CITATION: Baroch v. Canada Cartage, 2015 ONSC 3227
DIVISIONAL COURT FILE NO.: 85/15
DATE: 20150615

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: MARC-OLIVER BAROCH, Plaintiff/Respondent

AND:

CANADA CARTAGE DIVERSIFIED GP INC., DIRECT GENERAL PARTNER CORPORATION and CANADA CARTAGE SYSTEM, LIMITED, Defendants/Moving Parties

BEFORE: Lederman J.

COUNSEL: *Eric R. Hoaken, Ian C. Matthews, Larissa C. Moscu, Lauren P.S. Epstein*, for the Plaintiff/Responding Party

Linda Plumpton, Sylvie Rodrigue, Lisa Talbot, Sarah Whitmore, for the Defendants/Moving Parties

HEARD at Toronto: In writing

ENDORSEMENT

INTRODUCTION

[1] The moving parties (collectively "Canada Cartage") seek leave to appeal from the order of Justice Belobaba (the "motion judge") dated January 30, 2015 certifying this action as a class proceeding against Canada Cartage for unpaid overtime. The action is brought on behalf of some 7,800 former and current employees that worked at Canada Cartage between March 1, 2006 and the date of certification and were contractually entitled to receive overtime compensation pursuant to the *Canada Labour Code*, R.S.C. 1985, c.L-2 and its regulations.

FINDINGS OF THE MOTION JUDGE

[2] Of the requirements set out in section 5(1) of the *Class Proceedings Act*, 1992, SO. 1992, c. 6 ("CPA"), the only real issue at the certification motion was the commonality requirement in s. 5(1)(c), i.e. whether the claims raise common issues. The causes of action in breach of contract, negligence, and unjust enrichment were viable. The identifiable class, preferable procedure and adequate representative plaintiff criteria were not contested.

[3] The motion judge rejected Canada Cartage's argument that this is a "misclassification" case, where plaintiffs allege that they were wrongly classified as ineligible for overtime. The motion judge pointed out that if the issue were "simply misclassification and the determination of overtime eligibility the action would not be certified as a class proceeding" and "would collapse" just as it did in the recent Ontario Court of Appeal decisions in *McCracken v. Canadian Railway*, 2012 ONCA 445 ("*McCracken*") and *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 672 ("*Brown*").

[4] Instead, the motion judge found that the proposed class had been predefined to presume overtime eligibility, unlike the circumstances in *McCracken* and *Brown*. That being the case, the motion judge found that eligibility determinations and individual assessments were not at issue. Similar to the Court of Appeal decision in *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444 ("*Fresco*"), the plaintiff in this case focused attention on a policy or practice that is alleged to be systemic and thus common to all of the class members.

[5] The motion judge rooted his decision to certify the claims as a class action on two well-established principles:

- a plaintiff is entitled to frame and advance the case in a way most amenable for determination on a class wide basis; and

- merits-based arguments are irrelevant on certification.

[6] The motion judge ultimately certified nine common issues. One issue is whether it is a term of the employment contracts that the proposed class would be paid for overtime in a manner that complied with law. Another issue (Common Issue 2) is whether Canada Cartage had a policy or practice of avoiding or disregarding Federal Law obligations to pay overtime in accordance with contractual entitlements.

[7] The motion judge noted that almost all of the parties' submissions were directed to the latter issue. In deciding to certify the latter issue as a common issue, the motion judge listed a number of points that he considered, in combination, in finding "some basis in fact" that Canada Cartage had a policy or practice of avoiding or disregarding its overtime obligations, including:

(a) Canada Cartage had no written overtime policy during the applicable period;

(b) no Canada Cartage document existed that employees could consult to learn how their overtime entitlement would be established;

(c) Canada Cartage never issued any written directives to managers, supervisors or the payroll department about how to apply the various overtime rules and thresholds;

(d) a senior human resources director admitted that the mixed employment rules and application were "quite a gray area" for her;

(e) the vice-president of human resources stated that Canada Cartage did not co-ordinate or standardize its payroll process in order to determine what overtime

thresholds applied and the determinations varied from "employee to employee, location to location".

(f) a Federal "Assurance of Voluntary Compliance" issued to Canada Cartage by the Labour Program of Human Resources and Skills Development Canada that suggests on its face that the overtime compensation concerns may be class-wide.

THE TEST FOR GRANTING LEAVE TO APPEAL

[8] The test for granting leave to appeal under Rule 62.02(4) is well-settled. It is recognized that leave should not be easily granted and that the test to be met is a very strict one.

[9] This is particularly so when a certification decision is sought to be appealed, because of the deference owed to judges who have developed expertise in this very sophisticated area of practice: *Glover v. Toronto (City)*, 2010 ONSC 2366 at para 8.

[10] There are two possible branches upon which leave may be granted. Both branches involve a two-part test and in each case, both aspects of the two-part test must be met before leave may be granted.

[11] Under Rule 62.02(4)(a), the moving party must establish that there is a conflicting decision of another judge or court in Ontario or elsewhere (but not a lower level court) and that it is in the opinion of the judge hearing the motion "desirable that leave to appeal be granted". A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts: *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.*,(1992), 7 O.R. (3d) 542 (Div.Ct.).

[12] Under Rule 62.02(4)(b), the moving party must establish that there is reason to doubt the correctness of the order in question and that the proposed appeal involves matters of such importance that leave to appeal should be granted. It is not necessary that the judge granting leave be satisfied that the decision in question was actually wrong; that aspect of the test is satisfied if the judge granting leave is satisfied that the correctness of the order is open to "very serious debate": *Nazari v. OTIP/RAEO Insurance Co.*, [2003] O.J. No. 3442 (S.C.J. per Then J.); *Ash v. Lloyd's Corp.* (1992), 8 O.R. (3d) 282 (Gen Div., per Farley J.). In addition, the moving party must demonstrate matters of importance that go beyond the interest of the immediate parties and involve questions of general or public importance relevant to the development of the law and the administration of justice: *Rankin v. McLeod Young Weir Ltd.* (1986), 57 O.R. (2d) 569 (H.C.J. per Catzman J.); *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Div.Ct.).

ANY CONFLICTING DECISION UNDER RULE 62.02(4)(a) ?

[11] It is well established that there must simply be some basis in the evidence to establish the common issue and the answer to the common issue will advance the litigation. That is so where the proposed common issue alleges systemic conduct by a defendant. The inquiry is not to determine whether the assertions are true but only to find a factual basis for the proposed common issue.

[12] Canada Cartage alleges that the certification decision conflicted with other case law on the issue of whether and when a class action alleging systemic breach of overtime obligations should be certified. First, it asserts that the plaintiff must not only show a basis in fact for the existence of a systemic practice or policy, but also for the assertion that the systemic practice or policy acted as a barrier to the class members receiving overtime compensation. In this regard, references are made to the *Fresco* case and *Fulawka v. Bank of Nova Scotia* 2012 ONCA 443 ("*Fulawka*"). Even if such requirement was imposed by these cases, in considering Common Issue 2, the motion judge listed the evidence that "taken in combination – easily amounts to some evidence that the defendant may well be avoiding or disregarding its overtime obligations at a systemic level", and the same evidence relates to a potential barrier to class members receiving overtime compensation. The very premise of Common Issue 2 is that Canada Cartage has been avoiding or disregarding its overtime obligations and the motion judge found that the very absence of a policy or practice amounts to some evidence of a systemic impediment. It is therefore self-evident that this conduct, if proven, at a common issues trial, is a potential barrier to the receipt of overtime by class members. There is no conflict in the jurisprudence on this point.

[13] Further, Canada Cartage argued that there was a second area of alleged "conflict" in that the plaintiff was required to provide a basis in fact for a workable methodology to prove that the class as a whole was "affected or put at risk" by the systemic conduct embodied in Common Issue 2.

[14] Although that may relate to questions relating to causation or damages, Common Issue 2 does not. It asks about the existence of a class wide policy or practice of Canada Cartage of avoiding or disregarding its legal obligations to pay overtime to class members. The necessity to provide a "methodology" has no application to the Common Issue 2 in question here.

[15] The motion judge especially considered the jurisprudence on "misclassification" and distinguished those cases. There is no conflict with any case in this regard. Further, it should be noted that Canada Cartage conceded that the certified class definition met the identifiable class requirement in s. 5 (1)(b) of the *CPA*. Having conceded the identifiable class requirement, it is not open to Canada Cartage to re-open the class definition. Further, the plaintiff was entitled to frame and advance its case in a manner that makes it amenable to certification and he did so to avoid the action constituting a "misclassification" case.

[16] The fact that this case involves employees in more than 50 different job positions with different duties and responsibilities as opposed to the rather uniform group that comprised the class in the *Fresco* and *Fulawka* cases does not put this decision in conflict with those cases.

[17] Moreover, the motion judge determined that if certain certified common issues were determined in the plaintiff's favour, "there is a reasonable likelihood that the aggregate of the class members' damage could reliably be determined without proof by individual class members. The defendant would supply the proof." In so finding, there is no error in principle committed by the motion judge. It should be noted that the plaintiff does not dispute Canada Cartage's records insofar as they relate to the number of hours worked by current or former Canada Cartage employees or the nature of the jobs they were performing. The dispute here concerns whether overtime was properly recorded in these records and paid to class members. The motion

judge was aware that there is at least a reasonable likelihood that section 24(1)(c) of the CPA will be satisfied and he listed some of Canada Cartage's records that could be utilized for this purpose.

[18] By way of summary, there is no basis for Canada Cartage's position that the certification decision conflicts with appellate authority. The motion judge's decision illustrates that he was acutely aware of the Court of Appeal jurisprudence regarding aggregate damages, as well as a distinction between a systemic conduct allegation as opposed to one of misclassification.

[19] Accordingly, the first branch for leave to appeal under Rule 62.02(4)(a) has not been met.

[20] Nor has it been shown that it is desirable that leave to appeal be granted. The second branch under Rule 62.02(4)(a) has not been met.

THE TEST UNDER RULE 62.02(4)(b)

1. Good Reason to Doubt Correctness of the Decision ?

[21] In order for there to be "good reason to doubt the correctness" of the motion judge's order, its correctness must be open to very serious debate. Motion judges are entitled to significant deference and intervention should be restricted to a situation where matters of general principle are at stake.

[22] The issues raised by the moving party under this heading are virtually the same as advanced under the "conflicting decisions" branch of the other test considered above and are rejected for the same reason under this branch of the test.

[23] The moving parties also argue that the motion judge erred in his approach to s. 5(1)(c) of the CPA. They submit that:

(i) there is no common issue regarding the terms of employment agreement because different allegations flow to different employees depending on the threshold at which they are eligible for overtime;

(ii) there is no common issue regarding unjust enrichment because it was not shown that it could be resolved on a class wide basis.

However, these arguments turn on whether there was a basis in the evidence for the existence and commonality of Common Issue 2, which has already been addressed.

[24] Canada Cartage argued that the certification decision is incorrect because the motion judge "included within the scope of the class Canada Cartage's unionized employees." Canada Cartage did not appear to seriously contest class definition before the motion judge. Moreover, Canada Cartage did not produce any collective agreements to back up its assertion that the collective agreements cover the unionized employees' overtime allegations. Therefore, there is no basis to say that the unionized employees' claims "fall within the exclusive jurisdiction of the labour arbitrators".

[25] As for the common issue about the scope of the "Assurance of Voluntary Compliance", the motion judge reviewed the evidence and held that "on the face of the *AVC* itself, there is a basis in fact for concluding that it applied to all class members and not just shunters in Ontario." This is a finding of fact and does not raise any matter of general principle.

[26] As a result, there is no good reason to doubt the correctness of the motion judge's order

2. Matters of Importance?

[27] As for the second part of the test under Rule 62.02(4)(b), the moving parties must show that the proposed appeal involves "matters of importance that go beyond the interest of the immediate parties and involve questions of general or public importance relevant to the development of the law and administration of justice." The moving parties submit that the motion judge's decision raises doubt and uncertainty for employers across Canada who regulate their workplaces without written overtime policies or class-wide systems for overtime compensation where there is no evidence that these practices cause harm, and that appellate clarification is necessary.

[28] The law in this area is quite current and well developed by the Court of Appeal in a course of four decisions released between 2012 and 2014 that specifically addressed overtime related class actions in which commonality under section 5(1)(c) of the *CPA* was a major focus. In addition, the Supreme Court of Canada has released a number of class actions judgments reflecting a generous and flexible approach to class certification.

[29] The motion judge considered each of the Court of Appeal decisions and the Supreme Court's recent decisions in *Pro-Sys Consultations Ltd. v. Microsoft Corporation* [2013] S.C.J. No. 57 and *Vivendi Canada Inc. v. Dell'Aniello* [2014] 1 SCR 1. He merely applied the principles to the circumstances and facts before him. In so doing, the motion judge's conclusions, for which deference is owed, do not raise any new matters that affect the development of this area of the law.

CONCLUSION

[30] For these reasons, neither of the two-part tests set out in Rule 62.02 (4) (a) or (b) has been met. The motion for leave to appeal is dismissed with costs fixed at $27,917.62, all inclusive, payable by the moving parties to the respondent within 30 days.

Lederman J.

Date: June 15, 2015