CITATION: Fulawka v. Bank of Nova Scotia, 2014 ONSC 4743
COURT FILE NO.: 07-CV-345166CP
DATE: 20140827

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Cindy Fulawka / Plaintiff

AND:

The Bank of Nova Scotia / Defendant

BEFORE: Justice Edward P. Belobaba

COUNSEL: *David F. O'Connor, Louis Sokolov, J. Adam Dewar and Jordan Goldblatt* for the Plaintiff / Class

Martin Sclisizzi and Markus Kremer for the Defendant / Bank

HEARD: August 12, 2014

Proceeding under the Class Proceedings Act, 1992

SETTLEMENT APPROVAL

[1] This "bank overtime" action has settled. It was certified as a class proceeding in February 2010.[1] At the settlement approval hearing, I congratulated the parties and their counsel for achieving a sensible settlement that not only reflects well on the Bank of Nova Scotia ("Scotiabank") but is also reasonable and in the best interests of the class. I advised counsel that I would approve the proposed settlement, class counsels' legal fees, and the requested honorarium for the representative plaintiff and that written reasons would follow shortly.

[2] These are the reasons.

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[1] *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148, (2010) 101 O.R. (3d) 93.

The class action

[3] The class action alleged that the overtime compensation system in place at Scotiabank unlawfully deprived class members of overtime pay to which they were legally entitled. Scotiabank vigorously resisted certification and, after exhausting its rights of appeal, proceeded to defend the action on the merits. The case was to be ready for trial by July of this year. During the discovery process, the parties began a series of negotiations that, after several months, resulted in the proposed settlement described below.

The settlement

[4] The settlement provides class members with a remedy that, in my view, is as good or better than what could reasonably have been achieved after a successful common issues trial, but without the associated risk and delay of such a trial and the inevitable appeals.

[5] All overtime that was required or permitted is compensable under the settlement, whether or not the overtime work was "approved". The settlement provides for an efficient and streamlined process (including a "check box"- style claims form) that will allow for claims going back as far back as 13 years without the need for supporting documentation.

[6] The settlement provides for an independent appeal process that is similarly streamlined and without cost to class members, who can assert these rights without fear of reprisal. Class members will receive full compensation without having to deduct any legal fees that would have been paid to class counsel based on the retainer agreement.

[7] The total payout under the claims process will not be known until all of the overtime claims have been evaluated. However, class counsel estimates that the overall recovery may be in excess of $95 million. It is important to note again that Scotiabank will pay claims without any limit – whatever claims are submitted and approved will be paid.

The claims process

[8] Class members will submit claims for any overtime hours for which they were not compensated. Class members will submit the claims in writing to Scotiabank and will be paid for overtime that they were required or permitted to work regardless of whether the overtime was approved in any manner. The definition of "permitted" includes situations where Scotiabank knew or ought to have known that work beneficial to Scotiabank was being performed.

[9] The commencement of the period during which class members may make a claim will be determined by the statutory limitation periods applicable in the particular province

where the overtime being claimed was worked (such periods could reach back some 9 to 13 years depending on the province where the work was performed). The claims period will run until August 12, 2014, the date of the settlement approval hearing.

[10] The claims form is designed to be relatively simple and will include check boxes for various common situations in which the parties have acknowledged overtime may have been worked. Class members will be able to submit the claim forms by email, regular mail, fax, or in person.

[11] Scotiabank will evaluate the claims and determine if the class member has established that the time was worked and not compensated. Scotiabank will not reject the claim unless its own position is reasonably supported by documentary or sworn evidence (which evidence Scotiabank will disclose). As noted above, Scotiabank acknowledges that employees may not have documents to support their claims and that any lack of documentation will not disentitle class members to payment for overtime. In such circumstances, the claims will be evaluated based on the best or a reasonable estimate of the hours of unpaid work without supporting documentation.

[12] Any employee dissatisfied with Scotiabank's decision on a claim may appeal to an arbitrator. The arbitrator(s) will be selected by mutual agreement of the parties or, if the parties cannot agree, by the case management judge. Arbitrations will be determined through a streamlined and summary procedure with oral hearings only in cases above a certain value, or where the arbitrator considers it to be necessary. The arbitrator's decisions will be final. The costs of the arbitrations will be paid by Scotiabank.

[13] Class Counsel will advise and assist class members on any appeals without any additional compensation for doing so. At this time, it is not known how much additional time will be required of class counsel.

[14] Finally, Scotiabank has acknowledged and will reasonably ensure that there will be no retaliation for any claims made under this process by class members.

Settlement approval

[15] The settlement follows nearly seven years of litigation, including a hard fought four-day certification motion, a motion for leave to appeal, a three-day appeal to the Divisional Court followed by a further motion for leave to appeal, an appeal at the Court of Appeal and a motion for leave to appeal to the Supreme Court of Canada.

[16] I agree with both the representative plaintiff and class counsel that the settlement is an excellent and creative resolution to this litigation. It is a realistic and reasonable compromise that balances the certainty of substantial compensation for the class members today against the prospect of continued litigation and an uncertain outcome in the future.

[17] The settlement is easily approved. In my view, it is fair and reasonable and very much in the best interests of the class.

Legal fees approval

[18] Under the retainer agreement, class counsel was entitled, in the event of a successful outcome, either to a 30% recovery or a 4-times multiplier. Instead, the parties negotiated a settlement template that provided class members with a claims-made compensation process just described and a separate legal fees component to be paid by Scotiabank. However, the parties could not agree on the amount of the legal fees that would be paid by the bank. To help with this impasse, they retained the Hon. Stephen Goudge, a former judge of the Court of Appeal, to mediate the legal fees and disbursements. If mediation was not successful, Mr. Goudge would then arbitrate the legal fees issue, using the same legal principles that would govern a class proceedings judge on a fees approval motion. The parties would then jointly submit Mr. Goudge's arbitration award to this court for its approval.

[19] I pause to note that the overall settlement structure was highly creative and reflected well on both sides. Under the proposed settlement structure class members would receive a substantial level of compensation on their overtime claims without deduction of legal fees, and class counsel would recover legal fees based on mediation or arbitration before a respected and knowledgeable jurist.

[20] As it turned out, mediation did not succeed, so the matter proceeded to arbitration. In written reasons released in July 2014, the Hon. Stephen Goudge determined the base legal fees to be $3.8 million and then applied a 2.75 multiplier for a total legal fees award of $10.45 million. Disbursements and taxes were also to be paid by the bank. Here is how the arbitrator explained the multiplier:

> The circumstances under which class counsel undertook this action on a contingency basis and began its prosecution are important in [the] assessment. At that time, there were few precedents for large scale employment class actions. Prospects for certification were quite uncertain and were made even more daunting early on by the denial of certification in a very similar action. There were real questions about whether the need to address overtime entitlement issues individual by individual, would overwhelm any applicable systemic issues and make them unmanageable. There was the existence of a potentially preferable administrative procedure for these claims. And so on. The defendant was well resourced and the risk of appeal of a successful certification decision was high, as indeed later proved to be the case. Nonetheless, class counsel took the case on a contingency basis, knowing that if their work was unsuccessful they would not be paid. After proceeding for some two years, class counsel obtained certification.

> Almost three and a half years of hard fought litigation ensued with the Bank trying unsuccessfully to have the action decertified at every level of court. Thus, the risks shouldered by class counsel remained throughout this continuation of the proceeding. However, with each success, I think that class counsel's risk of defeat and therefore having their efforts go unpaid could be said to have gradually diminished, at least somewhat.
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> [...]
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> In conclusion, I continue to recognize that selecting a multiplier is an art not a science. I also recognize that the risks faced by class counsel and the success achieved for class members, though not complete, were significant. In all the circumstances, I conclude that the appropriate multiplier to apply to the base fee of $3.8 million is 2.75. The fee therefore payable by the Bank to class counsel is $10.45 million."[2]

[21] Mr. Goudge then concluded that a fee of $10.45 million was appropriate and reasonable compensation for class counsel in this case. Here is his reasoning:

> Class counsel's prediction of what will be ultimately recovered by class members is some $95 million. If one were to discount that by up to 50%, $10.45 million constitutes less than 25% of a $42.5 million recovery, a percentage less than that contemplated by the retainer agreement. Second, the multiplier of 2.75 is within the 1 to 3 to 4 range that [case law] speaks of. Third, the retainer agreement with its 30% contingency fee is not out of step with the fee I have decided upon, as indicated above. Finally, there is the need to provide sufficient real economic Incentive that cases like this will be brought — cases that look difficult and require persistent efforts from counsel over a significant period of time (six and a half years, in this case) to be drawn to a successful conclusion. While the premium here looks substantial in absolute dollars, the incentive needed to have counsel take a case requiring such efforts over such a long time to achieve a large recovery for the class suggests the need for a generous premium.
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> Thus, I conclude that the fee for class counsel of $10.45 million is fair and reasonable in the circumstances of the case. The Bank should pay it."[3]

[22] As is well known, I am not a fan of the multiplier approach. In my opinion, the "base fee" analysis is highly suspect because it uses hourly rates that are far from

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[2] *Arbitration Decision of the Hon. Stephen Goudge*, (July 25,2014) at paras. 26, 27 and 35.
[3] *Ibid.*, at paras. 36-38.

reasonable and accepts docketed time without the skepticism that it deserves. And the application of a multiplier (why "1 to 3 to 4" why not 5 or 6?) is unacceptably subjective if not completely arbitrary. In my view, any judicial assessment of the so-called "risks" undertaken by class counsel, based only on the case that is before the court, and not class counsel's antecedent wins and losses, is heavy on hindsight and actuarially irrational. Better and more principled, in my opinion, to use the contingency fee approach if this has been provided for in the retainer agreement.

[23] Nonetheless, I respect the arbitrator and I recognize his right to use the multiplier approach.[4] And I have no difficulty approving his $10.45 million legal fees award. Assuming even a $70 million class recovery (class counsel estimates $95 million), the legal fees represent less than half of what class counsel would arguably have been entitled to under the 30 percent contingency agreement. I am therefore satisfied that the $10.45 million amount is fair and reasonable. The legal fees are approved.

[24] Class counsel also ask that I approve a $15,000 honorarium for the representative plaintiff, Cindy Fulawka. Ms. Fulawka devoted a great deal of time and effort to this litigation and played a key role throughout. If the honorarium is to be paid out of class counsels' share (as here) and is not paid as a "kick back" for lending one's name to a class proceeding (no such suggestion here) then I am prepared to approve this request and I do so without hesitation.

Disposition

[25] The proposed settlement is approved.

[26] Class counsels' legal fees in the amount of $10.45 million (plus disbursements and taxes) are approved.

[27] The payment by class counsel of an honorarium to the representative plaintiff in the amount of $15,000 is also approved.

Belobaba J.

Date: August 27, 2014

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[4] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 33.