

Dara Fresco (plaintiff/appellant) v. Canadian Imperial Bank of Commerce  
(defendant/respondent)  
(C53230; 2012 ONCA 444)

**Indexed As: Fresco v. Canadian Imperial Bank of Commerce**

Ontario Court of Appeal  
Winkler, C.J.O., Lang and Watt, JJ.A.  
June 26, 2012.

**Summary:**

Fresco, the proposed representative plaintiff, applied under s. 5 of the Class Proceedings Act for certification of a class action against the Canadian Imperial Bank of Commerce (CIBC), on behalf of 31,000 bank tellers and customer service representatives who worked in 1,000 bank branches across Canada. The claim sought compensation for unpaid overtime work on the basis that the bank's overtime policy violated the bank's contractual obligations and the provisions of the Canada Labour Code. The plaintiff claimed damages, and declaratory and injunctive relief.

The Ontario Superior Court, in a judgment reported [2009] O.T.C. Uned. E32, denied certification on the ground that although a class action would be the preferable procedure, the action lacked the essential element of commonality of issues. The court held that it was "plain and obvious" that the bank's overtime policy complied with the Code. In a subsequent decision, reported at [2010] O.T.C. Uned. 1036, the court awarded the bank \$525,000 in costs, inclusive of fees, disbursements and GST. The plaintiff appealed the certification decision and the costs order.

The Ontario Divisional Court, Sachs, J., dissenting, in a decision reported (2010), 267 O.A.C. 317, dismissed the appeal. The plaintiff appealed again.

The Ontario Court of Appeal allowed the appeal and substituted an order certifying the class action. The court certified a number of the plaintiff's proposed common issues, but refused to certify, inter alia, a common issue concerning an aggregate assessment of damages.

Editor's Note: This case was one of a trilogy of cases dealing with certification of class actions - see also *Fulawka v. Bank of Nova Scotia*, [2012] O.A.C. TBEEd. JL.006; 2012 ONCA 443 and *McCracken v. Canadian National Railway Co.*, [2012] O.A.C. TBEEd. JL.008; 2012 ONCA 445.

**Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class or representative actions - Certification - Considerations (incl. when class action appropriate) - The plaintiff, a bank (CIBC) employee, sought to certify a class action respecting overtime policies, alleging that violations of contractual obligations and the Canada Labour Code - The motions judge held that although a class action was the preferable procedure, there were no common issues because it was "plain and obvious" that the overtime policy (requiring pre-approval for all overtime absent extenuating circumstances) did not violate the Code - The Divisional Court agreed - The plaintiff

appealed - The Ontario Court of Appeal allowed the appeal and certified the action, including a number of common issues - The motions judge erred in law in her analysis of whether the pleadings disclosed a cause of action (Class Proceedings Act (CPA), s. 5(1)(a)) - Furthermore, in conducting the common issues analysis (CPA, s. 5(1)(c)), the motions judge misconceived the plaintiff's action as being, in essence, a collection of individual claims for unpaid overtime and disregarded evidence showing some basis in fact to support the existence of many of the proposed common issues concerning liability - That error in principle displaced the substantial deference otherwise owed to certification judges when considering the common issues criterion and called for appellate intervention - See paragraphs 68 to 111.

### **Practice - Topic 209.9**

Persons who can sue and be sued - Individuals and corporations - Status or standing - Class actions - Appeals - [See **Practice - Topic 209.3**].

### **Practice - Topic 8825.4**

Appeals - General principles - Duty of appeal court from decision of motions judge on class action certification motion - [See **Practice - Topic 209.3**].

### **Cases Noticed:**

Markson v. MBNA Canada Bank (2007), 224 O.A.C. 71; 85 O.R.(3d) 321; 2007 ONCA 334, leave to appeal refused (2007), 383 N.R. 381; 248 O.A.C. 396 (S.C.C.), reld to. [para. 43].

Fulawka v. Bank of Nova Scotia, [2010] O.T.C. Uned. 1148; 101 O.R.(3d) 93; 2010 ONSC 1148, reld to. [para. 52].

Hollick v. Metropolitan Toronto (Municipality) et al., [2001] 3 S.C.R. 158; 277 N.R. 51; 153 O.A.C. 279; 2001 SCC 68, reld to. [para. 58].

LeFrancois et al. v. Guidant Corp. et al., [2009] O.T.C. Uned. D88; 2009 CanLII 30448 (Sup. Ct.), leave to appeal refused [2009] O.A.C. Uned. 487 (Div. Ct.), reld to. [para. 58].

Cassano et al. v. Toronto-Dominion Bank (2007), 230 O.A.C. 224; 87 O.R.(3d) 401; 2007 ONCA 781, leave to appeal refused (2008), 386 N.R. 389; 252 O.A.C. 399 (S.C.C.), reld to. [para. 66].

2038724 Ontario Ltd. et al. v. Quizno's Canada Restaurant Corp. et al. (2010), 265 O.A.C. 134; 100 O.R.(3d) 721; 2010 ONCA 466, leave to appeal refused (2011), 417 N.R. 397, reld to. [para. 66].

Anderson et al. v. Wilson et al. (1999), 122 O.A.C. 69; 44 O.R.(3d) 673 (C.A.), leave to appeal refused (1999), 258 N.R. 194; 138 O.A.C. 200 (S.C.C.); reld to. [para. 66].

Cloud et al. v. Canada (Attorney General) et al. (2004), 192 O.A.C. 239; 73 O.R.(3d) 401 (C.A.), leave to appeal denied (2005), 344 N.R. 192; 207 O.A.C. 400 (S.C.C.), reld to. [para 66].

2038724 Ontario Ltd. et al. v. Quizno's Canada Restaurant Corp. et al. (2009), 250 O.A.C. 87; 96 O.R.(3d) 252 (Div. Ct.), reld to. [para. 67].

Matson v. Great Northern Grain Terminals Ltd., [2005] C.L.A.D. No. 401, reld to. [para. 77].

T-Line Services Ltd. v. Morin, [1997] C.L.A.D. No. 422, reld to. [para. 77].  
RSB Logistic Inc. v. Hale, [1999] C.L.A.D. No. 548, reld to. [para. 77].  
Kindersley Transport Ltd. v. Semchyshen, [2002] C.L.A.D. No. 4, reld to. [para. 77].

**Statutes Noticed:**

Canada Labour Code, R.S.C. 1985, C. L-2, sect. 168(1) [para. 31]; sect. 174 [para. 3].  
Class Proceedings Act, S.O. 1992, c. 6, sect. 5(1)(a) [para. 28]; sect. 5(1)(c) [para. 34];  
sect. 24(1) [para. 109].

**Authors and Works Noticed:**

Arthurs, Harry, Fairness at Work: Federal Labour Standards for the 21st Century (2006),  
generally [para. 31].

**Counsel:**

Louis Sokovol, Steven Barrett, David F. O'Connor and Derek McKay, for the appellant;  
Patricia D.S. Jackson, Stuart Svonkin, John C. Field and Lauri A. Ressor, for the  
respondent.

This appeal was heard on November 30 and December 1, 2011, before Winkler, C.J.O.,  
Lang and Watt, J.J.A., of the Ontario Court of Appeal. The decision of the court was delivered by  
Winkler, C.J.O., on June 26, 2012.

Appeal allowed.

Editor: Elizabeth M.A. Turgeon

**Practice - Topic 209.9**

Persons who can sue and be sued - Individuals and corporations - Status or standing -  
Class actions - Appeals - The plaintiff, a bank (CIBC) employee, sought to certify a class  
action respecting overtime policies, alleging that violations of contractual obligations and  
the Canada Labour Code - The motions judge held that although a class action was the  
preferable procedure, there were no common issues because it was "plain and obvious"  
that the overtime policy (requiring pre-approval for all overtime absent extenuating  
circumstances) did not violate the Code - The Divisional Court agreed - The plaintiff  
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whether the pleadings disclosed a cause of action (Class Proceedings Act (CPA), s. 5(1)  
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individual claims for unpaid overtime and disregarded evidence showing some basis in  
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- That error in principle displaced the substantial deference otherwise owed to  
certification judges when considering the common issues criterion and called for  
appellate intervention - See paragraphs 68 to 111.

#### **Practice - Topic 8825.4**

Appeals - General principles - Duty of appeal court from decision of motions judge on class action certification motion - The plaintiff, a bank (CIBC) employee, sought to certify a class action respecting overtime policies, alleging that violations of contractual obligations and the Canada Labour Code - The motions judge held that although a class action was the preferable procedure, there were no common issues because it was "plain and obvious" that the overtime policy (requiring pre-approval for all overtime absent extenuating circumstances) did not violate the Code - The Divisional Court agreed - The plaintiff appealed - The Ontario Court of Appeal allowed the appeal and certified the action, including a number of common issues - The motions judge erred in law in her analysis of whether the pleadings disclosed a cause of action (Class Proceedings Act (CPA), s. 5(1)(a)) - Furthermore, in conducting the common issues analysis (CPA, s. 5(1)(c)), the motions judge misconceived the plaintiff's action as being, in essence, a collection of individual claims for unpaid overtime and disregarded evidence showing some basis in fact to support the existence of many of the proposed common issues concerning liability - That error in principle displaced the substantial deference otherwise owed to certification judges when considering the common issues criterion and called for appellate intervention - See paragraphs 68 to 111.