

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

MARC-OLIVER BAROCH

Plaintiff

- and -

CANADA CARTAGE DIVERSIFIED GP INC., DIRECT GENERAL
PARTNER CORPORATION, and CANADA CARTAGE SYSTEM, LIMITED

Defendants

STATEMENT OF DEFENCE

Proceeding commenced under the Class Proceeding Act, 1992

1. The defendants, Canada Cartage Diversified GP Inc., Direct General Partner Corporation, and Canada Cartage System, Limited, admit the allegations contained in paragraph 2, the first sentence of paragraph 3 and the first sentence of paragraph 4 of the amended statement of claim.
2. Except as expressly otherwise admitted in this statement of defence, Canada Cartage denies all other allegations made in the amended statement of claim. Canada Cartage specifically denies that the plaintiff and other class members are entitled to any of the relief claimed in the amended statement of claim.

Overview

3. In this class proceeding, the plaintiff asserts claims regarding the policies and practices of certain of the defendants in relation to compensation for hours worked by overtime eligible employees. The plaintiff, Marc-Oliver Baroch, is a former employee who worked as a shunter, or “shunt driver”, in the yard at a single distribution terminal in Ontario. The plaintiff is one of a small number of employees in Ontario who were affected by an isolated overtime compliance issue addressed with Human Resources and Skills Development Canada (“HRSDC”) in 2012.

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4. The plaintiff brings this class proceeding on behalf of a class that consists of current and former employees of the defendants who were eligible to receive overtime compensation pursuant to the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the “Code”) and its regulations during the class period (March 1, 2006 to January 30, 2015) (the “Class”). The members of the Class held many different job positions, performed different job functions, and worked on different client accounts and/or for different legal entities in different parts of the country. The members of the Class include, but are not limited to, drivers, shunters, dispatchers, warehouse workers, units pickers, dock workers, swampers, administrative staff and inventory coordinator. Different laws and regulations apply to the overtime entitlements of the members of the Class, depending on the position(s) that they held and job functions that they performed.

5. The Class, as certified, excludes unionized employees (“Unionized Employees”), the terms of whose employment relating to overtime and hours of work are prescribed by collective bargaining agreements and not by the *Canada Labour Code* or its regulations.

6. In any event, this Court has no jurisdiction, inherent or otherwise, to determine the rights and entitlements of Unionized Employees pursuant to the terms of the *Canada Labour Code* and at common law. The fact that this claim is brought by way of class action does not confer jurisdiction on this Court over Unionized Employees, the rights of whom are within the exclusive jurisdiction of another body. In this statement of defence, the term “Class” expressly excludes Unionized Employees. The defendants state that any and all claims asserted on behalf of Unionized Employees must be stayed or dismissed for, among other reasons, lack of jurisdiction and lack of capacity.

7. Throughout the class period, the members of the Class were entitled to receive overtime compensation in accordance with the requirements of the *Code* and certain regulations enacted thereunder. Those provisions provide that class members who were required or permitted to work overtime hours, beyond the eligibility threshold applicable to the employee’s job position or job duties at the relevant time, are to be compensated for those hours at the applicable overtime rate.

8. Contrary to the allegations in the amended statement of claim, the defendants state that their overtime practices during the class period were consistent with the requirements of the

Code and with the terms of the Class members' contracts of employment. The defendants engaged in no systemic practices that restricted or denied class members from receiving appropriate compensation for overtime hours they were required or permitted to work. Nor did management direct or encourage such practices. The plaintiff's claims should be dismissed.

The Parties

9. The defendants are part of a larger group of partnerships and corporations that together carry on business across Canada as a national trucking, cartage, and warehousing services provider.

10. Canada Cartage Diversified GP Inc. ("Diversified") is an Ontario company headquartered in Mississauga, Ontario. It is the general partner that carries on business on behalf of certain Manitoba limited partnerships that own trucking, cartage and warehousing operations in Ontario and Quebec.

11. Diversified holds all of the shares of Direct General Partner Corporation ("Direct"), an Ontario company headquartered in Mississauga, Ontario. Direct is the general partner that carries on business on behalf of a Manitoba limited partnership that that owns trucking, cartage and warehousing operations in Western Canada.

12. Canada Cartage System, Limited ("CCSL") was a corporation established under the laws of Ontario. Contrary to paragraph 5 of the amended statement of claim, CCSL did not, during the class period, engage in the business of dedicated trucking services throughout Canada or at all.

13. Direct and Diversified and the limited partnerships on behalf of whom they carry on business in their capacity as general partners are together referred to in this statement of defence as "Canada Cartage".

14. The plaintiff, Marc-Oliver Baroch, was employed by Canada Cartage System Limited Partnership, one of the limited partnerships on behalf of which Diversified carries on business. The plaintiff's date of hire was March 27, 2006 and his last day of work was on June 29, 2013. During that time, he was a shunter working on the Shoppers Drug Mart account out of the distribution terminal located in Mississauga, Ontario which is known as the "Matrix" distribution

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terminal. The plaintiff did not work in any other job positions or at any other locations while employed at Canada Cartage.

Canada Cartage's Business

15. Canada Cartage is a leading national provider of transportation services, including fully outsourced, customer-located, dedicated trucking services. As a provider of dedicated trucking services, Canada Cartage offers customized, integrated trucking solutions for the benefit of single customers, including equipment, drivers, management, and systems.

16. In addition to dedicated trucking services, Canada Cartage also offers various other services, including warehousing and distribution, general cartage, logistics, and moving services.

17. Canada Cartage operates through a network of 25 facilities located across Canada, as well as its headquarters in Mississauga, Ontario. Canada Cartage facilities are located in 14 Canadian cities, including Montreal, Toronto, Oshawa, London, Thunder Bay, Winnipeg, Brandon, Saskatoon, Regina, Calgary, Edmonton, and Vancouver. Canada Cartage also operates directly out of certain customer facilities.

18. Unlike many transportation companies, Canada Cartage does not offer a single homogeneous service. Instead, Canada Cartage customizes solutions to suit the unique circumstances of its clients. As a result, Canada Cartage carries on its business through hundreds of different and highly customized transportation installations across Canada.

19. A substantial number of Canada Cartage employees work as drivers some or all of the time. Each driver's work experience is unique and depends on that driver's particular responsibilities and location. Depending on the customer account, a Canada Cartage driver may start and finish a route from a Canada Cartage terminal, from the customer's location, or in some cases from a combination of both.

20. Canada Cartage facilities vary with respect to, among other things, the types of businesses and customers they service, their customer's needs and routes, their geographic location, their size and the manner in which they are staffed. These many differences result in

significant variability and complexity in the eligibility thresholds that govern the overtime entitlements of members of the Class.

Relevant Legislative Framework

21. Canada Cartage is a federally-regulated employer. The standard hours of work and overtime entitlements of many Canada Cartage employees are prescribed by Part III, Division I of the *Code*. Section 169 of the *Code* provides, among other things, that the standard hours of work of an employee shall not exceed eight hours in any day or forty hours in any week. Section 174 of the *Code* provides that an employee that is required or permitted to work in excess of the standard hours of work shall be paid for overtime at a rate not less than one and one-half times his or her regular rate of wages.

22. The *Motor Vehicle Operators Hours of Work Regulations, C.R.C., c. 990* (the “*MVOHOW* regulations”) modify the standard hours of work and overtime provisions of the *Code* as they apply to certain employees. These regulations apply to, among others, “city motor vehicle operators” and “highway motor vehicle operators” who are employed upon or in connection with, among other things, the operation of any industrial establishment engaged in the transportation of goods by motor vehicle from any point within a province to any point outside that province. As described below, the requirements of the *MVOHOW* regulations are complex.

23. As defined in the *MVOHOW* regulations, “city motor vehicle operators” (“City Drivers”) include drivers who operate “exclusively” within a 10-mile radius of their “home terminal” or who are considered City Drivers according to the “prevailing industry practice” in the geographical area in which they are employed.

24. Pursuant to section 5 of the *MVOHOW* regulations, the standard hours of work for City Drivers are not to exceed 9 hours in a day or 45 hours in a week.

25. For the purposes of this case, a “highway motor vehicle operator” (“Highway Driver”) is a motor vehicle operator who is not a City Driver. The standard hours of work of a Highway Driver are 60 hours in a week. Highway Drivers are eligible for overtime hours worked in excess of 60 hours per week. There is no daily overtime threshold applicable to Highway Drivers.

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26. Canada Cartage employs, and the Class includes, both City and Highway Drivers.
27. Determining whether a driver is a City Driver or a Highway Driver within the meaning of the *MVOHOW* regulations may depend, in part, on the application of an HRSDC (now Employment Skills Development Canada (“ESDC”)) – Labour Program motor vehicle operator survey which is used by HRSDC to assess the prevailing industry practice.
28. During the class period, HRSDC surveys were conducted in some but not all geographic areas in Canada to establish the prevailing industry practice for the purpose of assessing whether a driver is to be considered a City Driver or Highway Driver within that particular geographic area. In some cases, HRSDC conducted a survey but determined that *no* prevailing industry practice exists in a particular geographic area. As a result, the overtime eligibility threshold applicable to members of the Class who were drivers some or all of the time may depend on whether there is a survey in place in a particular geographic area.
29. Determining whether a driver is a City Driver or a Highway Driver also requires a determination of whether the driver operates “exclusively” within a particular geographic area, the parameters of which may be established by a survey. Neither the regulations nor the surveys issued by HRSDC in relation to certain geographic areas from time to time define the term “exclusively”.
30. Canada Cartage has been advised by HRSDC that strict compliance with the terms of a survey is not necessary to comply with the *MVOHOW* regulations.
31. Determining the standard hours of work and overtime entitlements of drivers is further complicated by the “mixed employment rules” contained in sections 7 and 8 of the *MVOHOW* regulations. Pursuant to these sections, an employee may be considered a City Driver or a Highway Driver or a non-driving employee, depending on how the employee spent the greatest number of hours in a day or week. For example, an employee may qualify as a City Driver on one day and a Highway Driver or non-driving employee on another day.
32. The routes on which many Canada Cartage drivers operate, and the distances they travel, vary from day to day and/or from week to week. While many drivers always fall within the

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definition of Highway Drivers under the *MVOHOW* regulations, others may be City Drivers one day or week and Highway Drivers the next, as a result of the routes they drive.

33. ***Eligibility Thresholds under Modified Work Schedules.*** Some Canada Cartage employees are subject to modified work schedules established under section 170 of the *Code* that modify their hours of work and overtime eligibility thresholds. Employees that are party to modified work agreements include mechanics and dispatchers, certain administrative staff, and tow truck drivers. Whether modified work schedules apply to these job positions depends on the particular facility in which the employees work. Not all employees that hold these job positions are party to modified work agreements.

34. ***Eligibility Thresholds under Customer Agreements.*** Section 168 of the *Code* provides in relevant part that nothing in Part III of the *Code* or the regulations shall be construed as affecting any rights or benefits of employees that are more favourable to the employee than his or her rights or benefits under the *Code*. Some Canada Cartage employees are subject to standard hours of work and/or overtime eligibility thresholds established in customer contracts applicable to certain off-site locations that are more favourable than those set out in the *Code* or the *MVOHOW* regulations.

Compensation for Overtime Hours at Canada Cartage

35. ***No Requirement to have Uniform Overtime Policy.*** As a result of the complex legislative framework described above, members of the Class are subject to different overtime eligibility thresholds. Which threshold applies depends on various factors unique to each member of the Class and each job position.

36. As a result of the variability among Canada Cartage's employees' job duties and job experiences, and the complexity of the existing regulatory regime, Canada Cartage did not have a single, uniform overtime policy during the class period which prescribed standard hours of work and overtime eligibility for all employees during the class period. The institution of such a policy at Canada Cartage would be impractical and unworkable.

37. In any event, there is no legal requirement that Canada Cartage have such a policy. The *Code* and regulations do not require that a company have a uniform overtime policy, or any

overtime policy. The *Code* instead requires that employees be compensated in accordance with the provisions of the *Code* and any applicable regulations.

38. ***No Practice of Paying Overtime at 60 Hours Threshold.*** Contrary to the allegations in the amended statement of claim, Canada Cartage did not at any time have a policy or practice whereby it only paid members of the Class for hours worked in excess of 60 hours in any week. Nor did it at any time have a practice of treating all members of the Class as Highway Drivers, without regard to the nature of the jobs they actually perform. Canada Cartage paid members of the Class in accordance with the legal requirements applicable to them. Over the class period, Canada Cartage paid substantial amounts of overtime compensation to members in the Class who exceeded standard hours of work thresholds below 60 hours per week. The defendants deny the plaintiff's allegations in this regard and puts the plaintiff to the strict proof thereof.

39. As described above, members of the Class were entitled to receive, and did receive, overtime compensation at a variety of overtime thresholds, many of which were below 60 hours per week, depending on their specific job duties and employment circumstances.

Overtime Payment Systems

40. Throughout the class period, Canada Cartage implemented/or and had in place reasonable and appropriate systems and practices to ensure that the members of the Class were properly compensated for overtime hours worked in accordance with the *Code*, the *MVOHOW* regulations, and the terms of contracts of employment. In particular, Canada Cartage had in place systems that would and did:

- (a) track employees' hours of work;
- (b) determine employees' standard hours of work and, where necessary, whether an employee was a City Driver, a Highway Driver, or a non-motor vehicle operator, including with reference to the mixed employment rules and HRSDC surveys;
- (c) determine whether an employee was required or permitted to work overtime hours; and

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- (d) ensure that employees were compensated for any and all overtime hours they were required or permitted to work beyond their applicable standard hours of work, at the overtime rate of pay.

41. These systems at all times met any obligations owed by Canada Cartage to the Class members under the *Code*, the *MVOHOW* regulations, the class members' contracts of employment and at law.

Record-Keeping Systems

42. Throughout the class period, Canada Cartage's record-keeping practices complied with the requirements of the *Code* and the Class members' contracts of employment.

43. Canada Cartage used a variety of methods to record Class members' hours of work and compensation. Those methods included, depending on the circumstances, timesheets, an electronic payroll system, and an electronic transportation management system. Records with respect to the hours of work of certain employees, including drivers, were made and maintained locally. Many of those records are in paper rather than electronic form. These recording and retention practices were at all times in compliance with Canada Cartage's legal obligations.

44. The defendants therefore deny that there has been any breach of any obligations owed to members of the Class in respect of record-keeping.

Assurance of Voluntary Compliance

45. In specific response to paragraphs 29 to 37 of the amended statement of claim, the defendants deny that they engaged in a systemic practice of avoiding or disregarding any obligations to pay overtime compensation to employees. The Assurance of Voluntary Compliance ("AVC") referred to in these paragraphs does not indicate that such a practice existed. The plaintiff's description of the circumstances surrounding the issuance of the AVC, and the requirements of the AVC itself, is incorrect.

46. In April 2012, following a complaint made by a shunter in Ontario and an investigation by HRSDC into Canada Cartage's compensation practices for certain shunters in Ontario, HRSDC issued the AVC. The AVC stated, among other things, that Canada Cartage must ensure

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that shunters were not paid overtime in accordance with the *MVOHOW* regulations' eligibility threshold applicable to Highway Drivers.

47. Contrary to the allegations in the amended statement of claim, the AVC at all times related and applied to only a limited group of 50 shunters in Ontario who worked on seven customer accounts. Canada Cartage's shunters at its other locations in Ontario and across Canada were already being treated as eligible for overtime at lawful eligibility thresholds.

48. Canada Cartage worked closely with HRSDC, and followed HRSDC's guidance, in resolving the isolated compliance issue raised in the AVC. Through discussions and consultations with HRSDC and with the affected employees, Canada Cartage developed and took corrective action in response to the issue identified in the AVC. Although the corrective action taken varied among the affected customer accounts, in each case the actions taken were lawful and in compliance with the requirements of the *Code*, the *MVOHOW* regulations and the AVC.

49. At no time did Canada Cartage "obfuscate" or mislead HRSDC or the class members regarding the organization's overtime practices, including the corrective actions taken in response to the AVC. Instead, Canada Cartage acted reasonably and in good faith in responding to the AVC. The defendants deny all of the facts and conclusions set out in the amended statement of claim regarding the AVC and Canada Cartage's actions in relation to it.

No Breach of Contract or Duty of Good Faith

50. The defendants deny that Canada Cartage systemically breached the terms of the class members' contracts of employment or that it breached any obligations of good faith that it owed to class members.

51. Contrary to the allegations in the amended statement of claim, Canada Cartage did not systematically fail to properly compensate Class members for the hours they worked up to the applicable statutorily-mandated standard hours of work or for all hours they worked in excess of their standard hours of work. Nor did Canada Cartage create barriers to Class members receiving the overtime compensation to which they were entitled. When members of the Class worked overtime hours, beyond the applicable statutorily-mandated standard hours of work (or beyond

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the standard hours of work provided for in an modified work agreement), they were compensated for the hours worked at the overtime rate.

52. At all material times, Canada Cartage was honest and forthright with the class members regarding their entitlements to overtime compensation.

No Breach of Duty of Care

53. The defendants deny that Canada Cartage breached any duty of care owed to members of the Class. Throughout the class period, Canada Cartage at all times met any standard of care imposed upon it to ensure that class members were compensated at the appropriate rates of pay for all hours they worked.

54. Canada Cartage took reasonable steps to ensure that its overtime compensation practices and systems were consistent with the provisions of the *Code*, the *MVOHOW* regulations, the class members' contracts of employment, and the interpretations and guidance provided by the Labour Program of HRSDC through the applicable Operations Program Directives ("OPDs") and Interpretations Policies and Guidelines ("IPGs") on overtime. Canada Cartage also ensured reasonable compliance with the terms of the surveys.

55. In addition, Canada Cartage proactively communicated with, sought, and followed the advice and guidance of HRSDC as necessary in structuring its overtime compensation practices. These steps included discussions with HRSDC regarding the proper interpretation of the surveys and the corrective actions to be taken in response to the AVC.

No Unjust Enrichment

56. The defendants deny that they, or any of them, were unjustly enriched, or that members of the Class have suffered a deprivation, as a result of a systemic failure to pay overtime compensation owing to class members, the existence of which is denied. As pleaded above, Canada Cartage's overtime practices applicable to the Class were and are lawful. Those practices and class members' contracts of employment provide the juristic reason for Canada Cartage's treatment of Class members with respect to overtime compensation. As a result, there is no basis for the claim for unjust enrichment.

Claims are Statute-Barred

57. The claims of some Class members are statute-barred, either in whole or in part. Canada Cartage pleads and relies on each of the following (and any earlier or other limitations acts in force in any of the provinces at any time throughout the class period): the *Limitation Act*, R.S.B.C. 1996, c. 266; the *Limitations Act*, R.S.A. 2000, c. L-12; *The Limitations Act*, S.S. 2004, c. L-16.1; *The Limitation of Actions Act*, C.C.S.M, c. L150; *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B; *Civil Code of Quebec*, S.Q. 1991, c. 64, s. 2875; *Limitations Act*, S.N.L. 1995, c. L-16.1; *Statute of Limitations*, R.S.P.E.I. 1988, c. S-7; *Limitation of Actions Act*, R.S.N.S. 1989, c. 258; *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5; *Limitation of Actions Act*, R.S.Y. 2002, c. 139; *Limitation of Actions Act*, R.S.N.W.T. (Nu.) 1988, c L-8; and *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8.

Defence to the Individual Claim of Marc-Oliver Baroch

58. Baroch was employed from March 2006 to July 2013 as a shunter working at the Matrix facility in Mississauga, Ontario.

59. The Matrix facility where Baroch worked was one of the seven facilities where HRSDC identified an overtime compliance issue during its investigation that led to the AVC being issued in April 2012.

60. Contrary to the plaintiff's allegations, Canada Cartage did not systemically "reverse engineer" his or any of the class members' rates of pay in response to the AVC. Instead, as part of the corrective action it took following the AVC, Canada Cartage met with the shunters at the Matrix facility (and at two other facilities) to discuss the possibility of implementing a schedule change that would reduce the shunters' standard hours of work. However, following these meetings and in response to the shunters' requests, Canada Cartage maintained their scheduled weekly hours and reduced their hourly rates of pay.

61. All of the shunters on the relevant accounts, including Baroch, agreed to this change. In fact, Baroch accepted and agreed to this change and remained employed with Canada Cartage as a shunter on the Matrix account for another year following the change. The circumstances surrounding Baroch's departure from Canada Cartage were entirely unrelated to this issue.

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Remedies

62. Canada Cartage denies that Class members have suffered any harm or damage resulting from a systemic failure to properly compensate them for their hours of work, or at all. Canada Cartages therefore denies that the plaintiff and other members of the class are entitled to any of the relief sought in paragraph 1 or elsewhere in the amended statement of claim, or any other relief.

Dismissal with Costs

63. Canada Cartage requests that this action be dismissed with costs.

September 30, 2015

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