

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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

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PERELL, J.

REASONS FOR DECISION

A. Introduction and Overview

[1] In this certified class action under the *Class Proceedings Act, 1992*,¹ the Plaintiff, Leigh Cunningham sues RBC Dominion Securities Limited/RBC Dominion Valeurs Mobiliers Limitée and RBC Dominion Securities Inc./RBC Dominion Valeurs Mobilières Inc. (collectively “RBC Dominion Securities”).

[2] The Class Members are past and present employees of RBC Dominion Securities. Their claims are for allegedly unpaid statutory vacation and holiday pay under the *Employment Standards Act, 2000*.²

[3] On this motion, Ms. Cunningham moves to have the court settle the Notice Plan and the Notice of Certification. Ms. Cunningham has drafted a Notice Plan and a Notice of Certification that she submits satisfies the requirements of the *Class Proceedings Act, 1992*.

[4] In Ms. Cunningham’s Notice Plan, the Defendants, RBC Dominion Securities will receive information about the number of putative class members that opt out. However, RBC Dominion Securities submits that the information it receives should identify the putative class members who have opted out.

[5] In Ms. Cunningham’s Notice Plan, the deadline for the opt-out period is 60 days after the date the first notice is published. RBC Dominion Securities, however, submits that the deadline should be 60 days after the date the last notice is published.

[6] Save for these two issues about the Notice Plan, the parties have settled the Notice Plan. Their disagreements are more intense about the Notice of Certification that goes with the Notice Plan.

[7] The parties disagree about the text of the Notice of Certification. RBC Dominion Securities proposes insertions and deletions to Ms. Cunningham’s “Notice of Certification”. These revisions are unacceptable to Ms. Cunningham.

[8] With respect to the Notice of Certification, in addition to some wordsmithing professed to make the Notice clearer and more understandable, RBC Dominion Securities submits that the Notice of Certification drafted by Ms. Cunningham has two major deficiencies that would be fixed by: (a) describing Ms. Cunningham’s claim and RBC Dominion Securities’ response to the allegations in the action in more detail; and (b) advising Class Members that if they participate in the class action, they and RBC Dominion Securities may be required to provide information and documentation for the common issues trial or individual hearings about their employment, including details of their compensation and working arrangements.

[9] It thus falls on the court to settle the two issues about the Notice Plan and the intense disagreements about the text of the Notice of Certification.

[10] For the reasons that follow, I agree with RBC Dominion Securities with respect to the

¹ S.O. 1992, c. 6.

² S.O. 2000, c. 41.

Notice Plan, and I agree with Ms. Cunningham with respect to the Notice of Certification.

[11] Save for the matter of the deadline for the opt-out period, I approve the Notice of Certification substantially in the form as drafted by Ms. Cunningham. I reserve the right of Ms. Cunningham to incorporate - as she may be advised - some of the insertions and deletions proposed by RBC Dominion Securities, because some of the revisions are modest improvements to the original draftsmanship.

[12] Except for: (a) the deadline for opting out, which should be 60 days from the last notice; and (b) the draftsmanship and wordsmithing that is acceptable to Ms. Cunningham, RBC Dominion Securities' revisions to the Notice of Certification may be ignored. The proposed revisions may be ignored because most of the suggestions are, to put it bluntly, pedantic meddling in Class Counsel's business.

[13] There is no altruistic role for RBC Dominion Securities to ensure that the putative Class Members make a fully informed decision about participating in the class action. It is not RBC Dominion Securities' role to ensure that the Class Members are properly, adequately, clearly, informed about the class action and about the implications of Ms. Cunningham's action having been certified. That is the business of Class Counsel and the court. In contrast to being altruistic, RBC Dominion Securities' role is adversarial. Its role with respect to the Notice of Certification is to ensure that its own interests are not prejudiced by the Notice of Certification.

[14] In the immediate case, RBC Dominion Securities has an ongoing relationship with some – not all – of the putative Class Members who are past and present employees of RBC Dominion Securities, and, therefore, it has a rightful interest in what is being said to its current and former employees in the Notice of Certification. In this regard, RBC Dominion Securities is entitled to a non-rhetorical, fair, and accurate description of its position in the class action lawsuit; however, it is not RBC Dominion Securities' role to speak about the what, where, how, why and when of what the class members can expect to happen in the lawsuit. In the immediate case, although RBC Dominion Securities made some useful (also some nit-picking) suggestions, it did not tend to its own business.

B. Factual Background

[15] The plaintiff, Leigh Cunningham, worked as an Investment Advisor in the RBC Dominion Securities' Winnipeg office for 26 years until she retired in 2017. RBC Dominion Securities is a full-service brokerage and investment management firm headquartered in Toronto with more than 100 offices nationwide. On behalf of former and current employees, Ms. Cunningham sued RBC Dominion Securities for allegedly unpaid statutory holiday and vacation pay.

[16] Justice Belobaba certified the action. However, he died before he could settle the Certification Order. In his Reasons for Decision dated December 29, 2022,³ Justice Belobaba certified the action as a national class action excluding British Columbia and Alberta.

[17] After Justice Belobaba's death, I settled the Certification Order, as follows:

[...]

³ *Cunningham v. RBC Dominion Securities*, 2022 ONSC 5862.

1. THIS COURT ORDERS that this action is certified as a class proceeding pursuant to s. 5 of the CPA with respect to the claims and causes of action of breach of contract, negligence, breach of fiduciary duty and unjust enrichment relating to vacation and to public holiday pay as set out in the Amended Statement of Claim.

2. THIS COURT ORDERS that the Class is defined as:

All former and current employees of either Defendant who are or were employed as an Investment Advisor, wealth advisor, portfolio manager, or similar or predecessor title, whose job responsibilities include (or included) providing clients with investment advice and/or growing the Defendants' client base and include those who provide (or provided) assistance to those who provide (or provided) such advice, including Associates and Assistants, and who were employed in a Province or Territory of Canada (other than British Columbia or Alberta):

(i) in Québec from March 15, 2017 to the Notice Date;

(ii) in Nunavut, Northwest Territories, and Prince Edward Island from July 9, 2014 to the Notice Date;

(iii) in Yukon from March 27, 2014 to the Notice Date;

(iv) in Saskatchewan, Ontario, New Brunswick, and Nova Scotia from July 9, 2005 to the Notice Date; and

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

[...]

5. THIS COURT ORDERS that the following proposed common issue is certified:

1. Are the Defendants liable in contract, negligence, breach of fiduciary duty, and, or unjust enrichment to take reasonable steps to ensure that the Class members were properly compensated with vacation and public holiday pay, and to pay vacation and public holiday pay that was owing to the class members?

C. The Notice Plan

[18] Ms. Cunningham's initial draft Order for the Notice Plan included the following paragraph requiring Class Counsel to serve on the Defendants a list of the persons who opted out:

10. THIS COURT ORDERS that Class Counsel serve on the Defendants within 14 days after the close of the opt-out period referred to above, an affidavit exhibiting a list of persons who have opted out of the class proceeding, if any.

[19] After RBC Dominion Securities made reference to the opt-out affidavit in its revisions to the draft Notice of Certification, Ms. Cunningham changed the Notice Plan provision to provide as follows:

10. THIS COURT ORDERS that, within 14 days after the close of the opt-out period referred to above, Class Counsel serve on: (a) the Notice Administrator an affidavit exhibiting a list of persons who have opted out of the class proceeding, if any; and (b) the Defendants an affidavit setting out the total number of persons who have opted out of the class proceedings, if any. The Defendants may subsequently bring a motion, on notice to the Plaintiff, for disclosure to them of the identity of the persons (or any of them) who have opted out, which the Court may authorize if and to the extent that the Court finds that there is a material change in the circumstances warranting such disclosure.

D. The Notice of Certification

[20] Set out below is a track-changes version of Ms. Cunningham’s Notice of Certification. The changes are the deletions and the insertions made by RBC Dominion Securities:

NOTICE OF CERTIFICATION

THIS NOTICE MAY AFFECT YOUR LEGAL RIGHTS – PLEASE READ IT CAREFULLY

You are receiving this notice because the records of the Defendants, RBC Dominion Securities Limited and RBC Dominion Securities Inc. (“RBC DS”), indicate that you are a current or former employee of RBC DS and a Class Member (as described below) in this vacation and holiday pay Class Action lawsuit, unless you choose opt out of the Class Action.

For more information about this Class Action please see: www.vacationpayclassaction.ca or contact Class Counsel as set out below.

Summary

The lawsuit of *Cunningham v RBC DS* alleges that over a number of years RBC DS failed to properly pay vacation and public holiday pay to current or former employees who are or were compensated either fully or partially based on commissions,⁴ on trades, account fees and trailer fees (referred to in the lawsuit as “commissions”), including investment advisors, wealth advisors and portfolio managers (or similar or predecessor positions, and other positions where the employee provides investment advice to clients) as well as their associates and assistants. RBC DS is defending the Class Action and denies the Plaintiff’s allegation that vacation and holiday pay were not included in commissions received by employees.

If the Plaintiff is successful in her lawsuit, Class Members may be eligible to receive compensation from RBC DS for vacation and/or holiday pay, if any, for which they have not been compensated already.

The Plaintiff commenced the lawsuit on July 9, 2020. In 2022, the Plaintiff moved for the certification of this action as a class proceeding. In Reasons for Decision released on December 29, 2022, the Honourable Justice Belobaba certified this action as a class proceeding. RBC DS moved for leave (permission) to appeal the certification decision to the Divisional Court and, in Reasons for Decision released on October 5, 2023, that motion was dismissed confirming that this action shall proceed as a class action.

The Court has not yet determined whether this lawsuit will be successful and it will now proceed to a common issues trial. A trial date has not yet been set by the Court.

The law firms Roy O’Connor LLP, Cavalluzzo LLP and Whitten & Lublin PC have been appointed as Class Counsel by the Court to represent the Class Members.

1. What the Lawsuit is About

The Representative Plaintiff, Ms. Leigh Cunningham (a former Investment Advisor at RBC DS in Winnipeg) has sued RBC DS alleging, among other things, that it failed to pay Class Members vacation and holiday pay on “commissions” as required by statutory employment law. The lawsuit asks the Court to award monetary compensation to Class Members and other related relief including an order that would require **changes to the manner in which** vacation and holiday pay on

“commissions” are calculated, recorded and paid to Class Members (Investment Advisors, Associates and Assistants).

RBC DS’s response to the Plaintiff’s claim is that its employees received their full entitlement to vacation and holiday pay, and that many, received more than their full entitlement because (a) vacation and holiday pay is already included in payouts from fees and commissions to employees, as stated in RBC DS’ Compensation Programs, (b) its employees receive additional vacation and holiday pay by continuing to receive a share of account revenues generated and/or received while they are off work for vacations or holidays and, for those employees who also receive a salary, by continuing to receive salary payments during vacations and holidays, and (c) RBC DS vacation and holiday entitlements are more generous than the minimum requirements set out in applicable provincial employment standards statutes.

A copy of the Certification Order, the Reasons of the Court relating to Certification, the Reasons of the Court settling the Certification Order, the Order regarding notice to the Class Members, the Statement of Claim, the Statement of Defence, [the Reply] and other legal documents associated with this case can be viewed at www.vacationpayclassaction.ca. These and other Court filings in this lawsuit are available for inspection at the office of the Superior Court of Justice, at the Courthouse located at 393 University Ave., Toronto, Ontario, Court File No.: CV-20-00643720-00CP.

2. It is Your Right to Choose Whether or not to Participate in the Class Action

How to Participate in the Class Action

PLEASE NOTE: Do nothing if you wish to be a class member in this Action.

Under Ontario law, if you are a person falling within the Class definition (set out below), you will automatically be included in the Class unless you choose to opt out of the Class Action. This includes Class Members who reside anywhere in Canada, not just in Ontario (except for individuals who were or are employed by RBC DS in BC and Alberta because those employees are excluded from this proceeding, as noted in the class definition quoted immediately below).

The Court Approved Class Definition

By order of the Ontario Superior Court of Justice dated December 29, 2022, the following persons are automatically included in this Class Action lawsuit, unless they choose to opt out of the Class Action:

All former and current employees of either Defendant who are or were employed as an Investment Advisor, wealth advisor, portfolio manager, or similar or predecessor title, whose job responsibilities include (or included) providing clients with investment advice and/or growing the Defendants’ client base and include those who provide (or provided) assistance to those who provide (or provided) such advice, including Associates and Assistants, and who were employed in a Province or Territory of Canada (other than British Columbia or Alberta):

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

(v) in Manitoba and Newfoundland & Labrador from July 9, 1990 to Insert Notice Date;

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

How to **Opt Out** the Class Action

If you do now wish to participate in the Class Action, you must contact Class Counsel by email or regular mail at the address below and provide them with your full legal name and mailing address and state that you wish to opt out of the Class Action. Class Counsel will confirm in writing your decision to **exclude yourself from** (opt out of) this Class Action. The deadline for opting out of this Class Action is **INSERT DATE**. Class Counsel will serve on RBC DS an affidavit with a list of persons who have opted out of the Class Action as required by the Order of the Court.

If you decide to opt out of this Class Action, you will be excluded from any settlement that may be entered into or any award of compensation that may be made by the Court. Once you opt out of this Class Action, you will receive no further communications regarding this Class Action.

All Class Members who do not opt out of the Class Action will be bound by any final judgment of the Court (whether or not the Class Action is successful) or any settlement approved by the Court.

3. What are the Financial and Other Consequences of the Lawsuit?

There is no cost to you as a Class Member in this lawsuit.

If you participate in the Class Action, you and RBC DS may be required to provide information and documentation to the Plaintiff's lawyers about your employment at RBC DS, including details of your compensation and working arrangements, the amount of compensation paid to you, and the breakdown of that compensation. That information may be included in evidence filed with the court in the common issues trial. You and other Class Members may be called to give evidence at trial about your employment and compensation.

If the lawsuit is successful at the common issues trial, or any subsequent appeal, *the Court may establish a process*, including individual hearings, in order to determine the amount of compensation, if any, each individual Class Member may be entitled to receive. If individual hearings are necessary, the hearing may require you and RBC DS to exchange relevant documents and information regarding your compensation, your team's business composition (such as fees versus commissions), the compensation of other team members, and the vacations and holidays that you took. You and other witnesses may be required to testify at the hearing regarding your claim for vacation and holiday pay. Alternatively, the Court may award compensation to the Class as a whole (of which you may receive a portion)

If the Class Action is successful, legal fees and disbursements incurred by Class Counsel will be deducted from the total amount recovered on behalf of the Class. The amount of such legal fees and disbursements must be reviewed and approved by the Court.

In this case, the Plaintiff has received financial support from the Class Proceedings Fund (the "Fund"), which is a body created by statute and designed to allow access to the courts through class actions in Ontario. The Fund has agreed to reimburse the Plaintiff for some disbursements incurred in pursuing this action. The Fund will also be responsible for costs that may be awarded against the Plaintiff in this case. In exchange, the Fund will be entitled to recover from any court award or settlement in favour of the Class the total amount of the disbursements paid by the Fund as well as 10% of any amounts that may be payable to Class Members.

If the Class Action is unsuccessful, Class Members will not be awarded compensation. If the Class Action is unsuccessful, you and other Class Members will not have any financial obligations in respect of the lawsuit.

Whether or not the Class Action lawsuit is successful, all Class Members who do not opt out of the Class Action will be bound by any final judgment of the Court, including any judgment approving a settlement.

4. Class Counsel & Other Matters

The law firms of Roy O'Connor LLP, Cavalluzzo LLP and Whitten & Lublin PC have been appointed as Class Counsel by the Court. As noted above, Class Counsel will be paid legal fees only if the lawsuit is successful and only to the extent that such legal fees are approved by the Court.

If you wish to participate personally in the lawsuit, please contact Class Counsel or you may apply directly to the Court for permission to do so.

5. More Information

For further information about the class proceeding lawsuit please see:

www.vacationpayclassaction.ca or contact Class Counsel at:

INSERT CONTACT INFO

PLEASE DO NOT CALL THE DEFENDANTS (RBC DOMINION SECURITIES), THE COURTHOUSE, OR THE REGISTRAR OF THE COURT ABOUT THIS ACTION. ALL QUESTIONS ABOUT THE LAWSUIT SHOULD BE DIRECTED TO CLASS COUNSEL.

This notice is published pursuant to the section 17 of the Ontario *Class Proceedings Act, 1992* and was approved by the Ontario Superior Court of Justice.

E. Statutory Provisions

[21] For the present purposes of resolving the dispute about the Notice Plan and the Notice of Certification, the relevant provisions of the *Class Proceedings Act, 1992* are sections 8, 9, 12, 17, 20, 21, 22 and 27, and which state:

Contents of certification order

8 (1) An order certifying a proceeding as a class proceeding shall,

- (a) describe the class;
- (b) state the names of the representative parties;
- (c) state the nature of the claims or defences asserted on behalf of the class;
- (d) state the relief sought by or from the class;
- (e) set out the common issues for the class; and
- (f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out.

Subclass protection

(2) [...]

Amendment of certification order

(3) The court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding.

Opting out

9 Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

[...]

Court may determine conduct of proceeding

12 The court, on its own initiative or on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a proceeding under this Act to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[...]

Notice of certification

17 (1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section.

Court may dispense with notice

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

Order respecting notice

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

- (a) the cost of giving notice;
- (b) the nature of the relief sought;
- (c) the size of the individual claims of the class members;
- (d) the number of class members;
- (e) the places of residence of class members; and
- (f) any other relevant matter.

Means of giving notice

(4) The court may, for the purposes of subsection (3), order that notice be given by any of the following means or combination of the following means, and may order that notice be given to different class members by different means:

- 1. Personally or by mail.
- 2. By posting, advertising, publishing or leafleting.
- 3. By individual notice to a sample group within the class.

4. By any electronic means the court considers appropriate.
5. By any means that may be prescribed.
6. By any other means the court considers appropriate.

Contents of notice

- (5) Unless the court orders otherwise, notice under this section shall,
 - (a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;
 - (b) state the manner by which and time within which class members may opt out of the proceeding;
 - (c) describe the possible financial consequences of the proceeding to class members;
 - (d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;
 - (e) indicate whether there is a third-party funding agreement as defined in section 33.1 between the representative plaintiff and a funder and, if so, provide a description of the payment to which the funder is entitled under the agreement;
 - (f) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;
 - (g) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;
 - (h) describe the right of any class member to participate in the proceeding;
 - (i) provide contact information for a person or entity to whom class members may direct inquiries about the proceeding;
 - (j) include the prescribed information; and
 - (k) include any other information the court considers appropriate.

Court to consider circumstances

- (6) The court shall make such orders under subsections (3), (4) and (5) as are necessary to ensure that the notice given is the best notice that is practicable in the circumstances.

Solicitations of contributions

- (7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements.

Public Guardian and Trustee

- (8) Notice ordered to be given under this section shall be served on the Public Guardian and Trustee if there is a reasonable possibility that the Public Guardian and Trustee is authorized to act on behalf of one or more class members.

[...]

*Notices, general requirements**Plain language*

20 (1) A notice under section 17, 18 or 19 shall be written in a plain language manner.

Bilingual

(2) A notice under section 17, 18 or 19 shall be written in English and in French, unless the court orders otherwise.

Court approval

(3) A notice under section 17, 18 or 19 shall be approved by the court before it is given.

Delivery of notice

21 The court may order a party to deliver, by whatever means are available to the party, the notice required to be given by another party under section 17, 18 or 19, where that is more practical.

Costs of notice

22 (1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties.

Exception, costs of notice of certification

(1.1) Despite subsection (1), the costs of any notice under section 17 may be awarded to the representative plaintiff only in the event of success in the class proceeding, except to the extent the defendant consents to their payment in whole or in part at an earlier time, and, for greater certainty, shall not be ordered to be paid by the defendant at any earlier time in the proceeding absent the defendant's consent.

Idem

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

[...]

Judgment on common issues

27 (1) A judgment on common issues of a class or subclass shall,

- (a) set out the common issues;
- (b) name or describe the class or subclass members;
- (c) state the nature of the claims or defences asserted on behalf of the class or subclass; and
- (d) specify the relief granted.

Effect of judgment on common issues

(2) A judgment on common issues of a class or subclass does not bind,

- (a) a person who has opted out of the class proceeding; or

(b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

Idem

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

(a) are set out in the certification order;

(b) relate to claims or defences described in the certification order; and

(c) relate to relief sought by or from the class or subclass as stated in the certification order.

F. Notice of Certification: General Principles

[22] The purpose of the Notice of Certification is: (a) to inform class members that the proceedings have been certified as a class action; (b) to tell them what the action is about; and (c) to permit class members to act on such notice, by taking such steps as they should be afforded to preserve their litigation autonomy by opting out of the class action.⁵

[23] The primary purpose of providing notice of certification is to advise members of the class that the action has been certified and to give them an opportunity to opt out if so advised.⁶

[24] Pursuant to the *Class Proceedings Act, 1992*, both before and after certification, the court has the power to regulate communications with putative class members and class members and to sanction communications by class counsel, the defendant, or the defendant's lawyer that undermine the statutory mandate of the *Class Proceedings Act, 1992* and to ensure that the putative class members or class members are given appropriate information when required to make decisions in relation to their legal rights in a class proceeding.⁷

[25] Where a communication to a putative class member or a class member constitutes misinformation, a threat, intimidation, coercion, or is made for some other improper purpose aimed at undermining the process, the court may intervene.⁸

[26] In the immediate case, both parties relied heavily on what I said about Notice Plans and Notices of Certification in *Heller v. Uber Technologies Inc.*⁹ In that case, I stated at paragraphs 24

⁵ *Silver v. IMAX*, 2012 ONSC 1047; *Spina v. Shoppers Drug Mart Inc.*, 2023 ONSC 4595.

⁶ *Fehr v. Sun Life Assurance Company of Canada*, 2021 ONSC 97; *Sorenson v. easyhome Ltd.*, 2012 ONSC 6252; *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, [2003] O.J. No. 6040 (S.C.J.).

⁷ *Del Giudice v. Thompson*, 2021 ONSC 2206; *de Muelenaere v. Great Gulf Homes Ltd.*, 2015 ONSC 7442; *Vitelli v. Villa Giardino Homes Ltd.* (2001), 54 O.R. (3d) 334 (S.C.J.); *Bywater v. Toronto Transit Commission* (1999), 43 O.R. (3d) 367 (Gen. Div.).

⁸ *Del Giudice v. Thompson*, 2021 ONSC 2206; *de Muelenaere v. Great Gulf Homes Ltd.*, 2015 ONSC 7442; *250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279; *Lundy v. VIA Rail Canada Inc.*, 2012 ONSC 4152; *Bartolome v. Mr. Payday Easy Loans Inc.*, [2008] B.C.J. No. 167 (S.C.); *Smith v. National Money Mart Co.*, [2007] O.J. No. 1507 (S.C.J.); *Ward-Price v. Mariners Haven Inc.* (2004), 71 O.R. (3d) 664 (S.C.J.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Pearson v. Inco Ltd.*, [2001] O.J. No. 4877 (S.C.J.), leave to appeal ref'd [2002] O.J. No. 2134 (Div. Ct.); *Lewis v. Shell Canada Ltd.* (2000), 48 O.R. (3d) 612 (S.C.J.); *Atkinson v. Ault Foods Ltd.*, [1997] O.J. No. 4676 (Gen. Div.).

⁹ 2022 ONSC 1998.

to 46:

24. Notice of the class proceeding being certified and of the right to opt-out is the means chosen by the Legislature to permit a putative Class Member to preserve his or her litigation autonomy during the communal stages of a class action because if the class member does not opt-out, he or she will be bound by the outcome of the class proceedings under the *Class Proceedings Act, 1992*.¹⁰ The class action judgment is only binding on a Class Member if he or she is given notice of the proceeding and afforded an opportunity to exclude himself or herself from the proceeding.¹¹

25. Pursuant to s. 17(6) of the *Class Proceedings Act, 1992*, the court shall make orders about the Notice and the Notice Plan as are necessary to ensure that the notice given is the best notice that is practicable in the particular circumstances of the case. Pursuant to s. 17 (4), the court has the discretion to employ a variety of means to give notice. Pursuant to s. 17 (5), the court has the discretion to order that notice be given to different Class Members by different means. Pursuant to s. 17(2), the court has the discretion to dispense with notice, if the court considers it appropriate to do so.

26. In supervising and approving the Notice and the Notice Plan, the court exercises a discretionary jurisdiction that takes into account the particular circumstances of the case.¹²

27. The primary purpose of providing Notice of Certification is to advise the putative Class Members that the action has been certified and its impact on their rights and to give them an opportunity to opt-out if they wish to retain the right to sue the defendant individually.¹³ Meaningful and effective notice is fundamental to the workings of the class actions regime, and it is essential that the court closely monitor the notice process and ensure that Class Members are informed of the opportunity to exclude themselves or to participate in the judgment or settlement.¹⁴

28. The notice must be informative, accurate, balanced, and independent. The Notice must enable the Class Members to make informed decisions about their legal rights and enable them to decide on an informed basis whether to remain in or to opt out of the class litigation and thereby exercise their own litigation autonomy and make their own decisions about suing or not suing the defendant.¹⁵ Class members must be fully informed of the issues in the proceeding and the impact on them as individuals as the notice provisions are intended to prevent piecemeal dissemination of information critical to the decision making process and to ensure the integrity of the opt-out process.¹⁶

29. The wording of the notice must take account the particular context and the situation of the recipients to enable the members of the class to fully understand how the action affects their rights, which may include their rights in rival class proceedings in their home jurisdiction.¹⁷ Further, the content of the notice should be modulated to limit, to the greatest extent possible, undue panic,

¹⁰ *Silver v. IMAX*, 2012 ONSC 1047; *Berry v. Pulley*, 2011 ONSC 1378.

¹¹ *Silver v. IMAX*, 2012 ONSC 1047; *Currie v. MacDonald's Restaurant of Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.); *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 S.C.C. 46.

¹² *Fantl v. ivari*, 2018 ONSC 4443; *Markle v. Toronto (City)*, [2004] O.J. No. 3024 (S.C.J.).

¹³ *Fantl v. ivari*, 2018 ONSC 4443; *Canada Post Corp v. Lépine*, 2009 SCC 16; *McNaughton Automotive Ltd v. Co-Operators General Insurance Co.* (2003), 66 O.R. (3d) 112 (S.C.J.).

¹⁴ *Fantl v. ivari*, 2018 ONSC 4443; *Canada Post Corp v. Lépine*, 2009 SCC 16; *Mangan v. Inco Ltd* (1998), 38 OR (3d) 703 (Gen Div).

¹⁵ *Fantl v. ivari*, 2018 ONSC 4443; *Silver v. IMAX*, 2012 ONSC 1047; *Canada Post Corp v. Lépine*, 2009 SCC 16; *Walls v. Bayer Inc*, 2007 MBQB 131, leave to appeal ref'd 2005 MBCA 93, leave to appeal to SCC refused [2005] S.C.C.A. No. 409; *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, [2003] O.J. No. 6040 (S.C.J.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Mangan v. Inco Ltd.* (1998), 38 O.R. (3d) 703 (Gen. Div.).

¹⁶ *1176560 Ontario Ltd v. Great Atlantic & Pacific Co. of Canada Ltd* (2002), 62 O.R. (3d) 535 (S.C.J.), leave to appeal granted (2003), 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

¹⁷ *Canada Post Corp v. Lépine*, 2009 SCC 16.

alarm, or concern by class members.¹⁸ Extraneous information unrelated to how a class proceeding will affect class members' rights should be excluded.¹⁹

[...]

33. In the immediate case, the critical issue is whether the Class Members have sufficient information to make a fully informed decision about whether or not to exercise their right to opt out of the Plaintiffs' certified class action.

34. In theory, the right to opt out is an integral part of the type or representative action known as a class proceeding. After all, a putative Class Member begins as a stranger to the lawyer and client relationship and may not be interested, willing or able to commence litigation against the defendant. The putative Class Member has no retainer with Class Counsel, no lawyer and client relationship, and typically, the putative Class Member is not even a necessary party to the plaintiff's cause of action since the plaintiff could have sued the defendant without running the gauntlet of the test for certification of a representative action.

35. Despite not even knowing the plaintiff, in most class actions, the putative Class Member is quite happy to have the plaintiff be his or her champion in the battle for access to justice. This situation is particularly the case where the putative Class Members' claim is small or insufficiently large to justify the expense of hiring a lawyer and the exposure to costs if the litigation was unsuccessful.

36. In most certified class actions, there will be little or no reason for a Class Member to opt out. Even if they do not wish to sue the defendant, there is no reason to opt out because they will have to opt in to the distribution of any settlement or judgment and they can decide not to make a claim. The anecdotal evidence is that opt-outs are very rare and of these rarities many of the opt-outs are inadvertent.

37. Thus, a Class Member is very rarely harmed if they did not receive Notice of their right to opt-out. A Class Member becomes more interested in having notice of a settlement or of a judgment in order to opt-in to that settlement. Thus, at the certification stage, truth be told, Class Counsel have little incentive to seek a robust notice plan and they are simply fulfilling their duties as prescribed by the *Class Proceedings Act, 1992*. Class Counsel obviously do not wish there to be many, if any, opt-outs. Typically, however, there are very few opt-outs.

38. However, there are cases where the right to opt out is not a mere formality for the thesis of class actions. There are cases where the putative Class Member may genuinely not wish to be represented by the Representative Plaintiff and there are cases where the Class Member may genuinely not wish to be a participant in the class action.

39. Generally speaking, a genuine interest in opting out arises either because: (a) the putative Class Member wishes to preserve his or her litigation autonomy and hire a lawyer of his or her own to sue the defendant; or (b) the putative Class Member may not wish to sue the defendant at all.

40. In these situations where there is a genuine desire to opt out, the putative Class Member needs to know that he or she will be bound by the determination of the class action, be it settlement or a judgment, unless he or she opts out.

41. More precisely, the putative Class Member needs to know that pursuant to s. 27(2) of the *Class Proceedings Act, 1992*, a judgment on the common issues does not bind a person who has opted out of the class proceedings. The Class Member needs to know that pursuant to s. 27(3), a judgment on common issues binds every class member who has not opted out to the extent that the judgment determines common issues that (a) are set out in the certification order; (b) relate to claims or

¹⁸ *Hoy v. Medtronic Inc.*, 2002 BCSC 96; *Hoy v. Medtronic Inc.*, 2002 BCSC 1551.

¹⁹ *Arsalani v. Islamic Republic of Iran*, 2021 ONSC 1334; *Fehr v Sun Life Assurance Company of Canada*, 2021 ONSC 97; *Silver v. IMAX*, 2012 ONSC 1047.

defences described in the certification order; and (c) relate to relief sought by or from the class or subclass as stated in the certification order.

42. It is because of the provisions of s. 27 of the *Class Proceedings Act, 1992* that s. 17 (5) of the Act, which is about the content of the Notice of Certification, prescribes that “unless the court orders otherwise, notice under this section shall, . . . state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding.”

43. The case at bar is a case in which the Class Members may wish to exercise their right to opt out, particularly because they may not wish to sue the defendant at all and they may not wish to be bound by a judgment or settlement reached by the Plaintiffs. Some Class Members may wish their individual status to continue. As I explained at paragraphs 1-10 and 192-195 of my certification decision, there may be Class Members that do not wish to be bound by the resolution of the common issues. These Class Members for subjective or financial reasons may not wish to be bound by a court order that made a finding that they are or may be employees of Uber.

44. The case at bar is thus one of the relatively rare cases where on a class-wide basis, there may be more than a few class members who advertently wish to exercise their right to opt out. The case at bar, thus does call for a robust and effective Notice Plan and a Notice that clearly elucidates the information needed to make an informed decision about whether or not to exercise the right to opt out. I agree with Uber that a province-wide distribution of the Notice sensitive to language and diversity is called for in the circumstances of the immediate case.

45. Perhaps, ironically, it is typically of more interest to the defendant than it is to Class Counsel to have a robust Notice Plan. For example, in class actions with a national scope, the defendant will wish the notice to be adequate to ensure that it is binding in other jurisdictions in accordance with the conflicts of laws rules associated with the enforcement of foreign judgments.²⁰

46. A defendant is particularly interested in a robust notice plan in a case like the one at bar, where it is possible that more than a few putative Class Members will opt out. That said, given the hundreds of thousands of putative Class Members in the immediate case, it is highly unlikely that the number of opt-outs in the immediate case will make the class action economically unviable for Class Counsel.

[27] In the immediate case, there is no reason to backpedal or to qualify what I said in *Heller v. Uber Technologies Inc.* As noted above, both parties rely on the legal principles set out in that case. The parties, however, differ as to how those principles apply.

G. Analysis and Discussion

1. The Notice Plan

[28] As noted above, the parties are mainly in agreement about the notice plan. The only disagreements are about: (a) the deadline for the opt-out period; and (b) the disclosure of the identifies of the persons who decide to opt out.

[29] Ms. Cunningham’s position about the deadline is that it should be 60 days after the first notice is published. RBC Dominion Securities’ position is that the deadline should be 60 days after the last notice is published.

[30] There would be no difference between the parties about the deadline if all of the notices

²⁰ *Silver v. IMAX*, 2012 ONSC 1047; *Canada Post Corp. v. Lépine*, 2009 SCC 16; *Currie v. MacDonald’s Restaurant of Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.).

are released at the same time. However, if for some reason that did not occur, then RBC Dominion Securities' position is the correct one, because the later deadline ensures that all putative class members have at least 60 days to make a decision about whether or not to opt out.

[31] Turning then to the matter of the affidavit listing the persons who opt out of the action, Ms. Cunningham originally used the language of the Ontario Superior Court's model order for a contested certification. However, as noted above, Class Counsel changed the text to stipulate that instead of identifying the persons who opted-out, the affidavit would only indicate the number of opt-outs.

[32] The change was an inappropriate overreaction to RBC Dominion Securities' reference to the affidavit in its draft of the Notice of Certification. The test of the model order is consistent with the purposes of the *Class Proceedings Act, 1992* as interpreted by the Court. In *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*,²¹ the Court of Appeal stated at paragraphs 22-23, and 28:

[22] The opt-out list is, in essence, statutorily created information. The list is information that is created as a result of the terms of the order upon which the court certifies the class action. As s. 9 of the CPA mandates, any member of the class may opt-out, and the terms and conditions of the opt-out process must be set out in the certification order. It is that process that creates the opt-out information. Consequently, the opt-out information is not the private information of any party. And it is information that all parties are entitled to have.

[23] As the parties here acknowledged, the certification order could have directed that the opt-out forms be sent to the appellants as easily as to the respondents. Indeed, opt-out forms might, in some cases, be directed to a third party: [...] Regardless, both sides of the action would be entitled to the information, as would the court itself. [...]

[...]

[28] [...] All that the opt-out information does is permit someone to reduce the publicly known 850+ potential class members to the actual class members. Both the public and the appellants are entitled to know the identities of the class members who are advancing the claims unless a confidentiality order is made pursuant to s. 12 of the CPA.

[33] Although for reasons expressed below, there is no need to mention the opt-out affidavit in the Notice of Certification, RBC Dominion Securities is correct that the Notice Plan should provide for the normal opt-out affidavit and not just information about the number of persons that opted out.

[34] The opt-out list informs the defendant about who are not class members. This is important information for both parties for several reasons. If it is a long list, the defendant might move to have the action decertified. If the number of opt-outs was substantial, Class Counsel might have to rethink the economic viability of proceeding with the class action and then seek permission to discontinue the proposed class action. In any event, the defendant needs to know who has opted out because the putative Class Members that opt out will not be bound by the common issues judgment. Persons who opt out will not be bound by any settlement agreement that is approved by the court. The decision not to opt out means that the class member is bound by the judgment or by the release approved by the court.

²¹ 2019 ONCA 344.

[35] In theory, the opt-out list also informs the public about who are the litigants. As noted in *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, *supra*, the courts operate under the open court's principle and litigants must disclose their identity except when the court grants a sealing order, which is rarely given. However, practically speaking, in class actions, it will rarely be the case that the public will know more than the class definition. The opt-out list identifies the non-litigants, i.e., the persons who have opted-out from the class definition. In reality, the open court principle has little to do with the opt-out list.

[36] In the immediate case, as in most employment law class actions, the defendant employer will have its own records, and the defendant will be able to identify the actual litigants of contractors, or former and current employees. By process of elimination from the opt-out list, the defendant can determine who has not opted out.

[37] In the immediate case, recognizing RBC Dominion Securities' capability to identify the class members, Ms. Cunningham submits that RBC Dominion Securities will misuse the list (a) to identify who has opted out and favour those employees; and (b) to identify who has not opted out and retaliate against those current employees.

[38] Of course, if RBC Dominion Securities were to retaliate against current employees, then the employee can complain that RBC Dominion Securities has breached section 72 of the *Employment Standards Act, 2000*, which states:

Reprisal prohibited

74 (1) No employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so,

- (a) because the employee,
 - (i) asks the employer to comply with this Act and the regulations,
 - (ii) makes inquiries about his or her rights under this Act,
 - (iii) files a complaint with the Ministry under this Act,
 - (iv) exercises or attempts to exercise a right under this Act,
 - (v) gives information to an employment standards officer,

[...]

Onus of proof

(2) Subject to subsection 122 (4), in any proceeding under this Act, the burden of proof that an employer did not contravene a provision set out in this section lies upon the employer.

[39] And if RBC Dominion Securities were to breach s. 74 (1) of the Act, which puts the onus on it to prove that it did not breach the Act, then it would be exposed to the penalty provisions of sections 132 and 133 of the Act, which state:

General offence

132 A person who contravenes this Act or the regulations or fails to comply with an order, direction or other requirement under this Act or the regulations is guilty of an offence and on conviction is liable,

- (a) if the person is an individual, to a fine of not more than \$50,000 or to imprisonment for a term of not more than 12 months or to both;
- (b) subject to clause (c), if the person is a corporation, to a fine of not more than \$100,000; and
- (c) if the person is a corporation that has previously been convicted of an offence under this Act or a predecessor to it,
 - (i) if the person has one previous conviction, to a fine of not more than \$250,000, and
 - (ii) if the person has more than one previous conviction, to a fine of not more than \$500,000.

Additional orders

133 (1) If an employer is convicted under section 132 of contravening section 74 [...], the court shall, in addition to any fine or term of imprisonment that is imposed, order that the employer, [...], take specific action or refrain from taking specific action to remedy the contravention.

Same

(2) Without restricting the generality of subsection (1), the order made by the court may require one or more of the following:

1. A person be paid any wages that are owing to him or her.
2. In the case of a conviction under section 132 of contravening section 74 [...], a person be reinstated.
3. A person be compensated for any loss incurred by him or her as a result of the contravention.

[...]

[40] Given that I shall not be approving RBC Dominion Securities' draft of the Notice of Certification, which mentions the opt-out affidavit and given the above provisions of the *Employment Standards Act, 2000*, which prohibit retaliatory action and provide remedies, and given that the court also has authority under the *Class Proceedings Act, 1992*, to manage the class proceedings and to enjoin the defendant from retaliatory actions that interfere with the prosecution of the class action, there was no reason for Ms. Cunningham to depart from the normal practice about the affidavit of opt-outs.

2. The Notice of Certification

[41] In the immediate case, as drafted by Class Counsel, the Notice of Certification satisfies the technical requirements of the notice provisions of the *Class Proceedings Act, 1992*, and it provides putative class members with sufficient information so that he or she can make an informed decision about whether to opt out.

[42] The notice drafted by Class Counsel is similar to notices used in comparable class actions about enforcing the *Employment Standards Act, 2000*. The immediate case is not remotely a case like *Heller v. Uber Technologies Inc.*, where there was a question about the worker status of the class members and a very detailed notice about the consequences of opting out or not opting out was required.

[43] In the immediate case, the putative Class Members confront the normal circumstances of an opt-out decision and do not require other than the normal information provided in a Notice of Certification.

[44] Class members normally opt out because they wish to pursue their own claims or because for whatever reason, they do not wish to sue the defendant at all. Normally, a putative class member is not asked why he or she opted out, and he or she will have their own reasons for opting out, including apathy, indifference, distraction, misapprehension, or allegiance to the defendant. In the immediate case, for whatever reason the putative class members have enough information to make a decision.

[45] While RBC Dominion Securities denies being motivated to have drafted the revisions to the Notice of Certification to encourage the putative class members to opt out, the thrust of the message is that they should seriously consider opting out because of what will be demanded of a class member personally if they participate in a class action through to an individual issues trial. The revisions have the ominous undertone of a warning about the consequences of the action reaching individual issues trials.

[46] This message is all of inaccurate, unfair, and unnecessary. The fundamental message of a Notice of Certification is that, unless a class member elects to opt out, he or she will be bound by the results of any decision on the common issues. The action may never reach an individual issues trial, and if it does reach that stage of a class action, that will be the time to advise the class members about the consequences of proceeding to an individual issues trial.

[47] There is no reason for a putative class member to opt out because of fear of being a witness as RBC Dominion Securities' Notice of Certification insinuates. Class members do not have to get involved in the common issues phase of the action nor do they have to advance individual issues claims, so there is no reason to opt out on account of the circumstance that there may be individual issues trials in the immediate case.

[48] Class members will have to testify if the action proceeds to an individual issues trial, but until then RBC Dominion Securities will not know whether the Class Member means to pursue a claim and thereby identify himself or herself. In any event, the personal information of the Class Members is unlikely to become widely known even if there are individual issues determinations. I repeat that the case at bar does not call for the robust notice program that was called for in *Heller v. Uber Technologies Inc.*, and in the immediate case, the notice drafted by Class Counsel is adequate for class members to make an informed decision about whether or not to opt out.

[49] Recently, although the notice was not a Notice of Certification, in *Spina v. Shoppers Drug Mart Inc.*,²² I considered a defendant's arguments about the adequacy of information to be

²² 2023 ONSC 4595.

provided to the class members and about when class members should be informed about the result of the common issues stage of the action. At paragraphs 30-31, I stated:

30. In the immediate case, since it is only the interests of the class members that are engaged, one has to take with a grain of salt the defendants' concern that the class members will be confused by being informed about the outcome of the common issues trials, which may be overturned by the appeal and cross-appeal. Given that it is a fiduciary responsibility of class counsel to provide reports and legal advice to the class members about the litigation, one can be skeptical about the defendants' concerns about class members being confused.

31. Put bluntly, there is nothing that affects the interests of the defendants in the proposed notice, and it is not their business to interfere with reporting obligations of class counsel. Moreover, I rather doubt that the class members will be confused by the pending appeals. [...]

[50] Much the same thing may be said in the immediate case. Here, the interests of RBC Dominion Securities are adequately treated in the Notice of Certification as drafted by Class Counsel, and one has take with a heavy dose of salt RBC Dominion Securities' concern that class members will be confused about the consequences of opting out or not opting out of a class proceeding for statutory holiday and vacation pay.

[51] RBC Dominion Securities' deletions and additions to the Notice of Certification unduly describe the nature of the defences that it intends to advance in answer to Ms. Cunningham's and the Class Members' claim for statutory holiday and vacation pay.

[52] A Notice of Certification, however, is not the place to debate the merits of the claims or defences nor is it the place to intimate that Ms. Cunningham's claim will affect existing compensation arrangements. That intimation is just a threat that RBC Dominion Securities may in the future change what it says are currently favorable compensation arrangements. It remains to be determined whether the existing compensation arrangements comply with the law, and RBC Dominion Securities' comments about the merits and RBC Dominion Securities' doom and gloom sky is falling warnings about the consequences of the case are unwarranted fear mongering.

[53] Depending on the outcome of the common issues trial, RBC Dominion Securities may have its existing compensation arrangements changed to comply with the law if they do not already comply, and, in any event, RBC Dominion Securities is free to change its employment arrangements with any class of employee in the future provided that the arrangements comply with the law. The immediate case is about past practices not about what may happen in the future.

[54] RBC Dominion Securities says that there is no evidence that its language for the Notice of Certification was proposed in order to intimidate or frighten the putative Class Members and there are no allegations of any improper communications by it to its current or former employees before or after certification. This may be true, but under the *Class Proceedings Act, 1992*, drafting an improper notice is not a *mens rea* offence and the *actus reus* is manifested by the revisions proposed by RBC Dominion Securities.

[55] For these reasons, save for the revisions that Ms. Cunningham adopts, I approve the Notice of Certification as drafted by Class Counsel.

H. Conclusion

[56] An order should issue in accordance with the above reasons for decision. Given the divided success, I make no Order as to costs.

Perell, J.

Released: January 25, 2024

CITATION: Cunningham v. RBC Dominion Securities Limited, 2024 ONSC 542
COURT FILE NO.: CV-20-00643720-00CP
DATE: 20240125

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

LEIGH CUNNINGHAM

Plaintiff

- and -

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

Defendants

REASONS FOR DECISION

PERELL J.

Released: January 25, 2024