CITATION: Fulawka v. Bank of Nova Scotia, 2010 ONSC 1148
Court File No. 07-CV-345166 CP
Date: 20100219

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CINDY FULAWKA

Plaintiff

- and -

THE BANK OF NOVA SCOTIA

Defendant

Proceeding under the Class Proceedings Act, 1992

BEFORE: G.R. Strathy J.

COUNSEL: *Louis Sokolov, David O'Connor & Adam Dewar*, for the plaintiff/moving party

Robert L. Armstrong, Jeremy J. Devereux & Mary Gleason, for the defendant/respondent

DATE HEARD: November 16 – 19, 2009

REASONS FOR DECISION ON CERTIFICATION

[1] This is a motion for certification of a class action claiming overtime pay allegedly owing to approximately 5,000 sales staff who worked in retail branches of the Bank of Nova Scotia ("Scotiabank") from the year 2000 to the present (the "Class Period"). The plaintiff, Cindy Fulawka, claims that she and other members of the proposed class were routinely required to work outside their scheduled hours, without pay, in order to fulfill the demands of their jobs. She claims that this was a breach of their contracts of employment with Scotiabank and a breach of the *Canada Labour Code*, R.S.C. 1985, c. L.2, as amended (the "*Code*"). She also claims that Scotiabank has been unjustly enriched by the unpaid overtime work of the Class.

[2] There are two particularly contentious issues on this motion. The first arises from Scotiabank's claim that the plaintiff has asserted impermissible causes of action based on alleged breaches of the *Code* and that these do not pass the "cause of action" test in s. 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*C.P.A.*"). Scotiabank also moves to strike allegations in the statement of claim that are based on the *Code*. I have concluded that, while the plaintiff has no direct cause of action based on the *Code*, the *Code* can inform the duties she is owed by Scotiabank, be they contractual duties, a duty of good faith, or a duty of care independent of contract.

[3] The second issue relates to the requirement of s. 5(1)(c) of the *C.P.A.* that the claims of the class must raise common issues. The plaintiff asserts that duties owed by Scotiabank to the Class have been breached on a systemic level and that the existence of those duties, and their breach, can be determined without reference to the circumstances of individual employees. The further issue is whether the resolution of these issues will sufficiently advance the claims of Class Members to make them appropriate for certification.

[4] I have concluded that there is an evidentiary basis in this case of systemic wrongs that give rise to common issues, the resolution of which would advance the claim of every Class Member. The systemic wrongs flow from a policy that failed to reflect the realities of the workplace because it put the onus on the employee to obtain prior approval for overtime rather than requiring the employer to ensure that employees were paid for overtime that they were permitted or required to work. The systemic wrongs included the failure of Scotiabank to establish a system-wide procedure to record overtime, making it all the more difficult for employees to obtain fair compensation for their overtime work. To this extent, my conclusions differ from those of Lax J. in *Fresco v. Canadian Imperial Bank of Commerce,* [2009] O.J. No. 2531 ("*Fresco*"), who declined to certify a claim for overtime by employees of the CIBC. Unlike the case in *Fresco*, there is evidence in this case that the failure to pay overtime occurred because of the policy, not independent of the policy. There is also evidence that the failure to pay overtime was attributable to systemic conditions, as opposed to purely individual circumstances.

[5] For the reasons that follow, I have concluded that this action should be certified as a class action under the *C.P.A.*

Background

[6] Scotiabank is a federally-regulated Canadian chartered bank and is one of Canada's largest and oldest financial institutions. It carries on business around the world and has over 1,000 branches in Canada, providing financial services primarily to individual and small business customers. It employs over 65,000 people, some 21,000 of whom work at the branch level.

[7] Scotiabank divides its branch employees into Service Employees (i.e. tellers), Mid-office Employees and Sales Employees. The proposed Class includes only Sales Employees. These employees sell a variety of the Bank's products, including mortgages, credit cards, lines of credit, and RRSPs, to the bank's customers.

[8] Ms. Fulawka seeks to bring this action on her own behalf and on behalf of employees who work, or worked, in Scotiabank branches in Canada and who hold, or held, one of the

following four full-time front line sales positions at any time since January 1, 2000 (the "Class Period"):

> **Personal Banking Officer** ("PBO"): a PBO sells the bank's products and services, including deposit accounts, mortgages, credit card applications, loans, basic investment products and mutual funds, to "walk-in" customers;
>
> **Senior Personal Banking Officer** ("SPBO"): an SPBO provides services similar to a PBO, but deals with customers with more substantial assets;
>
> **Financial Advisor** ("FA"): an FA is the most senior member of a branch's sales team. FAs provide services similar to PBOs and SPBOs, but focus on providing investment advice to individuals with a higher net worth; and
>
> **Account Manager Small Business** ("AMSB"): an AMSB performs functions similar to an FA but focuses on small businesses rather than on individuals.
>
> (Collectively, the "Class Members" or the "Class")

[9] As of September 30, 2008, there were approximately 5,328 employees working in Scotiabank branches in these four categories. The plaintiff does not accept Scotiabank's estimate that there have been approximately 12,630 employees who have held one of these four jobs between January 1, 2000 and June 12, 2009.

The Plaintiff's Evidence

[10] In support of her motion for certification, the plaintiff has sworn two affidavits and has filed affidavits of four former Scotiabank employees and one current employee who are potential members of the Class. She has also filed affidavits of three expert witnesses. I will briefly summarize this evidence and will refer to specific aspects of additional evidence where required later in these reasons.

[11] The Plaintiff began working for Scotiabank in 1986 and has worked as a PBO, SPBO and an AMSB in branches in Saskatchewan and Ontario. Prior to taking a long-term disability leave in 2005, her annual salary was $41,692.

[12] The evidence of Ms. Fulawka and the five employee affiants is, in summary, as follows:

- They frequently worked overtime in order to carry out the usual functions of their jobs and they did not receive compensation. Ms. Fulawka estimates that she worked, on average, two overtime hours per day, frequently arriving early, working after closing hours, skipping lunch and rarely taking breaks.

- The nature of the work required them to accommodate customers' time demands and this necessitated meeting with customers after normal hours and during lunch breaks. Branch meetings and courses were often scheduled outside regular office hours.

- The nature of the work made the need for overtime difficult to predict and therefore, as a practical matter, it was hard for a Class Member to know when they would need to obtain advance approval from a superior, a requirement of Scotiabank's policy. For example, a customer might come into the branch just before closing and want to meet with a PBO; or telephone calls might have to be made after work. After work hours or coffee and lunch breaks were the only practical times to keep up with the paperwork or phone messages that developed during a busy work day.

- The "culture" of Scotiabank was such that overtime was rarely authorized and therefore employees rarely requested it. There was no policy that permitted approval of overtime after the fact, so it was never requested.

- Although Scotiabank's policy required overtime to be approved in advance, managers rarely authorized it and time off *in lieu* was frequently refused. Managers expected overtime to be worked without pay.

- Willingness to work overtime was regarded as an important factor in performance appraisals – Ms. Fulawka was commended in several appraisals for her willingness to work overtime. One appraisal commented that she worked overtime "without being asked in peak periods." Another potential Class Member, Ms. Kruppke, was commended for her willingness to skip breaks, to come in early or to stay late.

- Employees did not keep track of their overtime hours or their time *in lieu*, nor did Scotiabank.

- Ms. Fulawka did not complain about not being paid for overtime because she was concerned that she would be labeled a "problem employee" and would suffer reprisals.

[13] The plaintiff's expert evidence comes from academics and researchers:

- Judith Fudge, a law professor with considerable expertise in labour relations matters, expresses the opinion that non-compliance with hours of work provisions of the *Code* is widespread in federally-regulated businesses. The enforcement

mechanisms of the *Code* are, in her opinion, inadequate to ensure compliance with the legislation and to deal with systemic and large-scale violations.

- Richard Drogin, a statistics expert with extensive experience in overtime class actions in the United States, expresses the opinion that appropriate statistical techniques exist for estimating the percentage of putative Class Members who worked some "off-the-clock" hours, the average amount of such hours worked, and the consequent aggregate damages that could be assessed by the court.

- Graham Lowe, a sociologist, prepared a report for plaintiff's counsel on "Unpaid Overtime in Canada's Banking Sector." He concluded that the overtime earnings of bank employees do not reflect the amount of overtime they actually work.

[14] In reply affidavits, the plaintiff introduces the evidence of Christina Banks, a human resource management consultant, with experience in U.S. employment litigation. In overview, it is her opinion that:

> (a) the nature of the work carried out by the Class is "on-demand" work, which must be responsive to customer needs;
>
> (b) there is a high likelihood that members of the Class could have worked substantial uncompensated overtime hours that were unreported or under-reported;
>
> (c) Scotiabank's organizational structure, culture and processes act to discourage requests for overtime and reports of overtime hours worked and discourage managers from approving such requests or granting time *in lieu*;
>
> (d) Scotiabank has failed to make an adequate response to this issue; and
>
> (e) it would be possible to design a survey or other investigative tools that would provide reasonably accurate measurements of overtime hours worked.

The defendant has moved to strike portions of the evidence of Ms. Banks.

[15] Ms. Fulawka has also filed an affidavit of Heidi Rubin, an associate employed by Plaintiff's counsel, indicating that 39 people registered on counsel's website. Scotiabank has brought a motion to strike this affidavit as being hearsay.

Scotiabank's Evidence

[16] Scotiabank has mounted a full-scale evidentiary assault on the plaintiff's case. It has filed two detailed affidavits sworn by Arlene Russell, who was a Senior Vice-President responsible for Human Resources at Scotiabank. Ms. Russell speaks of Scotiabank's "corporate culture," the respect it accords to all its employees and its desire to create a work experience and workplace in

which all employees will thrive and be respected. She describes in detail the nature of Scotiabank's business, its policies, practices and record-keeping, and its processes for dealing with workplace issues. She expresses confidence that Scotiabank does not expect or require employees to regularly work more than their scheduled hours to complete their job responsibilities and says that there is no policy that encourages this and no systemic practice of doing so. She concludes her affidavit with the observation that, given her experience and tenure in the organization, she can state with confidence that there is no meaningful number of employees with concerns about compensation for overtime hours worked.

[17] Scotiabank also filed thirty-three affidavits from current and former employees who worked in the same branches where the plaintiff and her other affiants worked. This evidence disputes many of the allegations made by Ms. Fulawka and the other affiants concerning the allegations that they regularly worked overtime hours and that they had to work such hours in order to accomplish their duties. Scotiabank's affiants describe a positive work environment in which employees were treated fairly and respectfully. This evidence was also designed to show that overtime is a highly individualistic issue: experiences, practices and policies varied from branch-to-branch over the more than 1,000 Scotiabank branches across the country. Based on this evidence, Scotiabank asks me to find that the issues raised in this action are individual rather than common and that there is no systemic problem of unpaid overtime at Scotiabank.

[18] Scotiabank has also filed affidavits from six expert witnesses:

- Paul Gallina, an industrial relations expert, states that the complaints and investigation mechanism under the *Code* is an effective enforcement mechanism.

- Craig Riddell, an economist, provides a critique of the reports of Drs. Lowe and Fudge. He says that Dr. Lowe's conclusions are flawed and that Dr. Fudge's conclusions are not supported by the underlying data.

- Kevin Kelloway, an organizational psychologist, also critiques the reports of Drs. Lowe and Fudge. He concludes that the effect of long working hours varies from person to person.

- Sonya Kwon, a business and litigation consultant, challenges the plaintiff's experts' conclusions that acceptable methods could be developed to determine the amount of overtime worked on a class-wide basis.

- Michael Ward, a consulting economist makes similar challenges to the evidence of Dr. Drogin and described his proposal as "inherently unreliable."

- Stephen Smith, a data collection and survey expert, challenges the plaintiff's expert evidence that a survey methodology could

> be developed to produce accurate assessments of unpaid overtime hours on a class-wide basis.

[19] As with the plaintiff's evidence, I will refer to Scotiabank's evidence as necessary in the course of these reasons.

Scotiabank's Overtime Policy

[20] The standard work day for all Class Members is 7.5 hours and they work a 37.5 hour week. They are entitled to two fifteen minutes paid breaks each day and a one hour unpaid lunch break.

[21] It is common ground that throughout the Class Period Scotiabank maintained a written overtime policy that was, or should have been, applicable to all Class Members and that the terms of that policy are terms of employment of Class Members.

[22] The overtime policy in place from the beginning of the Class Period to September 30, 2008 required overtime to be authorized in advance by the employee's branch manager or department head. If an employee worked more than eight hours in a day or more than 37.5 hours in a week, authorized overtime was paid at one and a half times his or her hourly rate. Time off *in lieu* of payment for overtime was not encouraged, but it could be granted on an exceptional basis if previously agreed upon. If granted, it was allowed at one and a half times the overtime hours worked. The policy did not allow for approval of overtime after the fact. Scotiabank's evidence, however, is that overtime was frequently approved after the fact, in spite of the pre-approval requirement in the policy.

[23] Scotiabank's policy was expressly stated to be "based on Canada Labour Code guidelines." It was, however, more generous than the *Code* in some respects, since the *Code* stipulates that an employee is only eligible for overtime after working 40 hours in a week. The *Code* says nothing about the availability of time off *in lieu* of overtime pay.

[24] Scotiabank's evidence is that the pre-approval requirement in its policy was a necessary and appropriate tool to manage time, workload, and personnel and to control overtime costs.

[25] On October 1, 2008, Scotiabank initiated a revised overtime policy that was similar to the previous policy, but had some differences, which I will discuss below. The new policy provided:

> You require your manager's pre-approval to work overtime hours. In cases where it is not possible to obtain your manager's consent in advance, and it is critical for you to work overtime, notify your manager of the overtime worked at the next earliest opportunity, such as the next business day. *Additional hours that are requested, permitted or approved by your manager/department head will be compensated.* [emphasis added].

[26] There are four relevant differences between the previous policy and the 2008 policy. First "overtime hours" were defined to mean "requested, permitted or approved" hours worked by an employee eligible for overtime compensation. This appears to have been an attempt to

bring the policy in line with the *Code*, which provides that overtime hours *"required or permitted"* by the employer must be compensated.

[27] Second, the policy was changed to expressly allow for approval of overtime after it had been worked, if it was not possible to obtain prior approval and the work was "critical."

[28] The third change in Scotiabank's overtime policy was a requirement that time off *in lieu* had to be "cashed out" within a defined time period, failing which equivalent compensation would be paid out to the employee:

> Time off in lieu of overtime pay is to be taken within 90 days of the overtime worked, or in the case of special projects/peak periods, within 90 days of the end of the special project/peak period. Time off in lieu not taken with these timeframes will be paid to the employee.

[29] The fourth change was the extension of the overtime policy to include Level 6 employees, who previously had not been eligible. At the same time, a retroactive claims process was implemented to compensate Level 6 employees for overtime hours they had worked. I will explain this policy and the claims process in the next section.

Scotiabank's Retroactive Claims Process for Level 6 Employees

[30] Effective October 1, 2008 Scotiabank revised its overtime policy to extend overtime eligibility to employees holding jobs in Level 6. Two of the jobs in the proposed Class – AMSB and FA – are in Level 6. Level 6 also includes jobs not in the proposed Class, such as the Manager Customer Service position. At the same time, Scotiabank announced a summary procedure whereby Level 6 employees could claim compensation for additional hours they had worked in the period from November 1, 2005 to October 1, 2008 for which they did not receive compensation.

[31] Level 6 employees making a claim were asked to complete a form indicating the amount of additional hours they had worked without being compensated with time off or other special work arrangements. It was acknowledged that employees might not have records of their hours worked and Scotiabank said that this would be taken into account. Employees were encouraged, but not required, to provide supporting documents or records, if available.

[32] Each employee's request was then reviewed by a superior for reasonableness based on their knowledge of the employee's working hours, the work environment and any consideration that the employee may have already received for time worked (e.g. time off *in lieu*). The superior could, but was not required to, meet with the employee or to contact the employee's current or former peers or managers for additional information and clarification. Each request was then reviewed by Scotiabank's human resources department.

[33] The procedure was a simple and summary one. There was a compressed timetable for processing claims, which expected managers to complete their review of employee claims within a week and the human resources department to complete its review within three weeks. Any applicable payment requests were to be made within a month of the employee submitting his or her claim.

[34] Scotiabank paid out approximately $5 million to Level 6 employees under the retroactive claims process. This amount includes payments to employees who held jobs as Managers Customer Service or Managers Personal Banking as well as employees in the proposed Class holding jobs as an FA or AMSB. Approximately $3 million was paid to 455 employees who held positions as FA or AMSB.

[35] Following a series of case management meetings in this action, Scotiabank agreed to notify current and former Level 6 employees that their rights to participate as Class Members in this proposed class action would not be affected if they elected to obtain compensation under the plan. Employees who made requests for retroactive overtime compensation were not asked to sign a release or waiver.

Scotiabank's Record-Keeping System

[36] The time records kept by Scotiabank for employees in the Class have varied over time. Until January 2006, hours of full-time staff were recorded on monthly "staff plans" that were prepared in advance by a manager to schedule the hours that the branch's personnel were expected to work in the coming month. Full-time employees were supposed to review and initial the staff plan each month to ensure that it was accurate and to record any pre-approved overtime hours that they had worked. Time sheets were used to record the hours of part-time employees and to transmit the information to payroll, but time sheets were not kept for full-time employees. Scotiabank's evidence is that staff plans were intended to record all regular and overtime hours worked by full time employees.

[37] Scotiabank's position is that while record keeping procedures are established centrally for all branches, records are actually maintained at the branch level by individual managers and employees. As a result, the recording and monitoring of hours of work varies from branch to branch. Overtime hours are often tracked and recorded by a manager with an internal chart kept at the branch, or with handwritten logs or employee calendars. Compensation for overtime in the form of *lieu* time and flexibility is often tracked informally between employees and their managers – an employee will communicate with his or her manager about extra time worked, and, if approved, the manager will provide compensation with *lieu* time or flexible hours.

[38] Around January 2006, Scotiabank introduced an electronic application called "Absence E-Trac" ("E-Trac"), to record employees' vacations and other absences. This system was used primarily for absence management and it was not used to track or pay overtime hours.

[39] In January 2009, enhancements to E-Trac were made, directly linking it to Scotiabank's payroll system, with the result that employees could now record overtime hours directly in E-Trac and indicate whether they preferred to be paid for overtime hours or to receive time *in lieu*. The hours claimed would be confirmed by the employee's manager and the information sent directly to payroll.

[40] Until at least 2009, Scotiabank had no system to record employees' earned and accrued time *in lieu* or to track its usage.

The Code

[41] As a federal undertaking, Scotiabank is subject to the *Code*. The *Code* features large in this proceeding, because the plaintiff asserts that the terms of the *Code* are implied in the contract of employment of every member of the Class. Scotiabank disputes this proposition and says that the plaintiff cannot enforce the *Code* by way of civil action. It moves to strike the pleadings in the statement of claim based on the *Code*. I will discuss this motion in due course, but in the meantime, I will simply summarize the effect of the *Code*.

[42] Part III of the *Code* contains certain requirements regarding the payment of overtime wages to employees. Scotiabank acknowledges that the proposed Class Members are eligible for overtime under the *Code*. The provisions of the *Code* applicable to this action have been in force since prior to the commencement of the Class Period on January 1, 2000.

[43] Subsection 169(1)(a) of the *Code* states that, except as otherwise provided, the standard hours of work of an employee shall not exceed eight hours in a day or forty hours in a week. Subsection 169(1)(b) provides that "no employer shall cause or permit an employee" to work more than those hours. Other provisions require that overtime be paid where the specified hours are exceeded. The use of the words "or permit" is important, because the *Code* contemplates that an employer has a positive obligation not to "permit" overtime to be worked, at least without proper compensation.

[44] Section 174 of the *Code* provides as follows:

> Overtime Pay
>
> 174. When an employee is *required or permitted* to work in excess of the standard hours of work, the employee shall, subject to any regulations made pursuant to section 175, be paid overtime wages not less than one-and-a-half times his regular rate of wages. [emphasis added]

[45] The *Code* also requires an employer to accurately record all hours worked by employees and to maintain such records: s. 252(2) and 264(a) of the *Code* and s. 24 of the *Canada Labour Standards Regulations*, C.R.C., c. 986.

[46] Scotiabank brought a motion, which was heard at the same time as the certification motion, to strike or stay certain portions of the statement of claim that allege breaches of the *Canada Labour Code* on the ground that they are outside the jurisdiction of the court and disclose no cause of action. I will discuss this motion when I discuss the requirement in s. 5(1)(a) of the *C.P.A.* that the pleadings disclose a cause of action.

Scotiabank's motions to strike affidavits

[47] As noted earlier, Scotiabank moves to strike two "reply" affidavits sworn by Dr. Christina Banks, an industrial psychologist retained by the plaintiff. Scotiabank objects that much of Dr. Banks' evidence is not based on first-hand knowledge, is inadmissible expert evidence and constitutes argument and speculation rather than evidence. It also objects that Dr. Banks' second reply affidavit was served after cross-examinations had commenced, contrary to Rule 39.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The defendant has not

demonstrated any prejudice as a result of the late service and I would grant leave under rule 39.02(2) if necessary.

[48] Scotiabank's primary complaint about Dr. Banks' affidavit is in relation to her opinion that there may be systemic problems of overtime at Scotiabank. It says that the issue is not one that requires specialized expertise, is not technical in nature, and does not require expert evidence to enable the trier of fact to appreciate the matters raised by this motion: see *Fairford First Nation v. Canada* (1998), 145 F.T.R. 115, [1998] F.C.J. No. 47 (T.D.) at para. 9. Indeed, the record contains direct evidence on this issue. Second, it says that the evidence of Dr. Banks is largely statements of fact, rather than expressions of opinion. Finally, Scotiabank says that Dr. Banks' opinion addresses the "ultimate issue" and the court should be reluctant to admit such evidence: *R. v. J.J.*, [2000] 2 S.C.R. 600, [2000] S.C.J. No. 52 at para. 37. Scotiabank also moves to strike certain portions of one paragraph of Dr. Banks' further reply affidavit on the basis that they are inadmissible hearsay.

[49] Although I would be prepared to conclude that a human resources consultant with Dr. Bank's credentials is qualified to give expert evidence on the issue of systemic impediments to overtime claims, I agree with Scotiabank's submission that there is direct evidence on this issue from both parties. That evidence establishes a basis in fact for a common issue of whether there were systemic failings in Scotiabank's overtime and record-keeping policies and procedures that resulted in uncompensated overtime. I do not, therefore, find it necessary to rely on this aspect of Dr. Banks' evidence.

[50] The balance of Dr. Banks evidence goes to the question of whether damages can be determined on an aggregate basis. That issue is properly the subject of expert evidence and has been fully explored by experts on both sides.

[51] Scotiabank also moves to strike as hearsay an affidavit sworn by Heidi Rubin, an associate in the office of plaintiff's counsel, which deposes that 39 people have registered on a website established by counsel, identifying themselves as members of the putative Class and claiming to have worked unpaid overtime. In *Fresco*, at para. 8, Lax J. refused to consider an affidavit of counsel concerning a "survey" of potential Class members who had registered on counsel's website. The plaintiff says that evidence of a similar nature has been considered in other cases to show the existence of a class of persons with a common complaint: *Smith* v. *National Money Mart Co.*, [2007] OJ. No. 1507, 156 A.C.W.S. (3d) 1001 (S.C.J.) at para. 53; *Hollick* v. *Toronto (City)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No 67 at paras. 25-26 and *Lambert* v. *Guidant Corp.*, [2009] OJ. No. 1910, 72 C.P.C. (6th) 120 (S.C.J.) at para. 100. The defendant says that these cases are distinguishable and that the affidavit in this case is also distinguishable because it purports to state that the individuals have actually worked unpaid overtime.

[52] I do not find it necessary to resolve this issue as I do not find it necessary to consider Ms. Rubin's evidence. The affidavits of Ms. Fulawka and the other five affiants provide a sufficient basis in fact for the conclusions I have reached.

The Test for Certification

[53] Section 5(1) of the *C.P.A.* sets out the test for certification:

> The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[54] The test is to be applied in a purposive and generous manner, to give effect to the important goals of class actions – providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behavior modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 at paras. 26-29; *Hollick v. Toronto (City)*, above, per McLachlin C.J. at paras. 15 and 16:

> In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> It is particularly important to keep this principle in mind at the certification stage. ... the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act*, 1992, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action
> ...

[55] The critical dispute in this case, as in *Fresco*, pertains to the commonality requirement. The plaintiff advances the case in systemic terms, positing the existence of duties common to the Class, a failure to establish policies and procedures in fulfillment of those duties and a class-wide breach of those duties. The defendant argues that entitlement to overtime is an inherently individual determination and that there is no evidence that the issue is systemic. Scotiabank

argues, not surprisingly, that the issue has been conclusively decided by *Fresco*, a decision to which I now turn.

The Decision in Fresco

[56] On June 18, 2009, Lax J. released the decision in *Fresco,* a bank overtime case raising very similar issues. Counsel for Ms. Fulawka also acted for the plaintiff in *Fresco.* The expert evidence in the two cases is almost identical. The proposed common issues are very similar. The decision in *Fresco* was the subject of extensive discussion in the hearing before me, Scotiabank generally submitting that it was directly applicable and the plaintiff submitting either that it was distinguishable or that I should take a different course.

[57] CIBC's overtime policy, like Scotiabank's, had a pre-approval requirement; however, unlike Scotiabank's policy before 2008, the CIBC's policy permitted approval after the fact if there were "extenuating circumstances and approval is obtained as soon as possible afterwards ..."

[58] The essence of the decision in *Fresco* is contained in the following conclusion of Lax J., at para. 4:

> While some of the certification requirements could be satisfied, the action lacks the essential element of commonality. In my opinion, there is no asserted common issue capable of being determined on a class wide basis that would sufficiently advance this litigation to justify certification.

[59] Justice Lax found that the pre-approval requirement of the CIBC's policy was not illegal under the *Code* and that, in any event, a determination of its legality would not advance the claim of the class because the real claim was for a failure, independent of the policy, to compensate class members for overtime hours that were required or permitted.

[60] Lax J. found that the claim of systemic wrongdoing had no evidentiary foundation. The evidence showed that overtime was not paid for a variety of reasons, all of them particular to the individual as opposed to common to the class. In any event, systemic wrongdoing could only be resolved by examining the individual claims, thereby defeating the purpose of a class action (para. 6). She described the central flaw in the plaintiff's case as follows, at para. 70:

> Ultimately, the central flaw in the plaintiff's case is that instances of unpaid overtime occur on an individual basis. This lack of commonality cannot be overcome by certifying an issue that asks whether the defendant had a duty to prevent a series of individual wrongs, without any basis for the existence of this duty and where the duty does not relate to any pleaded cause of action.

[61] It appears that the plaintiff's intention to amend the statement of claim in this case to plead negligence was prompted by the reference in *Fresco* to the failure of the plaintiff to plead a duty.

[62] In *Fresco*, Lax J. rejected a common issue asking whether the defendant had a duty to accurately record hours worked by class members and to have a system to ensure that they were properly compensated for overtime hours. She gave two reasons: first, CIBC did not deny that it had a duty to record and compensate employees for hours worked; second, the determination of whether it breached this duty could not be conducted on a class wide basis. The practices used by CIBC to keep records were not common and varied across branches. Ms. Fresco did not assert any common flaw in the recordkeeping of the bank. Therefore, this issue could not be determined in common (para. 57).

[63] Lax J. also rejected a common issue concerning the relevant terms, express or implied, of the contracts of employment of putative class members. She held that, while this issue could be answered in common, its resolution would not advance the claims of the class. The CIBC did not deny that it had a contractual and statutory duty to pay overtime hours and to keep records. The main issue was whether the bank breached these duties in some common way. Simply determining that these duties exist would not advance the claim. Lax J. distinguished the case before her from *Bywater v. Toronto Transit Commission,* [1998] O.J. No. 4913, 27 C.P.C. (4th) 172 (Gen. Div.), where Winkler J. (as he then was) held that an issue does not cease to be common just because the defendant concedes it. The defendant's admission of liability in *Bywater v. Toronto Transit Commission* needed to be a common issue in order to bind the defendant to liability. This was not the case in *Fresco* as liability was not admitted (para. 59).

[64] Lax J. also declined to certify a common issue based on unjust enrichment because there was not sufficient evidence of common wrongdoing: "[U]nless there is some evidence of systemic wrongdoing, these cannot be common issues" (para. 59).

[65] As well, Lax J. declined to certify common issues asking about the availability of an aggregate assessment of damages. She noted that it might be appropriate to do so where there was a reasonable likelihood that a common issues judge could find that damages could be assessed in the aggregate (referring to *Markson v. MBNA Canada Bank,* 2007 ONCA 334, 85 O.R. (3d) 321, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 346). Lax J. distinguished *Markson v. MBNA Canada Bank* and *Lee Valley Tools v. Canada Post Corp.*, [2007] O.J. No. 4942, 57 C.P.C. (6th) 223 (Sup. Ct.) where aggregate assessments of damages were determined to be appropriate. In those cases, the defendant committed a wrongful act common to the entire class. Lax J. held, however, that in the case before her, there was no common act of the defendant that created liability for overtime wages. She found that unpaid overtime occurs on a fundamentally individual basis and therefore cannot be assessed in the aggregate (paras. 79-91).

[66] Justice Lax rejected the submission that the pre-approval provision of CIBC's policy was illegal under the *Code*, because it was in keeping with "the fundamental right of the employer to control its business, including employee's schedules, hours of work, and overtime hours ... Put another way, an employee cannot foist services on an employer and expect to be paid wages for them" (para. 31). Furthermore, the fact that overtime is worked and not paid does not make the

pre-approval policy itself illegal: this would be a breach of *both* CIBC's overtime policy and the *Code*. As Justice Lax stated:

> The Policy clearly contemplates that an employee unable to complete his/her assigned work during regular hours should discuss it with the manager who either must approve the overtime or make other arrangements such that the employee does not work overtime. If unapproved (and therefore unpaid) overtime is worked, then either it was required or permitted by the manager, in which case the failure to pay is a breach of the *CLC* and of the Policy, or it was not required or permitted, in which case the employee has no entitlement to overtime compensation. The fact that unapproved overtime was permitted, in breach of the Policy, and was subsequently not paid, in breach of the *CLC*, does not make the Policy or its pre-approval requirement illegal. (para. 32)

[67] In effect, she found that CIBC's pre-approval policy was a mechanism for "permitting" overtime hours.

[68] Justice Lax also found that the time *in lieu* provisions of CIBC's policy were not contrary to the *Code*. While time *in lieu* options are not expressly permitted by the *Code*, Justice Lax noted that, under subsection 168(1), the *Code* will not affect any employment benefit that is "more favourable to the employee." She held that the option of taking time *in lieu* of overtime pay was clearly more beneficial to the employee (para. 44).

[69] Lax J. found properly pleaded causes of action in breach of contract and unjust enrichment, found an identifiable class and would have found that the action met the preferable procedure requirement but for the absence of common issues of liability capable of being resolved at a common issues trial. She was not satisfied that CIBC's internal procedures, or the HRSDC process, were preferable alternatives.

Application of the test for Certification

Cause of Action

[70] The test under section 5(1)(a) is identical to the test on a motion to strike a pleading as disclosing no cause of action. It must be "plain and obvious" that the claim cannot succeed. The following principles apply:

> (a) no evidence is admissible for the purposes of determining the section 5(1)(a) criteria;
>
> (b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be assumed to be true;
>
> (c) the pleadings will only be struck if it is plain and obvious and beyond doubt that the plaintiff cannot succeed and the action is certain to fail;

(d) the novelty of the cause of action will not militate against sustaining the plaintiff's claim;

(e) matters of law which are not fully settled by the jurisprudence must be permitted to proceed; and

(f) the pleading must be generously read to allow for drafting inadequacies.

See Hollick v. Toronto (City), above, at para. 25; *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93.

[71] I will review the causes of action advanced by the plaintiff in this case.

Breach of contract

[72] The plaintiff pleads that it was an express or implied term of the contracts of employment of Class Members that they would be paid for overtime worked at one and a half times their hourly rates. Alternatively, the plaintiff pleads that the provisions of the *Code* and its regulations were implied terms of their contracts of employment and there was a breach of these implied terms. As plaintiff's counsel points out, claims for breach of contract based on the interpretation of common contract provisions have been frequently certified as class actions: *Hickey-Button v. Loyalist College of Applied Arts &* Technology (2006), 211 O.A.C. 301, [2006] O.J. No. 2393 (C.A.); 1176560 *Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada* (2002), 52 O.R. (3d) 535, [2002] O.J. No. 4781 (Sup. Ct.); *Griffin v. Dell Canada Inc.*, (2009) O.J. No. 418 (Sup. Ct.); *Despault v. King West Village Lofts Ltd.,* [2001] O.J. No. 2933, 10 C.P.C. (5th) 89 (Sup. Ct.); *Lau v. Bayview Landmark Inc.,* [1999] O.J. No. 4060, 40 C.P.C. (4th) 301 (Sup. Ct.).

[73] While Scotiabank does not acknowledge that the provisions of the *Code* are an implied term in the employment contracts of the Class, it does not dispute that there is a properly pleaded claim for breach of contract. I conclude, therefore, that it is not plain and obvious that this claim for breach of contract will fail.

Unjust enrichment

[74] The plaintiff pleads that Scotiabank has been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the plaintiff and the other Class Members, who have suffered a corresponding deprivation. The plaintiff says that there is no juristic reason for the deprivation and that Scotiabank's overtime policy is unlawful. Again, Scotiabank does not dispute this cause of action but says that it cannot be a common issue. In *Fresco*, Lax J. found that the statement of claim properly pleaded this cause of action, referring to *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 and *Pettkus v. Becker*, [1980] 2 S.C.R. 834, [1980] S.C.J. No. 103. Claims for unjust enrichment have been certified in other cases, including: *Griffin v. Dell Canada Inc.*, above; *Smith v National Money Mart*, [2007] O.J. No. 46, 37 C.P.C. (6th) 171 (Sup. Ct.); and *McCutcheon v. The Cash Store Inc.* (2006), 80 O.R. (3d) 644, [2006] O.J. No. 1860 (Sup. Ct.).

Breach of duty of good faith

[75] The plaintiff pleads that "the class members are in a position of vulnerability in relation to the defendant. As a result, the defendant owes a duty to the class members to act in good faith, which includes a duty to honour its statutory and contractual obligations to them." It pleads that Scotiabank breached this duty by failing to pay for all hours worked, failing to advise the Class of their right to recover payment, retaining the benefit to itself, creating a work environment in which overtime was required and imposing an unlawful overtime policy on them. The prayer for relief in the statement of claim includes a claim for a declaration that Scotiabank "has breached its obligation to act in good faith in the performance of its contracts with class members ..."

[76] In response to the defendant's objection that there is no free-standing cause of action for breach of the duty of good faith (relying on *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457, [2003] O.J. No. 4656 (C.A.)), the plaintiff says that the duty is not independent, but rather is inherent in the employment relationship: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, [1997] S.C.J. No. 94 ("*Wallace*") at paras. 91-98.

[77] Although *Wallace* dealt with the duty of good faith in the context of employee dismissals, the Court of Appeal has recognized that the duty of good faith also applies to the performance of the contract itself: see *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533, [2003] O.J. No. 1919; *Nareerux Import Co. v. Canadian Imperial Bank of Commerce* (2009), 97 O.R. (3d) 481, [2009] O.J. No. 4553 (C.A.) at paras. 68-73. In *Transamerica Life Canada Inc. v. ING Canada*, above, the Court of Appeal stated, at para. 53:

> I agree with Transamerica that Canadian courts have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. The implication of a duty of good faith has not gone so far as to create new, unbargained-for, rights and obligations. Nor has it been used to alter the express terms of the contract reached by the parties. *Rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into...* [emphasis added].

[78] The duty of good faith and fair dealing in the employment relationship is a feature of the contractual relationship and not an independent cause of action. It is not confined to the termination of the relationship and arises from the recognition of the vulnerability of the employee and the importance of work in personal fulfillment and financial security (see *Wallace*, above, at para. 93). The employees in this case are in a position of particular vulnerability, as they do not have the protection of a union and they are not members of management. They are responsible for the sale of Scotiabank's products and they are no doubt encouraged to maximize sales. The nature of their work, which requires that they respond to the unpredictable demands of customers, makes the necessity to work overtime a real possibility. The understandable need for managers to control overtime costs and the pre-approval requirement in the policy create institutional impediments to claims for overtime pay. It seems to me that there is, at the very

least, an argument that the duty of good faith and fair dealing requires the employer to pay for overtime work necessarily required or permitted by the employer, whether or not the overtime has been approved in advance.

[79] Putting the onus on the employee to obtain pre-approval for overtime does not adequately reflect the realities of the work place. It puts emphasis on protecting the interests of the employer as opposed to protection of the employee, to whom the duty of good faith is owed. The duty of good faith could include taking active measures to ensure that employees are not required or permitted to work overtime in order to perform the usual duties of their employment.

[80] The duty of good faith could also require that the employer take measures to ensure that overtime work of Class Members is properly recorded and properly compensated. Scotiabank's Vice President, Ms. Russell, suggested that it would be demeaning to require employees to punch a time clock or to keep track of their hours. If Ms. Fulawka's assertions are correct, it would be more demeaning for Class Members to work overtime without compensation. Moreover, in this age when most bank employees log into a computer at the beginning of the work day and log out at the end, it is hard to imagine that Scotiabank could not devise a time-tracking system that would be effective and automatic and that would allow managers, and their superiors, to track, regulate and fairly compensate overtime.

[81] These components of the duty of good faith do not derive from the *Code*, but their content is informed by the *Code*. I am satisfied that the claim for breach of the duty of good faith, viewed as a part of Scotiabank's contractual duties, discloses a cause of action.

Negligence

[82] Following the decision in *Fresco,* the plaintiff delivered a draft amended statement of claim that includes a claim in negligence. The draft pleading alleges that Scotiabank owed a duty of care to the Class to ensure that they were properly compensated for all hours worked at the appropriate rates and that it breached this duty by, among other things:

> (a) creating a working environment in which they were required to work overtime to carry out their duties, dissuaded from reporting overtime and from claiming compensation;
>
> (b) failing to take reasonable steps to monitor and record their hours worked;
>
> (c) failing to take reasonable steps to ensure that they were properly compensated; and
>
> (d) imposing an unlawful overtime policy.

The plaintiff relies on *Anns v. Merton London Borough Council*, [1978] A.C. 728 and *Cooper* v. *Hobart,* [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76.

[83] I accept the plaintiff's submission that the claim meets the "plain and obvious" test under s. 5(1)(a) of the *C.P.A.*: *Hunt* v. *Carey Canada Inc.*, above; *Operation Dismantle Inc.* v. *The Queen,* [1985] 1 S.C.R. 441, [1985] S.C.J. No. 22. Moreover, I conclude that the duties owed by Scotiabank can be informed by the provisions of the *Code*: *Haskett v. Equifax Canada Inc.*,

(2003), 63 O.R. (3d) 577, [2003] O.J. No. 771 (C.A.); *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, [1983] S.C.J. No. 14; *Boulanger v. Johnson & Johnson Corp.* (2003), 174 O.A.C. 44, [2003] O.J. No. 2218 (C.A.). I will discuss these provisions below.

The Pleading of the Code

[84] The plaintiff pleads and relies on the *Code*. She pleads that Scotiabank is required to comply with the *Code* and pleads s. 169(1) and 174, referred to above, as well as other sections dealing with the maximum hours of work and the employer's duty to retain records. She also pleads that the requirements of the *Code* and its regulations are implied terms in the contracts of Class Members. She says that the implied terms include the obligation to pay overtime for time worked and to keep accurate records of hours of work. Based on this, she says that Scotiabank's overtime policy violates the *Code*.

[85] Scotiabank says that the Court has no jurisdiction to enforce the *Code* and that the claims based on breaches of the *Code* disclose no cause of action.

[86] The plaintiff denies that she is seeking to directly enforce the Code or that she is seeking a remedy under the *Code*. She says that the *Code* plays a dual role in her case. First, it is the basis of an implied term in the contracts of employment of the Class and "informs" the duty of care owed to the Class. Second, she says that s. 168 of the *Code* renders void and unenforceable any contractual provisions that are less favourable than the *Code* rights. This would include the "pre-approval" requirement in the Scotiabank policy and the ineligibility of Level 6 employees.

[87] The issue is of some importance, for two reasons. First, as noted earlier, the *Code* requires that any employee "required *or permitted*" to work in excess of the standard hours (40 hours in a week and 8 hours in a day) is to be paid overtime at the rate of time and half. Second, the *Code* and its Regulation require an employer to keep a record of hours worked by every employee and to retain those records for three years. The *Code*'s use of the term "required or permitted" is arguably inconsistent with a pre-approval requirement, something that appears to have been recognized when Scotiabank amended its policy in 2008. As well, there is certainly an argument that for much of the Class Period Scotiabank did not keep the requisite records.

[88] For the reasons that follow, I accept Scotiabank's submission that the *Code* sets out minimum standards, contains its own enforcement mechanism and does not give rise to a civil cause of action. The portions of the statement of claim that seek to directly enforce the *Code* will be struck. I do not, however, accept the submission that the *Code* may not be implied into the contracts of employment of the Class as a matter of fact. As well, in my view, the provisions of the *Code* may be applicable in a more subtle way – to inform the standard of care owed by a federally-regulated employer to its employees.

[89] Scotiabank's motion to strike the pleadings based on the *Code* is brought under Rules 21.01(1)(a), 21.01(1)(b) and 21.01(3)(a) of the *Rules of Civil Procedure*. Rule 21.01(1)(a) allows for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs. In this case, a successful motion pursuant to Rule 21.01(1)(a) would dispose of a substantial element of the action, namely all claims pursuant to the *Code*.

[90] Rule 21.01(1)(a) is available to determine the validity of a cause of action or defence where the relevant facts are not in dispute: *Law Society of Upper Canada v. Ernst & Young*

(2003), 227 D.L.R. (4th) 577, 65 O.R. (3d) 577 (C.A.) at p. 595. Like a motion to dismiss pursuant to Rule 21.01(1)(a), the rule governing motions to strike under Rule 21.01(1)(b) is that a pleading may be struck where it is "plain and obvious" that it does not disclose a reasonable cause of action: *Hunt v. Carey Canada Inc.* The facts as pleaded are deemed to be true and read generously for the purposes of such a motion.

[91] Rule 21.01(3)(a) allows for an action to be stayed or dismissed on the ground that the court has no jurisdiction over the subject matter of the action.

[92] At common law, there is no entitlement to overtime pay at all or at a special rate in particular: *Macaraeg v. E Care Contact Centres Ltd.* (2008), 295 D.L.R. (4th) 358, [2008] B.C.J. No. 765 (C.A.), leave to appeal refused [2008] S.C.C.A. No. 293.

[93] In contrast, the *Code* establishes an entitlement to overtime pay and establishes a sophisticated regime for the enforcement of this right both through penal prosecutions and through an administrative recovery process. Inspectors appointed by the Minister have broad powers of investigation and enforcement, including the power to order payment of unpaid overtime. An appeal process exists allowing for a hearing before a referee who has the jurisdiction to summon witnesses, receive evidence under oath and to make legally binding decisions that are enforceable as if they were an order of the Court.

[94] It is well-settled that where a statute creates a liability not existing at common law, and provides for its own remedy, the court has no jurisdiction to enforce a claim under the statute: *Orpen v. Roberts*, [1925] S.C.R. 364, [1925] S.C.J. No. 14. Thus, for example, in *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181, [1981] S.C.J. No. 76, the Supreme Court held that there is no cause of cause of action to enforce rights conferred by the *Ontario Human Rights Code.* It is equally well-settled that breach of a statute does not give rise to a civil cause of action: *The Queen v. Saskatchewan Wheat Pool*, above. Moreover, the overwhelming weight of authority is to the effect that Part III of the *Code* does not create a civil cause of action and that the court has no jurisdiction to enforce it: *Conrad v. Imperial Oil* (1999), 173 D.L.R. (4th) 286, 174 N.S.R. (2d) 62 (C.A.); *A'Hearn v. T.N.T. Canada Inc.* (1990), 74 D.L.R. (4th) 663, [1990] B.C.J. No. 2236 (C.A.), leave to appeal dismissed [1990] S.C.C.A. No. 530; *Jordan v. Direct Transportation System Ltd.* (1986), 11 C.C.E.L. 142, [1986] O.J. No. 1887 (Dist. Ct.). Similar results have been reached in the consideration of comparable provincial legislation: see, for example, *Macaraeg v. E Care Contact Centres Ltd.*, above; *Pateman v. Ray's Ambulance Service Ltd.* (1973), 38 D.L.R. (3d) 709 at p. 720, [1973] S.J. No. 97 (Q.B.); *Thiessen v. Carriere Toyota NWT Ltd.* (1995), 15 C.C.E.L. (2d) 203 at pp. 206 and 209, [1995] N.W.T.J. No. 59 (S.C.); *Hopkins v. Paul Revere Insurance Co.*, [1989] O.J. No. 2424 (Dist. Ct.); *Kenney v. Browning-Ferris Industries Ltd.* (1988), 63 Alta. L.R. (2d) 164 at pp. 168-171, [1988] A.J. No. 1012 (Q.B.).

[95] There are exceptions where the statute expressly confers a civil remedy or, as contemplated in *Stewart v. Park Motors Ltd.*, [1968] 1 O.R. 234, [1967] O.J. No. 1117 (C.A.), where the legislation conferring the right does not provide for an adequate remedy. This is not such a case. Although the *Code* expressly preserves common law remedies (s. 168(1)), there is nothing in the *Code* to indicate an intention to confer a civil remedy. Moreover, as I have noted,

the *Code* contains a comprehensive mechanism to enable an aggrieved worker to obtain compensation.

[96] The provisions of the *Code* are to be contrasted with other regimes, such as the Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41, which between 1974 and 2000 provided that its terms were incorporated into every contract of employment to which it applied, and which now contemplates enforcement by civil action. The provisions of the *Employment Standards Act* have been construed to permit the court to grant remedies under the statute unless the employee has previously elected to pursue the administrative procedural regime: *Franklin v. University of Toronto* (2001), 56 O.R. (3d) 698 at p. 706, [2001] O.J. No. 4321 (S.C.J.); *Kumar v. Sharp Business Forms Inc.* (2001), 9 C.C.E.L. (3d) 75 at pp. 80-81 and 86, [2001] O.J. No. 1729 (S.C.J.); *Halabi v. Becker Milk Co.* (1998), 38 C.C.E.L. (2d) 80 at pp. 81-82, [1998] O.J. No. 2661 (Gen. Div.); *Poletek v. Thomas Cook Group (Canada) Ltd.* (1997), 27 C.C.E.L. (2d) 57 at p. 61, [1997] O.J. No. 1289 (Gen. Div.). Similar provisions exist in the comparable Nova Scotia statute (*Labour Standards Code*, R.S.N.S. 1989, c. 246, s. 82) and the Alberta statute (*Employment Standards Code*, R.S.A. 2000, c. E-9, s. 83). If Parliament intended to confer a civil cause of action through the *Code*, it had ample precedent.

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

[98] The plaintiff relies on *Stewart v. Park Motors Ltd.*, above, in support of her submission that the provisions of the *Code* should be implied into the contracts of employment of the Class. In that case, the Court of Appeal stated, at paras. 8 and 9:

> Where a statute creates a liability not existing at common law and provides a particular remedy for enforcing it, the question is raised as to whether the particular remedy provided is the only remedy or whether there is, in addition, a right of action for damages or other relief based on the breach of the statutory duty. As statutory duties deal with a great variety of matters of varying degrees of importance and are directed to a number of different objects it is impossible to give a simple, affirmative or negative answer to this question. Everything depends upon the object or intention of the statute. ...
>
> ... An examination of the authorities makes it clear that in the determination of this question it ought to be considered whether the action is brought in respect of the kind of harm which the statute was intended to prevent, if the person bring [sic] the action is one of the class which the

> statute was designed to protect, and if the special remedy provided by the statute is adequate for the protection of the person injured.

[99] The Court of Appeal found that the *Hours of Work and Vacations with Pay Act*, R.S.O. 1960. c. 181, did not exclude a civil remedy. That legislation was rudimentary by today's standards and contained no administrative enforcement provisions. In contrast, the *Code* contains an extensive enforcement regime and an elaborate administrative structure has been created to enable workers to obtain redress. In my view, this is not a case, like *Stewart v. Park Motors Ltd.*, where it is necessary to enforce the legislation by conferring a common law remedy.

[100] The plaintiff also relies on *Kumar v. Sharp Business Forms Inc.*, above, in which Cumming J. certified a class action for overtime pay and vacation pay under the *Employment Standards Act*, R.S.O. 1990, c. E. 14. The legislation at issue in that case contained three particularly important provisions. First, the minimum wage established under the statute was deemed to be part of the employment agreement between the parties (s. 23 stated that "Every employer who permits any employee to perform work or supply any services in respect of which a minimum wage is established shall be deemed to have agreed to pay the employee at least the minimum wage established under this Act.") Second, the minimum standards under the statute could not be contracted out of or waived. Third, the statute contained a specific provision allowing an employee to bring a civil action for wages and benefits owing or to pursue an administrative remedy, but not both. In this case, although the *Code* provisions apply "notwithstanding any other law, or any custom, contract or arrangement" (s. 168(1)), the *Code* contains no deeming provision. While it does not affect or limit an employee's contractual or legal rights that are more favourable, it does not expressly contemplate that its provisions will be enforced in a civil action.

[101] The plaintiff replies, in part, that she is not seeking to directly enforce the *Code* but that the *Code* is either implied by law or implied by fact into the contracts of employment of the Class. Although the plaintiff has not pleaded that the *Code* is implied *by fact* into the contracts of employment of members of the Class, her counsel makes this assertion in her factum in response to the motion to strike, as a result of the statement in the policy itself that it is "based on" the *Code.*

[102] I do not accept the broad proposition set out in the plaintiff's factum that "The Court of Appeal for Ontario, the Superior Court of Justice as well as courts of various levels in other provinces have repeatedly held that entitlements created by employments standards legislation are incorporated into contracts and enforceable in a court of law." The statute must be examined, in every case, to determine whether a cause of action is conferred.

[103] I find that the plaintiff has no direct cause of action based on the *Code* and that the pleadings in the statement of claim asserting a cause of action under the *Code* should be struck. This decision was made easier by the fact that the plaintiff disclaims any intention to assert such a cause of action. I am not prepared, however, to strike the pleading that the requirements of the *Code* and its regulations (including the duties to pay overtime for hours worked and to keep accurate records of hours worked) were implied terms of the contracts of the Class Members. I come to this conclusion because, in my view, the provisions of the *Code* may well inform the contractual duties, including the duty of good faith and fair dealing that Scotiabank owes to its

employees. I am therefore not prepared to conclude that it is plain and obvious that these claims should be struck.

Identifiable Class

[104] The plaintiff proposes the following Class definition:

> All current and former full-time personal banking and small business banking employees at Scotiabank's retail branches who held one or more of the following positions since 2000:
> (a) Personal Banking Officer;
> (b) Senior Personal Banking Officer;
> (c) Financial Advisor; or,
> (d) Account Manager Small Business (including its predecessor positions of Account Mangers and Account Officers).

[105] Scotiabank acknowledges that there is an identifiable class and that the class definition is appropriate, without conceding that there are no limitations issues arising in connection with the temporal scope of the Class. The class definition meets the test set out in *Hollick v. Toronto (City)*, above, at para. 17 and I will approve it.

Common Issues

[106] The critical question on this motion is whether the claims of the Class Members raise common issues, which are capable of being determined on a class-wide basis, and the resolution of which will sufficiently advance the litigation. The claim in *Fresco* failed to clear this hurdle.

[107] I will begin by summarizing the principles applicable to the common issues analysis. I will then set out the submissions of the parties. I will then analyze the issues and explain the reasons for my conclusion that this action raises common issues that are grounded in the evidence and suitable for certification. Finally, I will examine the particular common issues proposed and will identify the ones to be certified.

Principles applicable to common issues analysis

[108] Section 1 of the *C.P.A.* defines "common issues" as: (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[109] There must be some basis in the evidence before the court to establish the existence of the common issues: *Hollick v. Toronto (City)*, above, at para. 25. It should be kept in mind, however, that in certifying a common issue the court is not concluding that it will be answered in a manner favourable to one party or the other. The requirement that there must be an evidentiary basis for the existence of a common issue is a far cry from proof of the issue on the balance of probabilities.

[110] The resolution of common issues is what a class action is all about. As Winkler J. said in *Bywater v. Toronto Transit Commission*, above, at para. 12:

> ... *The Class Proceedings Act, 1992*, is an entirely procedural statute, and, as such, does not create any new cause of action. A decision on certification does not constitute a determination on the merits of the action. The presence of common issues is at the very center of a class proceeding. It is the advancement of the litigation through the resolution of the common issues in a single proceeding which serves the goals of the Act. It is clear from the language of s. 5(1)(c) that the Act contemplates that there be a connection between the common issues, the claims or defences and the class definition. In like fashion, the common issues must have a basis in the causes of action which are asserted.

[111] By resolving common issues, a class action facilitates access to justice and makes efficient use of judicial resources. The common issue requirement is not a high hurdle - it does not have to resolve a class member's claim, but the answer must be *necessary* to the resolution of each member's claim: *Hollick v. Toronto (City)*, above, at para. 18; *Williams v. Mutual Life Assurance Co.; Zicherman v. Equitable Life Insurance Co. of Canada*, [2003] O.J. No. 1160 and 1161, 226 D.L.R. (4th) 112 (C.A.), aff'g [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), which aff'd (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.). The requirement that the answer must be *necessary* to the resolution of the claim means that it must be *legally* necessary as opposed to simply of passing interest. Put simply, if the answer to the common issue would leave the individual issues judge with the question "So what?", it is not a proper common issue.

[112] It is sufficient if the common issue is one of fact or law that moves the litigation forward and avoids duplication: *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252, [2009] O.J. No. 1874 (Div. Ct.) at para. 31; *Gerber v. Johnston*, 2001 BCSC 687, [2001] B.C.J. No. 1088 at para 43. The common issue can make up a limited part of the liability question, and many individual issues may remain after its resolution. As the Court of Appeal said in *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924, app. for leave to appeal dismissed, [2005] S.C.C.A. No. 50, at paras. 53 – 55:

> In other words, *an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial.* This is consistent with the positive approach to the CPA urged by the Supreme Court as the way to best realize the benefits of that legislation as foreseen by its drafters.
>
> Neither the reasons of the motion judge nor those of the majority of the Divisional Court reflect this approach to the commonality assessment. The motion judge focused on those aspects of the claim that in his view would require individual determination, student by student. Although he did not have the benefit of the Supreme Court decision in *Hollick, supra*, he did not analyze what parts of the claim could be said to be common as explained in that decision. Moreover, in my view, he erred in his ultimate

> conclusion that there were no common issues. For its part, the majority of the Divisional Court felt it unnecessary to address this criterion.
>
> On the other hand, I think Cullity J. approached the commonality issue correctly and reached the right result. As I have described, *rather than focusing on how many individual issues there might be and concluding from that that there could be no common issues, Cullity J. analyzed whether there were any issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims.* [emphasis added]

[113] A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.) at para. 39, aff'd [[2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161, 226 D.L.R. (4th) 112 (C.A.); *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155, (S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).

The parties' submissions on the common issues

[114] The plaintiff submits that commonality in this case is found in the common terms of the employment contracts and work functions of the Class Members, the common overtime policy, and what the plaintiff says are systemic failings in Scotiabank's record-keeping, overtime and compensation policies and practices. The plaintiff says that, as in *Rumley v. British Columbia,* [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 and *Cloud v. Canada (Attorney General)*, the class-wide determination of whether duties owed to the Class were systemically breached will significantly advance the litigation.

[115] In *Cloud v. Canada (Attorney General)*, the Court of Appeal noted that a significant part of the claim of every class member focused on the way those responsible ran the aboriginal residential school. This included not only the policies and practices they employed, but also the policies and practices *they failed to employ* to prevent abuse. The resolution of the issue of the duties owed to members of the class, and whether they were breached, were questions that would significantly advance the action, even though individual adjudication would be required concerning injury and causation. A similar approach was taken in *Rumley v. British Columbia*, above, in which questions of systemic negligence – the failure to have in place management and operational procedures that would reasonably have prevented the abuse – made the claim appropriate for certification.

[116] The plaintiff says that common issues also exist concerning the express or implied terms of the employment contracts of the Class and that, as in *Cassano v. The Toronto-Dominion Bank*, (2008), 87 O.R. (3d) 401, [2007] O.J. No. 4406 (C.A.), leave to appeal to S.C.C. ref'd [2008] S.C.C.A. No. 15, *Markson v. MBNA Canada Bank*, above, *Hickey-Button v. Loyalist College of Applied Arts & Technology*, above, and *Lee Valley Tools v. Canada Post Corp.*, above, the resolution of these issues will significantly advance the claim of each member of the class.

[117] Finally, the plaintiff says that the resolution of the claim for unjust enrichment is ideally suited for resolution on a Class-wide basis.

[118] Scotiabank's position on the common issues is that where the proposed common issue requires an examination of the circumstances of each Class Member, it is incapable of being resolved on a class-wide basis and does not meet the common issues requirement: *Risorto v. State Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 676, 38 C.P.C. (6th) 373 (S.C.J.) at para. 74; *Fresco* at para. 70.

[119] Scotiabank also submits that the plaintiff has failed to establish any basis in fact for the allegation that there has been a systemic breach of duties owed to the Class.

[120] At the end of the day, Scotiabank says that each Class Member will still be required to prove:

(a) that overtime hours were worked;

(b) the number of overtime hours worked;

(c) which of the hours were

(i) "authorized" under the overtime policy or

(ii) required or permitted by the *Code*; and

(d) the extent to which he or she has not already been compensated for those hours.

It says that, as in *Fresco*, this analysis will require individualized inquiries that are inherently factual and dependent on the circumstances of each employee.

Analysis

[121] It is true that one approach to the plaintiff's case would be to frame it in the manner set out in paragraph 120, above. Ms. Fulawka might make out her claim by proving that she regularly worked in excess of 37.5 hours per week, proving the number of overtime hours worked in her career, proving that the overtime hours were "authorized" under the bank's policy or "required" or "permitted" under the *Code* and proving that she has not been compensated either by payment at time and a half or by time *in lieu*. Just as an individual class member in *Rumley v. British Columbia* might have proven a claim based on individualized breaches of duty, so Ms. Fulawka and other members of the Class might be able to prove individual breaches of contractual or other duties.

[122] As in *Rumley v. British Columbia*, however, the plaintiff is entitled to advance her case in a way that makes it amenable to determination on a Class-wide basis. This approach to the plaintiff's case would be to frame it, as Ms. Fulawka has, based on a contract common to the Class and systemic breaches of duties owed to Class Members. She says that the common terms of the contract, the systemic nature of the duties owed to the Class and the breaches of the contract and duties at a systemic level are common issues, the resolution of which will advance the claim of every Class Member.

[123] There is a basis in fact, albeit disputed, for the assertion that Ms. Fulawka and other Class Members regularly worked overtime in order to complete the ordinary duties of their employment. There is evidence that this was encouraged by Scotiabank and indeed Ms. Fulawka's own performance appraisals support this conclusion. Scotiabank's "system," such as it was, put the onus on the employee to obtain prior authorization and, for a large part of the Class Period, did not expressly allow for approval after the fact. In light of the evidence of Ms. Fulawka and other Class Members that, due to the nature of their work, it was very difficult for a Class Member to predict when overtime would be required, the pre-approval requirement could be described as a "Catch 22".[1] Simply put, overtime hours could only be pre-approved by management when there was a pressing need to work overtime. However, when there was a pressing need to work overtime, there was frequently no opportunity to seek pre-approval.

[124] The evidence in this case supports the common issue of whether, knowing the nature of the work carried out by Class Members, their position of relative vulnerability, and the risks of variations in practices from branch to branch and from manager to manager, Scotiabank owed them a duty to put a system in place to protect them from working unpaid overtime, caused either by the nature of the work or pressures, subtle or otherwise, from their superiors. This question would implicitly ask whether the employee should bear the responsibility of not working overtime unless it has been approved or whether the employer bears the responsibility of ensuring that managers do not *permit* or *require* overtime to be worked unless it is to be compensated. While an employer certainly has the right to protect itself against unrequested and unwanted overtime hours, it is arguable that the balance of power in the workplace is such that the protection of the employee against working unpaid hours should be the paramount consideration. It is also arguable that the employer has a responsibility to design, implement and enforce overtime policies and procedures on a system-wide basis to prevent abuses.

[125] The obligation of the employer to take active measures to prevent uncompensated overtime being worked has been recognized in labour arbitrations applying the *Code:* see Referee Emrich in *T-Line Services Ltd. v. Morin,* [1977] C.L.A.D. No. 422 at paras. 33-34:

> It is within the control and discretion of management to establish the hours of work and to supervise the work force effectively to avoid the triggering of overtime liability. Thus it is reasonable to cast the onus upon management to take active measures to regulate the hours that employees may work. In the absence of such measures, the employer runs the risk that through oversight or omission, workers are permitted to work overtime and thereby liability to pay overtime is triggered ...

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[1] "There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to.
"Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.
"'That's some catch, that Catch-22,' Yossarian observed.
"'It's the best there is,' Doc Daneeka agreed."(Joseph Heller, *Catch 22* (Simon & Schuster, USA 1961)).

[126] Viewed from this perspective, it is arguable that Scotiabank's policy put too much emphasis on the employer's interests and insufficient emphasis on the interests of Class Members. It is also arguable that it failed to protect Class Members against the risk that they would be required to work uncompensated overtime because of the demands of the jobs or their superiors. There is a basis in fact in this case for common issues based on the duty of Scotiabank to establish and implement a fair process to fulfill the duties it owed to the Class in relation to their overtime work.

[127] The resolution of the issue of whether Scotiabank had a duty to put a fair and reasonable overtime system in place, and whether its system (including the pre-approval requirement) fulfilled this duty, is one that will advance the claim of every Class Member. If a common issues judge were to find that there was such a duty and that Scotiabank's system was unfair and unreasonable, the absence of pre-approval would not be a defence to an individual overtime claim. While Scotiabank now acknowledges, and its new policy appears to reflect, that it has an obligation to pay overtime that has been "permitted," its pre-2008 policies and practices did not reflect this acknowledgement.

[128] There is also a factual basis for a common issue concerning Scotiabank's record-keeping system. Scotiabank's position is that the Plaintiff has failed to advance any evidence of a systemic flaw in its recordkeeping practices, and because the implementation of those practices was at the branch level, any inquiry into how records were kept must be conducted branch-by-branch and cannot be resolved on a Class-wide basis. I do not accept this. It amounts to Scotiabank saying that its record keeping system was so decentralized, varied and idiosyncratic that every claim for overtime must be examined on a case-by-case basis. Scotiabank cannot point to its own record keeping failures to defeat certification. This would not be an acceptable way for a bank to manage its customers' money and it is not an acceptable way to manage the compensation to which its employees are entitled. There is evidence that, for most of the Class Period, Scotiabank did not have an adequate system in place for the recording of regular time and overtime worked by Class Members. The staff plan was nothing more than a record, prepared in advance, of the hours that employees were *scheduled* to work. It was not a record of hours actually worked. While employees were supposed to check and correct their hours after the fact, Scotiabank's policy prevented them from recording and claiming for hours that had not been pre-approved. The "Catch 22" gave them no reason to record the hours they *actually* worked because they would not be paid unless the overtime had been pre-approved. The bank had no consistent corporate policy or system applicable to all branches, for the tracking of overtime. It had no system of tracking time *in lieu*" or of ensuring it was "cashed out". It is appropriate to ask whether this was a breach of a duty owed to the Class.

[129] The evidence before me, therefore, provides a basis in fact to ask whether Scotiabank owed duties to the Class to put policies and procedures in place to prevent overtime from being worked without compensation and to properly record all hours of overtime worked, whether pre-approved or not. There is also a basis to ask whether those duties were breached. The answers to these common issues do not depend on individual findings that have to be made with respect to each individual claimant. The answers will significantly advance the action because if they are answered in the affirmative the absence of pre-approval in any particular case may be irrelevant and the inability of an employee to prove the quantum of overtime hours worked may not be fatal to the claim. A conclusion by the common issues judge that the bank had a duty to pay

overtime that was permitted or required, and that it breached a duty to establish a system to properly record such overtime, could result in a conclusion that the failure to prove overtime hours worked is not a bar to recovery, or that the absence of records is not an impediment to proof of damages.

[130] In addition, if the common issues judge finds that Scotiabank failed to have a proper record-keeping system, and the absence of such records impairs the ability of Class Members to prove their damages, an aggregate assessment of damages using statistical means may well be the only way to fairly compensate Class Members. Although Class Members may be compensated more, or less, than they are owed by the defendant, this is not a bar to certification. As the Ontario Court of Appeal stated in *Markson v. MBNA Canada Bank*, above, at para. 49:

> It may be that in the result some class members who did not actually suffer damage will receive a share of the award. However, that is exactly the result contemplated by s. 24(2) and (3) because "it would be impractical or inefficient to identify the class members entitled to share in the award".

Scotiabank's poor record keeping practices may require the use of an aggregate assessment to determine the appropriate quantum of damages for Class Members. The lack of records may make it "impractical or inefficient" to use individual assessments.

[131] In summary, in the context of this case, and without being exhaustive, it is my view that each Class Member would benefit from the determination of:

(a) whether Scotiabank had a duty to put a system in place to ensure:

(i) that employees at the branch level were not required or permitted to work overtime without compensation;

(ii) that regular hours and overtime hours were properly recorded; and

(iii) that any employee who was required or permitted to work overtime hours was paid.

(b) whether the provision of the Policy requiring pre-approval of overtime was a breach of duty owed by Scotiabank to the Class;

(c) whether the contracts of employment of members of the Class included an implied term that overtime permitted or required would be compensated.

[132] With these comments in mind, I will examine the common issues proposed by the plaintiff. I will deal with them by grouping. The full common issues are set out in the appendix to these reasons.

Group A: Breach of Contract

[133] In view of the common nature of the employment duties of Class Members, the terms of their contracts are appropriate common issues. Lax J. came to the same conclusion in *Fresco* at para. 59, but found that the determination of these issues alone would not advance the litigation in the absence of evidence of systemic wrongdoings. As I have found an evidentiary basis for common duties and systemic breaches, that concern does not exist here. I am satisfied as well that breach of contract can be determined on a class-wide basis: see *Cassano v. The Toronto-Dominion Bank*, above.

[134] Scotiabank submits that since the overtime policy is admitted to be an express term of the contracts of each Class Member, this is not an appropriate common issue because its resolution does not advance the litigation. It relies on Justice's Lax's conclusion to this effect *Fresco* at paras. 58 and 59, distinguishing the decision of Winkler J. in *Bywater v. Toronto Transit Commission*, above.

[135] Scotiabank submits that the same applies to its admission that the Level 6 employees are entitled to overtime.

[136] Significantly, in *Fresco*, CIBC admitted that the statutory duties under the *Code* concerning compensation for overtime and the maintenance of records were incorporated into the contracts of employment of members of the class. It admitted that if an employee was required or permitted to work overtime, whether or not pre-approval was obtained, and was not compensated, this was a breach of the contract of employment. These admissions have not been made in this case. Scotiabank says that the implication of the *Code*, whether as a matter of fact or as a matter of law, is not a proper common issue. Although Scotiabank appears to acknowledge that the *Code* imposes an obligation to pay for overtime that has been *permitted* even if not approved in advance or even approved after the fact, this was not the response that Ms. Fulawka received when she complained to Scotiabank that she was frequently required to work overtime in order to perform her job. Her requests for compensation were met with the response that she was not asked to work overtime. Her superior referred her to the provisions of the policy that require overtime to be approved in advance.

[137] It seems to me that the observations of Winkler J. in *Bywater v. Toronto Transit Commission*, although expressed in that case concerning the admission of liability, apply equally to any admission that sufficiently advances the resolution of the common issues. In *Bywater v. Toronto Transit Commission*, above, Winkler J. stated, at paras. 13 and 14:

> Here, the defendant admits liability for the cause of the fire. This admission, it contends, eliminates the common issue of liability. Since this, it asserts, is the only common issue, the certification motion must fail.
>
> I cannot accede to this submission. This is not to in any way detract from the commendable and timely admission of fault by the defendant. However, an admission of liability in the air does not advance the litigation or bind the defendant in respect of the members of the proposed

> class. Without a certification order from this court no public statement by the defendant, and no admission in its defence to the nominal plaintiff, binds the defendant in respect of the members of the proposed class. A class proceeding by its very nature requires a certification order for the proposed class members to become parties to the proceeding. If the proposed class members are not parties to the proceedings, the admission of liability, as it relates to them, is no more than a bare promise. The words of the Divisional Court in *Westminer Canada Holdings Ltd. v. Coughlan* (1990), 75 O.R. (2d) 405, are apposite. Rosenberg J., speaking for the court, stated at 415:
>
> > The defendants have undertaken to this court not to raise the limitation defence in Nova Scotia. The appellant did not seek such an undertaking. Such an undertaking does not end the matter. In my view the juridical disadvantage remains. In his text, James Cooper Morton, *Limitation of Civil Actions* (Toronto: Carswell, 1988), states at p. 106:
> >
> > An agreement not to rely on the passage of time must meet the formal requirements of a contract before it can be considered binding. Specifically, consideration must pass between the parties. A bare promise not to rely on the passage of time is unenforceable.
>
> In any event, absent a judgment by a court of competent jurisdiction on the basis of the admission, *res judicata* does not apply to the proposed class. See *Thoday v. Thoday*, [1964] 1 All E.R. 341 at 352. Therefore the admission simpliciter does not resolve the common issue of liability as it relates to the class members nor does it bind the defendant to them."

[138] In a later case, *Caputo v. Imperial Tobacco Ltd.* (2004), 44 C.P.C. (5th) 350, [2004] O.J. No. 299 (S.C.J.) Winkler J. appeared to contemplate that an admission that was less than a full admission of liability might nevertheless lead to the conclusion that a class proceeding was the preferable procedure, because it would bind the defendant with respect to the class as a whole. In that case, the defendants acknowledged that there were "significant health risks associated with smoking," but said that individual issues of causation would still remain. However, Winkler J. found that the case was not appropriate for certification for other reasons. See also *Rideout v. Health Labrador Corp.* (2005), 12 C.P.C. (6th) 91, [2005] N.J. No. 228 (S.C.) at paras. 114 – 116; *Scott v. TD Waterhouse Investor Services (Canada) Inc.* (2001), 94 B.C.L.R. (3d) 320, [2001] B.C.J. No. 1874 (S.C.) at para. 79:

> ... a common issues trial cannot be avoided because the defendants admit certain facts or issues. Class members do not become parties to the litigation until after certification. Therefore, a public statement admitting issues at a certification hearing or in the originating proceeding cannot be a legal admission. It is a bare promise to admit: *Bywater v. Toronto Transit Commission* ...

[139] A defendant cannot finesse a motion for certification by admitting what would otherwise be a proper common issue. An admission that is less than a full-scale admission of liability, but that nevertheless is an important admission of fact or law or a combination thereof, may well be an important ingredient of a cause of action or may advance the resolution of other issues.

[140] It is frequently stated that common issues relating to implied terms are not appropriate for certification because the existence of implied terms depends on an examination of the circumstances of the individual contract made with each class member: *McLaine v.London Life Insurance Co.* (2007), 233 O.A.C. 275, [2007] O.J. No. 5035 (Div. Ct.) at paras. 85-86, 91; *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (S.C.J.) at para. 70. In this case, however, the existence of implied terms is based on an overtime policy that is common to all Class Members and duties, both contractual and statutory, that are owed to all Class Members. This is a case like *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, [2009] O.J. No. 1523 (S.C.J.) in which Lax J. concluded, at para. 52, that the issue of both express and implied terms did not depend on the individual knowledge, understanding or circumstances of each class member.

Group B: Systemic Defects in Overtime Policies and Practices

[141] For the reasons set out in my analysis of the *Code,* proposed common issue no. 3, which asks whether Scotiabank's policy breaches the *Code* and is void, is not suitable for certification. For the reasons set out earlier, however, I am satisfied that the issues concerning systemic duties are appropriate for certification. I will therefore certify common issues 4, 5 and 6.

[142] Scotiabank argues that certification of these systemic issues will not advance the claims of the Class because no Class Member needs to demonstrate a duty to record hours in order to found a successful claim. Even if there is such an obligation, Scotiabank says that it would not assist a Class Member who could not demonstrate that they worked unpaid overtime. Ms. Fulawka replies that this is an example of the defendant creating a "straw man" – trying to structure the plaintiff's claim so as to defeat certification, as opposed to acknowledging the right of the plaintiff to structure her case in a way that makes it appropriate for certification: see *De Wolfe v. Bell ExpressVu Inc.* (2008), 58 C.P.C. (6th) 110, [2008] O.J. No. 592 (S.C.J.); *Wilkins v. Rogers Communications Inc.* (2008), 66 C.P.C. (6th) 251, [2008] O.J. No. 4381 (S.C.J.) at para. 51.

[143] The answer to common issue 4 (whether there was a duty to record hours worked and whether the duty was breached) and issue 6 (whether there was a duty to establish a system) will advance the claim of each Class Member. The absence of a Class-wide system to record hours is a systemic impediment to the ability of every Class Member to prove that he or she worked overtime and how much overtime he or she worked. If it is found that Scotiabank had a duty to create such a system, and that the duty was breached, the claims will be advanced in a significant way because Scotiabank will be unable to rely on its own breach of duty to defeat the claims of Class Members. It is of interest that, when Scotiabank announced its retroactive overtime compensation program for Level 6 employees, it promised to take into account the fact that employees might not have records of the unpaid overtime they had worked. A binding determination of the issue, applicable to all Class Members, would significantly advance the claims of every Class Member. In *Fresco*, at para. 57, Lax J. noted that the plaintiff in that case

did not assert a common flaw in the record keeping practices of the bank, and that she therefore did not have to deal with this common issue. In the present case, the plaintiff has asserted, and provided evidence of, such a common flaw in Scotiabank's record keeping practices and policies.

[144] Similarly, the answers to common issues 5 and 6 (whether Scotiabank had a duty to prevent Class Members from working overtime hours it did not intend to compensate, and whether it had a duty to implement a Class-wide system to satisfy this duty) will advance the claim of each Class Member. If it is found that Scotiabank had an active duty to prevent unpaid overtime, and that it breached this duty, then proof by the employee that the work was "required" or "permitted" (to use the language of the *Code*) will likely result in recovery of overtime.

Group C: Misclassification

[145] Scotiabank admitted that it had misclassified Level 6 employees as management, thereby rendering them ineligible for overtime. As Lax J. noted in *Fresco* at para. 54, misclassification cases are appropriate for certification due to commonality of employment functions and common treatment by the employer. While Scotiabank established a procedure in 2008 to address the misclassification, its application was limited to claims post-November 2005. Moreover, I accept Ms. Fulawka's submission that some eligible claimants may have failed to assert a claim for a variety of reasons. The issue should be certified so that a determination can be made that is binding on Scotiabank and Class Members.

Group D: Unjust Enrichment

[146] I have found that the claim for unjust enrichment is appropriate for certification. Issues of whether Scotiabank was enriched and whether Class Members suffered a deprivation are therefore appropriate. Numerous cases have certified claims for unjust enrichment: see, for example, *Smith v. National Money Mart Co.* [2007] O.J. No. 46, 37 C.P.C. (6th) 171 (S.C.J.), leave to appeal ref'd [2007] O.J. No. 2160, 30 E.T.R. (3d) 163 (Div. Ct.).

Group F [sic]: Remedy & Damages

[147] Common issue 9 asks: "if the answer to any of the foregoing common issues is "yes", what remedies are Class Members entitled to?

[148] Common issue 10 asks whether Scotiabank is potentially liable on a Class-wide basis and, if so, whether damages can be assessed on an aggregate basis. It also asks whether aggregate damages can be assessed in whole or part on the basis of statistical evidence, the quantum of aggregate damages owed to Class Members and the appropriate method or procedure for distributing the aggregate damages award to Class Members. While the *C.P.A.* does not require that the entitlement to aggregate damages be determined as a common issue, it is appropriate to certify a common issue if there is a reasonable likelihood that the conditions for an aggregate assessment would be satisfied at a common issues trial: *Markson v. MBNA Canada Bank*, above; and, *Cassano v. Toronto-Dominion Bank*, above.

[149] As I have found that the plaintiff's claim is founded on systemic breaches of duty, which have a factual basis in the evidence, all members of the proposed Class were exposed to

the same risk of harm as a result of Scotiabank's policies and practices. In this case, if a common issues judge were to find that Scotiabank's overtime policy was a breach of the express or implied terms of the contracts of the Class members because it failed to compensate them for hours they were required or permitted to work, and that Scotiabank's record-keeping system breached the obligation it owed to all Class Members by failing to properly record their hours worked, these "systemic" breaches could support an aggregate assessment. The procedural tools in s. 23 and 24 of the *C.P.A.* for the determination of the quantum and distribution of the award could then come into play.

[150] *Markson v. MBNA Canada Bank* dealt with a similar legal issue. The defendant bank had failed to keep records of the impugned transactions. It was impractical, but not impossible, for each class member to prove that they had been charged a criminal rate of interest. The motions judge held that the case failed the common issues requirement due to the need to first determine individual issues of liability. The Court of Appeal certified the class action based on the availability of an aggregate assessment. As the Court stated at para. 42: "[aggregate assessments] provide a means of avoiding the potentially unconscionable result of a wrong eluding an effective remedy."

[151] I accept the expert evidence adduced by the plaintiff that there are methods available, including statistical and sampling methods, that could assist the court in determining the amount of an aggregate assessment and an appropriate method of distribution.

[152] Common issue 11 asks whether the proposed Class is entitled to an award of aggravated, exemplary or punitive damages based upon the Bank's conduct and, if so, whether this damages award could be determined on an aggregate basis. This may not be a case in which the appropriateness of aggravated or punitive damages can only be assessed by the examination of individual circumstances, conduct or damages. As I have concluded that it may be possible to assess damages on an aggregate basis due to the systemic nature of the wrongs at issue, it is appropriate to certify punitive damages as a common issue as well: *Cloud v. Canada (Attorney General)*, above; *Rumley v. British Columbia*, above. The claim for aggravated damages is also an appropriate common issue: *Currie v. McDonald's Restaurants of Canada Ltd.* (2007), 51 C.P.C. (6th) 99, [2007] O.J. No. 3622 (S.C.J.); *De Wolf v. Bell ExpressVu Inc.*, above; *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (Div. Ct.), above.

Common Issue 12

[153] Common issue 12 asks:

> To the extent that the claims of Class Members raise non-common or individual issues, what are the appropriate, most efficient and cost effective procedures for determining same?

[154] This question is essentially procedural and is not an appropriate common issue for certification. The common issues judge has jurisdiction under s. 25(2) of the *C.P.A.* to give directions concerning the procedures to be followed in determining the individual issues.

Preferable Procedure

[155] In *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641, [2005] O.J. NO. 4918 (C.A.) Rosenberg J.A., giving the judgment of the court, summarized at para. 67 the principles applicable to the preferable procedure requirement, which had been set out by Goudge, J.A. in *Cloud v. Canada (Attorney General):*

> 1. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim; second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.
>
> 2. The analysis must keep in mind the three principle advantages of class actions: judicial economy, access to justice, and behaviour modification.
>
> 3. This determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole.
>
> 4. The preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over the individual issues.

[156] In *Fresco*, Lax J. stated at para. 94:

> In determining whether a class proceeding is the preferable procedure for resolving the common issues, the court must consider not just the common issues, but rather, the claims of the class in their entirety: *Hollick* at para. 29. The preferability requirement can be met even where there are substantial individual issues, but a class proceeding will not satisfy the requirement that it is the preferable procedure to resolve the common issues if the common issues are overwhelmed or subsumed by the individual issues such that the resolution of the common issues will not be the end of the liability inquiry but only the beginning.

[157] Justice Lax indicated that, had she found common issues capable of resolution, even in the absence of an aggregate assessment of damages, the need for individual hearings would not be a barrier to certification and the alternative – CIBC's internal process – would not have been any more manageable.

[158] Scotiabank says that the resolution of the individual issues in some 5,000 or more cases would be a nightmare of complexity that would burden the court and would not promote judicial economy. It points to *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389, [1999] O.J. No. 2298 (Sup. Ct.) and *Webb v. 3584747 Canada Inc.*, [2005] O.J. No. 449, 40 C.C.E.L. (3d) 74 (Sup. Ct.) as an example of a class proceeding involving thousands of wrongful dismissal claims that became bogged down. Scotiabank says that existing processes, including the Bank's

overtime policy, the *Code*, or the Small Claims Court, are entirely adequate to deal with the claims of the Class in a cost-effective manner. The *Code* has the added advantage of having no express limitation period.

[159] I have several observations. First, it is not a foregone conclusion that individual trials will be required. It is possible that an aggregate assessment of damages will be appropriate.

[160] Second, even if individual assessments of entitlement and damages are required, I cannot conclude that their complexity would be overwhelming. When Scotiabank decided to develop and implement a compensation plan for Level 6 employees – a plan that efficiently compensated some 600 overtime claims – it was able to do so. If Scotiabank, of its own volition, recognizing a legal obligation to its employees, was able to design and successfully implement a compensation policy, there is every reason to believe that a common issues judge, assisted by the parties and their qualified experts, will be able to do so.

[161] Third, I acknowledge the concern expressed by Ms. Fulawka's counsel that Scotiabank's internal procedures are not sufficiently independent and that members of the Class would be reluctant to claim overtime while still employed because of the bank's "culture" and out of fear of reprisals. Counsel also submits that there are weaknesses and limitations in the *Code* provisions. Lax J. commented on these concerns in *Fresco* at paras. 97 – 98:

> Although CIBC offers multiple methods for employees to raise concerns about their employment situation, the reality is that there is a power imbalance in the employment relationship and employees may perceive that their employment status and advancement will be affected if they assert the rights to which they are entitled. This can be a disincentive to come forward and inhibits access to justice. This may explain why after the commencement of this action, only 31 employees came forward through the escalation process to raise concerns about unpaid overtime. Or, it may mean, as CIBC contends, that there is no systemic problem at the bank.
>
> The Arthurs Report to which I referred earlier comments on the first explanation in relation to CIBC's other proposed alternative to a class proceeding - the HRSDC [Human Resources and Skills Development Canada] process. Professor Arthurs found that a very small fraction of federally-regulated employees (0.36%) advance complaints each year against their employer and almost all of these complaints (92%) are advanced against their former employer. Moreover, the jurisdiction of an HRSDC inspector is limited to investigation of breaches of the *CLC* and he or she has no authority to investigate breaches of an employer's overtime policy or to adjudicate claims for breach of contract and unjust enrichment: *Pereira v. Bank of Nova Scotia*, [2007] O.J. No. 2796 (S.C.J.). This would not advance the goals of access to justice or behaviour modification. These are better served by a class proceeding which is subject to court management and judicial scrutiny.

[162] The facts leading to my conclusion that there are systemic factors that give rise to common issues lead me to conclude that there may be systemic barriers to employees taking the initiative to invoke Scotiabank's internal procedures or remedies under the *Code*. Those employees would have a justifiable concern, in my view, that they would not be perceived as "team players." A class proceeding can offer them a degree of anonymity and they will be protected by the Court's supervision of the claims process.

[163] Fourth, as Lax J. noted in *Fresco*, at para. 98, the jurisdiction of HRSDC inspectors is limited to the enforcement of the *Code* and they have no jurisdiction to enforce claims under Scotiabank's policy or over claims for breach of contract or unjust enrichment.

[164] Fifth, and last, none of the alternative procedures would provide an efficient means of resolving the common issues that I have identified.

Representative Plaintiff

[165] Scotiabank does not dispute the capability of Ms. Fulawka to represent the Class. It does take issue with the litigation plan, which it describes as "wholly deficient," primarily because it claims that the inherently individual claims of the Class make it impossible to construct a litigation plan that is workable. This issue is also raised in the context of the preferability analysis.

[166] I am satisfied that Ms. Fulawka is a genuine plaintiff, that she has no conflict of interest with the Class and that she has retained experienced counsel with the capacity, experience and resources to prosecute this action.

[167] Scotiabank's criticism of the litigation plan is met, as least in part, by my conclusion that the need for individual determination of some issues is not an impediment to certification, and that individual determinations may not be required in any event. The litigation plan is not cast in stone and will be subject to modification as the case progresses. It meets the requirements set out by Nordheimer J. in *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242, 19 C.C.L.I. (4th) 35 (S.C.J..) at para. 53, and also those summarized by MacKenzie J. in *Poulin v. Ford Motor Co. of Canada*, [2006] O.J. No. 4625, 35 C.P.C. (6th) 264 (S.C.J.) at para. 100.

Conclusion and Order

[168] For these reasons, this action will be certified as a class action under the *C.P.A.* Counsel may draft and submit to me an order in conformity with these reasons and complying with s. 8 of the *C.P.A.*

G.R. Strathy J.

DATE: February 19, 2010

Appendix

Plaintiff's Revised Proposed Common Issues

Group A: Breach of Contract

1. What are the relevant terms (express, implied or otherwise) of the Class Members' contracts of employment with Scotiabank respecting:

    a. regular and overtime hours of work?
    b. recording of the hours worked by Class Members?
    c. paid breaks?
    d. compensation for hours worked by Class Members?

2. Did Scotiabank breach any of the foregoing contractual terms? If so, how?

Group B: Systemic Defects

3. a. Are any parts of Scotiabank's overtime policy (current or past) unlawful, void or unenforceable for contravening the *Canada Labour Code*?

    b. If the answer to 3(a) is "yes", which provisions are unlawful, void or unenforceable?

4. a. Did Scotiabank have a duty (in contract or otherwise) to monitor and accurately record all hours worked by Class Members and ensure that Class Members were appropriately compensated for same?

    b. If the answer to 4(a) is "yes", did the Bank breach that duty?

5. a. Did Scotiabank have a duty (in contract or otherwise) to prevent Class Members from working hours for which the Bank it [sic] did not wish or intend to compensate?

    b. If the answer to 5(a) is "yes," did the Defendant breach that duty?

6. a. Did Scotiabank have a duty (in contract or otherwise) to implement and maintain an effective and reasonable system, procedure and practices which ensured that the duties set out in common issues 4 and 5 above, were satisfied for all class members?

    b. If the answer to 6(a) is "yes" did Scotiabank breach that duty?

c. If the answer to 6 (b) if [sic] "yes", and to the extent found necessary by the common issues trial judge, did the Defendant thereby require or permit all uncompensated hours of the Class Members?

Group C: Misclassification

7. Did Scotiabank breach its contracts of employment with the Class (or some of the Class Members) or was it unjustly enriched, by denying eligibility for overtime compensation to some class members whom Scotiabank classified as "level 06" or above?

Group D: Unjust Enrichment

8.a. Was Scotiabank enriched by failing to pay Class Members appropriately for all their hours worked?

b. If the answer to 8(a) is "yes", did the Class suffer a corresponding deprivation?

Group F: Remedy & Damages

9. If the answer to any of the foregoing common issues is "yes", what remedies are Class Members entitled to?

10. If the answer to any of common issues is "yes", is Scotiabank potentially liable on a class-wide basis? If "yes":

a. Can damages be assessed on an aggregate basis? If "yes":

i. Can aggregate damages be assessed in whole or part on the basis of statistical evidence, including statistical evidence based on random sampling?

ii. What is the quantum of aggregate damages owed to Class Members?

iii. What is the appropriate method or procedure for distributing the aggregate damages award to Class Members?

11. Is the Class entitled to an award of aggravated, exemplary or punitive damages based upon the Bank's conduct? If "yes":

a. Can these [sic] damages award be determined on an aggregate basis?

b. What is the appropriate method or procedure for distributing any aggregate aggravated, exemplary or punitive damages to Class Members?

12. To the extent that the claims of Class Members raise non-common or individual issues, what are the appropriate, most efficient and cost effective procedures for determining same?