SMHI LEGAL NOTES
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The Overtime Lawsuits

This past September a class action lawsuit was launched against KPMG, the large accounting firm, alleging that it had failed to pay overtime to many of its employees. This is the second such legal proceeding to be commenced in the last few months. The initial class action against the Canadian Imperial Bank of Commerce alleges that thousands of tellers and account managers worked overtime without being compensated.

While the filing of the lawsuits made headlines, this is only a start. To better understand class actions as well as the legal issue being raised in these cases, we have prepared two explanatory articles. In both instances, 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.

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 each sue individually.

The Goals

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

- Judicial economy by promoting a single proceeding 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.

Both Dara Fresco, the CIBC plaintiff, and Alison Corless, the KPMG plaintiff, could have commenced their own individual actions against their respective employers. They chose the class action route since they each assert that they are only one of hundreds of employees who have worked unpaid overtime. At least on the surface, these cases would seem to be exactly why the *Class Proceedings Act* was brought into being.

Once an action is certified, persons who fall within the class automatically become a member of the class. Any judgment obtained on the common issues in the action will bind all class members. A person is entitled to opt out by notifying, usually in writing, the lawyers for the class by a specific deadline. A person who opts out will not be bound by any decision and will not benefit from any decision or settlement.

Certification

While the filing of Ms. Corless' and Ms. Fresco's lawsuits made front page news, unless the actions are successfully certified they will end before they get 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. Although it sounds straightforward, certification of a class action is not easily granted. A lawsuit will be certified as a class proceeding if the following conditions are met.

1. The pleading 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.

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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.

The CIBC and the KPMG cases seem to meet all five of these criteria. In both instances, the cause of action is the overtime worked but not compensated. The proposed class in the CIBC case would be made up of current and former CIBC tellers and account managers and the common issue is the unpaid overtime. In the case of KPMG, the proposed class includes lawyers, non-chartered accountant staff and other employees who worked more than 44 hours a week without extra pay.

If Ms. Fresco and Ms. Corless are correct in that there are thousands of employees in a similar situation then this would certainly be the preferable way to proceed. Finally, both women seem to be plaintiffs who would fairly and adequately represent the interests of the classes.

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 case of *Markson* v. *MBNA Canada Bank* could also significantly increase the number of plaintiffs in a class. Mr. Markson filed a class action lawsuit against the MBNA Canada Bank claiming that the bank has been charging cardholders an illegal interest rate for cash advances.

The motions judge refused to certify the action, in part because it would be impossible to determine a class, since not all cardholders would have been charged an illegal rate or taken a cash advance.

The Court of Appeal disagreed and certified Markson's action. The appellate court based its decision on the fact that the *Class Proceedings Act* permits statistical sampling—meaning proof of individual losses is not needed in every case. This interpretation of the law could prove important in the CIBC and KPMG cases, since there may be employees in the proposed class who have not worked overtime or who were compensated.

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 correlation between certification and settlement.

Don't Mess with Employment Standards

Dara Fresco has spent the past 10 years working as a bank teller at more than a dozen branches of CIBC. Ms. Fresco 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.

Alison Corless worked for KPMG from 2000 to 2004 as a technician compiling corporate tax returns. She claims she is owed $87,000 in overtime.

The Minimum Standard

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. They are entitled to time and a half or they may agree to equivalent paid time off.

Ms. Corless's employment was governed by Ontario's *Employment Standards Act, 2000*. Pursuant to that Act, overtime is payable at time and a half for each hour worked in excess of 44 hours per week. Employers are prohibited from requiring employees to work more than 48 hours a week unless the employee agrees. Even if an employee is agreeable to the extended hours, the employer cannot require an employee to work more than 60 hours a week[1].

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

He Said She Said

Both CIBC and KPMG maintain that they have clearly defined policies concerning overtime, which comply with the applicable laws. Despite such policies, Ms. Fresco alleges that she is discouraged from recording her overtime hours. Ms. Corless claims that KPMG supervisors "from time to time required workers to charge 50 to 60 hours per week of work to projects - and "it is well known in the accounting and professional industry that hours worked by a productive employee are approximately one-third more than the hours charged."

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Child Support Payments: How Far Back Will They Go?

The Ontario Court of Appeal recently released a decision dealing with a payor father who failed to notify the mother, in a timely fashion, of a substantial increase in his income.

Chronology of Events
After nine years of marriage and three children, the parties divorced in 1998. The mother was granted custody and was awarded child support. The parties were required to annually disclose their income and to adjust child support accordingly.

In August 2000, the father began earning in excess of $300,000, which he failed to disclose. In 2002, the mother twice requested information about his income. She was eventually forced to bring a motion for contempt in 2004. When at last the father made the required disclosure, the amount of support was adjusted to reflect his higher income. The award was retroactive, but only to January 1, 2003 rather than to 2000, the date the father's income increased.

While the judge hearing the case did not want to condone the father's behaviour, she concluded that going back any further would place too great a financial burden on the father, such that it might impact his ability to meet the ongoing child support obligation. The mother appealed.

Retroactivity
In deciding whether an award should be retroactive, the Supreme Court has set out four factors to be considered. None of the factors is determinative; rather the judge hearing the case should consider the particular facts of each situation.

1. Was the bringing of the application for child support by the recipient parent unreasonably delayed?
The court must look to the reason for the delay. Since the right to child support is the right of the child, any delay by the recipient parent is just one factor to be considered.

2. The conduct of the payor parent.
The court is interested in whether the payor parent has acted in a blameworthy manner, thus contributing to the delay by the recipient parent.

3. The circumstances of the child.
The court should consider the child's needs both at the time the support should have been paid as well as at the time the application was actually brought.

4. Any hardship that may be occasioned by a retroactive award.
The hardship in this case is the hardship that the payor parent may suffer if ordered to make a large retroactive payment.

How Far Back?
The Supreme Court of Canada has stated that the fairest retroactive date is the date when "effective notice" is given by the recipient parent to the payor parent that child support needs to be renegotiated. For the notice to be "effective", the recipient parent need only broach the subject with the other parent. If the payor parent does nothing, however, it is incumbent upon the recipient parent to pursue the matter further.

Unless the payor parent has withheld information about a material change in his or her circumstances such as an increase in income, it will be inappropriate to order retroactive payments more than three years prior to the "effective notice" date.

The Decision
It was the opinion of the Ontario Court of Appeal that the father's conduct concerning requests for his current income was highly blameworthy. As such, the conduct weighed heavily "in favour of awarding very significant, if not full retroactive child support." The result was that the appellate court set aside the lower court's decision and ordered a new hearing.

If you have questions about child support or another family matter, please contact our firm.

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Although it will be some time before we will know whether these plaintiffs will be successful, their claims are certainly not without precedent. Similar lawsuits have been successfully launched in the United States. In 2005, Wal-Mart was ordered to pay $172 million in overtime pay to employees it had failed to compensate. And over the past two years some well-known financial institutions, including Citigroup Inc., Merrill Lynch & Co. and Morgan Stanley, have all made multi-million dollar agreements to settle suits accusing them of not paying their stockbrokers overtime.

The Moral
These lawsuits should be a wake up call to employers to review the wording and enforcement of their overtime policies.

Our lawyers are well versed in all aspects of employment law. If you have questions regarding your rights and responsibilities as an employee or an employer, please our firm.

[1]In some instances of extended hours the employer may require the approval of the Director of Employment Standards.

Good Fences Make Good Neighbours

While this proverb may be true, fences can also be a real source of conflict between neighbours. Who is going to pay for the fence? Who is going to build it? What will it look like? These are all issues that can sometimes lead to real dissension. *The Line Fences Act*, one of the oldest laws in Ontario, provides a procedure to resolve these disputes.

Can I put up a dividing fence between my property and my neighbour's?
The *Line Fences Act* allows a land owner to construct and maintain a fence to mark the boundary between his property and the adjoining lands.

Can I get my neighbour to pay for part of the fence?
If the fence is to be built on the property line and you approach the neighbour before construction begins then the neighbour will probably be required to pay for part of the cost.

What if the neighbour does not want to pay or disagrees with the type of fence I want to build?
One solution is to build the fence just inside the boundary line. The other solution is to approach the municipality to help resolve the dispute. Many municipalities, including Toronto, have established an arbitration process under the *Line Fences Act* to assist in these situations.

How does the arbitration process work?
The municipality appoints third parties to act as impartial fence-viewers. The fence-viewers visit the property and discuss the issues with each of the property owners. The fence-viewers will then make a decision, which will be sent to the property owners. The decision may include the location of the fence, who will pay for the work and when the work will begin and end.

Will the fence-viewers decide where the boundary line is?
No. *The Line Fence Act* does not deal with disputes concerning the location of the boundary line. If that is the issue, you must seek the advice of a lawyer and/or surveyor.

Can the arbitration process be used for an existing fence that requires repairs or reconstruction?
Yes. The same process is available if the issue is either repairs to or reconstruction of an existing fence.

Is there a cost to the arbitration process?
Yes and it can be expensive. The city of Toronto charges an initial fee of $1,100. Obviously it will be cheaper if you and your neighbour can come to an agreement on your own.

Where can I get more information?
For more information about line fences visit the city of Toronto's website, www.toronto.ca/fence. You can also download *A Guide to the Line Fences Act, 2006* from the Ministry of Municipal Affairs and Housing's website, www.mah.gov.on.ca. (Go to Frequently Asked Questions - Line Fences.)

Other Fence Rules

If you want to build a fence, other than a boundary fence, you should check with your municipality's buildings office. Many municipalities do not require a permit to build a fence, unless it is to enclose a pool.

The bylaws may also address which materials cannot be used as well as the height of the fence.

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