CITATION: Baroch v. Canada Cartage, 2021 ONSC 7376
COURT FILE NO.: CV-13-492525-CP
DATE: 20211110

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

Proceedings under the *Class Proceedings Act 1992,* S.O. 1992, c. 6

BEFORE: Justice Edward Belobaba

COUNSEL: *Rahool P. Agarwal and Michael A. Currie* for the Plaintiff
Linda Plumpton and Sarah Whitmore for the Defendants

HEARD: November 1, 2021 via Zoom video

Class Action Settlement and Legal Fees Approval

[1] After eight years of litigation, this class action alleging unpaid overtime by the defendant trucking company has settled for $22.25 million. Class counsel ask that the Court approve the settlement, the payment of a $10,000 honorarium to the representative plaintiff and the requested legal fees based on the 30 per cent contingency agreement.

[2] At the conclusion of the hearing on November 1, 2021, I advised counsel that each of these items would be approved and I signed the draft Orders. I further advised counsel that my written reasons would follow shortly.

[3] These are the reasons.

Background

[4] The background facts are set out in the certification decision[1] and can be summarized as follows.

[5] The plaintiff, Marc-Oliver Baroch, worked as a shunter[2] with the defendant Canada Cartage from March 2006 to June 2013. Canada Cartage is a national provider of trucking, warehousing, distribution, and logistics services with about 3000 employees.[3] It is a federally-regulated employer that is subject to the *Canada Labour Code*[4] and its regulations, including the *Motor Vehicle Operators Hours of Work Regulations* ("the federal legislation").[5]

[6] The federal legislation provides three overtime eligibility thresholds that may apply on the facts herein: 8 hours a day or 40 hours a week for non-driver employees, 9 hours a day or 45 hours a week for city drivers and 60 hours a week for highway drivers.

[7] The plaintiff alleged that Canada Cartage, as a matter of policy or practice, only paid overtime if the 60-hour threshold was exceeded; that it had no written overtime policy, no directives for its human resources staff and no centralized record-keeping system; that overtime eligibility determinations were made on a case-by-case basis in disregard of applicable law; and that when Canada Cartage was directed by federal labour authorities to comply with the prescribed overtime thresholds, it unilaterally reduced the hourly wage in the affected areas so it would appear that the required overtime was being paid when it was not.

[8] The defendant joined issue on each of these points and was confidently proceeding to the scheduled summary judgment motions when the action was settled.

[9] In a detailed submission that candidly examined the strengths and weaknesses of its case, class counsel persuaded me of the following. The class faced serious challenges with respect to the core allegation of systemic liability. To succeed, it had to prove that Canada Cartage had a company-wide policy or practice of failing to pay overtime as required by law. As it turned out, the defendant did not have a company-wide policy governing overtime. This left the class having to show that the defendant had a company-wide *practice* giving rise to unpaid overtime. Given that the defendant is a national business with separate divisions, multiple departments, and thousands of employees, proving a corporate-level practice would have been difficult. Moreover, the plaintiff's fact evidence largely focused on the eastern division.

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[1] *Baroch v. Canada Cartage,* 2015 ONSC 40.

[2] Mr. Baroch drove a shunt truck, a type of semi-tractor that moved and positioned semi-trailers within the confines of a customer's yard.

[3] The three named defendants are part of the Canada Cartage group of companies. For the purposes of this litigation and in particular this motion, nothing turns on any corporate distinctions.

[4] R.S.C. 1985, c. L-2.

[5] C.R.C., c. 990.

[10] The defendant trucking company, however, operated as two separate businesses, east and west — with different payroll records and practices, dozens of different job positions with different responsibilities, multiple terminals, divisions within terminals, and job groups within divisions, each with different managers and different practices with respect to overtime. I therefore agree with class counsel that proving systemic liability across the entire business, most notably with respect to the western division, would have been difficult at best.

[11] Further, there was no evidence of time worked but not paid, that is, "off the clock" overtime. The plaintiff's case was mainly limited to class members who were paid using the wrong overtime threshold because they were treated as highway drivers instead of city drivers (60/week versus 9/45) or city drivers instead of non-drivers (9/45 versus 8/40). This created a significant risk: if the defendant was successful in persuading the court that the plaintiff's case turned on a "misclassification" of employees, the court could well conclude that the case was not suitable for class-wide determination and should be decertified.

[12] The plaintiff also faced numerous obstacles regarding the scope and content of the damages claim and disputed interpretations of the *Canada Labour Code* and the *MVOHOW Regulations.* There were genuine disputes about the interpretation about the federal legislation particularly relating to the meaning and application of "prevailing industry practice" in the definition of a "city motor vehicle operator"; whether a shunter's applicable overtime threshold is 9/45 or 8/40; and the proper approach to overtime for salaried employees who are scheduled for a regular work week above the standard hours of 40 hours.

[13] The plaintiff also had to overcome numerous limitation hurdles. Indeed, the imposition of a two-year limitation period (which was certainly plausible) could have reduced the class-wide damages to $16 million.

[14] I commended class counsel on their candid and detailed assessment of the risks of further litigation and their understandable support for the proposed settlement.

Approval of the settlement agreement

[15] For the two main reasons that follow, I accept class counsel's overall submission that the non-reversionary $22.25 million settlement is fair and reasonable and very much in the best interests of the 7400 class members covered by the class period.

[16] First, class counsel were as informed as they could be about all aspects of their case when the matter was settled. This was a late-stage settlement, achieved only weeks before the scheduled summary judgment motions. The volume of available information (about risks and rewards) was detailed and extensive. Over the course of the eight years of litigation, the defendants had produced 95,000 documents; there were multiple contested motions; multiple discoveries and cross-examinations; two appeals; two mediations; and the preparation and filing of lengthy (and expensive) expert reports dealing with the nuances of the trucking industry, complex data analysis, statistical sampling and overall damage calculations. The settlement amount was based on hard evidence (trip data and payroll records) collected by the parties and used by their experts to calculate class members' aggregate damages.

[17] The factual foundation for settlement was as complete as reasonably possible.

[18] Next, the experts' suggested range of damages. The expert reports presented damage calculations that ranged from a low of $3 million to a high of $45 million. The $22.25 million settlement falls in the middle of this range and is over $7 million more than the highest amount presented by the experts for the defendant. This alone is worthy of note.

[19] I also note two additional features that favour judicial approval: (i) the claims process is remarkably straight-forward — no class member will be required to do anything to prove their entitlement to a payment from the settlement proceeds; and (ii) the distribution of the proceeds will be speedy — class members will start receiving payments in early 2022.

[20] Based on the risk assessments as set out above and the range of damages as identified by the parties' experts, I am satisfied that the settlement amount is fair and reasonable, falls well within the required zone of reasonableness, and is in the best interests of the class. I note that the representative plaintiff strongly supports the settlement and that there were no objectors.

[21] The settlement is approved.

Approval of the honorarium

[22] As a general rule, representative plaintiffs do not receive additional compensation for simply doing their job as class representatives. It is only where they can demonstrate a level of involvement and effort that goes beyond what is normally expected and is truly extraordinary, or where there is evidence that they were financially harmed because of their role as class representative that a significant honorarium will be justified.[6]

[23] Here, I am persuaded on the evidence that a performance honorarium at a level of $10,000 is justified for Mr. Baroch in part because of his level of dedication and commitment over a long and difficult 8-year litigation and, in particular, because he unselfishly put aside his individual pursuit of a single unpaid overtime claim in favour of a much riskier class-wide claim. I also accept the evidence that without Mr. Baroch's determined participation, this class action would never have materialized

[24] The payment of the requested $10,000 honorarium is approved.

Approval of the legal fees

[25] Based on the retainer agreement, which was pre-approved in an earlier Order, class counsel ask to be paid 30 per cent of the $22.25 million settlement as the agreed-to legal fees, plus disbursements and taxes. As discussed in *Cannon,*[7] and as further refined in *Brown*,[8] this

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[6] *Aps v. Flight Centre Travel Group,* 2020 ONSC 6779, at para. 43; *Casseres v. Takeda Pharmaceutical Company*, 2021 ONSC 2846, at para. 10.

[7] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

[8] *Brown v. Canada (Attorney General),* 2018 ONSC 3429.

contingency fee amount is presumptively valid and reasonable on the evidence herein and is approved.

[26] This brings me to this last comment.

Third-party funding and legal fees

[27] Class action litigation funding is becoming increasingly common. In a growing number of cases, class counsel sensibly secure third-party funding (whether from the Class Proceedings Fund or a private sector provider) to minimize their financial exposure, particularly with regard to disbursements and adverse cost awards.

[28] Here, class counsel entered into an agreement with a private-sector litigation funder, Augusta Pool 1 Canada Limited. The latter agreed to cover a certain level of disbursements and adverse cost awards in return for a funder's fee, the repayment of the disbursements amount and 10 per cent of the overall recovery.

[29] Class counsel ask that the court approve a payment of $3,945,000 to Augusta to reimburse it for $1,500,000 for disbursements incurred, $2,250,000 representing 10% of the settlement, plus an additional $195,000 as a funder's fee. The $3.945 million will be paid not by class counsel out of their fees but out of the settlement.

[30] I do not question the value of, or need for, litigation funding agreements or LFAs, particularly in the context of class action litigation. However, I note that many if not all class action judges (myself included) have generally ignored the impact of third-party funding in their assessment of class counsel's legal fees and "risks incurred".

[31] It was only a year or so ago that I began to discuss LFAs and their relevance in the determination of reasonable legal fees. As I said in *Macdonald v. BMO Trust*[9] it should be "self-evident … that third-party funding should be a relevant factor in the 'risks incurred' analysis".[10] I added, however, that "it may be unfair to impose this new risk metric retroactively on a class action that was undoubtedly commenced under a very different expectation".[11]

[32] The same can be said here. As I advised class counsel at the hearing, their legal fees in this case were not in jeopardy and would not be adjusted because of the LFA. However, I add

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[9] *Macdonald et al v. BMO Trust Company et al,* 2021 ONSC 3726

[10] *Ibid* at para. 43. Also see Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (2018) at 165: "There is no legitimate reason why class action lawyers should be compensated as generously when the risks of litigation are borne by others. Costs of justice matter, and to this end, the presence of third-party funding is a relevant factor in the access to justice analysis."

[11] *Macdonald, supra,* note 9, at para. 44.

this commentary to draw attention to the new approach that is now mandated by the amended CPA.

[33] The amended CPA, which applies to actions commenced on or after October 1, 2020, makes clear in s. 32 (2.2) that "in considering the degree of risk assumed by the solicitor, the court shall consider":

> (c) the existence of … any … funding arrangement that affected the degree of risk assumed by the solicitor in providing representation.

[34] Judges will soon be required to consider third-party funding arrangements — whether public or private sector LFAs — in their assessment of "risks incurred" and their determination of reasonable legal fees. I have no doubt that the implications of this particular amendment are already well-understood by all class counsel.

Disposition

[35] The settlement agreement, the requested honorarium and class counsel's legal fees are approved.

[36] Orders to go as per the draft Orders signed at the conclusion of the hearing on November 1, 2021.

Signed: *Justice Edward Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective and binding from the date it is made and is enforceable without any need for entry and filing. Any party to this Judgment [Order] may submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

Date: November 10, 2021