COURT OF APPEAL FOR ONTARIO

CITATION: McCracken v. Canadian National Railway Company,
2012 ONCA 797
DATE: 20121120
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

Scott Hutchinson, Aaron Dantowitz and Benjamin Kates, for the Law Foundation of Ontario

Heard: February 28 and 29, 2012

On appeal from the order 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.

COSTS ENDORSEMENT

Winkler C.J.O.:

[1] This court's judgment in *McCracken v. Canadian National Railway Company*, 2012 ONCA 445, was released concurrently with two other appeals in a trilogy of class actions against federally-regulated employers claiming unpaid overtime pay: *Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443, and *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444. In *McCracken*, this court overturned the motion judge's order certifying the proposed action. The parties are to return before the motion judge to make oral submissions on the costs of the certification motion.

[2] The court has now had the opportunity to review submissions on the costs of the appeal of the successful appellant, Canadian National Railway Company, as well as the joint submissions of the proposed representative plaintiff, Michael McCracken, and the Law Foundation of Ontario. The Class Proceedings Committee of the Law Foundation approved the proposed class action for funding support from its Class Proceedings Fund.

[3] CN seeks partial indemnity costs of the appeal in the amount of $300,000, including disbursements in the amount of $13,293.49 and taxes. CN's counsel indicate that this amount represents approximately one-third of the actual costs incurred ($931,464) and reflects a discount from the maximum allowable on a partial indemnity scale ($487,799).

[4] The plaintiff and the Law Foundation submit that no costs should be awarded for the appeal, but if they are, the award should not exceed $50,000.

[5] The plaintiff and the Foundation complain that as much as $229,074 of the actual fees appearing in CN's costs outline ($127,050 on partial indemnity) and an unspecified portion of the claimed disbursements, arise from work done in connection with the Divisional Court proceedings. These proceedings were resolved on consent and on a no-costs basis and are not properly claimed as costs of the proceedings in this court. As noted above, however, CN reduced the amount of its alleged actual costs on a partial indemnity basis by approximately $180,000, which neutralizes the concern raised by the plaintiff and the Foundation.

[6] I would not accept the position of the plaintiff and the Law Foundation that no costs should be awarded to CN for the appeal in this court. The outcome of the appeal, its complexity, the principle of indemnity and the reasonable expectations of the plaintiff all militate in favour of a significant partial indemnity costs award.

[7] This was a two-day hearing and each side raised a host of issues by way of appeal and cross-appeal. It should come as no surprise to the plaintiff or the Law Foundation – given the $300 million claimed in the action and the almost $750,000 in costs that the plaintiff was awarded on the certification motion – that

the appeal would be hard-fought and would be argued by experienced counsel on behalf of CN.

[8] However, in furtherance of the goals of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the court will also consider whether any of the factors set out in s. 31(1) of that Act – a test case, a novel point of law, a matter of public interest – apply: see *Ruffolo v. Sun Life Assurance Co.* (2009), 95 O.R. (3d) 709 (C.A.). I agree with the position of the plaintiff and the Law Foundation that this appeal involved novel points of law. Indeed, in its factum filed in support of the request for leave to appeal the certification order to the Divisional Court, CN took the position that the proposed action "engages serious, novel legal issues. It raises important questions regarding how misclassification can be heard collectively, if at all."

[9] I also agree with the plaintiff and the Foundation that the proposed action was animated by public interest concerns insofar as this class proceeding was intended to afford an efficient means to obtain collective redress for employees of a federally-regulated company. The public interest issue is whether or not a misclassification case can properly be made the subject matter of a class proceeding. This public interest purpose is consistent with the fundamental objective of the *CPA* of providing enhanced access to justice: *Pearson v. Inco Ltd.* (2006), 79 O.R. (3d) 427, at para. 13.

[10] I reject CN's argument that access to justice considerations are not involved because the Class Proceedings Fund will indemnify the representative plaintiff for any costs award. The Fund was created to facilitate access to justice. If the Fund were required to absorb steep cost awards imposed on litigants even though the proposed action displays the factors in s. 31(1) of the *CPA*, this would have an undesirable chilling effect on class proceedings.

[11] On the other hand, it must be recognized that class actions come at a cost to defendants. Indemnifying parties – such as class counsel or the Law Foundation – must assess the risks of an unsuccessful litigation strategy and balance them against the possible rewards: see *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 1737, 87 C.P.C. (6th) 345, at para. 20. The risk of adverse cost awards must factor into the decision to fund and indemnify a proceeding. The *CPA* was never intended to insulate representative plaintiffs from the possible costs consequences of unsuccessful litigation: *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2008), 93 O.R. (3d) 257 (C.A.), at para. 29.

[12] Considering that the appeal raised novel legal issues and that the proposed class action engaged the access to justice rationale animating the *CPA*, I would fix costs at a significantly lower amount than is being claimed by CN. However, I would not give effect to the plaintiff and the Foundation's submission that an order of no costs – or, in the alternative, an award of not more

than $50,000 – would be fair and reasonable in this case. Given the complexity of the appeal, the amount at stake in the litigation, and CN's complete success on appeal, in my view, costs of the appeal should be fixed on a partial indemnity scale at $60,000, inclusive of disbursements and taxes.

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