

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

CINDY FULAWKA

Plaintiff/Moving Party

- and -

THE BANK OF NOVA SCOTIA

Defendant/Respondent

Proceeding under the Class Proceedings Act, 1992

**FACTUM OF THE PLAINTIFF
(Revised Settlement & Fee Approval)**

March 1, 2016

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PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

FACTUM
(Revised Settlement & Fee Approval)

PART I: OVERVIEW

1. The Representative Plaintiff Cindy Fulawka (“Plaintiff”) moves for an order approving the proposed revised settlement reached by the parties (“Revised Settlement”) as being reasonable, fair and in the best interests of the Class. The Plaintiff and the Defendant also jointly request an order approving the payment of Class Counsel’s fees by the Defendant.
2. The parties are aware of this Court’s recent decisions directing Class Counsel to avoid “boilerplate” submissions and to file meaningful affidavit evidence providing reasons why the proposed settlement is fair and reasonable and is in the “zone of reasonableness”.
3. The Plaintiff has, to that end, done her utmost (within the bounds of a confidential mediation) to summarize the dynamics of the negotiations that lead to the Revised Settlement. As discussed below, the Plaintiff had already filed voluminous evidence

regarding her concerns with the Bank's claims handling processes. The Plaintiff has now filed a relatively comprehensive affidavit on the dynamics, risks and benefits of the revised settlement process and Revised Settlement. In the Plaintiff's respectful submission, it is self-evident that the parties' negotiations were hard-fought and conducted at arms-length.

4. The Plaintiff and Class Counsel believe that this is an excellent outcome for the Class Members and the best arrangement that was negotiable in the circumstances. If the Revised Settlement is approved, 1,600 Class Members will avoid any further risk, effort or delay and be paid, within sixty days, \$20.6 million in additional compensation. In the view of the Representative Plaintiff and Class Counsel, the proposed Revised Settlement is fair, reasonable and in the best interests of the Class.
5. As with the original settlement, the Class Members' compensation will not be reduced by legal fees as the Bank has agreed to pay those fees directly to Class Counsel. Class Counsel's fees were negotiated separately from the balance of the revised settlement and the revised settlement is not contingent on the approval of Class Counsel's fees. The Plaintiff and Class Counsel submit that the \$2.3 million (inclusive of disbursements plus HST) to be paid by the Bank is fair compensation for more than 15 months of additional and unexpected work.

PART II: FACTS

Procedural History & 2014 Settlement

6. The Plaintiff launched this class action in 2007. The Plaintiff alleged that the Bank unlawfully deprived Class Members of overtime compensation to which they are legally

entitled. This class action was certified by Justice Strathy (as he then was) in 2010. The Bank vigorously resisted certification and, after exhausting its rights of appeal, filed a statement of defence in 2013.

Affidavit of Adam Dewar sworn March 1, 2016 (“Dewar Affidavit”) at para. 3.

7. The parties began settlement negotiations in 2014 and after months of negotiations came to an agreement (the “2014 Settlement”). Key features of the 2014 Settlement included the following:

- a. claimants would submit a “check box” style claims form;
- b. pursuant to s. 24 of the Claims Process unless the Bank had documentary or sworn evidence that reasonably and objectively supported a reduction or denial of the claim the claim would be paid;
- c. claims were to have been submitted by October 15, 2014 (that deadline could be extended where the claimant had a reasonable explanation for the delay);
- d. the Bank was required to respond to all claims by November 28, 2014;
- e. Class Members had a streamlined right of appeal to an arbitrator if they were not satisfied with the Bank’s response to the substance of their claim or the reasons for which it did not accept their late claim;
- f. Class Counsel’s fees would be paid directly by the Bank (thereby not reducing the compensation payable to Class Members) using a multiplier on its base time (plus disbursements and taxes).

Dewar Affidavit at paras 4-6, 9 and 10.

8. The Original Settlement was approved by this Honourable Court at an approval hearing on August 12, 2014. As noted by this Honourable Court in its Reasons for Decision approving the original 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.

[...]

[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.

Dewar Affidavit at para. 8.

The Bank's Administration of the Settlement & the Plaintiff's Concerns

9. In September 2014, the Plaintiff identified concerns with the Bank's administration of the Claims Process. Early concerns about a series of emails sent by the Bank were resolved through the case management process.

Dewar Affidavit at paras 11-13.

10. On November 7, 2014, the Bank advised Class Counsel that it was requesting a 90-day extension to the claims response deadline. The Plaintiff did not consent to that extension. At a case conference on November 14, 2014, Justice Belobaba declined to grant the extension and directed the Bank to bring a formal motion. Subsequent to that attendance, the Bank scheduled a motion, revised its claims investigation processes and significantly increased the resources devoted to investigating and processing claims. Details of the revisions to the Bank's claims investigations process are set out at length in the affidavit of Adam Dewar sworn March 1, 2016.

Dewar Affidavit at paras 14-17.

11. On November 20, 2014 the Plaintiff identified more serious concerns about the Bank's claims handling processes. The Plaintiff had learned that the Bank had sent draft or template affidavits to its witnesses. The templates included sample answers for use in

response to Class Members' claims. The Bank subsequently indicated at a November 21, 2014 case conference that the templates were only sent in respect of claims under \$20,000, provided sample language only and did not suggest answers. Class Counsel began preparing materials for a formal motion challenging the Bank's investigation and decision-making process.

Dewar Affidavit at paras 18 and 19.

12. On November 28, 2014, Class Members began receiving the Bank's responses to their claims. Many of the responses contained the wording that had been suggested by the Bank in the template affidavit. The Plaintiff and Class Counsel's concerns about the Bank's investigation and decision making process are set out at paragraph 15 below.

Dewar Affidavit at para. 20.

13. On December 4, 2014 the parties' motions were adjourned to allow further cross-examinations and the appeal process under the existing settlement was suspended by court order. On the return date of the motions, the motions were adjourned to 2015 and Justice Belobaba directed the Bank to prepare a report on the administration of the claims process.

Dewar Affidavit at para. 23.

14. The Plaintiff filed various affidavits in response to the Bank's extension motion and in support of the Plaintiff's own motion to challenge the Bank's investigation and decision making processes. Those affidavits outlined various concerns of the Plaintiff, Class Members and Class Counsel (referred to above and below) relating to the Bank's processes. The material served on the Bank by the Plaintiff and filed with the Court includes:

- a. an affidavit of Steven Barrett dated December 3, 2014;
- b. 4 affidavits of George Pakozdi dated December 3, 4, 8 and 10, 2014;
- c. a further 60 page affidavit of George Pakozdi dated June 19, 2015, with 12 schedules analyzing prepared by Mr. Pakozdi (covering 84 pages) and attaching over 100 sets of claims and responses to claims. This affidavit and attachments cover 10 volumes; and
- d. an affidavit from an expert that opined on the Bank's investigative process.

Dewar Affidavit at para. 24.

15. The Plaintiff would ultimately assert that the Bank breached numerous terms of the settlement (the Claims Process) and otherwise did not in good faith adhere to the terms of the 2014 Settlement. The issues and concerns raised by the Plaintiff included the following:

- a. The use of draft or template witness statements – many of the Bank's responding statements for claims under \$20,000 adopted or mirrored language from the draft or template witness statements distributed by the Bank.
- b. Many claims were reduced or denied on the basis of a 2008 Retroactive Overtime Claims Process (ROCP), which the Bank had previously undertaken not to rely upon to the prejudice of Class Members' rights.
- c. Many of the Bank's responses appeared to rely upon a lack of authorization/pre-approval of the overtime, when the Claims Process specifically provided that authorization or approval was not needed.
- d. The Bank appeared to rely upon other internal policies (including relying upon an internal requirement to record overtime in "E-trac") as a basis on which to support the denial or reduction of many claims.

- e. The Bank appeared to reject or reduce certain claims while listing reasons therefor which did not appear to accord with the broad definition of eligible overtime as set out in the Claims Process.
- f. Many claims were reduced or denied in the absence of sworn evidence.
- g. The Bank rejected or reduced many claims in the absence of sworn evidence covering some or all of the claims periods in question.
- h. The Bank responses failed to disclose copies of any documents that the Bank reviewed in its consideration of a Class Member's claim, when the Claims Process required the production of any documents reviewed by the Bank in the context of considering a claim.
- i. The Bank appeared to have rejected many claims submitted after the October 15, 2014 deadline without considering whether the Class Members had provided a reasonable explanation for having submitted the claim late.

Dewar Affidavit at para. 25.

16. Subsequent to December 12, 2014, the Bank twice re-reviewed its prior decisions on the overtime claims. As confirmed in its first claims report dated January 16, 2015, the Bank re-reviewed certain claims after December 12, 2014 and found that it had made errors and inconsistencies, which resulted in the Bank paying out an additional approximately \$3 million to the claimants. As confirmed in its second or supplementary claims report dated June 2, 2015, the Bank re-reviewed certain other claims and again found errors or inconsistencies, which resulted in the Bank paying out an additional approximately \$960,000.

Dewar Affidavit at paras 28-30.

17. The Bank ultimately received a total of 2,227 claims seeking \$70,582,246. The Bank contended that \$13,156,951 should have been excluded from the claims for various

reasons, including but not limited to late claims, ineligible positions, incomplete claims, opt-outs, signed releases, claims entirely outside the applicable limitations period, etc. The Bank thus contended that the net total appropriately considered by the Bank was \$57,432,295. Under the 2014 Settlement to date, the Bank has paid out \$18,701,432. The Bank then advised that 1,226 claims had either been paid in full or in part.

Dewar Affidavit at paras 31-32.

The Events Leading up to the December 2015 Mediation

18. By mid-July 2015, the Plaintiff had served the Amended Notice of Motion to challenge the Bank's processes and had also served the supplementary (10 volume) affidavit of George Pakozdi and the affidavit from the expert.

Dewar Affidavit at para. 33.

19. Following the delivery of this material, a case conference was scheduled with Justice Belobaba for August 18, 2015. At that case conference Justice Belobaba directed Class Counsel to file a summary of what was contained in the 10 volume affidavit of Mr. Pakozdi, which would outline the issues raised with examples (from the Bank's responses to claims) for each issue. Justice Belobaba requested that the Bank, for its part, provide a summary of its position on those issues.

Dewar Affidavit at para. 34.

20. At this time and during this period, the Bank indicated, through its counsel, that the Bank would vigorously contest the allegations in the Plaintiff's motion and material, and would require significant time to file responding affidavit material – corresponding with the amount of time taken to gather and submit the Plaintiff's material in support of the

motion. The Bank took the position that it had conducted itself appropriately in the circumstances. The Bank further indicated that the motion brought by the Plaintiff was not the appropriate manner in which to challenge decisions on any Class Member's overtime claim under the 2014 Settlement - the Bank took the position that Class Members were afforded an appeal right under the Claims Process and that any and all issues raised by the Plaintiff in her motion could and should be addressed in the context of those individual appeals. The Bank's counsel indicated that the issues were hotly contested and that appeals were inevitable (a position with which Class Counsel agreed). Furthermore, the Bank advised, again through its counsel, that the kind of challenge advanced by the Plaintiff (if pursuable at all) may have to be pursued in the context of a fresh proposed class action alleging a common breach of the 2014 Settlement.

Dewar Affidavit at para. 35.

21. In advance of the next case conference, on Friday August 28, 2015, the Plaintiff served a volume of material summarizing its position with examples. The Bank provided its own position in a brief letter dated Tuesday, September 1, 2015 and attached a summary memorandum in accordance with the request from Justice Belobaba.

Dewar Affidavit at para. 36.

22. In its letter of September 1, 2015 the Bank repeated its assertion that it had conducted itself appropriately and in good faith in the circumstances, and had treated claims fairly and consistently. The Bank advised that its re-reviews (or look-back reviews) after December of 2014 ensured that Class Members' claims were treated fairly and consistently. The Bank also contended that these re-reviews (look-back reviews) corrected, where necessary, any prior reliance on the 2008 Retroactive Overtime Claims

Process, E-Trac, authorization and the requirement that the overtime work be permitted by the Bank. The Bank further indicated that, of the 2,368 witness statements it obtained, only 256 remained unsworn as of that date and that, given the Plaintiff's request that no further steps be taken, the Bank had suspended its efforts to have the remaining 256 sworn. The Bank contended that the use of precedent or sample language in affidavits was appropriate given, among other things, the large number and complexity of the claims as well as the time constraints.

Dewar Affidavit at para. 37.

23. The parties attended a case conference before Justice Belobaba on September 2, 2015 and following that case conference, the parties agreed to attend a mediation to try to resolve the issues underlying the outstanding motions. The parties felt that an experienced mediator may be able to assist in the negotiation of new settlement terms.

Dewar Affidavit at paras 38 and 39.

24. The Plaintiff and Class Counsel had concerns about whether it was possible to revise the settlement in any manner that would reasonably maintain the requirement of claims being evaluated individually. In particular, the Plaintiff and Class Counsel had concerns about:

- a. How claims could be fairly re-adjudicated in the circumstances, particularly with Bank witnesses for claims under \$20,000 having received draft or template witness statements, the Bank witnesses having already committed to evidence in their statements, and the references and reliance upon approval and other issues which were not relevant to the Claims Process.
- b. The time necessary to allow a third party to re-investigate and re-evaluate claims (to redo that aspect of the settlement process that was previously carried out by the Bank) in such circumstances could be quite lengthy. If multiple reviewers (or

adjudicators) were used, there was a distinct possibility for inconsistent approaches and decisions.

- c. A fair re-evaluation of individual claims may arguably require allowing Class Members to file more material (evidence) and make individual submissions.
- d. The number of individuals who had claims rejected or reduced (over 1600) would complicate the process.
- e. It was not clear that the Court would sanction an individual re-evaluation process in the circumstances of this case.
- f. It appeared to Class Counsel (based on information received from Class Members) that many Class Members would not want to pursue a further re-evaluation of their claim in any event. As noted in Mr. Pakozdi's June 2015 affidavit (paragraphs 84 to 88), Class Counsel chose a 50-person subset of Class Members whose claims had been denied or partially rejected, and inquired if they would be appealing the Bank's decision on their claims. About one-half of the subset of the 50 Class Members contacted indicated that they would not appeal or were not sure that they would appeal. Mr. Pakozdi has advised that various other Class Members who had previously contacted Class Counsel had also indicated that they would not be appealing for various reasons. Class Counsel were concerned that many Class Members would decline to take part in such a re-evaluation or would otherwise abandon or withdraw their claims. For current employees of the Bank, for example, the re-evaluation of their claims may effectively be seen to be contesting the views and evidence of their supervisors (employer representative). As well, there was a concern that many claimants, whether or not current employees, had made comments that indicated that they had lost confidence in the claims process.
- g. If any such re-evaluation was a substitute for (or a re-doing of) the Bank's initial review of the claims, Class Members would then still have the opportunity to appeal that re-evaluation to an arbitrator under the second phase of the 2014 Settlement.

h. Lastly, and fundamentally, if there was to be any revision to the settlement, the Bank did not appear willing for that to involve a detailed review or re-evaluation of more than 1600 individual claims. The Bank indicated that it wanted a fair and final approach to settlement that would see the settlement completed in relatively short order (that is, without time-consuming individual re-reviews or appeals).

Dewar Affidavit at para. 40.

25. The Plaintiff and Class Counsel were of the view that, in all the circumstances, it would be advisable to pursue the possibility of establishing an aggregate fund of additional money to be paid by the Bank, with a process of distribution to the Class Members in question (those with partially or fully rejected claims) that was not based on a detailed individual review or appeal of each Class Member's claim.

Dewar Affidavit at para. 41.

Mediation & Tentative Agreement

26. The parties attended confidential two-day mediation before the Honourable George Adams Q.C. on December 16 and 17, 2015. Mr. Adams is one of Canada's leading mediators. By approximately 9:00 pm on the second day of the mediation, the parties had agreed, subject to the approval of the Court, to new settlement terms. As discussed in detail below, the new terms will, if approved by this Honourable Court, supersede the 2014 Settlement and result in a significant additional payment (\$20.6 million) to claimants by the Bank in accordance with an agreed upon formula for distribution.

Dewar Affidavit at paras 42-50.

27. The Plaintiff was specifically contacted and consulted during the mediation.

Dewar Affidavit at paras 51-53.

Notice to the Class of the Proposed Revised Settlement

28. In accordance with the Court's direction, notice of the proposed revisions to this settlement was provided by the Bank and Class Counsel on February 12, 2016 by email, regular mail and by posting the notice on Class Counsel's websites. In particular, most of the notices were sent by email by the Bank to the email address that the Bank had on file for that individual. For the approximately 100 Class Members for whom the Bank did not have an email address, the Bank has advised, through its counsel, that it sent those Class Members a copy of the notice by mail to their last known municipal address. Class Counsel also sent out a copy of the notice to anyone who had contacted them following the August 2014 approval of the 2014 Settlement.

Dewar Affidavit at para. 54.

PART III: ISSUES & THE LAW

29. There are two issues on this motion:

(A) Should the Proposed Revised Settlement should be approved?

(B) Should Class Counsel's Fees be approved?

ISSUE (A) – SETTLEMENT APPROVAL

Whether the Settlement is Fair, Reasonable & in the Best Interests of the Class

30. Section 29(2) of the *Class Proceedings Act* ("CPA") provides that a settlement of a class proceeding is not binding unless approved by the court.

Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA"), s. 29(2)

31. To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of the Class.

Fantl v. Transamerica Life Canada, 2009 CanLII 42306 (ON SC) at para 57.

Farkas v. Sunnybrook and Women's Health Sciences Centre, 2009 CanLII 44271 (ON SC), at para 43.

32. Fairness is not a standard of perfection. All settlements are the product of compromise and settlements rarely give all parties exactly what they want. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of the Class when compared to the alternative of the risks, costs, and delays of continued litigation.

Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 2811 (Ont. Gen. Div.).

See also: *Nunes v. Air Transat A.T. Inc.*, 2005 CanLII 21681 (ON SC), at paras 7-8.

Cassano v. Toronto-Dominion Bank (2009), 98 O.R. (3d) 543 (SCJ), at paras 4-5

33. In determining whether a settlement is reasonable and in the best interests of the Class the following factors may be considered:

- a. the likelihood of recovery or likelihood of success;
- b. the amount and nature of discovery, evidence or investigation;
- c. the proposed settlement terms and conditions;
- d. the recommendation and experience of counsel;
- e. the future expense and likely duration of litigation;
- f. the number of objectors and nature of objections;
- g. the presence of good faith, arms-length bargaining and the absence of collusion;
- h. the information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations; and
- i. the nature of communications by counsel and the representative plaintiff with Class Members during the litigation.

Fantl, supra at para 59

Corless v. KPMG LLP, [2008] O.J. No. 3092 (S.C.J.), at para 38

Farkas, supra, at para 45

34. In order to assist the Court in assessing whether a proposed settlement is fair, reasonable and in the best interests of the Class, “boiler plate” submissions should be avoided. Class Counsel should provide meaningful affidavit evidence providing reasons why the agreed settlement amount is fair and reasonable and is in the “zone of reasonableness.”

Sheridan Chevrolet v Furakawa Electric et al, 2016 ONSC 729 (CanLII) at paras 10-12

Leslie v Agnico-Eagle Mines, 2016 ONSC 532 (CanLII) at para. 11

35. To establish that the Revised Settlement falls into forgoing “zone of reasonableness”, the Plaintiff addresses the factors most applicable to this Settlement in turn. As set out below, particular attention is paid to the additional financial benefits to be received by the Class (\$20.6 million with no deductions for Class Counsel’s fees), contrasted with the risks of continued litigation.

Terms, Features & Benefits of the Revised Settlement

Additional Compensation

36. The Plaintiff and Class Counsel’s core concern was that the Bank’s claims handling process may have resulted in the underpayment of Class Members. The Revised Settlement addresses this concern. In addition to the \$18.7 million already paid to Class Members, the Bank agreed to pay an additional \$20.5 million (which has since been adjusted to total approximately \$20.6 million). The Revised Settlement more than doubles the initial amount paid out by the Bank. From the perspective of the Plaintiff and Class Counsel, this additional payment is appropriate given the risks and circumstances.

Dewar Affidavit at para. 48(a).

37. In the event that no settlement was achieved at the mediation, the litigation would likely have continued on for several years (having regard to inevitable appeals) with no guarantee of a result or total additional payout that would be better than, or even close to, the proposed settlement.

Dewar Affidavit at para. 48(b).

38. \$20.6 million brings the total payout to the Class by the Bank to \$39.3 million. As noted above, the Bank considered a net total of \$57,432,295 in claims. If one were to add to that net total, the amounts for late claims (\$2,138,199) and ineligible positions (\$3,681,700), the claims considered now total \$63,252,194 (which still excludes claimants that opted out, signed releases, whose claims were entirely outside the limitation period, were not employed by the Bank, etc.). A payout of \$39.3 million represents a payout of just over 62 percent of the \$63.25 million total claims made.

Dewar Affidavit at para. 48(c).

Distribution of Additional Compensation

39. In addition to the additional payment, the parties were also concerned about devising an appropriate and timely distribution of the additional funds. Under the proposed revised settlement, Claimants will not need to submit any additional forms or documentation or take any additional steps to participate in the Revised Settlement. Class Members will not need to pursue a re-evaluation, will not need to provide further evidence or submissions supporting their claims, and will not need to pursue appeals. All Class Members who had appeal rights, i.e. those whose claims were partially or fully rejected (save and except the minor exclusions noted above), will be eligible under the terms of the Revised Settlement without any further effort on their part.

Dewar Affidavit at paras 48(e) and 48(f).

40. Claimants will, subject to whether their claim was partially or fully rejected and the value of their claim, receive an additional payment up to a maximum total payment as set out in Schedule A to the minutes of settlement. The percentages range from a payout of 25% to 100% of the total amount claimed, with higher percentages being paid out on the lower thresholds or categories of claims. All claimants who had partially denied claims will ultimately receive 50% or more of their original claim. A majority of claimants who were fully denied will receive 50% or more of their original claims. Accordingly, each eligible claimant will receive payment of at least some portion of their claim.

Dewar Affidavit at para 48(g).

41. The monetary claim thresholds were not arbitrarily created for the purposes of this revised settlement. As noted above, the Bank advised, explained and confirmed (in affidavit material and under cross-examination by Class Counsel) that it conducted more extensive or greater investigations of higher dollar value claims with a relatively larger share of the Bank's time and resources devoted to claims in excess of \$50,000 and, as such, the Bank's position is that the Bank's adjudication of higher threshold claims was likely more accurate and, as such, any additional payments made to those claimants should be less on a percentage basis than for lower dollar value claims. In the circumstances, smaller dollar value claims (in particular those under \$20,000) were afforded less investigation and therefore the adjudication of those claims may have been less precise. As such, lower dollar value claims will receive a higher percentage payout on the total value of their claims.

Dewar Affidavit at para. 48(h).

42. Class Counsel came to understand that other potential distribution methods could involve significant additional individual review of over 1600 claims forms and Bank responses

(which were voluminous) and further complexities and room for debate and the exercise of discretion or judgment.

Dewar Affidavit at para. 48(i).

43. A payout of higher percentages to claims under \$20,000 also accorded with the challenge that the Plaintiff and Class Counsel had advanced in respect of the draft affidavits sent for claims under \$20,000.

Dewar Affidavit at para. 48(j).

44. Claims that were fully rejected were found by the Bank to have been wholly without merit and less deserving of compensation. This led to the distinction between partially approved claims and claims that were fully denied.

Dewar Affidavit at para. 48(k).

45. Importantly, it was clear to Class Counsel that, if the settlement negotiations failed, there would have been no \$20.6 million fund available for the Class as a whole, and Class Members would have been left as individuals with the risk associated with the outstanding motions and appeals. There is no guarantee that the Class would win the motion and appeals, and even if it did, what sort of remedy might be afforded to the Class. Class Members may have ended up with only the right to an individual appeal, in circumstances where many Class Members would be unlikely to have exercised such right, for various reasons as discussed above. Alternatively, an appeal court could have agreed with the Bank and held that the current challenge should be pursued separately as a new class action or alternatively, that the motion brought by the Plaintiff had no merit.

Dewar Affidavit at para. 48(l).

Timing of Payment

46. If the revised settlement is approved Class Members will be paid (less statutory deductions and the Class Proceedings Funds 10% levy) within 60 days of the date of the approval order.

Dewar Affidavit at para. 48(m).

47. As noted above, if the Class returns to the motions (and appeals therefrom) and the potential subsequent need for Class Members to individually appeal, any further payout for Class Members is likely to be years away. It took years just to have this case certified and survive various levels of appeal and motions for leave – the claim started in December 2007 and the Bank’s motion for leave to the Supreme Court of Canada was dismissed in March 2013.

Dewar Affidavit at para. 48(n).

Late Claims

48. Class Counsel was aware that there was no guarantee that any such rejected late claims would ever be considered. Under the 2014 Settlement terms, the claimant would have to appeal the rejection and then establish for the arbitrator a reasonable explanation why the claim was submitted late. Some claimants had a more compelling explanation why they did not submit by the deadline. Some Class Members indicated that they did not pay heed to or take notice of the settlement until after the initial deadline.

Dewar Affidavit at para. 48(r).

49. As set out in her Amended Notice of Motion, the Plaintiff sought among other things, an order effectively disallowing the rejection by the Bank of any claims submitted after the October 15, 2014 deadline where the Bank had failed to consider whether the Class

Member had provided a reasonable explanation for having submitted the claim after the deadline.

Dewar Affidavit at para. 48(s).

50. In Class Counsel's view, claims submitted closer to the October 15th deadline might have a better chance (all other things being equal) of ultimately being considered – a delay of a short period of time is often more understandable than a lengthy delay (again, all other things being equal). Some of the late claims were submitted right after October 15, 2014. Some claims were submitted many months after.

Dewar Affidavit at para. 48(t).

51. If a reasonable explanation was established to the satisfaction of an arbitrator under the 2014 Settlement, the claim would then have been considered but, again, there was no guarantee that the claim would be accepted in part or whole and paid, just that the claim would be eligible for review and adjudication.

Dewar Affidavit at para. 49(u).

52. Following intense negotiations, the parties agreed that any claims received by the Bank by December 31, 2014 would be eligible for additional payment pursuant to the terms of the revised settlement agreement. Any claims received by the Bank thereafter would not. A significant majority of late claims were received by the Bank prior to December 31, 2014.

Dewar Affidavit at para. 48(v).

53. A 2.5-month blanket extension for late claims seemed to be a significant and reasonable compromise. The Plaintiff and Class Counsel understood that it would see a significant majority of late claims accepted under the revised proposed settlement, without the need for any Class Member having to explain or justify the reasons the claim was late. 2.5

months seemed to be a fair and reasonable general extension. In regard to the length of extensions, the Plaintiff and Class Counsel considered the fact that the Plaintiff and Class Counsel had rejected the Bank's request for a 90-day extension to the deadline on the Bank to respond to over 2000 claims. The Bank had committed significant additional resources to the process and managed to get through the claims initially by December 11, 2014, which was only two weeks after the original November 28, 2014 deadline.

Dewar Affidavit at para. 48(w).

54. Moreover, the acceptance of late claims up to December 31st was part of the larger proposed revised deal, which seemed very beneficial to the Class.

Dewar Affidavit at para. 48(x).

55. Following the mediation, it came to Class Counsel's attention that two claimants had submitted claims materials to Class Counsel before December 31, 2014 but that their claims were not forwarded to the Bank until after December 31, 2014. As such, those claims were outside the deadline agreed to by the parties. One claimant's materials were misfiled and not forwarded to the Bank until March. The other arrived shortly before or during the Christmas holiday break and was not forwarded to the Bank until early January. Class Counsel proposes, subject to the approval of the Court, to have the Bank pay those two individuals (on the same basis as the other late claimants) and deduct the amount paid to these two Class Members from the fees otherwise payable to Class Counsel as part of this revised settlement.

Dewar Affidavit at para. 48(y).

Ineligible Positions

56. The Bank advised that fifty-two (52) claims were fully denied by the Bank on the basis that the claimant had only occupied an “ineligible position” (as determined by the Bank). As a condition of the final settlement, all of the previously declined “ineligible position” claims are to be included as eligible for compensation under the revised settlement.

Dewar Affidavit at para. 48(z).

57. The Plaintiff and Class Counsel were concerned that certain positions may have been deemed to be, or treated as, ineligible in circumstances where the position or positions may have been eligible or may at least have been the subject of an argument about eligibility. The Plaintiff and Class Counsel did not want to exclude potentially eligible positions from the revised settlement.

Dewar Affidavit at para. 48(aa).

Incomplete Claims

58. The Bank had advised that 16 claims had been received that did not have a number of hours on the claims form that would allow the Bank to process the claim. Class Counsel understands that the Bank had inquired of such claimants to provide further information but none was forthcoming. Class Counsel had seen some evidence in some of the forms received from Class Members of the Bank requesting such information. In the circumstances, it seemed reasonable to proceed with the settlement without insisting on the inclusion of these Class Members particularly since the absence of information on the total amount of their claims would make it impossible to determine entitlement without further investigation.

Dewar Affidavit at paras 48(bb) and 48(cc).

No Appeals

59. 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 under the Revised Settlement.

Dewar Affidavit at paras. 48(dd).

Exclusions from the Revised Settlement

60. As set out above, the vast majority of claimants will receive 50% or more of their original claims as part of the Revised Settlement.

Dewar Affidavit at para. 49.

61. In addition to late claims submitted after December 31, 2014, the individuals listed below will also receive no compensation:

- a. Claimants who are **not in the class** (10 individuals - \$391,040);
- b. There were originally ten (10) individuals with claims totalling \$383,613 who had in fact **opted out** of the Class (and thus were not Class Members). Two (2) of those Class Members brought a motion to rescind their opt-outs. The parties agreed that those two class members would be included in the Revised Settlement (subject of course to this Court's approval of the Revised Settlement).
- c. Class Members who **withdrew** their claims (2 Class Members);
- d. Class Members who previously signed **releases** in favour of the Bank (30 Class Members - \$1,247,992);
- e. Claimants who were **not employed by the Bank** (8 Class Members - \$261,000)

- f. Claimants whose claims were **entirely outside the limitation period** (32 claims - \$3,579,909).

It would seem that the individuals listed above who submitted claims were not properly considered Class Members, would not have been eligible for any payment under the terms of the 2014 Settlement in any event or, in the case of the 2 withdrawn claims, had decided not make a claim under the 2014 Settlement.

Dewar Affidavit at para. 50.

Objectors & Supporters of the Settlement

- 62. Out of approximately 1,600 Class Members affected by the revised settlement, approximately 6 have submitted comments that are generally supportive of the settlement and approximately 9 have submitted objections to the revised settlement.

Class Member Comments, Exhibits “Q” through “FF” to the Dewar Affidavit.

- 63. Some of the supporters of the settlement, including the Plaintiff (as discussed below), have stated that the Revised Settlement is a good deal for the Class that provides significant cash compensation while at the same time bringing finality to a long and taxing court process.
- 64. Other Class Members question some aspects of the Revised Settlement but agree that it is, overall, a good deal.
- 65. Objections generally fall into the following categories:

- a. **The thresholding of claims is arbitrary and claims just over a threshold get less** – For example, one Class Member wrote, *“With respect to the proposed settlement percentages, had my claim been between \$40,000 and \$50,000 and partially accepted, I would have received a larger settlement at 80% than the*

amount I did receive on my claim of \$63,974. How is this equitable?" As noted above at paragraph 41, the monetary thresholds were not arbitrarily created for purposes of the Revised Settlement. The thresholds corresponded to different levels of review and investigation of the claims as conducted by the Bank when they examined the claims. The approach of the Bank to the investigations and reviews was separated into three bands (claims below \$20,000; claims between \$20,000 and \$50,000; and claims above \$50,000). Accordingly, claims between \$20,000 and \$50,000 generally were investigated and reviewed more by the Bank than claims below \$20,000 with claims above \$50,000 (even if the claim in question was only just over \$50,000) getting the most investigation and review by the Bank. The higher value claims received greater attention and a more comprehensive review and investigation by the Bank.

- b. **Claims submitted after December 31, 2015 should be included in the Revised Settlement** – For example, one Class Member wrote, *“I would strongly urge you to extend the timeframe for Late Claims to ensure all affected employees will be fairly compensated.”* As noted above at paragraph 53, a 2.5 month blanket extension for late claims seemed to be a significant and reasonable compromise in the context of the Revised Settlement as a whole. There was certainly no guarantee that any, let alone the vast majority, of late claims would have been accepted by an arbitrator and this was the best extension that could be obtained in the circumstances; and,
- c. **The Bank should be compelled to properly investigate and pay all claims for overtime, and follow the law** – For example, one Class Member wrote, *“At this*

point within the law suit it cannot and should not be just about money in hand. It should be about Scotiabank complying with the law and paying their employee's for the hours that were worked." Another wrote, *"The Case Management Judge, should disapprove the Revised Settlement, and force Scotiabank to do a proper investigation of actual overtime hours worked, and not pick on the arbitrary percentages based on the amount of the Claim as illustrated on the information notice of the Revised Settlement."* While the Plaintiff and Class Counsel understand Class Members' frustration in this regard. It is not in the best interests of the Class to require them to walk-away from \$20.6 million in additional compensation for the chance to argue that the Bank should be forced to re-investigate each and every individual claim, with the risks and delays inherent in further litigation.

Recommendation of Plaintiff & Class Counsel

66. Class Counsel strongly recommends that the Court approve the proposed revisions to the settlement. Class Counsel believes that is the best arrangement that was negotiable in the circumstances.

Dewar Affidavit at para. 56.

67. Class Counsel views this is as a settlement that sees significant additional funds going to Class Members without further risk for Class Members, without further efforts by Class Members (including having to launch, prepare for and pursue appeals) and without further significant delays (which likely would have been years of appeals from the outstanding motions).

Dewar Affidavit at para. 57.

68. While Class Counsel felt that the Plaintiff had a good challenge to the Bank's claims-handling processes, the challenge would have taken considerable time. Even if the Plaintiff was successful on that challenge and upheld on appeal, the remedy was uncertain. Class Members may well have ended up having to pursue individual reviews or appeals of their claims. Many Class Members, as noted above, would likely not have pursued their claims further.

Dewar Affidavit at para. 58.

69. The Plaintiff concurs with the view of Class Counsel. The Representative Plaintiff's confirmed her earlier comments to Class Counsel in her email submission of February 29, 2016:

"...I want to confirm that I feel that this appears to be the best solution for all involved to get this case settled once and for all. It's been a long road and I would really like to see completed. I certainly would have rathered everyone got what they had coming to them but understand that this is a compromise for all involved.

Keep up the great work and thanks so much for all of your hard work!"

Email of Cindy Fulawka dated February 29, 2016, Exhibit "O" to the Dewar Affidavit.

70. In light of the foregoing, the Plaintiff respectfully submits that the Revised Settlement is fair, reasonable and in the best interests of the Class.

ISSUE (B) – FEE APPROVAL

71. The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved:

Parsons v. Canadian Red Cross Society, [2000] O.J. No. 2374 (S.C.J.), at para 13.

Smith v. National Money Mart, 2010 ONSC 1334 (CanLII), at paras 21-23.

Fischer v. I.G. Investment Management Ltd., 2010 ONSC 7147 (CanLII), at para 25.

72. On the Original Settlement in this action, this Honourable Court (after expressing its general concern with multiplier based fee awards) approved Class Counsel's base fee (with a 3% deduction for duplications etc.) and the 2.75 multiplier recommended by the Honourable Steven Goudge Q.C. According to paragraph 23 to the 2014 Settlement Decision:

[23] Nonetheless, I respect the arbitrator and I recognize his right to use the multiplier approach. 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.

73. Since the approval of the Original Settlement, Class Counsel spent significant time after the Bank first raised its request for an extension battling with the Bank regarding that requested revision to the settlement and challenging the Bank's processes. As set out in Class Counsel's bill of costs, those fees total approximately \$1.1 million to date. Class Counsel incurred approximately \$114,000 in disbursements in the same context.

Dewar Affidavit at paras 59-60.

Bill of Costs of Class Counsel, Exhibit "GG" to the Dewar Affidavit.

74. The fees and disbursements incurred relate to the very structure of the settlement, relief requested to address alleged breaches of the settlement, and efforts to re-negotiate the settlement. The work in question was not part of the 2014 Settlement. When the initial 2014 Settlement was negotiated and approved, Class Counsel did not and could not

anticipate that it would have to carry out the work done over the last 15 months, which culminated in the significant re-negotiation of the settlement itself.

Dewar Affidavit at para 62.

75. These additional fees and disbursements were incurred without any assurance that any part would be paid, let alone in the foreseeable future. Class Counsel launched a significant and important challenge to the Bank's processes in the interests of the Class and faced the very real possibility of fighting not only the motion but appeals and significant questions about remedy. As a result, the Plaintiff and Class Members faced years of potential litigation and risk.

Dewar Affidavit at para. 63.

76. Given that the Defendant had previously committed, in the context of the 2014 Settlement, to paying fees to Class Counsel and that the Defendant did not want fees deducted from payouts to Class Members, Class Counsel believed that it was appropriate, as this case headed into the mediation with Mr. Adams in December 2015, that the Defendant should pay for additional fees and disbursement of Class Counsel (should the matter successfully re-settle). Given that Mr. Goudge had already determined what reduction was generally appropriate for the total fees and what multiplier was appropriate, and that this Court had approved the fees suggested by Mr. Goudge, Class Counsel submitted in its mediation brief that that was the appropriate formula to re-apply to Class Counsel's fees for this unexpected and risky re-settlement work.

Dewar Affidavit at para. 64.

77. At the mediation, and in accordance with the previously approved formula, Class Counsel proposed that its fees be paid based on its total base fee less 3%, multiplied by 2.75, plus

disbursements and taxes. That total was well over \$2.5 million plus taxes. The parties exchanged some offers and counteroffers on fees on the second day of the mediation. The Plaintiff offered to take less than the strict application of the 2.75 multiplier would have provided. The parties settled on \$2.3 million (inclusive of disbursements) plus HST. If disbursements are deducted from the total, the actual fees payable to Class Counsel are just under \$2.19 million, which represent a multiplier of approximately 1.99 on the base fees incurred to date for the challenge and re-settlement.

Dewar Affidavit at para. 65.

78. Class Counsel never considered seeking fees at the 30 percent specified in its Retainer applied against the \$20.6 million fund created in the re-settlement (which would have equaled a fee of over \$6 million for the re-settlement). As noted above, the parties had agreed in the original settlement that the Bank would pay fees and that Class Members would not have their payouts reduced by the fees of legal counsel. Although this was a re-settlement, Class Counsel – like the Bank – did not want to see Class Members’ payouts reduced by fees.

Dewar Affidavit at para. 66.

79. The total payout for overtime and fees by the Bank in the context of the 2014 Settlement and this proposed resettlement is as follows:

- a. \$18.7 million to the Class under the 2014 Settlement;
- b. \$10.45 million for Class Counsel fees for the 2014 Settlement;
- c. \$20.6 million to the Class under the Revised Settlement; and
- d. \$2.3 million (or \$2.19 million plus disbursements) for Class Counsel fees for the Revised Settlement.

80. The total amount that will be paid by the Bank, in the event that the Revised Settlement and Class Counsel fees are approved will total \$52.05 million (exclusive of taxes). The total of \$12.75 million to be paid for Class Counsel fees represents just under 24.5 percent of the total to be paid by the Bank. Under its contingency retainer, as noted in the 2014 Settlement approval decision, Class Counsel was arguably entitled to 30 percent.

Dewar Affidavit at para. 67

81. The payment of Class Counsel's fees was negotiated at the mediation separately from the balance of the Revised Settlement. Class Counsel specifically advised Mr. Adams at the mediation that the settlement for the Class was not tied to or conditional in any way on the outcome of the fee request.

Dewar Affidavit at para. 68.

82. The efforts of Class Counsel have generated a further \$20.6 million under a streamlined revised settlement process that will see Class Members receiving further compensation without any further delay, efforts or deduction for fees.


Dewar Affidavit at para. 69.


PART IV: ORDER REQUESTED

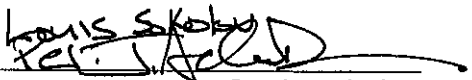
83. The Plaintiff respectfully requests an order approving the Revised Settlement and Class Counsel's fee request as being fair, reasonable and in the best interests of the Class.


ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 1, 2016

David F. O'Connor
Per: 
David F. O'Connor


J. Adam Dewar

Louis Sokolov
Per: 
Louis Sokolov

Peter Engelmann
Per: 
Peter Engelmann

Schedule "A" Authorities

1. *Cassano v Toronto-Dominion Bank*, 98 O.R. (3d) 543 (available on QL Can) (SCJ)
2. *Corless v KPMG LLP*, 2008 CanLII 39784 (ON SC)
3. *Dabbs v Sun Life Assurance Co of Canada*, [1998] OJ No. 2811 (Ont Gen Div)
4. *Fantl v Transamerica Life Canada*, 2009 CanLII 42306 (ON SC)
5. *Farkas v Sunnybrook & Women's College Health Sciences Centre*, 2009 CanLII 44271 (ON SC)
6. *Fischer v. IG Investment Management Ltd.*, 2010 ONSC 7147 (CanLII)
7. *Leslie v Agnico-Eagle Mines*, 2016 ONSC 532 (CanLII)
8. *Nunes v Air Transat A.T. Inc.*, 2005 CanLII 21681 (ON SC)
9. *Parsons v. Canadian Red Cross Society*, [2000] OJ No. 2374 (SCJ)
10. *Sheridan Chevrolet v Furakawa Electric et al*, 2016 ONSC 729 (CanLII)
11. *Smith v National Money Mart*, 2010 ONSC 1334 (CanLII)

Schedule "B" – Legislation

Class Proceedings Act, 1992, SO 1992, c 6

Settlement without court approval not binding

29(2) A settlement of a class proceeding is not binding unless approved by the court.

CINDY FULAWKA
Plaintiff/Moving Party

-and-

THE BANK OF NOVA SCOTIA
Defendant/Respondent

Court File No. 07-CV-345166 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

Proceeding under the *Class Proceedings Act, 1992*

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(Revised Settlement & Fee Approval)

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