

AMENDED THIS MARCH 30/16 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT A

RULE/LA RÉGLE 26.02 (_____)

THE ORDER OF JUSTICE BELOBABA
L'ORDONNANCE DU

DATED / FAIT LE MARCH 29 2016

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

ONTARIO

SUPERIOR COURT OF JUSTICE

REGISTRAR _____ GREFFIER _____
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE 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*

FRESH AS AMENDED REPLY

1. The plaintiff denies all the allegations contained in the Statement of Defence unless otherwise expressly indicated herein, and states that the defined terms employed in this Reply have the same meaning as those set forth in the Amended Statement of Claim.
2. Contrary to Canada Cartage's assertion in paragraph 3 of the Statement of Defence and elsewhere, the plaintiff's allegations are not advanced against "certain defendants" but rather against all of the defendants and the entities they control, which together comprise a single, integrated, national operation.
3. Contrary to the final sentence of paragraph 4 of the Statement of Defence and elsewhere, different laws and regulations do not apply to the overtime entitlements of the members of the

class. The minimum entitlements of members of the class to overtime compensation are prescribed by the *Code* and its regulations.

4. Insofar as paragraph 12 of the Statement of Defence could be read to suggest that CCSL is no longer an active corporation, the plaintiff expressly denies this allegation. CCSL continues to be an active corporation incorporated pursuant to the laws of Ontario. It shares the same head office as Diversified and Direct.

5. Contrary to the assertions contained in paragraph 14 of the Statement of Defence, the defendants were the common employer of the plaintiff and of the class members during the class period. For example, the plaintiff's Record of Employment states that he was employed by Canada Cartage System Limited Partnership, while his letter offering him employment states that he was to be employed by CCSL. The plaintiff states that the complexity of Canada Cartage's corporate structure during the class period should not be permitted to defeat its legal duties and obligations to the class as set forth in the Amended Statement of Claim.

Canada Cartage is Required to Have Regard to Prevailing Industry Practices

6. In reply to Canada Cartage's allegations in paragraphs 30 and 54 of the Statement of Defence and elsewhere, the plaintiff states that Canada Cartage, as an employer that is subject to the *Code* and the *MVOHOW* regulations, has an affirmative obligation to ascertain and comply with the "prevailing industry practice" that applies to class members who are "motor vehicle operators" as defined in the *MVOHOW* regulations. As such, Canada Cartage must take all necessary steps to comply with the interpretive guidance on prevailing industry practice that is offered by HRSDC, including in the form of surveys. In the absence of a survey or other interpretive guidance from HRSDC, Canada Cartage must take all necessary steps to ascertain and

apply a prevailing industry practice in the geographical areas in which it employs class members as motor vehicle operators. "Reasonable compliance" with the surveys or prevailing industry practices is inadequate and insufficient.

Unionized Employees are not Presumptively Excluded from the Class as Defined

7. In reply to paragraphs 5-6 of the Statement of Defence, the plaintiff states that he does not purport to advance, on behalf of current or former Canada Cartage employees, any claim for any part of the class period during which the terms and conditions of an employee's employment were governed by a collective agreement between Canada Cartage and a union.

8. The plaintiff pleads that the Court retains jurisdiction to determine the rights and entitlements of class members for any part of the class period during which a class member's terms and conditions of employment were not governed by a collective agreement between Canada Cartage and a union. All class members are entitled to the same minimum standards with respect to overtime compensation as set forth in the *Code* and its regulations.

Canada Cartage's Failure to Have a Practice or System to Fulfill Duties to Class Members

9. The plaintiff denies the allegations in paragraphs 36-37 of the Statement of Defence and elsewhere regarding the overtime policy of Canada Cartage and states that Canada Cartage did not have any overtime policy during the class period. Moreover, Canada Cartage is required to have a practice or system so as to ensure that class members are paid the overtime compensation to which they are entitled. Contrary to paragraph 40 of the Statement of Defence, Canada Cartage did not have any such system or practice in place during the class period, which exposed all class members

to the same risk that Canada Cartage would thereby violate the obligations it owed to class members contractually and at common law.

10. The plaintiff admits the first sentence in paragraph 35 of the Statement of Defence that the legislative framework has complexity and that class members' overtime compensation eligibility are governed by different thresholds. It is this complexity that enhances Canada Cartage's obligation to have a system or practice in place to ensure that class members are and were paid the overtime compensation to which they are and were entitled.

The AVC Required Company-Wide Compliance for All Employees

11. The plaintiff denies the allegations in paragraphs 3 and 45 to 49 of the Statement of Defence and elsewhere regarding Canada Cartage's characterization of the AVC. Specifically, the AVC was not restricted to an allegedly "isolated" overtime issue, nor did it relate exclusively to a "limited group" of class members.

12. The AVC states Canada Cartage must "ensure that all employees are being paid overtime for hours worked in excess of the standard hours." Canada Cartage failed to take all necessary steps to ensure compliance with the AVC.

13. Furthermore, contrary to the assertions made in paragraph 48 of the Statement of Defence and elsewhere, the process by which Canada Cartage responded to the AVC was not collaborative. Canada Cartage misled certain class members about the reasons for the changes it was making to their compensation in light of the AVC and failed to take all necessary steps to ensure that "all employees" were properly being paid overtime in accordance with the AVC.

14. In any event, the plaintiff denies the allegations in paragraphs 60-61 of the Statement of Defence and elsewhere, which indicate that all of the shunters “agreed” to the alleged “corrective action” taken by Canada Cartage in response to the AVC. No such agreement was reached, and even if it was, the affected employees did not give informed consent to such agreement and there was no consideration to support it.

Canada Cartage Fraudulently Concealed Its Failures from Class Members

15. The plaintiff denies the allegations in paragraph 57 of the Statement of Defence and elsewhere that the claims of some class members are statute-barred. Class members were unable to discover their claims due to the conduct of Canada Cartage in fraudulently concealing both the entitlements of class members to receive overtime compensation and Canada Cartage’s failure to fulfill the duties to it owed to class members in relation to their overtime work.

16. Canada Cartage knowingly breached its obligation to class members to ensure that they were compensated at their agreed wage or rate of pay for hours worked up to the applicable statutorily-mandated standard hours of work, and at the overtime rate of one and one-half times their normal wage or rate of pay for all hours worked in excess of their standard hours of work.

17. Contrary to the assertion of Canada Cartage in paragraph 52 of the Statement of Defence and elsewhere, Canada Cartage was not honest with class members regarding their entitlements to overtime compensation. Taking advantage of class members’ lack of sophistication, Canada Cartage concealed from them their entitlements to overtime compensation by actively misleading them about the statutory, contractual, or other obligations on Canada Cartage to provide overtime compensation. As a result, Canada Cartage concealed the fact that class members were not

receiving the overtime compensation to which they are entitled and the fact that Canada Cartage was failing to fulfill its duties to them as its employees.

18. Class members exercised reasonable diligence in attempting to determine their entitlements and regularly questioned Canada Cartage management about the nature of the overtime compensation they were receiving (or, for that matter, not receiving). In violation of its duties in the context of its special relationship as class members' employer, Canada Cartage actively and systemically deceived class members in response to these inquiries. This deception abused class members' vulnerability and exploited the power imbalance between Canada Cartage and the class.

19. Canada Cartage's fraud concealed the existence of the plaintiff's cause of action and delayed the running of the limitation period.

March 29, 2016

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Eric R. Hoaken LSUC#: 35502S
Tel: (416) 645-5075
ehoaken@counsel-toronto.com

Ian C. Matthews LSUC#: 55306N
Tel: (416) 598-5365
imatthews@counsel-toronto.com

Larissa C. Moscu LSUC#: 62928W
Tel: (416) 360-3018
lmoscu@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

TO: **TORYS LLP**
Barristers and Solicitors
79 Wellington Street West
Suite 3000
P.O. Box 270, TD Center
Toronto ON M5K 1N2

Linda Plumpton LSUC#: 38400A

Tel: (416) 865-8193

Fax: 416-865-7380

Sylvie Rodrigue LSUC#: 54834L

Tel: (416) 865-8150

Fax: 416-865-7380

Lisa Talbot LSUC#: 44672I

Tel: (416) 865-8222

Fax: 416-865-7380

Sarah Whitmore LSUC#: 61104E

Tel: (416) 865-7315

Fax: 416-865-7380

Lawyers for the Defendants

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LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Eric R. Hoaken LSUC#: 35502S
ehoaken@counsel-toronto.com
Tel: (416) 645-5075

Ian C. Matthews LSUC#: 55306N
imatthews@counsel-toronto.com

Tel: (416) 598-5365

Larissa C. Moscu LSUC#: 62928W
lmoscu@counsel-toronto.com

Tel: (416) 360-3018

Fax: (416) 598-3730

Lawyers for the Plaintiff