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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

MARC-OLIVER BAROCH

Plaintiff
(Respondent)

- and -

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

Defendants
(Moving Parties)

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

FACTUM OF THE RESPONDENT
(Canada Cartage Motion to Vary Discovery Plan Order)

May 24, 2018

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
Breanna Needham LSUC#: 70078V
bneedham@counsel-toronto.com
Tel: 416 360 3017
Fax: 416 598 3730

Lawyers for the Plaintiff and the Class

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
Lisa Talbot LSUC#: 44672I
Tel: 416 865 8222
Sarah Whitmore LSUC#: 61104E
Tel: 416 865 7315
Rachael Saab LSUC#: 64190W
Tel: 416 865 8172
Fax: 416 865 7380

Lawyers for the Defendants

TABLE OF CONTENTS

PART I - OVERVIEW

1. This motion calls on the Court to determine whether Canada Cartage has satisfied the stringent criteria for re-opening an issued and entered order governing discovery obligations on the basis of purported 'fresh evidence' about proportionality.

2. The answer is "no". The plaintiff submits that the discovery plan order in this certified class action, which was extensively litigated more than two years ago and was the subject of an unsuccessful motion for leave to appeal by Canada Cartage, should not be re-opened at this juncture. Canada Cartage's evidence supporting its motion to vary is derived from information that has always been available to the company by the exercise of reasonable diligence and is, in any event, not cogent. It is not evidence that justifies Canada Cartage's exceptional request for the Court's exercise of discretion to re-open an order, which the Supreme Court has cautioned should only be done sparingly and with the greatest care.

3. Canada Cartage brought this motion to vary the obligations imposed by the discovery plan order only after the plaintiff moved on April 13, on behalf of the class, to re-establish deadlines for completion of the steps contemplated by the discovery plan order that still remain incomplete. The evidence on this motion demonstrates that, more than two years after being ordered to collect and produce documents to the plaintiff and class, Canada Cartage has not even begun this process for certain categories of documents.

4. The principle of finality ought to be respected and Canada Cartage should not be given another opportunity to argue about the scope of its document production obligations. Instead, it should focus on meeting its obligations under the discovery plan order so that the parties can move beyond the discovery stage and towards the merits.

PART II – FACTS

(A) The April 2016 Discovery Plan Order

5. On April 27, 2016, the parties appeared before the Court to argue a motion about discovery-related matters.[1] In its supporting factum, Canada Cartage vigorously resisted the productions sought by the plaintiff and the class, claiming that its competing proposal "focuses on proportionate discovery" and "strives for judicial economy and a proportionate expenditure of resources". Canada Cartage asserted that the proposal advanced by the plaintiff and the class was "disproportionate, and costly".[2]

6. This Court issued a direction on April 27 resolving the remaining discovery-related issues largely in favour of the plaintiff and the class.[3] The direction was incorporated into an April 27, 2016 order ("**April 2016 Order**"), which required, among other things, production of certain categories of documents that are now the subject of this motion to vary.[4]

7. These "**Terminal Level Documents**", as they have been defined by Canada Cartage,[5] are said to comprise the following categories of production set out in the April 2016 Order:

> (a) "[A]ll communications to or from individual class members in regards to overtime pay" ("**Paragraph 5(a) Productions**");[6]

---

[1] Affidavit of M. Lilly Iannacito sworn April 12, 2018 ("First Iannacito Affidavit"), para. 7 (MOTION RECORD OF THE MOVING PARTY – APRIL 13 ("PMR – APRIL 13"), TAB 2).

[2] Responding Factum of Canada Cartage on the Discovery Plan Motion at paras. 3-4, being Exhibit "E" to the Affidavit of Tyler Paquin sworn April 20, 2018 ("Paquin Affidavit") (MOTION RECORD OF THE DEFENDANTS ("DMR"), TAB 2E).

[3] Baroch v. Canada Cartage – Directions re Discovery Plan – April 27, 2016, being Exhibit "A" to the First Iannacito Affidavit (PMR – APRIL 13, TAB 2A).

[4] Order of Justice Belobaba dated April 27, 2016 ("April 2016 Order"), being Exhibit "C" to the First Iannacito Affidavit (PMR – APRIL 13, TAB 2C).

[5] *See* Canada Cartage's Notice of Motion dated April 20, 2018 at para. 10 (DMR, TAB 1); Paquin Affidavit at para. 10 (DMR, TAB 2).

[6] April 2016 Order at para. 5(a) (PMR – APRIL 13, TAB 2C).

(b) "[A]ll communications to and from the Defendants' managerial employees, including the Defendants' operations managers during the class period, relating to one or more class members' overtime pay or the payment of overtime generally" ("**Paragraph 5(d) Productions**");[7] and

(c) "[A]ll documents generated or maintained at the terminal level of the Defendants," relating to "class members' overtime pay", "modified work agreements" and "mixed employment rules" ("**Paragraph 5(e) Productions**").[8]

8. The April 2016 Order required that all document productions, including production of Terminal Level Documents, be completed by November 30, 2016.[9]

(B) Canada Cartage Unsuccessfully Moves for Leave to Appeal the April 2016 Order

9. Canada Cartage moved for leave to appeal the April 2016 Order. In its notice of motion, Canada Cartage asserted that it was desirable for leave to be granted because, among other things, the April 2016 Order allegedly "contemplates a disproportionate expenditure of resources by Canada Cartage to collect and produce" the required documents.[10] Canada Cartage echoed this sentiment in its factum for the Divisional Court, claiming that the April 2016 Order "permits the plaintiff to mutate the common issues into a disproportionate and unmanageable bottom-up approach" to discovery.[11]

10. Canada Cartage's motion for leave to appeal was dismissed on September 20, 2016.[12]

---

[7] April 2016 Order at para. 5(d) (PMR – APRIL 13, TAB 2C).

[8] April 2016 Order at para. 5(e) (PMR – APRIL 13, TAB 2C).

[9] April 2016 Order at para. 2(c) (PMR – APRIL 13, TAB 2C).

[10] Notice of Motion for Leave to Appeal dated May 12, 2016 at para. 21, being Exhibit "C" to the Affidavit of M. Lilly Iannacito sworn April 30, 2018 ("Second Iannacito Affidavit") (RESPONDING MOTION RECORD OF THE PLAINTIFFS ("PMR – APRIL 30"), TAB 1C).

[11] Factum of the Moving Parties on the Motion for Leave to Appeal dated June 13, 2016 at para. 34, being Exhibit "D" to the Second Iannacito Affidavit (PMR – APRIL 30, TAB 1D).

[12] First Iannacito Affidavit at para. 12 (PMR – APRIL 13, TAB 2).

(C) The April 2016 Order is Varied on Consent

11. Canada Cartage did not complete its productions by November 30, 2016 as required by the April 2016 Order. It finished producing non-Terminal Level Documents on March 1, 2017.[13]

12. Ultimately, the parties agreed to vary the April 2016 Order, resulting in a consent order dated March 20, 2017 ("**March 2017 Order**").[14] This order provides that the April 2016 Order remained in effect except as expressly modified.[15]

13. Importantly, the March 2017 Order uses a different, narrower definition of 'terminal-level documentary productions' than how Canada Cartage defines Terminal Level Documents in its motion to vary. The March 2017 Order refers to terminal-level documentary productions only as Paragraph 5(e) Productions.[16]

14. The March 2017 Order modifies the timing for completion of Paragraph 5(e) Productions. It does not modify Canada Cartage's obligations in relation to the Paragraph 5(a) or 5(d) Productions whatsoever. For Paragraph 5(e) Productions, the March 2017 Order requires:

(a) Production of these documents by July 31, 2017 if an agreement was reached about these documents;[17]

(b) If the parties did not reach an agreement, 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 production of its Paragraph 5(e) Productions;[18] and

---

[13] Paquin Affidavit at para. 21 (DMR, TAB 2).

[14] First Iananacito Affidavit at para. 13 (PMR – APRIL 13, TAB 2); Order of Justice Belobaba dated March 20, 2017 ("March 2017 Order"), being Exhibit "D" to the First Iannacito Affidavit (PMR – APRIL 13, TAB 2D).

[15] March 2017 Order at para. 1 (PMR – APRIL 13, TAB 2D).

[16] March 2017 Order at para. 2 (PMR – APRIL 13, TAB 2D); *compare* Paquin Affidavit at para. 10 (DMR, TAB 2).

[17] March 2017 Order at para. 3 (PMR – APRIL 13, TAB 2D.)

[18] March 2017 Order at para. 4 (PMR – APRIL 13, TAB 2D).

(c) If Canada Cartage did not move to vary by June 23, 2017, it was to produce all Paragraph 5(e) Productions by July 31, 2017.[19]

15. The April 2016 Order, as varied by the March 2017 Order, are referred to together in this factum as the "**Discovery Plan Order**".

(D) 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 and voluntarily suspended adherence to the deadlines in the Discovery Plan Order while mediation was pursued. However, no order suspending the operation Discovery Plan Order was sought or obtained from the Court.[20]

17. In connection with the mediation process, Canada Cartage produced approximately 23,000 Terminal Level Documents in September 2017, which fell into the category of Paragraph 5(e) Productions as contemplated by the April 2016 Order.[21]

18. Production of these documents, which Canada Cartage raised in its affidavit evidence despite acknowledging that the documents were given to the plaintiff on a "without prejudice" basis,[22] was made in response to a request for this information from the plaintiff and class that was a condition of their participation in the mediation.[23]

---

[19] March 2017 Order at para. 5 (PMR – APRIL 13, TAB 2D).
[20] First Iananacito Affidavit at paras. 18-19 (PMR – APRIL 13, TAB 2).
[21] Paquin Affidavit at para. 31 (DMR, TAB 2).
[22] Paquin Affidavit at para. 31 (DMR, TAB 2).
[23] Second Iannacito Affidavit at paras. 12-13 (PMR – APRIL 30, TAB 1).

19. Mediation was scheduled for November 6, 2017 and conducted before The Honourable Stephen Goudge, Q.C.[24]

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

20. 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 plaintiff 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.[25]

(F) The Plaintiff and Class Seek to Re-Establish Discovery Deadlines

21. 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. Canada Cartage resisted and, on April 13, the plaintiff and class brought a motion seeking to re-set and re-establish deadlines for compliance with the Discovery Plan Order.[26]

(G) Canada Cartage Moves to Vary the Discovery Plan Order

22. On April 20, Canada Cartage brought the instant motion, seeking to vary the Discovery Plan Order by (1) deleting the requirement for it to make the Paragraph 5(a) Productions altogether; (2) deleting the requirement for it to make the Paragraph 5(d) Productions altogether;

---

[24] First Iananacito Affidavit at para. 20 (PMR – APRIL 13, TAB 2).

[25] First Iananacito Affidavit at para. 21 (PMR – APRIL 13, TAB 2). Canada Cartage claims that it told lead counsel for the plaintiff and the class at the time that, because he had a medical issue and would be absent from the office for a period of time, "Canada Cartage would not proceed with this motion [to vary] until counsel for the plaintiff advised that he was well enough to proceed": Affidavit of Rachael Jastrzembski sworn April 20, 2018 at para. 8(g), (h) (DMR, TAB 2). The plaintiff and class deny this occurred. Their evidence is that Canada Cartage "never offered, agreed or otherwise advised that it would delay its Motion to Vary at any time following the mediation held on November 6, 2017": Second Iannacito Affidavit at paras. 16-17 (PMR – APRIL 30, TAB 1).

[26] First Iannacito Affidavit at paras. 22-24 (PMR – APRIL 13, TAB 2).

and (3) varying the Paragraph 5(e) Productions contemplated in the April 2016 Order by instead requiring that Canada Cartage produce a statistically significant sample of those documents.[27]

PART III – ISSUES, LAW & ANALYSIS

23. The issue on Canada Cartage's motion, stated succinctly, is whether Canada Cartage has satisfied the Court that this is one of the rare instances in which an issued and entered order should be re-opened on the basis of fresh evidence. For reasons that will be more fully developed in the following pages, the plaintiff and class submit that the answer to this issue is "no".

(A) Applicable Legal Principles

24. In its notice of motion, Canada Cartage relies on rule 37.14 in support of the requested variation to the Discovery Plan Order.[28] That rule has no application here. It applies to orders obtained on motions without notice, orders obtained when a party fails to appear on a motion, or where a party is affected by an order made by a registrar.[29]

25. The operative rule is rule 59.06. That rule provides as follows:

> AMENDING, SETTING ASIDE OR VARYING ORDER
>
> 59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.
>
> (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;

---

[27] Notice of Motion dated April 20, 2018 at para. 32 (DMR, TAB 1).

[28] Notice of Motion dated April 20, 2018 at para. 33 (DMR, TAB 1).

[29] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 37.14(1).

> (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.

26. It is worth observing that, while a motion to vary that is properly the subject of a rule 37.14 motion allows the court to "vary the order on such terms as are just", no such language appears in rule 59.06.[30]

27. Canada Cartage's motion appears to be, in substance, a request to vary the Discovery Plan Order in accordance with rule 59.06(2)(a) and, in particular, on the ground of "facts arising or discovered after [the Discovery Plan Order] was made". Canada Cartage's factum captures its position in this regard: the company purports to rely on "new" data points going to the issue of proportionality that are said to justify a revision to the Discovery Plan Order: (1) Canada Cartage's "experience complying with the Discovery Plan Order to date"; (2) the "expected costs associated with the production of Terminal Level Documents"; and (3) the "anticipated potential value of the Plaintiff's claim, if it succeeds."[31]

28. In *Mehedi v. 2057161 Ontario Inc.*, the Court of Appeal described the test to be applied under rule 59.06(2)(a) in the following terms:

> The test under rule 59.06(2)(a) to re-open a trial that applies *after* the judgment or other order has been issued and entered was set out by Doherty J.A., speaking for the court, in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257, [1998] O.J. No. 3516 (Ont. C.A.), at paras. 41 and 44. As he noted, the onus is on the moving party to show that all the circumstances "justify making an exception to the fundamental rule that final judgments are exactly that, final." In particular, the moving party must show that the new evidence could not have been put forward by the exercise of reasonable

---

[30] See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 37.14(2).

[31] Factum of the Defendants (Motion to Vary Discovery Plan Order) dated April 20, 2018 ("Canada Cartage Factum") at para. 46.

> diligence at the original proceedings. The court will go on to evaluate "other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment."[32]

29. The test to be applied under rule 59.06(2)(a) is, in effect, adapted from the test for the admission of fresh evidence, which is routinely utilized by Canadian courts in both the criminal and civil contexts. The Supreme Court of Canada has confirmed that consideration of whether the fresh evidence could have been adduced earlier through the exercise of due diligence is to be applied more strictly in the civil context than in the criminal context.[33]

30. Ontario courts have accepted that, while they retain discretion to re-open a hearing to allow new evidence even after the order has been taken out, "[t]his discretion should only be exercised in the clearest of cases … and only to prevent a miscarriage of justice".[34] Similarly, in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, the Supreme Court confirmed that the discretion to re-open a matter should be exercised "sparingly and with the greatest care".[35] Canada Cartage must demonstrate that "the integrity of the litigation process is at risk … or that there is some principle of justice at stake that would override the value of finality in litigation, or that some miscarriage of justice would occur if such a reconsideration did not take place."[36]

---

[32] *Mehedi v. 2057161 Ontario Inc.*, 2015 ONCA 670 [*Mehedi*] at para. 13 (RESPONDING BRIEF OF AUTHORITIES OF THE PLAINTIFF ("RBOA"), TAB 1).

[33] See *R. v. Lacasse*, 2015 SCC 64 at para. 115 (noting that the fresh evidence "should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases") (RBOA, TAB 2).

[34] *Matzelle Estate v. Father Bernard Prince Society of the Precious Blood* (1996), 1996 CarswellOnt 2733 (Gen. Div.) at para. 16 (RBOA, TAB 3).

[35] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 [*Sagaz*] at para. 61 (RBOA, TAB 4).

[36] *1057854 Ontario Inc. v. Kara Holdings Inc.* (2005), 2005 CarswellOnt 1130 (S.C.J.) [*Kara*] at para. 41 (citing *Schmuck v. Reynolds-Schmuck* (2000), 46 OR. (3d) 702 (S.C.J.) at para. 25) (RBOA, TAB 5).

31. Two additional legal propositions that apply to Canada Cartage's request to vary the Discovery Plan Order warrant mention at this juncture.

32. First, Ontario jurisprudence confirms that once a party begins to comply with an order but fails, it cannot simply seek to vary the order.[37] Here, after unsuccessfully seeking leave to appeal, Canada Cartage began to comply with the Discovery Plan Order and then, as revealed in its own evidence, projected that based on its "experience", producing Terminal Level Documents would be "prohibitive".[38] It has, however, produced 23,000 Terminal Level Documents responsive to paragraph 5(e) of the April 2016 Order in the context of mediation.[39]

33. Second, Ontario jurisprudence holds that a consent order should only be varied under rule 59.06 when it does not express the real intention of the parties or where there is fraud.[40] Neither is alleged here. Because consent orders are based on parties' agreement and not a judge's determination of what is fair and reasonable, they are subject to modification only on the same grounds on which a contract can be rectified. This becomes significant here because the March 2017 Order was made on consent.

34. The parties agreed, in the March 2017 Order, that the April 2016 Order will "remain in effect, except as expressly modified".[41] Not only does the March 2017 Order not modify the Paragraph 5(a) and 5(d) Productions, it affirms those requirements, on consent, as originally expressed in the April 2016 Order. It is not open to Canada Cartage to seek to vary, on the basis

---

[37] *Weston on the Humber v. Kelly*, 2016 ONSC 573 (Div. Ct.) at para. 2 (RBOA, TAB 6).
[38] Paquin Affidavit at para. 26 (DMR, TAB 2).
[39] Paquin Affidavit at para. 31 (DMR, TAB 2).
[40] *Monarch Construction Ltd. v. Buildevco Ltd.* (1988), 1988 CarswellOnt 369 (C.A.) at para. 3 (RBOA, TAB 7).
[41] March 2017 Order at para. 1 (PMR – APRIL 13, TAB 2D).

of purported fresh evidence, obligations that originated in the April 2016 Order that have since been affirmed by agreement of the parties and embodied in a consent order.

(B) "Fresh" Evidence Was Largely Available to Canada Cartage in 2016

35. The core information upon which Canada Cartage bases its assertion that the production of Terminal Level Documents is not proportionate has always been available to it or, at the very least, could have been available to it with the exercise of reasonable diligence.

36. Canada Cartage relies on a description of some of the different categories of Terminal Level Documents it says would have to be collected to comply with the Discovery Plan Order. It describes these documents (and their size) in support of an estimate that it would have to produce "millions of pages of productions, consisting of the payroll registers, trip sheets and time sheets at the various terminal facilities throughout the class period."[42]

37. Canada Cartage has always had available to it the information needed to make this kind of generic estimate. On cross-examination, the Canada Cartage affiant who gave this evidence, Tyler Paquin, agreed that, at any given time since he started at the company in 2000:

(a) Canada Cartage kept records of its current and former employees, and their positions;[43]

(b) Canada Cartage could tally up the approximate number of terminals and customer facilities out of which it operates;[44]

(c) Canada Cartage knew the number of weekly, biweekly, or semimonthly payroll registers that were being generated on an annual basis;[45] and

---

[42] Paquin Affidavit at para. 41 (DMR, TAB 2).

[43] Transcript of the Cross-Examination of Tyler Paquin held May 17, 2018 ("Paquin Cross") at qq. 105-108 (TRANSCRIPT AND ANSWER TO UNDERTAKING BRIEF RE TYLER PAQUIN ("TRANSCRIPT BRIEF"), TAB A).

[44] Paquin Cross at qq. 127-28, 135 (TRANSCRIPT BRIEF, TAB A).

[45] Paquin Cross at q. 137 (TRANSCRIPT BRIEF, TAB A).

(d) At any given time, the company had a general sense of the approximate number of trips its employees were doing in a year.[46]

38. These are the data sources based on which Mr. Paquin deposed to Canada Cartage's estimate of "millions of pages" of Terminal Level Documents. Putting aside, for the moment, whether an estimate such as this is sufficiently cogent and reliable to justify re-opening the Discovery Plan Order, the point is that the data on which Canada Cartage's estimate about "millions of pages" is premised has always been accessible to it. What we are talking about, after all, is *Canada Cartage's documents and records*. It is self-evident that information about Canada Cartage's documents and records is available to the company.

39. Canada Cartage also relies on an estimate it received from its third party document reviewer as fresh evidence about proportionality.[47] The document reviewer estimates, based on more than 30 assumptions, both the number of Terminal Level Productions that would need to be reviewed and the projected costs associated with that review.[48] The only thing "new" about this evidence is that the third party document reviewer appears to have been asked to prepare an estimate for the purpose of this motion, as its estimate was delivered to Canada Cartage on April 20 – the same day Canada Cartage delivered its material for this motion to vary.[49]

40. None of the inputs into the document reviewer's estimate appear to have been unavailable at the time the Discovery Plan Order was made. A document review estimate, based on these same assumptions, could have been sought in April 2016. Indeed, it appears that the

---

[46] Paquin Cross at q. 140 (TRANSCRIPT BRIEF, TAB A).

[47] Paquin Affidavit at para. 42(a) (DMR, TAB 2).

[48] Paquin Affidavit at para. 42(a) (DMR, TAB 2).

[49] Email from Counsel for Canada Cartage to Class Counsel re Paquin Undertaking dated May 23, 2018 (TRANSCRIPT BRIEF, TAB C).

document reviewer has not been provided with any information by Canada Cartage about the costs associated with the only meaningful slice of Terminal Level Documents produced thus far: the 23,000 Paragraph 5(e) Productions produced on a without prejudice basis for mediation. In its estimate, the document review firm writes: "One item to note is that we were not provided the cost for the 23,000 terminal level documents that were produced on a Without Prejudice basis. *That information would reduce some of these assumptions*".[50]

41. Canada Cartage also relies on the conclusions of Deloitte LLP, who it says conducted an 'analysis' of the purported value of class members' claims for overtime, as 'fresh evidence' on the issue of proportionality.[51] Putting aside, for the moment, the cogency of this evidence (discussed in the next section of this factum) and the fact that the plaintiff and the class reject it in the strongest terms, it should be observed that Canada Cartage's affiant Mr. Paquin lists the information that was provided to Deloitte LLP to allow it to complete this 'analysis', and *all of this information predates 2016*.[52]

42. Canada Cartage has not put forward any evidence about when Deloitte LLP's 'analysis' was undertaken and why, if it believed it would be probative of the issue of proportionality, this 'analysis' was not presented to the Court at the time of the Discovery Plan Order. Certainly, the information on which this Deloitte 'analysis' appears to have been based was all available to Canada Cartage in 2016.

43. Canada Cartage has an affirmative evidentiary obligation to demonstrate to this Court that its so-called 'fresh evidence' could not have been put forward by the exercise of reasonable

---

[50] Exhibit 3 to the Paquin Cross (TRANSCRIPT BRIEF, TAB B3). [Emphasis added].
[51] Paquin Affidavit at paras. 43-47 (DMR, TAB 2).
[52] Paquin Affidavit at para. 44 (DMR, TAB 2).

diligence at the original proceeding. It has not satisfied this onus. Its motion record is silent altogether or, at most, opaque about when information about proportionality on which it now seeks to rely on this motion could have been available to it.

44. It is not as if this is the first time the issue of proportionality has come up in connection with the Discovery Plan Order. Canada Cartage raised proportionality in its factum for the April 27, 2016 motion and on its subsequent motion for leave to appeal the April 2016 Order to the Divisional Court.[53] No doubt, Canada Cartage's evidence about proportionality at the time was framed in more general terms than it is on the instant motion. But the fact that Canada Cartage is making more detailed arguments about proportionality now does not change the reality that, with reasonable diligence, Canada Cartage *could* have marshalled this evidence in April 2016.

45. Courts have cautioned against opening the door to the reception of fresh evidence when, in reality, the evidence could always have been available:

> The court should discourage unwarranted attempts to bring forward evidence available at the trial to disturb the basis of a judgment delivered or to permit an unsuccessful party, after learning of the judgment, to attempt to rehabilitate his or her case with the aid of further proof. Once a party has obtained a judgment, he or she is entitled not to be deprived of it without very solid grounds.[54]

46. Parties are expected to consider their position in advance of a motion, raise all issues they think appropriate and lead all of the relevant evidence.[55] The process surrounding the making of the Discovery Plan Order is not meant to be reiterative. As has been observed, "it is always a

---

[53] Notice of Motion for Leave to Appeal dated May 12, 2016 at para. 21 (PMR – APRIL 30, TAB 1C); Factum of the Moving Parties on the Motion for Leave to Appeal dated June 13, 2016 at para. 34 (PMR – APRIL 30, TAB 1D).

[54] *Luck v. Canada (Attorney General)*, 2010 ONSC 1422 (S.C.J.) at para. 10 (RBOA, TAB 8); see also *Sagaz*, *supra* note 35 at para. 60 (RBOA, TAB 4).

[55] *People's Trust Company v. Atas*, 2018 ONSC 58 (S.C.J.) at para. 18 (RBOA, TAB 9).

simple matter, using hindsight, to go about reconstructing a better method of presenting the case when one finds oneself in the sorry position of loser".[56]

47. Canada Cartage should not be permitted to re-open an order based on information that it could have obtained earlier through reasonable diligence, particularly given the strict approach to the diligence requirement that is to be utilized in the context of civil proceedings.

(C) Canada Cartage's Evidence is Not Cogent

48. In evaluating whether the purported fresh evidence warrants re-opening the Discovery Plan Order, this Court should have regard to its cogency. "Cogency" of evidence relates to its force, power and incisiveness.[57] It is respectfully submitted that much of Canada Cartage's evidence on this motion going to the issue of proportionality is based on estimates, assumptions, or hearsay. This is not cogent evidence.

(i) Estimates and Assumptions

49. Canada Cartage's evidence that it would have to produce "millions of pages" of Terminal Level Documents is presented as an "estimate".[58]

50. The document reviewer's estimate is also, self-evidently, an estimate. Canada Cartage refused to identify its document reviewer.[59] Information about the document reviewer's estimate, which is hearsay, was offered through Mr. Paquin, who did not depose to a belief that it was true

---

[56] *Kara, supra* note 36 at para. 41 (citing *Strategic Resources International Inc. v. Cimetrix Solutions Inc.* (1997), 34 O.R. (3d) 416 (Gen. Div.)) (RBOA, TAB 5).

[57] *Terracon Development Ltd. v. Winnipeg (City) Assessor*, 2002 MBCA 117 at para. 10 (RBOA, TAB 10).

[58] Paquin Affidavit at para. 41 (DMR, TAB 2).

[59] Paquin Cross at q. 148 (TRANSCRIPT BRIEF, TAB A).

as required by the *Rules*.[60] Mr. Paquin acknowledged at his cross-examination that, other than providing information to the reviewer about employee headcount and an assumption that 1 in 4 class members used email to communicate with Canada Cartage about potentially relevant issues, he had no involvement in the preparation of the document reviewer's estimate.[61]

51. Inasmuch as Canada Cartage seeks to rely on the cogency of its unidentified document reviewer's estimate, this is undermined by the fact that the reviewer makes more than 30 assumptions and acknowledges that, once Canada Cartage provides further information to it, some of these assumptions could be "reduce[d]".[62] Mr. Paquin provided a critical assumption to the document reviewer: that documents would need to be collected from some 1,950 class members (based on an estimate about the frequency of class members' email communications with Canada Cartage). Mr. Paquin admitted on cross-examination, however, that his assumption in this regard "has not been tested."[63]

(ii) "Analysis"

52. Regarding Canada Cartage's evidence about the 'analysis' performed by Deloitte LLP and the conclusions it reached about the value of class members' overtime claims, this hearsay evidence was also put into the record through Mr. Paquin. Again, nowhere in his affidavit does Mr. Paquin attest that he believes the Deloitte evidence to be true, as required by the *Rules*.[64]

53. It is necessary to step back for a moment and recognize what Canada Cartage is attempting to do in relation to the evidence about Deloitte LLP. It is seeking to rely, on this

---

[60] See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 39.01(4).
[61] Paquin Cross at qq. 152-54 (TRANSCRIPT BRIEF, TAB A).
[62] Exhibit 3 to the Paquin Cross (TRANSCRIPT BRIEF, TAB B3).
[63] Paquin Cross at q. 113 (TRANSCRIPT BRIEF, TAB A).
[64] See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 39.01(4).

motion, on an analysis conducted and conclusions reached by Deloitte LLP about the value of class members' claims. It did not put the Deloitte LLP 'analysis' into evidence. It had a lay witness, Mr. Paquin, give evidence about the conclusions Deloitte LLP reached, in contravention of rules 39.01(4) and (7).[65] These conclusions, which have not been tested (and could not be tested through Mr. Paquin), were drawn from an analysis that was disclosed in the context of mediation, and marked by Canada Cartage as "For Mediation Purposes Only/Settlement Privilege".[66] No request was made of the plaintiff and the class to waive settlement privilege.[67]

54. Effectively, Canada Cartage has put privileged, untested, hearsay opinion statements of Deloitte LLP into evidence through a lay witness without disclosing its 'analysis', much less complying with the rule 53.03(2.1) requirements for an expert report. Not only is Canada Cartage's approach highly procedurally irregular, but the evidence itself is unreliable hearsay that ought not to be given any weight.

55. In an effort to ensure that this Court is provided with a balanced evidentiary perspective, Canada Cartage's unilateral disclosure caused the plaintiff and the class, in its responding affidavit evidence, to disclose the conclusions of its own expert, Cohen Hamilton Steger & Co. Specifically, the plaintiff and class retained Cohen Hamilton Steger & Co., which produced a model calculating the possible aggregate Class-wide unpaid overtime by Canada Cartage as

---

[65] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 39.01(7) ("Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03 (2.1)").

[66] Second Iannacito Affidavit at paras. 5-6, 8 (PMR – APRIL 30, TAB 1).

[67] Second Iannacito Affidavit at para. 7 (PMR – APRIL 30, TAB 1).

ranging between $34.6 million (reflecting amounts from November 2011 onwards) to $93.5 million (reflecting the entire class period).[68]

56. It is regrettable that Canada Cartage has chosen to disclose without prejudice, settlement privileged information to the Court and, in order to balance the evidentiary picture, caused the plaintiff and class to do the same. Suffice to say that there is a wide gulf between the parties and their respective experts regarding the value of class members' claims for unpaid overtime.

(iii) Conclusion on Cogency of 'Fresh' Evidence

57. The quality of Canada Cartage's evidence on the issue of proportionality leaves much to be desired. It is not cogent. Untested hearsay evidence of an anonymous document reviewer and the purported conclusions of Deloitte LLP drawn from an untested without prejudice report do not provide firm evidentiary footing to re-open and vary a Discovery Plan Order, particularly one that has already been the subject of vigorous litigation and a motion for leave to appeal.

(D) Canada Cartage's Delay in Moving to Vary and Prejudice to the Plaintiff and Class

58. This Court ought to consider the passage of time between the April 2016 Order (April 27, 2016) and Canada Cartage's motion to vary (April 20, 2018) in evaluating whether to accede to Canada Cartage's request to vary the Discovery Plan Order.

59. Canada Cartage has had over 2 years to collect and produce Terminal Level Documents. Over that period, as Mr. Paquin acknowledged on cross-examination, apart from collecting and producing 23,000 Terminal Level Documents that are Paragraph 5(e) Productions, Canada Cartage has not yet begun collecting documents from the terminal level of its operations:

---

[68] Second Iannacito Affidavit at paras. 9-10 (PMR – APRIL 30, TAB 1).

> Q: In your Affidavit, you describe 23,000 sample documents collected from the terminal level of Canada Cartage's operations; correct?
>
> A: Okay. Yeah.
>
> Q: Yes?
>
> A: Correct.
>
> Q: And apart from those 23,000 documents, you and I can agree, sir, that Canada Cartage has not yet taken any steps to collect any other documents from the terminal level of Canada Cartage?
>
> A: I can agree to that.[69]

60. Canada Cartage has been under court order to produce Terminal Level Documents since April 2016. In its own evidence, Canada Cartage acknowledges that it did not raise concerns about the collection of Terminal Level Documents with the plaintiff and the class until March 2017 – almost a year after the April 2016 Order.[70] While the parties agreed in May 2017 to voluntarily suspend adherence to the deadlines in the Discovery Plan Order while mediation was pursued, Canada Cartage has known since December 15, 2017 that the plaintiff and class had decided to press on with their case.[71] It has been clear to Canada Cartage since that time, and crystal clear since the Class Counsel's letter dated February 26, 2018, that the plaintiff and class were seeking full compliance with the Discovery Plan Order.

61. It is inescapable that Canada Cartage has delayed in bringing a motion to vary, and delayed over two years in taking any steps to collect Terminal Level Documents apart from the 23,000 Paragraph 5(e) Productions produced for mediation. This delay militates against the variation now being requested, which seeks to delete *entire categories* of Terminal Level

---

[69] Paquin Cross at qq. 47-49 (TRANSCRIPT BRIEF, TAB A).

[70] Paquin Affidavit at para. 28 (DMR, TAB 2).

[71] First Iannacito Affidavit at paras. 18, 21 (PMR – APRIL 13, TAB 2).

Documents – Paragraph 5(a) and (d) Productions – before any documents from those categories are even collected.

62. It ought to be inferred that the plaintiff and class would be prejudiced by a variation of an order that they fought for and obtained in April 2016, upheld on a motion for leave to appeal, and agreed to vary on consent in March 2017. This is particularly so as it relates to the categories of Terminal Level Documents the plaintiff has been entitled to receive since April 2016 that Canada Cartage now seeks to avoid collecting and producing altogether: Paragraph 5(a) and 5(d) Productions.

(E) Conclusion on Canada Cartage's Motion to Vary

63. In *Mehedi,* the Court of Appeal explained that, when a court is being asked to exercise its discretion and re-open an order pursuant to rule 59.06(2)(a), the "onus is on the moving party to show that *all the circumstances* "justify making an exception to the fundamental rule that final judgments are exactly that, final."[72]

64. On this motion, the plaintiff and the class submit that all of the circumstances weigh against re-opening the Discovery Plan Order on the basis of 'new' evidence about proportionality. These circumstances include that Canada Cartage appealed the April 2016 Order and made a submission about proportionality, the fact that much of its evidence on this motion could have been obtained earlier through the exercise of reasonable diligence, the lack of cogency of the purported 'new' information, and the passage of time since the April 2016 Order was made.

---

[72] *Mehedi*, *supra* note 32 at para. 13 (RBOA, TAB 1). [Emphasis added.]

65. The time has come for Canada Cartage to stop arguing about Terminal Level Documents and start complying with the Discovery Plan Order that has long-ordered their production.

PART V – ORDER SOUGHT

66. The plaintiff and the class respectfully request an order dismissing Canada Cartage's motion to vary, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of May, 2018.

Lax O'Sullivan Lisus Gottlieb LLP

_____

Eric R. Hoaken
Ian C. Matthews
Breanna Needham

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

Lawyers for the Plaintiff and the Class

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Mehedi v. 2057161 Ontario Inc.*, 2015 ONCA 670

2. *R. v. Lacasse*, 2015 SCC 64

3. *Matzelle Estate v. Father Bernard Prince Society of the Precious Blood* (1996), 1996 CarswellOnt 2733 (Gen. Div.)

4. *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59

5. *1057854 Ontario Inc. v. Kara Holdings Inc.* (2005), 2005 CarswellOnt 1130 (S.C.J.)

6. *Weston on the Humber v. Kelly*, 2016 ONSC 573 (Div. Ct.)

7. *Monarch Construction Ltd. v. Buildevco Ltd.* (1988), 1988 CarswellOnt 369 (C.A.)

8. *Luck v. Canada (Attorney General)*, 2010 ONSC 1422 (S.C.J.)

9. *People's Trust Company v. Atas*, 2018 ONSC 58 (S.C.J.)

10. *Terracon Development Ltd. v. Winnipeg (City) Assessor*, 2002 MBCA 117

SCHEDULE "B"

LEGISLATION RELIED UPON

Courts of Justice Act

RRO 1990, REGULATION 194

Rules of Civil Procedure

RULE 37 MOTIONS — JURISDICTION AND PROCEDURE

Setting Aside, Varying or Amending Orders

Motion to Set Aside or Vary

37.14 (1) A party or other person who,

(a) is affected by an order obtained on motion without notice;

(b) fails to appear on a motion through accident, mistake or insufficient notice; or

(c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

[…]

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

Contents — Motions

39.01 (4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

[…]

Expert Witness Evidence

39.01 (7) Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03 (2.1).

[…]

RULE 53 – EVIDENCE AT TRIAL

Expert Witnesses

Experts' Reports

53.03 (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

i. a description of the factual assumptions on which the opinion is based,

ii. a description of any research conducted by the expert that led him or her to form the opinion, and

iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

[…]

RULE 59 – ORDERS

Amending, Setting Aside or Varying Orders

Amending

59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.

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.

MARC-OLIVER BAROCH
Plaintiff (Respondent)

-and-

CANADA CARTAGE DIVERSIFIED GP INC. et al.
Defendants (Moving Parties)

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE RESPONDENT
(Canada Cartage Motion to Vary Discovery Plan 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
Breanna Needham LSUC#: 70078V
bneedham@counsel-toronto.com
Tel: 416 360 3017
Fax: 416 598 3730

Lawyers for the Plaintiff and the Class