

FTR Now

Court of Appeal Dismisses Overtime Eligibility Class Action Certification Appeal

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On October 6, 2014, the Court of Appeal for Ontario unanimously dismissed an appeal from the Ontario Divisional Court's decision[1] dated April 23, 2013 which in turn dismissed an appeal from a decision dated April 27, 2012, dismissing a motion for certification of a claim regarding eligibility for overtime pay as a class action.[2] The Court of Appeal agreed with the findings of the motion judge, upheld at the Divisional Court, that the common issues requirement of the *Class Proceedings Act, 1992* ("CPA") was not met in this case as eligibility for overtime pay could not be determined on a common basis for all members of the proposed class.

In this *FTR Now*, we discuss the background to this case and the significance of the Court of Appeal decision.

BACKGROUND

In 2012, the proposed representative plaintiffs brought a motion for certification of their claims for overtime pay on behalf of a group of Analysts, Investment Advisors ("IAs") and Associate Investment Advisors ("AIAs") currently or formerly employed by CIBC or CIBC World Markets ("CIBCWM"). The plaintiffs claimed that their employer had wrongly classified them as ineligible for overtime.

By way of background, as a federally-regulated employer, CIBC is subject to the *Canada Labour Code* ("Code"). CIBCWM, a provincially-regulated employer, is subject to the *Employment Standards Act, 2000* ("ESA"). Both statutes contain provisions regarding overtime eligibility; both also contain exceptions to the overtime provisions for those employees who exercise management functions. For example, the overtime provisions of the ESA state that they do not apply to "a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis... ."

[The motion judge](#), Justice Strathy (as he then was), found that four of the five tests for certification under the CPA had not been met. On the common issues requirement (s. 5(1)(c) of the CPA), he stated that a fact-specific analysis as to the work performed by the employees was necessary to determine whether each employee exercised supervisory or managerial functions. Job title and position were not relevant considerations. Justice Strathy concluded that the question of whether an employee has managerial responsibilities "simply cannot be answered on a common basis."

[Before Divisional Court](#), the appellants narrowed the class definition to exclude Analysts and sought to exclude IAs with obvious managerial or supervisory responsibilities. The remaining proposed class members of IAs and AIAs were employed by CIBCWM, which was subject only to the provisions of the ESA.

The narrowing of the class definition, however, did not alter the need for a fact-specific inquiry. The Divisional Court reviewed the Court of Appeal's decision in [McCracken v. Canadian National Railway Company](#), in which a motion for certification of an overtime eligibility class action was denied. The Divisional Court upheld the findings of Justice Strathy and stated that "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 determined on a class-wide basis." The Divisional Court also agreed with Justice Strathy's finding that a class action in this case "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."

THE COURT OF APPEAL DECISION

[The Court of Appeal](#) focused its analysis on the key issue of commonality and the test under s. 5(1)(c) of the CPA. It found that the evidence tendered did not support the assertion that overtime could be determined across the proposed class. It referred to the motion judge's finding that there were "variations in the individual circumstances that would put some Investment Advisors well on the "managerial side" of the scale... ." It also referred to the finding, endorsed by the Divisional Court, that "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."

In considering the common issues requirement of the CPA, the Court extracted from recent case law four guiding principles in order for this requirement to be met [at para. 36]:

- The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim.
- A common issue need not dispose of the litigation and can address only limited aspect of the liability question. It is sufficient if the issue is common to all claims and its resolution will advance the litigation for or against the class.
- Success for one member of the class must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to the question raised by the common issue must be capable of extrapolation to each member of the class.
- A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each claimant.

The Court agreed with the lower courts that under the common issues requirement, most inquiries will be evidence-driven. It referred to *McCracken*, which stated that the issue of commonality depended on whether "the similarity of job duties performed by class members provides the fundamental element of commonality." Here, the evidence "showed a wide variability in the autonomy, duties and responsibilities of employees having the same job title or classification." As in *McCracken*, the evidence here showed a "lack of "core commonality"" in the duties of the proposed class members.

In concluding that the common issues requirement was not met, a finding which was fatal to the appeal, the Court stated:

[55] The motion judge (at para. 113) and the Divisional Court (at paras. 25-26) properly focused the common issue inquiry on the degree of variability of those job characteristics, functions, duties and responsibilities that were germane to the characterization of the employee as managerial/supervisory for the purposes of overtime pay eligibility under the ESA and the CIBC overtime policy. If that variability makes it impossible to determine eligibility for overtime pay across the full proposed class, then eligibility for overtime pay is not a common issue regardless of whether all of the proposed class members share certain job functions.

[56] The issue under s. 5(1)(c) of the CPA is not job similarities at large, but whether the evidence shows that job functions and duties of proposed class members relevant to their eligibility for overtime pay are sufficiently similar across the proposed class to permit determination of eligibility without addressing the individual circumstances of the proposed class members: *McCracken*, at para. 104. The motion judge and Divisional Court focused on the right question.

The Court rejected the argument that the motion judge went beyond the proper limits of a certification motion by analyzing the merits of the claim, finding that "he was concerned with the "merits" of the argument that eligibility for overtime pay could be determined as a common issue." It also rejected the argument that the lower courts failed to certify any of the other common issues, stating that "without a common issue of eligibility for overtime pay, certification based on proposed common issues involving the terms of the employment contract that relate to overtime pay would surely be a case of the tail wagging the dog."

Hicks Morley's CIBC CIBCWM team was composed of [John C. Field](#), [Lauri A. Reesor](#) and [Elisha Jamieson-Davies](#). If you have any questions regarding this decision, please contact [John C. Field](#) at 416.864.7301, [Lauri A. Reesor](#) at 416.864.7288

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[1]See our [FTR Now](#) dated April 24, 2013.

[2]See our [FTR Now](#) dated May 2, 2012.

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