

CANADA

(CLASS ACTION)
SUPERIOR COURT

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-06-000 404-075

SARAH GAUDET, domiciled and
residing in 991 L'Habitat street,
apt. 5, Sherbrooke, district of St-
François, province of Quebec,
J1H 6H9

Petitioner

vs.

**CANADIAN IMPERIAL BANK
OF COMMERCE**, having a place
of business at 1155 Boul. Rene-
Levesque West, district of
Montreal, province of Quebec,
H3C 3B2

Respondent

**MOTION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION
AND TO BE GRANTED THE STATUS OF REPRESENTATIVE**
(Section 1002 C.p.c.)

IN SUPPORT OF THE PRESENT MOTION, THE PETITIONER STATES THE
FOLLOWING:

1. **The Petitioner wishes to institute a class action on behalf of persons that are a part of the following group, of which the Petitioner is herself a member:**

All persons, currently and formerly employed as non-management, non-unionized employees of CIBC 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 Quebec.

THE PARTIES

2. The Petitioner Sarah Gaudet is a former non-management, non-unionized, front line customer service employee who worked for the Respondent CIBC between 1999 and 2006;
3. The Respondent CIBC is a Canadian chartered bank with its head office in Toronto and with offices and branches across Quebec as well as a place of business in Montreal. 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 Respondent 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. Approximately 8,6% of these employees are in Quebec;
7. 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.
8. **The facts that support an individual claim by the Petitioner against the Respondent are as follows:**
 - 8.1. The Petitioner began working for CIBC in December 1999;
 - 8.2. She was hired as an « on-call » employee for many retail branches in the region of Estrie and worked full-time in the summers;
 - 8.3. In 2001, she got a position in a retail branch in Lennoxville;
 - 8.4. In 2002, she got another position in a retail branch in Waterville;
 - 8.5. At the end of 2002 and the beginning of 2003, she worked for six months as a trainer for employees in different retail branches;
 - 8.6. In 2003, she went to work in a branch in Coaticook as a non-management, non-unionized, front line customer service employee;

- 8.7. In 2004, she moved to the Lennoxville branch and again worked as a non-management, non-unionized, front line customer service employee;
- 8.8. She left CIBC's employ in August 2006;
- 8.9. She worked as a full-time employee;
- 8.10. Her annual salary at the time was 31 200\$;
- 8.11. During her employment for the CIBC, the Petitioner has worked, on average, approximately two and a half hours to five hours per week beyond the standard hours of work that she was paid for;
- 8.12. The Petitioner was required to work the additional time in order to complete the basic duties of her position as known to, or directed by the CIBC. She has been directed by the CIBC not to report any of this additional time on her time sheets and not to make any claim for overtime;
- 8.13. The Petitioner was also required to attend work-related meetings that took place outside her standard work hours, for which she was never paid;
- 8.14. The approximate value of the additional time, for which she has not been paid, is as follows :

Year	Amount
2004	4,410.00 \$
2005	4,410.00 \$
2006	1,800.00 \$

- 8.15. The contents of paragraph 9 are applicable to the Petitioner individually as well as a member of the group;

9. The facts that support a claim by the members of the group including the Petitioner against the Respondent are as follows:

- 9.1. The Petitioner 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 Quebec (the "class" or "class members") and who were not paid for hours worked beyond their standard work week;

- 9.2. 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;
- 9.3. 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;
- 9.4. 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

CONTRACTUAL

- 9.5. The class members consist of both full-time and part-time employees of CIBC.
- 9.6. 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.

- 9.7. Part-time employees are also 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.
- 9.8. 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 *Canada Labour Code, L.R.C., (1985), ch. L-2* (hereafter "the Code");

STATUTORY

- 9.9. 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;
- 9.10. 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.”;
- 9.11. 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.”
- 9.12. 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;

- 9.13. The Code further provides, in section 168, that its minimum standards apply notwithstanding any other law or any custom, contract or arrangement;
- 9.14. 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

- 9.15. In April 2006, CIBC instituted the Current Overtime Policy, a copy of which is filed hereby as exhibit **P-1**. 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;
- 9.16. 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.)”;
- 9.17. 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;
- 9.18. 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;
- 9.19. At the last branch where the Petitioner has worked and in other branches across Quebec, the class members, including the Petitioner, have regularly worked in excess of their agreed upon regular daily hours of work, to perform work or services for CIBC’s benefit and at its direction or with its permission and knowledge;

- 9.20. At the last branch where the Petitioner has worked and in other branches across Quebec, 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.
- 9.21. The practices referred to in paragraphs 9.19 and 9.20, above, are the 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.
- 9.22. 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.
- 9.23. 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%;
- 9.24. 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;
- 9.25. As a result, class members across Quebec 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;
- 9.26. CIBC has breached the express or implied terms of its contracts of employment with the class members by failing to pay for additional hours;
- 9.27. 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 RESPONDENT HAS BEEN UNJUSTLY ENRICHED

- 9.28. CIBC has been unjustly enriched as a result of receiving the benefit of the services of the Petitioner and the other members of the class. The precise value is not known to the Petitioner 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.

- 9.29. The Petitioner 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.
- 9.30. 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

- 9.31. Being non-management employees, members of the class are in a position of vulnerability in relation to the Respondent. As a result, the Respondent 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.
- 9.32. 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.

10. **The composition of the group makes the application of sections 59 or 67 C.p.c. impractical and difficult, considering that there are thousands of members and that it is impossible for the Petitioner to obtain a mandate from each member of the group;**
11. **The questions of law and fact that are identical, similar or related for each member of the Group and that the Petitioner seeks to have answered are the following :**
 - 11.1. Did CIBC violate the law, its contractual obligations and its obligation to act in good faith and was enriched unjustly by refusing to pay for the hours worked by its non-management, non-unionized employees and former employees working for retail branches in Quebec?
 - 11.2. If so, then did the members incur damages as a result?
12. **The only question of law and fact that is particular to each employee is the following :**
 - 12.1. What is the amount owed by CIBC in damages to each member of the group?
13. **It is suitable to authorize the institution of a class action for the benefit the members of the group for the following reasons;**
 - 13.1. 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;
 - 13.2. 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 is likely to produce a voluntary change in the behaviour of CIBC;
14. **The nature of the recourse instituted by the Petitioner is an action in damages;**

15. **There has already been a motion for authorization to institute a class action in front of the Superior Court of Ontario, record # 07-CV-334113CP for the same claim, a copy of which is filed hereby as exhibit P-2;**

16. **The Petitioner asks for the following conclusions:**

GRANT the action of the Petitioner;

GRANT the class action for all the members of the group;

CONDEMN the Respondent to pay all the members the amounts representing damages resulting from the Respondent's actions for an approximate amount of seventy-five (75) million dollars or any other amount that the Court deems just;

17. **The Petitioner asks that she be granted the status of Representative;**

18. **The Petitioner is able to ensure an adequate representation of the members for the following reasons :**

18.1. She is a member of the group and worked at CIBC for nearly seven years;

18.2. She is able to collaborate with her attorneys and carry out all the necessary procedures for them to accomplish their mandate;

18.3. She has ample knowledge of the facts that support the claim;

18.4. She has shown the will and has the availability to assist and collaborate adequately with her attorneys;

19. **The Petitioner proposes that the class action be instituted in front of the Superior Court, in the district of Montreal, for the following reason:**

19.1. The Superior Court in the district of Montreal has the jurisdiction to rule on this claim considering that the Respondent has an establishment in the district of Montreal and the cause of action for the Petitioner has taken place in the district of Montreal.

FOR THESE REASONS, may it please this honourable Court to:

AUTHORIZE the present motion;

GRANT the Petitioner Sarah Gaudet the status of representative on behalf of the following group:

All persons, currently and formerly employed as non-management, non-unionized employees of CIBC 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 Quebec.

AUTHORIZE the institution of a class action against CIBC, for the following collective questions:

Did CIBC violate the law, its contractual obligations and its obligation to act in good faith and was enriched unjustly by refusing to pay for the hours worked by its non-management, non-unionized employees and former employees working for retail branches in Quebec?

If so, then did the members incur damages as a result?

IDENTIFY as follows the conclusions that are sought:

GRANT the action of the Petitioner;

GRANT the class action for all the members of the group;

CONDEMN the Respondent to pay all the members the amounts representing damages resulting from the Respondent's actions for an approximate amount of seventy-five (75) million dollars or any other amount that the Court deems just;

DECLARE that any member of the group who did not request to be excluded as a member be bound by all judgments relating to the class action;

DETERMINE the delay beyond which a a member can no longer request his exclusion from the group as being sixty (60) days after the date of the notice to the members;

DECLARE that after this date, all members that have not requested their exclusion from the group be bound by all judgments relating to the class action;

ORDER the publication of the notice to the members at the latest thirty (30) days after a judgment is rendered on the present motion;

REFER the record to the Chief Justice in order for him to fix the district in which the class action will be brought;

In the event that the class action will be brought in another district than the district of Montreal, **ORDER** the Court clerk to transfer the current record to the clerk for the designated district;

The whole, with costs, including the costs for the notice to the members and the experts and interest at the legal rate increased by the additional indemnity as provided by section 1619 of the Civil Code of Quebec.

THE WHOLE RESPECTFULLY SUBMITTED.

Montreal, June 18th, 2007

(S) ~~Melançon, Marceau, Grenier et Sciortino~~

Melançon, Marceau, Grenier et
Sciortino
Attorneys for Petitioner

CERTIFIÉ CONFORME

Melançon, Marceau, Grenier et Sciortino
**MELANÇON, MARCEAU,
GRENIER & SCIORTINO, AVOCATS**

NOTICE OF PRESENTATION

TO :

Canadian Imperial Bank of Commerce
1155, boul. René-Lévesque West
Montreal (Quebec) H3C 3B2

TAKE NOTICE the Motion of Petitioner for Motion for Authorization to Institute a Class Action and to be Granted the Status of Representative will be presented for decision to one of the honourable judges of the Court Superior, of the district of Montreal, sitting in practice division, at the Montreal Courthouse, located at 1, Notre-Dame Street East, in room 2.16, on July 17th, 2007 at 9h00

PLEASE GOVERN YOURSELF ACCORDINGLY.

Montreal, June 18th, 2007

(S) ~~Melançon, Marceau, Grenier et Sciortino~~

**Melançon, Marceau, Grenier
et Sciortino, s.e.n.c.
Attorneys for Petitioner**

CERTIFIÉ CONFORME

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