

**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

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

**PLAINTIFF'S FACTUM – CERTIFICATION
(Returnable December 10-12, 2014)**

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PART I - INTRODUCTION

1. The plaintiff moves for certification of this proposed class action, which concerns the overtime policies and practices of national trucking and logistics provider Canada Cartage.

2. The Amended Statement of Claim pleads that Canada Cartage breached its contractual obligations to class members by engaging in a policy or practice of avoiding or disregarding the payment of overtime in a manner that complied with the *Canada Labour Code* and its regulations. It asserts that Canada Cartage failed to act in good faith when it avoided and disregarded these obligations, and breached a duty of care by failing to take reasonable steps to ensure that class members were compensated, at appropriate rates of pay, for all hours worked – steps that include having appropriate overtime systems, policies and practices in place and ensuring they were consistent with interpretive guidance issued by the federal government. It alleges that Canada Cartage was unjustly enriched in the circumstances. On behalf of the class, the Amended Claim seeks declaratory relief, specific performance of Canada Cartage's obligations to class members, and general and punitive damages totalling \$100 million.

3. This proposed class action focuses on systemic conduct of Canada Cartage, as expressed in the company's policies and practices. This approach provides the requisite commonality to permit certification, even if nuanced answers to the common issues emerge at trial.

4. There is no dispute that the class is identifiable, a class action would be the preferable procedure, or that Marc-Oliver Baroch would be an appropriate representative plaintiff. Canada Cartage concedes these points and in any case, there is some basis in fact to support each of them. In the result, based on Canada Cartage's own concessions and evidence, there are approximately 7800 class members who are entitled to receive overtime and whose claims – presuming they

disclose reasonable causes of action – are preferably resolved through a class action with Mr. Baroch as the class representative.

5. This motion requires the Court to determine if Mr. Baroch has properly pleaded causes of action in contract, tort and unjust enrichment and provided some basis in fact to establish that the common issues he has proposed are common to all class members. It is not plain and obvious that the claims in contract, negligence and unjust enrichment are doomed to fail. Courts of this province have allowed similar causes of action to go forward in other overtime class actions.

6. The evidence on this motion demonstrates that Canada Cartage (i) had no overtime policy during the class period, (ii) took no steps to give guidance or direction to those responsible for determining overtime compensation for class members, even though it asserts that determining overtime for class members is complicated, and (iii) in so doing, exposed all class members to the actual or potential risk that their overtime entitlements would be avoided or disregarded. This is a factual basis that supports commonality.

7. Mr. Baroch respectfully submits that this claim is clearly amenable to certification and that the requirements of subsection 5(1) of the *Class Proceedings Act* are satisfied.

PART II - SUMMARY OF FACTS

(A) The Parties and Class Definition

8. The proposed representative plaintiff, Marc-Oliver Baroch, was employed by Canada Cartage (as defined below) as a shunter from March 2006 until June 2013.¹ In that capacity, Mr. Baroch operated a shunt truck – a type of semi-tractor – to move and position semi-trailers within the Matrix yard (“Matrix”). Canada Cartage has a contract to provide transportation and

¹ Affidavit of Marc-Oliver Baroch, sworn March 22, 2014, paras. 10 and 34 (Plaintiff’s Motion Record, Tab 2) [“Baroch Affidavit”]. See also Record of Employment of Mr. Baroch (Plaintiff’s Motion Record, Tab 2C).

distribution services at Matrix, which is a major terminal for Shoppers Drug Mart stores in Eastern Canada.²

9. Mr. Baroch brings this action on behalf of himself and a class of all persons who, at any time between March 1, 2006 and the date of the certification order in this action (the “class period”), were employed by Canada Cartage and who were entitled to receive overtime compensation pursuant to the *Canada Labour Code*³ and its regulations (the “class” or “class members”).⁴

10. The defendant Canada Cartage Diversified GP Inc. (“Diversified”) is an Ontario corporation with its head office in Mississauga, Ontario. Along with the entities it controls, Diversified engages in the business of dedicated trucking services and other related services, including warehousing and distribution centres, general cartage, and logistics and moving services.⁵ The defendant Direct General Partner Corporation (“Direct”) is a wholly-owned subsidiary of Diversified.⁶ The defendant Canada Cartage System, Limited (“CCSL”) is an Ontario corporation. Despite the defendants’ assertion that CCSL is not part of the Canada Cartage group of companies, the evidence establishes that Mr. Baroch’s offer of employment was made “[o]n behalf of Canada Cartage System, Ltd.”⁷

² Baroch Affidavit, paras. 9 and 16 (Plaintiff’s Motion Record, Tab 2).

³ R.S.C. 1985, c. L-2 [the “Code”].

⁴ Amended Statement of Claim (Second Supplementary Motion Record, Tab 1).

⁵ Affidavit of Lilly Iannacito, sworn March 21, 2014, para. 11 (Plaintiff’s Motion Record, Tab 4) [“Iannacito Affidavit”]; Affidavit of Bradley Gehring, sworn July 20, 2014, paras. 15-16 and 23 (Defendants’ Motion Record, Tab 1) [“Gehring Affidavit”].

⁶ Gehring Affidavit, paras. 25-26 (Defendants’ Motion Record, Tab 1); Iannacito Affidavit, paras. 10-1 (Plaintiff’s Motion Record, Tab 4).

⁷ Gehring Affidavit, para. 24 (Defendants’ Motion Record, Tab 1); Cross-Examination of Bradley Gehring, September 16, 2014, p. 5, q. 4 (Joint Brief of Transcripts and Exhibits, Tab B) [“Gehring Examination”][“JBTE”]. See also Mr. Baroch’s offer of employment letter (Defendants’ Motion Record, Tab 2A); Iannacito Affidavit, paras. 15-19 (Plaintiff’s Motion Record, Tab 4).

11. Together, the defendants and the entities they control make up Canada Cartage (or the “company”), which is a leading national provider of transportation, trucking, warehousing, distribution, and logistics services. It has facilities across Canada and generally segregates its operations into Eastern Canada (Ontario and Quebec) and Western Canada (Manitoba, Saskatchewan, Alberta, and British Columbia).⁸ As of June 30, 2014, Canada Cartage employed 3056 individuals.⁹ These employees work at both company-owned terminals and at client sites.¹⁰

12. Canada Cartage is a federally-regulated employer subject to the *Code* and its regulations,¹¹ including the *Motor Vehicle Operators Hours of Work Regulations* (“MVOHOW regulations”).¹²

(B) The Canada Labour Code and Regulations

13. The *Code* and its regulations create a regulatory floor with respect to the standard hours of work and payment of overtime. According to section 168(1) of the *Code*:

This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

14. Overtime is defined in section 166 of the *Code* as “hours of work in excess of standard hours of work.” Under section 174 of the *Code*, an employee’s compensation for overtime “shall, subject to any regulations made pursuant to section 175, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.”

⁸ Gehring Affidavit, paras. 15-19 (Defendants’ Motion Record, Tab 1).

⁹ Gehring Affidavit, para. 20 (Defendants’ Motion Record, Tab 1).

¹⁰ Gehring Affidavit, paras. 17 and 29 (Defendants’ Motion Record, Tab 1).

¹¹ Gehring Affidavit, paras. 9 and 35 (Defendants’ Motion Record, Tab 1); Rule 39 Examination of Barbara Eddy, September 9, 2014, p. 16, q. 47-49; pp. 30, q. 101 (JBTE, Tab A) [“Eddy Examination”]; Gehring Examination, pp. 23-24, q. 80 (JBTE, Tab B); Iannacito Affidavit, paras. 15-19 (Plaintiff’s Motion Record, Tab 4).

¹² C.R.C., c. 990.

15. Under subsection 169(1) of the *Code*, the ‘default’ measurement of “standard hours of work” for employees subject to the *Code*, including putative class members, is eight hours of work per day and forty hours in a week (the “8/40 threshold”). However, the *MVOHOW* regulations modify the default measurement of standard hours of work for certain employees in the trucking industry,¹³ namely, “city motor vehicle operators” and “highway motor vehicle operators”.

Pursuant to section 2 of the *MVOHOW* regulations:

“city motor vehicle operator” means a motor vehicle operator who operates exclusively within a 10-mile radius of his home terminal and is not a bus operator and includes any motor vehicle operator who is classified as a city motor vehicle operator in a collective agreement entered into between his employer and a trade union acting on his behalf or who is not classified in any such agreement but is considered to be a city motor vehicle operator according to the prevailing industry practice in the geographical area where he is employed;

“highway motor vehicle operator” means a motor vehicle operator who is not a bus operator or a city motor vehicle operator.

16. In the case of city motor vehicle operators, section 5 of the *MVOHOW* regulations prescribes the standard hours of work as 9 hours in a day and 45 hours in a week (the “9/45 threshold”). For highway motor vehicle operators, section 6 of the regulations sets the standard hours of work at 60 hours in a week, with no daily threshold (the “60-hour threshold”).

17. The Labour Program of Human Resources and Skills Development Canada (“HRSDC”) – now known as Employment and Social Development Canada – conducts surveys of geographic regions to determine the “prevailing industry practice” that applies to city motor vehicle operators in a certain geographical area. In essence, the surveys assist in making the determination of whether a driver is a city or highway motor vehicle operator, having regard to the distance he

¹³ C.R.C., c. 990.

travels from his home terminal and the prevailing industry practice in that geographical area. Canada Cartage received the results of surveys conducted during the class period.¹⁴

18. The overtime requirement in section 174 of the *Code* is not altered or abridged by the *MVOHOW* regulations. Thus, an employee who works as a city motor vehicle operator and who works over and above the 9/45 threshold is to be paid overtime for hours above that threshold at a rate of pay not less than one and one-half times his or her regular rate of pay. The same is true for an employee who is a highway motor vehicle operator and who works over and above the 60-hour threshold. Employees who are not motor vehicle operators remain subject to the default measurement of standard hours of work and are to be paid overtime compensation if working in excess of the 8/40 threshold.

19. If an employee is employed in different job positions in a given day or week, and those job positions are subject to different standard hours of work (the 8/40 threshold, the 9/45 threshold and the 60-hour threshold), the “mixed employment” rules in the *MVOHOW* regulations are engaged. Under subsection 7(1) of the *MVOHOW* regulations, the employee’s standard hours of work are deemed to be the standard hours of work for the position in which he or she works the greatest number of hours in that day or week (and overtime is payable accordingly). By operation of subsections 7(2) and 7(3), however, overtime is not payable on any daily or weekly hours worked as a highway motor vehicle operator, except when an employee’s total hours exceed 60 hours in a week.

20. The Labour Program of HRSDC regularly and publicly issues guidance on the provisions of the *Code* pertaining to overtime and the *MVOHOW* regulations. This guidance includes “IPGs”

¹⁴ Gehring Examination, p. 76, q. 296 (JBTE, Tab B).

– Interpretations, Policies and Guidelines. Generally speaking, IPGs are instituted to ensure that the statutory and regulatory provisions are interpreted consistently across the country. For example, 700-10-IPG-071, entitled “Survey Procedure for Ascertaining a Prevailing Industry Practice in a Geographical Area – *Motor Vehicle Operators Hours of Work Regulations*” (“Survey Procedure”),¹⁵ contains a definition of “shunter,” which explains that a shunter is not a city or highway motor vehicle operator and is to be paid overtime at the 8/40 threshold.

21. Canada Cartage admits that it is required to comply with the *Code* and the *MVOHOW* regulations that pertain to the payment of overtime.¹⁶ The company also admits that it is obliged to use and apply the surveys conducted by the Labour Program of HRSDC and that it must consider the mixed employment rules in the *MVOHOW* regulations in complying with its overtime obligations to class members.¹⁷ Barbara Eddy, Canada Cartage’s Senior Director of Human Resources for Eastern Canada – whose responsibilities include ensuring that Canada Cartage’s employment practices comply with the *Code* and the *MVOHOW* regulations – agreed that the IPGs issued by the Labour Program should also be consulted as part of the effort to ensure compliance with the applicable legislation and regulations.¹⁸

(C) Canada Cartage’s Former and Current Overtime Practice

22. Canada Cartage does not have any written overtime policy that applies to class members, nor did such a policy exist during the class period.¹⁹ There is no Canada Cartage document that

¹⁵ Survey Procedure for Ascertaining a Prevailing Industry Practice in a Geographical Area - Motor Vehicle Operators Hours of Work Regulations, Exhibit 7 to the Eddy Examination (JBTE, Tab A7).

¹⁶ Gehring Examination, p. 23-24, q. 80 (JBTE, Tab B); Eddy Examination, p. 30, qq. 100-101 (JBTE, Tab A).

¹⁷ Gehring Examination, p. 72, qq. 278-280; p. 85, qq. 329-330 (JBTE, Tab B); Eddy Examination, p. 79, q. 286; pp. 81-82, qq. 294-295 (JBTE, Tab A).

¹⁸ Eddy Examination, pp. 10-11, qq. 24-25; p. 16, qq. 47-49; p. 19, qq. 58-61 (JBTE, Tab A).

¹⁹ Gehring Affidavit, paras. 11 and 31 (Defendants’ Motion Record, Tab 1); Eddy Examination, p. 10, q. 20-21; pp. 28-29, q. 93 (JBTE, Tab A); Gehring Examination, pp. 14-15, qq. 46-48 (JBTE, Tab B).

employees can consult to learn how their overtime entitlement will be calculated.²⁰ Nor has the company issued any written policies or directives to managers, supervisors or the payroll department about how to apply the various overtime rules and thresholds.²¹ In short, there is no Canada Cartage document or directive that the persons who calculate an employee's overtime can consult to ensure they do so in a consistent way.²²

23. Canada Cartage's complete dearth of guidance with respect to overtime is difficult to reconcile with the company's assertion, sprinkled throughout its evidence, that determining how employees are treated for overtime requires an inquiry into a complex matrix of factors.²³ Even for employees subject to the standard 8/40 threshold, Canada Cartage's evidence is that there could be a "multitude of ways" that the information about their overtime could be kept, indicating that "each manager has their own ability and flexibility to deal with it as per their discretion."²⁴

24. Canada Cartage has many policies in other areas. It has issued lengthy employee handbooks (the "Handbooks") containing policies that apply to numerous areas of an individual's employment.²⁵ However, overtime work and compensation is not covered by the Handbooks.

25. Furthermore, despite agreeing that the company was obliged to use and apply the Labour Program's surveys to determine whether an employee was a city or a highway motor vehicle operator,²⁶ Ms Eddy admitted that she does not understand how to apply the surveys.²⁷ Ms Eddy

²⁰ Gehring Examination, pp. 14-15, qq. 46-48 (JBTE, Tab B); Eddy Examination, pp. 28-29, q. 93 (JBTE, Tab A); Gehring Affidavit, para. 56 (Defendants' Motion Record, Tab 1).

²¹ Eddy Examination, p. 29, q. 95-97 (JBTE, Tab A); Gehring Examination, pp. 15-16, qq. 50-51; p. 66, q. 250 (JBTE, Tab B)

²² Gehring Examination, p. 66, q. 250 (JBTE, Tab B).

²³ Gehring Affidavit, para. 11 (Defendants' Motion Record, Tab 1).

²⁴ Gehring Examination, pp. 26-27, qq. 90-92 (JBTE, Tab B).

²⁵ Canada Cartage Company Policies, National Employee Handbook - Eastern Division revised April, 2014, Exhibit 3 to Eddy Examination (JBTE, Tab A3) ["Employee Handbook 2014"]; Canada Cartage Employee Instruction Manual dated 2003, Exhibit 4 to the Eddy Examination (JBTE, Tab A4) ["Employee Handbook 2003"].

²⁶ Eddy Examination, pp. 73-74, q. 286 (JBTE, Tab A).

learned about the surveys from a putative class member – Dawid Juszcak – in 2013, even though a copy of the survey applicable to Mr. Juszcak was delivered to Canada Cartage’s Director of Human Resources in 2010.²⁸ Remarkably, Ms Eddy admitted that before June 27, 2013, she had been making the determination of whether a driver was a city or a highway motor vehicle operator without reference to the applicable survey.²⁹ Even after learning of the surveys in the context of a complaint filed by Mr. Juszcak to the Labour Program, Ms Eddy ignored them in responding to Mr. Juszcak’s complaint.³⁰

26. Canada Cartage acknowledged that for employees for whom driving may be part of their duties, it required a system to track how much driving and non-driving they were doing to ensure they were paid at the correct overtime threshold.³¹ However, there is no evidence it had such a system. Ms Eddy admitted that the mixed employment rules were “quite a gray area” for her³² and that she 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.³³ Although Canada Cartage claimed that applying the mixed employment rules was “complicated”, it has not issued any directives or advice in written form to assist the people in the company who apply these rules to its employees.³⁴

²⁷ Eddy Examination, p. 15, q. 45; p. 77, q. 273 and 276 (JBTE, Tab A).

²⁸ Eddy Examination, pp. 71-72, q. 277 (JBTE, Tab A); Letter dated June 27, 2013 from E. Armah, Labour Program, to Canada Cartage, Exhibit “E” to the Affidavit of Dawid Juszcak sworn March 21, 2014 (Plaintiff’s Motion Record, Tab 3E) [“Juszcak Affidavit”].

²⁹ Eddy Examination, pp. 73-74, qq. 286-287 (JBTE, Tab A).

³⁰ Eddy Examination, p. 78, q. 280 (JBTE, Tab A); Letter dated June 24, 2013, from Canada Cartage to A. Cvitanovic, Labour Program, Exhibit “D” to the Juszcak Affidavit, (Plaintiff’s Motion Record, Tab 3D).

³¹ Gehring Examination, pp. 41-42, qq. 144-145 (JBTE, Tab B). Ms Eddy also had no knowledge of whether Canada Cartage had a system that identifies which driving employees are city motor vehicle operators and which are highway motor vehicle operators: Eddy Examination, p. 47, q. 152 ((JBTE, Tab A).

³² Eddy Examination, pp. 80-81, q. 290 (JBTE, Tab A).

³³ Eddy Examination, p. 82, q. 298 (JBTE, Tab A).

³⁴ Gehring Examination, p. 85, q. 329; p. 88, q. 342 (JBTE, Tab B).

27. Bradley Gehring, the company's Vice President of Human Resources, was asked about the system that Canada Cartage uses to track what duties its employees are performing for the purpose of applying the overtime thresholds. He was initially unable to answer, saying that he would have to "look at what they're doing on a case-by-case basis again."³⁵

28. Mr. Gehring testified that Canada Cartage makes no effort to coordinate or standardize its payroll process concerning the determination as to what overtime threshold in the *Code* or the *MVOHOW* regulations is applicable to a particular employee:

Q. Where in that process that you've described is a determination made about which overtime threshold applies to that employee?

A. That could be at the billing group, it could be payroll group, it could be at the management group.

Q. And when you say "could be" are you speculating or do you mean that it varies from employee to employee or location to location?

A. That's correct, it does vary from employee to employee, location to location.³⁶

29. While Canada Cartage admitted the importance of identifying the appropriate overtime threshold to apply, it has no consistent system or practice to track the duties of its employees and determine the correct threshold to be applied to each of them.³⁷

30. Furthermore, despite Ms Eddy's acknowledgement that she is aware of the IPGs promulgated by the Labour Program and that she attempted to follow and comply with the interpretations in the IPGs,³⁸ the evidence suggests otherwise. Ms Eddy's belief is that shunters are

³⁵ Gehring Examination, p. 42, qq. 146-147 (JBTE, Tab B).

³⁶ Gehring Examination, pp. 46-48, qq. 160-161; pp. 57-58, q. 214, 215; p. 66, qq. 249-250 (JBTE, Tab B).

³⁷ Eddy Examination, p. 47 q. 152 (JBTE, Tab A); Gehring Examination, pp. 42-44, qq. 146-151; p. 72, qq. 278-279 (JBTE, Tab B).

³⁸ Eddy Examination, p. 19, qq. 58-61 (JBTE, Tab A).

to be paid overtime at the 9/45 threshold,³⁹ even though the Labour Program's 700-10-IPG-071 defines shunters and specifies that they should be paid overtime at the 8/40 threshold.

(D) The Assurance of Voluntary Compliance

31. On April 26, 2012, the Labour Program of HRSDC issued an Assurance of Voluntary Compliance ("AVC") to Canada Cartage, having determined that Canada Cartage was not in compliance with its overtime obligations under the *Code* and its related regulations.⁴⁰

32. After receiving a complaint about Canada Cartage's overtime practices, the Labour Program investigated. As part of the investigation, an inspector attended at Canada Cartage's offices and reviewed payroll information for the employee who had made the complaint, as well as the payroll information of other employees.⁴¹ The investigation led the Labour Program to issue the AVC.

33. The AVC required Canada Cartage to take corrective action concerning overtime pay:

Standard hours of work for employees is 8 hours a day and 40 hours a week and for City Motor Vehicle operators 9 hours a day and 45 hours a week.

The employer will ensure **all employees are being paid overtime** pay for hours worked in excess of the standard hours. The employer will ensure shunt drivers are not being paid overtime in accordance with highway motor vehicle operator provisions.⁴²

34. In signing the AVC, Canada Cartage expressly declared that it "understand[s] the violations noted" and "agree[d] to correct the violations."⁴³ It also "agree[d] to inform, in writing,

³⁹ Eddy Examination, p. 19, qq. 58-61; p. 67, q. 236 (JBTE, Tab A).

⁴⁰ Assurance of Voluntary Compliance, Exhibit "E" to the Gehring Affidavit (Defendants' Motion Record, Tab 1E) ["AVC"].

⁴¹ Eddy Examination, pp. 60-61, qq. 210-213 (JBTE, Tab A).

⁴² AVC (emphasis added) (Defendants' Motion Record, Tab 1E).

⁴³ AVC (Defendants' Motion Record, Tab 1E).

the inspector of HRSDC – Labour Program [...] that remedial action has been taken or submit an action plan with time frames.”⁴⁴

35. Despite the AVC’s clear requirement that Canada Cartage ensure that “all employees” were being paid overtime for hours worked in excess of their standard hours of work, Canada Cartage’s remedial efforts focussed only on shunters in Ontario.⁴⁵ Moreover, despite 700-10-IPG-071 specifying that shunters should be paid at the 8/40 threshold, Canada Cartage interpreted the AVC to require shunters to be paid overtime at the 9/45 threshold.⁴⁶ Significantly, Ms Eddy admitted that after signing the AVC on behalf of the company, she did not make any efforts to ensure that Canada Cartage complied with it nationwide.⁴⁷

36. In response to the AVC, Canada Cartage submitted an action plan to the Labour Program on April 30, 2012 (the “Action Plan”),⁴⁸ stating that the company’s “[c]urrent practice is to pay overtime after 60 hours per week or 55 hours per week, depending on the contract with the client.”⁴⁹

37. In the Action Plan, Canada Cartage represented to the Labour Program that “all shunters on all accounts will be paid consistently according to [the *Code*’s] guidelines.” As it related to Matrix (where Mr. Baroch worked as a shunter), the Action Plan stated that Canada Cartage was “[i]n the process of developing [a] new schedule.” Instead, as will be discussed in more detail below, Canada Cartage engaged in a reverse engineering effort – not limited to Matrix – and unilaterally

⁴⁴ AVC (Defendants’ Motion Record, Tab 1E).

⁴⁵ Eddy Examination, pp. 68-69, qq. 242 and 246; p. 62, q. 220 (JBTE, Tab A); Gehring Examination, pp. 119-120, qq. 471-473 (JBTE, Tab B).

⁴⁶ Eddy Examination, p. 68, q. 242 (JBTE, Tab A).

⁴⁷ Eddy Examination, pp. 87-88, q. 318 (JBTE, Tab A).

⁴⁸ Gehring Examination, pp. 133-144 q. 528-529 (JBTE, Tab B).

⁴⁹ Canada Cartage Systems Limited Ontario – Shunter Overtime action plan dated April 30, 2012, Exhibit 1 to the Gehring Examination (JBTE, Tab B1) [“Action Plan”].

reduced certain shunters' hourly rate of pay while altering their earnings statements so as to nominally show the payment of overtime.⁵⁰ The shunters' hours of work and gross weekly earnings remained unchanged. Canada Cartage admits that it engaged in this conduct, but takes the position that "[n]one of the shunters who had their hourly rates reduced rejected this change."⁵¹

(E) Mr. Baroch's Employment History at Canada Cartage

(i) Commencement

38. Mr. Baroch worked at Canada Cartage from March 27, 2006 to June 27, 2013.⁵² His record of employment lists his employer as Canada Cartage System Limited Partnership,⁵³ the general partner of which is the defendant, Diversified.

39. During the hiring process, Mr. Baroch was required to meet with the Safety, Compliance, and Recruiting Manager for Canada Cartage, Gord Russell, who told him that Canada Cartage viewed and treated all of its employees in a similar manner.⁵⁴ Moreover, Mr. Baroch was advised that all hourly employees in the transportation part of the company were paid the same rate of pay across Canada unless they operated specialized equipment, and that they were all classified as truck drivers for payroll purposes, regardless of the actual job they performed.⁵⁵

40. Mr. Russell also advised Mr. Baroch that as Canada Cartage was a federally-regulated company, it was not required to pay overtime compensation until an employee had worked more than 60 hours in a week. Based on numerous conversations Mr. Baroch had with other Canada Cartage employees, he believes this information was widely publicized by Canada Cartage and

⁵⁰ Baroch Affidavit, paras. 25-30 (Plaintiff's Motion Record, Tab 2).

⁵¹ Gehring Affidavit, paras. 80-81 (Defendants' Motion Record, Tab 1).

⁵² Record of Employment of Mr. Baroch (Plaintiff's Motion Record, Tab 2C).

⁵³ Record of Employment of Mr. Baroch (Plaintiff's Motion Record, Tab 2C).

⁵⁴ Baroch Affidavit, para. 13 (Plaintiff's Motion Record, Tab 2).

⁵⁵ Baroch Affidavit, para. 13 (Plaintiff's Motion Record, Tab 2).

known by employees.⁵⁶ Dawid Juszcak, a putative class member, confirmed that Peter Nicholson, a Canada Cartage manager, told him the same thing.⁵⁷

(ii) Working Experience

41. While at Canada Cartage, Mr. Baroch worked as a shunter at the Matrix yard.⁵⁸ The Matrix shunt trucks are not licensed to be driven on public roads, so Mr. Baroch never drove one of these trucks outside the yard during his time at Canada Cartage.⁵⁹ He drove on public roads in the course of his employment only once.⁶⁰

42. During his tenure, Canada Cartage employed a total of four shunters, including Mr. Baroch, at Matrix. Canada Cartage scheduled the shunters to work 12-hour shifts, five days a week.⁶¹ Thus, Mr. Baroch typically worked approximately 60 hours per week. Other Canada Cartage employees at the Matrix facility, who performed a variety of jobs, regularly worked between 50 to 60 hours per week and often more.⁶²

(iii) Compensation

43. Throughout his employment at Canada Cartage, Mr. Baroch was paid on an hourly basis.⁶³ He was paid what he understood was the “standard” rate applied to all Canada Cartage employees in the transportation part of the company (except for those who operated specialized equipment). In his early years of employment he received annual raises, which he believed were country-wide,

⁵⁶ Baroch Affidavit, para. 14 (Plaintiff’s Motion Record, Tab 2).

⁵⁷ Juszcak Affidavit, para. 18 (Plaintiff’s Motion Record, Tab 3).

⁵⁸ Baroch Affidavit, para. 16 (Plaintiff’s Motion Record, Tab 2).

⁵⁹ Baroch Affidavit, para. 17 (Plaintiff’s Motion Record, Tab 2).

⁶⁰ Cross-Examination of Marc-Oliver Baroch, September 19, 2014, p. 35, qq. 193-194 (JBTE, Tab C) [“Baroch Examination”].

⁶¹ Baroch Affidavit, para. 17 (Plaintiff’s Motion Record, Tab 2).

⁶² Baroch Affidavit, para. 18 (Plaintiff’s Motion Record, Tab 2).

⁶³ Baroch Affidavit, para. 21 (Plaintiff’s Motion Record, Tab 2).

given how the memoranda that announced these raises were addressed.⁶⁴ A pay freeze put into place in 2009 applied to all hourly employees in the transportation part of Canada Cartage.⁶⁵ At that time, Mr. Baroch was earning \$19.50 per hour.⁶⁶

44. Until July 2012, Mr. Baroch was paid overtime only when he exceeded 60 hours of work in a week. In the year leading up to July 2012, his weekly gross earnings in a typical 60-hour week – with no overtime compensation and a rate of pay of \$19.50 per hour – totalled about \$1170.⁶⁷

(iv) Canada Cartage Unilaterally Changes Compensation in 2012

45. In April or May 2012, Mr. Baroch was advised by Mr. Nicholson that Canada Cartage was being forced to change how it compensated its shunters.⁶⁸ Specifically, Mr. Baroch was told that Canada Cartage was obligated to pay shunters overtime after 45 hours in a week.⁶⁹

46. In July 2012, Mr. Baroch's rate of pay was unilaterally reduced by Canada Cartage to \$17.34 per hour. He continued to perform the same job and work the same shifts, but now his earnings statement began to reflect notional overtime compensation for hours worked in excess of 9 hours in a day or 45 hours in a week. A typical 60-hour work week therefore continued to yield gross weekly earnings of about \$1170, the same amount Mr. Baroch had been earning before the adjustments to his hourly rate of pay and the alteration to his earnings statements.⁷⁰

⁶⁴ Baroch Affidavit, paras. 21-22 (Plaintiff's Motion Record, Tab 2).

⁶⁵ Baroch Affidavit, para. 22 (Plaintiff's Motion Record, Tab 2).

⁶⁶ Baroch Affidavit, para. 23 (Plaintiff's Motion Record, Tab 2).

⁶⁷ Baroch Affidavit, paras. 23-24 (Plaintiff's Motion Record, Tab 2); Mr. Baroch's Earnings Statement for the period ending June 11, 2011, Exhibit "A" to the Baroch Affidavit, (Plaintiff's Motion Record, Tab 1A) ["Baroch's Earning Statements"].

⁶⁸ Baroch Affidavit, para 25 (Plaintiff's Motion Record, Tab 2).

⁶⁹ Baroch Affidavit, para. 25 (Plaintiff's Motion Record, Tab 2).

⁷⁰ Baroch Affidavit, para. 29 (Plaintiff's Motion Record, Tab 2); Baroch's Earnings Statement (Plaintiff's Motion Record, Tab 1B).

47. Based on his conversations with other shunters, including outside of the Matrix facility, Mr. Baroch's uncontroverted evidence is that similar unilateral adjustments had been made by Canada Cartage to other shunters' rates of pay.⁷¹

(F) The Class

(i) Characteristics

48. The class size is approximately 7800 people, who include both current and former Canada Cartage employees.⁷² Although the evidence demonstrates that the class members may have different job titles and may perform a variety of job functions requiring different skills,⁷³ there is no dispute that these employees are entitled to be paid overtime at one and one half times their hourly rate of pay when they exceed their standard hours of work.

49. As Canada Cartage employees, all class members are subject to the same nationwide corporate policies.⁷⁴ The current Handbook and its predecessor largely contain policies of national application on a variety of employment issues including attendance, vacation, and leave of absence, among others, but contain no policy on overtime work or compensation.⁷⁵

50. In addition to Mr. Baroch, two members of the putative class have provided evidence in support of the plaintiff's certification motion.

⁷¹ Baroch Affidavit, para. 30 (Plaintiff's Motion Record, Tab 2).

⁷² Gehring Affidavit, para. 49 (Defendants' Motion Record, Tab 1).

⁷³ Gehring Affidavit, para. 40 (Defendants' Motion Record, Tab 1).

⁷⁴ Employee Handbook 2014 (JBTE, Tab A3); Eddy Examination, p. 24, qq. 78-79 (JBTE, Tab A).

⁷⁵ Employee Handbook 2014 (JBTE, Tab A3); Memorandum from Canada Cartage to all Ontario CCS Employees dated August 29, 2014, Exhibit "B" to the Eddy Examination (JBTE, Tab A2). See also Employee Handbook 2003 (JBTE, Tab A4).

(ii) *Dawid Juszcak*

51. Mr. Juszcak worked for Canada Cartage between 2005 and 2013.⁷⁶ Mr. Juszcak is a Polish immigrant and his job at Canada Cartage was the first job he held in Canada.⁷⁷ Initially, he worked as a helper, which involved travelling with a Canada Cartage driver to make deliveries.⁷⁸ Eventually, he became a driver and was paid what he believed was the uniform rate of pay for Canada Cartage drivers at the time.⁷⁹ Mr. Juszcak worked at two different Canada Cartage terminals⁸⁰ and typically worked between five and six days and 45 to 60 hours per week.⁸¹ Throughout his employment he was paid overtime compensation only if he exceeded 60 hours of work in a week.⁸² Mr. Juszcak's undisputed evidence was that many other Canada Cartage employees worked similar hours and drove similar distances as he did.⁸³

52. It was the unchallenged evidence of Mr. Juszcak that, beginning in late 2012 or early 2013, Canada Cartage made changes to the pay structure for drivers. Specifically, the company would only pay drivers for a pre-determined number of hours to complete their daily delivery runs, regardless of the time actually required for that run, unless the driver could provide documentary or photographic proof acceptable to Canada Cartage.⁸⁴ Drivers found it extremely difficult to complete their runs within the allotted time or supply the type of proof required by Canada Cartage.⁸⁵

⁷⁶ Juszcak Affidavit, para. 1 (Plaintiff's Motion Record, Tab 3).

⁷⁷ Juszcak Affidavit, paras. 4-5 (Plaintiff's Motion Record, Tab 3).

⁷⁸ Juszcak Affidavit, para. 6 (Plaintiff's Motion Record, Tab 3).

⁷⁹ Juszcak Affidavit, paras. 7-8 (Plaintiff's Motion Record, Tab 3).

⁸⁰ Juszcak Affidavit, paras. 8-9 (Plaintiff's Motion Record, Tab 3).

⁸¹ Juszcak Affidavit, para. 10 (Plaintiff's Motion Record, Tab 3).

⁸² Juszcak Affidavit, paras. 9-10 and 17 (Plaintiff's Motion Record, Tab 3).

⁸³ Juszcak Affidavit, para. 31 (Plaintiff's Motion Record, Tab 3).

⁸⁴ Juszcak Affidavit, paras. 11-12 (Plaintiff's Motion Record, Tab 3).

⁸⁵ Juszcak Affidavit, paras. 11-13 (Plaintiff's Motion Record, Tab 3).

53. After advising Canada Cartage that he believed he was a city motor vehicle operator, Mr. Juszczak was told that he was mistaken and that he was only entitled to overtime after 60 hours in a week.⁸⁶ Mr. Juszczak was also told by Ms Eddy that she had spoken with the President and CEO of Canada Cartage, Jeff Lindsay, and that Mr. Juszczak would be paid based on the amount that Canada Cartage charged its customers.⁸⁷ After resigning from the company, Mr. Juszczak was told by Mr. Nicholson that paying him overtime would be too expensive for Canada Cartage, although Mr. Nicholson later called Mr. Juszczak and told him that Canada Cartage might be willing to make a deal and pay him some overtime.⁸⁸ In 2013, Mr. Juszczak filed a complaint with the Labour Program of HRSDC that has yet to be resolved.⁸⁹

(iii) Albert Bush

54. Albert Bush has worked as a yard worker at Canada Cartage's terminal in Ajax since July 2008.⁹⁰ Mr. Bush does not drive any trucks as part of his regular duties at Canada Cartage, and neither do the fifteen other employees of Canada Cartage who work yard control with him.⁹¹

55. Throughout his employment with Canada Cartage, Mr. Bush has worked 12-hour shifts with four days on followed by four days off. As a result, over an 8-week period, Mr. Bush works four weeks in which he works four 12-hour shifts (48 hours per week) and four weeks in which he works three 12-hour shifts (36 hours per week).⁹² He receives overtime compensation only when he works an additional 12-hour shift over and above his regular four-on-four-off schedule.⁹³ Mr.

⁸⁶ Juszczak Affidavit, para. 18 (Plaintiff's Motion Record, Tab 3).

⁸⁷ Juszczak Affidavit, para. 20 (Plaintiff's Motion Record, Tab 3).

⁸⁸ Juszczak Affidavit, para. 21 (Plaintiff's Motion Record, Tab 3).

⁸⁹ Juszczak Affidavit, para. 22 (Plaintiff's Motion Record, Tab 3).

⁹⁰ Affidavit of Albert G. Bush, sworn August 20, 2014, paras. 1 and 8 (Supplementary Motion Record, Tab 2) ["Bush Affidavit"].

⁹¹ Bush Affidavit, paras. 9-10 (Supplementary Motion Record, Tab 2).

⁹² Bush Affidavit, paras. 11-12 (Supplementary Motion Record, Tab 2)

⁹³ Bush Affidavit, para. 13 (Supplementary Motion Record, Tab 2); Bush Earnings Statement with overtime, Exhibit "B" to the Bush Affidavit (Supplementary Motion Record, Tab 2B).

Bush deposed that the other yard control employees who work with him have had the same experience.⁹⁴ His evidence went unchallenged by Canada Cartage.

56. From 2008 until December 2012, Mr. Bush's earnings statements reflected the actual hours he worked in each week.⁹⁵ In 2012, Mr. Bush's weekly earnings statements (and those of his fellow yard control workers) changed, such that they began to reflect the average number of hours worked over a two month cycle – 42 hours.⁹⁶ Mr. Bush has not been paid any overtime on the 42-hour per week earnings statements; instead, he continues to receive overtime only if he works an extra 12-hour shift in a given week.⁹⁷ He was given no notice of the change to his earnings statements, and, according to his unchallenged evidence, the only explanation he received was that it was to simplify payroll.⁹⁸

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

57. There is one issue to be determined on the motion: does the action meet the criteria for certification in subsection 5(1) of the *Class Proceedings Act*⁹⁹?

58. The plaintiff submits that, applying the certification test in a purposive and generous manner, he easily clears the low evidentiary hurdle for certifying this action as a class proceeding. First, it is not plain and obvious that the pleaded causes of action in contract, negligence and unjust enrichment cannot succeed. Second, there is some basis in fact for this Court to conclude that there is an identifiable class of two or more individuals who share claims that raise common issues of

⁹⁴ Bush Affidavit, para. 19 (Supplementary Motion Record, Tab 2).

⁹⁵ Bush Affidavit, para. 13 (Supplementary Motion Record, Tab 2); Bush Earnings Statements reflecting 36-hour work weeks and 48-hour work weeks, Exhibit "A" to the Bush Affidavit (Supplementary Motion Record, Tab 2A).

⁹⁶ Bush Affidavit, paras. 16 and 19 (Supplementary Motion Record, Tab 2A).

⁹⁷ Bush Affidavit, para. 17 (Supplementary Motion Record, Tab 2A).

⁹⁸ Bush Affidavit, paras. 17-18 (Supplementary Motion Record, Tab 2A).

⁹⁹ S.O. 1992, c. 6 ["CPA"].

fact or law, which are preferably resolved by means of a class action with Mr. Baroch as representative plaintiff.

(A) The Pleadings Disclose Causes of Action

59. The Amended Claim discloses causes of action in contract, negligence and unjust enrichment. In considering paragraph 5(1)(a) of the *CPA*, the court must accept the pleaded allegations of fact as true unless they are patently ridiculous or incapable of proof. Matters of law that are not fully settled in the jurisprudence must be permitted to proceed, and the Amended Claim is to be read generously to allow for any drafting inadequacies.¹⁰⁰

(i) Contract

60. The Amended Claim pleads that it is an express or implied term of class members' contracts of employment with Canada Cartage that they are entitled to be compensated at their agreed rate of pay for hours worked up to the applicable statutorily-mandated standard hours of work and for overtime at one and one-half times their agreed rate of pay for all hours worked in excess of their standard hours of work.¹⁰¹ Further, the Amended Claim pleads that the overtime provisions of the *Code* and its regulations constitute minimum requirements that are implied into class members' employment contracts with Canada Cartage.¹⁰²

61. Mr. Baroch alleges that at all material times, Canada Cartage engaged in a systemic practice whereby it avoided or disregarded its obligations to pay overtime to class members in a manner that complies with the *Code* and its regulations¹⁰³ and that this constituted or resulted in a

¹⁰⁰ *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148, para. 70 (Plaintiff's Book of Authorities, Tab 1a) ["BOA"] ["*Fulawka Certification*"].

¹⁰¹ Amended Statement of Claim, para. 25 (Second Supplementary Motion Record, Tab 1).

¹⁰² Amended Statement of Claim, para. 26 (Second Supplementary Motion Record, Tab 1).

¹⁰³ Amended Statement of Claim, para. 29 (Second Supplementary Motion Record, Tab 1).

breach of class members' contracts of employment.¹⁰⁴ For certain class members, including Mr. Baroch, this breach of contract included unilateral reductions made by the company to their hourly rates of pay, which Canada Cartage calculated to make it appear as though it was paying overtime compensation, when in fact those class members' gross weekly earnings remained unchanged.¹⁰⁵

62. Claims for breach of contract based on the interpretation of a common contract have frequently been certified by courts, including in the overtime context.¹⁰⁶ Mr. Baroch's claims in contract should be permitted to proceed.

(ii) Breach of Duty of Good Faith

63. The Amended Claim pleads that class members are in a position of particular vulnerability vis-à-vis Canada Cartage and accordingly that it is an express or implied term of class members' contracts of employment that the company observe a duty of good faith and fair dealing with them, characterized by candour, reasonableness, honesty and forthrightness.¹⁰⁷ Mr. Baroch says that this contractual term was breached by Canada Cartage in a number of ways, having regard to the pleaded practice whereby the company systemically avoided or disregarded its obligations to pay overtime to class members in a manner that complies with the *Code* and its regulations.¹⁰⁸ For instance, breaches resulted from Canada Cartage's imposition of an unlawful policy or practice regarding overtime that did not account for the nature of work performed by class members and by the company misleading class members about overtime entitlements.¹⁰⁹

¹⁰⁴ Amended Statement of Claim, para. 43 (Second Supplementary Motion Record, Tab 1); Revised List of Common Issues, Appendix "1".

¹⁰⁵ Amended Statement of Claim, para. 43 (Second Supplementary Motion Record, Tab 1).

¹⁰⁶ *Fulawka Certification*, *supra* note 100, para. 72 (and the cases cited therein).

¹⁰⁷ Amended Statement of Claim, paras. 44-45 (Second Supplementary Motion Record, Tab 1).

¹⁰⁸ Amended Statement of Claim, para. 29 (Second Supplementary Motion Record, Tab 1).

¹⁰⁹ Amended Statement of Claim, para. 46 (Second Supplementary Motion Record, Tab 1).

64. The pleaded breaches of the duty of good faith are advanced as a common feature of Canada Cartage's contractual employment relationship with Mr. Baroch and the putative class members. In his certification decision in *Fulawka*, Strathy J. (as he then was) permitted causes of action similarly grounded in a contractual duty of good faith to go forward, observing that this duty applies to the performance of the contract itself and is not confined to the termination of the employment relationship.¹¹⁰ Strathy J. held that the content of the duty of good faith may include requiring an employer to take "measures to ensure that overtime work [...] is properly recorded and properly compensated," noting 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."¹¹¹

65. Mr. Baroch submits that the duty of good faith also includes an obligation for Canada Cartage to be candid with employees about their true entitlement to overtime and its efforts to comply with the *Code* and its regulations in this respect.

66. In light of *Fulawka*, it cannot be said that these claims are certain to fail.

(iii) Negligence

67. The Amended Claim pleads that Canada Cartage owed a duty to Mr. Baroch and the putative class members to take reasonable steps to ensure that they are properly compensated at the appropriate rates of pay for all hours of work.¹¹² This duty, as with class members' employment

¹¹⁰ *Fulawka Certification*, *supra* note 100, paras. 77 and 78.

¹¹¹ *Fulawka Certification*, *supra* note 100, para. 80.

¹¹² Amended Statement of Claim, para. 47 (Second Supplementary Motion Record, Tab 1).

contracts with Canada Cartage, is informed by the *Code* and its regulations pertaining to overtime.¹¹³

68. Canada Cartage is alleged to have breached its duty to class members in a number of ways.¹¹⁴ Chief among these breaches is Canada Cartage's failure have appropriate systems, policies and practices in place to allow it to ensure that overtime was properly paid. The company is also alleged to have breached the duty of care by failing to obtain appropriate professional advice on its overtime obligations to class members and failing to ensure that its policies and practices were consistent with the interpretations and guidance promulgated by the Labour Program of HRSDC.¹¹⁵ As a result of these breaches of duty, the Amended Claim alleges that class members have directly suffered harm by not being properly compensated, at appropriate rates of pay, for all hours worked.¹¹⁶

69. The cause of action in negligence is similar to that which was allowed to proceed in *Fulawka*.¹¹⁷ In that case, Strathy J. accepted that the duties owed by the employer to class members "can be informed by the provisions of the *Code*" that pertain to overtime.¹¹⁸ Consequently, it cannot be plain and obvious that the plaintiff's cause of action in negligence is certain to fail.

(iv) Unjust Enrichment

70. The Amended Claim pleads that Canada Cartage has received the benefit of class members' services in circumstances in which the class was not properly compensated for all hours

¹¹³ Amended Statement of Claim, para. 47 (Second Supplementary Motion Record, Tab 1).

¹¹⁴ Amended Statement of Claim, para. 48 (Second Supplementary Motion Record, Tab 1).

¹¹⁵ Amended Statement of Claim, para. 48 (Second Supplementary Motion Record, Tab 1).

¹¹⁶ Amended Statement of Claim, para. 49 (Second Supplementary Motion Record, Tab 1).

¹¹⁷ *Fulawka Certification*, *supra* note 100, para. 82.

¹¹⁸ *Fulawka Certification*, *supra* note 100, paras. 83 and 103.

worked at appropriate rates of pay.¹¹⁹ The class members' deprivation of wages to which they are entitled corresponds to this enrichment, for which it is pleaded there is no juristic reason.¹²⁰

71. The pleading of unjust enrichment satisfies the requirements set forth in *Garland v. Consumers' Gas Co.*¹²¹ Common issues of unjust enrichment have been certified in other class proceedings, including in the overtime context.¹²² It is not plain and obvious that this cause of action is certain to fail.

(v) Conclusion Regarding Pleadings Causes of Action

72. In *Rosen*, this Court noted that the cause of action criterion is a "very low hurdle."¹²³ Mr. Baroch submits that the paragraph 5(1)(a) criterion is satisfied and that the pleaded causes of action should be allowed to proceed.

(B) There is a Clearly Identifiable Class

73. Paragraph 5(1)(b) of the *CPA* requires an identifiable class of two or more persons to be represented by Mr. Baroch. The class has been defined as all persons who, at any time during the class period, were employed by Canada Cartage and who were entitled to receive overtime compensation pursuant to the *Code* and its regulations.¹²⁴ In order to satisfy the identifiable class requirement, there must simply be "some basis in fact" to support the proposed class definition.¹²⁵

74. The defendants do not contest the identifiable class criterion. As a result, Canada Cartage acknowledges that, based on its own evidence, there are approximately 7800 identifiable current

¹¹⁹ Amended Statement of Claim, para. 50 (Second Supplementary Motion Record, Tab 1).

¹²⁰ Amended Statement of Claim, paras. 51-52 (Second Supplementary Motion Record, Tab 1).

¹²¹ *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (BOA, Tab 2).

¹²² *Fulawka Certification*, *supra* note 100, para. 74

¹²³ *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144, para. 29 (BOA, Tab 3) [*"Rosen"*].

¹²⁴ Amended Statement of Claim, para. 7 (Second Supplementary Motion Record, Tab 1).

¹²⁵ *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013] 3 S.C.R. 545, para. 52 (BOA, Tab 4).

and former employees who were entitled to receive overtime compensation pursuant to the *Code* and its regulations at some point during the class period.¹²⁶ The fact that the class is comprised of individuals who are entitled to receive overtime distinguishes this case from misclassification cases such as *Brown v. Canadian Imperial Bank of Commerce*¹²⁷ and *McCracken v. Canadian National Railway*,¹²⁸ where the very issue upon which the proposed common questions turned was whether putative class members were entitled to receive overtime.

75. Canada Cartage's ability to identify the class with precision through an analysis of its own payroll records provides the basis in fact to satisfy paragraph 5(1)(b) of the *CPA*.¹²⁹ Even if there were questions on the margins as to whether a particular individual is included in the class definition, the *CPA* permits the Court to enter into a relatively elaborate factual investigation in order to determine class membership.¹³⁰

76. Mr. Baroch submits that the class definition is appropriate. Any further narrowing may arbitrarily exclude some class members who Canada Cartage itself acknowledges were entitled to receive overtime during the class period if they were required or permitted to work in excess of their standard hours of work. Paragraph 5(1)(b) of the *CPA* is satisfied.

¹²⁶ Gehring Affidavit, paras. 47 and 49 (Defendants' Motion Record, Tab 1). This approximate number does not include the 687 individuals Canada Cartage has identified as additional individuals who are subject to collective agreements and are also Canada Cartage employees who are entitled to overtime compensation under the *Code* and its regulations: Gehring Affidavit, para. 8 (Defendants' Motion Record, Tab 1).

¹²⁷ *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677 (BOA, Tab 5) ["*Brown OCA*"].

¹²⁸ *McCracken v. Canadian National Railway*, 2012 ONCA 445 (BOA, Tab 6b) ["*McCracken OCA*"].

¹²⁹ Gehring affidavit, paras. 47, 51 and 52 (Defendants' Motion Record, Tab 1).

¹³⁰ *Sauer v. Canada (Agriculture)*, 2008 CarswellOnt 5081 (S.C.) para. 28 (BOA, Tab 7).

(C) The Claims of Class Members Raise Common Issues

77. The common issue requirement in paragraph 5(1)(c) of the *CPA* is not a high hurdle.¹³¹ In determining commonality, the Court need not resolve conflicting facts or evidence.¹³² It must simply determine whether there is some basis in fact to find that each of the issues can be determined on a class-wide basis. The Supreme Court has recently clarified that “the factual evidence required at this stage goes only to establishing whether the [common issues] are common to all class members.”¹³³ The proper focus is on the form of the action and whether the action can appropriately go forward as a class proceeding.¹³⁴

78. In evaluating the commonality requirement, this Court must bear in mind that Mr. Baroch is entitled to frame and advance his case in a way which makes it amenable to determination on a class-wide basis.¹³⁵ For an issue to be considered an appropriate common issue, it must be a substantial ingredient of each class member’s claim and its resolution must be necessary to the resolution of that claim.¹³⁶ An issue can be a substantial ingredient of a claim even if it makes up a very limited aspect of the liability question.¹³⁷

(i) Common Issues 1-5: Breach of Contract and Duty of Good Faith

79. The first five proposed common issues concern the existence of common contractual terms or duties and whether certain systemic conduct by Canada Cartage constituted or resulted in a breach of those terms and duties:

¹³¹ *Fulawka Certification*, *supra* note 100, para. 111.

¹³² *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2013] 3 S.C.R. 477 para. 102 (BOA, Tab 8) [*Pro-Sys*].

¹³³ *Pro-Sys*, *supra* note 132, para. 110.

¹³⁴ *Option consommateurs v. Infineon Technologies AG*, [2013] 3 S.C.R. 600, para. 65 (BOA, Tab 9) [*Infineon*].

¹³⁵ *Fulawka Certification*, *supra* note 100, para. 122, citing *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (BOA, Tab 10) [*Rumley*]; see also *Markson v. MBNA Canada Bank*, 2007 ONCA 334, para 39 and the cases cited therein (BOA, Tab 11) [*Markson*].

¹³⁶ *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158, para. 18 (BOA, Tab 12) [*Hollick*].

¹³⁷ *Cloud v. Canada (Attorney General)*, 2004 CarswellOnt 5026 (C.A.), para. 53 (BOA, Tab 13) [*Cloud*].

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?

80. The factual evidence establishes a basis for concluding that these questions are common to all class members.

81. Beginning with the first common issue, all class members are employed by Canada Cartage and therefore have contractual relationships with the company. All class members are entitled to receive overtime. Canada Cartage admits that it must comply with the overtime provisions of the *Code* and the *MVOHOW* regulations in its dealings with the class, obligations that are informed by consideration of the Labour Program's surveys, the mixed employment rules and the IPGs.

82. If it is necessary to determine whether Canada Cartage's obligation to pay overtime is implied into class members' employment contracts, Mr. Baroch submits that this determination can be made on a class-wide basis. In *Fulawka*, the Court of Appeal noted that "[d]etermining the relevant express and implied terms of the employment contract of class members – particularly

concerning [the defendant's] obligations for compensating and recording overtime hours – is a necessary and substantial ingredient of class members' claims."¹³⁸

83. Regarding the second common issue, the requisite commonality arises from the asserted policy or practice of Canada Cartage that affected all members of the class, insofar as it exposed class members to the risk – potential or actual – that Canada Cartage would not pay overtime to class members in accordance with their contractual entitlements.

84. There is some basis in fact to find that this proposed common issue can be determined on a class-wide basis. The company lacked an overtime policy and did not issue *any* written directives or guidance to its employees, managers, supervisors or the payroll department that would ensure that an employee's overtime entitlement was being determined in a consistent way. This provides a factual basis to suggest that if Canada Cartage systemically avoided or disregarded its overtime obligations to class members, all class members were affected by this, insofar as they were all exposed to the potential or actual risk that they might be harmed by Canada Cartage's conduct. This is so particularly in circumstances where Canada Cartage asserts that the determination of class members' overtime entitlements is complicated, multi-faceted, and depends not just on consideration of the *Code* and the *MVOHOW* regulations, but the mixed employment rules, surveys and the IPGs, among other things.

85. A variety of other evidence demonstrates that any Canada Cartage policy or practice of avoiding or disregarding its overtime obligations to class members affected or potentially affected all class members, which provides a basis in fact for the commonality of this issue. The AVC provides factual support for commonality, because it was issued as a result of the Labour

¹³⁸ *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, para 89 (BOA, Tab 1b) [*"Fulawka OCA"*].

Program's review of payroll records for more than one employee and the corrective action it specified included directing Canada Cartage to "ensure that *all employees* are being paid overtime pay."¹³⁹ Commonality of this issue can also be grounded in Ms Eddy's evidence that Canada Cartage made no effort to ensure that Canada Cartage complied with the AVC nationwide, that she interpreted the AVC as only applying to shunters notwithstanding the clear language of the AVC, and that, prior to prior to June 27, 2013, she had determined whether a driver was a city or a highway motor vehicle operator without reference to the applicable survey.

86. The evidence of Mr. Baroch, Mr. Juszczak and Mr. Bush also bears on the commonality of the systemic policy or practice by Canada Cartage, because it illustrates how different class members – working at different positions for the company – were all exposed to a common risk that their overtime entitlements were being avoided or disregarded by the company:

- (a) Mr. Baroch explained that as a shunter, he was initially paid overtime only after working 60 hours in a week, and his rate of pay was later unilaterally reduced by Canada Cartage to make it appear he was being paid overtime. He also explained that his experience in this respect was not an isolated incident.¹⁴⁰
- (b) Mr. Juszczak's unchallenged evidence is that in 2012 or 2013, Canada Cartage changed the pay structure for drivers so that they would be paid only for a pre-determined number of hours to complete their daily runs regardless of how long these runs actually took to complete, unless they could provide documentary or photographic evidence that was acceptable to the company.¹⁴¹ Mr. Juszczak

¹³⁹ AVC (emphasis added) (Defendants' Motion Record, Tab 1E).

¹⁴⁰ Baroch Affidavit, para. 30 (Plaintiff's Motion Record, Tab 2).

¹⁴¹ Juszczak Affidavit, paras. 11-13 (Plaintiff's Motion Record, Tab 3).

believed this regularly resulted in drivers being shortchanged on their pay.¹⁴² Mr. Juszczak also noted that Ms. Eddy told him that, based on a conversation she had with the President and CEO of Canada Cartage, the amount of overtime Mr. Juszczak would be paid was based on the amount that the company charged its customers.¹⁴³

- (c) Mr. Bush, despite not driving a truck as part of his job duties, never received any overtime on his typical 12-hour shifts, nor did any of the other fifteen employees who performed the same job function at the Ajax terminal.¹⁴⁴

87. The plaintiff's theory of the case, and the basis upon which certification is sought, is that these irregularities occurred through or as a result of a systemic policy or practice – or systemic policies and practices – adopted by Canada Cartage.

88. A class-wide determination of whether Canada Cartage had a policy or practice of avoiding or disregarding its obligations to pay overtime to class members at any time during the class period will substantially advance class members' claims as it would present a very different factual matrix for evaluating individual class members' claims for damages.¹⁴⁵ It would limit – and perhaps preclude – Canada Cartage's ability to rely on the process or processes it currently uses in attempting to meet its overtime obligations to class members as a basis to argue that class members have been properly paid for overtime. It would assist class members in establishing liability of Canada Cartage once a class member demonstrated that he or she was required or permitted to

¹⁴² Juszczak Affidavit, para. 13 (Plaintiff's Motion Record, Tab 3).

¹⁴³ Juszczak Affidavit, para. 20 (Plaintiff's Motion Record, Tab 3).

¹⁴⁴ Bush Affidavit, paras. 13, 17, and 19 (Supplementary Motion Record, Tab 2).

¹⁴⁵ *Fulawka OCA*, *supra* note 138, para. 96.

work hours in excess of the standard hours of work threshold at which overtime is payable.¹⁴⁶ It would also advance the claims for declaratory relief and the claim for an order directing Canada Cartage to specifically perform its contracts of employment with class members.¹⁴⁷

89. With respect to the third common issue, determining whether Canada Cartage's policy or practice of avoiding or disregarding its overtime obligations to class members constituted or resulted in a breach of class members' employment contracts would also move the litigation forward in a meaningful way. If resolved in favour of the class, the third common issue would establish a class-wide breach of contract and provide a basis for the class to seek monetary relief. Establishing a systemic breach of contract would also bear on the issue of punitive damages and on the request for specific performance of class members' employment contracts.

90. The fourth and fifth common issues, which concern the existence of a common duty of good faith owed by Canada Cartage to class members and whether that duty was breached, are also substantial ingredients that will necessarily advance class members' breach of contract, declaratory, and punitive damages claims for the reasons given above.

91. There is some basis in fact for these common issues, because there is a basis for concluding that they have class-wide reach. All class members have a particular vulnerability vis-à-vis Canada Cartage in matters relating to compensation and overtime, as demonstrated through Mr. Baroch's evidence that the company's employees "feel powerless to say anything and believe their jobs would be at risk if they spoke up."¹⁴⁸

¹⁴⁶ *Fulawka OCA*, *supra* note 138, para. 98.

¹⁴⁷ *Fulawka OCA*, *supra* note 138, para. 99.

¹⁴⁸ Supplemental Affidavit of Marc-Oliver Baroch, sworn August 21, 2014, para. 9, (Supplementary Motion Record, Tab 1) ["Baroch Supplemental Affidavit"]; see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, para 93 (BOA, Tab 14).

92. If Canada Cartage is found to owe a duty of good faith, Mr. Baroch submits that it will arise out of the nature of the employer-employee relationship that is common to all putative class members. Much of the same evidence that supports the common issue as to whether Canada Cartage avoided or disregarded its overtime obligations to class members provides a basis that supports a breach of the duty of good faith as a common issue; indeed, if Canada Cartage is found to have a policy or practice of avoiding or disregarding its overtime obligations, Mr. Baroch submits that the existence of such a policy or practice is itself a class-wide breach of the duty of good faith.

93. There is also an evidentiary basis for finding that Canada Cartage systemically misled class members about their true entitlements to overtime. The lack of any overtime policy or direction to class members that would allow them to determine or understand their overtime entitlement is common by its very nature, and Mr. Baroch submits that this could constitute or result in a finding that the company was not candid and forthright with its employees with respect to overtime, thereby breaching a duty of good faith owed to all class members.

(ii) Common Issues 6-7: Systemic Negligence

94. The sixth and seventh proposed common issues are:

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?

95. There is evidence that provides some basis for concluding that these issues are common to all class members. The company has or had an employment relationship with every member of the class, meaning that the proximity between Canada Cartage and each class member arises out of a common relationship. If Canada Cartage owes a duty of care to take reasonable steps to ensure that class members are properly compensated at appropriate rates of pay for all hours worked, Mr. Baroch submits that the duty is a common one that is owed to all class members.

96. There is evidence that provides a basis for finding that the content of any duty of care owed by the company to the class members will be informed by considerations with class-wide implications. The evidence of Mr. Gehring and Ms Eddy confirms that Canada Cartage lacked any consistent system, policy or practice for ensuring that class members were paid the overtime to which they were entitled. No direction regarding overtime was given to management or payroll, and no direction was given to employees, notwithstanding Canada Cartage's issuance of many other national policies in its Handbooks. There is also evidence that suggests that the lack of any consistent system, policy, or practice led to some or all class members being deprived of the overtime to which they are entitled.

97. Whether Canada Cartage's failure to have reasonable and effective overtime systems, policies and practices 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. Although the manner of the breach may be nuanced among class members, this is not an impediment to commonality. In *Dell'Aniello v. Vivendi Canada Inc.*, the Supreme Court recently reiterated that:

[C]ommon question[s] may require nuanced and varied answers based on the situations of individual members. 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. It is enough that the answer to the question does not give rise to conflicting interests among the members.¹⁴⁹

98. In *Fulawka*, the Court of Appeal rejected the defendant's argument that resolving systemic defect issues on a class-wide basis would not advance the litigation because the issues would not resolve any of the class members' claims for unpaid overtime.¹⁵⁰ According to Chief Justice Winkler, resolving common issues about systemic defects "would present a very different factual matrix for 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."¹⁵¹

99. Similarly, if Canada Cartage was found to have breached a duty to have a reasonable and effective system in place to accurately record class members' hours and ensure they were paid for all overtime hours worked, this could prevent Canada Cartage from relying on such a system – or on the records produced by it – in arguing that an individual class member did not suffer any damages.¹⁵²

100. The second reason that the Court of Appeal rejected the defendant's argument in *Fulawka* is also apposite in this case: resolving the systemic defect issue would be determinative of certain declaratory and injunctive relief sought by the plaintiff.¹⁵³

101. Here, a finding that Canada Cartage breached its duty to class members to take reasonable steps to ensure that it met its overtime payment obligations would establish an entitlement to the relief sought at paragraph 1(d) of the Amended Claim and would likely entitle the plaintiff to the order claimed at paragraph 1(h) directing the defendants to specifically perform their contracts of

¹⁴⁹ *Dell'Aniello v. Vivendi Canada Inc.*, [2014] 1 S.C.R. 1, para. 46 (BOA, Tab 15).

¹⁵⁰ *Fulawka OCA*, *supra* note 138, para. 92-93.

¹⁵¹ *Fulawka OCA*, *supra* note 138, para. 96.

¹⁵² *Fulawka OCA*, *supra* note 138, para. 97.

¹⁵³ *Fulawka OCA*, *supra* note 138, para. 99.

employment with the class members. Therefore, just as in *Fulawka*, this Court should find that resolving these common issues would advance class members' claims for monetary and non-monetary relief.¹⁵⁴

(iii) Common Issue 8: Unjust Enrichment

102. The eighth common issue, which has three subparts, addresses unjust enrichment:

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?

103. As Chief Justice Winkler noted in *Fulawka*, "there is ample authority establishing that unjust enrichment can constitute a common issue."¹⁵⁵ If it is determined that Canada Cartage had a policy or practice of avoiding or disregarding its overtime obligations to class members, then such policy or practice would enrich the company. This enrichment would correspond with some or all class members being unlawfully deprived of the overtime to which they were entitled. This common issue should be certified.

(iv) Common Issue 9: The Assurance of Voluntary Compliance

104. The ninth common issue¹⁵⁶ pertains to the AVC issued to Canada Cartage by the Labour Program on April 26, 2012:

¹⁵⁴ *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, para 104, (BOA, Tab 16b) [*"Fresco OCA"*]. (Court of Appeal finding that resolving the common issue of whether the employer had a duty to implement an overtime system that satisfied its obligations under the *Code*, and whether the employer's actual system met these obligations, would advance the claim of every class member).

¹⁵⁵ *Fulawka OCA*, *supra* note 138, para. 106.

¹⁵⁶ See Revised List of Common Issues, Appendix "1". This common issue was erroneously labelled as issue 12 in the Revised List of Common Issues that was included in the Plaintiff's Second Supplementary Motion Record.

[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?

105. 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, as Canada Cartage maintains. 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.”¹⁵⁷ However, Ms Eddy’s own evidence is that she only understood the document to apply to shunters in Ontario, and that she took no action to ensure compliance in other job categories or elsewhere in Canada.¹⁵⁸ Canada Cartage was unable to say if it made any effort to determine how long before the issuance of the AVC it was non-compliant with its overtime obligations to class members,¹⁵⁹ and Ms Eddy could not recall whether employees were told that they were entitled to compensation for the period of time in which they had been under-paid for overtime.¹⁶⁰

106. The common issues pertaining to the AVC are a substantial ingredient of class members’ claims. If it is determined that the AVC required Canada Cartage’s compliance for all class members and that Canada Cartage failed to take the necessary steps to do so, it will significantly advance the claims that Canada Cartage breached class members’ contracts of employment and the duty of care owed to class members. It will support an order directing that the defendants specifically perform their contracts of employment with the class members, as well as the claim for punitive damages.

¹⁵⁷ AVC (Defendants’ Motion Record, Tab 1E).

¹⁵⁸ Eddy Examination, p. 68, q. 242; pp. 86-87, q. 314; pp. 87-88, q. 318 (JBTE, Tab A).

¹⁵⁹ Gehring Examination, p. 130, q. 510 (JBTE, Tab B).

¹⁶⁰ Eddy Examination, p. 63, q. 223 (JBTE, Tab A).

(v) *Common Issues 10-11: Remedies and Damages*

107. The final two common issues¹⁶¹ ask what remedies are available to class members, whether damages can be assessed on an aggregate basis, and whether aggravated, exemplary or punitive damages are available to class members, and if so, at what quantum:

[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?

108. The availability of remedies is clearly appropriate for certification as a common issue, since these remedies would flow from findings on the previously-reviewed common issues that pertain to the systemic conduct of Canada Cartage. Mr. Baroch submits that if Canada Cartage systemically breached its obligations to class members, the class would be exposed to the same

¹⁶¹ See Revised List of Common Issues, Appendix “1”. These common issues were erroneously labelled as issues 13 and 14 in the Revised List of Common Issues included in the Plaintiff’s Second Supplementary Motion Record.

risk of harm and would therefore be entitled to the same remedies.¹⁶² The question of remedy is a substantial and necessary ingredient of class members' claims.

109. Punitive damages are also appropriate for certification as a common issue. In *Rosen*, this Court certified punitive damages as a common issue, noting that both liability for and quantum of punitive damages “depend on the conduct of the defendant and are not affected by individual concerns.”¹⁶³ That is also the case here, particularly in the light of a recent comment by the Divisional Court that “[t]he judge who conducts the common issues trial is in the best position to determine whether an award of punitive damages is appropriate.”¹⁶⁴ If Canada Cartage is found to have engaged in systemic conduct in breach of its obligations to class members, particularly if it did so wilfully, then there is a common basis for an award of punitive damages.

110. The question of an aggregate assessment of damages should also be certified as a common issue, and this Court has the discretion to do so.¹⁶⁵ For aggregate damages to be an appropriate common issue, however, there must be a reasonable likelihood that three preconditions can be met. First, section 24(1)(a) of the *CPA* requires that monetary relief is claimed on behalf of some or all class members,¹⁶⁶ which is the case here.

111. Second, aggregate damages may be available when the defendant’s liability “to at least some members of the class” will be established through the resolution of the certified common issues, assuming those issues are resolved in favour of the class.¹⁶⁷

¹⁶² *Fulawka Certification*, *supra* note 100, para. 149.

¹⁶³ *Rosen*, *supra* note 123, para. 64.

¹⁶⁴ *Good v. Toronto Police Service Board*, 2014 ONSC 4583 (Div. Ct.), para 80 (BOA, Tab 17).

¹⁶⁵ *Rosen*, *supra* note 123, para. 64; see also *Pro-Sys*, *supra* note 132, para. 134.

¹⁶⁶ *Fulawka OCA*, *supra* note 138, para. 120.

¹⁶⁷ *Fulawka OCA*, *supra* note 138, para. 123.

112. Canada Cartage's liability to some or all members of the class can be established if the third common issue – whether the systemic conduct of Canada Cartage constituted or resulted in a breach of class members' contracts of employment – is determined in favour of the class. Paragraph 24(1)(b) of the *CPA* can be satisfied if a defendant engages in conduct that exposes all class members to the risk of harm.¹⁶⁸ In *Markson*, Rosenberg J.A. noted that “[i]n my view, condition (b) is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments.”¹⁶⁹

113. Third, aggregate damages are available when they can be calculated through a “top-down” approach, namely, situations in which monetary liability to some or all class members can reasonably be determined globally without proof from individual class members.¹⁷⁰

114. Mr. Baroch submits that there is a basis in fact to conclude that it is reasonably possible to assess the quantum of monetary liability without proof by individual class members. Canada Cartage was itself 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, which contain detailed information regarding employee duties and hours worked.¹⁷¹

115. Canada Cartage groups its employees into seven different job categories,¹⁷² and has records regarding which employees it categorized as being eligible for overtime after the 8/40

¹⁶⁸ *Fresco v. Canadian Imperial Bank of Commerce*, 2009 CarswellOnt 3481 (S.C.), para 88 (BOA, Tab 16a) [*“Fresco Certification”*] (citing *Markson*, *supra* note 135; *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781 (BOA, Tab 18) [*“Cassano”*] and *Lee Valley Tools Ltd. v. Canada Post Corp.*, 2007 CarswellOnt 8216 (S.C.), (BOA, Tab 19); *Fulawka OCA*, *supra* note 138, para. 133.

¹⁶⁹ *Markson*, *supra* note 135, para. 48.

¹⁷⁰ *Fulawka OCA*, *supra* note 138, para. 126.

¹⁷¹ Gehring Affidavit, paras. 12 and 51 (Defendants' Motion Record, Tab 1).

¹⁷² Gehring Affidavit, paras. 34 (Defendants' Motion Record, Tab 1).

threshold.¹⁷³ For driving employees, Canada Cartage 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.¹⁷⁴ Canada Cartage's safety and compliance department also maintains driver logs, which track the precise hours that a driver is working and driving.¹⁷⁵

116. In short, there is a basis on which this Court could reasonably conclude that all the information needed to assess the quantum of monetary liability of Canada Cartage on an aggregate basis is available and in the possession of the company.

117. The provision for statistical sampling in s. 23 of the *CPA* can be employed to determine the aggregate part of the defendant's liability without proof of individual claims.¹⁷⁶ If Canada Cartage is found to have engaged in class-wide systemic conduct that exposed class members to the risk of harm, sections 23 and 24 of the *CPA* exist to ensure that a wrong does not elude an effective remedy.

118. In *Markson*, the defendant was found to have structured its affairs in such a way that would make it very difficult to determine the extent of its liability to class members.¹⁷⁷ However, in that case, not all class members would have suffered harm as a result of the bank's charging of improper rates of interest on cash advances (because some class members may have never taken a cash advance, for example). The effect of the defendant's accounting practices in that case was that

¹⁷³ Gehring Examination, p. 25, q. 86 (JBTE, Tab B).

¹⁷⁴ Gehring Examination, pp. 45-46, qq. 154-157 (JBTE, Tab B).

¹⁷⁵ Gehring Examination, pp. 48-49, qq. 165-169 (JBTE, Tab B).

¹⁷⁶ *Markson*, *supra* note 135, para. 45.

¹⁷⁷ *Markson*, *supra* note 135, para. 42.

the precise extent of any individual violation could be “determined only at great cost.”¹⁷⁸ In certifying a common issue regarding aggregate damages, the Court of Appeal noted that:

As I have said, because of the way the defendant has structured its affairs it is practically impossible to determine the extent of its breach of s. 347. Once the common issues are resolved, it would be possible to review the statements of each individual cardholder and calculate the cardholder’s damages. The vast number of accounts to be reviewed and the small potential award in each case are such that it is impractical and inefficient to do so. Sections 23 and 24 provide a means of avoiding the potentially unconscionable result of a wrong eluding an effective remedy.¹⁷⁹

119. In *Fulawka*, the Court of Appeal noted that the decisions in *Markson* and *Cassano* were cases in which s. 24(1)(c) was satisfied because the “information needed for assessing the quantum of monetary relief was available in the form of documentary evidence from the respective defendants’ own transactional records.”¹⁸⁰

120. Mr. Baroch submits that sections 23 and 24 of the *CPA*, interpreted in the light of *Markson* and *Cassano*, confirm that a common issue on aggregate damages should be certified to ensure that if Canada Cartage is found to have systemically breached class members’ contracts of employment, the company cannot rely on the complexity and individualized nature of its record keeping and thereby permit a wrong to escape an effective remedy.

(vi) *Conclusion on Common Issues*

121. For all the foregoing reasons, Mr. Baroch submits that there is some basis in fact for each of the common issues. These issues are necessary to resolve each class member’s claim and are a substantial ingredient of those claims. Paragraph 5(1)(c) of the *CPA* is satisfied.

¹⁷⁸ *Markson*, *supra* note 135, para. 36.

¹⁷⁹ *Markson*, *supra* note 135, para. 42.

¹⁸⁰ *Fulawka OCA*, *supra* note 138, para. 127.

(D) A Class Proceeding is the Preferable Procedure

122. The preferable procedure criterion in paragraph 5(1)(d) of the *CPA* captures two ideas. First, the proceeding must be preferable in the sense that it is a fair, efficient and manageable method of advancing class members' claims. Second, it must be preferable to other procedures such as joinder, test cases, consolidation or other means of resolving the dispute.¹⁸¹

123. The defendants do not contest that a class proceeding is the preferable procedure for resolving any common issues certified by this Court. The effect of this concession is that if this Court is satisfied that there is a basis in fact for any of the common issues and finds that these common issues are a substantial and necessary part of class members' claims, Canada Cartage cannot argue that resolving those issues by way of a class proceeding would be unfair, inefficient, or unmanageable or that some other procedure is better suited for resolving those common issues.

124. This case is not the first in which the preferability of a class proceeding for overtime has been evaluated against other mechanisms for resolving employees' overtime complaints, such as the procedure under Part III of the *Code* involving Labour Program referees or inspectors. The certification judges in *Fresco* and *Fulawka* both determined that a class action would be the preferable procedure for advancing the overtime claims of class members.

125. There is some basis in fact to conclude that a class action is the preferable procedure for addressing class members' claims against Canada Cartage. A class proceeding will provide class members with the benefit of anonymity, an important consideration given that there is a basis in

¹⁸¹ *Rosen, supra* note 123, para. 66.

fact to conclude that Canada Cartage retaliated against Mr. Baroch and had him fired from Quik-X, a company for which he worked following his departure from Canada Cartage.¹⁸²

126. The importance of anonymity is further underscored by Mr. Bush's unchallenged evidence that he fears reprisal from Canada Cartage¹⁸³ and Mr. Baroch's unchallenged evidence that other Canada Cartage employees have told him that "as it relates to questioning the compensation paid to them by the company, they too feel powerless to say anything and believe their jobs would be at risk if they spoke up."¹⁸⁴

127. Mr. Juszczak's unchallenged evidence is that the Labour Board complaint process lacks transparency, has not given him an opportunity to participate in a meaningful way, and has been frustrating.¹⁸⁵ He would not recommend the process to any of his former co-workers.¹⁸⁶

128. A class action will be more effective than claims under Part III of the *Code* because the jurisdiction of HRSDC inspectors is limited to the enforcement of the *Code*.¹⁸⁷ The *Code* imposes a six month limitation on an employee bringing an overtime complaint to the Labour Program, and restricts the scope of any retroactive payment order to 12 months.¹⁸⁸ As noted by the Court of Appeal in *Fulawka*:

Given the type of liability and damages raised by class members' claims, the limitation on the jurisdiction and remedial authority of inspectors and referees under the *Code* would thwart rather than fulfill the central *CPA* goal of promoting access to justice.¹⁸⁹

¹⁸² Baroch Affidavit, para. 39 (Plaintiff's Motion Record, Tab 2).

¹⁸³ Bush Affidavit, para. 6 (Supplementary Motion Record, Tab 2).

¹⁸⁴ Baroch Supplemental Affidavit, para. 9 (Supplementary Motion Record, Tab 1).

¹⁸⁵ Juszczak affidavit, paras. 29-30 (Plaintiff's Motion Record, Tab 3).

¹⁸⁶ Juszczak affidavit, para. 30 (Plaintiff's Motion Record, Tab 3).

¹⁸⁷ *Fresco Certification*, supra note 168, para. 98; *Fulawka Certification*, supra note 100, para. 163.

¹⁸⁸ *Code*, s. 251.01(2); 251.1(1.1).

¹⁸⁹ *Fulawka OCA*, supra note 138, para. 167.

129. The Court of Appeal's observation applies with equal force to this motion. Accordingly, this Court should find that paragraph 5(1)(d) of the *CPA* is satisfied.

(E) Mr. Baroch is an Appropriate Representative Plaintiff

130. Paragraph 5(1)(e) of the *CPA* requires a representative plaintiff who would fairly and adequately represent the interests of the class, who has a workable litigation plan, and who does not have, on the common issues for the class, a conflicting interest with other class members. Courts have interpreted this requirement to consider the representative plaintiff's motivation to prosecute the claim, the class counsel he or she hired to advance the claim, his or her ability to bear the costs of the litigation, and whether he or she will vigorously and capably prosecute the interests of the class.¹⁹⁰

131. The defendants do not contest the paragraph 5(1)(e) criterion. In any event, Mr. Baroch's evidence is that he understands the role of the representative and is prepared and willing to discharge his obligations fairly and in the best interests of the proposed class at all times.¹⁹¹ He has already been active in these proceedings, including by swearing two affidavits, submitting to cross-examination, and making efforts to inform putative class members about the lawsuit.¹⁹² He is not aware of any conflict arising out of the common issues with any member of the proposed class.¹⁹³

132. Mr. Baroch has retained counsel that he believes have the requisite skill, expertise, and experience to carry this litigation forward in a manner that is not only workable, but also fair and

¹⁹⁰ *Fresco Certification*, *supra* note 168, para. 99; *McCracken v. Canadian National Railway*, 2010 ONSC 4520, paras. 458-461 (BOA, Tab 6a); *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.) para 218 (BOA, Tab 20) [*"Silver"*].

¹⁹¹ Baroch Affidavit, paras. 47-49 (Plaintiff's Motion Record, Tab 2).

¹⁹² Baroch Affidavit, para. 49 (Plaintiff's Motion Record, Tab 2).

¹⁹³ Baroch Affidavit, para. 52 (Plaintiff's Motion Record, Tab 2).

reasonable to the interests of the class as a whole.¹⁹⁴ There is a factual basis to conclude that Mr. Baroch has the ability to bear the costs of the litigation, as counsel has undertaken to indemnify him for any adverse costs awards made against him in the action.¹⁹⁵

133. Furthermore, Mr. Baroch has produced a workable litigation plan. Courts have determined that the plan need not be perfect, but simply workable, as it is necessarily preliminary.¹⁹⁶ Mr. Baroch's litigation plan contains a detailed description of the steps to be taken in the action, including steps to be taken for documentary and oral discoveries, communications with class members including notice, and the trial of the common issues.¹⁹⁷ In any event, Mr. Baroch's litigation plan is not set in stone, as it contemplates ongoing reconsideration and revision as necessary under the continuing case management authority of this Court.¹⁹⁸

134. This Court should find that paragraph 5(1)(e) of the *CPA* is satisfied.

PART IV - ORDER REQUESTED

135. The plaintiff submits that the Court should grant the motion, with costs, order that this action be certified as a class proceeding, and appoint Mr. Baroch as the representative plaintiff.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of November, 2014.



Eric R. Hoaken / Ian C. Matthews / Larissa C. Moscu / Lauren P.S. Epstein

¹⁹⁴ Baroch Affidavit, para. 51 (Plaintiff's Motion Record, Tab 2).

¹⁹⁵ Baroch Affidavit, para. 45 (Plaintiff's Motion Record, Tab 2).

¹⁹⁶ *Cloud*, *supra* note 137, para. 95; *Sauer*, *supra* note 130, para. 67; *Silver*, *supra* note 190, paras. 223-5.

¹⁹⁷ Litigation Plan, Exhibit "F" to the Baroch Affidavit (Plaintiff's Motion Record, Tab 2F) ["Litigation Plan"].

¹⁹⁸ Litigation Plan, para. 26 (Plaintiff's Motion Record, Tab 2F).

APPENDIX "1"

CANADA CARTAGE CLASS ACTION – REVISED LIST OF 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?

SCHEDULE "A"

LIST OF AUTHORITIES

- 1(a) *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148
- 1(b) *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443
2. *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629
3. *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144
4. *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013] 3 S.C.R. 545
5. *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677
- 6(a) *McCracken v. Canadian National Railway*, 2010 ONSC 4520
- 6(b) *McCracken v. Canadian National Railway*, 2012 ONCA 445
7. *Sauer v. Canada (Agriculture)*, 2008 CarswellOnt 5081 (S.C.)
8. *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2013] 3 S.C.R. 477
9. *Option consommateurs v. Infineon Technologies AG*, [2013] 3 S.C.R. 600
10. *Rumley v. British Columbia*, [2001] 3 S.C.R. 184
11. *Markson v. MBNA Canada Bank*, 2007 ONCA 334
12. *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158
13. *Cloud v. Canada (Attorney General)*, 2004 CarswellOnt 5026 (C.A.)
14. *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701

15. *Dell'Aniello v. Vivendi Canada Inc.*, [2014] 1 S.C.R. 1
- 16(a) *Fresco v. Canadian Imperial Bank of Commerce*, 2009 CarswellOnt 3481 (S.C.)
- 16(b) *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444
17. *Good v. Toronto Police Service Board*, 2014 ONSC 4583 (Div. Ct.)
18. *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781
19. *Lee Valley Tools Ltd. v. Canada Post Corp.*, 2007 CarswellOnt 8216 (S.C.)
20. *Silver v. IMAX Corp.*, 2009 CarswellOnt 7873 (S.C.)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Canada Labour Code, R.S.C., 1985, c. L-2

Definitions

166. In this Part...

"overtime" means hours of work in excess of standard hours of work;

[...]

Saving more favourable benefits

168. (1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

[...]

Standard hours of work

169. (1) Except as otherwise provided by or under this Division

(a) the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; and

(b) no employer shall cause or permit an employee to work longer hours than eight hours in any day or forty hours in any week.

[...]

Overtime pay

174. When an employee is required or permitted to work in excess of the standard hours of work, the employee shall, subject to any regulations made pursuant to section 175, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.

[...]

Making of complaint

251.01 (1) Any employee may make a complaint in writing to an inspector if they believe that the employer has contravened

(a) any provision of this Part or of the regulations made under this Part; or

(b) any order.

Time for making complaint

(2) A complaint under subsection (1) shall be made within the following period

(a) in the case of a complaint of non-payment of wages or other amounts to which the employee is entitled under this Part, six months from the last day on which the employer was required to pay those wages or other amounts under this Part; and

(b) in the case of any other complaint, six months from the day on which the subject-matter of the complaint arose.

Extension of time

- (3) The Minister may, subject to the regulations, extend the period set out in subsection (2)
- (a) if the Minister is satisfied that a complaint was made within that period to a government official who had no authority to deal with the complaint and that the person making the complaint believed the official had that authority;
 - (b) in any circumstances prescribed by regulation; or
 - (c) in the conditions prescribed by regulation.

Limitation

(4) An employee is not permitted to make a complaint under subsection (1) if the complaint is that the employee has been dismissed and considers the dismissal to be unjust.

For greater certainty

(5) For greater certainty, a complaint is not permitted under this section if it relates to a disagreement whose settlement is governed exclusively by a collective agreement under subsection

Payment order

251.1 (1) Where an inspector finds that an employer has not paid an employee wages or other amounts to which the employee is entitled under this Part, the inspector may issue a written payment order to the employer, or, subject to section 251.18, to a director of a corporation referred to in that section, ordering the employer or director to pay the amount in question, and the inspector shall send a copy of any such payment order to the employee at the employee's latest known address.

Limitation

(1.1) A payment order must not relate to wages or other amounts to which the employee is entitled for the period preceding

- (a) in the case where the employee made a complaint under subsection 251.01(1) that was not rejected under subsection 251.05(1), the 12 months before the day on which the complaint was made or, if there was a termination of employment prior to the complaint being made, the 12 months before the date of termination; and
- (b) in any other case, the 12 months before the day on which an inspection under this Part, during the course of which the inspector made the finding referred to in subsection (1), began.

Motor Vehicle Operators Hours of Work Regulations, C.R.C., c. 990

Definitions

2. In these Regulations,

“city motor vehicle operator”

“city motor vehicle operator” means a motor vehicle operator who operates exclusively within a 10-mile radius of his home terminal and is not a bus operator and includes any motor vehicle operator who is classified as a city motor vehicle operator in a collective agreement entered into between his employer and a trade union acting on his behalf or who is not classified in any such agreement but is considered to be a city motor vehicle operator according to the prevailing industry practice in the geographical area where he is employed; (*conducteur urbain de véhicule automobile*)

“highway motor vehicle operator”

“highway motor vehicle operator” means a motor vehicle operator who is not a bus operator or a city motor vehicle operator; (*conducteur routier de véhicule automobile*)

“motor vehicle operator”

“motor vehicle operator” means a person who operates a motor vehicle; (*conducteur de véhicule automobile*)

[...]

City Motor Vehicle Operator

5. (1) Subject to subsection (2) and section 8, the standard hours of work of a city motor vehicle operator may exceed 8 hours in a day and 40 hours in a week but shall not exceed 9 hours in a day and 45 hours in a week, and no employer shall cause or permit a city motor vehicle operator to work longer hours than 9 hours in a day or 45 hours in a week.

(2) In a week in which a general holiday occurs that, under Division V of the Act, entitles a city motor vehicle operator to a holiday with pay in that week, the standard hours of work of the city motor vehicle operator in that week may exceed 32 hours but shall not exceed 36 hours, but, for the purposes of this subsection, in calculating the time worked by a city motor vehicle operator in any such week, no account shall be taken of any time worked by the operator on the holiday or of any time during which the operator was at the disposal of the employer during the holiday.

Highway Motor Vehicle Operator

6. (1) Subject to this section and section 8, the standard hours of work of a highway motor vehicle operator may exceed 40 hours in a week but shall not exceed 60 hours, and no employer shall cause or permit a highway motor vehicle operator to work longer hours than 60 hours in a week.

(2) In a week in which a general holiday occurs that, under Division V of the Act, entitles a highway motor vehicle operator to a holiday with pay in that week, the standard hours of work of the highway motor vehicle operator in that week may exceed 32 hours but shall not exceed 50 hours, but, for the purposes of this subsection, in calculating the time worked by a highway motor vehicle operator in any such week, no account shall be taken of any time worked by the operator on

the holiday or of any time during which the operator was at the disposal of the employer during the holiday.

(3) Subject to subsection (4), the hours of work of a highway motor vehicle operator who does not normally drive on public roads may, pursuant to an authorization made under the Commercial Vehicles Drivers Hours of Service Regulations, exceed 60 hours in a week.

(4) Where a permit referred to in subsection (3) has been issued in respect of a motor vehicle operator, the hours of work set out in the permit shall be regarded as the standard hours of work for that operator.

Mixed Employment

7. (1) Subject to subsection (2), where an employee is employed in any day or in any week in not less than two of the following classes of employees,

(a) a city motor vehicle operator,

(b) a highway motor vehicle operator, and

(c) an employee whose hours of work are not described in these Regulations and are not calculated according to the *Canada Labour Standards Regulations*,

his standard hours of work in any such day or week, as the case may be, shall be deemed to be the standard hours of work for the class of employment in which he works the greatest number of hours in that day or week.

(2) Subject to subsection (3), where an employee works as described in subsection (1), section 174 of the Act does not apply in respect of any time worked by the employee in a day or week while employed as a highway motor vehicle operator.

(3) Where the total working hours of an employee described in subsection (1) exceeds 60 hours in any week, all hours worked in excess of 60 shall be counted as overtime.

Class Proceedings Act, 1992, S.O. 1992, c. 6

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
- (a) the pleadings or the notice of application discloses a cause of action;
 - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
 - (c) the claims or defences of the class members raise common issues;
 - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
 - (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

[...]

Statistical evidence

23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics. 1992, c. 6, s. 23 (1).

Idem

(2) A record of statistical information purporting to be prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity. 1992, c. 6, s. 23 (2).

Notice

- (3) Statistical information shall not be admitted as evidence under this section unless the party seeking to introduce the information has,
- (a) given reasonable notice of it to the party against whom it is to be used, together with a copy of the information;
 - (b) complied with subsections (4) and (5); and
 - (c) complied with any requirement to produce documents under subsection (7). 1992, c. 6, s. 23 (3).

Contents of notice

(4) Notice under this section shall specify the source of any statistical information sought to be introduced that,

- (a) was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada;
- (b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or
- (c) was derived from reference material generally used and relied on by members of an occupational group. 1992, c. 6, s. 23 (4).

Idem

(5) Except with respect to information referred to in subsection (4), notice under this section shall,

- (a) specify the name and qualifications of each person who supervised the preparation of statistical information sought to be introduced; and
- (b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced. 1992, c. 6, s. 23 (5).

Cross-examination

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information. 1992, c. 6, s. 23 (6).

Production of documents

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure. 1992, c. 6, s. 23 (7).

Aggregate assessment of monetary relief

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. 1992, c. 6, s. 24 (1).

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. 1992, c. 6, s. 24 (3).

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order. 1992, c. 6, s. 24 (4).

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims. 1992, c. 6, s. 24 (5).

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

- (a) the use of standardized proof of claim forms;
- (b) the receipt of affidavit or other documentary evidence; and
- (c) the auditing of claims on a sampling or other basis. 1992, c. 6, s. 24 (6).

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 24 (7).

Idem

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 24 (8).

Extension of time

(9) The court may give leave under subsection (8) if it is satisfied that,

- (a) there are apparent grounds for relief;
- (b) the delay was not caused by any fault of the person seeking the relief; and
- (c) the defendant would not suffer substantial prejudice if leave were given. 1992, c. 6, s. 24 (9).

Court may amend subs. (1) judgment

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so

MARC-OLIVER BAROCH
Plaintiff

-and-

CANADA CARTAGE DIVERSIFIED GP INC. et al.
Defendants

Court File No. CV-13-492525-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

PLAINTIFF'S FACTUM – CERTIFICATION
(Returnable December 10-12, 2014)

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