

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
MICHAEL BOZSIK)	
)	
)	Louis Sokolov, David O’Connor, Adam
)	Dewar, Daniel Iny and Louis Century, for
)	the Plaintiff
– and –)	
)	
LIVINGSTON INTERNATIONAL INC.)	Linda Plumpton, Lisa Talbot and Sylvie
)	Rodrigue for the Defendant
)	
)	
)	
)	HEARD: September 26 & 27, 2016

2016 ONSC 7168 (CanLII)

REASONS FOR JUDGMENT

GRAY J.

[1] This is yet another “unpaid overtime” class proceeding. While the plaintiff claims that it is a “prototypical” overtime case, and should be certified as such, it should be clear by now that there is no such thing as a prototypical case of this sort. Each case must be determined on its own facts, and, in particular, can only be certified if there are sufficient common issues that would justify certification.

[2] For the reasons that follow, I grant certification.

Background

[3] The defendant, Livingston International Inc., started from fairly small roots in 1945 as an export packing and packaging company. Over the years, it grew into a large enterprise. It now operates globally in several countries in North America, Europe and Asia. It has approximately 3,200 employees worldwide.

[4] In Canada, Livingston operates four distinct lines of business out of 41 locations in 8 provinces. Those lines of business are:

- a) Canadian Brokerage;
- b) Trade Consulting;
- c) International Freight Forwarding;
- d) Business Process Services.

[5] The largest line of business is Canadian Brokerage. It is primarily involved in securing the entry of goods into Canada on behalf of Livingston's clients. Most of the evidence tendered by the plaintiff is in relation to the Canadian Brokerage business. I will have more to say about that later.

[6] Livingston says its vision is to be recognized as the premier customs and compliance services company. It has identified certain features that it pursues in this respect, including client focus, decisiveness, positive attitude, financial responsibility, and balance, as core values.

[7] The plaintiff, Mr. Bozsik, is the proposed representative plaintiff. He was an import analyst, who worked for Livingston from 2006 until he was terminated in 2012.

[8] The proposed class, which was amended shortly before the motion for certification, is as follows:

All current or former non-management employees of the defendant in its offices across Canada, who are or were employed, at any time on or after August 15, 2017, in administrative, clerical, technical and supervisory job classifications or otherwise subject to the defendant's overtime policy or policies.

[9] Livingston estimates that slightly more than 1000 current employees may fall within the scope of the proposed class definition. Livingston says this includes employees in approximately 79 different job positions within the various lines of business. Livingston says the tasks and work experiences of these people vary significantly. It says those differences affect the likelihood that an employee may be asked to work overtime hours, and the manner in which the time is recorded.

[10] As noted, Livingston operates four lines of business. Livingston says the employees in each line of business provide very different services. Some of those differences are significant. In some cases, services are offered 24 hours per day, seven days per week, as is the case in Canadian Brokerage. Most other services do not, and operate instead within regular business hours, five days per week.

[11] I will briefly summarize Livingston's evidence as it relates to each line of business.

[12] Canadian Brokerage Services involves clearing goods through customs for importers. Employees within Canadian Brokerage prepare the required documents and/or electronic submissions in order to clear goods for import into Canada. They also calculate the payment of taxes, duties and excise taxes, and facilitate communications between Canadian Border Services Agency ("CBSA") and importers.

[13] The customs clearing service is provided around the clock, seven days per week. Shipments arrive at borders at all hours of the day, and there are legislative timelines by which a shipment must be cleared and documentation finalized. If those timelines are not met, penalties may be imposed upon the importer.

[14] Livingston says the proposed class definition includes 27 different job positions within Canadian Brokerage. The positions differ with respect to the activities, knowledge, skills and responsibilities involved, and those differences affect the likelihood that a given employee may be required to work overtime.

[15] The Trade Consulting business is mainly comprised of project-based work for clients. The company assists clients in maintaining and establishing trade compliance programs, establishing internal controls for international trade, meeting audit requirements, recovering duties and taxes, and managing border security.

[16] Livingston says the proposed class definition comprises approximately 14 different job positions in Trade Consulting, each with different purposes, activities and responsibilities. Livingston says these differences impact the likelihood that an employee may be required to work overtime.

[17] Livingston's International Freight Forwarding line of business provides logistical services to facilitate the shipment of good internationally. Livingston says the work consists mainly of data-entry and communication with clients, overseas agents and carriers. Livingston says the nature of this work is such that there is no "chronic" need for overtime.

[18] Livingston says the proposed class definition includes three different job categories within International Freight Forwarding, each with unique responsibilities and duties relevant to the likelihood that a given employee will be required to work overtime.

[19] The Business Process Services line of business offers clients fully outsourced business processes, including customer call centres, program management, information management, and electronic records management.

[20] Livingston says the proposed class definition includes six different job positions within Business Process Services, each with a unique purpose and involving different activities, skills, knowledge and responsibilities, which impact the extent to which overtime may be required. Livingston says that in general, there is little need for overtime.

[21] Clearly, the largest line of business is Canadian Brokerage. While the numbers are not exact, it appears that of the slightly more than 1000 current employees in the proposed class, over 600 are in Canadian Brokerage.

[22] Upon hiring, all non-management employees are required to sign a standard form contract of employment. It is somewhat lengthy, so I will not reproduce it. It includes the following provisions:

Hours of work

Your regular hours of work are 37.5 hours per week. Your work schedule will be communicated to you.

Many Livingston locations operate seven days per week and 24 hours per day. In order to meet any changes in operational requirements and fluctuations in workflow, your normal regular days and hours of work are subject to change with reasonable notice. For the purpose of this agreement, reasonable notice will not be less than one month.

Company Policies

You agree to abide by policies, rules and procedures which Livingston currently has in force and may amended from time to time. In particular, you agree to be bound by and to execute the Code of Conduct attached hereto, and to comply with any subsequent changes or additions thereto, which Livingston reserves the right to adopt from time to time.

Employment with Livingston is always contingent upon sustaining a good level of job performance as well as maintaining conduct in accordance with all corporate standards and policies.

[23] The Code of Conduct, attached to the standard form contract of employment, is also lengthy and I will not reproduce it. It includes the following provision:

Employees, officers, directors, contractors and consultants will strive to personify Livingston's corporate values, known as the Livingston Compass. These values are client-focused, respect, decisiveness, financial responsibility, positive attitude and balance.

[24] All non-management employees of Livingston are subject to a written Overtime Policy. Because of its importance to this case, I will reproduce it in full. It reads as follows:

Scope

This policy applies to all employees who are covered by the overtime provisions of the applicable employment standards legislation. Generally, it applies to non-management employees, who are in administrative/clerical and technical/supervisory job classifications and work a regular seven-and-a-half or eight-hour day.

Where an employee's work schedule differs from the standard work day or work week, specific overtime practices will be applied based on legislative requirements.

Policy statement

Overtime is to be avoided as much as possible and must be pre-approved by the manager. The company will pay overtime at the rate of one-and-a-half times the employee's regular salary for authorized overtime in excess of eight hours per day or the rate specified by the applicable employment standards legislation, whichever is greater. Preauthorized overtime hours worked in excess of an employee's standard work day but which are not in excess of eight hours will be compensated at straight time.

Payment for overtime hours worked outside of an employee's regularly scheduled work week, for example Saturday or Sunday, will be at the rate of one and a half times regular salary for authorized overtime in excess of 40 hours per week. In this case, all preauthorized overtime hours up to 40 hours per week will be

compensated at straight time or the rate specified by the applicable employment standards legislation, whichever is greater.

Subject to operational needs and any relevant legislation, overtime will be banked and compensated by a mutually agreed time-off. This time in lieu must be taken within three months. In no case may an employee bank more than 60 hours of overtime at any given time. Overtime is banked at the same rate at which it would have otherwise been paid.

Employees will not be paid overtime for business travel outside of regular work hours except in accordance with the applicable employment standards legislation.

[Emphasis added]

[25] Both parties have filed extensive evidence with respect to the overtime practices at Livingston. The evidence diverges considerably. I will simplify it as best I can.

[26] The plaintiff, Mr. Bozsik, has filed his own affidavit as well as the affidavits of Lyle Losey; June Jayetilleke; Jackie Alli; Deborah Hewitt; and Rory McGovern. Mr. Bozsik, Ms. Alli and Mr. Losey filed reply affidavits to some of the evidence filed by Livingston. The plaintiff also filed the affidavit of a proposed expert, Stefan Boedeker, and a reply affidavit of Mr. Boedeker.

[27] Livingston objected to the affidavit of Rory McGovern, and I will have more to say about that later.

[28] The defendant filed the affidavits of Stacy Brown; Wendy Archambault; Tracy Mallen; Gary Reid; Cora Di Pietro; Shawn Kloostra; Connie Lucas; Keith Rodgers; Louise Ross; and John White.

[29] The deponents were cross-examined.

[30] As noted earlier, Mr. Bozsik worked in Canadian Brokerage as an import analyst. He says that throughout his employment with Livingston he regularly worked in excess of the regular daily hours of work for which he was paid, and was required to work unpaid overtime hours throughout his employment.

[31] Mr. Bozsik says that the nature of the Customs Brokerage business is such that his duties, and the duties of employees with whom he worked, were frequently time sensitive and

performed on demand. He says he was required to do whatever was necessary to ensure that clients' shipments were not delayed even if that meant working overtime for which he was not paid. He says that workloads were high and unpredictable, making it difficult to predict overtime demands in advance. He says that Livingston's overtime policy required that overtime be authorized in advance. Managers almost always refused prior authorization and overtime was thus not compensated.

[32] Mr. Bozsik estimates that he worked approximately seven to ten hours of unpaid overtime per week.

[33] Mr. Bozsik refers to material on Livingston's website, in which it is asserted that Livingston's policy is to ensure that importers and exporters are not exposed to the risk of delays and penalties. Livingston's business model prioritizes around-the-clock, top-notch customer service. He says a number of conditions lead to unpaid overtime, including:

- a) Livingston's business model of around-the-clock customer service;
- b) Cost-cutting measures and chronic staffing shortages;
- c) The industry trend towards "just in time delivery" of goods;
- d) Limited capacity to deal with excess volume;
- e) Technical and other computer system problems and outages;
- f) Backlogs of transactions;
- g) The need to assist other locations that may be behind schedule;
- h) Seasonal changes in volume;
- i) Constant interruptions;
- j) Training;
- k) Travel;
- l) Accounting issues; and
- m) The requirement that employees wait for confirmation (between 15 minutes and one or more hours) from CBSA that shipments have cleared customs.

[34] Mr. Bozsik says that throughout his employment, he was dissuaded from reporting overtime hours or requesting authorization to work overtime in advance. He says the overtime

pressures were faced by various non-management staff, including release agents, traffic agents, expenditure processing clerks, import permit specialists, runners, and user support and IT staff.

[35] Mr. Bozsik deposes that a chronic problem was the releasing of shipments crossing the border. This became known as “releasing the queue”. There was always a backlog, and employees were routinely pressured into assisting. Mr. Bozsik identified many emails that put pressure on employees to assist. This went on for many years. As a result of this pressure, employees, including Mr. Bozsik, worked untold hours of overtime, usually without being compensated.

[36] Mr. Bozsik deposes that when he and others were required to assist with the queue, it meant that other regularly-scheduled duties could not be completed in time. This acted as further pressure to work overtime hours, generally not compensated.

[37] Mr. Bozsik deposes that the problem was nationwide in scope. Often, requests came from other locations to assist with the queue. Again, this added to the pressure to work overtime, generally on an uncompensated basis.

[38] Mr. Bozsik deposes that computer and other technical problems that frequently arose also contributed to the need to work overtime.

[39] Mr. Bozsik deposes that he and others were often required to work on statutory holidays. In such circumstances, overtime was to be paid through time off in lieu, but it was often impossible to schedule time off in lieu, and thus overtime would not be compensated at anything other than straight time.

[40] Mr. Bozsik points out that Livingston’s overtime policy requires that overtime be approved in advance. In most case, managers would not approve overtime in advance, although it was expected that overtime be worked nevertheless. Mr. Bozsik points out that in a few cases, managers actually confirmed in emails that overtime could not be approved if it meant that payment was required, or that in rare cases paid overtime would be approved. As examples, he identifies the following:

- a) An email from Kay Robinson dated July 9, 2008, in which she states “You can work the overtime with time in lieu. You know I can’t get authorization for paid time.”
- b) An email from Mike Winter dated July 8, 2011, in which he states “I have spoken to Shawn and he has approved (in this instance only) paid overtime for anyone who can cover these shifts. Please let me know if you can help!”

[41] Lyle Losey worked for Livingston between 2010 and 2014 as an import analyst. Prior to his employment with Livingston, he was employed by a company that was ultimately acquired by Livingston.

[42] Mr. Losey deposes that overtime pay was, with few exceptions, not available. In some special circumstances, lieu time was available to compensate, but scheduling issues made it impossible to utilize all of the accumulated lieu time.

[43] Mr. Losey deposes that around the year 2009 he began to work extra hours to complete his work. He submitted timesheets indicating the extra hours worked, but his managers never commented on his recording his extra time, and he was never paid for the time.

[44] June Jayetilleke started work with Livingston in 1988. She was an import permit specialist. Her primary responsibility was liaising with federal government officials to obtain import permits for clients of Livingston.

[45] Ms. Jayetilleke deposes that in 2000 she relocated to the Airport Road office in Mississauga. She says she worked a lot of overtime hours and would rarely be compensated for it. When she complained, she was told that everyone works overtime and she should not complain.

[46] In 2003, she worked at the West Mall office and continued there until she resigned on December 21, 2012. She says that while there, she filled out timesheets. When she recorded overtime hours she worked, her direct supervisor, Heather Bunyan, told her to remove the overtime hours because she would not be compensated for them. After that incident, she felt there was no point in recording overtime hours.

[47] While at West Mall, Ms. Jayetilleke was an accounts payable clerk. Her workload was such that it was difficult to leave at the end of the regular shift. She says that from 2008 until 2012, the director of her office was John Field, the manager of her department was Ruth Harrison, and her direct supervisor was Heather Bunyan.

[48] Ms. Jayetilleke deposes that she would often work numerous hours of overtime and not be compensated at all for them. She says management told them that overtime was not available, so she did not record any overtime hours. She says she and her colleagues commented and complained frequently to John, Ruth and Heather regarding the amount of overtime they were putting in and inconsistent compensation they were receiving. John, Ruth and Heather would often simply tell them they were getting banked time. The problem was that they would only get banked time if the overtime was approved. Much of the time, overtime was not approved in advance.

[49] Ms. Jayetilleke says that around 2009, Ruth began having daily morning meetings. During some of the meetings, she and her colleagues would complain that they were not being paid for all of the overtime. She says Ruth would tell them that Livingston did not pay overtime. She said she also complained to Heather, whose response was that Livingston does not pay overtime but that they still needed to get the work done.

[50] Ms. Jayetilleke deposes that in early 2011, Mr. Field told employees at office meetings that there would be no more compensation for overtime including payment of money or time or lieu.

[51] Jackie Alli worked as an expenditure processing clerk between 1999 and 2012.

[52] Prior to her employment with Livingston, she worked for Blaiklock Inc., which was ultimately acquired by Livingston. In about 2000, she mentioned to John Field that she had been paid overtime at Blaiklock and wanted to be paid for overtime hours at Livingston. She deposes that Mr. Field told her “Livingston does not pay overtime.”

[53] Ms. Alli deposes that after 2004, she worked a lot of overtime hours for which she received no compensation. When she complained about this, Livingston management (including

Lorraine Miller) told her that Livingston does not like to pay overtime and that she should not ask for compensation for overtime anymore.

[54] Ms. Alli deposes that after 2006, there was an increase in her daily workload. She was often assigned more work than she could complete in one day. The situation got worse starting in 2008 when a number of workers were fired due to the financial crisis. Livingston did not hire enough people to replace those that had been let go. John Field, and other managers like Heather Bunion and Ruth Harrison would tell employees that Livingston's clients were relying on them to complete their work, that their work was "time-sensitive" and that they "had to get the job done". Management frequently told them that they had to complete their assigned work during the regular work day. However this was almost always impossible.

[55] Ms. Alli deposes that Livingston required its employees to record the hours they worked on timesheets. However, managers, including John Field, Heather Bunion and Ruth Harrison would tell her not to record any overtime hours or claim any compensation for the overtime hours she had worked. Heather would re-do the timesheets to exclude the overtime hours she recorded. She would then direct her to sign the revised timesheet before she gave it to John. Later on, Heather would just tell her to remove the overtime hours herself. The reason given was that overtime was not available.

[56] Ms. Alli deposes that even when they were supposedly accumulating banked time, employees were rarely allowed to take it and they would lose any unused banked time at the end of the year.

[57] Deborah Hewitt worked for Livingston from March 1995 to November 2014. From 1995 to 1997 she worked as an entry analyst in Montreal. She was primarily responsible for releasing shipments from customs.

[58] After 1997, she worked as an import analyst at the Ottawa office.

[59] Ms. Hewitt deposes that there were numerous occasions when she was not compensated for overtime hours she worked, but there were some occasions when she was. Management would sometimes inform employees that overtime compensation would be available for a

specific period. However, management would not explain why overtime compensation was only available for this specified period. Her understanding was that employees would only receive overtime compensation if there was prior approval. If she requested compensation after working overtime, she was told that compensation was not available because there was no prior approval and she had “volunteered” by choosing to work the additional hours. She rarely made formal requests for overtime compensation because she knew it would not get approved.

[60] Ms. Hewitt deposes that on July 6, 2000, she received a personal letter from Peter Luit, President and Chief Executive Officer of Livingston. Included in the letter was the following:

I am writing to personally thank you for all the extra effort you have been devoting to the merger of Blaiklock and Livingston International. People like you demonstrate to the entire company the amazing potential of Livingston International.

Working evenings and weekends has proven critical to our ability to change processes and systems while minimizing disruption to our clients. We know this is placing stress on you as well as the family and friends who take up the slack at home when long hours are required.

[61] Rory McGovern is a lawyer with Sotos LLP, one of the law firms representing the plaintiff. In his affidavit, he relates certain conversations he had with an unnamed manager at Livingston and a number of unnamed employees. In substance, the evidence is to the effect that Livingston expected, and expects, overtime hours to be put in, but rarely pays for them. As noted earlier, this affidavit is objected to by Livingston. I will deal with the objection later.

[62] Stefan Boedeker is a statistician and an economist. His work focuses on the application of economic, statistical, and financial models. He has extensive experience applying economic and statistical theories to employment related matters. He has been retained in approximately 150 wage and hour class action cases, to calculate exposure to or quantify damages. He has reviewed the statement of claim and the affidavits filed by the plaintiff.

[63] Mr. Boedeker notes that Livingston appears to maintain a number of systematic methods of keeping track of individual employees arriving and leaving the workplace. There appears to be a key card system and two computer systems referred to “Citrix” and “Locus”. In

addition there is a general query ledger (the “GQL”) that can be accessed by managers. There is mention of an accounts payable system called Coda that tracks log ins and log outs by users.

[64] Mr. Boedeker deposes that in his experience, systems like Locus and Citrix are part of so-called enterprise resource planning systems. Times of log on and log off are recorded automatically and stored electronically. Terminals where individuals log on or off typically include a personal identification number or code. He deposes that log on and log off times are reliable approximations for the time worked because the nature of the work requires employees to access a computer system to start their work.

[65] Mr. Boedeker believes that an analysis can be conducted of the data available from Livingston’s systems to calculate or at least approximate overtime hours worked. Alternatively, statistical sampling can be done.

[66] As noted earlier, the deponents of the affidavits were cross-examined. I will not describe the cross-examinations, unless some particular point is made that is necessary to discuss.

[67] I will now review, briefly, the affidavits filed on behalf of the defendant.

[68] Stacy Brown is the Chief Human Resources Officer of Livingston International, Inc., an indirect wholly-owned subsidiary of the defendant. She is responsible for implementing and maintaining best practice human resource strategies, policies and actions throughout the defendant’s operations worldwide.

[69] In her affidavit, Ms. Brown describes the nature of each of Livingston’s lines of business. She also states that back-office functions such as human resources, marketing, sales, finance, legal and information technology, support all lines of business.

[70] Ms. Brown notes that some services, particularly customs clearance services, are offered around the clock, 24 hours per day, seven days a week. Most other services are provided within normal business hours, five days a week. Many of Livingston’s offices consist of

employees working in different lines of business within the same office, but doing very different jobs and tasks within and across lines of business.

[71] Ms. Brown, in her affidavit, discusses Livingston's overtime policy. She states that the pre-approval obligation contained in the policy is included to allow Livingston to manage its workforce, allocate resources appropriately, and encourage employees to maintain work/life balance. Just as employees cannot assign themselves regularly scheduled hours of work, they also cannot assign themselves overtime hours. She states, however, "The overtime policy does not, however, prohibit the payment of overtime in circumstances where employees are entitled to overtime in accordance with legislation but have not obtained pre-approval. Nor is there any policy or practice at Livingston that limits such compensation."

[72] Ms. Brown also states "The pre-approval process is informal and varies as between managers. There are no forms to be filled out. I am not aware of any circumstances in which overtime has been denied because pre-approval was not obtained."

[73] In her affidavit, Ms. Brown notes that the proposed class definition might include approximately 79 different current job positions, across different lines of business and numerous back-office functions. There are very different work demands and cultures involving different activities and different responsibilities, requiring different knowledge and skills, involving different types of interactions with clients and other staff members. The differences affect the likelihood that a given employee might be asked to work overtime hours, and the manner in which that time is recorded.

[74] Ms. Brown notes that Mr. Bozsik and three of the other affiants all worked in Canadian Brokerage. He and two of the affiants worked in the same job position as import analysts. The other two affiants worked in the Accounts Payable department. Ms. Brown notes that none of the affiants worked in Trade Consulting; International Freight Forwarding; or Business Process Services.

[75] Ms. Brown notes that the class definition includes many people who have not worked any overtime; those who have been fully compensated for overtime hours; and any people whose claim would be barred by an applicable limitation period. These can only be determined on an

individual, case-by-case basis and would require a determination of the employee's hours worked and compensation received.

[76] Ms. Brown notes that an analysis of Livingston's payroll records reveals that in the period from October 1, 2014 to January 3, 2016, Livingston paid \$955,094.44 in overtime compensation to individuals who performed in job positions that might be included in the proposed class definition. She says 607 individuals out of a total of approximately 1077 individuals who performed in job positions that might be included the proposed class definition (or 56 per cent) received some overtime pay. The total number of overtime hours for which payment was made was 34,858.7 hours.

[77] Ms. Brown states that some employees fill out daily timesheets or submit excel spreadsheets tracking hours, but many do not. This is because the vast majority of proposed class members work standard business hours. The practices with respect to the recording of deviations from standard hours worked will vary, based on job position, job location, and the individual preferences and practices of the employee's respective managers.

[78] Ms. Brown states that an electronic time management system, Workflow, is used. It is used to track exceptions to standard hours including vacation time, accrued and taken, shift changes, employee absences, sick days, bereavement days and, for some employees, overtime hours. However, not all lines of business, departments and manager use Workflow as an overtime tracking tool.

[79] Ms. Brown states that there is no mechanism or setting in Workflow which allows overtime hours that are banked to expire or be forfeited, including at the end of the year. Nor is there a policy or practice to manually erase such hours at the end of a year.

[80] Ms. Brown notes that Mr. Bozsik describes his own particular experience in only one of Livingston's distinct lines of business, and in one of 41 offices in Canada. She says Mr. Bozsik cannot realistically describe the situation in all workplaces and in all different job positions.

[81] Ms. Brown notes that Ms. Alli, during her employment with Livingston, struggled with punctuality and absenteeism. This was raised with Ms. Alli as part of her annual performance

review. Eventually, her employment was terminated on October 16, 2012. She was given a retiring allowance in the amount of \$30,000 in exchange for which she provided a complete release of all claims. For her final pay period, she received payment for 12.5 hours of overtime at a rate of one and a half times regular salary.

[82] Ms. Brown notes that Ms. Jayetilleke retired in December, 2012, and for her final pay period she was paid for nine hours of overtime at a rate of one and a half times regular salary.

[83] Wendy Archambault is the Senior Vice-President, Canadian Brokerage Services. She has been employed with Livingston since July 1980.

[84] Ms. Archambault deposes that it is very important that Livingston avoid the imposition of penalties upon its clients.

[85] Ms. Archambault deposes that customs clearing services are provided around the clock. She says employees pitch in for one another to service clients.

[86] Ms. Archambault says the proposed class definition might encompass 27 different current job positions performed by approximately 685 people within Canadian Brokerage. Each of the positions has a different purpose, involves different activities and different responsibilities, requiring different knowledge and skills, involving different types of interactions with clients and other staff members, and has its own complexities and challenges. She says the work of an import analyst is vastly different from the work of other positions within Canadian Brokerage. She says the overtime pressures that Mr. Bozsik describes have no application to many of the positions within Canadian Brokerage. She says there is no “chronic” need for overtime across Canadian Brokerage. She says Livingston staffs to meet demand within employees’ standard hours.

[87] Ms. Archambault says there are no systemic practices of which she is aware, or policy, to require employees to work overtime without providing overtime pay or banked time in lieu of pay; to dissuade employees from claiming or otherwise claiming compensation for overtime worked; to dissuade employees from reporting overtime hours worked or requesting

authorization to work overtime in advance or to deny approval of overtime worked, even after the fact.

[88] Tracy Mallen is the Director, Operations for Livingston. She leads Livingston's Business Process Services line of business for Canada. She joined Livingston in October, 1994.

[89] Ms. Mallen says Business Process Services is a line of business through which Livingston offers clients fully outsourced business processes. It is composed of five different forms of outsourced services: customer call centre services; program management services; information management; carrier eManifest services; and electronic records management.

[90] Ms. Mallen says the proposed class definition might encompass six different current job positions performed by approximately 78 employees within Business Process Services. Each position is different.

[91] Ms. Mallen says the nature of the Business Process Services line of business is such that there is no chronic need for overtime. In fact, there is little need for overtime at all. When overtime is needed, it is idiosyncratic and related to work volume or employee absenteeism.

[92] Ms. Mallen deposes that she has no recollection of ever having any discussion at the management level or otherwise of any company-wide policy or practice to require employees to work unpaid overtime, nor does she have any knowledge of such a policy or practice. She says she has never discouraged or denied prior authorization for overtime that was required or permitted, nor has she ever denied approval for payment of overtime when such time has been required or permitted.

[93] Gary Reid is the Vice-President of International Freight Forwarding. He has held this position since Livingston acquired this service capability through its acquisition of Blaiklock Inc. in 1999.

[94] Mr. Reid deposes that Livingston's International Freight Forwarding business involves organizing the logistics of the shipment of goods internationally, usually from the manufacturer to a market, customer or final point of distribution. He says the nature of the work in

International Freight Forwarding is composed mainly of data entry and communications with clients, overseas agents and carriers.

[95] Mr. Reid deposes that the proposed class definition might encompass at least three different non-management job positions within International Freight Forwarding. There are currently 56 employees in those positions. Each position is different.

[96] Mr. Reid says the nature of the International Freight Forwarding line of business is such that there is no chronic need for overtime given the nature of the work. He says they typically have ample advance notice of client expectations and can normally organize themselves to meet deadlines within standard hours. When overtime is needed, it is typically to address transactional volume or to cover for other employees' vacations or illnesses.

[97] Mr. Reid says deviations to standard hours are entered into Workflow. Workflow entries then get processed into the payroll system. He is not aware of any employee in International Freight Forwarding who banks time in lieu of receiving overtime pay.

[98] Cora Di Pietro is the Vice-President and General Manager, Trade Consulting. She has held this position since January 2006. She says deadlines that employees face are most often set at the outset of a client's project. As a result, employees often are well aware of their deadlines for several weeks in advance of the deadlines and have the ability to discuss and negotiate those deadlines with clients.

[99] Ms. Di Pietro deposes that the proposed class definition might encompass 14 different current job positions currently performed by 42 employees within Trade Consulting. She says each position is different.

[100] Ms. Di Pietro deposes that the nature of the Trade Consulting line of business is such that there is no chronic need for overtime. When a client-driven deadline does give rise to a need for overtime, it is highly idiosyncratic.

[101] Ms. Di Pietro says that most Trade Consulting Services (approximately 60 per cent) are charged out to clients based on billable hours docketed to a client file.

[102] Shawn Kloostra is the Senior Director, Service Delivery for Canadian Brokerage. He has been in that position since October, 2014. He joined Livingston in 1999, when Blaiklock Inc. was acquired by Livingston.

[103] When he served as Director, Service Delivery, Mr. Kloostra was responsible for management of Mr. Bozsik's client service team for almost the entire time that Mr. Bozsik was employed with Livingston, between February 2007 until Mr. Bozsik's termination of employment in 2012.

[104] Mr. Kloostra says he has always been aware that Livingston's overtime policy provided for overtime compensation for employees who worked beyond 40 hours per week or eight hours per day. Any employee that is required or permitted to work beyond those hours is entitled to be paid or to take time in lieu, if the employee agrees, at the rate of time and a half. He is not aware of any manager denying an employee's request for overtime compensation for hours they were permitted or required to work.

[105] Mr. Kloostra says issues regarding Mr. Bozsik's job performance started to be raised in and around 2011. He assigned Connie Lucas the responsibility of managing Mr. Bozsik's team with a view to improving the team's performance. Ms. Lucas made him aware of several issues regarding Mr. Bozsik's job performance. He was not able to improve his performance nor was he able to manage his workload. Eventually, Mr. Kloostra was involved in determining that Mr. Bozsik's employment should be terminated.

[106] Connie Lucas is a Manager, Service Delivery and works out of the Airport Road National Service Centre. She joined Livingston in 1999 following Livingston's acquisition of Blaiklock Inc. She was Mr. Bozsik's manager in 2012 at the time when Mr. Bozsik was terminated.

[107] Ms. Lucas confirms that the customs brokerage industry is a 24/7 industry. The industry operates that way to provide timely and efficient client service. She says the team members do not work "around-the-clock" nor do they work "on demand". As far as she is aware, there has never been a policy or practice in Canadian Brokerage that relies on unpaid overtime from team members in order to meet client service obligations.

[108] Ms. Lucas says she seeks to staff teams to avoid the need for overtime work. However, there are circumstances where overtime hours may be necessary. She says team members may occasionally work beyond their regularly scheduled hours without obtaining pre-approval. In those cases, team members advise her of the overtime hours they worked after the fact, and she ensures that these employees are provided with compensation for their time.

[109] Ms. Lucas says that in early 2012, she was warned by Mike Winter that she might run into difficulty with Mr. Bozsik as he could be a challenge to work with and had difficulty following directions from his supervisors. She says that almost as soon as she took over management of Mr. Bozsik's team, she witnessed the type of behaviour by Mr. Bozsik that Mr. Winter had cautioned her about.

[110] Ms. Lucas says she attempted to provide Mr. Bozsik with training, but he took issue with this and told her the systems were "crap".

[111] Ms. Lucas says Mr. Bozsik's deviations from standard hours were to be recorded in Workflow. Based on Mr. Bozsik's entries in Workflow from 2009 to 2012, Mr. Bozsik did not work any overtime hours apart from a few days where he worked on statutory holidays. On those occasions he was provided with time off in lieu at the rate of time and a half. Ms. Lucas' own recollection is that Mr. Bozsik almost invariably worked his standard work hours.

[112] Ms. Lucas expresses a number of points of disagreement with Mr. Bozsik's affidavit.

[113] Keith Rodgers is a Manager, Service Delivery for Livingston. He began working for Livingston in 1990. Mr. Rodgers supervised Deborah Hewitt from 1997 to 2014.

[114] Mr. Rodgers deposes that to the extent that Ms. Hewitt struggled to complete her tasks within her regularly scheduled hours of work, this was primarily a consequence of Ms. Hewitt's unauthorized absences during her regularly schedule hours of work. This was addressed with Ms. Hewitt on multiple occasions. It was also raised during her performance reviews.

[115] Mr. Rodgers deposes that to the best of his recollection, Ms. Hewitt never approached him with staffing or overtime-related concerns.

[116] Louise Ross is a Manager, Service Delivery in Livingston's Calgary office. She first worked for Livingston in or around 1991, for four years. She then left and returned to Livingston in 2009. She supervised Lyle Losey from 2009 to January 2011, and then from January 2013 until Mr. Losey resigned in 2014.

[117] Ms. Ross deposes that although Livingston's pre-approval of overtime requirement is important, it has not been rigidly applied in her experience. She says that in the rare case of an employee having to work overtime without pre-approval, she has brought the issue to the attention of her director, and in her experience, Livingston has compensated the employee for that time. More commonly, employees anticipate the need for overtime work and have no difficulty bringing that need to her attention.

[118] Ms. Ross deposes that during the period in which she supervised Mr. Losey, Mr. Losey's attitude towards the work was negative. He seemed to believe that the work was beneath him and that he should be doing something else. His attitude was at odds with the team-focused culture promoted by Livingston.

[119] Ms. Ross deposes that the company tries to schedule employees' shifts to accommodate the time-sensitive nature of the industry. If an employee is unable to complete a time-sensitive task at the end of his or her shift, there are other employees who can assist. For this reason, there was never a need for employees to stay until all of the work was completed.

[120] Ms. Ross deposes that Mr. Losey did not adapt to Livingston's culture. He was very much focused on his own workload. Mr. Losey did not raise with her or the team the need for assistance. She would have expected Mr. Losey to do so if he was in fact working overtime, since she encouraged team members to ask each other for help.

[121] Ms. Ross deposes that she never communicated to Mr. Losey that he would not be compensated for overtime work. On a number of occasions, he worked on statutory holidays and in fact he utilized all of his banked hours.

[122] Ms. Ross deposes that she does not recall seeing any timesheets on which Mr. Losey recorded overtime hours. She does not recall receiving emails from Mr. Losey indicating he was

working overtime on weekends for which he was not being paid. She can recall very few instances in which Mr. Losey advised her of the need to work overtime.

[123] John White is the Vice-President, IT, Canadian and Corporate Systems. He has served in that position since January 2013. He joined Livingston in January 2006.

[124] Mr. White describes a number of electronic systems, software programs and technologies. In particular, he describes Locus; Coda; CASS; GQL; Citrix; and the pass card system.

[125] Locus does not record employees' hours of work, and does not create data that is relied on or used by the company as a record for employees' hours of work.

[126] Coda is not used to track employees' hours of work.

[127] CASS is a third-party, Cloud-based software. It is not used to record employees' hours of work.

[128] GQL is not used to record employees' hours of work.

[129] Citrix is a third-party software product. While it records log on and log off times for employees who make use of the system, these records are not used at Livingston as records of employees' hours of work.

[130] Some, but not all, of Livingston's offices in Canada require electronic pass card access. There is no requirement that each employee use his or her own pass card to gain access to an office. For example, a large group of employees can enter an office all at the same time by holding the door open after a single employee has used his or her pass card to open the door.

[131] Reply affidavits were filed by Mr. Bozsik; Ms. Alli; Mr. Losey; and Mr. Boedeker.

[132] Mr. Bozsik disputes the evidence given by Wendy Archambault, Shawn Kloostra and Connie Lucas that is possible to predict the need for overtime hours in advance, and to staff accordingly. Mr. Bozsik says the nature of Livingston's work is inherently unpredictable, time-sensitive and responsive to clients' needs as they arise. He disagrees that team members

“occasionally” worked beyond their regularly scheduled hours without obtaining pre-approval. He says members of the proposed class worked overtime without obtaining pre-approval routinely. Employees typically did not request pre-approval because they knew it would not be granted.

[133] Mr. Bozsik deposes that the Workflow document identified by Ms. Lucas includes only a tiny fraction of the overtime hours he worked. It does not include any of the overtime hours he routinely worked before his shift, during breaks and lunch, and after his shift. In fact, the Workflow document appears to indicate that Mr. Bozsik took time off on January 9, 2012 and April 16 – 19, 2012. In fact, he worked on those days.

[134] Mr. Bozsik disagrees with the proposition that there is no chronic need for overtime in Livingston’s divisions outside Canadian Brokerage, specifically Freight Forwarding, Trade Consulting and Business Process Services. He says that company-wide cost-cutting measures and chronic understaffing affected all divisions, not just Canadian Brokerage. He says all employees are subject to the overtime policy which, among other things, restricts compensation for overtime to “authorized overtime”, requiring management pre-approval. He says he routinely had contact with other branches and divisions of Livingston, and through his dealings with other employees it became clear that they faced many of the same pressures as he did.

[135] In her reply affidavit, Ms. Alli disagrees with the complaints about her punctuality and absenteeism. She says that with the exception of one occasion to attend a funeral, she was only absent when she was sick. She says the overtime pay she received was only for a small fraction of the overtime hours she worked in 2012. She worked overtime during 2012, and throughout her entire career at Livingston.

[136] Mr. Losey, in his reply affidavit, disagrees with the complaints about his performance and attitude. He says he understood that overtime pay was unavailable. That was his understanding of Livingston’s overtime policy because that is what they were consistently told by managers. While he was paid for some hours of overtime between 2008 and 2013 this did not compensate him for all of the overtime hours he worked over his career at Livingston.

[137] In his reply affidavit, Mr. Boedeker comments on the affidavit of John White.

[138] Mr. Boedeker deposes that in his opinion each of the technologies referred to by Mr. White creates time-stamped data that are electronically retained, and which contain information that can be used to identify when employees were engaged in work-related activities. Those time stamps can be used to ascertain if an employee was engaged in a work-related activity that occurred outside the employee's regular work hours and as such, may not have been properly compensated. Furthermore, cross-referencing the data across systems will yield useful information about work-related activities that employees engaged in outside their regular work hours.

[139] In Mr. Boedeker's opinion, even though none of the systems described by Mr. White may be designed to track all work-related daily activities by all employees, they nevertheless contain numerous, detailed data points that can be utilized to assess hours worked outside regular work hours.

Submissions

[140] Counsel for the plaintiff submits that the tests for certification have been met. Counsel submits that the plaintiff has established that:

- a) the pleadings disclose a cause of action;
- b) there is an identifiable class of two or more persons;
- c) the claims of the class members raise common issues;
- d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- e) the plaintiff is a proper representative plaintiff who:
 - i. will fairly and adequately represent the interests of the class;
 - ii. has proposed a reasonable litigation plan; and
 - iii. does not have a conflict of interest with the class.

[141] Counsel submits that the statement of claim pleads valid causes of action in breach of contract (including breach of the obligation of good faith); unjust enrichment; and negligence.

[142] With respect to the cause of action based on breach of contract, counsel submits that the plaintiff's claim is based on the express terms of the contract of employment, and implied terms.

Under both the express and implied terms, the defendant is under an obligation to accurately record the hours worked by each employee, so that overtime at the appropriate rate will be paid. To the extent that Livingston's overtime policy authorizes the payment of overtime only where it is pre-approved, it is ineffective if an employee actually works more than the prescribed hours. To the extent that hours have not been accurately recorded and compensated, or Livingston has failed to prevent employees from working hours that it did not intend to compensate, Livingston has not acted in good faith.

[143] Counsel submits that Livingston has been unjustly enriched in that Livingston has received the benefit of unpaid hours worked; class members have suffered a deprivation in the amount of wages not paid for hours they have worked; and there is no juristic reason why Livingston should retain the benefit of the unpaid hours.

[144] Counsel submits that Livingston owes a duty of care to class members to ensure that they were properly compensated for hours worked at the appropriate rates. Livingston has fallen below the requisite standard of care in that it has failed to record and compensate for overtime hours.

[145] In other Ontario cases, all three causes of action have been held to have been validly pleaded where unpaid overtime has been claimed. Accordingly, the requirement that the statement of claim disclose a cause of action has been met.

[146] With respect to an appropriate class definition, counsel submits that the appropriate test is whether the plaintiff has defined the class by reference to objective criteria such that a person can be identified to be a class member without reference to the merits of the action. Furthermore, the class must be bounded in the sense that it is not unlimited; the class definition must be objective and not merits-based; the class must not be unnecessarily broad nor arbitrarily under-inclusive; and class members need not have identical claims and it need not be shown that each member would be successful.

[147] Counsel submits that the proposed definition is bounded in that it mirrors the definition of overtime eligibility as set out in Livingston's overtime policy. It is limited to non-management employees and is governed by the date the overtime policy came into effect, August

15, 2007. It is rationally connected to the common issues. It is neither unnecessarily broad nor arbitrarily under-inclusive.

[148] Accordingly, counsel submits that the proposed class definition should be accepted.

[149] Counsel submits that there are a number of appropriate common issues.

[150] Counsel submits that the evidentiary bar to establish that a common issue exists is a low one. It needs only to be shown that there is “some basis in fact” to conclude that an issue is common.

[151] A common issue can be certified even if it makes up only a very limited aspect of the case, and even though many individual issues remain to be decided after its resolution. It is sufficient if the resolution of a common issue will advance the litigation some distance.

[152] The answer to a question raised by a common issue must be capable of extrapolation to each member of the class. The commonality requirement does not mean that an identical answer is necessary for all members of the class, or even that the answer must benefit each of them to the same extent.

[153] Counsel submits that the first two proposed common issues are appropriate. They are:

Breach of Contract

1. What are the terms (express or implied or otherwise) of the Class Members’ contracts of employment with Livingston International Inc. (the “Defendant”) respecting:

- a. Regular and overtime hours of work?
- b. Recording of the hours worked by Class Members?
- c. Breaks?
- d. Payment of hours worked by Class Members?
- e. Lieu time as purported compensation for overtime hours worked?

2. Did the Defendant breach any of the contractual terms? If so, how?

- a. Without limiting the generality of common issue 2, did the Defendant breach its contractual duty of good faith in the

performance of its contracts of employment with the Class Members? If so, how?

[154] With respect to the first proposed common issue, the plaintiff has submitted sufficient evidence to show that there is some basis in fact to conclude that the terms of the contracts of employment of all class members are common. There is a common contract of employment signed by every employee, and there are common policies, including the overtime policy. Implied terms would include terms specified by the relevant employment standards legislation.

[155] With respect to the second proposed common issue, counsel submits that the plaintiff has filed sufficient evidence to show that there is some basis in fact to conclude that Livingston has breached the contractual terms on a common, or systemic, basis. There is evidence that Livingston generally requires pre-approval of the working of overtime hours, which means that overtime is actually worked and not paid for. Evidence has been filed to show that overtime hours are generally not recorded, even though they are worked. Evidence has been filed that would show that lieu time is either not booked, or if it is, it is allowed to expire and not be paid for. Evidence has been filed to show that work pressures are such that working overtime is likely.

[156] Proposed common issues 3 to 5 are as follows:

The Defendant's Systemic Duties

3. Did the Defendant have a duty (in contract, tort or otherwise) to prevent Class Members from working, or a duty not to permit or not to encourage Class Members to work, overtime hours for which they were not properly compensated or for which the Defendant would not pay?

a. If “yes”, did the Defendant breach that duty?

4. Did the Defendant have a duty (in contract, tort or otherwise) to accurately record and maintain a record of all hours worked by Class Members to ensure that Class Members were appropriately compensated for same?

a. If “yes”, did the Defendant breach that duty?

5. Did the Defendant have a duty (in contract, tort or otherwise) to implement and maintain an effective and reasonable system or procedure which ensured that the duties in Common Issues 3 and 4 were satisfied for all Class Members?

a. If “yes”, did the Defendant breach that duty?

[157] Counsel submits that these proposed common issues overlap the allegations of breach of contract and negligence. They inquire into Livingston’s systems, or lack of systems, as they relate to the working of overtime. They inquire into the recording of hours worked by class members and the systemic checks and balances (or lack thereof) employed by Livingston to make sure that class members are in fact paid for all hours worked.

[158] Counsel submits that sufficient evidence has been filed to show that there is some basis in fact to conclude that the systemic practices, or deficiencies, alleged by the plaintiff actually exist.

[159] Proposed common issue 6 reads as follows:

Unjust Enrichment

6. Was the Defendant enriched by failing to pay Class Members appropriately for all their hours worked? If “yes”,

- a. Did the Class suffer a corresponding deprivation?
- b. Was there no juristic reason for the enrichment?

[160] This proposed common issue simply tracks the cause of action in unjust enrichment pleaded in the statement of claim. Once again, the plaintiff has filed sufficient evidence to show that there is some basis in fact to conclude that this issue is common.

[161] Common issues 7 and 8 read as follows:

Remedies

7. Subject to further order of the Common Issues Trial Judge, if the answer to any of the common issues 2 – 6 is “yes”, and the Defendant’s liability (or potential liability) to the Class Members (or any part of the Class) is established, what remedies are the Class Members (or any part of the Class) entitled to?

8. If the Class Members are entitled to an award of monetary damages:

- a. Can damages be assessed on an aggregate basis for all or part of the Class? If “yes”,
 - i. What is the most efficient method to assess those aggregate damages? Without limiting the generality of the foregoing, can aggregate damages be assessed in whole or in part on the basis of statistical evidence, including statistical evidence based on random sampling?

ii. What is the quantum of aggregate damages owed to Class Members or any part thereof?

iii. What is appropriate method or procedure for distributing the aggregate damages award to Class Members?

b. Is the Class entitled to an award of aggravated, exemplary or punitive damages based upon the Defendant's conduct? If "yes",

i. Can these damages awards be determined on an aggregate basis?

ii. What is the appropriate method or procedure for distributing any aggregate aggravated, exemplary or punitive damages to Class Members?

[162] While it is ultimately up to the common issues trial judge to determine remedies, including whether an aggregate assessment of damages is appropriate, the court may certify a question about aggregate damages where it believes there is a "reasonable likelihood" that the statutory pre-conditions set out in section 24 (1) (a), (b) and (c) of the Act will be satisfied.

[163] An aggregate assessment can be certified where the quantum of damages could reasonably be calculated, without proof by individual class members, based on a review of the defendant's records.

[164] In this case, counsel submits that the plaintiff has established that damages may be determined on an aggregate basis because the defendant maintains a number of time-stamped electronic records that can be used to calculate the overtime hours worked by class members. This cannot be precisely determined until after the defendant complies with its disclosure requirements (assuming the case is certified), however, it is reasonably likely on the basis of the evidence filed that an aggregate assessment of damages will be possible.

[165] With respect to preferability, a class proceeding will be a preferable procedure where it presents a fair, efficient and manageable method of determining the common issues, and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of behaviour of wrongdoers. The onus will be on the defendant to demonstrate that there is a better way to resolve the common issues than by way of a class proceeding.

[166] In this case, a class proceeding is a fair, efficient and manageable method of determining the common issues. Each individual claim is small, and would not likely be worthwhile to pursue individually. Furthermore, many of the claimants are current employees of Livingston, and it is unlikely that they will wish to actively pursue litigation against their employer. It is likely that a class proceeding is the only mechanism that will secure access to justice for the class members with a maximum of judicial economy. There is simply no other mechanism that can be said to be preferable to a class proceeding.

[167] With respect to the representative plaintiff and a litigation plan, counsel notes that the plaintiff's litigation plan has not been seriously challenged. If there are issues with respect to the plan itself, the plan can be amended as the litigation proceeds.

[168] Mr. Bozsik himself is dedicated to pursuing the litigation, and vigorously representing the interests of the class members. There is no conflict of interest with the class. The action has been approved for financial support by the Class Proceedings Committee of the Law Foundation of Ontario, and accordingly the Class Proceedings Fund will indemnify Mr. Bozsik from any adverse costs award.

[169] Counsel for the plaintiff accordingly submits that this action should be certified as a class proceeding.

[170] Counsel for Livingston submits that the motion to certify the action as a class proceeding should be dismissed.

[171] Counsel submits that the pleadings do not disclose a cause of action. Counsel submits that the plaintiff's causes of action are premised on the illegality of the overtime policy. Counsel submits that the policy is lawful. It is plain and obvious that the plaintiff's argument based on the illegality of the policy must fail.

[172] Counsel submits that Livingston is obliged to comply with the minimum employment standards set out in each province's employment standards legislation. Counsel submits that Livingston's overtime policy accommodates differences in provincial policies by ensuring that

the standards articulated in the policy are as favourable as, or more favourable than, each province's legislative standard; or the provisions of the policy are subject to applicable law.

[173] Counsel submits that while the policy encourages employees to seek approval for overtime hours before they are worked, it does not prevent payment of overtime where an employee is entitled to it in accordance with the policy and/or applicable employment standards legislation, but who has not obtained pre-approval for the overtime. Accordingly, the policy does not prevent compensating employees for overtime for which they are otherwise entitled on the basis that they did not seek pre-approval.

[174] Counsel submits that mutually agreed time off is lawful. To the extent that relevant employment standards legislation dictates an alternative approach to the treatment of time in lieu, Livingston will apply the approach required by legislation.

[175] With the overtime policy stripped away, counsel submits that the plaintiff cannot advance the causes of action raised by the plaintiff, except to the extent that those causes of action are based on Livingston's systems for recording overtime. There is no evidentiary basis for the plaintiff's claims relating to the tracking of and payment for overtime.

[176] Counsel submits that the plaintiff has failed to establish that there is an appropriate identifiable class.

[177] Counsel submits that the class definition as proposed is arbitrarily broad. It includes 79 different positions across Livingston's various lines of business. Those differences impact the likelihood that overtime may be required. Furthermore, there are different systems for recording hours of work depending on the line of business, office location and manager.

[178] Counsel submits that since it is clear that any claim for unpaid overtime that Mr. Bozsik may have had before October, 2012 is time barred, there is no basis for a class definition that extends beyond that date.

[179] Counsel submits that there are no issues capable of being resolved on a common basis. Even if it were possible to discern some, they would not meaningfully advance the litigation.

[180] Counsel submits that while it is not necessary to determine the merits of the action, the “some basis in fact” standard must be a meaningful screening device, and require more than a superficial level of analysis. The plaintiff must adduce sufficient evidence to satisfy the motions judge that the common issue will significantly advance the litigation, and can effectively be tried as a common issue.

[181] Furthermore, the court must ask whether the resolution of a proposed common issue would depend upon individual findings of fact or would sufficiently advance each proposed class members’ claim.

[182] Counsel submits that none of the proposed common issues satisfies these requirements.

[183] Counsel submits that proposed common issues 1 and 2 are not capable of class-wide determination.

[184] Counsel submits that the existence of a company-wide overtime policy does not satisfy the common issue requirement. The commonality requirement requires the answer to the common issues to be “capable of extrapolation to all class members.” In this case, the issue of whether the employment terms of the proposed class members were breached depends heavily on the nature of the work performed by a given employee.

[185] The nature of the work varies dramatically according to the employee’s job position, line of business, location, and the service that he or she assists that line of business in providing. The mere fact that there exists a policy that applies to all of these employees does not advance the question of whether these employees were required or permitted to work overtime for which they were not compensated, or whether barriers to overtime compensation exist.

[186] Counsel submits that the evidence is clear that variations in roles, responsibilities and expectations impact the likelihood that an employee will be expected to work overtime. This fatally undermines the court’s ability to assess in common whether any terms of the proposed class members’ contract of employment were breached. Any attempt by the court to answer the proposed common issues is likely to mire the court in highly individualized issues and claims.

[187] Counsel submits that the plaintiff has not furnished any evidence establishing a basis in fact for any systemic barrier that prevented class members from being compensated for overtime. Rather, a manager in each of Livingston's four lines of business indicated that it is their practice to compensate employees who work overtime, regardless of whether the employee obtains pre-approval.

[188] Counsel submits that the evidence relied on by the plaintiff does not establish any systemic breach of contract, but rather deals only with the individual experiences of the affiants.

[189] Most of the affiants performed customs clearing tasks that Mr. Bozsik himself performed. Accordingly, it is not possible to generalize the job pressures to all of the job positions embraced by the class definition. The plaintiff has not tendered any affidavit evidence from any employee in International Freight Forwarding, Trade Consulting, or Business Process Services.

[190] Counsel submits that at most, the affidavit evidence tendered by the plaintiff is simply evidence of individual claims for unpaid overtime.

[191] Counsel submits that proposed common issues 3 to 5 are not proper common issues.

[192] Counsel submits that the issue of whether Livingston failed to prevent, permitted or encouraged employees to work uncompensated overtime is inherently an individual inquiry. This is particularly the case given the overtime policy which contemplates compensation for overtime worked at a standard that meets or exceeds applicable employment standards legislation. The inquiry will inevitably break down into individual claims.

[193] Counsel submits that Livingston does not owe any free-standing duties in relation to recordkeeping, apart from contractual and statutory obligations. To the extent that Livingston may owe any duties with respect to recordkeeping, the question of whether those duties have been breached will rely heavily on individual assessments. This will depend on which of the four distinct lines of business in which the employee works; which of the different types of services the employee is providing; in which of the 41 locations the employee is working; and which of the 79 different job positions the employee holds.

[194] Counsel submits that any duty regarding recordkeeping will be inherently variable, depending on these among other features.

[195] Counsel submits that the proposed common issue relating to unjust enrichment is not a proper common issue. It depends upon the resolution of whether an employee was properly compensated for working overtime hours. This would require the court to make individual findings of fact. The question of whether any member of the proposed class suffered a corresponding deprivation will also be an individual issue.

[196] Counsel submits that the proposed common issues 7 and 8, dealing with damages, do not meet the test for commonality.

[197] Pursuant to s.24(1) of the Act, damages can be assessed on an aggregate basis where the following criteria are met:

- a) monetary relief is claimed on behalf of some or all class members;
- b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[198] Counsel submits that the court must examine the proposed methodology for proving damages in the aggregate, to determine whether the methodology is capable of reasonably determining aggregate damages.

[199] Counsel submits that the proposed methodology as proffered by Mr. Boedeker is completely unworkable, and does not provide a means for the court to reliably determine the aggregate overtime hours worked by the class. Counsel points out that the technologies on which Mr. Boedeker intends to rely were not designed to track employee time. Mr. Boedeker does not understand the functionality and the capabilities of many of the technologies. His proposed methodology requires a comparison of his time analysis to records showing employees' actual hours of work in a given day. There is no evidence that any historical records showing

employees' regularly scheduled hours exist. There is no evidence that the data on which Mr. Boedeker intends to rely covers the entire proposed class.

[200] Counsel submits that in essence, Mr. Boedeker's evidence is speculative, and may provide unreliable data points relating to the hours worked by some members of the class. Furthermore, there is no evidence that any of these systems were in place through the class period.

[201] Counsel submits that Mr. Bozsik is not an appropriate representative plaintiff.

[202] Counsel submits that Mr. Bozsik's claim is unique, and any time pressures Mr. Bozsik felt were the result of his job performance rather than any circumstance relating to his job. Furthermore, his situation is not analogous to the situation of employees in three out of the four lines of business of Livingston.

[203] Furthermore, counsel submits that most of Mr. Bozsik's claim is time barred. He only has a claim in respect of overtime hours worked in the last month of his employment.

[204] Counsel submits that there are concerns with respect to Mr. Bozsik's credibility and character.

[205] On cross-examination, Mr. Bozsik refused to answer questions about a certificate of conviction that disclosed that someone named Michael Bozsik was convicted of a sexual offence under the *Criminal Code*, and refused to answer questions as to whether his sentence contained any restrictions that might have circumscribed Mr. Bozsik's hours of work.

[206] Furthermore, Mr. Bozsik improperly forwarded to his own personal email account many documents containing confidential client information. This was clearly contrary to Livingston's Code of Conduct.

[207] Counsel submits that these issues raise serious concerns with respect to Mr. Bozsik's credibility and character and suggest that he is not a fair or adequate representative for the proposed class.

[208] For these reasons, counsel submits that the motion to certify this action as a class proceeding should be dismissed.

[209] Authorities referred to by the parties include *Fresco v. Canadian Imperial Bank of Commerce* (2012), 111 O.R. (3d) 501 (C.A.); *Fulawka v. Bank of Nova Scotia* (2012), 111 O.R. (3d) 346 (C.A.); *Baroch v. Canada Cartage*, 2015 ONSC 40; *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144; *AIC Limited v. Fischer*, [2013] 3 S.C.R. 949; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.); *Bhasin v. Hyrnew*, [2014] 3 S.C.R. 494; *Cooper v. Hobart*, [2001] 3 S.C.R. 537; *Vivendi Canada Inc. v. Dell’Aniello*, [2014] 1 S.C.R. 3; *Hickey-Button v. Loyalist College of Applied Arts and Technology* (2006), 211 O.A.C. 301 (C.A.); *Ramdath v. George Brown College of Applied Arts and Technology*, 2010 ONSC 2019; *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.); *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921; *Cassano v. Toronto-Dominion Bank* (2007), 87 O.R. (3d) 401 (C.A.); *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R. 477; *Johnson v. Ontario*, 2016 ONSC 5314; *Rumley v. British Columbia*, [2001] 3 S.C.R. 184; *Arabi v. Toronto-Dominion Bank*, [2006] O.J. No. 2072 (S.C.J.); *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242 (S.C.J.); *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.); *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (S.C.J.); *McCracken v. Canadian National Railway* (2012), 111 O.R. (3d) 745 (C.A.); *Omarali v. Just Energy Group Inc.*, 2016 ONSC 4094; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Khelawon*, [2006] 2 S.C.R. 787; *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 (S.C.J.); *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [2013] 3 S.C.R. 545; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534; and *6323588 Canada Ltd. v. 709528 Ontario Ltd.*, 2012 ONSC 2985.

Analysis

[210] Before addressing the requisite factors set out in s.5(1) of the *Class Proceedings Act*, I will first consider the defendant’s objection to the affidavit of Rory McGovern. In my view, the objection is well-founded.

[211] Mr. McGovern purports to relay information provided to him by an anonymous manager employed by Livingston, and by a number of anonymous employees. In my view, the affidavit is not admissible. Even if it is technically admissible, it should be given no weight.

[212] Rule 39.01 (4) reads as follows:

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.

[213] Mr. McGovern's affidavit does not state the source of his information that forms the basis of his affidavit. To refer to anonymous sources does not comply with the rule: see *McCracken, supra* at paras. 109 and 110.

[214] Even if it could be said that the requirements of rule 39.01(4) have been complied with, I am not inclined to give the affidavit any weight. It contains nothing more than rank hearsay. The defendant cannot meaningfully challenge its contents, nor can Mr. McGovern be cross-examined in any practical way.

[215] For these reasons, I have ignored Mr. McGovern's affidavit.

[216] I will now turn to the factors as set out in s.5(1) of the *Class Proceedings Act*.

(i) Do the pleadings disclose a cause of action?

[217] In my view, the statement of claim pleads valid causes of action in breach of contract (including breach of the implied obligation of good faith); unjust enrichment; and negligence. These are the same causes of action that were pleaded in *Fresco, supra*; *Fulawka, supra*; *Baroch, supra*; and *Rosen, supra*. In each case, it was held that the pleading of such causes of action was adequate.

[218] I do not accept the argument of counsel for the defendant that it is plain and obvious that reliance on the overtime policy is doomed to fail. In essence, counsel's argument is that the overtime policy admits of only one meaning, one that is favourable to the defendant's case. In

counsel's submission, the bald reference to employment standards legislation in the policy is sufficient to make the plaintiff's claim untenable. With respect, I disagree.

[219] The defendant's argument is really a merits-based argument that is more properly left to the trial judge. At this stage, it is not clear that the defendant's position will prevail, and indeed I think the plaintiff's argument is more attractive. The statement "Overtime is to be avoided as much as possible and must be pre-approved by the manager", together with references to "authorized overtime" and "pre-authorized overtime" give rise to a strong inference that overtime will be compensated only where it is approved in advance. If the policy is to bear the meaning asserted by Livingston, that is, that overtime will be compensated if it is actually worked, but not approved in advance, one might have expected some specific wording in the policy that would make that clear. This is particularly so because, as acknowledged by Livingston's witnesses, there are no other documents issued by Livingston that purport to spell out how the policy is to be applied in practice. Virtually every manager is left to interpret the policy without guidance.

[220] The plaintiff's interpretation may be assisted, at trial, if the trial judge were to accept evidence of how employees were actually treated when it came to the payment of overtime.

[221] In my view, the statement of claim pleads valid causes of action, and the requirements of s.5(1)(a) of the Act have been met.

(ii) Is there an identifiable class of two or more persons that would be represented by the representative plaintiff?

[222] For ease of reference, the proposed class is set out as follows:

All current or former non-management employees of the defendant in its offices across Canada, who are or were employed, at any time on or after August 15, 2007, in administrative, clerical, technical and supervisory job classifications or otherwise subject to the defendant's overtime policy or policies.

[223] The requirements of a class capable of certification were summarized by Strathy J. (as he then was), in *Fairview Donut Inc. v. The TDL Group Corp.*, [2012] O.J. No. 834 (S.C.J.), at para. 220, as follows:

- (a) membership in the class should be determinable by objective criteria without reference to the merits of the action;
- (b) the class criteria should bear a rational relationship to the common issues asserted by all class members, but all class members need not share the same interest in the resolution of the asserted common issues;
- (c) the class must be bounded and not of unlimited membership;
- (d) there is a further obligation, although not onerous, to show that the class is not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues;
- (e) membership in a class may be defined by those who make claims in respect of a particular event or alleged wrong, without offending the rule against the class description being dependent on the outcome of the litigation; and
- (f) a proper class definition does not need to include only those persons whose claims will be successful.

[224] In my view, these requirements are met. Membership in the proposed class is determinable by objective criteria without reference to the merits. The class is bounded and not of unlimited membership. Membership is tied to the date on which the overtime policy was created. It is not unnecessarily broad.

[225] I do not agree with counsel for the defendant that the claims of the class members are statute barred. A limitations defence must be pleaded. There may well be discoverability issues. In any event, whether or not the claims of some class members are statute barred is a matter for the trial judge.

[226] In my view, the requirements of s.5(1)(b) of the Act have been met.

(iii) Are there appropriate common issues?

[227] As usual, this is the main fighting ground.

[228] The proposed common issues have been reproduced earlier, and I will not reproduce them again.

[229] The term “common issues” is defined in s.1 of the *Class Proceedings Act* as

- a) common but not necessarily identical issues of fact, or
- b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[230] Strathy J. summarized the principles surrounding the definition of appropriate common issues in *Fairview Donut, supra* at paras. 229 and 230 as follows:

- a. the underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis;
- b. an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution;
- c. there must be a basis in the evidence before the court to establish the existence of common issues;
- d. there must be a rational relationship between the class identified by the plaintiff and the proposed common issues;
- e. the proposed common issue must be a substantial ingredient of each class member’s claim and its resolution must be necessary to the resolution of that claim;
- f. a common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class;

- g. the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation in the same manner, to each member of the class;
- h. a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant;
- i. where questions relating to causation or damages are proposed as a common issue, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis;
- j. common issues should not be framed in overly broad terms;
- k. the core of a class proceeding is the element of commonality – there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this; and
- l. the common issues should be clear, neutrally-worded and fair to both parties.

[231] There are a myriad of cases that discuss the standards for determining whether there are appropriate common issues.

[232] It is incumbent on the plaintiff to show, through evidence, that an issue is “common” so that it can be certified. The test is not high. There must be “some basis in fact” to conclude that there is a common issue for certification: see *Pro-Sys Consultants, supra* at para. 99.

[233] The resolution of the common issue or issues need not resolve the entire action. It is sufficient if it resolves an issue or issues that will move the action some distance: see *Vivendi, supra*, at para. 4. The fact that there may be many individual issues left to be determined does not mean that common issues should not be certified: see *Cloud, supra* at para. 53.

[234] Proposed common issues 1 and 2 raise the issue of the terms of the contracts of employment of members of the class regarding hours of work and overtime, and whether those terms have been breached. In my view, the plaintiff has shown that there is some basis in fact to conclude that these are proper common issues.

[235] Every member of the class is required to sign a virtually identical contract of employment, which incorporates the same overtime policy as one its terms. There is clearly some basis in fact to conclude that the terms of the overtime policy, standing alone, can operate so as to deprive class members of overtime compensation to which they are entitled. If the policy is interpreted as contended by the plaintiff, class members who work beyond their regularly scheduled hours, but who do not receive advance approval for the payment of overtime, can be denied compensation. This is so even though they may be otherwise entitled under employment standards legislation.

[236] The plaintiff's interpretation of the policy may be assisted, in my view, by the evidence tendered by a number of witnesses on behalf of the plaintiff, to the effect that employees were told that they would not be approved for the payment of overtime but that they were expected to continue performing their work, if necessary beyond their regularly scheduled hours, in order to get the job done. There is some evidence that employees were discouraged from putting in requests for overtime, and were discouraged from recording overtime hours that were worked.

[237] This is the sort of systemic evidence that was quoted with approval by Winkler C.J.O. in *Fresco, supra*, at paras. 75, 86 and 103. As noted earlier, at this stage the evidentiary bar is a low one. The fact that the defendant disputes the evidence is not determinative. The only question at this stage is whether there is some basis in fact to support the proposition that a common issue exists.

[238] The systemic evidence will also be relevant to proposed common issues 3 to 5, which I will discuss in a moment.

[239] Proposed common issues 3 to 5 squarely raise issues that are dependent on the evidence of systemic practices tendered by the plaintiff.

[240] In some cases, the systemic practices alleged by the plaintiff reflect an absence of controls by Livingston. For example, it is alleged that there is a lack of control in accurately recording the hours worked by class members. It is asserted that this lack of control gives rise to a failure to accurately record hours worked. This feature can properly give rise to a certifiable common issue: see *Baroch*, at para. 31.

[241] In my view, there is some basis in fact for this assertion. Livingston does not dispute the lack of a centralized system for recording hours. In fact, Livingston asserts that each line of business and office operates independently, to a large degree, and the actual system of recording hours is left to individual managers.

[242] In my view, the plaintiff has tendered evidence to show that there is some basis in fact to conclude that this lack of control leads to the failure to record hours that are actually worked, and for which overtime can be claimed.

[243] Other systemic evidence called by the plaintiff includes evidence that would tend to show that managers discouraged employees from actually recording their hours worked, to the extent that they exceeded their regularly scheduled hours, and discouraged employees from claiming overtime. Once again, this is the sort of evidence that was approved by Winkler C.J.O. in *Fresco, supra*, as showing that there is some basis in fact to conclude that there are proper common issues rooted in systemic practices.

[244] I do not accept the argument of the defendant that if there are common issues grounded in the evidence, they are restricted to the Canadian Brokerage line of business.

[245] First of all, all members of the proposed class, whether in the Canadian Brokerage line of business or otherwise, are subject to a common employment contract and overtime policy. Second, the evidence of systemic practices was not restricted to the Canadian Brokerage line of business.

[246] Affidavits were sworn by June Jayetilleke and Jackie Alli, who worked as clerks in the finance department. They processed invoices for payment. As such, they did not work in any particular line of business, rather, they worked as part of a service that, in global terms, serviced all of the different lines of business.

[247] Both deponents gave evidence as to systemic practices that, according to the deponents, meant that they were deprived of compensation for overtime that they worked. Both deponents swore that they were told by managers, whom they named, that overtime would not be paid; that they should not record overtime hours; and that when they complained they were told that

Livingston does not pay overtime but that the work still had to get done. This evidence shows that there is some basis in fact to conclude that the systemic practices went beyond Canadian Brokerage.

[248] Some of the systemic evidence coming from the Canadian Brokerage line of business appears to suggest that there are broader systemic instructions that apply company-wide. For example, as referred to earlier, in an email to Mr. Bozsik dated July 9, 2008, Kay Robinson stated “You know I can’t get authorization for paid time”, and in an email to Mr. Bozsik dated July 8, 2011 from Mike Winter, Mr. Winter stated “I have spoken to Shawn and he has approved (in this instance only) paid overtime for anyone who can cover these shifts. Please let me know if you can help!” These emails suggest that there may be a common systemic issue.

[249] In my view, as was held by Winkler C.J.O. in *Fresco*, the plaintiff has shown that there is some basis in fact to conclude that there are systemic, probably unwritten, policies at Livingston that would give rise to proper common issues as reflected in proposed common issues 3, 4 and 5.

[250] Proposed common issue 6 simply raises a legal issue as to whether Livingston has been unjustly enriched. From an evidentiary perspective, the evidence is the same as that canvassed under the previous proposed common issues. The plaintiff has shown that there is some basis in fact for the proposition that this is a proper common issue for certification.

[251] Proposed common issues 7 and 8 relate to remedies and possible damages. In particular, proposed common issue 8 addresses the issue of aggregate damages.

[252] Strictly speaking, it is unnecessary to certify as a common issue any issue as to remedial relief. Sections 23, 24, 25 and 26 of the *Act* contain ample authority for the common issues trial judge to determine what, if any, remedial relief, including damages, is appropriate after the common issues dealing with the merits of the case have been determined. Indeed, the trial judge has authority to determine aggregate damages and a manner of their distribution even if aggregate damages have not been certified as a common issue: see *Markson, supra*, *Ramdath v. George Brown*, 2010 ONSC 2019; *Ramdath v. George Brown*, 2015 ONCA 921; and *Cassano, supra*.

[253] However, it is appropriate to certify the availability of aggregate damages as a common issue where the requirements of s.24(1) can be determined in advance. In particular, it must be decided whether “the aggregate or a part of the defendant’s liability to some or all class members can reasonably be determined without proof by individual class members.”

[254] In this case, expert evidence has been tendered in the form of an affidavit, and responding affidavit, by Mr. Boedeker, who opines that there are electronic systems in place at Livingston from which reasonable estimates of uncompensated overtime hours may be made. While Livingston has not filed expert evidence of its own, it has filed an affidavit sworn by Mr. White, in which he disputes that the electronic systems actually record the information that Mr. Boedeker believes they record.

[255] In fairness to Mr. Boedeker, his evidence is hampered, at this stage, by his lack of access to the systems in place at Livingston. However, based on his expertise and his familiarity with similar systems, he believes that enough information can be gleaned from those systems to be useful.

[256] If aggregate damages are certified as a common issue, this will open up an avenue of disclosure and discovery that will permit Mr. Boedeker to be better informed and to be able to render a more accurate estimate of potential aggregate damages, or perhaps, be persuaded that such an estimate is not attainable. With admirable candour, counsel for Livingston advised me that this is a strong reason why Livingston is opposed to an order certifying aggregate damages at this stage. Livingston would prefer not to open up discovery on this issue at this point.

[257] I understand Livingston’s concern. Disclosure and discovery on this issue could become oppressive. However, as the case management judge, I have the ability to keep disclosure and discovery within reasonable bounds and I can limit it where warranted. Proportionality will be important.

[258] In my view, the plaintiff has established that there is some basis in fact to establish that aggregate damages can reasonably be determined without proof by individual class members. Accordingly, I am satisfied that aggregate damages can be certified as a common issue.

[259] Proposed common issue 7 is unnecessary, and in any event is too broad. As noted, the entire issue of remedies is under the control of the trial judge. There is simply no need to certify all remedial issues as common issues.

[260] As far as aggravated, exemplary or punitive damages are concerned, the plaintiff has claimed them in paragraph 39 of the statement of claim. While the test for awarding any such relief is a high one, the evidence in support of such a claim is common to all class members based on the systemic evidence I have already reviewed.

[261] For these reasons, I will certify proposed common issue 8. Common issue 7 is not certified.

(iv) Is a class proceeding the preferable procedure for resolving the common issues?

[262] The preferability inquiry involves answering two questions: first, would the class action be a fair, efficient and manageable method of advancing the claim? Second, would the class action be preferable to other reasonably available means of resolving the claims of class members? See *Cloud, supra*; and *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.).

[263] To some extent, the preferability inquiry involves a determination of whether individual issues will overwhelm the common issues. In my view, they will not.

[264] The resolution of the common issues depends, for the most part, on a determination of the common contractual issues and a resolution of the systemic issues reviewed earlier. I do not think individual issues will interfere with those inquiries. To the extent that there are any individual issues left to be determined after the resolution of the common issues, they are primarily remedial in scope, and the trial judge will have ample tools at his or her disposal to deal with them once the common issues have been addressed, assuming the plaintiff succeeds on one or more common issues.

[265] Livingston does not suggest that there is any alternative procedure that would be better suited to determining the claims of the class members.

[266] In my view, a class proceeding is the preferable procedure for resolving the common issues, and the requirements of s.5(1)(d) of the Act have been met.

(v) Is Mr. Bozsik an appropriate representative plaintiff?

[267] The issue here is whether Mr. Bozsik will fairly and adequately represent the class; whether he has a workable plan for advancing the proceeding; and whether he has any conflict of interest with other class members.

[268] Mr. Bozsik has sworn that he understand his obligations as a representative plaintiff, and will vigorously pursue the interests of the class members.

[269] Livingston submits that Mr. Bozsik's claim is highly individual and for that reason he is not an appropriate representative plaintiff. I disagree. The claim of any individual class member is likely to be unique. However, that does not mean that such a class member is disqualified from being a representative plaintiff.

[270] Livingston submits that Mr. Bozsik's claim is wholly, or in part, statute barred. Whether or not that is the case, this does not disqualify Mr. Bozsik from being a representative plaintiff.

[271] Livingston submits that Mr. Bozsik should be disqualified on account of his credibility and character. Livingston says Mr. Bozsik improperly kept in his possession documents that are confidential and belong to Livingston. Furthermore, Livingston asserts that Mr. Bozsik was convicted of a sexual offence under the *Criminal Code*.

[272] In my view, neither of these features disqualifies Mr. Bozsik.

[273] Livingston is free, if it chooses, to seek a protective or sealing order for any documents in the possession of Mr. Bozsik. The mere fact that he may have confidential documents in his possession is not relevant to the question of his suitability as a representative plaintiff.

[274] At this point, there is no evidence that Mr. Bozsik was actually convicted of any criminal offence. On the assumption that he was, however, I do not see that as something that

would disqualify him as a representative plaintiff. The suggestion that any restrictions flowing from his conviction might have restricted him in performing overtime work is speculative, at best. Even so, it has nothing to do with whether he will adequately represent the interests of class members.

[275] Livingston has made no submissions with respect to the litigation plan or whether Mr. Bozsik otherwise has any conflict of interest with the class members.

[276] I am satisfied that Mr. Bozsik is an appropriate representative plaintiff.

Disposition

[277] For the foregoing reasons, this action is certified as a class proceeding. The common issues will be as proposed by the plaintiff, except for common issue 7, which is not certified. .

[278] If the parties cannot agree on the form and content of the formal order, I will entertain written submissions.

[279] I will entertain written submissions with respect to costs, not to exceed five pages together with a costs outline. Counsel for the plaintiff shall have five days to file submissions, and counsel for the defendant shall have five days to respond. Counsel for the plaintiff shall have three days to reply.

Gray J.

Released: November 17, 2016

CITATION: Bozsik v. Livingston International Inc., 2016 ONSC 7168
COURT FILE NO.: 5270/14
DATE: 2016-11-17

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHAEL BOZSIK

Plaintiff

– and –

LIVINGSTON INTERNATIONAL INC.

Defendant

REASONS FOR JUDGMENT

Gray J.

Released: November 17, 2016