


Welcome

In this issue we welcome a lawyer and a master.

This time last year we introduced you to Kelly Hart, our articling student. We are pleased to announce that Kelly was recently called to the Ontario bar. He has joined Williams McEnery as our newest lawyer. To read more about Kelly turn to his bio on page 4.

Although Master Calum MacLeod has been a member of the bar since 1983 and a master since 1998, he was only lately appointed a case management master for our jurisdiction. To learn more about Ottawa's newest master turn to page 3. We have also included an article that explains the history of this office, which is celebrating its 170th anniversary.

Finally, we look at the \$600 million class proceeding that has been started against the CIBC. This case raises several interesting issues. A class action cannot proceed unless it has been certified, no small hurdle to overcome. This case is also expected to open a discussion around something many Canadians find themselves doing: working overtime for free. 

Summer 2007, Volume 25

In this issue:

Employment Standards. p. 2

Celebrating 170 Years. p. 3

Welcome: Master MacLeod. p. 3


Bio: Kelly Hart. p. 4

The OT Lawsuit

By now you have no doubt heard about the \$600 million lawsuit that has been launched against CIBC. The lawsuit is a class action¹ covering thousands of tellers and account managers who allegedly worked overtime without being compensated. Dara Fresco, a 34-year old teller, is leading the charge. Ms. Fresco, who has worked at more than a dozen branches of CIBC over the past 10 years, claims that she has regularly been required to work between 2 and 5 hours of unpaid overtime each week. She calculates that she is owed approximately \$50,000 in overtime pay.

While the filing of the lawsuit made a big splash in the headlines, this is only the

first step in what could be a lengthy process. To better understand what will transpire in the coming months, we have prepared two articles to explain the key issues.

The first hurdle that must be cleared is the certification of the lawsuit as a class action. The second step is to make the case for the unpaid overtime. Neither step is a cakewalk. 

¹The terms class action and class proceeding are used interchangeably throughout these three articles.

The Making of a Class Action

Although Ontario's *Class Proceedings Act, 1992* has been around for 15 years, class actions are still a relatively new phenomena in Ontario. A class action is a proceeding that allows a large group of plaintiffs, who have suffered a similar wrong at the hands of the same defendant, to sue in a single proceeding rather than having to sue individually.

The Goals

With respect to the CIBC case, Dara Fresco could have commenced her own individual litigation against the bank. However she chose the class action route since she alleges that she is only one of thousands of CIBC employees who has worked unpaid overtime. At least on the surface, this case would seem to be exactly why the *Class Proceedings Act* was brought into being.

The three principle goals that the *Class Proceedings Act* seeks to achieve are:

- Judicial economy by promoting a sin-

gle cause of action instead of a multitude of individual cases.

- Access to justice by reducing the costly monetary barriers of individual actions.
- The modification of the future behaviour of the defendants.

Certification

While the filing of Ms. Fresco's lawsuit made front page news in early June, unless the action is successfully certified it will end before it gets started. Unlike a regular lawsuit that is started by a plaintiff simply filing and issuing a statement of claim, a class action cannot proceed until it has been certified (i.e. officially approved) by the court.

To successfully certify a class action, the would-be plaintiffs must establish to the court's satisfaction that a class action is the best way to proceed with the claim. A

see **CLASS** page 2

CLASS - continued from page 1

lawsuit will be certified as a class proceeding if the following conditions are met.

1. The pleadings or the notice of application discloses a cause of action.
2. There is an identifiable class of two or more persons that would be represented by the representative plaintiff.
3. The claims of the class members raise common issues.
4. A class proceeding would be the preferable procedure for the resolution of the common issues.
5. There is a representative plaintiff who would fairly and adequately represent the interests of the class and who has produced a plan for the proceeding.

The CIBC case seems to meet all five of these criteria. The cause of action is the overtime worked but not compensated. The proposed class would be made up of current and former CIBC tellers and account managers and the common issue is the unpaid overtime. Although Ms. Fresco could choose to sue individually,

if she is correct that there are thousands of employees in a similar situation, then this would certainly be the preferable way to proceed. And finally, Ms. Fresco would seem to be a representative plaintiff who would fairly and adequately represent the interests of the class.

Help from the Ontario Court of Appeal


The Ontario Court of Appeal recently ruled on a certification application which could make the certification process easier for would-be plaintiffs. The decision could also significantly increase the number of plaintiffs in a class.

Markson, the holder of a MBNA credit card, had sought to have certified his class action against the MBNA Canada Bank. He alleged that the bank has been charging cardholders an illegal interest rate for cash advances. Although the proposed class will include all persons who held an MBNA card during a certain time period, many of those persons would not have been charged an illegal rate or have taken a cash advance.

The motions judge refused to certify the action in part because it would be impos-

sible to determine a class. The decision was upheld by the Divisional Court. However, the Court of Appeal disagreed with the lower courts and certified Markson's action as a class proceeding. The appellate court based its decision on the fact that the *Class Proceedings Act* permits statistical sampling. In other words, the court indicated that proof of individual losses by class members was not needed in every case.

This interpretation of the law could prove important in Ms. Fresco's case since there may be tellers and account managers who have not worked overtime or who were compensated for any overtime they worked.

We will have to wait and see if MBNA appeals the decision to the Supreme Court of Canada. We will also have to wait to see whether Fresco's case will be successfully certified. (This will likely take up to a year.) Looking at the results of previous class actions, it seems apparent that certification is key, not just because the law requires it for an action to proceed, but because there is a strong likelihood that certification will lead to a settlement. 

Don't Mess with Employment Standards

Dara Fresco has spent the past 10 years working as a bank teller. Over the last decade she has plied her trade at more than a dozen branches of the CIBC. Although Ms. Fresco's regular work week is 37.5 hours, she claims that she is routinely required to work two to five extra hours a week without being compensated. By her calculations she is owed about \$50,000 in overtime pay.

Most jurisdictions in Canada have laws that provide minimum employment standards to protect otherwise vulnerable employees. Employment standards legislation addresses a myriad of issues, including overtime. Since banking falls within the federal jurisdiction, employees like Ms. Fresco are subject to the

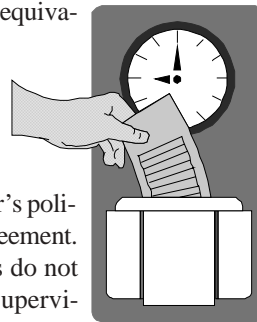
rules set out in the *Canada Labour Code*. Pursuant to that law, bank tellers who work in excess of 40 hours a week must be compensated. Employees who work overtime are entitled to time and a half or they may agree to equivalent paid time off.

These minimum standards can be improved upon by an employment contract, by the employer's policies or by a collective agreement. The minimum standards do not apply to managers or supervisors.

In a statement by the bank, it claims to have a clearly defined policy concerning

overtime. Despite such a policy, Ms. Fresco alleges that she is discouraged from recording her overtime hours.

Although it will be some time before we will know whether Ms. Fresco will be successful, her claim is certainly not without precedent. Similar lawsuits have been successfully launched south of the border. Wal-Mart was ordered to pay \$172 million in overtime pay to employees it had failed to compensate. In similar decisions, Radio Shack was ordered to pay \$30 million and Starbucks \$18 million.



see **STANDARDS** page 4

Celebrating 170 Years of Masters¹

This year marks the 170th anniversary of masters in Ontario. Although the general public is perhaps less familiar with the office of master, the role they play is an important one in our judicial process. To fully appreciate and understand the role of the master a little history lesson is in order.

In the dying years of the 13th century a new type of court began to emerge in England. Until this point the king's laws were enforced by the "courts of law". The type of cases that this court would hear was quite narrow and the procedures extremely technical. Since plaintiffs were often denied relief, many began to throw themselves on the king's mercy.

With the growing number of such petitions, the King began to regularly delegate these hearings and decisions to his Chancellor. It was not long before the chancery, the king's secretarial department, began to look an awful lot like a court. Thus was born the Court of Chancery.

Unlike the courts of law, decisions of the Court of Chancery were guided by conscience and were based on morals and equality. (This court is often referred to as the court of equity.) The first chancellors were members of the clergy who had no legal training. This changed in 1529 when Sir Thomas Moore, a lawyer, was appointed chancellor. In addition to the office of chancellor, the Court of Chancery also featured the office of master.

During the late 1700s, efforts were underway to introduce a similar court of equity to Upper Canada. In 1837 *An Act to Establish a Court of Chancery in this Province* was finally passed. The statute created a court of equity and brought with it the office of the master.

In 1881, the decision was made to merge the administration of the courts of law and equity. The result was the creation of the office of the master-in-chambers. Henceforth, the official referee or clerk of the law courts, who performed a role similar to the masters, would be known as master.

Unlike judges, who are appointed by the federal government and who derive their authority from the Constitution, a master's jurisdiction is fixed by provincial law. Also they are appointed by the provincial government. The main duties of a master are to deal with interlocutory and procedural questions, matters that would otherwise require a judge to rule on.

In 1996, the *Courts of Justice Act* was amended to provide for the appointment of case management masters. Ottawa based Master Robert Beaudoin was the first to occupy this newly created office. Today, Ontario has 16 case management masters. Although case management masters exercise the same duties that masters historically exercised, their jurisdiction has been expanded to include case management and dispute resolution.

"There have been various offices of master under different names in the past 170 years. Whether known as master-in-ordinary, master-in-chambers, master, assistant master, local master, senior master or case management master, the office has been found essential to the working of civil justice in Ontario for almost two centuries."² 📁

¹The article *170 Years of Masters in Ontario* by Master MacLeod was invaluable to the writing of this article.

²This is a quote by Master Calum MacLeod.

Welcome to Ottawa

The Ottawa legal community recently welcomed its newest member, Master Calum MacLeod. Master MacLeod is a case management master, who was recently transferred to our jurisdiction from Toronto.



Master MacLeod obtained his law degree from Queen's University and was called to the bar of Ontario in 1983. Following his call to the bar, he practised law in Toronto and then Barrie. During that time he developed a broad range of legal experience in the areas of civil and family litigation as well as commercial law. In addition, he has been very involved in the development and promotion of cost effective and viable Alternative Dispute Resolution options.

Master MacLeod holds the designation of Chartered Mediator. He has been involved in resolving hundreds of disputes including personal injury, insurance claims, business and construction disputes, labour relations and family law. He has spoken, taught and written about dispute resolution for a number of organizations.

In 1998, he was appointed master. In this role, Master MacLeod hears motions, conducts references and presides over settlement conferences and case conferences.

As Ottawa's newly appointed case management master, he will work closely with Master Beaudoin. He will divide his time between civil and family matters. We at Williams McEney would like to extend our congratulations to Master MacLeod on his new position and we look forward to working with him. 📁

KELLY P. HART

After successfully completing his articles at Williams McEnery, Kelly Hart was called to the Bar in June. Now a full fledged lawyer, Kelly is our firm's newest associate.

Kelly, who originally hails from Manitoba, received his LL.B. from the University of Ottawa. Prior to law school, Kelly attended Trinity Western University in Langley, British Columbia. He earned a Bachelor of Arts with a concentration in Political Science.

Over the next year, he will work closely with our senior litigators on a variety of matters. Kelly, who has a keen interest in civil litigation, will also concentrate on insurance defence work, although he will be handling some plaintiff files.

When not practising law, Kelly, enjoys a good game of hockey with a local men's league. He is also involved in several charitable endeavours including Habitat for Humanity. He founded the Horizon Scholarship Fund at his alma mater, Trinity Western University. The scholarship, which is funded by he and fellow alumni, helps students in need of financial aid.

Kelly is married to the lovely Kaarin Hart.

We welcome Kelly and look forward to working with him. 

STANDARDS - continued from page 2


A comparable case, although not a class action, was adjudicated by the Manitoba Labour Board. That case involved the supervisor of a retail clothing store. At the time she was recruited, the plaintiff signed a "manager's all-inclusive contract" paying her \$42,000 a year. Although the employer had agreed to pay the plaintiff time in lieu for her overtime, this never happened. The plaintiff calculated that during the six months prior to her resignation she worked 84 hours of overtime.

In ordering the employer to reimburse the plaintiff almost \$9,000, the Board concluded that the parties' agreement stipulating a salary as being "inclusive of all hours required to be worked" violated Manitoba's *Employment Standards Code*. It found the agreement to be an attempt to contract out of the statutory provisions which prevailed over the Agreement. In

addition, the Board found that for these purposes, the plaintiff was an employee, regardless of her supervisory title. This decision was upheld by the Manitoba Court of Appeal.

While this case is not binding on the Ontario Court, it could prove persuasive for Ms. Fresco, particularly since the wording of the Manitoba Employment Code at the time of this decision is reasonably similar to what is found in the *Canada Labour Code*.

Finally, Ms. Fresco's case should serve as a wake up call to employers to review their overtime policies as well as the enforcement of these policies.

Our lawyers are well versed in all aspects of employment law. If you have questions please contact our firm. 



williams mcenery
barristers & solicitors

169 Gilmour Street
Ottawa, Ontario K2P 0N8
Phone: (613) 237-0520
Fax: (613) 237-3163

www.williamsmcenery.com

Eric R. Williams

williams@williamsmcenery.com

Paul T. McEnery

pmcenery@williamsmcenery.com

Chris F. Reil

creil@williamsmcenery.com

Aaron E. Moscoe

amoscoe@williamsmcenery.com

Mark O. Charron

mcharron@williamsmcenery.com

Paul W. Muirhead

muirhead@williamsmcenery.com

Jennifer E. Jolly

jjolly@williamsmcenery.com

Jaye E. Hooper

hooper@williamsmcenery.com

Juliet L. Knapton

jknapton@williamsmcenery.com

Kelly P. Hart

khart@williamsmcenery.com

AREAS OF PRACTICE

Civil/Commercial Litigation
Construction & Lien Litigation
Employment Matters
Motor Vehicle Litigation
Personal Injury Litigation
Real Estate
Wills & Estate Administration
Insurance Defence Claims

If you prefer to receive this newsletter by e-mail, please notify us at newsletter@williamsmcenery.com

www.williamsmcenery.com

