

An Update on the Overtime Class Action Cases

Date: September 17, 2012

Lawyers You Should Know: Christopher McClelland

Original Newsletter(s) this article was published in: Employment Notes: September 2012

Three recent decisions have provided some clarification on the issue of class actions by employees for unpaid overtime. On June 26, 2012, the Court of Appeal for Ontario issued its decision in the cases of *Fulawka v. The Bank of Nova Scotia*, *Fresco v. Canadian Imperial Bank of Commerce* and *McCracken v. Canadian National Railway Company*. Each case dealt with the preliminary question of whether the action should be certified as a class proceeding. In effect, the Court was being asked to determine if representative plaintiffs should be permitted to pursue claims on behalf of hundreds or even thousands of employees. As such, the amounts at issue in these cases are potentially significant.

The Court ultimately decided that the actions against the Bank of Nova Scotia and the CIBC would be allowed to proceed as class actions, while the action against CN was not certified. The distinction between the two sets of cases related primarily to whether there was a common issue amongst the various groups of employees. In the bank cases, the Court found that the claims were about allegedly improper policies and practices; primarily that the banks implemented overtime policies that required or permitted employees to work uncompensated overtime hours. In contrast, the CN case was primarily about whether certain groups of employees had been misclassified as managers or supervisors, which made them exempt from being paid overtime. The Court found that determining this issue would require looking at the job functions of each employee individually, and that a class action was not the proper process for addressing this issue.

Given the history of these proceedings to date, it is likely that some or all of the unsuccessful parties will seek leave to appeal to the Supreme Court. As such, it may be some time before we know if these cases will be proceeding to trial.