

Civil Litigation

Ontario appellate court greenlights damages hearing in CIBC class action

By **Christopher Guly**

(February 17, 2022, 10:49 AM EST) -- A 15-year class action with the Canadian Imperial Bank of Commerce (CIBC) could be near its end following a decision by the Ontario Court of Appeal.

In *Fresco v. Canadian Imperial Bank of Commerce* 2022 ONCA 115, released on Feb. 9, a three-judge panel of the court dismissed the bank's appeals of three Superior Court judgments by Justice Edward Belobaba.

One, *Fresco v. Canadian Imperial Bank of Commerce* 2020 ONSC 75, granted summary judgment to Dara Fresco as the representative plaintiff. Another, *Fresco v. Canadian Imperial Bank of Commerce* 2020 ONSC 4288, certified aggregate damages as a common issue; and the third — *Fresco v. Canadian Imperial Bank of Commerce* 2020 ONSC 6098 — dismissed CIBC's summary judgment motion for a class-wide limitations order.

According to the statement of claim filed with the Superior Court in 2007, Fresco began working for CIBC in 1998 as a "roving teller" assigned to 12 different branches in Toronto to fill in for permanent employees off work for various reasons. From 1999 to 2006, she served as a teller and a personal banker with clients at different branches during which time she and some 31,000 other CIBC employees in those roles were often never compensated for working overtime, contrary to the *Canada Labour Code* (CLC), as claimed in the \$600-million lawsuit she launched on behalf of the class who worked for the bank between 1993 and 2009.

The class action focuses on two CIBC overtime policies that enable the bank to obtain, as the appellate court summarized, "economic value of overtime work without compensating employees as required by the [CLC]."

The first overtime policy, which applied to employees in the retail branch network included in the class from 1993 to 2006, provided for additional compensation where employees worked more than eight hours a day or 37.5 hours a week, but required that employees get management approval before working overtime in order to receive payment.

The second policy, which applied to all of CIBC's lines of business, was implemented in 2006. Although it maintained the pre-approval requirement, it also allowed for post-approval in "extenuating circumstances where approval was sought as soon as possible after the overtime work was done," said the Court of Appeal summary.

In its appeal, CIBC argued that the motion judge, Justice Belobaba, misinterpreted s. 174 of the CLC regarding overtime pay and challenged his determination that the bank's overtime policies were "institutional impediments" to the overtime claims of class members.

As the appellate court summarized, CIBC argued that the CLC gives the employer the right to determine when overtime hours will be worked, and that its overtime policies were developed "for the purpose of discouraging overtime work" and "never intended to permit overtime work that was not compensated." Furthermore, the bank argued that its 1993 overtime policy stated that "it is against the law to not pay overtime."

The respondent, Fresco, countered that regardless of its motivation, CIBC's policies caused uncompensated overtime on a systemic basis and therefore breached CLC s. 174.

Justice Belobaba agreed, and the Appeal Court concurred with his findings.

The motion judge found that in the bank's 1993 overtime policy, the imposition of a pre-approval requirement as a precondition for overtime compensation was more restrictive than the "required or permitted" language in s.174 of the CLC, according to the appellate court summary. On CIBC's 2006 overtime policy, he found that the addition of possible post-approval in extenuating circumstances "did not cure the deficiencies because the Code required that overtime be paid whenever such hours were required or permitted, without exception."

As the Appeal Court stated: "The motion judge accordingly restated the standard under s. 174 as: 'When an employee is required or allowed to work or is not prevented from working 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,'" Justices Peter Lauwers and Lorne Sossin wrote in their reasons, agreed to by Justice Alison Harvison Young.

"We accept the motion judge's interpretation of s. 174, which is well-supported by the case law."

The Court of Appeal also agreed with Justice Belobaba's finding that "the bank's unlawful overtime policies and hours-of-work recording practices were systemic or institutional impediments."

Justices Lauwers and Sossin wrote that CIBC's "policies imposed additional hurdles on employees seeking overtime compensation systemically across the institution."

They also agreed with the motion judge's finding that the bank's failure to record "actual" hours of work, by directing class members to only indicate overtime on an "exceptional basis" as per the 1993 (pre-approval) and 2006 (post-approval in extenuating circumstances) policies, amounted to a "systemic deficiency," contrary to the CLC.

On Justice Belobaba's certification of aggregate damages, the Court of Appeal said he "properly expressed the standard" for certifying such damages as being, in the motion judge's words, "whether there is a reasonable likelihood that the methodology suggested by the plaintiff's [respondent Fresco's] expert [relying on employee time-stamped data] can determine damages in the aggregate without proof by individual class members," which would result "in a fair and sufficiently reliable determination of the defendant's monetary liability."



Louis Sokolov, Sotos LLP

Class action lawyer Louis Sokolov, a partner with the Toronto-based firm, Sotos LLP, has been involved in what Justice Belobaba described in one of his rulings as "protracted litigation" against CIBC from the outset of the proceeding.

Sokolov was also one of the lawyers involved in a class action suit, also launched in 2007, against the Bank of Nova Scotia in which Justice Belobaba, in *Fulawka v. Bank of Nova Scotia* 2016 ONSC 1576, approved a settlement of \$50 million with costs to about 17,000 bank employees for unpaid overtime.

The case against CIBC — the first and thus far largest overtime class action in Canada — reveals “a culture of uncompensated overtime where there were policies in place that not only didn’t catch it, but actually facilitated it, by requiring pre-approval for overtime,” explained Sokolov, one of seven lawyers leading the class action involving two other firms: Roy O’Connor LLP and Goldblatt Partners LLP.

“The nature of the work is that you’re not going to get pre-approval because it’s a retail environment and employees worked overtime when customers came in late and had to serve them, or tellers came in early to set up their tills.”

Sokolov noted that both the superior and appeal courts also found that CIBC’s recordkeeping practices did not comply with the minimum standards of the CLC.

“The bank didn’t tell managers that they had to record actual hours worked, so they just submitted scheduled hours,” he explained, adding that most of CIBC’s employee log-in/log-off workplace records were destroyed, or as he paraphrased the bank’s explanation, “inadvertently deleted.”

The legal battle with CIBC has been a long one.

It has been 10 years since the Ontario Court of Appeal certified the class proceeding in its ruling, *Fresco v. Canadian Imperial Bank of Commerce* 2012 ONCA 444.

CIBC’s overtime policies have been in breach of the CLC “since 1993,” Sokolov asserted.

“Justice Belobaba found that the bank was effectively negligent in not being aware of its legal responsibilities, and the Court of Appeal was clear that the two overtime policies were contrary to the *Canada Labour Code*,” said Sokolov, noting that bank tellers are at best, modestly paid.

“That’s what makes the bank’s conduct so disappointing,” he added. “The bank was earning massive profits off the backs of their retail employees — between 2007 and now, it comes out to in excess of \$45 billion U.S., let alone what the pay in the C-suite was during that time.”

“The refusal to pay employees overtime and to own up to its mistakes, unlike the Bank of Nova Scotia, is particularly unfortunate.”

Sokolov said that when the class action was launched in 2007 and received much media attention, “a lot of employers woke up, and certainly when the Court of Appeal certified this case in 2012, I don’t think there was much doubt among any in-house counsel in Canada that overtime policies tying compensation to pre-approval were not going to pass muster.”

“We’ve been fighting the bank every step of the way since 2012 — fighting to get documents, on summary judgment, on appeal,” said Sokolov, who has spent about 20 of his 30 years practising law focused on class actions.

“I’ve never been involved in a case that is fought as hard as this one, and the aggressiveness of the response is beyond anything I’ve experienced in any other class action I’ve worked on,” he said.

“It seems that CIBC is much more interested in paying its lawyers tens of millions of dollars to avoid answering the case on its merits rather than paying its employees what it owes them.”

CIBC was represented in the appeal by eight lawyers from two different firms: Hicks Morley Hamilton Stewart Storie LLP and Torys LLP. None responded to a request for comment on the appellate court ruling.

However, in a statement sent to *The Lawyer’s Daily*, CIBC said that the bank is “reviewing the decision and assessing next steps.”

“We believe we maintain effective overtime policies and practices, including a clear overtime policy that is easily accessible,” said the e-mail.

Counsel from both sides will appear before Justice Belobaba on Sept. 28 to address the issue of aggregate damages for unpaid hours.

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