Court File No. 07-CV-345166CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CINDY FULAWKA

Plaintiff/Moving Party

- and -

THE BANK OF NOVA SCOTIA

Defendant/Respondent

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

AFFIDAVIT OF ADAM DEWAR

(Sworn March 1, 2016)

I, J. Adam Dewar, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a partner with Roy O'Connor LLP ("Roy O'Connor"), part of the Class Counsel group in this Class Action. As such, I have knowledge of the matters to which I hereinafter depose. Where the information below is not based on my direct knowledge and the facts are based upon information and belief from other sources, I have stated the source of that information. I verily believe that information to be true.

Nature of Motion

2. This affidavit is sworn in support of the Plaintiff's motion for an order approving the proposed revisions to the settlement of this action and Class Counsel fees. These revisions were agreed to by the Plaintiff and the Bank at a two-day mediation in December 2015. A copy of the minutes of settlement is attached hereto as Exhibit "A".

History of the Action and Settlement

3. This action was commenced in December 2007. The Plaintiff alleged that the Bank unlawfully deprived Class Members (current and former front-line sales staff) of overtime compensation to which they were legally entitled. The Plaintiff moved for certification and certification was granted by Justice Strathy (as he then was) in a decision dated February 19, 2010. The Bank's appeals to the Divisional Court and Court of Appeal were unsuccessful and in 2013 its motion for leave to appeal to the Supreme Court was dismissed.

4. In 2014, the parties began settlement negotiations. After several months of negotiation, the parties eventually negotiated terms of settlement (the "2014 Settlement", or existing or current settlement). The 2014 Settlement was essentially a streamlined claims process designed to reasonably compensate Class Members for their uncompensated overtime without any requirement for Class Members to provide corroborating documents, and regardless of whether the overtime had been approved by the Bank. The terms of the proposed settlement were set out in a document entitled "The Bank of Nova Scotia Overtime Claims

Process" (the "Claims Process") and a letter dated July 24, 2014, which documents are attached hereto as Exhibits "B" and "C". The Claims Process was designed to provide a relatively informal, simple, efficient and effective way to address claims.

5. To make a claim under the 2014 Settlement, Class Members would submit what was essentially a short "check-box" style claims form to the Bank indicating the amount of overtime hours worked, the branch (if known), the range of dates in which the overtime was worked, and a check box list of reasons for unpaid overtime. Each claim would be paid unless the Bank had documentary or sworn evidence that reasonably and objectively supported a reduction or denial of the claim. Among other things, section 24 of the Claims Process specifically provided:

> *…Furthermore, the Bank will not reject the claim, in whole or in part, unless the Bank's position is reasonably and objectively supported by documentary or sworn evidence (for example: documents showing that the Claimant was away sick on the dates claimed, or showing that the branch was closed on the relevant date, or the sworn statement of a current or former supervisor or another current or further employee of the Bank).*

6. The parties also agreed (as set out in the aforesaid July 24, 2014 letter) that Class Counsel would be paid a multiplier on its base time (plus disbursements and taxes), with the total fees ultimately being determined by the Honourable Stephen Goudge, Q.C. as arbitrator if necessary. When the parties could not agree on the fees, the Honourable Mr. Goudge rendered a decision on the fees on July 25, 2014, a copy of which is attached to the settlement approval order referred to at

paragraph 8 below. Mr. Goudge set the base fee at the total fees incurred less 3%, and set the multiplier at 2.75.

7. On July 18, 2014, the Court approved a Notice of the Settlement Approval Hearing that provided that all persons who were on the class list produced by the Bank would receive direct notice of the proposed settlement by mail. The July 18 order also provided that notice would be posted on Class Counsels' websites, as well as the website "unpaidovertime.ca". A copy of the Order approving the Notice of the Settlement Approval Hearing is attached as Exhibit "D".

8. On August 12, 2014, the Honourable Justice Belobaba approved the settlement and Class Counsel's fees. A copy of Justice Belobaba's Reasons for Decision approving the settlement and a copy of the Settlement Approval Order dated August 12, 2014 are attached hereto as Exhibits "E" and "F".

9. Under the Claims Process, Class Members were required to submit their claims forms by October 15, 2014. Any claims submitted after this deadline would not be considered unless the Bank or, if applicable, a single arbitrator (under the appeal process) determined that the there was a reasonable explanation for the delay. The Defendant was then required to respond to the claims by November 28, 2014.

10. The settlement Claims Process also gave Class Members a right of appeal. If a Class Member was not satisfied with the Bank's response, the Class Member could appeal his or her claim through a streamlined process to a single arbitrator. As set out further below, over 1,600 Class Members had their claims reduced or

denied by the Bank, and so were eligible to take part in this streamlined appeal process under the terms of the existing settlement.

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

11. Starting in September 2014, the Plaintiff, other Class Members and Class Counsel began to develop concerns about various aspects of the Bank's administration of the Claims Process.

12. In particular, in or about September 2014, the Plaintiff became aware that the Bank had sent emails to Class Members asking them to provide more information about their claims and suggesting that their claims would not be considered if they did not comply. The Plaintiff raised concerns regarding these emails with the Bank. The Bank assured the Plaintiff that, when the Bank asked for further information in future emails, it would be careful to clarify that it was only asking for further information if it was available and that, even if further information was not forthcoming, the Bank would evaluate claims in any event.

13. On or about October 7, 2014, the Bank sent out another round of emails to various Class Member claimants, which stated that their claims could not be assessed on information that the Class Member had provided in their claims forms and asking them to answer a series of questions within 10 days, including asking who would corroborate the claim and why the hours were not claimed previously. The Plaintiff raised concerns over this further round of emails, and following a case

conference before Justice Belobaba, the Bank agreed to send out "clarifying emails".

14. On or about November 7, 2014, the Bank advised Class Counsel that it was requesting a 90 day extension to the claims response deadline of November 28, 2014 (with the extension to run until February 27, 2015). The Plaintiff did not consent to that extension.

15. The Bank scheduled a case conference for November 14, 2014.

16. On November 13, 2014, the Bank served an affidavit sworn by Alan Stewart, a partner at Deloitte LLP. Deloitte had been retained by the Bank to assist in managing the processing of the approximately 2100 claims that had been received from Class Members. The affidavit explained, among other things, that the complexity and scope of the investigations far exceeded the Bank's expectations.

17. At a case conference on November 14, 2014, Justice Belobaba declined to grant the extension at the case conference and instead directed the Bank to bring a formal motion. Justice Belobaba advised that the earliest possible date upon which he could hear the motion was December 4, 2014. The Bank indicated that it would then bring a formal motion. As in part described below, the Bank subsequently assigned, hired or retained more staff and professionals to accelerate the administration and investigation of the claims. The Bank subsequently served its notice of motion and ultimately requested an extension of the November 28 deadline to December 12, 2014. A copy of the Bank's notice of motion is attached hereto as Exhibit "G".

18. On or about November 20, 2014, it came to the Plaintiff's attention that the Bank sent to various witnesses (primarily Bank employees in managerial positions at branches) draft or template affidavits that included sample answers for use in response to Class Members' claims. Class Counsel raised concerns about the use of draft or template affidavits with counsel for the Bank and, in a telephone case conference on November 21st, with Justice Belobaba. During that case conference, the Bank's counsel indicated that the draft affidavits were only sent in respect of claims under $20,000. The Bank's counsel also indicated that the templates provided sample language only and did not suggest answers, and referred to instructions provided with templates. No formal orders were issued by Justice Belobaba during the case conference.

19. Following the case conference, Class Counsel began preparing materials for a formal motion challenging the Bank's investigation and decision making process, including the Bank's dissemination and the use of aforesaid draft or template affidavits for claims under $20,000. Among other things, the Plaintiff wanted to strike those affidavits. The Plaintiff was also seriously concerned that those affidavits may have contaminated the relevant supervisor affiants across the country (witness pool).

20. On or about November 28, 2014, Class Members began receiving from the Bank the responses to their claims. Many of the responses from branch managers contained the wording that had been suggested by the Bank in the aforesaid draft affidavits. Class Members and Class Counsel also noted many other significant issues and concerns with the Bank's responses (discussed further below).

21. On or about December 1, 2014, the Bank served another affidavit in support of its motion to extend the claims response deadline. The affidavit was from Stephen Gaskin (Senior Vice President, Operations, Shared Services Group). That affidavit outlined in part the process that the Bank had undertaken in investigating and reviewing the claims under the 2014 Settlement. Mr. Gaskin explained that, after November 14, the Bank retained and assigned in excess of 200 more staff and professionals (including internal staff (up to and including Senior Vice Presidents) as well as external firms (including Borden Ladner Gervais and Hicks Morley)) to the administration, investigation and decision making for the claims. He further explained that the Bank had also established an Overtime Team to manage the claims process, which was comprised of senior executives and which included a Senior Steering Committee and a Project Oversight Committee. Class Counsel was advised that the latter two committees met daily between November 17 and 28, 2014.

22. Class Counsel conducted cross-examinations of Messrs. Gaskin and Stewart (the Bank's affiants as noted above). In their affidavits and, more specifically, during their cross-examinations, Messrs. Gaskin and/or Stewart were questioned about, and offered evidence that, among other things:

a. For eligible claims, the Bank had originally intended to investigate every claim and speak with each of the supervisors who had worked with a claimant for the entire period of his or her claim.

b. That changed after November 14th when the Bank was not granted a motion date for it motion to extend the response deadline until after that deadline. At that point, and in light of the fast approaching response deadline, the Bank decided to change the approach to shorten the investigation process. The Bank decided to approach the investigation of claims based on monetary thresholds or categories. The suggestion of using such monetary thresholds or categories of claim came, at least in part, from Mr. Stewart of Deloitte.

c. For claims between $20,000 and $50,000, the Bank intended and made efforts to speak with supervisors who covered at least two-thirds of the period of the claim in question (and not necessarily witnesses who covered the entire claim period). Thus less time was required to investigate these claims. For claims of $50,000 or more, the process did not change – that is, the Bank still intended and made efforts to speak to each supervisor who would have worked with the claimants for the full period of their claims. Each of the claims falling into the category of $50,000 and above, and the category of $20,000 to $50,000, would involve the efforts of an investigator who conducted the interviews or witness contacts.

d. For the claims of $20,000 or less, the aforesaid draft affidavit with general instructions was cascaded down (through district managers and branch managers) to the supervisor who supervised the claimant for the greatest time during the period of the claim for that claimant (one supervisor was contacted by the Bank). There were no investigators involved in conducting any interviews for the claims under $20,000.

e. There was at least some concern expressed internally within the Bank to Mr. Stewart of Deloitte that interviewing less than 100% of the supervisors for a particular claim would obviously mean that there was information for part of the claims in question that the Bank would not have for purposes of its decision making. The decision to interview less than 100% of the supervisors on claims below $50,000 was designed to shorten the investigation process in an effort to attempt to meet the November 28th claims response deadline.

23. The parties participated in a relatively brief attendance before Justice Belobaba on December 4, 2014. At that attendance, the Bank's motion for the extension was adjourned to December 12th (to allow further cross-examinations) and the appeal process under the existing settlement was suspended by court order.

24. For her part, 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.

25. The Plaintiff asserted 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.

26. A copy of the Plaintiff's Amended Notice of Motion challenging the Bank's processes is attached hereto as Exhibit "H".

27. On December 12, 2014, Justice Belobaba adjourned the Bank's motion for an extension and the Plaintiff's motion to challenge the Bank's processes in part to allow the parties time to file further materials (particularly on the Plaintiff's

motion). At that hearing, the Bank advised that it would, as of that date, have completed the review of all claims. At the hearing, Justice Belobaba directed the Bank to prepare a report on the administration of the claims process. A copy of Justice Belobaba's December 12, 2014 endorsement is attached hereto as Exhibit "I".

28. Subsequent to December 12, 2014, the Bank twice re-reviewed its prior decisions on the overtime claims.

29. 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.

30. A copy of the Bank's Claims Process Report dated January 16, 2015 and the Bank's Supplementary Claims Process Report dated June 2, 2015 are attached hereto as Exhibits "J" and "K".

31. 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 has advised that 1,226 claims have either been paid in full or in part to date.

32. For ease of convenience, a copy of a schedule prepared by the Bank setting out the total claims and the Bank's exclusions is attached hereto as Exhibit "L".

The Events Leading up to the December 2015 Mediation

33. 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.

34. Following the delivery of this material, a case conference was scheduled with Justice Belobaba for August 18, 2015. The status of the motions and the related material were discussed at the case conference. Among other things, 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.

35. 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.

36. 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. The Bank took the position that the Plaintiff's volume was not consistent with the request from Justice Belobaba from August. The Bank reserved the right to file its responding motion material and further reserved the right to respond in greater detail to the Plaintiff's brief.

37. The September 1, 2015 letter from the Bank is attached as Exhibit "M" hereto. In that letter, 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.

38. The parties attended a case conference before Justice Belobaba on September 2, 2015.

39. 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.

40. 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 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), we 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 our office had also indicated that they would not be appealing for various reasons. Class Counsel was 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).

41. 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.

The December 2015 Mediation

42. The parties agreed to attend at a mediation (a structured meeting before a neutral party to explore the possibility of settling a dispute) before the Honourable George Adams Q.C. I understand that Mr. Adams, a retired judge with more than 20 years' experience as a mediator, is one of Canada's leading mediators and that he has no ties to either party.

43. The parties prepared confidential mediation briefs for Mr. Adams. The mediation proceeded over two-days on December 16 and 17, 2015. The mediation went past normal business hours each day and was confidential in accordance with the terms

of a mediation agreement executed by the parties. A copy of that mediation agreement is attached hereto as Exhibit "N".

44. Senior members of the Plaintiff's Class Counsel team (David O'Connor, Louis Sokolov, Peter Engelmann and myself) attended on behalf of Ms. Fulawka and the Class. The Bank was represented by its external legal counsel from Borden Ladner Gervais LLP, and senior representatives the Bank.

45. After a brief introductory session lead by Mr. Adams on the first day of the mediation, the parties separated or "broke out" into separate boardrooms for the balance of the mediation. Mr. Adams then acted as an intermediary between the parties for the rest of the mediation. The issues, concerns, positions, offers and counter-offers of the parties were conveyed to the opposite side by Mr. Adams. There was no direct contact between the parties' representatives until the Minutes of Settlement were ultimately finalized (after the fundamental revised settlement terms had been set). The negotiations between the parties were at arms length throughout.

46. In very broad terms, it was the Plaintiff's and Class Counsel`s goal to maximize the overall compensation payable to the Class while minimizing any additional delay in the payment of that compensation. It was also our goal, for the reasons noted above, to avoid any approach to a revised settlement that required a detailed review of each and every claim (claims form or Bank response).

47. The majority of the mediation was focused on the related issues of determining how much additional compensation would be paid by the Bank and how that

compensation would be distributed among the Class Members. 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 which will, if approved by the Court, supersede the original 2014 Settlement and result in a significant additional payment to claimants by the Bank in accordance with a formula for distribution. The formula is objective (will not require any exercise of discretion) and will allow payments in a timely manner.

48. The following is a summary of the key features and benefits to the Class Members of the revised settlement:

a. **Additional Compensation –** As set out above, a 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 and was reached at the end of intense negotiations. From our perspective, this additional payment is appropriate given the risks and circumstances.

b. 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.

c. The Plaintiff was specifically contacted during the mediation and consulted about the quantum of the additional payment and indicated that the amount was satisfactory in the circumstances.

d. $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.

e. **Distribution of Additional Compensation –** 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.

f. 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 proposed revised settlement without any further effort on their part.

g. 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.

h. As may be obvious from the foregoing, 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.

i. Class Counsel came to understand that other potential distribution methods could involve significant additional individual reviews and further analysis of over 1600 claims forms and Bank responses (which were voluminous) and further complexities as well as room for debate and the exercise of discretion or judgment.

j. A payout of higher percentages to claims under $20,000 also accorded with the challenge that we had advanced in respect of the draft affidavits sent for claims under $20,000.

k. Claims that had been partially approved by the Bank under its investigations and reviews were found by the Bank to have been partially substantiated and were obviously acknowledged by the Bank to have been deserving of compensation. Claims that were fully rejected by the Bank were obviously considered by the Bank not to have been substantiated. This lead to the distinction between partially approved claims and claims that were fully denied.

l. 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 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 having to pursue some form of individual appeal or 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.

m. Timing of Payment – 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.

n. 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 years away. It should be recalled that 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.

o. Late Claims – After the October 15, 2014 deadline had passed, some Class Members submitted claims directly to the Bank.

p. Our firm continued to receive calls from Class Members. Our people – including Mr. Pakozdi – were instructed to tell Class Members that their

claims were late but that they could still submit them. We encouraged Class Members to submit their claims and provide us with the reasons why the claim was submitted late so that those reasons could be passed on to the Bank. Class Counsel submitted various such claims to the Bank on behalf of Class Members.

q. Once we began to receive copies of some of the Bank's responses to claims, it appeared that the Bank had rejected all late claims, so we advised Class Members thereafter that their claims would likely be rejected but, again, we encouraged them to submit their claims to us as soon as possible and to provide the reasons to explain why the claims were late. We never guaranteed any Class Member that his or her late claim would be accepted or paid.

r. Class Counsel was aware that there was no guarantee that any such rejected late claim 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, take notice of or have notice of the settlement until after the initial deadline.

s. As set out in our Amended Notice of Motion, the Plaintiff sought on her Motion challenging the Bank's processes, 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.

t. It seemed to us (Class Counsel) that 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.

u. 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.

v. 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.

w. A 2.5 month blanket extension for late claims seemed to be a significant and reasonable compromise. We 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. A 2.5 month period seemed to be a reasonable general extension. In regard to the length of extensions, we had regard to 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 2 weeks after the original November 28, 2014 deadline.

x. 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.

y. 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 2 Class Members from the fees otherwise payable to Class Counsel as part of this revised settlement.

z. **Ineligible Positions –** 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.

aa. 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.

bb. **Incomplete Claims –** 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.

cc. We understood that the Bank had inquired of such claimants to provide further information but none was forthcoming. We 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.

dd. **No Appeals –** 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 proposed revised settlement.

Exclusions from the Revised Settlement

49. As set out above, the vast majority of claimants will receive 50% or more of their original claims as part of this revised settlement.

50. 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 proposed revised settlement). The motion record for leave to allow those former Class Members to opt-back into this proceeding was prepared and is available for this Court's review;

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 employees - $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.

Contact with the Representative Plaintiff

51. In late 2014 and throughout 2015, Class Counsel has been in contact with Cindy Fulawka regarding the information from Class Members regarding the responses to claims, the motion to challenge the response process, the Bank's motion for an extension, the evidence gathered, the status of conferences with Justice Belobaba, the preparation for and attendance at the mediation. As noted above, we were in contact with Ms. Fulawka by telephone during the mediation.

52. Class Counsel has sought input from Ms. Fulawka on the steps referred to above. Ms. Fulawka indicated prior to the mediation that the creation of a significant fund of money by the Bank with distribution in some reasonable manner in the

near future seemed to be the best outcome in the circumstances. Ms. Fulawka did not see the advantage to spending many more years fighting with the Bank (which she has done for over 8 years now) with the continuing risks and with the possibility that, even if the challenge to the response processes was successful, the Class Members might then face some form of individual and potentially time consuming evaluation or appeal process.

53. As noted above, Ms. Fulawka supports this proposed revised settlement. An email from Ms. Fulawka, confirming her earlier comments to us in that regard, is attached hereto as Exhibit "O". Ms. Fulawka would have preferred to attend the approval motion in person but she lives in a smaller town in Saskatchewan and her health and mobility are not strong. She extends her apologies and thanks to this Honourable Court.

Notice of Revised Settlement & Responses/Submissions from Class Members

54. 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 5, 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. We were advised by the Bank's counsel that any claimant who had difficulty with the email distribution and

contacted the Bank received a hard copy by mail and courier. 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. A copy of the court-approved notice of revised settlement approval is attached to this affidavit as Exhibit "P".

55. Class Counsel has received written submissions from Class Members who indicated that their written submissions should be forwarded to the Court and the Defendant Bank. Copies of the submissions received to date are attached as Exhibits "Q" through "FF".

Class Counsel's Recommendation on the Revised Settlement

56. 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.

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

58. While we felt that we had a good challenge to the Bank's processes, the challenge would have taken considerable time with uncertainty of result. Even if the Plaintiff was successful on that challenge and upheld on appeal, the remedy was uncertain. Class Members may 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.

Class Counsel's Fees

59. Class Counsel spent significant time since 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. Those fees total approximately $1.1 million to date.

60. Class Counsel incurred approximately $114,000 in disbursements in the same context.

61. A copy of Class Counsel's bill of costs for time rendered from November 7, 2014 (the date the Bank requested an extension of the deadline to respond to claims) to February 29, 2016 is attached to this affidavit as Exhibit "GG". Class Counsel rendered additional fees from the original settlement approval (August 12, 2014) to November 6, 2016. Much of those fees were more in the nature of settlement administration and total in excess of $120,000.

62. The fees and disbursements incurred since November 7, 2014 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. Indeed, when the initial 2014 Settlement was negotiated and approved, Class Counsel did not and could not anticipate that we

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

63. These additional fees and disbursements were incurred without any guarantee 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, we faced years of potential litigation and risk.

64. 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.

65. 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 day 2 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.

66. 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.

67. 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 to Class Counsel for the 2014 Settlement;

    c. $20.6 million under the proposed resettlement; and

    d. $2.3 million (or $2.19 million plus disbursements) for Class Counsel fees for the proposed resettlement.

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

68. The payment of Class Counsel's fees was negotiated at the mediation separately from the balance of the proposed revised settlement agreement. I estimate that less than 10 minutes (and perhaps less than 5 minutes) of the time spent by Class Counsel with Mr. Adams at the two-day mediation was spent on the issue of fees. We had 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.

69. 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 further delay, efforts or deduction for fees.

SWORN BEFORE ME)
At the City of Toronto in)
the Province of Ontario,) *Original Affidavit Sworn By Adam Dewar*
this 1st day of March, 2016) _____
) J. Adam Dewar
_____)
A Commissioner, etc.)