject: Mortgage Specialist - Vacation Pay and Statutory Holiday Pay…**
>
> During a recent MS conference call a question was asked about vacation pay and statutory holiday pay. This communication responds to the question.
>
> Question: As a BMO Mortgage Specialist how am I paid vacation and statutory holiday pay?
>
> As a fully commissioned sales force, Mortgage Specialists are paid both vacation pay at 6% and statutory holiday pay at 4%. These payments are included as components of your overall monthly commission received, but they are individually calculated and paid by BMO on top of any earned commission. This is explained in the Compensation Guide (pages 10 -11). The amounts paid to you for vacation pay and statutory holiday pay are clearly set out on the Statement of Earnings Details you receive for each pay period. The Statement of Earnings can be found on the myHR site under my Pay and Benefits.
>
> Vacation and statutory holiday pay for bank employees are governed by the Federal Canada Labour Code as opposed to any provincial legislation. The vacation and statutory holiday payments made by the bank comply with the applicable law. In fact, for many, these payment calculations exceed the requirements.
>
> Statutory holidays are paid days of rest. If an MS voluntarily decides to work on a statutory holiday, he or she is entitled to substitute another day off for the holiday. The MS still receives his or her statutory holiday pay. This too is explained in the Compensation Guide (page10 -11) and is in compliance with the *Canada Labour Code* requirement.
>
> …

[25] Affidavit of L. Rychlik, Ex. A. “MS Compensation Plan Details”.
[26] Affidavit N. Bruno-Romeo, Ex. E.

[Emphasis added.]

[176] In my view, the August 7, 2013 email sent to Mortgage Specialists provides some basis in fact that in 2013 BMO contractually agreed with Mortgage Specialists that it would pay them vacation pay and holiday pay in accordance with Part III of the *CLC*.

[177] The terms of the 2014 MS Plan are also not in evidence. This brings me then to the Defendant's argument that the Plaintiff has failed to produce sufficient evidence that could lead this Court to conclude that there is some basis in fact that the *CLC* provisions regarding holiday pay and vacation pay were incorporated into the contracts of Mortgage Specialists, during the years that those documents have not been produced.

[178] I agree with the Plaintiff that the Defendant cannot rely on the absence of the MS Plan for the 2014 (or subsequent years), as grounds for defeating the certification of common issue 1. It is understandable that a representative plaintiff may not have access to all of the MS Plans for the class period, particularly given that he is no longer employed with the Defendant. On the other hand, given BMO's policy to retain payroll records for seven years, it is reasonable to infer that the Defendant could access the MS Plans from at least 2014 onwards, but chose not to produce them.[27]

[179] As noted by the Court in *Navartnarajah v. FSB Group Ltd*., 2021 ONSC 5418 at para. 15, the Defendant cannot simply state, without evidence, that each of the contracts are different and thus will require the Court to resort to individual inquiries.

[180] Though the 2014 MS Plan is not in evidence, based on the evidence produced regarding the surrounding years (2013 and 2015), coupled with the lack of evidence to the contrary, it is reasonable to infer that the 2014 MS Plan was substantially similar in terms of its wording on the Statutory Pay issue.

[27] Affidavit # 1 of D. Keith at para. 52.

[181] The evidence provided in relation to the MS Plans for the years 2015 to 2018 suggests that only minor variations in wording were made to the Statutory Pay policy. In each of the compensation plans created for the years 2014 to 2018, BMO reiterated in its commitment that MS employees would receive their entitlement to vacation pay and holiday pay under the *CLC*.

[182] The evidence leads me to conclude that there is some basis in fact that for the years 2013 to 2018, BMO had contractually agreed with the Mortgage Specialists that it would pay them *CLC* HP and *CLC* VP.

[183] However, I am not able to come to this conclusion for the period 2019 onwards. The first substantial revision to the MS Plan after 2013, appears to have been made in 2019. The 2019 version of the MS Plan was titled “Mortgage Specialist Variable Compensation Guide” (the “2019 MS Plan”). This plan does not refer to the *CLC*, vacation or holiday pay, nor is there evidence of other communications sent to the Mortgage Specialists during this time period suggesting that the 2019 MS Plan incorporated the *CLC* provisions regarding holiday pay and vacation pay.

[184] It is unknown whether any revisions were made to the 2019 MS Plan in the years 2020 to 2022, as there is no affidavit evidence on this issue, and no plans were provided for those years. I conclude that the evidence in relation to the years 2019 onwards, falls short of providing sufficient evidentiary basis that there was a contractual commitment by BMO to pay holiday pay and vacation pay to Mortgage Specialists in accordance with the *CLC* provisions.

b) PWC Plan

[185] I now turn to the PWC Plans. As with the MS Plans, there is some basis in fact that the PWC Plans formed part of the employment contracts for PWCs, and that they were revised periodically. [28]

[28] Affidavit # 1 of D. Keith at para. 44.

[186] I turn then to whether any of the PWC Plans expressly incorporated the *CLC* provisions regarding holiday pay and vacation pay.

[187] The evidence suggests that PWCs were informed in 2009 that they would no longer be receiving Vacation Reconciliation Payments. Instead, their total cash compensation would be inclusive of statutory holiday pay, overtime pay, and statutory vacation pay.[29]

[188] The 2010 PWC Plan did not refer to the *CLC*, but stated that PWCs' total cash compensation (consisting of base pay, commission and bonus) "includes the overtime pay and vacation pay to which you may be entitled for that period".[30] This plan did not refer to holiday pay and provided no specific formula to calculate the vacation pay.

[189] The evidence suggests that there is some similarity between the 2011 PWC Plan and the 2009 PWC Plan. The 2011 PWC Plan states:

> Note that your total cash compensation consisting of Base pay, Commission and BHPB Year-end Performance Bonus includes the statutory holiday pay, overtime pay and vacation pay to which you may be entitled for that period.

[190] No plans were provided for the years 2012, 2013, 2014, 2017, 2018, 2020, 2021, or 2022.

[191] The 2015 version of the policy made no mention of statutory vacation pay or holiday pay.

[192] In 2016, PWCs were informed that in response to changes to the *CLC,* which came into effect in March 2015, "BMO Canada has aligned its statutory holiday entitlement pay practices to the updated Code".[31]

[193] Mr. Keith explains it thus:[32]

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[29] Affidavit of S. Strong at para. 7.
[30] Affidavit #1 of P. Cheetham, Ex. B at 32.
[31] Affidavit of S. Strong, Ex. F at 47.
[32] Affidavit #1 of D. Keith.

> 40. Amendments to the *CLC* in March 2015 implemented a new formula for statutory holiday pay for Employees who earned commissions. It required that all Employees who were paid in part or in whole on a commission basis and who completed at least 12 weeks of continuous employment with an employer be paid holiday pay equal to 1/60th of the wages, excluding overtime pay, that they earned in the 12-week period prior to the week in which the statutory holiday occurred. The previous formula had been 1/20th of the commission earned over the 20 days worked immediately preceding the week in which the statutory holiday occurred.
>
> 41. To respond to this change, BMO made changes to two aspects of statutory holiday pay. First, we implemented the new pay formula for commissions, and second, we began listing statutory holiday pay as a separate line item on commissions on Employees' pay stubs. This latter change occurred in August/September 2016. Copies of BMO's updates and briefings regarding administrative changes from the *CLC* for Mortgage Specialists and Financial Planners are attached hereto as **Exhibit "H"**.

[194] On August 30, 2017, all PWCs were sent an email stating that their Total Cash Compensation, effective fiscal 2009, adhered to the *CLC*. The email states in part: [33]

> …
>
> Feedback and questions have been received in National Office and further discussed at the PWC Advisory council about the treatment of PWC Vacation Pay since the realignment in payment structure in 2009. Let me start by saying thank you for raising your concerns. We strive to have an open dialogue, and it's important for you to ask questions and feel comfortable raising any concerns you may have. I'd like to take the opportunity now to provide some clarity, and give you the chance to ask any questions.
>
> In November of 2008, we implemented the Total Compensation Program (effective fiscal 2009) for all PWCs. A component of this revised compensation plan was the elimination of a "Vacation Pay Reconciliation" top-up payment. Within the new program, a PWC's total cash compensation includes the vacation pay which they would be entitled to.
>
> The change was announced by letter to all PWCs who would have been in the role at the time and documented in the 2009 Compensation Plan document. There have been no changes since then.
>
> This alignment of Total Cash Compensation was and remains consistent with external market practices across our industry, across Wealth Management, and adheres to the Canadian Labour Code. We have revised the Compensation Plan document (attached) to clarify the details of your vacation pay (found on page 12). We apologize for any confusion this may have caused.
>
> …

[33] Affidavit of S. Strong at para. 10, Ex. D.

[Emphasis added.]

[195] As I understand the Plaintiff's argument, the August 2017 email sent to the PWCs suggests that despite the fact that the wording in the various compensation plans applicable to each category of employees varied, sometimes from year to year, BMO had contractually agreed from 2009 onwards that it would abide by the requirements of the *CLC* in relation to vacation pay. Putting aside for a moment, that the pleading itself does not specifically plead reliance on the August 2017 email, three things flow from the above.

[196] First, similar to the argument advanced for MS Plans, the absence of a common law entitlement to vacation pay and holiday pay suggests that the references in the 2009 and 2011 PWC Plans to vacation pay and holiday pay was to what was statutorily required by the *CLC*.

[197] Second, the August 2017 email lends some support for a broad contractual term in relation to payment of *CLC* VP. This email provides some evidentiary basis that BMO had contracted with all PWCs that it would pay vacation pay under Part III of the *CLC*, from 2009 onwards to at least 2017.

[198] Third, it can be inferred on the evidence that no major changes to BMO's holiday pay and vacation pay policy in relation to PWCs, were made until at least 2019 when a new compensation plan was issued. This new plan made no mention of vacation pay or holiday pay.

[199] I conclude that the record provides some basis in fact that the PWC Plans from 2009 to 2018 contractually bound BMO to pay PWCs vacation pay in accordance with the *CLC*. In relation to holiday pay, the record provides some basis in fact that a similar contractual term was incorporated into the PWC Plans for the 2011 year.

c) Conclusion

[200] I now turn to considering whether common issue 1 is a class wide issue.

[201] While there was a variation of how vacation pay and holiday pay were calculated amongst the different roles, there is some evidence that employees within a particular role were impacted by the same policies, and shared the same compensation structure during the relevant period. Further, while there may have been additional contractual provisions that impacted the class members which were contained in individual offer letters or other communications with BMO, there is some evidence that all PWCs and Mortgage Specialists were treated the same with respect to the issues of statutory vacation pay and statutory holiday pay, i.e., that it was included as a part of their total compensation.

[202] In making this finding, I acknowledge that there are disputes regarding: the contractual status of the compensation plans and whether they confer contractual obligations; and when, or in which manner, the compensation plans incorporate the *CLC* provisions regarding holiday pay and vacation pay. It is not necessary for me to resolve those disputes at this stage, though I note that there is legal authority for the proposition that if the policy does not confer contractual obligations, it at least reflects BMO's existing contractual obligations: *Ormrod v. Etobicoke (Hydro-Electric Commission),* 2001 CanLII 28045 (O.N.S.C.) at para. 24.

[203] As noted by the Court in *Fulawka ONCA* at para. 82, it is up to the court hearing the proceeding to ultimately decide if the *CLC* provisions regarding holiday pay and vacation pay, are in fact incorporated into the employment contracts of the employees. At this stage, I need only to determine that the issue raised in common issue 1 is not a fiction, but is grounded in some evidence.

[204] I turn then to the terms of the individual Offer Letters and the degree to which they applied the compensation plans to the class members. First, I note that while the Offer Letters may have varied from one employee to another, there is some basis in fact that the Statutory Pay policy was universal, and that all the PWCs and Mortgage Specialists were treated the same with respect to the issue of Statutory Pay. Second, while the compensation plans that were incorporated into the Offer Letters of the PWCs and Mortgage Specialists may have said different things about

the *CLC*, vacation pay and holiday pay, as well as changed over time, does not derogate from the ability of this Court to find that a common issue exists in relation to the question of whether BMO contractually agreed to pay holiday pay and vacation pay in accordance with Part III of the *CLC* for each type of employment role, during certain periods of time.

[205] An issue can be common even if it makes up a limited aspect of the liability question, and leaves many individual issues still to be decided: *Andriuk v. Merrill Lunch Canada Inc.*, 2014 ABCA 177 at para. 124.

[206] Importantly, even a significant level of individuality will not preclude the court from finding that there is commonality: *Pro-Sys* at para. 112.

[207] On the other hand, common issues must not be expressed in overly broad terms, as this does not serve the interests of fairness or efficiency: *Rumley v. British Columbia*, 2001 SCC 69 at para. 29.

[208] The requirement that class members must share common issues, does not mean that the answers to these common questions must be the same for each individual. As long as the success of one member does not result in the failure of another member, the issue may still be “common.”

[209] I am satisfied that there is some evidence to support the position that the contracts of PWC and MS employment did incorporate the requirements to pay vacation pay and holiday pay under Part III of the *CLC*. However, the evidence supports this contention for only some of the years during the class period. Further, the variations between the PWC employment contracts and MS employment contracts means that while they may share the same overarching common issue, the answer may vary as between the two employment roles.

[210] To address these concerns, I find that it is necessary to bifurcate common issue 1, and make some adjustments to the class period.

[211] In relation to the court's power to adjust the common issues and class definition, I note the following passage from *Krishnan BCCA*, where the Court of Appeal stated:

> [79] I agree with the representative plaintiff's submission that chambers judges are entitled to use their experience in managing certification applications—the judge has the power to reformulate definitions, the class or the common issues, and, consistent with s. 5(6) of the *CPA*, to permit amendments to pleadings and the filing of further evidence: *Douez v. Facebook, Inc*., 2018 BCCA 186 at para. 47, citing *Kumar v. Mutual Life Assurance Company of Canada* (2003), 226 D.L.R. (4th) 112 (O.N.C.A).

[212] However, in so doing, the court must be satisfied that the modifications do not result in prejudice to the party responding to them: *Harrison v. Afexa Life Sciences Inc.,* 2018 BCCA 165 at para. 47, leave to appeal to SCC ref'd, 38196 (7 February 2019).

[213] I turn then to the class period. The proposed class definition is:

> All non-unionized Variable Compensation Employees who worked for Bank of Montreal since January 1, 2010 to the date of certification of this action and who are federally regulated in the roles of Private Wealth Consultants and Mortgage Specialists (the "Class" or "class members").

[214] Based on the evidence currently available, I find that it is appropriate at this time to narrow the class definition to cover the period January 1, 2010, to December 31, 2018, as follows:

> All non-unionized Variable Compensation Employees who worked for Bank of Montreal since January 1, 2010 to December 31, 2018, and who are federally regulated in the roles of Private Wealth Consultants and Mortgage Specialists (the "Class" or "class members").

[215] It is possible that after the parties have conducted further document discovery, there may be some basis to extend the class definition to cover a wider period beyond 2018. That evidentiary basis does not exist at this time.

[216] Common issue 1 as it is currently framed, asks the following question:

> Were the requirements to pay Vacation Pay and Holiday Pay under Part III of the *Canada Labour Code* part of the employment contracts of the class members?

[217] However, I find that this question is too broad as it does not allow for the differences that exist between the MS Plans and the PWC Plans.

[218] There are two possibilities that could occur at this juncture. First, this issue could be bifurcated to address the concerns noted above, by, for example, asking the following types of questions:

> 1. Were the requirements to pay Vacation Pay under Part III of the *Canada Labour Code* part of the employment contracts of the:
>
> a) Mortgage Specialists for any of the years 2013 to 2018, inclusive; and
>
> b) Private Wealth Consultants for any of the years 2010 to 2018, inclusive.
>
> 2. Were the requirements to pay Holiday Pay under Part III of the *Canada Labour Code* part of the employment contracts of the:
>
> a) Mortgage Specialists for any of the years 2013 to 2018 inclusive; and
>
> b) Private Wealth Consultants for the year 2011.

[219] In my view common issues framed as above, or those using substantially similar wording, would meet the requirement under s. 4(1)(c).

[220] Another option is to create a subclass. The *CPA* allows for the creation of subclasses where the class members have different interests in relation to the common issues, or whose claims raise different common issues: Branch, W.B. "Class Actions in Canada", 2nd Ed. Para. 5.8 Subclassing ("Branch Class Actions"); s. 6 of *CPA*.

[221] However, a subclass is not necessarily required just because there is some variability between groups: see *Persaud v Talon international Inc*., 2020 ONSC 3858.

[222] The threshold test for the creation of a subclass was described as follows in *Tataskweyak Cree Nation v. Canada (Attorney General),* 2021 MBQB 153 at para. 54:

> The preponderance of legal authority seems to favour maintaining the integrity of the class at least until an insurmountable conflict arises on the common issues.
>
> (Cited in Branch Class Actions.)

[223] At this juncture, given the overarching issue between the PWCs and the Mortgage Specialists remains the same, as well as there being no apparent conflict between the groups, I am of the preliminary view that bifurcation of the question as noted above, rather than subclassing, is more appropriate. However, to ensure fairness and that no party is prejudiced, the parties should be permitted to provide submissions on the issue.

[224] Consequently:

a) the Plaintiff has leave to propose revisions to common issue 1 to address the concerns noted above;

b) the Defendant may provide submissions on the revised common issue 1 proposed by the Plaintiff; and

c) in the event that a party is of the view that subclassing is more appropriate than bifurcation to address the above concerns regarding common issue 1, that party may provide submissions on the matter.

[225] I turn now to common issues 2 and 3.

2. Common Issues 2 and 3

[226] The Plaintiff proposes the following as common issues 2 and 3:

> 2. Were the class members underpaid and are thus owed Vacation Pay in respect of their total compensation in accordance with the *Canada Labour Code* by the Defendant;
>
> 3. Were the class members underpaid and are thus owed General Holiday Pay in respect of their total compensation in accordance with *Canada Labour Code* by the Defendant;

[227] It is the Plaintiff's position that BMO breached its contractual obligations to Mortgage Specialists and PWCs by not paying *CLC* HP and *CLC* VP at all, or by mis-calculating the payments. The alleged miscalculations include:

a) using the class member's base salary rather than total "wages", which included commissions; or

b) applying the wrong percentage; or

c) failing to increase the percentage based on length of service.

[228] The Defendant submits that: (1) these common issues will not significantly advance the litigation; (2) will be dependent upon individual findings of fact; (3) cannot be resolved on a class-wide basis for the period prior to 2014, because BMO lacks relevant payroll records from this time; and (4) there is no basis in fact that a common issue relating to holiday pay from and after 2016 actually exists.

[229] As the Plaintiff correctly notes, if it is found (as sought through common issue 1) that the contracts of class members incorporated the minimum standards under the *CLC*, it is proper for this Court to determine whether BMO fulfilled its contractual duties or duty of good faith with respect to the manner in which it calculated statutory holiday pay and statutory vacation pay. Answering that question, provided that it is framed properly and can be answered in common, will significantly advance the litigation.

[230] To be certified as a common issue, the questions regarding whether the contractual terms were breached, must focus on the overarching commonality between the class members. That commonality is found in the arguments advanced by the Plaintiff, which are grounded in the *CLC* provisions regarding holiday pay and

vacation pay entitlements, versus the formula used by BMO to calculate statutory holiday pay and vacation pay.

[231] Part III of the Canada Labour Code provides as follows in relation to vacation pay and holiday pay:

> **184.01** An employee is entitled to vacation pay equal to:
>
> > **(a)** 4% of their wages during the year of employment in respect of which they are entitled to the vacation;
> >
> > **(b)** 6% of their wages during the year of employment in respect of which they are entitled to the vacation, if they have completed at least five consecutive years of employment with the same employer; and
> >
> > **(c)** 8% of their wages during the year of employment in respect of which they are entitled to the vacation, if they have completed at least 10 consecutive years of employment with the same employer.
> >
> > **…**
>
> **196(1)** Subject to subsections (2) and (4), an employer shall, for each general holiday, pay an employee holiday pay equal to at least one twentieth of the wages, excluding overtime pay, that the employee earned with the employer in the four-week period immediately preceding the week in which the general holiday occurs.
>
> **Employees on commission**
>
> **(2)** An employee whose wages are paid in whole or in part on a commission basis and who has completed at least 12 weeks of continuous employment with an employer shall, for each general holiday, be paid holiday pay equal to at least one sixtieth of the wages, excluding overtime pay, that they earned in the 12-week period immediately preceding the week in which the general holiday occurs.

[232] Section 166 defines "wages" as "every form of remuneration for work performed but does not include tips and other gratuities".

[233] Section 168 of the *CLC* provides:

> **168(1)** This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

[234] Section 168 effectively sets the *CLC* provisions regarding holiday pay and vacation pay as a threshold for the minimal amount of holiday pay and vacation pay that each federally regulated employee is entitled to. Consequently, I agree with the Plaintiff that if this Court finds that the *CLC* provisions for holiday pay and vacation pay are incorporated into the employment contracts of the class members, the Court could use those provisions as a threshold against which it could measure whether the class members' employment contracts were breached.

[235] There is evidence which provides some basis in fact for the assertion that: (1) all PWCs and Mortgage Specialists had their *CLC* HP and *CLC* VP entitlements calculated in the same manner; and (2) *CLC* HP and *CLC* VP were paid using a methodology that did not reflect the agreed upon contractual terms.

[236] The following formula sample calculation appears in the 2009 and 2015 MS Plans:[34]

Sample Calculation:

If commission earned is $100, then on your pay commissions will be $90, vacation pay will be $6, and statutory holiday pay will be $4.

Earnings Type	Earnings%	Vacation Pay %	Statutory Pay %	Total
100 % Commission	90%	6%	4%	100%

[237] It is reasonable to infer that this calculation relates to the *CLC* HP and *CLC* VP that would be owing to the employee. Although this sample calculation does not appear in many of the MS Plans, nor in any of the PWC Plans, there is some evidence that this methodology of subsuming the *CLC* VP and *CLC* HP into the total compensation payment, was used for Mortgage Specialists and PWCs during the class period.

[34]Affidavit #1 of D. Keith.

[238] The following statement appears in Mr. Keith's affidavit regarding the VPR Program versus the inclusion of vacation pay into the compensation for excluded employees:[35]

> Annual vacation reconciliation applies to all BMO Canada salaried employees (full-time/part-time), except employees in excluded job codes or those in a grade 60 role. Employees in excluded job codes have a compensation plan that explains vacation pay is included in their compensation (e.g. commission employees). Therefore, these employees would not be entitled to additional vacation pay, and as a result, need to be excluded (by job code) from the vacation reconciliation program.
>
> [Emphasis added.]

[239] Further, Ms. Bruno-Romeo avers that she would receive payroll reports which indicated her commission earnings based on the transactions she made. However, she was paid in such a way that the total of her commissions, holiday pay and vacation pay on her payslips equalled the commission she had earned.

[240] I also find that this method could be found to be in breach of a contractual commitment to pay *CLC* HP and *CLC* VP. It is arguable that by reducing the commissioned earnings to account for holiday pay and vacation pay, BMO was effectively getting the class members to subsidize their own holiday pay and vacation pay, rather than paying for these benefits itself.

[241] There is also some evidence that BMO was underpaying *CLC* VP by using an incorrect formula. For example, Mr. Biggar avers that his vacation pay was only 5% of his earnings, rather than being 6% as indicated by the applicable *CLC* requirements based on the length of time he had worked at BMO. Mr. Haynes avers that he was paid the same rate for "regular pay" as he was for vacation pay, despite his commission being at least four times the amount of base pay for the applicable time period. Mr. Cheetham's states that his payslip from 2016 shows that his vacation pay was paid at the same hourly rate as his base pay, rather than based on his commission pay.

[35] Affidavit # 1 of D. Keith, Ex. F.

[242] This brings me to common issues 2 and 3 as they are presently drafted. I find them to be problematic in many respects. First, they are overly broad, such that by using the word “underpaid”, without any further particularization, any manner of underpayment is captured, rather than underpayments allegedly caused by application of BMO’s policy about how it would calculate *CLC* HP and *CLC* VP for Mortgage Specialists and PWCs.

[243] Second, the common issues do not differentiate between *CLC* VP and *CLC* HP, which the evidence suggests may have been treated differently by the Employer. Just as holiday pay and vacation pay need to separated out in common issue 1, they need to be separated out in common issues 2 and 3.

[244] Third, these common issues conflate the question of whether the Employer breached the contractual terms regarding *CLC* HP and *CLC* VP, with the issue of damages.

[245] Fourth, these common issues would require individual inquiries, since whether or not an underpayment actually occurred would depend on, for example, when and for how long a particular employee was employed at BMO.

[246] Finally, the proposed common issues 2 and 3 do not correlate to the actual arguments advanced by the Plaintiff.

[247] Based on the arguments advanced, the real question is whether the methodology used by BMO in calculating holiday pay and vacation pay for the class members was in violation of BMO’s contractual obligations to the class members. A question framed in that manner, which focuses on the methodology – rather than individual findings of underpayment – would satisfy the common issues criterion: see *Curtis v. Medcan Health Management Inc.*, 2021 ONSC 4584 at para. 87 (“*Curtis ONSC*”), rev’d on other grounds in 2022 ONSC 5176 (*“Curtis DC”*).

[248] Common issues 2 and 3 need to be re-drafted to address the above concerns, and to make specific reference to the newly framed common issue 1. For example, wording similar to the following would meet the criteria under s. 4(1)(c):

> 3. If the answer to [revised] common issue 1 is yes, was the manner in which BMO calculated Vacation Pay during the class period, in violation of the provisions contained in Part III of the *Canada Labour Code*?
>
> 4. If the answer to [revised] common issue 2 is yes, was the manner in which BMO calculated Holiday Pay during the class period, in violation of the provisions contained in Part III of the *Canada Labour Code*?

[249] The Plaintiff has leave to re-submit common issues 3 and 4 to address the concerns noted above, and the Defendant may provide submissions on the revised common issues proposed by the Plaintiff.

3. Common Issue 4

[250] The Plaintiff proposes the following as common issue 4:

> 4. Whether Bank of Montreal failed to keep records in accordance with s. 252(1) of the *Canada Labour Code* and s. 24 of the *Canada Labour Standards Regulations*, C.R.C. c. 986.

[251] As noted from the wording of common issue 4, the Plaintiff grounds his argument on the obligations for record keeping that are contained within the *CLC* and related regulations.

[252] Section 252(1) of the *CLC* requires that employers keep records of their employees' general holidays and annual vacations. Section 24(2)(e) of the *CLC Regulations*, requires records of "the actual earnings, indicating the amounts paid each day, with a recording of the amounts paid for overtime, vacation pay, general holiday pay".

[253] The Plaintiff has plead this issue in the Amended Claim as follows:

> 21. At all material times, the Pay Statements provided by BMO to Private Wealth Consultants did not show that Vacation Pay was computed on the variable compensation portion of their pay. BMO treated variable compensation as inclusive of Vacation Pay for Private Wealth Consultants and paid vacation pay only on their base pay.
>
> …

> 35. At all material times, in connection with Mr. Cheetham and the other Variable Compensation Employees, BMO failed to keep any records showing that it paid Vacation Pay with respect to variable compensation for the number of weeks of vacation to which the employee was entitled under section 184 of the CLC, as required under section 24 of the Canada Labour Standards Regulations, CRC, c 986 ("CLC Regulations").

[254] What is missing from the pleadings, is any allegation that the requirement to keep records was incorporated into the employment contracts of the class members. Nor did the Plaintiff make such an assertion at the hearing.

[255] At the certification hearing, the Plaintiff framed this issue as a concern with the lack of detailed information on the pay stubs of the class members providing a breakdown of the Holiday Pay and Vacation Pay. As an example, counsel pointed to the failure of the Defendant to list until August or September 2016, Holiday Pay as a separate line item for commissions on employees' pay stubs.[36]

[256] I find that common issue 4 does not meet the criteria under s. 4(1)(c), and it cannot be saved by any re-drafting. I say this for two reasons.

[257] First, I accept that there is some basis in fact that, for example, detailed information relating to holiday pay was not listed on the class members' pay stubs until August or September 2016. However, there is no evidence that the Employer agreed to be bound by s. 252(1) of the *CLC*, or s. 24 of the *CLC Regulations* as a term of the employment contracts of the class members. Nor is there evidence that the Employer otherwise contractually agreed to keep records in the manner suggested by the Plaintiff.

[258] Second, the proposed common issue does not materially advance the issues. The pleadings do not seek any relief directly in connection to a breach of common issue 4. Rather, the Plaintiff submits that whether BMO kept adequate records "will help to inform the common issues judge about what findings can be made for the different groups involved, for instance relating to what methodology would be used

[36] Plaintiff's Written Submissions at para. 181, referring to Affidavit # 1 of D. Keith at para. 41.

to determine which class members suffered a loss, or the quantum of that loss".[37] In support, the Plaintiff relies on *Trotman* at para. 59. However, *Trotman* did not involve any common issue related to record keeping. Rather, the Court in *Trotman* simply set out at para. 59, the four possible outcomes to a common issues trial that were articulated in *Pioneer Corp. v. Godfrey*, 2019 SCC 42 ("*Pioneer*").

[259] I conclude that common issue 4 does not meet the requirement of s. 4(1)(c) and cannot be certified.

4. Common Issue 5

[260] The Plaintiff proposes the following as common issue 5:

> 5. If liability is established, are aggregate damages available;
>
> a) If the answer is yes, what is the quantum of aggregate damages owed to class members or any part thereof;

[261] There is no dispute that as a general proposition, aggregate damages can be certified as a common issue: see for example, *Pro-Sys*; and *Steele v. Toyota Canada Inc.,* 2011 BCCA 98.

[262] Indeed, an aggregate damages award is specifically contemplated in the *CPA* under s. 29(1), as follows:

> 29(1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (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.

[37] Plaintiff's Reply Submissions at para. 51.

[263] It is important to note that the criteria in s. 29(1) relates to an *award* for aggregate damages; this is not the criteria that needs to be met at the certification stage: *LaSante v. Kirk*, 2023 BCCA 28 at para. 84. This is an important distinction when considering whether aggregate damages is a suitable common issue. Certification of the question of aggregate damages as a common question does not indicate an entitlement to aggregate damages.

[264] In *LaSante*, the appellants argued that the certification judge erred in certifying aggregate damages as a common issue because the preconditions of s. 29 of the *CPA* could not be met. In upholding the lower court decision, the Court of Appeal saw no error in the judge's observation that the criteria of s. 29(1) of the *CPA* need only be met to award aggregate damages, not to certify them as a common question: *LaSante* at para. 84.

[265] At para. 49, the Court of Appeal cited the following passages from the certification decision with approval:

> [26] Certification of aggregate damages does not amount to a commitment to awarding aggregate damages. The criteria under s. 29 need only be met to award such damages, not to certify them as a common issue. Though I have expressed my skepticism about the nuisance claim brought on a class-wide basis, if the plaintiff succeeds in establishing liability under that cause of action, the appropriateness and amount of aggregate damages would be in issue. I find that the theory of damages inherent to the plaintiff's claim in nuisance for loss of a right, while perhaps not fully developed, is sufficient to satisfy the "methodology" requirement referenced by the defendants.
>
> [27] Though it was unclear based on the originally certified issues whether the plaintiff was seeking aggregate damages in nuisance, a fact that the Court of Appeal acknowledged, they have made the fact that they are doing so clear in their reply submissions at this hearing. Rather than an introduction of a new common issue, I view this as a clarification of the common issue that has been remitted to me for further consideration.
>
> [28] I would therefore certify the issue of aggregate damages, borrowing some of the language from the aggregate damages common issue approved by the Court of Appeal in *Tucci v. Peoples Trust Company*, 2020 BCCA 246, as follows:
>
> > Can a part of the Class Members' damages in nuisance be assessed in the aggregate pursuant to section 29 of the *CPA*? If so, in what amount?
> >
> > (*Kirk v. Executive Flight Centre Fuel Services*, 2021 BCSC 987.)

[266] The Court of Appeal noted that by certifying the aggregate damages question, the judge simply recognized that if the plaintiff was successful in establishing liability in nuisance, the appropriateness and amount of aggregate damages would become an issue necessarily in common. Questions of whether any damages were available on an aggregate basis would have to be determined at the next stage of trial: *LaSante* at para. 88.

[267] The Court of Appeal went on to note that this "bifurcated" approach is consistent with the BCCA's decision in *Tucci v. Peoples Trust Company*, 2020 BCCA 246, and has been followed by the Ontario Court of Appeal in *Brazeau v. Canada (Attorney General),* 2020 ONCA 184 at paras. 102–104.

[268] The Defendant in the case at hand argues that the methodology proposed by the Plaintiff for determining damages is unworkable on a class wide basis, and must of necessity, involve individual findings of fact. The issue of a workable methodology was discussed by the Court in *LaSante*, as follows:

> [93] The Supreme Court of Canada further confirmed at para 119 of *Pioneer Corp.* that methodology that may not be sufficient for the purpose of establishing liability to all class members (depending on the findings of the trial judge) may nevertheless be sufficient for the purposes of certifying aggregate damages as a common issue. In this case, the appellants have shown no proper basis for interfering with the judge's exercise of discretion in his case management role in accepting that "the theory of damages inherent to the plaintiff's claim in nuisance for loss of a right, while perhaps not fully developed, is sufficient to satisfy the 'methodology' requirement referenced by the defendants" (at para 26). The *Pioneer Corp*. case simply does not support their position.

[269] Methodology was also raised in *Lewis v. WestJet Airlines Ltd.*, 2022 BCCA 145, where the Court noted that:

> [159] A proposed methodology need not be "compelling": *Fischer* at para. 43. Further, though the methodology needs to be "realistic," it will not always require expert evidence: *Ewart v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at paras. 9 and 104, leave to appeal to SCC ref'd, 38784 (19 December 2019); *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353 at para. 38, leave to appeal to SCC ref'd, 36668 (14 April 2016). Nevertheless, a methodology cannot be "a bare pleaded allegation": *Atlantic Lottery* at para. 160.

[270] The challenge in the case at bar is that not only is the Plaintiff's theory regarding aggregate damages undeveloped, I find it difficult to ascertain from the theory as currently articulated, a "realistic" methodology that can satisfy the concerns noted in *Atlantic Lottery*.

[271] The Plaintiff has alleged damages in two respects: first, on the basis that the Employer did not pay any *CLC* HP and *CLC* VP; and second, that the Employer miscalculated the payments made, by using the employee's base salary rather than total "wages", which included commissions; applying the wrong percentage; or failing to increase the percentage based on length of service.

[272] I agree with the Defendant that these theories of damages require individual assessments. For example, the Court will have to determine what benefits a particular class member was entitled to receive and whether they did in fact receive their entitlements under the *CLC*. The *CLC* entitlement will vary depending on the *CLC* provisions applicable at the time, the nature of the entitlement (i.e., vacation pay or holiday pay), whether or not the person was an employee or working in a management capacity, how long they worked, and during what years they worked.

[273] Additional individual issues may also arise, such as the impact of a release signed by some of the class members upon termination of their employment with BMO, and the expiry of a limitation period. As to the latter question, I pause here to note that the parties have not asked this Court to certify the limitation period defence as a common issue. However, it has been plead as a defence, and I agree that it will need to considered, along with the other matters noted above, in assessing what if any damages are payable to a particular class member.

[274] The Defendant suggests that the *Curtis ONSC* decision is the most analogous in facts to the case at bar. Although *Curtis ONSC* dealt with the provincial employment standards legislation, the plaintiff similarly alleged that the employer had underpaid vacation and holiday pay to Variable Compensation Employees. The employer conceded they had breached the contracts of employment, and prior to the litigation being commenced, paid the employees two years worth of holiday pay and

vacation pay benefits. The action was commenced for benefits beyond that period. The certification judge found a number of common issues existed and were certifiable, but refused to certify an aggregate damages common issue. Ultimately the matter was not certified as a class proceeding on the basis of preferability.

[275] The decision was successfully appealed, with the Ontario Divisional Court holding that the certification judge erred in finding that a class action is not the preferable procedure: see *Curtis DC.* The appellants raised various arguments, though the sole issue considered by the Court was that of the preferable procedure analysis – the Court did not discuss the aggregate damages issue.

[276] The Court in *Curtis ONSC* noted as follows:

> [88] The Defendants are, however, successful in their argument that questions 5 to 8 are not certifiable. Pursuant to s. 24 (1) of the *Class Proceedings Act, 1992,* aggregated damages are only available when (a) monetary relief is claimed on behalf of 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 of the defendant's liability can reasonably be determined without proof by individual class members.
>
> [89] In the immediate case, individual questions of fact relating to the determination of Medcan's liability remain to be determined and the aggregate of Medcan's liability cannot be determined without proof by individual Class Members. The common issue is that Medcan made its vacation pay and public holiday pay calculations without taking into account individual circumstances such as commission income and bonuses. The individual circumstances of the consequences of that common mistake remain to be determined at individual issues trials. There is no statistical sampling that would assist in determining what the individual Class Members is owed.
>
> [90] The *Class Proceedings Act, 1992* is a procedural statute, and it does not create a new type of damages known as aggregate damages. All that s. 24 (1) of the *Class Proceedings Act* does is that it recognizes that in certain circumstances depending upon the nature of the Class Members' claims, it may be possible to avoid individual assessments of damages and arrive at a calculation of damages equal to what the defendant would have to pay if there were individual assessments. The case at bar is not that type of case.
>
> [91] The popularity of unjust enrichment claims where the Class Members claim compensation for the defendant's wrongdoing based on the defendant's gain as opposed to their individual losses is the gold standard for aggregate damages because the preconditions of s. 24 (1) will be satisfied. But the immediate case is not such a case. Although the Class Members do claim unjust enrichment, their unjust enrichment claims are just the other side of the

> coin of their breach of employment contract claims and these claims do not lend themselves to an aggregate assessment; rather, those claims require individual determinations of what the Class Member is paid vacation pay and unpaid public holiday pay.

[277] The comments of the Court in *Curtis ONSC* are apt in this case.

[278] The Plaintiff has failed to provide a basis on which this Court could conclude that the question of aggregate damages meets the common issues criteria. Common issue 5 is therefore not suitable for certification pursuant to s. 4(1)(c) of the CPA.

[279] It is possible that during the common issues trial, circumstances may emerge such that this Court may re-consider this issue. As held by the Supreme Court of Canada in *Pro-Sys* at paras. 134–135, if the evidence ultimately discloses that there is a common issue regarding aggregate damages, there is nothing preventing the trial judge from addressing it at the common issues trial if liability is found.

D. Is a Class Proceeding the Preferable Procedure?

[280] Section 4(a)(d) requires that a class proceeding be the preferable procedure for the fair and efficient resolution of the common issues.

[281] This means that the Plaintiff must show some basis in fact that a class proceeding: (1) would be a fair, efficient and manageable method of advancing the clam; (2) would be preferable to any other reasonably available means of resolving the claims of the class members; and (3) it will facilitate the goals of judicial economy, behaviour modification, and access to justice: see *Curtis DC.*

[282] In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, s. 4(2) requires the court to consider the following non-exhaustive list of factors:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[283] With respect to s. 4(2)(a), the Defendant argues that: (1) the proposed common issues will not meaningfully advance the litigation; and (2) there are "extremely numerous and complex" individual issues that will still need to be determined after the common ones are addressed.

[284] The central issues in the litigation are: (1) what were the terms of the employment contracts in relation to statutory holiday pay and vacation pay; (2) did the Employer breach these terms; and (3) if so, what damages are payable as a result of the breach. Common issue 1 is aimed at the first question, and common issues 2 and 3, are aimed at the second question.

[285] In my view, once common issues 1 to 3 are revised in accordance with these Reasons, they have the potential to significantly advance the litigation. Regardless of whether there are individual trials, or a common issues trial, the court will still need to determine what the terms of the employment contracts were in relation to holiday pay and vacation pay, and whether those terms were breached. The revised common issues 1 to 3 can assist the court in arriving at answers to those questions on a class wide basis, thereby narrowing the issues for individual issue trials, and avoiding the court having to consider the same policies, conceivably hundreds of times.

[286] While many issues will still remain after common issues 1 to 3 (as revised) are answered, the existence of such issues does not derogate from the importance of the common issues. Indeed, ss. 27 and 28 of the *CPA* specifically contemplate the court undertaking individual assessments of liability or determining other individual issues as required, in ways that can meet the goals of judicial economy and access to justice.

[287] Further, as noted in s. 7(1) of the *CPA*, certification is not barred merely because the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues, or the relief claimed relates to separate contracts involving different class members.

[288] In this case, most of the remaining issues raised by BMO go primarily to the question of damages. They include such matters as the applicable limitation periods, contributory negligence, waiver, estoppel, and failure to mitigate. Those individual issue evaluations will be significantly advanced if this Court is able to answer the threshold questions of (1) whether the contracts of employment included terms incorporating the *CLC* provisions regarding holiday pay and vacation pay, and (2) whether those terms were violated by the methodology employed by BMO through its policy governing the MS and PWC employee roles.

[289] In my view, factor 4(2)(a) weighs heavily in favour of certification.

[290] I turn now to factor 4(2)(b), which I find also weighs in favour of certification. The Defendant asserts that there is evidence that some putative class members may wish to pursue these claims on an individual basis. Specifically, there is evidence that Ms. Bruno-Romeo commenced a wrongful dismissal lawsuit against BMO in 2015. The action was settled in August 2017, by payment of a monetary sum to Ms. Bruno-Romeo, in exchange for her releasing BMO from all claims arising from her employment, including "[a]ny claims against any of the Releasees under the Canada Labour Code", and agreeing not to initiate any claims against BMO relating to this.[38]

[291] I agree with BMO's submission that there may be some class members who bring wrongful dismissal lawsuits that may not wish to "cede the individual settlement leverage created by their vacation and holiday pay claims to this class action nor wish to reopen any release and termination payment arrangements they entered into with BMO"[39]. However, the evidence falls short of establishing that their numbers are

[38] Affidavit #2 of D. Keith at paras. 3–4.
[39] Defendant's Written Submissions at para. 185.

significant. Further, these class members have the option of opting out of the class proceeding and pursue whatever individual relief they consider appropriate.

[292] Similarly, while there may be some class members that have substantial claims for unpaid holiday pay and vacation pay entitlements, the size of individual claims is not a bar to certification. Again, individual members who prefer to have more control over the proceeding because they have large claims, can always opt out.

[293] I come to a similar conclusion in relation to factor 4(2)(c). There is no evidence that there are any other individual or class proceedings in Canada which involve these issues. However, there have historically been a few complaints made before the *CLC* Head regarding issues of holiday pay and vacation pay entitlement involving Variable Compensation Employees. Mr. Cheetham brought such a complaint but withdrew it prior to the commencement of this action. Mr. Haynes also made a complaint under the *CLC*, as did the plaintiff in *Lavin v. Bank of Montreal,* 2015, [2015] C.L.A.D. No. 45; 2015 CanLII 23806.[40]

[294] While prior claims can be evidence that proposed class members may wish to control separate actions[41], the fact that Mr. Haynes, Mr. Cheetham, Ms. Bruno-Romeo, Mr. Strong, Ms. Rychlik, and Mr. Biggar are all participating in this action and have provided affidavits in support, provides some basis in fact that there are many class members, if given the choice, who would prefer the class proceeding over filing complaints under the *CLC*.

[295] I turn now to factors 4(2)(d) and (e) which focus on whether the class action would be preferable to any other alternative method of resolving the class members' claims. This is done by comparing "the competing possibilities through the lens of the goals of behaviour modification, judicial economy and access to justice": *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 16–17 ("*AIC*").

[40] Defendant's Written Submissions at paras. 75–79, 134, 188.
[41] See *MacLean v. Telus Corporation and Telus Communications Inc*., 2006 BCSC 766 at para. 69.

[296] This inquiry requires "the representative plaintiff… to show some basis in fact for concluding that a class action would be preferable to other litigation options", as well as any "specific non-litigation alternative" raised by the defendant: *AIC* at para. 49.

[297] In this case, the Defendant raises two other available means of resolving the class members complaints regarding unpaid holiday pay and vacation pay. These are: (1) claims brought under the *CLC* complaint process to Employment and Social Development Canada (EDSC);[42] or (2) individual court actions brought in provincial or supreme court.

[298] In my view, neither of these alternative processes meet the goals of judicial economy, behaviour modification, and access to justice.

[299] The Lewis line of authorities are instructive on this point. One of the issues before the Court of Appeal in *Lewis BCCA 2022*, was whether the certification judge had erred in refusing to find that a class proceeding was the preferable procedure. The Court of Appeal summarized the claim as follows:

> [18] In summary, the Amended Claim relies on a single cause of action: breach of a specific contract based on specific terms and conditions. Those terms and conditions are incorporated into the contract and are based on WestJet's various policies and Code of Conduct. The primary remedy sought for that breach of contract is disgorgement. The Amended Claim repeatedly and unequivocally eschews reliance on any statutory breach or duty of care and it disclaims any right to general or compensatory damages.

[300] The Court of Appeal allowed the appeal in part, finding that the certification judge had erred in several respects, such as: failing to consider the mandatory statutory factors under the preferability analysis; and by misconstruing the plaintiff's claim as one of workplace discrimination instead of breach of contract. In finding that a class proceeding was the preferable procedure, the Court of Appeal noted that the Human Rights Tribunal presented various substantive and procedural access to justice concerns which would not occur in a class proceeding. However, the Court of

[42] This was formerly known as Human Resources and Skills Development Canada (HRSDC)

Appeal agreed with the certification judge that the final proposed common issue relating to aggregate damages was not certifiable as the plaintiff had failed to advance any proposed methodology for the resolution of that issue*: Lewis BCCA 2022* at para. 160.

[301] In *Dominguez*, Justice Fitzpatrick considered the *ESA*, and found that the six-month limitation period, as well as the lack of procedure for consolidating complaints before the *ESA* tribunal, impacted issues of judicial economy and access to justice, thus favouring a class proceeding: *Dominguez* at paras. 232, 234, 245, 263.

[302] In *Fulawka ONCA* the Court dealt with the same legislation that is at issue here, and found that the *CLC* process was not the preferable process for resolving the class members' claims for the following reasons:

> [168] The courts below accepted that class members may be reluctant to bring forward individual claims for uncompensated overtime using Part III proceedings due to fear of affecting their employment status and advancement: see the motion judge's reasons, at paras. 161-62, and the Divisional Court's reasons, at paras. 135 and 137….
>
> [169] In addition to fear of employer reprisals, there are also costs associated with using Part III proceedings that may deter class members from bringing complaints under the Code for relatively small amounts of unpaid overtime. The Arthurs Report notes, at p. 222:
>
> > However, employees may have to incur out-of-pocket expenses to pursue their rights. They may have to take time off work to attend a hearing, travel to or communicate with a Labour Program office, or hire a lawyer or other advocate to represent them in certain types of proceedings. Given the relatively small amounts usually claimed in Part III proceedings, such expenditures may seriously erode the amount recovered, to the point where employees are in effect deterred from seeking remedies at all.
>
> [170] The statistics regarding the infrequent use of Part III proceedings by current employees and the costs associated with this use support the conclusion that the goal of access to justice would be better advanced by a class proceeding. The class proceeding relieves individual class members of the need to incur out-of-pocket expenses and the need to hire a lawyer or other advocate to represent them. Class actions also offer judicial oversight, which would deter any potential employer retaliation against employees taking part in the litigation.

[303] A similar conclusion was reached in *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2351 (aff'd on appeal to the Ontario Divisional Court in 2010 ONSC 4724, and rev'd on appeal to the Court of Appeal in 2012 ONCA 444). In *Fresco*, employee plaintiffs sought certification of a class proceeding against CIBC for unpaid overtime wages. Though the motion judge ultimately found that the commonality requirement in s. 5(1)(c) could not be made out – thus the class proceeding could not be the preferable proceeding – she stated that *had* she found that there were common issues, she would have found a class proceeding to be the preferable procedure for resolving those issues: at paras. 92–98.

[304] In *Curtis DC,* the Court noted that the certification judge failed to properly consider the goals of access to justice and behaviour modification required in the preferability analysis:

> [40] …[T]he fear of reprisal would operate as a barrier to access to justice because the class consists not solely of former employees of Medcan, but also includes current employees. Those employees would be less willing to pursue individual actions against Medcan for fear of a negative impact on their employment circumstances. By contrast, a class proceeding would provide anonymity, and security in numbers. Even if class members did not have a fear of reprisal, many might not be aware of their ability to pursue an individual claim. Because of the notice requirement, a class proceeding would ensure that class members become aware of their ability to make a claim.
>
> [41] Because the certification judge failed to consider the barriers to access to justice, his analysis of the ability of a class proceeding to address those barriers, as compared to individual actions, was incomplete. Had he considered the ability of individual actions to address the barriers to access to justice he would have found that individual actions could not address those barriers. The access to justice barriers that could be addressed by means of a class action would be left in place.
>
> …
>
> [53] In employment cases such as this one, class proceedings would serve the goal of behaviour modification because they would signal to employers that they are expected to be informed of and to comply with their statutory obligations regarding employee compensation. Individual claims under the *ESA* and individual actions would be much less effective in achieving this goal because the amounts recovered would be relatively small. Moreover, individual claims would never result in the employer being held entirely accountable for the "full costs of their conduct.": In a case such as this one, absent the possibility of a class action, there may be little incentive for employers to comply, especially where the non-compliance may persist for years, and their liability may be cut-off by a statutory limitation period.

> [54] It is worth noting that class proceedings have repeatedly been found to be the preferable procedure for employment and *ESA*-related cases.
>
> [Citations omitted.]

[305] In case at bar, there are hundreds if not several thousand putative class members. It would be highly practical and inefficient for these to be adjudicated on an individual basis through the *CLC* process. I acknowledge that the Head under the *CLC* does have the power to conduct internal audits of the Employer's payroll records and investigations, which could ultimately lead to orders to pay for other employees. However, there is no mechanism to compel the Head to undertake an investigation to address system wide issues. This impacts consideration of judicial economy. Having one judge manage these claims in a class proceeding is far preferable from a judicial economy perspective, particularly since there are likely hundreds if not thousands of potential class members.

[306] Further, under s. 251.01(2)(a) of the *CLC*, a complaint must be submitted within six months of when the wages were owed. For this reason alone, most of the members would not be able to avail themselves of the *CLC* process.

[307] Even with the power of the Head to extend this limitation period under s. 251.01(3), the recovery under the *CLC* is limited to 24 months, without any consideration for discoverability: *CLC* at s. 251.1(1.1)(a). The Plaintiff in this case has pleaded that the compensation plans were set out such that claims were not discoverable by class members.

[308] Such restrictive limitation periods as what is contained in the *CLC*, without the "leniency" of discoverability exclude some members of the class from having access to justice. This consideration has been held to weigh in favour of a class proceeding: *Navartnarajah* at para. 26.[43]

[309] Finally, the claims in this proceeding are grounded in breach of contract, which is outside of the jurisdiction of the *CLC*. In *Fulawka ONCA,* the Court noted

[43] Though *Navartnarajah* was in the context of the *ESA*, the consideration is relevant to the *CLC*.

that a class action is also a preferable procedure because the administrative actors under the *CLC* do not have jurisdiction over certain claims such as breach of contract and breach of duty of good faith:

> [166] The appellant's arguments for preferring Part III proceedings over a class proceeding once again fundamentally misstate the nature of the claims asserted on behalf of the class members. These claims are framed in breach of contract, breach of a duty of good faith, negligence and unjust enrichment -- causes of action over which the administrative actors under the *Code* have no jurisdiction: see Lax J.'s decision in *Fresco*, at para. 98. Inspectors and referees appointed under the *Code* have no jurisdiction to investigate a claim that an employer's company-wide overtime policy breaches the terms of its employees' employment contracts. Nor do they have jurisdiction to determine if an employer has been unjustly enriched by a failure to comply with its duties to pay overtime on a company-wide [page 392] basis. Moreover, the pleadings seek declaratory and injunctive forms of relief and punitive damages that inspectors and referees lack jurisdiction to grant."

[310] In the case at bar, the Plaintiff's claim is for breach of contract and breach of the duty of good faith, and includes declaratory relief, which a *CLC* adjudicator cannot order.[44]

[311] In Mr. Haynes' case, the *CLC* Inspector did not examine whether a breach of contract had actually occurred, yet he relied on the contractual assertions made by BMO to dismiss the claim. The *CLC* Inspector told Mr. Haynes that:

> For the 4% on your commissions, I cannot claim it because it clearly specified in your work contract and it is not against the Labour Code dispositions."[45]

[312] I agree with Plaintiff's counsel that the *CLC* door that the Defendant says the plaintiffs can walk through, "leads to a brick wall".

[313] Further, many of the class members would have quite small claims, which would limit the feasibility of hiring legal counsel, thereby impacting access to justice.

[314] Commencing individual actions before the courts is also fraught with problems impacting access to justice, judicial economy, and behaviour modification. Knowledge of a claim is the first step to access to justice. The issue of

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[44] Amended Claim at para. 38, b–e; *CLC* at ss. 249(2), 251(1), 251.06(1), 251.1(1), 251.12(1)
[45] Affidavit of S. Haynes at para. 16; Ex. G.

discoverability which has been raised in this case, means that many class members may not know that they may have a claim against BMO for statutory holiday pay and vacation pay. The class proceeding, if permitted, would provide them with notice that is not possible through the individual litigation process, even where joinder is sought. Further, even if they did find that claims had been commenced by individual employees, the putative class members would not benefit from the tolling of their limitation periods.

[315] Individual claimants may also have difficulty attracting legal counsel, particularly given the complexity of the legal arguments which deal with the *CLC* and interpretation of contractual terms. It is unlikely that lawyers who are not class counsel would be willing to take on individual claims on a contingency fee basis, where there is a real risk that they may recover nothing. There is some evidence that the cost of legal services for employment and labour litigation, up to mediation or trial, ranged between $7,500 to $10,000 in Western Canada in 2019.[46] In BC the average cost of a civil action, not including trial, ranged from $15,000 to $20,000.[47] Even if the litigant succeeds, it is unlikely that they would recover their full legal fees, based on the applicable tariffs under the *Rules*.

[316] The high cost of legal fees for individual actions creates wide ranging access to justice issues. Many putative class members may be dissuaded from proceeding with claims without legal counsel. For those that do proceed without counsel, having legal representation may mean the difference between success or failure. Indeed, in *Lavin* and *Zeelie v. Bank of Montreal,* 2013 CarswellNat 1888 – cases commenced against the same defendant – workers were self-represented and unsuccessful before the administrative board.

[46] Marg Bruineman, “Steady Optimism: Lawyers surveyed in Canadian Lawyer’s 2019 Legal Fees Survey say fee reductions are unlikely”, online: Canadian Lawyer Magazine <https://www.canadianlawyermag.com/staticcontent/AttachedDocs/CL_Apr_19-survey.pdf> (April 2019) at 24 [Bruineman].
[47] Bruineman at 23.

[317] In *Dominguez* at para. 241, Justice Fitzpatrick summarized the following advantages of a class proceeding over an individual proceeding, which are all relevant to this case:

> (a) Whatever limitation period is found to be applicable to the claim is tolled for the entire class (s. 39);
>
> (b) A formal notice program is created which will alert all interested persons to the status of the litigation (s. 19);
>
> (c) The class is able to attract counsel through the aggregation of potential damages and the availability of contingency fee arrangements (s. 38);
>
> (d) A class proceeding prevents the defendant from creating procedural obstacles and hurdles that individual litigants may not have the resources to clear;
>
> (e) Class members are given the ability to apply to participate in the litigation if desired (s. 15);
>
> (f) [omitted in the original]
>
> (g) The action is case managed by a single judge (s. 14);
>
> (h) The court is given a number of powers designed to protect the interests of absent class members (s. 12);
>
> (i) Class members are protected from any adverse cost award in relation to the common issues stage of the proceeding (s. 37);
>
> (j) In terms of the resolution of any remaining individual issues, a class proceeding directs and allows the court to create simplified structures and procedures (s. 27);
>
> (k) Through the operation of statute, any order or settlement will accrue to the benefit of the entire class, without the necessity of resorting to principles of estoppel (ss. 26 & 35).

[318] This case also meets the preferability analysis when it comes to the issue of behaviour modification. In *Curtis DC* at para. 53, the Court noted that class proceedings are preferable for employment related issues, as they promote behaviour modification and access to justice. See also *Holllick* at para. 15.

E. Is there an Adequate Representative Plaintiff?

[319] Section 4(1)(e) requires that there is a representative plaintiff who:

> (i) would fairly and adequately represent the interests of the class,

> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[320] The proposed representative plaintiff need not be "typical" of the class but must be "adequate" in the sense that they are willing to vigorously prosecute the claim: *Dutton* at para. 41.

[321] I am satisfied that Mr. Cheetham is an adequate representative plaintiff. He understands the claim; shares common interests with the other class members; has an ongoing interest in the claim; his interest on the common issues is not in conflict with the interests of the other class members; and he has engaged competent counsel who are experienced in employment matters and in class proceedings concerning employment standards violations. On the latter point, I am advised that the Plaintiff's counsel's law firm currently has more than ten issued employment class actions in various stages against major employers, including Deloitte, RBC Life Insurance, Allstate, and Desjardins.[48] Further, Mr. Monkhouse, lead counsel for the Plaintiff, is licenced in both Ontario and BC and provides employment law advice in both those jurisdictions.

[322] The Defendant does not raise concerns with Mr. Cheetham being an adequate representative plaintiff. However, the Defendant does raise concerns about the litigation plan. The Defendant argues that the litigation plan does not provide a workable method for advancing the proceeding on behalf of the class, as it ignores the complexities in resolving individual issues after a common issues trial.

[323] Defendant's counsel relies on the following passage from *Caputo v. Imperial Tobacco Ltd.,* [2004] O.J. No. 299, 2004 CanLII 24753, quoted by Justice Branch in *Krishnan BCSC* at para. 237:

> [75] The *Act* mandates that the representative plaintiff produce a "plan" that sets out a "workable method of advancing the proceeding on behalf of the class…". McLachlin C.J. held in *Hollick* that the preferability analysis must be

[48] Plaintiff's Written Submissions at para. 279.

> conducted through a consideration of the common issues in the context of the claims as a whole. (para. 30) In this context, the litigation plan is often an integral part of the preferability analysis. Frequently, in more complex cases, it is only when the court has a proper litigation plan before it that it is in a position to fully appreciate the implications of "preferability" as it pertains to manageability, efficiency and fairness.

[324] I agree with the Defendant's counsel that the litigation plan needs to flesh out in further detail the various issues that will need to be addressed after the conclusion of the common issues trial. This is particularly the case with respect to the various defences that are raised, to allow for a full and fair hearing on the merits. However, there is no reason that the litigation plan cannot be modified at a later stage of the proceedings. Mr. Cheetham has indicated a willingness to make any amendments to the litigation plan, as ordered by the Court. Indeed, this process was endorsed by the Court in *Fakhri et al. v. Alfalfa's Canada Inc. cba Capers*, 2003 BCSC 1717 at para. 77, aff'd in *Fakhri v. Wild Oats Markets Canada, Inc.,* 2004 BCCA 549 at para. 26.

[325] In my view, the litigation plan is sufficient at this stage of the proceeding, and meets the requirements of s. 4(1)(e)(ii) of the *CPA*. Specifically, I am satisfied that there is a litigation plan that sets out a workable method of advancing the proceeding on behalf of the class. Mr. Cheetham's litigation plan includes provisions for pre-certification, notice of certification and opt-outs, a discovery process, and individual issues determinations.

IV. Conclusion

[326] I am satisfied that Paul Cheetham is a suitable representative plaintiff for the following class:

> All non-unionized Variable Compensation Employees who worked for Bank of Montreal since January 1, 2010 to December 31, 2018, and who are federally regulated in the roles of Private Wealth Consultants and Mortgage Specialists (the "Class" or "class members").

[327] I am also satisfied that the Plaintiff's claim for breach of contract meets the criteria under s. 4(1)(a) of the *CPA*, and that a class proceeding is the preferable procedure for this action.

[328] However, before this action can be certified, a number of matters must be addressed by the Plaintiff.

[329] First, the Plaintiff will need to further amend the Amended Claim to plead reliance on the August 2017 email, to address the concerns raised at paras. 194 through 197 of these Reasons.

[330] Second, the claim for breach of the duty of good faith must be amended as per paras. 126 through 134 of these Reasons, in order to satisfy the requirement of s. 4(1)(a).

[331] Third, common issues 1 to 3 will need to be revised to meet the requirements of s. 4(1)(c) of the *CPA*. To that end:

a) the Plaintiff has leave to propose revisions to common issues 1, 2, and 3, to conform with these Reasons;

b) the Defendant may provide submissions on the revisions to common issues 1-3 which are proposed by the Plaintiff; and

c) in the event that a party is of the view that subclassing is more appropriate than bifurcation to address the concerns raised in relation to common issue 1, that party may provide submissions on the matter.

[332] The parties are to arrange for a further hearing to discuss the timing of the submissions and the next steps in this litigation that arise from these Reasons.

"Shergill J."