CITATION: Le Feuvre v. Enterprise Rent-A-Car Canada Company, 2023 ONSC 3425
DIVISIONAL COURT FILE NO.: 452/22
DATE: 20230619

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Lococo, Leiper and Schabas JJ.

BETWEEN:	)	
JARED LE FEUVRE Plaintiff (Appellant)	)	*Jonathan Ptak, Jamie Shilton, Jean-Alexandre De Bousquet and Daria Chye*, for the Plaintiff (Appellant)
– and –	)	
ENTERPRISE RENT-A-CAR CANADA COMPANY Defendant (Respondent)	)	*Christopher P. Naudie, Geoffrey Hunnisett, Elie Farkas and Alexandra McLennan Brown*, for the Defendant (Respondent)
	)	**HEARD at Toronto:** May 10, 2023

<u>REASONS FOR JUDGMENT</u>

<u>R. A. Lococo J. (P. Schabas J. concurring):</u>

I. Introduction

[1] The appellant Jared Le Feuvre appeals from the order of Justice Edward M. Morgan of the Superior Court of Justice dated July 15, 2022, with reasons reported at 2022 ONSC 4136.

[2] In the order under appeal, the motion judge dismissed the appellant's certification motion in a proposed class action against the respondent Enterprise Rent-a-Car Canada Company. The appellant asks that the court set aside the order and make an order certifying the action as a class proceeding, or in the alternative, remitting the matter for reconsideration in accordance with the court's reasons.

[3] Among other things, the appellant claims that the motion judge erred in finding that the proposed class action does not raise common issues relating to liability. I disagree.

[4] For the reasons below, I would dismiss the appeal.

II. Background

[5] The respondent is a Canadian subsidiary of a U.S.-based car rental company that operates approximately 500 rental car branches in seven provinces including Ontario. The appellant seeks to represent a class of approximately 2,500 individuals employed by the respondent since 2010 with the title of Branch Rental Manager (BRM), Assistant Branch Rental Manager (ABRM) or Station Manager (SM) (collectively referred to as prospective "class members"). By corporate policy, those individuals were not eligible to receive overtime pay for hours worked in excess of the statutory minimum set out in provincial employment standards legislation. The appellant claims that the respondent misclassified those employees as managers and improperly deprived them of overtime pay to which they were entitled.

III. Decision under appeal

[6] In his reasons for decision, the motion judge referred to the "complicated factual background" that gave rise to the action: at para. 7. There was no dispute that the proposed class members might be expected to divide their time between daily operations or customer service on one hand and supervisory or operations management tasks on the other, but the evidence was divided on the fundamental issue of whether they performed mostly managerial or non-managerial functions. The motion judge noted that this stark division was "partly due to the fact that the affiants reflect a mix of urban centre vs small town locations, airport vs non-airport branches, downtown vs suburban storefronts, and unionized vs non-unionized workplaces": at para. 4.

[7] Against that factual background, the motion judge considered the certification test out in s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*CPA*). Section 5(1) requires the court to certify a class proceeding if all the following criteria apply:

a. The pleadings disclose a cause of action (s. 5(1)(a));

b. There is an identifiable class of two or more persons (s. 5(1)(b));

c. The class members' claims raise common issues (s. 5(1)(c));

d. A class proceeding would be the preferable procedure for the resolution of the common issues (s. 5(1)(d)); and

e. There is a representative plaintiff who meets the statutory requirements (s. 5(1)(e)).

[8] The motion judge noted that it is well settled that the evidential threshold on a certification motion is relatively low, requiring the plaintiff to establish "some basis in fact" for the claim, which does not involve an assessment of the claim's merits: at para. 9. The motion judge then considered the application of the first four certification criteria.

[9] With respect to ss. 5(1)(a) and (b), the motion judge found that the evidence provided "some basis in fact" to support a cause of action and a viable class, with one proviso relating to s. 5(1)(a), as explained below: at paras. 10-22.

[10] The motion judge noted that the heart of the claim was that the respondent breached its obligation to pay the putative class members overtime for hours worked above the statutory threshold applicable in the employment legislation of the each of the seven provinces in which the

respondent operated: at para. 11. In Ontario, the overtime threshold (44 hours per work week) is set out in s. 22 the *Employment Standards Act, 2000*, S.O. 2000, c 41 (*ESA*).

[11] The motion judge found that the pleadings provided a potentially viable cause of action against the respondent in each province except British Columbia: at para. 16. Relying on *Macareag v. E Care Contact Centres Ltd.*, 2008 BCCA 182, 77 B.C.L.R. (4th) 205, the motion judge found that exclusive jurisdiction for determining issues of overtime pay in British Columbia lies with the Director under that province's employment standards legislation and that statutory minimums are not enforceable in court as implied terms of an employment contract: motion decision, at para. 12. On that basis, the motion judge found that it was plain and obvious that the statutory causes of action were not proper causes of action in respect of class members in British Columbia: at para. 13.

[12] With respect to s. 5(1)(c), the motion judge found that there were no certifiable common issues: at paras 23-46. The appellant proposed 12 common issues, grouping them into the categories of Liability, Aggregate Damages, Unjust Enrichment, and Punitive and Exemplary Damages: at para. 25. The motion judge, at paras. 29-31, identified three proposed common issues (numbered as common issues 2, 4 and 5) as central to the determination of liability, as follows:

a. Did the respondent breach its contracts of employment with class members by denying their eligibility for overtime compensation?

b. Did the respondent owe class members statutory, contractual or common law duties to (i) properly advise them of their entitlement to overtime pay, (ii) ensure that their hours were monitored and accurately recorded, (iii) ensure that they were properly compensated for their overtime work?

c. Did the respondent breach any of these duties, and if so, how?

[13] The motion judge noted that these questions pose the crucial issue of whether, by denying overtime pay in employment contracts, the respondent breached its contractual obligations to class members: at para. 31. Establishing that the respondent did not pay class members for overtime work would establish the potential for a claim but not the factual basis for an actual claim. The breach occurred only if the claimant in fact worked overtime and was in fact denied pay for that work: at para. 32. Making that determination would require a specific examination of the claimant's particular job functions and routine workday. At the certification stage, "[m]erely carrying the label of BRM, ABRM, or SM does not provide any basis in fact for the analysis that must ensue": at para. 34.

[14] The motion judge said that appellant's counsel addressed this problem by stressing that the proposed common issues "focus attention on the issue of misclassification", arguing that "the issue is a class-wide one since the managerial classifications in issue do not vary class member to class member": at para. 35. In the appellant's submission, the misclassification claim conformed with the Court of Appeal's statement in *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677, 326 O.A.C. 159, at para 40, that eligibility for overtime pay could be certified as a common issue only "if the evidence on the motion demonstrated that the alleged misclassification of the employees as managers/supervisors could be resolved commonly for all employees in the proposed class."

[15] The motion judge disagreed. He found that the evidence did not reach the threshold for certifying common issues set out in *Brown*, at para. 41, citing *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745, at para. 104, that is, the evidence must establish "some basis in fact to find that the functions, responsibilities and duties of all of the employees in the putative class are sufficiently similar that the classification of those employees as eligible or ineligible for overtime pay could be made for the class as a whole and without regard to the specific circumstances of individual employees": motion decision, at para. 36.

[16] The motion judge noted that this standard required a review of the work actually performed by each individual class member. Citing *Brown*, at para. 44, he also stated that "[s]ubstantial variability in the 'autonomy, duties and responsibilities of employees having the same job title or classification' will lead to the conclusion that there is no 'core commonality' in the functions and duties under examination": motion decision, at para. 37.

[17] At paras. 44-45, the motion judge concluded his analysis of common issues relating to liability as follows:

> 44. The evidence in the record before me demonstrates that the variability and mix of the work actually performed by BRMs, ABRMs and SMs across hundreds of branches makes the alleged misclassification impossible to resolve on a basis that is common to all employees in the proposed class. A class that includes personnel in small branches where the management is expected to be a jack of all job functions, and personnel in high-volume airport branches where the division of job functions between management and non-management is clear and hierarchical, is not a class that raises issues in the way envisioned by the *CPA*. Some of the putative class members may well be misclassified while others are not; but the factual basis for that determination is so varied that each member would have to bring their own claim and pursue their own findings of fact.
>
> 45. For this reason, common issues 2, 4, and 5 do not meet the test for certification.

[18] The motion judge went on to note that since there were no certifiable common issues with respect to liability, the "balance of the issues must fall away" and need not be addressed: at para. 46. However, the motion judge went on to address aggregate damages and preferable procedure.

[19] If the court certifies common issues relating to liability, the court may determine aggregate damages, in whole or in part, if the requirements set out in s. 24(1) of the *CPA* are met, including the requirement that "the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members": *CPA*, at s. 24(1)(c). After considering the evidence of two expert witnesses provided by the appellant, the motion judge found that the appellant failed to discharge his onus of demonstrating a methodology with a realistic prospect of establishing aggregate damages on a class-wide basis. Therefore, the requirement in s. 24(1)(c) was not satisfied: motion decision, at paras. 50-64.

[20] The motion judge also briefly addressed the requirement in s. 5(1)(d) that a class proceeding would be the preferable procedure for the resolution of common issues. The motion judge found that this requirement was not met "because the lack of commonality makes it an inappropriate class proceeding in the first place": motion decision, at para. 66.

IV. Grounds for appeal

[21] The appellant submits that in failing to certify the action, the motion judge erred in several respects, including the following:

a. Common issues relating to liability: The motion judge erred in finding that the class members' claims did not raise issues relating to liability that can be resolved in common;

b. Aggregate damages: The motion judge erred in failing to certify proposed common issues relating to aggregate damages; and

c. B.C. claims: The motion judge erred in finding that there was no cause of action with respect to claims by class members in British Columbia.

V. Jurisdiction and standard of review

[22] The Divisional Court has jurisdiction to hear this appeal under s. 39(1)(a) of the *CPA* and s. 30(1) of the *CPA* as it is read before September 1, 2020, since the action was commenced prior to that date. For actions commenced on or after that date, a party may appeal to the Court of Appeal from an order certifying, refusing to certify, or decertifying a class proceeding.

[23] The appellate standards of review apply on this appeal, as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 19, 10, 26-37: see *Canada (Minister of Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 37, which reaffirmed the Supreme Court's formulation of the appellate standards of review as set out in *Housen*.

[24] The standard of review is correctness for questions of law, including for legal principles extricable from questions of mixed fact and law.

[25] The standard of review is palpable and overriding error for questions of fact and (except as noted above) for questions of mixed fact and law, including with respect to the application of correct legal principles to the evidence.

[26] A palpable and overriding error is an obvious error that is sufficiently significant to vitiate the challenged finding: *Longo v. MacLaren Art Centre*, 2014 ONCA 526, 323 O.A.C. 246, at para. 39. The appellant must show that the error goes to the root of the challenged finding such that it cannot safely stand in the face of the error: *Waxman v. Waxman* (2004), 186 O.A.C. 201 (C.A.), at p. 267, leave to appeal refused, [2004] S.C.C.A. No. 291.

VI. Analysis – common issues relating to liability

[27] The appellant submits that the motion judge erred in finding that the class members' claims did not raise issues relating to liability that can be resolved in common. Among other things, the appellant argues that:

a. The motion judge misapprehended or failed to consider relevant evidence;

b. The motion judge applied the wrong legal tests; and

c. The motion judge erred in failing to address the "greater benefit" exemption from statutory minimum employment standards: see *ESA*, at s. 5(2).

[28] I will address each of these submissions in turn.

A. Did the motion judge misapprehend or fail to consider relevant evidence?

[29] The appellant challenges the motion judge's central conclusion that the work experiences of different class members were too diverse to permit a trial judge to make a common determination as to whether the class members have been wrongfully denied overtime paid because they have been misclassified as managers. The appellant says that in reaching that conclusion, the motion judge erred by focusing his attention on some variability in the evidence regarding certain job functions, while failing to consider the evidence establishing the lack of managerial authority. Notably, this evidence indicates that class members do not have final decision-making authority over hiring and firing, promotions, approvals for leaves of absence or making substantial purchases.

[30] The appellant notes the emphasis in case law that a manager must have "a significant level of autonomy and real decision-making authority and discretion" and must have the authority to "make final decisions, not simply recommendations", citing *McCracken*, at para. 63, and *429485B.C. Ltd. (c.o.b. Amelia Street Bistro) (Re)*, [1997] B.C.E.S.T.D. No. 503, at para. 22. The appellant says that the motion judge failed to address the second part of that test. The appellant also argues that the motion judge failed to consider evidence of the baseline level of non-managerial work that was common across the class members. The appellant submits that the failure to consider relevant evidence constitutes an error in law requiring appellate intervention.

[31] I disagree.

[32] Citing *Brown*, at para. 44, the motion judge noted that "[s]ubstantial variability in the 'autonomy, duties and responsibilities of employees having the same job title or classification' will lead to the conclusion that there is no 'core commonality' in the functions and duties under examination": motion decision, at para. 37. At para. 44, the motion judge found that the variability and mix of work actually performed by class members made it impossible to resolve the misclassification issue on a common basis in this case. The motion judge was clearly of the view, having weighed the evidence, that the degree of variability in this case was substantial. The appellant argues that in assessing the evidence to reach that conclusion, the motion judge erred in focusing on "some" degree of variability in the evidence regarding certain job functions, while failing to consider other evidence that he says establishes the lack of managerial authority.

[33] The fallacy in the appellant's analytic approach is clear from *Brown*, at para. 55, where the Court of Appeal stated as follows:

> The question whether eligibility for overtime pay could be determined as a common issue did not turn on an arithmetical totalling up of the similarities and differences in the job-related duties and responsibilities of proposed class members. Nor did it require a ranking in order of importance of the various functions of the employees. The motion judge (at para. 113) and the Divisional Court (at paras. 25-26) properly focused the common issue inquiry on the degree of variability of those job characteristics, functions, duties and responsibilities <u>that were germane to the characterization of the employee as managerial/supervisory for the purposes of overtime pay eligibility under the *ESA* and the CIBC overtime policy.</u> If that variability makes it impossible to determine eligibility for overtime pay across the full proposed class, then eligibility for overtime pay is not a common issue regardless of whether all of the proposed class members share certain job functions. [Emphasis added.]

[34] The motion judge appropriately conducted a holistic assessment of evidence relating to the management functions performed by class members to determine whether there was a sufficient degree of commonality to meet the requirement in s. 5(1)(c) in this case. In doing so, the motion judge was not required to address every aspect of the evidence relevant to that issue, nor was he required "to respond to every argument raised by the parties, to recite all the evidence or to articulate all the relevant inferences or principles of law": *Trillium Motor World Ltd. v Cassels Brock & Blackwell LLP*, 2017 ONCA 544, 72 B.L.R. (5th) 177, at para. 354, leave to appeal refused, [2017] S.C.C.A. No. 366.

[35] While framed as an error in principle or failure to consider key evidence, what the appellant is in substance asking this court to do is to reweigh the evidence, overturn the motion judge's evidentiary findings and arrive at a different conclusion on the issue of commonality. To do so would be inconsistent with this court's role on appeal: see *Housen*, at para. 3. I see no error in principle or palpable and overriding error in the motion judge's analysis that would justify appellate intervention.

B. Did the motion judge apply the wrong legal tests?

[36] The appellant submits that the motion judge applied the wrong legal test to the claim relating to class members in Ontario, Alberta, Saskatchewan and Prince Edward Island, as explained below.

[37] In applying s. 5(1)(c), the appellant submits that the motion judge was required to consider (i) the legal tests necessary for resolving the class members' claims, and (ii) the evidence as to whether the tests could be applied on a common basis. The legal tests at issue are the managerial exemptions in the employment statutes in the provinces where the respondent does business. Those exemptions provide an exception from the requirement to pay overtime compensation to employees who work more than the statutory overtime threshold.

[38] While the wording of the exemptions may vary, the managerial exemptions generally apply to persons whose work is supervisory or managerial in nature. In Ontario and certain other provinces, there is a second branch to the managerial exemption, as explained below. In Prince Edward Island, there is no managerial exemption from the overtime requirement.

[39] In Ontario, the managerial exemption provides that the requirement to pay overtime compensation does not apply to "a person whose work is supervisory or managerial in character <u>and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis</u>" (emphasis added): O. Reg. 285/01, s. 8(b); *ESA*, s. 141(3). A limiting proviso of that nature also applies in Alberta and Saskatchewan.

[40] The appellant submits that while there are similarities between the provincial managerial exemptions, there are important nuances described in the appellant's written and oral argument that the motion judge did not acknowledge in his decision. The appellant says that the motion judge instead adopted a general and undifferentiated approach to the misclassification analysis that ignored material distinctions between the exemptions. As a result, the appellant says that the motion judge applied the wrong test to the claims of class members in Ontario, Alberta, Saskatchewan and Prince Edward Island, which resulted in the wrong conclusions as to whether the managerial exemptions for these class members can be applied in common. Among other things, the appellant relied on decisions of the Ontario Labour Relations Board ("OLRB") to support his submission that the managerial exemption does not apply to "managers" who spent a relatively low percentage of their time performing non-managerial tasks, with the result that they are entitled to overtime pay. The appellant submits that the motion judge erred by failing even to consider the more restrictive exemption requirements in Ontario and other provinces and their effect on the baseline commonality of non-managerial work that necessitates payment for overtime. By doing so, the appellant says the motion judge erred in principle.

[41] Again, I disagree. As the respondent argued in its submissions, the inquiry to determine whether the second prong of the test (like the first prong) has been met is fact-specific and not limited to merely looking at some percentage of time that an employee is involved in non-managerial work. The decisions that the appellant cites do not purport to apply any bright-line numerical threshold to determine when nonmanagerial tasks result in the non-application of the managerial exemption from overtime pay.

[42] Further support for the fact-specific nature of the enquiry required for both branches of the managerial exemption may be drawn from Penny J.'s analysis of the managerial exemption in *Tsakiris v. Deloitte & Touche LLP*, 2013 ONSC 4207, 8 C.C.E.L. (4th) 210, a wrongful dismissal case in which the compensation that the plaintiff "senior manager" claimed included overtime pay. In *Tsakiris*, at para. 130, the trial judge acknowledged ORLB jurisprudence that provides a two-step inquiry for determining whether an employee is entitled to overtime pay. First, there is a determination if the "character" of the employment is managerial. If so, then, second, there would be a determination whether the individual performs non-managerial tasks and, if so, whether these tasks are done on an irregular or exceptional basis. After considering the underlying remedial purpose of the *ESA* (to establish fair, minimum standards of employment to remedy the unequal bargaining position of individual, non-organized employees in relation to their employers), the trial judge concluded as follows:

> The question posed by the combined effect of s. 22 of the *ESA* and s. 8(b) of O. Reg. 85/01 is whether, in substance, the nature of the employment is truly supervisory or managerial in character – if it is, the exemption applies and the overtime pay provisions do not; if it is not, the exemption does not apply and the overtime pay provisions do.

[43] It should also be borne in mind that the motion judge was considering these legal tests in the context of a certification motion, in which the degree of commonality among members of the proposed class was the main issue. In order to succeed on the motion, the appellant was required to provide some evidence of a common factual basis for concluding that each class member "in fact worked overtime and in fact was denied pay for that work": at para. 32. The motion judge continued, at para. 33 of his decision:

> That question turns on specific fact finding that can only be answered claimant by claimant, or putative class member by putative class member. As Strathy J. (as he then was) observed in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, at para 140(h): 'A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant.'

[44] Given the fact-specific nature of determining whether the managerial exemption applies, I agree with the respondent that the motion judge did not err in focusing his analysis on the level of variability of functions performed by class members, consistent with the Court of Appeal's framework for assessing commonality in misclassification cases: see *Brown*, at para. 41. I see no error in principle or palpable and overriding error in the motion judge's analysis.

C. Did the motion judge err in failing to address the 'greater benefit" exemption from statutory minimum employment standards?

[45] No employer or employee is permitted to contract out of or waive an employment standard in the *ESA*. Any contract to do so is void: *ESA*, s. 5(1). By way of exception to that general rule, if an employment contract provision affords a "greater benefit" to an employee than an employment standard, that contractual provision applies and the employment standard does not. For the exception to apply, the contractual provision must directly relate to the same subject matter as an employment standard: *ESA*, s. 5(2).

[46] Although not addressed in the parties' oral submissions, the appellant submits in his factum that the motion judge also erred by failing to address the appellant's position that the respondent's defence arising from the "greater benefit" exception raises a certifiable common issue. The issue was not explicitly raised in the common issues placed before the motion judge, but the appellant argues that this issue falls within the scope of the second common issue before the motion judge, that is, whether the respondent breached its contracts of employment with class members by denying their eligibility for overtime compensation.

[47] As noted above, one of the components of the "greater benefit" defence is that the contractual benefit relates to the same subject matter as that covered by the statutory employment

standard. The appellant notes that the proposed common issue would include consideration of whether the opportunity to earn higher income or bonuses relates to the same subject matter as the opportunity to receive overtime pay, an issue that the appellant submits can be answered on a class-wide basis. The appellant relies on *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144, 9 C.C.E.L. (4th) 315, at paras. 57-61, in which Belobaba J. certified the application of the "greater benefit" exemption in a proposed action by investment advisers claiming overtime pay.

[48] As explained below, I do not agree that the motion judge erred in failing to address a potential defence arising from the "greater benefit" exemption.

[49] In the current case, the motion judge identified misclassification as a "threshold issue" in the claim, holding that "[w]ithout being able to determine the threshold issue of liability, it stands to reason that a common issues trial court will not be able to determine the secondary issues that flow from the initial threshold": motion decision, at para. 46. A certifiable common issue must be a "substantial ingredient" of each class member's claim, the answer to which will "significantly advance the action": at paras. 24 and 30. A determination on the applicability of a "greater benefit" exemption in this case would not substantially advance the claims of class members for overtime pay in circumstances in which the central issue is whether they are properly classified as managers.

[50] As well, I consider *Rosen* to be distinguishable from the current case, since the motion judge in that case had already decided that the application of the managerial exemption was a certifiable common issue: *Rosen*, at para. 54. In these circumstances, it is fair to assume that the action in *Rosen* would have been certified as a class action whether or not the motion judge recognized the application of a greater benefit exemption as a common issue.

[51] Accordingly, I see no merit to this ground of appeal.

VII. Aggregate damages and the B.C. claims

[52] Given the conclusion I have reached on commonality, it is not necessary to address the motion judge's conclusions relating to aggregate damages and the B.C. claims. I observe, however, that the motion judge's findings regarding aggregate damages involve findings of fact or of mixed fact and law, which are entitled to deference. In addition, in light of the motion judge's findings on commonality and aggregate damages, even if claims were able to be advanced under British Columbia law, the test for certification is still not met.

VIII. Disposition

[53] For the foregoing reasons, I would dismiss the appeal with costs payable to the respondent in the agreed amount of $40,000 all inclusive.

Lococo J.

I agree

Schabas J.

<u>Leiper J. (dissenting):</u>

Introduction

[54] These reasons consider the appellant's arguments seeking to overturn the motion judge's decision to refuse certification in three respects:

a. the finding that the British Columbia class members have no cause of action under s. 5(1)(a) of the *Class Proceedings Act;*

b. the s. 24(1) aggregate damages issue; and

c. the s. 5(1)(c) analysis with respect to the common issues claim.

[55] The common thread in the appellant's submissions is that the motion judge failed to consider relevant case law and apply it to the record before him, leading to a faulty analysis and decision. The respondent submits that the appellant is effectively attempting to retry the certification motion on appeal. While the reasons do not discuss every argument, the respondent submits that the motion judge can be taken to have considered and rejected the appellant's submissions, based on the detailed record and case law that was before the motion judge.

[56] I concur with my colleagues that the motion judge was not required to address or make an explicit finding on every argument raised by the parties. For the B.C. claim issue and the aggregate damages issue, I would not interfere with the motion judge's conclusions because the reasons advert to case law relied on by the appellant or otherwise articulate facts which lend support for the findings. I have considered those issues here because those sub-issues do not "fall away" as they did on the motion as a result of my finding on the common issues analysis.

[57] However, with the greatest of respect to the motion judge and acknowledging the longstanding deference that is shown to judges sitting on class action certification motions, I conclude that the motion judge erred in finding that it was plain and obvious that there were no common issues that would advance this litigation. I conclude that in the common issues analysis, the motion judge did not deal with an important area of evidence of commonality across the class, that is, the limits on managerial authority of the proposed class members. This evidence supports the assertion of systemic misclassification. For class members located in Ontario, Alberta, Saskatchewan and P.E.I., the motion judge erred in failing to consider the employment legislation that would apply to all members of the class in those provinces, thus supporting certification as a common issue.

[58] I discuss the first two issues briefly and then turn to the common issues analysis.

A. The s. 5(1)(a) analysis: Did the Motion Judge err in holding that there was no cause of action in respect of the claims by class members in B.C.?

[59] The motion judge concluded for the s. 5(1)(a) analysis that in every province but British Columbia, the alleged breaches of the applicable statutory standards for paid overtime are justiciable in Ontario. The motion judge excluded the claims in B.C. based on *Macareag v. E Care Contact Centres*, 2008 BCCA 182, 77 B.C.L.R. (4th) 205. In *Macareag*, the B.C. Court of Appeal held that the provincial Director under B.C.'s employment standards legislation has exclusive jurisdiction for determining issues of overtime pay. The motion judge concluded:

> Accordingly, the statutory causes of action may be valid for Ontario, but it is plain and obvious that they are not proper causes of action in respect of B.C. class members: *Hollick v. Toronto (City)*, [2001] 3 SCR 158, at para 25. The certification process cannot be used as a means of granting rights to those individuals that they would not otherwise have: *Pioneer Corp. v. Godfrey*, 2009 SCC 42, at para 116.

[60] The appellant argues that the motion judge failed to consider the line of cases which have distinguished *Macareag* and certified class action claims where the employer expressly contracted to pay overtime in accordance with the legislated minimum standards: *Dominguez v. Northland Properties Corporation*, 2012 BCSC 328, [2012] B.C.J. No. 443; *Walter v. Western Hockey League*, 2017 ABQB 382, 62 Alta. L.R. (6th) 85, at paras. 36-38.

[61] The appellant submits that the motion judge failed to apply the reasoning from these cases to the evidence before him on the certification motion. The appellant filed Enterprise personnel policy documents which provided that "[w]hen and as required by applicable legislation, employees will be paid overtime wages for all hours worked in excess of a regular work week as provided by provincial legislation."[1]

[62] The appellant submits that these policies are evidence that Enterprise expressly adopted the legislative standards as a term of the class members' employment contracts and the motion judge erred in failing to apply *Dominguez* and *Walter* in these circumstances.

[63] I disagree. In his discussion on this point, the motion judge expressly recognized and cited *Dominguez* and *Walter* for the proposition that "[a]s contractual terms, [the terms for overtime

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[1] The entire Overtime section reads as follows:

You will be asked and authorized to work overtime only when there is a genuine need. Working unauthorized overtime will subject an employee to discipline. Managers will make every reasonable effort to provide advance notice of overtime needs. Our success in maintaining good customer relations depends on our willingness to work extra hours when necessary. Meeting our customer service commitment is important to our success.

When and as required by applicable legislation, employees will be paid overtime wages for all hours worked in excess of a regular work week as provided by provincial legislation. Schedules of specific provincial standards on overtime hours can be obtained from your group Human Resources department or your local Employment Standards office. Participation in voluntary after hour social functions will not entitle you to overtime, unless required by applicable legislation.

pay] can be enforced in actions for breach of contract, and that class actions can be certified on that basis."

[64] It was open to the motion judge to conclude that the personnel policies were written for non-branch manager employees, and thus Enterprise had not explicitly adopted the minimum standards for the proposed class members in British Columbia.

[65] I would reject this ground of appeal.

B. The Section 24(1) Analysis: Did the Motion Judge err by not certifying the Aggregate Damages common issues?

[66] Aggregate damages refer to the collective adjudication of claims that are common to multiple individuals, where the resolution of the common issues are "capable of establishing the defendant's monetary liability to at least some members of the class": *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, at para. 124.

[67] Section 24 of the *CPA* sets out the three-part test for certifying aggregate damages:

> 24(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[68] At the certification stage, the court must consider whether the proposed methodology for calculating aggregate damages is "sufficiently credible or plausible to establish some basis in fact for the commonality requirement": *Pro-Sy Consultants Ltd. v. Microsoft Corporations*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 118.

[69] The appellant submits that the motion judge erroneously compared the methodology in *Fulawka* to the methodology proposed here by Mr. Boedeker, finding that this methodology was precluded for the same reasons as set out in *Fulawka* at paras. 136-37.

[70] Mr. Boedeker proposed a method for the calculation of class-wide unpaid overtime hours by analyzing timestamped data generated by the software applications used by the class members during their workdays. Overtime rates for each class member would be derived from Enterprise's compensation data and then multiplied by the number of hours managers worked over the applicable overtime threshold.

[71] In *Fulawka*, the Court of Appeal held that a proposed aggregate damages methodology that required survey-type interviews with a random sample of class members ran afoul of the requirement in s. 24(1)(c) of the *CPA* that the assessment of aggregate damages be made "without proof by individual class members". Chief Justice Winkler noted however at para. 138 that "[t]he foregoing is not to be taken as a general prohibition on statistical evidence in assessing damages. Statistical evidence … may well be appropriately used in certain contexts".

[72] At paras. 62 through 64 of his reasons, the motion judge adopted the reasoning in *Fulawka* that statistical sampling cannot be used as proof of aggregate damages. However, he did so without mentioning or discussing the features distinguishing the Boedeker methodology from the methodology proposed in *Fulawka*. The appellant submits that in applying *Fulawka*, the motion judge may have misunderstood what "branch specific" information would be required to supplement the available data. According to the appellant, the answer can be found in the evidence of Mr. Boedeker on this question.

[73] During cross-examination, counsel for the respondent asked Mr. Boedeker whether he would conduct "individual inquiries" into business activity at the branch level to improve his statistical model. Mr. Boedeker responded "Yes", explaining:

> I mean, it's an inquiry into data that the defendant probably maintains in the normal course of business. You call it individual inquiry, but I would say I would need a data set with the following parameters and they would include some of these branch specifics, for example. And again, they are measuring...the customer volume, for example, would measure what is necessary or can help to predict staffing needs, right. So if there's some event and more rental cars are needed, right, then there is an impact on the work that needs to be supplied to fulfil the consumer or customer's demands. And those data are typically used to improve in any kind of backcasting or forecasting model.

[74] Mr. Boedeker surmised that this type of branch specific data, or "operational data" would typically be kept by the respondent. Including data such as the size of fleets and the number of employees at a branch, could improve the predictability of his analysis. The proposed methodology would not require evidence from individual members of the class.

[75] The appellant submits the motion judge misunderstood that the record established that the methodology proposed is not on all fours with the methodology in *Fulawka*.

[76] The appellant submits further that the motion judge applied *Fulawka* without mentioning or discussing *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115, 160 O.R. (3d) 173. In *Fresco*, a similar methodology was proposed by Mr. Boedeker which involved calculating unpaid overtime owing to bank employees based on timestamped computer use data. The Court of Appeal concluded that Mr. Boedeker's methodology was sufficient to support certification of the aggregate damages common issue. The appellant included *Fresco* on the motion for certification in support of the aggregate damages issue.

[77] I would not give effect to these submissions.

[78] First, the motion judge was aware of the Court of Appeal's 2022 decision in *Fresco*: he applied it at paras. 21 and 38 of his reasons, relative to discoverability and as an example of a common issues overtime case where the employer conceded that the employee class was entitled to overtime pay. While he did not expressly discuss the case or the distinguishing features in the Boedeker methodology as compared to the methodology in *Fulawka* in his analysis of aggregate damages I would accord deference to his choice especially considering his other factual findings concerning the Boedeker methodology.

[79] The reliability of the method proposed by Mr. Boedeker was subject to several weaknesses that the motion judge described at para. 57 of his reasons:

> There is no guarantee, of course, that any given employee logged into a computer upon arrival at work in the morning or logged out upon leaving work at night; but the thinking is that if the sample is large enough there will be sufficient overlap between the data and the precise information sought that one can extrapolate the necessary information from the admittedly incomplete or faulty information at hand. As Mr. Boedeker explains it, the use of this data would also have to be supplemented by individualized information obtained at the branch level in order to properly understand the policies and variables that might impact hours worked at a given location at a given time.

[80] The motion judge's conclusion was supported by evidence called by the respondent on the certification motion from Dr. Thompson, who opined that the limited log-in/log-off data generated by the Enterprise systems was insufficient for assessing the time worked by class members during a given workday. The Enterprise platforms do not record when an individual stops using them, nor does it track non-compensable activities that occur between timestamps, or the various activities performed by class members that do not require logging into or out of a timestamped system.

[81] I would not give effect to this ground of appeal.

C. *The Section 5(1)(c) Analysis: Did the Motion Judge err in finding there was no basis for common issue certification?*

[82] The context for the common issue analysis is well established. The proper approach is to analyze whether there are any issues necessary to the resolution of each class member's claim that are substantial ingredients of that claim. The court must consider whether allowing the action to proceed will avoid duplicating fact finding or legal analysis: *Hollick v. Toronto (City)*, 2001 SCC 68 (CanLII), [2001] 3 S.C.R. 158, at paras. 18-19; *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation et al.* (2009), 96 O.R. (3d) 252 (Div Ct.) ("*Quizno's 2009*"), aff'd 2010 ONCA 466 ("*Quizno's 2010*"), leave to appeal to the SCC denied, 33865 (3 February 2011).

[83] As the majority of the Divisional Court observed in *Quizno's 2009*, at para. 31:

> The common issues requirement is a "low bar". Common issues need not determine liability. They may make up a very limited aspect of the liability. They need only be issues of fact or law which

> will move the litigation forward and avoid duplication. Many individual issues, including damages, may remain to be decided after the resolution of a common issues trial.

[84] I agree with my colleagues with their articulation of the standard of review on appeal. I also agree that the motion judge correctly stated the legal test on the common issues analysis.

[85] Failure to provide adequate reasons is an error in law, which is subject to a standard of correctness: *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, at para. 28.As noted by the Court of Appeal "[L]egal errors by the motion judge on matters central to a proper application of s. 5 of the *CPA* displace the deference usually owed to the certification motion decision": *Quizno's 2010*, at para. 37. See also *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, 111 O.R. (3d) 501, at para. 68.

[86] In my view the motion judge erred by focussing primarily on one element of the evidence, that is, the variations across the class in the proportion of hourly-type tasks performed by different prospective class members depending on the location and size of the rental car branch. This was an issue that affected a matter central to the proper application of the common issues test to the evidence because the motion judge was presented with submissions, evidence and law supporting findings that the respondent systemically misclassified class members by limiting the authority of branch managers, despite their titles. The motion judge did not address these materials in his reasons but instead focused exclusively on the appellant's "essence of the job" arguments on commonality.

[87] Further, the motion judge's analysis failed to consider evidence that all prospective class members performed hourly wage type tasks regularly, such as maintenance, washing cars, cleaning duties, picking up vehicles from other branches, checking customers into their vehicles, and shovelling snow. In certain provinces, including Ontario, the regular performance of non-managerial tasks means that the managerial exemption to overtime pay under employment standards legislation cannot apply.

[88] The respondent submits that it can be inferred from the lengthy record, the arguments below and the detailed reasons that these arguments had to have been considered and rejected by the motion judge. Although I agree with the respondent that a judge need not set out every conclusion reached in arriving at a decision, I would not apply that reasoning to these two arguments on the common issues question because of their importance to the outcome and the analysis. The commonality requirement has been described as the "central notion" of class proceedings: *Pro-Sys*, at para. 106.

[89] Indeed, counsel for the respondent pointed out, and the motion judge agreed, that the "misclassification issue" was a threshold issue on the claim and that failure on this issue meant that all the subsidiary issues would fall away. It was, quite simply, a cornerstone issue. A failure to independently analyze critical issues on certification is "the kind of error that attracts the intervention of an appellate court": *Quizno's 2010*, at para. 38.

[90] Given the central role of the common issues analysis and that the test on certification is whether there is "some basis in fact" for each of the requirements under the *CPA*, it was incumbent on the motion judge to address to address in his reasons the limited scope of authority and the regular performance of non-managerial tasks by all class members. Failure to do so, with respect, was an error in law.

[91] I begin with the limited scope of authority argument.

The Limited Scope of Authority Issue

[92] The Appellant submits that the motion judge mischaracterized common issues 2, 4 and 5, which were articulated as:

> 2. Did the Defendant breach its contracts of employment with the Class Members by denying eligibility for overtime compensation to the Class Members who held the position of:
>
> (a) Branch Rental Manager or an equivalent position?
>
> (b) Assistant Branch Manager, Station Manager, or an equivalent position?
>
> 4. Did the Defendant owe Class Members statutory, contractual, or common law duties, and/or duties of good faith, to:
>
> (a) properly advise Class Members of any entitlement to Overtime Pay for hours worked in excess of the applicable provincial thresholds per week?
>
> (b) Ensure that the Class Members' hours of work were monitored and accurately recorded?
>
> (c) Ensure that Class Members were appropriately compensated for their overtime work during the class period?
>
> 5. If so, did the Defendant breach any of these duties? If so, how?

[93] The appellant submits that the motion judge erred by treating common issue 2 as simply a claim for a failure to pay some but not all individuals overtime for work done rather than a systemic issue of mischaracterizing its managers as such while restricting their autonomy as managers.

[94] There was evidence in the record that the respondent, a national company, established a national set of employment policies, job descriptions and training processes for its employees. It has a hierarchical structure, with branch managers reporting to area managers who in turn report to vice-presidents/general managers.

[95] All members of the proposed class, by virtue of their classification as branch managers, are considered over-time exempt. The class members regularly work overtime and are expected to do so. The respondent conducts performance reviews and has individual sales targets for the class managers.

[96] However, the prospective class members have limits on their managerial authority. Their job descriptions do not give them the responsibility for any of the following:

1. Hiring and firing;
2. Arranging for promotions;
3. Suspending employees;
4. Approving leaves of absence; or
5. Purchasing.

[97] The motion judge described the issue in the litigation as a question of a risk that some members of the class "might be misclassified". He found that this would not be enough to determine if a breach had occurred, a question that could only be answered through individual findings of fact about whether, in fact, the claimant had worked overtime and was denied pay. This was not the common issue advanced by the appellant. The common issue he put forward was whether the class members were all misclassified because of their employer's baseline expectation that they perform overtime work while also having limits on their managerial authority. If there was a systemic misclassification, then the claimants were wrongly denied eligibility for overtime pay.

[98] To properly consider the common issue that was before him, the motion judge needed to address the appellant's argument that there is commonality in the proposed class members' limited scope of managerial authority. Instead, he limited the analysis to whether potential class members have a shared "essence of the job" in terms of their functions, duties, and responsibilities. On his review of the evidence, the motion judge found this common thread was missing:

> The Plaintiff's manager-affiants are for the most part drawn from outside of the largest corporate operating groups. By way of illustration, a witness who is an [Assistant Branch Rental Manager] in Regina indicates that he spent an average of 70 work hours each week on non-managerial functions. Likewise, the Plaintiff himself deposed that his experience as a manager at a northern Ontario branch was that he supervised 2 employees and managed about 270 vehicles. Perhaps not surprisingly, this group overall deposes that 65%-90% of their time is spent on non-managerial functions such as serving customers at the counter and even washing and parking cars.
>
> The Defendant's manager-affiants, by contrast, are for the most part drawn from larger centres. By way of illustration, a witness who is a BRM in downtown Toronto estimates that she spends 70% of her time on managerial tasks like financial and fleet management. Likewise, a witness who works as an SM at the Pearson Airport branch deposes that she supervises 23 employees and manages

> 2,700 vehicles. It is again unsurprising that this group overall deposes that they spend only 10%-30% on non-managerial tasks.

[99] The motion judge's summary of the differences among members of managerial staff focussed on the different proportions of managerial to non-managerial tasks among the proposed class members. The motion judge returned to this theme in his treatment of the common issues question several times, summarizing this as evidence of the "variability and mix of the work actually performed" by the proposed class members: at para. 44. In his concluding paragraphs on common issues 2, 4 and 5, the motion judge distinguished the case before him from *Navaratnarajah v. FSB Group Ltd.*, 2021 ONSC 5418, [2021] CarswellOnt 11479, where the differences among members of the class were "at the margins of the working relationship": at para. 43. He returned to the example of differences among the class members, such as the "percentage of time spent on non-managerial tasks", which he found went "to the core of the Plaintiff's claim": at para. 43.

[100] But variability in the tasks or in the proportion of non-managerial tasks completed is not dispositive of whether there were common issues because the evidence also established a basis in fact to make the argument that the managers in the proposed class do not have true managerial authority.

[101] In *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677, [2014] CarswellOnt 13747, at para. 55 ("*Brown 2014*"), the Court of Appeal writes that the focus in the common issue analysis is "on the degree of variability of those job characteristics, functions, duties and responsibilities that were germane to the characterization of the employee as managerial or supervisory for the purposes of overtime pay eligibility under the *ESA* and the [employer's] overtime policy." The evidence on the branch managers' limited scope of managerial authority shows no variability and is highly relevant to the characterization of the employee and their eligibility for overtime pay.

[102] The appellant submitted legal support for the restricted authority proposition, such as *429485 B.C. Ltd. (c.o.b. Amelia Street Bistro) (Re)*, [1997] B.C.E.S.T.D. No. 503, in which the British Columbia Employment Standards Tribunal reconsidered the issue of whether a bistro employee was a manager. The Tribunal described a manager as having "power of independent action, autonomy and discretion." Typical responsibilities of managers include hiring, firing, discipline, authorizing overtime, time off, leaves of absence, laying off, changing work processes, training, and scheduling. Importantly, each case will turn on the degree to which an employee exercises power and authority that is "typical of a manager": at para. 22.

[103] In *McCracken v. Canadian National Railway Company*, 2010 ONSC 4520, [2010] O.J. No. 3466, at paras. 59-67, Perell J. reviewed the case law on the legal question of what constitutes a manager. This is a question of fact, to be determined in the context of the organization. Titles are not determinative. The court must look at certain indicia such as representing the employer in collective bargaining, setting budgets, determining the structure of the organization, setting policy, reviewing performance, hiring, and firing. In short, the court must look for indicia of "a significant level of autonomy and real decision-making authority": *McCracken*, at para. 63.

[104] Although not put before the motion judge, there is additional support for the proposition advanced by the appellant in this court's decision in *Brown v. Canadian Imperial Bank of Commerce*, 2013 ONSC 1284 (Div. Ct.), [2013] O.J. No. 1837, at para. 25:

> In the context of overtime entitlement under the ESA there are many factors to consider in determining whether a person is performing managerial or supervisory functions. The inquiry is much broader than simply looking at whether the person supervises or controls the work of others. The determination of the issue for any individual must take into account the employee's authority, autonomy, level of responsibility, degree of control over his or her hours of work and where and how that work is done. Consideration needs to be given to whether, how and to what extent the employee is accountable to anyone else for the manner in which the work is done or the hours devoted to it. The inquiry will be fact specific and cannot be determined by abstract definition.

[105] The respondent submits that this argument is without merit because the evidence before the motion judge established a wide variety in functions and managerial authority among members of the class. The respondent points to paras. 41-44 of the affidavit of Brian Oddy in support of this argument.

[106] A review of these paragraphs in the Oddy affidavit confines this evidence to the proportions of work devoted to managerial versus non-managerial tasks in different locations. It does not specifically address the evidence filed by the appellant concerning centralized decision-making and other uniform limits on branch manager authority. According to the evidence of Kevin Alton, Paul Westlake and the appellant, the branch managers have no authority over hiring, firing, approving leaves of absence, fleet sizes or promotions. These functions are fulfilled by area managers, who are not part of the proposed class.

[107] These assertions were not contradicted by the evidence filed by the respondent, save for one paragraph in Mr. Oddy's affidavit that asserts, without any detail, that individuals working in the branch manager positions exercise different managerial functions and assume different levels of responsibility, depending on customer volume, branch location, experience, reputation, capability, ambition, objectives and a number of other factors.

[108] I find that given the affidavit evidence and submissions on the question of whether the class members were truly "managers" and the relationship of that evidence to the central question of commonality, the motion judge needed to consider this aspect of the argument. The uniform lack of authority is not answered by pointing to variations in the amount of non-supervisory work undertaken by different class members. It is answered by looking at the overall nature of the work done, informed by the non-supervisory tasks but also the limits on overall authority of the class members, the nature and structure of the organization and indicia of autonomy. The reasons for decision do not address that aspect of the argument.

[109] The other aspect of the common issues arguments that is absent from the certification analysis involves several pieces of provincial legislation providing for overtime exemptions. I turn to those next.

The Common Claims and the Employment Standards Legislation in Ontario, Alberta, Saskatchewan, and PEI

[110] The motion judge was alive to the issue of different articulations of the test for overtime exemptions across the provinces. His reasons advert to the origin of overtime pay obligations in provincial legislation. Further, in his assessment of the "cause of action" under s. 5(1)(a) of the *CPA*, the motion judge accepted that based on this legislation, except for in British Columbia (which I deal with below), the alleged statutory breaches "appear to present causes of action which are at least potentially viable": at para. 16. In the common issues analysis, the motion judge also acknowledged the submission of the respondent that there are differences between the provincial legislation: at para. 27. However, he did not assess or discuss in his reasons the impact of the legislation in Ontario, Alberta, Saskatchewan, and PEI on the commonality of the proposed class members' claims arising from the facts in the record. I consider this question for each of those provinces in turn.

[111] In Ontario, the test for an overtime exemption has two components: 1) the work done by the person must be "supervisory or managerial in character", and 2) the person must perform "non-supervisory or non-managerial tasks on an irregular or exceptional basis: O. Reg. 285/01 under the *ESA*, at s. 8(b); *Brown 2014*, at para. 20; *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144, [2013] O.J. No. 3805, at footnote 4 to para. 5; *Tsakiris v. Deloitte & Touche LLP*, 2013 ONSC 4207, [2013] O.J. No. 4207, at para. 157.

[112] The Ontario Labour Relations Board applied this two-part test in 1748271 *Ontario Inc. v. Patterson*, 2015 CanLII 26117. The OLRB considered that, although his work was "supervisory", it was "obvious" on the evidence that the store manager in that case had not met the second part of the test for the overtime exemption. The OLRB wrote at para. 12:

> As store manager, [the employee] regularly and non-exceptionally performed non-supervisory and non-managerial tasks. He regularly made CSR (customer service retention) calls to customers, assisted in delivering product to customers' houses, cleaned the store, etc.

[113] In *Tchernov v. Synergex Corporation*, 2011 CanLII 46647 (Ont. L.R.B.), the OLRB likewise concluded that the second part of the test was not met where an accounts payable supervisor regularly (20-30% of the time) performed the same duties as the employees she supervised. Thus her non-managerial tasks were not "irregular" or "exceptional". That she was paid a salary and had supervisory responsibilities did not end the analysis: *Tchernov*, at paras. 15 and 18. This is precisely the kind of evidence that was before the motion judge: the proposed class members regularly did the same work as the employees they supervised. The motion judge did not grapple with this aspect of the common issues argument—despite evidence on the certification motion that these class members regularly and not exceptionally performed non-supervisory, non-managerial tasks.

[114] In Alberta, the wording of the relevant employment standards legislation conveys a similar idea: the non-supervisory work must be done "more than incidentally": *Employment Standards Regulation*, Alta. Reg. 14/1997, at s. 2(1). The appellant did establish a basis in fact with the percentages of non-supervisory work that this was work performed regularly and non-incidentally. This was not discussed in the reasons for decision.

[115] In Saskatchewan the operative test is whether an employee works “entirely” that is, “continuously” carrying out managerial responsibilities: *Saskatchewan Employment Act*, S.S. 2013, c. S-15.1, s. 2-7(3). Thus the evidence in the record makes out a basis in fact that class members in Saskatchewan were not overtime exempt. Variations in the proportion of non-managerial work done by the class members employed in Saskatchewan are not an answer to the “continuous” requirement.

[116] Finally, in Prince Edward Island, the employment legislation does not exempt managers from overtime. Thus proportions of supervisory to non-supervisory hours worked has no relevance to these members of the class.

[117] Had the motion judge considered the employment standards legislation across the four provinces, combined with evidence of the nature of the branch managers’ job classifications and duties, this would have formed a significant sub-group and alternative pathway to a finding of a common issue for class members from Ontario, Alberta, Saskatchewan and P.E.I. It was an error to omit an explanation for why this aspect of the appellant’s argument was rejected.

[118] The appellant proposes a revised articulation of questions 2, 4 and 5 in its factum which would more precisely reflect these aspects of the common issues. I would adopt those proposed amendments and certify these questions.

Section 5 (1)(d): The Preferable Procedure

[119] Given his conclusions on the common issues analysis, the motion judge concluded at para. 66 that this aspect of the test was superfluous. It is self-evident that a claim devoid of common issues means that “the lack of commonality makes it an inappropriate class proceeding”.

[120] By virtue of these findings, s. 5(1)(d) requires renewed consideration, as does the issue of a suitable representative plaintiff, pursuant to s. 5(1)(e) of the *CPA*.

Conclusion

[121] For these reasons, I would allow the appeal and return the matter to a motion judge for reconsideration.

Leiper J.

Date of Release: June 19, 2023

CITATION: Le Feuvre v. Enterprise Rent-A-Car Canada Company, 2023 ONSC 3425
DIVISIONAL COURT FILE NO.: 452/22
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ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Lococo, Leiper and Schabas JJ.

BETWEEN:

JARED LE FEUVRE

Plaintiff (Appellant)

– **and** –

ENTERPRISE RENT-A-CAR CANADA COMPANY

Defendant (Respondent)

REASONS FOR JUDGMENT

R. A. Lococo J. (Leiper J. dissenting)

Date of Release: June19, 2023