

Michael Ian McCracken (plaintiff/appellant/respondent by cross-appeal) v. Canadian National Railway Company (defendant/respondent/appellant by cross-appeal)  
(C52635; 2012 ONCA 445)

**Indexed As: McCracken v. Canadian National Railway Co.**

Ontario Court of Appeal  
Winkler, C.J.O., Laskin and Cronk, J.J.A.  
June 26, 2012.

**Summary:**

McCracken, a former Canadian National Railway Company (CN) employee, brought a motion to certify a class action, alleging that CN had unlawfully classified all its "first line supervisors" (FLSs) as "managers" thus depriving them of overtime and holiday wages payable under the Canada Labour Code. Under s. 167(2) of the Code, the overtime and maximum hours of work rules of the Code did not apply to employees who "are managers or superintendents or who exercise management functions". McCracken advanced claims of violation of the Code, breach of contract, breach of a duty of good faith, unjust enrichment, and negligence. He submitted that common issues arising from those claims were informed by the contract of employment, CN's duties and obligations under the Code, and CN's failure to develop and implement reasonable and effective systems, procedures, and practices to ensure that first line supervisors are or were properly classified and that all of their hours worked, including overtime and holiday hours, were properly recorded. CN brought a motion to dismiss the action under rule 21 of the Civil Procedure Rules, arguing that the court lacked jurisdiction to hear the proposed action.

The Ontario Superior Court, in a decision reported [2010] O.T.C. Uned. 4520, rejected CN's jurisdiction argument. However, the motions judge struck, dismissed and stayed various elements of the plaintiff's claims in negligence and breach of contract. In the result, the motions judge granted the motion for certification, but in doing so, significantly re-drafted the common issues. McCracken (proposed plaintiff) appealed and CN cross-appealed. (As explained in Footnote 2 of the judgment below, the matter proceeded directly to the Court of Appeal.)

The Ontario Court of Appeal allowed CN's appeal from the certification order and set aside that order. The absence of a core of commonality was fatal to the certification of the action. That conclusion made it unnecessary to decide the correctness of the motions judge's rulings on the rule 21 motion, or to review his rulings on the other proposed common issues and preferable procedure.

Editor's Note: This case was one of a trilogy of cases dealing with certification of class actions - see also *Fresco v. Canadian Imperial Bank of Commerce*, [2012] O.A.C. TBed. JL.007; 2012 ONCA 444 and *Fulawka v. Bank of Nova Scotia*, [2012] O.A.C. TBed. JL.006; 2012 ONCA 443.

**Practice - Topic 209.3**

Persons who can sue and be sued - Individuals and corporations - Status or standing -

Class or representative actions - Certification - Considerations (incl. when class action appropriate) - A motions judge certified a class action against the Canadian National Railway Company (CN), wherein the plaintiff alleged that CN had misclassified all its "first line supervisors" (FLSs) as "managers" thus depriving them of overtime and holiday wages payable (Canada Labour Code) - CN appealed - The Ontario Court of Appeal set aside the certification - The motions judge was correct in rejecting common issues respecting misclassification - The evidence failed to establish 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 would be needed to determine if they were properly classified - However, the motions judge fell into reversible error in recasting as a common issue the question of what the minimum requirements were 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 - The absence of commonality was fatal to the certification of this action - See paragraphs 7 and 53 to 135.

#### **Cases Noticed:**

Hollick v. Metropolitan Toronto (Municipality) et al., [2001] 3 S.C.R. 158; 277 N.R. 51; 153 O.A.C. 279, refd to. [para. 34].

Caputo et al. v. Imperial Tobacco Ltd. et al., [2004] O.T.C. 112; 236 D.L.R.(4th) 348 (Sup. Ct.), refd to. [para. 78].

Singer v. Schering-Plough Canada Inc., [2010] O.T.C. Uned. 42; 87 C.P.C.(6th) 276; 2010 ONSC 42, refd to. [para. 82].

Fulawka v. Bank of Nova Scotia, [2010] O.T.C. Uned. 1148; 101 O.R.(3d) 93; 2010 ONSC 1148, refd to. [para. 84].

Fresco v. Canadian Imperial Bank of Commerce, [2009] O.T.C. Uned. E32; 84 C.C.E.L. (3d) 161 (Sup. Ct.), refd to. [para. 84].

Algoma Central Marine v. Captains and Chiefs Association, [2010] C.I.R.B.D. No. 40; 2010 CIRB 531, affd. [2011] N.R. Uned. 24; 2011 FCA 94, refd to. [para. 85].

NorthwestTel Mobility Inc., Re, [2006] C.I.R.B.D. No. 4; 2006 CIRB 346, refd to. [para. 85].

Québec-Téléphone v. Syndicat des agents de maîtrise de Québec-Téléphone. [1996] C.L.R.B.D. No. 36, affd. (1997), 221 N.R. 312; 75 A.C.W.S.(3d) 1056 (F.C.A.), refd to. [para. 85].

International Association of Machinists and Aerospace Workers v. Quebecair (1979), 33 di 480 (C.L.R.B. No. 163), refd to. [para. 85].

Cominco Ltd., Re (1980), 40 di 75 (C.L.R.B. No. 240), refd to. [para. 85].

Island Telephone Co., Re (1990), 81 di 126 (C.L.R.B. No. 811), refd to. [para. 85].

Brown et al. v. Canadian Imperial Bank of Commerce et al., [2012] O.T.C. Uned. 2377; 2012 ONSC 2377, refd to. [para. 92].

Vancouver Wharves Ltd., Re, [1975] 1 Can. L.R.B.R. 162, refd to. [para. 94].

Canada Post Corp., Re (1989), 79 di 35 (C.L.R.B. No. 767), refd to. [para. 95].

Canadian Union of Bank Employees v. Bank of Nova Scotia (1977), 21 di 439 (C.L.R.B. No. 91), refd to. [para. 95].

British Columbia Telephone Co., Re (1977), 33 di 361 (C.L.R.B. No. 98), refd to. [para.

95].

Lau et al. v. Bayview Landmark Inc. et al., [1999] O.T.C. 220; 40 C.P.C.(4th) 301 (Sup. Ct.), refd to. [para. 100].

Smith et al. v. National Money Mart Co. et al., [2007] O.T.C. 938 (Sup. Ct.), refd to. [para. 110].

Royal Bank of Canada v. Rastogi et al., [2011] O.A.C. TBEEd. JA.029; 2011 ONCA 47, refd to. [para. 141].

CMLQ Investors Co. v. CIBC Trust Corp. (1996), 3 C.P.C.(4th) 62 (Ont. C.A.), refd to. [para. 141].

**Statutes Noticed:**

Canada Labour Code, R.S.C. 1985, C. L-2, sect. 167(2)(a) [para. 27].

Class Proceedings Act, S.O. 1992, c. 6, sect. 5(1) [para. 34].

**Counsel:**

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

This appeal was heard on February 28 and 29, 2012, before Winkler, C.J.O., Laskin and Cronk, J.J.A., of the Ontario Court of Appeal. The decision of the court was delivered by Winkler, C.J.O., on June 26, 2012.

Appeal dismissed.

Editor: Elizabeth M.A. Turgeon