

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

MARC-OLIVER BAROCH

Plaintiff
(Moving Party)

- and -

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

Defendants
(Respondents)

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

**FACTUM OF THE MOVING PARTY
(Motion in Writing)**

April 13, 2018

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PART I - OVERVIEW

1. Following extensive efforts to agree on a Discovery Plan, the representative Plaintiff in this certified class proceeding moved for and obtained, in the face of sustained opposition by the Defendants (“Canada Cartage”), an Order from this Court on April 27, 2016 establishing prompt deadlines for the completion of key steps in the discovery process. The Order was unsuccessfully appealed by Canada Cartage and later varied on consent by Order dated March 20, 2017. The April 2016 Order, as varied in 2017 (together, the “Discovery Plan Order”) remains in force, but its key deadlines have long passed and have not been met by Canada Cartage.

2. This motion is an incremental and proportionate step after efforts to get Canada Cartage to agree to updated discovery deadlines were met with resistance and a declaration by its counsel that a further motion to vary the Discovery Plan Order will be forthcoming.

3. The relief sought in this motion by the Plaintiff and the Class he represents is straightforward: that the Court give directions re-setting the deadlines for the completion of key discovery steps under the Discovery Plan Order. The Plaintiff submits that these deadlines should be re-set having regard for the original timelines for compliance, the amount of time Canada Cartage has already had to comply, and any amount of time during which Canada Cartage can fairly be excused from complying with the Discovery Plan Order.

4. The Plaintiff acknowledges that, although no Order suspending the operation of the Discovery Plan Order has been sought or obtained under Rule 59.06(2)(b), an oral agreement was reached between the parties in May 2017 suspending their adherence to the deadlines in the Discovery Plan Order while they engaged in a mediation process. This process culminated in

mediation before The Honourable Stephen Goudge, Q.C. on November 6, 2017. Canada Cartage knew as of mid-December 2017 that the mediation had failed, as its counsel was advised at that time that the representative Plaintiff would press on with his case. Thus, even if 7-8 months can fairly be attributed to the mediation process, this does not come close to providing a complete excuse for the non-fulfillment of obligations under the Discovery Plan Order.

5. Canada Cartage plainly does not like the Discovery Plan Order. It sought to appeal the Order and evidently intends to move to vary it a second time. But these efforts, which Canada Cartage is entitled to pursue, have been costly and have bogged the case down in discovery.

6. Rule 59.06(2)(c), coupled with section 12 of the *Class Proceedings Act, 1992*, provide this Court with the jurisdiction and case management authority to give directions carrying an Order into operation to facilitate a fair and expeditious determination of the common issues on their merits. This Court should exercise these powers and re-set fresh but prompt deadlines for compliance with the Discovery Plan Order so that this case can start moving again.

PART II – FACTS

(A) The Certification Process

7. Following a contested certification motion, this Court certified this proceeding as a class action on January 30, 2015. Canada Cartage then moved for leave to appeal the certification Order; however, its motion was dismissed on June 15, 2015.¹

¹ Affidavit of M. Lilly Iannacito sworn April 12, 2018 (“Iannacito Affidavit”), paras. 2-4 (MOTION RECORD OF THE MOVING PARTY (“PMR”), TAB 2).

(B) Efforts to Agree on a Discovery Plan Result in a Motion

8. Following the conclusion of the certification process and discovery getting underway, counsel for the Plaintiff circulated a draft Discovery Plan to counsel for Canada Cartage on November 11, 2015. On February 18, 2016, a motion date of April 27, 2016 was booked on consent of the parties to settle aspects of the Discovery Plan, an appearance that proved to be required.²

(C) The April 2016 Discovery Plan Order

9. In the afternoon of April 27, 2016, following the parties' morning appearance, this Court issued a brief direction resolving the remaining issues related to the Discovery Plan. Among the items that the Court addressed in its direction were (i) the deadline for Canada Cartage to produce documents from the various terminals out of which it operates ("terminal-level productions"); (ii) the date by which examinations for discoveries were to be completed; and (iii) the procedure to be followed to resolve disputes about redacted documents.³ The Court invited the parties, in the event of "any further disagreements about the content of the discovery plan", to "arrange a case conference at their convenience."⁴

10. The Court's April 27 direction formed the basis of an Order dated April 27, 2016 (the "April 2016 Order"). The April 2016 Order provides that:

- (a) in regards to terminal-level productions, that Canada Cartage complete its productions by November 30, 2016 (*i.e.*, roughly seven months' time);

² Iannacito Affidavit, paras. 5-7 (PMR, TAB 2).

³ Iannacito Affidavit, paras. 8-9 (PMR, TAB 2); April 27, 2016 Direction, paras. 1, 2, 3(vii) (PMR, TAB 2A).

⁴ April 27, 2016 Direction, para. 5 (PMR, TAB 2A).

- (b) in regards to examinations for discovery, that these be completed by January 31, 2017 (*i.e.*, roughly nine months' time); and
- (c) in regards to an unresolved dispute about redactions, the party that made the redaction(s) was required to bring a motion on notice to confirm its redactions within thirty days of November 30, 2016.⁵

(D) Canada Cartage Unsuccessfully Attempts to Appeal the April 2016 Order

11. Instead of arranging a further case conference to address disagreements about the Discovery Plan, on May 12, 2016, Canada Cartage moved for leave to appeal the April 2016 Order. On September 20, the Divisional Court dismissed Canada Cartage's motion for leave. By this time, nearly five months had elapsed since the April 2016 Order had been made.⁶

(E) The April 2016 Order is Varied on Consent

12. The parties subsequently consented to varying aspects of the Court's April 2016 Order, which resulted in a further Order of the Court dated March 20, 2017 (the "March 2017 Order"). By this time, almost eleven months had elapsed since the April 2016 Order. The March 2017 Order specified that the April 2016 Order remained in effect except as expressly modified.⁷

13. Regarding terminal-level productions, examinations for discovery and redactions, the March 2017 Order provided that:

- (a) if the parties reached an agreement about terminal-level productions by May 31, 2017, Canada Cartage was required to produce the agreed-upon terminal-level

⁵ Order dated April 27, 2016, paras. 1, 2(c), 3, 7 (PMR, TAB 2C).

⁶ Iannacito Affidavit, paras. 11-12 (PMR, TAB 2).

⁷ Iannacito Affidavit, para. 13 (PMR, TAB 2); Order dated March 20, 2017, para. 1 (PMR, TAB 2D).

productions by July 31, 2017 (*i.e.*, roughly fifteen months after the April 2016 Order was made);

- (b) if the parties did not reach an agreement about terminal-level productions by May 31, Canada Cartage could move to vary the April 2016 Order no later than June 23, 2017 and ask the Court to fix a date for its terminal-level productions;
- (c) if Canada Cartage did not bring a motion to vary, it was to produce all the terminal-level documents required by the April 2016 Order by July 31, 2017;
- (d) examinations for discovery would be completed by October 31, 2017 (*i.e.*, seventeen months after the April 2016 Order was made), subject to any further order of the Court in relation to terminal-level productions; and
- (e) in regards to an unresolved dispute about redactions, the party who made the redaction(s) was now required to bring a motion on notice to confirm its redactions within 30 days of either February 28, 2017 (in the case of documents produced by that date), or the agreed upon or Ordered deadline for terminal-level productions.⁸

(F) The Deadline for Canada Cartage to Confirm its Redactions is Again Extended

14. Following to the March 2017 Order, the parties executed a consent on March 30, 2017. In it, they agreed to further extend the deadline for Canada Cartage to move on notice to confirm

⁸ Order dated March 20, 2017, paras. 3-7 (PMR, TAB 2D).

any disputed redactions to its existing productions until April 14, 2017.⁹ Notwithstanding this consent, no formal variation was sought or made to the Court's March 2017 Order.¹⁰

15. On April 17, 2017, Canada Cartage delivered a Notice of Motion seeking to confirm its redactions, which was replaced by an Amended Notice of Motion delivered the next day. No supporting affidavit material was delivered with Canada Cartage's motion, no date for the motion was scheduled, and it is unclear whether Canada Cartage filed this motion with the Court.¹¹

(G) Efforts to Mediate the Dispute Before The Honourable Stephen Goudge, Q.C.

16. In May 2017, the parties agreed to see if they could achieve a mediated resolution of this class action. As a by-product, the parties agreed to voluntarily suspend adherence to the deadlines in the Discovery Plan Order while mediation was pursued. However, no Order suspending the operation of the April 2016 Order, as varied by the March 2017 Order, was sought or obtained from the Court.¹²

17. At the time of the parties' agreement more than twelve months had passed since the April 2016 Order. In accordance with the March 2017 Order, Canada Cartage had less than two months left to bring a motion to vary (by June 23, 2017) or, in the absence of such a motion, three months left to complete terminal-level productions (by July 31, 2017).

⁹ Iannacito Affidavit, para. 14 (PMR, TAB 2); Consent dated March 30, 2017, para. 1 (PMR, TAB 2E).

¹⁰ Iannacito Affidavit, para. 15 (PMR, TAB 2).

¹¹ Iannacito Affidavit, paras. 16-17 (PMR, TAB 2).

¹² Iannacito Affidavit, paras. 18-19 (PMR, TAB 2).

18. Mediation was scheduled for November 6, 2017 and conducted before The Honourable Stephen Goudge, Q.C.¹³

(H) The Mediation Fails and the Plaintiff and Class Press On with the Action

19. Counsel for the Plaintiff and the Class advised counsel for Canada Cartage on December 15, 2017 that it did not wish to continue to pursue further mediation with Mr. Goudge and that the Plaintiffs and Class intended to press on with their case. Counsel for Canada Cartage advised, in response, that its clients would move to vary the Discovery Plan Order.¹⁴

(I) The Plaintiffs Seek to Re-Establish Discovery Deadlines and the Defendants Balk

20. On February 26, 2018, two months having passed and no motion to vary having been brought, the Plaintiff and Class wrote to Canada Cartage to advise that they required full compliance with the Discovery Plan Order. The February 26 letter asked that:

- (a) Canada Cartage's terminal-level productions be completed by April 30, 2018;
- (b) examinations for discovery be completed by September 28, 2018; and
- (c) Canada Cartage deliver its motion record seeking to confirm its redactions by March 16, 2018 (or else produce redacted documents in an un-redacted form by that date).¹⁵

¹³ Iannacito Affidavit, para. 20 (PMR, TAB 2).

¹⁴ Iannacito Affidavit, para. 21 (PMR, TAB 2).

¹⁵ February 26, 2018 Letter to Canada Cartage (PMR, TAB 2F).

21. Canada Cartage responded on March 5, 2018 and disputed all of the requests made in the February 26 letter. Canada Cartage's letter again indicated that it intended to bring a motion to vary the Discovery Plan Order.¹⁶

22. By further letter dated April 4, 2018, a further month now having passed with no motion to vary, the Plaintiff and the Class advised Canada Cartage that it disagreed with its letter, that a motion would be required to get the proceeding back on track, and that they would bring a motion to carry the Discovery Plan Order into operation by way of a request to the Court to "re-set prompt deadlines for the completion of (i) terminal-level productions, (ii) examinations for discovery; and (iii) any motion to sustain redactions."¹⁷

23. On April 5, this Court advised counsel for the parties that it will hear all aspects of the discovery plan matter in writing.¹⁸ Almost four months after being advised by counsel for the Plaintiff and the Class that mediation had failed and that they would press on with the case, Canada Cartage has not yet brought a motion to vary the Discovery Plan Order.¹⁹ By the time this Court decides this motion, approximately two years will have passed since the Discovery Plan Order was first made.

PART III – ISSUES, LAW & ANALYSIS

24. The issue on this motion is whether this Court should provide directions to carry the Discovery Plan Order into operation by re-setting prompt deadlines for (i) the completion of terminal-level production of documents by Canada Cartage; (ii) the completion of examinations

¹⁶ March 5, 2018 Letter to the Plaintiff and the Class (PMR, TAB 2G).

¹⁷ April 4, 2018 Letter to Canada Cartage (PMR, TAB 2H).

¹⁸ April 5, 2018 E-Mail from Gladys Gabbidon (PMR, TAB 2I).

¹⁹ Iannacito Affidavit, para. 26 (PMR, TAB 2).

for discovery; and (iii) for Canada Cartage to move to confirm any redactions made to its documents. The answer to this issue is “yes”.

25. Rule 59.06(2)(c) provides that a party who seeks to carry an order into operation may make a motion in the proceeding for the relief claimed. This particular subrule has been judicially described as “an independent source of jurisdiction to give directions or make an order to carry an order into operation”.²⁰ In *D.G. v. A.F.*, the Court of Appeal, making reference to majority decision of the Supreme Court of Canada in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, referred to rule 59.06(2)(c) and its provincial cousins as provisions that allow courts “to vary or add to their orders so as to carry them into operation...”.²¹

26. The Court of Appeal has actively encouraged rule 59.06(2) motions to be decided by the same judge who made the initial order:

[29] While the law does not *require* the trial judge whose judgment is at issue to hear the rule 59.06(2) motion, it is *preferable* for the trial judge to do so. The trial judge is already familiar with all of the evidence at trial, and is well-suited to expeditiously determine [the motion].²²

27. This Court, having made the Discovery Plan Order, is well-suited to re-set and re-calibrate its procedural deadlines. Your Honour has managed this action since its infancy and understands its dynamics better than any other judge.

28. This being a class proceeding, section 12 of the *Class Proceedings Act, 1992* provides this Court with a broad, discretionary power that can be exercised in tandem with Rule

²⁰ *Clarke v. Clarke*, 2013 ONSC 5352 (S.C.J.), para. 29 (BRIEF OF AUTHORITIES OF THE MOVING PARTY, TAB 1).

²¹ *D.G. v. A.F.*, 2015 ONCA 290, para. 24 (BRIEF OF AUTHORITIES OF THE MOVING PARTY, TAB 2).

²² *Mehedi v. 2057161 Ontario Inc. (Job Success)*, 2014 ONCA 604, para. 26 (BRIEF OF AUTHORITIES OF THE MOVING PARTY, TAB 3).

59.06(2)(c) in order to give directions to get this proceeding back on track. In *Endean*, the Supreme Court of Canada confirmed the breadth of section 12, which confers power that may be exercised to ensure the “fair and expeditious determination of issues arising in class proceedings”.²³

29. In re-setting the deadlines for compliance with the Discovery Plan Order, this Court should consider the following:

- (a) From the time that the representative Plaintiff first circulated a Discovery Plan (November 11, 2015) until the April 2016 Order was made, approximately five months’ worth of discovery time elapsed;
- (b) The April 2016 Order gave Canada Cartage roughly seven months to complete its terminal-level productions (to November 30, 2016). For nearly five of these seven months, Canada Cartage pursued a motion for leave to appeal the April 2016 Order. This motion, which Canada Cartage was entitled to bring, did not operate to stay the April 2016 Order;
- (c) By the time of the March 2017 Order, the parties were sixteen months into the discovery process. The March 2017 Order provided a new outside date for completion of terminal-level productions of July 31, 2017, unless Canada Cartage moved to vary by June 23, 2017. Effectively, when the parties agreed to suspend adherence to the Discovery Plan Order deadlines to pursue mediation in May 2017, this agreement tolled the deadline for Canada Cartage to bring a motion to

²³ *Endean v. British Columbia*, 2016 SCC 42, para. 32 (BRIEF OF AUTHORITIES OF THE MOVING PARTY, TAB 4).

vary with about two months remaining, and the deadline for Canada Cartage to complete its terminal-level productions in the absence of such a motion to vary with about three months remaining;

- (d) Accepting that the parties agreed to suspend the Discovery Plan Order during the 7-8 month mediation process, Canada Cartage was told on December 15, 2017 that the mediation failed and its counsel advised that it would move to vary the Discovery Plan Order. Almost four months have passed since that time; and
- (e) On February 26, 2018, the Plaintiff and the Class offered to give Canada Cartage two more months to complete terminal-level productions, and asked that examinations for discovery be completed in six months' time. Canada Cartage was also offered two weeks to deliver a motion record to confirm its redactions, harkening back to the Notice of Motion it delivered, without supporting affidavit material, in mid-April 2017.

30. In light of the foregoing, the Plaintiff and the Class submit that it is open to the Court to give directions along the lines of the following:

- (a) Terminal-level productions: to be completed by Canada Cartage within a further two months' time. Canada Cartage has had at least sixteen months since the April 2016 Order (twenty four months, less eight months for mediation) to work on its terminal-level productions. It has been under Court order to produce these documents the entire time;

- (b) Examinations for discovery: to be completed within 2-4 months of production of all terminal-level documents by Canada Cartage. For obvious reasons, examinations for discovery must await the completion of productions (and a delivery of sworn affidavit of documents) by Canada Cartage.

- (c) Redactions: Canada Cartage should deliver its motion record in support of its April 2017 Notice of Motion to confirm its redactions within two weeks' time, or else produce its redacted documents in an un-redacted form in two weeks' time.

PART V – ORDER SOUGHT

31. The Plaintiff and the Class respectfully request an Order re-setting the deadlines in the Discovery Plan Order for terminal-level productions, examinations for discovery and any motion confirm redactions made to produced documents, together with their costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of April, 2018.



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Clarke v. Clarke*, 2013 ONSC 5352 (S.C.J.)
2. *D.G. v. A.F.*, 2015 ONCA 290
3. *Mehedi v. 2057161 Ontario Inc. (Job Success)*, 2014 ONCA 604
4. *Endean v. British Columbia*, 2016 SCC 42

SCHEDULE “B”

LEGISLATION RELIED UPON

Courts of Justice Act

RRO 1990, REGULATION 194

Rules of Civil Procedure

INTERPRETATION

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Proportionality

1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[...]

ORDERS ON TERMS

1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

[...]

RULE 59 – ORDERS

Amending, Setting Aside or Varying Orders

Setting Aside or Varying

59.06 (2) A party who seeks to,

- (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
- (b) suspend the operation of an order;
- (c) carry an order into operation; or
- (d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

Class Proceedings Act, 1992

SO 1992, CHAPTER 6

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[...]

Rules of court

35. The rules of court apply to class proceedings.

MARC-OLIVER BAROCH
Plaintiff (Moving Party)

-and-

CANADA CARTAGE DIVERSIFIED GP INC. et al.
Defendants (Respondents)

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