

Court File No.

07 - CV - 334 113 PD2

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN**

**DARA FRESCO**

Plaintiff

- and -

**CANADIAN IMPERIAL BANK OF COMMERCE**

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

**STATEMENT OF CLAIM**

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

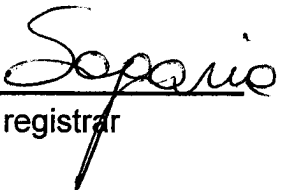
Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO

PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$10,000.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$100.00 for costs and have the costs assessed by the court.

Date June 4, 2007

Issued by M. Sagaria  
Registrar   
Local registrar

Address of 393 University Avenue  
court office 10<sup>th</sup> Floor  
Toronto, Ontario  
M5G 1E6

**TO: CANADIAN IMPERIAL BANK OF COMMERCE  
COMMERCE COURT WEST – 199 BAY STREET  
TORONTO, ONTARIO  
M5L 1E9**

## CLAIM

1. The plaintiff claims:
  - (a) an order certifying this proceeding as a class proceeding and appointing the plaintiff as representative plaintiff for the class;
  - (b) an order, pursuant to s. 24 of the *Class Proceedings Act, 1992*, directing an aggregate assessment of damages;
  - (c) \$500 million in general damages for the class, or such other sum as this Honourable Court deems just;
  - (d) an interlocutory and a final mandatory order directing that the defendant specifically perform its contracts of employment with the class members and comply with the *Canada Labour Code* (the "Code") and, in particular, to accurately record all hours worked by class members and to pay the class members for all hours worked beyond their agreed upon standard hours (the "additional hours") at a rate of time and a half their normal hourly rate or, in the alternative, at their regular hourly rate up to 40 hours per week or 8 hours per day and at time and a half their regular rate thereafter;
  - (e) an interlocutory and a final order declaring the current overtime policy of the defendant Canadian Imperial Bank of Commerce ("CIBC") effective in April, 2006 (the "Current Overtime Policy") to be unlawful and unenforceable and restraining the CIBC from enforcing the Current Overtime Policy, to the extent that the

Current Overtime Policy requires or permits class members to work overtime hours for which they will not be paid, contrary to the *Code*;

- (f) an order, pursuant to s. 23 of the *Class Proceedings Act, 1992*, admitting into evidence statistical information, including statistical information concerning hours of work performed by members of the class, and an order directing CIBC to preserve, and disclose to the plaintiff, all records (in any form) relating to the hours of work performed by class members;
- (g) in the alternative to the claim for damages in (b) and (c) above, an order directing the defendant to account to the class members for the unpaid additional hours worked by each member of the class, including all hours worked beyond their contractually specified regular time limits (the “unpaid overtime”), and an order requiring CIBC to disgorge to the class members all amounts withheld by it in respect of such unpaid overtime;
- (h) a declaration that CIBC has been unjustly enriched, to the deprivation of members of the class, by the value of the work performed by members of the class and an order requiring CIBC to disgorge to the class members all amounts withheld by it in respect of such unpaid overtime in respect of which it has been unjustly enriched;

- (i) pre-judgment and post-judgment interest on the amounts payable pursuant to subparagraphs (b), (c), (d), (g) and (h) in equity or otherwise at common law, or alternatively pursuant to sections 128 and 129 the *Courts of Justice Act*, compounded annually;
- (j) punitive, aggravated and exemplary damages in the amount of \$100 million, or such other amount as to this Honourable Court seems just;
- (k) a declaration that CIBC has breached its contracts of employment with each member of the class;
- (l) a declaration that CIBC has breached its obligation to act in good faith in the performance of its contracts of employment with the class by failing to comply with its contractual obligations toward its employees, by failing to adhere to statutory requirements and its own internal policies respecting the payment of wages for hours worked beyond their agreed upon regular daily hours of work and by retaining for itself amounts due to the class in respect of the wages for these hours;
- (m) a declaration that CIBC breached its statutory obligations under Part III, Division I of the *Code*;
- (n) costs of this action on a substantial indemnity basis plus Goods and Services Tax;

- (o) the costs of administering the plan of distribution of the recovery in this action in the sum of \$1 million or such other sum as this Honourable Court deems appropriate; and
- (p) such further and other relief as may be required by the *Class Proceedings Act*, 1992 or as this Honourable Court may deem just.

#### THE PARTIES

2. The plaintiff Dara Fresco ("Fresco") lives in Toronto, Ontario. She has been a non-management employee of CIBC since 1998.
3. The defendant CIBC is a Canadian chartered bank with its head office in Toronto. It was formed through the merger of the Canadian Bank of Commerce and the Imperial Bank of Canada in 1961, and continued under the *Bank Act, 1991*, R.S.C. c. 46.
4. The defendant CIBC is one of Canada's largest corporations. As at the end of the 2006 business year, it had assets in excess of 29 billion dollars and profit of over 2.6 billion dollars. Profits generated from retail banking operations are very important to the total profits of the CIBC.
5. CIBC has hundreds of retail branch offices and more than 38,000 current employees in Canada, most of whom are non-management. In addition, CIBC has tens of thousands of former non-management employees. Approximately one third of CIBC non-management employees provide retail banking services at CIBC retail branch offices in Canada.

6. Almost none of the CIBC employees are unionized. There is little or no job security for the class members, and vast inequality of bargaining power between them and the CIBC.

#### THE CLASS

7. The plaintiff brings this action on her own behalf and on behalf of a class of persons consisting of current and former non-management, non-unionized employees of CIBC in Canada who are or were tellers or other front-line customer service employees (limited to personal bankers, commercial bankers and account executives) working at CIBC retail branch offices across Canada (the "class" or "class members").

8. The duties performed by class members or the duties associated with the various positions held by members of the class, as well as the policies and practices of CIBC which affect their conditions of employment, are relatively uniform and consistent throughout CIBC's branches. Tellers and the other positions within the class definition at every branch are required to perform substantially the same duties.

9. As CIBC knew or should have known, or as it directed or permitted, the class members are consistently required to work additional hours in order to complete the common duties of their positions. In addition, CIBC has expressly required or directed employees to perform additional functions from time to time for which class members have not been paid, or have not been paid at the contractually or statutorily mandated rates.

10. CIBC has required, encouraged or permitted class members to record only their standard hours of work and has discouraged employees from submitting claims for overtime. When class members have had the temerity to claim overtime, CIBC has often refused, as a matter of practice or policy, to pay for the hours worked and has done so without lawful excuse. In fact, as set out in the Current Overtime Policy, described below, in the absence of prior approval, CIBC will refuse to pay overtime to class members unless the class member establishes that extenuating circumstances are present.

#### **SOURCES OF THE OBLIGATION TO PAY OVERTIME**

##### **I. CONTRACTUAL**

11. The class members consist of both full-time and part-time employees of CIBC.

12. Full-time class members are under contract for 37.5 hours of work per week. They are entitled to be paid overtime at time and a half their regular hourly rates pursuant to their contracts of employment for hours worked in excess of eight hours per day and 37.5 hours per week.

13. Part-time class members are considered by CIBC to be anyone whose contract provides for 36 hours per week or less. Part-time employees are entitled to be paid at time and a half their regular hourly rates pursuant to their contracts of employment for their work in excess of eight hours per day and 37.5 hours per week.

14. Further and in the alternative, it is an express or implied contractual term that both full and part-time class members are entitled to be paid for time worked in excess of their contractual maximum hours at their regular hourly rates up to 40



hours per week, after which they are entitled to be paid overtime at one and a half times their regular hourly rates pursuant to the *Code*.

## II. STATUTORY

15. CIBC is a federally regulated corporation. It is required to comply with the minimum conditions set out in the *Code* in respect of such matters as wages, hours of employment, and severance entitlement. The minimum standards contained in the *Code*, including those relating to overtime, seek, among other things, to protect vulnerable employees from undue exploitation by employers who may seek to take advantage of superior economic and bargaining power in setting unlawfully onerous terms and conditions of employment.

16. Pursuant to section 169 of the *Code*:

“(a) the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; and

(b) no employer shall cause or permit an employee to work longer hours than eight hours in any day or forty hours in any week.”

17. Section 174 of the *Code* further provides that:

“When an employee is ***required or permitted*** to work in excess of the standard hours of work, the employee shall, subject to any regulations made pursuant to section 175, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.”

[emphasis added]

18. Regulations promulgated pursuant to the *Code* (namely, section 24 of the *Canada Labour Standards Regulations*, C.R.C., c. 986) oblige an employer, including CIBC, to accurately record and maintain records of its employees' hours of work. Accordingly, CIBC should have accurate records of all hours of work for the class members.

19. The *Code* further provides, in section 168, that its minimum standards apply notwithstanding any other law or any custom, contract or arrangement.

20. The requirements of the *Code* and its regulations, and in particular the requirements to pay for additional time, including but not limited to time and one-half for hours in excess of 8 hours per day or 40 hours per week, and to keep accurate records of hours of work, are implied terms in the contracts of class members.

#### **THE CURRENT OVERTIME POLICY**

21. In April 2006, CIBC instituted the Current Overtime Policy. It applies "to all employees of CIBC and its controlled subsidiaries whose employment relationship is governed by Canadian law" and who are not exempt from the overtime entitlements set out in the *Code*.

22. The Current Overtime Policy provides for payment at one and a half times salary for the "greater of the daily or weekly totals worked in excess of regular hours (37.5 per week or 8 hours per day.)"

23. However, the Current Overtime Policy restricts payment of overtime to those situations where employees have received advance prior approval or where there have been “extenuating circumstances” and approval is obtained as soon as possible thereafter. It thereby purports to excuse CIBC from any obligation to pay overtime if pre-authorization is not obtained from management. The Current Overtime Policy does not allow for payment of overtime to persons, like the class members, who are routinely required or permitted to work overtime to fulfil the basic duties of their employment.

24. The Current Overtime Policy therefore expressly places barriers to claims for overtime, and attempts to shift the burden from management to the class members. To this extent the Current Overtime Policy is in violation of the *Code*.

25. It is apparent from this history that CIBC will continue to violate the *Code’s* overtime protections unless prevented from doing so by Court Order. The class members are largely powerless as individuals to enforce their contracts of employment, as they would risk discharge from their employment for asserting their rights.

#### **THE PLAINTIFF’S EMPLOYMENT HISTORY AT CIBC**

26. The plaintiff began working for CIBC in April 1998.

27. For the first year of her employment, the plaintiff was a “roving teller”, assigned to 12 different branches filling in for permanent employees who were sick or otherwise absent from work.

28. Between 1999 and September 2002, the plaintiff worked as a teller at the CIBC branch at Kingston Road and Balsam Avenue in Toronto.
29. Between September 2002 and March 2004, the plaintiff worked as a personal banker at the Kingston Road and Balsam Avenue branch. Unlike a teller, a personal banker has a portfolio of specific clients, whose accounts she is responsible for administering. In addition, she is provided with a yearly quota in respect of the value of services she is required to sell to her clients.
30. Between March and August 2004, the plaintiff worked as a personal banker at the Kingston Road and Midland branch of CIBC. Between August 2004 and February 2005, she worked at the same branch as a teller.
31. The plaintiff went on maternity leave from February 2005 to March 2006.
32. Between March and November 2006, the plaintiff returned to the Kingston Road and Midland Avenue branch where she worked as a teller.
33. Since November 2006, the plaintiff has been employed as a teller at the Danforth Avenue and Broadview Avenue branch of CIBC in Toronto. Her current annual salary is \$30,715.00.
34. At each of the branches where the plaintiff has worked and all other branches, the class members, including the plaintiff, have regularly worked in excess of their agreed upon regular daily hours of work, including working before the scheduled beginning and after the scheduled end of their shifts, and during lunch breaks, to

perform work or services for CIBC's benefit and at its direction or with its permission and knowledge.

35. At each of the branches where the plaintiff has worked and all other branches, class members were directed to prepare time records that described their hours of work as no more than their regular daily hours of work, notwithstanding that they worked in excess of their standard hours.

36. The practices referred to in paragraphs 34 and 35, above, are as a result of a uniform, consistent and systemic practice of CIBC to refrain from paying class members compensation for additional hours of work, notwithstanding its contractual and statutory obligations to do so.

37. As a teller, the plaintiff has worked, on average, approximately two and one half to five hours per week beyond the regular daily hours of work that she was paid for. As a personal banker, the plaintiff has worked, on average five to 15 hours per week beyond her regular daily hours of work. At present, since November 2006, the plaintiff works, on average, approximately two and one half hours per week more than her regular daily hours of work.

38. The additional time that the plaintiff works is necessary in order to complete the basic duties of her position as known to, or directed by, CIBC. She has been directed by CIBC not to report any of this additional time on her timesheets and not to make any claim for overtime. All class members are similarly directed by CIBC not to report any of their additional time on their timesheets and not to make any claim for

such additional hours, which CIBC knows are necessary in order to complete the standard job requirements such as balancing before leaving work.

39. With the exception of a brief period of time, in or around December 2006, the plaintiff has never been paid for the additional time that she has worked. The approximate value of the additional time, for which she has not been paid, is as follows:

<b>Year</b>	<b>Amount</b>
1999	\$ 4,500.00
2000	\$ 4,500.00
2001	\$ 4,500.00
2002	\$ 6,950.00
2003	\$ 12,000.00
2004	\$ 9,545.00
2005	\$ 700.00
2006	\$ 3,200.00
2007 (to date)	\$ 1,325.00

**SYSTEMIC BREACH OF EMPLOYMENT CONTRACTS**

40. CIBC's practice of not paying compensation for additional hours was accentuated over the previous decade, during which CIBC reduced its Canadian workforce by more than 20%.

41. During this period, CIBC instituted a "Performance Management and Measurement System" for employees demanding increasing financial performance and maintaining or improving the level of operational activities from a consistently decreasing pool of employees.

42. As a result, class members across Canada continue to work additional hours, for which they are not paid, in order to satisfy the basic requirements of their jobs or at the specific direction of CIBC.

43. CIBC has breached the express or implied terms of its contracts of employment with the class members by failing to pay for additional hours.

44. In the alternative, CIBC has breached the implied terms of its contracts of employment with class members that it comply with the *Code* requirements to pay for additional hours.

**THE DEFENDANT HAS BEEN UNJUSTLY ENRICHED**

45. CIBC has been unjustly enriched as a result of receiving the benefit of the services of the plaintiff and the other members of the class. The precise value is not known to the plaintiff but is within, or should be within, the exclusive knowledge of CIBC as it is required to accurately record the overtime worked by class members under the *Code*.

46. The plaintiff and the other members of the class have suffered a deprivation, in the form of wages corresponding to the unpaid overtime hours that they have worked.

47. There is no juristic reason for this unjust enrichment. The CIBC's former overtime policy, that allowed CIBC in its discretion to refuse to approve overtime after it was claimed, was unlawful and does not supply a juristic reason. CIBC's Current Overtime Policy is similarly unlawful and does not supply a juristic reason.

**BREACH OF EMPLOYER'S DUTY OF GOOD FAITH**

48. Being non-management employees, members of the class are in a position of vulnerability in relation to the defendant. As a result, the defendant owes a duty to act in good faith towards its employees, in particular towards the class, and to honour its statutory and contractual obligations towards the class.

49. CIBC has breached its duty of good faith by, *inter alia*:

- (a) failing to pay for the additional hours of work of the class members despite permitting such work to be performed;
- (b) failing to advise the class members of their right to recover for such additional hours and, in particular, the implied terms of their contracts under the *Code* and its regulations as referred to above;
- (c) directing employees to not record additional hours or the actual hours worked;
- (d) failing to maintain accurate records of all actual hours worked by the class members; and
- (e) creating a working environment and circumstances in which vulnerable, non-management employees are compelled to: (i)



work additional hours in order to carry out the duties assigned to them; (ii) not report such additional hours; and (iii) not attempt to claim or obtain compensation for their additional hours.

**A CLASS PROCEEDING IS APPROPRIATE**

50. The class members as individuals risk losing their jobs if they pursue individual claims. The class members as individuals cannot match the resources of the CIBC. The individual claims of each class members would not be economical to pursue as individual claims in individual lawsuits. The class members will be denied access to justice in the absence of a class proceeding.

51. It is unlikely that an individual could or would seek prospective relief to deter future overtime misconduct by CIBC. Moreover, CIBC is sufficiently large and well-resourced that an individual lawsuit would be unlikely to have any significant impact on its behaviour. This class proceeding will either produce a voluntary change in the behaviour of CIBC or result in a Court Order that will compel a change in its behaviour.

52. The alternative to this national class proceeding is a multiplicity of proceedings in a variety of jurisdictions across Canada, where similar factual and legal issues would be raised. This would be inefficient and could produce inconsistent rulings.

**DAMAGES**

53. As a result of the CIBC's breach of its employment contracts and unjust enrichment, as set out above, the plaintiff, and members of the class, have suffered

damages. This is an appropriate case for the class proceedings judge to admit statistical evidence of the class members' losses, and to award damages on the basis of an aggregate assessment.

54. Members of the class therefore also claim aggravated, exemplary and punitive damages in the amount of \$50 million as a result of the arbitrary, callous and highhanded actions of CIBC as set out above.

55. The plaintiff pleads and relies upon the following statutes and regulations:

- (a) *Canada Labour Code* R.S., 1985, c. L-2, sections 167-169, 174, 247, and 252;
- (b) *Canada Labour Standards Regulations*, C.R.C., c. 986, sections 20 and 24; and
- (c) *Class Proceedings Act 1992*, S.O. 1992 c. 6, sections 2, 5, 23 and 24.

The plaintiff proposes that this action be tried in the City of Toronto.

June 4, 2007

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DARA FRESCO  
Plaintiff and CIBC

Defendant

Court File No: 07-CV-  
07-CV-334113 P02

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**STATEMENT OF CLAIM**

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