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Court of Appeal makes certification of class actions for overtime pay more difficult

Canadian Courts have been faced in recent years with a number of class actions in which employees allege that their employer improperly misclassified them as ineligible for overtime pay. The Ontario Court of Appeal's recent decision in *Brown v. Canadian Imperial Bank of Commerce* makes it more difficult for such claims to proceed as class actions.

At issue in *Brown* was a claim by investment advisors and associate investment advisors at CIBC Wood Gundy for overtime pay. Under CIBC's overtime policy, these groups were categorized as managerial and therefore ineligible for overtime pay. The Plaintiff argued that all investment advisors and associate investment advisors had common job duties and were commonly categorized as ineligible for overtime pay. Consequently, the Plaintiff contended that eligibility for overtime pay could be determined as a common issue and the class proceeding could not be certified.

CIBC countered that its policy provided discretion to determine eligibility for overtime pay on a case-by-case basis. In appropriate cases, individual employees' circumstances (including their actual responsibilities and their degree of managerial responsibility and oversight) would be taken into account in determining eligibility for overtime pay.

The Court of Appeal upheld the decisions of lower courts refusing to certify the proceeding as a class action. In the circumstances of the case, given the potential for case-by-case assessment of employees' responsibilities, eligibility for overtime could not be determined as a common issue.

Inherent in the Court of Appeal's decision is the idea that the mere fact that employees share job titles and have broadly similar job functions does not in itself mean their eligibility for overtime can be determined on a common basis. Evidence that an employer will occasionally make exceptions to its general policy by assessing its employees' eligibility for overtime on a case-by-case basis will pose an impediment to the certification of these claims as class proceedings.