

07CV-345-166 CP

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

CINDY FULAWKA

Plaintiff

- and -

THE BANK OF NOVA SCOTIA

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDING ACT*, 1992

STATEMENT OF CLAIM

TO THE DEFENDANT

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

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

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

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

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO

PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$10,000.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$100.00 for costs and have the costs assessed by the court.

Date December ⁴⁶₁₀, 2007

Issued by


Local registrar

Address of court office 393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO: **THE BANK OF NOVA SCOTIA**
Scotia Plaza, 44 King Street West
Toronto, Ontario
M5H 1H1

CLAIM

1. The plaintiff claims:

- (a) an order certifying this proceeding as a class proceeding and appointing the plaintiff as representative plaintiff for the class;
- (b) an order, pursuant to s. 24 of the *Class Proceedings Act*, 1992, directing an aggregate assessment of damages;
- (c) \$250 million in general damages for the class, or such other sum as this Honourable Court deems just;
- (d) an interim, interlocutory and final mandatory order directing that The Bank of Nova Scotia ("BNS") specifically perform its contracts of employment with the class members and comply with the *Canada Labour Code* (the "*Code*") and, in particular, that the defendant accurately record all hours worked by class members and pay class members for all hours worked as follows:
 - (i) at their agreed normal hourly rate for hours worked up to the agreed maximum standard hours, and at their agreed overtime rate of one and a one-half times their normal hourly rate for all hours worked in excess of their agreed

maximum standard hours (their "Contractual Overtime");
or,

- (ii) in the alternative, at their regular hourly rate up to 40 hours per week or 8 hours per day, and at one and a one-half times their regular hourly rate for the greater of all hours worked in excess of 40 hours per week or 8 hours per day (their "Statutory Overtime").

(Hereafter, unless otherwise specified, the terms "overtime hours" and "overtime" are used to denote both Contractual Overtime and/or Statutory Overtime);

- (e) an interim, interlocutory and a final order declaring the current Standard Overtime Policy of BNS to be unlawful and unenforceable, and restraining BNS from enforcing the current Standard Overtime Policy, to the extent that it requires or permits class members to work overtime hours for which they will not be paid, or purports to prevent payment for overtime hours which they have worked, contrary to the *Code*;
- (f) an order, pursuant to s. 23 of the *Class Proceedings Act*, 1992, admitting into evidence statistical information, including statistical information concerning or relating to hours of work performed by members of the class, and an order directing

BNS to preserve and disclose to the plaintiff all records, in any form, relating to hours worked by members of the class;

- (g) in the alternative to the claim for damages in subparagraphs (b) and (c) above, an order directing the defendant to account to class members for all unpaid hours, including overtime, worked by each member of the class, and an order requiring BNS to disgorge to class members all amounts withheld by it in respect of such unpaid hours;
- (h) in the alternative to subparagraphs (b), (c) and (g) above, a declaration that BNS has been unjustly enriched, to the deprivation of members of the class, by the value of the unpaid hours, including overtime, worked by members of the class, and an order requiring BNS to disgorge to members of the class all amounts withheld by it in respect of such unpaid hours;
- (i) a declaration that BNS has breached its contracts of employment with each member of the class;

- (j) a declaration that BNS has breached its obligation to act in good faith in the performance of its contracts with class members by, among other things:
 - (i) failing to pay for all hours worked by the class members, including overtime, despite requiring and/or permitting such hours, including overtime, to be worked;
 - (ii) failing to advise the class members of their right to recover for such unpaid hours and, in particular, of the implied terms of their contracts under the *Code* and its regulations as referred to herein;
 - (iii) retaining for itself the benefit of amounts due to the class members in respect of such unpaid hours;
 - (iv) creating a working environment and circumstances in which the class members are: (i) required to work overtime hours in order to carry out the duties assigned to them; (ii) actively dissuaded from reporting such overtime hours; and (iii) actively dissuaded from claiming or obtaining compensation for their unpaid overtime; failing to maintain accurate records of all actual hours worked by the class members; and

- (v) imposing on the class members an overtime policy that purports to create an unlawful barrier to payment of overtime.
- (k) a declaration that BNS has breached its statutory obligations under Part III, Division I of the *Code*;
- (l) pre-judgment and post-judgment interest on the amounts payable pursuant to subparagraphs (b), (c), (d), (g) and (h) in equity or otherwise at common law, or alternatively pursuant to sections 128 and 129 of the *Courts of Justice Act*, compounded annually;
- (m) punitive, aggravated and exemplary damages in the amount of \$100 million, or such other amount as this Honourable Court deems just;
- (n) costs of this action on a substantial indemnity basis, together with applicable Goods and Services Tax thereon in accordance with the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended;
- (o) the costs of administering the plan of distribution of the recovery in this action in the sum of \$1 million or such other sum as this Honourable Court deems appropriate; and

- (p) such further and other relief as may be required by the *Class Proceedings Act, 1992* or as this Honourable Court may deem just.

THE PARTIES

2. The plaintiff Cindy Fulawka lives in Sedley, Saskatchewan. Since May 28, 1986 she has been employed at various retail bank branches of the defendant BNS in the provinces of Saskatchewan and Ontario. During her employment with BNS, the plaintiff has held various customer service job positions, including Personal Banking Officer and Account Manager, Small Business, that regularly required her to provide personal banking or small-business banking services to BNS customers.

3. The defendant BNS is a federally regulated Canadian chartered bank with its registered office in Halifax, Nova Scotia and its corporate headquarters in Toronto, Ontario. It is a Schedule I Bank under the *Bank Act*, 1991, R.S.C. c. 46.

4. BNS is one of Canada's largest corporations. At the end of its 2006 fiscal year, BNS had assets in excess of \$379 billion and profits of \$3.5 billion. Profits generated from the personal and small-business banking services offered at BNS retail branches are very important to the total profits of BNS.

5. BNS has over 970 retail branch offices and thousands of current, non-management personal banking and small-business banking employees. In addition,

BNS has thousands of former, non-management personal banking and small-business banking employees.

THE CLASS

6. The plaintiff brings this action on her own behalf and on behalf of the following class of persons:

All non-management, customer service employees at BNS retail branches:

- (a) who have held the position of personal banking officer, personal banking account manager or personal banking customer service employee;
- (b) who have held the position of small-business banking officer, small-business banking account manager or small-business banking customer service employee; and
- (c) whose duties or responsibilities have been to provide personal banking or small-business banking services to BNS customers, irrespective of whether their formal job title or position as designated by BNS at any relevant time was as specifically worded in subparagraphs (a) and (b) above.

(referred to hereafter as alternatively the “class”, “class members” or “PSB employees”)

7. At all material times, the duties performed by and associated with PSB employees, as well as the policies and practices of BNS that affect the conditions of their employment, were materially uniform and consistent across the defendant's retail branches.

8. At all material times, the duties of PSB employees were focused on providing individual and/or small business BNS customers with personalized assistance with respect to the purchase and management of a standard range of BNS products and services. Typical examples of such BNS products and services include personal loans, small business loans, lines of credit, home mortgages, credit cards, RRSP's and financial counselling, among other things.

9. In providing assistance with respect to such products and services, all PSB employees were subject to minimum sales goals and performance targets, as set by BNS.

10. As part of their duties, all PSB employees were required by BNS to accommodate the time demands and schedules of BNS customers, irrespective of whether such accommodation necessitated that PSB employees work outside of their normal working hours and in addition to their agreed standard maximum hours or statutory maximum hours.

11. As BNS directed or permitted, and as it knew or should have known, members of the class were consistently required to work unpaid overtime to satisfy the duties and meet the sales goals and performance targets associated with their positions,

including the duty to accommodate the time demands and schedules of BNS customers.

12. In addition, BNS has expressly required or directed members of the class to perform additional functions from time to time for which class members have not been paid, or have not been paid at the contractually or statutorily mandated rates.

13. As a matter of policy and practice, and without lawful excuse, BNS strictly discourages its PSB employees from requesting payment for unpaid overtime, and where such overtime pay is requested, regularly refuses to pay same. In fact, as set out in its current Standard Overtime Policy, described below, BNS requires that PSB employees secure advance authorization to work overtime and BNS will not pay overtime absent such advance authorization. Moreover, as a matter of policy and practice, BNS regularly refuses to grant advance authorization to work overtime, notwithstanding the fact that such overtime is regularly necessary for class members to fulfill the duties and meet the sales goals of a PSB employee, including their duty to accommodate the schedules and time demands of BNS customers.

SOURCES OF THE OBLIGATION TO PAY OVERTIME

I. CONTRACTUAL

14. It is an express or implied term of the class members' contracts of employment with BNS that they are entitled to be paid at their agreed normal hourly rate for hours worked up to their agreed maximum standard hours, and at their agreed overtime rate of one and a one-half times their normal hourly rate for all hours worked in excess of their agreed maximum standard hours.

15. Further and in the alternative, it is an express or implied term of the class members' contracts of employment with BNS that, in accordance with the *Code*, they are entitled to paid at their regular hourly rate up to 40 hours per week or 8 hours per day, and at a rate of one and a one-half times their regular hourly rate for the greater of all hours worked in excess of 40 hours per week or 8 hours per day .

II. STATUTORY

16. As BNS is a federally regulated corporation, it is required to comply with the minimum conditions set out in the *Code* in respect of such matters as wages, hours of employment, and severance entitlement. The minimum standards contained in the *Code*, including those relating to overtime, are intended, among other things, to protect vulnerable employees from undue exploitation by employers who may seek to take advantage of superior economic and bargaining power by setting unlawfully onerous terms and conditions of employment.

17. Pursuant to section 169 (1) of the *Code*:

“Except as otherwise provided by or under this Division

(a) the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; and

(b) no employer shall cause or permit an employee to work longer hours than eight hours in any day or forty hours in any week.”

18. Section 171 (1) of the *Code* provides that:

“An employee may be employed in excess of the standard hours of work but, subject to sections 172, 176 and 177, and to any regulations made pursuant to section 175, ***the total hours that may be worked by any employee in any week shall not exceed forty-eight hours in a week*** or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in the industrial establishment in or in connection with the operation of which the employee is employed.” [emphasis added]

19. Section 174 of the *Code* further provides that:

“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 for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.”
[emphasis added]

20. Sections 252(2) and 264(a) of the *Code* and section 24 of the *Canada Labour Standards Regulations*, C.R.C., c. 986, collectively oblige an employer such as BNS to accurately record and maintain records of its employees' hours of work. Accordingly, BNS should have accurate records of all hours of work for the class members.

21. Section 168 of the *Code* further provides that the *Code*'s minimum standards apply notwithstanding any other law or any custom, contract or arrangement.

22. The requirements of the *Code* and its regulations are implied terms in the contracts of class members. In particular, these implied terms include the requirements to pay for hours of overtime worked, including but not limited to time and one-half for hours in excess of 8 hours per day or 40 hours per week, and to keep accurate records of hours of work, .

THE CURRENT STANDARD OVERTIME POLICY OF BNS

23. The current Standard Overtime Policy of BNS provides for the payment of overtime “at **1.5 times [one’s] normal hourly rate** times the number of overtime hours worked” [emphasis in original].

24. However, the Standard Overtime Policy purports to restrict payment of overtime to those situations where employees have received prior authorization to work overtime. It expressly provides that “[o]vertime must be authorized in advance by the Branch Manager/Department Head and be recorded accordingly on the staff plan.” The Standard Overtime Policy thereby purports to excuse BNS from any obligation to pay overtime if advance authorization is not obtained from management. It does not allow for payment of overtime to persons who, like the class members, are routinely required or permitted to work overtime to fulfil the basic duties of their employment absent such advance authorization.

25. By purporting to limit the defendant’s obligation to pay overtime to situations where overtime has been authorized in advance, the current Standard Overtime Policy attempts to create an unlawful barrier to claims for payment for hours of overtime worked, and is in violation of the *Code*.

26. The application of the current Standard Overtime Policy of BNS will continue to violate the *Code's* overtime protections unless prevented from doing so by Court Order.

27. Individually, class members are largely powerless to challenge the current Standard Overtime Policy or to enforce their contracts of employment with BNS. In attempting to do so they would risk discharge and/or other employment- and career-related sanctions.

THE PLAINTIFF'S EMPLOYMENT HISTORY AT BNS

28. The plaintiff began working for BNS on May 28, 1986 as a Consumer Credit Interview Clerk at the Prince Albert, Saskatchewan retail branch, located at 1201 Central Avenue. She held several other non-management positions at the Prince Albert branch until her transfer to The South Hill Shoppers Mall branch in Prince Albert, Saskatchewan in 1994.

29. On August 16, 1994, the plaintiff was promoted to the position of Assistant Manager, Consumer Credit at the South Hill Shoppers Mall Branch. She was again promoted at the same branch on August 13, 1996 to Assistant Manager, Personal Banking. She remained in this position until March 24, 1999 when she applied for a transfer to London, Ontario.

30. In March 1999, the plaintiff relocated to London, Ontario and took up the position of Senior Retail Administration Clerk at the Defendant's retail branch located at the Galleria Mall, London, Ontario. She continued in this position until Nov. 29,

1999 when she was promoted to Personal Banking Officer and transferred to Montgomery Place Branch, London, Ontario. On August 29, 2000 she was promoted to Senior Personal Banking Officer. She remained in this position until March 5, 2001 when she transferred to the Fanshawe Park Road Branch, London, Ontario, where she continued as a Senior Personal Banking Officer.

31. On August 27, 2001 the plaintiff transferred to Swift Current, Saskatchewan, where she was promoted to Branch Account Officer and then to Account Manager, Small Business.

32. On March 24, 2003, the plaintiff transferred to the BNS South Albert Branch, Regina, Saskatchewan, where she took up the position of Personal Banking Officer, Sales and Service. On August 24, 2004 she was promoted to Senior Personal Banking Officer, Sales and Service at the same branch. She remained in this position until August, 2005.

33. Since August 2005, the plaintiff has been on disability leave from active employment. Her annual salary in 2005 when last actively employed was \$41,692.00.

34. At each of the branches where the plaintiff has worked and at all other branches of BNS, the class members, including the plaintiff, have been regularly required and/or permitted to work more than their agreed maximum standard or statutory maximum hours, in the absence of, and without the opportunity to obtain, advance authorization. For her part, the plaintiff worked, on average between five and fifteen hours per week of additional work, for which she was not paid, beyond her

agreed maximum standard hours. This additional work was performed by class members, including the plaintiff, in order to fulfill their duties and to meet the sales goals as PSB employees. BNS has regularly refused or otherwise failed to remunerate in full the regular, standard and overtime hours of PSB employees at each of its branches.

35. Moreover, BNS has regularly refused or otherwise failed to grant advance authorization for overtime even when such advance authorization is specifically requested, and has actively discouraged the making of such requests, despite knowing that such overtime is regularly necessary to the fulfillment of the duties and sales goals of PSB employees as determined and imposed by BNS.

36. The practices referred to in the preceding two paragraphs are the result of a uniform, consistent and systemic practice of BNS of refusing or otherwise failing to pay class members compensation for their hours worked, notwithstanding its contractual and statutory obligations to do so.

SYSTEMIC BREACH OF EMPLOYMENT CONTRACTS

37. BNS has breached the express or implied term of its contracts of employment with the class members that it pay for all hours worked, including its obligation to pay overtime at a rate of one and one-half times the class members' regular hourly rates for hours worked in excess of their standard hours.

38. In the alternative, BNS has breached the implied terms of the contracts of employment that BNS comply with the *Code* requirements to pay for all hours

worked, including its obligation to pay overtime at a rate not less than one and one-half times class members' regularly hourly rates for all hours worked in excess of 40 hours or 8 hours per day.

THE DEFENDANT HAS BEEN UNJUSTLY ENRICHED

39. BNS has been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the plaintiff and the other members of the class. The precise value of such unpaid hours of work is not known to the plaintiff but is within, or should be within, the exclusive knowledge of BNS as the defendant is required to accurately record the hours worked by class members under the *Code*.

40. The plaintiff and the other members of the class have suffered a deprivation, in the form of wages corresponding to the unpaid hours that they have worked.

41. There is no juristic reason why BNS should be permitted to retain the benefit of the unpaid hours worked by the plaintiff and the other members of the class. The current Standard Overtime Policy of BNS, which purports to restrict the availability of paid overtime to situations where managerial authorization has been secured in advance, is unlawful and does not provide a juristic reason.

BREACH OF EMPLOYER'S DUTY OF GOOD FAITH

42. 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.

43. BNS has breached its duty of good faith by, among other things:

- (a) failing to pay for all hours worked by the class members, including overtime, despite requiring and/or permitting such hours, including overtime, to be worked;
- (b) failing to advise the class members of their right to recover for such unpaid hours and, in particular, of the implied terms of their contracts under the Code and its regulations as referred to herein;
- (c) retaining for itself the benefit of amounts due to the class members in respect of such unpaid hours;
- (d) creating a working environment and circumstances in which the class members are: (i) required to work overtime hours in order to carry out the duties assigned to them; (ii) actively dissuaded from reporting such overtime hours; and (iii) actively dissuaded from claiming or obtaining compensation for their unpaid overtime; failing to maintain accurate records of all actual hours worked by the class members; and
- (e) imposing on the class members an overtime policy that purports to create an unlawful barrier to payment of overtime.

44. The plaintiff pleads and relies upon the following statutes and regulations:

- (a) *Canada Labour Code* R.S., 1985, c. L-2, sections 167-169, 171, 174, 247, 252, 261 and 264;
- (b) *Canada Labour Standards Regulations*, C.R.C., c. 986, sections 20 and 24; and
- (c) *Class Proceedings Act 1992*, S.O. 1992 c. 6, sections 2, 5, 23 and 24.

The plaintiff proposes that this action be tried in the City of Toronto.

December 10th, 2007

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