

# Liability and damages in Canada's largest class action for unpaid overtime

December 15, 2020

After twelve years of litigation in *Fresco v. Canadian Imperial Bank of Commerce*, Justice Belobaba of the Ontario Superior Court of Justice recently decided two summary judgment motions on the merits – dealing first with liability and then damages.

In the [liability decision](#), Belobaba J. found the defendant bank liable for permitting the plaintiff class members (front-line bank employees) to work uncompensated overtime hours, and for failing to record those hours in accordance with federal labour legislation.

In the [damages decision](#), Belobaba J. found that the class members were entitled to damages for breaches of their employment contracts, and certified an additional common issue as to aggregate damages in an amount to be determined at a further hearing.

## Background and legislation

In 2007, the representative plaintiff, Dara Fresco, commenced a proposed class action on behalf of 31,000 customer service employees who had worked for CIBC between February 1993 and June 2009. The core allegation was that CIBC's overtime policies and record-keeping systems contravened the [Canada Labour Code](#) (the Code), and as a result, thousands of front-line bank employees were not properly compensated for their overtime work.

Section 174 of the Code provides that when employees are "required or permitted" to work more than the standard hours of work (no more than eight hours per day and forty hours per week), their employer must pay them time and a half. Section 24(2) of the Code requires every employer to record the number of hours worked each day by every employee and to keep this information on file for at least three years.

## Liability decision

In the liability decision, Belobaba J. interpreted section 174 of the Code to mandate pay at time and a half where employers require (or do not prevent) employees from working overtime hours. He then applied this interpretation to CIBC's overtime policies.

CIBC had two relevant overtime policies in that time period. The first required employees to obtain “pre-approval” from management before incurring any overtime. The second extended the pre-approval requirement 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.

Belobaba J. determined that CIBC’s overtime policies breached the Code because nothing in the Code predicated an employee’s eligibility for overtime pay on formal approval or extenuating circumstances. In addition, CIBC did not accurately record and maintain information about the number of hours worked each day by every employee. Belobaba J. found that some employees worked overtime hours that were not recorded and were not compensated in accordance with the Code, and that CIBC permitted (or did not prevent) all uncompensated overtime hours.

## **Damages decision**

After finding CIBC liable in the first summary judgment motion, Belobaba J. considered the issue of damages in the second. He found that CIBC was unjustly enriched for failing to pay some employees appropriately for all their hours worked, but noted that a finding of unjust enrichment added little remedy in a case that was fundamentally about damages for breach of an employment contract. Belobaba J. found that the employees involved were entitled to damages from the breaches of their employment contracts. He rejected the claim for punitive damages.

Belobaba J. certified an additional common issue of aggregate damages, which allows the plaintiff to argue that the court should determine damages without requiring each class member to prove his or her claim individually. The amount of aggregate damages would be determined at a future hearing. Before such a hearing, CIBC would need to extract the necessary time-stamped data and convert it to a usable form so that the plaintiff’s expert could complete his proposed aggregated damages report.

## **Takeaways**

These decisions are significant as they underscore the importance of implementing overtime policies and procedures that comply with applicable employment standards legislation. Employers have a positive obligation to prevent employees from working overtime hours if they do not wish to compensate them for that time. Belobaba J.’s finding that aggregate damages might be available in this case is also significant, as the Ontario Court of Appeal had refused to certify aggregate damages in at least [one other overtime case](#).

By

[Katie Archibald](#)

Expertise

[Banking & Financial Services, Disputes, Labour & Employment, Class Action Defence](#)

---

## BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

[blg.com](http://blg.com)

### BLG Offices

#### Calgary

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T 403.232.9500  
F 403.266.1395

#### Ottawa

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

#### Vancouver

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

#### Montréal

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

#### Toronto

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.