



## Leave to appeal certification decision in overtime class action granted

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A [recent decision](#) of the Ontario Divisional Court has granted leave to the Bank of Nova Scotia to appeal the [certification decision](#) which had certified a class action for overtime payments brought on behalf of current and former retail banking employees for overtime payments they alleged were owing to them.

### Background

The Bank of Nova Scotia (Scotiabank) moved for leave to appeal the decision of Justice Strathy in the Ontario Superior Court (see previous blog post for [summary](#)) on the grounds that the decision directly conflicted with the decision of Madam Justice Lax in [Fresco v. Canadian Imperial Bank of Commerce](#) (*Fresco*) on matters involved in the proposed appeal, and on the grounds that there was good reason to doubt the correctness of Justice Strathy's decision and the proposed appeal involved matters of such importance that the appeal should be granted.

The overtime policy at Scotiabank required that overtime be requested in advance and there was no policy that permitted approval of overtime after the fact. The plaintiff claimed that the routine of unpaid overtime was a breach of the Class Members' employment contracts and that it also breached the provisions of the [Canada Labour Code](#), R.S.C. 1985, c. L.2 (the Code). The plaintiff further claimed for unjust enrichment, breach of duty of good faith and negligence. The damages claimed were in the amount of \$250,000,000 and an additional \$100,000,000 in punitive, aggravated and exemplary damages.

### Leave to appeal granted

The Test for Leave to Appeal is set out in Ruler 62.02(4) of the [Rules of Civil Procedure](#) and states that Leave shall not be granted unless either (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

Justice Greer granted Scotiabank's request for leave to appeal the certification decision on both grounds stating that although the Plaintiff had argued that she should not deliver a decision that this case and *Fresco* were conflicting and that she should wait for the full panel of the Divisional Court to render its decision on the appeal in *Fresco* (which at the time of this decision was in reserve), each case moves at

is own pace and Justice Strathy's decision in the court below in this case and the decision in *Fresco* were indeed conflicting. Her Honour based this finding on the fact that the common issues in both of the proposed actions substantially overlapped and were so similar that "leave must be granted."

Her Honour stated:

Her Honour noted that the issue of implying terms of good faith and negligence into employment contracts had an overall impact in class actions such as this, that the role of the Code in such contractual matters was of general importance to labour law, and finally that the impact of Justice Strathy's decision certifying the class action against Scotiabank was one that transcended the overtime issue raised against one bank – it affected all businesses where companies have relied on its written policies where the Code applied and which had overtime policies. "If the Judge erred in his findings on this issue, it would be an error of law...In my view, there is good reason to doubt the correctness of the decision...[and] the matters raised in this Motion for Leave are of such importance that Leave should be granted."

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