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NOTE: Please find attached a copy of the Reasons for Judgment from Justices MacKenzie, Molloy and Harvison-Young with regard to the above matter.

If you have any questions please feel free to contact the Divisional Court office at 416-327-5100.

CITATION: Fulawka v. The Bank of Nova Scotia, 2011 ONSC 530

DIVISIONAL COURT FILE NO.: 105/10

DATE: 20110603

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MACKENZIE, MOLLOY AND HARVISON YOUNG JJ

BETWEEN:

CINDY FULAWKA

Plaintiff/Respondent

)
)
) *Louis Sokolov, Steven Barrett, David F.
) O'Connor, J. Adam Dewar, for the
) Plaintiff/Respondent*

- and -

THE BANK OF NOVA SCOTIA

Defendant/Appellant

)
) *Robert L. Armstrong, Mary J. Gleason,
) Jeremy Devereux, Michael Kotrly, for the
) Defendant/Appellant*

)
)
)
) HEARD at Toronto: December 1, 2, 3,
) 2010

HARVISON YOUNG J.

A. OVERVIEW

Introduction

[1] This is an appeal by the defendant, the Bank of Nova Scotia ("Scotiabank"), from a decision of Strathy J. (the "motion judge") granting the plaintiff's motion to certify this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"): *Fulawka v. The Bank of Nova Scotia* (2010), 101 O.R. (3d) 93 (S.C.) (the "Reasons").

[2] The action arises from a claim made for overtime compensation for employees of Scotiabank branches working as Personal Banking Officers ("PBO"), Senior Personal Banking Officers ("SPBO"), Financial Advisors ("FA") and Account Managers Small Business ("AMSB") (collectively "Class Members") at any time from January 1, 2000. As of September 30, 2008, there were 5,328 Class Members.

[3] Ms. Fulawka claims that Scotiabank, in breach of a number of systemic duties, made it difficult for Class Members to claim and recover appropriate overtime compensation, with the result that Class Members regularly worked overtime for which they were not appropriately compensated. She asserts causes of action for a breach of contract (informed by a breach of a duty of good faith and the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("*Code*")), unjust enrichment, negligence, and a breach of the *Code* itself.

[4] The motion judge struck those parts of the Statement of Claim that sought to directly enforce the *Canada Labour Code*. He did so on the basis that the *Code* sets out its own minimum standards, contains its own enforcement mechanism and does not give rise to a civil cause of action. He also held, however, that the *Code* can inform the duties owed by Scotiabank, be they contractual duties, a duty of good faith, or a duty of care independent of contract.

[5] In allowing the certification action, subject to striking those parts of the Statement of Claim that sought to enforce the *Code*, the motion judge also concluded that there is an evidentiary basis in this case of systemic wrongs that gives rise to common issues, the resolution of which would advance the claims of every Class Member. He summarizes his conclusion on this issue at para. 4 of his Reasons as follows:

The systemic wrongs flow from a policy that failed to reflect the realities of the workplace because it put the onus on the employee to obtain prior approval for overtime rather than requiring the employer to ensure that employees were paid for overtime that they were permitted or required to work. The systemic wrongs included the failure of Scotiabank to establish a system-wide procedure to record overtime, making it all the more difficult for employees to obtain fair compensation for their overtime work. ... There is also evidence that the failure to pay overtime was attributable to systemic conditions, as opposed to purely individual circumstances.

B. ISSUES

1. The Appeal

[6] Scotiabank appeals the certification of the action. The appellant argues that the motion judge:

- (a) erred in finding bases for a number of causes of action such as breach of contract (factually informed by the *Code* and a duty of good faith) and negligence, which, in the circumstances, do not exist at law and are effectively based on the *Code*, despite the fact that he had struck those aspects of the claim that attempted to enforce the *Code* directly;

- (b) erred in finding common issues (when such issues were not necessary to the individual cases of the proposed Class Members and would not advance their cases);
- (c) erred in finding that a class proceeding would be the preferable procedure;
- (d) erred in finding that the litigation plan met the requirements of s. 5(1)(e) of the *CPA*; and
- (e) erred in failing to strike the affidavits of two of the plaintiff's expert witnesses.

2. The Cross Appeal

[7] Ms. Fulawka has brought a Cross Appeal of the motion judge's decision refusing to certify the common issue #3, which asked,

- (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?

[8] Scotiabank brought a Motion to Quash the Cross Appeal on the basis that the plaintiff was seeking to appeal a final order which only lies with the Court of Appeal. Ms. Fulawka has not appealed the motion judge's decision with respect to the direct enforcement of the *Code* to the Court of Appeal.

[9] Having heard the submissions of the parties on the Motion to Quash, the court advised the parties in the course of the hearing that the Motion to Quash was allowed. I agree that there can be no appeal to this court of an order to strike, as such an order is a final order: see e.g. *Smith Estate v. National Money Mart Co.* (2008), 92 O.R. (3d) 641 (C.A.), at para. 30; *M.J. Jones Inc. v. Kingsway General Insurance Co.* (2003), 68 O.R. (3d) 131 (C.A.), at paras. 6 and 10; *Van de Wiel v. Blaikie* (2005), 230 N.S.R. (2d) 186 (C.A.), at paras. 18-19; *Manos Foods International Inc. v. Coca Cola Ltd.* (1999), 180 D.L.R. (4th) 309 (C.A.) As Scotiabank submitted, an appeal from this order lies only to the Court of Appeal. None was taken.

[10] The issue concerning the role that the *Code* could play to "inform" common law duties remained as a significant issue in this appeal and will be discussed below.

[11] By letter dated February 11, 2011, counsel for the plaintiff wrote to this court seeking permission to make additional submissions in light of two Supreme Court of Canada decisions which had been released on December 23, 2010, since the *Fulawka* hearing: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62; *Canada (Attorney General) v. McArthur*

2010 SCC 63. The appellants objected to this request on the grounds that these decisions are irrelevant to the issues before this court in *Fulawka*. I granted permission to the parties to file brief additional submissions.

[12] Having reviewed these submissions, I am of the view that these decisions are not relevant to the issues before this Court. There is no issue as to the Court's jurisdiction to directly enforce the *Code* in this appeal. Rather, the central issue, as will be discussed below, concerns the effect of the motion judge's decision to strike those paragraphs of the statement of claim that sought to directly enforce the *Code*.

C. SUMMARY OF CONCLUSIONS

[13] For the reasons that follow, the appeal is dismissed. As the motion judge noted, most of the issues between the parties fell into two main categories: first, whether the causes of action propounded by the plaintiff were bound to fail; and, second, whether the claims asserted constituted common issues.

[14] 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.

[15] 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.

[16] 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*.

D. STANDARD OF REVIEW

[17] The law is clear that, on an appeal from a judge's decision, the applicable standard of review is one of correctness with respect to issues of law or legal principle: see *Housen v Nikolaisen*, [2002] 2 S.C.R. 235. The standard of review for findings of fact is that such findings cannot be reversed unless there is a palpable and overriding error: *Housen*, at para. 10. Questions of mixed fact and law are on a spectrum. If a legal question can be separated out, it will be reviewed for correctness, but otherwise, questions of mixed fact and law will not be overturned absent palpable and overriding error: *Housen*, at paras. 36-37.

[18] Appellate courts have recognized the special expertise of class action judges in this highly specialized area of the law, and have held that substantial deference is owed on certification decisions: see *Cassano v. The Toronto Dominion Bank*, 2007 ONCA 781, at para. 23; *Anderson et al. v. Wilson et al.* (1999), 44 O.R. (3d) 673 (C.A.), at para. 12; and *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.), at para. 33.

[19] At the outset, I would emphasize that the role of this court is to consider whether the motion judge erred in terms of the record before him (and us) in this case. This Court recently heard another appeal from a class action certification decision involving overtime claims made by employees of the Canadian Imperial Bank of Commerce ("CIBC"), which is now before the Court of Appeal. In that case, *Fresco v. Canadian Imperial Bank of Commerce* (2010), 323 D.L.R. (4th) 376 (Ont. S.C. (Div. Ct.)), the motion judge dismissed the certification application and this Court upheld that decision.

[20] During the course of the hearing of the present appeal, counsel for both parties spent considerable time and energy addressing the similarities (which Scotiabank emphasized) and the differences (which Ms. Fulawka emphasized) between the facts and evidence of the present appeal and those in the *Fresco* case.

[21] In my view, 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*. The record before this court is the *Fulawka* record and not the *Fresco* record. Having said that, the determinations made in *Fresco* and other class proceedings decisions such as *McCracken v. Canadian National Railway Co.*, 2010 ONSC 4520, may be relevant to the resolution of various issues arising in this and similar class proceedings cases, and will be referred to in the analysis of such issues in the course of these reasons.

E. ANALYSIS

1. Did the motion judge err in finding that it was not plain and obvious that the plaintiff's claims were bound to fail?

[22] The standard of review on the question of whether it was plain and obvious that the plaintiff's claims were bound to fail is one of correctness which must be considered in relation to each of the various causes of action asserted by Ms. Fulawka.

[23] The test for certification set out at s. 5(1) of the *CPA* provides as follows:

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

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

[24] The motion judge noted in his Reasons, at paragraph 54, that s. 5(1):

... is to be applied in a purposive and generous manner, to give effect to the important goals of class actions – providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v.*

Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 at paras. 26-29; *Hollick v. Toronto (City)*, above, per McLachlin C.J. at paras. 15 and 16.

In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

It is particularly important to keep these principles in mind at the certification stage. ... the certificate stage is decidedly not meant to be a test of the merits of the action ...

[25] The motion judge correctly stated that the test on a motion for certification is identical to the test on a motion to strike a pleading for disclosing no cause of action in that it must be "plain and obvious" that the claim cannot succeed. He also noted that "matters of law which are not fully settled by the jurisprudence must be permitted to proceed": Reasons, at para. 70. He then considered each of the claims for breach of contract, unjust enrichment, breach of duty of good faith and negligence in turn, and declined to strike any of the claims. For the reasons that follow, I conclude that there is no basis for interfering with the motion judge's conclusion that it was not plain and obvious that these claims could not succeed.

Breach of Contract

[26] The motion judge noted that claims for breach of contract based on the interpretation of common contract provisions have frequently been certified as class actions: see e.g. *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 211 O.A.C. 301 (C.A.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada* (2002), 62 O.R. (3d) 535 (S.C.); *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.); *Despault v. King West Village Lofts Ltd.*, [2001] O.T.C. 546 (S.C.); *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (S.C.). He concluded that it was not plain and obvious that the claim for breach of contract will fail. He summarized the plaintiff's position on this point at para. 72 of his Reasons:

The plaintiff pleads that it was an express or implied term of the contracts of employment of Class Members that they would be paid for overtime worked at one and a half times their hourly rates. Alternatively, the plaintiff pleads that the provisions of the *Code* and its regulations were implied terms of their contracts of employment and there was a breach of these implied terms.

[27] The motion judge also observed that "[w]hile Scotiabank does not acknowledge that the provisions of the *Code* are an implied term in the employment contracts of the Class, it does not dispute that there is a properly pleaded claim for breach of contract": Reasons, at para. 73.

[28] As will be discussed further in the following sections of these reasons, the motion judge did allow Scotiabank's motion to strike the direct cause of action based on the *Code* in the

Statement of Claim, although “the *Code* can inform the duties she is owed by Scotiabank, be they contractual duties, a duty of good faith, or a duty of care independent of contract”: Reasons, at para. 2. The ambit of this ruling with respect to the *Code*, and its effect on the breach of contract claim in particular, was the subject of considerable debate and disagreement between the parties during the course of the hearing of the appeal and the motion to dismiss the cross appeal.

[29] Scotiabank argues that the motion judge, having correctly held that the *Code* could not be directly enforced by this action, erred in permitting the *Code*’s indirect enforcement by holding that it could “inform” the terms of the employment contract. Scotiabank argues that this permits the plaintiff to do indirectly that which she cannot do directly.

[30] Ms. Fulawka pleaded two sources of the obligation to pay overtime: a statutory obligation pursuant to the *Code* and a common law contractual obligation. Scotiabank submits that the motion judge erred in holding that contractual terms could be implied into the contracts of Class Members or could inform duties of good faith. The heart of Scotiabank’s submission on this point is that the breach of contract cause of action is incompatible with the finding that the Court lacks jurisdiction to enforce the *Code*. I do not agree.

[31] Citing a body of case law including Supreme Court of Canada jurisprudence, the motion judge held at paragraph 94 of his Reasons:

- (a) “[W]here a statute creates a liability not existing at common law, and provides for its own remedy, the court has no jurisdiction to enforce a claim under the statute”;
- (b) “[B]reach of statute does not give rise to a civil cause of action”; and
- (c) “Part III of the *Code* does not create a civil cause of action and that the court has no jurisdiction to enforce it.”

[32] Nothing in the above-cited principles, or the case law cited by the motion judge in support of them, precludes an employer from conducting its affairs (including by way of company-wide policies, directives or other communications) in such a way that provisions of the *Code* constitute implied or incorporated terms of its contracts of employment with its employees.

[33] The appellant’s position on this issue collapses the finding that the *Code* cannot be directly enforced with the question of what terms might be factually implied into a contract. There are many examples of legislation, such as human rights legislation, which are not directly enforceable but whose terms may influence, inform, or be expressly incorporated into contracts. Indeed, some legislation is intended to play such a hortatory role.

[34] There is no reason why terms of the employees’ contracts, properly construed, might not include a term that overtime would be paid whenever an employee was “required or permitted” to work in excess of the standard (37.5) hours of work, having been informed by that wording

which appears in the *Code*, and reflecting perhaps other norms in the workplace that have also been informed by the *Code* provisions.

[35] There is a factual basis for the pleading that relevant provisions of Part III of the *Code* are implied or otherwise incorporated by fact into Class Members' contracts of employment. The Bank's policies and directives contain numerous express references to minimum employment standards set out in Part III of the *Code*, including a reference that the overtime policy is designed or, in other words, intended by the Bank, to be compliant with the *Code*.

[36] For example, Scotiabank's Overtime Policy (as it existed before October 2008) states in two places: "The Bank's overtime policy is based on *Canada Labour Code* guidelines and covers the period of time from Monday to Sunday". There is, accordingly, some evidentiary basis for the argument that some *Code* provisions informed or were incorporated into the contract as implied terms. Whether that was in fact the case, and precisely how such provisions should be interpreted, are properly questions for the trial judge.

[37] Scotiabank also argues that the plaintiff's implied term argument must fail because one cannot imply a term that is inconsistent with the express provisions of the contract. The flaw in Scotiabank's position on this point is that it presupposes that a proper interpretation of the contract as a whole would be inconsistent with the "permitted and required" wording propounded by the respondent.

[38] As Ms. Fulawka pointed out, Scotiabank's own policy referred to the *Code* and its intention to comply with the *Code* in numerous places. Whether the policy is actually part of the contract of employment or not, it is at least part of the context within which the contract, and in particular the overtime provisions, are to be interpreted. In other words, there is some evidence (namely, the policy that makes reference to the *Code*) upon which a trial judge could conclude that the contract did incorporate the provisions of the *Code*. He could conclude that it might have been implied into the Class Members' contract, or possibly that the policy was actually incorporated into the contract. The role that the policy played and whether it or some parts of it formed part of the employment contract are matters for trial and cannot be determined at this point in the absence of a full evidentiary record. Accordingly, it is not plain and obvious that the "implied by fact" argument cannot succeed.

Implied by Law

[39] The parties disagreed as to whether the motion judge intended to eliminate the possibility that provisions of the *Code* (i.e. the phrase "permitted or required") might be implied by law such that they formed part of the contract. Scotiabank submits that he intended to preclude this possibility and was correct on this point. The respondent argues that he did not so intend, but just in case the motion judge did so intend, she cross appealed the refusal to certify on this point to this Court.

[40] To the extent that the motion judge did mean to eliminate the possibility of arguing that *Code* provisions are implied by law, this would have been a final order from which an appeal to the Court of Appeal would have arisen. None was taken. We dismissed the cross appeal on jurisdictional grounds on the basis that the order striking the elements of the claim that sought to directly enforce the *Code* was a final order from which an appeal lies only to the Court of Appeal.

[41] In our view, the trial judge in this matter can interpret the Statement of Claim and the statement of common issues and determine whether the issue of “implied by law” remains and an appeal would lie from that determination. It is neither necessary nor appropriate, in our view, that this court resolve that issue at this point.

Good Faith

[42] Scotiabank argues that it is plain and obvious that Ms. Fulawka’s claim based on an implied contractual duty of good faith could not succeed.

[43] At the outset, it is important to note that Ms. Fulawka does not allege a free-standing or stand-alone duty of good faith independent of the terms of the employment contract. She pleads that the Class Members are in a position of vulnerability in relation to the defendant. As a result, the defendant owes a duty to the Class Members to act in good faith, which includes a duty to honour its statutory and contractual obligations to them.

[44] It is clear, and apparently not in dispute between the parties, that the duty of good faith is inherent in the employment relationship (see *Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C.R. 701), and that it applies to the performance of the contract and not merely to the dismissal of employees: see *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.); *Nareerux Import Co. Ltd. v. Canadian Imperial Bank of Commerce* (2009), 97 O.R. (3d) 481 (C.A.); *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.).

[45] Scotiabank bases its submission that the motion judge erred in refusing to strike the good faith claim on a number of grounds. First, it argues that the failure to properly compensate Class Members for their overtime work could not result in defeating or eviscerating “the very purpose and objective” of the employment contract because overtime pay is only a small part of the employment agreement. I disagree. The essence of the employment agreement is an exchange of time and effort for wages. Overtime compensation is a form of wages, and it is arguable that actions or omissions which deprive Class Members of proper wages for their labour do defeat the central purpose and objective of the employment contract.

[46] Second, Scotiabank cited the majority of the Divisional Court decisions in *Fresco, supra*, arguing that the motion judge erred in failing to find that it is plain and obvious that (a) “there is nothing illegal or improper about a pre-authorization requirement in an overtime policy”; (b) “there is no requirement under the *Code* ... to establish a Class-wide system to record hours”; (c)

“there is no duty under the *Code* or at common law to prevent employees from working overtime”.

[47] This argument effectively takes findings that were made in *Fresco* on the evidentiary record before Lax J., and seeks to transplant them into the *Fulawka* context. Unlike Lax J. in *Fresco*, the motion judge in this case did find a basis in fact for the breach of duty of good faith on the facts as pleaded before him. As the majority of the Divisional Court noted in *Fresco*, referring to the motion judges’ respective decisions, “[e]ach motion judge applied the legal principles concerning common issues to the facts and pleadings before them”: *Fresco*, at para. 105.

[48] As discussed above in relation to breach of contract, Ms. Fulawka alleges that Scotiabank was contractually obliged to compensate for overtime, and that this work environment and culture issues, along with the failure to accurately record hours actually worked, constituted a breach of a duty of good faith. She argues that Scotiabank created a work environment and culture that encouraged and even required employees to work beyond their scheduled hours, while its pre-authorization policy made it impracticable or generally impossible for employees to be paid for overtime worked.

[49] The argument that Scotiabank breached its duty of good faith rests on the premise that it was obliged to compensate for overtime but that, in the course of the performance of its obligations to its employees, it violated its obligations to act in good faith by making the recovery of overtime pay very difficult, with the result that it was frequently worked but not paid for.

[50] In this case, the motion judge found that there was a factual basis for asking whether – by virtue of how Scotiabank structured and operated its workplace, and what it knew or should have known about Class Members’ work responsibilities – Scotiabank owed and breached the following duties:

- (a) To compensate all required or permitted overtime hours regardless of pre-authorization;
- (b) To prevent overtime hours that Scotiabank did not intend to compensate; and
- (c) To create and implement a system to properly record all hours of overtime actually worked.

[51] He found, at para. 78 of his Reasons, 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.” He also found, at para. 79 of his Reasons, that 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. In addition, he held at para. 80 that such a duty could require that the employer take measures to ensure that the overtime work of Class Members is properly recorded and properly compensated.

[52] As will be addressed below in the course of the discussion of the common issues, the heart of this case is the motion judge's finding that there was an evidentiary basis for systemic duties and breaches, which was not found to be the case in *Fresco*. The examples of good faith just cited are all associated with such systemic duties and breaches. Accordingly, *Fresco* is neither authoritative nor helpful with respect to the issue.

[53] There is some evidence, albeit strongly contested, to support a conclusion that Scotiabank breached its duty of good faith in this manner. The email exchange between Ms. Fulawka and Ms. Robson of Scotiabank in November, 2005 is one such example. In the course of this exchange, Ms. Fulawka complained that the goals at Scotiabank are set "so high that all of us have to work countless hours just to keep our heads above water. While Scotiabank's policy states people in my position and lower should receive overtime...we never do!". In the course of replying, Ms. Robson reiterates the policy that "overtime must be authorized in advance by the Branch Manager" and that "all authorized eligible overtime must be paid." How this, and other, evidence is to be weighed is a question for the trial judge. For these reasons, I am unable to conclude that the trial judge erred in concluding that it was not plain and obvious that Scotiabank breached its duty of good faith to the plaintiff in the performance of the employment contract.

Unjust Enrichment

[54] Scotiabank does not take issue with unjust enrichment as a cause of action, but argues that it cannot be a common issue. This will be addressed below in the context of the discussion of the common issue grounds of appeal.

Negligence

[55] The draft pleading submitted by the plaintiff alleges that Scotiabank owed a duty of care to the employee members of the proposed class to ensure that they were properly compensated for all hours worked at the appropriate rates, and that Scotiabank breached this duty by, *inter alia*:

- (a) creating a working environment in which Class Members were required to work overtime to carry out their duties but dissuaded from reporting overtime and from claiming compensation;
- (b) failing to take reasonable steps to monitor and record their hours worked;

- (c) failing to take reasonable steps to ensure that they were properly compensated; and
- (d) imposing an unlawful overtime policy (Reasons, para. 82).

[56] The motion judge accepted Ms. Fulawka's submission that the claim met the "plain and obvious" test under s. 51(1)(a) of the *CPA*, citing *Hunt v. Carey Inc.*, [1990] 2 S.C.R. 959, and concluding at para. 83 of his Reasons "that the duties owed by Scotiabank can be informed by the provisions of the *Code*: *Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577, [2003] O.J. No. 771 (C.A.); *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, [1983] S.C.J. No. 14; *Boulanger v. Johnson & Johnson Corp.* (2003), 174 O.A.C. 44, [2003] O.J. No. 2218 (C.A.)."

[57] In the next section of his Reasons, the motion judge addressed the pleading of the *Code*, concluding that those portions of the Statement of Claim that sought to directly enforce the *Code* should be struck. He continued at para. 88:

I do not, however, accept the submission that the *Code* may not be implied into the contracts of employment of the Class as a matter of fact. *As well, in my view, the provisions of the Code may be applicable in a more subtle way - to inform the standard of care owed by a federally-regulated employer to its employees.*
[Emphasis added.]

[58] Scotiabank argues that the allegations do not constitute a proper tort claim and that it is plain and obvious that the negligence claim cannot succeed and should therefore be struck. It bases its position on the application of the "*Anns* test" set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) governing the recognition of novel duties of care. It argues that the tort claim as pleaded meets neither the first nor the second stage of the test.

[59] It is common ground that the duty of care alleged is a novel one which is subject to the *Anns* test.

[60] Ms. Fulawka submits that Scotiabank's analysis of her negligence claim is flawed and fails to recognize the necessary modifications required of the *Anns* test in Rule 21 or certification motion context. The recurring and central theme of the respondent's arguments concerning negligence is the submission that courts must be circumspect about striking such claims in the absence of a full evidentiary record: see e.g. *Haskett, supra*; *Anger v. Berkshire Investment Group Inc.* (2001) 141 O.A.C. 301 (C.A.); *Sauer v. Canada (Attorney General)* (2007), 225 O.A.C. 143 (C.A.).

[61] The general test to determine whether a duty of care arises in a particular case was clearly laid out by the Supreme Court of Canada in *Cooper v. Hobart*, [2001] 3 S.C.R. 537. The test uses the two-stage approach derived from *Anns* that is now well known.

[62] At the first stage, the plaintiff must establish that the harm that occurred was the reasonably foreseeable consequence of the defendant's act, and in addition that there was sufficient proximity between the plaintiff and defendant such that it would be just and fair to impose the cost of the plaintiff's loss on the defendant. If the plaintiff can do this, a *prima facie* duty of care arises.

[63] At the second stage, the evidentiary burden shifts to the defendant to establish countervailing policy considerations beyond the relationship between the parties that are sufficient to negative the imposition of a duty of care.

[64] The appellant argues that Ms. Fulawka has not met the test under the first stage because she neither suffered a harm that was a reasonably foreseeable consequence of the defendant's alleged actions, nor was there sufficient proximity between the plaintiff and the defendant.

[65] Ms. Fulawka has met the foreseeability of harm test. If, for example, only pre-authorized hours are compensable, Class Members' actual work hours are not recorded, or *in lieu* time is not banked and paid out, some Class Members will not be paid for their hours (as the evidence confirms) and all Class Members are at risk of not being paid for all hours worked at the appropriate rate of pay. All Class Members are thus exposed to the risk of harm in this sense. The requisite relationship of proximity is also clear and direct. This is a relationship between employer and employee, with an employer's action having an obvious impact on the relatively vulnerable employees.

[66] The more difficult, and indeed the most hotly contested, issue in relation to the negligence cause of action asserted lies in the application of the second stage of the *Anns* test and the question of whether there are residual policy reasons sufficient to negate a duty of care.

[67] Scotiabank argues that there are a number of such residual policy reasons. These policy reasons track those relied upon by Perell J.'s decision in *McCracken, supra*, (released August 17, 2010, six months after the decision of Strathy J. in this case), as well as *Piresferreira v. Ayotte* (2010), 263 O.A.C. 347 (C.A.), among others. The overarching theme of Ms. Fulawka's response to these arguments is that the authorities do not support a finding that such residual policy reasons exist at this early stage of this litigation.

[68] Scotiabank submits, first, that there are existing and efficient remedies available to the proposed class under the *Code* and in contract with respect to the overtime policy. Scotiabank argues that the recognition of the proposed tort would therefore encourage needless litigation, relying on *Elliott v. Insurance Crime Prevention Bureau* (2005), 256 D.L.R. (4th) 674 (N.S. C.A.), at paras. 80-84.

[69] Second, Scotiabank argues that the fact that the damages sought under negligence are identical to those available in the other claims constitutes another policy reason negating the duty of care. The proposed tort, it argues, would in this sense establish liability for conduct that did not actually cause any injury, and, in any event, the proposed tort would provide less

protection than the *Code* remedies because the *Code* imposes strict liability on employers and does not require a negligence finding.

[70] Third, Scotiabank states that recognition of the tort would “be overly intrusive and inconsistent with established principles of employment law” and would again encourage needless litigation: see *e.g. Piresferreira*.

[71] Having considered the submissions of the parties on the issue of whether the negligence claim should be struck, I conclude that the motion judge was correct in declining to strike the cause of action in negligence.

[72] First, there is clear authority to support the proposition that courts should be very circumspect about striking claims on the basis of the second stage of the *Anns* test at preliminary stages in the absence of full evidentiary records: see *Haskett, supra; Anger, supra; Sauer, supra*. On a Rule 21 or certification motion, the court applies the two-stage *Anns/Cooper* analysis to the facts as pleaded in the Statement of Claim in order to determine not whether a duty of care could be recognized or succeed, but whether it is plain and obvious that no duty of care can be recognized.

[73] As the respondent argues, *Piresferreira, supra*, is not determinative for this reason. There, the claim was struck on residual policy grounds following trial, not on a Rule 21 motion. Scotiabank relies on *Elliott, supra*, in support of its argument that the proposed tort would encourage needless litigation because alternate remedies are available. In *Elliott, supra*, the plaintiff had successfully pursued some alternate remedies. Here, Ms. Fulawka has not yet succeeded in any claim.

[74] Perell J. himself distinguished *McCracken* from *Fulawka* in the course of his reasons. At paragraph 381, he stated that *McCracken* was distinguishable on the grounds that there was no systemic wrongdoing in *McCracken* upon which to base commonality on a class-wide basis. He continued to say at paragraph 383 that, in *McCracken*:

the alleged wrongdoing was not a class-wide wrongdoing but rather was a wrongdoing perpetrated at an individual level when a first line supervisor who was not a manager or performing managerial functions was permitted or required to do overtime work and was not paid for it by CN in accordance with the *Canada Labour Code*. In the case at bar, the wrongdoing, which depends on the individual status of the first line supervisor, occurs at an individual level and there is no basis for commonality.

Second, Fulawka is distinguishable from *McCracken, supra; Haskett, supra; Anger, supra; Sauer, supra*.

[75] This difference is significant, in my view, in relation to the assessment of the existence of policy reasons negating a duty of care. In *Fulawka*, the character of the duties and the breaches

alleged are systemic, not individual, in nature. These precise duties are not simply generalized individual breaches, but are different in a number of respects. Given the nature of the systemic duties alleged in contract and unjust enrichment, it is premature or speculative to state exactly how the actions will play out, and to say, for example, that a tort remedy would be superfluous and unnecessary. It is premature to say, at this stage, that Scotiabank will be able to establish countervailing policy considerations sufficient to negate the imposition of a duty of care.

[76] In conclusion, the motion judge was correct in finding that it was not plain and obvious that the negligence claim in its amended Statement of Claim cannot succeed pursuant to the “plain and obvious test” under s. 5(1)(a) of the *CPA*.

2. **Did the motion judge err in finding common issues?**

[77] The motion judge summarized his conclusions with respect to the common issues analysis as follows, at para. 131:

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

- (a) whether Scotiabank had a duty to put a system in place to ensure:
 - (i) that employees at the branch level were not required or permitted to work overtime without compensation;
 - (ii) that regular hours and overtime hours were properly recorded; and
 - (iii) that any employee who was required or permitted to work overtime hours was paid.
- (b) whether the provision of the Policy requiring pre-approval of overtime was a breach of duty owed by Scotiabank to the Class;
- (c) whether the contracts of employment of members of the Class included an implied term that overtime permitted or required would be compensated.

[78] In general, Scotiabank argues that none of the certified common issues relating to the Bank’s systemic failures is necessary to Class Members’ claims because no individual Class Member needs to demonstrate systemic wrongdoing in order to make out an individual claim for unpaid overtime. It submits that the motion judge erred in certifying the issues relating to systemic duties because they are not necessary to the resolution of each member’s claim. Scotiabank asserts that, at the end of the day, no matter how the case is characterized, the plaintiff is claiming for hours that she says she worked, and the systemic duties do not advance this claim.

[79] This argument was addressed by the motion judge at paragraphs 121-122 of his Reasons:

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

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

[80] In my view, Scotiabank's submissions, in effect, attempt to reframe the claims made by the plaintiff as being individual rather than systemic in nature, and to then attack the claims for being essentially individual in nature and therefore lacking in commonality. This pervades the arguments which the appellant raises in relation to the common issue question, which will be addressed in greater detail in relation to the particular common issues alleged and certified by the motion judge.

[81] Ms. Fulawka claims that Scotiabank breached a number of systemic duties and thus caused harm or risk of harm to each proposed Class member. As the motion judge correctly stated, the plaintiff and other members of the Class have chosen to frame their claim based on contractual (and other) wrongs that make it amenable to determination on a Class-wide basis. She was entitled to do so, and the court must consider those claims as asserted and not as the defendant's counsel would recast them: see *Lambert v. Guidant Corp.* (2009), 72 C.P.C. (6th) 120 (S.C.).

[82] The harm alleged is not framed in terms of individual refusals by the bank to compensate for overtime, but in terms of systemic duties and systemic breaches that the plaintiff claims caused employees to work overtime for which they were not compensated. As discussed above, the appellant's arguments that it is "plain and obvious" that the claims disclose no valid causes of action must fail.

[83] The common issues certified alleged the existence of and breach of the following systemic duties:

- (a) “to monitor and accurately reflect all hours worked and ensure that Class Members were appropriately compensated for same” (Common Issue 4);
- (b) “to prevent Class Members from working overtime for which the Bank it [sic] did not wish or intend to compensate” (Common Issue 5); and
- (c) “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 were satisfied for all Class Members” (Common Issue 6).

[84] In reviewing the law concerning common issues, the motion judge stated at paragraph 111 of his Reasons that:

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

[85] He continued to cite the following passage from the Court of Appeal decision in *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), application for leave to appeal dismissed, [2005] S.C.C.A. No. 50, at paragraphs 53-55:

In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial. [Emphasis omitted.]

[86] In short, and as Swinton J. stated in *Fresco* at paragraph 71, “[i]n determining whether there are common issues that will significantly advance the litigation, the underlying question is

whether allowing the action to continue as a class proceeding will avoid duplication of fact finding or legal analysis.”

[87] Scotiabank does not take issue with the motion judge’s articulation of the principles to be applied pursuant to s. 1 of the *CPA*, which defines common issues as: (a) common, but not necessarily identical issues of fact, or (b) common, but not necessarily identical issues of law that arise from common, but not necessarily identical facts.

[88] Scotiabank does, however, argue that the motion judge committed two particularly significant errors in the course of his common issues analysis.

[89] First, Scotiabank argues that the motion judge failed to properly apply the requirement that there be some basis in fact for the common issues, and applied an incorrect and less stringent test by relying on inferences and suppositions. It argues that the motion judge allowed Ms. Fulawka to take issues that are not a necessary part of each of the class member’s claim and to use those unnecessary issues as a basis on which to find commonality.

[90] Second, it submits that the motion judge failed to apply the requirement that the resolution of a common issue be necessary to the resolution of each class member’s claim.

[91] These arguments will be addressed in the terms of each group of common issues proposed, as the motion judge did in his reasons.

Group A: Breach of Contract (Common Issues 1 & 2)

[92] The motion judge found at paragraphs 133-134 of his Reasons that, in view of the common nature of the employment duties of the Class Members, the terms of their contracts are common issues. He noted that Lax J. had reached the same conclusion in *Fresco*, but found that the determination of those issues alone would not advance the litigation in the absence of evidence of systemic wrongdoings. However, he did find an evidentiary basis for systemic wrongdoing and concluded that breach of contract could be determined on a class-wide basis.

[93] Scotiabank argued that since the overtime policy was admitted to be an express term of the contract of each Class Member, this is not an appropriate common issue because its resolution does not advance the litigation. It relies here (as it did before the motion judge) on Lax J.’s conclusion on this point, distinguishing the decision of Winkler J. in *Bywater v Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. J. (Gen. Div.)), arguing that the same principle applies in the present case.

[94] The motion judge, however, observed at paragraph 136 that in *Fresco*, unlike *Fulawka*, CIBC had admitted that the terms of the *Code* concerning compensation for overtime and maintenance of records were incorporated into the contracts of employment of members of the class. It admitted that if an employee was required or permitted to work overtime, with or without pre-approval, and was not compensated, the contract of employment was breached. He

noted that this admission had not been made by Scotiabank. While Scotiabank appeared to acknowledge that the *Code* imposes an obligation to pay for overtime that has been permitted, even if not approved in advance or even approved after the fact,

this was not the response that Ms. Fulawka received when she complained to Scotiabank that she was frequently required to work overtime in order to perform her job. Her requests for compensation were met with the response that she was not asked to work overtime. Her superior referred her to the provisions of the policy that require overtime to be approved in advance (at para. 136).

[95] In short, unlike *Fresco*, where Lax J. found that the reasons for working overtime differed among the various groups, the motion judge concluded that there was evidence that the refusals to pay overtime were caused by the policy and were not, as in *Fresco*, independent of it. Scotiabank vigorously contests the email exchange upon which the respondent relies to evidence this, but the essence of its arguments goes to the weight or assessment of this evidence and not to its existence.

[96] There is evidence that, if accepted by the trial judge, can justify a finding that Scotiabank systemically breached the Class Members' contracts. The appellant has not established that there is any palpable or overriding error that would justify interfering with the motion judge's conclusion on this point. Scotiabank also submitted that the identification of implied terms is not a proper common issue. It submits that there is no basis for implying such terms by law, and that such terms cannot be implied by fact as they do not meet the legal requirements governing implied terms. These arguments overlap with those made in relation to the cause of action analysis above and will not be repeated here.

[97] Scotiabank also argues, however, that the existence of implied terms is not a proper common issue because of the necessarily fact-specific nature of implied terms. I disagree. The essence of the question is whether there were system-wide implied contractual terms. Strathy J. found that there was some evidence to suggest that there were.

[98] For example, there was evidence that Scotiabank's policies referred to its compliance with the *Code*. It is no answer to the proposed common issue to say that by definition an implied term must be individual in nature. There is no reason why the same implied term or term cannot apply Class-wide, which is precisely what the plaintiff alleges in her claim. She asserts, for example, that the *Code* provisions that require compensation for overtime work that is "required or permitted" were implied terms of every Class Member's employment contract. This is an example of the appellant's attempt to recast the claim as an individual action.

[99] In addition, as the motion judge correctly observed, the existence of implied terms is based on an overtime policy that was common to all Class Members. I agree with the motion judge that this is a case like *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303 (Ont. S.C.), in which Lax J. concluded that the issue of both express and implied terms did not depend on the individual knowledge, understanding or circumstances of each class-member.

Group B: Systemic Defects in Overtime Policies and Practices (Common Issues 4, 5 and 6)

[100] The motion judge held that the issues concerning systemic duties as set out in the proposed common issues 4, 5 and 6 are appropriate for certification. As set out above, these common issues concern the alleged duties to record the hours worked and appropriately compensate overtime actually worked, to prevent employees from working overtime which it did not intend to compensate, and to implement and maintain a system to ensure that these duties were complied with.

[101] Scotiabank's central argument with respect to the systemic duties made before this court, as before the motion judge, is that certification of these systemic issues will not advance the claims of the Class because no Class Member has to show a duty to record hours on Scotiabank's part in order to found a successful overtime claim.

[102] The commonality, Scotiabank asserts, is that the proposed Class Members worked and were not paid, and none of the systemic duties are elements of any of the individual claims. Essentially, it argues the claim consists of an attempt to take inherently individual duties and make them general by calling them "systemic". It emphasizes that the claims are essentially for compensation for unpaid overtime, that these are inherently individual claims dependent on wildly divergent facts in each individual branch and individual circumstance, and that the resolution of these common issues will not advance each Class Member's claim.

[103] It also argues that there was no basis in fact for a finding that there was a duty to keep records of actual overtime hours worked or for the other common issues alleged. Further, it argued that there was no basis in fact for the finding that the pre-approval policy "caused" unpaid overtime to be worked. The appellant's arguments fail for the following reasons.

[104] The motion judge specifically considered and addressed these very arguments, which were also raised before him. He concluded at para. 143 of his Reasons that the answer to common issue 4 (whether there was duty to record hours and whether it was breached), and issue 6 (whether there was a duty to establish a system) would advance the claim of each Class Member. As he noted, the absence of a Class-wide system to record hours is a systemic impediment to the ability of every Class Member to prove that he or she worked overtime and how much overtime he or she worked. A finding that such a duty existed and was breached would thus significantly advance the claims because Scotiabank would be unable to rely on its own breach of duty to defeat the claims of Class Members.

[105] The motion judge, at para. 143 of his Reasons, distinguished the present case from *Fresco* on this issue as well. In *Fresco*, as Lax J. noted at para. 57 of her reasons, the plaintiff had not asserted a common flaw in record-keeping practices. Ms. Fulawka did assert such system-wide flaws, and provided evidence of such common flaws in Scotiabank's record keeping systems.

[106] Scotiabank's argument that these common issues will not advance the litigation because no Class Member has to show a duty to record hours to found a successful overtime claim is flawed because it again amounts to an attempt to recast the plaintiff's case as one that is individually rather than systemically based. Scotiabank is, as Ms. Fulawka submits, "ignoring the actual claim asserted against it by the Plaintiff, namely, a claim that is based on the Bank's systemic liability and focuses on the Bank's class-wide acts and omissions". As Cullity J. stated in *Lambert, supra*, at para. 72, "[T]he court is concerned only with the claims asserted by the plaintiffs on behalf of the class. It is not concerned with other claims that defendants' counsel believe the plaintiff should have made, or would, for the purpose of rebuttal, have preferred them to have made."

[107] This point was also made by the Supreme Court of Canada in *Rumley v British Columbia*, [2001] S.C.J. No. 39 (S.C.C.), at para. 30.

[108] The resolution of these common issues would indeed advance the litigation by, as the motion judge concluded, preventing Scotiabank from relying on such breaches of duty to defeat the claims of the Class Members. Scotiabank is incorrect to state that even after the common issues were determined in their favour, the Class Members would still need to individually demonstrate the quantum of their overtime, and/or that it was required or permitted. This understates the significance of the fact that the claim is cast systemically and not individually as discussed above.

[109] The common issues trial judge could find that Scotiabank, in failing to monitor and record hours worked and in failing to prevent the working of overtime that it did not intend to compensate, failed on a Class-wide basis to take effective or sufficient steps to control hours of work, and as a result has by "oversight or omission" permitted all Class Members' overtime work in its retail branches: see *T-Line Services Ltd. v. Morin*, [1997] C.L.A.D. No. 422, at para. 33. In short, the question of whether uncompensated overtime worked by the Class Members was "required or permitted" may be determinable on a Class-wide basis.

[110] In addition, if the court orders or accepts an aggregate assessment of damages based on statistical sampling, it is possible that damages could be assessed and distributed without the need for each Class Member to specifically assert an individual claim. In any event, the resolution of the common issues (including those relating to the enforceable terms of the common employment contracts and what other duties if any were owed by the Bank relating to hours, recoding of hours, overtime, and the like) would significantly advance the litigation even if a need for individualized determinations of overtime remained. The determinations could, in themselves, entitle the Class Members to declaratory relief. The guiding consideration is whether certification will avoid duplication of fact-finding or legal analysis. It is not necessary that the common issues resolve all or even most of the issues, so long as it advances the litigation: *Cloud, supra*, at paras. 53-55; *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252 (Div. Ct.), at para. 31, aff'd [2010] O.J. No. 2683 (C.A.); *Gerber v. Johnson*, 2001 BCSC 687, at para. 43.

[111] As well, the appellant's argument that there is no evidentiary basis for the systemic duties and breaches alleged must fail. The motion judge carefully considered the evidence. He did not, as the appellant submits, ignore evidence that related to the systemic claims alleged. He found that there was a basis in fact, "albeit disputed" (Reasons, para. 123) for the assertion that Ms. Fulawka and other Class Members regularly worked overtime in order to complete the ordinary duties of their employment. He referred specifically to evidence that supported this conclusion, such as Ms. Fulawka's performance appraisals. He continued at para. 123 of his Reasons:

Scotiabank's "system," such as it was, put the onus on the employee to obtain prior authorization and, for a large part of the Class Period, did not expressly allow for approval after the fact. In light of the evidence of Ms. Fulawka and other Class Members that, due to the nature of their work, it was very difficult for a Class Member to predict when overtime would be required, the pre-approval requirement could be described as a "Catch 22". Simply put, overtime hours could only be pre-approved by management when there was a pressing need to work overtime. However, when there was pressing need to work overtime, there was frequently no opportunity to seek pre-approval. [Citations omitted.]

[112] Based on this, the motion judge concluded at para. 124 of his Reasons that the evidence supported the common issue of whether, knowing the nature of the work carried out by the Class Members, their positions of relative vulnerability, and the risks of variations in practices from branch to branch and from manager to manager, Scotiabank owed them a duty to put a system in place to protect them from working unpaid overtime, caused either by the nature of the work or pressures from their superiors.

[113] Two flaws underlie Scotiabank's argument that there was no basis in fact for the motion judge's conclusion that there is an evidentiary foundation for the common issues alleging systemic duties and breaches. First, Scotiabank is, in effect, asking the court to assess and weigh the evidence. This is not appropriate at the certification stage where the evidentiary standard is a low one.

[114] As Cullity J. stated in *Grant v. Canada (Attorney General)* (2009), 81 C.P.C. (6th) 68 (Ont. S.C.), at para 21, there must be "some basis in reality" for a finding of common issues. The motion judge was well aware of the fact that the evidence supporting the common issues was very much contested, but he correctly applied the test that asked whether there was some evidentiary basis for the claim, leaving the assessment and weighing of all the evidence to the trial judge to determine.

[115] As set out above, there is evidence in the record to support the claim that the Bank relied on the pre-approval requirement to justify refusing to pay overtime. There is also evidence in the record that Scotiabank did not have a system for recording actual overtime hours worked. The appellant has not shown any palpable and overriding error in the factual findings made that would justify intervention by this court.

[116] The second flaw in Scotiabank's submission that there is no evidentiary basis for the common issues relating to systemic duties and breaches is that the evidence it asserts was not considered was evidence relating to individual variations and not to the systemic issues actually raised by Ms. Fulawka's claim. The existence of individual differences in practices across branches is not inconsistent with, for example, the existence and breach of a systemic duty to record hours actually worked. In effect, this is another attempt to recast Ms. Fulawka's claims as individual rather than systemic in nature, and for the reasons already discussed it must fail.

Misclassification

[117] This proposed common issue asks whether Scotiabank breached its contracts of employment with the Class (or some of the Class Members), or was unjustly enriched, by denying eligibility for overtime compensation to some Class Members whom Scotiabank classified as "level 06" or higher.

[118] Scotiabank acknowledged that it had misclassified Level 6 employees as management, which rendered them ineligible for overtime. It established a process in 2008 to address the misclassification (the retroactive overtime compensation plan or the "ROCP") which was limited to claims post-November 2005. It claims that there is no "misclassification" claim pleaded, and submits that to the extent that there is a claim, it is a purely statutory claim under the *Code* and thus cannot proceed.

[119] I agree with Ms. Fulawka that the misclassification claims rest on the same bases as the claims of other employees who are proposed Class Members.

[120] The motion judge stated that misclassification cases are appropriate for certification due to commonality of employment functions and common treatment by the employer, as Lax J. had noted in *Fresco* at para. 54. He accepted Ms. Fulawka's submission that some eligible claimants might have failed to assert their claims, and also concluded that the issue should be certified so that a determination could be made that is binding on Scotiabank and Class Members. This, and the fact that the overtime claims of Level 6 employees prior to 2005 were not included in the ROCP, justify his conclusion that the purported misclassification was an appropriate common issue.

Unjust Enrichment

[121] As the motion judge noted, having found that there was some basis for a cause of action in unjust enrichment, it is clear that the questions of whether Scotiabank was enriched and whether Class Members were deprived without a juristic reason are proper common issues. Scotiabank submits that the motion judge erred in failing to "recognize that all three elements of unjust enrichment are specific to, and vary with respect to, each individual employee, and thus are typically individualized and do not raise common issues that would warrant certification". Again, this ignores the fact that the allegations in *Fulawka* are systemic and not individual in nature and must be addressed accordingly. There is no basis for concluding that the motion

judge erred in finding that the unjust enrichment issue was an appropriate one for certification. As the motion judge noted at para. 146 of his Reasons, numerous cases have certified claims for unjust enrichment, including for example, *Smith v. National Money Mart Co.* (2007), 37 C.P.C. (6th) 171 (S.C.J.), leave to appeal ref'd (2007), 30 E.T.R. (3d) 163 (Div. Ct.); and *McCutcheon v. The Cash Stores* (2006) 80 O.R. (3d) 644 (S.C.J.).

Remedies and Damages (Common Issues 9 and 10)

[122] Scotiabank submits that the motion judge erred in certifying the remedy and damages as a common issue. Common issue 9 asks “If the answer to any of the foregoing common issues is ‘yes’, what remedies are Class Members entitled to?” Common issue 10 asks whether Scotiabank is potentially liable on a Class-wide basis and, if so, whether damages can be assessed on an aggregate basis. It also asks, as the motion judge noted at para. 148 of his reasons, whether aggregate damages can be assessed in whole or in part on the basis of statistical evidence, what the quantum of aggregate damages owed to Class Members would be, and the appropriate method or procedure for distributing the aggregate damages award to Class Members.

[123] The motion judge observed at para. 148 of his Reasons that the *CPA* does not require that the entitlement to aggregate damages be determined as a common issue, stating, “[I]t is appropriate to certify a common issue if there is a reasonable likelihood that the conditions for an aggregate assessment would be satisfied at a common issues trial”. He reiterated the fact that the plaintiff’s claim is founded on systemic breaches of duty, so that all members of the proposed class were exposed to the same risk of harm as a result of Scotiabank’s policies and practices.

[124] Scotiabank submits that the motion judge erred in so finding and argues that the conditions set out s. 24(1) of the *CPA* cannot be met in the circumstances of this case. Section 24(1) of the *CPA* provides:

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.

[125] Scotiabank argues that ss. 24(1)(b) and (c) cannot be met in this case.

[126] With respect to s. 24(1)(b), Scotiabank submits that the motion judge misapplied *Markson v. MBNA Canada Bank, supra*, where the Court of Appeal held at para. 48 that s. 24(1)(b) “is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments”. As the appellant notes, the Court of Appeal did not alter or remove the requirement in s. 24(1) that liability must have been established before an aggregate assessment is permitted. It also emphasizes that the concept of “potential liability” does not relieve the plaintiff of the requirement to prove causation at the common issues trial. In *Markson*, the only issue remaining after the common issues trial was the application of the decision on the common issues to the specific account activity of each class member to determine that class member’s entitlement to monetary relief: *Markson*, at para. 49.

[127] Here, Scotiabank argues, as in *Fresco*, that there is no possibility that liability to employees for unpaid overtime can be established on a Class-wide basis and thus, it continues, there can be no “formula” that can be simply applied to each Class Member to determine his or her legal entitlement and the requirements of s. 24(1)(b) will not have been met.

[128] The flaw in this reasoning is, once again, that it understates or ignores the significance of the systemic duties and breaches that are alleged in this case. As the Court of Appeal stated in *Markson* (at para. 48), condition 24(1)(b) is met “where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments.” Thus, potential 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.

[129] For example, and as the motion judge wrote, if the common issues trial judge were to find that the appellant unlawfully restricted overtime compensation to pre-authorized hours and/or failed to record all overtime hours worked by Class Members, a direct Class-wide risk of non-compensation (*i.e.* harm) will have been established. The common issue trial may determine that Scotiabank, through class-wide “oversight or omission,” permitted all Class Members’ overtime work in its retail branches and that at least some were not compensated for their work. As Ms. Fulawka submits, all that would be required in this scenario is to determine the number of uncompensated overtime hours that were worked by Class Members, which is a quantification that could reasonably be determined by means of aggregate assessment.

[130] I agree with the motion judge, at para. 150 of his Reasons that this case is similar to *Markson* where the defendant bank had failed to keep records of the impugned transactions, and it was “impractical but not impossible, for each class member to prove that they had been charged a criminal rate of interest.”

[131] In addition, if Scotiabank is found to have breached Class Members’ contracts of employment (through systemic breaches) or to have been unjustly enriched, actual (and not just potential) liability for the entire Class will have been established because these are causes of

action in which liability arises without proof of actual consequential damages: see *Quizno's, supra*, at para. 55; see also *Cassano, supra*, at para 47.

[132] Scotiabank also argues that damages cannot be reasonably estimated as required by s. 24(1)(c). This argument fails. The motion judge accepted the expert evidence led showing the methods available, including statistical and sampling methods, that could assist the court in determining the amount of an aggregate assessment and an appropriate method of distribution. This finding of fact cannot be disturbed absent palpable and overriding error, which the appellant has not shown. In any event, and as the Divisional Court noted in *Quizno's* at para 102, “[i]t is neither necessary nor desirable to engage in a weighing of ... conflicting evidence on a certification motion. ... Where the assumptions are debated by experts, these questions are best resolved at a common issues trial.”

[133] In short, the argument that the motion judge erred in finding that there is a reasonable likelihood that the conditions for an aggregate assessment would be satisfied at a common issues trial fails.

3. **Did the motion judge err in finding that a class action would be a preferable procedure for resolving the Class Members' claims?**

[134] Scotiabank also argues that the motion judge erred in finding that a class proceeding is the preferable procedure for resolving the Class Members' claims pursuant to s. 5(1)(d) of the *CPA* on the basis that it would not result in judicial economy or improved access to justice, and that there is no need for behavior modification. Ms. Fulawka submits that the motion judge's finding on this point was well-supported by the evidentiary record, and notes that Lax J. also reached the same conclusion in *Fresco*.

[135] I conclude that there is no basis for interfering with the motion judge's conclusion that a class proceeding is the preferable procedure. Ms. Fulawka tendered expert evidence on the viability of aggregate assessment, and there was also evidence that the Class Members lacked the financial resources necessary to bring forward individual claims, and that they were afraid of, colloquially, “biting the hand that feeds them”: Reasons at para. 161. She also submits that the fact that Scotiabank has instituted a revised overtime policy with respect to its level 6 employees along with the ROCP lends further support to the argument that it is not necessary for individual employees to be able to document the actual hours of overtime they had worked. As part of the ROCP, the Bank acknowledged that level 6 employees would not have records of their unpaid overtime hours and that the lack of such records would be taken into account. Scotiabank paid out over \$3 million to the Class Members under the ROCP.

[136] The motion judge reviewed the fact and the law on the preferable procedure issue thoroughly at paras. 155-164 of his Reasons. He noted an aggregate assessment of damages might be possible, and he rejected the argument that even if individual assessments of entitlement and damages were required, their complexity would be overwhelming. He noted that when Scotiabank decided to develop and implement a compensation plan for its level 6

employees through the ROCP, it was able to efficiently compensate some 600 overtime claims. The motion judge concluded that if Scotiabank was able to design and implement a compensation policy, “there is every reason to believe that a common issues judge, assisted by the parties and their qualified experts, will be able to do so”: Reasons, at para. 160.

[137] The motion judge also agreed with Ms. Fulawka that employees might well be concerned that coming forward individually would affect their employment status and advancement, referring to Lax J.’s similar remarks in *Fresco*, where she also noted that only a very small percentage of federally regulated employees advance complaints against their employers, and of these, some 96% are against *former* employers: Reasons, at para. 161; see also *Fresco*, at paras. 97-98.

[138] In my view, the motion judge was correct in finding that a class proceeding is the preferable procedure for the reasons given by him. These were also the reasons given by Lax J., which were upheld in that case by the Divisional Court and, in that respect, the considerations at play were very similar indeed. The fact that, in this case, Scotiabank has already successfully implemented a compensation plan compensating many retroactive overtime claims makes it a stronger case in the sense that, as the motion judge noted, it is clear that such a plan can be implemented efficiently.

4. **Did the motion judge err in finding that the litigation plan was sufficient?**

[139] Scotiabank also asserts that the plaintiff’s litigation plan is insufficient because it does not “specify how individual issues will be addressed”. I disagree. As discussed throughout these reasons, the claim is essentially one based on systemic duties and breaches. It is not clear what individual issues will remain. In the event that some do remain, the best means of resolving them will likely depend on the particular evidence and facts of the case, including what if any bases there may be for determining or estimating unpaid overtime hours. In addition, as the respondent submits, litigation plans are works-in-progress that must be revised and updated as the litigation progresses: see *Cloud, supra*; *Andersen v. St. Jude Medical*, [2004] O.T.C. 30 (S.C.), at para. 14.

5. **Did the motion judge err in failing to strike the affidavits of two of the plaintiff’s expert witnesses?**

[140] Finally, Scotiabank argues that the motion judge erred in failing to strike certain affidavit evidence of Dr. Banks and Ms. Rubin. I reject this argument.

[141] As far as Ms. Banks’ affidavit is concerned, Scotiabank’s primary concern was in relation to her opinion that there may be systemic problems relating to overtime at Scotiabank. The motion judge did not rely on her evidence in that regard: Reasons, at para. 49. He did find that the balance of her evidence went to the question of whether damages can be determined on an aggregate basis, and he concluded that that issue was properly the subject of expert evidence and had been fully explored by experts on both sides.

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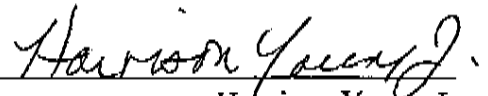
[142] Scotiabank argues that Ms. Rubin's affidavit should have been struck as inadmissible hearsay. The issue had been argued before the motion judge, who did not find it necessary to resolve it because he found that the affidavits of Ms. Fulawka and the other five affiants provided a sufficient basis in fact for the conclusions he reached. Accordingly, he did not consider Ms. Rubin's affidavit. I do not find that the motion judge erred in failing to formally strike the affidavit, but as the respondent submits, even if he did, the result of the motion would not have been any different.

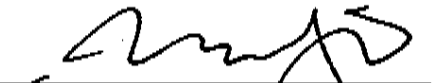
D. CONCLUSION

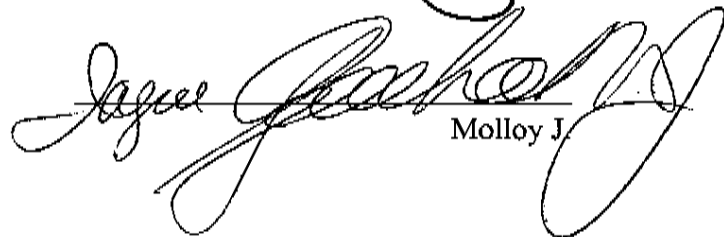
[143] For the foregoing reasons, I would dismiss Scotiabank's appeal and the motion to quash the plaintiff's cross-appeal is allowed.

E. COSTS

[144] If the parties cannot agree on costs, written submissions may be addressed to the Court, each submission not to exceed 7 pages in length excluding appendices. Those submissions shall be exchanged between the parties on a schedule to be agreed upon by them. Counsel for the plaintiff shall then assemble all of the submissions in a single bound volume and deliver three copies of that volume to the Court.


Harvison Young J.


I agree MacKenzie J.


Molloy J.

Released: June 03, 2011

CITATION: Fulawka v. The Bank of Nova Scotia, 2011 ONSC 530
DIVISIONAL COURT FILE NO.: 105/10
DATE: 201106**03**

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

MACKENZIE, MOLLOY AND HARVISON YOUNG JJ

BETWEEN:

CINDY FULAWKA

Plaintiff/Respondent

- and -

THE BANK OF NOVA SCOTIA

Defendant/Appellant

REASONS FOR JUDGMENT

Harvison Young J.

Released: June **03**, 2011

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