Court of Appeal File No.

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

DARA FRESCO

Plaintiff
(Appellant)

- and -

CANADIAN IMPERIAL BANK OF COMMERCE

Defendant
(Respondent)

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6

NOTICE OF APPEAL

The Plaintiff and Class Counsel (as defined below) (the Appellants) appeal to the Court of Appeal for Ontario from the Order of the Honourable Mr. Justice Paul M. Perell dated June 2, 2023 determining the fees and disbursements of Class Counsel and the Plaintiff's honorarium in this proceeding (the "**Fee Approval Order**).

THE APPELLANTS ASK that the Fee Approval Order be set aside, and an order be substituted as follows:

1. approving the retainer agreement between the Plaintiff and Class Counsel, dated June 5, 2007, and fixing Class Counsel's fees in accordance with the agreed-upon fee set out therein, namely 30% of the money recovered for the class, net of disbursements, plus applicable taxes, or in such other amount as this Honourable Court deems fair and reasonable in the circumstances, plus interest, to be calculated from June 2, 2023, on any additional fees awarded to Class Counsel;

2. awarding the Representative Plaintiff, Dara Fresco, an honorarium in the amount of $30,000, or such other amount as this Honorable Court deems fair and reasonable in the circumstances; and

3. such other relief as this Honourable Court deems appropriate and just in the circumstances.

THE GROUNDS OF APPEAL ARE:

1. This is one of the hardest-fought employment class actions in Canadian history.

2. Dara Fresco commenced this action in 2007 for unpaid overtime based on untested systemic theories of liability on behalf of a proposed class of thousands of current and former employees of the Defendant bank, working as tellers and front-line sales employees in retail branches. It was one of the first of its kind, involving complex and novel legal issues and an exceptional risk profile on both certification and the merits.

3. The class is represented by a consortium of three firms: Goldblatt Partners LLP, Roy O'Connor LLP, and Sotos LLP (together, "**Class Counsel**").

4. The path to certification was difficult and protracted, taking five years to achieve a positive result against a formidable and well-resourced Defendant.

5. Following a five-day hearing in December 2008, the Plaintiff's certification motion was dismissed by Justice Lax in June 2009 with an adverse costs award of $525,000.

6. The Plaintiff's appeal to the Divisional Court was dismissed by a majority of the panel in September 2010.

7. This Court granted leave in January 2011 from the Divisional Court's decision. In June 2012, it allowed the appeal and certified the action. The request to certify the issue of aggerate damages was dismissed.

8. Following certification, Class Counsel undertook an extensive and at times contested disclosure process. Several interlocutory motions were advanced in respect of the

Defendant's productions and to address privilege issues. The investment of time and resources was substantial.

9. The Plaintiff moved for summary judgment on the certified common issues and sought to certify aggregate damages as a new common issue. These motions were heard over the course of three hearings starting in December 2019 by the late Justice Belobaba as Case Management Judge.

10. In three decisions released in 2020, Justice Belobaba granted summary judgment to the Plaintiff on all certified common issues, except punitive damages. In addition, he certified the new common issue of aggregate damages.

11. After obtaining summary judgment, the Plaintiff obtained production of voluminous electronic records from the Defendant in support of its proposed request for a monetary award of aggregate damages. The Plaintiff retained and instructed experts to develop and implement a sophisticated methodology for assessing damages based on time-stamped electronic data as a proxy for records of hours worked. This exercise was complex and novel, entailing advanced statistical analysis. It was undertaken and completed by Class Counsel while the Defendant appealed all three decisions of Justice Belobaba (including liability and the certification of aggregate damages as a new common issue) to this Court.

12. The Defendant's appeal was vigorously contested and ultimately dismissed in February 2022.

13. The Plaintiff then scheduled a motion for September 2022 seeking quantification of aggregate damages. Before the motion was heard, the parties agreed to mediate.

14. The mediation was initially unsuccessful, but the parties carried on negotiating. In late 2022, they settled for the all-inclusive sum of $153 million, by far the largest settlement in any employment class action in Canadian history. The monetary settlement exceeded the total damages the Defendant would likely have had to pay if the aggregate damages assessment had gone to a hearing. It also matched or exceeded the total damages that class members could reasonably be expected to be awarded,

even after considering any subsequent individual hearings for presumptively time-barred years dating back to 1993.

15. In early 2023, the Plaintiff moved for settlement approval and a proposed distribution plan before Justice Belobaba. At the same time, a fee approval motion was brought under section 32 of the *Class Proceedings Act*.

16. Pursuant to their retainer agreement, Class Counsel were entitled to fees calculated on one of two bases:

> **Contingency Percentage**
>
> (a) The contingency fee shall be 30% plus G.S.T. of the settlement or judgment proceeds on behalf of class members, net of disbursements; or
>
> **Contingency Multiplier**
>
> (b) the contingency fee shall be 4 x the ordinary hourly rates of counsel …

17. By the time the fee approval motion was brought, the case had been ongoing for nearly 16 years. Class Counsel had incurred work in progress of over $16 million while carrying millions of dollars in disbursements for months at a time.

18. At the fee approval motion, Class Counsel requested a 30% contingency fee based on their retainer, amounting to $44 million and equivalent to a multiplier of less than 2.7.

19. Class members were provided with notice of the approval motions. Dozens of them wrote unsolicited emails of support. Not a single class member objected to the settlement or Class Counsel's fee request.

20. At a hearing on March 3, 2023, Justice Belobaba approved the settlement and distribution plan. He lauded Class Counsel on their candour and analysis in the settlement approval materials and stated, among other things, that:

    a. this action was among the most important and challenging class actions in Canadian history;

b. Class Counsel encountered mega-risks;

c. there was no doubt that Class Counsel had achieved the best interests of the class in the ultimate result; and

d. he was persuaded that this settlement was very fair, very reasonable, and very much in the interests of the class.

21. On the question of fee approval, the only issue Justice Belobaba raised was a request of Class Counsel to review their records and advise if any duplication of work or base docketed time (the $16 million work in progress) had occurred given that three firms had shared duties. He asked for supplemental submissions on that point. Justice Belobaba stated that success on the risk and result factors was a "given" and directed Class Counsel only to focus on any potential duplication in base time.

22. Justice Belobaba signed the Settlement and Distribution Approval Orders dated March 3, 2023, but did not release reasons pending his request for supplemental submissions on fee approval. The Plaintiff delivered supplemental submissions on March 24, 2023, which reflect Justice Belobaba's favourable comments at the settlement approval hearing:

> As Class Counsel believe that the Court appreciates, this was a difficult, high-risk and ground-breaking case which was hard fought by an extremely determined and well-resourced Defendant, from beginning to end. Class Counsel dedicated the resources that they deemed necessary to get the job done and they were successful in obtaining an overall excellent result for the Class, that has now been approved by the Court. **As this Court noted at the March 3rd approval hearing, the risks and results in this case were at the very high or highest end of the scale.** Class Counsel respectfully submit that the dedication of such significant time and resources to achieve such results exemplifies what Ontario's class action regime was designed to achieve and reflects positively on the integrity of the legal profession. [Emphasis added.]

23. In an email to all counsel following the delivery of these supplemental submissions, Justice Belobaba advised that, due to his medical condition, he would be unable to

decide Class Counsel's fee request or Ms. Fresco's honorarium, and that a new judge would need to be assigned.

24. Justice Perell heard the fee approval motion on April 24, 2023. He did not request or receive additional materials beyond those already before Justice Belobaba.

25. In reasons dated June 2, 2023, the motion judge denied the fee request of $44 million and fixed Class Counsel's fees at $25 million (plus taxes and disbursements), which amounted a 1.5x multiplier over Class Counsel's incurred time. The Court also denied any honorarium for Ms. Fresco.

26. The motion judge's decision contains multiple errors warranting this Court's intervention.

27. The motion judge erred in principle by giving no weight or insufficient weight to factors and considerations relevant to his decision, including but not limited to:

    a. the importance of the issues to members of the class;

    b. the result achieved by Class Counsel, especially in light of the likely outcome of the damages phases of the proceeding; and

    c. the considerable risks undertaken by Class Counsel.

28. The motion judge erred in principle by improperly and incorrectly characterizing Class Counsel's justification of the constituent elements of fee approval:

    a. as immodest, boastful, or reflective of the "seven deadly sins of pride, greed, wrath, envy, lust, gluttony, and sloth"; and

    b. as self-serving and "cringeworthy".

    These characterizations were not isolated and instead permeated and dominated his analysis on the fairness and reasonableness of the requested fee, giving rise to a reversible error in principle.

29. The motion judge erred in law and/or made palpable and overriding errors of fact in:

    a. allowing his analysis to be tainted by subjective assumptions and beliefs about the conduct of class counsel on fee approval motions generally, rather than focussing on the specific circumstances before him;

    b. rejecting the relevance and reliability of multipliers in the context of class action fee awards;

    c. rejecting the relevance of fee awards in comparable cases and failing to conduct any analysis of such cases;

    d. not providing any reasons or principled basis upon which he determined that the $44 million requested fee (at a multiplier of lower than 2.7) was unfair or unreasonable in the circumstances;

    e. misstating, misapprehending, and/or misapplying principles of champerty and the "integrity of the profession" in refusing the requested fee;

    f. failing to perform any objective assessment of the fairness and reasonableness of Class Counsel's proposed fee and whether it was in fact improper, champertous, or would otherwise call the integrity of the profession into question;

    g. departing from established precedent relating to the determination and approval of counsel fees in class proceedings and imposing an approach that was not grounded in applicable authorities; and

    h. misapprehending the facts and circumstances in *Fulawka* on the nature and basis for the fee approved in that case and incorrectly analogizing to or distinguishing *Fulawka* from the present case.

30. The motion judge erred in law and/or made palpable and overriding errors in his appreciation of the evidence, including by:

a. speculating about relevant facts and/or making findings of fact based on conjecture;

b. "guess[ing]", without evidence and/or through unsupported or unfair inferences, that "Justice Belobaba would have thought that Class Counsel could have pressed on for more" compensation for the class than what was achieved under the settlement;

c. speculating, without evidence and/or through unsupported or unfair inferences, that Justice Belobaba may not "have shared Class Counsel's view that the outcome was an excellent one and as good or better than what would have been achieved had the litigation continued";

d. finding, without evidence and/or through unsupported or unfair inferences, that Class Counsel had overstated the risk of this proceeding because, among other things, Class Counsel had started researching the law and interviewing potential class members, including "hundreds" of employees, before the proceeding was commenced; and

e. implying, without evidence and/or through unsupported or unfair inferences, that Justice Belobaba would not likely have approved of the proposed fee.

31. The motion judge erred in principle by considering and relying on factors and considerations irrelevant to his decision and for which there was no factual or evidentiary basis, including but not limited to:

a. assumptions about the motivation of class counsel on fee approval motions generally, including that they are "fodder for the weavers of tall tales" and can be "potentially misleading";

b. assumptions that class counsel are incentivized to be "inefficient" and "wasteful" in their pricing, hours, and work, and to do "more than was necessary to prosecute the action";

c. assumptions that class counsel, "out of risk aversion, collusion with the Defendant's Counsel, champerty, and, or profiteering have negotiated a settlement that undoubtedly is very good for the lawyers but which does not achieve meaningful substantive justice for the class members or meaningful behaviour modification of the wrongdoing defendants";

d. assumptions that class counsel are pressured by defendants into settling, leading to outcomes that amount to a "modest licensing fee for wrongdoing" while leaving class members in "desperate need for more compensation"; and

e. adverting to an alleged "trick of the trade" adopted by class counsel to purportedly increase their fee, namely, negotiating non-reversionary settlement funds and using "smaller monetary value non-residual fixed sum settlement funds rather than higher value residual settlement".

32. The motion judge erred in failing to award an honorarium to the Representative Plaintiff by misapprehending, among other things:

a. the applicable legal principles relevant to his assessment;

b. Ms. Fresco's courageous role in initiating this class action against what was her then-employer;

c. the significant risks to her employment and reputational hardship experienced by Ms. Fresco in acting as Representative Plaintiff; and

d. Ms. Fresco's active participation in all aspects of this litigation from its inception through settlement nearly 16 years later.

THE BASIS OF THE COURT'S JURISDICTION IS:

1. Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990 c. C. 43;

2. the Order appealed from is final; and

3. leave to appeal is not required.

July 4, 2023

LAX O'SULLIVAN LISUS GOTTIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Jonathan C. Lisus LSO#: 32952H
jlisus@lolg.ca
Tel: 416 598 7873
Zain Naqi LSO#: 67870U
znaqi@lolg.ca
Tel: 416 645 3789
David Ionis LSO#: 79542U
dionis@lolg.ca
Tel: 416 956 0117
Fax: 416 598 3730

Lawyers for the Appellant

TO: **TORYS LLP**
Barristers and Solicitors
79 Wellington Street West, Suite 3000
Box 270, TD South Tower
Toronto ON M5K 1N2

Linda Plumpton LSO#: 38400A
lplumpton@torys.com
Sarah Whitmore LSO#: 61104E
swhitmore@torys.com
Ryan Lax LSO#: 63740E
rlax@torys.com
Lara Guest LSO#: 67773S
lguest@torys.com
Tel: 416 865 0040
Fax: 416 865 7380

Lawyers for the Respondent

HICKS MORLEY LLP
Barristers and Solicitors
77 King Street West
TD Centre, 39th Floor
Toronto ON M5K 1K8

John C. Field LSO#: 23695F
john-field@hicksmorley.com
Lauri Reesor LSO#: 48643U
lauri-reesor@hicksmorley.com
Elisha C. Jamieson-Davies LSO#: 52865N
elisha-jamieson-davies@hicksmorley.com
Tel: 416 362 1011
Fax: 416 362 9680

Lawyers for the Respondent

AND TO: **CLASS PROCEEDINGS FUND**
The Law Foundation of Ontario
110 Spadina Avenue, Suite 800
Toronto, ON M5V 2K4

Remissa Hirji LSO#: 62207Q
rhirji@lawfoundation.on.ca
Tel: 416 595 1425
Fax: 416 598 1526

Lawyers for the Class Proceedings Fund

DARA FRESCO
Plaintiff (Appellant)

-and-

CANADIAN IMPERIAL BANK OF COMMERCE
Defendant (Respondent)
Court of Appeal File No.

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6

NOTICE OF APPEAL

LAX O'SULLIVAN LISUS GOTTIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Jonathan C. Lisus LSO#: 32952H
jlisus@lolg.ca
Tel: 416 598 7873
Zain Naqi LSO#: 67870U
znaqi@lolg.ca
Tel: 416 645 3789
David Ionis LSO#: 79542U
dionis@lolg.ca
Tel: 416 956 0117
Fax: 416 598 3730

Lawyers for the Appellant