

## OVERTIME NIGHTMARE

*Fresco et al. v. Canadian Imperial Bank of Commerce*

*Robert M. Bell*

On June 5, 2007, a 34-year-old personal banker and teller launched a \$600 million class action against her employer, the Canadian Imperial Bank of Commerce (CIBC). The proposed class action seeks damages for unpaid overtime hours on behalf of current and former CIBC employees.

Class actions are a familiar feature of the employment law landscape in the United States. Recently, several major employers in the United States, including Walmart, Starbucks, Taco Bell and Radio Shack have been forced to pay massive retroactive overtime costs to employees. Similar class actions have been rare in Canada; however, this trend may change in light of the proposed CIBC class action.

The proposed CIBC class action indicates that employers may face significant liability if they do not comply with employment standards legislation regarding overtime pay. It is imperative that Ontario employers abide by this legislation. Legislative requirements addressing overtime pay for eligible employees in Ontario are summarized below.

Federally regulated employers (like the CIBC) are governed by the *Canada Labour Code* and they are especially vulnerable to claims of unpaid overtime. Under the *Code*, all hours worked in excess of 8 hours per day or 40 hours per week are to be paid at one and one-half times the regular wage rate. The *Code* provides that an employer can *require or permit* an employee to work in excess of the standard hours of work. The effect of this language is that an employee may be entitled to overtime pay in circumstances where an employer has not requested that an employee work overtime, but where the employer has failed to prevent the employee from working excess hours.

Where there is a modified work schedule, a federally regulated employee is entitled to daily overtime only for hours worked in excess of his or her standard daily hours of work. For example, an employee that works four 10 hour shifts is entitled to overtime on any hours worked in excess of the 10 scheduled hours per day or 40 hours per week.

Provincially regulated employers in Ontario are governed by the *Employment Standards Act, 2000*, which establishes that overtime begins for most employees after they have worked 44 hours in a work week. Upon reaching the 44 hour threshold, employees must receive overtime pay, which is one and one-half the regular wage rate.

In contrast to the *Canada Labour Code*, unless a contract of employment or a collective agreement provides otherwise, an employee does not earn overtime pay on a daily basis by working more than a set number of hours per day. Overtime is calculated only on a weekly basis or over a longer period pursuant to an averaging agreement.

Toronto Office Tel: 416.408.3221 London Office Tel: 519.433.7270