FTR Now

Overtime Eligibility Class Action Certification Dismissal Upheld on Appeal

Date: April 24, 2013

On April 23, 2013, the Ontario Divisional Court unanimously dismissed an appeal from a decision of Justice Strathy in which he denied a motion for certification of a proposed class action against CIBC and CIBC World Markets. We summarized the lower court decision in a previous FTR Now. In this *FTR Now*, we provide an overview of the Divisional Court decision.

On appeal, the appellants sought to narrow the proposed class definition by excluding "Analysts", in light of the Court of Appeal's decision in *McCracken*. The proposed revised class consisted of "Investment Advisors" ("IAs") and "Associate Investment Advisors" ("AIAs") of CIBC World Markets (provincially regulated and therefore subject to the *Employment Standards Act*, *2000*).

The Divisional Court unanimously agreed with the respondents' assertion that the proposed amended class "exhibits the same individuality as the class definition considered by the motion judge". While the appellants had sought to exclude those exercising managerial and supervisory responsibilities from the class definition, that goal was not met. The Divisional Court specifically held at paragraph 17 of its reasons for decision as follows:

[17] As explained in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38, the proposed class must be capable of clear definition. Not only should it bear a rational relationship to the common issues asserted, "it is necessary that any particular person's claim to membership in the class be determinable by stated objective criteria". In this case, the amended class definition would not meet that requirement. It would still be necessary to go beyond the "objective criteria" to consider evidence on a case by case basis of whether the person was otherwise in a supervisory or managerial role within the meaning of the *ESA*. The proposed class definition as amended would serve to exclude some Investment Advisors and Associate Investment Advisors, but it does not provide a definition that could include any person in the class without the need for further evidence.

The Divisional Court further upheld Justice Strathy who found that the appellants had not met the common issue requirement under s. 5(1)(c) of the *Class Proceedings Act* ("CPA"). The Divisional Court, in relying on the Court of Appeal's decision in *McCracken*, specifically held as follows:

[26] As the result in *McCracken* shows, it is not good enough for a plaintiff to identify and seize upon apparently significant similarities if there are substantial differences which will inevitably require resorting to the evidence of individual class members. In this particular case, the appellant has failed to prove any basis in fact to show that the proposed class members' job functions (even using the amended definition) are sufficiently similar that eligibility could be decided on a class-wide basis. The only supporting evidence is Mr. Singer's affidavit, which is not only overwhelmed by the evidence to the contrary but insufficient in and of itself to establish a basis in fact to support a common issue of eligibility.

The Divisional Court also upheld Justice Strathy's finding that the appellants failed to meet the preferability requirement under
s. 5(1)(d) of the CPA. At paragraph 30, the Divisional Court quoted with approval Justice Strathy's conclusions on that issue as follows:

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. A class action would not, therefore, 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.

Brown v. Canadian Imperial Bank of Commerce, 2013 ONSC 1284

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, Lauri A. Reesor at 416.864.7288 or Elisha C. Jamieson at 416.864.7344.

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