

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SHAKYA ABEYWICKRAMA

Plaintiff

– and –

THE BANK OF NOVA SCOTIA and
SCOTIA MORTGAGE CORPORATION

Defendants

) Adam Tanel, Elie Waitzer, Laura Clerk,
) Vadim Kats, and Nicole Taylor for the
) Plaintiff

) Paul-Erik Veel, Meghan S. Bridges, and
) Blerta Gjoci, for the Defendants

) **HEARD:** May 5, 2026

LEIPER, J.

REASONS FOR DECISION

Proceeding under the *Class Proceedings Act*, 1992

I. INTRODUCTION

[1] The plaintiff, Ms. Abeywickrama, moves for certification of a proposed class action arising from the defendants’ (“Scotia”) practice of automatically renewing residential mortgages at maturity and charging allegedly unlawful interest rates and penalties.

[2] Ms. Abeywickrama alleges that:

1. The *Interest Act*, RSC 1985, c I-15 applies to the defendants;
2. The defendants have been systematically breaching s. 8 of the *Interest Act* since August 2015;
3. The defendants breached their contracts with the class members;
4. The provisions in the contracts that provide for automatic renewal are unconscionable; and

5. The defendants have been unjustly enriched.

[3] Ms. Abeywickrama also moves to strike portions of the expert report of Dr. Courchane filed by Scotia because it is inadmissible opinion evidence on questions of domestic law.

[4] Scotia submits that the plaintiff does not have a viable cause of action linked to s. 8 of the *Interest Act*, breach of contract or unconscionability. Scotia submits that the class size is overbroad and should take into account the applicable limitation periods. Scotia submits there is no workable methodology for aggregate damages. Scotia also submits that a class action is not the preferable procedure for class members who have mortgage complaints against the bank.

[5] For the reasons that follow, I conclude that Dr. Courchane's report is admissible as evidence as to the bank's perspective relative to mortgages and the practice of autorenuals of mortgages. I accept its limitations and will not consider the opinion as evidence as to how to approach the statutory interpretation questions that the parties have raised on this motion.

[6] I conclude that Ms. Abeywickrama has met the test for certification and certify the class action in accordance with these reasons.

II. BACKGROUND

The Bank's Amendment Clause and the Impugned Automatic Renewal of Residential Mortgages

[7] Ms. Abeywickrama brings this action because of Scotia's practice of including a clause in its standard form contracts, which allows it to renew Scotia mortgages into a six-month closed mortgage at its "posted" rate, for those borrowers who do not pay out their mortgage at maturity, or who fail to negotiate an alternative arrangement with Scotia.

[8] Ms. Abeywickrama alleges that the six-month closed mortgage rate differential is often extreme – sometimes more than double the prior rate. By virtue of being a closed mortgage, borrowers who arrange for less expensive financing cannot discharge their auto renewed Scotia mortgages during the six months closed term, without paying a penalty.

[9] Scotia offers residential mortgages that are governed by a contract of adhesion set out in three standard form documents:

- (a) Personal Credit Agreement,
- (b) Companion Booklet, and
- (c) Standard Charge Terms (collectively, the "Contract").

[10] The term in issue, entitled "Amendments, Extension or Renewals" (the "Amendment Clause") applies to each Scotia residential mortgage across Canada. It has been in place since at

least 2015. The Amendment Clause provides that if a borrower does not repay the money owing to Scotia under their mortgage in full or enter into a renewal agreement by the maturity date, Scotia will "automatically renew" their mortgage into a fixed rate six-month closed term mortgage at Scotia's posted interest rate. It reads:

Amendments, Extensions or Renewals

[...]

You agree to pay all money owing under any Personal Loan at the end of the term (referred to as the "maturity date") or, if we have offered to renew your Personal Loan, to enter into a renewal agreement with us on or before the maturity date. If you do not, provided that we have not advised you that we will not renew your Personal Loan, you agree that (i) any Personal Loan that is a mortgage loan will be automatically renewed into a fixed rate six month closed term at our posted rate with a Scotiabank Flexible Mortgage option (as described in this Booklet) unless we have indicated otherwise in the renewal agreement (a copy of which we will provide to you)

[11] Ms. Abeywickrama alleges that this unlawful practice affects thousands of borrowers annually. She submits that Scotia's practice contravenes s. 8 of the *Interest Act: Elle Mortgage Corporation v. Sihota*, 2021 ONSC 1593, 16 B.L.R. (6th) 105, at paras. 26-32; *Brookstreet MIC II Inc. v. Dawson*, 2020 ONSC 3, at para. 45; *We Care Funding Limited Partnership v. 1569635 Ontario Limited*, 2023 ONSC 5658, 54 R.P.R. (6th) 89.

[12] Ms. Abeywickrama tendered evidence to establish that Scotia is the only lender out of the "Big Five" Canadian banks that automatically renews borrowers into closed term mortgages. RBC, TD Bank, CIBC, and BMO automatically renew mortgages into open term mortgages of varying term lengths. Borrowers with these banks do not incur prepayment charges if they switch to a different mortgage lender before their term is up.

The Representative Plaintiff, Shakya Abeywickrama, and the Scotia Renewal

[13] Ms. Abeywickrama and her husband entered into a five-year closed fixed rate mortgage at a 3.34% interest rate with Scotia to buy their first home in Saskatoon in 2018.

[14] As the August 22, 2023 maturity date approached, Ms. Abeywickrama decided not to renew with Scotia: she had obtained more favourable terms from another lender.

[15] In or about June 2023, Ms. Abeywickrama advised Scotia that she did not plan to renew her mortgage with the bank. On or about July 21, 2023, Ms. Abeywickrama and her husband signed a payout request authorizing her preferred mortgage lender to take all steps to discharge the 2018 mortgage by paying all money owing under the mortgage prior to its maturity date.

[16] Scotia telephoned Ms. Abeywickrama to remind her of her mortgage maturity. It also sent her a letter on July 18, 2023, as required by banking legislation, which set out the mortgage maturity date, her options at end of term and described the automatic renewal provision.

[17] Ms. Abeywickrama signed a mortgage payout request form in July; however, Scotia did not receive that request until August 17, 2023. On Monday, August 21, 2023, at 12:01 pm, Scotia notified her preferred lender that it could not process the payout request, because it was unable to

verify the signatures for Ms. Abeywickrama and her husband. The mortgage was not paid out at maturity.

[18] On August 22, 2023, without further notification to Ms. Abeywickrama, Scotia automatically renewed the 2018 mortgage into a fixed rate six-month closed term at an interest rate of 7.75%. This meant that her monthly payments increased by 42%.

[19] Upon finding out about the automatic renewal, Ms. Abeywickrama took immediate steps to discharge the mortgage and change lenders. During the time it took to discharge the Scotia mortgage, Ms. Abeywickrama made the first monthly payment to Scotia. In order to discharge the six-month autorenewed mortgage, Ms. Abeywickrama paid the stipulated penalty to Scotia of \$5,456.94.

[20] Ms. Abeywickrama complained to Scotia about this practice. Scotia's Customer Complaints Appeals Office ("CCAO"), refused to reimburse Ms. Abeywickrama for the interest she paid under the autorenewed mortgage or the penalty payment. After the Banking Ombuds Office recommended a resolution, Scotia offered Ms. Abeywickrama a good faith payment of \$1,100, conditional on her signing a release. Ms. Abeywickrama rejected that offer.

Class Member Brent Mooney and the Scotia Mortgage Renewal

[21] Another Scotia borrower, Brent Mooney, swore an affidavit in support of the certification motion which describes his experience with the auto renewal practices adopted by Scotia.

[22] On November 14, 2019, he entered into a five-year closed fixed rate mortgage at a 2.79% interest rate with Scotia.

[23] In 2024, Mr. Mooney decided against renewing his Scotia mortgage because he had obtained more favourable terms from another lender.

[24] A Scotia representative wrote to Mr. Mooney in May of 2024 to provide renewal information. Scotia representatives made seven attempts to reach him in the next several months to discuss renewal, however he did not respond to those requests.

[25] In early November 2024, Mr. Mooney instructed his mortgage broker to request a payout statement from Scotia to discharge the Scotia mortgage prior to its maturity date on November 14, 2024.

[26] On November 11, 2024, Mr. Mooney's mortgage broker informed him of a delay in obtaining the payout statement. Mr. Mooney emailed Scotia with written instructions to renew the Scotia mortgage into an open term to avoid penalties in the event that he could not discharge his mortgage on the maturity date. Mr. Mooney's representative at Scotia was out of the office and had placed an out-of-office message on her email. Mr. Mooney did not contact anyone else at the bank after sending the email requesting renewal into an open-term mortgage.

[27] On November 14, 2024, Scotia automatically renewed Mr. Mooney's mortgage into a fixed six-month closed mortgage at a rate of 7.85%. The autorenewal rate was higher than the rate he had obtained from the other lender.

[28] Mr. Mooney took steps to discharge the Scotia mortgage and changed lenders. During the time it took to discharge the Scotia renewal mortgage, Mr. Mooney made multiple mortgage payments at the higher rate to Scotia. He then paid Scotia \$7,049.11 in penalty charges to discharge the Scotia renewal mortgage.

[29] Mr. Mooney complained to Scotia. On December 27, 2024, the Scotia complaint office denied Mr. Mooney's request for reimbursement of the interest and the penalties he paid.

Scotia's Position on Certification: The plaintiff cannot meet the test on certification

[30] Scotia submits that the plaintiff's claim is defective because it discloses no cause of action, and no basis in fact for the existence of the proposed common issues. Scotia submits that its autorenewal provisions are common and benefit its customers. This is because borrowers rarely pay their residential mortgages in full after a single term. Further, customers often fail to take steps to discharge or renew their mortgage before the maturity date. If there was no autorenewal, those customers would default on their loans, negatively affecting their credit scores and increasing their costs of future borrowing. Scotia submits that its automatic renewal provisions protect borrowers from such outcomes and points out that this is a long-standing practice across Canada's Schedule I banks. Further, Scotia submits that the practice is consistent with the regulatory framework set out in the *Bank Act* and has not attracted regulatory attention or criticism.

[31] Scotia tendered an expert report from a mortgage industry consultant, Dr. Courchane, to support its submission that Scotia's autorenewal provisions protect consumers from falling into default on their residential mortgages.

[32] The plaintiff takes issue with part of the expert report, submitting that Dr. Courchane has given evidence on the interpretation of Canadian domestic law, which is inadmissible.

The Interpretation of Section 8 of the *Interest Act*

[33] Scotia's alleged breach of s. 8 of the *Interest Act* is the linchpin for the plaintiff's cause of action. Ms. Abeywickrama concedes that if she cannot establish some basis in fact for the existence of this cause of action, the court cannot certify her action. As a result, I consider first the purpose and interpretation of s. 8 in the context of autorenewals of mortgages before analyzing the issues on certification.

[34] Section 8 provides:

No fine, etc., allowed on payments in arrears

8 (1) No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

Interest on arrears

(2) Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.

[35] The Supreme Court has provided guidance on the purpose and the application of s. 8 of the *Interest Act* in *Krayzel Corp v Equitable Trust Co.*, 2016 SCC 18, [2016] 1 S.C.R. 273.

[36] Section 8 protects landowners from charges “that would make it impossible for [them] to redeem, or to protect their equity”: *Krayzel*, at para. 21. Historically, this provision appears to have originated in 1880 from a concern that farmers could become trapped by loans that included unclear fines for arrears of mortgages on farm properties: *Krayzel* at para. 19, citing *Reliant Capital Ltd. v. Silverdale Development Corp.*, 2006 BCCA 226, 270 D.L.R. (4th) 717, at para. 48, leave to appeal refused, [2006] S.C.C.A. No. 265.

[37] Section 8 describes three classes of prohibited charges that may have the effect of increasing the charge on arrears: a “fine”, a “penalty” or a “rate of interest.”

[38] As such, s.8 limits the freedom to contract on rates of interest provided for under s. 2 of the *Interest Act*. Section 2 permits parties to contract for “any rate of interest or discount,” subject to what is “otherwise provided by this Act or any other Act of Parliament” (emphasis added).

[39] Accordingly, s. 2 must be read along with the restriction imposed by s. 8 upon the rate of interest on a loan secured by a mortgage: *Krayzel*, at para. 26.

[40] An increase in an interest rate on a mortgage that is triggered by a default will infringe s.8, in contrast to an increase that occurs simply because of the passage of time: *Krayzel*, at para. 33. In the circumstances of *Krayzel*, the Supreme Court found that where such an increase arose from the use of “discounts” to incentivize punctual payment, this may be a breach of s. 8 if the trigger is a default rather than the passage of time: *Krayzel*, at para. 31.

[41] Ontario courts have applied the *Krayzel* principles across a range of lending scenarios, where loans are secured by mortgages on real property.

[42] In *Walia v. 2155982 Ontario Inc.*, 2019 ONSC 1059, aff’d 2020 ONCA 493, 448 D.L.R. (4th) 125, the court heard a motion for summary judgment that included the issue of the enforceability of a mortgage that provided for an increase in interest rate from 12 to 21% in these terms:

The mortgage will become due and payable at the end of the term, failing which or in default of any payment interest rate of interest will be 21% per annum.

[43] The motion judge decided that either a default of a monthly payment or non-payment of the principal at term triggered an increased interest rate, and as a result, the term offended s.8 of the *Interest Act*: *Walia*, at paras. 36-38.

[44] The motion judge found that “arrear” as used in s. 8 of the *Interest Act* could refer to either a missed monthly payment or to unpaid principal when due at maturity: *Walia*, at paras. 34-36.

[45] The Court of Appeal for Ontario upheld the motion judge. The Court of Appeal wrote that “on a plain reading of the condition, there can be no doubt that the increase from 12 percent to 21 percent is triggered as a result of the nonpayment of the mortgage on the expiry of its term, which is a default. We agree with the motion judge that the condition contravenes s. 8 and is invalid”: *Walia v. 2155982 Ontario Inc.*, 2020 ONCA 493, 448 D.L.R. (4th) 125, at para. 22.

[46] *Walia* was not an autorenewal case, however it is authority for a finding that where a mortgage loan bears an increased interest rate that is triggered by a default arising from nonpayment of the mortgage on the expiry of its term, s. 8 of the *Interest Act* applies: *Walia*, at para. 22.

[47] In *Sihota*, the respondent established that a mortgage term that deemed a mortgage to renew automatically at a higher cost breached s. 8 of the *Interest Act*: *Sihota*, at paras. 26-32. The application judge reasoned that at the instant the mortgage matured but remained unpaid by the mortgagor, this amounted to a default which triggered the increase. The application judge gave s. 8 of the *Interest Act* a broad and liberal construction, to further the objects of the *Act* as consumer protection legislation: *Sihota*, at paras. 28 and 30.

[48] Recently, in a 2025 decision of the British Columbia Supreme Court, the court applied *Krayzel* and *Walia* to a mortgage that provided for a renewal fee and higher interest rate upon nonpayment of the mortgage on maturity. In *Five Peaks Capital Ltd. v. Global City Properties (Cottonwood) Ltd.*, 2025 BCSC 1726, the trial judge reviewed the principles that emerge from those decisions at para. 29:

1. Focus on substance over form: What counts is how the impugned term operates, and the consequences it produces, irrespective of the label used (para. 25). In practice, a clause is not saved from s. 8 merely because it’s structured as a reward for performance rather than a penalty for default.
2. Both penalties and discounts may offend s.8: Section 8 applies both to discounts (incentives for performance) as well as penalties for non-performance whenever their effect is to increase the charge on the arrears beyond the rate of interest payable on principal money not in arrears (para. 31).

3. Legitimacy of purpose does not save the clause: “Inquiring into the ‘legitimacy’ of the purpose underlying an arrangement that offends s. 8 not by its purpose but by its effect undermines Parliament’s clearly expressed intent (para. 32).
4. Distinction between time-based increases and default-based increases: An interest rate increase triggered by the mere passage of time, rather than default, does not offend s. 8 (para. 33).

[49] The trial judge found that the higher rate stipulated by the lender to apply on the date the mortgage was due if not paid in full, breached s. 8 of the *Interest Act*. As a matter of substance, “the trigger was the borrower’s failure to repay the loan when due, resulting in a default, and the increased rate was to be imposed on the arrears. Under *Krayzel*, such a default-based increase falls squarely within s. 8’s prohibition”: *Five Peaks*, at para. 72.

III. ISSUES

[50] There are two issues:

- A. Should any portions of Dr. Courchane’s report be struck as inadmissible opinion evidence?
- B. Has the plaintiff met the test for certification under the *Class Proceedings Act*, 1992?

IV. ANALYSIS OF THE ISSUES

A. Should any portions of Dr. Courchane’s report be struck as inadmissible opinion evidence?

[51] The plaintiff moves to strike a portion of Scotia’s expert witness, Dr. Marsha Courchane’s report. The parties agree upon the legal principles for the admission of expert evidence. Expert evidence is admissible where:

- (a) the evidence is logically relevant,
- (b) the evidence is necessary to assist the trier of fact,
- (c) no other exclusionary rule applies, and
- (d) the expert is properly qualified.

[52] Scotia tendered a report from Dr. Marsha Courchane, an expert in the mortgage industry in the United States and Canada. Dr. Courchane has conducted research and written articles and papers that deal with the Canadian mortgage and housing markets. Since 2003, she has served as

an economic consultant, including as a consultant for financial institutions who undergo regulatory examinations. The plaintiff does not challenge her qualifications to give evidence on matters related to mortgage lending in Canada and the United States.

[53] Scotia asked Dr. Courchane to answer various questions about the mortgage lending industry, automatic renewals, and the mortgages at issue in this litigation.

[54] The plaintiff seeks to exclude a portion of Dr. Courchane's opinion in responding to two of the questions in her report, questions 5 and 6:

5. From an economic perspective, would another mortgage lender in Canada consider a mortgage that was auto renewed based on the terms set out in Scotiabank's documents to have gone into arrears at any point, and if so, at what point?

6. The Supreme Court of Canada has held that "the purpose of Section 8 (of the *Interest Act*) is to protect landowners from charges "that would make it impossible for them to redeem, or to protect their equity." From an economic perspective to what extent would an automatic renewal provision of the kind included in the mortgages of Ms. Abeywickrama and Mr. Mooney offend that purpose?

[55] The plaintiff submits that in responding to questions 5 and 6, Dr. Courchane gave impermissible opinion evidence on how the court should interpret s. 8 of the *Interest Act*. Expert witnesses may not give opinions on questions of domestic law because such evidence fails to meet the threshold requirement for admissibility: *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 40; *Canada (Board of Internal Economy) v. Canada (Attorney General)*, 2017 FCA 43, 412 D.L.R. (4th) 336, at para. 18; *Heyworth v. Doyle Plumbing Heating and Cooling*, 2022 ONSC 677, at para. 60, *aff'd* 2023 ONCA 754.

[56] I conclude that Dr. Courchane did not provide an expert opinion on questions of domestic law. In her report, Dr. Courchane is careful to confine her opinion to the perspective of a mortgage lender. She explicitly states that she is "not in a position to opine on this question from a legal perspective". I accept that limitation in her evidence.

[57] Dr. Courchane's opinion explains how banks view auto renewed mortgages in relation to arrears. She explains that mortgage lenders do not consider mortgages that are not paid on maturity to be in arrears or to have defaulted, as long as the borrower made their payments under the mortgage and under any auto renewed mortgage. Banks view this as a seamless transaction without "arrears" that could trigger enforcement measures.

[58] This gives some context to why this is a common practice. It could be relevant at trial to the question of punitive damages, depending on the trial findings, and the evidence produced after discovery.

[59] At this stage of the proceedings, I conclude that the Courchane expert evidence is marginally relevant and only as evidence of context and the bank's perspective. I do not receive the Courchane opinion in response to question 5 as evidence bearing on the interpretation of the *Interest Act*.

[60] At question 6, Dr. Courchane discusses whether autorenewal could make it impossible for a borrower to redeem or protect their equity from an "economic perspective." To respond to that question, Dr. Courchane assumes that the plaintiff relies on the text of s. 8 of the *Interest Act* and the purpose of s. 8 which Dr. Courchane received from Scotia's counsel as provided by the Supreme Court of Canada.

[61] The opinion considers a range of borrowers who might have their equity put at risk, including those who struggle to make their mortgage payments, or those who have missed payments. Dr. Courchane describes the beneficial outcomes arising from autorenewal, including avoiding what the lending industry would see as a true default, impacts on a borrower's credit score and similar outcomes from a mortgage that falls into arrears that lasts 90-days or longer.

[62] Dr. Courchane confines her opinion to the variety of economic consequences that can flow from a default as applied to different borrowers' circumstances, and how autorenewal can be viewed as advantageous to both the borrower and the lender. While this evidence may inform the bank's intentions, as the *Five Peaks* decision illustrates, I must be careful not to conflate "legitimacy of purpose" evidence with the question of whether there is some basis in fact for the issue of whether Scotia's auto renewal clause in the Contract violates s. 8 of the *Interest Act*.

[63] I find that this section of Dr. Courchane's opinion falls within the permissible scope of expert evidence, so long as I am careful to keep its use and limits in mind in analyzing the issues for certification.

[64] While Dr. Courchane cites the purpose of the *Interest Act* in the section, she states this as an assumption given to her by counsel. She applies her opinion to the question of whether mortgage lenders, not the court, would consider mortgages that are auto renewed to be in arrears.

[65] The plaintiff submits that this portion of the report is simply "a reworking of the Defendants' legal argument dressed up as an "economic perspective". Although Dr. Courchane states she cannot provide a legal opinion on whether the plaintiff's mortgage principal went into "arrears" on the maturity date for the purposes of s. 8, her opinion agrees with Scotia's counsel's hypothetical from the perspective of a mortgage lender.

[66] It is true that the defendants have argued and will defend the action at trial on the basis that the automatic renewal avoids arrears because the bank renews its chosen borrowers' mortgages at the point of default. If there are no arrears, then Scotia submits that s. 8 does not apply to these renewal arrangements.

[67] However, as the plaintiff points out, this argument represents a substantive defence on the merits which cannot be determined at certification. At trial, the plaintiff will argue that the *Interest*

Act is remedial legislation which demands a focus on substance over form. In the plaintiff's submission, the fact that Scotia or any other mortgage lender deems a putative Class Member's mortgage to have been "renewed" immediately upon maturity does not alter the fact that Scotia's unilateral right to impose higher interest rates is triggered by the class member's non-payment of the principal at maturity. The bank's perspective is not determinative: that is the task for the court engaged in the exercise of statutory interpretation.

[68] To conclude, while ensuring that the evidence of the bank's economic perspective is not equivalent to the correct statutory interpretation of s. 8 of the *Interest Act*, I find that the impugned portions of the Courchane report are admissible, although given the issues at certification, this evidence is of limited probative value.

B. Has the plaintiff met the test for certification under the Class Proceedings Act, 1992?

The Legal Framework for Certification

[69] For a class proceeding to be certified, the plaintiff must show that:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims of the class members raise common issues of fact or law;
- (d) a class proceeding is the preferable procedure; and
- (e) there is an appropriate representative plaintiff.

Class Proceedings Act, 1992, SO 1992, c 6, s 5(1). (the "CPA")

[70] The test for whether the plaintiff has successfully pleaded a cause of action is the "plain and obvious" test applicable on a motion to strike: *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 63.

[71] At this stage, the Court considers the pleadings – the facts of which are presumed to be true – and is not permitted to consider evidence: *Pro-Sys Consultants*, at para. 63. As an exception, the parties may rely on documents referred to in a pleading that are incorporated into the pleading by reference: *McCreight v Canada (Attorney General)*, 2013 ONCA 483, 116 O.R. (3d) 429, at para 32; *Del Giudice v Thompson*, 2024 ONCA 70, 169 O.R. (3d) 731, at paras 17-18, leave to appeal to S.C.C. refused, 41202 (September 19, 2024).

[72] Where a claim is "doomed to fail" it is critical to the viability of civil justice that the court dispose of such claims at an early stage in the proceedings: *Atlantic Lottery Corp v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 19.

[73] For the other criteria, the plaintiff must show “some basis in fact” that the common issues asserted exist. The plaintiff must present evidence to support certification, and the opposing parties may challenge that evidence: *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras 22–25; *Tonn v Sears Canada Inc.*, 2016 BCSC 1081, at para 28. This is intended to be a meaningful screening exercise, without becoming a trial in advance or resolving merits questions: *Gifford v. Air Canada*, 2025 ONSC 3335 at para. 46; *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606 at para. 71.

[74] I will review each of the criteria within s. 5 of the *CPA* and discuss the parties’ positions on each of them, beginning with s. 5(1)(a).

Section 5(1)(a): Do the pleadings disclose a cause of action?

[75] The plaintiff alleges three causes of action:

1. breach of s. 8 of the *Interest Act*, with a corresponding right to seek damages under s. 9 of the *Interest Act*;
2. breach of contract, based on Scotia’s standard form contract documents and a pleaded term that those contracts would comply with applicable law;
3. unjust enrichment by virtue of the interest charged under the automatic renewals, and the prepayment penalties charged for borrowers who seek to redeem early under those automatic renewals.

[76] Scotia submits that it is plain and obvious that the claim cannot succeed based on the plaintiff’s alleged breach of s. 8 of the *Interest Act*, because the term “arrears” used in s. 8 does not apply in the circumstances of an auto renewed mortgage by a bank.

[77] Scotia submits alternatively, that the structure of the automatic renewal program, even if it creates technical “arrears” and falls under s. 8, cannot be found to have breached s. 8.

[78] I begin with Scotia’s submission that there are no arrears on automatically renewed mortgages and that s. 8 of the *Interest Act* does not apply, such that this action cannot succeed.

Is it “plain and obvious” that s. 8 of the *Interest Act* does not apply to interest or penalties arising from auto renewed bank mortgages?

[79] Scotia submits that as a matter of statutory interpretation, s. 8 protects against higher rates charged on “arrears” but in an auto renewed mortgage, there have been no “arrears”. Scotia submits that the term “arrears” suggests there has been a default with an amount that is due and owing for a period of time. Scotia submits that the whole point of the automatic renewal is to prevent a mortgagor from going into arrears leading to enforcement and potential damage to a borrower’s credit standing.

[80] In making this argument, Scotia distinguishes *Sihota* and *Five Peaks*. The mortgages in those cases were from lenders who were not Schedule 1 or Schedule 2 banks, governed by the *Bank Act* S.C. 1991, c 46. The *Bank Act* regulates bank renewals of mortgages and provides a framework for disclosure of rates and protection for borrowers from increases within 21 days of the renewal notices. The logic of Scotia's argument is that autorenewals are a norm for banks. Federal legislation regulates banks to protect customers and when the *Bank Act* is read together with s. 2 of the *Interest Act* which permits freedom of contract around interest rates, it is plain and obvious that the plaintiff will not be able to prove this novel claim in the context of bank loans secured by mortgages on real property.

[81] Scotia further distinguishes the case at bar from *Sihota* on the basis that no notice was required by the lender in *Sihota*, in contrast to the notice required under the *Bank Act*. Scotia points to the “nudges” it provided to the plaintiff and to Mr. Mooney that their autorenewals were upcoming and which notified each of them of the terms of those autorenewals.

[82] *Bank of Montreal v. Xifeng Diao* (July 21, 2023), Calgary, 2201-07585, Mattis J. involves the only case that counsel could locate that involved a default after the lender was placed into a further bank mortgage that had been auto renewed. In that decision, the self-represented homeowner, Mr. Diao, whose mortgage was renewed automatically at a higher rate, eventually defaulted on a subsequent, agreed-upon mortgage loan. Mr. Diao blamed the cost of borrowing following auto renewal on his inability to protect his equity. After the bank obtained default judgment and Mr. Diao moved to set it aside. During his submissions, Mr. Diao referred to the holding in *Sihota* and sought to set aside the default judgment. The motion judge distinguished the circumstances in *Sihota* from the facts in *Diao*.

[83] While *Diao* mentions *Sihota*, the motion judge did not determine or analyze the question of whether s. 8 of the *Interest Act* applied in these circumstances: default judgment after default on an agreed mortgage after an auto renewed mortgage. On the final appeal from the decision, the Alberta Court of Appeal observed that it was open to Mr. Diao to bring an action as to whether the higher interest rate imposed on him contravened s. 8 of the *Interest Act*: *Bank of Montreal v. Diao*, 2024 ABCA 402, 77 Alta. L.R. (7th) 167, at para. 77. *Diao* is limited in its scope and does not amount to a decision which found that the bank's practice cannot attract the application of s. 8 of the *Interest Act*.

[84] Scotia will have all of the arguments it advanced under s. 5(1)(a) at trial to distinguish banks from other lenders. However, there is no decision which draws the distinction that Scotia strives to make between its autorenewals at higher rates and with added penalties, to those imposed or considered in *Sihota* or in *Five Peaks*.

[85] The Court of Appeal for Ontario has upheld a finding that a failure to pay out a mortgage at maturity leads to “arrears” for the purpose of applying s. 8 of the *Interest Act*: *Walia*, at para. 22.

[86] Scotia's higher rates are tied to the failure of the borrower to pay the money owed under the mortgage at the end of the term. This is the trigger for the increase. The same argument was

made in both *Sihota* and *Five Peaks*, and s. 8 of the *Interest Act* applied in those cases. Scotia was not able to provide any decision in which a court has interpreted s. 8 of the *Interest Act* with reference to the regulatory framework in the *Bank Act*, or distinguished *Sihota* on facts which are similar to the case at bar.

[87] Although banks may not consider a mortgage to be in arrears at the moment that a mortgage is unpaid at maturity, and when an autorenewal clause applies, this is merely the perspective of the bank. I do not apply that evidence to the question of the legal test under s. 5(1)(a) and whether the plaintiff's claim is certain to fail because s. 8 does not apply in these circumstances. I find that s. 8 could apply to the claim as pled by the plaintiff. Given the jurisprudence, I do not conclude that Ms. Abeywickrama's claim is certain to fail.

[88] I turn next to Scotia's alternative argument, that if s. 8 applies to its circumstances, the claim of a breach of s. 8 is nevertheless certain to fail.

Is it “plain and obvious” that if s. 8 of the *Interest Act* applies to auto renewed bank mortgages, there can be no finding of a breach at trial?

[89] Scotia alternatively submits that it is plain and obvious that, on the facts as pleaded, and if s. 8 applies, the plaintiff will not be able to establish a breach of s. 8 of the *Interest Act*.

[90] Scotia submits that there are features in the plaintiff's claim that make it plain and obvious that there has been no breach of s. 8 of the *Interest Act*.

[91] First, aside from the autorenewal at maturity, Scotia submits that here there was no “freestanding default” or nonpayment of the mortgage, other than the failure to pay the loan out at the moment of maturity, as with the “vast majority” of the facts in the existing s.8 jurisprudence, such as in *Five Peaks*, *Krayzel* and other decisions relied on by the plaintiff including the Court of Appeal's decision in *Walia* and *P.A.R.C.E.L. Inc. v. Acquaviva*, 2015 ONCA 331, 126 O.R. (3d) 108.

[92] That may be true; however, Scotia's submission does not avoid the issue created by the decision in *Sihota* which found that s. 8 applied to the arrears created by the borrower's failure to pay a mortgage at maturity followed by an autorenewal at a higher rate. It also ignores the plain language and interpretation of the principles underlying s. 8, which do not require a default that lasts for a particular period of time, or to adopt a definition of arrears from the lender's perspective.

[93] Scotia submits that in *Sihota*, there are sufficient distinguishing features from the case of bar that must lead to a finding that it will not assist the plaintiffs. These include differences in notice provisions in the case of the lender in *Sihota*, the fact that the autorenewal in *Sihota* “always” led to a higher rate, and that in the case of banks, a borrower has the right to insist on an autorenewal once the bank has given notice of the rate at least 21 days before the date of maturity.

[94] Second, and alternatively, Scotia submits that if these distinctions are not persuasive, nevertheless the court must decline to apply horizontal *stare decisis* to *Sihota* because the court

did not receive meaningful arguments on s. 8. Scotia submits that there was no evidence such as that tendered here from Dr. Courchane, and the court in *Sihota* did not consider either s. 2 of the *Interest Act* or the mortgage renewal framework included in the *Bank Act*.

[95] Scotia compares these circumstances to the line of cases which certified common issues on the doctrine of waiver of tort before any appellate level court had ruled on the doctrine. In *Babstock*, the Supreme Court of Canada dispensed with this cause of action: *Atlantic Lottery v. Babstock*, at paras. 15 and 35.

[96] First, on the factual distinctions between the case at bar and the decisions discussed above, these are squarely issues to be addressed at a trial. While there may be circumstances in which Scotia's posted six-month closed rate could be lower than the mortgage to be auto renewed, this claim seeks a remedy only for members of the class who faced a higher rate on autorenewal. The proposed class definition is:

All persons situated in Canada (including their heirs, estates, executors, trustees or personal representative) whose mortgages held by the Defendants were automatically and/or involuntarily renewed for another term at a higher rate than that applicable to their previous term.

[97] The plaintiff's position is that the autorenewal is triggered by a failure to repay or renew at maturity, which brings the mortgage into arrears. This is consistent with the existing case law.

[98] The right of the borrower to insist on the auto renewed rate once the bank has given notice that it will be applied may be characterized as the borrower's right not to have a further increase within 21 days of maturity. While this may protect a borrower from a different type of impact on their equity, it is not plain and obvious that this protection means that s. 8 of the *Interest Act* does not apply to autorenewals triggered by the arrears linked to the borrower's failure to renew or pay on maturity.

[99] As the plaintiff submits, s. 8 does not have any minimum thresholds for what constitutes "arrears" including an amount, whether enforcement proceedings have begun, or the impact on a borrower's credit score. The legislative purpose of s.8 is simpler: to protect borrowers from "higher charges": *Krayzel*, at para. 53.

[100] While Scotia argues, supported by the evidence of Dr. Courchane, that autorenewals protect borrowers from default litigation or adverse credit impacts, this line of reasoning would amount to an inquiry into the legitimacy of the purpose of the arrangement. It is the adverse effect of the arrangement which s. 8 seeks to protect: *Krayzel*, at para. 32. Further, expert evidence is not admissible at the first step of the certification test under s. 5(1)(a): *Kranjcec v. Ontario*, (2004) 69 O.R. (3d) 231 (S.C.), at para. 23.

[101] Scotia's submissions on horizontal *stare decisis* and *Sihota* invite me to determine a trial issue at certification. Those submissions require a comparison between the record filed on the merits in *Sihota* and the record for certification. The interpretation of s. 8 is in issue in this action.

There is a line of jurisprudence which aids in the interpretation of s. 8, which the plaintiff will rely upon at trial and Scotia will try and distinguish. *Sihota* is not identical to the facts in the case at bar but has salient features in common including an auto renewal and whether s. 8 of the *Interest Act* applies in that context.

[102] I do not agree with the comparison to the *Babstock* decision and the denouement for claims based in “waiver of tort.” Scotia submits that this action should be dismissed, just as the Supreme Court did with waiver of tort claims in *Babstock*. In *Babstock* the majority sought to address the lack of clarity in the law around novel claims. The court held that novel claims should not necessarily be permitted to proceed to trial simply because they are novel: *Babstock*, at paras. 19-21.

[103] I cannot conclude that the claim in the case at bar is truly novel in the same way that waiver of tort as a cause of action was a novel, unprecedented application of the law of negligence to a restitutionary remedy. In the case at bar, the plaintiff pleads s. 8 of the *Interest Act* to the unique autorenewal provisions in Scotia’s mortgages (which include a six-month closed mortgage with penalties, with the posted rates) following the reasoning from prior decisions involving other mortgage lenders whose attempts at autorenewals at higher rates were found to offend s. 8.

[104] The claim in this case is more akin to a line of cases describing incremental developments in the law which should proceed to trial: *Babstock*, at para. 19. The Supreme Court has described the correct approach to the statutory interpretation of s. 8 of the *Interest Act* in *Krayzel*. Lower courts have taken that guidance and applied it in a variety of circumstances. These developments distinguish this case from the line of “waiver of tort” cases, which arrived in the Supreme Court of Canada for the first time with a novel claim, in *Babstock*.

[105] I decline to find that the plaintiff’s claim under s. 8 of the *Interest Act* is certain to fail. The claim meets the pleading test pursuant to s. 5(1)(a) of the *CPA*.

Is it “plain and obvious” that the claim in breach of contract is certain to fail?

[106] Ms. Abeywickrama also pleads in breach of contract which she connects to her s. 8 claim. She alleges that the members of the class entered into the Contract with Scotia, which included a stipulation that “We may change these interest rates from time to time at our discretion as permitted by applicable law.”

[107] The plaintiff pleads that the Contract was governed by “applicable law” and implies that interest rates charged on auto renewed mortgages would not contravene the *Interest Act*. Thus, Scotia was prohibited from imposing a higher interest rate in breach of the *Interest Act* by the terms of its Contract with its customers.

[108] The relevant portions of the pleading begin at paragraph 59 of the statement of claim:

Breach of Contract

59. The Automatic Renewal Interest and Other Charges constitute breaches of the Mortgage Terms, as well as breaches of Scotiabank's duties and obligations of good faith and honest contractual performance owed to the Plaintiff and Class Members.

60. Additionally, and in the alternative, if the Automatic Renewal Interest and Other Charges are permitted under the Mortgage Terms (which is not admitted and specifically denied), then the Automatic Renewal Provisions are void for unconscionability and/or unenforceable based on violation of various statutes pled herein, including the Interest Act and section 4 of the Statute of Frauds, which requires that all agreements relating to land be in writing and executed by the parties.

...

65. Moreover, Scotiabank either knew or ought to have known that their imposition of Scotiabank's Automatic Renewal Mortgage is contrary to the law. Scotiabank acted in bad faith by continuing to engage in its automatic mortgage renewal practice despite its understanding that such a practice is unlawful.

[109] Scotia submits that the plaintiff's statement of claim has not pleaded a tenable claim in breach of contract. Scotia relies on the statement of the law on implied terms, from the decision of the Court of Appeal in *G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd.*, (1984) 43 O.R. (2d) 401.

[110] *G. Ford Homes* confirms the following principles:

1. The courts will be cautious in their approach to implying terms to contracts.
2. A court will not rewrite a contract for the parties.
3. No term will be implied that is inconsistent with the contract. Implied terms are as a rule based upon the presumed intention of the parties and should be founded upon reason.
4. The circumstances and background of the contract, together with its precise terms, should all be carefully regarded before a term is implied.
5. Every case must be determined by its own particular facts.

[111] The plaintiff pleads that Scotia breached the terms the Contract with borrowers, because it represented that interest rates would be charged as permitted by law. Pleading in this manner does not offend the principles set out by *G. Ford Homes*. In the highly regulated context of a bank offering mortgage loans to customers, the contractual obligation to comply with law can fairly be interpreted at this stage of the test to include the *Interest Act*. Scotia does not submit that it is not subject to that legislation. This does not amount to permitting a pleading that rests on a court rewriting the contract. It does not imply a term that is inconsistent with the contract.

[112] The claim in breach of contract is tenably pleaded. I will not dismiss it pursuant to s. 5(1)(a). I turn next to the submissions on unconscionability.

Is it “plain and obvious” that the plaintiff’s claim that the contracts are void for unconscionability are certain to fail?

[113] The plaintiff pleads that the contracts are void because they are unconscionable, in the alternative to the pleading that the contracts breached s. 8 of the *Interest Act*.

[114] Scotia submits that the pleading falls short of what must be pleaded. There must be both a relationship in which there is inequality of bargaining power and a ‘substantially improvident or unfair bargain’: *Graham v. Impark*, 2010 ONSC 4982, 74 B.L.R. (4th) 172, at para. 116, leave to appeal to Div. Ct. refused, 85 B.L.R. (4th) 167.

[115] The relevant portions of the statement of claim are as follows:

62. At all material times, there existed a self-evident inequality of bargaining power between Scotiabank (a multinational banking institution) and Shakya (a marketing services specialist). The Plaintiff and Class were powerless to negotiate the Mortgage Terms, which are part of a standard form contract of adhesion with an institution operating within a state-sanctioned oligopoly over necessary financial services.

63. No reasonable person who had understood and appreciated the effect of the Automatic Renewal Provisions would have agreed to them, and it would be unconscionable to allow Scotiabank to collect excess interest in direct violation of section 8 of the Interest Act.

[116] The leading case on unconscionability is *Uber v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118. Whether or not a bargain is “improvident” is assessed contextually. The court will ask if the bargain unduly advantages the stronger party or unduly disadvantages the more vulnerable party: *Uber v. Heller*, at para. 74.

[117] The plaintiff has pleaded the inequality of bargaining power and an improvident outcome. Paragraph 62 of the pleading alleges the inequality. Paragraph 73 alleges the improvident outcome: “No reasonable person who had understood and appreciated the effect of the [provisions] would have agreed to them.”

[118] The pleading is pithy, nevertheless it clears the bar. Ms. Abeywickrama’s claim pleads the minimum elements of unconscionability. I find that she has met the test in s. 5(1)(a) for this aspect of the claim.

[119] With these findings on all of the submissions on s. 5(1)(a), and having found that the plaintiff has met the test, I move on to the next stage.

Section 5(1)(b) Is there an identifiable class of two or more persons?

[120] The plaintiff must establish that there is an identifiable class of two or more persons: *CPA*, s. 5(1)(b).

[121] The plaintiff proposes the following class definition:

All persons situated in Canada (including their heirs, estates, executors, trustees or personal representatives) whose mortgages held by the Defendants were automatically and/or involuntarily renewed for another term at a higher rate than that applicable to their previous term.

[122] Scotia concedes that there are two or more people who meet this class definition. In fiscal year 2023, 28,000 Scotia borrowers had their mortgages autorenewed at higher rates. One of those people was the representative Plaintiff, Ms. Abeywickrama.

[123] The plaintiff has proposed objective criteria. Members of the class will be able to identify whether they belong to the class without reference to the merits of the action: *Cloud v. Canada (Attorney General)*, (2004) 73 O.R. (3d) 401 (C.A.), at para. 45, leave to appeal refused, [2005] S.C.C.A. No. 50.

[124] The plaintiff has not included any "start date" in the proposed class definition, although in her case, she discovered that she would be subject to a higher rate if the autorenewal took place when she received the notice letter from the bank on August 27, 2023. The plaintiff brought her claim on July 10, 2024, which Scotia concedes was within the applicable limitation period.

[125] However, Scotia submits that the same reasoning will apply to each class member: their knowledge of a claim arises from the receipt of a letter prior to autorenewal telling them the new interest rate. This is the point at which the limitations clock starts to run for each class member and will be measured against the limitation period in effect for each province.

[126] I agree, although there may be class members who did not discover their claims when Scotia sent out the renewal letter. Limitation periods can be determined at trial and may well limit class membership in most instances to those who received notice of higher auto renewed rates within two years of the date of the issuance of the claim. There may be exceptions that will require individualized inquiries. The trial judge will be able to make those findings from the evidence produced by the parties. Defining the class period without reference to a start date does not mean that limitation periods do not apply. I decline to close off the possibility that certain borrowers may not have discovered that they had a valid claim at the time that Scotia sent them notice of their autorenewal interest rate.

[127] I find that the plaintiff has met the test within s. 5(1)(b) of the *CPA*.

Section 5(1)(c) Do the claims of the class members raise common issues of fact or law?

[128] The claims of the class must raise common issues of fact or law that will move the litigation forward. In assessing commonality, the court considers whether allowing the action to proceed as a representative one will avoid duplicating the fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 39.

[129] An issue will be common if it is a substantial ingredient of each class member's claim, and its resolution is a necessary component for resolving the claim: *Hollick*, at para. 18.

[130] The plaintiff submits that the proposed common issues will dispose of all of the class members' claims, because they rely on the question of whether Scotia's practice of auto renewing mortgages violates the *Interest Act*.

[131] The Plaintiff must demonstrate that there is some basis in fact that:

- (i) the asserted issue actually exists; and
- (ii) it is common to the entire class.

Lilleyman v. Bumblebee 2024 ONCA 606, 173 O.R. (3d) 682, at para. 28, leave to appeal refused [2024] S.C.C.A. No. 406.

[132] I consider next the proposed common issues (PCIs).

i. Common Issues (a)-(b): Breach of the *Interest Act*

[133] Common issues (a)-(b) ask whether Scotia breached s. 8 of the *Interest Act*, and if so whether the plaintiff and class are entitled to recover the amounts paid in respect of automatic renewal Interest and prepayment charges pursuant to s. 9 of the *Interest Act*.

[134] The plaintiff submits that the answers to these questions are necessary to resolve each claim. To answer them, the trial judge must decide if Scotia's standard form autorenewal provision offends s. 8 because it imposes a higher rate of interest on arrears of mortgage principal or interest.

[135] Scotia submits the PCIs (a) and (b) cannot be certified because there is no basis in fact to establish that there are "arrears in principal or interest" after an automatic renewal. Scotia relies on the same submissions it made under s. 5(1)(a), bolstered by admissible expert evidence from Dr. Courchane, and from Scotia's representative, Alex Dey, that the autorenewal practice is in place to prevent defaults. The bank's position is that autorenewals protect borrowers from the adverse outcome of a default and enforcement on the mortgage.

[136] Scotia also relies on the fact that Canadian financial regulators are aware of Scotia's autorenewal practice (and that of other Schedule I Canadian banks) and have not raised any policy concerns with these practices.

[137] The plaintiff has tendered case law on the application of s. 8 of the *Interest Act*, which satisfies me that there is some basis in fact to show that the plaintiff may be able to show at trial that Scotia's autorenewal practices violate s. 8.

[138] Scotia's expert evidence concerning the bank's interpretation of arrears, and its economic perspective on the commercial context including how these practices might be beneficial to borrowers, is not a compelling reason to refuse certification. The Supreme Court of Canada has cautioned that commercial purpose evidence is incompatible with s. 8, which must be considered through the lens of the effect of the financial arrangement: *Krayzel*, at para. 32.

[139] I find that the plaintiff has established that PCIs (a) and (b) should be certified as common issues.

ii. Common issues (c)-(f): Breach of Contract

[140] The plaintiff seeks to add common issues (c)-(f) on the alleged breach of contract. Those questions are as follows:

(c) Did the Defendants' contract with the Plaintiff and Class Members permit the Defendants to charge the Automatic Renewal Interest and Other Charges?

(d) If the answer to (c) is yes, are the provisions in the Defendants' contract that purport to permit the Defendants to charge the Automatic Renewal Interest and Other Charges void for unconscionability?

(e) Have the Defendants breached their contract with the Plaintiff and Class Members?

(f) Have the Defendants breached their duty of good faith and honest contractual performance with the Plaintiff and Class Members?

[141] Scotia has conceded that all mortgages it enters with borrowers are governed by the same standard form contract. I have found that the plaintiff has pleaded her claim adequately in breach of contract. I would certify questions (c), (e) and (f).

[142] However, Scotia challenges whether PCI (d) should be certified because each class member's circumstance will need to be examined to determine the issue of unconscionability.

[143] The plaintiff has framed her claim around unconscionability as deriving from the standard form clause affecting autorenewal. Like the arbitration clause in the class action brought on behalf of drivers in *Uber v. Heller*, the inequality derives from the contract of adhesion. It does not derive from any individual circumstances, like those listed by Perell, J in *Graham*, at para. 117: including "age, impaired mental health or ability, recklessness, a weak or submissive personality, intimidation, lack of representation, ignorance, illiteracy, poverty, need, or distress."

[144] The Supreme Court observed in *Uber v. Heller*, that “the potential for [standard form contracts] to create an inequality of bargaining power is clear.” *Uber*, at para. 89.

[145] Although there may be some basis in fact to the common question on the issue of inequality of bargaining power arising from Scotia’s Contract with its borrowers, I am not persuaded that the question of improvidence is a common question in this action. As the parties have acknowledged, the autorenewal rates may be less than the prior rate of a Scotia borrowers’ mortgage. While those borrowers would be excluded from the class, the reality is that there will be a continuum of rate changes across the class.

[146] For example, the plaintiff’s borrowing rate went from 3.34% annually to 7.75%. Mr. Mooney’s rate went from 2.79% to 7.85%. In each of these examples, the borrower signed a five-year mortgage when interest rates were low and then became subject to a 6-month closed auto renewed mortgage in a rising rate market. Both borrowers were locked into rates that were more than double their prior rate.

[147] As Scotia points out, any borrower is free to enter into a mortgage loan for a six-month closed term, at the bank’s posted rates which fluctuate with market conditions. In such circumstances, those loans would not be viewed as being improvident, even if they were not optimal given the ability of borrowers to negotiate or shop for better rates. Thus, it must be that the allegation of improvidence made by the plaintiff arises from the delta between the old rate and the new rate. This leads back to the need for individual inquiries, and the circumstances for each lender into the level of improvidence presented by the renewal terms.

[148] In contrast, the Uber drivers in *Uber v. Heller* all faced the same high fee as a barrier to arbitration of contract disputes: \$14,500, which did not include other costs including travel, accommodation, legal fees and lost wages. The upfront costs were disproportional to any potential award available at arbitration. The improvidence of the arbitration clause to the class was apparent.

[149] I decline to certify PCI (d) on the basis that the plaintiff has not established some basis in fact on which it can be said that this is a question in common across the class. The question of improvidence will need to be examined relative to the rate difference for each borrower, the financial circumstances and context for each, and the impact.

iii. Common Issues (g)-(i): Unjust Enrichment

[150] Common issues (g)-(i) relate to unjust enrichment. The plaintiff submits there is some basis in fact in the evidentiary record that Scotia has been enriched by charging the autorenewal rates and the penalties for prepayment under the terms of the six-month closed mortgages on autorenewal. The plaintiff submits that the class members have suffered a corresponding deprivation. Finally, given the allegations of breach of contract, the plaintiff submits that there is no juristic reason for the enrichment and the corresponding deprivation.

[151] Scotia submits these questions should not be certified, because its contract with its customers provides a juristic basis for charging the autorenewal rates. A contract may be a juristic

reason to deny a remedy for unjust enrichment: *Garland v. Consumers Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at paras. 40 and 44.

[152] This will be the very issue at trial. Having certified the questions on whether Scotia breached its contracts with its borrowers, the validity of Scotia's juristic reason is in issue. It follows that while there may be a defence, there is also the possibility that the plaintiff can establish the contract is not valid and thus there may be merit to the claim in unjust enrichment. I will certify these questions.

iv. Common Issues (j)-(l): Aggregate Damages

[153] The court routinely certifies aggregate damages questions in class actions: *Stenzler v. TD Asset Management Inc.*, 2020 ONSC 111 at para. 43, leave to appeal refused, 2020 ONSC 5987.

[154] The plaintiff tendered evidence from accounting expert, Peter Steger, in support of her submission that there is some basis in fact that a reasonable methodology exists to determine Scotia's aggregate liability to the class without the need for proof from individual class members.

[155] Mr. Steger opines that Scotia does or should have in its possession accounting records quantifying in the aggregate all profits unlawfully gained by Scotia. The plaintiff seeks to prove this amount as damages under her pleaded disgorgement remedy. Scotia should have a record of sums paid by the class members to Scotia in violation of s. 8 of the *Interest Act*. Those amounts are recoverable as damages under the statutory remedy provided by s. 9 of the *Interest Act*.

[156] Scotia's mortgage expert, Dr. Courchane, disagrees with the plaintiff's proposed methodology because it could lead to unfair windfalls. For example, the proposed methodology assumes that every borrower who auto renewed would have been able to accept a preferable, lower rate, which might no longer be available on the mortgage market. Further, Dr. Courchane critiques the methodology because it does not account for borrowers' ability to mitigate the costs of auto renewal.

[157] I need not resolve these questions at certification. There need only be evidence of a workable methodology at this stage that could determine damages. The trial judge will need to resolve conflicts among the experts concerning the damages methodology: *Pro-Sys Consultants*, at para. 126 and 134.

[158] The trial judge will need to determine remedy following a finding of liability. Whether or not I certify a question in aggregate damages would not prevent the trial judge from applying s. 24 of the *CPA* to the case at that stage: *Pro-Sys Consultants*, at para. 134.

[159] For these reasons, I will certify the proposed questions in aggregate damages.

v. Common Issues (m)-(n): Punitive Damages & Interest

[160] The plaintiff seeks to certify a question on punitive damages founded on Scotia's conduct.

[161] In addition to auto renewing mortgages where the bank was asked not to do so, Ms. Abeywickrama alleges that Scotia's misconduct is aggravated by the fact that it is the only "Big Five" bank that collects prepayment charges by automatically renewing borrowers into closed term mortgages. In her submission, this distinguishing feature easily clears the low "some basis in fact" standard.

[162] Common issue (n) asks whether Scotia is liable for pre- and post-judgment interest. This has regularly been certified as a common issue where there is a possibility that a common issues judge will decide that an aggregate assessment of damages is appropriate.

[163] Given that these questions are derivative of the prior common questions, I agree and certify PCIs (m) and (n).

Section 5(1)(d) Is a class proceeding the preferable procedure?

[164] The next part of the test for certification is that a class proceeding must be the "preferable procedure for the resolution of the common issues": *CPA*, Section 5(1)(d).

[165] Section 5 (1.1) of the *CPA* supplements 5(1)(d) outlines that a class proceeding will be the preferable procedure if at a minimum:

1. It is superior to all reasonably available means of determining the entitlement of the class members' claims;
2. The questions of fact and law common to the class members predominate over any issues affecting only individual class members.

[166] To be preferable, the court must consider whether: the design of the class action is manageable; there are reasonable alternative procedures, or the proposed class action is the superior procedure; and the common issues predominate over the individual issues. These factors are considered through the lens of the overriding goals of class proceedings: access to justice, behaviour modification, and judicial economy. The predominance requirement, in particular, is intended to ensure that a class action advances these objectives: *Banman v. Ontario*, 2023 ONSC 6187, at paras. 317-321.

[167] Scotia submits that the plaintiff has not established either the superiority or predominance requirements. Scotia relies on the "realistic alternatives" by way of complaints to the Ombudsman for Banking, or by way of actions on small claims court.

[168] I disagree. The plaintiff and Mr. Mooney attempted to achieve access to justice through the bank's complaint processes, without satisfaction.

[169] Ms. Abeywickrama sought reimbursement of her auto renewed interest charges and prepayment charges. Scotia's Escalated Customer Concerns Office and the CCAO both denied her request.

[170] After she escalated her complaint to the ADRBO, Scotia offered Ms. Abeywickrama a reduced amount as a "goodwill gesture" in exchange for a liability release. The successor to the ADRBO, the Ombudsman for Banking Services and Investments, has no authority to bind Scotia by its recommendations.

[171] Mr. Mooney escalated a formal complaint after he was required to pay Scotia \$7,049.11 in prepayment charges after his mortgage was renewed into a six-month closed term at a rate that was almost double the rate he obtained from another lender and after he had written to request renewal into an open term mortgage. Mr. Mooney's request to be reimbursed for the interest he paid under the auto renewed mortgage was denied by the bank.

[172] These complaint mechanisms are limited to each borrower, and if there has been a systemic breach affecting thousands of borrowers, the complaint processes are a poorer alternative. This avenue for relief is an individual response to an alleged systemic, broader issue. Requiring thousands of individual complaints would undermine access to justice for the class, and the goal of behaviour modification.

[173] Judicial economy is also served by a single action determining the liability issue, rather than thousands of smaller claims, each turning on the same point of statutory interpretation to a known set of facts.

[174] Given my findings on the PCIs, I conclude that the common issues predominate because they flow from a determination of the legality of Scotia's standard form contract. The only potential individual issues relate to limitation period defences, which can be determined once the question of liability is resolved.

[175] Further, the court will be able to award aggregate damages under s. 9 of the *Interest Act*, and consider disgorgement measured by Scotia's total profit from the impugned interest and prepayment charges. These are not individual issues. In *Richard v. Canada*, 2024 ONSC 3800, 561 C.R.R. (2d) 178, at paras. 405-406, this court included the possibility of aggregate damages in the preferability analysis and in its discussion on whether common issues predominated over the individual issues.

[176] The same reasoning applies to the case at bar. The common issues taken at a whole predominate over the individual issues. The size of the class means that judicial economy is better served by a class action. Access to justice is served by class proceedings. There are no meaningful, practical alternatives available to the class members as a whole. Behaviour modification is served by permitting this claim to proceed on behalf of the class of borrowers and adjudicating questions of liability, disgorgement and punitive damages.

[177] The issue of a Schedule I bank's autorenewal of mortgages and the application of the *Interest Act* to the standard form contracts that govern the relationship between thousands of borrowers and the bank is an important legal question. The questions in this litigation will clarify

the contractual relationship which often concerns a family's ability to afford a significant and meaningful family asset.

[178] I conclude that a class proceeding is clearly the preferable and appropriate procedure in this case.

Section 5(1)(e) Is there an appropriate representative plaintiff?

[179] Ms. Abeywickrama is an appropriate representative plaintiff. She was directly affected by the bank's autorenewal provisions and has a cause of action as pleaded. She has no conflict of interest with the proposed class and has produced a workable litigation plan which can be expected to evolve as the case progresses toward trial.

V. CONCLUSION

[180] I certify this proceeding pursuant to the *CPA* and in accordance with my reasons.

[181] If the parties cannot agree as to costs of the motion, they may propose a timetable for the exchange of brief written submissions.

Leiper, J.

Released: June 4, 2026

CITATION: Abeywickrama v. The Bank of Nova Scotia et al, 2026 ONSC 3262
COURT FILE NO.: CV-24-00723561-0000
DATE: 20260604

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SHAKYA ABEYWICKRAMA

Plaintiff

– and –

THE BANK OF NOVA SCOTIA and SCOTIA
MORTGAGE CORPORATION

Defendants

REASONS FOR DECISION

Leiper, J.

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