CITATION: Fresco v. Canadian Imperial Bank of Commerce, 2020 ONSC 75
COURT FILE NO.: 07-CV-334113 PD2
DATE: 20200330

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*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *David O'Connor, Steven Barrett, Louis Sokolov, Adam Dewar, Peter Englemann and Louis Century* for the Plaintiff

Patricia D. S. Jackson, Linda Plumpton, John Field, Sarah Whitmore, Ryan Lax, Lara Guest, Lauri Reesor and Elisha Jamieson-Davies for the Defendant

HEARD: December 12, 2019

Cross-motions for Summary Judgment - Liability Issues

[1] After twelve years of protracted litigation, this class action for "unpaid overtime" is finally before this court for a decision on the merits. Dara Fresco, the representative

plaintiff, moves for summary judgment on the certified common issues. The defendant CIBC brings a cross-motion for summary judgment asking that common issues be answered in their favour and the action be dismissed.

[2] Both sides agree, as do I, that the common issues can be decided summarily. The analysis is largely documentary in nature and there are no credibility issues. The volume of material filed by both sides was understandably extensive but does not preclude summary adjudication. None of the common issues requires a trial.

[3] I have attached the eight certified common issues in the Appendix. Common issues 1 to 5 ask about liability. Common issues 6 to 8 relate to remedies and damages. The plaintiff also seeks an order directing an assessment of aggregate damages (or certifying aggregate damages as a new common issue) and directing CIBC to produce paper and electronic records relevant to the aggregate assessment.

[4] Counsel have asked that I release my decision in two parts, first liability and then damages. I have agreed to do so. If I find liability, there will then be a further hearing on remedies and damages (and the requested additional issue on aggregate damages). I will then release the second part of my decision.

[5] My reasons are organized as follows. I begin with the background. I then discuss the applicable provisions of federal labour law. Next, I describe the defendant's two overtime policies that were in effect during the 16-year class period. I then set out my analysis and answers to common issues 1 to 5.

Background

[6] In June 2007, Ms. Fresca commenced a proposed class action on behalf some 31,000 customer service employees who had worked for CIBC at any time between February 1993 and June 2009. The proposed class was defined as:

> 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 June 18, 2009, as tellers or other front-line customer service employees, including [specified listing] ...

[7] The core allegation is that over the 16 years in question, CIBC's overtime policies and record-keeping systems contravened the *Canada Labour Code*[1] ("Code") and, as a

[1] *Canada Labour Code*, R.S.C. 1985, c. L-2.

result, thousands of front-line bank employees were not properly compensated for their overtime work. The plaintiff does not claim that the defendant bank never paid overtime or that every single class member worked uncompensated overtime. Rather, the unlawful restrictions and deficiencies in the bank's overtime compensation system have resulted in some class members not being compensated for all hours worked.

[8] The liability issues (numbers 1 to 5) ask systemic or system-wide questions. This is the basis upon which the action was certified by the Court of Appeal. Certification was at first instance denied by the motions judge[2] and, again on appeal, by a majority of the Divisional Court.[3] It was only at the Court of Appeal that the systemic basis of the proposed class action was fully understood and accepted.[4]

[9] Chief Justice Winkler, writing for a unanimous Court, made clear that in order to prevail at the common issues trial, the plaintiff would have to prove that CIBC's system-wide overtime policy and related practices were "institutional impediments"[5] to class member overtime claims that were otherwise compensable under the Code. The Court of Appeal also made clear that the allegations of *systemic* deficiencies could not be derailed with anecdotal examples of *individual* compliance – by showing for example that in some of the more than 1000 CIBC branches some of the class members were paid overtime or their work hours were properly recorded. Alleged differences in individual class members' experiences "are not relevant to the systemic issues raised by the appellant."[6]

[10] As noted by the Court of Appeal:

> The terms and conditions in CIBC's overtime policies governing overtime compensation, and the accompanying standard forms that class members submit when requesting such compensation, apply to all class members regardless of their own particular job responsibilities or job titles. To the extent that the policies and record-keeping systems of CIBC are alleged to fall short of CIBC's duties to class members, or to constitute a breach of class members' contracts of

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[2] *Fresco v Canadian Imperial Bank of Commerce,* [2009] O.J. No. 2531 (SCJ).

[3] *Fresco v Canadian Imperial Bank of Commerce,* (2010) 103 O.R. (3d) 659. (Div. Ct.)

[4] *Fresco v Canadian Imperial Bank of Commerce,* [2012] O.J. No. 2883 (C.A.). When I refer to the Court of Appeal in these reasons, I am referring to this decision on the certification appeal.

[5] *Ibid.* at para. 75.

[6] *Ibid.* at para. 103.

> employment, these elements of liability can be determined on a class-wide basis and do not depend on individual findings of fact.[7]

[11] The class action before me requires answers to five common issues asking about institutional non-compliance. Again, the answers to the systemic questions are not neutralized with anecdotal evidence (that some class members were sometimes paid overtime in some branches) that falls short of showing bank-wide (all branches) compliance. One can still have system-wide deficiencies in the scope and content of the overtime policy even if a substantial number of class members in a substantial number of branches have no complaints in practice. I hasten to add, however, that if common issues 1 to 5 are answered in favour of the plaintiff and liability is established, the plaintiff will still face significant challenges in common issues 6 to 8 that deal with remedies and damages.

[12] The proposed common issues were certified by the Court of Appeal because the Court found "some basis in fact" for the allegations of systemic non-compliance. We are now at the merits stage and the adjudication of the common issues where the standard of proof is obviously more than just "some basis in fact.". The approach that applies now, as it does in civil litigation generally, is proof on a balance of probabilities. The plaintiff must establish on the evidence that it is more likely than not that the alleged statutory or contractual duties were indeed breached by the defendant bank causing losses to some of the class members.

Canada Labour Code requirements

[13] Because the defendant bank falls under federal regulatory jurisdiction, federal labour law applies. The relevant requirements of the Code are set out below:

***Canada Labour Code,* R.S.C. 1985, c. L-2**
Saving more favourable benefits **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.
Standard hours of work **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

[7] *Ibid.*, at para. 103.

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.
Overtime pay **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 75, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.
***Canada Labour Standards Regulations*, C.R.C., c. 986**
Keeping of Records **24 (2)** Every employer shall keep, for at least three years after work is performed by an employee, the following information: … **(d)** the hours worked each day, except where the employee is … **(e)** the actual earnings, indicating the amounts paid each pay day, with a recording of the amounts paid for overtime, vacation pay, general holiday pay, bereavement leave pay, termination pay and severance pay;

[14] In short, the Code provisions make clear that the standard hours of work cannot exceed eight hours per day and forty hours per week. Where an employee is "required or permitted" to work more than the standard hours of work, they must be paid time and a half. Every employer is required to record the hours worked each day by every employee and keep this information on file for at least three years.

[15] Here the class members' standard hours of work were 7.5 hours per day and 37.5 hours per week and thus complied with s. 169(1) of the Code. If a class member worked more than 8 hours per day or 37.5 hours per week, they would become eligible for overtime. I will shortly set out the defendant's overtime policies and record-keeping practices. Before I do, I should explain the meaning of "required or permitted" in s. 174 that provides as follows:

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

The meaning of "required or permitted"

[16] There is little difficulty with the word "required" which is relatively easy to understand. The focus here is on the word "permitted." The policy question is whether

"permitted" should be interpreted narrowly favouring the employer (and meaning "impliedly required") or more broadly favouring the employee (and meaning "allowed" or "not prevented"). In *Machtinger v. HOJ Industries*,[8] the Supreme Court answered this policy question in favour employees by noting the power dynamics in the modern workplace and the importance of employment standards legislation:

> The harm which the Act seeks to remedy is that individual employees, and, in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers... Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not.[9]

[17] Not surprisingly, the labour law case law, with only one exception,[10] has interpreted s.174 of the Code as a worker protection provision and "permitted" to mean "allow" or "fail to prevent." The gist of the dozen or so labour law decisions that have considered "permitted" in the context of overtime work[11] is captured in the following propositions:

- The Code imposes liability for overtime "whenever it is permitted, even if it is not required or authorized. The intent of the Code is to protect employees who are simply allowed to work overtime without pay."[12]
- An employer cannot "simply look the other way when an employee is working beyond the standard hours" then claim the work was not required or permitted.[13]

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[8] *Machtinger v. HOJ Industries ltd.*, [1992] 1 S.C.R. 986.

[9] *Ibid.*, at para. 31-32. See also *Re Rizzo & Rizzo Shoes ltd.*, [1998] 1 S.C.R. 27, at para. 36.

[10] *Matson v. Great Northern Grain Terminals Ltd.*, [2005] C.L.A.D. No. 401, to be discussed further below.

[11] *T-Line Services Ltd. v. Morin*, [1997] C.L.A.D. No. 422 at para. 33-34; *RSB Logistic Inc. v. Hale*, [1999] C.L.A.D. No. 548; *Kindersley Transport Ltd. v. Semchyshen*, [2002] C.L.A.D. No. 4; *Haskins v. 2IC Systems Inc.*, [2003] C.L.A.D. No. 271; *Ruckaber v. Big Rig Towing & Recovery Ltd.*, [2016] C.L.A.D. No. 65; *Yanke Transfer Ltd. v. Lippai*, [2004] C.L.A.D. No. 41; *Misty Press v. 942260 Ontario Ltd. (c.o.b. Allanport Truck Lines)*, [2003] C.L.A.D. No. 398; *Island Express Air Inc v Somers*, [2019] CLAD No. 80; *Misty Blue Transport Ltd v Papic*, [2017] C.L.A.D. No 200; *Sjoberg v. Schneider's Trucking Ltd.*, [2004] C.L.A.D. No. 196; *Willow Creek Carriers Inc. v. Dripps*, [2000] C.L.A.D. No. 317; and *Muscowpetung Saulteaux First Nation v. Keepness*, [2001] C.L.A.D. No. 146.

[12] *Haskins, supra* note 11, at para. 101.

[13] *Island Express, supra* note 11, at para. 15.

- An employer cannot "avoid these statutory obligations by knowingly permitting employees to work overtime and then later taking the position the overtime was not authorized. This is in fact the mischief sought to be avoided by the use of the word 'permitted' in Section 174."[14]
- In other words, an employer is liable for permitting overtime if it "acquiesce[s] by its failure to prevent."[15]

[18] The employer in *T-Line Services*[16] was liable because it "took no steps to prevent or direct [the employee] to stop working beyond the end of his shift."[17] The labour referee reasoned that if employers could avoid their obligation to pay overtime "by turning a blind eye to such work, the avenue for exploiting the efforts of the worker and subverting the efficacy of the employment standard is apparent."[18] The burden is not on the employee to ask permission to work the extra hours but on the employer to intervene and prevent. If the employer knows or ought to know that an employee is working overtime but fails to take reasonable steps to prevent the employee from working then the overtime must be compensated.[19]

[19] This interpretation of the word "permit" can also be found in provincial employment standards laws and their American counterparts. For example, in Ontario, in regulations enacted under the *Employment Standards Act,*[20] work shall be deemed to be performed when it is "permitted or suffered to be done by the employer."[21] The employee will be considered to have performed the work "if the employer was aware that the

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[14] *RSB Logistic, supra* note 11, at para. 37; *Ruckaber, supra,* note 11, at para. 37.

[15] *Ruckaber, supra* note 11, at para. 38. See also *T-Line Services, supra* note 11, at para. 27.

[16] *T-Line Services, supra,* note 11.

[17] *Ibid* at para. 27.

[18] *Ibid* at para. 34.

[19] *Ibid.*

[20] *Employment Standards Act 2000,* S.O. 2000, c. 41.

[21] *When Work Deemed to be Performed, Exemptions and Special Rules*, O. Reg. 285/01, s. 1.1(1)(a)(i).

employee was working or could have anticipated that they might be working but failed to take steps to prevent it".[22]

[20] American courts have likewise interpreted the "suffer or permit" standard under the federal *Fair Labor Standards Act*[23] to impose a duty on management to prevent unwanted work. An employer is liable if it knows or should have known that overtime work was being done and failed to take steps to prevent it.[24] The regulation clarifying the "suffer or permit" standard provides that "work not requested but suffered or permitted is work time" and that "it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed."[25]

[21] Only one labour arbitrator (in Alberta) has embraced the narrower, pro-employer interpretation. In *Matson v. Great Northern Grain Terminals Ltd.*,[26] the arbitrator interpreted "permit" as meaning implied authorization, in contrast to "require" as meaning express authorization. Thus, the employer was not liable to pay overtime even though it knew about overtime being worked and even though "by inaction, took advantage" of the employee. *Matson* also imposed an obligation on the employee to "be more assertive in making her overtime claim... and to refuse to work extra hours."[27]

[22] I agree with the plaintiff that *Matson* does not accord with the realities of the modern workplace and undermines the remedial purpose of the Code by incentivizing employers to look the other way when overtime work is being done. *Matson* is also inconsistent with the weight of judicial and arbitral authority and with the meaning of "permit" which by definition includes "not to prevent."[28]

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[22] *Employment Standards Act, 2000* "Policy and Interpretation Manual" (2018 Release 2) at 946-947.

[23] *Fair Labor Standards Act of 1938,* 29 USC s. 203, as amended.

[24] *Forrester v. Roth's IGA Foodliner,* 646 F.2d 413 at 414 ("An employer who is armed with this knowledge cannot stand idly by an allow an employee to perform overtime work without proper compensation"); *Mumbower v. Callicott,* 526 F.3d 1183 at 1188 ("The employer who wishes no such work to be done has a duty to see it is not performed").

[25] *Code of Federal Regulations,* 29 C.F.R. § 785.11 and 785.13.

[26] *Matson, supra,* note 10.

[27] *Ibid.*, at para. 35.

[28] In *Regina v. Royal Canadian Legion,* [1971] 3 O.R. 552, the Court of Appeal noted that one of the dictionary meanings for "permit" is "not to prevent."

[23] I note, in any event, that in this case the defendant, through its senior HR executive John Silverthorne, agreed on cross-examination that "permitted" includes a duty to prevent unwanted overtime – in particular, that "a key aspect of the overtime policy [was] that managers were to prevent hours that they had not approved."

[24] In sum, I am satisfied that "permitted" in s. 174 of the Code means "allowed" or "not prevented." Section 174 of the Code can therefore be restated as follows:

> When an employee is required or allowed to work or is not prevented from working in excess of the standard hours of work, the employee shall be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.

[25] I now turn to the defendant bank's overtime policies.

CIBC's overtime policies

[26] Over the 16-year class period, the defendant bank had two relevant overtime policies: one that was in effect from February 1993 to April 2006 and a second that took effect in April 2006.

[27] **The 1993 Policy.** As set out by the Court of Appeal,[29] the 1993 Policy provided that:

> All employees in levels 1-5 under the new Job Grading System, will be entitled to overtime payment at the rate of 1.5 times regular salary for any time worked in excess of 8 hours per day or 37.5 hours per week.
>
> Note: Employees MUST obtain prior authorization from management before incurring any overtime.

[28] An attachment to the 1993 Policy sets out a list of questions and answers to assist managers in responding to employees' questions about the terms of the policy. In response to the question - "*Will I get paid for the overtime I work?*" - the attachment said this:

> Payment of overtime to non-managerial employees who work more than 8 hours a day is a requirement of the Canada Labour Code. Time off in lieu of overtime may be granted but should be utilized ONLY for occasional overtime and the time off should be taken within 3 months of the occurrence. Prior to

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[29] *Supra,* note 4, at paras. 19-20.

> incurring any overtime, employees MUST ensure they have the approval of their supervisor or manager. It is against the law to not pay overtime.

[29] In short, from February 1993 to April 2006, the defendant's overtime policy required the "prior authorization" or the pre-approval of the employee's supervisor or manager. There was no provision for any post-approval. There was no discussion of "require or permit."

[30] **The 2006 Policy.** The second overtime policy took effect in April 2006. As noted by the Court of Appeal,[30] the 2006 Policy contained the following message to the bank's employees:

> 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.

[31] The 2006 Policy defined "overtime" as follows and emphasized the need for pre-approval:

> For the purposes 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 ... 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.* Attached to this policy is the form to be submitted to request approval for overtime hours. [Emphasis in original.]

[32] The form for requesting approval of overtime hours was titled "Overtime Pre-Approval Form". It did not mention post-approval. The form provided that "[i]t is the employee's responsibility to ensure pre-approval is obtained prior to working in excess of 8 hours per day or 37.5 hours per week."

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[30] *Supra,* note 4, at paras. 13-17.

[33] The related "Overtime Policy (Canada) Manager Guidelines" document advised managers that "overtime should only be authorized on an exceptional basis" and that "employees must receive written management approval in advance of the overtime being worked."

[34] In short, the 2006 Policy extended the 1993 Policy "pre-approval" requirement for overtime claims and added the possibility of post-approval but only under "extenuating circumstances" and only if the post-approval was obtained "as soon as possible" after the overtime work was performed.

[35] Having described the relevant provisions of the Code and the defendant's 1993 and 2006 overtime policies, I can now analyze and answer common issues 1 to 5.

Common issues 1 to 5

[36] **Common issue 1.** *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?*

***Answer*:** Yes.

[37] There is no dispute about this first question. The defendant agrees that the requirements of the Code, as set out above, were incorporated as implied terms in every class member's contract of employment. The defendant bank therefore had both a statutory and contractual duty to prevent or not permit class members from working overtime hours for which they were not properly compensated or for which the defendant would not pay.

Did the defendant breach these duties?

***Answer*:** Yes.

[38] When it granted certification, the Court of Appeal concluded it was at least arguable[31] that both the 1993 and 2006 overtime policies contravened s. 174 of the Code. The "arguable" standard used by the Court of Appeal was all that was needed at that stage to satisfy the certification criteria. Here, of course, we are at the merits stage. The plaintiff must go beyond "arguable" and must establish on a balance of probabilities that

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[31] *Ibid.*, at paras. 70 and 72.

the defendant's overtime policies fell short of the requirements set out in the Code and were, therefore, unlawful. And further that the impugned overtime policies and practices imposed "an institutional impediment to claims for overtime that would otherwise have been compensable under s. 174 of the Code."[32]

[39] In my view, the plaintiff has established that both the 1993 and 2006 overtime policies contravened the requirements set out in s. 174 of the Code. The parties filed expert reports to support their respective submissions. There is no need for me to rely or even refer to these reports. I find that the defendant bank breached its statutory and contractual duty to the class member employees. I can make this finding by simply contrasting the language of the defendant's system-wide policies with s. 174 of the Code.

[40] I will explain my finding by considering each of the overtime policies in turn.

[41] **The 1993 Policy,** as already noted, required pre-approval as a precondition for overtime compensation. As the Court of Appeal noted when certification was granted:

> [T]he wording of the [1993 Overtime Policy] does not provide for any exception to the requirement that employees must obtain prior authorization from management before incurring overtime.[33]

[42] The 1993 Policy explicitly directed under the heading of "Entitlement" that "Employees MUST [emphasis in original] obtain prior authorization from management before incurring any overtime." In other words, if prior authorization was not obtained, employees were not "entitled" to overtime compensation. CIBC's *Personnel Manual* confirmed that payment may only be made for "authorized overtime."

[43] The defendant points to the sentence at the end of the 1993 Policy: "It is against the law to not pay overtime." I agree with the plaintiff that this sentence alone cannot remedy the deficiencies in the 1993 Policy which explicitly precluded compensation for any overtime that was worked without pre-authorization, even overtime that was permitted (not prevented). Section 174 requires that overtime work be compensated if required or permitted even where pre-approval is stated as the company norm. The imposition of a pre-approval requirement as a precondition for overtime compensation is more restrictive than the "required or permitted" language in s. 174 of the Code.

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[32] *Ibid.*, at para. 75.

[33] *Ibid.*, at para. 88.

[44] The case law confirms this proposition. In *Kindersley,* a pre-authorization policy provided that "No overtime shall be paid or time given off unless previously authorized by your supervisor." The Referee rejected the employer's argument that this required prior approval to work overtime: "No matter what interpretation one places on this statement in the policy, the policy cannot be permitted to circumvent the clear provisions of the Code requiring overtime pay when an employee is 'required or permitted' to work in excess of the standard hours of work."[34] In *Outcrop v Pamplin,* the Supreme Court of the Northwest Territories interpreted a statutory overtime provision that was virtually identical to s. 174 of the Code. The court found that it was "clearly contemplated" that a requirement of "prior authorization" was a narrower requirement than the requirement to pay for hours that are "required or permitted". [35]

[45] Again, the fact that some branch managers in some branches may have signed off on overtime claims that had not been formally pre-approved (as several affiants of the defendant swear was the case) does not negate the fact that the restrictive "pre-approval" provisions of the system-wide 1993 Policy violated s. 174 of the Code.

[46] ***The 2006 Policy*** extended the 1993 Policy "pre-approval" requirement for overtime claims and added the possibility that post-approval would be available under "extenuating circumstances" and post-approval was obtained "as soon as possible" after the overtime work was performed.

[47] Here again the bank's obligation to pay overtime was more restrictive than what was statutorily mandated under s. 174 of the Code. As the Court of Appeal noted in the certification appeal, the proviso that post-approval could be granted but only in "extenuating circumstances" did not necessarily eliminate the inconsistencies between the terms of the 2006 Policy and the requirements of the Code:

> The fact that the [2006 Policy] provides that overtime may be paid if there are "extenuating circumstances and approval is obtained as soon as possible afterwards" does not necessarily eliminate the inconsistency between the terms of the policy and the requirements of the Code ... by limiting the prospect of being compensated for such work to situations where there are "extenuating circumstances" and where the employee obtains approval "as soon as possible thereafter", the [2006 Policy] arguably creates prerequisites to compensation

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[34] *Kindersley, supra,* note 11, at para. 35.

[35] *Outcrop Ltd. v. Pamplin*, [1987] N.W.T.J. No. 5, at para. 76.

> that are inconsistent with the requirements of the Code and the practical demands of the workplace.[36]

[48] There is nothing in the Code that predicates an employee's eligibility for overtime compensation on formal pre-approval or extenuating circumstances. Nor is it correct to suggest, as does the defendant, that "extenuating" simply means "explainable."[37]

[49] In any event, the 2006 Policy was based primarily on pre-approval and extended the possibility of post-approval under certain circumstances. The Court of Appeal referred to the email that Executive VP for Human Resources, Jacqueline Moss, sent out to all employees after this class action was commenced: "To be clear, under our policy, where overtime is requested or required by CIBC, overtime is paid." The Court of Appeal went on to note that "The email does not refer to compensation for overtime work that is permitted by CIBC, in contrast with the language in s. 174 of the Code."[38]

[50] Section 174 of the Code clearly provides that overtime hours must be compensated whenever they were required or permitted. The fact that pre-approval was not obtained or that extenuating circumstances justifying post-approval were not present is of no import. By prescribing otherwise, the 2006 Policy was more restrictive than what was statutorily required under s. 174 of the Code.[39]

[51] There is nothing wrong with an overtime policy that proposes pre-authorization as the preferred corporate norm *provided* that the policy is also makes clear that neither pre-

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[36] *Supra,* note 4, at para. 76.

[37] Dictionaries define "extenuating" as "making forgivable" or "showing reasons why a wrong or illegal act or a bad situation should be judged less seriously or excused." The word "extenuating" is about "excusing or justifying one's action" and not merely providing an explanation.

[38] *Supra,* note 4, at para. 96.

[39] See also the client advisory publications of leading employment law firms including those of the firm that is the defendant's co-counsel in this very case: (i) Broad, "*Overtime Class Actions,*" (2008) (Hicks Morley Hamilton Stewart Storie LLP): "Very generally stated, where an employee undertakes activities for the benefit of the employer, it will usually be found to be work and compensable. Lack of authorization to perform the services in question is not usually a defence to a claim for unpaid overtime pay; rather, it is a human resources issue to be managed by the employer;" and (ii) Meehan and Mihailovich, "*What is Work?*" (2008) (Hicks Morley Hamilton Stewart Storie LLP): "Finally, it is important to know that work performed contrary to an express requirement that an employee obtain advance approval for overtime is nonetheless considered work for which the employee is entitled to be paid."

approval nor "post-approval in extenuating circumstances" are preconditions for payment – that overtime must and will be paid whenever overtime hours were required or permitted, full stop.

[52] **Common issue 2.** *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?*

Answer: Yes.

[53] Here again there is no dispute about the first question. The defendant bank agrees that it had a statutory duty (incorporated as an implied term in the employment contract) to accurately record and maintain a record of all hours worked by class members to ensure that class members were appropriately compensated.

Did the defendant breach this duty?

Answer: Yes.

[54] Despite the defendant's submissions to the contrary, I have no difficulty finding on the evidence before me that actual hours of work were not recorded. This was a system-wide, indeed systemic deficiency, that contravened the Code.[40]

[55] The defendant bank expected and directed class members to write down their actual hours only on an "exceptional basis… when they sought to be paid for hours worked beyond their regularly scheduled hours." The timesheet that the bank says was used for seeking post-approval expressly repeats the pre-approval requirement. To reiterate, system-wide policies told class members that overtime work would not be compensated unless it was pre-approved (or post-approved in extenuating circumstances after 2006). Hours worked that were otherwise permitted (not prevented) were not recorded and not compensated.

[56] In 2003, the bank implemented human resources software known as PeopleSoft, a customizable software that had the capability to track compensable hours. Notwithstanding this capability, the bank failed to systematically record the actual hours worked by class members or lieu time they may have taken. A June 2006 bank document entitled "Overtime Monitoring Reports" included the following admissions:

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[40] *Canada Labour Standards Regulations*, C.R.C. c. 986, s. 24(2) - set out above in para. 13.

> *How do I know if an employee worked overtime?*
>
> Currently, we are not able to determine if an employee worked overtime because we do not track hours worked on a daily basis. ...
>
> *How do I know if I paid the correct amount in overtime pay?*
>
> If there is not a report that can accurately determine the number of hours worked per day and per week, it would be impossible to know from a reporting perspective, if the correct overtime amount was paid.
>
> *How do I track lieu day entitlement?*
>
> Currently, there is not a function in Peoplesoft that allows a manager to track overtime hours worked but not paid.

[57] A July 2006 bank document entitled "Overtime Policy Canada - Compliance Monitoring" said this:

> Because managers do not track actual hours worked each day in PeopleSoft, but only enter overtime hours to make a compensation transaction, we are not able to report on whether or not any employees have worked overtime hours but not received overtime compensation for those hours.

[58] In a Compliance Monitoring document in 2006, the defendant bank acknowledged that it was not able to report on whether any employees have worked uncompensated overtime because "currently, time worked is not recorded except for the purpose of payment of overtime for *salaried* employees". (My emphasis).

[59] While actual hours may have been recorded for some employees at some branches on some occasions, there was no system to ensure this was done consistently across all branches. In the vast majority of cases, the only hours recorded were the regular hours and the *approved* overtime hours. I agree with the plaintiff that this was a breach of CIBC's duty to the class to ensure all their hours of work were recorded (and all overtime that was required or permitted was compensated).

[60] **Common issue 3.** *If the answer to common issues 1(a) or 2(a) is "yes", and to the extent found necessary by the common issues trial judge, did the defendant thereby require or permit all uncompensated hours of the class members?*

***Answer*:** Yes.

[61] Common issue 3 is essential because, as the Court of Appeal noted in *Fulawka v. Bank of Nova Scotia*,[41] a parallel bank overtime case, it provides "the final component for establishing potential liability to all class members."[42] As the Court explained: "Unless class members were required or permitted to perform overtime work, the defendant would not have had a duty to compensate them for such work."[43]

[62] In my opinion, common issue 3 asks two questions: One, has the plaintiff established that at least *some* of the class members worked uncompensated overtime hours? And two, has the plaintiff established that it is more likely than not that these hours of uncompensated overtime work were permitted or not prevented by the defendant bank? I am satisfied on the evidence that the answer to both questions is "yes." I will explain my reasoning.

(1) Some of the class members worked uncompensated overtime

[63] There is an abundance of evidence that supports this first finding: that some of the class members worked uncompensated overtime. I begin with the comments of the Court of Appeal and the affidavits filed by the plaintiff.

[64] The Court of Appeal noted the "evidence from CIBC witnesses that the nature of the work performed by front-line employees can make it difficult to obtain pre-approval of overtime."[44] The Court of Appeal also referred to the affidavits filed by the plaintiff that were summarized as follows:

> According to Ms. Fresco and the others who filed affidavits in support of the Claim, while overtime is expected and often worked, its compensation is discouraged. Pre-approval is hard to get, especially on a regular basis. Employees are not encouraged to record all the hours that they worked. Employees are discouraged from filling in time sheets that record overtime that has not been pre-approved. Performance assessments and reviews discourage the claiming of and payment of overtime. Willingness to work overtime is regarded as a positive factor in performance appraisals and employees are afraid to claim overtime for fear that this will impact adversely on their employment

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[41] *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443.

[42] *Ibid.*, at para. 131.

[43] *Ibid.*, at para. 130.

[44] *Supra*, note 4, at para. 95.

> and/or advancement at CIBC. Therefore, while overtime is worked on a regular basis, employees rarely request payment for that overtime.[45]

[65] The Court of Appeal also referred to the affidavit from Mark Hutchinson, a former CIBC branch manager:

> Given that the overtime that arises cannot often be predicted, the requirement of the official policy of "pre-authorization" for overtime is unrealistic, and in most circumstances unworkable. It simply provides Managers and upper management with an excuse for refusing to pay overtime since prior authorization is not often sought, let alone granted. Furthermore, the overtime policy (which I only saw relatively recently ...) provides that, for overtime to be paid, extenuating circumstances must exist where advance approval was not obtained. My experience was that the vast majority of overtime worked by me prior to becoming a manager, and by my employees once I became a manager, were not worked in extenuating circumstances.[46]

[66] The points made in these affidavits were also made over the 16-year class period by hundreds of class members in their responses to the bank's annual employee surveys. The survey did not ask specifically about overtime but concluded with an open-ended section that invited "other" comments. Some of the employees took this opportunity to make pointed comments about unpaid overtime. I have reviewed dozens of the "open prompt" responses that commented on unpaid overtime. The following half-dozen examples provide a fair representation:

- (2001) "CIBC SUCCEEDS AS A COMPANY BY EXPLOITING ITS EMPLOYEES. WE WORK OVERTIME AND DON'T GET PAID FOR IT, NOR DO WE GET TIME OFF IN LIU (sic) OF. FTE HOURS WERE CUT AND YET THE AMOUNT OF WORK HAS NOT CHANGED. CIBC CAN START BY PAYING ITS EMPLOYEES FOR ALL THE HOURS THEY WORK. CIBC SHOULD ALSO COACH THEIR BRANCH MANAGERS TO LEAD BY EXAMPLE."

- (2005) "As a whole, I actually do like my job ... [but] ... time to wake up and smell the coffee .... I put in on average 50 hours a week, do not get compensated for my overtime, nor am I able to take time off in lieu; and the work just keeps piling on. If I hear "it will only take about 2 minutes" one more time I am sure I will scream. If I speak to my Manager about this, his response is neither helpful or caring, and "this organization expects you to put in overtime on your own

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[45] *Ibid.*, at para. 91.

[46] *Ibid.*, at para. 92.

> time. That is the way they have structured the system. Please re-structure the system ..."
>
> - (2007) "Less staffing and more duties are putting more stress on employees as overtime is being worked and not being paid for or compensated for."
>
> - (2008) "Overtime is not being paid unless approved. Some situations do not allow you to get approval beforehand. CIBC says they will pay overtime or lieu time but the manager will not approve any overtime. Too much work for the time allotted to do it. Expectations not realistic."
>
> - (2008) "What is happening is that no one can get pre-approval for overtime and has to work is anyway, so CIBC is getting free labour out of a vast majority of their employees..."
>
> - (2009) "[...] overtime is a daily issue for most of us, yet there seems to be no way to get it "authorized". Even working into evening with the IS is considered 'the cost of doing business' and does not get approval. We need a better understanding. In my branch (and several others) we are very short staffed & we have been in the position to work late and miss lunch hrs daily. The overtime far exceeds a 7.5hr day, but to get anything back is impossible. [...]"

[67] It is true that only a small percentage of the thousands of surveyed employees took the time to record their complaints about unpaid overtime. It is also true that some of surveyed employees were not class members, being employees in foreign branches. Nonetheless, it is fair and reasonable to conclude that most and at least some of these respondents were class members working in branches scattered across the country. There is no evidence to suggest otherwise: that the hundreds of complaints about unpaid overtime came from only one province or one area of the country; or that they were the product of employees' collusion or conspiracy. These open-prompt complaints provide clear evidence that at least some of the class members worked uncompensated overtime.

[68] The defendant submits that none of this employee survey evidence is admissible because it is anonymous, unreliable hearsay. I do not understand this submission. The bank is asking the court to reject internal employee survey data that the bank itself requested and found to be reliable and useful. For example, Ms. Speal, a senior HR manager, gave evidence that:

> Managers and business leaders use the feedback gleaned from the employee survey, including responses to the open-ended prompt, as applicable, to inform people-related decisions and actions that will result in a better experience for our employees.

[69] In a letter to CIBC employees in 2009, the defendant bank's CEO encouraged employees to participate in the 2009 Employee Survey and went on to underscore the importance and reliability of "past surveys":

> The annual survey is one of our most objective and consistent means of obtaining feedback from employees across the organization about what they are experiencing and how they view CIBC at the corporate and business levels and within their own teams ...Your feedback in past surveys has given us insight into your work experience so that we can continue our efforts to create an environment where all employees can excel ...

[70] Further, in these motions, the defendant's own witnesses relied on the survey comments calling them "[t]he systemic data we do have."[47] In other words, the bank itself viewed the annual employee surveys as providing "systemic data." It was presented to the court as systemic data. In my view, it is too late for the defendant to turn on itself and suggest otherwise.

[71] It is also important to note that the employee surveys discussed herein were not external public opinion surveys but internal employee surveys. However, even public opinion surveys have been found to be admissible "provided the survey is both reliable ... and valid (in the sense that the right questions have been put to the right pool of respondents in the right way ...)".[48] Put bluntly, the hundreds of comments about overtime that were made in the open-prompt section cannot be *completely* dismissed as unreliable or invalid. Many of them, and at the very least some of them, are germane and probative.

[72] I hasten to add that if I am wrong in this analysis and the employee survey comments in question are somehow inadmissible on these motions, I still find on the evidence before me that some class members worked uncompensated overtime. I refer to the evidence in three CIBC documents: (i) the 1999 Open Forum Survey; (ii) the 2007 Workplace Effectiveness Project; and (iii) the 2007 "theme" reports.

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[47] For example, Mr. Silverthorn relied on the survey results to show a relatively "low" complaint volume: "The systemic data that we do have, from subsequent surveys, indicates that the percentage of employees mentioning 'overtime' is consistently very low." In other words, CIBC agreed that this was systemic data. It was presented to the court as systemic data. The plaintiff submits that it does not lie in CIBC's mouth to now argue that the data should be excluded as inadmissible. I agree with the plaintiff.

[48] *Mattel Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, at para. 45.

[73] The 1999 Open Forum Survey is an internal bank document that was created by or for the defendant bank (the bank did not assist on this point). Note the "observations" and the comments attributed to the employees and business units:

> OBSERVATIONS
>
> Non-compliance: it is recognized, both by employees and business units, that overtime is not always being paid for.
>
> Examples of employee's comments regarding overtime include:
>
> - Overtime is never paid and taking time off because of overtime is strongly discouraged.
> - Respect for people is at an all-time low. The amount of unpaid overtime is unacceptable.
> - The subject of overtime is avoided in the Open Forum Questionnaire. It always has been. As a major concern among employees, it should be included.
> - Staff are expected to work overtime but are told they will not be paid. Up to grade 5 should be paid overtime.
>
> During our review, comments received from various business units regarding overtime include:
>
> - Have never had any budget to pay overtime … since the branches are cut to a bare minimum of staff, it is becoming increasingly difficult to accommodate time off in lieu.
> - General practice is no overtime in payment, lieu days are granted but not necessarily equal compensation for the overtime hours worked.

[74] In June 2007, after the rollout of its 2006 overtime policy, the defendant bank prepared a report based on visits to 85 branches entitled "Workplace Effectiveness Project." Here are some examples of the comments that were made by the employees:

> - OT not paid for additional hours; afraid of losing job.
> - Scheduled to 4:30 but the vault is open and you can't leave; if you leave, you're not a team player; never paid for OT; half hour since February 2005.
> - Not paid for time to balance.
> - No such thing as OT unless they ask you to stay.

[75] The three 2007 "theme reports" that were prepared for the bank by an outside survey specialist (who tabulated the annual survey data and distilled the "themes") were the subject of an unsuccessful privilege motion that I decided last year.[49] The 2007 theme

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[49] *Fresco v. CIBC*, 2019 ONSC 3309.

documents identified and reported the following themes:

> Employees feel overworked and undervalued ... Employees feel they put in too many hours and then are not recognized or compensated for it ... Concerns are expressed regarding the lawsuit on lack of payment for overtime.[50]

[76] Here again the defendant bank tried to argue "inadmissible hearsay" even though the survey specialist was retained by the bank, the theme reports were requested by the bank's "business leaders" and were delivered by HR to "the leadership of Retail Markets."[51] The defendant bank itself requested and relied on these documents. The "inadmissible hearsay" characterization is misguided and does not succeed.

[77] In short, as set out above, there is an abundance of evidence that some of the class members worked uncompensated overtime.

(2) The defendant permitted all uncompensated hours of the class members

[78] The Court of Appeal stated that this common issue should be answered in the affirmative if this court "find[s] there is an evidentiary basis that could support a conclusion that all uncompensated overtime hours were required or permitted by CIBC."[52]

[79] I find there is an evidentiary basis that could support a conclusion that all uncompensated hours were required or permitted by the defendant bank. More specifically, I find for the five reasons set out below (and in combination) that the defendant bank must be found, on balance, to have permitted all uncompensated overtime hours of the class members.

- ***The bank's overtime policies contravened s. 174 of the Code.***

[80] As I have already found, both the 1993 Policy and the 2006 Policy violated the minimum requirements set out in s. 174 of the federal labour code.

- ***The bank's failure to record actual hours "worked each day" contravened the Canada Labour Standards Regulations.***

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[50] *Ibid.*, at para. 9.

[51] *Ibid.*, at para. 33.

[52] *Supra,* note 4, at para. 105.

[81] I have also found that the defendant bank failed to record actual hours worked in violation of the Code's regulations. This resulted in inaccurate payroll records which in turn made it impossible for all employees to be compensated in accordance with the Code. Case law tells us that the failure to keep track of hours worked by employees "effectively permits" employees to work overtime.[53]

- ***The bank delegated the responsibility for the interpretation and enforcement of its overtime policy to more than 1000 branch managers without any guidance or direction.***

[82] The evidence shows that the defendant bank delegated the interpretation and enforcement of its overtime policy to its more than 1000 branch managers and did so without providing any guidance or direction. There is no evidence of any direction issued to the managers at any time during the class period that all overtime hours that were required or permitted were to be recorded. And, further, as John Silverthorn, the bank's senior HR officer confirmed: "there was no directive or instructions given to managers or even guidance given to managers about how they can go about not permitting or preventing unwanted hours."[54] Case law tells us that a policy prohibiting overtime work in the absence of a plan for recording and controlling hours worked is "meaningless."[55]

- ***The bank knew or should have known that some employees were working unpaid overtime***

[83] An employer is liable for "permitting" overtime hours if it knew or should have known that overtime hours were being worked and failed to take steps to prevent the work. Here, there is compelling evidence of actual or constructive knowledge – I refer, at minimum, to the internal bank reports and theme documents reviewed above. Over the 16 years of the class period, the defendant bank knew or should have known that some employees were not being compensated for overtime work and many others were at least exposed to this risk.

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[53] *Misty Blue Transport, supra,* note 11, at para. 30.

[54] When asked on cross-examination whether there was any "directive or instructions given to managers or even guidance given to managers about how they can go about not permitting or preventing unwanted hours," Mr. Silverthorn answered, "Not that I'm aware of."

[55] *Ruckaber, supra,* note 11, at para. 36.

➢ ***The bank simply "looked the other way"***

[84] The evidence shows that year after year, hundreds of class members complained that they were working unpaid overtime. The defendant bank had repeated notice that its "delegation" model was not working and did nothing in response. If an employer is told of the existence of numerous complaints about unpaid overtime, does nothing in response, and simply "looks the other way," the employer is effectively permitting the employees to work overtime.[56] A failure to pay attention to complaints about unpaid overtime "effectively permits" employees to work overtime pursuant to the Code.[57]

[85] I therefore find, for the five reasons just stated, and in combination, that the defendant bank must be found to have permitted (or not prevented) all uncompensated overtime hours of the class members. I answer common issue 3 in the affirmative.

[86] **Common issue 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? And (d) Payment of hours worked by Class Members?

> ***Answer***: The relevant terms of the class members' contracts of employment respecting the matters listed are the provisions of the defendant's overtime policies and the requirements of the Code. Discussed above at paras. 37 and 53.

[87] **Common issue 5:** Did the Defendant breach any of the foregoing contractual terms?

> ***Answer***: Yes. The defendant breached the implied contractual terms that incorporated the provisions of the Code regarding the recording of hours of work and the payment of overtime. Discussed above at paras. 38 to 51 and 54 to 59.

[88] **One final matter: good faith.** The plaintiff has alleged that in addition to breaching the provisions of the Code, the defendant bank also breached its legal duty to perform its contractual obligations in good faith. I am not persuaded by this submission.

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[56] *Island Express, supra,* note 11, at para. 15.

[57] *Misty Blue Transport, supra,* note 11, at para. 26.

[89] As the Supreme Court noted in *Bhasin v. Hrynew,*[58] "good faith" is about honest contractual performance[59] which means that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract."[60] This is a standard that in my view has not been met on the evidence before me.

[90] I can find on the evidence that CIBC was careless and indifferent, indeed negligent, about its obligation to comply with the requirements of the Code. I can also find that the bank should have known better. It is a multi-billion-dollar financial institution with an able legal staff that can easily advise on the requirements of federal labour law. For some reason this didn't happen. The bank dropped the ball, to be sure. But I cannot find on the evidence before me that the defendant bank lied or knowingly misled its employees about the legality of its overtime policies. The "breach of good faith" allegation does not succeed.

Conclusion

[91] The defendant bank breached the overtime obligations prescribed by federal labour law. Rather than implementing a system to pay for all hours required or permitted (and to track actual hours worked so that this could be achieved), the bank failed to record actual hours worked and made overtime compensation contingent primarily on pre-approval. I have found on the record before me that some class members worked overtime hours that were not recorded and were not compensated in accordance with the requirements of the Code. I have also found, for the reasons set out above, that the defendant bank must be found to have permitted (or not prevented) all uncompensated overtime hours of the class members.

[92] The bank's unlawful overtime policies and hours-of-work recording practices were systemic or institutional impediments.[61] That is, they were system-wide in nature and they impeded class member overtime claims that were otherwise compensable under the Code.

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[58] *Bhasin v. Hrynew,* 2014 SCC 71.

[59] *Ibid.,* at para. 33.

[60] *Ibid.,* at para. 73.

[61] As noted in *Baroch v Canada Cartage,* 2015 ONSC 40 at para. 31: "The *absence* of a written class-wide policy or practice can also amount to some evidence of a systemic impediment." In *Fulawka v. Bank of Nova Scotia,* [2010] O.J. No. 716 (S.C.J.) at para. 143, this court found that the absence of a class-wide system to record overtime hours was a "systemic impediment to the ability of every Class Member to prove that he or she worked overtime and how much overtime he or she worked."

[93] The plaintiff has established liability.

[94] The appropriate remedies, including damages, will be addressed in the second part of this decision when I consider common issues 6 to 8 and the related question of aggregate damages. Common issues 6 and 7 may provide the plaintiff with some challenges, including limitation periods, calculation of loss, and the logistics of class member distribution. But, as I have already noted, these issues will be addressed in a further hearing.

Disposition

[95] Common issues 1 to 5 are answered in favour of the plaintiff.

[96] Counsel are invited to contact me to schedule argument on the remaining common issues 6 to 8, the aggregate damages question and any related matters. Costs are deferred to the completion of the remedies and damages portion.

[97] I am obliged to counsel on both sides for the high quality of their advocacy and their overall assistance.[62]

Justice Edward P. Belobaba

Date: March 30, 2020

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[62] With one caveat – the length of the written submissions. Counsel for both sides ignored the requirement for judicial pre-approval and unilaterally filed mega-length factums: the plaintiff filed a 78-page factum and the defendant CIBC filed a 157-page factum with another 169 pages in single-spaced appendices. The parties' reply and sur-reply factums added another 64 pages in written submissions. In total, about 470 pages. Rather than requiring counsel to resubmit rule-compliant material and thus delaying the hearing, I allowed the mega-length factums but then took two days out of court to read and review the detailed submissions and related evidentiary material. The one advantage of the mega-length factums, as it turned out, was that counsel were able to complete the in-court portion in less than a day.

Appendix

Certified Common Issues

The Defendant's Overtime Policies and Recording of Hours Worked

1. 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?

2. 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. If the answer to common issues 1(a) or 2(a) is "yes", and to the extent found necessary by the common issues trial judge, did the Defendant thereby require or permit all uncompensated hours of the class members?

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?

***

***Common Issues 6 to 8 have been deferred to a further hearing*:**

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?

Remedy & Damages

7. If the answer to any of common issues 1, 2, 3, 5 or 6 is "yes", what remedies are Class Members entitled to?

8. If the answer to any of common issues 1, 2, 3, 5 or 6 is "yes", 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?

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