

# **CLASS ACT: ROBIN HOOD STRIKES AGAIN**

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## INTRODUCTION

Within the past year, the Ontario Superior Court of Justice has released two decisions that should be of particular interest to both federally and provincially regulated employers. These cases involved employees bringing class action lawsuits against their employers (prominent banks), claiming unpaid overtime and alleging systemic breaches of the *Canada Labour Code* (the “Code”). Both cases ended in completely different outcomes, which many would say are directly contradictory.

This paper focuses on the key issues before the Superior Court of Justice relating to the certification of the proposed class actions. A basic primer on class actions in Ontario is provided, followed by more detailed commentary on the statutory requirements to certify a class action in Ontario, and particularly on the “common issue” aspect of these requirements. Following this, the cases themselves are reviewed in some detail, with a focus on those aspects of the decisions that were crucial to the success or failure of the actions. At the same time, this paper draws on some of the Court’s comments in relation to overtime policies and the payment of overtime, and offers suggestions as to how employers can learn from these two cases.

### The Cases

Before delving too far into the substantive aspects of class actions in Ontario, it is useful to provide a short summary of the two cases that are the focus of this paper.

On February 12, 2010, the Ontario Superior Court of Justice (per Justice Strathy) certified a \$300-million class action lawsuit against The Bank of Nova Scotia (*Fulawka v Bank of Nova Scotia*, [2010] O.J. No. 716) (hereinafter the “*Scotiabank*” decision). Ms. Cindy Fulawka, a member of Scotiabank’s front-line sales department, alleged that Scotiabank owed her, and approximately 5,000 other sales staff, overtime pay dating back to 2000. According to the claim, Scotiabank sales employees had been working outside of scheduled hours, without pay, in order to meet the demands of their jobs. Ms. Fulawka alleged this failure to pay overtime was a breach of the employees’ contracts of employment, as well as the *Code*.

It would be an understatement to say that Justice Strathy’s decision to certify the class in *Scotiabank* came as an unwelcome surprise to

employers across Canada, especially in Ontario. The *Scotiabank* decision arrived hard on the heels of an earlier decision of the same Court in which Madam Justice Lax refused to certify what appeared to be a very similar class action against the Canadian Imperial Bank of Commerce (*Fresco v Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531) (hereinafter the “*CIBC*” decision). In *CIBC*, Ms. Dara Fresco brought an action on behalf of front-line retail employees. As with Ms. Fulawka, Ms. Fresco’s primary claim was for compensation for unpaid overtime wages, and she alleged that CIBC had breached the employees’ contracts of employment, and the *Code*.

Commenting on the similarity between the cases, Justice Strathy in *Scotiabank* states that *CIBC* involves “very similar issues”, and that “the expert evidence in the two cases is almost identical. The proposed common issues are very similar...” Yet despite these similarities, Justice Strathy comes to the opposite conclusion of that reached by Justice Lax in *CIBC*. The reasons for this are explored below.

## **CLASS PROCEEDINGS – THE BASICS**

Before reviewing the *Scotiabank* and *CIBC* decisions in more detail, what follows is a brief primer on class actions in Ontario. This will provide the context for an in-depth consideration of the two cases. When reading this, it is important to keep in mind the goal of class proceedings: to provide access to justice for litigants, to promote the efficient use of judicial resources, and to sanction wrongdoers to encourage behaviour modification (*Scotiabank*, at paragraph 54).

### **What is a Class Action?**

A class action lawsuit generally involves one or more “representative” plaintiffs (although it could be defendants) who seek to represent a larger group of plaintiffs with the same or similar claims against one or more defendants. The benefit of the class action is it allows for the “global” resolution of issues against the defendant(s) without the need for a multiplicity of lawsuits, and therefore is a more efficient and effective use of judicial resources while at the same time providing access to justice for plaintiffs.

In Ontario, class actions are governed by the *Class Proceedings Act, 1992*. The first step in a class action lawsuit is the filing and serving of a statement of claim, just as in any regular litigation. Before the action can

proceed any further, the representative plaintiff must bring a motion requesting “certification” of the class. If the class is certified, the action then proceeds much like regular litigation, guided by the *Class Proceedings Act*. For the purposes of this paper the focus is on the certification of a class action.

## **Certification**

Certification of a class is the first, and perhaps most important, step in the litigation of a class action lawsuit. This importance is amply demonstrated by the interest and attention generated by the *Scotiabank* and *CIBC* decisions, when in fact all that has been decided is the question of certification. No finding of liability has been made. By achieving certification, the class achieves the kind of leverage that often leads to a beneficial settlement for members of the class.

The requirements for certification of a class action in Ontario are set out at section 5 of the *Class Proceedings Act*, which provides that a court shall certify a class proceeding on a motion if:

- (a) The pleadings or the notice of application discloses a cause of action;
- (b) There is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) The claims or defence of the class members raise common issues;
- (d) A class proceeding would be the preferable procedure for the resolution of the common issues;
- (e) There is a representative plaintiff or defendant who,
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the proceeding that sets out a

workable method of advancing the proceeding on behalf of the class and of notifying the class members of the proceeding, and

- (iii) does not have, on the common issues for the class, an interest in conflict with the interests of the other class members.

This test has been summarized as follows:

There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers [*CIBC* at paragraph 21, citing *Sauer v. Canada (A.G.)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14)].

In *Scotiabank*, Justice Strathy stated that the above test for certification is to be applied in a “purposive and generous manner”, to give effect to the goals of certification (*Scotiabank*, paragraph 54).

### **Common Issues**

It has been said that the determination of “common issues” is at the core of the certification test. (Winkler J, as he was then, in *Frohlinger v. Nortel Networks Group*, [2007] O.J. No. 148 at para. 25 (S.C.J.)). In both *Scotiabank* and *CIBC*, the most contentious issue was whether the claims raised common issues. As is explained below, this was in fact the pivotal factor for certification in *Scotiabank* and the failure to certify in *CIBC*.

The term “Common issues” is defined in the *Class Proceedings Act* to mean, “common but not necessarily identical issues of fact” or “common but not necessarily identical issues of law that arise from the common but not necessarily identical facts.” In *CIBC*, Justice Lax explains (at paragraph 21):

It is not enough for there to be a common defendant. Nor is it enough that class members assert a common type of harm as commonality is measured qualitatively rather than quantitatively. There must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this.

Justice Strathy in *Scotiabank* discusses at length the concept of “common issues.” He holds that the common issue requirement is not a high hurdle – it does not have to resolve a class member’s claim, but the answer to the common issue(s) must be necessary to the resolution of each member’s claim. Justice Strathy finds that it is sufficient if the common issue is one of fact or law that moves the litigation forward and avoids duplication. The common issue may make up a limited part of the liability question and many individual issues may remain after its resolution; however, a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant.

### **THE CANADA LABOUR CODE**

Before delving into the two decisions, some further background information is required. Below is a short summary of the key *Code* provisions dealing with overtime (these provisions also are set out in full as Appendix “A” to this paper):

1. Part III of the *Code* contains minimum standards requirements, including those regarding the payment of overtime wages.
2. Subsection 169(1)(a) sets out the standard hours of work, being eight hours per day or 40 hours in a week. No employer shall “cause or permit” an employee to work more than those hours.
3. Section 174 provides that, when an employee is “required or permitted” to work in excess of the standard hours of work, the employee is entitled to be paid overtime wages of one-and-a-half times his or her regular wages.
4. Employers are required to accurately record all hours worked by employees (section 252(2)).

It is interesting to note, at least according to Justice Strathy in *Scotiabank*, that the word “permit” in section 169 of the *Code* connotes an obligation on an employer also to not “permit” overtime to be worked. That is, the employer has to take steps to ensure that an employee does not work overtime without compensation; simply saying that the Employer has not authorized the overtime and may be ignorant it is being worked likely is insufficient (*Scotiabank*, paragraph 43).

## **THE TWO OVERTIME CASES – IN DETAIL**

We now turn to a consideration of the facts of the two cases. Given the prominence of the banks’ respective overtime policies in the outcome of the cases, these policies receive particular attention below.

### ***CIBC***

Ms. Dara Fresco proposed to certify a class action on behalf of current and former non-management and non-unionized employees of CIBC in Canada who worked at CIBC’s Canadian retail branches as front-line customer service employees. It was estimated that this proposed class covered more than 3,100 employees.

The primary claim put forward by Ms. Fresco was for compensation for unpaid overtime wages. Ms. Fresco alleged that CIBC had breached its contractual and statutory duties to her and to the other class members by failing to pay the class members for all hours worked at the appropriate rates of pay.

Ms. Fresco alleged that at each of the branches where she has worked, class members were directed to prepare time records that described their hours of work as no more than their regular daily hours and to make no claim for overtime hours worked. She claimed that she worked at times up to 15 hours per week on average beyond her regular scheduled hours and that such work was necessary to complete the basic duties of her employment. Ms. Fresco alleged the approximate value of the additional time for which she had not been paid between 1999 and the 2007 (the date of commencement of the action) was \$47,220. In addition to the general damages claimed, she claimed aggravated, exemplary and punitive damages in the amount of \$100 million.

### **CIBC's Overtime Policy**

Ms Fresco alleged that CIBC's Overtime Policy was illegal. Pursuant to this policy, employees were required, in order to be paid for overtime hours worked, to obtain the approval of a manager in advance of working the overtime. The policy also provided for paid time off at time-and-a-half *in lieu* of wages for overtime, at the option of the employee. The day-to-day implementation of the Overtime Policy took place at the branch manager level. Branch managers had significant autonomy in managing branch employees, including with respect to staffing and scheduling. When the Overtime Policy was introduced, CIBC issued Manager Guidelines, which provided that overtime work should be authorized only on an exceptional basis. Amongst other requirements, managers were obliged to document any pre-approval of overtime; could not permit employees to work overtime hours when overtime has not been approved; and had to refer questions regarding overtime that they were unable to answer to the Human Resources Consultant ("HRC") or Employee Relations Consultant ("ERC").

Employees also had responsibilities relating to overtime, including to: (1) obtain appropriate written authorization prior to working overtime, or as soon as possible afterwards; (2) submit overtime hours as soon as they were worked; (3) refer any questions to their manager; and (4) follow the escalation process (through increasingly senior levels of management) if they had any concerns regarding overtime.

Ms. Fresco claimed that the pre-approval requirement violated the *Code* requirement that employees be paid for overtime at a rate not less than one and one-half times regular wages when the employee is "required or permitted" to work in excess of standard hours of work. Further, the time *in lieu* option was argued to be impermissible under the *CLC*.

### ***Scotiabank***

Ms. Cindy Fulawka, a member of Scotiabank's front-line sales department, alleged that Scotiabank owed her, and approximately 5,000 other sales staff, overtime pay dating back to 2000. According to the claim, Scotiabank sales employees had been working outside of scheduled hours, without pay, in order to meet the demands of their jobs. Ms. Fulawka alleged this failure to pay overtime was a breach of the employees'

contracts of employment, as well as the *Code*. She also claimed that Scotiabank had been unjustly enriched by the unpaid overtime work.

Ms. Fulawka proposed to bring this action on behalf of current and former employees who work or had worked in full-time front-line sales position at any time since January 1, 2000. Scotiabank estimated that the proposed class covered approximately 12,630 employees.

Ms. Fulawka's evidence in support of her certification motion suggested that:

- (1) the class employees frequently worked unpaid overtime in order to carry out the usual functions of the their jobs;
- (2) the nature of their jobs required them to accommodate customers' time demands, which necessitated after-hours meetings;
- (3) the nature of their work made overtime unpredictable and it was difficult for a class member to obtain advance approval from a superior;
- (4) Scotiabank had a culture of not authorizing overtime and therefore it was rarely requested;
- (5) despite Scotiabank's overtime policy requiring overtime to be approved in advance, managers rarely authorized it and time *in lieu* was often refused;
- (6) working overtime (even when not approved) was an important factor in performance appraisals; and
- (7) neither employees nor Scotiabank kept track of overtime hours or time *in lieu*.

### **Scotiabank's Overtime Policy**

Central to the evidence was Scotiabank's overtime policy. Pursuant to this policy, which was expressly stated to be based on the *Code*, overtime was required to be authorized in advance by a branch manager or department head. If an employee worked more than eight hours in a day or more than 37.5 hours in a week, authorized overtime was paid at one-and-a-half times. Time *in lieu* was not encouraged, but it was available on an exceptional basis. Even though there was no provision for authorizing

overtime after the fact, Scotiabank's evidence suggested that this frequently occurred.

Significant evidence also was heard regarding Scotiabank's record-keeping system, which had varied over time. Prior to 2006, hours of full-time staff were recorded on monthly "staff plans" that were prepared in advance by a manager to schedule the hours that these full-time employees were expected to work in the coming month. Staff were expected to review the accuracy of the plans, and to record any pre-approved overtime hours they had worked. Time sheets were not kept for full-time employees. In January 2006, Scotiabank introduced an electronic management tool for tracking vacations and time off. In 2009, it was linked to the payroll such that employees could record overtime hours directly and indicate whether they preferred to receive pay or time *in lieu* for such overtime.

### CERTIFICATION OF A CLASS

With this factual background in mind, we now turn to the Court's decision to certify the class in *Scotiabank* although it had refused to do so in *CIBC*.

It is important to keep in mind that, at the certification stage of a class action, the motion judge is not concerned with the merits of the claim(s). As stated by Winkler J (as he was then) in *Bywater v. Toronto Transit Commission* [1998] O.J. No. 4913, 27 C.P.C. (4th) 172 (Gen. Div.) at paragraph 12: "[a] decision on certification does not constitute a determination on the merits of the action." As a result, a court's comments on issues not crucial to the question of certification should be read with a degree of caution. For example, when reviewing overtime policies, the court is looking not at whether the policy in fact breached the *Code*, but whether there is a cause of action should such breach be established and whether the evidence is sufficient to arguably support such a breach. Despite the preliminary nature of a certification motion and the lack of a "merits" review, a reading of the two decisions (particularly *Scotiabank*) confirms that the court offers a number of merit-based pronouncements; these comments should provide some guidance as to the view of the judiciary on the issue being discussed.

In both *CIBC* and *Scotiabank*, the plaintiffs allege a number of common issues, including the banks' overtime policies and practices being in contravention of the *Code*, breach of employment contracts (both

implied and express), unjust enrichment, and remedy and damages. A fulsome review of each alleged common issue is beyond the scope of this paper; instead, our focus is on the overtime policies of the banks and their alleged failure to pay overtime wages in contravention of the *Code*.

### ***CIBC***

In *CIBC*, Justice Lax finds that there are no common issues to be decided such that the class action cannot be certified. The crux of Justice Lax's decision in relation to overtime is summed up succinctly in the following passages (at paragraphs 5 and 6):

... It is my opinion that the [Overtime] Policy is not illegal, and that at any rate the determination of its legality will not materially advance any class member's claim for unpaid overtime wages. Any losses that Ms. Fresco or class members may have suffered were not caused by an allegedly illegal Policy, but rather by a failure independent of the Policy to compensate for overtime hours worked that were required or permitted...

Ms. Fresco asserts that there is a common or pervasive or systemic policy, practice or experience of unpaid overtime at CIBC ... It is my conclusion that there is no evidentiary foundation for this, but even if there were, this is not a case where questions of systemic wrongdoing can be resolved without examining the individual claims, thereby defeating the purpose of a class action.

It can be seen by these comments that Justice Lax views the plaintiffs' claims as being better suited to resolution on an individual level. That is, the claims of the proposed class could not be resolved or furthered without the court undertaking an individual analysis of each claim. This would defeat the purpose of the class action. As Justice Lax points out at paragraph 51:

An issue will not be common if its resolution is dependent upon individual findings of fact that

have to be made with respect to each individual claimant.

In the result, when Justice Lax finds at paragraph 70 that “instances of unpaid overtime occur on an individual basis”, it is clear and plain that this is the basis for the Court’s refusal to certify the class.

### ***Scotiabank***

Despite commenting that the overtime policy is not illegal, and perhaps mindful of the procedural rather than substantive nature of the certification motion, Justice Lax does not offer any further insight into her view on the overtime policy. Conversely, in *Scotiabank*, Justice Strathy finds that there were “systemic” wrongs that existed across the Scotiabank organisation, such that there were common issues capable of certification. Justice Strathy states:

“[t]he systemic wrongs flow from a policy that failed to reflect the realities of the workplace because it put the onus on the employee to obtain prior approval for overtime that they were permitted or required to work.”

Chief amongst these “systemic wrongs” was Scotiabank’s failure to establish a system-wide procedure to record overtime (at least prior to the change in 2006), such that it was difficult for employees to obtain fair compensation for their overtime work.

### **Systemic Inadequacies Not Persuasive in *CIBC***

Interestingly, *CIBC* involved a similar claim about systemic inadequacies that was dismissed by the Court. Ms. Fresco claimed in *CIBC* that her employer had a duty to implement a system to ensure that it complied with its contractual duty not to require or permit overtime to be worked without compensation. *CIBC* did not dispute the contractual duty to ensure that overtime was compensated; however, it questioned the existence of any systemic obligation. Justice Lax agrees with *CIBC*, commenting that the contractual obligation to properly compensate overtime does not have to be performed “though any particular mechanism”.

It appears that, in *CIBC*, the Court was content for the bank to ensure overtime was compensated at an individual level; whereas, in *Scotiabank*, the Court was critical of the overtime policy which was operating at an organizational level, and required Scotiabank to more carefully oversee the implementation of this policy. The *Scotiabank* decision on this issue of organization-wide policing of the overtime policy seems to directly contradict Madam Justice Lax's comments in *CIBC*.

### **Responsibility Assigned to Employer in Scotiabank**

For Justice Strathy, an issue for trial is, "whether the employee should bear the responsibility of not working overtime unless it has been approved or whether the employer bears the responsibility of ensuring that managers do not permit or require overtime to be worked unless it is to be compensated." To this end he states at paragraph 124:

While an employer certainly has the right to protect itself against unrequested and unwanted overtime hours, it is arguable that the balance of power in the workplace is such that the protection of the employee against working unpaid hours should be the paramount consideration. It is also arguable that the employer has a responsibility to design, implement and enforce overtime policies and procedures on a system-wide basis to prevent abuses.

This is an example of a pronouncement that borders on a finding on the merits, couched in language ("arguable") that leaves the court room to manoeuvre at trial. At the very least, this comment should be concerning to employers for the potential ramifications it could have on an employer's obligation to oversee and manage the overtime of its employees, despite any policies it may have in place.

In certifying the class action, Justice Strathy concludes at paragraph 129:

The evidence before me, therefore, provides a basis in fact to ask whether Scotiabank owed duties to the Class to put policies and procedures in place to prevent overtime from

being worked without compensation and to properly record all hours of overtime worked, whether pre-approved or not. There is also a basis to ask whether those duties were breached. The answers to these common issues do not depend on individual findings that have to be made with respect to each individual claimant ... A conclusion by the common issues judge that the bank had a duty to pay overtime that was permitted or required, and that it breached a duty to establish a system to properly record such overtime, could result in a conclusion that the failure to prove overtime hours worked is not a bar to recovery, or that the absence of records is not an impediment to proof of damages.

### **CONCLUSION: WHAT DOES THIS ALL MEAN?**

It should come as no surprise to learn that both *CIBC* and *Scotiabank* are being appealed. Further appeals to the Supreme Court of Canada are likely. This leaves the current state of employee class actions in Ontario in a state of flux. Stay tuned, but also consider reviewing your overtime policies in the meantime.

Employers likely breathed a sigh of relief and nodded approvingly while reading the *CIBC* decision. These same employers no doubt were left scratching their heads after reading *Scotiabank*. Seemingly similar facts led to polar opposite outcomes within a short period of time before the same court. It will take a higher court to bridge the apparent chasm or at least to harmonize the different results.

In the meantime, employers are left with the comments of Justice Strathy and Justice Lax regarding overtime policies. Immediate improvements to overtime policies and practices should be considered by employers at both the federal and provincial levels without having to wait for further decisions from higher courts. In considering what improvements may be warranted, Justice Strathy in particular goes into helpful detail in his review of the Scotiabank policy, and concludes that it is potentially invalid in a number of areas. Some of Justice Strathy's

comments should be particularly noteworthy for employers, the most relevant of which can be distilled into the following propositions:

1. An overtime policy that places the emphasis on employees to obtain approval for overtime, may be inconsistent with the *Code* (and quite likely similar provincial legislation);
2. Employers should implement system-wide procedures to monitor overtime and ensure that any contractual or statutory obligations are being met. Simply having a policy in place, without sufficient supervision, likely falls short of the required standard.
3. Employers, given their positions of power in the workplace, must be mindful of the power imbalance with employees and design policies that reflect a true equilibrium, perhaps even tipping any benefit of the doubt in favour of affected employees.

As noted above, a motion for certification does not involve a decision on the merits. As such, many of the court's comments in *CIBC* and *Scotiabank* that appear to be substantive, or do not directly relate to the issue of certification, are likely *obiter* and without binding authority. Even so and at the very least, the comments are reflective of the court's view and offer insight into the direction the court may take on both certification and the ultimate merits of future class actions. Therefore employers should keep these early views of the Court in mind when designing or reviewing overtime policies and procedures. Given the success of the class in *Scotiabank*, both federal and provincially legislated employers should stay alert to potential class actions that may be waiting in the wings.

## **Appendix A – Canada Labour Code, Part III, Division 1**

### **Hours of Work**

#### Standard hours of work

**169.** (1) Except as otherwise provided by or under this Division

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

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

#### Averaging

(2) Where the nature of the work in an industrial establishment necessitates irregular distribution of the hours of work of an employee, the hours of work in a day and the hours of work in a week may be calculated, in such manner and in such circumstances as may be prescribed by the regulations, as an average for a period of two or more weeks.

#### Duration of averaging

(2.1) The averaged hours of work calculated pursuant to subsection (2) remain in effect

(a) where the averaging of hours of work is agreed to in writing by an employer and a trade union, for the duration of that agreement or for such shorter period as is agreed to by the parties; or

(b) where the averaging of hours of work is not agreed to in writing by an employer and a trade union, for no longer than three years.

#### General holidays in week

(3) In a week in which one or more general holidays occur that under Division V entitle an employee to holidays with pay in that

week, the hours of work of the employee in that week shall be reduced by the standard hours of work for each general holiday in that week and, for the purposes of this subsection, in calculating the time worked by an employee in any such week, no account shall be taken of any time worked by the employee on the holidays or of any time during which the employee was at the disposal of his employer during the holidays.

R.S., 1985, c. L-2, s. 169; 1993, c. 42, s. 14

#### Overtime pay

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

R.S., c. L-1, s. 32; R.S., c. 17(2nd Supp.), s. 5.