

# Update

## Employment Law

August 19, 2009

### A second look at overtime pay policies and class actions: The CIBC decision will be appealed

A motion for certification of an intended class proceeding brought against the Canadian Imperial Bank of Commerce (“CIBC”) for its alleged failure to pay overtime to its former and current front-line customer service employees was recently dismissed by the Ontario Superior Court of Justice. On July 21, 2009, the representative plaintiff, Dara Fresco, confirmed that she is appealing the lower court’s decision.

The result of this appeal will no doubt be of interest to employers who have been watching this case unfold with a view to effectively developing and implementing their own overtime policies. The appeal will also provide further guidance for employers as to the likely use of class actions as a means of obtaining compensation for unpaid overtime.

#### Background of the CIBC decision

The claim, which was commenced in 2007, was brought by Ms. Fresco on behalf of as many as 30,000 former and current ‘tellers’ and sought an estimated \$600 million for unpaid overtime and punitive damages. In essence, the claim alleged that CIBC routinely required these employees to work overtime, but failed to pay them for it, or provide them with time-off in lieu of overtime worked. Central to the case was the legality of

CIBC’s overtime policy, which stated that:

In order for employees to be compensated for overtime hours worked, the hours must be pre-approved by a manager in advance. Overtime, for which prior management approval was not obtained, will not be compensated unless there are extenuating circumstances and approval is obtained as soon as possible thereafter.

As noted by the court, the overtime policy was communicated to CIBC employees in a number of ways, including on CIBC’s internal internet site and by postings on bulletin boards at the various branches.

Ms. Fresco asserted that the *Canada Labour Code* (the “CLC”) requires that all overtime worked must be paid and accordingly, the pre-approval requirement in the bank’s overtime policy was a violation of the CLC rendering the policy unlawful. The bank, therefore, could not rely on its overtime policy as a means of denying overtime to any employee who had worked overtime hours but without obtaining the necessary pre-approvals. Ms. Fresco further asserted that the bank’s systemic application of the allegedly unlawful overtime policy allowed for the matter to properly proceed as a class action.

The court disagreed and found that CIBC’s overtime policy, particularly including the pre-approval requirement, was permitted under the CLC. In particular, the court held that the very language of the CLC contemplated a right of the employer to pre-approve overtime. The court stated that “in order to ‘require and permit’ an employee to work overtime, management must be directly involved in deciding whether the employee works overtime. Indeed, a pre-approval requirement is a proper way to ensure an employer complies with the maximum rules of the CLC.”

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The court affirmed the “fundamental right of the employer to control its business, including employees’ schedules, hours of work and overtime hours.” As a result, an employee cannot unilaterally and the without agreement of the employer “foist” services on an employer and expect to be paid wages for them. Conversely, an employer cannot avoid its statutory obligations by knowingly permitting employees to work overtime and then later taking the position that the overtime was not authorized.

The court also found that offering employees the option of time in lieu of overtime pay was not illegal, as it provided contractual benefits that were more favourable to employees than the statutory guarantees under the CLC in that they had the ability to chose pay or time off in lieu of pay.<sup>1</sup>

In refusing to certify the class proceeding, the court held that the representative plaintiff’s claim failed on the “common issues” requirement necessary to advance a claim as a class proceeding. The court held that the individual issues in the case were “front and centre” – each individual case needed to be looked at separately to see if any overtime was, in fact, owing by CIBC. The court left open the possibility of “misclassification” claims – that is, claims in which the employer is alleged to have erroneously treated all members of the proposed class as ineligible for overtime – proceeding as class actions.

## What can be learned from the CIBC decision so far

As noted, Ms. Fresco will be appealing the decision, which may result in changes to the current landscape. In addition, other similar class actions are working their way through the courts, including against Scotiabank, CN Railway and CIBC (but this time involving investment bankers and analysts instead of tellers), that may provide additional insight or may impact the current rights and obligations of employers.

That said, the following points can be taken from the CIBC decision so far:

- It is well within an employer’s right to require that all overtime be subject to a proper pre-approval process.
- Employers should take care, however, to not only properly draft a policy concerning hours of work and overtime, but to ensure that employees are made aware of such policy by providing each employee with a copy of the policy and having them sign an acknowledgement confirming that they received, read and understand it. Employers should also properly monitor and manage the implementation of any such policy.
- Proper management of an hours of work and overtime policy requires an employer to systematically keep track of hours worked by each employee, not ‘turn a blind eye’ to an employee who is working beyond regular hours, and to document all requests for overtime by the employer.
- Due to the absence of commonality, it is expected that cases involving individual issues – hours of work, overtime and vacation pay – will proceed by way of individual employee claims and not class action lawsuits.

If you would like to know more about this matter or have any questions with respect to the foregoing, please do not hesitate to contact any member of our Employment group:

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<sup>1</sup> Notably, section 20 of the *Ontario Employment Standards Act*, 2000, specifically allows for time off in lieu of pay for overtime worked provided both the employer and employee agree and the paid time off work is taken with 3 month of the work week in which the overtime was earned.