COURT FILE NO.: 07-CV-334113CP [Toronto]
DATE: 20090618

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

DARA FRESCO

Plaintiff

- and -

CANADIAN IMPERIAL BANK OF COMMERCE

Defendant

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

Howard Goldblatt, *Louis Sokolov*, *R. Douglas Elliott*, *David F. O'Connor*, and *Derek McKay*, for the Plaintiff/Moving Party

Patricia Jackson, *Linda Plumpton*, *Stuart Svonkin*, *John C. Field*, and *Lauri A. Wall*, for the Defendant

HEARING DATES: December 8, 9, 10, 11, 12, 2008

REASONS FOR DECISION

LAX J.

Overview

[1] This is an intended class proceeding brought by Dara Fresco on behalf of current and former front-line service workers in retail branches of the Canadian Imperial Bank of

Commerce ("CIBC"). The primary claim being advanced is for compensation for unpaid overtime wages. Ms Fresco seeks certification of this action as a class proceeding pursuant to s. 5 of the *Class Proceedings Act*, 1992, S.O. c. 6 ("*CPA*"). She alleges that the bank has breached its contractual and statutory duties to her and to those she seeks to represent by failing to pay class members for all hours worked at the appropriate rates of pay.

[2] Ms Fresco frames her claim in breach of contract and unjust enrichment. Central to these claims is the allegation that CIBC's Overtime Policy ("the Policy") is illegal. The Policy requires employees to obtain approval in advance from a manager in order to be compensated for overtime hours worked unless there are extenuating circumstances and approval is obtained as soon as possible afterwards. It also provides for paid time off at the rate of time and a half in lieu of monetary compensation at the option of the employee. The pre-approval requirement is said to violate the statutory requirement under the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("*CLC*") that employees be paid for overtime at a rate not less than one and one-half times regular wages when the employee is "required or permitted" to work in excess of standard hours of work. The time in lieu option is also said to be impermissible under the *CLC*.

[3] This is not a misclassification case in which the employer is alleged to have treated all members of the proposed class as ineligible for overtime.[1] Rather, this case, sometimes referred to as an "off-the-clock" case, alleges that CIBC has failed to compensate employees who are entitled to be paid overtime in the manner required by law. CIBC does not dispute the statutory entitlement of class members to be compensated as provided in the *CLC* when they are required or permitted to work overtime. CIBC agrees that whether or not pre-approval is obtained, if an employee is required or permitted to work overtime and is not compensated, this is a breach of the *CLC* and a breach of the contract of employment.

[1] See, e.g., *Rocher v. Sav-On Drug Stores, Inc.*, 34 Cal. 319, 96 P.3d 194; *Bell v. Farmers Insurance Exchange*, 115 Cal. App. 4th 715, 9 Cal. Rptr. 3d 544 (Ct. App.); and *Gentry v. Circuit City Stores, Inc.*, 42 Cal. 4th 443, 165 P.3d 556. See also *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.).

[4] My reasons follow, but in brief summary, it is my conclusion that this is not a proper case for certification and that a class proceeding is not the preferable procedure for resolving the claims of class members for unpaid overtime. While some of the certification requirements could be satisfied, the action lacks the essential element of commonality. In my opinion, there is no asserted common issue capable of being determined on a class wide basis that would sufficiently advance this litigation to justify certification.

[5] The cornerstone of Ms Fresco's claim is the alleged illegality of the CIBC Policy and, in particular, the pre-approval requirement. It is my opinion that the Policy is not illegal, and that at any rate the determination of its legality will not materially advance any class member's claim for unpaid overtime wages. Any losses that Ms Fresco or class members may have suffered were not caused by an allegedly illegal Policy, but rather by a failure independent of the Policy to compensate for overtime hours worked that were required or permitted. Ms Fresco's real complaint is not that the Policy is illegal, but that the Policy was applied in an illegal manner so as to require or permit class members to work unpaid overtime.

[6] Ms Fresco asserts that there is a common or pervasive or systemic policy, practice or experience of unpaid overtime at CIBC. It is unclear whether she asserts that the allegedly illegal Policy gives rise to this or whether this is advanced independent of the Policy. In either case, it is an assertion of systemic wrongdoing. It is my conclusion that there is no evidentiary foundation for this, but even if there were, this is not a case where questions of systemic wrongdoing can be resolved without examining the individual claims, thereby defeating the purpose of a class action.

Evidence on the Motion

[7] The parties filed voluminous evidence from current and former employees and managers relating to CIBC's practices with respect to overtime. There were extensive cross-examinations. The parties dispute the effect of this evidence. Ms Fresco submits that CIBC's opposing evidence is designed to draw the court into an impermissible inquiry into the merits; it is CIBC's position that the evidence of facts that contradict or

expose inconsistencies in the plaintiff's evidence and CIBC's responding evidence are not tendered for this purpose but to demonstrate that there is no common issue regarding unpaid wages and that the commonality requirement has not been met. I will later explain why I accept CIBC's position.

[8] The plaintiff also tendered an affidavit from Charlene Wiseman, one of Ms. Fresco's lawyers in this case, which purports to be evidence of CIBC's overtime practices based on a self-selected survey sample of potential class members registered on plaintiff's counsel's website. Prior to the motion, Ms Fresco's counsel provided CIBC's counsel with an unsworn copy of the affidavit so that CIBC could advise whether it consented to the admission of that evidence or whether a motion would be required. CIBC objected to the affidavit as inadmissible hearsay. The affidavit was nonetheless filed as evidence on this motion without bringing a motion or seeking the court's direction. Ms Fresco's response is that this is the best available survey evidence of CIBC's unpaid overtime practices, given that CIBC rejected both the plaintiff's request to provide her with information on the class members to allow the plaintiff to conduct its own random sample and the plaintiff's proposal to conduct a joint random survey of the putative class. This is not a compelling answer. The evidence constitutes hearsay and does not meet either the test of necessity or of reliability: *R. v Smith*, [1992] 2 S.C.R. 915 at 933-934; *R. v Khan*, [1990] 2 S.C.R. 531 at 541. As the evidence is not properly before the court and constitutes inadmissible hearsay, I have not considered Ms Wiseman's affidavit.

[9] Both parties tendered evidence from various experts. To the extent that this evidence is relevant to the certification requirements, it is helpful in determining whether there is some basis in fact for the submissions of counsel on the requirements for certification in sections 5(1)(b) through (e) of the *CPA* and I will refer to it as necessary.

Background

[10] CIBC is a federally-regulated chartered bank with a varied network of 1,043 retail bank branches across the country. Ms Fresco has been employed with CIBC since April 1998 in a number of different capacities in different locations with different branch

managers, including as a roving Customer Service Representative or teller ("CSR"), as head CSR and as a Personal Banking Assistant ("PBA"). Currently, she is the head CSR at CIBC's Broadview and Danforth branch in Toronto.

[11] This action, commenced on June 4, 2007, is brought on behalf of current and former non-management and non-unionized employees of CIBC in Canada who worked at CIBC's Canadian retail branches as front-line customer service employees, including CSRs, Assistant Branch Managers, Financial Service Representatives ("FSRs"), Financial Service Associates ("FSAs") and Branch Ambassadors.

[12] Based on the original proposed class definition, which had no temporal limitation, CIBC estimated the class size to be about 31,000 employees by examining its records going back to 2001. The revised class definition submitted at the hearing now proposes a class period reaching back to February 1, 1993. CIBC had no opportunity to address this, but believes that the expanded class period will result in a significantly greater class size.

[13] Ms Fresco pleads that CIBC has failed to comply with the minimum requirements of the *CLC* and the Regulations by failing to pay statutory overtime to class members and by failing to keep proper records of its employees' hours of work in breach of its contractual and statutory duties. She pleads that the pre-approval requirement in the Policy purports to excuse CIBC from paying any overtime and does not allow for payment of overtime to class members who were routinely required or permitted to work overtime. She alleges that at each of the branches where she has worked, class members were directed to prepare time records that described their hours of work as no more than their regular daily hours and to make no claim for overtime hours worked. She claims that she has worked at times up to 15 hours per week on average beyond her regular scheduled hours and that such work is necessary to complete the basic duties of her employment. She alleges that the approximate value of the additional time for which she has not been paid between 1999 and the commencement of the action is $47,220. In addition to the general damages claimed, she claims aggravated, exemplary and punitive damages in the amount of $100 million.

[14] In the Statement of Claim, Ms Fresco seeks an order directing CIBC to perform its contracts of employments with class members and comply with the *CLC* and, in particular, to accurately record all hours worked by class members and to pay them for hours worked beyond their agreed upon standard hours at the rate of time and a half their normal hourly rate, or alternatively, at their regular hourly rate up to 40 hours per week or 8 hours per day and at time and a half thereafter. She asks for an order declaring the Policy to be unlawful and restraining CIBC from enforcing it to the extent that it requires or permits class members to work overtime hours for which they will not be paid, contrary to the *CLC*. She asks for an order directing an aggregate assessment of damages and claims $500 million in general damages. In the alternative to the claim for damages, she seeks an order declaring that CIBC has been unjustly enriched and an order directing CIBC to account for the unpaid additional hours worked by each member of the class by disgorgement of amounts withheld by it in respect of unpaid overtime.

CIBC's Overtime Policy

[15] CIBC has had an overtime policy for eligible employees for a number of years. The version of the Policy that is attacked in this proceeding is the April 10, 2006 version. Minor changes were made to the Policy in June 2007, but the provisions of the Policy at issue in this proceeding remained the same. Relevant excerpts are set out below:

> **SUMMARY**
>
> CIBC is committed to creating an environment where all employees across the organization are compensated equitably and according to market practices and Canadian legislation. We recognize that from time to time, management may require employees to work beyond regular hours of work and in those cases, CIBC provides additional compensation to eligible employees in the form of overtime payment or paid time off in lieu. Overtime may be authorized on an exceptional basis when management reviews and approves that the work or service involved is essential, and that overtime is the most appropriate and cost effective way of doing this work or providing this service.
>
> **INTENT**
>
> In recognition of the changing complexity of our workforce and the desire to help clients achieve their goals, CIBC has developed this Employee Overtime Policy (Canada) to

help management align our resources appropriately and in accordance with the legal and regulatory framework governing overtime. In addition, CIBC strives to ensure consistent treatment of all employees across Canada wherever possible.

POLICY DEFINITIONS

…

Definition of Overtime

For the purpose of this Policy, overtime is defined as pre-approved and authorized time worked by an employee in excess of 8 hours in a day or 37.5 hours in a week as set out in the Employees Eligible for Overtime Pay section below and for which the employee may be entitled to compensation pursuant to their terms of employment, or by law.

…

PRE-APPROVAL REQUIRED

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 afterwards … [italics in original]

TIME OFF IN LIEU OF PAYMENT

When requested by the employee and authorized by management, an employee may take time off in lieu of (instead of) payment of overtime pay. Time off in lieu is accrued at the overtime pay rate (generally one and one-half hours off for every hour of overtime worked) … The decision to grant time off in lieu of payment is at the manager's discretion but a manager cannot require an employee to take time off in lieu of payment of overtime pay.

Time off in lieu must be taken within 90 calendar days of working the overtime (and scheduled with the Manager) or it must be paid out at that time. Any lieu time not taken within this established time frame will be paid to the employee.

[16] CIBC provides a number of opportunities for employees to be informed about the Policy, including by communications on CIBCToday and other internal intranet sites, by

postings on bulletin boards at branches and by reference to the Policy and how to locate it on CIBC's internal site on forms that employees complete when overtime is worked.

[17] At CIBC, the branch manager enjoys significant autonomy in managing branch employees, including with respect to staffing and scheduling. At the time the 2006 Policy was introduced, CIBC issued Manager Guidelines that include an explanation of the elements of the policy, tips for planning personnel resources and a number of different scenarios to illustrate the varied circumstances in which employees should receive overtime compensation. They state as a general matter that overtime work should only be authorized on an exceptional basis. They require managers who regularly require their employees to work overtime to review their staffing model to ensure they are appropriately resourced to handle on-going workloads. Managers are obligated to: (1) plan their resources, projects and business requirements well in advance to determine whether overtime is necessary; (2) ensure that they document any pre-approval of overtime; (3) not permit employees to work overtime hours where overtime has not been approved; and (4) refer questions regarding overtime that they are unable to answer to the Human Resources Consultant ("HRC") or Employee Relations Consultant ("ERC") for their line of business.

[18] Employees also have responsibilities relating to overtime, including to: (1) obtain appropriate written authorization prior to working overtime, or as soon as possible afterwards; (2) as soon as overtime hours have been worked, submit them in accordance with the requirements of their line of business; (3) refer any questions to their manager; and (4) follow the escalation process if any process or practices used within the employee's business unit appear not to follow the Policy, or if the employee has any other concerns regarding overtime. The escalation process forms part of the Policy under the heading "Resolving Concerns". It begins with the employee talking with his or her manager and if not satisfied with the response, escalating the concern up the ladder ultimately to the Employee Relations Policy and Governance department at CIBC's head office.

[19] In addition to the escalation process, employees can raise concerns about overtime by contacting CIBC's Human Resources Contact Centre, CIBC's Ethics Hotline, the CIBC Employee Ombudsman or by filing a complaint with Human Resources and Social Development Canada ("HRSDC"). Except for the Ombudsman which CIBC introduced in May 2008 after the commencement of the action, these methods for redressing concerns have existed for some years. CIBC submits that these processes are preferable to a class proceeding for resolving the claims of class members.

Certification Requirements

[20] Section 5(1) of the *CPA* sets out the criteria for the certification of a class proceeding. The language is mandatory. The court is required to certify the action as a class proceeding where the following five-part test for certification is met:

> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
>
> (c) the claims of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff who,
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[21] These requirements are linked: "There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers": *Sauer v. Canada (A.G.)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14. The core of a class proceeding, as

Winkler J. (as he then was) pointed out in *Frohlinger v. Nortel Networks Group*, [2007] O.J. No. 148 at para. 25 (S.C.J.), is "the element of commonality". It is not enough for there to be a common defendant. Nor is it enough that class members assert a common type of harm as commonality is measured qualitatively rather than quantitatively. There must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this.

5(1)(a) - Cause of action

[22] The test under s. 5(1)(a) is well settled and identical to the test under rule 21.01(1)(b) of the *Rules of Civil Procedure*. The following principles apply to the determination of the issue of whether the pleadings disclose a cause of action under s. 5(1)(a):

- no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 25.

- all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and thus assumed to be true;

- the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 41, leave to appeal to S.C.C. refused, [2005] 1 S.C.R. vi.

- matters of law not fully settled in the jurisprudence must be permitted to proceed: *Ford v. F. Hoffmann-LaRoche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 17(e).

- the pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information: *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959 at 980; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at 679.

[23] The Statement of Claim alleges and CIBC does not dispute that the employment contract between CIBC and its employees obliges CIBC to compensate employees for overtime worked as defined in the Policy and by law and that a failure to do so gives rise to a cause of action for breach of contract. Ms Fresco's claim for unjust enrichment is

likewise premised on the allegation that CIBC failed to appropriately compensate class members for overtime hours, thereby enriching CIBC and depriving class members without juristic reason: see, *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 and *Pettkus v. Becker*, [1980] 2 S.C.R. 834. The Statement of Claim properly pleads these causes of action.

[24] In dispute is whether CIBC's overtime Policy is unlawful giving rise to both causes of action. CIBC submits that its Policy is lawful and consistent with the provisions of the *CLC* such that Ms Fresco's claim based on its illegality – both as to the requirement for pre-approval and the time in lieu option – does not disclose a tenable cause of action. It therefore submits that the proposed common issues that seek a determination of the legality of the Policy should be dispensed with at the first step of the certification analysis.

[25] The only pleaded attack on the Policy is the pre-approval requirement, but I will address both elements below.

Pre-Approval

[26] The pre-approval requirement provides 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 afterwards."

[27] Subsection 169(1) of the *CLC* provides as follows:

> 169.(1) Except as otherwise provided by or under this Division
>
> (a) the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; and
>
> (b) no employer shall cause or permit an employee to work longer hours than eight hours in any day or forty hours in any week.

[28] Section 174 of the *CLC* provides as follows:

> 174. When an employee is required or permitted to work in excess of the standard hours of work, the employee shall, subject to any regulations made pursuant to section 175, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.

[29] Subsection 169(1) of the *CLC* sets a clear limit on hours of work which are not to be exceeded and creates the corresponding right of the employer to control the hours of work. Section 174 of the *CLC* expressly denies overtime treatment unless the employer expressly or impliedly asks the employee to work overtime, i.e. it was "required" or the employee asked permission to work overtime and was granted such permission expressly or impliedly, i.e. it was "permitted": *Matson v. Great Northern Grain Terminals Ltd.*, [2005] C.L.A.D. No. 401 at para. 32. Subsection 169(1) places the onus and responsibility on the employer to ensure that employees do not exceed these maximum hours thresholds, unless the exception in section 174 applies. Section 174 permits employees to exceed the maximum hour thresholds only where the employer has required or permitted the overtime work. The very language of the *CLC* therefore contemplates the right to pre-approve overtime. In order to "require or 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 way to ensure that an employer complies with s. 171 of the *CLC*, which states that the total hours worked by an employee in any week shall not exceed 48 hours.

[30] The authorities relied on by Ms Fresco are fact-specific. In *Kindersley Transport Ltd. v. Semchyshen*, [2002] C.L.A.D. No. 4, the referee found that the managers tacitly approved (i.e. permitted) the complainant to work significant overtime to handle the increase in her duties. In *RSB Logistics v. Hale*, [1999] C.L.A.D. No. 548, the referee found that the manager knew the complainant was working overtime, that he had observed her working the overtime and that he had received written reports from her regarding the overtime she was working. In *Re Crown Group Security Ltd.*, [2004] B.C.E.S.T.D. No. 189, a case decided under similar provincial legislation,[2] the employer was found to have allowed the employee to remain at work after the end of her scheduled

[2] Section 35(1) of the British Columbia *Employment Standards Act*, R.S.B.C. 1996, c. 113 requires an employer to pay overtime wages if the employer "requires, or directly or indirectly allows" the employee to work more than 8 hours per day or 40 hours per week.

shifts, giving rise to liability for overtime pay. These cases indicate that employers are required to pay for non-preapproved overtime where, as a factual matter, the manager required or permitted overtime to be worked. This is not disputed by CIBC. Ms. Fresco pointed to no case that stands for the proposition that a pre-approval requirement is itself contrary to the *CLC*.

[31] Leaving aside the statutory framework, it is the fundamental right of the employer to control its business, including employees' schedules, hours of work and overtime hours.[3] The ability to authorize overtime is in fact one of the legal criteria used to assess whether or not an employee is considered managerial and exempt from the hours of work provisions of the *CLC*.[4] An employee cannot unilaterally and without agreement of the employer determine what is "work" (i.e., services to be paid for). Put another way, an employee cannot foist services on an employer and expect to be paid wages for them. Where an employer's overtime policy contains a provision that requires prior authorization, the employee is not entitled to work overtime hours at the employee's own initiative and then claim entitlement to overtime pay: *Chabaylo v. Koscis Transport Ltd.*, [2003] C.L.A.D. No. 519 at paras 4 and 10. Conversely, an employer cannot avoid its statutory obligations by knowingly permitting employees to work overtime and then later taking the position the overtime was not authorized: *RSB Logistics* at paras 30 and 37.

[32] The Policy clearly contemplates that an employee unable to complete his/her assigned work during regular hours should discuss it with the manager who either must approve the overtime or make other arrangements such that the employee does not work overtime. If unapproved (and therefore unpaid) overtime is worked, then either it was required or permitted by the manager, in which case the failure to pay is a breach of the

[3] *Wang v. Oceanfood Industries Ltd.*, 2006 BCSC 1945 at paras. 7-8, aff'd 2007 BCCA 447; *Newfoundland and Labrador (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees* 2006 NLTD 37, 148 L.A.C. (4th) 1 at paras. 71, 85; *Ford Motor Co. of Canada Ltd. and C.A.W., Loc. 1520* (1992), 27 L.A.C. (4th) 257 at para. 11.

[4] *Leontsini v. Business Express Inc.*, (1997), F.C.R. 131 at paras. 5 and 14; *Island Telephone Co. v. Canada (Minister of Labour)* (1991), 44 C.C.E.L. 168 at 180 (F.C. T.D.); *Isaac v. Listuguj Mi'gmaq First Nation*, [2004] C.L.A.D. No. 287 at para. 148; *Prince Rupert Port Authority (Re)*, [2002] CIRB No. 203 at para. 69; Geoffrey England et al., *Employment Law in Canada* (4th ed.) (looseleaf) (Markham: LexisNexis Canada Inc., 2005) at 8-143, 8-205; Human Resources and Social Development Canada Guideline "Clarification on Excluded Employees, Canada Labour Code, Part III" (Number 802-1/815-1-1P6-049) at p. 6.

CLC and of the Policy, or it was not required or permitted, in which case the employee has no entitlement to overtime compensation. The fact that unapproved overtime was permitted, in breach of the Policy, and was subsequently not paid, in breach of the *CLC*, does not make the Policy or its pre-approval requirement illegal.

[33] Ms Fresco's real complaint and the implication of the evidence that she relies on is not that the Policy is illegal, but that the Policy is not being applied at the branch level. It is not the pre-approval requirement that "requires or permits" employees to work overtime without compensation. The Policy clearly requires managers to approve overtime that they know is to be worked, and clearly specifies that overtime is not to be routinely permitted. Routinely being required to work overtime to fulfill basic duties is thus a breach of the Policy, as is any other scenario in which overtime is required or permitted but not properly compensated. It is therefore plain and obvious that the pre-approval requirement is not unlawful on its face.

Time in Lieu

[34] Many provincial employment standards statutes explicitly allow employers and employees to agree to time off in lieu. See, e.g., *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 22(7). The *CLC* does not explicitly address this alternative. Ms Fresco submits that as section 174 of the *CLC* provides that overtime worked "is to be paid", it is not plain and obvious that time in lieu is permitted under the *CLC*.

[35] The *CLC* provides a threshold right or benefit for overtime in section 174. It can be superseded by arrangements that provide better rights or benefits than that threshold. Subsection 168(1) of the CLC reads as follows:

> 168. (1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

[36] Where a contract is more beneficial to an employee than rights under Part III of the *CLC*, the contract will govern: *National Bank of Canada v. Canada (Minister of*

Labour) (1997), 3 Admin. L.R. (3d) 51 (F.C.T.D.) at para. 8, aff'd [1998] F.C.J. No. 872 (F.C.A.). The additional right or benefit will only be considered more favourable if it serves the same purpose that the statutory standard is designed to address: *Re Falconbridge Nickel Mines Ltd. and Egan* (1983), 42 O.R. (2d) 179 (C.A.) at 187; *Re Queen's University and Fraser et al.* (1985), 51 O.R. (2d) 140 at 144 (Div. Ct.). The purpose of section 174 in requiring employers to pay overtime is to discourage employers from requiring employees to work longer hours in concentrated periods of time and to reward the extra efforts of employees: *Falconbridge Nickel Mines* at 187.

[37] In assessing whether or not time in lieu is a more favourable benefit within the meaning of subsection 168(1) of the *CLC* (i.e., a greater right or benefit), CIBC relies on an analytical approach which develops out of provincial jurisprudence dealing with substantially similar language to subsection 168(1) of the *CLC* and which has been adopted in the federal jurisprudence as being applicable to interpreting subsection 168(1) of the *CLC*.[5]

[38] In *White Pass Transportation* at 376, the court defined the proper approach in this way: "the benefits to be compared should be benefits falling within the precise compass under consideration; in this case, termination pay." It follows that the benefits to be compared here are those which directly relate to the employment standard in s. 174 of the CLC, as opposed to some broader, overall measure of benefits under the employees' employment contracts.

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[5] *White Pass Transportation Ltd. v. Canada (Attorney General)* (1986), 33 D.L.R. (4th) 371 (B.C.C.A.) at 376; *Echo Bay Mines Ltd. v. Marren* (1997), 31 C.C.E.L. (2nd) 164, at para. 42; *Falconbridge Nickel Mines Ltd.* at 193-194, *Queen's University* at 144, 155; *Reimer Express Lines Ltd. v. Teamsters, Local 938 (Overtime Pay Grievance)*, [2000] C.L.A.D. No. 762 at paras. 21, 22 ("*Reimer Express Lines*"); *Air Canada v. Khan*, [2002] C.L.A.D. No. 353 at paras. 20, 21, 22; *ICS Courier v. Communications, Energy and Paperworkers Union of Canada, Local 333 (HA-10-06 and JK-2-06 Grievances)*, [2007] C.L.A.D. No. 436 at paras. 19, 24; *ADM Milking Co. v. United Food & Commercial Workers International Union, Local 175*, [2002] C.L.A.D. No. 598 at para. 11,; *Telus Communications Inc. v. Telecommunications Workers Union*, [2006] C.L.A.D. No. 453 at paras. 67, 69, 70, 71.

[39] The provision of paid time off at the rate of time and a half in lieu of overtime hours worked at the option of the employee is consistent with this purpose. It fulfills the objective of rewarding the extra efforts of employees by giving them back the personal time they lost by working overtime, at the higher rate of time and a half. Many employees prefer this form of compensation. There is thus a compelling argument to be made that time in lieu on its own at the rate of time and a half is at least as favourable a benefit as wages at the statutory rate.

[40] Regardless, the Policy offers a more favourable benefit because it offers employees a choice. It seems plain and obvious that offering employees a choice between wages at time and a half and time in lieu at time and a half is more favourable than providing the statutory benefit without any choice. Furthermore, as entitlement under the Policy is calculated on the basis of 37.5 hours per week rather than 40 hours, a CIBC employee who works, for example, 45 hours in a week is entitled to a choice between 11.25 hours of time away from work or 11.25 hours of wages. Under the *CLC*, this employee would receive 7.5 hours of wages. A policy that gives an employee a choice between two options, one of which is a quantitatively better version of the statutory benefit, is clearly a more favourable benefit.

[41] In support of her interpretation, Ms Fresco relies on a statement in the report of Professor Harry Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Ottawa: Human Resources and Skills Development Canada, 2006) (the "Arthurs Report"), in which he notes that although a time in lieu option is authorized in seven Canadian jurisdictions and found in numbers of workplaces in the federal domain, Part III of the *CLC* does not currently authorize this and is "unlawful". He proposes that Part III should be amended to "permit an employee and his or her employer to agree that overtime hours will be compensated by time off with pay, at the rate of one and one half hours for every hour worked as overtime, to be taken at a time mutually agreeable to the employer and employee."

[42] The proper interpretation of Section 174 of the *CLC* has been judicially considered. In *Chabaylo* at para. 8, the referee found that time in lieu is lawful if:

(a) the employee chooses and consents to having overtime work compensated by way of time in lieu;

(b) the time in lieu is provided at the rate of time and a half; and

(c) the policy contains a "winding up" provision that allows an employee to "cash out" his or her banked overtime at reasonably regular intervals.

[43] The lawfulness of a time in lieu option has also been recognized in *RSB Logistic Inc. v. Hale*, [1999] C.L.A.D. No. 548 at para. 35 and *ConAgra Grain, Canada v. Beare*, [2004] C.L.A.D. No. 140 at para. 32. The Policy clearly complies with all three requirements. In this respect, it is different from the unlawful policy in *Kindersley Transport*, relied on by Ms Fresco. There, the employer provided time in lieu *equal* to the number of overtime hours worked rather than at the rate of one and a half.

[44] While it certainly gives me pause to disagree with one of Canada's most respected labour scholars, Professor Arthurs did not engage in the more favourable benefit analysis. He did not consider s. 168 of the *CLC* or the labour jurisprudence that has developed in this area that specifically addresses time in lieu in relation to s. 174 of the *CLC*. While I am not bound by these decisions, I agree with their reasoning. In my opinion, the plaintiff's interpretation of s. 174 leads to an absurd result that would deny employees the more favourable benefit contemplated by s. 168 of the *CLC*. I conclude that it is plain and obvious that the time in lieu provision in CIBC's Policy is lawful and complies with the *CLC*. I acknowledge that if the time in lieu provision in the Policy is not followed and employees are not given the option to choose between wages and time in lieu or are not able to "cash out" within 90 days, this would violate the Policy. It does not however make this provision unlawful on its face.

[45] As I reject Ms Fresco's submissions with respect to both aspects of the Policy that are challenged, she does not state a tenable claim based on the allegation that the Policy is illegal. I will address this further under the commonality requirement in s. 5(1)(c).

[46] Ms Fresco meets the first requirement for certification.

5(1)(b) - Identifiable class

[47] At the hearing, Ms. Fresco proposed the following revised class definition:

> Current and former non-management, non-unionized employees of CIBC in Canada who worked at CIBC's retail branches, High Value Cluster offices or Imperial Service offices at any time from February 1, 1993 to the date of the certification order in this action, as tellers or other front-line customer service employees, including the following:
>
> > *Customer Service Representatives* (also formerly known as Tellers);
> > *Assistant Branch Managers (Level 4)*;
> > *Financial Service Representatives* (also formerly known as Personal Banking Associates, Personal Bankers, Senior Personal Bankers and Business Advisors);
> > *Financial Service Associates;* and
> > *Branch Ambassadors*
>
> And other employees who performed the same or similar job functions as the above under a different or previous CIBC job title.

[48] Section 5(1)(b) requires that "there be an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant." The purpose of a class definition is (a) to identify persons with a potential claim; (b) define who will be bound by the result; and (c) describe who is entitled to notice: *Bywater v. Toronto Transit Commission,* [1998] O.J. No. 4913, 27 C.P.C. (4th) 172 (Gen. Div.) at para. 10. Class members are not required to have identical claims and class membership identification is not commensurate with the elements of the causes of action advanced on behalf of the class: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 45 (C.A.), leave to appeal to S.C.C. refused, [2005] 1 S.C.R. vi.

[49] CIBC objected to the original class definition because it contained no temporal limitation and the definition used language that did not relate to CIBC's job descriptions. The revised class definition addresses these concerns. I would not give effect to its remaining criticism that the class definition is "fatally over-inclusive" and not rationally connected to the common issues because it includes members who have no claim for overtime. That the claims of some or even most class members will be unsuccessful is not a reason to reject the class definition. All class members have an interest in the resolution

of the asserted common issues. The expanded class period may raise issues about manageability, but not about membership. Assuming that there are common issues and that a class proceeding is the preferable procedure to resolve these issues, their resolution would apply to everyone in the proposed class.

[50] The second criterion for certification is met.

5(1)(c) – Common Issues

The Legal Test

[51] For an issue to be common, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 18. An issue will not be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant. *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155 (S.C.J.), aff'd, [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.). The underlying question is whether the resolution of a proposed common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at para. 39.

[52] The common issues criterion is not a high legal hurdle, but a plaintiff must adduce some basis in fact to show that issues are common: *Hollick* at para. 25. An issue can be common even if it makes up a very limited aspect of the liability question and although many individual issues remain to be decided after its resolution: *Cloud* at para. 53. It is not necessary that the answers to the common issues resolve the action or even that the common issues predominate. It is sufficient if their resolution will significantly advance the litigation so as to justify the certification of the action as a class proceeding.

[53] Ms. Fresco asks the court to certify the following common issues:

The Defendant's Overtime Policies and Recording of Hours Worked

1. Are any parts of the Defendant's Overtime Policies (from February 1, 1993 to the present) unlawful, void or unenforceable for contravening the *Canada Labour Code*?
    a. If "yes", which provisions are unlawful, void or unenforceable?

2. Did the Defendant have a duty (in contract or otherwise) to prevent Class Members from working, or a duty not to permit or not to encourage Class Members to work, overtime hours for which they were not properly compensated or for which the Defendant would not pay?
    a. If "yes", did the Defendant breach that duty?

3. Did the Defendant have a duty (in contract or otherwise) to accurately record and maintain a record of all hours worked by Class Members to ensure that Class Members were appropriately compensated for same?
    a. If "yes", did the Defendant breach that duty?

3.1. Did the Defendant have a duty (in contract or otherwise) to implement and maintain an effective and reasonable system or procedure which ensured that the duties in Common Issues 2 and 3 were satisfied for all Class Members?
    a. If "yes", did the Defendant breach that duty?

Breach of Contract

4. What are the relevant terms (express or implied or otherwise) of the Class Members' contracts of employment with the Defendant respecting:
    a. Regular and overtime hours of work?
    b. Recording of the hours worked by Class Members?
    c. Paid breaks?
    d. Payment of hours worked by Class Members?

5. Did the Defendant breach any of the foregoing contractual terms?

Unjust Enrichment

6. Was the Defendant enriched by failing to pay Class Members appropriately for all their hours worked? If "yes",
    a. Did the class suffer a corresponding deprivation?
    b. Was there no juristic reason for the enrichment?

Limitation Periods

6.1. What statutory limitation periods, if any, apply to the claims of the class?

Remedy & Damages

7. If the answer to any of common issues 1-3 or 5-6 is "yes", what remedies are Class Members entitled to?

8. If the answer to any of common issues 1-3 or 5-6 is "yes", is the Defendant potentially liable on a class-wide basis? If "yes",
    a. Can damages be assessed on an aggregate basis? If "yes",
        i. Can aggregate damages be assessed in whole or part on the basis of statistical evidence, including statistical evidence based on random sampling?
        ii. What is the quantum of aggregate damages owed to Class Members?
        iii. What is the appropriate method or procedure for distributing the aggregate damages award to Class Members?

    b. Is the Class entitled to an award of aggravated, exemplary or punitive damages based upon the Defendant's conduct? If "yes",
        i. Can these damages award be determined on an aggregate basis?
        ii. What is the appropriate method or procedure for distributing any aggregate aggravated, exemplary or punitive damages to Class Members?

Non-Common or Individual Issues, If Any

9. To the extent that the claims of Class Members raise non-common or individual issues, what are the appropriate, most efficient and cost effective procedures for determining same?

Analysis of the Proposed Common Issues

[54] A useful place to begin is to compare the kind of claim that is advanced in this proceeding with the kind of claims that are advanced in the misclassification cases.[6] In those cases, commonality arises from the employees' identical or similar job duties and the determination by the employer that it is not required to pay overtime to employees with these duties. The question for the common issues judge is whether the employees' duties entitle them to overtime within the meaning of the applicable statutes and regulations. This can be assessed without examining individual claims. Success for one does mean success for all: *Western Canadian Shopping Centres* at para. 40.

[6] See footnote 1.

[55] But here, eligibility is not in issue. The employer agrees that this group of employees are all eligible for overtime. This is a claim for systemic breach of duty that alleges that CIBC failed to compensate eligible employees for overtime. Ms Fresco has the burden to show by some evidence that CIBC did something or failed to do something in breach of this duty that deprived or potentially deprived class members of the compensation to which they are lawfully entitled. At certification some basis in fact must be shown that this issue exists and that its resolution will move the individual overtime claims forward. Absent commonality on this core issue, there is nothing common for the common issues trial judge to decide and the individual nature of the claims will negate any benefit to a class action.

[56] Ms Fresco submits that commonality arises from the Policy, the legality of which is the subject of proposed common issues 1 and 1a. In view of my earlier conclusion that the Policy is not unlawful on its face, there is no basis in fact for accepting this as a common issue. However, even if the Policy's pre-approval requirement is illegal, the resolution of this issue will not advance any of the claims for unpaid overtime. Regardless of its legality, the pre-approval requirement does not cause the wrongs that are alleged. Therefore, if required or permitted overtime is worked but not compensated, this breach of the employment contract occurs independent of the Policy. The legality of the pre-approval requirement does not assist in answering the question whether CIBC has liability for unpaid overtime.

[57] Ms Fresco proposes in common issue 3 that CIBC's recordkeeping practices are a source of commonality. CIBC acknowledges that it has a duty to accurately record all hours worked as an incident of CIBC's contractual obligations to compensate class members for all hours worked and as mandated by ss. 252(2) and 264(a) of the *CLC* and s. 24 of the Canada Labour Standards Regulations, C.R.C., c. 986. The methods by which CIBC branches keep records are not common and practices vary across branches, but there is no evidence that CIBC systematically failed to keep records. Therefore, there are only two possible inquiries for a common issues trial judge: (1) whether CIBC's methods of record-keeping are lawful; and (2) whether the records it keeps are accurate. A common issues trial judge could decide the first issue, but as with the legality of the

Policy, that determination would not materially advance the litigation. The plaintiff does not assert any independent cause of action arising from a failure to keep proper records. Each member of the class would still have to establish that he or she worked uncompensated overtime hours. To the extent that the question of recordkeeping is relevant to the litigation, it is relevant only with respect to the accuracy of the records as evidence of hours worked by class members. However, since the plaintiff does not assert any common flaw in the recordkeeping, the question of the accuracy of the records is an individual one.

[58] Proposed common issue 4 addresses the terms of the employment contract. CIBC agrees that it has statutory and contractual duties to appropriately compensate class members for overtime hours worked, to maintain proper records as required under the *CLC* and the Regulations and that these duties are incorporated into the contracts of class members. It disputes none of the terms of the employment contracts of class members.

[59] Ms Fresco argues, relying on the decision of Winkler J. (as he then was) in *Bywater*, that a common issue of fact or law does not cease to be a common issue simply because the defendant concedes or admits the issue before or at certification and therefore, the issue must be included in a certification order in order to bind members of the class. In *Bywater*, Winkler J. was dealing with the defendant's admission of liability for a fire in the Toronto subway. Without a certification order, the admission did not advance the litigation or bind the defendant to liability. As there is no admission of liability in this case, the same concern does not arise. While I agree that proposed issue 4 could be answered in common, its determination alone will not advance the litigation sufficiently to justify certification as a class proceeding without certification of the more contentious liability issues. The central inquiry in this case is whether CIBC, in some common way, breached the duties it acknowledges it owes to class members giving rise to the claims for breach of contract (common issue 5) and unjust enrichment (common issue 6). Unless there is some evidence of systemic wrongdoing, these cannot be common issues.

[60] I turn then to consider the assertion that there is a systemic policy, practice or experience of unpaid overtime at CIBC. This assertion was not proposed as an explicit common issue, but it is the liability question underlying the claims of class members that are articulated in proposed common issues 2, 3.1. 5 and 6. Liability could arise if there is some common act or omission committed by CIBC that caused or contributed to the systemic failure to properly compensate overtime.

[61] I see no difference between common issues 2 and 5. Although common issue 2 is phrased in the language of duty and breach of duty, the claim that is advanced is for unpaid overtime and the issue to be resolved is whether there is a systemic failure to pay class members for overtime hours worked. While only a minimum evidentiary basis is required, there must be some evidence to show that this issue exists and that the common issues trial judge is capable of assessing it in common. Otherwise, the task for the common issues trial judge would not be to determine a common issue, but rather to identify one.

[62] In this case, Ms Fresco put forward evidence of her own experience and the experience of twelve affiants as a basis in fact for the assertion that CIBC engaged in systemic wrongdoing so as to deny class members overtime compensation. As three of the affiants refused to be cross-examined, the relevant evidence on the motion is that of Ms Fresco, nine other class members and one branch manager. This evidence shows a variety of individual circumstances that give rise to unrelated bases for unpaid overtime claims that can only be resolved individually by considering the evidence of the affiant advancing the claim, the evidence of various other current and former CIBC employees who managed and/or worked with that affiant, and various records maintained on a non-centralized basis by CIBC.

[63] Ms Fresco's own claim is a good example of the individual nature of the claims. Her claim would appear to depend on whether or not the accommodation that she was given for breast-pumping breaks is properly included as hours worked in the calculation of her entitlement to overtime. The claim of another class member turns on disputed evidence as to the length of her smoking breaks and whether this is to be included as time

worked for the purpose of calculating overtime entitlement. Still another primarily bases her claim on hours worked between 8:00 and 8:30 a.m. in circumstances where she agrees that she arrives early at the branch because her husband drops her off on his way to work, but CIBC asserts that she was not required to begin work before 8:30 a.m. At least two of the affiants were part-time CSRs who on cross-examination acknowledged that they did not work overtime hours and that they were paid for all the hours they worked. As was the case with a number of other affiants, they mistakenly believed that they were entitled to be paid at the overtime rate whenever they exceeded their scheduled hours, even if those hours were less than 8 hours in a day or 37.5 hours in a week. In my view, this evidence does not provide a sufficient basis in fact to show the existence of systemic wrongdoing. What it shows is a number of individual circumstances that arise for disparate reasons and require individual resolution.

[64] If I am wrong in my appreciation of this evidence, I am nonetheless of the view that the individual claims would need to be resolved in order to come to a determination on this question. Therefore, proceeding as a class action will not avoid duplication of fact-finding and legal analysis.

[65] In *Fehringer*, which was a claim against a newspaper for allegedly improper conduct committed by one of its employees, Justice Nordheimer questioned how the court could determine an issue of systemic negligence without knowing the particulars of the negligence complained of, including knowing what the conduct was, where it occurred, how it occurred, whether the defendants had knowledge of it and what steps, if any, were taken as a consequence. I acknowledge that *Fehringer* was decided before *Cloud*, which arguably lowered the threshold for class certification of actions founded on allegations of systemic wrongdoing, but I believe that the result in *Fehringer* would have been no different, given the individual nature of the conduct complained of. In this case, the conduct complained of has the superficial appearance of commonality, but it is my view that this proceeding would inevitably break down into individual inquiries.

[66] As in *Fehringer*, the individual issues in this case are front and centre and it would be virtually impossible to embark on a trial of the common issues without

engaging in an individual examination of the specific circumstances that underlie each class member's claim. It would be, as Justice Nordheimer said, "putting the cart before the horse". I agree with him that in this case the court would be asked to determine systemic wrongdoing either in a factual vacuum or on the basis of an individual examination of each claim, which defeats the very purpose of a class action.

[67] Common issue 3.1 asks whether CIBC has a duty to implement some type of system to ensure that it complies with its contractual obligation not to require or permit overtime to be worked without compensation, and whether this duty was breached. To the extent this issue raises a question that is distinct from the question of whether CIBC breached its obligation to properly compensate overtime, I do not believe it to be suitable for certification. Ms Fresco has not pointed to any basis for such a duty, and I can see none.

[68] This is not the same kind of case as *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 183 or *Cloud*, in which the defendants were entities responsible for overseeing the conduct of others who directly inflicted harm on class members, and who were alleged to owe fiduciary duties to class members on that basis. Rather, the proposition here is effectively that a defendant corporation has an independent duty to prevent itself from breaching a contractual obligation or, put differently, to perform a contractual obligation in a particular way.

[69] There is no factual basis for the existence of any express or implied contractual term giving rise to such a duty. CIBC's contractual obligation was to properly compensate overtime, not to perform this obligation through any particular mechanism. Nor has Ms Fresco shown any basis for some non-contractual duty arising at common law or equity. Moreover, she does not plead any cause of action in negligence or breach of fiduciary duty as in *Rumley* or *Cloud*.

[70] Ultimately, the central flaw in the plaintiff's case is that instances of unpaid overtime occur on an individual basis. This lack of commonality cannot be overcome by certifying an issue that asks whether the defendant had a duty to prevent a series of

individual wrongs, without any basis for the existence of this duty and where the duty does not relate to any pleaded cause of action.

[71] Finally, I wish to address the expert evidence on which Ms Fresco relies. In my opinion, this evidence does not assist her.

[72] Professor Judith Fudge of the Faculty of Law at the University of Victoria was retained to provide an opinion on two issues: (1) the prevalence of unpaid overtime in federally regulated industries; and (2) the adequacy of the current enforcement mechanisms under Part III of the *CLC*. With respect to the first issue, she opined that federal employers require their employees to perform "excess hours of chronic overtime." This evidence provides no basis in fact that there is a systemic policy, practice or experience of unpaid overtime at CIBC, one of many federally-regulated employers.

[73] The Arthurs Report upon which Professor Fudge relies makes clear that there is considerable variation in non-compliance within the federal sector based on industry, firm size and type of offence. Professor Arthurs was not specifically examining the issue of unpaid overtime, but rather he was looking generally at the question of compliance with Part III of the *CLC*. At the beginning of the chapter in his Report that addresses this question, Professor Arthurs says at p. 192:

> … As we have come to understand that high labour standards are associated with high-performance economies, we have also come to expect that many employers will not only meet, but exceed minimum standards – as most major federal employers do most to the time.

[74] He concludes this chapter and says at p. 194:

> To sum up what we know about compliance …. Though the data is unreliable for various reasons, non-compliance is almost certainly lowest in large firms and with respect to "bread and butter" issues like unpaid wages and benefits: it is highest among small firms, in the trucking industry and with regard to non-monetary workplace issues such as posting sexual harassment policies.

[75] In my opinion, this evidence similarly provides no basis in fact that there is a systemic practice of unpaid overtime at CIBC.

[76] Dr. Graham Lowe, a Professor Emeritus in Sociology at the University of Alberta, authored a report entitled “Unpaid Overtime in Canada’s Banking Sector.” He analyzed data concerning employment in NAICS code 5221 (establishments primarily engaged in accepting deposits and lending funds – which includes banks and credit unions) from a number of studies conducted by Statistics Canada. He found that, in 2006, 20.3% of employees in NAICS code 5221 reported that they were not paid for their overtime and that this was twice the rate for all industries (11.5%).

[77] Like Professor Fudge’s report, this evidence does not speak to the particular circumstances at CIBC. It could be that CIBC’s employees are in the 79.7% of 5221 employees who reported that they did not work unpaid overtime. It could be that they are in the 20.3% who reported that they did work unpaid overtime. Or, it could be that the problem is with other employers within code 5221. It is not enough to show that there are problems with unpaid overtime at banks and credit unions and that CIBC is a bank in order to create some basis in fact that there is a problem of unpaid overtime at CIBC. This claim is not advanced against the banking industry, but against CIBC.

[78] For the above reasons, I am unable to accept proposed common issues 1 to 6 as common issues. CIBC raised a number of objections to common issue 6.1 which concerns limitation periods. Given my findings on the other common issues, whether or not this is an acceptable common issue seems to be beside the point.

[79] Proposed common issues 7 and 8 address the question of remedy.

[80] The pleadings contemplate two types of remedy: declarations and damages. For the reasons that follow, no certifiable common issue exists with respect to either issue.

[81] Ms Fresco seeks a declaration that the Policy or its application is unlawful and unenforceable. As any non-payment of overtime was suffered by class members on an individual basis, there can be no substantial common interest in any declaration respecting breach of contract or unjust enrichment. To the extent that CIBC’s failure to pay for overtime work gives rise to damages, entitlement to damages varies among the employees according to the amount of unpaid overtime worked by each. Damages-related

questions therefore lack a substantial common ingredient as well. In *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, leave to appeal to S.C.C. refused, [2007] 3 S.C.R. xii, however, the Court of Appeal held that where damages entitlements vary among individual class members according to their personal experiences, the certification judge can nevertheless certify common issues relating to damages if there is a reasonable likelihood that a common issues judge could find that damages can be assessed in the aggregate.

[82] Proposed common issue 8 anticipates this, asking in part (a) whether this action is an appropriate one for an aggregate assessment and proportional distribution of damages. Strictly speaking, it is not necessary to certify a common issue on the suitability of an aggregate assessment as this determination is made by the common issues trial judge. However, it has become the practice to do this if the court is satisfied that there is a reasonable likelihood that the conditions for an aggregate assessment of damages could be satisfied: *Cassano v. Toronto-Dominion Bank* (2005), 9 C.P.C. (6th) 291 (Ont. S.C.J.) at para. 50, a decision reversed on other grounds but implicitly approved on this point by the Court of Appeal, at 2007 ONCA 781, 87 O.R. (3d) 401, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 15 at paras. 18, 38-53; *Tiboni v. Merck Frost* (2008), 295 D.L.R. (4th) 32 (Ont. S.C.J.), leave to appeal denied on certification, [2008] O.J. No. 4731 at para. 94; *Lee Valley Tools v. Canada Post Corp.*, [2007] O.J. No. 4942, 57 C.P.C. (6th) 223 (S.C.J.) at para. 43.

[83] Therefore, as in *Markson*, the lynchpin question for proposed common issues 7 and 8 is whether there is a reasonable likelihood that the conditions for an aggregate assessment of damages under s. 24 of the *CPA* could be met. If it is not reasonably likely that these conditions can be met, not only can the issue relating to an aggregate assessment not be certified, but the issues relating to damages reduce to individual issues and also cannot be certified.

[84] Ms Fresco contends that this action is “ideally suited” for such an assessment of damages under ss. 23 and 24 of the *CPA*. I cannot agree. For the reasons already given and those that follow, there is no reasonable likelihood that the conditions for an

aggregate assessment of damages can be met in this case, and that accordingly all of Ms Fresco's proposed common issues relating to damages lack a substantial common ingredient and cannot be accepted.

[85] The law on s. 24 of the *CPA* continues to develop. The provisions state, in relevant part, as follows:

> *Statistical evidence*
>
> 23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.
>
> *Aggregate assessment of monetary relief*
>
> 24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. 1992, c. 6, s. 24 (1).
>
> *Average or proportional application*
>
> (2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).
>
> *Idem*
>
> (3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

[86] The leading case in this area is *Markson*, in which the defendant bank charged a credit card cash advance fee that could, under certain circumstances, result in a criminally high rate of interest contrary to s. 347 of the *Criminal Code*. The certification judge refused to certify the action in part because the question of whether and to what extent class members were charged an illegal interest rate was an individual one. The Divisional

Court upheld this finding. In reversing the earlier decisions, Rosenberg J.A. pointed out that the defendant had structured its accounting records in such a manner as to make it difficult and costly to determine which class members had been charged criminal rates of interest (at para. 36). He went on to conclude that the case was an appropriate one for aggregate assessment and proportional distribution of damages notwithstanding that only some class members had in fact been charged illegal interest. He held that the s. 24(1)(b) condition that all factual and legal questions other than those relating to the assessment of damages could be satisfied where "potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments" (at para. 48).

[87] Subsequent cases have applied the principle from *Markson*. These cases and the language of s. 24 make clear that the idea of "potential liability" derived from *Markson* refers to a direct risk of harm wrongfully created by the defendant to which the entire class is exposed, rather than to some vaguer probability of liability. As Feldman J.A. stated in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 106 at 40: "[S]ection 24 of the Class Proceedings Act is applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage." The concept of potential liability is therefore a narrow one informed by the concept of causation. The plaintiff must be capable of proving a direct causal connection between the alleged wrongful act and the harm or potential harm. Put differently, the defendant must have committed an identifiable wrongful act that could constitute a but-for cause of harm to any given class member and that does in fact cause harm to some of them.

[88] In *Markson*, it was the defendant bank's act of imposing charges at an alleged criminal rate of interest that exposed all class members to the risk of harm (although not all suffered harm) that gave rise to potential liability and satisfied the condition in s. 24(1)(b). In *Cassano*, the wrongful act was the charging of foreign transaction fees. If the plaintiff was successful in establishing that the charging of these fees was a breach of contract, it made all such fees improper. In *Lee Valley*, the defendant's wrong was to engage in practices that resulted in overcharging class members for shipping parcels. The

liability determination turned on whether Canada Post was in violation of the *Weights and Measures Act*, in which case all shipping charges were improper, although the damages owing to individual class members varied and were difficult to determine.

[89] This case does not fit the *Markson* model. CIBC's liability does not arise from a wrongful act common to the class. There is no causal relationship between the alleged wrong and the harm or potential harm alleged – namely, that class members were not paid overtime to which they were entitled. To the extent that some employees in some CIBC branches have claims for unpaid overtime, CIBC's failure to compensate them is a breach of the Policy and a breach of contract, but this failure did not cause harm or potential harm anywhere else. The only other basis for class-wide liability is the alleged systemic policy, practice or experience of unpaid overtime, for which there is no evidentiary foundation and which cannot in any event form the basis of a class action because of the need to first determine individual issues. The plaintiff can therefore not satisfy the condition in s. 24(1)(b).

[90] It is CIBC's position that the plaintiff cannot satisfy the condition in s. 24(1)(c). CIBC says that it does not have a single body of data reflecting the compensation provided to employees for overtime or additional hours upon which a reliable statistical sample could be based. It does not use electronic methods such as time clocks or swipe cards to record hours of work, and accordingly CIBC submits that there is no accurate method to reflect compensable work hours and that other proposed methods to determine this, such as log-on/log-off records, cannot be used as a proxy. I am not necessarily persuaded by this submission, but as Ms Fresco cannot satisfy the condition in s. 24(1)(b), this issue becomes moot.

[91] For these reasons, common issues 7 and 8 are not acceptable common issues.

5(1)(d) – Preferable Procedure

[92] I will go on to consider the preferable procedure requirement on the assumption that there are common issues to be proved.

[93] Section 5(1)(d) of the *CPA* requires that a class proceeding be the preferable procedure for the resolution of the common issues. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim; second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The preferability inquiry is conducted through the lens of the three goals of class actions: access to justice, judicial economy and behaviour modification and by taking into account the importance of the common issues to the claims as a whole including the individual issues: *Cloud* at para. 73; *Hollick* at paras. 27-28; *Markson* at para. 69.

[94] In determining whether a class proceeding is the preferable procedure for resolving the common issues, the court must consider not just the common issues, but rather, the claims of the class in their entirety: *Hollick* at para. 29. The preferability requirement can be met even where there are substantial individual issues, but a class proceeding will not satisfy the requirement that it is the preferable procedure to resolve the common issues if the common issues are overwhelmed or subsumed by the individual issues such that the resolution of the common issues will not be the end of the liability inquiry but only the beginning.[7]

[95] If I had found that there were common issues of liability capable of being resolved by a common issues trial judge, the outcome of a common issues trial would dispose of the issue of CIBC's liability, except for the potential existence of individual issues relating to limitation defences if these are pleaded. I would not regard this as a sufficient barrier to a finding that a class proceeding would be the preferable procedure: see *Risorto* at paras. 79 and 81.

[96] Nor would I regard individual hearings as a sufficient barrier in the event an aggregate assessment of damages is not available. CIBC submits that the consequent need for individual hearings would overwhelm the proceeding and make it

[7] *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766, 23 C.P.C. (5th) 360 (Sup. Ct.), aff'd [2004] O.J. No. 5309 (Div. Ct.); *Risorto*; *Mouhteros v DeVry Canada Inc.* (1998) 41 O.R. (3d) 63 (Gen. Div.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 106 at 40, at paras 56, 58.

unmanageable. I am not convinced, however, that the first of the alternative procedures proposed by CIBC – CIBC's internal escalation process – would make the proceeding more manageable. Some form of individual determination would still be required. It is reasonable to think that in order to resolve the claims that have already been brought forward through this process, CIBC would have had to undertake a comprehensive process of investigation including interviewing or taking statements from employees, managers and co-workers, examining records, if any, and assessing credibility. In a class proceeding, any individual hearings can benefit from the findings made by the common issues trial judge. This makes a class proceeding more efficient and meets the goal of judicial economy.

[97] Although CIBC offers multiple methods for employees to raise concerns about their employment situation, the reality is that there is a power imbalance in the employment relationship and employees may perceive that their employment status and advancement will be affected if they assert the rights to which they are entitled. This can be a disincentive to come forward and inhibits access to justice. This may explain why after the commencement of this action, only 31 employees came forward through the escalation process to raise concerns about unpaid overtime. Or, it may mean, as CIBC contends, that there is no systemic problem at the bank.

[98] The Arthurs Report to which I referred earlier comments on the first explanation in relation to CIBC's other proposed alternative to a class proceeding – the HRSDC process. Professor Arthurs found that a very small fraction of federally-regulated employees (0.36%) advance complaints each year against their employer and almost all of these complaints (92%) are advanced against their former employer. Moreover, the jurisdiction of an HRSDC inspector is limited to investigation of breaches of the *CLC* and he or she has no authority to investigate breaches of an employer's overtime policy or to adjudicate claims for breach of contract and unjust enrichment: *Pereira v. Bank of Nova Scotia*, [2007] O.J. No. 2796 (S.C.J.). This would not advance the goals of access to justice or behaviour modification. These are better served by a class proceeding which is subject to court management and judicial scrutiny.

5(1)(e) – a representative plaintiff with a workable litigation plan

The Representative plaintiff

[99] Whether a proposed representative plaintiff can provide adequate representation was addressed by Chief Justice McLachlin in *Western Canadian Shopping Centres* at para. 41:

> … In assessing whether the proposed representative plaintiff is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by class members). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied however, that the proposed representative will vigorously and capably prosecute the interests of the class (citation omitted).

[100] CIBC advances two reasons for rejecting Ms Fresco as a representative plaintiff: (1) she lacks credibility; and (2) her claim presents legal and factual issues that are highly individual and are not common to other members of the class. These objections are not persuasive.

[101] As to the first reason, CIBC relies on the decision of Farley J. in *Shaw v. BCE Inc.*, [2003] O.J. No. 2695 (S.C.J.). In that case, Justice Farley appears to have found that the court is able on a motion for certification to reject a proposed representative plaintiff where his credibility is in question and his claims are, on the basis of the evidence in the record, without merit. In *Markson v. MBNA Canada Bank*, [2004] O.J. No. 3226 (S.C.J.), Justice Cullity considered the proposition advanced in *Shaw* in a lengthy passage at paras. 83 to 89. He concluded that as the evidence on motions for certification is not properly directed at the merits of a plaintiff's claim, a finding such as that made in *Shaw* should be confined to very clear cases. I agree with Justice Cullity. With great respect to Justice Farley, I do not think credibility can or should be assessed on a certification motion.

[102] As to the second reason, Ms Fresco's claim is not any more or less typical than the claims of other members of the class. There is no reason to think that any other representative plaintiff would have more in common with the class. The problem is not

with Ms Fresco's so-called atypical claim, but with the individualized nature of the claims in this proceeding. Each claim presents individual factual issues and no claimant is necessarily typical of the class. In any event, there is no requirement of typicality in the *CPA*. I am satisfied that Ms Fresco is a suitable representative plaintiff.

Litigation Plan

[103] In its Factum, CIBC criticized the litigation plan largely on the basis that it lacks sufficient detail that corresponds to the complexity of the litigation. I agree with CIBC that the litigation plan does not address the question of limitation periods, but it is addressed adequately in Ms Fresco's Reply Factum at para. 77 and could easily be incorporated into the litigation plan. A revised litigation plan was delivered mid-way through the hearing, which attempts to address some of the criticisms that were identified in the Factum. By and large, CIBC's criticisms reprise the manageability argument if aggregate assessment is not available.

[104] Manageability is not a convincing argument in this case. The commencement of this action attracted widespread interest. As I have already indicated, after its commencement, a total of 31 employees from locations across the country came forward to raise concerns that they had not been properly compensated for time worked. I am not suggesting that this represents the only individual claims for unpaid overtime at CIBC, but it does seem to be an exaggeration for CIBC to forecast that there will be "tens of thousands of claims" to resolve. To resolve individual claims, the litigation plan proposes the appointment of referees and the adoption of the summary trial procedure set out in Rule 76 of the *Rules of Civil Procedure* with affidavit evidence and limited cross-examination, subject to the direction of the common issues trial judge. I see no problem with this and there is no reason to think that CIBC's procedural rights will be ignored.

[105] Defendants frequently raise arguments on manageability as an obstacle to certification both under the preferable procedure requirement and also as a deficiency in the litigation plan. A deficient litigation plan that cannot be remedied can reveal that the action is unmanageable and therefore is not the preferable procedure. I do not consider this litigation plan to be deficient. It is certainly not cursory and apart from failing to

address limitation periods, some thought has been given to how the action can be managed in the event that individual damage assessments are required. I repeat what I said in *Sauer* at para. 66:

> … the ghostly spectre of unmanageability underlying the arguments presented against certification is unconvincing. As with most ghosts, it will either vanish in the daylight of case management, the direction of the trial judge, or agreement of the parties or it will return in the night to haunt this proceeding, in which case the defendant may move under section 10 of the *CPA* for decertification: *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.) at para. 70.

[106] Ms Fresco has satisfied this criterion for certification.

Conclusion

[107] As Ms Fresco failed to satisfy the commonality requirement in section 5(1)(c), a class proceeding cannot be the preferable procedure to resolve the claims of class members. I do not believe that this can be remedied on the basis of the action as framed and the common issues proposed. The motion is therefore dismissed.

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LAX J.

Released: June 18, 2009

COURT FILE NO.: 07-CV-334113CP [Toronto]
DATE: 20090618

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DARA FRESCO

Plaintiff

- and -

CANADIAN IMPERIAL BANK OF COMMERCE

Defendant

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

LAX J.

Released: June 18, 2009