

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE
MR. JUSTICE BELOBABA

)
)
)

Tues DAY, THE
29 DAY OF MARCH, 2016



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*

ORDER

THESE MOTIONS, made by:

- a) the Defendants, for an Order staying or dismissing the claims of certain class members whose terms and conditions of employment by Canada Cartage are or were governed by collective agreements, on the basis that this Court lacks jurisdiction over said class members for the period in which the terms and conditions of their employment were governed by collective agreements, and for other related relief; and

- b) the Plaintiff, for an Order certifying a subclass and common issues for that subclass in respect of certain class members whose terms and conditions of employment by Canada Cartage are governed by collective agreements, and for other related relief,

were heard on December 17, 2015 at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the materials filed, hearing the submissions of the lawyers for the parties, and subsequently being advised by counsel for the parties that they have agreed to resolve the motions on the terms set forth in this Order,

1. **THIS COURT ORDERS** that the certified class definition set forth in the certification order dated January 30, 2015 be and hereby is amended such that paragraph 4 of the January 30, 2015 certification order is struck out and replaced with:

4. **THIS COURT ORDERS** that the Class is defined as follows:

all persons who, at any time during the Class Period, were employed by Canada Cartage and:

(a) who were entitled to receive overtime compensation pursuant to the *Canada Labour Code*, R.S.C. 1985, c. L-2 and its regulations; and

(b) whose terms and conditions of employment were, for any part of the Class Period, not governed by a collective agreement between Canada Cartage and a union.

2. **THIS COURT ORDERS** that the Amended Statement of Claim be and hereby is amended in the form of the Fresh as Amended Statement of Claim attached hereto as Exhibit "A" to this Order.

3. **THIS COURT ORDERS** that the Reply be and hereby is amended in the form of the Fresh as Amended Reply attached hereto as Exhibit "B" to this Order.

4. **THIS COURT ORDERS** that the Motion of the Defendants and the Motion of the Plaintiff are dismissed.

5. **THIS COURT ORDERS** that the Defendants shall pay costs to the Plaintiff in the amount of \$25,000, all-inclusive, payable within 30 days of this Order.



BELOBABA J. /

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAR 30 2016

PER / PAR:



EXHIBIT "A"

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

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: March 28, 2016

Issued by: _____

Local Registrar

Address of
court office: 393 University Avenue, 10th Floor
Toronto ON M5G 1E6

TO: CANADA CARTAGE DIVERSIFIED GP INC.
1115 Cardiff Blvd.
Mississauga, ON L5S 1L8

AND TO: DIRECT GENERAL PARTNER CORPORATION
1115 Cardiff Blvd.
Mississauga, ON L5S 1L8

AND TO: CANADA CARTAGE SYSTEM, LIMITED
1115 Cardiff Blvd.
Mississauga, ON L5S 1L8

CLAIM

1. The plaintiff claims:

- (a) an order, pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”), certifying this action as a class proceeding and appointing the plaintiff as representative plaintiff for the class described herein;
- (b) an order directing the defendants to preserve and disclose to the plaintiff all records, in any form, relating to rates of pay, type of work performed, and hours worked by members of the class between March 1, 2006 and the date of the certification order in this action;
- (c) a declaration that the defendants breached their contracts of employment with some or all members of the class;
- (d) a declaration that the defendants owed a duty of care to the class to take reasonable steps to ensure that class members were properly compensated at the appropriate rates of pay for all hours worked and that the defendants breached this duty with respect to some or all class members;
- (e) a declaration that the defendants have been enriched, and that the members of the class have suffered a corresponding deprivation, by the value of the work performed by members of the class that was not properly compensated as overtime or at agreed upon rates of pay, and that there is no juristic reason for such enrichment;

- (f) general damages for the class in an amount of \$75 million, or as otherwise calculated on an aggregate basis for breach of contract, negligence and unjust enrichment;
- (g) in the alternative to the damages described in subparagraph (f), an order requiring the defendants to account for all hours worked by class members between March 1, 2006 and the date of the certification order in this action for which class members were:
 - (i) not paid overtime in accordance with the defendants' obligations; and/or
 - (ii) not paid the rate of pay provided for by their contracts of employment;and a corresponding order requiring the defendants to disgorge to class members all amounts withheld by them in respect of such hours worked;
- (h) an interim, interlocutory and final mandatory order directing that the defendants specifically perform their contracts of employment with the class members;
- (i) punitive, aggravated, and exemplary damages in an amount of \$25 million, or as otherwise determined by this Honourable Court;
- (j) prejudgment and postjudgment interest calculated in accordance with sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (k) the costs of this proceeding on a substantial indemnity basis, plus all applicable taxes;

- (l) the costs of administering the distribution of any amount recovered on behalf of class members in this action; and
- (m) such further and other Relief as this Honourable Court may deem just.

THE PARTIES

2. The plaintiff, Marc-Oliver Baroch, is an individual residing in Mississauga, Ontario. Mr. Baroch was employed by Canada Cartage (as described in paragraph 6, below) from March 27, 2006 until June 29, 2013, where he worked as a shunter. In that capacity, Mr. Baroch operated a shunt truck – a type of semi-tractor – in order to move and position semi-trailers within the yard of a warehouse facility operated by one of Canada Cartage’s customers.

3. 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, which regularly includes the transport of freight across provincial and international borders. In addition, Diversified and the entities it controls offer a number of other related transportation services and expertise throughout Canada, including warehousing and distribution centres, general cartage, and logistics and moving services.

4. The defendant, Direct General Partner Corporation (“Direct”), is an Ontario corporation with its head office in Mississauga, Ontario. Direct is a wholly-owned subsidiary of Diversified. Along with the entities it controls, Direct operates the warehousing division of Canada Cartage and has distribution warehouses across Canada.

5. The defendant, Canada Cartage System, Limited (“CCSL”) is an Ontario corporation with its head office in Mississauga, Ontario. CCSL engages in the business of dedicated trucking services throughout Canada.

6. Together, the defendants and the entities they control make up Canada Cartage. Canada Cartage is an indivisible, integrated national operation, subject to federal regulation owing to the interprovincial and international nature of the transportation services it provides to its customers. As such, Canada Cartage is subject to the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the “Code”), and its regulations, including the *Motor Vehicle Operators Hours of Work Regulations*, C.R.C., c. 990 (the “MVOHOW regulations”).

THE CLASS

7. The plaintiff brings this action on his own behalf and on behalf of a class of all persons who, at any time between March 1, 2006 and January 30, 2015 (the “class period”), were employed by Canada Cartage and (a) who were entitled to receive overtime compensation pursuant to the *Code* and its regulations; and (b) whose terms and conditions of employment were, for any part of the class period, not governed by a collective agreement between Canada Cartage and a union (the “class” or “class members”). Examples of positions held by class members include drivers, shunters, dispatchers, warehouse personnel, units pickers, dock workers, swampers, and inventory coordinators. For any class member whose terms and conditions of employment were, for any part of the class period, governed by a collective agreement between Canada Cartage and a union, the plaintiff does not claim in respect of such period.

8. At all material times, the basic duties performed by class members across the country were largely uniform and consistent based upon the position(s) they held at Canada Cartage. Moreover,

the material policies and practices of Canada Cartage that affected the conditions of class members' employment – particularly as they relate to the payment of overtime – are similarly uniform and consistent across Canada.

9. Very few of Canada Cartage's employees are unionized, and the nature of the work performed by class members often does not require a high school education. Consequently, there is a significant power imbalance between Canada Cartage and the class because class members have little or no job security and tend to perform tasks that involve fungible skills.

10. Owing to their particular vulnerability, class members have limited latitude to question Canada Cartage's overtime practices or the wages they are paid.

11. At all material times, Canada Cartage regularly required or permitted class members to work hours in excess of their standard hours of work in order to complete the common duties of their employment. However, contrary to its obligations to class members, Canada Cartage engaged in a systemic practice of not paying overtime compensation to which class members are entitled. Despite having an understanding of the company's obligations, Canada Cartage management directed and encouraged this practice at all material times.

12. Even once Canada Cartage was formally notified in April 2012 by the Labour Program of Human Resources and Skills Development Canada ("HRSDC") – now known as Employment and Social Development Canada – of its non-compliance with its overtime obligations to class members, the company's non-compliance continued. Canada Cartage represented to the Labour Program that it was compliant with the *Code* and its regulations, and subsequently proceeded to systemically and unilaterally reduce certain class members' rates of pay without reasonable notice as part of a deliberate and calculated effort to improperly "reverse engineer" class members'

compensation to make it appear as though they were being paid overtime, when in fact class members' gross weekly earnings remained unchanged. Again, Canada Cartage management directed and encouraged this practice.

13. Canada Cartage took advantage of the class members' lack of sophistication, systemically misleading class members about their entitlement to overtime. This included issuing directives through management that deliberately obfuscated both Canada Cartage's overtime obligations to class members and the true rationale surrounding its reasons for unilaterally reducing some class members' rates of pay.

SOURCES OF OBLIGATION TO ENSURE CLASS IS PROPERLY COMPENSATED

I. Statutory

14. The legislative scheme established by the *Code* and its related regulations creates a regulatory floor with respect to the standard hours of work and payment of overtime. As such, Canada Cartage cannot impose hours of work requirements or overtime policies on class members that are less favourable than the floor established by the legislative scheme. However, there is no prohibition on federally-regulated companies offering more favourable standard hours of work or paying overtime at a rate that is greater than what the law requires. 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.

15. The purpose of these minimum standards is to prevent exploitation of vulnerable or unsophisticated employees, such as the class members. The legislative scheme aims to reduce the risk that the significant power imbalance between the employer and its employees will result in the creation of overly onerous and unfair employment terms and conditions.

16. Overtime is defined in section 166 of the *Code* as “hours of work in excess of standard hours of work.” Compensation for overtime is subsequently described in section 174 of the *Code*:

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.

17. The ‘default’ or ‘baseline’ measurement of “standard hours of work” for employees subject to the *Code*, including class members, is eight hours of work per day and forty hours in a week. Section 169(1) of the *Code* reads:

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.

18. However, pursuant to section 175(1)(a) of the *Code*, the Governor in Council may modify the provisions of sections 169 (standard hours of work) and 171 (maximum hours of work) of the *Code* by regulation. In the case of the trucking industry, there is such a regulation – the *MVOHOW* regulations – that modifies the ‘default’ or ‘baseline’ measurement of standard hours of work for certain class members.

19. The *MVOHOW* regulations modify sections 169 and 171 of the *Code* with respect to certain defined occupations, including “city motor vehicle operators” and “highway motor vehicle

operators” who are employed upon or in connection with the operation of any industrial establishment engaged in the transportation of goods or passengers by motor vehicle from any point in a province to any point outside that province. Canada Cartage is such an industrial establishment.

20. 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.

21. 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. 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 maximum.

22. Section 174 of the *Code* is not altered or abridged by the *MVOHOW* regulations. Thus, for a class member who is employed as a city motor vehicle operator and who works over and above 9 hours in a day or 45 hours in a week, he or she is entitled to be paid overtime at a rate of pay not less than one and one-half times his or her regular rate of pay for additional time. The same is true for a class member who is a highway motor vehicle operator and who works over and above 60 hours in a week. Other class members remain subject to the ‘default’ or ‘baseline’ measurement of standard hours of work and are therefore entitled to be compensated with overtime if working in excess of 8 hours in a day or 40 hours in a week.

23. 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 “OPDs” – Operations Program Directives – and “IPGs” – Interpretations, Policies and Guidelines. Generally speaking, OPDs describe the policies and procedures that Labour Program staff must follow when enforcing the *Code* and its regulations, while IPGs are instituted to ensure that the statutory and regulatory provisions which it oversees are interpreted consistently across the country. At all material times, Canada Cartage was aware of the applicable OPDs and IPGs that pertained to overtime and consulted these OPDs and IPGs in an effort to comply with its overtime obligations under the *Code* and its regulations.

II. Contractual

24. Few terms of class members’ employment contracts are as important to them as their pay. Compensation is a central term of the contract of employment and forms a fundamental aspect of the exchange or bargain between Canada Cartage and the class members. Any change to this aspect of the contract must be made through negotiation and fresh consideration. Such a change cannot be made unilaterally.

25. 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 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.

26. The class members' employment contracts are informed by the provisions of the *Code* and its regulations pertaining to standard hours of work and payment of overtime, which set out minimum requirements that are implied into their contracts and which Canada Cartage must meet.

III. Duty of Care

27. The employment relationship between Canada Cartage and class members is a relationship of proximity, such that it would be reasonably foreseeable that any lack of care on the part of Canada Cartage relating to its compensation policies or practices would be likely to cause harm to the members of the class. The relationship between Canada Cartage and the class is also a special relationship characterized by a power imbalance and vulnerability of the class members.

28. In these circumstances, Canada Cartage owes a duty of care to class members. At a minimum, this duty of care requires that Canada Cartage take reasonable steps to ensure that class members are compensated at their agreed normal 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. The content of this duty of care to the class is informed by Canada Cartage's obligations under the *Code* and its regulations.

THE FORMER AND CURRENT OVERTIME PRACTICE OF CANADA CARTAGE

29. At all material times, Canada Cartage engaged in a systemic practice of avoiding or disregarding its obligations to class members to pay overtime in a manner that complies with the *Code* and the regulations thereunder. Canada Cartage engaged in this practice despite knowing

that it had a contractual obligation and duty of care to ensure class members were properly compensated for all hours worked.

30. Many class members were routinely and consistently told that owing to Canada Cartage's status as a federally-regulated company, it was only required to pay overtime to its employees after 60 hours of work in a week.

31. On or about 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 meeting its overtime obligations to class members under the *Code* and its regulations. The AVC required Canada Cartage to "ensure that all employees are being paid overtime for hours worked in excess of the standard hours." In signing the AVC, Canada Cartage admitted that it had violated the *Code* and the regulations thereunder and agreed to take remedial action to correct its non-compliance.

32. Canada Cartage represented to the Labour Program of HRSDC that, going forward, its overtime payment practices would comply with the *Code* and the regulations. Despite these representations, Canada Cartage's non-compliance continued. Canada Cartage deliberately misled the Labour Program of HRSDC about the remedial steps it would undertake to correct its non-compliance. It did not correct its violations and class members continued to not be paid overtime in accordance with the *Code* or their contractual entitlements.

33. On June 26, 2012, the Court of Appeal for Ontario released two certification decisions in cases involving the payment of overtime to employees of federally-regulated companies: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, and *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444. Both actions were certified as class actions advancing claims for unpaid

overtime work, though neither action altered or otherwise affected the law regarding the entitlement of employees to overtime under the *Code* or the *MVOHOW* regulations.

34. In or about July 2012, Canada Cartage's weekly earning statements issued to some class members changed. These earnings statements now began to reflect, for the first time, the payment of overtime at thresholds below 60 hours of work in a week. Canada Cartage had represented to the Labour Program of HRSDC that it would develop new schedules for certain class members who had previously only been paid overtime at thresholds above 60 hours a week. However, at this time, Canada Cartage systemically and unilaterally reduced these class members' rates of pay without reasonable notice, as part of a calculated effort to "reverse engineer" class members' compensation to make it appear as though class members were being paid overtime when in fact class members' gross weekly earnings remained unchanged.

35. This "reverse engineering" of class members' pay, while communicated discreetly and verbally to class members, was nevertheless directed and coordinated in a systemic manner by Canada Cartage management, so as to continue depriving class members of the overtime compensation to which they were entitled.

36. Canada Cartage deliberately obfuscated the true rationale surrounding the unilateral reduction of class members' rates of pay, maintaining to class members that their pay needed to be adjusted to symbolically reflect overtime, while reassuring them that their gross weekly earnings would remain the same.

37. All the while, but particularly since receiving the AVC, Canada Cartage was aware of its obligation to pay overtime to class members, but misled class members in order to achieve a result in which it never actually had to pay class members the total compensation to which they were

entitled. The deliberate conduct of Canada Cartage is unconscionable, in that it was not right or reasonable for Canada Cartage to mislead class members about their entitlement to overtime. The company knew the state of the law and should have provided accurate information to class members.

THE PLAINTIFF'S EMPLOYMENT HISTORY AT CANADA CARTAGE

38. The plaintiff began working at Canada Cartage on or about March 27, 2006. Throughout his tenure, he was employed as a shunter. Initially, he earned \$19.27 per hour, which increased to \$19.50 per hour in or about 2008.

39. Canada Cartage routinely required or permitted the plaintiff to work between 50-60 hours per week during the course of his employment, which concluded on or about June 29, 2013.

40. Because the plaintiff operated a shunt truck but did not leave the warehouse yard on a typical day of his employment, he was entitled to overtime when he worked in excess of 8 hours in a day or 40 hours in a week. However, prior to July 2012, the plaintiff was only paid overtime when he exceeded 60 hours of work in a regular work week. In the year leading up to July 2012, the plaintiff's weekly gross earnings in a typical 60-hour week – with no overtime and a rate of pay of \$19.50 per hour – totalled about \$1,170.

41. Beginning in July 2012, the plaintiff's rate of pay was unilaterally reduced by Canada Cartage to \$17.34 per hour without reasonable notice, and he was notionally paid overtime for hours worked in excess of 9 hours in a day or 45 hours in a week. Owing to the unilateral reduction in his rate of pay, a typical 60-hour work week for the plaintiff – with “overtime” ostensibly

payable after 45 hours and a rate of pay of \$17.34 per hour – continued to yield gross weekly earnings of about \$1,170.

42. The plaintiff's case typifies the practice of Canada Cartage in refraining from paying class members appropriate compensation for additional hours of work, notwithstanding its obligations to do so.

SYSTEMIC BREACHES OF CLASS MEMBERS' EMPLOYMENT CONTRACTS

I. Failure to Appropriately Compensate Class Members

43. Contrary to the express or implied terms of the class members' employment contracts as informed by the *Code* and its regulations, Canada Cartage systemically failed to compensate the class members at their agreed normal wage or rate of pay for hours worked up to the applicable statutorily-mandated standard hours of work, and at their agreed 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. Specifically, Canada Cartage breached class members' contracts of employment by, *inter alia*:

- (a) failing to pay overtime in accordance with its contractual obligations; and
- (b) unilaterally reducing certain class members' rates of pay without notice, which occurred once Canada Cartage realized the potential consequences of failing to comply with its obligation to pay overtime, and as part of a calculated effort to improperly "reverse engineer" class members' compensation to make it appear as though they were being paid overtime when in fact their gross weekly earnings remained unchanged.

II. Failure to Act in Good Faith

44. The employer-employee relationship creates a power imbalance due in part to the vulnerability of the employees, especially when those employees lack sophistication. At the same time, the law recognizes the importance of work to an individual's personal fulfillment and financial security. For these reasons, it is an express or implied term of class members' contracts of employment that Canada Cartage observe a duty of good faith and fair dealing with them, characterized by candour, reasonableness, honesty, and forthrightness. Put another way, it is an express or implied term of class members' employment contracts that Canada Cartage not act in bad faith by being, for example, untruthful, misleading or unduly insensitive.

45. The class members are in a position of particular vulnerability in relation to Canada Cartage. Most do not have the protection of a union and generally do not possess a high level of education. Many of the class members perform difficult manual labour tasks in their employment. They often work long shifts.

46. Canada Cartage breached its duty of good faith and fair dealing to the members of the class by, *inter alia*:

- (a) failing to act in good faith by imposing an unlawful overtime policy or practice on class members that did not account for the nature of the work performed by individual class members;
- (b) failing to act in good faith by misleading class members about their entitlement to overtime;

- (c) failing to act in good faith by misleading class members and obfuscating the rationale surrounding the unilateral reduction of certain class members' rates of pay once the defendants realized the potential consequences of failing to comply with their obligation to pay overtime to class members; and
- (d) failing to act in good faith by retaining for itself the benefits of amounts due to class members for which class members were not properly compensated at appropriate rates of pay.

CANADA CARTAGE HAS ACTED NEGLIGENTLY

47. The duty of care owed by Canada Cartage is informed by the obligations set out in the *Code* and its regulations pertaining to standard hours of work and overtime. Therefore, one aspect of Canada Cartage's duty of care to the class members is to take reasonable steps to ensure that class members are properly compensated at the appropriate rates of pay for all hours worked.

48. Canada Cartage has breached this duty of care by, *inter alia*:

- (i) engaging in an unlawful practice of not paying overtime to class members in accordance with its obligations;
- (ii) failing to ensure that it had appropriate systems, policies or practices in place to determine the eligibility of class members to be paid overtime in accordance with the *Code* and/or the *MVOHOW* regulations;
- (iii) failing to ensure that it correctly recorded the hours worked, the type of work performed, and the rate of pay used to compensate class members;

- (iv) failing to take reasonable steps to ensure class members were properly compensated for all hours worked at the rate at which they were entitled to be paid;
- (v) failing to seek or obtain appropriate professional advice regarding its obligations to pay overtime in accordance with the provisions of the *Code* and/or the *MVOHOW* regulations; and
- (vi) failing to ensure that its policies and practices were consistent with the interpretations and guidance provided by the Labour Program of HRSDC, including the interpretations and guidance provided through the applicable OPDs and IPGs that pertain to overtime.

49. As a result of these breaches, the members of the class have directly suffered harm in that they have not been properly compensated, at appropriate rates of pay, for all hours worked.

CANADA CARTAGE HAS BEEN UNJUSTLY ENRICHED

50. Canada Cartage has been unjustly enriched as a result of receiving the benefit of class members' services in circumstances in which the class was not properly compensated for all hours worked at appropriate rates of pay. Specifically, Canada Cartage was enriched by failing to pay class members overtime in accordance with its obligations and by unilaterally reducing and "reverse engineering" certain class members' rates of pay beginning in or about July 2012. The precise value of the work for which class members were not properly compensated is not known to the plaintiff but is within the knowledge of Canada Cartage, pursuant to the company's obligations under the *Code* and its regulations to accurately record the hours worked by class members.

51. The class members have suffered a deprivation, in the form of wages corresponding to the hours of work for which they were not properly compensated at appropriate rates of pay.

52. There is no juristic reason why Canada Cartage should be allowed to retain the benefit of the improperly compensated hours of work completed by class members.

A CLASS PROCEEDING IS APPROPRIATE

53. As individuals, class members risk retaliation, including potentially losing their jobs, if they pursue individual claims against Canada Cartage. Further, an individual class member cannot match the resources of Canada Cartage in the context of a legal proceeding.

54. Canada Cartage is a sizable and well-resourced company. An individual class member's lawsuit would be unlikely to have any real or lasting impact on its behaviour. On the other hand, a class proceeding would produce either a voluntary change or a court-ordered change by Canada Cartage to its compensation practices.

55. The alternative to a class action would be a multitude of legal proceedings in a variety of jurisdictions throughout the country. This would both be inefficient and create the potential for inconsistent results.

DAMAGES

56. As a result of the conduct of Canada Cartage detailed above, the class members have suffered damages. This is an appropriate case for the class proceedings judge to admit statistical evidence of class members' losses and to award damages based on an aggregate assessment, as contemplated by sections 23 and 24 of the *CPA*.

57. Further, members of the class are entitled to aggravated, exemplary, and punitive damages in an amount of \$25 million, or such other amount as this Honourable Court may determine, owing to the arbitrary, callous, and highhanded actions of Canada Cartage set out above.

58. The plaintiff pleads and relies on the following statutes, regulations and guidelines:

- (a) *Canada Labour Code*, R.S.C. 1985, c. L-2;
- (b) *Motor Vehicle Operators Hours of Work Regulations*, C.R.C., c. 990;
- (c) the OPDs and IPGs pertaining to overtime under the *Code* and the *MVOHOW* regulations, including “Survey Procedure for Ascertaining a Prevailing Industry Practice in a Geographical Area – Motor Vehicle Operators Hours of Work Regulations – 700-10-IPG-071”;
- (d) *Class Proceedings Act, 1992*, S.O. 1992, c. 6; and
- (e) *Courts of Justice Act*, R.S.O. 1990, c. C.43.

59. The plaintiff proposes that this action be tried in the City of Toronto.

March 28, 2016

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

Eric R. Hoaken LSUC#: 35502S
Tel: (416) 645-5075
Ian C. Matthews LSUC #: 55306N
Tel: (416) 598-5365
Larissa C. Moscu LSUC#: 62928W
Tel: (416) 360-3018
Fax: (416) 598-3730

Lawyers for the Plaintiff

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

FRESH AS AMENDED STATEMENT OF CLAIM

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

Eric R. Hoaken LSUC#: 35502S
Tel: (416) 645-5075

Ian C. Matthews LSUC #: 55306N
Tel: (416) 598-5365

Larissa C. Moscu LSUC#: 62928W
Tel: (416) 360-3018
Fax: (416) 598-3730

Lawyers for the Plaintiff

EXHIBIT "B"

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

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 28, 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

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

FRESH AS AMENDED REPLY

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

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

ORDER

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 Moscu LSUC#: 62928W
lmoscu@counsel-toronto.com
Tel: 416 360 3018
Fax: 416 598 3730

Lawyers for the Class