# COURT OF APPEAL FOR ONTARIO

CITATION: Fulawka v. Bank of Nova Scotia, 2012 ONCA 443
DATE: 20120626
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Winkler C.J.O., Lang and Watt JJ.A.

BETWEEN

Cindy Fulawka

Plaintiff (Respondent)

and

The Bank of Nova Scotia

Defendant (Appellant)

Martin Sclisizzi, Morton G. Mitchnick, Markus F. Kremer and Heather K. Pessione, for the appellant

Louis Sokolov, Steven Barrett, David F. O'Connor and J. Adam Dewar, for the respondent

Heard: December 1 and 2, 2011

On appeal from the order of the Divisional Court (Justices A. Donald K. MacKenzie, Anne M. Molloy, and Alison L. Harvison Young), dated June 3, 2011, with reasons reported at 2011 ONSC 530, 337 D.L.R. (4th) 319, affirming the order of Justice George R. Strathy of the Superior Court of Justice, dated February 19, 2010, with reasons reported at 2010 ONSC 1148, 101 O.R. (3d) 93.

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**Winkler C.J.O.:**

## A. INTRODUCTION

[1] This is one of several proposed class proceedings commenced by employees of federally-regulated companies advancing claims for unpaid overtime work. The defendant employers in these proceedings are governed by the provisions of the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("*Code*"). The *Code* requires employers to pay, at minimum, 1.5 times an employee's normal hourly rate for overtime hours that an employee is "required or permitted" to work. The motions to certify these actions as class proceedings have met with different fates.

**(1) Overview of Three Overtime Class Action Appeals Heard by this Court**

[2] The present proceeding was started by the representative plaintiff, Cindy Fulawka ("plaintiff" or "respondent"), an employee of the defendant, The Bank of Nova Scotia ("Scotiabank" or "appellant"). In her amended statement of claim, the plaintiff pleads that Scotiabank's policies and practices for compensating overtime work performed by members of the putative class constitute both a breach of class members' contracts of employment and a breach of Scotiabank's obligation to act in good faith. On behalf of class members, she seeks general and special damages totalling $350 million, as well as declaratory and injunctive relief. The motion judge certified the action as a class proceeding. His decision was upheld by a unanimous Divisional Court.

[3] In a similar proceeding commenced by Dara Fresco, an employee of Canadian Imperial Bank of Commerce ("CIBC"), the motion judge refused to certify the action as a class proceeding: see *Fresco v. Canadian Imperial Bank of Commerce* (2009), 84 C.C.E.L. (3d) 161 (Ont. S.C.). The Divisional Court, in a split decision, upheld the order refusing to certify the proceeding: see 2010 ONSC 4724, 103 O.R. (3d) 659.

[4] In a third action started by Michael McCracken, an employee of Canadian National Railway ("CNR"), against his employer for allegedly avoiding its obligations to pay overtime compensation, the motion judge certified the action

as a class proceeding: see *McCracken v. Canadian National Railway Co.*, 2010 ONSC 4520, 3 C.P.C. (7th) 81.

[5] Members of the same two law firms argued these three certification motions on behalf of the different representative plaintiffs.[1]

[6] This court granted leave to appeal from the decisions of the Divisional Court in the present case (*Fulawka*) and in *Fresco*. In *McCracken*, there is an appeal and cross-appeal as of right to this court from the motion judge's order dismissing the plaintiff's claim in part under rules 21.01(1) and (3) of the *Rules of Civil Procedure*, R.R.O. 1990, O. Reg. 194. Based on a consent order of this court, the appeals and cross-appeals as of right in *McCracken* were combined with appeals filed in Divisional Court from the motion judge's certification order in the same matter.

[7] Scotiabank's appeal in *Fulawka* was heard consecutively with the plaintiff's appeal in *Fresco*. The *McCracken* appeal was heard by this court on February 28 and 29, 2012. The reasons in *Fulawka* are being released concurrently with those in *Fresco*, 2012 ONCA 444, and *McCracken*, 2012 ONCA 445.



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[1] Members of a different law firm recently brought a certification motion in an overtime class action in the banking sector in *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377, [2012] O.J. No. 1853. In that case, the representative plaintiffs alleged that their employer wrongly classified the putative class members as ineligible for overtime. The motion judge refused to certify the proceeding as a class action.

[8] The claim for unpaid overtime in *McCracken* rests on a theory of liability that CNR misclassified employees as managers and, by doing so, unlawfully avoided its obligation to pay them overtime. In contrast, in the class actions against Scotiabank and CIBC, the crux of the representative plaintiffs' claims is that the overtime policies adopted by their respective employers imposed more restrictive conditions for receiving overtime compensation than those set forth in the *Code*.



[9] More particularly, in *Fulawka* and *Fresco*, the plaintiffs allege that the overtime policies of the defendant banks conflict with private law duties owed by the banks to the employees who comprise the proposed classes. The overtime policies required class members to obtain prior approval from a manager in order to be compensated for overtime work that they were required or permitted to perform. Such a pre-approval requirement, the plaintiffs assert, is contrary to the dictates of s. 174 of the *Code*, which, they submit, informs the private law duties owed to the class members. Section 174 of the *Code* stipulates that:

> 174. When an employee is *required or permitted* to work in excess of the standard hours of work, the employee shall … 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.]

[10] The plaintiffs allege that Scotiabank and CIBC used the pre-approval requirement in their overtime polices to avoid their obligation under the *Code* to pay for overtime work that was "required or permitted" by the employer. In

addition, the plaintiffs allege that Scotiabank and CIBC failed to implement proper record-keeping systems for recording the overtime hours worked by class members.



[11] The motion judges in the Scotiabank and CIBC actions reached conflicting conclusions about whether the criteria for certification in s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*") were satisfied. Subsection 5(1) imposes five criteria for certifying a class proceeding, which may be summarized as follows:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class;
>
> (c) the claims raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there are appropriate representative plaintiffs who could produce a workable litigation plan.

[12] The motion to certify the *Fresco* action against CIBC as a class proceeding was heard first. The motion judge concluded that the central claim advanced by the representative plaintiff is that the pre-approval requirement in CIBC's overtime policy is illegal. She concluded that the policy is not illegal and, in any event, that a determination of its legality would not significantly advance the class members' claims for unpaid overtime. According to the motion judge, the proposed common issues could not be resolved without examining the

employees' claims for unpaid overtime on an individual basis, thereby defeating the very purpose of a class action. In her view, there is no evidentiary foundation demonstrating a systemic policy or practice of unpaid overtime at CIBC. Rather, the evidence shows only a variety of individual circumstances giving rise to claims for unpaid overtime that need to be resolved individually.

[13] A majority of the Divisional Court upheld the motion judge's refusal to certify the action as a class proceeding, with Sachs J. giving detailed dissenting reasons in favour of certifying the action.

[14] In contrast, the motion judge in *Fulawka* held that the criteria for certification were met. He was satisfied that there is an evidentiary basis to support the claim that Scotiabank's failure to pay overtime is attributable to systemic conditions rather than to the purely individual circumstances of class members. The systemic wrongs include Scotiabank's imposition of the pre-approval requirement for obtaining overtime pay and its failure to establish a class-wide procedure to record overtime, which impeded the class members' ability to obtain compensation for their overtime work. The motion judge also concluded that a class action is the preferable procedure for resolving the class members' claims. This decision was upheld by a unanimous Divisional Court.

**(2) Overview of this Appeal**

[15] The two overarching issues raised by Scotiabank in its appeal of the Divisional Court's decision are: (1) whether the proposed common issues are suitable for certification; and (2) whether the class action is the preferable procedure for resolving the common issues.

[16] The common issues certified by the motion judge in this action are very similar to the common issues that the motion judge refused to certify in *Fresco*: see the appendix to these reasons and to the reasons in *Fresco*, which set out the proposed common issues.

[17] The courts below attributed the contrasting results in the two cases to the different evidence advanced by the plaintiffs in support of their respective certification motions. Before this court, Scotiabank asserts that there is no material difference in the pleadings or the evidence advanced by the plaintiffs in this case and in *Fresco*. The real difference, Scotiabank argues, is in the way the motion judges approached the critical question of whether the plaintiffs' proposed common issues are essentially individual claims for unpaid overtime, or if the common issues raise systemic issues that are preferably resolved through the mechanism of a class proceeding.

[18] I agree with Scotiabank's position that both certification motions should either succeed or fail together. However, in my view, both actions are appropriate

for certification. With the exception of the issue relating to an aggregate assessment of monetary relief under s. 24(1) of the *CPA*, I would answer the critical question about the nature of the common issues in the same way as did the motion judge in the present case. The proposed common issues raise the requisite degree of commonality for purposes of certification. I also agree that a class proceeding is the preferable procedure for resolving these issues. While I do not agree that an aggregate assessment under s. 24(1) is possible, my reasons in this regard do not affect the soundness of the certification order.

[19] For the reasons that follow, I would allow in part the appeal by Scotiabank as it concerns the proposed common issue relating to the availability of an aggregate assessment of damages, but would otherwise dismiss the appeal from the Divisional Court's order affirming the certification order.

## B. FACTS

### (1) Overview of the Proposed Class Proceeding

[20] The proposed representative plaintiff, Cindy Fulawka, started this action on behalf of the more than 5,000 current and former full-time, front-line sales staff who held specified positions in any of Scotiabank's Canadian retail branches from January 1, 2000 to the present. Class members include all full-time employees who held one or more of the following four job titles: personal banking

officer, senior personal banking officer, financial advisor and account manager small business. These employees perform similar, and often identical, work.

[21] The plaintiff alleges that there are three defective features in Scotiabank's overtime compensation system:

> (1) Scotiabank's overtime policy imposes more restrictive conditions for receiving overtime payment than the minimum standards of the *Code*;
>
> (2) Scotiabank's record-keeping systems do not create an accurate record of the hours actually worked by class members; and
>
> (3) Scotiabank failed to put in place a system for monitoring and preventing employees from working overtime hours that Scotiabank did not intend to compensate.

According to the plaintiff, these defective features give rise to causes of action in contract, unjust enrichment and tort.

**(2) Scotiabank's Overtime Policies During the Class Period**

[22] Scotiabank had a written policy on overtime throughout the class period. The policy in effect from the beginning of the class period in 2000 to October 1, 2008 ("the Initial Policy") stated that it was "based on Canada Labour Code guidelines". Under the Initial Policy, employees were eligible for overtime pay at a rate of 1.5 times the regular hourly rate if they worked more than eight hours in a day, or in excess of "the standard 37.5 hour work week", whichever of the two was greater. The Initial Policy made it mandatory for overtime hours to be

authorized “in advance” by a branch manager or department head. The Initial Policy also gave employees the option of requesting time off *in lieu* of overtime pay at a rate of 1.5 times the overtime hours worked. Such a request could be granted, “on an *exception basis*” (emphasis in original).

[23] Scotiabank changed its overtime policy in October 2008 (“the Revised Policy”), almost a year after the commencement of the class action in December 2007. The Revised Policy creates an exception to the pre-approval requirement:

> If you are eligible for overtime pay, then your manager/department head must authorize overtime hours worked in advance. *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.]

[24] The Revised Policy defines “overtime hours” as “requested, permitted or approved hours worked by an employee eligible for overtime compensation” in excess of eight hours per day or in excess of the standard 37.5 hour work week, whichever of the two is greater.

[25] Like the Initial Policy, the Revised Policy provides for time off *in lieu* of overtime pay, but it introduced a requirement that *lieu* time “is to be taken within 90 days of the overtime hours worked,” failing which overtime pay is to be paid to the employee in place of time off *in lieu*.

[26] The Revised Policy also extended overtime eligibility to employees holding jobs that Scotiabank had classified as “Level 6” – a management-level classification of employees who were previously ineligible for overtime. Two of the job categories in the proposed class – financial advisor and account manager small business – were classified as Level 6. Level 6 also includes job categories that are not included in the proposed class.

[27] The Revised Policy implemented a simple procedure whereby Level 6 employees could claim retroactive compensation for overtime hours worked from November 1, 2005 to October 1, 2008. Under this procedure, which was administered by the bank's human resources department, Scotiabank paid out approximately $5 million in retroactive overtime pay to Level 6 employees, including approximately $3 million to 455 employees who held the positions of financial advisor and account manager small business.

**(3) Scotiabank’s System for Recording Hours of Work During the Class Period**

[28] The official record-keeping system at Scotiabank for recording employees’ hours of work has changed several times during the class period. Until January 2006, hours of full-time employees were recorded on monthly staff plans that managers prepared in advance to reflect the hours that staff were expected to work in the coming month. Employees were to review and initial the staff plan each month to ensure its accuracy and to add any pre-approved overtime hours

that they had worked. Time sheets reflecting the actual hours worked were kept for part-time staff, but not for full-time staff.

[29] In January 2006, Scotiabank adopted an electronic system to record employees' vacations and other absences called "Absence E-Trac". However, this system was not used to track or facilitate the payment of overtime hours.

[30] In January 2009, Absence E-Trac was enhanced so that employees could record overtime hours. Employees could also indicate whether they preferred to be paid overtime hours or to receive time *in lieu*. Managers would confirm the hours claimed by employees and this information was then sent to payroll.

[31] Scotiabank tendered affidavit evidence on the motion to the effect that, while record-keeping procedures are centrally established for all branches, the actual recording and monitoring of hours of work is conducted at the branch-level by individual managers. Consequently, record-keeping systems vary from branch to branch. According to this evidence, overtime hours are often recorded using internal charts, handwritten logs, or employee calendars. Scotiabank also relied on affidavit evidence showing that compensation for overtime in the form of *lieu* time is often tracked informally by employees and their managers.

### (4) Relevant *Code* Provisions

[32] The *Code* governs hours of work for individuals in the federal sector, including bank employees. Part III of the *Code* contains certain requirements for

paying overtime wages to employees. Regulations enacted pursuant to the *Code* require employers to keep a record of employees' hours of work. In addition, Part III of the *Code* creates a procedure for enforcing employees' prescribed rights, including the right to receive overtime payment.



**(a) *Code* Provisions Requiring Payment of Overtime Wages**

[33] The combined effect of ss. 169(1) and 174 of the *Code* is that an employer must pay an employee overtime wages at the rate of 1.5 times the regular rate of wages when the employee works more than eight hours in a day or more than 40 hours in a week. Section 169(1) states:

> 169. (1) Except as otherwise provided …
>
> (*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.

Section 174 provides as follows:

> 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 for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.

[34] The *Code* does not expressly permit an employer to provide time *in lieu* as an alternative to paying overtime wages. Section 168(1) of the *Code* states:

> 168. (1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or

> arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

It is arguable whether time *in lieu* would qualify as "rights or benefits" under s. 168(1), but nothing turned on this issue on the certification motion or on appeal.

**(b) Record-Keeping Requirements under the *Code***

[35] Sections 252(2) and 264(a) of the *Code* and the accompanying regulations under the *Code* require employers to accurately record all hours worked by employees and to keep these records for at least three years after the work is performed. The specific record-keeping requirements are established by s. 24(2) of the *Canada Labour Standards Regulations*, C.R.C., c. 986, which provides, *inter alia*, that the employer shall keep a record in respect of each employee of "the hours worked each day", as well as "the actual earnings, indicating the amounts paid each pay day, with a recording of amounts paid for overtime, vacation pay, general holiday pay, bereavement leave pay, termination pay and severance pay."

**(c) Procedure Established by the *Code* for Enforcing Employees' Rights**

[36] The *Code* creates a detailed procedure for enforcing employees' rights under Part III of the statute. The Labour Program of Human Resources and Social Development Canada ("HRSDC") is responsible for monitoring compliance with Part III of the *Code* by, for example, investigating and adjudicating employee

wage complaints. Inspectors appointed by the federal Minister of Labour possess broad powers of investigation and enforcement, including the power to order payment of unpaid overtime: see s. 251.1 of the *Code*.

[37] The *Code* creates an appeal process from inspectors' decisions through which an aggrieved person may request a hearing before a referee: see s. 251.11(1). The referee has the power to summon witnesses, receive evidence under oath, award costs, and make decisions that may be enforced as orders of the Federal Court: see ss. 251.12(2), (4) and 251.15(3).

## C. THE MOTION JUDGE'S REASONS

[38] The motion judge heard the plaintiff's motion to certify the class proceeding together with a motion by Scotiabank seeking an order under rules 21.01(1)(a) or 21.01(1)(b) of the *Rules of Civil Procedure* to dismiss, strike or stay portions of the statement of claim, or alternatively, an order under rule 21.01(3)(a) to dismiss or stay the action on the ground that the court has no jurisdiction over its subject matter.[2] Scotiabank's central position on the Rule 21 motion was that the plaintiff's claims are impermissibly based on alleged breaches of the *Code* and that the court has no jurisdiction to enforce the *Code*.

[2] Scotiabank also moved to strike certain affidavit evidence filed by the plaintiff. The motion judge dismissed this motion and the Divisional Court upheld this order. Scotiabank is not appealing from this aspect of the Divisional Court's order.

[39] The motion judge observed, at paras. 2 and 3, that there were “two particularly contentious issues” before him: (1) whether the plaintiff asserted impermissible causes of action based on alleged breaches of the *Code*; and (2) whether the claims asserted on behalf of the class members raise common issues.

[40] In this court, Scotiabank is not appealing from the motion judge’s ruling on the jurisdiction issue or from his ruling that the plaintiff met the requirement in s. 5(1)(a) of the *CPA* that the pleadings disclose a cause of action. Nonetheless, it is helpful to describe how the motion judge resolved these issues in order to better understand the grounds of appeal that Scotiabank does raise concerning the common issues and preferable procedure criteria in ss. 5(1)(c) and 5(1)(d) of the *CPA*.

[41] In my view, the motion judge correctly applied the test for determining whether the pleadings disclose a cause of action. He rejected Scotiabank’s position that the action is essentially a collection of individual claims for unpaid overtime. Instead, the motion judge focused on the systemic nature of the allegations advanced by the plaintiff. This approach informed his analysis of the common issues and led to his conclusion that the certified common issues are appropriate ones for certification purposes. I discuss his reasons at some length because, for the most part, I endorse his analytical approach to the cause of action issue and the common issues question.

### (1) First Issue on the Certification Motion: Do the Pleadings Disclose a Cause of Action?

[42] The first contentious issue on the certification motion involved Scotiabank's submission that the plaintiff's proposed causes of action do not meet the threshold for certification under s. 5(1)(a) of the *CPA*. As the motion judge recognized, at para. 70, the test for winnowing out causes of action under s. 5(1)(a) is identical to the test on a motion under rules 21.01(1)(a) and (b) to strike a pleading as disclosing no cause of action – whether it is "plain and obvious" that the claim cannot succeed at trial: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[43] The motion judge, at paras. 72-103, reviewed the five causes of action advanced by the plaintiff in her amended pleadings: (1) breach of contract; (2) unjust enrichment; (3) breach of a duty of good faith; (4) negligence; and (5) breach of the *Code*.

### (a) Breach of Contract and Unjust Enrichment

[44] The plaintiff pleaded that it was an express or implied term of class members' employment contracts that they would be paid for overtime at a rate of 1.5 times their usual hourly wage. On the motion, Scotiabank did not dispute that, in this respect, the plaintiff's claim for breach of contract was properly pleaded. Scotiabank also conceded that the claim for unjust enrichment was properly pleaded.

[45] Given Scotiabank's concessions, there was no real dispute that the s. 5(1)(a) criterion for certification was satisfied. However, Scotiabank argued that the claims pleaded do not raise common issues, as will be discussed below at paras. 58-65.

[46] Moreover, in the courts below, Scotiabank disputed the plaintiff's assertion that the *Code* provisions constitute implied terms of the class members' employment contracts: see para. 73 of the motion judge's reasons. The motion judge also dealt with this point of contention in discussing the common issues.

**(b) Breach of a Duty of Good Faith**

[47] The plaintiff pleads a breach of Scotiabank's duty of good faith toward the class members. Scotiabank submitted to the motion judge that it is plain and obvious that such a pleading cannot succeed at trial because a free-standing cause of action for breach of the duty of good faith does not exist at law, citing *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.).

[48] The motion judge regarded the duty of good faith as part of Scotiabank's contractual duties based on the Supreme Court of Canada's decision in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. The motion judge explained, at para. 78, that 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 … arises from the recognition of the vulnerability of the employee and the importance of work in personal fulfillment and financial security". He concluded that, when viewed in this manner, the plaintiff's claim discloses a cause of action.

[49] The motion judge found that it is at least arguable that Scotiabank breached the duty of good faith owed to class members in the following ways: (i) by putting the onus on them to obtain pre-approval for receiving overtime compensation; (ii) by creating a working environment that dissuaded employees from claiming overtime; and (iii) by failing to implement a record-keeping system that records all hours worked. His reasons in this regard, at paras. 78-81, bear repeating because they properly reflect the systemic nature of the causes of action asserted by the plaintiff:

> 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.

> 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.
>
> 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.
>
> 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**.**

**(c) Negligence Claim**

[50] After the motion to certify the unpaid overtime class action against CIBC was dismissed in the parallel *Fresco* action, the plaintiff in this action submitted a draft amended pleading that added a claim in negligence. In the amended pleading, the plaintiff alleges that Scotiabank owed a duty of care to class

members to ensure they were properly compensated, at the appropriate rates, for all hours worked. Further, she asserts that Scotiabank breached this duty in various ways, including by imposing an unlawful overtime policy, by creating a work environment in which class members were required to work overtime to complete their duties but were dissuaded from reporting overtime and claiming compensation, and by failing to take reasonable steps to monitor and record hours of work.



[51] The motion judge accepted that the negligence claim as pleaded meets the plain and obvious test. He further accepted, at para. 83, that the duties owed by Scotiabank in negligence "can be informed by the provisions of the *Code*".

**(d) Breach of the *Code* Provisions**

[52] The pleadings further assert that various elements of Scotiabank's overtime policies and record-keeping practices violate the *Code.* This aspect of the claim was the focus of Scotiabank's attack under s. 5(1)(a) of the *CPA* and its motion under rules 21.01(1)(a) and (b) and 21.01(3)(a) of the *Rules of Civil Procedure*. Scotiabank asserted that it was plain and obvious that the plaintiff's claims based on breaches of the *Code* disclose no reasonable cause of action. Scotiabank also argued that the court has no jurisdiction to enforce the *Code* and thus these elements of the claim should be struck under rule 21.01(3)(a).

[53] The motion judge agreed with Scotiabank's position to the extent that he concluded, at paras. 88 and 103, that the plaintiff cannot rely on a cause of action based directly on breaches of the *Code.* He observed, at para. 93, that 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." Moreover, he observed, at paras. 96-97, that a review of the *Code* does not reveal a legislative intention to confer a civil cause of action, and, further, that the *Code* provides a comprehensive mechanism for enforcing the rights it confers on employees. The motion judge struck those portions of the plaintiff's pleadings that he viewed as asserting a direct cause of action based on the *Code*. For example, he struck references in the pleadings to "compliance" with or "violations" of the *Code* and to "statutory" overtime or "statutory" obligations.

[54] However, the motion judge noted, at para. 103, that his decision to strike these portions of the pleadings "was made easier by the fact that the plaintiff disclaims any intention to assert such a cause of action." In the motion judge's view, the plaintiff was not trying to enforce the provisions of the *Code.* He explained that, although the plaintiff had not specifically pleaded that the *Code* is implied by fact into the class members' contracts of employment, her counsel made this assertion in her factum responding to the motion to strike (at para.

101). This assertion was premised on the statement in Scotiabank's Initial Overtime Policy that it is "based on" the *Code*.

[55] The motion judge thus refused to strike the portions of the pleadings asserting that the *Code* requirements and those of the related regulations are implied terms of the class members' contracts. For example, the plaintiff's amended statement of claim states, at para. 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.

[56] The motion judge concluded, at para. 103, that the *Code* provisions "may well inform the contractual duties, including the duty of good faith and fair dealing that Scotiabank owes to its employees."

[57] Having held that the majority of the plaintiff's pleaded causes of action satisfy the plain and obvious test from *Hunt v. Carey*, the motion judge next considered if the claims raise common issues.

### (2) Second Issue on the Certification Motion: Do the Claims Raise Common Issues?

[58] The second, and indeed, the central contentious issue on the certification motion concerned the criterion in s. 5(1)(c) of the *CPA*: the claims of the class must raise common issues. Section 1 of the *CPA* defines common issues as

issues that are: (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.



[59] The motion judge agreed with the defendant that it is possible to frame the plaintiff's case as one that will require an examination of the circumstances of each class member to prove the following elements: the class member worked overtime hours; the number of overtime hours worked; which of those hours were "authorized" under the terms of the overtime policy or "required or permitted" under the *Code*; and whether the employee was compensated for those hours. However, relying on *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, the motion judge observed, at para. 122:

> 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.

[60] The motion judge found, at para. 123, that there is a factual basis, albeit a disputed one, for the plaintiff's assertions that:

- she and other class members regularly worked overtime to complete their ordinary duties;
- overtime work was encouraged by Scotiabank, as reflected by Ms. Fulawka's performance appraisals;

- Scotiabank's system put the onus on the employee to obtain prior authorization;
- for a large part of the class period, Scotiabank's overtime policy expressly prohibited approval of overtime work after the fact;
- Ms. Fulawka and other class members' evidence was that, due to the nature of their work, it was very difficult for class members to predict when overtime would be required; and
- when there was a pressing need to work overtime, there was frequently no opportunity to seek pre-approval.

[61] The motion judge was also satisfied, as he noted at para. 128, that there is a factual basis for a common issue concerning Scotiabank's record-keeping system:

- there is evidence that, for most of the class period, Scotiabank did not have an adequate system for recording regular time and overtime worked by class members;
- 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;
- Scotiabank had no consistent corporate policy or system applicable to all branches for tracking overtime; and

- Scotiabank had no system of tracking time *in lieu* or of ensuring that it was "cashed out".

He concluded that the evidentiary record provides a factual basis for asking whether Scotiabank owed duties to the class to properly record all hours worked, whether pre-approved or not, and whether those duties were breached.

[62] He found, at para. 129, that these common issues do not depend on individual findings with respect to each employee. In addition, he determined that resolving these common issues 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."

[63] The motion judge went on to say, at para. 130, that if the common issues trial judge were to find that Scotiabank failed to implement a proper record-keeping system, and that this failure impeded 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."

[64] The motion judge ultimately certified ten of the twelve proposed common issues listed in the appendix to these reasons. He refused to certify proposed common issue 3, asking if any parts of Scotiabank's overtime policies are unlawful, void, or unenforceable for contravening the *Code.* In doing so, he relied

on the same reasons he provided for striking the portions of the pleadings that alleged free-standing violations of the *Code*.

[65] The motion judge also refused to certify common issue 12, about the appropriate means for determining any individual issues that the class members' claims may be found to raise. In his view, this was essentially a procedural question and not an appropriate common issue.

[66] The plaintiff is not appealing from the motion judge's refusal to certify these two common issues to this court.

### (3) Other Issues on the Motion: Preferable Procedure and the Litigation Plan

[67] Scotiabank argued that resolving the individual issues of the more than 5,000 class members by way of individual trials after the common issues trial would not promote judicial economy, and thus a class proceeding is not the preferable procedure for resolving the class members' claims for unpaid overtime. Scotiabank pointed to other available procedures, such as its Revised Policy, or the investigative and adjudicative regime available under the *Code*, or the Small Claims Court, as more cost-effective procedures for dealing with the class members' claims.

[68] The motion judge, at paras. 159-64, gave five reasons for rejecting Scotiabank's submissions on preferable procedure:

> (i) individual trials might not be necessary and an aggregate assessment of damages might be appropriate;
>
> (ii) even if individual assessments of entitlement and damages are required, a common issues trial judge assisted by the parties and their experts should be able to fashion a claims process that is not unduly complex;
>
> (iii) employees may be reluctant to raise concerns about overtime payment with their employer under the *Code* or Scotiabank's internal procedures due to fear of reprisals, whereas a class proceeding can offer a degree of anonymity and protection through the court's supervision of the claims process;
>
> (iv) there are weaknesses and limitations in the *Code* procedures, including the fact that HRSDC inspectors do not have jurisdiction to investigate alleged violations of an employer's own overtime policy; and
>
> (v) none of the alternative procedures would provide an efficient means of resolving the common issues that the motion judge identified.

[69] Finally, while Scotiabank conceded that Ms. Fulawka and her counsel are capable of representing the class, Scotiabank argued that the litigation plan is "wholly deficient". The motion judge dismissed this criticism, noting, at para. 167, that the litigation plan is "not cast in stone". He concluded that, in any event, the litigation plan meets the requirements set out in *Bellaire v. Independent Order of Foresters* (2004), 19 C.C.L.I. (4th) 35 (Ont. S.C.), as well as in *Poulin v. Ford Motor Co. of Canada* (2006), 35 C.P.C. (6th) 264 (Ont. S.C.).

## D. REASONS OF THE DIVISIONAL COURT

[70] In reasons by Harvison Young J., the Divisional Court unanimously upheld the certification order and the motion judge's decision to dismiss Scotiabank's Rule 21 motion in part. The court quashed the plaintiff's cross-appeal from the motion judge's order striking portions of the statement of claim for improperly asserting a cause of action based on the *Code.* The court quashed the cross-appeal on the basis that it was an appeal from a final order, which lies to the Court of Appeal as of right: see paras. 7-9. The plaintiff has not appealed from this aspect of the motion judge's order in this court.

[71] Harvison Young J. concisely summarized the court's reasons for dismissing Scotiabank's appeal, at paras. 14-16:

> The motion judge applied the correct test to all the causes of action asserted in breach of contract, breach of a duty of good faith, unjust enrichment and negligence by asking in relation to all of them whether it was "plain and obvious" that they could not succeed. The motion judge correctly applied the test to the claims asserted, emphasizing the need to apply the test in a generous and purposive manner in order to give effect to the important goals of class actions, as well as the need for courts to be circumspect about striking claims in the absence of a full evidentiary record. Striking those parts of the claim that sought to directly enforce the *Code*, he concluded that it was "plain and obvious" that these claims could not succeed. In my view, the motion judge's conclusions were appropriately anchored in an evidentiary record, keeping in mind that the ultimate question of weight of such evidence is appropriately left to the trial judge.

> The motion judge was also correct in certifying the common issues with respect to which Scotiabank appeals. In doing so, and as will be discussed further, the motion judge applied the proper legal tests, concluding that the determination of the common issues advanced would advance the claim of every Class Member. Contrary to Scotiabank's submissions, the motion judge did have an evidentiary basis, albeit on a contested basis, for his conclusions. Scotiabank's submissions relative to common issues, in essence, seek to reframe the claims from the systemic issues asserted by the plaintiff as claims which are individual in nature and, accordingly, lacking in commonality. The motion judge was correct in declining to accept Scotiabank's attempts to recast Ms. Fulawka's claims, and in holding that they must be assessed in the systemic terms advanced. The motion judge was correct in certifying the issues relating to breach of contract, systemic defects in overtime policies and practices, misclassification, unjust enrichment, remedies and damages.
>
> Third, the motion judge was correct in finding that a class proceeding is the preferable procedure for resolving the Class Members' claims pursuant to s. 5(1)(e) of the *CPA*.

[72] The court agreed with the motion judge's analysis of the common issues, including the question of the potential availability of an aggregate assessment of damages under s. 24(1) of the *CPA*. The court also agreed with his analysis of the preferable procedure issue. Rather than summarize the reasons of the Divisional Court at this juncture, I will refer to them in my subsequent analysis to the extent that they reinforce some of the points I wish to make.

[73] I pause, however, to note that Harvison Young J. emphasized, at para. 21, that the court in *Fulawka* did not have before it the evidentiary record of *Fresco*.

She said that it “is neither possible nor appropriate for this court to attempt to assess the merits of the present appeal in relation to the record before the court in *Fresco*.” Understandably, the court was reluctant to take sides with either the majority or the dissenting opinions of the Divisional Court in *Fresco* and instead distinguished that case. In my companion reasons in *Fresco*, I will explain why these cases are not distinguishable for certification purposes.



## E. ISSUES ON APPEAL

[74] A preliminary matter is the standard of review that applies to the decisions of the courts below. The appellant submits that the correctness standard applies because the courts committed errors of law in the course of analyzing the common issue and preferable procedure criteria for certification.

[75] Specifically, the appellant asserts that the courts below committed the following three errors:

> (1) The courts below erred in certifying the proposed common issues when the proposed issues would not significantly advance the claims of any of the individual claimants. The resolution of the common issues would not establish a single element necessary for any of the class members to succeed in their claims for unpaid overtime.
>
> (2) The courts below erred in misinterpreting s. 24 of the *CPA* by holding that it could be used to determine aggregate damages in the present case.
>
> (3) The courts below erred in concluding that the preferable procedure criterion is met when the *Code*

> establishes an effective procedure for resolving overtime complaints.

[76] The respondent, on the other hand, points to the case law establishing that the decision of a judge on a certification motion is entitled to substantial deference on appeal and should only be interfered with if the motion judge erred in principle, or made a palpable and overriding error of fact or of mixed fact and law: see *Cloud v. Canada (A.G.)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 39, leave to appeal refused, [2005] S.C.C.A. No. 50; *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.), at para. 43, leave to appeal refused, [2006] S.C.C.A. No. 1; *Cassano v. Toronto-Dominion Bank,* 2007 ONCA 781, 87 O.R. (3d) 401 (C.A.), at para. 23, leave to appeal refused, [2008] S.C.C.A. No. 15; and *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33, leave to appeal refused, [2007] S.C.C.A. No. 346.

## F. ANALYSIS

[77] The Divisional Court properly set out the principles governing the standard of review, at paras. 17-18, which is consistent with the jurisprudence cited by the respondent. For the reasons that follow, I agree with the Divisional Court's conclusion that the motion judge did not err in principle or commit any palpable and overriding error in his analysis of the appropriateness of the common issues, other than the common issue concerning the availability of an aggregate assessment of damages. In my view, the courts below erred in law in their

interpretation of the requirements in s. 24(1) of the *CPA* governing the availability of an aggregate assessment of damages. Finally, I agree with the Divisional Court that the motion judge did not commit any reviewable error in concluding that the preferable procedure criterion is met.



**(1) The Appropriateness of the Common Issues Related to Liability**

[78] As the Supreme Court of Canada established in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25, the certification judge must be satisfied that there is "some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action." In his reasons in this case, the motion judge, at para. 109, referred to this passage from *Hollick* and added:

> 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.

[79] I agree with the motion judge's comment. To the same effect, see also the majority of the Divisional Court in *Fresco*, at para. 72, and *Grant v. Canada (Attorney General)* (2009), 81 C.P.C. (6th) 68 (Ont. S.C.), at para. 21. While the evidentiary basis for establishing the existence of a common issue is not as high as proof on a balance of probabilities, there must nonetheless be some evidentiary basis indicating that a common issue exists beyond a bare assertion

in the pleadings. To be clear, this is simply the *Hollick* standard of “some basis in fact”.

[80] What then is an appropriate common issue for certification purposes? As noted above, s. 1 of the *CPA* defines common issues as issues that are: (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. Section 5(1)(c) includes as a condition for certification that the claims or defences of the class members raise common issues.

[81] There are a number of legal principles concerning the common issues requirement in s. 5(1)(c) that can be discerned from the case law. Strathy J. provided a helpful summary of these principles in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, 87 C.P.C. (6th) 276. Aside from the requirement just described that there must be a basis in the evidence to establish the existence of the common issues, the legal principles concerning the common issues requirement as described by Strathy J. in *Singer*, at para. 140, are as follows:

> The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] S.C.R. 534 at para. 39.
>
> An issue can be a common issue 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: *Cloud*, at para. 53.

There must be a rational relationship between the class identified by the plaintiff and the proposed common issues: *Cloud*, at para. 48.

The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick,* at para. 18.

A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Dutton*, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 46 B.C.L.R. (4th) 234, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee,* 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-46 and 160.

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, at para. 39, aff'd (2001), 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp.* (2002), 27 C.P.C. (5th) 155 (S.C.J.), aff'd (2003), 39 C.P.C. (5th) 151 (Div. Ct.).

> Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.,* 2003 CanLII 35843 (C.A.), at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, at para. 139.
>
> Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia,* 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 29.

[82] As Strathy J. commented in *Singer*, at para. 140, these legal principles are "by no means exhaustive". I would also add that it is up to the motion judge to decide what legal principles are the contentious ones in any particular case and to focus the analysis accordingly. The motion judge will then consider the pertinent legal principles with reference to the evidence adduced on the motion to decide if there is some basis in the evidence to establish the existence of the common issues.

[83] On this appeal, Scotiabank does not argue that there is no basis in fact for the common issues. The plaintiff filed affidavit evidence that is capable of supporting each of the factual assertions referred to by the motion judge, as set

out above at paras. 60-61. These factual assertions form the building blocks of the common issues.

[84] Rather than attacking the factual basis for the common issues, Scotiabank asserts that the motion judge erred in certifying common issues that are not substantial ingredients of the class members' claims. According to Scotiabank, resolving the proposed common issues would not significantly advance the litigation. I would not accept these submissions for the following reasons.

**(a) Common Issues 1 and 2 – Breach of Contract Issues**

[85] On the certification motion, the appellant argued that resolving the first common issue concerning the relevant terms of the class members' employment contracts would not significantly advance the litigation because Scotiabank admitted that the overtime policy is an express term of the contracts and further admitted that Level 6 employees are entitled to overtime pay. However, the courts below noted that, unlike CIBC in *Fresco*, Scotiabank did not accept that the statutory duties under the *Code* are incorporated as terms of the class members' employment contracts. And, unlike CIBC, Scotiabank did not concede that if an employee was required or permitted to work overtime, whether or not pre-approval was obtained, and the employee was not compensated, this would constitute a breach of the employment contract: see the motion judge's reasons,

at para. 136; the Divisional Court's reasons, at para. 94; and the motion judge's reasons in *Fresco*, at para. 58.

[86] In oral argument on this appeal, counsel for Scotiabank conceded that the terms of the *Code* are incorporated by reference as terms of class members' employment contracts.[3] Counsel acknowledged that Scotiabank's overtime policies must be read, applied and administered in a manner that is consistent with the *Code*. Counsel further conceded that if an employee were permitted to work overtime without pre-approval, Scotiabank would be liable to pay overtime. Counsel's concessions on this appeal (Scotiabank was represented by different counsel in the courts below) are consistent with Scotiabank's position that this case is indistinguishable from *Fresco*.

[87] A strategic concession of this sort is a hollow one, especially where it is made by a defendant for the first time on a second appeal from a certification order. With this concession, Scotiabank seeks to have this court overturn the certification order. Yet, in the absence of a certification order, any admission fails to bind the defendant *vis-à-vis* the proposed class in any meaningful way. As

[3] Counsel for the respondent rose to advise the panel that this was the first time in the proceedings that Scotiabank had conceded that the *Code* provisions are incorporated into the contract. Counsel for the appellant responded that he had not been counsel in the courts below. Counsel for Scotiabank went on to acknowledge that the Initial Policy (which admittedly forms part of the employment contract of class members) states that it is based on the *Code*. He further acknowledged that, to the extent there is any inconsistency between the terms of the policy and the requirements of the *Code*, the terms of the policy would be void. Counsel went on to make it clear that he was not conceding preferable procedure.

stated in *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div)), at para. 14:

> 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.

[88] In *Fresco*, at para. 59, Lax J. held that *Bywater* is distinguishable because it involved an admission of liability by the defendant, whereas the defendant bank was merely making a concession about the terms of class members' employment contracts. I disagree with this distinction. The same concern arises in both cases: the admission of what would otherwise be a proper common issue should not be allowed to defeat a finding of commonality. This is because, in the absence of a certification order, the admission has no binding effect as between the defendant and the members of the class. As the motion judge in this case observed, at para. 139: "A defendant cannot finesse a motion for certification by admitting what would otherwise be a proper common issue." Likewise, Scotiabank cannot ask this court to overturn a certification order on the basis that it has admitted a proper common issue.

[89] In my view, the first common issue is a substantial ingredient of the claim that Scotiabank has breached its contracts of employment with members of the class. Determining the relevant express and implied terms of the employment contract of class members – particularly the terms concerning Scotiabank's obligations for compensating and recording overtime hours – is a necessary and substantial ingredient of the class members' claims.

[90] Common issue 2 asks whether Scotiabank breached any of the express or implied terms of the class members' employment contracts. If the common issues trial judge determines that Scotiabank applied the pre-approval requirement in a way that was contrary to the express or implied terms of the class members' employment contracts, then this would support the claim that Scotiabank systemically breached the class members' contracts and would significantly advance the class members' claims for declaratory and monetary relief, as will be further explained in discussing common issues 4, 5 and 6.

**(b) Common Issues 4, 5 and 6 – the "Systemic Defect" Issues**

[91] Next, the appellant argues that the so-called "systemic defect" common issues 4, 5 and 6 are not necessary or substantial ingredients of the class members' claims. Common issue 4 asks whether Scotiabank had a duty to accurately record hours worked and whether it breached such duty. Common issue 5 concerns whether Scotiabank had a duty to prevent class members from

working hours for which it did not intend to compensate them. Common issues 6(a) and 6(b) ask whether Scotiabank had a duty to implement a system to ensure the duties in common issues 4 and 5 were satisfied, while common issue 6(c) asks whether, as a result of breaching its duty to implement such a system, Scotiabank consequently required or permitted all uncompensated hours worked by the class members.

[92] According to the appellant, resolving these issues would not advance the litigation because, even if they were resolved in favour of the plaintiff, none of the elements of the class members' claims for unpaid overtime would be established.

[93] While I see common issues 6(a) and 6(b) as superfluous, I reject the appellant's argument that resolving common issues 4 and 5 would not advance the litigation.

[94] The appellant is essentially urging this court to conclude that the plaintiff has raised artificial common issues. According to the appellant, what lies beneath this artifice of systemic common issues are hopelessly individualized claims for overtime by potentially thousands of Scotiabank employees, who worked in hundreds of different bank branches across the country. These branches had different systems for recording overtime hours worked and different practices for compensating such hours. The courts below are said to have failed to ask whether resolving any of the so-called systemic issues would significantly

advance the individual class members' claims for unpaid overtime, which Scotiabank sees as lying at the heart of this litigation.

[95] I reject the appellant's objections concerning the allegedly individualized nature of the class members' claims for two reasons.

[96] First, the potential need for individual assessments does not undermine the utility of a class proceeding. If common issues 4 and 5 were resolved in favour of the class, this would present a very different factual matrix for considering the evidence concerning individual claims than the factual matrix that would exist at individual trials conducted in the absence of a common issues determination. The appellant's argument ignores this reality.

[97] For example, as was explained by the motion judge, at para. 143, and the Divisional Court, at paras. 108-10, if common issue 4 were resolved in favour of the plaintiff class, this could support an argument by the class members that Scotiabank should not be allowed to rely on its own breach of its record-keeping duty in a manner that prevents the class members from proving damages. I deal with this point further at paras. 130-32.

[98] Similarly, a favourable answer to common issue 5 – concerning Scotiabank's duty to prevent class members from working hours for which the bank did not intend to compensate them – could assist individual class members in establishing Scotiabank's liability in their respective cases. As the motion judge

observed, at para. 144: “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.”

[99] Second, and more fundamentally, the appellant improperly attributes a very narrow theory of liability to the pleadings. The appellant insists that its liability to class members depends on proof by individual class members that they were not compensated for overtime hours that they were required or permitted to perform, as well as proof of how many such hours individual class members worked during the class period. The appellant thereby misconceives the plaintiff’s claim as pursuing only monetary forms of relief. The appellant ignores that resolving common issues 4 and 5 would be determinative of various claims for declaratory and injunctive relief, including the plaintiff’s request for an order directing Scotiabank to: “specifically perform its contracts of employment with the class members” and to “accurately record all hours worked by class members and pay class members for all hours worked”. The motion judge’s reasons at paras. 121-31, referred to above at paras. 59-63, explain why the plaintiff’s action is not simply a collection of individual claims for unpaid overtime.

[100] I have a further comment concerning the systemic defect common issues.

[101] As indicated above, I do not see any purpose that would be served by answering common issues 6(a) and 6(b). In *Fresco*, the Divisional Court was unanimous in concluding that these common issues are not distinct from the underlying duties asserted in common issues 4 and 5: see the majority of the Divisional Court, at para. 116, and Sachs J., at para. 240. I agree with the Divisional Court in *Fresco* on this point. I will say more about common issue 6(c) in discussing the availability of an aggregate assessment under s. 24(1) at paras. 131-32.

[102] In conclusion, while I do not see the distinct importance of common issues 6(a) and 6(b), I find that resolving common issues 4 and 5 in favour of the class members would advance their claims for monetary and non-monetary relief.

**(c) Common Issues 7 and 8 – Misclassification and Unjust Enrichment**

[103] The appellant contends that the most that could be determined in relation to common issue 7 (whether Scotiabank breached its contracts of employment or was unjustly enriched by misclassifying certain class members as Level 6), and common issue 8 (whether Scotiabank was unjustly enriched by failing to pay class members for all of their hours worked), is the scope of Scotiabank's obligations to pay overtime.

[104] According to the appellant, the critical question of whether Scotiabank actually breached its obligations cannot be answered on a class-wide basis. The

motion judge gave the following reasons for certifying the misclassification issue, at para. 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.* [Emphasis added.]

[105] I agree with the motion judge on this issue. The proposed class includes certain individuals who, by virtue of their employment classification, were treated as ineligible for overtime compensation. While Scotiabank has since reclassified them as non-managerial employees, certifying the misclassification issue permits a determination that binds Scotiabank and the proposed class. I will say more about the appropriateness of certifying a proposed common issue of misclassification in my reasons in *McCracken*.

[106] The proposed common issue concerning whether Scotiabank was unjustly enriched by failing to appropriately compensate class members for all hours worked raises issues of fact and law that relate to all members of the class. As pointed out by the courts below, there is ample authority establishing that unjust

enrichment can constitute a common issue: see *Smith v. National Money Mart Co.* (2007), 37 C.P.C. (6th) 171 (Ont. S.C.), leave to appeal refused (2007), 30 E.T.R. (3d) 163 (Div. Ct.); *McCutcheon v. The Cash Store Inc.* (2006), 80 O.R. (3d) 644 (S.C.).



[107] Thus, I would dismiss the appellant's ground of appeal concerning the correctness of the motion judge's decision to certify the common issues related to liability, subject only to the limited exception that I would allow the appeal from the Divisional Court's order upholding the motion judge's order certifying common issues 6(a) and 6(b).

### (2) The Common Issue Concerning an Aggregate Assessment under s. 24(1) of the *CPA*

[108] The appellant raises a separate ground of appeal involving the correctness of the decision to certify common issue 10(a) concerning an aggregate assessment of damages.[4] The proposed common issue reads as follows:

> 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

[4] The appellant's submissions on the damages issues focused on the suitability of the proposed common issue of the availability of an aggregate assessment of damages arising from the claims for unpaid overtime as raised by common issue 10(a).

> 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?



[109] The appellant argues that the courts below erred in holding that an aggregate assessment under s. 24(1) of the *CPA* may be available in this case. According to the appellant, there is no "reasonable likelihood" that class members' damages can properly be assessed in the aggregate, or that liability can be established without inquiries of individual class members regarding the amount, if any, of overtime work they were required or permitted to perform.

[110] Section 24(1) of the *CPA* authorizes a common issues trial judge to assess damages on an aggregate basis:

> 24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> > (a) monetary relief is claimed on behalf of some or all class members;
> >
> > (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
> >
> > (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[111] As the motion judge recognized, at para. 148, it is appropriate to certify a common issue of entitlement to aggregate damages if the plaintiff establishes that "there is a reasonable likelihood that the preconditions in section 24(1) of the *CPA* would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues": see *Markson*, at para. 44, quoting with approval Cullity J. in *Vezina v. Loblaw Cos.* (2005), 17 C.P.C. (6th) 307 (Ont. S.C.), at para. 25. The motion judge held, at para. 149, that the plaintiff met this burden because there is a factual basis for the claimed systemic breaches of Scotiabank's duties that "could support an aggregate assessment".

[112] The motion judge relied on *Markson*, at para. 42, for the proposition that aggregate assessments "provide a means of avoiding the potentially unconscionable result of a wrong eluding an effective remedy". And he accepted the plaintiff's expert evidence "that there are methods available, including statistical and sampling methods, that could assist the court [at a common issues trial] in determining the amount of an aggregate assessment and an appropriate method of distribution" (at para. 151).

[113] The Divisional Court agreed with the motion judge's conclusion that there is a reasonable likelihood that s. 24(1) would be satisfied. Regarding the condition in s. 24(1)(b), Harvison Young J. observed, at para. 128, that the systemic nature of the plaintiff's claim is such that potential class-wide liability will exist on a showing that Scotiabank exposed all class members to a direct risk of

harm and that at least some of them suffered harm as a result. Regarding the condition in s. 24(1)(c), Harvison Young J. accepted that the expert evidence shows there are statistical and sampling methods available to determine an aggregate assessment and an appropriate method of distribution (at para. 129). In her view, the appellant had not demonstrated any palpable and overriding error in the motion judge's factual finding on this point (at para.132).



[114] I agree with the appellant that the courts below erred in law in concluding there is a reasonable likelihood that all of the preconditions in s. 24(1) can be met in this case. In particular, the courts below erred in interpreting the requirement in s. 24(1)(c).

**(a) General Principles for Interpreting s. 24(1) of the *CPA***

[115] When discussing the availability of an aggregate assessment of damages under s. 24(1) of the *CPA*, it is important to be precise about what is meant by the term "aggregate" in the class action context. Used loosely, the term simply refers to the collective adjudication of claims that are common to multiple individuals. The use of the term in this manner must be distinguished from the use of the term in the context of s. 24(1).

[116] In *Anderson v. Wilson* (1999), 44 O.R. (3d) 673, leave to appeal refused, [1999] S.C.C.A. No. 476, this court discussed the appropriateness of certifying a class action involving claims for mental distress in a case where class members

were notified by public health authorities that they may have been infected with Hepatitis B at clinics operated by the defendant. Carthy J.A., writing for the court, made the following comment, at pp. 679-80:

> There are many persons with the same complaint, each of which would typically represent a modest claim that would not itself justify an independent action. *In addition, the nature of the overall claim lends itself to aggregate treatment because individual reactions to the notices would likely be similar in each case* - fear of a serious infection and anxiety during the waiting period for a test result. If evidence from patients to support such reactions to the notices is necessary, it would probably suffice to hear from a few typical claimants. The balance of the evidence as to liability would relate to the conduct of the clinics, the reaction of the Public Health Authorities and foreseeability issues. [Emphasis added.]

[117] In *Healey v. Lakeridge Health Corp.*, 2011 ONCA 55, 103 O.R. (3d) 401, the appellants suggested that Carthy J.A.'s use of the term "aggregate" in the above passage supports the proposition that an aggregate assessment of damages is available under s. 24(1) where damages are sought on behalf of class members for psychological injury. On behalf of a five-judge panel of this court, Sharpe J.A. explained, at para. 74, that this passage from *Anderson* does not speak to the availability of aggregate damages under s. 24(1). Rather, Carthy J.A. was merely referring to the appropriateness of a class proceeding for advancing individual claims on an "aggregate" basis. He was not addressing whether damages for mental distress could be dealt with by resort to s. 24(1).

[118] The *Report of the Attorney General's Advisory Committee on Class Action Reform*, (Toronto: Ministry of the Attorney General of Ontario, 1990) (Chair: Michael G. Cochrane) ("A.G.'s Report") explains when it may be appropriate to assess a defendant's liability on an aggregate basis. The Report states, at p. 43:

> [W]here monetary relief is sought by the class and liability is not in issue (e.g. liability is admitted) special methods of establishing the quantum may be appropriate. It may be impractical, for example, to require thousands of class members to individually prove their claims as they would in an ordinary proceeding. In such a case the court should be permitted to determine the total aggregate of the defendant's liability if to do so can be reasonably achieved.

[119] Section 24(1) establishes three preconditions that must be met for a court to determine the aggregate amount of monetary relief for which a defendant is liable.

[120] First, s. 24(1)(a) requires that monetary relief is claimed on behalf of some or all class members. This condition is easily understood and applied. I would simply point out that s. 24(1) may be available when there is a claim on behalf of some or all class members for either damages or restitutionary relief in the form of a monetary payment.

[121] Second, s. 24(1)(b) provides that "no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability". As the

passage cited above from the A.G.'s Report indicates, condition (b) may be satisfied in two situations:

> i) where the defendant concedes liability to some or all members of the class; or
>
> ii) where the resolution of the common issues is capable of determining the defendant's liability to some or all members of the class.



[122] Rosenberg J.A. in *Markson*, at para. 48, commented as follows about the second situation in which s. 24(1)(b) may be satisfied:

> In my view, condition (b) is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments. Or, in the words of s. 24(1)(b), where the only questions of fact or law that remain to be determined concern assessment of monetary relief.

[123] *Markson* stands for the proposition that an aggregate assessment of monetary relief may be appropriate where the defendant's liability to at least some members of the class will be established through the resolution of the certified common issues, assuming those issues are decided in favour of the class. This is what is meant by the statement in *Markson* that s. 24(1)(b) is satisfied where "potential liability can be established on a class-wide basis". The expression – "potential liability" – simply reflects an assumption that the common issues will be resolved in favour of the class. This presumption is appropriate at the certification stage, where the merits of the action are not in issue.

[124] There is a crucial distinction between the test for certifying common issues under s. 5(1)(c) and the question of whether an aggregate assessment of monetary relief may be certified as a common issue. As referred to above, at para. 81, and as amply developed in class proceedings jurisprudence, the proposed common issues do not have to be determinative of the defendant's liability to members of the class for an action to be certified. In contrast, the language of s. 24(1)(b) reveals that in order to be an appropriate case for an aggregate assessment, the resolution of the common issues must be capable of establishing the defendant's monetary liability to at least some members of the class. It is not enough that the resolution of the common issues could lead to injunctive or declaratory relief in favour of the class.

[125] Thus, in cases where the defendant does not concede liability for a wrong that gives rise to monetary relief, the question of whether s. 24(1)(b) could be satisfied requires parsing out the elements of the cause of action that must be proven to establish the defendant's monetary liability to some or all members of the class. If it is possible for these elements to be established through the resolution of the common issues, then the requirements of s. 24(1)(b) are capable of being met.

[126] Finally, s. 24(1)(c) states that the aggregate of the defendant's liability "can reasonably be determined without proof by individual class members." This provision is directed at those situations where the monetary liability to some or all

of the class is ascertainable on a global basis, and is not contingent on proof from individual class members as to the quantum of monetary relief owed to them. In other words, it is a figure arrived at through an aggregate assessment of global damages, as opposed to through an aggregation of individual claims requiring proof from individual class members. I would describe the latter calculation as a "bottom-up" approach whereas the statute envisages that the assessment under s. 24(1) be "top down".

[127] *Markson* and *Cassano* are examples of cases where both conditions (b) and (c) of s. 24(1) were satisfied. Condition (b) was satisfied because the resolution of the common issues could potentially establish the defendant's liability for a wrong giving rise to monetary relief to at least some members of the class. Condition (c) was satisfied because it was possible to reasonably assess the quantum of monetary liability without proof by individual class members. In both cases, the information needed for assessing the quantum of monetary relief was available in the form of documentary evidence from the respective defendants' own transactional records.

**(b) Applying the General Principles to this Case**

[128] There is obviously no dispute that monetary relief is claimed on behalf of the class members, as required by s. 24(1)(a). The representative plaintiff is

claiming both damages and restitutionary relief by way of monetary payment through an order for disgorgement.

[129] The next question is whether s. 24(1)(b) is capable of being satisfied. This issue turns on whether the resolution of the common issues has the potential to determine Scotiabank's liability for monetary relief to some or all of the class members.

[130] Resolving common issues 4 and 5 in favour of the class would significantly contribute to establishing Scotiabank's liability for breach of contract, including the alleged breach of a duty of good faith, and liability based on the claims of negligence and unjust enrichment. However, the resolution of these issues, as framed in common issues 4 and 5, would not be determinative of Scotiabank's liability for damages or restitutionary relief to some or all members of the class. This is because common issues 4 and 5, as presently worded, do not raise the question whether the class members were actually required or permitted to perform overtime work for which they were not compensated. Unless class members were required or permitted to perform overtime work, the defendant would not have had a duty to compensate them for such work.

[131] Nonetheless, this outstanding element is at least capable of being resolved commonly, as suggested by common issue 6(c). In common issue 6(c), the respondent proposed the question whether – to the extent that Scotiabank

breached its alleged duty to implement and maintain a system to ensure that common issues 4 and 5 were met – Scotiabank thereby required or permitted all uncompensated hours by class members. As noted, I am of the view that common issues 6(a) and 6(b) add nothing of substance to common issues 4 and 5. However, by combining common issue 6(c) with common issues 4 and 5, the final component for establishing potential liability to all class members is in place. The revised version of this common issue would read:

> If the answer to common issues 4 (b) or 5 (b) is “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?

[132] There is a basis in fact for common issue 6(c) in the evidence adduced on the motion from the representative plaintiff and other class members, which provides some support for the plaintiff’s allegations that: class members were regularly required to work overtime in order to complete the ordinary duties of their employment; Scotiabank encouraged class members to work overtime; Scotiabank’s “system”, such as it was, put the onus on employees to obtain prior authorization, and for much of the class period, did not explicitly allow for approval after the fact; and, due to the nature of their work, it was very difficult for class members to obtain pre-approval of overtime work: see the motion judge’s reasons, at para. 123. If a trial judge were to find that the evidence adduced at the common issues trial substantiated these allegations, then he or she might

find that there is an evidentiary basis supporting a conclusion that all uncompensated overtime hours were required or permitted by Scotiabank.

[133] I recognize that in this case not all class members may have actually worked overtime or have worked overtime that went uncompensated. This does not mean that s. 24(1)(b) is not capable of being satisfied. The statute clearly distinguishes between liability for monetary relief and entitlement by individual class members to share in an award of monetary relief. The distinction drawn in s. 24 of the *CPA* between the need to prove liability on the part of the defendant for monetary relief and the question of entitlement on the part of individual class members to receive a portion of this relief was explained in *Markson*, at para. 48:

> Section 24(3) provides, in part, that, "In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award". The subsection therefore contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis, which may be impractical or inefficient.

[134] Moreover, s. 24(2) contemplates distributing a share of an aggregate award on an average or proportional basis to some or all individual class members. In other words, an aggregate assessment of damages may be made even if it is impractical or inefficient to determine the quantum of relief to which individual class members are entitled. Accordingly, the prospect that it may be

difficult or even impossible for individual class members to prove the amount of unpaid overtime that they were required or permitted to perform during the class period does not negate a conclusion that s. 24(1)(b) is capable of being satisfied.

[135] However, what cannot be overcome in this case is condition (c) in s. 24(1), which requires that "the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members." The respondent's position is that statistical evidence can be used to avoid requiring proof by individual class members on the issue of damages.

[136] Professor Richard Drogin, an expert in statistics, gave evidence on behalf of the plaintiff at the certification motion. He opined that it would be possible to conduct a random sampling of the class members to establish a basis for an aggregate assessment of damages. His proposed procedure would involve receiving out-of-court sworn testimony from a random sampling of individual class members, whose evidence would be considered as representative testimony for the class as a whole. Professor Drogin's proposal for arriving at an aggregate assessment of damages posits that the court would decide liability for unpaid overtime to each person in the random sample based on the evidence obtained from the out-of-court examinations. He opined that, because the court's findings with regard to unpaid overtime worked would be for a random sample, these results could be reliably projected to the class as a whole.

[137] The plaintiff's proposed procedure for arriving at a global damages figure is antithetical to the requirement in s. 24(1)(c) that the aggregate amount of the defendant's liability "can reasonably be determined without proof by individual class members." In order to give effect to Professor Drogin's proposal, the language used by the legislature would have to be "can reasonably be determined without proof by *all of the* individual class members". But the qualifying words – "all of the" – are not present in the provision. While Professor Drogin's proposed method is based on proof from a limited subsection of the class, it still impermissibly requires proof from individual class members in order to arrive at an aggregate damages figure.

[138] The foregoing is not to be taken as a general prohibition on statistical evidence in assessing damages. Statistical evidence, including that drawn from findings made at individual hearings, may well be appropriately used in certain contexts, such as where the court is providing directions for hearings to be conducted under s. 25 of the *CPA.* This point will be further discussed below, at paras. 143-44.

[139] To summarize, an aggregate assessment of monetary relief may only be certified as a common issue where resolving the other certifiable common issues could be determinative of monetary liability and where the quantum of damages could "reasonably" be calculated without proof by individual class members. The latter condition is not satisfied here.

[140] Before leaving this point, I note that I am mindful of the concerns expressed in *Markson*, at para. 42, and by the motion judge, at para. 130, that in some cases, a wrong could go without a remedy because of the prior conduct of the defendant.

[141] As discussed above, the facts in *Markson* are materially different than those here and therefore gave rise to different considerations. In *Markson,* the records for determining the aggregate amount of relief owed by the defendant existed, but the difficulty and expense of actually calculating the amount was at issue. The proposed statistical sampling in *Markson* was based on recourse to the defendant's own undisputed records. There was no prejudice to the defendant in the use of its own records as the evidentiary basis for a statistical analysis of the aggregate amount of monetary relief. In contrast, in this case, the records of the amount of unpaid overtime work that class members were required or permitted to perform are allegedly either incomplete or non-existent. Indeed, the propriety of how Scotiabank kept records of hours worked is included as a common issue.

[142] I recognize that a liberal and purposive approach should be taken in interpreting the *CPA*. However, in my view, it is simply not open to the court to attempt to fashion a remedy that would run afoul of an essential element of the statutory language. I reach this conclusion regardless of how the common issues

trial judge ultimately resolves the common issue of the propriety of Scotiabank's record-keeping practices.

[143] Moreover, I do not find it necessary to stretch the wording of s. 24(1)(c), since other provisions of the *CPA* provide ample authority for the common issues trial judge to develop procedures for resolving individual claims in a way that will provide an effective remedy. By way of example, s. 25(1) of the *CPA* provides the court with the power to direct hearings to determine individual issues. Section 25(2) empowers the court to give any necessary directions relating to the procedures to be followed in conducting these hearings. In giving such directions, s. 25(3) instructs the court to choose "the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties". Section 25(3) further provides that the court may:

> (a) dispense with any procedural step that it considers unnecessary; and
>
> (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

[144] In my view, s. 25(3)(b) affords wide latitude to authorize the rules of proof at such further hearings. The presiding judge would have the option of considering if statistical information derived from random sampling, or other methods, would be of assistance in calculating the quantum of individual class members' entitlement to monetary relief.

[145] Concluding on this point, I am satisfied that the courts below erred in principle in interpreting s. 24(1) of the *CPA*. I would strike common issue 10(a) concerning the possibility of conducting an aggregate assessment of damages.

**(3) No Error in the Preferable Procedure Analysis**

[146] The appellant submitted in its factum that the administrative proceedings established by Part III of the *Code* to investigate and adjudicate claims for overtime pay ("Part III proceedings") are not only the preferable means of resolving class members' claims, but the exclusive means of doing so. In oral argument, counsel did not press the exclusive jurisdiction point. He instead asked the court to find that Part III proceedings constitute the preferable procedure for resolving the class members' claims. However, somewhat equivocally in my view, counsel in oral argument continued to rely on the British Columbia Court of Appeal's decision in *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, 77 B.C.L.R. (4th) 205, at para. 82, leave to appeal refused, [2008] S.C.C.A. No. 293. Specifically, he relied on *Macaraeg* for the proposition that "it would be wrong for the court to assume a jurisdiction parallel to that of specialty labour tribunals" to deal with the class members' claims. Counsel also argued that allowing the class action to proceed would frustrate the comprehensive legislative scheme for resolving claims for unpaid overtime, which would be contrary to the authority of *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704.

[147] The appellant has not challenged the motion judge's ruling on the Rule 21 motion that the court has subject matter jurisdiction over the class members' claims. Thus, in my view, it would not be appropriate for this court to decide the exclusive jurisdiction issue when dealing with the question of preferable procedure under s. 5(1)(d) of the *CPA*.

[148] Having said that, I note that it would be very difficult, if not impossible, for counsel to reconcile the exclusive jurisdiction argument advanced in his factum with his concession in oral argument that the terms of the *Code* are incorporated into the class members' contracts of employment. If the terms of the class members' contracts of employment create an entitlement to receive compensation for overtime work that is required or permitted by the employer, then the court has jurisdiction to enforce that contractual obligation. The terms of the *Code* make this clear. Section 261 states:

> 261. No civil remedy of an employee against his employer for arrears of wages is suspended or affected by this Part.

[149] Of course, it remains for the trial judge to determine if the terms of the *Code* are implied into the contracts, and, if necessary, to determine whether the terms are implied as a matter of fact or a matter of law: see *Haldane v. Shelbar Enterprises Ltd.* (1999), 46 O.R. (3d) 206 (C.A.), at paras. 14-15.

[150] I will now turn to why the appellant's preferable procedure argument fails. The Supreme Court of Canada in *Hollick*, at para. 28, established that there are

two elements of the preferable procedure analysis: (i) determining whether the class action would be a fair, efficient and manageable method of advancing the claims, and; (ii) determining whether a class proceeding would be preferable to other reasonably available means of resolving the class members' claims.



**(a) Whether a Class Action Would be a Fair, Efficient and Manageable Method of Advancing the Class Members' Claims**

[151] The appellant contends that the numerous individual claims for unpaid overtime would "inevitably overwhelm" a class proceeding. The appellant points to *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.) and *Webb v. 3584747 Canada Inc.* (2005), 40 C.C.E.L. (3d) 74 (Ont. S.C.) as telling a cautionary tale against using the class proceeding mechanism in the employment law context.

[152] In *Webb v. K-Mart*, the court certified a class action for wrongful dismissal against K-Mart Canada Ltd. The class consists of over 3,000 former K-Mart employees from across Canada who were dismissed following K-Mart's merger with the Hudson's Bay Company. The court approved a litigation plan that provided for the determination of individual issues related to reasonable notice and mitigation through summary hearings before retired judges who were members of a private arbitration firm.

[153] The arbitration process proved to be more costly than expected and the expense of individual arbitrations typically exceeded the amount awarded. Six

years after certification, only 24 of the 1,000 cases that were intended to proceed to a hearing had actually been heard. Class counsel applied to the court to amend the hearing system and counsel for K-Mart brought a cross-motion to decertify the class proceeding. The court dismissed the motion to decertify and granted the motion to vary the hearing process by providing for the appointment of different referees who charged less for their services.

[154] The appellant submits that the claims process for determining whether overtime compensation is owed to individual class members and, if so, the amount owed to each, would not be any more manageable or efficient than was the individual hearing process for determining reasonable notice in *Webb*.

[155] It is well-established that the "fairness, efficiency and manageability of a class proceeding are all affected where the substance and complexity of the individual issues overwhelm the common issues": see Ward Branch, *Class Actions in Canada*, looseleaf (Aurora, Ont.: Canada Law Book, 2007), at para. 4.920, citing *Carom v. Bre-X Minerals Ltd.* (1998), 20 C.P.C. (4th) 163, and supplementary reasons (1998), 20 C.P.C. (4th) 187 (Ont. Ct. (Gen. Div.); *Pearson v. Inco Ltd.* (2002), 27 C.P.C. (5th) 171 (Ont. S.C.), aff'd (2004), 183 O.A.C. 168 (Div. Ct.), appeal to Ont. C.A. allowed, (2005), 78 O.R. (3d) 641. However, I find that two of the motion judge's five reasons, at paras. 159-60, for dismissing the appellant's arguments on preferability are responsive to the "fair, efficient and manageable" issue:

> (1) it is not a foregone conclusion that individual trials will be required; and
>
> (2) even if individual assessments of entitlement and damages are needed, "there is every reason to believe that a common issues trial judge, assisted by the parties and their qualified experts," will be able to design and successfully implement an efficient process.



[156] I agree with the motion judge's first observation that it is not a foregone conclusion that individual trials will be required notwithstanding my view that an aggregate assessment of damages under s. 24(1) is not available. I also share the motion judge's confidence that – if the ultimate finding is that compensation should be paid to class members – there is every reason to believe that a common issues trial judge, assisted by the parties and their experts, will be able to design and successfully implement a satisfactory compensation system.

[157] The reason for this confidence, as explained in *Cassano*, at para. 60, is that the *CPA* "is a powerful procedural mechanism that permits the court to take a variety of approaches in resolving the claims of class members." As further explained in *Cassano*, at para. 64:

> [W]hat is called for in addressing the preferable procedure requirement is to look not just at the common issues trial, but at the other procedural options for conducting the class action litigation pursuant to the *CPA.* In this regard, I note that s. 25 of the *CPA* confers broad jurisdiction on the common issues trial judge to fashion procedures to be followed where, among other things, damages cannot be assessed in the aggregate. This section deals specifically with individual

> participation in a class proceeding following a favourable determination on the common issues.

[158] I referred above to s. 25 of the *CPA*. Where individual class members are required to participate in order to decide individual issues, s. 25(1) of the *CPA* authorizes the court to appoint "one or more persons to conduct a reference" (s. 25(1)(b)) and "with the consent of the parties, direct that the issues be determined in any other manner" (s. 25(1)(c)). The effect of these provisions is that the court may direct that individual claims to unpaid overtime be determined through procedures other than individual trials.

[159] As the motion judge recounted in his reasons, at paras. 31-33, Scotiabank itself implemented a summary procedure for retroactively compensating some 600 overtime claims by employees who had been classified as Level 6 and who had been treated as ineligible for overtime prior to October 1, 2008. Scotiabank structured a claims process such that the affected employees could complete a form indicating the amount of additional hours they had worked without being compensated through time off or other special work arrangements from November 1, 2005 to October 1, 2008. Employees were encouraged, but not required, to provide supporting documents or records if possible. If no supporting records were available, employees were required to include "supporting commentary" for their request.

[160] Each employee's request was reviewed by a superior for reasonableness based on his/her knowledge of the employee's working hours, the work environment, and any consideration the employee may have previously received for the time worked. If a manager disagreed with an employee's request for overtime compensation, then an "Employee Relations team within HR Shared Services" would review the request.

[161] Although it is not a perfect template, this procedure demonstrates that individual claims for unpaid overtime can be dealt with efficiently. A process whereby employees submit claims that are reviewed by a manager or supervisor, with any dispute resolution being conducted by a third party, is not wholly different from summary procedures using statements of evidence and adjudication.

[162] I caution that this procedural example is not intended to fetter the discretion of the common issues trial judge in any way. He or she would determine both whether individual assessments were necessary and, if so, the manner in which those assessments should be conducted.

**(b) Whether a Class Action is Preferable to Other Reasonably Available Means for Resolving the Class Members' Claims**

[163] The appellant further submits that resolving the class members' claims through Part III proceedings would more efficiently fulfill the goals of the *CPA*: judicial economy, access to justice and behaviour modification. According to the

appellant, the availability of Part III proceedings "fully answers" the access to justice question. Moreover, the appellant argues that Part III proceedings provide access to justice in a way that is less formal than a class proceeding and that does not burden the resources of the judiciary, thereby meeting the judicial economy objective. In addition, the appellant contends that the goal of behaviour modification has been achieved considering that Scotiabank has already revised its overtime policy and record-keeping procedures.



[164] The recent decision in *Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47, 109 O.R. (3d) 498, at paras. 44-45, explains how the second element of the preferability analysis is to be conducted:

> The second element of the preferability inquiry described in *Hollick* requires a comparative analysis as to whether a class action would be preferable to other reasonably available means of resolving the class members' claims. The preferability inquiry must necessarily take into account the central characteristics of the proposed alternative proceeding as a means of resolving the claims. This exercise includes, but is not limited to, considering the following characteristics of the alternative proceeding: the impartiality and independence of the forum; the scope and nature of the alternative forum's jurisdiction and remedial powers; the procedural safeguards that apply in the alternative proceeding, including the right to participate either in person or through counsel and the transparency of the decision-making process; and the accessibility of the alternative proceeding, including such factors as the costs associated with accessing the process and the convenience of doing so.

> These characteristics must be considered in relation to the type of liability and damages issues raised by the class members' claims against the defendants in the putative class action and the manner in which they are addressed, if at all, in the alternative proceeding. The court must then compare these characteristics to those of a class proceeding through the lens of the goals of the *CPA*: judicial economy, access to justice and behaviour modification. [Footnotes omitted.]



As noted in *Fischer*, at para. 46, not all of these characteristics will necessarily be relevant in a given case.

[165] Relevant to the comparative analysis required in this case are the following two characteristics of Part III proceedings: (i) the scope and nature of the alternative forum's jurisdiction and remedial powers; and (ii) the accessibility of the alternative proceeding. Comparing these characteristics of Part III proceedings with those of a class proceeding supports the conclusion of the courts below that the class proceeding is the preferable procedure for resolving the class members' claims. I note that I agree in substance with the preferability analysis of Lax J. in *Fresco,* at paras. 95-98, some of which the motion judge relied on in this case. While Lax J. did not have the benefit of *Fischer*, the crux of her approach is consistent with a focus on the two identified factors from *Fischer*.

**(i) The scope and nature of the alternative forum's jurisdiction and remedial powers**

[166] The appellant's arguments for preferring Part III proceedings over a class proceeding once again fundamentally misstate the nature of the claims asserted on behalf of the class members. These claims are framed in breach of contract,

breach of a duty of good faith, negligence and unjust enrichment – causes of action over which the administrative actors under the *Code* have no jurisdiction: see Lax J.'s decision in *Fresco*, at para. 98. Inspectors and referees appointed under the *Code* have no jurisdiction to investigate a claim that an employer's company-wide overtime policy breaches the terms of its employees' employment contracts. Nor do they have jurisdiction to determine if an employer has been unjustly enriched by a failure to comply with its duties to pay overtime on a company-wide basis. Moreover, the pleadings seek declaratory and injunctive forms of relief and punitive damages that inspectors and referees lack jurisdiction to grant.

[167] Given the type of liability and damages issues raised by the class members' claims, the limitations on the jurisdiction and remedial authority of inspectors and referees under the *Code* would thwart rather than fulfill the central *CPA* goal of promoting access to justice.

**(ii) The accessibility of the alternative proceeding**

[168] The courts below accepted that class members may be reluctant to bring forward individual claims for uncompensated overtime using Part III proceedings due to fear of affecting their employment status and advancement: see the motion judge's reasons, at paras. 161-62, and the Divisional Court's reasons, at paras. 135 and 137. The motion judge in *Fresco*, at paras. 97-98, referenced a

report by Professor Harry Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Ottawa: Human Resources and Skills Development Canada, 2006) ("Arthurs Report"), as did both courts below in this case by reference to the *Fresco* decision. The Arthurs Report, at pp. 191-92, reveals that only a very small fraction of federally-regulated employees (0.36 percent) advance complaints against their employers through Part III proceedings and some 92 percent of such complaints are against former employers.



[169] In addition to fear of employer reprisals, there are also costs associated with using Part III proceedings that may deter class members from bringing complaints under the *Code* for relatively small amounts of unpaid overtime. The Arthurs Report notes, at p. 222:

> However, employees may have to incur out-of-pocket expenses to pursue their rights. They may have to take time off work to attend a hearing, travel to or communicate with a Labour Program office, or hire a lawyer or other advocate to represent them in certain types of proceedings. Given the relatively small amounts usually claimed in Part III proceedings, such expenditures may seriously erode the amount recovered, to the point where employees are in effect deterred from seeking remedies at all.

[170] The statistics regarding the infrequent use of Part III proceedings by current employees and the costs associated with this use support the conclusion that the goal of access to justice would be better advanced by a class proceeding. The class proceeding relieves individual class members of the need

to incur out-of-pocket expenses and the need to hire a lawyer or other advocate to represent them. Class actions also offer judicial oversight, which would deter any potential employer retaliation against employees taking part in the litigation.

[171] Thus, in my view, the courts below committed no error in concluding that the preferable procedure requirement is met.

## G. CONCLUSION AND DISPOSITION

[172] For these reasons, I would allow the appeal from the Divisional Court's order upholding the motion judge's certification order to the limited extent that I would strike proposed common issue 10(a) on the basis that an aggregate assessment of damages is not available in this case. I would also strike common issues 6(a) and 6(b) on the basis that these alleged duties add nothing of substance to the duty alleged in common issues 4 and 5. In all other respects, I would dismiss the appeal from the Divisional Court's order.

[173] The party demanding costs may file brief written submissions on costs within 10 days of the release of these reasons. Any responding submissions shall be filed within 10 days thereafter.

Released: "WKW" June 26, 2012

"W.K. Winkler CJO"
"I agree, S.E. Lang J.A."
"I agree David Watt J.A."

## APPENDIX

## PLAINTIFF'S REVISED LIST OF 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 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) is “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 the 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 the 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?**

***** Not certified *per* the motion judge's order.
****** Not certified in accordance with these reasons.
******* Certified with modification in accordance with these reasons.