

# BANK LIABLE IN CANADA'S LARGEST UNPAID OVERTIME CLASS ACTION

Posted on April 6, 2020

**Categories:** [Insights](#), [Publications](#)

After more than a decade of litigation in *Fresco v Canadian Imperial Bank of Commerce*,<sup>[1]</sup> the Ontario Superior Court of Justice ("ONSC") has found CIBC liable for requiring or permitting uncompensated overtime to be worked, and for failing to accurately record all hours worked, by front-line bank employees.

## Background

The litigation commenced when Dara Fresco, the representative plaintiff, brought a proposed class action against CIBC for unpaid overtime in 2007. The plaintiff also alleged that CIBC had acted in bad faith. The proposed class was comprised of 31,000 current and former non-management, non-unionized front-line bank employees who worked for CIBC between February 1993 and June 2009.

The core allegation was that over this 16-year period, CIBC's overtime policies and record-keeping practices contravened the *Canada Labour Code* (the "Code") and denied front-line bank employees adequate overtime compensation.<sup>[2]</sup> The class action did not allege that CIBC never paid overtime or that every single class member worked uncompensated overtime. Rather, the representative plaintiff alleged that certain restrictions and deficiencies in the bank's overtime compensation system resulted in some class members not being compensated for all hours worked.

The ONSC initially refused to certify the class action in 2009. The Divisional Court upheld the ONSC's decision but, on further appeal by the representative plaintiff, the Ontario Court of Appeal certified the class action in 2012. The Supreme Court of Canada subsequently refused CIBC's appeal on certification in 2013. The representative plaintiff then moved for summary judgment before the ONSC on the certified common issues.

## Decision

The Code sets out a number of overtime requirements for federally-regulated employers such as CIBC. In particular, section 174 of the Code provides:

Where an employee is required or permitted to work in excess of the standard hours of work, the employee shall ... be paid for the overtime at a rate of wages not less than one and one-half times his

regular rate of wages. [Emphasis added.]

The “standard hours of work” in the case of front-line bank employees were 7.5 hours per day and 37.5 hours per week (even though the Code allows for up to 8 hours per day and 40 hours per week).

The motion judge started his analysis by finding that the word “permitted” in section 174 of the Code meant “not prevented” (as opposed to “impliedly required”). He accordingly interpreted section 174 to mandate pay at one and one-half times the regular rate of wages where employers require or *do not prevent* employees from working overtime hours. The motion judge then applied this interpretation of section 174 to CIBC’s overtime policies.

CIBC had a series of overtime policies over the relevant 16-year period. The general policy was that CIBC would only pay an employee for overtime if the overtime was pre-approved by a manager. CIBC instructed managers to pre-approve overtime solely in exceptional circumstances. In 2006, however, CIBC expanded its policy to include the possibility of post-approval in “extenuating circumstances”.

The motion judge found that these policies breached the Code because nothing in the legislation predicates an employee’s eligibility for overtime compensation on formal approval or extenuating circumstances. The motion judge further determined that:

- CIBC did not accurately record and maintain a record of all hours worked by class members, as required under section 24(2) of the *Canada Labour Standards Regulation*.<sup>[3]</sup> In this regard, hours worked that were not pre-approved (or post-approved in extenuating circumstances after 2006) were neither recorded nor compensated.
- At least some class members worked uncompensated overtime because the nature of the employees’ front-line work could make it difficult to obtain pre-approval of overtime.
- It was more likely than not that CIBC permitted or did not prevent these hours of uncompensated overtime to be worked.
- However, CIBC had *not* breached its duty to perform contractual obligations in good faith. There was no evidence that the bank lied or knowingly misled its employees about the legality of its overtime policies.

While the motion judge noted that there is nothing wrong with an overtime policy that proposes formal approval as the preferred corporate norm, the policy should also make clear that neither pre-approval nor post-approval are preconditions for payment. In the words of the motion judge, overtime must be paid whenever overtime hours are required or permitted, “full stop”.

### **Takeaways for Employers**

The motion judge’s decision deals only with the certified common issues respecting liability. The certified

common issues respecting remedies and damages have yet to be decided (and the motion judge has already said that the representative plaintiff will face “significant challenges” on these issues).

Nevertheless, the motion judge’s decision is still significant because it underscores the importance of implementing overtime policies, practices and procedures that comply with applicable employment standards legislation. While a policy of preferring pre-authorization of overtime is not inherently wrong, this case confirms that employers have a positive obligation to prevent employees from working overtime if they do not wish to pay for the extra hours worked.

As the motion judge noted, the burden is not on the employee to ask permission to work overtime. Rather, the burden is on the employer to intervene and prevent the employee from working overtime. In the words of the motion judge: “If the employer knows or ought to know that an employee is working overtime but fails to take reasonable steps to prevent the employee from working then the overtime must be compensated.”

by Paul Boshyk, Kyle Lambert and Eleanor Rock (Articled Student)

[1] 2020 ONSC 75.[ps2id id='1' target='']

[2] RSC 1985, c L-2.[ps2id id='2' target='']

[3] CRC, c 986.[ps2id id='3' target='']

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2020