



## Ontario judge denies certification in overtime class action - individual nature of issues incapable of resolution on a common basis

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In [Brown v. Canadian Imperial Bank of Commerce](#), Justice Strathy of the Ontario Superior Court of Justice examined the plaintiff's motion to certify the proceeding as a class action under the [Class Proceedings Act, 1992](#) on behalf of a class of employees of the defendants Canadian Imperial Bank of Commerce (CIBC) and CIBC World Markets Inc. (CIBCWM) (referred to collectively as CIBC).

Facts:

Unlike other [recent similar overtime class actions](#), which alleged that hours worked by overtime-eligible employees was not recognized and paid by the employer, the question to be answered in this case was the eligibility of the class members to overtime. The plaintiffs alleged that they and other similarly-situated class members had been wrongly classified by CIBC as ineligible for overtime, in violation of their contractual obligations, the [Canada Labour Code](#) (the CLC, for CIBC employees) and the [Employment Standards Act, 2000](#) (the ESA, for CIBCWM employees).

The plaintiffs proposed to include within the class "all Ontario current and former CIBC and CIBCWM employees, since 1996, who were classified by CIBC and CIBCWM as Level 6 or higher, who held job titles or business titles that included the words "analyst" or "investment advisor" (otherwise known as financial advisor)." The plaintiffs asserted that this group of employees was incorrectly classified as ineligible for overtime, and that it could be determined, on a job-by-job basis, whether particular employees are legally entitled to overtime and therefore whether they have been misclassified.

The Court's Decision:

In denying certification of the proposed class action, Justice Strathy examined the elements of the certification test, which he summarized as "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".

*Cause of Action*

The plaintiffs argued, and CIBC did not contest, that the proposed causes of action were (a) breach of express or implied terms of contract; (b) unjust enrichment; and (c) alternatively, breach of the ESA and the CLC. Given the concession of CIBC on this issue, Justice Strathy was satisfied that the plaintiffs set out an adequate cause of action.

### *Identifiable Class*

This is the first section of the certification test which was problematic for the plaintiffs. The plaintiffs claimed that the proposed class was bounded in time and objectively defined and that class members would be able to self-identify based on their employment level and their job title or business title. However, Justice Strathy noted that there were 52 job titles and 368 business titles of CIBC employees that contained the word “analyst”. The evidence did not bear out the assumption that all analysts performed similar duties that were not managerial. In fact, the central common issues (i.e. whether the employees were correctly classified as ineligible for overtime) could not be extrapolated to all members of the class. Similar issues arose for the employees who were “investment advisors” or “financial advisors”.

### *Common Issues*

Similar to the problems with the identifiable class, Justice Strathy found that the central common issue of the misclassification of employees was in fact not common to all class members. In fact, the classification of each employee would require individual findings of fact that would have to be made with respect to each individual claimant. Justice Strathy noted that the plaintiffs admitted that if common determinations with respect to eligibility could not be made, individual determinations would be required. Further, once the classification of the class members was complete, individual determinations would be required to determine which employees in fact worked overtime, and if so, how much.

### *Preferable Procedure*

The individual nature of the proposed claims also determined the preferable procedure requirement. Justice Strathy concluded:

“The insurmountable impediment in this case, and the reason why the preferable procedure requirement has not been met, is that the issue of CIBC’s liability to pay overtime to every class member is an individual issue. It will require individual fact-finding concerning the circumstances of every class member and the individual application of the relevant legal principles to those circumstances. A class action would not, therefore, be a fair, efficient and manageable way of advancing the claims of class members and it would not promote either access to justice or judicial economy.”

In the case of the investment advisors, Justice Strathy found that their claims in particular were quite substantial (in the case of the representative plaintiff, over \$50,000 per year in overtime was claimed), and such claims would be better served under the Court’s Simplified Procedure, given the individual fact-based enquiry that would be necessary to resolve the issues.

### *Representative Plaintiffs and Litigation Plan*

In a final parting shot to the plaintiffs, Justice Strathy found that neither of the proposed representative plaintiffs were suitably engaged in the proposed litigation, as one was out of the country and refused to attend cross-examinations and the other, located in Canada, did not attend the certification motion. In addition, the plaintiffs’ litigation plan did not contain a feasible method for dealing with the individual nature of the eligibility determinations that were required for every member of the class. In conclusion, Justice Strathy found that “the plaintiffs have failed to establish a realistic, efficient and workable procedure for the resolution of the central common issue of eligibility and the individual issues that will necessarily remain.”

Summary:

This case is another in the growing area of overtime class actions. In this case, employers can find some relief in the finding that the classification of potentially managerial employees will usually require an examination of each plaintiff's individual circumstances. Justice Strathy held that only in circumstances where a class has "identical or similar" job duties would a class action be suitable for these types of claims.

It is interesting to note the examination and evaluation of the proposed representative plaintiffs. While the issues with the proposed representative plaintiffs was not fatal to the motion, especially given the decision regarding the suitability of the proposed class, Justice Strathy nonetheless evaluated the appropriateness of each proposed representative plaintiff in detail.

While the decision is a positive one for employers, it is important to note that this area of the law is continuing to develop, and the Court of Appeal for Ontario currently has two similar overtime class action cases under reserve (see *Fulawka v. Bank of Nova Scotia*, [2010 ONSC 1148](#), aff'd [2011 ONSC 2645 \(Div. Ct.\)](#), which was certified at first instance, and *Fresco v. Canadian Imperial Bank of Commerce* [2009 CanLII 31177 \(ON SC\)](#), aff'd [2010 ONSC 4724 \(Div. Ct.\)](#), which was not certified.) Appeals in both proceedings were heard jointly by the Court of Appeal (Winkler C.J.O., Lang and Watt J.J.A.) on November 30 and December 1 and 2, 2011. The Court of Appeal reserved its decision.

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