FOCUS ON
CLASS ACTIONS

How will *Fulawka* affect overtime cases?

Courts may be more willing to certify following high-profile settlement

BY ARSHY MANN
Law Times

After seven years of waiting, one of the high-profile overtime class actions has finally come to a resolution.

In August, the Ontario Superior Court of Justice approved what could be a $95-million settlement in *Fulawka v. The Bank of Nova Scotia*. The development makes it the first of a series of overtime class actions to reach a settlement.

Fulawka began in 2007 and formed part of a trilogy of cases the Ontario Court of Appeal ruled on in 2012 in which it set out the ground rules for when the court would certify overtime class actions. The Supreme Court of Canada denied The Bank of Nova Scotia leave to appeal the certification decision in 2013, but the parties reached a settlement before a trial took place.

The 16,000 class members will be able to make claims for unpaid overtime going back as far as 13 years.

Monique Jilesen, a partner with Lenczner Slaght Royce Smith Griffin LLP, says that since none of the overtime cases has made it to trial, class action lawyers still don't have much in the way of guidance when it comes to rulings of fact.

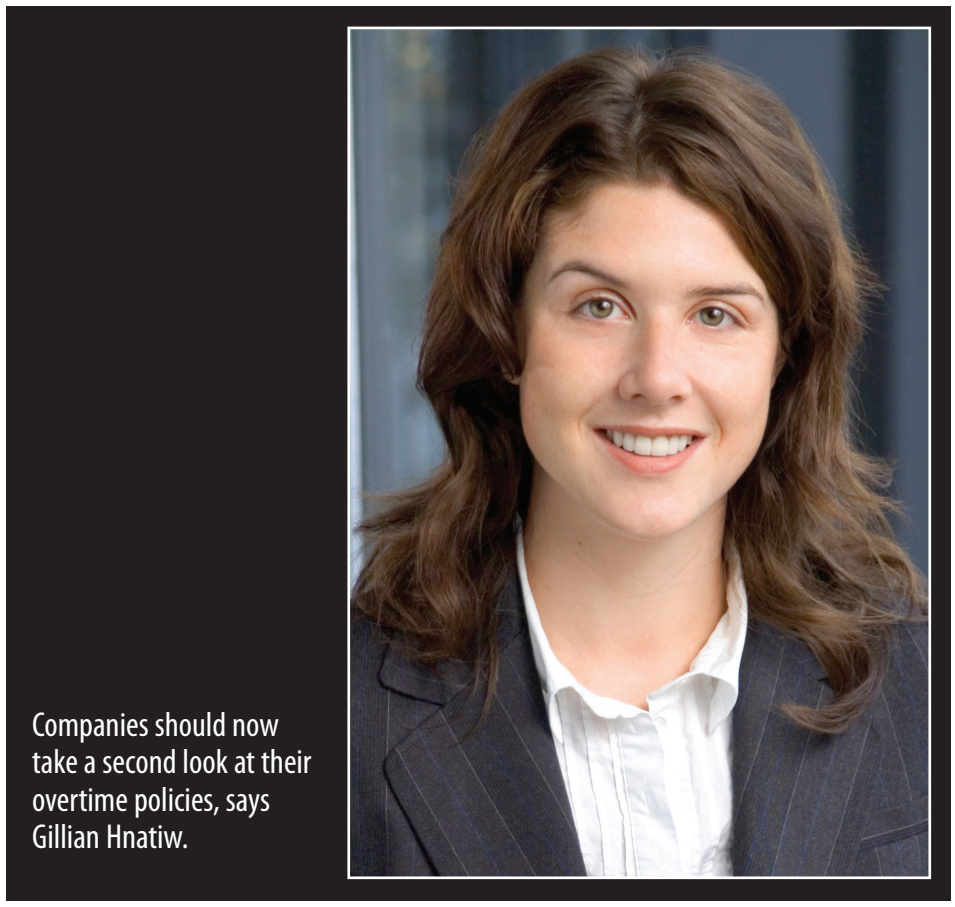
"There's been no determination on the merits in any of them as to whether or not the companies are in compliance with the Employment Standards Act because they're all certification cases," she says.

"When you think about it, it's quite astounding, actually, that there's been litigation for all of these years and yet no determination made on the merits with respect to any of them."

The trend of overtime class actions began in the United States with a number of cases against large employers, especially companies in the retail and food service industries. In Canada, the cases have largely involved two categories of claims: misclassification and off-the-clock duties.

The misclassification cases involved allegations that classes of people the company had deemed to be managers actually did the work of employees and should therefore qualify for overtime.

"It's one thing how an employer labels a group of employees and it's another what their duties and responsibilities actually consist of," says Gillian Hnatiw, a partner at Lerners LLP.



Companies should now take a second look at their overtime policies, says Gillian Hnatiw.

The off-the-clock cases have to do with companies that have policies requiring employees to get permission from a manager to work overtime.

"So plaintiffs said those policies were not practical or fair and unlawful, and that was a common issue because if you had to stay another 15 minutes to finish helping a client, you couldn't seek preapproval from your manager on that but you ought to be entitled to the overtime," says Jilesen.

The Ontario courts have generally been more willing to certify the off-the-clock cases because plaintiffs can point to a common policy that affected a group of employees. Along with *Fulawka,* which was primarily an off-the-clock case, the Court of Appeal also certified *Fresco v. Canadian Imperial Bank of Commerce*.

The misclassification cases encounter more difficulty at the certification stage because the potential class members often have a variety of job titles and responsibilities, a fact that makes it more difficult to prove they share common characteristics.

The courts have so far denied certification in two misclassification cases: *McCracken v. Canadian National Railway* and *Brown v. Canadian Imperial Bank of Commerce*. In another, *Rosen v. BMO Nesbitt Burns Inc.*, the court certified the action.

"The evidence indicated that individualized assessments of the job duties and responsibilities of class members would be needed to determine if they were properly classified," wrote the then-Ontario chief justice Warren Winkler in ruling against the plaintiffs in *McCracken.*

Hnatiw suspects defence lawyers may approach overtime cases, especially the off-the-clock variety, with different tactics in the future.

"For a long time, the certification battle has been the seminal battle in any of these actions, and upon certification, the hope is that you'll move forward quickly to settlement," she says.

"But I have heard rumblings that some corporations may be re-evaluating that strategy and instead of trying to resist certification with a scorched-earth approach, perhaps they'll be quicker to agree to certification on certain issues or on certain terms."

The hope, she says, would be to reach better common issues by negotiation and then defend them on the merits since "it seems the court is more and more inclined to certify and at least allow these cases to clear that threshold test."

The facts of the individual cases will still be a paramount consideration for the courts, but in matters where the circumstances are similar to *Fulawka,* Hnatiw expects the courts to be more willing to certify.

"If you have another case where a class of fairly homogenous employees were the subject of a fairly clear-cut policy, then you may see parties in the future spending less time fighting about certification and move on to the merits more expeditiously," she says.

In light of the *Fulawka* settlement, Hnatiw says companies should take a second look at their policies to avoid any possible future litigation.

"I think they need to think about how their overtime policies work in practice and not just on paper," she says.

"If your policy consists of a lot of red tape, you might want to re-evaluate that at this point because that red tape can act as an effective deterrent to employees in obtaining what is their fair compensation for time worked." LT

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