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## *Overtime Class Actions Update*

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As first mentioned in the October 2010 Snapshot “Overtime Class Actions are Gaining Momentum in Canada”, class actions brought by employees for unpaid overtime have exploded in recent years. The Ontario court has continued the trend towards granting certification of overtime class actions in its most recent decision of *Fulawka v. Bank of Nova Scotia* (“*Fulawka*”), which was released on June 3, 2011. Given the development of this area of law, it is important for employers to be familiar with the features that distinguish a class action lawsuit from an “ordinary” lawsuit.

First, class actions, like “ordinary” lawsuits start with the filing of a statement of claim. In a proposed class action, however, before a statement of defence is filed, the plaintiffs bring a motion to certify the lawsuit as a class action. This step is often a significant undertaking that may take several years to be resolved, as can be seen in the recent cases. For example, in *Fresco v. CIBC* (“*Fresco*”), the statement of claim was filed on June 4, 2007. The certification motion was heard on December 8-12, 2008; the first appeal was heard by the Divisional Court on March 24-25, 2010; and leave to appeal was granted by the Court of Appeal on January 21, 2011, with the appeal yet to be heard. Similarly, in *Fulawka*, the statement of claim was filed on December 10, 2007. The certification motion was heard on November 16-19, 2009; and, the first appeal was heard by the Divisional Court on December 1-3, 2010. In both cases, it has been approximately four years since the statement of claim was filed and the certification issue has not been resolved. This issue is likely to proceed all the way to the Supreme Court of Canada.

The certification stage serves as a gate-keeping function. The court’s permission is required in order to advance beyond this point. The court must be satisfied of 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;

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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 notifying the 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.

The most common objection of employers at the certification stage is that there is not a common issue. More particularly, employers often argue that there is a lack of commonality between the proposed class members because they were employed pursuant to individual contracts of employment, worked in different positions, worked different amounts of overtime, for different rates of pay, and in different locations.

To date, the court has generally rejected these arguments of employers in respect of overtime claims. In *Fulawka*, the Divisional Court held that the claim was framed as an action for systemic wrongs and, as such, the individual circumstances of each proposed class member was of limited importance. The Divisional Court also held that there were significant common issues that could be resolved together and significantly advance the litigation, even if damages for unpaid overtime had to be assessed for each employee separately.

Assuming the certification hurdle is passed, notice must be given to all class members setting out details such as the identities of the parties, a description of the action, the damages claimed, an overview of the class action process, and information about the rights of class members. Class members who do not wish to be bound by the class action are then given a period in which they are permitted to opt out.

From this point forward, class actions proceed in much the same way as “ordinary” lawsuits. Through the discovery process the parties exchange relevant documents and conduct examinations for discovery. Generally, the defendant only examines the representative plaintiff, but may request permission from the court to examine other class

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members. Finally, the trial stage is broken into three parts: (i) resolution of the issues common to the class members; (ii) resolution of individual issues, if any; and, (iii) calculation of damages on a group or individual basis.

Like “ordinary” lawsuits, most class actions settle before trial. In fact, many class actions settle at the certification stage. Since class actions require court approval of any settlement before it is binding on the parties, motions for certification are often heard in conjunction with motions for approval of settlement. The court will consider a number of factors including the terms of the settlement, the potential expense and duration of the litigation, the number of objectors among the class, and the likelihood of success if the action goes to trial.

In addition to the different procedural steps involved in class actions, as described above, another distinguishing feature of class actions is the publicity they attract. Proposed class actions have the potential to stimulate extensive and unwanted publicity due to the nature of the allegations, the potentially large number of employees involved, and the cumulative value of the claims. This unwanted public attention is a good reason to ensure that your company’s overtime practices are consistent with its legal obligations.

In conclusion, it is important for employers to take steps to minimize the risk of employees starting overtime class actions. While such actions have been limited to federal employers, it is possible that they will spread to the provincial jurisdiction in the near future. We have already seen a group of employees unsuccessfully attempt to certify a class action for constructive dismissal in *Kafka v. Allstate Insurance Company of Canada* (“*Kafka*”). This is just the beginning.

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