

Case In Point

Ontario Court Affirms Plaintiff's Evidentiary Burden Under The *Class Proceedings Act, 1992*

Date: October 31, 2017

In [Bartholomew v. Coco Paving Inc. et al.](#), the Ontario Superior Court recently rendered a helpful decision in dismissing a motion for certification of a proposed class action. The Court re-affirmed the evidentiary burden which must be met by a plaintiff in satisfying the four tests under sections 5(1)(b) through 5(1)(e) of the *Class Proceedings Act, 1992* (CPA). The CPA judge found that the plaintiff failed to meet his evidentiary burden with respect to identifiable class, common issues, preferability and workable plan.

In his decision, the CPA judge applied the Supreme Court of Canada's analysis in [Hollick v. Toronto \(City\)](#) and [Sun-Rype Products Ltd. v. Archer Daniels Midland Company](#).

The plaintiff had been an employee of Lafarge Paving and Construction Limited (LPCL), and was located at its Peterborough asphalt plant. Pursuant to an Asset Purchase Agreement, Coco Paving Inc. acquired the Ontario asphalt plants of LPCL, Lafarge Canada Inc. (LCI) and other Lafarge related corporations. The plaintiff subsequently became an employee of Coco Paving Inc. The plaintiff's employment was terminated by Coco Paving Inc.

The plaintiff carried out construction duties in the construction office which was located at the Peterborough asphalt plant. He did not carry out duties similar to those performed by the plant foreman and the load/operator at the Peterborough asphalt plant. The CPA judge found that only a small percentage of the plaintiff's duties were associated with the asphalt plant, and those simply related to issuance of tickets to the trucks after they had loaded the asphalt at the asphalt plant.

The plaintiff alleged that he had not been paid overtime at the correct threshold and that he should have been paid overtime between 44 and 55 hours rather than being paid overtime based on the road building exemption in the *Employment Standards Act, 2000*, whereby overtime is paid in excess of 55 hours per week. The plaintiff alleged that there were other employees working in asphalt plants across Ontario in a similar position.

With respect to section 5(1)(b) and the test on identifiable class, the Court found as follows:

[35] The plaintiff asserts that there are probably as many as 100 other individuals whose names and addresses he is not aware of. It is pure speculation on his part that there exists more than one other individual, other than himself, who has a claim similar to or identical to the type of claim that

he asserts in the proposed class action. The plaintiff fails, in my view, to meet the relatively simple test set forth in Section 5(1)(b) of the CPA. In essence, the plaintiff's claim is merely a claim representing himself and no one else.

The plaintiff also failed to meet the test under section 5(1)(c). The CPA judge applied the Court of Appeal's analysis in [McCracken v. Canadian National Railway Company](#) in disposing of the test on common issues against the plaintiff. The CPA judge similarly found that "there is no basis in fact to support a finding that the essential misclassification determination could be made without resorting to the evidence of individual class members."

The CPA judge also held that a class action was not the preferable procedure under the test under section 5(1)(d) of the CPA. The Court noted that while the existence of individual issues is not necessarily fatal to certification, cases in which there are so many individual issues that individual trials will be required for virtually each class member should not be certified.

Finally, the Court held that the plaintiff had failed to satisfy the test under section 5(1)(e) of the CPA. The Court agreed with the defendants' position that the proposed litigation plan was "not a litigation plan at all, but rather a plan that in essence presumes the settlement of the matter and does not even contemplate liability or damages phases." The CPA judge also noted that the evidentiary record did not provide assurance to the Court that the plaintiff's counsel had the necessary knowledge, skill and experience in prosecuting a class action on behalf of the plaintiff.

Lafarge Canada Inc. was successfully represented by Hicks Morley's John C. Field