

## Class Action for Unpaid Overtime Derailed: Is this the End of High-profile Overtime Class Proceedings?

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A \$600-million class action against the Canadian Imperial Bank of Commerce (“CIBC”) for unpaid overtime has been dismissed. But employers should not assume that the threat of class actions for unpaid overtime is now over.

### *Fresco v. CIBC*

The employees who brought this action claimed they were assigned heavier workloads than could be completed within their standard working hours. They alleged that they were required (or permitted) to work overtime to meet the demands of their jobs and CIBC failed to pay them overtime in contravention of the *Canada Labour Code*.

The court decided that this case should not proceed as a class action because the claims of the employees lacked the required commonality to warrant certification as a class action. For a lawsuit to be certified as a class action it must meet criteria set down by the *Class Proceedings Act*. This includes that the claims raise “common issues” and a class proceeding would be “preferable for the resolution of the common issues.”

The claims of the employees in the proposed class involved unique individual circumstances such as the length of smoking breaks taken by one employee and whether another employee arrived at work before the start of her shift because CIBC required her to do so or because it was convenient to her as that is when her husband dropped her off at work. The court decided that it would be necessary to examine the facts of each individual claim to determine whether or not CIBC had improperly failed to pay overtime.

The employees also argued that the action should proceed as a class action because CIBC’s overtime violated the *Canada Labour Code* and this provided a common issue to warrant certification. The policy required that employees obtain pre-approval of managers in advance of working overtime in order to be paid overtime hours. The court rejected the argument that this pre-condition violated the *Code* on the basis that managers were required under the policy to approve overtime where it was required to be worked. The employees’ real concern, according to the court, was that the policy was applied in an illegal manner, not that the policy was itself illegal.

The proceeding has attracted substantial media coverage and was described as “the largest unpaid overtime class action ever launched in Canada”. The action even has its own website

([www.cibcunpaidovertime.ca](http://www.cibcunpaidovertime.ca)) and toll-free telephone number, containing information about the action and inviting class members to register.

As of the date of writing, the employees are considering whether or not to appeal. Given the stakes, it would be surprising if this decision were not appealed.

## **Other Unpaid Overtime Class Actions**

The CIBC case was the first of several high-profile class actions brought in Canada for alleged unpaid overtime. Accounting firms KPMG and PriceWaterhouseCoopers recently settled their respective class actions for unpaid overtime under the Ontario *Employment Standards Act, 2000*, and Canadian National Rail (“CN”) and Scotiabank are currently involved in class actions similar to CIBC for unpaid overtime under the *Canada Labour Code*.

The issues in the Scotiabank class action, while not identical, are similar enough to those before CIBC that this refusal to certify will likely affect the proceedings in that case, particularly considering the same judge is presiding.

The CN class proceeding is different in nature from the CIBC case. CN is alleged to have misclassified more than a thousand employees as “managers” in order to avoid paying overtime under the *Canada Labour Code*. CIBC did not dispute whether employees were eligible, only that they should be paid where they are required or permitted to work overtime, whereas CN is disputing such eligibility.

## **Lessons for Employers: Risk of Employment-Related Class Actions**

Employers should not assume that this is the end for good of unpaid overtime class actions. The court that approved the KPMG settlement certified the class in that case and found commonality of issues. Like the CN case, the issues there related to misclassification of employees, rather than what the courts have termed “off-the-clock” cases (CIBC, Scotiabank).

Employers should understand that it only takes one aggrieved employee (or former employee) to start a class action. Under Ontario law, a single “representative” plaintiff can issue a claim under the *Class Proceedings Act*, seeking certification from the court of a “class” of plaintiffs. Later, the court will decide whether or not to certify a class (or classes) of plaintiffs as requested in the claim.

In the employment context, class proceedings present the greatest risk for larger employers primarily in “entitlement” areas such as overtime, vacation pay, termination pay, pension benefits and retiree health benefits. However, smaller organizations should not assume that they face no threat. Relatively small classes of employees have been certified to bring wrongful dismissal claims.

Employers wishing to avoid the risk of potentially costly class action cases should review their hours of work practices and classifications now and, if necessary, take appropriate action to fix any problems before they end up in court.

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