The Clock’s Ticking: Ontario Court Of Appeal Dismisses Bank’s Appeal In Overtime Class Action



After nearly 15-years of protracted litigation, the Ontario Court of Appeal recently dismissed the Canadian Imperial Bank of Commerce’s appeal of Justice Belobaba’s trio of decisions, released in 2020, finding that CIBC’s overtime policies and record-keeping practices for tracking and compensating overtime hours were unlawful, “systemic impediments” and in breach of the *Canada Labour Code*.

The Court of Appeal’s decision has wide-ranging implications for the employment and class actions bars across the country, and serves as yet another warning to employers to regularly review and update their policies, procedures and practices to ensure compliance with minimum employment standards. The Court’s decision also confirms employers’ duty under the Code to actively prevent employees from working overtime hours. From a class actions perspective, the Court’s discussion of the test for certifying the aggregate damages question, despite a previous refusal to certify the question at first instance, and the application of the ‘reasonable likelihood’ test given the Supreme Court’s decision in *Pro-Sys Consultants Ltd. v Microsoft Corporation*, is also of significance for national class action litigation across Canada.

Background

In 2007, Dara Fresco, as representative plaintiff, commenced a class action against CIBC on behalf of 31,000 customer service employees who had worked for the Bank between 1993 and 2009.

The core allegation underlying the action is that for 16 years, CIBC’s overtime policies and record-keeping systems contravened the *Canada Labour Code* and, as a result, thousands of front-line employees were not properly paid for overtime work. Besides breaches of the Code, Fresco alleged that CIBC’s policies, actions and inactions, breached the Class Members’ employment agreements permitted CIBC to be unjustly enriched by allowing it to keep money for itself that should have been paid to Class Members as wages. Fresco maintained that the overtime policies evidenced “systemic non-compliance” as a result of “institutional impediments” to Class Members’ overtime claims.

Certification of the class action was denied at first instance, and again on appeal

by a majority of the Divisional Court. It was not until the matter was ultimately appealed to the Court of Appeal that the systemic basis of the proposed class action was accepted for certification when, in 2012, the Court of Appeal certified eight common issues.

After certification, Fresco and CIBC each brought summary judgment motions. Justice Belobaba released three decision arising from the motions for summary judgment. In the first decision, Justice Belobaba granted summary judgment for the Class Members on liability, finding that CIBC's overtime policies and record-keeping practices for tracking and compensating hours were unlawful and "systemic impediments" to overtime pay for the Class Members. In the second decision, Justice Belobaba certified aggregate damages as a common issue (adding to the eight previously certified common issues). In the third and final decision, Justice Belobaba dismissed CIBC's request for a class-wide limitations order.

CIBC appealed each of the decisions, leading to the Court of Appeal's latest decision and another development in this long-winding saga.

The Court of Appeal Dismisses the Appeals

CIBC brought three appeals, arising from Justice Belobaba's three motion decisions, on liability, damages and limitations. The Court dismissed each of CIBC's appeals.

Liability: Interpretation of the Code and Institutional Impediments

The central issue on CIBC's appeal of liability was the interpretation and application of section 174 of the Code, which sets out the entitlements of workers to enhanced pay when "required or permitted to work overtime." Justice Belobaba found that 'permitted' in the expression "required or permitted" under the Code should be interpreted to mean "allow" or "fail to prevent", which he found aligned with the Supreme Court of Canada's prior guidance of interpreting such questions in favour of the employees given the power dynamics in the modern workplace and the importance of employment standards legislation (*Machtinger v HOJ Industries*). Justice Belobaba's interpretation was also well-grounded in labour arbitration decisions interpreting section 174 of the Code."

As a result, Justice Belobaba restated the standard under section 174 of the Code 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 Court accepted Justice Belobaba's interpretation of the Code and relied on his findings of fact that CIBC's policies failed to prevent overtime from being worked without compensation. The Court found that, as a result of CIBC's policies, overtime hours that were permitted but not authorized under the policies would not be paid, contrary to the Code.

Likewise, the Court upheld Justice Belobaba's finding that the overtime policies and record-keeping practices for tracking and compensating overtime were "institutional impediments." The Court clarified the test to determine whether an employer's policy or practice serves as an institutional impediment: the operative question is how employees were harmed by the policy—if the policy creates a systemic hurdle to appropriate compensation, then it operates as an institutional impediment. That is the case even if there are some employee who were not denied compensation under the policy.

As the Court noted, to succeed on this aspect of the claim, Fresco did not have to show that every Class Member was owed overtime compensation, only that *some* Class

Members were owed compensation because they were not paid as a result of the operation of CIBC's overtime policies and record-keeping practices. It is not a question of *how many* employees were denied compensation. Instead, the question is how employees were denied compensation, which Justice Belobaba found, and the Court of Appeal agreed, was as a result of the overtime policies and record-keeping system, supporting the decision that the overtime policies and record-keeping system were institutional impediments.

Aggregate Damages: The Test is Met

Access to damages determined in the aggregate in a class action is governed by section 24 of the Class Proceedings Act, which sets out the requirements to determining the aggregate (or part of a defendant's) liability.

On the earlier appeal of the certification motion, the Court had refused to certify the aggregate assessment of damages as a common issue. The basis on which it did so was mainly because the "sampling" methodology first proposed by Fresco's expert could not be reliably used to determine aggregate damages. Yet Fresco sought an order on the summary judgment motion directing an assessment of aggregate damages, or certifying aggregate damages as a new common issue. Justice Belobaba determined that the new methodology proposed by Fresco on the motion was not based on sampling and differed from the methodology rejected by the Court on the certification motion. As a result, Justice Belobaba was satisfied that the "reasonable possibility" hurdle under section 24 of the Act was cleared and certified another common issue: *Can the defendant's monetary liability be determined on an aggregate basis? If so, in what amount?*

On the present appeal, the Court found that Justice Belobaba properly expressed the standard for certifying aggregate damages—determining whether there is a "reasonable likelihood" that the methodology suggested by Fresco's expert can determine damages in the aggregate, without proof by individual class members. The newly proposed methodology is, as Justice Belobaba found, credible or plausible enough to establish some basis in fact for the commonality requirement. The Court confirmed that any conflicts between the parties' experts on damages will ultimately be resolved by the trial judge, but that is not the role of the certification motion judge.

Limitations Defence: The Requirement for Individual Discoverability and Extra-Provincial Application of the Class Proceedings Act

Applying the statutory discoverability requirements under Ontario's Limitations Act (and its analogues in Saskatchewan and Alberta), the limitation periods begin to run as soon as the claimant reasonably discovers that they have sustained a loss, that the loss was caused by the defendant, and, that taking legal action was the "appropriate means." The Court agreed with Justice Belobaba's findings that the first two branches of the test were met. The discoverability issue hinged on the third branch—whether Class Members knew taking legal action was appropriate.

Justice Belobaba found that the "appropriate means" requirement was not met and gave two main reasons for so finding: (i) some (or perhaps, many) of the Class Members feared reprisal if they sued CIBC for unpaid overtime; and (ii) some (or perhaps, many) of the Class Members reasonably relied on CIBC's repeated misrepresentations that its overtime policies complied with federal labour law. As a result, Justice Belobaba concluded that these issues required individual assessments of when discoverability was met for an individual claimant. This reflected the general rule that the viability of a limitations defence is best determined on an individual basis with individual assessments.

The Court of Appeal rejected the first reason, that Class Members may fear reprisal as a valid basis on which the limitations period could be suspended, but found merit in Justice Belobaba's second reason—the Class Members' purported reliance on CIBC's misrepresentations. As a result, the Court found that the influence of this factor on individual class members is a matter best left to individual assessment and relegated to the individual hearings phase.

The Court did not give effect to CIBC's other argument on the limitations appeal that whether a class member knew that a proceeding was an "appropriate means" only applied to claims where applicable limitations statutes included discoverability language (i.e., Ontario, Saskatchewan and Alberta). The Court found that whether the "appropriate means" criterion is an element of the common law discoverability rules was a question to be decided on the individual assessments and not on a class-wide basis.

As for the issue of the extra-provincial application of section 28 of the Act, CIBC argued that as this class action has a national reach, with class members across the provinces, and because limitation periods affect the substantive rights of the Class Members and CIBC, they fall within the provincial power over "property and civil rights" under section 92 of the *Constitution Act, 1867*. As a result, CIBC maintained that section 28 of the Act—which suspends the running of limitation periods in favour of Class Members— should not apply to suspend the limitation periods of Class Members who reside outside of Ontario.

The Court of Appeal agreed with Justice Belobaba's conclusion that ruling on the extra-territorial applicability of section 28 would be premature (because, even though the issue may arise again at the individual hearings stage, the litigation may never reach such a stage). The Court also declined to remit the question back to Justice Belobaba for resolution and reiterated the principle that courts should not unnecessarily decide constitutional questions.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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