FTR Now

Overtime Class Action Update

Date: July 4, 2012

On June 26, 2012, the Court of Appeal for Ontario released three decisions in proposed overtime class actions in the latest development respecting claims for overtime by current and former employees. This *FTR Now* discusses these decisions.

The first two cases were heard by the Court of Appeal consecutively and involve proposed class proceedings against banks on behalf of non-managerial class members who claimed that policies, practices or systems routinely denied their right to be paid overtime wages contrary to the *Canada Labour Code* and their employment contracts. The Court of Appeal determined that both actions were appropriate for certification as class proceedings.

In *Fulawka v. Bank of Nova Scotia*, on appeal from the Divisional Court, which had upheld the certification of the class action by the motion judge, the Court of Appeal dismissed the appeal by the employer, except with respect to certain common issues. Although the certification of the action as a class proceeding was upheld, the appeal was granted on a limited basis striking out the proposed common issue seeking an aggregate assessment of damages. The Court of Appeal determined that the criteria for an aggregate assessment set out in the *Class Proceedings Act* was not met. The Court of Appeal also struck out two other proposed common issues which asked whether the employer had duties to implement a system to ensure the employer met its duty to record hours worked and prevent class members from working hours which it did not intend to compensate. The Court of Appeal held that the alleged duties to implement a system were superfluous and added nothing of substance to the other duties alleged. It also revised a proposed common issue to include whether the defendant required or permitted all uncompensated hours of the class members. The Court of Appeal held that a class proceeding was the preferable procedure for the resolution of the certified common issues.

In *Fresco v. CIBC*, in which CIBC was successful at both the motion for certification stage and on appeal to the Divisional Court in resisting certification, the Court of Appeal reversed the decisions below, substituting an order certifying the class action. The Court of Appeal held that the motion judge misconceived the action as being a collection of individual claims for unpaid overtime and also held that it was not plain and obvious that CIBC's overtime policy complied with the *Canada Labour Code*. At the same time, however, the Court of Appeal did not certify that claim as a common issue. The proposed common issues respecting the effect of limitation periods and efficient procedures for dealing with individual issues also were not certified. In addition, the issue of whether damages could be assessed on an aggregate basis was not certified as a common issue either.

In the third case, *McCracken v. Canadian National Railway*, the plaintiff claimed that the issue of the eligibility of front-line supervisors to overtime compensation was a common issue as he alleged that the front-line supervisors had been misclassified as managers. The proposed class proceeding was certified at first instance by the motion judge. The complex appeal routes from the motion judge's order resulted in all appeals being transferred to the Court of Appeal. The Court of Appeal allowed CN's appeal and cross appeal and set aside the certification order. The Court of Appeal found that the absence of commonality was fatal to certification in this action. The Court of Appeal determined that the motion judge was correct in rejecting the plaintiff's proposed common issues respecting whether CN had misclassified the employees as the evidence did not support that a finding could be made on a class wide basis. Instead, it was clear that individualized assessments would be required to determine if individual front-line supervisors were misclassified as managers. Although the motion judge was correct in that finding, the Court of Appeal held that the motion judge erred in attempting to recast the common issues to determine the minimum requirements for a manager at CN. The lack of any evidence supporting commonality still remained.

Notably, the *McCracken* decision follows on the heels of the recent decision of Strathy J. in *Brown v. CIBC*, also a claim of

misclassification for the purposes of overtime, in which CIBC was successful in resisting certification (for more information see our *FTR Now* dated May 2, 2012 reporting on the *Brown* decision).

The plaintiffs have appealed Strathy J.'s decision to the Divisional Court. Stay tuned for further developments.

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