COURT OF APPEAL FOR ONTARIO

CITATION: McCracken v. Canadian National Railway Company, 2012 ONCA 445
DATE: 20120626
DOCKET: C52635

Winkler C.J.O., Laskin and Cronk JJ.A.

BETWEEN

Michael Ian McCracken

Plaintiff (Appellant/
Respondent by Cross-Appeal)

and

Canadian National Railway Company

Defendant (Respondent/
Appellant by Cross-Appeal)

Louis Sokolov, Peter L. Roy, Steven Barrett, David F. O'Connor and Sean M. Grayson, for the appellant/respondent by cross-appeal

Guy J. Pratte, Morton G. Mitchnick, Sylvie Rodrigue, Jeremy J. Devereux and Michael Kotrly, for the respondent/appellant by cross-appeal

Heard: February 28 and 29, 2012

On appeal from the orders of Justice Paul M. Perell of the Superior Court of Justice, dated August 17, 2010, with reasons reported at 2010 ONSC 4520, 3 C.P.C. (7th) 81, and on appeal from the costs order of Justice Paul M. Perell, dated November 2, 2010, with reasons reported at 2010 ONSC 6026, 100 C.P.C. (6th) 334.

Table of Contents

Winkler C.J.O.:

A. INTRODUCTION

[1] This is the third of a trilogy of class action cases against federally-regulated employers claiming unpaid overtime pay: see also *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, and *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444. The court's concurrently released reasons in *Fulawka* and *Fresco* explain why the two class actions against the defendant banks for unpaid overtime pay should be certified.

[2] The present class action against the defendant, Canadian National Railway Company ("defendant" or "CN"), is premised on a different theory of liability than in the overtime class actions against the banks. The overtime actions against the banks are brought on behalf of class members who were classified as non-managerial employees.[1] Their right to be paid overtime wages at 1.5 times their normal hourly rate is provided for in their employment contracts and by the provisions of Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("*Code*"). The central issue is not whether the class members are eligible for

[1] In *Fulawka*, the plaintiff's pleadings included a misclassification claim concerning Level 6 employees at Bank of Nova Scotia ("Scotiabank"). In 2008, Scotiabank re-classified these employees as non-management and extended overtime entitlement to them. Scotiabank also implemented a retroactive claims process whereby Level 6 employees could claim unpaid overtime going back to 2005.

overtime pay but, rather, whether the policies, practices or systems of the defendant banks have effectively and routinely denied payment of overtime compensation to class members, contrary to the express or implied terms of their employment contracts.

[3] In contrast, in the present case, CN has classified the class members as managerial employees. The class consists of First Line Supervisors ("FLSs") employed by CN. The effect of s.167(2)(a) of the *Code* is that employers are not required to pay overtime compensation as provided in Part III of the *Code* to employees who "are managers or superintendents or exercise management functions". CN's overtime policy explicitly excludes FLSs from eligibility for overtime pay. The success of the proposed class action for unpaid overtime pay thus depends on the threshold issue whether CN has misclassified FLSs as managerial employees.

B. OVERVIEW OF THE PROCEEDINGS

[4] The motion to certify the class action against CN under s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6, s. 30 ("*CPA*"), was heard together with CN's motion under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to dismiss the action. On the Rule 21 motion, CN argued that the Superior Court of Justice lacks jurisdiction to hear the proposed action. The motion judge rejected this argument. However, he struck, dismissed and stayed various

elements of the plaintiff's claims in negligence and breach of contract. The motion judge granted the motion for certification, but in doing so, he significantly re-drafted the common issues.

[5] Both parties have appealed different elements of the motion judge's orders. The plaintiff appeals from the Rule 21 order and the certification order, while CN appeals and cross-appeals from the Rule 21 order and appeals from the certification order. CN also appeals from the order awarding the plaintiff his costs of both motions. All the appeals that would otherwise lie in the Divisional Court have been traversed to this court.[2]

[6] The parties raise a matrix of issues before this court. However, it is not necessary to decide most of these issues to dispose of the various appeals and cross-appeals.

[7] For the reasons that follow, I would allow CN's appeal from the certification order and set aside that order. I conclude that the motion judge was correct in rejecting the plaintiff's proposed common issues concerning whether CN

---

[2] The appellate routes are a maze of complexity owing to s. 30 of the *CPA* and s. 6 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The parties both filed motions for leave to appeal in the Divisional Court from the motion judge's order certifying the action as a class proceeding. In addition, both parties appealed to this court from the motion judge's order under rules 21.01(1) and (3) of the *Rules of Civil Procedure* dismissing part of the plaintiff's claim. The defendant sought leave to appeal the interlocutory parts of the Rule 21 order to the Divisional Court and cross-appealed as of right from the final elements of that order to this court. The defendant also sought leave to appeal to the Divisional Court from the motion judge's costs order on the motions. On consent of the parties, leave to appeal to the Divisional Court from the interlocutory parts of the motion judge's Rule 21 order, and his certification and costs orders, was granted by orders of Jennings J., dated December 14, 2010. Pursuant to a consent order of Doherty J.A., dated February 9, 2011, the appeals as of right from the order under Rule 21 were combined with the appeals pending in Divisional Court for hearing by this court.

misclassified FLSs as managerial employees. The evidence on the motion did not support a finding that a common issues trial judge would be able to resolve the fundamental issue of misclassification on a class-wide basis. Rather, the evidence indicated that individualized assessments of the job duties and responsibilities of class members would be needed to determine if they were properly classified.

[8] However, the motion judge fell into reversible error in recasting as a common issue the question of what the minimum requirements are to be a managerial employee at CN. The same evidentiary deficiency – the lack of evidence supporting a finding of a core of commonality concerning FLSs' job duties and responsibilities – still remained.

[9] These conclusions on the absence of a core of commonality make it unnecessary to decide the correctness of the motion judge's rulings on the Rule 21 motion, or to review his rulings on the other proposed common issues and preferable procedure. At the end of these reasons, I comment briefly on a few practice points that arise out of some of these rulings.

C. FACTUAL BACKGROUND

(1) Overview of the Proposed Class Proceeding

[10] The putative representative plaintiff, Michael McCracken ("plaintiff"), is a former CN employee. He started this action on behalf of approximately 1,550

current and former non-unionized CN employees across Canada who have held the position of FLS since July 5, 2002.

[11] The plaintiff began working at CN in 1998 as a unionized employee. In October 2005, he was promoted to the non-unionized position of manager of corridor operations, which is a FLS position. In January 2008, he was promoted to the position of senior manager, corridor operations. The plaintiff alleges in his statement of claim[3] that the senior manager position is a FLS position, while according to CN, it is a higher-ranking managerial position rather than a FLS position. The plaintiff held the position of senior manager, corridor operations until March 26, 2008, the day after he served the statement of claim in this action. He deposed that he was informed that he was being demoted to the unionized position of dispatcher because he had started the action and not for performance deficiencies. The plaintiff resigned from CN in 2010.

[12] The plaintiff pleads causes of action against CN based on CN's alleged violation of the *Code*, breach of contract, breach of a duty of good faith, negligence and unjust enrichment. The central allegation driving the proposed class action is that, since July 5, 2002, CN has uniformly, deliberately, improperly, negligently, and illegally misclassified FLSs as managers. As a result of this misclassification, CN is said to have unlawfully deprived the class

---

[3] Amended Fresh as Amended Statement of Claim, dated March 3, 2010.

members of their entitlement to receive overtime pay and holiday wages as stipulated by the *Code*. The statement of claim alleges that all class members have been regularly scheduled, as a matter of uniform company policy, to work in excess of 40 hours per work week or 8 hours per day without receiving overtime pay, contrary to law and in violation of various provisions of Part III of the *Code*, as will be discussed below.

[13] The plaintiff claims $250 million in general damages, $50 million in special damages and an order pursuant to s. 24 of the *CPA* directing an aggregate assessment of damages. The plaintiff also seeks an order requiring CN to disgorge amounts wrongly withheld from the class in respect of unpaid overtime and holiday pay. In addition, the plaintiff requests various forms of declaratory and injunctive relief, including a declaration that CN has been unjustly enriched, and a declaration that CN has breached the *Code* and the express or implied terms of the employment contracts with class members by misclassifying these employees and by failing to pay them overtime pay.

(2) **The Role of FLSs at CN**

[14] In CN's employment hierarchy, FLSs are immediately above unionized workers and immediately below the non-unionized managerial positions of assistant superintendant and superintendant. FLSs are the primary point of contact between the non-unionized and unionized workforce.

[15] Approximately 82 percent of CN's Canadian employees are unionized. This element of CN's workforce is represented by five major unions and is divided into over 30 different bargaining units, each of which is governed by a different collective agreement. The collective agreements regulate such matters as the length of the work week, overtime, vacation pay, and contracting out of work. FLSs are required to know and enforce the rules found in the various collective agreements that apply to the unionized employees under their supervision.

[16] CN's recruiting materials describe the duties of FLSs as follows:

> The First Line Supervisor manages the day-to-day operation of their territory through their unionized staff; ensures the on-time performance of trains, delivering on our commitments to our customers; the efficient utilization of locomotives and repair of cars (Mechanical); repair and maintenance of trackage and signals (Engineering); and safe haulage of merchandise to their destination (Transportation); as well as interacting with customers (Marketing).

[17] CN identified 70 different job positions held by FLSs. More than 90 percent of FLSs are responsible for duties associated with train operations, which encompasses the movement of trains, the repair and maintenance of tracks and signals, and the repair and maintenance of train cars and engines. There are also FLS positions in finance and accounting, customer service, corporate facilities, and various other miscellaneous positions.

[18] The salary range for FLSs is from $55,600 to $109,200. FLSs are eligible for bonuses equivalent to 15 to 30 percent of their base pay. They are also entitled to benefits, including a defined benefit pension plan and a share purchase plan.

(3) **CN's Overtime Policy**

[19] CN's overtime policy, titled "Compensation Management – Time Management" ("Policy"), came into effect on January 1, 2006. The Policy put into writing the policy and practice that had existed at CN since July 5, 2002.

[20] The Policy states that it "is intended for non-unionized, professional and administrative support employees working in Canada. *For greater clarity, this policy does not apply to managers, supervisors or anyone who exercise[s] management functions*" (emphasis added). The Policy entitles non-unionized and non-managerial employees of CN to receive compensation at a rate of 1.5 times the employee's regular rate for pre-authorized or directed overtime hours worked.

[21] FLSs are not eligible for such overtime pay under the Policy. However, the Policy provides that FLSs may be paid discretionary lump sum amounts in extraordinary circumstances where extensive hours are required:

> In the spirit of the FLS compensation package, First Line Supervisors may receive payments under the Service Response/Emergency program, in case of extraordinary circumstances where extensive hours are required e.g. derailments, severe winter conditions etc. Under these special circumstances, a Vice-President,

> General Manager or equivalent may authorize a special lump sum payment to be paid in increments of $500. In cases involving payments in excess of $2,500, the authorizing officer will review the circumstances with the appropriate Vice-President.

[22] The Policy also provides that FLSs who are required to work on a general holiday will receive time off at the regular rate.

[23] The plaintiff refers to the Policy several times in his statement of claim. He asserts that the Policy forms part of each class member's contract of employment. He alleges that FLSs had been entitled to receive overtime wages until July 5, 2002, when the Policy came into effect. The plaintiff requests a declaration that the Policy is "unlawful, void and unenforceable".

[24] On the certification motion, CN led evidence that conflicted with the plaintiff's allegation that FLSs received overtime wages up until July 5, 2002. CN pointed to its 1998 policy on overtime applicable to FLSs working in the Operations Division,[4] which announced that CN was "adopt[ing] the CP [Canadian Pacific] method of not paying overtime or shift premiums and instead create[d] an allowance" for these FLSs.

(4) **Hours Worked by FLSs**

[25] The plaintiff pleads that FLSs regularly work in excess of 40 hours per week or eight hours per day and they regularly work on statutory holidays. He

---

[4] Most FLS positions exist in the Operations Division in one of three departments: Transportation, Mechanical and Engineering.

also pleads that FLSs are frequently called for unscheduled work and to substitute for unionized and non-unionized employees: see the motion judge's reasons, at para. 48.

[26] The plaintiff pleads, and the defendant does not dispute, that CN does not keep records of the hours worked by FLSs.

(5) **Relevant *Code* Provisions**

[27] The provision of the *Code* of most significance in this case is s. 167(2), which states:

> 167. (2) Division I does not apply to or in respect of employees who
>
> (*a*) are managers or superintendents or exercise management functions…

[28] The plaintiff also pleads and relies on provisions in Division I of Part III of the *Code* regulating the standard hours of work and payment of overtime for employees who are subject to Part III: see ss. 169(1) and 174. As explained in *Fulawka*, at para. 33, the combined effect of ss. 169(1) and 174 of the *Code* is that an employer must pay an employee overtime wages at the rate of 1.5 times the regular rate of wages when the employee works more than eight hours in a day or more than 40 hours in a week. However, s. 167(2)(a) exempts employees who are managers, superintendents or who exercise management functions from entitlement to overtime pay under these provisions.

[29] The plaintiff further pleads and relies on the provisions in Division XVI of the *Code*, and in the accompanying regulation, which impose obligations on employers to accurately record and maintain records of employees' hours of work: see ss. 252(2) and 264(a) of the *Code* and s. 24 of the *Canada Labour Standards Regulations*, C.R.C., c. 986.[5] He also pleads and relies on the provisions in ss. 191, 196, 198 and 199 of Division V of the *Code* governing compensation for general holidays, including the entitlement of managerial employees to be compensated for work performed on a general holiday.

[30] The plaintiff pleads that the duties and obligations found in these provisions of the *Code* and the *Regulations* are implied by fact or law into the contracts of employment of class members.

(6) **Procedural History**

[31] The plaintiff moved to certify the action as a class proceeding. He submitted that a misclassification case such as his is "inherently amenable to resolution by way of class proceeding." CN argued that none of the criteria for certification was satisfied.

[32] CN moved under rule 21.01(3)(a) for an order dismissing the action on the basis that the Superior Court of Justice has no jurisdiction to directly enforce the *Code.* CN also moved under rule 21.01(1)(b) to strike portions of the claim for

---

[5] These statutory and regulatory provisions are discussed in this court's reasons in *Fulawka*, at para. 35.

failing to disclose a reasonable cause of action. The certification and Rule 21 motions were argued together in July 2011.

D. THE MOTION JUDGE'S REASONS

[33] The motion judge granted CN's Rule 21 motion in part and granted the plaintiff's certification motion with qualifications and conditions. His reasons on the Rule 21 motion may be summarized as follows:

- The language of the *Code* reveals that Parliament intended that courts have a subject matter jurisdiction to enforce wage claims for overtime and thus the statutory rights in the *Code* are terms of the contract of FLSs "by force of statute": see paras. 114-85.

- The plaintiff's claim for breach of the express or implied terms of the employment contract discloses a reasonable cause of action: see paras. 199-227.

- However, the plaintiff's claim for breach of contract based on CN's alleged failure to pay holiday pay should be dismissed on the merits because CN provided class members with time *in lieu* of holiday pay, which is permitted by ss. 198 and 199 of the *Code*: see paras. 204-13.

- The plaintiff's claims for breach of an express or implied term of the contract should be stayed because these causes of action are academic or moot, the court having concluded that the terms of the *Code* are terms of the contract by force of statute: see paras. 228-34.

- The plaintiff has actually proven on the Rule 21 motion that he has a cause of action for breach of a statutory implied term, which is an issue that

might otherwise have been decided at the common issues trial: see paras. 224-27.

- The court on a certification motion has jurisdiction to decide or stay what would otherwise be a common issue based on rule 37.13(2)(a) of the *Rules of Civil Procedure*, and this jurisdiction is augmented and enhanced by ss. 12 and 13 of the *CPA*: see paras. 228-32.

- The asserted cause of action for breach of a free-standing duty of good faith should be struck because no such independent duty exists. However, the pleading of the material facts alleging a breach of duty of good faith may remain in support of the cause of action for breach of contract: see paras. 235-45.

- The plaintiff has shown a cause of action for unjust enrichment: see para. 246-48.

- The plaintiff's proposed cause of action for negligence should be struck from the statement of claim for failing to disclose a reasonable cause of action: see paras. 249-72.

- CN's limitation period argument is limited to the claims and causes of action for negligence and breach of a free-standing duty of good faith based on CN allegedly improperly classifying its FLSs as managers. These claims are not proceeding so the limitation period issue is moot: see paras. 273-76.

[34] The motion judge then turned to the certification motion. Before assessing the five criteria for certification under s. 5(1) of the *CPA*,[6] the motion judge

[6] The criteria in s. 5(1) of the *CPA* may be summarized as follows:
(a) the pleadings disclose a cause of action;
(b) there is an identifiable class;

addressed CN's argument that the evidentiary threshold that a plaintiff must meet to prove the certification criteria should be higher than the "some basis in fact" test described in *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158, at paras. 16-26. At paras. 291-92, the motion judge described a "festering point of complaint by defendants" that a plaintiff need only show "some basis in fact" for each of the criteria for certification to obtain a certification order.

[35] The motion judge explained that the "some basis in fact" test is not applied in the way that defendants have suggested. Rather, he observed that satisfying the "some basis in fact" test is "necessary but not sufficient for the satisfaction of the various criteria" (at para. 300). I will say more about his reasons on this issue below, at paras. 72-81.

[36] The motion judge next addressed the five criteria for certification and concluded they were met for the following reasons.

(1) **Section 5(1)(a): Do the Pleadings Disclose a Cause of Action?**

[37] The motion judge relied on his reasons on the Rule 21 issues to conclude that the plaintiff had shown a cause of action for unjust enrichment and for breach of contract based on express or implied contractual terms and based on contractual terms implied by force of statute: see para. 304.

(c) the claims raise common issues;
(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
(e) there are appropriate representative plaintiffs who could produce a workable litigation plan.

(2) Section 5(1)(b): Identifiable Class

[38] CN did not dispute that the plaintiff identified a class that technically satisfies the requirements of the *CPA*, but argued that the class definition was deficient because the plaintiff failed to provide any evidence concerning FLSs in 56 of the 70 job positions held by FLSs, and argued that there was thus no basis in fact for including these FLSs as class members.

[39] The motion judge found this argument to be fallacious because the plaintiff demonstrated some basis in fact for his own cause of action and for his own job description. He concluded that this was a sufficient evidentiary basis for the plaintiff's submission that there is a group of similarly-situated claimants with similar claims: see paras. 305-11.

(3) Section 5(1)(c): Common Issues

[40] The plaintiff initially proposed a list of seven common issues (the "Revised List"), which includes "misclassification" as common issue 1: see the motion judge's reasons, at para. 322, and Appendix A to these reasons. The plaintiff's Revised List was predicated on his submission that, at the common issues trial, the court could and should determine whether FLSs were properly or improperly classified as managers on a class-wide basis: see the motion judge's reasons, at para. 323.

[41] The motion judge expressed reservations about the commonality of some of the proposed issues. To focus the discussion on his concerns, the motion judge prepared an amended list containing six common issues (the "Amended Revised List") and requested the parties' submissions on his suggestions: see the motion judge's reasons, at para. 325, and Appendix B to these reasons. This list did not include misclassification of the class as a free-standing common issue, although it included questions about whether CN had statutory or common law duties to properly classify class members and, if so, whether CN had breached any of these alleged duties.

[42] The plaintiff accepted the Amended Revised List with the following three reservations: i) misclassification of the whole class should be certified as a common issue, as the plaintiff had initially submitted; ii) there should be an additional common issue about how management status can be determined on a class-wide basis; and iii) there should be a common issue about the aggregate assessment of damages.

[43] CN disputed that any of the proposed common issues – whether from the plaintiff's Revised List or the motion judge's Amended Revised List – are proper common issues for one or more or all of the following reasons: (i) the issues are not common to the class; (ii) answering the proposed common issues depends on individual findings of fact for each claimant; (iii) the proposed common issues are not necessary to the resolution of each class member's claim for overtime;

(iv) resolution of the common issues would not significantly advance the litigation; and (v) the common issues lack a factual basis in the evidence.

[44] The motion judge examined each of the proposed common issues from both lists and through a process of elimination, he arrived at a final list of six questions, which he ultimately certified ("Approved List"): see the motion judge's reasons, at para. 351, and Appendix C to these reasons. I include his Approved List here for ease of reference:

> Common Issue One – Payment of Overtime Pay
>
> Did the Class Members receive overtime pay under the [*Code*]?
>
> Common Issue Two – Contract Terms
>
> What are the terms by force of statute of the Class Members' contracts of employment with the Defendant respecting: (i) classification; (ii) regular and overtime hours; and (iii) the recording of hours worked?
>
> Common Issue Three – Minimum Requirements of Manager Status at CN
>
> In accordance with the meaning under s. 167 (2) of the *Canada Labour Code*, of "employees who are managers or superintendents or exercise management functions", what are the minimum requirements to be a managerial employee at CN?
>
> Common Issue Four – Unjust Enrichment
>
> Would the Defendant be unjustly enriched by failing to compensate a Class Member with pay or overtime pay for hours worked in excess of his or her standard hours of work?
>
> Common Issue Five – Damages or other relief

> If the Defendant breached a duty or its contract or was unjustly enriched what remedies are available to the Class Member?
>
> Common Issue Six – Punitive Damages
>
> Would the Defendant's conduct justify an award of aggravated, exemplary or punitive damages?

[45] The motion judge observed, at paras. 353-54, that four of these questions (common issues 1, 2, 4 and 5) are answerable before the common issues trial. He said, at para. 359, that while answering these four questions would advance the litigation, they are not determinative of the action "because the heart of the matter remains whether the first line supervisors were or were not managers, which is unanswered."

[46] In arriving at this list, the motion judge rejected the plaintiff's proposed common issues 1, 2, 3(a)-(b), 4(a)-(i) and 7(a) from the Revised List. He observed, at para. 331, that these questions, which include the proposed misclassification common issue: "lack commonality or would depend on individual findings of fact for each claimant." In his opinion, "these questions cannot be determined on a class-wide basis and rather require individual questions to be answered."

[47] Rather than certifying misclassification as a common issue, the motion judge certified a common issue of his own design – common issue 3 – which

would identify "the minimum requirements to be a managerial employee at CN".[7] The motion judge reasoned, at para. 363, that this question "avoids the problems of commonality" of the plaintiff's proposed misclassification question. He found, at paras. 363-64, that common issue 3 could be answered on a class-wide basis and that doing so would substantially advance the litigation because it would divide the class into the following three groups:

> i) class members who satisfy the minimum standards for being a manager at CN because of who they are and what they do;
>
> ii) class members who could not possibly satisfy the minimum standards for being a manager at CN; and
>
> iii) class members whose status as a manager at CN remained to be determined.

[48] According to the motion judge, at para. 367, by dividing the class into these three groups, the claims of the first group would be dismissed, while the claims of the latter two groups would proceed to manageable individual issues trials as contemplated by s. 25 of the *CPA*.

(4) **Section 5(1)(d): Preferable Procedure**

[49] After critiquing the parties' approach to the preferable procedure issue, at paras. 445-51, the motion judge concluded, at para. 456, that a class action is preferable to the administrative process under the *Code* for resolving the class

---

[7] The motion judge reviewed, at paras. 58-67, various cases describing the analytical approach under the *Code* to classifying employees as a manager or an employee who exercises management functions.

members' claims. He observed that the class proceeding will "provide access to justice and judicial economy for a mass mistake in an efficient and manageable way."

(5) **Section 5(1)(e): Representative Plaintiff and Litigation Plan**

[50] The motion judge found Mr. McCracken to be a suitable representative plaintiff because "he has no conflict of interest in the sense that his claim or position in the class is adverse in interest" to other class members and he "was astute enough to hire seasoned class action counsel" to prosecute the litigation: see paras. 471-72.

[51] As for the litigation plan, the motion judge observed, at para. 474, that the plaintiff "must go back to the drawing board and prepare a new litigation plan based on the outcomes of the motion and cross-motion." He held that, even in the absence of a suitable litigation plan, this criterion was satisfied because he foresaw no difficulty in producing one. The motion judge made the certification order subject to the condition that a litigation plan be settled.

(6) **Costs**

[52] The motion judge awarded the plaintiff – "really class counsel" – costs of the motions on a partial indemnity scale fixed at $740,650.55: see *McCracken v. Canadian National Railway Co*., 2010 ONSC 6026, at para. 33. He found that, even though the defendant succeeded in part on the Rule 21 motion and even

though the plaintiff's certification motion was granted with qualifications, the plaintiff had achieved a level of success warranting an award of costs in his favour without an offsetting award in favour of CN (at para. 21).

E. THE MISCLASSIFICATION ISSUE

(1) Misclassification is a Necessary Element for Establishing Liability

[53] As discussed, the class members' claims for damages for unpaid overtime are framed in breach of statute, breach of contract, negligence and unjust enrichment. In attempting to make this action amenable to certification as a class proceeding, the plaintiff proposed a common issue concerning misclassification. In theory, if this common issue were to be resolved in the plaintiff's favour, this would be a finding that CN had uniformly and improperly classified all FLSs as managerial employees. Such a finding would significantly advance the unpaid overtime claims of class members on a class-wide basis because it would establish their eligibility to receive overtime wages under Part III of the *Code*.

[54] Conversely, if CN were found to have properly classified the class members as managers or as employees who exercise managerial functions, then CN would not have breached any alleged statutory or private law duty to pay them overtime wages and their claims would fail.

[55] The central factual assertion related to the misclassification issue is found in paragraph 13 of the statement of claim:

> The nature of the Class Members' duties, responsibilities and authority is such that they were not managers or superintendents or exercising management functions within the meaning of section 167(2) of the *Code*.

[56] There is no question that, in the abstract, a class-wide resolution of the issue concerning the alleged misclassification of FLSs would significantly advance the litigation. A crucial question on the motion was whether there is some basis in fact to find that the misclassification issue could be resolved commonly.

(2) **Plaintiff's Proposed Common Issues Concerning Misclassification**

[57] The plaintiff argues that the motion judge erred in refusing to certify common issue 1 on his Revised List, which states:

> Common Issue One – Misclassification
>
> Are the Class Members excluded from overtime eligibility under contract (express or implied) and/or under the [*Code*]?

[58] The plaintiff's Revised List includes other questions concerning the misclassification issue. These questions ask if CN had contractual, statutory, or tort duties to properly classify the class members and, if so, whether CN breached any of these duties: see common issues 2, 3(a) and (b) and 4(a)-(i) in Appendix A. My analysis of common issue 1 applies equally to the misclassification issue as it arises out of these common issues.

(3) **Plaintiff's Evidentiary Basis for Misclassification as a Common Issue**

[59] The plaintiff contends that he led evidence on the certification motion establishing that misclassification can "be determined on a class-wide basis (or at the very least, on the basis of sub-groups)", and that this evidence "far exceeded" the standard of some basis in fact.

[60] The plaintiff points to two types of evidence that he introduced on the motion:

> (1) evidence that CN made an arbitrary, class-wide determination that all class members are management without conducting any analysis of their job functions; and
>
> (2) evidence of restrictive and common limits on class members' authority and discretion such that they uniformly had no real decision-making authority in essential managerial matters.

[61] The primary evidence that the plaintiff points to in the first category is the following testimony of CN's director of compensation, Louis Lagacé, during cross-examination on his affidavit:

> Q. Have you ever analyzed the individual job functions [of FLSs]?
>
> A. Not under my leadership.[8]
>
> Q. To your knowledge has it ever been done?

---

[8] Mr. Lagacé assumed the role of Director of Compensation at CN in January 2001.

> A. Well, I cannot speak of my predecessors. But clearly, you know, in our company first line supervisors are managers and therefore they are not subject to overtime.
>
> Q. To your knowledge has there ever been an analysis of each of the jobs of the first line supervisors to determine whether they're managers?
>
> A. No. We rely largely on when someone is appointed a first line supervisor, say a trainmaster, clearly this individual is administered along the job grade and compensated accordingly.

[62] The plaintiff's evidence in the second category – which is said to show that there are common limits on FLSs' decision-making authority – consists of sworn affidavits from the plaintiff, 11 current or former class members, and two CN employees who are union representatives. The class members who gave affidavit evidence on behalf of the plaintiff held one or more of the following job titles: trainmaster, mechanical supervisor, chief train dispatcher (also known as manager of corridor operations or MCO), coordinator operations and crew management supervisor.[9] Although CN identified 70 different job titles for FLSs based on its payroll codes, the plaintiff submits that the job titles of the affiants are from a group of ten job titles that are held by nearly 80 percent of currently-employed class members.

---

[9] The class member, Enzo Fabrizi, says he held the position of Commuter Central Officer from 1997-2006 and his affidavit focuses on this time period. This particular job title does not appear on the list of 70 FLS job categories as of April 1, 2008, which CN filed in evidence.

[63] These class members assert that FLSs do not have real decision-making authority in essential managerial matters and that they uniformly lack the following powers or responsibilities that are characteristic of managers:

- the authority to hire, terminate, promote, demote or transfer employees;
- the authority to represent management in collective bargaining or in grievance procedures;
- unfettered authority to discipline;
- involvement in setting budgets or policies;
- determining employees' schedules; and
- negotiating contracts on behalf of CN.

[64] The following summary of the affidavits submitted by the plaintiff illustrates the nature of the evidence that he tendered to show that FLSs uniformly lack real decision-making authority in managerial matters:

- Affidavit evidence of Ian McCracken, who held the FLS position of manager, corridor operations, from 2005 to January 2008 and held the title of senior manager, corridor operations from January to March 2008, at MacMillan Yard, Toronto:

> I do not believe that I was ever a manager or that I ever exercised management functions while I was a FLS. I could not hire, fire, promote, demote or transfer other employees. My efforts to assist in matters involving hiring were rebuffed. My power to discipline other employees was limited to investigating and recommending that minor disciplinary warnings be issued. I lacked the power to decide whether discipline would actually be imposed and, if so, its nature. Those decisions were made by my supervisors and more

> senior managers. I could not make budgetary or expenditure decisions on behalf of CN. I was told by my manager that I lacked the authority to make any changes to schedules for rail traffic controllers, even if I felt that a change was logical. When other MCOs requested the trains be subjected to unscheduled stops, I was expected to run these requests by the superintendent or assistant superintendent.

- Affidavit evidence of George Anderson, presently a unionized employee at CN, who held three different FLS positions[10] from 1995 to 2006:

> In my role as FLS, I did not have any authority to hire, fire, suspend, promote, demote or transfer employees. I had no independent authority to issue demerit points, suspensions, terminations or demotions. I could initiate investigations and recommend demerit points to my supervisor or general manager, but I could not issue demerit points without their prior approval. I was never involved in any arbitration cases on behalf of CN. I had no independent authority to schedule hours of work for employees. I did not make any budgetary decisions and I had no involvement in the development of company policy or planning. I did not negotiate any contracts on behalf of CN. When employees under my supervision needed to work overtime, I could keep them working in accordance with their collective agreements and as specifically authorized by my superiors. *During my time at CN, I have worked primarily in the South Western Ontario region, including in Windsor, Sarnia and London. At all of these locations, in my experience, the FLSs had no different level of authority than described above.* [Emphasis added.]

- Affidavit evidence of John Caissie, who has held FLS positions[11] in Winnipeg, Moncton, Toronto and Montreal over the last 19 years:

---

[10] Mr. Anderson deposed that he held the FLS positions of MCO in Toronto and manager of dispatchers and crew clerks in Michigan, U.S.A. He also held the position of trainmaster, first in Michigan, and later in Windsor and Sarnia. To the extent that Mr. Anderson's comments relate to his experience while working as a FLS in Michigan, it is not admissible evidence in the proposed class action. The class consists only of FLS employees at CN's Canadian operations.

> My responsibilities as a FLS have included supervising a number of employees. At no time have I exercised managerial functions. I have not had a determining influence on the employment, promotion or discipline of other staff. I have never hired, fired, promoted or transferred employees. I have never unilaterally disciplined employees, though I have recommended discipline at times to my superiors, who are under no obligation to accept my recommendations. I have not acted on behalf of CN at grievance arbitrations, nor have I ever controlled scheduling or made budgetary or expenditure decisions. Finally, I have never been involved in company policy or planning, or negotiated contracts on behalf of CN. *I understand, from speaking with various colleagues throughout my employment that the level of supervision I exercised as trainmaster, manager – crew utilizations and manager – corridor operations is in line with that exercised by other FLSs employed by CN in both large and small centres across the country.* [Emphasis added.]

(4) **CN's Evidence on the Misclassification Issue**

[65] CN's primary position on commonality, as described by the motion judge, at para. 56, was that the misclassification issue, as a matter of adjudication, cannot be proved globally in a class action because the status of each FLS must be assessed individually. To support this position, CN lead evidence to show a wide disparity in the roles and functions of FLSs, including of FLSs holding the same job position: see the motion judge's reasons, at para. 69.

---

[11] Mr. Caissie deposed that he held the following FLS positions: manager for customs in Winnipeg; crew coordinator in Moncton; trainmaster in Brampton; and manager – crew utilization in Toronto. He is currently a MCO in Toronto.

[66] CN tendered evidence – including affidavits from 19 class members – to show that class members work in different environments ranging from small towns to large cities, from office environments to shops, garages, small depots, or outdoors in train yards, or along the vast length of track that comprises CN's rail network: see the motion judge's reasons, at para. 44.

[67] In addition, in an effort to highlight the lack of commonality of FLSs' job functions and responsibilities, CN introduced a chart outlining the affidavit evidence adduced by both parties about the varying duties and responsibilities of class members who held the positions of MCO and trainmaster. CN argued that this chart illustrates that the level of authority and managerial responsibility of class members varies significantly. For example, some MCO's deposed that they have authority to approve overtime and to perform job performance appraisals of unionized employees without approval or oversight from higher levels of CN management. In contrast, other MCOs deposed that they have no authority to make any changes to work schedules or to provide input into performance evaluations.

[68] Similarly, some class members who held the position of trainmaster said that they have authority to directly lay off unionized employees or to make decisions about required staffing levels that sometimes cause lay-offs, while another class member asserted that trainmasters cannot unilaterally lay-off employees. Several trainmasters gave evidence that they have the authority to

remove an employee from service where drugs or alcohol are involved and in the event of a serious rule violation. There was no evidence to the contrary. Several trainmasters indicated that they have authority to impose demerit points and to level discipline, while others said that they never disciplined employees or they claimed to have only a limited role in discipline.

[69] In addition, CN's tendered affidavit evidence indicated that FLSs working in more remote locations exercise greater decision-making authority than FLSs working in busier, more urban locations where more senior-level managers are present in the workplace. For example, one trainmaster, Norman Hart, deposed that he supervised only 16 yard employees and inbound and outbound train crews when he worked at CN's largest rail yard near downtown Toronto, whereas he supervised well over 100 employees when he worked at a smaller yard in Hornepayne, Ontario. His evidence indicated that he exercised more significant decision-making authority over unionized staff when he worked in Hornepayne where there was no higher-level manager within a several hundred mile radius.

[70] CN's secondary line of attack against the proposed common issue of misclassification involved adducing evidence intended to refute the plaintiff's assertion that FLSs were not properly classified as managers. CN offered evidence showing the following attributes of FLSs, as described by the motion judge, at paras. 68-69:

- FLSs are expected to play a pivotal role in managing CN's workforce because they are the primary point of contact between management and unionized employees.

- Many FLSs undergo extensive training to acquire the management skills required for their jobs.

- Some FLSs have the authority to approve overtime and leaves of absence, to co-ordinate crews, to schedule shifts, to approve changes to the vacation schedule, to complete job performance appraisals, to administer collective agreements and to oversee compliance with safety legislation.

- FLSs carry out their role dependent upon their experience and aptitudes, for example, some FLSs manage large numbers of employees whereas others exercise control over significant budgets.

F. ANALYSIS

[71] As discussed, the success of the proposed class action is contingent on the threshold issue whether CN misclassified FLSs as managerial employees. The overarching dispositive question on appeal is whether the allegation of misclassification raises a certifiable common issue. In resolving this question, it is necessary to address the following three questions raised by the parties:

> (1) Did the motion judge err by creating a new test for certification?
>
> (2) Did the motion judge err by rejecting the plaintiff's proposed common issue of misclassification?
>
> (3) Did the motion judge err by reframing a common issue concerning the minimum requirements to be a managerial employee at CN?

(1) Did the Motion Judge Err by Creating a New Test for Certification?

(a) Plaintiff's Submissions

[72] The plaintiff contends that the motion judge erred by applying a new test for certifying common issues. The relevant passage from the motion judge's reasons states, at paras. 301-302:

> That the some basis in fact test is a necessary but not sufficient condition for certification makes sense because the criteria for certification are not just factual matters. In so far as the criteria are factual, the plaintiff is more favourably treated than is the defendant. However, all the criteria are issues of mixed fact and law, and the legal and policy side of the class definition, commonality, preferability, and the adequacy of the

> representative plaintiff are matters of argument and not just facts, although there must be a factual basis for the arguments. While defendants may have to push the evidentiary burden up a steep hill, they are on a level playing field with the plaintiffs in arguing the law and policy of whether the various criteria have been satisfied.
>
> Applying the some basis in fact test to the case at bar, Mr. McCracken must show that there is some basis in fact for his cause of action and some basis in fact for each of the certification criteria other than the first one. CN, however, if it is able to do so, may show that there is no evidentiary basis for the claims or the certification criteria. If the evidentiary basis is established, then whether the certification criteria have been satisfied remains a matter of argument between Mr. McCracken and CN on a level playing field.

[73] The plaintiff interprets the motion judge's comment that the "some basis in fact" test is a "necessary but not sufficient condition for certification" to mean that the motion judge not only required him to show some basis in fact for the proposed common issues, but that he also imposed "an additional burden of proving, on a balance of probabilities, and as a matter of law and policy, that a common issue ought to be certified." According to the plaintiff, the motion judge viewed this "additional burden" as "levelling the playing field" between plaintiffs and defendants on a certification motion.

[74] The plaintiff complains that the motion judge's approach to establishing commonality is "unsupported by any class action jurisprudence and is at odds with the purpose of class proceedings." He contends that the motion judge failed

to certify the proposed misclassification issue because he confused what should have been a factual analysis with a legal and policy analysis.

(b) The Motion Judge Did Not Apply a New Test for Certification

[75] The “some basis in fact” principle is meant to address two concerns. First, there is a requirement that, for all but the cause of action criterion, an evidentiary foundation is needed to support a certification order.

[76] Second, in keeping with the procedural scheme of the *CPA*, the use of the word “some” conveys the meaning that the evidentiary record need not be exhaustive, and certainly not a record upon which the merits will be argued. This legislative intention is reflected in s. 2(3)(a) of the *CPA*, which – although honoured more often in the breach – requires the proposed representative plaintiff to bring a motion for certification within 90 days of the filing of, or the expiry of the time for filing of, a statement of defence or notice of intent. Thereafter, leave of the court is required to bring the motion: see s. 2(3)(b).

[77] With the exception of the motion judge’s suggestion that the “some basis in fact” test applies to the cause of action requirement in s. 5(1)(a) of the *CPA*, his reasons do not bear out the plaintiff’s suggestion that he imposed an additional and unprecedented burden of proof on the plaintiff at the certification stage. In my view, the motion judge was simply explaining that the legal principles governing the criteria for certification have to be considered in the context of the

evidentiary record filed in support of the motion. It is clear from *Hollick* that, were it otherwise, the certification criteria would be argued in the air.

[78] An example of what the motion judge meant by his comment that the "some basis in fact test is a necessary but not sufficient condition for certification" is provided by the preferable procedure analysis in *Caputo v. Imperial Tobacco Ltd.* (2001), 236 D.L.R. (4th) 348 (Ont. S.C.J.). The court there stated, at para. 67: "[I]n as much as the defendants cannot simply assert to any effect that there are other procedures that would be preferable without an evidentiary basis, neither can the plaintiffs satisfy the onus with argument alone. It must be supported by some evidence."

[79] This point applies equally to the common issues criterion in s. 5(1)(c) of the *CPA*. In assessing whether there is some basis in the evidence to establish the existence of common issues, the motion judge must consider the pertinent legal principles that apply to the commonality assessment with reference to the evidence adduced on the motion.

[80] As indicated, the notable exception is that the "some basis in fact" test does not apply to the first criterion in s. 5(1)(a) that the pleadings disclose a cause of action. This criterion does not require the plaintiff to lead evidence showing a basis in fact for the allegations in the pleadings: see *Hollick*, at para. 25. The pleadings must contain sufficient factual allegations to establish the

necessary elements of the cause of action asserted. However, unless the allegations of fact are patently ridiculous or incapable of proof, the facts must be accepted as pleaded for the purpose of determining if the plaintiff has stated a viable cause of action.

[81] It is not clear to me what the motion judge had in mind with his remarks about the plaintiff and defendant being on a level playing field on the certification motion. However, I do not accept the plaintiff's submission that the motion judge imposed an impermissibly higher burden on him to show commonality. The motion judge found that the misclassification issue required individual assessments of the class members. For the reasons that follow, I agree with his conclusion on this point.

(2) Did the Motion Judge Err by Rejecting the Plaintiff's Proposed Common Issue of Misclassification?

(a) Governing Principles on Common Issues

[82] This court's reasons in *Fulawka*, at para. 80, describe the definition of common issues in s. 1 and the requirement in s. 5(1)(c) of the *CPA* that the claims of the class members raise common issues. *Fulawka* also sets out, at para. 81, the legal principles concerning the common issues requirement that have emerged from the case law, citing *Singer v. Schering-Plough Canada Inc.,* 2010 ONSC 42, 87 C.P.C (6th) 276, at para. 140. And, as noted in *Fulawka*, at para. 82, it is up to the motion judge to decide which of the governing legal

principles concerning the common issues requirement are contentious in any particular case.

[83] As will become clear in the ensuing analysis, the contentious legal principles governing the commonality inquiry in the present case are the following:

> The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] S.C.R. 534, at para. 39.
>
> With regard to the common issues, "success for one member 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." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Dutton*, at para. 40; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 46 B.C.L.R. (4th) 234, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee,* 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-46 and 160.
>
> A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, at para. 39, aff'd (2001), 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp.* (2002), 27 C.P.C. (5th) 155, (S.C.J.), aff'd (2003), 39 C.P.C. (5th) 151 (Div. Ct.).
>
> Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that

> are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia,* 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 29.

(b) Plaintiff's Submissions on his Proposed Common Issue of Misclassification

[84] The plaintiff contends that misclassification cases are "inherently amenable to resolution by way of class proceeding." In support of this view, he relies on *obiter* comments by the motion judges in *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148, 101 O.R. (3d) 93, and in *Fresco v. Canadian Imperial Bank of Commerce* (2009), 84 C.C.E.L. (3d) 161 (Ont. S.C.), about misclassification class actions.

[85] He also points to a "substantial body" of decisions by the Canadian Industrial Relations Board and its predecessor, the Canadian Labour Relations Board (collectively, the "Board"), which he says show that group-wide determinations of managerial classification can be made: *Re Algoma Central Marine*, 2010 CIRB 531, [2010] C.I.R.B.D. No. 40, aff'd 2011 FCA 94, [2011] F.C.J. No. 340; *Re NorthwesTel Mobility Inc.*, 2006 CIRB 346, [2006] C.I.R.B.D. No. 4; *Québec-Téléphone v. Syndicat des agents de maîtrise de Québec-Téléphone*, [1996] C.L.R.B.D. No. 36, aff'd (1997), 75 A.C.W.S. (3d) 1056 (Fed. C.A.); *International Association of Machinists and Aerospace Workers v. Quebecair* (1979), 33 di 480 (CLRB no. 163); *Cominco Ltd.* (1980), 40 di 75

(CLRB no. 240); and *Island Telephone Company Limited* (1990), 81 di 126 (CLRB no. 811).

[86] The plaintiff then argues that the motion judge was satisfied that the evidence shows "some basis in fact" to find that the misclassification issue can be determined on a class-wide basis. He especially relies on the motion judge's following statements, at paras. 70 and 293:

> For his part, Mr. McCracken provided evidence about the role of first line supervisors, and his evidence shows that there is some basis in fact for his allegations that first line supervisors are not managers under the *Code*. There is evidence that at least some of them: (a) do not have authority to hire, terminate, promote, demote, or transfer employees; (b) do not represent management in collective bargaining or in grievance procedures; (c) have limited authority to discipline restricted to investigating and recommending minor discipline; and (d) are not involved in setting budgets, CN policies, or its Service Plan.
>
> …
>
> ... Mr. McCracken has provided some basis in fact for the proposition that all first line managers are non-managers. Therefore, he might assert that the commonality of the first line supervisors is established as a common issue to be decided at the common issues trial.

[87] The plaintiff says that, having made these factual findings, the motion judge erred by refusing to certify his proposed misclassification issue given that this issue is indisputably a substantial and necessary ingredient of each class member's claim.

(c) The Motion Judge Did Not Err by Concluding that the Plaintiff's Proposed Misclassification Issue Cannot be Determined on a Class-wide Basis

[88] There are three flaws in the plaintiff's argument:

> (i) the cases he relies on do not establish that misclassification cases are inherently amenable to resolution by way of a class action;
>
> (ii) the motion judge did not find a basis in fact showing that the plaintiff's proposed misclassification issue could be resolved commonly; and
>
> (iii) the plaintiff's evidence fails to establish the existence of a common issue of misclassification.

[89] I discuss each flaw in turn.

(i) Misclassification cases are not necessarily appropriate for certification

[90] The plaintiff relies on Strathy J.'s statement in *Fulawka*, at para. 145, that: "misclassification cases are appropriate for certification due to commonality of employment functions and common treatment by the employer." He also relies on the following comments by Lax J. in *Fresco*, at para. 54, distinguishing misclassification cases from the claim for overtime wages in the proceeding before her:

> A useful place to begin is to compare the kind of claim that is advanced in this proceeding with the kind of claims that are advanced in the misclassification cases. *In those cases, commonality arises from the employees' identical or similar job duties and the determination by the employer that it is not required to pay overtime to employees with these duties.* The question for the common issues judge is whether the employees' duties

> entitle them to overtime within the meaning of the applicable statutes and regulations. This can be assessed without examining individual claims. Success for one does mean success for all... [Emphasis added. Footnote and citation omitted.]

[91] These comments do not assist the plaintiff. I agree with the motion judge's observation, at para. 385, that these comments cannot be taken as a categorical assertion that every misclassification case is inevitably certifiable as a class action. On the contrary, these comments make it clear that misclassification cases are amenable to certification where the similarity of job duties performed by class members provides the fundamental element of commonality.

[92] Indeed, after the present appeal was argued, Strathy J. released a decision refusing to certify a proposed class action for unpaid overtime: see *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377, [2012] O.J. No. 1853. That action was based on the allegation that the defendant bank had misclassified class members as managerial employees. Strathy J. concluded that the actual job duties performed by the members of the proposed class differed significantly, which would make it impossible to assess on a common basis whether the defendant bank had properly classified them.

[93] The Board decisions that the plaintiff relies on likewise do not support his position. In these cases, the Board made determinations of managerial status under s. 3 of Part I of the *Code* for the purpose of deciding if employees should be included in the bargaining unit. Employees who perform "management

functions” are excluded from the collective bargaining rights conferred by Part I of the *Code* because the definition of “employee” in s. 3 excludes persons who perform “management functions” from the protection of Part I.

[94] A review of these decisions – and other Board decisions that CN cites – reveals that the Board has made group-wide determinations of managerial status in cases where the job tasks of the affected employees are defined by a common job description and where there was no dispute that the employees perform similar tasks, or where the parties consented to a group determination by the Board: see e.g. *Algoma Central,* at para. 13; *NorthwesTel*, at paras. 10-14; and *Vancouver Wharves Ltd*., [1975] 1 Can L.R.B.R. 162.

[95] Contrary to the plaintiff’s proposed reading of these decisions, in *Island Telephone*, the Board indicated that it carefully reviewed the individual circumstances of the employees in question. In addition, where the case involves classifying numerous positions and where there are varying levels of responsibility between positions and within the same position, the Board has received extensive oral and documentary evidence to determine whether a particular employee’s position is managerial in nature: see, e.g., *Canada Post Corp.* (1989), 79 di 35 (CLRB no. 767); *Canadian Union of Bank Employees v. Bank of Nova Scotia* (1977), 21 di 439 (CLRB no. 91); and *Quebecair*.

Moreover, even in cases where the employees' job descriptions were substantially similar, the Board considered the particular circumstances of individual employees in isolated locations and concluded that, unlike employees in more centralized work places who reported to higher-level managers, the employees in more isolated locations actually performed management functions: see *Québec-Téléphone*, at para. 40; *British Columbia Telephone Co.* (1977), 33 di 361 (CLRB No. 98), at p. 378.

(ii) The motion judge did not find a basis in fact showing that the plaintiff's proposed misclassification issue could be resolved commonly

[96] The second shortcoming in the plaintiff's argument is his contention that the motion judge found there is a basis in fact establishing that the misclassification issue could be resolved on a class-wide basis. The plaintiff relies on the motion judge's comment that his evidence "shows that there is some basis in fact for his allegations that [FLSs] are not managers under the *Code*." However, the motion judge tempered this observation with his ensuing comment, at para. 70, that there is evidence that "*at least some of them*" do not exercise managerial functions (emphasis added).

[97] And while the motion judge said, at para. 293, that "Mr. McCracken has provided some basis in fact for the proposition that all first line managers are non-managers", he concluded that same paragraph with the following remark:

> However, as I will explain later in these Reasons for Decision, accepting Mr. McCracken's submission as correct is to accept as a given truth something that is patently or obviously untrue because there are some questions that are not common issues and rather are fundamentally or intrinsically or unavoidably individual questions.

Following up on this point, the motion judge later said, at para. 333, that: "[t]he common label of being a first line supervisor tells almost nothing about entitlement [to overtime pay] under the *Code*."

[98] Thus, when his reasons are viewed in their entirety, I do not think that the motion judge can accurately be said to have found that there is a basis in fact showing that the plaintiff's proposed misclassification issue could be determined on behalf of the entire class.[12]

[99] I will now explain why such a factual finding was not available when the applicable legal principles on commonality are applied to the evidentiary record.

(iii) The plaintiff's evidence fails to establish the existence of a common issue of misclassification

(a) What the plaintiff's evidence needed to establish

[100] The plaintiff filed evidence from multiple class members indicating that they do not have real decision-making authority and asserting that CN has misclassified them as managers or as employees who exercise managerial

---

[12] I recognize that the motion judge commented, at para. 345, that "Mr. McCracken has met the low standard of showing that there is some basis in fact for his proposed common issues." However, this comment must be read in light of his finding, at para. 331, that the plaintiff's proposed misclassification question – together with various other of his proposed questions on the Revised List – "cannot be determined on a class-wide basis and rather require individual questions to be answered."

functions. However, to raise common issues, more is required than simply showing that some members of the class have similar claims. This point was made in *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.), at para. 24:

> But neither is it enough to show that there is a group of similarly situated individuals with respect to claims against the defendants. Evidence of the mere existence of multiple plaintiffs with a similar cause of action against the defendants does not in and of itself establish that the claims should be litigated as a class action. The claims that those individuals could assert must also be capable of raising common issues.

[101] To satisfy the commonality requirement in s. 5(1)(c) of the *CPA*, the evidence must afford some basis in fact to find that the claims of individual class members raise common issues as defined by the case law.

[102] The plaintiff's proposed misclassification common issue asks:

> Are the class members excluded from overtime eligibility under contract (express or implied) and/or under the [*Code*]?

[103] The plaintiff is required to show that there is a basis in fact to find that this proposed common issue satisfies the apposite legal principles concerning commonality, which are repeated here for ease of reference (citations omitted):

> The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis.
>
> With regard to the common issues, "success for one member 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." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, 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 individual claimant.
>
> Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient".

[104] For these legal principles to be satisfied in the context of a proposed common issue of misclassification, the plaintiff's evidence must establish some basis in fact to find that the job functions and duties of class members are sufficiently similar that the misclassification element of the claim against CN could be resolved without considering the individual circumstances of class members. In the absence of such evidence, there is no basis in fact to find that resolving the proposed common issue would avoid duplication of fact-finding or legal analysis, or that success for one class member will mean success for all, or that individual findings of fact would not be required with respect to each individual claimant. Likewise, in the absence of this type of evidence, the requirement that the common issue should not be framed in overly broad terms is not met. That is because the motion judge could not be satisfied that the

plaintiff's proposed abstract question will not "break down into individual proceedings."

(b) The plaintiff's evidence

[105] The plaintiff's evidence, as summarized above at paras. 62-64, includes affidavits from class members who held several different FLS positions. This evidence indicates that these class members lacked real decision-making authority in managerial matters, including the powers of hiring and firing, imposing discipline, and setting budgets and policies.

[106] These class members spoke more generally about the duties and responsibilities of other FLSs – including ones they had worked with or ones they had spoken to. However, even in this latter respect, the affiants' assertions are not evidence that a court could rely on as establishing a basis in fact for the existence of a common issue of misclassification because the assertions in question are vague and anecdotal.

[107] For example, Mr. Anderson deposed: "During my time at CN, I have worked primarily in the South Western Ontario region, including in Windsor, Sarnia and London. At all of these locations, in my experience, the FLSs had no different level of authority than described above." Mr. Anderson does not indicate what FLS job positions he is referring to, the number of class members he has in mind, or why he is well-positioned to assess the level of authority exercised by these class members.

[108] Equally vague and unhelpful is the following statement in Mr. Caissie's affidavit:

> I understand, from speaking with various colleagues throughout my employment that the level of supervision I exercised as Trainmaster, Manager – Crew Utilizations and Manager – Corridor Operations is in line with that exercised by other FLSs employed by CN in both large and small centres across the country.

[109] Mr. Caissie does not identify the "various colleagues" he spoke with, nor indicate the positions held by the "other FLSs" to which he refers. He also fails to explain why these colleagues were well-positioned to comment on the level of supervision exercised by FLSs in both large and small centres across the country.

[110] Even considering rule 39.01(4) of the *Rules of Civil Procedure*, which permits an affidavit on a motion to contain statements of the deponent's information and belief, this evidence falls short of meeting the requirement for specifying the source of the information and belief: see *Smith v. National Money Mart Company*, [2007] O.J. No. 1507 (S.C.). In sum, these statements are simply bald, sweeping and conclusory assertions. They do not constitute evidence showing a basis in fact for the claim that the class members' job duties and responsibilities across all of CN's workplaces are sufficiently similar that a common issues trial judge could determine on a class-wide basis whether CN properly classified them as managerial employees.

[111] The plaintiff, in responding to CN's evidence showing a lack of uniformity in the job duties and responsibilities of class members, also filed affidavits from two union leaders at CN: Rex Beatty and John Dinnery. Mr. Beatty has never held a FLS position, while Mr. Dinnery held a FLS position from 1979-1982 – long before the start of the class period.

[112] Mr. Beatty described his experience working for unions representing CN employees. The relevant parts of his evidence are confined to observations about the authority of the trainmaster position, which is held by about 18 percent of current class members. For example, he stated: "At no location do trainmasters have the authority to hire, discipline, or terminate employees, to negotiate contracts with the union, or to participate in the grievance procedure beyond its most preliminary stage."

[113] Mr. Dinnery's evidence primarily describes his involvement with FLSs in his role as president of the United Steel Workers Union, Local 2004 ("USW 2004"). The USW 2004 represents CN employees in the engineering division. Employees in the bargaining unit represented by USW 2004 are subject to Collective Agreement 10.1, which is one of approximately 40 collective agreements governing CN's unionized workforce. Mr. Dinnery said:

> Because the Collective Agreement is the same from coast to coast, the authority of [FLSs] under the Agreement is similarly uniform. Based on my experience in the union leadership, I believe that the

> union's dealing with [FLSs] are exactly the same across Canada. Indeed, under the Collective Agreement, employees must be treated in the same manner by their supervisors.

[114] This evidence reveals several inaccuracies and limitations. First, the premise for Mr. Dinnery's claim that the authority of FLSs is uniform appears to be that their authority is defined by the collective agreement. However, the collective agreement only dictates the terms and conditions of the work performed by employees who are supervised by the FLSs. In other words, the uniformity is not of the supervisors but of the supervised.

[115] Second, his statement ignores that there are different collective agreements that apply to the employees supervised by FLSs. Differences in the collective agreement provisions concerning matters such as imposing discipline, lay-offs, and setting hours of work undermine the premise of uniformity in the FLSs' authority.

[116] Third, Mr. Dinnery's evidence is limited to discussing the role of FLSs in CN's engineering division. He says nothing about the role of FLSs in the transportation or mechanical departments, or in the areas of sales and marketing or support services. His evidence is further limited to describing the role played by FLSs in imposing discipline and participating in the grievance process. In the former respect, he acknowledged that under the collective agreement with USW 2004, FLSs have authority to impose up to 15 demerit points for minor infractions

without needing authorization from higher management to do so, subject to the employee's right to request a formal investigation by more senior management. Mr. Dinnery did not discuss the other indicia of management functions, such as the extent of FLSs' authority over matters such as budgeting, scheduling hours of work, deciding staffing levels, ordering lay-offs, or participating in policy-making.

(c) The lack of evidence of job descriptions for FLS positions

[117] On the certification motion, there was no evidence in the form of job descriptions for the various FLS positions. Class counsel asked CN's representative, Mr. Lagacé, to undertake to "provide copies of the various job descriptions [for FLSs] in the various salary grades as they existed in 1999." CN refused on the basis that the undertaking was not within the proper scope of a cross-examination on an affidavit and on the basis that "it is not relevant to the issues before the court". The plaintiff did not bring a refusals motion to compel the requested undertaking.

[118] CN asserts on appeal that it does not have any formal job descriptions for FLS positions. In oral argument, the plaintiff asked the court to draw an adverse inference on this point because of CN's refusal to provide any documentation in response to the questions put to the deponent.[13] However, there is no adverse

[13] The record suggests that CN at least had a job description for the FLS position of trainmaster. The record includes a 2007 report by an inspector with Human Resources and Social Development Canada under Part III of the *Code*, regarding his investigation of a trainmaster's complaint that he was improperly excluded from the overtime provisions of the *Code* because CN misclassified him as a manager. The inspector commented: "It is my determination, after reviewing the comments made by both parties, *the*

inference that could be drawn that would advance the plaintiff's request to certify the action. Evidence of job descriptions is only relevant to the commonality criterion. In considering as a whole the evidence of the nature of the job functions performed by class members, the court cannot go so far as to infer that each job is identical or substantially similar. CN has adduced evidence to the contrary suggesting that individuals with the same job title had different duties and responsibilities.

(d) The plaintiff's suggested use of "sub-groups"

[119] The plaintiff – in apparent recognition of the lack of evidence showing sufficient commonality of the job functions and responsibilities of class members – suggested on appeal that the misclassification issue could be adjudicated based on "sub-groups". However, he did not offer any concrete guidance on how to sub-divide the class, such as by way of job title, or by the location where class members worked (e.g., urban centres versus more isolated areas). Instead, the plaintiff suggested using the sub-groups that the motion judge identified in approved common issue 3, namely: (1) class members who clearly meet the minimum managerial criteria; (2) those who clearly could not meet these criteria; and (3) those whose status remains to be determined.

---

job descriptions of the Trainmaster submitted by both Mr. [H] and CN Rail and the above-noted cases, ... that Mr. [H] did perform sufficient managerial functions to warrant his exclusion from the Hours of Work provision of the *Code*" (emphasis added).

[120] Applying the plaintiff's suggested lines of division would not assign individual class members to a particular sub-group. The common issues trial judge would need to identify the indicia of managerial functions and would then need to apply these indicia to members of the class, without any assurance that this application could be done commonly, that is, without the need to examine the individual circumstances of most, if not all, of the 1,550 class members.

(e) Plaintiff's position in reply

[121] In his reply factum, the plaintiff contends that a trial judge would substantially advance the case for all class members by making a class-wide determination of the various indicia of management that are relevant within the organizational and operational context of CN. He goes on to identify three possible scenarios that might arise after the trial judge identifies these criteria:

> In particular, a trial judge could substantially advance the case for all class members by first making a class-wide determination of the various indicia of management specifically relevant within the organizational and operational context of CN. A trial judge could then make one of several determinations depending on the evidence led at trial. *One determination would be to move to an individual assessment process in which "the common issues judge could use the considerable resources of the CPA to achieve manageable individual proceedings" in order to determine, on a principled and consistent basis, which of the class members (or groups of class members) are not management.* A second determination could find that the class as a whole, or sub-groups within the class, do or do not have sufficient independent authority under the above criteria to qualify

> as management. A third determination could be that some of the common indicia may be determined, on a class-wide basis, leaving only limited individual inquiries. [Footnotes omitted. Emphasis added.]

[122] The next section of my reasons explains why determining the various indicia of management will not substantially advance the case for all class members. I make three observations about the plaintiff's position in reply.

[123] First, the plaintiff's Revised List did not refer anywhere to the need for the trial judge to identify the legal and factual criteria for deciding whether class members were properly classified as managerial employees. In submitting that "a trial judge could substantially advance the case for all class members by first making a class-wide determination of the various indicia of management", the plaintiff is arguing, in effect, that the action should be certified so that the common issues trial judge can determine what the common issues should be.

[124] At a conceptual level, the plaintiff's approach is fundamentally wrong. The sentiment expressed in *Caputo*, at para. 56, applies here:

> [T]he judge presiding over the "common issues trial" is there in the role of arbiter of issues that have already been set out. That role is to make findings with respect to issues certified for trial, rather than to decide what issues are to be resolved. Setting the issues for trial is the role of the motions judge on certification.

[125] In other words, it is a misapplication of the *CPA* to certify an action where the common issues trial judge is expected to formulate the issues for trial. I would add that while the motion judge on certification may amend or revise common

issues, it is the plaintiff who bears the responsibility at first instance for proposing the common issues and for adducing evidence demonstrating that those issues exist. The plaintiff must not abdicate this responsibility in the hope that the motion judge will formulate certifiable issues.

[126] Second, the plaintiff's submissions reveal a practical defect. The plaintiff speaks of the common issues trial judge making determinations of the indicia of management that are "specifically relevant within the organizational and operational context of CN". However, the evidentiary record reveals that the "organizational and operational context of CN" differs for individual class members depending on factors such as which FLS job title they hold, where they work and whether they work alongside other FLSs or higher-level managers. The effect of this evidence is that there are no common issues but rather an amalgam of individual assessments. As stated by Cullity J. in *Risorto v. State Farm Mutual Automobile Insurance Co.* (2007), 38 C.P.C. (6th) 373 (Ont. S.C.), at para 45: "[i]f an issue is one that the court at trial could decide only by reference to the facts relating to the claim of each class member, it lacks commonality."

[127] Finally, the plaintiff acknowledges in these submissions that, after the common issues trial judge identifies the indicia of managerial status, "one determination would be to move to an individual assessment process" for deciding which of the class members are not management. This acknowledgement amounts to a full and complete answer to the certification

requirement in s. 5(1)(c) because it is an admission that the plaintiff's evidence does not provide a basis in fact to find that the misclassification issue can be resolved without the need for individual assessments of class members.

(f) Summary

[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. 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.

[129] Finally, determining the minimum requirements to be a managerial employee at CN would not advance the claims of class members in any significant way.

(3) **Did the Motion Judge Err by Reframing a Common Issue Concerning the Minimum Requirements to be a Managerial Employee at CN?**

[130] The motion judge rejected the plaintiff's proposed misclassification common issues on the basis that they lacked commonality. Having done so, he

drew up a set of revised common issues for certification, at para. 351, which included the following common issue:

> In accordance with the meaning under s. 167 (2) of the [*Code*], of "employees who are managers or superintendents or exercise management functions", what are the minimum requirements to be a managerial employee at CN?

The motion judge held that this "minimum requirements" issue could be determined on a class-wide basis and that resolving it would substantially advance the litigation.

[131] I do not agree with the motion judge's conclusion that the issue he proposed is a certifiable common issue. The motion judge rejected the plaintiff's various formulations of a misclassification common issue based on his finding that the element of commonality is lacking. In that, he was correct.

[132] Where the motion judge fell into error was in attempting to recast common issues that were, in his view, amenable to certification. Despite his efforts to reformulate the common issues, the evidentiary shortcomings remained. A core of commonality either exists on the record or it does not. In other words, commonality is not manufactured through the statement of common issues. The common issues are derived from the facts and from the issues of law arising from the causes of action asserted by class members and not the other way around.

[133] 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 proceeding in any significant way. The motion judge seemingly acknowledged this point, as reflected by his remarks, at para. 359, that "the heart of the matter remains whether the first line supervisors were or were not managers, which is unanswered."

[134] 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.

[135] In the absence of an evidentiary basis for certifying a common issue that would resolve the misclassification allegation, the proposed class action for unpaid overtime wages simply collapses.

G. ADDITIONAL ISSUES

[136] On the Rule 21 motion, the motion judge concluded that the Superior Court of Justice has jurisdiction to enforce the provisions of Part III of the *Code* pertaining to overtime and holiday pay. He reached this conclusion based on his view that the *Code* provisions are terms of CN's employment contracts "by force of statute". CN contends that this conclusion is in error.

[137] Given that I see no basis in fact for the proposed common issue of misclassification, it is not necessary to consider the parties' arguments concerning jurisdiction. Nor is it necessary to consider CN's submission that the motion judge should have struck the plaintiff's claims for breach of contract for failing to state a proper cause of action. However, in not addressing these issues, I do not wish to be understood as endorsing the motion judge's reasons on them.

[138] The parties also object to the following rulings by the motion judge on the Rule 21 motion and on the certification motion:

> 1. Did the motion judge err in staying the plaintiff's claims for breach of express or implied terms of the class members' contracts of employment?
>
> 2. Did the motion judge err in dismissing the plaintiff's claim for holiday pay?
>
> 3. Did the motion judge err in striking the plaintiff's pleading in negligence for policy reasons without the benefit of a proper record?
>
> 4. Did the motion judge err in refusing to certify the proposed common issue concerning contractual terms?

> 5. Did the motion judge err in refusing to certify any of the proposed common issues concerning the duty in contract, the duty of good faith, and a duty in tort?
>
> 6. Did the motion judge err in finding that an aggregate assessment of damages would not be available?
>
> 7. Did the motion judge err in finding on the certification motion that a class proceeding would be the preferable procedure?

[139] Again, given my reasons on the absence of a proper common issue concerning the fundamental question of misclassification, it is not necessary to assess these questions individually. However, as the first five of these questions point to a common theme about the scope of a motion judge's authority on a Rule 21 motion and on an accompanying motion for certification, I make the following comments.

[140] The motion judge made the following rulings and observations that, in my view, misconstrue the extent of his authority under the *Rules* and under the relevant provisions of the *CPA*:

> - A consequence of the certification and Rule 21 motions is that several common issues will have already been determined (at para. 14).
>
> - The function of a Rule 21 motion is not to adjudicate the genuine merits of a claim or defence, but there is a way on any motion to obtain judgment on the merits by way of a motion for judgment. It is appropriate to use the motion for judgment jurisdiction under rule 37.13(2) in this case to dismiss the plaintiff's claim for holiday pay on the merits (at paras. 211-12).

- It is also appropriate to use the motion for judgment jurisdiction and the jurisdiction provided by ss. 12 and 13 of the *CPA* to decide common issues on their merits before the common issues trial (at paras. 228-31).

- It would be propitious to the advancement of the class action and fair to both the class members and CN to exercise the court's jurisdiction to decide that the terms of the *Code* are terms of the employment contracts by force of law (at para. 232).

- The plaintiff's claims for breach of express or implied contract terms should be stayed (at paras. 228-34).

- Four of the six questions on the list of approved common issues can and should be answered before the common issues trial and these answers, which are readily available, would substantially advance the class member's litigation against CN (at para. 353).

- The answer to common issue two is now known as a by-product of CN's motion under rule 20.01(3)(a). The answer to the question is that compliance with the overtime provisions of the *Code* is by force of statute an implied term of the contracts of employment between CN and the FLSs (at para. 357).

- Answering common issue two substantially advances the litigation and makes it unnecessary or moot to answer several factually or legally more difficult questions (at para. 357).

- Common issues four and five are subjunctive tense questions that are readily answered in the subjunctive. On the assumption that CN did not pay overtime pay when it was required to do so and on the assumption that CN's as yet

> unpleaded defence failed at the common issues trial, then the requirements for an unjust enrichment claim would be satisfied at the common issues trial and CN would have to disgorge its ill-gotten gains, once those gains had been calculated (at para. 358).

[141] While a Rule 21 motion permits a motion judge to find that a pleaded cause of action is wholly without merit, a motion judge should not convert such a motion into a motion for judgment using rule 37.13(2)(a) unless the parties agree that all relevant evidence is before the court and they have had a full opportunity to argue their positions on the motion for judgment: see *Royal Bank of Canada v. Rastogi*, 2011 ONCA 47, at para. 22, citing *CMLQ Investors Company v. CIBC Trust Corporation* (1996), 3 C.P.C. (4th) 62 (Ont. C.A.), at para. 8. Those circumstances did not exist here.

[142] Nor do I agree that the provisions in ss. 12 and 13 of the *CPA* confer jurisdiction on a certification judge to decide the common issues before the common issues trial. Section 12 is a purely procedural provision that allows a motion judge to make orders concerning the conduct of a class action, while s. 13 empowers a motion judge to stay a related proceeding.

[143] Moreover, deciding common issues on the certification motion is antithetical to the well-established principle enshrined in *Hollick*, at para. 16, that the decision to certify a class action is not a decision on the merits of the action.

A key reason for this is that the evidentiary record at the certification stage is far from complete.

[144] I also note that the motion judge fundamentally altered the plaintiff's proposed common issues. While this is a power that may be exercised by the motion judge, it should be exercised with caution and restraint and should be the exception rather than the norm.

[145] Given his decision to refashion the common issues, the motion judge granted certification subject to the condition that a litigation plan be settled. In my view, motion judges should not, as a matter of common practice, bifurcate the requirement in s. 5(1)(e)(ii) of the *CPA* to produce "a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class". Nor should the litigation plan requirement be treated as a mere afterthought.

[146] Preparing a litigation plan requires the plaintiff to translate his or her analytical proposal for a class proceeding into practice by having to explain, in concrete terms, the process whereby the common issues, and any remaining individual issues, will be decided. The need for a clear explanation of how a proposed common issue would be resolved for all class members on a common basis serves as an important check in considering if the plaintiff has met the common issues and preferable procedure criteria.

H. CONCLUSION AND DISPOSITION

[147] The absence of commonality is fatal to the certification of this action. I would allow CN's appeal and cross-appeal from the certification order and would set aside that order. The plaintiff's appeal from the motion judge's certification order is dismissed. Given my proposed disposition of the appeals from the certification order, I would dismiss the parties' appeals from the motion judge's order under Rule 21.

[148] In light of this result, the motion judge's costs order should be set aside. CN shall have its costs of the certification motion, to be fixed by the motion judge.

[149] The parties may make written submissions on the costs of the appeal, with the respondent/defendant's submissions to be delivered within 10 days of the release of these reasons and the appellant/plaintiff's submissions to be delivered within 10 days thereafter.

Released: "WKW"

"W.K. Winkler CJO"
"I agree John Laskin J.A."
"I agree E.A. Cronk J.A."

APPENDIX A: PLAINTIFF'S REVISED LIST OF COMMON ISSUES

Common Issue One – Misclassification

1. Are the Class Members excluded from overtime eligibility under contract (express or implied) and/or under the *Canada Labour Code*, c. L-2, as amended?

Common Issue Two – Overall Breach and Misclassification

2. Did the Defendant breach its contracts of employment with the Class or was it unjustly enriched, by denying eligibility for overtime compensation to some or all Class Members whom CN classified as [FLSs]?

Common Issue Three – Breach of Contract

3.

a) What are the relevant terms of (express or implied or otherwise) of the Class Members' contracts of employment with the Defendant respecting: (i) classification; (ii) regular and overtime hours; (iii) holiday pay; and (iv) the recording of hours worked?
b) Did the Defendant breach any of the foregoing terms? If so how?

Common Issue Four – Duties of the Defendant

4.

a) Did the Defendant have a contractual duty (express or implied) to take reasonable steps to ensure that Class Members were properly classified?
b) If so, did the Defendant breach this duty?
c) Did the Defendant have a statutory duty to take reasonable steps to ensure that Class Members were properly classified?
d) If so, did the Defendant breach this duty?
e) Did the Defendant have a duty to act in good faith in the performance of its contractual and/or statutory obligations to the Class and individual Class Members, including (but not limited to) a duty to take reasonable steps to ensure that Class Members were properly classified?
f) If so, did the Defendant breach this duty?
g) Did the Defendant owe a duty of care to the Class or each Class Member to ensure that individual Class Members were properly classified?
h) If so, what is the standard of care?
i) Did the Defendant fall below the standard of care? If so how?

Common Issue Five – Unjust Enrichment

5.

a) Was the Defendant enriched by (i) failing to compensate the Class Members with pay or overtime pay for hours worked in excess of their standard hours of work, or (ii) failing to compensate the Class Members with holiday pay?
b) If the answer to question 5(a)(i) or (ii) is "yes," did the Class suffer a corresponding deprivation?
c) If the answer to question 5(a)(i) and (b) is "yes," was there any juristic reason for the enrichment?
d) If the answer to question 5(a)(ii) and (b) is "yes," was there any juristic reason for the enrichment?

Common Issue Six – Damages or other Relief

6.

a) If an answer to any of the foregoing common issues is in favour of the Class, what remedies are Class Members entitled?
b) If an answer to any of the foregoing common issues is in favour of the Class, is the Defendant potentially liable on a class-wide basis? If "yes":
    1. Can damages be assessed on an aggregate basis? If "yes":
        a. Can aggregate damages be assessed in whole or in part on the basis of statistical evidence, including statistical evidence based on random sampling?
        b. What is the quantum of aggregate damages owed to Class Members?
        c. What is the appropriate method or procedure for distributing the aggregate damages award to Class Members?

Common Issue Seven – Punitive Damages

7.

a) Is the Class entitled to an award of aggravated, exemplary or punitive damages based upon the Defendant's conduct?
b) If the answer to 7(a) is "yes," can that damage award be determined on an aggregate basis?
c) If the answer to 7(b) is "yes," what is the appropriate method or procedure for distributing the aggregate aggravated, exemplary or punitive damage award to the Class?

APPENDIX B: MOTION JUDGE'S PROPOSED "AMENDED REVISED LIST OF COMMON ISSUES"

Common Issue One – Payment of Overtime Pay

1. Did the Class Members receive overtime pay and or holiday pay under the *Canada Labour Code*, c. L-2, as amended?

Common Issue Two – Breach of Contract

2.

a. What are the terms (express or implied or otherwise) of the Class Member's contracts of employment with the Defendant respecting: (i) classification; (ii) regular and overtime hours; (iii) holiday pay; and (iv) the recording of hours worked?

Common Issue Three – Duties of the Defendant

3.

a. Did the Defendant have a contractual duty (express or implied) to take reasonable steps to ensure that Class Members were properly classified?
b. If so, did the Defendant breach this duty?
c. Did the Defendant have a statutory duty to take reasonable steps to ensure that Class Members were properly classified?
d. If so, did the Defendant breach this duty?
e. Did the Defendant have a duty to act in good faith in the performance of its contractual and/or statutory obligations to the Class and individual Class Members to ensure that Class Members were properly classified?
f. If so, did the Defendant breach this duty?
g. Did the Defendant owe a duty of care to the Class or each Class Member to ensure that individual Class Members were properly classified?
h. If so, what is the standard of care?
i. Did the Defendant fall below the standard of care? If so how?

Common Issue Four – Unjust Enrichment

4.

a. Would the Defendant be enriched by (i) failing to compensate a Class Members with pay or overtime pay for hours worked in excess of his or her standard hours of work, or (ii) failing to compensate the Class Member with holiday pay?

b. If the answer to question 4(a)(i) or (ii) is “yes,” would the Class Member suffer a corresponding deprivation?
c. If the answer to question 4(a)(i) and (b) is “yes,” was there any juristic reason for the enrichment?
d. If the answer to question 4(a)(ii) and (b) is “yes,” was there any juristic reason for the enrichment?

Common Issue Five – Damages or other Relief

5. If the Defendant breached a duty or its contract or was unjustly enriched what remedies are available to the Class Member?

Common Issue Six – Punitive Damages

6. Would the Defendant’s conduct justify an award of aggravated, exemplary or punitive damages?

APPENDIX C: COMMON ISSUES APPROVED BY THE MOTION JUDGE

Common Issue One – Payment of Overtime Pay

Did the Class Members receiv overtime pay under the *Canada Labour Code*, c. L-2, as amended?

Common Issue Two – Contract Terms

What are the terms by force of statute of the Class Members' contracts of employment with the Defendant respecting: (i) classification; (ii) regular and overtime hours; and (iii) the recording of hours worked?

Common Issue Three – Minimum Requirements of Manager Status at CN

In accordance with the meaning under s. 167 (2) of the *Canada Labour Code*, of "employees who are managers or superintendents or exercise management functions", what are the minimum requirements to be a managerial employee at CN?

Common Issue Four – Unjust Enrichment

Would the Defendant be unjustly enriched by failing to compensate a Class Member with pay or overtime pay for hours worked in excess of his or her standard hours of work?

Common Issue Five – Damages or other relief

If the Defendant breached a duty or its contract or was unjustly enriched what remedies are available to the Class Member?

Common Issue Six – Punitive Damages

Would the Defendant's conduct justify an award of aggravated, exemplary or punitive damages?