



Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**NATHALIE DEACON and GAIL OUELLETTE**

Plaintiffs

- and -

**THE BANK OF NOVA SCOTIA**

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

**TO THE DEFENDANT:**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date \_\_\_\_\_

Issued by \_\_\_\_\_  
Local registrar

Address of court office: 330 University Avenue, 8<sup>th</sup> Floor  
Toronto, ON M5G 1R7

TO: **The Bank of Nova Scotia**  
44 King Street West  
Toronto, ON M5H 1H1

**CLAIM**

1. The plaintiffs claim on their own behalf and on behalf of the other Class Members as against the defendant, the Bank of Nova Scotia (“Scotiabank”):<sup>1</sup>
  - (a) \$500 million in general damages and/or disgorgement, or such other amount as provided before trial;
  - (b) \$50 million in punitive damages;
  - (c) an order certifying this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the “CPA”);
  - (d) an order appointing the plaintiffs as representative plaintiffs on behalf of the Class pursuant to the CPA;
  - (e) an order defining the Class as set out in paragraph 9;
  - (f) a declaration that the terms of Part III of the *Canada Labour Code*, RSC 1985, c. L-2 (the “CLC”) are implied terms of the Class Members’ employment contracts;
  - (g) a declaration that all commission and variable incentive-based compensation paid to the Class is “wages” within the meaning of s. 166 of the CLC;

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<sup>1</sup> Capitalized terms not defined in paragraph 1 are defined below.

- (h) a declaration that Scotiabank breached the *CLC* by failing to pay the Class Members the minimum vacation pay and statutory holiday pay required by the *CLC*;
- (i) a declaration that the Class Members are owed vacation pay and statutory holiday pay on all commission and variable incentive-based compensation throughout the Class Period;
- (j) a declaration that Scotiabank breached its employment contracts with the Class Members by failing to pay them the minimum vacation pay and statutory holiday pay prescribed by the *CLC*;
- (k) a declaration that Scotiabank was negligent and breached its duty of care to the Class Members by failing to take reasonable steps to ensure that it paid the Class Members the minimum vacation pay and statutory holiday pay required by the *CLC*;
- (l) a declaration that Scotiabank is in breach of trust to the Class Members by failing to remit funds for vacation pay and statutory holiday pay to Class Members when those funds were impressed with a trust for the benefit of the Class Members;
- (m) a declaration that Scotiabank was unjustly enriched by its failure to pay the Class Members their minimum vacation pay and statutory holiday pay, and an order requiring Scotiabank to pay restitution to Class Members for the amounts it failed to remit;

- (n) a declaration that Scotiabank breached its contracts with Class Members by improperly excluding vacation pay and statutory holiday pay in calculating their pension entitlements;
- (o) costs of providing notice to the Class Members in respect of this action;
- (p) an order, if necessary, directing the process for determination of individual damages;
- (q) costs of distributing the proceeds of any judgment and/or order to the Class Members;
- (r) pre-judgment and post-judgment interest at the internal rate of return Scotiabank received, compounded monthly, or, in the alternative, the rate of return Class Members would have achieved on a reasonably prudent investment, compounded monthly, or, in the further alternative, at the rate provided under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “CJA”), compounded monthly;
- (s) costs of this action; and
- (t) such further and other relief as this Court considers just.

**A. The Plaintiffs**

2. The plaintiffs in this action are current or former employees of the defendant, Scotiabank.

3. The plaintiff, Nathalie Deacon (“Deacon”), has been employed Scotiabank for 19 years, since 2004. She is a resident of Calgary, Alberta.
4. The plaintiff, Gail Ouellette (“Ouellette”), was a Scotiabank employee for 32 years, between 1986 and 2018. She retired in 2018. Ouellette is a resident of Ottawa, Ontario.
5. Each of the plaintiffs and the other Class Members is or was a Home Financing Advisor (“HFA”) at Scotiabank during the Class Period (defined below). Until approximately 2012, Scotiabank referred to HFAs as Mortgage Development Managers.
6. As HFAs, the plaintiffs and the other Class Members sell or sold mortgage and insurance products to Scotiabank clients.
7. Scotiabank pays HFAs exclusively variable compensation—commissions on mortgage sales and other variable, incentive-based compensation such as bonuses—rather than by annual salary.

**B. The Defendant**

8. The defendant, Scotiabank, is a federally-regulated chartered bank offering financial services to the public, including mortgage and insurance products.

**C. The Class**

9. The plaintiffs bring this action pursuant to the *CPA* on behalf of the following class (the “Class” and “Class Members”):

All individuals employed by Scotiabank as HFAs<sup>2</sup> at any time between November 1, 2009 and the date of certification (the “Class Period”). For greater certainty, the Class does not include the proposed class in the action styled as *Justin Ngan v. The Bank of Nova Scotia*, Court File No. CV-22-00691702-00CP in the Ontario Superior Court of Justice in Toronto.

**D. CLC entitlements to vacation pay and statutory holiday pay**

10. The purpose of vacation pay and statutory holiday pay is to allow employees to take time off without loss of pay.
11. The CLC requires federally-regulated employers to provide vacation and statutory holiday pay.
12. The purpose of the statutory regime is to benefit employees, not employers.

**1. Annual vacation with pay**

13. The CLC requires federally-regulated employers, including Scotiabank, to provide their employees with annual vacation with pay. The duration of the employee’s annual vacation with pay depends on the length of the employee’s tenure:

**Annual vacation with pay**

**184** Except as otherwise provided by or under this Division, in respect of every year of employment by an employer, every employee is entitled to and shall be granted a vacation with vacation pay of

- (a) at least two weeks if they have completed at least one year of employment;
- (b) at least three weeks if they have completed at least five consecutive years of employment with the same employer; and

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<sup>2</sup> Including any previous titles for substantially the same role, including, without limitation, Mortgage Development Managers.

(c) at least four weeks if they have completed at least 10 consecutive years of employment with the same employer.

14. Typically, salaried employees take time off from work without their employer interrupting their regular pay. This satisfies those employees' annual entitlement to vacation with pay under section 184 of the *CLC*.
15. In contrast, employees who are paid on commission or variable, incentive-based compensation generally experience an interruption to and corresponding decrease in their income due to time off work. Accordingly, they must receive their *CLC* annual vacation with pay benefit in the form of vacation pay, coupled with unpaid time off work.
16. Like vacation time, the *CLC* vacation pay entitlement is calculated based on the length of an employee's tenure:

#### **Calculation of vacation 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.

17. Employers are required to pay vacation pay on an ongoing basis, and any vacation pay owing at the time of termination in respect of any prior completed year of employment must be paid within 30 days:



### **Termination of employment during year**

**188** When an employee ceases to be employed, the employer shall pay to the employee within 30 days after the day on which the employee ceases to be employed

(a) any vacation pay then owing by the employer to the employee under this Division in respect of any prior completed year of employment; and

(b) the applicable percentage, under section 184.01, of the wages of the employee during any part of the completed portion of their year of employment in respect of which vacation pay has not been paid to them.

### **2. Holiday pay**

18. The CLC also provides employees with paid “general holidays” (known more commonly as statutory holidays):

### **Entitlement to holidays**

**192** Except as otherwise provided by this Division, every employee is entitled to and shall be granted a holiday with pay on each of the general holidays falling within any period of his employment.

19. The CLC provides a calculation for general holiday pay, including for commission-based employees like the plaintiffs and the other Class Members:

### **Holiday pay**

**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.

**3. *Vacation pay and holiday pay are “wages”***

20. Both vacation pay (s. 186) and statutory holiday pay (s. 200) are “for all purposes deemed to be wages” under the *CLC*.
21. Pursuant to s. 166 of the *CLC*, “wages includes every form of remuneration for work performed but does not include tips and other gratuities.”
22. Commission and variable, incentive-based compensation paid by Scotiabank to HFAs are “wages” under the *CLC*.

**E. *Scotiabank eliminated vacation pay and statutory holiday pay for HFAs***

23. Before November 1, 2009, Scotiabank paid HFAs their commissions and/or other incentive-based compensation plus vacation pay and statutory holiday pay, consistent with the requirements of the *CLC*.
24. On or about November 1, 2009, Scotiabank changed the way that it compensates its HFAs, including the plaintiffs and the other Class Members. In doing so, it changed its approach to vacation pay and statutory holiday pay.
25. Since the change in approach, Scotiabank has failed to meet the requirements of the *CLC*.
26. Since November 1, 2009, Scotiabank stopped paying vacation pay and statutory holiday pay in addition to the HFAs’ variable, incentive-based compensation. Instead, Scotiabank has purported to include vacation pay and statutory holiday

pay in the commissions and/or incentive-based compensation that it pays to HFAs, rather than paying those statutory entitlements in addition to their other compensation.

27. Scotiabank failed to inform the plaintiffs and the other Class Members adequately about its change in approach to vacation pay and statutory holiday pay.
28. In making this change and throughout the Class Period, Scotiabank did not provide an equivalent or greater benefit than vacation pay and statutory holiday pay to the plaintiffs and the other Class Members.
29. Scotiabank's approach to vacation pay and statutory holiday pay for its HFAs since November 1, 2009 is contrary to both the *CLC* and Scotiabank's own Compensation Policy (as defined below).

***F. Scotiabank's Compensation Policy since fiscal 2010***

30. Beginning in fiscal year 2010 (i.e., November 1, 2009), Scotiabank provided annual compensation guides and accompanying compensation plans for HFAs (together, and as amended, the "Compensation Policy").
31. The Compensation Policy does not disclose that HFAs are no longer receiving vacation pay and statutory holiday pay in addition to their other compensation.
32. In any event, the Compensation Policy is internally inconsistent regarding vacation pay and statutory holiday pay.

33. Among other things, the Compensation Policy section on vacation pay and statutory holiday pay directs HFAs to a chart appended to the Compensation Policy (the “Payout Grid”). The Payout Grid looks like this:

**Appendix D – HFA Vacation and Statutory Holiday Payout Grid**

For illustrative purposes, amounts are rounded to 2 decimal places. Actual calculations will use 11.11%.

Base Commission or Bonus (bps)	Vacation Pay	Statutory Holiday Pay	Total Commission or Bonus Paid (bps)
1.0	0.067	0.044	1.11
2.0	0.134	0.088	2.22
2.5	0.168	0.110	2.78
3.0	0.201	0.132	3.33
3.8	0.255	0.167	4.22
4.0	0.268	0.176	4.44
4.1	0.275	0.180	4.56
4.2	0.281	0.185	4.67
5.0	0.335	0.220	5.56

[...]

The Bank reserves the right to amend Appendix D at any time and in such manner and to such extent, as it deems advisable.

34. The Payout Grid implies to HFAs that vacation pay and statutory holiday pay is paid in addition to commissions or bonuses. For example, the Payout Grid states that on a base commission or bonus of 1.0 basis points (known as “bps,” which is 1/100<sup>th</sup> of 1%), the total commission or bonus paid to the HFA is 1.11 bps, including 0.067 bps for vacation pay and 0.044 of statutory holiday pay.
35. This is not what Scotiabank has paid its HFAs throughout the Class Period.
36. As described above, and contrary to the Payout Grid, throughout the Class Period, Scotiabank did not pay HFAs a base commission plus additional bps for vacation pay and statutory holiday pay. Rather, Scotiabank paid only a base commission. For illustrative purposes, in the table above at paragraph 33, the HFAs receive only 1.0 bps; they do not receive 1.11 bps.

37. The Compensation Policy is confusing and misleading, particularly when taken together with the commission statements and pay stubs provided to HFAs, described below.

**G. *Scotiabank's commission statements and pay stubs exacerbate the confusion***

38. Scotiabank implements the Compensation Policy in a confusing and misleading way at the time of payment to HFAs.

39. First, Scotiabank provides HFAs with a commission statement each bi-weekly pay period (the "Commission Statements"). These Commission Statements describe a "gross" compensation earned for commissions and other forms of variable incentive-based compensation, as applicable. In the Payout Grid, this gross amount is referred to as the "base commission or bonus" in the first column.

40. The Commission Statements show the gross commissions earned, minus vacation and statutory holiday pay, for a net commission amount payable.

41. Second, on the HFA's paystub (which is provided separately to HFAs by a different department than the department that provides Commission Statements), Scotiabank adds back the vacation pay and statutory holiday pay that it deducted from the gross commissions on the Commission Statement.

42. The pay stub is the primary document to which HFAs refer to understand what Scotiabank is paying them. The pay stub that Scotiabank provides to its HFAs expressly states that Scotiabank is paying amounts for vacation pay and statutory holiday pay in addition to the HFAs' commissions. However, Scotiabank does not

in fact pay vacation pay and statutory holiday pay in addition to the HFAs' commissions. Rather, Scotiabank calculates the commissions and then reverse engineers amounts to be deducted for vacation pay and statutory holiday pay. Scotiabank reflects these numbers on the HFAs' pay stubs, leaving the appearance of compliance with the *CLC*.

43. This approach makes it impossible for HFAs to understand that Scotiabank is not providing vacation and statutory holiday pay. This approach is contrary to both the *CLC* and the Compensation Policy.
44. Scotiabank has provided contradictory information to HFAs, suggesting in some documents that HFAs receive statutory holiday pay in addition to their commissions, and in other documents that those payments are included in their commissions with no further amounts payable.
45. It is impossible for the HFAs to (i) be aware of their entitlements under the *CLC*, and (ii) understand whether or not Scotiabank is providing them with their entitlements.

***H. Impact of the Compensation Policy on pension value***

46. Scotiabank offers and/or has offered pension plan participation to some or all of its HFAs since at least November 1, 2009.
47. The pension is governed by the Scotiabank Pension Plan as amended and restated effective July 1, 2011 (the "Pension Plan").

48. An employee participating in the Pension Plan (a “Member”) has their retirement benefit determined by a formula, one component of which is the Member’s Highest Average Salary.
49. The Pension Plan defines a Member’s Highest Average Salary as “the average of a Member’s Salary for the 60 consecutive calendar months of his Continuous Service during which his Salary was the highest, expressed as an annual amount and computed [as described in the Pension Plan].”
50. For the plaintiffs and the other Class Members, who are classified differently than salaried employees under the Pension Plan, the Pension Plan defines their “Salary” in s.2.34(5) as “the annual rate of commission, being the sum of the Member’s eligible commission earnings received from an Employer in the three preceding complete consecutive years, divided by three.” This definition is subject to the proviso that “Salary will be determined from the employment records of the Member’s Employer, or his predecessor or successor employer if applicable, and excludes overtime, special allowances, shift and other premiums and bonuses.”
51. Scotiabank’s policy of failing to provide vacation pay and statutory holiday pay understates the Salary of the plaintiffs and the other Class Members under the Pension Plan. Instead of basing an HFA’s Salary on their commission on mortgage sales, for instance, Scotiabank based it on the lesser amount of the HFAs’ commission minus vacation pay and statutory holiday pay.
52. As described above, Scotiabank’s approach is contrary to the *CLC* and the plaintiffs’ and the other Class Members’ employment agreements. In the result,

Scotiabank consistently understates the Member's Highest Average Salary, and ultimately reduces the overall value of the plaintiffs' and the other Class Members' pension benefit at retirement.

***I. The plaintiffs' experience with Scotiabank***

53. Deacon has been an HFA since 2007.
54. Ouellette was an HFA from 1999 to 2018.
55. In the case of each of the plaintiffs, they received vacation pay and statutory holiday pay in addition to their commission and variable incentive-based compensation until November 1, 2009.
56. When Scotiabank changed its compensation plan for HFAs for fiscal 2010, the plaintiffs:
  - (a) no longer received their vacation pay and statutory holiday pay in addition to their other compensation;
  - (b) were not adequately informed of Scotiabank's change in approach to vacation pay and statutory holiday pay; and
  - (c) did not receive any equivalent or greater benefit than vacation pay and statutory holiday pay, and at no time since fiscal 2010 have the plaintiffs received an equivalent or greater benefit than vacation pay and statutory holiday pay.



57. The plaintiff Ouellette is now retired and receiving her Scotiabank pension. Ouellette's pension benefit was calculated on her Member's Highest Average Salary calculated by Scotiabank.
58. Ouellette's pension benefit was unlawfully lower than it should have been because Scotiabank deducted vacation and statutory holiday pay from her Salary. She earns a lower pension income as a result and will continue to earn a lower pension income for the duration of her participation in the Pension Plan.

**J. Scotiabank is liable to the Class**

59. Scotiabank has engaged in breach of contract, negligence, breach of trust, and/or has been unjustly enriched by failing to provide the Class Members with their statutory entitlements.
60. Accordingly, Scotiabank is liable to the Class Members for all unpaid vacation and statutory holiday pay dating back to November 1, 2009, and is liable for any corresponding loss to the pension value of the plaintiffs and the other Class Members.

**1. Breach of contract**

61. Scotiabank's employment agreements with each of the plaintiffs and the other Class Members contains an express or implied term to include the provisions of the CLC and/or that Scotiabank will comply with the CLC.

62. In failing to pay vacation pay and statutory holiday pay in accordance with the *CLC*, Scotiabank has breached its employment agreements with the plaintiffs and the other Class Members.
63. The plaintiffs and the other Class Members have suffered damages as a result of Scotiabank's breach of contract. The damages include the amount of vacation pay and statutory holiday pay Scotiabank failed to remit and the loss to the value of their pensions, where applicable.

**2. Negligence**

64. Scotiabank owes the plaintiffs and the other Class Members duties under the *CLC* to provide vacation pay and statutory holiday pay, and systemically breached those duties by failing to comply with their statutory obligations.
65. Scotiabank owes the plaintiffs and the other Class Members a duty of care to take reasonable steps to ensure that the plaintiffs and the other Class Members received all of their statutory entitlements under the *CLC*.
66. By engaging in the conduct set out above, Scotiabank failed to meet the requisite standard of care.
67. The plaintiffs and the other Class Members suffered damages as a result of Scotiabank's negligence.

**3. Breach of trust**

68. Scotiabank holds the vacation pay and statutory holiday pay it ought to have remitted to the plaintiffs and the other Class Members in trust for the benefit of the plaintiffs and the other Class Members.
69. By failing to remit those statutory entitlements to the plaintiffs and the other Class Members, Scotiabank engaged in breach of trust.
70. Scotiabank is required to disgorge any and all benefit it obtained as a result of its breach of trust. Alternatively, the plaintiffs and the other Class Members suffered losses as a result of Scotiabank's breach of trust, and the plaintiffs and the other Class Members are entitled to equitable compensation or damages.

**4. Unjust enrichment**

71. Scotiabank has been unjustly enriched by retaining vacation pay and statutory holiday pay to which the plaintiffs and the other Class Members are entitled in breach of the *CLC*, and the plaintiffs and the other Class Members suffered a corresponding deprivation. There is no juristic reason for Scotiabank's enrichment, nor is there a juristic reason for the deprivation suffered by the plaintiffs and the other Class Members.
72. The plaintiffs and the other Class Members are entitled to disgorgement or restitution of the amounts by which Scotiabank was unjustly enriched.

**5. Punitive damages**

73. Scotiabank knowingly imposed a policy in which it systemically failed to comply with its obligations under the *CLC* to provide vacation pay and statutory holiday pay to the plaintiffs and the other Class Members.
74. Such conduct flagrantly violated Scotiabank's obligations under the *CLC*, at common law, and in equity. Such egregious conduct justifies an award of punitive damages in the amount of \$50 million or such other amount as the Court considers appropriate.

**6. Time value of money**

75. Since on or about November 1, 2009, Scotiabank has had the benefit of amounts unlawfully withheld from the plaintiffs and the other Class Members and has benefitted from its unlawful retention of those funds. Scotiabank should not be permitted to retain enormous benefits at the expense of the plaintiffs and the other Class Members, who are or were its employees.
76. The plaintiffs and the other Class Members are entitled to pre-judgment interest or the time value of their award at the internal rate of return that Scotiabank received during the Class Period, compounded monthly.
77. The plaintiffs and the other Class Members were denied amounts to which they were entitled under the *CLC* since on or about November 1, 2009 and have been unable to make use of those funds.

78. Alternatively, the plaintiffs and the other Class Members are entitled to pre-judgment interest at the rate of return they would have achieved on a reasonably prudent investment, compounded monthly.
79. In the further alternative, the plaintiffs and the other Class Members are entitled to pre-judgment interest at the rate provided under the *CJA*, compounded monthly.
80. In the further alternative, the plaintiffs and the other Class Members are entitled to pre-judgment interest at the rate provided under the *CJA*.

***K. Legislation and place of trial***

81. The plaintiffs and the other Class Members plead and rely on the *CPA*, *CLC*, *CJA*, and *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2<sup>nd</sup> Supp.).
82. The plaintiffs and the other Class Members propose that this action be tried in the City of Toronto.

July 14, 2023

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**NATHALIE DEACON and GAIL OUELLETTE**  
Plaintiffs

-and- **THE BANK OF NOVA SCOTIA**  
Defendant

Court File No.

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PROCEEDING COMMENCED AT  
TORONTO

**STATEMENT OF CLAIM**

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