

ONTARIO

SUPERIOR COURT OF JUSTICE

THE HONOURABLE
JUSTICE PERELL

) WEDNESDAY, THE 26TH DAY
) OF OCTOBER, 2022

BETWEEN:

NICOLE CURTIS, AMR GALAL and KATRINA BUHLMAN

Plaintiffs

– and –

**MEDCAN HEALTH MANAGEMENT INC, ANDREW CARRAGHER, SHAUN C.
FRANCIS, EDWIN F. HAWKEN, URBAN JOSEPH, BEAU LASKEY, THOMAS P.
REEVES, OWEN ROGERS, CRAIG SHEPHERD**

Defendants

Proceeding under the Class Proceedings Act, 1992

ORDER

ON APPEAL, the Ontario Superior Court of Justice, Divisional Court, by decision dated September 19, 2022, set aside the certification order dismissing the plaintiff’s motion for certification dated June 25, 2021.

- 1 **THIS COURT ORDERS** that this action is certified as a class proceeding, pursuant to s. 5 of the *Class Proceedings Act, 1992* (the “CPA”), as against Medcan Health Management Inc. (“**Medcan**”), Andrew Carragher, Shaun C. Francis, Edwin F. Hawken, Urban Joseph, Beau Laskey, Thomas P. Reeves, Own Rogers, Craig Shepherd (the “**Class Defendants**”).
2. **THIS COURT ORDERS** that the Class is defined as:

All variable compensation employees of Medcan Health Management Inc. who worked from April 7, 2005 until the date when the notice is delivered to the class.

3. **THIS COURT ORDERS** that Nicole Curtis, Amr Galal and Katrina Buhlman are appointed as the representative plaintiffs for the Class and Monkhouse Law Employment Lawyers is hereby appointed as lawyers for the Class (“**Class Counsel**”).

4. **THIS COURT ORDERS** that the issues outlined in **Schedule “A”**, attached hereto, are certified as common issues

5. **THIS COURT ORDERS** that the Long Form Notice of Certification and Short Notice of Certification attached hereto as **Schedule “B”** are approved.

6. **THIS COURT ORDERS** that the Class Defendants shall provide Class Counsel a list of last known emails and mailing addresses of all Class Members, both currently and formerly employed by Medcan Health Management Inc., within 45 days of the date of this Order.

7. **THIS COURT ORDERS** that the methods of distribution of the Notice of Certification shall be as follows:

- a. Using the records of Medcan, Class Counsel shall send the Approved Notice by regular mail to the addresses on file with Medcan of all currently employed Class Members;
- b. Using the records of Medcan, Class Counsel shall send the Approved Notice by e-mail to the last known e-mail addresses on file with Medcan of all currently employed Class Members;
- c. Using the records of Medcan, Class Counsel shall send the Approved Notice by regular mail to the last known addresses on file with Medcan of formerly employed ClassMembers;

d. Using the records of Medcan, Class Counsel shall send the Approved Notice by e-mail to the last known e-mail addresses on file with Medcan of formerly employed Class Members;

e. Using internal communication channels of Medcan that are currently in use to communicate with currently employed Class Members, including internal e-mail lists, workplace newsletters, and workplace bulletin boards, Medcan will send and post the Approved Notice through those internal communication channels;

f. Class Counsel and Medcan will e-mail and/or mail the Approved Notice to any person who may request it;

g. Class Counsel shall post the Approved Notice on the Medcan class action webpage already created by Monkhouse Law <https://www.monkouselaw.com/Medcan-vacation-and-holiday-pay-class-action/>;

h. Medcan shall post the Approved Notice on the Defendants' website and internal intranet (<http://www.Medcan.com/>), in a conspicuous location; and

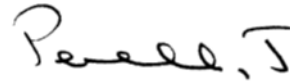
i. The Approved Short Notice will be published at the Plaintiffs' expense a total of four (4) times in both the Wednesday and Saturday editions of the Toronto Star and the national edition of the National Post commencing on a Wednesday within 21 days of the order granting certification, and again two weeks later.

8. **THIS COURT APPROVES** the litigation plan as provided in the Plaintiff's certification affidavits and enclosed as **Schedule "C"**.

9. **THIS COURT ORDERS** that the Notice of Opting Out attached hereto as **Schedule "D"** is approved.

10. **THIS COURT ORDERS** that the statement of claim is amended as per the Fresh as amended statement of claim, attached as **Schedule “E”**.

11. **THIS COURT ORDERS** that costs of certification and of the appeal are to be determined with the Plaintiff submissions within 20 days, the Defendant 20 days following.



THE HONOURABLE JUSTICE PERELL

SCHEDULE "A"

Common Issues:

1. What are the terms (express or implied or otherwise) of the Class Members' contracts of employment with the Defendants regarding:
 - a. Regular and overtime hours of work;
 - b. Recording of the hours worked by the class members;
 - c. Payment of hours worked by class members; and
 - d. Lieu time as purported compensation for overtime hours worked.
2. Whether the Defendants breached any of the contractual terms and, if so, how. Without limiting generality of the foregoing, whether the Class Members are owed damages from the Defendants for:
 - a. Vacation pay; and
 - b. Public holiday pay.
3. Whether the Defendants have a duty (in contract or otherwise) to accurately record and maintain a record of all hours worked by Class Members to ensure that Class Members were appropriately compensated for same.
 - a. If such a duty exists, whether the Defendants breached that duty.
4. Whether the Defendants have a duty (in contract or otherwise) to implement and maintain an effective and reasonable system or procedure which ensured that the duties in Common Issues 2 were satisfied for all Class Members.
 - a. If such a duty exists, whether the Defendants breached that duty.

SCHEDULE “B”***LONG NOTICE OF CERTIFICATION AS A CLASS ACTION***

*To: All former and current employees of Medcan Health Management Inc. (the
“Company”)*

**THIS NOTICE MAY AFFECT YOUR RIGHTS. PLEASE READ
CAREFULLY.****The Nature of the Action**

On April 7, 2020, Nicole Curtis and Amr Galal commenced an action in the Ontario Superior Court of Justice against the Company.

This action was brought on behalf of all variable compensation employees of Medcan Health Management Inc. who worked from April 7, 2005 until the date when the notice is delivered to the class.

The action alleges that the Company’s variable compensation employees were underpaid vacation and public holiday pay on their variable compensation. The Company disputes these claims.

By order dated October 26, 2022, The Honourable Justice Perell certified the action as a class proceeding against the Company and appointed Nicole Curtis, Amr Galal, and Katrina Buhlman as representative plaintiffs for the class.

Participation in the Class Action

In a class proceeding, the common issues are determined at a common issues trial and the individual issues are determined at individual issues trials. If you were a variable compensation employee of the Company and fall within the class definition, you will be automatically included as a member of the class unless you opt out. All members of the class will be bound by the judgment of the Court at the common issues trial, or any settlement reached by the parties and approved by the Court. Depending on the outcome of the common issues, there may be individual issues trials to determine the claims of the individual class members and the company’s defence to those individual claims.

Fees and Disbursements

You do not need to pay any legal fees out of your own pocket with respect to the common issues trial. A retainer agreement has been entered into between the representative plaintiff and Class Counsel with respect to legal fees for the common issues stage of the proceeding. The agreement provides that the law firm has been retained on a contingency fee basis, whereby it will be paid its fees only in the event of a successful result in the litigation or a Court approved settlement. The fees payable to the lawyers for the class will be paid out of any judgment and will not be paid directly by class members for the common issues trial. Any fee paid to lawyers for the class is subject to the Court’s approval.

If the action proceeds to individual issues trials, you are free to choose a lawyer of your own choice or you may choose to retain Class Counsel on a contingency fee basis whereby it will be paid its fees only in the event of a successful result in the litigation or a settlement.

Opt Out

If you wish to exclude yourself from this class proceeding (“opt out”), you must complete and return the “Opt Out” form by no later than FRIDAY FEBRUARY 24, 2023.

The Opt Out form may be downloaded at:

<https://www.monkouselaw.com/medcan-vacation-and-holiday-pay-class-action/>

If you would like to opt out, you can also e-mail, fax, or send a letter to Class Counsel that states your intention to opt-out.

If you choose to opt out within the above noted deadline you will not recover any monies in the event the representative plaintiffs are successful in this action and you will not be bound by any court decision in these proceedings.

If you do not choose to opt out by the prescribed deadline, you will be bound by any judgment ultimately obtained in these proceedings, whether favourable or not, or any settlement if approved by the court.

You may wish to obtain independent legal advice with respect to this matter.

Contact Information

If you have any questions or concerns about the matters in this Notice or the status of this Class Action, please visit:

<https://www.monkouselaw.com/medcan-vacation-and-holiday-pay-class-action/>

You may contact Class Counsel in a number of ways.

By email at the following address:

Medcan.classaction@monkouselaw.com

By mail at the following address:

220 Bay Street, Suite 900
Toronto, Ontario

M5J 2W4

Or by fax or telephone:

Phone: (416) 907-9249

Fax: (888) 501-723

Short Form Notice of Certification for Publication in News Papers- Medcan Class Action**Notice of Certification of Class Action for Allegedly Unpaid Vacation and Holiday Pay against Medcan**

By order of Justice Perell of the Superior Court dated October 26, 2022 a class action has been certified against Medcan and its directors.

This action was brought on behalf of all variable compensation employees of Medcan Health Management Inc. who worked from April 7, 2005 until **[the date of the certification order]**.

The action alleges that the Company's variable compensation employees were underpaid vacation and public holiday pay on their variable compensation. The Company disputes these claims.

If you wish to exclude yourself from the proceeding, you must complete an opt-out form no later than Friday, February 24, 2023. The opt-out form and more information about the class action is available at:

<https://www.monkouselaw.com/medcan-vacation-and-holiday-pay-class-action/>

SCHEDULE “C”

Court File No. CV-20-00639259-00CP

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

NICOLE CURTIS and AMR GALAL

Plaintiffs

– and –

MEDCAN HEALTH MANAGEMENT INC.,

ANDREW CARRAGHER,

SHAUN C. FRANCIS,

EDWIN F. HAWKEN,

URBAN JOSEPH,

BEAU LASKEY,

THOMAS P. REEVES,

OWEN ROGERS,

CRAIG SHEPHERD

Defendants

Proceeding commenced under the *Class Proceedings Act, 1992*

LITIGATION PLAN

Pursuant to section 5(1)(e)(ii) of the *Class Proceedings Act, 1992* (“CPA”), the Plaintiffs propose that this Litigation Plan be followed with respect to these proceedings, subject to the Court’s approval:

STAGE 1: PRE-CERTIFICATION INQUIRIES

1. The Plaintiffs propose the following class definition:

All variable compensation employees of Medcan Health Management Inc. who worked from April 7, 2005 until the date when the notice is delivered to the class.

Communicating with the Class

2. Monkhouse Law has experience communicating with Class Members in employment class proceedings. In combination with the required court ordered notices, class counsel has established a website page and an email address to facilitate communication with Class Members.

3. Monkhouse Law has taken the initiative of creating a website page that offers details and updates on the progress of the litigation. The website page is: <https://www.monkouselaw.com/Medcan-vacation-and-holiday-pay-class-action/>.

4. Potential Class Members can locate the website page through an internet search or through links established on Monkhouse Law's website. Through this website page, Class Members may become aware of this action and are kept apprised of the progress of the litigation. Email contacts are also available on the website to allow interested parties to contact Monkhouse Law with inquiries.

STAGE 2: NOTICE OF CERTIFICATION AND OPT OUT

5. Following certification of this action as a class proceeding, notice of certification will be delivered pursuant to section 17 of the *CPA*, in a form and manner approved by this Court.

Draft Notice

6. A draft of Notice of Certification ("Draft Notice") is attached hereto as Schedule "B" to the Certification Order and is subject to the Court's approval. Upon certification of this proceeding and Court approval of the Draft Notice, the Notice of Certification ("Approved Notice") will be disseminated.

7. The Draft Notice provides the website page address established for this class action (<https://www.monkouselaw.com/Medcan-vacation-and-holiday-pay-class-action/>), a contact email address (alexandra@monkouselaw.com), and Monkhouse Law's mailing address and phone number to allow for newly identified Class Members to make any inquiries regarding the class action.

Notice Program

8. The Plaintiffs request that the Approved Notice be disseminated at the Defendants' expense.

9. The Approved Notice will be distributed using the internal communication channels of Medcan Health Management Inc. ("Medcan"), as well as external communication tools. The Plaintiffs request that the Court order that the following specific methods of distribution of the Approved Notice be implemented within 30 days of the certification order, or by a date to be determined by the Court:

- a. Using the records of Medcan, the Approved Notice shall be sent by regular mail to the addresses on file with Medcan of all currently employed Class Members;
- b. Using the records of Medcan, the Approved Notice shall be sent by e-mail to the last known e-mail addresses on file with Medcan of all currently employed Class Members;

- c. Using the records of Medcan, the Approved Notice shall be sent by regular mail to the last known address on file with Medcan of formerly employed Class Members;
 - d. Using the records of Medcan, the Approved Notice shall be sent by e-mail to the last known e-mail address on file with Medcan of formerly employed Class Members;
 - e. Using internal communication channels of Medcan that are currently in use to communicate with currently employed Class Members, including intranet, internal e-mail lists, workplace newsletters, and workplace bulletin boards, the Approved Notice will be sent and/or posted through those internal communication channels by Medcan;
 - f. E-mail or mail the Approved Notice to any person who may request it;
 - g. Post the Approved Notice on the Medcan class action webpage already created by Monkhouse Law <https://www.monkhouselaw.com/Medcan-vacation-and-holiday-pay-class-action/>;
 - h. Medcan will post the Approved Notice on the Defendants' website (<http://www.Medcan.com/>), in a conspicuous location and disseminate it by intranet; and
 - i. A short form of the Notice to be approved by the court will be published at the Plaintiffs' expense a total of four (4) times in both the Wednesday and Saturday editions of the Toronto Star and the national edition of the National Post commencing on a Wednesday within 21 days of the order granting certification, and again two weeks later
10. In addition to responding to individual inquiries, Monkhouse Law will continue to update the Medcan class action webpage following certification. The phone numbers and e-mail address for inquiries provided on the website will continue to operate until the class action is finally resolved.

Opt-Out

11. The Plaintiffs submit that the Court should agree to set an opt-out deadline of 120 days after the date of the Certification Order.

12. The Draft Notice outlines the significance of opting out explains that those members of the class who choose to opt out within stipulated deadline will not recover any monies in this action. Further, the Draft Notice makes clear that affected persons who do not opt out will be considered Class Members and will be bound by the Court's judgment or the terms of any settlement.

13. "Opt-Out" forms (a draft of which is attached as Schedule "D" of the Certification Order), to be approved by the Court, will be made available by Monkhouse Law upon request and will be posted on the Medcan class action webpage <https://www.monkouselaw.com/Medcan-vacation-and-holiday-pay-class-action/>

14. Class Members who wish to opt out of the class action as certified must complete and return the Opt-Out form to Monkhouse Law no later than 120 days after the date of the Certification Order. The Opt-Out form can be returned by registered mail, regular mail, e-mail, or facsimile.

15. Monkhouse Law will serve an affidavit listing the opt-outs within 30 days of the opt-out deadline on request of the Defendants and will maintain accurate and up-to-date records of all Opt-Out Forms Received.

STAGE 3: PLEADINGS AND DOCUMENTARY DISCOVERY

16. If the action is certified as a class proceeding, the Court will be asked to order the Defendants to deliver their Statement of Defence no later than 60 days following the date on which the Court issues the certification order. The Plaintiffs will have 30 days following service of the Statement of Defence to serve a Reply, if any.

17. All pleadings in the action shall be served and filed within 90 days following the issuance of the certification order.

18. Within 120 days following certification, each side shall furnish on the other side all documents arguably relevant to the matter in the form of an affidavit of documents. This shall be unless otherwise agreed shall initially be provided in PDF format numbered starting with number 1 being the most recent and each document labeled having a name of “#DD-MM-YYY – Description of Document.” Either party shall have the right to request originals of electronic documents (including metadata) or to review originals of any physical document.

STAGE 4: EXAMINATION FOR DISCOVERY

19. Examinations for discovery for the common issues trial will commence after the exchange of affidavits of documents. Examinations are to be completed within 120 days of the exchange of documents.

20. Subject to refusals and undertakings, the Plaintiffs anticipate that the examinations for discovery of Defendants’ representatives will take approximately 5 to 10 days, which would occur over the course of three to four months, subject to the parties’ availability.

STAGE 5: EXCHANGE OF EXPERT OPINIONS

21. The exchange of expert reports, if necessary, shall be governed by the timetable agreed to between the parties and ordered by the Court.

STAGE 6: COMMON ISSUE TRIAL

22. The trial of the certified common issues will take place on a timeline agreed to by the parties or as ordered by the Court and shall be set after the conclusion of discoveries and all preliminary motions.

23. A full list of the witnesses the parties intend to call will be provided in accordance with a trial management timetable agreed to between the parties.

FUNDING

24. The Plaintiffs' legal fees for the common issues stage of the action are to be paid on a contingency basis based on success on the common issues, as provided for in the *CPA*, and are subject to the Court's approval.

25. Monkhouse Law will continue to provide the funding of all disbursements necessary to properly prosecute this action to successful completion.

SETTLEMENT

26. Monkhouse Law will conduct settlement negotiations with the Defendants' counsel from time to time, as circumstances dictate. The Plaintiffs are prepared to enter into mediation processes or discussions during the litigation as the Defendants may agree or counsel recommend.

REVIEW OF THE LITIGATION PLAN

27. This Litigation Plan will be subject to regular review by Monkhouse Law and counsel for the Defendants, and may be revised and/or modified at any time during the litigation process as required, under the continuing case management authority of this Court.

SCHEDULE "D"**NOTICE OF OPTING OUT****TO: Monkhouse Law****220 Bay Street, Suite 900****Toronto, Ontario****M5J 2W4****ATTN: Monkhouse Law – Re Medcan Class Action**

I do not want to participate in the class action styled as *Nicole Curtis, Amr Galal and Katrina Buhlman v Medcan Health Management Inc, Andrew Carragher, Shaun C. Francis, Edwin F. Hawken, Urban Joseph, Beau Laskey, Thomas P. Reeves, Owen Rogers, Craig Shepherd* regarding the claims of underpayment of statutory public holiday pay and vacation pay to eligible variable compensation employees by the Defendants.

I understand that by opting out, I will not be eligible for the payment of any amounts awarded or paid in the class action.

Dated: _____

Signature

Print Name

Address

City, Province, Postal Code

Telephone

Email

This Notice may be delivered by Registered Mail, regular mail, e-mail, or facsimile as applicable on or before FRIDAY FEBRUARY 24, 2023

SCHEDULE "E"

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

NICOLE CURTIS, ~~and~~ AMR GALAL and KATRINA BUHLMAN

Plaintiffs

– and –

MEDCAN HEALTH MANAGEMENT INC.,

ANDREW CARRAGHER,

SHAUN C. FRANCIS,

EDWIN F. HAWKEN,

URBAN JOSEPH,

BEAU LASKEY,

THOMAS P. REEVES,

OWEN ROGERS,

CRAIG SHEPHERD

Defendants

Proceeding commenced under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

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.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$10,000 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for the costs and have the costs assessed by the court.

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: January 18, 2021

Issued by: _____

Local Registrar

Address of Court Office:

393 University Avenue

Toronto, ON M5G 1E6

TO: Medcan Health Management Inc.

150 York Street, Suite 1500

Toronto, Ontario M5H 3S5

TO: Andrew Carragher

c/o Medcan Health Management Inc.

150 York Street, Suite 1500

Toronto, Ontario M5H 3S5

TO: Shaun C. Francis

c/o Medcan Health Management Inc.

150 York Street, Suite 1500

Toronto, Ontario M5H 3S5

TO: Edwin F. Hawken

c/o Medcan Health Management Inc.

150 York Street, Suite 1500

Toronto, Ontario M5H 3S5

TO: Urban Joseph

c/o Medcan Health Management Inc.

150 York Street, Suite 1500

Toronto, Ontario M5H 3S5

TO: Beau Laskey

c/o Medcan Health Management Inc.

150 York Street, Suite 1500

Toronto, Ontario M5H 3S5

TO: Thomas P. Reeves

c/o Medcan Health Management Inc.

150 York Street, Suite 1500

Toronto, Ontario M5H 3S5

TO: Owen Rogers

c/o Medcan Health Management Inc.

150 York Street, Suite 1500

Toronto, Ontario M5H 3S5

TO: Craig Shepherd

c/o Medcan Health Management Inc.

150 York Street, Suite 1500

Toronto, Ontario M5H 3S5

RELIEF CLAIMED

1. The Proposed Representative Plaintiffs claim the following on ~~her~~ their behalf, and on behalf of members of the Class:

(a) The sum of \$5,000,000 as general damages covering the damages to the class;

(b) an order certifying this action as a class proceeding and appointing Nicole Curtis, ~~and~~ Amr Galal and Katrina Buhlman as Representative Plaintiffs of the Class;

(c) a declaration that the members of the Class are owed public holiday and vacation pay on variable compensation above and beyond the compensation they were paid;

(d) that damages be paid to each class member equal to the public holiday and vacation pay that they ought to have received during their employment with the Defendant;

(e) in the alternative, a declaration that the defendant was unjustly enriched by underpayment or non-payment of vacation pay and public holiday pay to the Class, and must make restitution;

(f) pre-judgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended;

(g) post-judgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended;

(h) any goods and services tax or harmonized sales tax which may be payable on any amounts pursuant to Bill C-62, the *Excise Tax Act*, R.S.C. 1985, as amended or any other legislation enacted by the Government of Canada or Ontario;

(i) the costs of this action on a substantial indemnity basis; and

(j) such further and other relief as counsel may advise and this Honourable Court permits.

BACKGROUND

2. Medcan Health Management Inc. (“**Medcan**” or “**the Defendant**”) is a provider of a range of medical, therapeutic, and health enhancement services, provided both through employer benefit programs and directly to individual customers.

3. Medcan’s business model involves employing numerous people who are paid mainly through variable compensation (“**Variable Compensation Employees**”). This variable compensation is often but not exclusively in the form of commissions based on the volume of services they deliver or new customers they attract, but is also done sometimes by way of bonuses or other payments.

4. Medcan’s business includes personal fitness training. Even in the case of a fitness trainer, the majority of the employee’s remuneration is in the form of a commission that is a percentage of the revenue earned for Medcan by the trainer.

5. Nicole Curtis (“**Ms. Curtis**”) is an individual residing in the Province of Ontario. Ms. Curtis was employed by Medcan from October 2011 to May 2016, first as a Client Service Specialist and subsequently as a Corporate Sales Executive.

6. Amr Galal (“**Mr. Galal**”) is an individual residing in the Province of Ontario. Mr. Galal held various positions at Medcan from about June 2008 to May 2019, starting as an Inside Sales Agent and ending as Director, Sales and Partnerships.

7. Katrina Buhlman (“**Ms. Buhlman**”) is an individual residing in the Province of Ontario. Ms. Buhlman was employed by Medcan from December 2009 to September 2018, as an Inside Sales Agent, a Sales Director, and as an Account Manager.

8. Throughout their employment with Medcan, Ms. Curtis, ~~and Mr. Galal~~ and Ms. Buhlman earned their incomes mainly from variable compensation, which was called commissions. Each

received a small base salary, but the bulk of their remuneration was in the form of these commission payments.

9. This class action is brought because Ms. Curtis, Mr. Galal, Ms. Buhlman, and other Variable Compensation Employees working for the Defendant, were systemically denied the minimum standards to which they were entitled under the *Employment Standards Act, 2000*, S.O. 2000 (“*ESA*”).

10. Andrew Carragher, Shaun C. Francis, Edwin F. Hawken, Urban Joseph, Beau Laskey, Thomas P. Reeves, Owen Rogers and Craig Shepherd are Medcan’s directors and under section 131 of the *Business Corporations Act*, RSO 1990, c B 16 are liable for unpaid wages and for vacation pay accrued under the *ESA*.

The Class

11. This action is brought on behalf of a class of persons, defined as:

All variable compensation employees of MEDCAN HEALTH MANAGEMENT INC.

12. Ms. Curtis, ~~and~~ Mr. Galal and Ms. Buhlman seek to have the class time period run from the earliest of,

- a. The start date of employment of the longest-serving current Variable Compensation Employee;
- b. Or the start date of any Variable Compensation Employee who was terminated or resigned within the last two years since this claim was issued;

until the date when the notice of class action is sent out to class members with the opt-out forms.

EMPLOYMENT STANDARDS ENTITLEMENTS

13. Under the *Employment Standards Act, 2000* (“*ESA*”) employees must be paid additional public holiday pay above and beyond their regular pay as per sections 24-32 (“**Public Holiday Pay**”). For the vast majority of the class period Public Holiday Pay was calculated per s. 24(1) of the *ESA*, for employees with variable compensation this pay is to be an average of what they earned over the preceding 20 days.

14. Under the *ESA* employees must be paid additional vacation pay above and beyond their regular pay, as per s. 35.2 (“**Vacation Pay**”). This pay must be at least 4 per cent of the wages earned by the employee for those with less than five years seniority and 6 per cent for those with greater than five years seniority.

15. All Vacation Pay that has previously accrued remains owing to an employee, as per s. 38 of the *ESA*.

16. When an employee’s employment ends, “the employer shall pay any wages to which the employee is entitled,” as per s. 11(5) of the *ESA*.

17. In the *ESA*, wages are defined to include variable compensation (including commission) income.

18. As per s. 5(1) of the *ESA*, no employee may opt out of a benefit of the *ESA* unless the employee receives a greater benefit.

19. Under s. 15.1 of the *ESA* the Defendant was required to keep detailed records of the class members’ Vacation Pay, and the Plaintiffs were not provided any such records and are not aware whether such records exist.

20. As per s. 40(1) and (2) of the *ESA*, the Vacation Pay that ought to have been paid has a trust over it and creates a lien upon the assets of the employer in the amount of the monies that ought to have been paid.

COMPENSATION POLICY EXCLUDED VACATION AND PUBLIC HOLIDAY PAY ON VARIABLE COMPENSATION

21. Ms. Curtis, Mr. Galal, Ms. Buhlman, and other Variable Compensation Employees working for the Defendant received Vacation and Public Holiday Pay solely on their base salary, if at all, and not on their total compensation, as required by the *ESA*.

22. The pay stubs of Ms. Curtis and Mr. Galal reported no Vacation Pay at all. The paystubs of Ms. Buhlman report some Vacation Pay, but it is almost always calculated as a percentage of her base pay.

23. The Defendant failed in its obligations to correctly calculate pay. It failed in its obligations to be transparent and inform employees about the calculation of their pay.

24. The compensation policies applicable to Ms. Curtis, Mr. Galal, Ms. Buhlman, and other variable compensation employees violated the ESA. They did not provide for Vacation and Statutory Holiday Pay correctly calculated based on their total wages, inclusive of variable compensation. Ms. Curtis, ~~and~~ Mr. Galal, ~~and~~ Ms. Buhlman seek to be Representative Plaintiffs for all persons denied such compensation while working for the Defendant.

PARTIAL PAYMENT OF RETROACTIVE PAY ALREADY ADMITTED AND DISCOVERABILITY

25. In December 2019, the Defendant paid out some variable commissioned persons for vacation and public holiday pay that had been due and owing for the previous two years.

26. In March 2020, Mr. Galal received a notification from the Defendant that some of his Public Holiday Pay entitlements had been miscalculated for 2018 and 2019 and that the Defendant will pay him \$4,903.84 as a result of the error.

27. In March 2020, Ms. Buhlman also received a notification from the Defendant that some of her Public Holiday Pay entitlements had been miscalculated for 2018 and 2019 and that the Defendant will pay her \$1,683.77 as a result of the error.

28. The Plaintiffs state by the 2019 and 2020 communications and payments, the Defendant admitted that its payroll system has not been adequately compensating the Variable Compensation Employees throughout their employment.

29. Vacation pay and Public Holiday Pay ought to be paid out for the full tenure of the Plaintiffs and of all Variable Compensation Employees with the Defendant for the following non-exclusive reasons:

- a. The deprivation of these benefits was only discoverable to the Plaintiffs, and the other Variable Compensation Employees, once they were made aware of the pay discrepancy by the Defendant at the very earliest in December 2019;

b. The benefits under the *ESA* roll over and thus the two-year limitation period under the *Limitations Act, 2002*, SO 2002, c24, Sched B properly runs for all benefits owing from 7 days after employment ends as per s.11(5)(a) of the *ESA*.

30. The Plaintiffs further state that in so far as the calculations of what has been paid out to date appear in some circumstances to be incorrect that any Variable Compensation Employee whose payments are not correct ought to be compensated for the difference between the amount paid and the amount owed under the *ESA*.

LOCATION

31. Ms. Curtis, ~~and~~ Mr. Galal, and Ms. Buhlman propose this action be tried at the City of Toronto, in the Province of Ontario.