

# **OVERTIME CLASS ACTION**

**FULAWKA v. THE BANK OF NOVA SCOTIA**

**NOTICE OF HEARING FOR APPROVAL OF PROPOSED REVISED SETTLEMENT**

**APPROVAL HEARING TO BE HELD ON MARCH 3, 2016**

Please read this notice carefully as it may affect your legal rights.

This notice is directed to Class Members who have made claims for unpaid overtime under the Court-approved settlement in this class action (the “Original Settlement”) against The Bank of Nova Scotia (the “Bank”) and whose claims have been rejected or reduced by the Bank.

In November 2014, the Representative Plaintiff identified a number of concerns about the Bank’s responses to claims made under the Original Settlement and brought a motion before the Class Action Case Management Judge to address those concerns. The Bank brought its own motion to extend the deadline by which it was to have responded to Class Member claims. By order of the Class Action Case Management Judge, the appeal process set out under the Original Settlement was suspended until the Plaintiff’s and the Bank’s motions could be resolved.

Following a two-day mediation in December 2015, the Representative Plaintiff and the Bank agreed, subject to the approval of the Ontario Superior Court of Justice, to revise the terms of the Original Settlement in order to resolve the issues raised in the motions (the “Revised Settlement”). The approach in the Revised Settlement is more streamlined (involving the establishment of a \$20.6 million settlement fund and fixed thresholds of payout) and avoids further significant delays and risks for class members. If the Revised Settlement is approved by the Court, the approximately 1,600 Class Members whose claims were reduced or denied will be paid a percentage (as set out below) of their eligible claim without the need to pursue an appeal (rights of appeal are extinguished under the Revised Settlement).

This notice summarizes the key terms of the proposed Revised Settlement and explains how Class Members can comment on the proposed revisions to the Original Settlement in advance of the approval hearing to be heard in Toronto on March 3, 2016.

## **1. HISTORY OF THIS CLASS ACTION**

In December 2007, a class action lawsuit was commenced against the Bank on behalf of certain full-time retail branch bank employees in Canada. The lawsuit claimed that the Bank failed to pay all the overtime compensation to which these persons were entitled.

The lawsuit was “certified” as a class proceeding by the Ontario Superior Court of Justice in February 2010. The law firms of Roy O’Connor LLP, Sack Goldblatt Mitchell LLP and Sotos LLP (collectively “Class Counsel”) act for the Class.

In 2014, the parties reached an agreement to settle the class action. That settlement was approved by the Ontario Superior Court of Justice on August 12, 2014 (defined above as the “Original Settlement”).

Under the Original Settlement, class members were invited to submit claims to the Bank for overtime that had been worked but not paid by the Bank. The deadline to submit claims was October 15, 2014. The Bank was to respond to the claims by November 28, 2014. Class members who were not satisfied with the response from the Bank had the right to appeal the decision to an independent arbitrator, under an appeal process set out in the Original Settlement.

In November and December 2014, the Representative Plaintiff identified concerns over aspects of the Bank's responses to a number of Class Member claims and brought a motion before the Class Action Case Management Judge to address those concerns. The Bank also brought a motion for an extension to the November 28, 2014 deadline to respond to claims. The Class Action Case Management Judge directed that the appeal process be suspended pending the resolution of the issues to be addressed in the motions.

In December 2015, the parties attended a two-day mediation (that is, a settlement meeting) before the Honourable George Adams Q.C. (a retired judge and one of Canada's leading mediators). At the conclusion of that mediation, the parties agreed, subject to the approval of the Court, to revise the Original Settlement as discussed in section 3 below.

## **2. WHO DOES THE PROPOSED REVISED SETTLEMENT APPLY TO?**

The Revised Settlement applies to only those Class Members who made a claim under the Original Settlement **and** whose claim was fully rejected or partially reduced by the Bank.

**If you did not make a claim or your claim was paid in full, the proposed Revised Settlement does not affect you. Class Members who did not make claims or whose claims were paid in full will not receive any compensation under the terms of the proposed Revised Settlement.**

Claims rejected because they were received by the Bank after the claims submission deadline (October 15, 2014) will now be paid in part, as set out in section 3 (c) below if the claim was received by the Bank on or before December 31, 2014 (except if the claim was rejected for some other reason as well (for example, claims that were substantially incomplete)).

Fifty-two (52) claims that were fully rejected by the Bank on the basis that the claimant was in an "ineligible position" (as determined by the Bank) will also now be paid, in part, as set out below.

The following people will not receive payments under the Revised Settlement:

- Class Members who have not made claims;
- Class Members whose claims were paid in full;
- Claimants who are not in the class;
- Class Members who opted out of the class action (but for 2 former Class Members who brought a motion to rescind their opt-outs);
- Class Members who withdrew their claims;
- Class Members who previously signed releases in favour of the Bank;
- Class Members who submitted claims after December 31, 2014 (late claims);
- Class Members who submitted substantially incomplete claims; and,

- Claimants who were not employed by the Bank or whose claims were outside the limitation period.

**3. WHAT ARE THE TERMS OF THE PROPOSED REVISED SETTLEMENT?**

The proposed Revised Settlement must be approved by the Court before it will take effect. The key terms and conditions of the proposed Revised Settlement include:

- a. **\$20.6 Million Additional Compensation** – The Bank will pay approximately an additional \$20.6 million to the approximately 1,600 Class Members whose claims were fully rejected or partially reduced.

This \$20.6 million amount is in addition to the approximately \$18.7 million already paid by the Bank to Class Members.

The amounts payable to Class Members out of the \$20.6 million shall be subject to all tax and source deductions, as well as the 10% levy owing to the Class Proceedings Fund (CPF);

- b. **Distribution of Additional Compensation** – Claimants will not need to submit any additional forms or documentation or take any additional steps to participate in the Revised Settlement. For clarity, no Class Member will need or be able to launch and pursue an appeal. The percentages to be paid out range from a payout of 25% to 100%, with higher percentages being paid out on the lower total dollar value claims.

All claimants whose claims were partially reduced will receive 50% or more of their original claim and the majority of claimants whose claims were fully rejected will receive 50% or more of their original claims. All class members whose claims were partially reduced under the Original Settlement will, unless they have already been paid compensation in excess of the percentages set out below, receive more compensation under the Revised Settlement. In no event, will any class member be required to pay back any compensation already paid by the Bank under the terms of the Original Settlement.

The payout percentages are calculated based on whether the claim was fully rejected or partially reduced, and also based on the total amount of each claimants claim. The claimants’ total recovery (inclusive of any amounts already paid) is capped at the following percentages:

<b>Claims Which Were Fully Rejected</b>	<b>Payout Percentage</b>
Under \$20,000	75% of claim

Between \$20,000 and \$49,999	50% of claim
\$50,000 and above	25% of claim

<b>Claims Which Were Partially Reduced</b>	<b>Payout Percentage</b>
Under \$20,000	100% of total amount claimed
Between \$20,000 and \$49,999	80% of total amount claimed
\$50,000 and above	50% of total amount claimed

**Example 1: Fully Rejected Claims**

If a Class Member made a claim totalling **\$30,000** of eligible unpaid overtime and that claim was fully rejected by the Bank, that Class Member would receive **50%** of their claim for a total of **\$15,000** (less appropriate deductions and the CPF Levy) under the proposed Revised Settlement.

**Example 2: Partially Reduced Claims**

If a Class Member made a claim totalling **\$30,000** of eligible overtime and the Bank paid a reduced amount of **\$10,000**, that Class Member will receive **80%** of their claim for a total of **\$24,000** – given that \$10,000 was already paid, the Class Member would now be paid **\$14,000** more (less appropriate deductions and the CPF Levy) under the proposed Revised Settlement.

Please note that the foregoing examples are simplified illustrations of how fully rejected and partially reduced claims will be treated under the proposed Revised Settlement. Actual calculations will be more complex. .

- c. **Late Claims** – Any and all claimants whose claims were rejected because they filed claims with the Bank after October 15, 2014 (the original claims submission deadline) will now receive payments in accordance with the foregoing distribution formula if their claim was filed with the Bank before December 31, 2014 (except if the claim was rejected for some other reason as well). Any claims filed after December 31, 2014 will not be entitled to any payment under the Revised Settlement;

- d. **No Appeals** – Under the Revised Settlement, the appeal rights set out in paragraphs 27 to 35 of the original Claims Process (schedule A to the Settlement Approval Order dated August 12, 2014) are extinguished for all Class Members;
- e. **Class Counsel Fees** – The Bank will pay Class Counsel’s additional fees and disbursements incurred to address the foregoing issues (as noted below).

A complete copy of the full Revised Settlement documentation, including the executed minutes of settlement (as agreed to at the December 2015 mediation), will be available at [www.unpaidovertime.ca](http://www.unpaidovertime.ca). Further material from Class Counsel relating to the request for court approval of the revised settlement will likely be available in the next week on the same website.

#### **4. THE COSTS OF THE PROPOSED REVISED SETTLEMENT**

**There is no cost to claimants to participate in the revised settlement.**

As with the Original Settlement, Class Counsel will be paid directly by the Bank for the additional work required to reach the proposed Revised Settlement. Class Members are not required to pay any fees. The Bank has agreed to pay, subject to the approval of the court, Class Counsel’s additional fees and disbursements of \$2.3 million plus HST.

The Representative Plaintiff has been granted funding and indemnification from an adverse costs award by the Class Proceedings Fund (“CPF”). The CPF is entitled by law to receive a 10% levy on any money that you are paid as part of the Revised Settlement.

#### **5. THE SETTLEMENT APPROVAL HEARING**

A settlement hearing will take place before the **Class Action Case Management Judge** on March 3, 2016, at 10:00 a.m. in Court Room #5 at Osgoode Hall, 130 Queen Street West, Toronto, Ontario. At that time, the Court will determine whether the terms of the Revised Settlement are fair and reasonable and in the best interests of the Class, and if the Court so finds, the Court will address the approval of Class Counsel compensation.

The Representative Plaintiff and Class Counsel believe that the proposed Revised Settlement is fair, reasonable and in the best interests of the Class. If the Court is satisfied with the fairness of the Revised Settlement, it will be approved. If the Court does not approve the Revised Settlement, the motions previously brought by the Plaintiff and the Bank will proceed.

Class Members and members of the public may attend the hearing but are not required to do so. Class Members are entitled, but not obligated, to express their opinions about the Revised Settlement and whether or not it should be approved. If you wish to make a written submission to the Court, you must deliver the submissions in writing to Class Counsel at the address below, no later than February 24, 2016, so that it can be provided to and brought to the attention of the Court and the Defendant in advance. The written submissions should include:

- Your name, address and telephone number;

- A brief statement of the reasons that you support or oppose the proposed Revised Settlement ; and
- Whether you plan to attend at the hearing to approve the Revised Settlement.

Please note that any written submissions will not be confidential, and will be shared with the Defendant Bank of Nova Scotia and filed publicly with the Court.

**More Information?**

Please address any requests for further information about this action, or any written submissions about the proposed revised settlement, to:

**Roy O'Connor LLP**

Attention: George Pakozdi

2300-200 Front St. W.

Toronto, ON M5V 3K2

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**PLEASE DO NOT CALL OR CONTACT THE COURT OR THE BANK OF NOVA SCOTIA ABOUT THIS CLASS ACTION.**

**THIS NOTICE WAS APPROVED BY THE ONTARIO SUPERIOR COURT OF JUSTICE**