



Back to Lawsuits over denied overtime pay against CIBC, Scotiabank to go ahead

## Lawsuits over denied overtime pay against CIBC, Scotiabank to go ahead

June 26, 2012

Alyshah Hasham

Five years ago bank teller Dara Fresco announced that she would no longer tolerate the unpaid overtime required by her job at a CIBC branch in Toronto.

Routine tasks that had to be done when the bank closed for the day, such as counting the ATM balance and paperwork, added hours of uncompensated work to her day, she said.

But the unprecedented \$600 million class-action lawsuit she launched against the bank to recover the allegedly owed overtime pay was denied certification by a justice in 2009.

The battle seemed over for Fresco and the 31,000 customer service employees she represented — until a [key ruling](#) from the Ontario Court of Appeal resurrected the lawsuit on Tuesday.

The break came through a class-action lawsuit inspired by Fresco's. It was launched against Scotiabank in 2008 by Cindy Fulawka, a personal banker in Saskatchewan, on behalf of 5,000 employees, and was certified by a different judge in 2010.

The contradictory rulings on the two similar lawsuits muddled the waters so much that the cases eventually came into the hands of Chief Justice Warren Winkler and the Ontario Court of Appeal.

On Tuesday, the court's three-judge panel gave [both lawsuits](#) the green light.

"(The decision) means that employees can band together to have the access to the courts that large corporations have," said lawyer Louis Sokolov, of Sack Goldblatt Mitchell, who represents both the CIBC and Scotiabank employees.

"The court plainly recognized what we say is obvious — that in large modern workplaces employees operate under systems, they are compensated as a result of systems, and when those systems fail it causes real damage to their employees."

Sokolov's co-counsel, David O'Connor at Roy Elliott O'Connor, says Fulawka is "encouraged" by the decision.

Barring appeals by CIBC and Scotiabank, the certification of the lawsuits means they can proceed to trial, where the claims made by the bank employees will be examined.

Scotiabank said Tuesday it was disappointed by the ruling and is keeping all options on the table.

"We are confident that the bank's employee policies have been applied fairly and consistently, and we will continue to put that case forward while defending ourselves vigorously," said the bank in a statement.

However, the decision is an important step in providing consistent guidelines for class-action lawsuits of this type in Canada, said Morton Mitchnick of Borden Ladner Gervais, who represents Scotiabank in the case.

"I think it was apparent when the Chief Justice took on the case himself that these are very important decisions in virtually uncharted territory," he said.

The Tuesday ruling also overturned the certification of a class-action lawsuit against CN Rail. The lawsuit alleged that CN Rail misclassified some employees as managers to avoid paying them overtime.



Dara Fresco, right, with lawyer Louis Sokolov in 2007, after the CIBC head teller filed a law suit over unpaid overtime. The Ontario Court of Appeal ruled on Tuesday, June 26, 2012 that the law suit should be certified.

AAARON HARRIS/THE CANADIAN PRESS FILE PHOTO

The CN Rail lawsuit failed to show enough similarities between the employees included in the lawsuit to qualify as class-action, according to the ruling.

“The absence of commonality is fatal to the certification of this action,” Winkler wrote [in the decision](#).

Sokolov, who also represents the CN Rail employees, says they are considering whether to appeal.

It is unlikely that the Tuesday rulings will encourage many new class-action suits to come forward in Canada, Sokolov said.

The three lawsuits addressed in the rulings emerged after a flurry of similar suits were filed in the United States.

That trend cooled after the U.S. Supreme Court halted a class-action sex-discrimination case against Walmart in a landmark decision last year, said Mitchnick.

He says the cautious approach evident in Winkler’s rulings will place a similar check on class-action lawsuits in Canada.