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Overtime Class Actions are Gaining Momentum in Canada

By Malcolm MacKillop and Meighan Ferris-Miles

Class actions for unpaid overtime have exploded in recent years. There are currently three such class actions moving through our legal system and the stakes are high. CIBC employees are claiming \$500 million in damages. Bank of Nova Scotia employees are claiming \$300 million in damages. CN employees are claiming \$250 million in damages. Each of these cases are in the early stages of litigation. As these cases gain momentum, they provide valuable lessons for employers in regards to managing overtime of employees and preventing claims for unpaid overtime going forward.

Employees with claims for unpaid overtime have several options available for pursuing such claims. Firstly, employees of provincially regulated companies may file a claim with the Employment Standards Branch of the Ontario Ministry of Labour and employees of federally regulated companies may file a claim with the Labour Program of Human Resources and Skills Development Canada. In the alternative, employees may elect to file a claim with the court. In the further alternative, a group of employees may elect to commence a class action. This option requires the group of employees to first be certified as a class. To be successful at this step, the group of employees must establish the following:

- The pleadings disclose a cause of action;
- There is an identifiable class of two or more persons that would be represented by the representative plaintiff;
- The claims or defences of the class members raise common issues;
- A class proceeding would be the preferable procedure for the resolution of the common issues; and,
- 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

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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.

To date, the Ontario court has reached different conclusions in regards to certifying certain overtime class actions. Early cases suggest the court was reluctant to certify overtime class actions. More recently, the courts have rejected their earlier opinions and have granted motions for certification.

It all started in 1998 with *Halabi v. Becker Milk Co.* (“Becker Milk Co.”). The court denied certification of the class. The court held that since the *Employment Standards Act* (“ESA”) had its own quick, cost effective process that did not require judicial intervention, it was preferable to resolving the common issues through a class action.

The next case came in 2001 with *Kumar v. Sharp Business Forms Inc.* (“Sharp”). The court granted the motion for certification. The court expressly rejected the reasoning in *Becker Milk Co.* noting that the *ESA* permits civil actions.

Earlier this year, on February 19, 2010, the Ontario Superior Court released its decision in *Fulawka v. Bank of Nova Scotia* (“Bank of Nova Scotia”). Justice Strathy granted the motion for certification. He held that there was an evidentiary basis of systemic wrongs that gave rise to common issues, the resolution of which would advance the claim of every class member. The systemic wrongs flowed from a policy that failed to reflect the realities of the workplace because it put the onus on the employee to obtain prior approval for overtime rather than requiring the employer to ensure the employees were paid for overtime that they were permitted or required to work. The Bank of Nova Scotia has appealed the decision primarily on the basis of the differing approach taken by the court in *Fresco v. CIBC* (“CIBC”), as described below. The appeal is scheduled to be heard by the Ontario Divisional Court on December 1 to 3, 2010.

The case of *Bank of Nova Scotia* stands in contrast to the most recent case of *CIBC*. In *CIBC*, Justice Lax of the Ontario Superior Court denied certification of the class. She held that there was no evidentiary foundation for any common issues that would advance the litigation. In particular, there was no evidence of a systemic practice of unpaid overtime at CIBC and any other issues that may be considered common issues

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would not significantly advance the litigation. The group of employees appealed. On September 10, 2010, the Ontario Divisional Court released its decision. The three judge panel was split. Justice Swinton and Justice Ferrier upheld the decision of the Superior Court. They denied certification of the class. Justice Sachs dissented and would have granted the motion for certification.

The third class action that is currently moving through the legal system is *McCracken v. Canadian National Railway Company* ("CN"). On August 17, 2010, Justice Perell of the Ontario Superior Court of Justice granted the motion for certification. He held there were common issues and a class proceeding was a preferable procedure for determining class members' claims.

The Bank of Nova Scotia, CIBC and *CN* cases are the subject of a relentless series of appeals. The issue of certifying overtime class actions will likely proceed to the Supreme Court of Canada in order to settle the matter. In the interim, employers should consider the following:

- Overtime policies should state that employees are not permitted to work overtime unless it is pre-authorized. There should, however, also be a mechanism for employees to have overtime approved after the fact. Sometimes issues arise that need to be dealt with promptly and it is not practical to have overtime pre-authorized in such circumstances. Ensure that overtime policies permit for individual application and assessment. This reduces the likelihood that there will be common issues between all employees and, as such, minimizes the risk of certification of the class.
- Ensure that overtime policies are being consistently followed. Employers will be in a stronger position to argue that there is no common issue between all employees if it can be established that overtime policies are always followed except in exceptional and unique cases. This minimizes the risk of certification of the class.
- Conduct an analysis of the eligibility requirements under overtime policies. Remember that generally speaking salaried employees are entitled to overtime pay. Certain categories of employees (ie. managers, information technology professionals, engineers, etc.) are exempt from overtime pay.

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- Maintain accurate time sheets for all employees. Wherever possible, it is advisable to have each employee sign off on the weekly schedule acknowledging that it is an accurate reflection of the hours worked. Such records will be critical in defending any claims.
- Have a system for monitoring and authorizing employees' hours of work. Employees should also be informed that working unauthorized overtime could result in discipline. In conclusion, it is important to remember that simply having a policy that requires pre-approval of overtime may not be sufficient. The fact remains that an employer is obligated to ensure that overtime is not worked or, if it is worked, the employee must be paid accordingly. These measures may seem onerous. However, overtime claims may prove to be costly, particularly if such claims are certified as class proceedings.

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