CITATION: Baroch v. Canada Cartage, 2015 ONSC 40
COURT FILE NO.: CV-13-492525-CP
DATE: 20150130

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Marc-Oliver Baroch	)	*Eric Hoaken, Ian Matthews and Larissa Moscu* for the Plaintiff/Moving Party
Plaintiffs	)	
	)	
– and –	)	
	)	
Canada Cartage Diversified GP Inc., Direct General Partner Corporation and Canada Cartage System Limited	)	*Sylvie Rodrigue, Linda Plumpton, Lisa Talbot and Sarah Whitmore* for the Defendants/Responding Parties
	)	
Defendants		
	)	
	)	
	)	**HEARD:** December 10, 2014

Proceedings under the Class Proceedings Act, 1992

CERTIFICATION DECISION

Belobaba J.:

[1] When is an overtime misclassification case not a misclassification case? When it is framed as a complaint about the systemic policies or practices of the defendant employer.

[2] This is the insight that, in large part, drives this motion for the certification of a proposed class action about unpaid overtime. The focus is on the employer's policies and practices, not on individual employee entitlements.

[3] Of the five requirements set out in s. 5(1) of the *Class Proceedings Act*,[1] the only one in dispute is the commonality requirement in s. 5(1)(c). The question before me is whether there is some basis in fact for the existence of the proposed common issues. For ease of reference, the proposed common issues are set out in the Appendix.

Background

[4] The plaintiff, Marc-Oliver Baroch, worked as a shunter[2] with Canada Cartage from March 2006 to June 2013. The defendant, Canada Cartage, is a national provider of trucking, warehousing, distribution, and logistics services and currently has about 3000 employees.[3]

[5] Canada Cartage is a federally-regulated employer that is subject to the *Canada Labour Code*[4] and its regulations, including the *Motor Vehicle Operators Hours of Work Regulations* ("the federal legislation").[5] The federal legislation provides three overtime eligibility thresholds that apply on the facts herein: for non-driver employees, 8 hours a day or 40 hours a week; for city drivers, 9 hours a day or 45 hours a week; and for highway drivers, the overtime eligibility threshold is set at 60 hours a week.

[6] The plaintiff alleges that Canada Cartage, as a matter of policy or practice, only paid overtime if the 60-hour threshold was exceeded; that it had no written overtime policy, no directives for its human resources staff, and no centralized record-keeping system; that overtime eligibility determinations were made on a case-by-case basis in disregard of applicable law; and that when Canada Cartage was directed by federal labour authorities to comply with the prescribed overtime thresholds, it unilaterally reduced the hourly wage in the affected area so it would appear that the required overtime was being paid when it was not.

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[1] *Class Proceedings Act 1992*, S.O. 1992, c. 6.

[2] Mr. Baroch drove a shunt truck, a type of semi-tractor that moved and positioned semi-trailers within the confines of a customer's yard.

[3] The three named defendants are part of the Canada Cartage group of companies. For the purposes of this motion, nothing turns on any corporate distinctions. It is sufficient to note that if this action is certified, it will be certified as against all of the defendants. I will continue to refer to the defendants collectively as "Canada Cartage".

[4] R.S.C. 1985, c. L-2.

[5] C.R.C., c. 990.

Not a Misclassification Case

[7] It is beyond dispute that the determination of overtime eligibility in the federally-regulated trucking industry is no easy matter. The calculations are complicated by the diversity of job descriptions and by fact that in any given week, shunters, for example, may do some city driving, and city drivers may do some highway driving, and so forth. The federal law adds further complexity with its "mixed employment rules," "modified work agreement" situations and "regional survey" considerations.

[8] If the issue in this proposed class action was simply misclassification and the determination of overtime eligibility, the action would not be certified as a class proceeding. Given the inevitability of individualized assessments, the commonality requirements in s. 5(1)(c) of the CPA would not be satisfied. The proposed class action would collapse just as it did in *McCracken*[6] and *Brown*.[7]

[9] But this not a misclassification case.

[10] The action has been carefully framed to avoid the pitfalls of *McCracken* and *Brown*. Consider the class definition. The action is being brought on behalf of some 7800 former and current employees that worked at Canada Cartage at any time between March 1, 2006 and the date of certification and "were entitled to receive overtime compensation pursuant to the *Canada Labour Code* and its regulations." The class thus includes only those former or current employees who were entitled to receive overtime compensation under the federal legislation (i.e. if they exceeded the applicable hours of work threshold.) Unlike in *McCracken* and *Brown*, the class has been pre-defined to assume overtime eligibility. The class definition makes clear that eligibility determinations and individual assessments are not at issue.

[11] Tracking the approach in *Fresco*[8] and *Fulawka*[9], the plaintiff has focused attention on a policy or practice that is alleged to be "systemic" and thus common to all of the class members. The plaintiff says that Canada Cartage breached its contractual obligations to class members by engaging in a policy or practice of avoiding or disregarding the

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[6] *McCracken v. Canadian National Railway*, 2012 ONCA 445.

[7] *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677.

[8] *Fresco v. Canadian Bank of Commerce*, 2012 ONCA 444.

[9] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443[*Fulawka Appeal*].

payment of overtime in a manner that complied with federal law.[10] The plaintiff says that in doing so, Canada Cartage failed to act in good faith and breached a duty of care by failing to take reasonable steps (such as having appropriate record-keeping systems in place) to ensure that class members were compensated at appropriate rates of pay for all hours worked. The plaintiff also alleges that Canada Cartage was unjustly enriched and, on behalf of the class, seeks declaratory relief of $75 million in aggregate damages and $25 million in punitive damages. It is only if the aggregate damages claim does not succeed, that the plaintiff claims "in the alternative" for the disgorgement and payment of individual overtime claims.

[12] Thus, the defendants' submission that this is a misclassification case is simply wrong. The defendants are also wrong to suggest that as a matter of law the class member's eligibility for overtime must be resolved before the defendants' liability can be determined. They point to *McCracken* and *Brown* for support. However, in *McCracken* and *Brown*, the very question in the proposed common issues was whether putative class members were entitled to receive overtime. This action is more akin to *Fresco* and *Fulawka*, where individual eligibility was not in issue and the focus was on the systemic policies or practices that allegedly amounted to breaches of the employment agreements.

[13] In almost every overtime class action, whether *McCracken*, *Brown*, *Fresco*, or *Fulawka*, the defendant employer has invariably argued that the claims were "hopelessly individualized"[11] with no commonality. When this was shown to be the case, i.e. where individual eligibility was the very question in the proposed common issues (*McCracken* and *Brown*) the action was not certified as a class proceeding. But where eligibility was a given,[12] and the common issues were focused on systemic problems that were arguably common to the class (*Fresco* and *Fulawka*), the action was certified.

[14] The fact that the answers to the common questions may be nuanced and varied will not defeat certification. As the Supreme Court recently noted in *Vivendi Canada v. Dell'Aniello*:

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[10] I will henceforth refer to this allegation more simply as the defendant having a policy or practice of avoiding or disregarding "its overtime obligations."

[11] *Fulawka Appeal*, *supra*, note 9, at para. 94.

[12] As noted in *Brown*, *supra*, note 7, at para. 39: "In *Fulawka* and *Fresco*, it was acknowledged that all of the employees in the proposed class were eligible for overtime pay."

> The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent.[13]

[15] Nor will certification be defeated simply because individual trials may still be required after the common issues have been answered. The Court of Appeal made this clear in *Fresco*:

> The fact that individual issues – including whether particular class members actually worked uncompensated overtime hours, and if so, how many overtime hours they worked – would remain after the common issues trial does not prevent a finding of commonality under s. 5(1)(c) of the CPA.[14]

[16] If there is some basis in fact for the proposed common issue and the answer to the common issue will advance the litigation, that is all that is required, in most cases, to clear the s. 5(1)(c) hurdle.

Decision

[17] In my view, the plaintiff has easily cleared the s. 5(1)(c) hurdle. The motion for certification is granted.

[18] My decision is rooted in two well-established propositions in the class action case law: one, that a plaintiff is entitled to frame and advance his case in a way that is most amenable for determination on a class-wide basis[15] (and if this means focusing primarily on systemic problems, that is his right); and two, merit-based arguments are irrelevant on certification[16] (and defendants should not waste time and money presenting evidence that is best left for the common issues trial.)

[19] I will explain my reasons for decision under the headings as set out below.

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[13] *Vivendi Canada Inc. v. Dell'Antello*, [2014] 1 S.C.R. 1, at para. 46.

[14] *Fresco*, *supra* note 8 at para. 106.

[15] *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148 at para. 122 [*Fulawka Certification*], citing *Rumley v. British Columbia*, [2001] 3 S.C.R. 184. Also see *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 39 and cases cited therein.

[16] *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 S.C.J. No. 57 at para. 102.

The only hurdle is s. 5(1)(c)

[20] In too many cases, defence counsel will oppose certification by arguing all five of the requirements in s. 5(1) of the CPA simply for the sake of argument. Here, to their credit, counsel for the defendant did not do this. They raised a minor objection under the cause of action requirement,[17] but otherwise agreed that the only real dispute was commonality and s. 5(1)(c). And they were wise to do so.

[21] I have no difficulty concluding that the requirements set out in ss. 5(1)(a), (b), (d) and (e) of the CPA are satisfied. The causes of action in breach of contract, negligence, and unjust enrichment are viable. There is an identifiable class of two or more persons. A class action is the preferable procedure and Mr. Baroch is a suitable representative plaintiff with a workable litigation plan and no conflicts of interest.

The s. 5(1)(c) case law

[22] The key principles that apply herein can be stated succinctly. The question under s.5(1)(c) is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action.[18] The motion judge's primary concern under this provision is to decide if there is commonality. Commonality requires more than a bare assertion in the pleadings,[19] and it cannot be manufactured through the wording of the proposed common issues.[20] The plaintiff must show some basis in fact (i.e. some evidence) for the existence of the proposed common issue.[21]

[23] The "some basis in fact" standard does mean that the court must resolve conflicting facts and evidence at the certification stage. Indeed, it is "ill-equipped" to do

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[17] The defendant tried to argue that the good faith/honesty in contractual performance obligation in an employment context, only applies when the employment agreement is being terminated. Even before *Bhasin v. Hrynew*, 2014 SCC 71, the common law did not confine honesty in the performance of employment agreements to cases of employment termination: see *Fulawka Certification, supra* note 15, at paras. 77 and 78. In *Bhasin*, the Supreme Court explicitly recognized a common law duty of honesty in the performance of all contracts. The good faith claim is therefore a viable claim.

[18] *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, at paras. 15 and 16

[19] *Fulawka Appeal*, supra, note 9, at para. 79.

[20] *McCracken, supra*, note 6, at para. 132.

[21] *Fulawka Appeal, supra*, note 9, at para. 79. The evolution of the "some basis in fact" requirement is critically analyzed in Kain, *"Developments in Class Actions Law: The 2013-14 Term – The Supreme Court of Canada and the Still-Curious Requirement of "Some Basis In Fact"*, (2015) 68 S.C.L.R. 77.

so.[22] The certification motion is not meant to be a test of the merits of the action.[23] The merits of the plaintiff's allegations will be decided when the common issues are adjudicated, either via trial or motion for summary judgment. All that the plaintiff has to show at this stage is some evidence of the existence of the common issue and that the common issue will advance the litigation. Again, the fact that the defendant, in response, can marshal cogent and compelling evidence going to the merits is not relevant.

The proposed common issues

[24] Even a quick review of the proposed common issues (attached in the Appendix) reveals that the plaintiff is framing his action around the core allegation that the defendant had a policy or practice of avoiding or disregarding its overtime obligations. The focus throughout is on the systemic nature of the impugned policy or practice. Proposed common issues 1 to 7 ask about the existence of this practice or about certain of the defendant's duties and breaches related thereto. Common issue 8 asks about unjust enrichment. Common issue 9 about the Assurance of Voluntary Compliance ("AVC"). And common issues 10 and 11 about remedies, and in particular, whether aggregate and punitive damages can be awarded, and if so in what amount. Put simply the plaintiff has framed his action, as is his right, to focus on the defendant's conduct, not on individual employee overtime entitlements.

[25] Is there some evidence of the existence of the proposed common issues? Will the common issues advance the litigation? I will consider each of them in turn.

Common issue 1 – the employment agreement

[26] Common issue 1 asks whether it was a term of the employment agreement that class members would be paid for overtime in a manner that complied with federal legislation. Canada Cartage admits that its obligation to compensate class members for overtime in a manner that complies with federal legislation is an obligation that is incorporated into the class members' employment contracts.[24] There is thus some basis in fact supporting the existence and commonality of this first issue. And, as the Court of Appeal noted in *Fulawka,* "Determining the relevant express and implied terms of the

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[22] *Pro-Sys Consultants, supra,* note 16 at para. 102.

[23] *Hollick, supra,* note 18, at para. 16. Also see s. 5(5) of the CPA.

[24] Indeed s. 168(1) of the *Canada Labour Code* prohibits contracting out of the minimum eligibility thresholds.

employment contract of class members … is a necessary and substantial ingredient of the class members' claims."[25]

[27] The answer to common issue 1 also provides a foundation for both the declaratory and damages claims and for common issues 3, 4, 6, 8, 10 and 11. It will definitely advance the litigation. Counsel will understand that this common issue has to be certified despite the defendant's admission because "in the absence of a certification order, any admission fails to bind the defendant vis-à-vis the proposed class in any meaningful way."[26] Common issue 1 is certified.

Common issue 2 – policy or practice

[28] Common issue 2 asks whether the defendant had a policy or practice of avoiding or disregarding its obligations under federal law to pay overtime in accordance with the contractual entitlements. This is the core "systemic" allegation. Almost all of the parties' submissions were directed at this particular issue.

[29] I find that the plaintiff has more than succeeded in presenting some evidence of the existence and commonality of proposed common issue 2. I set out below the items of evidence that *in combination* persuade me that there is some basis in fact for the allegation that Canada Cartage had a policy or practice of avoiding or disregarding its overtime obligations:

- Canada Cartage had no written overtime policy during the class period. There was no Canada Cartage document that employees could consult to learn how their overtime entitlement would be calculated. Canada Cartage issued detailed employee handbooks containing policies that applied to various areas of an individual's employment but there was no information about overtime thresholds.

- Canada Cartage never issued any written directives to managers, supervisors or the payroll department about how to apply the various overtime rules and thresholds. There was no Canada Cartage document or directive that persons responsible for calculating an employee's overtime could consult to ensure that they do so in a consistent fashion.

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[25] *Fulawka Appeal, supra*, note 9, at para. 89.

[26] *Ibid.*, at para. 87.

- Barbara Eddy, a senior human resources director, whose responsibilities included ensuring that employment practices complied with federal labour law, did not know of any system or process used by Canada Cartage to keep track of what duties an employee was performing on any given day so that it could apply the mixed employment rules and determine the correct overtime threshold. Ms. Eddy also admitted that the mixed employment rules were "quite a gray area" for her.

- Even though she agreed that the company was obliged to use and apply the federal Labour Program's regional surveys to determine whether an employee was a city or a highway driver, Ms. Eddy stated that she did not understand how to apply the surveys. Indeed, until June, 2013, when she learned about these surveys as a result of an employment complaint, Ms. Eddy said she had been making city versus highway driver determinations without reference to the applicable survey. And then, even after learning of the surveys as a result of said employment complaint, she ignored them when responding to the complaint.

- Bradley Gehring, the company's vice-president of human resources, when asked about the system that Canada Cartage used to track what duties its employees were performing for the purpose of the overtime thresholds said that he would have to "look at what they're doing on a case-by-case basis."

- Mr. Gehring also stated that Canada Cartage did not coordinate or standardize its payroll process in order to determine what overtime thresholds applied and that the determinations varied "from employee to employee, location to location." Employee overtime determinations could be made by the billing group, the payroll group, or at the management level of the company.

- Even for employees subject to the standard 8/40 threshold, there could be a "multitude of ways" that the information about their overtime could be kept, and that "each manager had their own ability and flexibility to deal with it as per their discretion."

- In April, 2012, the Labour Program of Human Resources and Skills Development Canada ("HRSDC") issued an AVC to Canada Cartage. The scope and content of the AVC remains a matter of dispute between the parties. But on the face of the AVC, Canada Cartage is required to "ensure all employees are being paid overtime for hours worked in excess of the standard hours."

[30] Taken in combination this itemization easily amounts to some evidence that the defendant may well be avoiding or disregarding its overtime obligations at a systemic level: i.e. no written policies or directives; no printed information for employees; no standardized systems or centralized record-keeping; case-by-case determinations; senior

company officials that do not fully understand the applicable laws; and a federal AVC that suggests on its face that the overtime compensation concerns may be class-wide.

[31] Counsel for the defendant, relying on *Fresco,* tried to argue that the plaintiff could not point to any written document that actually set out a systemic policy or practice that acted as a barrier or impediment to class members receiving overtime compensation.[27] The case law, however, is clear that evidence of an actual policy or practice that serves as a barrier or impediment is not always required. The *absence* of a written class-wide policy or practice can also amount to some evidence of a systemic impediment. For example, in *Cloud,*[28] the *failure* to have in place systems or procedures that would have prevented the harms alleged made the claim appropriate for certification.[29] In *Rumley,*[30] it was the *failure* to have in place management and operational procedures that would reasonably have prevented the alleged abuse that made the claim appropriate for certification.[31] And, in the *Fulawka* certification decision, the *absence* of a class-wide system to record overtime hours was found to be a "systemic impediment to the ability of every class member to prove that he or she worked overtime and how much overtime he or she worked."[32]

[32] The systemic nature of the employer's conduct and its effect on the ability of all members of the class to recover overtime pay provided the degree of commonality necessary to satisfy s. 5(1)(c) of the CPA in *Brown.*[33] In *Fulawka,* the certification judge focused on the fact that "all members of the proposed class were exposed to the same risk of harm as a result of [the defendant's] policies and practices" to find commonality.[34] Both the *Brown* and *Fulawka* observations apply here.

[33] Counsel for the defendant presented pages of affidavit and cross-examination evidence rebutting the plaintiff's allegations – evidence about why written policies or

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[27] *Fresco v. Canadian Imperial Bank of Commerce,* 2012 ONCA 444, at para. 87; *Fresco Appeal, supra,* note 8, *at* paras. 91 and 92.

[28] *Cloud v. Canada (Attorney General),* (2004) 73 O.R. (3d) 401 (C.A.)

[29] Discussed in the *Fulawka Certification, supra,* note 15, at para. 115.

[30] *Rumley, supra,* note 15.

[31] Discussed in the *Fulawka Certification, supra,* note 15, at para. 115.

[32] *Fulawka Certification, ibid* at para. 143.

[33] *Brown, supra,* note 7, at para. 39.

[34] *Fulawka Certification, supra,* note 15, at para. 149.

directives were unworkable or impractical; that Canada Cartage did have some systems in place to track and record employee overtime; that it did not ignore the federal labour surveys; and that the AVC was only intended to apply to about 50 shunters, not the entire work force. But, as already noted, this is the very merits-based debate that is not permitted on a certification motion. The merits will be litigated (and Canada Cartage may well prevail) later at the common issues trial.

[34] The answer to common issue 2 also provides a foundation for both the declaratory and damages claims and for common issues 3, 5, 7, 8, 10 and 11, and will definitely advance the litigation. Common issue 2 is certified.

Common Issue 3 – breaches of employment agreements

[35] If the answer to common issues 1 and 2 is "yes", then common issue 3 asks whether the defendant's policy or practice of avoiding or disregarding its obligations to pay overtime as required under federal law constitutes or results in a breach of class members' contracts of employments.

[36] Common issue 3 is problematic. Whether or not the defendant's disregard of its obligations to pay overtime resulted in a breach of a class member's employment contract can only be determined on an individual basis. Assume, for example, that Canada Cartage disregarded its overtime obligations during a portion of the class period but, as it turned out, no one worked any overtime during this time period and thus no overtime was owing to any employee. The impugned practice alone (disregarding overtime obligations) would not amount to a breach of the employment agreements. The possibility or risk that you may not be paid overtime because of an employer's impugned practice is not a breach of the employment agreement.

[37] What is a breach is failing to pay overtime that is actually owed. But that determination can only be made on an individual basis.[35] And, as the case law makes clear, a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant.[36] Common issue 3 is not certified.

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[35] If the argument is that the defendant's disregard of the federal overtime obligations was a breach of the implied contractual duty of good faith that attaches to employment agreements, that question is posed and examined in common issues 4 and 5.

[36] *Singer v. Schering-Plough Canada Inc.* [2010] O.J. No. 113 at para. 140(h), and cases cited therein.

Common issues 4 and 5 – good faith and honesty

[38] The fourth and fifth common issues ask whether Canada Cartage owed class members a duty ("in contract or otherwise") of good faith, candour and honesty in respect of its overtime obligations, and if so, whether this duty was breached.

[39] The legal basis for these questions is not in dispute. Contractually implied good faith obligations in the context of employment agreements have been recognized by this court,[37] and a common law duty of honesty in contractual performance generally was recently endorsed by the Supreme Court in *Bhasin*.[38]

[40] The real question is whether there is some factual basis for the existence of this common issue. I find that there is. Much of the same evidence that supports common issue 2 – whether Canada Cartage avoided or disregarded its overtime obligations to class members – also provides an evidentiary basis that supports a breach of the duty of good faith as a common issue. Indeed, if the defendant is found to have a policy or practice of avoiding or disregarding its overtime obligations, the existence of such a policy or practice would itself be a class-wide breach of the duty of good faith or honesty in contractual performance.

[41] I note that in certifying *Fulawka*, Strathy J. (as he then was) permitted causes of action grounded in a duty of good faith to go forward because the duty of good faith could include requiring an employer to take "measures to ensure that overtime work [...] is properly recorded and properly compensated." And further, that in this day and age, "it is hard to imagine that [the employer] could not devise a time-tracking system that would be effective and automatic and that would allow managers, and their superiors, to track, regulate and fairly compensate overtime."[39]

[42] The answers to common issues 4 and 5 would have significance for all of the class members and would advance the breach of contract and punitive damages claims. Common issues 4 and 5 are certified.

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[37] *Fulawka Certification, supra*, note 15, at paras. 77 and 78.

[38] *Bhasin, supra*, note 17.

[39] *Ibid.*, at para. 80.

Common Issues 6 and 7 – the negligence claims

[43] Common issues 6 and 7 ask whether the defendant owed class members a duty to have reasonable record-keeping systems in place to ensure that all class members were paid for all overtime hours worked, and if so, whether the defendant breached this duty.

[44] I find that there is some basis in fact for concluding that these issues exist and are common to all class members. There is evidence from the defendant's human resource officers, Ms. Eddy and Mr. Gebring, that the defendant had no standardized record-keeping system and no uniform policy or practice for ensuring that class members were properly paid the overtime to which they were entitled. The defendant obviously had an employment relationship with every member of the class. Whether the defendant's failure to have appropriate and effective overtime systems in place constituted or resulted in a breach of a duty of care owed to class members is an issue that can be answered on a class-wide basis.

[45] The observations of Strathy J. in *Fulawka*, and the Court of Appeal in *Fresco*, regarding Scotiabank and CIBC respectively, apply with equal force here:

> The absence of a class-wide system to record hours is a *systemic impediment* to the ability of every class member to prove that he or she worked overtime and how much overtime he or she worked. If it is found that Scotiabank had a duty to create such a system, and that the duty was breached, the claims will be advanced in a significant way because Scotiabank will be unable to rely on its own breach of duty to defeat the claims of class members.[40]

> To the extent that the policies and record-keeping systems of CIBC are alleged to fall short of CIBC's duties to class members, or to constitute a breach of class members' contracts of employment, these elements of liability can be determined on a class-wide basis and do not depend on individual findings of fact.[41]

[46] The answers to common issues 6 and 7 would also advance the litigation. The Court of Appeal made two points in this regard in *Fulawka*: first, that resolving common issues about systemic defects "would present a very different factual matrix for

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[40] *Fulawka Certification, supra*, note 15, at para. 143.

[41] *Fresco, supra*, note 9, at para. 103.

considering the evidence concerning individual claims than the factual matrix that would exist at individual trials conducted in the absence of a common issues determination;"[42] and secondly, that the resolution of systemic issues could be determinative of the declaratory and injunctive relief sought by the plaintiff.[43]

[47] Here, a finding that Canada Cartage breached the duty set out in common issue 6 would establish an entitlement to the declaratory relief sought at paragraph 1(d) of the amended claim (regarding a duty to take reasonable steps to ensure that class members were properly compensated for work done) and could well entitle the plaintiff to the order claimed at paragraph 1(h) (directing the defendants to specifically perform their contracts of employment with the class members.)

[48] In short, I am satisfied that there is some evidence for the existence and commonality of common issues 6 and 7, and that their resolution would advance the litigation. Common issues 6 and 7 are certified.

Common issue 8 – unjust enrichment

[49] Common issue 8 asks whether Canada Cartage was enriched at any time during the class period by failing to pay overtime to class members in accordance with its obligations. If it is determined that Canada Cartage had a policy or practice of avoiding or disregarding its overtime obligations to class members, then such a policy or practice, given the length of the class period, would likely result in some level of enrichment on the part of the defendant and a corresponding deprivation on the part of some or all of the class members.

[50] The commonality of the unjust enrichment issue is not in serious dispute. Nor is the fact that it would advance the litigation by determining the declaratory relief sought in paragraph 1(e) of the amended statement of claim and by assisting with the damages claim in paragraph 1(f) and the disgorgement claim (pleaded in the alternative) in paragraph 1(g). Common issue 8 is certified.

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[42] *Fulawka Appeal*, *supra* note 9, at para. 96.

[43] *Ibid.*, at para. 99.

Common issue 9 – the AVC

[51] Common issue 9 asks, in essence, whether the AVC required Canada Cartage to ensure that *all* employees were being paid overtime for hours worked in excess of the thresholds, or just the 50 or so shunters, and further, whether Canada Cartage failed to take steps to comply with the AVC.

[52] Here as well, the plaintiff has cleared the "some evidence" hurdle. 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. The corrective action specified in the AVC includes the direction that the employer "will ensure that all employees are being paid overtime pay for all hours worked in excess of the standard hours of work."

[53] As for the second question, I find that there is some evidence that the defendant failed to take steps to comply with (the plaintiff's interpretation of) the AVC. Ms. Eddy, who was responsible for responding to the AVC, stated that she only understood the AVC to apply to shunters in Ontario, and took no action to ensure compliance in other job categories or outside Ontario.

[54] If this court finds that the AVC was intended to apply to "all employees" this would result in a class-wide finding that would affect all class members.[44] I am also satisfied that the answer to the AVC issue would advance the litigation on the good faith/breach of contract and punitive damages claims. Common issue 9 is certified.

Common issue 10 – remedies

[55] If the answer to some or all of common issues 1 to 9 is "yes", then common issue 10 asks what remedies are available to class members.

[56] Plaintiffs routinely propose the "what remedies" question as a common issue. Frankly, I don't know why they do so. The common issues trial judge is fully able to ask and answer the remedies question without the prompting or direction of the certification

[44] The defendant has presented evidence that strongly suggests that the AVC was only intended to apply to some 50 Ontario-based shunters, and not to the entire work-force. The defendant may well prevail on this point at the common issues trial. But, again, as I have already noted, the only question on certification is whether the plaintiff has advanced *some* evidence for the existence of the common issue and not whether this evidence is rebutted by the defendant. The merits will be litigated and decided at the common issues trial.

judge. In *Sankar v. Bell Mobility*,[45] I refused to certify the "what remedies" question because:

> [I]n my view it is too broad, and frankly, too self-evident. This is a question that every judge must ask in almost every case that he or she adjudicates. Also … the plaintiff is pursuing two remedies: damages for breach of contract and restitution for unjust enrichment, plus a claim for punitive damages. No other remedies are sought, so why ask the question?[46]

[57] Likewise here. This is a broad, self-evident question that will be before the common issues trial judge with or without any input from me. I recognize that some judges have certified a "what remedies" question as a common issue. I will not do so, however, for the reasons just stated. There is simply no need to do so. Common issue 10 is not certified.

Common issue 11 – liability on class-wide basis

[58] If the answer to some or all of common issues 1 to 9 is "yes" then common issue 11 asks whether Canada Cartage is potentially liable on a class-wide basis. This introductory question – whether the defendant is potentially liable on a class-wide basis – is an appropriate foundational question that has a class-wide reach. The proposed common issues that have been certified thus far were certified because there was some evidence of commonality, i.e. that they applied on a class-wide basis. If some of these common issues are answered "yes" (such as common issues 2, 5 or 7) it follows that the defendant's liability would also be on a class-wide basis. The real thrust of common issue 11 is in the two sub-parts: the availability of (a) aggregate and (b) punitive damages. I will deal first with common issue 11(a) and the availability of aggregate damages.

Common issue 11(a) – aggregate damages

[59] If the answer to common issue 11 is "yes", then common issue 11(a) asks whether damages can be assessed on an aggregate basis, and if so, whether statistical evidence can be used; what quantum should be awarded; and how aggregate damages award should be distributed.

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[45] *Sankar v. Bell Mobility Inc.*, 2013 ONSC 5916.

[46] *Ibid.*, at para. 77.

[60] Strictly speaking, it is the common issues trial judge who should determine whether the conditions for aggregate assessment, as set out in s. 24(1) of the CPA, have been satisfied because that it is that judge who makes the assessment.[47] However, a practice has developed to certify questions about aggregate damages when the court on the certification motion believes that there is a "reasonable likelihood" that the statutory preconditions as set out in ss. 24(1)(a), (b) and (c) will be satisfied if the plaintiff succeeds at the common issues trial.[48] I will consider each of them in turn.

[61] *Is monetary relief being claimed on behalf of some or of all class members?* The plaintiff is claiming some $100 million in aggregate and punitive damages. This first condition is obviously satisfied.

[62] *Are there any questions of fact or law that will remain to be determined in order to establish the amount of the defendant's liability other than those relating to the assessment of the monetary relief?* If common issues 2, 5, 7, 8 or 9 are resolved in the plaintiff's favour, the defendant's liability will be established in contract, tort or unjust enrichment. No further questions of fact of law relating to the defendant's liability will need to be determined. All that will remain is the assessment of monetary relief. Thus, there is a reasonable likelihood that this second condition will be satisfied.

[63] *Can the aggregate of the defendant's monetary liability to some or all of the class members be reasonably determined without proof by individual class members?* The question is not whether damages can be assessed with the same degree of accuracy as in an individual action, but rather whether damages can be reasonably determined without proof by individual class members.[49] The focus is on "the type of evidence that should be required before a court makes an aggregate assessment".[50] And the question is "not whether evidence is put forward in common or individual form, but rather whether the proof submitted is *sufficiently reliable* to permit a *just determination* of the defendant's liability."[51]

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[47] Winkler, Perell, Kalajdzic and Warner, *The Law of Class Actions in Canada* (2014) at 121.

[48] *Ibid.*, and cases cited therein.

[49] *Ramdath* v. *George Brown College*, 2014 ONSC 3066 at para. 44; Winkler, Perell et al, *supra*, note 47, at 264.

[50] Ministry of the Attorney General, Ontario Law Reform Commission, *Report on Class Actions* (1982), Vol. II, at 555 and 869.

[51] *Ibid.* at 555. (Emphasis added.)

[64] Here, if some of the certified (systemic) common questions are answered in the plaintiff's favour, and, for example, the common issues judge finds that the defendant avoided or disregarded its overtime obligations, breached its duty of good faith or honesty, failed to have reasonable and effective record-keeping and other systems in place to ensure that all class members were paid for all overtime hours worked, or breached the AVC, thereby causing loss or damage to the class members, there is a reasonable likelihood that the aggregate of the class members' damage could be reliably determined without proof by individual class members. The defendant would supply the proof.

[65] Canada Cartage groups its employees into a number of different job categories, and has records regarding which employees it categorized as being eligible for overtime after the 8/40 threshold. For driving employees, it keeps records of the actual driving time of the employee based on the trip sheets filled out by drivers, which are scanned into the billing system. The defendant's safety and compliance department also maintains driver logs, which track the precise hours that a driver is working and driving. It appears that the defendant was able to perform a calculation of how much overtime it paid to class members at particular overtime thresholds based on an analysis of its own payroll records. In short, there is a basis on which this court could reasonably conclude that the information needed to decide the defendant's monetary liability on an aggregate basis is available and in the possession of the company.

[66] It will of course be up to the common issues trial judge to determine whether this is in fact the case. It may be that the defendant's records are sufficient to provide a basis for an aggregate determination, or it may be that the evidence will prove otherwise. The most I can conclude at this point, having reviewed the material before me, is that there is at least a reasonable likelihood that s. 24(1)(c) will be satisfied.[52]

[67] In sum, I am satisfied that the introductory question in common issue 11 about the defendant's potential liability and the question in 11(a) about aggregate damages should be certified. It follows from this that the questions in 11(a)(ii) and (iii) about quantum and distribution should also be certified. However, I will leave common issue 11(a)(i) about the use of statistical evidence and random sampling to the common issues trial judge.[53]

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[52] In *Sankar, supra*, note 45, at para. 86, I concluded that 'reasonable likelihood' is a predictive standard that is less than 'likely' but more than a 'reasonable possibility.'

[53] Perhaps by the time this matter has travelled through the several levels of predictable appeal, the Court of Appeal will have found an opportunity to revisit and reverse the unfortunate comment about "random sampling" that was

Common issue 11(b) – punitive damages

[68] Common issue 11(b) asks whether punitive damages should be awarded, and if so, what should be the appropriate quantum.

[69] In cases where the compensatory component of the damages award requires individualized assessments, judges have certified the entitlement question and have deferred the quantum question until the amount of compensation has been determined.[54]

[70] Here, however, given the "systemic" focus of the action and the claim for aggregate (not individualized) damages, there is no reason not to certify the quantum question as well. If Canada Cartage is found to have engaged in systemic conduct that resulted in a breach of its obligations to class members, particularly if it did so wilfully or even recklessly, there will be a common basis for an award of punitive damages. Given the $25 million claim, the determination of the punitive damages question, both entitlement and quantum, would definitely advance the litigation. Common issue 11(b) is certified.

Disposition

[71] This action is certified as a class proceeding.

[72] Proposed common issues 1, 2, 4, 5, 6, 7, 8, 9, 11, 11(a), 11(a)(ii), 11(a)(iii), 11(b) and 11(b)(i) are certified as the common issues. Proposed common issues 3, 10 and 11(a)(i) are not certified as common issues.

[73] Counsel shall prepare an order, in the form contemplated by s. 8 of the CPA. If they are unable to agree on the form of the order a case conference may be arranged.

[74] I have already received some costs submissions from both parties. If either party wishes to supplement its costs submission given the results achieved herein or for any

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made in the *Fulawka Appeal, supra* note 9, at para. 137. As I noted in *Nolevaux v. King and John Festival Corporation*, 2013 ONSC 5451 at paras. 14-19, the Court's assertion that random sampling of even a handful of class members is not permitted under s. 24(1)(c) is a serious error that needs to be corrected at the earliest opportunity.

[54] *Trillium Motor World v. General Motors of Canada*, 2014 ONSC 4336 at paras. 7-11. I know I suggested otherwise in *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144 at para. 64, but I have since concluded that I was wrong to do so.

other reason, it should deliver same in accordance with the following schedule: the plaintiff within 10 days, the defendant within 10 days thereafter.

[75] My thanks to counsel for their assistance.

Belobaba J.

Released: January 30, 2015

Appendix: Proposed Common Issues

1) Was it a term of Class Members' contracts of employment with Canada Cartage that they would be paid for overtime in a manner that complied with the applicable provisions of the *Canada Labour Code* and its regulations?

2) Did Canada Cartage have, at any time during the Class Period, a policy or practice of avoiding or disregarding its obligations to pay overtime to Class Members in accordance with their contractual entitlements?

3) If the answer to 1 and 2 is "yes", did the policy or practice of Canada Cartage during the Class Period of avoiding or disregarding its obligations to pay overtime to Class Members in a manner that complied with the applicable provisions of the *Canada Labour Code* and its regulations constitute or result in a breach of Class Members' contracts of employment?

4) Did Canada Cartage owe Class Members a duty (in contract or otherwise) to act in good faith and deal with them in a manner characterized by candour, reasonableness, honesty and/or forthrightness in respect of Canada Cartage's obligations to pay overtime to Class Members?

5) If the answer to 4 is "yes", did Canada Cartage breach this duty owed to Class Members?

6) Did Canada Cartage owe Class Members a duty (in contract or otherwise) to take reasonable steps to ensure that it met its obligations to pay overtime to Class Members by, for example, having reasonable and effective systems, procedures and/or policies in place to monitor and accurately record the hours worked and duties performed by Class Members and to ensure that all Class Members were paid for all overtime hours worked?

7) If the answer to 6 is "yes", did Canada Cartage breach this duty owed to Class Members?

8) a. Was Canada Cartage enriched at any time during the Class Period by failing to pay overtime to Class Members in accordance with its obligations?

b. If the answer to 8(a) is "yes", did Class Members suffer a corresponding deprivation?

c. If the answer to 8(b) is "yes", is there a juristic reason for Canada Cartage's enrichment?

9) Did the Assurance of Voluntary Compliance ("AVC") issued by the Labour Program of HRSDC to Canada Cartage on April 26, 2012 require Canada Cartage's compliance in paying overtime to all Class Members who worked in excess of their standard hours of work (as prescribed by the *Canada Labour Code* and its regulations) and did Canada Cartage fail to take necessary and effective the steps to comply with the AVC?

10) If the answer to some or all of the foregoing common issues is "yes", what remedies are available to Class Members?

11) If the answer to some or all of the common issues is "yes", is Canada Cartage potentially liable on a class-wide basis? If "yes":

a. Can damages be assessed on an aggregate basis? If "yes":

i) Can aggregate damages be assessed in whole or in part on the basis of statistical evidence, including statistical evidence based on random sampling?

ii) What is the quantum of aggregate damages owed to Class Members?

iii) What is the appropriate method or procedure for distributing the aggregate damages award to Class Members?

b. Is the Class entitled to an award of aggravated, exemplary or punitive damages based upon Canada Cartage's conduct towards some or all Class Members? If "yes":

i) What is the appropriate quantum of aggravated, exemplary or punitive damages that should be awarded to the Class?

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CITATION: Baroch v. Canada Cartage, 2015 ONSC 40
COURT FILE NO.: CV-13-492525-CP
DATE: 20150130

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Marc-Oliver Baroch

Plaintiff

– and –

Canada Cartage Diversified GP Inc., Direct General Partner Corporation and Canada Cartage System Limited

Defendants

REASONS FOR JUDGMENT

BELOBABA J.

Released: January 30, 2015