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Overtime Eligibility Class Action Certification Motion Dismissed

Date: May 2, 2012

On April 27, 2012, Mr. Justice George Strathy of the Ontario Superior Court of Justice released his decision in which he dismissed a motion for certification of a proposed class action brought by Michael Brown and Brian Singer, on behalf of current and former "Analysts," "Investment Advisors" and "Associate Investment Advisors" employed by the Canadian Imperial Bank of Commerce ("CIBC") and the CIBC World Markets ("CIBC WM"), in which the Plaintiffs claimed that these groups of employees were eligible for overtime. CIBC and CIBC WM are represented by Hicks Morley and Torys.

Justice Strathy found that four of the five parts of the test for certification of an action as a class proceeding under the *Class Proceedings Act*, *1992* (the "*CPA*") were not met. This *FTR Now* reviews this significant decision.

Justice Strathy held that the key issue of determining eligibility for overtime turned on whether or not a person has managerial responsibilities which "simply cannot be answered on a common basis." Determination of that issue would require an examination of the circumstances of each employee to establish eligibility. Justice Strathy stated that a class action would not "be a fair, efficient and manageable way of advancing the claims of class members and it would not promote either access to justice or judicial economy."

With respect to section 5(1)(b) of the *CPA*, the motion judge found the proposed amended class definition was not suitable for certification. Justice Strathy held that the evidence did not support the Plaintiffs' assumption that all "analysts" performed similar duties that were not managerial and the identification of an "analyst" class results in a class that is, ultimately, randomly selected. Justice Strathy further found that the evidence lacked "the glue of commonality that makes it possible to make binding determinations of fact or law that apply to all class members." The motion judge found that similar problems existed with the Investment Advisor and Associate Investment Advisor positions as well.

With respect to the common issue requirement of the *CPA* (section 5(1)(c)), the motion judge held that the question of eligibility for overtime "cannot simply be answered on a common basis…[in] each case the answer would require an examination of the particular circumstances of employees who are only linked by the commonality of their names."

Justice Strathy reviewed the considerable jurisprudence regarding whether a person is a manager or supervisor and held that:

[80] The authorities support the conclusion that the determination of whether a person exercises supervisory or managerial functions requires a fact-based analysis of the work actually performed by the employee. The employee's job title and position in the management chain are not relevant considerations. What counts is what the employee actually does, how they do it, and how much independence and authority they exercise in the environment in which they work.

With respect to section 5(1)(d) of the *CPA* and the preferable procedure requirement, the motion judge stated as follows:

[199] The insurmountable impediment in this case, and the reason why the preferable procedure requirement has not been met, is that the issue of CIBC's liability to pay overtime to every class member is an individual issue. It will require individual fact-finding concerning the circumstances of every class member and the individual application of the relevant legal principles to those circumstances.…

Finally, Justice Strathy concluded that Section 5(1)(e) of the test under the *CPA* was also not met:

[209] Case management would not, however, resolve the shortcomings in the plaintiffs' litigation plan. I agree with the defendants' submission that the plan provides no feasible method for dealing with the individual nature of the eligibility determinations that must be made for every member of the class. The plaintiffs have failed to establish a realistic, efficient and workable procedure for the resolution of the central common issue of eligibility and the individual issues that will necessarily remain.

Justice Strathy's decision is a significant one for employers in the context of overtime class action litigation.

Brown v. Canadian Imperial Bank of Commerce, 2012 ONSC 2377 (CanLII)

Hicks Morley's CIBC/CIBC WM team was composed of John C. Field, Lauri A. Reesor, and Elisha C. Jamieson. If you have any questions regarding this decision, please contact John C. Field at 416.864.7301 or Lauri A. Reesor at 416.864.7288.

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