COURT OF APPEAL FOR ONTARIO

CITATION: Brown v. Canadian Imperial Bank of Commerce, 2014 ONCA 677
DATE: 20141006
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Doherty, Epstein and Benotto JJ.A.

BETWEEN

Michael Brown and Brian Singer

Plaintiffs (Appellants)

and

Canadian Imperial Bank of Commerce and CIBC World Markets, Inc.

Defendants (Respondents)

Jonathan Ptak, Eliezer Karp and Jody Brown, for the appellants

Patricia D.S. Jackson, Linda M. Plumpton, Sarah E. Whitmore, John C. Field and Elisha C. Jamieson, for the respondents

Heard: May 15, 2014

On appeal from the order of the Divisional Court (Regional Senior Justice Edward F. Then and Justices David Aston and Katherine E. Swinton), dated April 23, 2013, with reasons reported at 2013 ONSC 1284, dismissing an appeal from the order of Justice George R. Strathy of the Superior Court of Justice, dated April 27, 2012, with reasons reported at 2012 ONSC 2377.

Doherty J.A.:

I

OVERVIEW

[1] This is yet another case in which plaintiffs seek to certify a class action claiming overtime pay. The motion judge dismissed the motion for certification and the Divisional Court dismissed an appeal from that order. This court granted leave to appeal from the order of the Divisional Court.

[2] At the certification motion, the plaintiffs ultimately proposed a class definition consisting of employees who had worked for the respondents after 1996 and who held the job titles of Analyst, Investment Advisor ("IA") or Associate Investment Advisor ("AIA"). The motion judge concluded that eligibility for overtime pay under the applicable statutory regime or the respondents' overtime policy could not be determined on a common basis for all members of the proposed class. He further held that, absent a common issue on the question of eligibility for overtime pay, the claim should not be certified under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*").

[3] In the Divisional Court, the plaintiffs, in response to the reasons of the motion judge and the decision of this court in *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745 (released after the ruling of the motion judge), narrowed the proposed class. The amended class definition excluded Analysts from the proposed class and an attempt was made to remove

IAs and AIAs who had supervisory or managerial responsibilities. The Divisional Court held that despite the considerable narrowing of the proposed class, the determination of eligibility for overtime pay remained an employee-specific inquiry that was not amenable to resolution as a common issue. In coming to that conclusion, the court placed considerable reliance on the analysis in *McCracken*. The Divisional Court also agreed with the motion judge that none of the other proposed common issues rendered the claims suitable for certification.

[4] In this court, the plaintiffs argue, first, that the courts below erred in holding that eligibility for overtime pay was not a common issue. They submit that both the motion judge and the Divisional Court fundamentally misapprehended the relevant evidence and failed to apply the legal principles governing the common issue assessment required by s. 5(1)(c) of the *CPA*. Second, the appellants submit that even if eligibility for overtime pay was not a common issue, there were other common issues that warranted certification of the action.

[5] I would dismiss the appeal. Like the courts below, I think the outcome of the certification motion turned on s. 5(1)(c) of the *CPA* and, specifically, whether eligibility for overtime pay could be certified as a common issue. I propose to focus almost exclusively on the s. 5(1)(c) requirement for certification.

[6] I find no material misapprehension of the evidence by the motion judge or the Divisional Court. Nor did either court err in its legal analysis relevant to

whether eligibility for overtime pay was a common issue. More specifically, the analysis of both courts is consistent with this court's reasoning in *McCracken*. *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144, 44 C.P.C. (7th) 149, leave to appeal to Div. Ct. refused, [2013] O.J. No. 6258 (S.C.J.), a certification motion decided after the Divisional Court's ruling in this case in which the motion judge certified an overtime pay claim, does not alter the legal landscape described in *McCracken* and is factually distinguishable from the present case. Nothing in *Rosen* casts doubt on the correctness of the decision to refuse certification in this case.

II

THE PARTIES

[7] This action was commenced by Michael Brown, who had been employed by CIBC World Markets Inc. ("CIBCWM") as an Analyst. I need say nothing more about Mr. Brown because Analysts are no longer a part of the proposed class.

[8] Brian Singer, the other proposed representative plaintiff, was added to the action in May 2009. Mr. Singer worked for CIBCWM, first as a bond salesman (1994-96), and later as an IA (1996-2002). According to him, as an IA, he advised clients on suitable investments, but did not perform any managerial or supervisory functions. His remuneration was based on a commission on the fees generated by the sales of various financial products and a percentage of the

asset management fees paid to CIBCWM by his clients. Mr. Singer estimated that his average annual pay was about $75,000. The income of IAs varied widely. Some made over $1,000,000 per year.

[9] Mr. Singer worked about 65 to 70 hours per week, including weekends. Most of his work was done in the office. Mr. Singer believed that the nature of the work done by IAs, the workload given to them by management, and the compensation scheme developed by management, effectively required all IAs and AIAs to work well in excess of 44 hours per week. It was understood that IAs and AIAs did not work regular eight-hour days.

[10] Management never kept track of Mr. Singer's hours or asked him to fill out timesheets. Management never said anything to him about overtime and he was not aware that he had a potential claim to overtime until he spoke to legal counsel. According to Mr. Singer, IAs were not considered to be eligible for overtime at CIBCWM. He estimated that he was entitled to about $50,000 per year in overtime pay.

[11] In his reply affidavit, Mr. Singer indicated that he had an assistant who received a bonus as determined by his branch manager. That bonus was a percentage of Mr. Singer's gross monthly revenues. The bonus was paid by

CIBCWM and that amount was deducted from Mr. Singer's paycheque. Other IAs had the same arrangement.[1]

[12] The respondent, CIBC, is a Canadian federally-chartered bank. Its labour relations are governed by the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("*Code*"). The respondent, CIBCWM, is the wholesale banking arm of CIBC. It provides investment advice and services to individual clients through its retail division, CIBC Wood Gundy. There are about 40 Wood Gundy branches in Ontario. CIBCWM is provincially incorporated and its labour relations are governed by the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*"), and its predecessor, the *Employment Standards Act*, R.S.O. 1990, c. E.14 ("*ESA, 1990*").

[13] Employees who fall within the definition of the class as proposed in the Divisional Court are all employed by CIBCWM, effectively removing the CIBC as a defendant. I will, however, use the terms "CIBC" and "CIBCWM" interchangeably in these reasons. The narrowing of the proposed class by the appellants also eliminates the need to consider the overtime provisions in the *Code*, leaving only the *ESA* provisions relating to overtime pay for consideration.

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[1] Because the reply affidavit and cross-examination of Mr. Singer preceded the narrowing of the proposed class in the Divisional Court, the job title of Mr. Singer's assistant was not relevant and it is unclear whether that assistant held the AIA job title. If that assistant was an AIA, Mr. Singer could be excluded from the proposed class under the revised definition put forward in the Divisional Court.

III

THE PROPOSED CLASS

[14] As indicated above, the definition of the proposed class has changed in the course of these proceedings. The latest description of the proposed class, first put forward in the Divisional Court and relied on in this court is as follows:

> All Ontario current and former CIBC and CIBCWM employees, since 1996, who were classified by CIBC or CIBCWM as Level 6 or higher, who held the title Investment Advisor (otherwise known as Financial Advisor) or Associate Investment Advisor, exclusive of any time period for which they:
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> (a) held the position of Branch Manager; or
>
> (b) held the position of Assistant Branch Manager; or
>
> (c) had deductions taken from earned commissions which were attributed to an Associate Investment Advisor who was assigned to him/her.

[15] The description of the proposed class identifies three characteristics of members of the class. First, it refers to persons employed by CIBC or CIBCWM since 1996. Second, it refers to persons who have certain CIBC job levels or classifications (Level 6 or higher). Third, it refers to persons given specified job titles by CIBC (IA, AIA).

[16] The exceptions set out in subparagraphs (a) and (b) further narrow the class description. Both remove persons who would otherwise fall within the class, but who have obvious supervisory or managerial responsibilities. These

two exceptions parallel provisions in the *ESA* and in CIBC's overtime policy that exempt employees with managerial or supervisory responsibilities from entitlement to overtime pay. The exception in subparagraph (c) is difficult to understand. It excludes from the class IAs, and theoretically AIAs, who pay from their commissions at least part of the salaries of CIBC employees assigned to them, but only if the assigned employee holds the job title AIA. Consequently, an IA who has several persons assigned to him or her and who supervises and pays those persons from commissions will still fall within the proposed class as long as none of the persons supervised have been given the job title AIA by the CIBC.[2] It is unclear why the job classification or job title of the person assigned to the IA should be taken as determinative of whether that IA exercises a managerial or supervisory function.

IV

THE PROPOSED COMMON ISSUES

[17] The common issues proposed on appeal are set out in an appendix to these reasons. They include eligibility for overtime pay (issue "e"). The same

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[2] There is debate between the parties as to the meaning of subsection (c) and, in particular, whether the exemption refers to all AIAs, or only AIAs at Level 6 or higher. The Divisional Court preferred the latter view (at paras. 15-16). Apart from the merits of that argument, there is a more fundamental problem with the exception in subsection (c). It does not, in my view, refer to persons who have not been assigned the job title AIA by management even if they choose to use the title AIA as part of their informal business title. Consequently, IAs like the affiant, Ms. Timms, who supervised and indirectly paid several CIBC employees who worked for her, would not be excluded from the proposed class because none of those individuals had the job title AIA, although some chose on their own initiative to use that designation as part of their informal business title.

proposed common issues and others were argued before the motion judge. He dealt with each, at paras. 127-87. I need not address each of the proposed common issues individually. Like the motion judge and the Divisional Court, I am satisfied that the outcome of the certification motion turns on whether the issue of the proposed class members' eligibility for overtime pay raises a common issue within the meaning of s. 5(1)(c) of the *CPA*. I will, however, refer to some of the other proposed common issues when I address the appellants' alternative argument that even if eligibility for overtime pay was not a common issue, there are other common issues that merit certification.

V

ENTITLEMENT TO OVERTIME PAY

(a) The Legislation

[18] Subject to certain exceptions, the *ESA* and its predecessor, the *ESA, 1990*, provide that no employer can require or permit an employee to work more than 48 hours per week. Employees who work more than 44 hours in a week are entitled to overtime pay calculated at time and a half for each hour worked in excess of 44 hours: *ESA*, ss. 17(1), 22; *ESA, 1990*, ss. 17 and 24.

[19] Employers are obliged to keep a record of the number of hours employees work in a day and in a week: *ESA*, s. 15; *ESA, 1990*, s. 11. Employers must also provide employees with a written statement on each pay day setting out the

pay period for which the wages are paid, the rate of pay, the gross amount of the wages and the manner in which that amount was calculated along with any deductions: *ESA*, s. 12(1); *ESA, 1990*, s. 10(1).

[20] The regulations under both the *ESA* and the *ESA, 1990* contain a provision that excludes employees from entitlement to overtime pay based on their managerial or supervisory functions. The current regulation describes the exemption in these terms:

> 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.[3]

(b) CIBC's Overtime Policy

[21] Before 2006, CIBC did not have a formal overtime policy applicable to all employees. It could not locate any written overtime policy applicable to IAs or AIAs for the period prior to 2006. CIBC introduced a comprehensive overtime policy applicable to all Canadian employees in April 2006. That policy has remained in force with minor changes since that time.

[22] The current overtime policy provides for overtime pay at time and a half for eligible employees who work more than eight hours in a day or 37.5 hours in a week. Overtime must be pre-approved except in extenuating circumstances. The

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[3] O. Reg. 285/01, s. 8(b). See also R.R.O. 1990, Reg. 325, s. 6(b).

present policy specifically addresses employees who are exempt from eligibility for overtime pay. The policy says in part:

> At CIBC, as a general rule, all roles evaluated at Level 7 and above, all people-management roles and specific roles deemed to be management functions are designated as exempt. This exemption is based on an analysis of a number of factors and criteria such as level of responsibility, impact, overall compensation, autonomy, authority, complexity and span of control related to the job.

[23] CIBC has also issued management guidelines to assist in the implementation of its overtime policy. Those guidelines provide that:

> Eligibility for overtime compensation is outlined in the Overtime Policy (Canada). Generally, all employees performing jobs classified levels 1 to 6 (except people managers and employees exercising management functions) are eligible for overtime compensation. Generally, employees performing jobs classified as levels 7 and above are ineligible for overtime compensation.

[24] Mr. Singer filed three affidavits in this proceeding. He refers to his personal experiences as an IA and the responsibilities and duties he had while employed at CIBCWM. Mr. Singer's affidavits say little about the work of IAs in general or CIBC's overtime pay policy.

[25] CIBC filed extensive evidence relating to the duties, responsibilities and functions of IAs and its overtime pay policy. I do not propose to review any of the evidence in detail. The motion judge, and to a lesser extent the Divisional Court,

performed that task. I will refer to the motion judge's summary of the evidence relating to the CIBC overtime policy.

[26] The validity of the appellants' contention that eligibility for overtime pay raises a common issue within the meaning of s. 5(1)(c) of the *CPA* depends on whether the job level designations and job titles used by CIBC capture a sufficient commonality of employment function and responsibility among employees who have the same job level designation and/or job title. The appellants contend that one can, by reference to the CIBC job levels and job titles, distinguish between employees with significant autonomy and/or managerial and supervisory responsibilities from those who have no such autonomy or responsibilities. CIBC counters that its job level designations and job titles are by no means definitive indicators of the particular job related functions performed by employees, or the scope of any supervisory or managerial responsibilities that a particular employee may have.

[27] Early in his reasons, and after summarizing the evidence relevant to the manner in which CIBC assigned job levels, titles and descriptions, the motion judge said, at para. 30:

> CIBC had adduced uncontradicted evidence, primarily through Ms. Sandy Sharman, Senior Vice President of Human Resources, Retail Markets of CIBC, which I accept, that eligibility for overtime at CIBC is not determined exclusively based on job levels, job codes or job descriptions. Her evidence is that in appropriate

> cases, the determination of overtime eligibility requires individual consideration of an employee's circumstances by his or her manager, assisted by the CIBC human relations department. Managers are required to make judgments about the overtime eligibility of their subordinates by examining their actual responsibilities and their degree of managerial responsibility and oversight.

[28] The motion judge also considered the evidence specific to IAs at some length (paras. 47-61). He summarized that evidence, at para. 113, in these terms:

> The evidence proves that there are variations in individual circumstances that would put some Investment Advisors well on the "managerial" side of the scale in view of their individual autonomy, independence and discretion. While further investigation would be necessary to reach a definitive conclusion, it seems to me that there is good argument that CIBC's witnesses Mr. Baker and Ms. Timms [both IAs] would fall on the managerial side of the scale. There are aspects of Mr. Sutherland's [another IA and CIBC affiant] circumstances that would put him on the same side of the scale. CIBC does not dispute that it is possible that there are some Investment Advisors who may be entitled to overtime. It simply says that the determination cannot be made on a collective basis.

[29] The motion judge reiterated his finding, at para. 175:

> The answer to the question: "Are Investment Advisors managers?" simply cannot be answered in common. The answer must be: "It depends." While in my view, there may be a strong argument that the autonomy, responsibilities and method of remuneration of Investment Advisors points in the direction of their positions being managerial, it is possible, as CIBC in fact acknowledges, that some individuals might be

> considered as eligible for overtime. But the answer to the question would require in each case an individual granular analysis.

[30] The Divisional Court, in concluding that eligibility for overtime pay is not a common issue even in respect of the narrowed proposed class put forward in that court, endorsed the motion judge's analysis of the evidence and added, at para. 24:

> Eligibility for overtime at CIBCWM is not determined on the basis of job levels, job codes, job titles or job descriptions as the motions judge found on the basis of the evidence. As pointed out at para. 80 of the Reasons: 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.

VI

THE ISSUES RAISED ON APPEAL

A. ELIGIBILITY FOR OVERTIME PAY AS A COMMON ISSUE

(i) The alleged misapprehension of the evidence

[31] Mr. Singer's affidavits and his cross-examination offered very little to support the contention that the eligibility of IAs for overtime pay could be determined on a class-wide basis. His evidence said almost nothing about AIAs. Mr. Singer spoke of his own experiences as an IA. His relatively few references to the status of IAs as a group within the CIBC were general and largely unsubstantiated. The appellants' claim that the eligibility of IAs for overtime pay

could be determined on a class-wide basis depended mainly on material produced by CIBC and the cross-examination of some of the CIBC affiants. Counsel for the appellants submit that the motion judge and the Divisional Court fundamentally misconstrued the effect of that evidence.

[32] Counsel argue that on CIBC's own evidence, it has an overtime policy that excludes employees from overtime pay based on job classifications (Level 7 and higher) and job titles (IAs and AIAs). Counsel contend that the motion judge and Divisional Court "ignored" the generic bases upon which CIBC determined eligibility for overtime pay in deciding that eligibility was not a common issue. Counsel put it this way in their factum:

> The defendants in this case have, for corporate purposes in determining eligibility, already classified the class members in common based on common employment functions. *Having already treated the class members on a common basis to deny them overtime pay, the defendants cannot now say that the Court could not, or should not, determine whether this class-wide determination was correct on a common basis.* [Emphasis added.]

[33] The submissions summarized above repeat those made to the motion judge. He considered at some length CIBC's overtime pay policies and the evidence of the affiants relevant to the policies (paras. 167-75). He recognized that CIBC used its internal job classification system to establish guidelines for the determination of overtime eligibility. Employees at Levels 1 to 6 were "generally" eligible for overtime pay, subject to the managerial exception, whereas

employees at Levels 7 and above were “generally” ineligible for overtime pay because of the functions and duties they performed. However, as the guidelines and the evidence of the affiants made clear, ultimate entitlement to overtime pay was determined on an individual basis and turned on the nature of the individual employee’s duties, responsibilities, and that employee’s level of autonomy from management within CIBC.

[34] As the motion judge observed, job levels and titles used by CIBC did not correlate with specific job functions commonly performed by all persons at the same job level or with the same job title. Persons with the same job level or job title could perform different functions and have different responsibilities. In respect of IAs specifically, the motion judge concluded that individual IAs could have very different duties and responsibilities and operate at very different levels of autonomy from management. Those differences could be particularly significant from one CIBC branch to another. While all IAs shared certain sales-related functions and responsibilities, the same could not be said about other aspects of their employment. The motion judge observed, at para. 193:

> The duties and responsibilities of Investment Advisors range from what might be described as administrative at one end of the spectrum to managerial and even entrepreneurial and independent at the other end.

[35] The motion judge’s findings are consistent with and supported by the evidentiary record. Indeed, I can find no evidence to support the position put

forward by the appellants. With respect, it is their position that misapprehends the evidence by mischaracterizing the guidelines in the CIBC policies as bright line rules governing an employee's eligibility for overtime pay. As the guidelines make plain, a final determination of eligibility is based on the employment functions, duties and responsibilities of the particular employee and not his or her job title or classification. The motion judge's finding that an employee's level of autonomy and managerial or supervisory authority cannot be determined by reference to job title or job classification stands on firm evidentiary footing. I proceed to an examination of the legal analysis accepting the relevant facts as found by the motion judge.

(ii) The alleged legal errors

[36] A class proceeding can only be certified if the claims (or defences) raise common issues: *CPA* s. 5(1)(c). The term "common issues" is defined, albeit in a somewhat unhelpful fashion, in s. 1 of the *CPA*. The case law has developed several principles to be applied in determining whether an issue satisfies the "common issue" requirement of s. 5(1)(c): see *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, at paras. 78-84, leave to appeal refused, [2012] S.C.C.A. No. 326; *McCracken*, at paras. 82-83. From those cases, I take four principles as germane to the arguments advanced on this appeal:

- 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.

[37] The appellants do not dispute the applicable legal principles but rather their application by first the motion judge and second the Divisional Court. The relevant principles are identified and thoroughly examined in *McCracken*. Counsel for both sides accept that *McCracken* is the controlling authority.

[38] *McCracken*, like this case, involved an attempt to certify a class proceeding involving a claim for overtime pay brought on behalf of employees who were said by the employer to have management responsibilities. In

McCracken, the representative plaintiff alleged that the employer had improperly classified all employees with a specific classification as managers. That classification rendered those employees ineligible for overtime pay under the relevant federal legislation. The plaintiff sought to certify a class action on behalf of all employees who fell within that job classification. The plaintiff put forward eligibility for overtime pay as one of several proposed common issues.

[39] Winkler C.J.O., writing for the court, began by explaining that the overtime pay claim in *McCracken* differed from the overtime pay claims certified in the companion cases of *Fulawka* and *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, 111 O.R. (3d) 501, leave to appeal refused, [2012] S.C.C.A. No. 379. In *McCracken*, the fundamental issue was the eligibility of employees in the putative class for overtime pay under the relevant legislation. In *Fulawka* and *Fresco*, it was acknowledged that all of the employees in the proposed class were eligible for overtime pay. However, in those cases, the plaintiffs claimed that their employers, through company-wide policies and practices, had systematically imposed barriers preventing the putative class members from claiming and collecting the overtime pay due to them under the applicable statutory provisions and the terms of their employment contract. The systemic nature of the employer's conduct and its effect on the ability of all members of the class to recover overtime pay provided the degree of commonality necessary to satisfy s. 5(1)(c) of the *CPA*.

[40] As noted in *McCracken*, at paras. 3 and 56, the claim made in that case depended on whether the employer had misclassified the proposed class of employees as “managers/supervisors”, thereby rendering them ineligible for overtime pay. Eligibility for overtime pay could only be certified as a common issue under s. 5 (1)(c) of the *CPA* if the evidence on the motion demonstrated that the alleged misclassification of the employees as managers/supervisors could be resolved commonly for all employees in the proposed class.

[41] *McCracken* emphasized that the question of commonality had to be determined based on the evidence adduced on the certification motion and depended on whether “the similarity of job duties performed by class members provides the fundamental element of commonality”: *McCracken*, at para. 91. That commonality exists only where the evidence establishes some basis in fact to find that the functions, responsibilities and duties of all of the employees in the putative class are sufficiently similar that the classification of those employees as eligible or ineligible for overtime pay could be made for the class as a whole and without regard to the specific circumstances of individual employees: *McCracken*, at para. 104.

[42] Winkler C.J.O. concluded, at para. 128:

> The plaintiff’s litigation strategy seizes on the superficial commonality that all class members work for CN and all share the common label of being a FLS [front-line supervisor]. However, this common label conveys a

> false impression of commonality given the evidence on the motion of the different job responsibilities and functions of class members, who hold many different job titles and who work in a variety of workplaces with different reporting structures and different sizes of workforce. 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. Simply put, the plaintiff has not shown that any significant element of his claim is capable of common proof.

[43] The analysis in *McCracken* is consistent with the analysis of the motion judge and the Divisional Court in this case. Indeed, the Chief Justice in *McCracken* referred, with apparent approval, to the motion judge's common issue analysis in this case: *McCracken*, at para. 92.

[44] Clearly, the outcome of most common issue inquiries under s. 5(1)(c) will be evidence-driven. There is no rule that misclassification claims are automatically incapable of raising common issues, just as there is no rule that other kinds of overtime pay claims will inevitably raise common issues. However, the evidence led by the employer in *McCracken* is similar in important ways to the evidence led by the CIBC. In both cases, the evidence showed a wide variability in the autonomy, duties and responsibilities of employees having the same job title or classification. The evidence in both cases revealed the same lack of "core commonality" in the functions and duties of those employees included in the proposed class.

[45] The fact-specific nature of the s. 5(1)(c) commonality inquiry is demonstrated by a comparison of the result in this case with the result in *Rosen*. *Rosen*, like this case, involved a claim for overtime pay brought by investment advisors against their employer, a large financial institution. The representative plaintiff in *Rosen* alleged that the employer had improperly classified all investment advisors as ineligible for overtime pay under the employer's overtime policy and the provisions of the *ESA*. The plaintiff sought to certify a class action on behalf of all investment advisors, subject to specific exceptions for those investment advisors who had managerial duties.

[46] The motion judge in *Rosen* found that the claim should proceed as a class action and that the eligibility of class members for overtime payment was an appropriate common issue. The Superior Court of Justice refused leave to appeal to the Divisional Court from the order certifying the action as a class proceeding: [2013] O.J. No. 6258 (S.C.J.).

[47] The factual similarities between *Rosen* and this case are obvious. However, there are significant factual differences. As noted on the leave application to the Divisional Court, at para. 21, the factual differences explain the different results.

[48] There are at least three significant differences between the two cases. First, and most importantly, the motion judge in *Rosen* found, at para. 50, after

reviewing all of the evidence adduced on the certification motion, that all of the investment advisors in the proposed class "have the *same* or *very similar* job functions" (emphasis in the original). In contrast, as emphasized by both the motion judge and the Divisional Court, the evidence in this case revealed that employees sharing the job title IA or AIA could have very different responsibilities, duties and functions. As noted by the motion judge, at para. 138, on the evidence before him, an employee's eligibility for overtime pay at CIBC could only be determined by an examination of the specific circumstances of the employee and not by reference to the employee's job title or classification. This fundamental evidentiary difference between *Rosen* and this case, standing alone, explains and justifies the different results reached by the motion judges in the two cases.

[49] A second distinction between the two cases is found in the class descriptions. The class in *Rosen*, unlike the class proposed here, excluded any investment advisor who had either an associate investment advisor or a sales assistant assigned to him or her by the employer. The exclusionary language in *Rosen* arguably eliminated all investment advisors with supervisory or managerial responsibility for other employees. In this case, the proposed managerial exception to the class eliminates some, but by no means all, IAs who have supervisory and managerial responsibilities for other CIBC employees. Some IAs in the class proposed by the appellants will have supervisory authority

over other CIBC employees assigned to them. A determination of whether that authority is such as to place an IA within the managerial/supervisory exception to eligibility for overtime pay could only be made by an examination of the specific circumstances relevant to the individual IA.

[50] The third distinction between *Rosen* and this case lies in the basis upon which the employer's policy denied overtime pay to the proposed class. In *Rosen*, the employer's policy denied overtime pay to anyone who was paid by commission (at para. 4). That policy was in direct conflict with the provisions of the *ESA* (at paras. 5-6). The argument in *Rosen* that the employer itself had determined ineligibility for overtime pay based on a feature common to all members of the proposed class (payment by commission) was firmly rooted in the evidence. In contrast, the evidence in this case did not support the contention that eligibility for overtime pay was determined by a factor common to the entire proposed class. To the contrary, the evidence, which came primarily from the CIBC witnesses, was to the effect that eligibility for overtime pay was based on an individual assessment of the employee's functions, duties and responsibilities.

[51] The motion judge in *Rosen* was alive to the reasons of the Divisional Court in this case (paras. 15-20). He accepted, at para. 48, that "generally" one could only determine whether an individual exercises supervisory or managerial functions by reference to the work actually performed by the specific employee.

The motion judge went on to hold, however, that on the facts presented to him, eligibility for overtime pay could be treated as a common issue. I read the motion judge in *Rosen* as viewing the case before him as somewhat exceptional.

[52] *Rosen* does not assist the appellants.

[53] In addition to relying on *Rosen*, the appellants submit that the motion judge and Divisional Court misapplied the legal principles set out in *McCracken* and its companion cases. They argue that the courts below erroneously required that the job functions, duties and responsibilities of the proposed class members be "virtually identical" as a prerequisite to certification as a common issue under s. 5(1)(c) of the *CPA*. The appellants submit that the courts should have determined commonality by examining the evidentiary record for "similarity of the primary functions" of the proposed class members. The appellants submit that all of the proposed class members are engaged primarily in sales-related activities. The appellants argue that this commonality of primary function is sufficient to render eligibility for overtime pay a common issue.

[54] In advancing this argument, the appellants do not make reference to any specific passage in the reasons of the motion judge or the Divisional Court. I can find no support for the alleged error in those reasons. Nor, in my view, is there anything in the terms of the *ESA* or the CIBC overtime policy suggesting that

eligibility for overtime pay requires the identification of the “primary” function of an individual employee.

[55] The question whether eligibility for overtime pay could be determined as a common issue did not turn on an arithmetical totalling up of the similarities and differences in the job-related duties and responsibilities of proposed class members. Nor did it require a ranking in order of importance of the various functions of the employees. 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.

[57] The appellants further contend that the Divisional Court erred in holding that the motion judge had not gone beyond the proper limits of the certification motion by engaging in an assessment of the ultimate merits of the plaintiffs' claim. The appellants refer to well-established authority to the effect that the merits of the claim are not relevant on the certification motion: see *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at paras. 102-105.

[58] The Divisional Court, at para. 29, rejected this submission. So would I. The motion judge on the certification motion was not concerned with the ultimate merits of the claim, that is whether employees were wrongly deprived of overtime pay. Rather, he was concerned with the "merits" of the argument that eligibility for overtime pay could be determined as a common issue. The motion judge could only make that determination by examining the evidence relevant to the issues engaged by the s. 5(1)(c) inquiry. The motion judge engaged in a factual inquiry to the extent required by s. 5(1)(c) of the *CPA*. In doing so, he observed that the evidence disclosed that some members of the proposed class, as it was defined before him, for example, IAs who were branch managers, clearly engaged in managerial and supervisory functions that would place them firmly within the managerial exception to eligibility for overtime pay. That observation was both relevant to the common issue inquiry and justified on the evidence. Indeed, I regard the appellants' subsequent significant narrowing of the proposed

class in the Divisional Court to eliminate IAs who clearly had managerial responsibilities essentially as an admission that the proposed class as framed before the motion judge included IAs who fell within the managerial/supervisory exception to eligibility for overtime pay. The motion judge's comments went no further than that.

B. OTHER PROPOSED COMMON ISSUES

[59] Alternatively, the appellants argued that if eligibility for overtime pay is not a common issue, the courts below erred in failing to certify any of the other proposed common issues. Those issues are found in the appendix to these reasons. The appellants argue that even if eligibility for overtime pay had to be determined on an individual basis, the resolution of the other proposed common issues would significantly advance the action: see *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, at para. 53 (C.A.), application for leave to appeal refused, [2005] S.C.C.A. No. 50.

[60] This submission runs firmly against the analysis in *McCracken*. In that case, the motion judge, after deciding that eligibility for overtime pay of the proposed class members was not a common issue, held that the "minimum requirements" to be a managerial employee could be resolved as a common issue. Winkler C.J.O. held that the motion judge erred in so holding, explaining, at paras. 133-35:

> In the absence of a common issues trial that would be able to resolve the threshold misclassification issue, determining the issue of the minimum indicia of management – or on the motion judge's formulation, the "minimum requirements" for being a managerial employee at CN – would not advance the proceedings in any significant way….
>
> In attempting to state common issues that would minimally advance the proceeding on a class-wide basis, the motion judge lost sight of the fact that the plaintiff's action for unpaid overtime is fundamentally a misclassification case. *Answering the motion judge's revised common issues would not eliminate the need for substantial individual inquiries to determine whether – having regard to the specific job duties and responsibilities of class members and the organizational context in which each works – CN had properly or improperly classified FLSs as managerial employees.*
>
> In the absence of an evidentiary basis for certifying a common issue that would resolve the misclassification issue, the proposed class action for unpaid overtime wages simply collapses. [Emphasis added.]

[61] The Chief Justice's words apply with full force to this case. Common issues referable to the terms of the employment contract as they relate to overtime pay and CIBC's compliance with those terms (proposed common issues "a" – "c"), are elements of the claim. However, absent an ability to determine the "threshold misclassification issue" as a common issue, the resolution of issues in respect of the terms of the employment contract as they relate to overtime pay would only minimally advance the litigation. 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.

[62] I also agree with the submission made by counsel for the CIBC that some of the other proposed common issues could only be determined on a class-wide basis if eligibility for overtime pay could be determined on a class-wide basis. For example, common issue "d" asks "did the defendant breach any of its contractual or statutory duties?" The duties owed by CIBC to its employees, however, depend on whether the employees are eligible for overtime pay. It must follow that if eligibility for overtime pay is not a common issue that can be determined on a class-wide basis, then allegations of breaches of contractual and statutory duties that are premised on eligibility for overtime pay likewise cannot be resolved as common issues. Similarly, proposed common issue "f", which asks "were the defendants unjustly enriched by failing to compensate Class Members for overtime pay", simply reformulates the eligibility question in terms of an unjust enrichment claim. Both questions are equally incapable of resolution on a class-wide basis.

[63] The motion judge considered whether the other proposed common issues could justify certification. He concluded, at para. 199, that as eligibility for overtime pay could not be determined as a common issue, the appellants had failed to demonstrate that a class proceeding was the "preferable procedure for

the resolution of the common issues": s. 5(1)(d) *CPA*.[4] The Divisional Court agreed with this assessment (para. 30). The appellants have not demonstrated any basis upon which this court could interfere with those assessments.

VII

CONCLUSION

[64] For the reasons set out above, I would dismiss the appeal and affirm the order of the Divisional Court dismissing the appeal from the order of the motion judge dismissing the motion for certification.

[65] Costs of the appeal will be addressed in writing. CIBC will serve and file submissions of no more than seven pages within 30 days of the release of these reasons. The appellants, and if so advised, the Class Proceedings Fund, which the court was told has funded this action, will file their submissions, also of no more than seven pages, within 15 days of receipt of CIBC's submissions. If necessary, CIBC may file a reply to the appellants' submissions of no more than three pages within seven days of receipt of the appellants' submissions.

RELEASED: "OCT -6 2014"
"DD"

"Doherty J.A."
"I agree Gloria Epstein J.A."
"I agree M.L. Benotto J.A."

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[4] The motion judge, at para. 201 and following, went further in respect of IAs and AIAs. He held that even if eligibility for overtime could have been determined on a class-wide basis for IAs and AIAs, he would still have found that a class proceeding was not the preferable procedure for the resolution of the claims of the IAs and AIAs. He gave several reasons for coming to that conclusion. I need not address that part of his reasons.

APPENDIX
PROPOSED COMMON ISSUES

Breach of Contract and Statutory Claim

a. Do the minimum requirements of the *ESA* and the *Code* with regard to overtime form express or implied terms of the contracts with the Class Members?

b. Do the Defendants owe contractual duties to the Class Members and statutory duties to:

    i. ensure that the Class Members are properly classified regarding overtime pay eligibility?

    ii. advise Class Members of their eligibility to overtime pay for hours worked in excess of the standards hours of work? If so, how?

    iii. ensure that the Class Members' hours of work were monitored and accurately recorded? If so, how?

    iv. ensure that Class Members who were eligible for overtime pay were compensated for hours which the employer required or permitted to be worked in excess of the standard hours of work, in accordance with the *ESA* and the *Code*?

        1. If so, how?

        2. Is a pre-approval requirement for overtime permissible?

c. Do the Defendants have a duty (in contract or otherwise) to implement and maintain an effective and reasonable system or procedure which ensured that the duties in Common Issues (a) through (c) were satisfied for the Class Members?

d. Did the defendant breach any of the above contractual duties or statutory duties?

    i. If so, how?

e. Are the Class Members eligible for overtime pay?

Unjust Enrichment

f. Were the defendants unjustly enriched by failing to compensate Class Members with overtime pay for hours worked in excess of the standard hours of work?

Aggregate Damages

g. If the defendants breached their contractual or statutory duties to the Class or were unjustly enriched, can damages be assessed on an aggregate basis? If so, in what amount and to whom are they payable?

Punitive Damages

Are the Class Members entitled to an award of punitive damages based on the defendants' conduct? If so, in what amount and to whom are they payable?