

Cindy Fulawka (plaintiff/respondent) v. The Bank of Nova Scotia (defendant/appellant)  
(C54467; 2012 ONCA 443)

**Indexed As: Fulawka v. Bank of Nova Scotia**

Ontario Court of Appeal  
Winkler, C.J.O., Lang and Watt, J.J.A.  
June 26, 2012.

**Summary:**

Fulawka was an employee of the Bank of Nova Scotia (Scotiabank), a federally-regulated company governed by the Canada Labour Code. The Code required employers to pay, at minimum, 1.5 times an employee's normal hourly rate for overtime hours that an employee was "required or permitted" to work. Fulawka, as representative plaintiff, claimed that Scotiabank's overtime policies gave rise to a breach of contract, breach of a duty of good faith, negligence and unjust enrichment. On behalf of class members, Fulawka sought general and special as well as declaratory and injunctive relief. Fulawka sought to have the action certified as a class action.

The Ontario Superior Court, in a decision reported [2010] O.T.C. Uned. 1148; 2010 ONSC 1148, certified the action as a class proceeding, including a number of common issues. Scotiabank appealed.

The Ontario Divisional Court, in a decision with neutral citation 2011 ONSC 530, unanimously dismissed the appeal. Scotiabank appealed again.

The Ontario Court of Appeal allowed the appeal to a limited extent. The court struck a proposed common issue respecting an aggregate assessment of damages, holding that such an assessment was not available in this case (Class Proceedings Act, s. 24(1)). The court also struck two of the common issues as superfluous. In all other respects, the court dismissed the appeal from the Divisional Court's order.

Editor's Note: This case was one of a trilogy of cases dealing with certification of class actions - see also *Fresco v. Canadian Imperial Bank of Commerce*, [2010] O.A.C. TBE d. JL.007; 2012 ONCA 444 and *McCracken v. Canadian National Railway Co.*, [2012] O.A.C. TBE d. JL.008; 2012 ONCA 445.

**Practice - Topic 208.4**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class actions - Aggregate damages - Section 24(1) of the Class Proceedings Act provided that in a class proceeding there could be an aggregate assessment of damages 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" - The Ontario Court of Appeal interpreted s. 24(1) - See paragraphs 115 to 127.

#### **Practice - Topic 208.4**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class actions - Aggregate damages - Fulawka, a Scotiabank employee, sought to certify a class action respecting overtime policies - A motions judge granted certification, including a common issue respecting the aggregate assessment of damages (Issue 10(a)) - The Divisional Court agreed - Scotiabank appealed respecting Issue 10(a) - The Ontario Court of Appeal held that an aggregate assessment of damages (Class Proceedings Act (CPA), s. 24(1)), was not available - The courts below erred in law in concluding that the precondition in s. 24(1)(c) of the CPA was met (i.e., whether the aggregate or a part of the defendant's liability to some or all class members could reasonably be determined without proof by individual class members) - Issue 10(a) was, therefore, struck - See paragraphs 108 to 145.

#### **Practice - Topic 208.4**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class actions - Aggregate damages - The Ontario Court of Appeal noted that, on a certification application, the representative plaintiff had produced an expert, who opined that it would be statistically possible to establish a basis for an aggregate assessment of damages - The court stated that the plaintiffs proposed procedure for arriving at a global damages figure was antithetical to the requirement in s. 24(1)(c) of the Class Proceedings Act (CPA) that the aggregate amount of the defendant's liability "can reasonably be determined without proof by individual class members" - The court stated that this should not be taken as a general prohibition on statistical evidence in assessing damages - Statistical evidence might well be appropriately used in certain contexts, such as where the court provided directions for hearings under s. 25 of the CPA - See paragraphs 135 to 144.

#### **Practice - Topic 208.4**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class actions - Aggregate damages - Section 24(1) of the Class Proceedings Act provided that in a class proceeding there could be an aggregate assessment of damages where certain conditions were met - The Ontario Court of Appeal stated that "To summarize, an aggregate assessment of monetary relief may only be certified as a common issue where resolving the other certifiable common issues could be determinative of monetary liability and where the quantum of damages could 'reasonably' be calculated without proof by individual class members" - See paragraph 139.

#### **Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Considerations (incl. when class action appropriate) - A motions judge certified a class action, including a common issue respecting the aggregate assessment of damages (Class Proceedings Act (CPA), s. 24(1)) - The Divisional Court agreed - The proposed defendant appealed - The Ontario Court of Appeal agreed with the Divisional Court that substantial deference was owed on certification decisions, and that the motions judge did not err in principle or commit any

palpable and overriding error in his analysis of the appropriateness of the common issues, except for the aggregate assessment of damages issue - Also the appeal court agreed with the Divisional Court that the motions judge did not commit any reviewable error in concluding that the preferable procedure criterion was met - See paragraphs 74 to 78.

### **Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Considerations (incl. when class action appropriate) - The Ontario Court of Appeal stated that s. 5(1) of the Class Proceedings Act imposed five criteria for certifying a class proceedings, which could be summarized as follows: "(a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there are appropriate representative plaintiffs who could produce a workable litigation plan" - See paragraph 11.

### **Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Considerations (incl. when class action appropriate) - Section 5(1)(a) of the Class Proceedings Act provided that one of the criteria for certification was that the pleadings disclose a cause of action - The Ontario Court of Appeal stated that "... the test for winnowing out causes of action under s. 5(1) (a) is identical to the test on a motion under rules 21.01(1)(a) and (b) to strike a pleading as disclosing no cause of action - whether it is 'plain and obvious' that the claim cannot succeed at trial: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959" - See paragraph 42.

### **Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Considerations (incl. when class action appropriate) - The Ontario Court of Appeal discussed what constituted an appropriate common issue for certification purposes (Class Proceedings Act, s. 5(1)(c)) - See paragraphs 80 to 84.

### **Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Considerations (incl. when class action appropriate) - Fulawka, a Scotiabank employee, sought to certify a class action respecting overtime policies - A motions judge certified the action - The Divisional Court agreed - Scotiabank appealed, arguing that the numerous individual claims for unpaid overtime would "inevitably overwhelm" a class proceeding - The Ontario Court of Appeal held that Scotiabank's preferable procedure argument failed because the individual claims for unpaid overtime could be dealt with efficiently by the common issues trial judge - A class action would be a fair, efficient and manageable method of advancing the class members' claims - See paragraphs 67 to 72 and 146 to 162.

### **Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Considerations (incl. when class action appropriate) - Fulawka, a Scotiabank employee, sought to certify a class action, claiming that Scotiabank's overtime policies were contrary to the Canada Labour Code - Fulawka claimed breach of contract, breach of a duty of good faith, negligence and unjust enrichment - A motions judge certified the action - The Divisional Court agreed - Scotiabank appealed, arguing that Part III proceedings under the Canada Labour Code would more efficiently fulfill the goals of the Class Proceedings Act of judicial economy, access to justice and behaviour modification - The Ontario Court of Appeal held that the courts below made no error in concluding that the preferable procedure requirement for certification was met - See paragraphs 163 to 171.

### **Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Considerations (incl. when class action appropriate) - Fulawka, a Scotiabank employee, sought to certify a class action, claiming that Scotiabank's overtime policies were contrary to the Canada Labour Code, resulting in a breach of contract - The motions judge certified the action, including a common issue (No. 1) as to the terms of the class members' contracts - The Divisional Court agreed - Scotiabank appealed, conceding on appeal that, inter alia, the terms of the Code were incorporated by reference as terms of class members' contracts - The Ontario Court of Appeal stated that Scotiabank could not ask the appeal court to overturn a certification order on the basis that it was admitting a proper common issue - Issue No. 1 was a substantial ingredient of the claim that Scotiabank had breached its contracts of employment - See paragraphs 86 to 89.

### **Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Considerations (incl. when class action appropriate) - Fulawka, a Scotiabank employee, sought to certify a class action respecting overtime policies - A motions judge certified the action, including a common issues (Nos. 4 and 5), respecting systemic defects - Issue No. 4 was whether Scotiabank had a duty to accurately record hours worked and whether it breached such duty - Issue No. 5 concerned whether Scotiabank had a duty to prevent class members from working hours for which it did not intend to compensate them - Scotiabank argued that the common issues would not advance the litigation, because underlying the artifice of systemic common issues were hopelessly individualized claims for overtime by potentially thousands of employees from hundreds of different branches - The Ontario Court of Appeal rejected Scotiabank's argument that common issues 4 and 5 would not advance the litigation - See paragraphs 91 to 102.

### **Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Considerations (incl. when class action appropriate) - Fulawka, a Scotiabank employee, sought to certify a class action respecting Scotiabank's overtime policies - A motions judge certified the action, including an issue

respecting whether Scotiabank breached its employment contracts or was unjustly enriched by denying eligibility for overtime compensation to some class members whom Scotiabank classified as "level 06" or above (Issue No. 7) - A motions judge certified this issue so that a determination could be made that was binding on Scotiabank and class members - Scotiabank appealed - The Ontario Court of Appeal agreed with the motions judge on the appropriateness of certifying a proposed common issue respecting misclassification - See paragraphs 103 to 105.

### **Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Considerations (incl. when class action appropriate) - Fulawka, a Scotiabank employee, sought to certify a class action respecting Scotiabank's overtime policies - A motions judge certified the action, including an issue respecting whether Scotiabank was unjustly enriched by failing to pay class members for all of their hours worked (Issue No. 8) - The motions judge certified this issue so that a determination could be made that was binding on Scotiabank and class members - Scotiabank appealed, arguing that the most that could be determined in relation to issue No. 8 was the scope of its obligations to pay overtime - The Ontario Court of Appeal rejected Scotiabank's argument - See paragraphs 106 and 107.

### **Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Considerations (incl. when class action appropriate) - [See all **Practice - Topic 208.4**].

### **Practice - Topic 209.7**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Evidence and proof - The Ontario Court of Appeal agreed with a motions judge who stated that "It should be kept in mind, however, that in certifying a common issue the court is not concluding that it will be answered in a manner favourable to one party or the other. The requirement that there must be an evidentiary basis for the existence of a common issue is a far cry from proof of the issue on the balance of probabilities" - The appeal court continued: "While the evidentiary basis for establishing the existence of a common issue is not as high as proof on a balance of probabilities, there must nonetheless be some evidentiary basis indicating that a common issue exists beyond a bare assertion in the pleadings. To be clear, this is simply the Hollick [SCC 2001] standard of 'some basis in fact'" - See paragraphs 78 and 79.

### **Practice - Topic 209.9**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class actions - Appeals - A motions judge certified the action, including a common issue respecting the aggregate assessment of damages (Class Proceedings Act (CPA), s. 24(1)) - The Divisional Court agreed - The proposed defendant appealed - An issue arose as to the standard of review - The Ontario Court of Appeal agreed with the Divisional Court that substantial deference was owed on certification decisions and that the motions judge

did not err in principle or commit any palpable and overriding error in his analysis of the appropriateness of the common issues, other than the common issue concerning the availability of an aggregate assessment of damages - The courts below erred in law in their interpretation of the requirements in s. 24(1) of the CPA respecting an aggregate assessment of damages - Also the appeal court agreed with the Divisional Court that the motions judge did not commit any reviewable error in concluding that the preferable procedure criterion was met - See paragraphs 74 to 78.

#### **Practice - Topic 8825.4**

Appeals - General principles - Duty of appeal court from decision of motions judge on class action certification motion - [See **Practice - Topic 209.9**].

#### **Words and Phrases**

**Aggregate** - The Ontario Court of Appeal discussed the meaning of the word "aggregate" in s. 24(1) of the Class Proceedings Act, S.O. 1992, c. 6 - See paragraphs 115 to 127.

#### **Cases Noticed:**

Transamerica Life Canada Inc. et al. v. ING Canada Inc., [2003] O.A.C. Uned. 565; 68 O.R.(3d) 457 (C.A.), rehd to. [para. 47].  
Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701; 219 N.R. 161; 123 Man.R. (2d) 1; 159 W.A.C. 1, rehd to. [para. 48].  
Rumley et al. v. British Columbia, [2001] 3 S.C.R. 184; 275 N.R. 342; 157 B.C.A.C. 1; 256 W.A.C. 1; 2001 SCC 69, rehd to. [para. 59].  
Bellaire v. Independent Order of Foresters (2004), 19 C.C.L.I.(4th) 35 (Sup. Ct.), rehd to. [para. 69].  
Poulin v. Ford Motor Co. of Canada Ltd. et al., [2006] O.T.C. 1172; 35 C.P.C.(6th) 264 (Sup. Ct.), rehd to. [para. 69].  
Cloud et al. v. Canada (Attorney General) et al. (2004), 192 O.A.C. 239; 73 O.R.(3d) 401 (C.A.), leave to appeal denied [2005] 1 S.C.R. vi; 344 N.R. 192; 207 O.A.C. 400, rehd to. [para. 76].  
Pearson v. Inco Ltd. et al. (2005), 205 O.A.C. 30; 78 O.R.(3d) 641 (C.A.), leave to appeal denied (2006), 357 N.R. 394; 225 O.A.C. 397 (S.C.C.), rehd to. [para. 76].  
Cassano et al. v. Toronto-Dominion Bank (2007), 230 O.A.C. 224; 87 O.R.(3d) 401; 2007 ONCA 781, leave to appeal denied (2008), 386 N.R. 389; 252 O.A.C. 399 (S.C.C.), rehd to. [para. 76].  
Markson v. MBNA Canada Bank (2007), 224 O.A.C. 71; 85 O.R.(3d) 321; 2007 ONCA 334, leave to appeal refused (2007), 383 N.R. 381; 248 O.A.C. 396 (S.C.C.), rehd to. [para. 76].  
Hollick v. Metropolitan Toronto (Municipality) et al., [2001] 3 S.C.R. 158; 277 N.R. 51; 153 O.A.C. 279; 2001 SCC 68, rehd to. [para. 78].  
Grant v. Canada (Attorney General) (2009), 81 C.P.C.(6th) 68 (Sup. Ct.), rehd to. [para. 79].  
Singer v. Schering-Plough Canada Inc., [2010] O.T.C. Uned. 42; 87 C.P.C.(6th) 276; 2010 ONSC 42 (Sup. Ct.), rehd to. [para. 81].  
Bywater v. Toronto Transit Commission (1998), 83 O.T.C. 1; 27 C.P.C.(4th) 172 (Gen. Div.), rehd to. [para. 87].

Smith et al. v. National Money Mart Co. et al., [2007] O.T.C. 64; 37 C.P.C.(6th) 171 (Sup. Ct.), leave to appeal refused (2007), 30 E.T.R.(3d) 163 (Div. Ct.), refd to. [para. 106].

McCutcheon v. Cash Store Inc. et al., [2006] O.T.C. 424; 80 O.R.(3d) 644 (Sup. Ct.), refd to. [para. 106].

Vezina et al. v. Loblaw Companies Ltd. et al., [2005] O.T.C. 365; 17 C.P.C.(6th) 307 (Sup. Ct.), refd to. [para. 111].

Anderson et al. v. Wilson et al. (1999), 122 O.A.C. 69; 44 O.R.(3d) 673 (C.A.), refd to. [para. 116].

Healey v. Lakeridge Health Corp. et al. (2011), 273 O.A.C. 179; 103 O.R.(3d) 401; 2011 ONCA 55, refd to. [para. 117].

Macaraeg v. E Care Contact Centers Ltd. (2008), 255 B.C.A.C. 126; 430 W.A.C. 126; 77 B.C.L.R.(4th) 205; 2008 BCCA 182, refd to. [para. 146].

St. Anne-Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704; 68 N.R. 112; 73 N.B.R.(2d) 236; 184 A.P.R. 236, refd to. [para. 146].

Haldane v. Shelbar Enterprises Ltd. (1999), 125 O.A.C. 254; 46 O.R.(3d) 206 (C.A.), refd to. [para. 149].

Webb v. K-Mart Canada Ltd. et al. (1999), 107 O.T.C. 373; 45 O.R.(3d) 389 (Sup. Ct.), refd to. [para. 151].

Webb v. 3584747 Canada Inc., [2005] O.T.C. 104; 40 C.C.E.L.(3d) 74 (Sup. Ct.), refd to. [para. 151].

Carom et al. v. Bre-X Minerals Ltd. et al. (1998), 62 O.T.C. 192; 20 C.P.C.(4th) 163, supplementary reasons (1998), 20 C.P.C.(4th) 187 (Gen. Div.), refd to. [para. 155].

Pearson v. Inco Ltd. et al. (2004), 183 O.A.C. 168 (Div. Ct), revd. (2005), 205 O.A.C. 30; 78 O.R.(3d) 641 (C.A.), additional reasons (2006), 208 O.A.C. 284, refd to. [para. 155].

Fischer et al. v. IG Investment Management Ltd. et al. (2012), 287 O.A.C. 148; 109 O.R. (3d) 498; 2012 ONCA 47, refd to. [para. 164].

#### **Statutes Noticed:**

Canada Labour Code, R.S.C. 1985, C. L-2, sect. 168(1) [para. 34]; sect. 169(1) [para. 33]; sect. 174 [para. 9]; sect. 252(2), sect. 264(a) [para. 35].

Canada Labour Code Regulations (Can.), Canada Labour Standards Regulations, C.R.C., c. 986, sect. 24(2) [para. 35].

Canada Labour Standards Regulations - see Canada Labour Code Regulations (Can.), Canada Labour Standards Regulations.

Class Proceedings Act, S.O. 1992, c. 6, sect. 5(1) [para. 11]; sect. 24(1) [para. 108]; sect. 25 [para. 143].

#### **Authors and Works Noticed:**

Arthurs, Harry, *Fairness at Work: Federal Labour Standards for the 21st Century* (2006), pp. 191 to 192 [para. 168]; 222 [para. 169].

Branch, Ward, *Class Actions in Canada* (2007) (Looseleaf), para. 4.920 [para. 155].

Ontario (Attorney General), *Report of the Attorney General's Advisory Committee on*

Class Action Reform (1990), p. 43 [para. 118].

**Counsel:**

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

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

This appeal was heard on December 1 and 2, 2011, before Winkler, C.J.O., Lang and Watt, J.J.A., of the Ontario Court of Appeal. The decision of the court was delivered by Winkler, C.J.O., on June 26, 2012.

Appeal allowed in part.

Editor: Elizabeth M.A. Turgeon

**Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Considerations (incl. when class action appropriate) - Section 24(1) of the Class Proceedings Act provided that in a class proceeding there could be an aggregate assessment of damages 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" - The Ontario Court of Appeal interpreted s. 24(1) - See paragraphs 115 to 127.

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### **Practice - Topic 8825.4**

Appeals - General principles - Duty of appeal court from decision of motions judge on class action certification motion - A motions judge certified the action, including a common issue respecting the aggregate assessment of damages (Class Proceedings Act (CPA), s. 24(1)) - The Divisional Court agreed - The proposed defendant appealed - An issue arose as to the standard of review - The Ontario Court of Appeal agreed with the Divisional Court that substantial deference was owed on certification decisions and that the motions judge did not err in principle or commit any palpable and overriding error in his analysis of the appropriateness of the common issues, other than the common issue concerning the availability of an aggregate assessment of damages - The courts below erred in law in their interpretation of the requirements in s. 24(1) of the CPA respecting an aggregate assessment of damages - Also the appeal court agreed with the Divisional Court that the motions judge did not commit any reviewable error in concluding that the preferable procedure criterion was met - See paragraphs 74 to 78.