

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

STEPHEN APS

Plaintiff

and

FLIGHT CENTRE TRAVEL GROUP (CANADA) INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

PLAINTIFF'S FACTUM
(Certification, Settlement, Distribution Protocol and Class Counsel Fees Approval)
(Returnable November 9, 2020)

November 3, 2020

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**FACTUM OF THE PLAINTIFF
(CERTIFICATION, SETTLEMENT, DISTRIBUTION PROTOCOL AND FEE
APPROVAL)**

PART I - OVERVIEW

1. This is a motion for an order:
 - (a) on consent, certifying this action as a class proceeding and appointing the plaintiff Stephen Aps as the representative plaintiff;
 - (b) approving the settlement reached between the plaintiff and the defendant, Flight Centre Travel Group (Canada) Inc. (“Flight Centre”) dated August 21, 2020 (the “Settlement Agreement”);
 - (c) approving the Distribution Protocol, the appointment of Trilogy Class Action Services as the administrator of the proposed settlement and Class Counsel’s notice plan;

- (d) approving the Retainer Agreement entered into between the representative plaintiff and Class Counsel and the fees and disbursements incurred by Class Counsel; and
 - (e) approving an honorarium to be paid to Mr. Aps in the amount of \$10,000.¹
2. This proposed class action is about the right of employees to be fairly and honestly compensated for all their hours of work over the overtime threshold. The putative class members are non-managerial “travel consultants” who work in Flight Centre’s various locations across Canada servicing the travel retailer’s clientele. It is not contested that provincial employment standards legislation applied to the class members and that all were eligible for overtime pay;² nor is it contested that employees were supposed to be paid for all their hours of work and were not supposed to work without receiving pay. This claim is eminently suitable for class treatment and ought to be certified as a class action. Flight Centre used “template” employment documents and applied a common overtime policy across the country; it was their intention to treat the class members consistently. Commonality arises out of the standard contracts, policies and practices.
3. The proposed settlement, which is subject to court approval, contemplates Flight Centre paying to the Class the sum of \$7 million and implementing a Timekeeping System, as defined in section 5(aa) of the proposed settlement, which will track and record the daily hours of work for all employees in the job classifications covered by the proposed settlement.³ The proposed settlement, if approved, will completely resolve the litigation

¹ Notice of Motion, para 1, Plaintiff’s Motion Record (Certification, Settlement, Distribution Protocol and Class Counsel Fees Approval) [“**PMR**”], Tab 1, pp 1-4.

² Except for British Columbia which has a unique exclusion for commission-based employees, as is discussed in greater detail below.

³ Affidavit of Joshua Mandryk, sworn November 2, 2020 [“**Mandryk Affidavit**”], PMR, Tab 2, p 36, paras 36-37.

between the parties at a relatively early stage of the litigation. It will provide fair compensation to the Class Members for the unpaid overtime they worked during their time at Flight Centre. Class Counsel and the representative plaintiff believe that the proposed settlement represents a good resolution for Class Members.⁴

4. The proposed distribution protocol achieves the objective of maximizing the take-up rate in the event that the proposed settlement is approved. The notice plan will reach the most Class Members possible and will provide them with an easy and expeditious way to make a claim. The proposed distribution protocol does not require Class Members to prove their overtime hours.⁵
5. Class Counsel is seeking a fee of 25% of the amount of the settlement, plus taxes and disbursements. This is consistent with the Retainer Agreement and is in line with fees awarded in similar cases. The fee requested by Class Counsel is reflective of the risk that Class Counsel took on when they agreed to litigate this case on a contingency basis.⁶
6. Class Counsel's fee request breaks down as follows:
 - (a) 25% of the \$7,000,000 Settlement Amount as specified in the Retainer Agreement (in the event that the case settled prior to certification) amounting to \$1,750,000;⁷
 - (b) HST on fees in the amount of \$227,500; and
 - (c) disbursements of \$34,589.07 (plus taxes thereon)⁸.

⁴ Mandryk Affidavit, PMR, Tab 2, p 24, para 4.

⁵ Mandryk Affidavit, PMR, Tab 2, pp 39, 42, paras 47, 55.

⁶ Mandryk Affidavit, PMR, Tab 2, pp 25-26, 70, paras 8-11.

⁷ Mandryk Affidavit, PMR, Tab 2, p 69, para 150.

⁸ Mandryk Affidavit, PMR, Tab 2, p 69, para 152; Exhibit "U": Fee and Disbursement Chart to Mandryk Affidavit, PMR, Tab 2U, pp 348-349.

7. The proposed settlement has attracted overwhelming support from Class Members who have reached out to the representative plaintiff and to Class Counsel in significant numbers. Fewer than 0.45% of Class Members have opted out, and Class Counsel do not anticipate any Class Members attending the approval hearing to oppose the proposed settlement or the fee and honorarium requests.⁹
8. On its own, the proposed settlement represents a very good result and the representative plaintiff and Class Counsel urge this Court to accept it on its own merits. However, in consideration of the impact of the COVID-19 pandemic on the travel industry and on Flight Centre in particular, the risk that the Class Members will not recover anything in this litigation in the event that this settlement is not approved militates even stronger in favour of approving the proposed settlement.

PART II - THE FACTS

A. Background

9. This proposed class action was commenced on February 21, 2019 on behalf of:

All current or former Travel Consultants employed by Flight Centre Travel Group (Canada) Inc. in the Provinces of Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Newfoundland, for the period from December 2008 to the date of certification (the “**Class**” and “**Class Members**”)¹⁰

10. There are 4,982 people in the class.¹¹

⁹ Mandryk Affidavit, PMR, Tab 2, pp 67-68, paras 141-149.

¹⁰ Mandryk Affidavit, PMR, Tab 2, p 25, para 6

¹¹ Mandryk Affidavit, PMR, Tab 2, p 25, para 7.

11. Flight Centre is the largest brick and mortar travel retailer in Canada, which had around 150 locations across Canada at the time the Statement of Claim was issued. The Class Members are non-managerial employees at Flight Centre's locations in the provinces in which it operates, namely, Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Newfoundland. The claim relates to unpaid overtime for hours worked above the overtime thresholds under the applicable employment standards legislation. The action was framed in breach of contract (including the duty of good faith), unjust enrichment and negligence.¹²

12. The plaintiff pleaded that the Class Members' employment contracts were subject to the applicable provincial employment standards legislation, which were incorporated into the contracts of employment as a matter of law, and that Flight Centre breached these requirements by, amongst other things: failing to ensure that the Class Members' hours of work were monitored and accurately recorded; failing to implement an effective system or procedure for recording all hours of work; failing to ensure that Class Members were compensated for all hours worked; and, imposing on Class Members an overtime policy that unlawfully created a barrier to the payment of overtime. At its core, the claim alleges that Flight Centre required and/or permitted Class Members to work hours in excess of the overtime threshold without paying them. The claim was also framed in breach of Flight Centre's obligation to act in good faith in the performance of its employment contracts and in unjust enrichment.¹³

¹² Mandryk Affidavit, PMR, Tab 2, p 26, para 13; Exhibit "B": Amended Amended Statement of Claim, Mandryk Affidavit, Tab 2B, PMR.

¹³ Mandryk Affidavit, PMR, Tab 2, pp 26-28, paras 14-15.

13. The Statement of Claim was amended on November 18, 2019 to extend the class period to December 2008, and again on September 3, 2020 pursuant to the proposed settlement in order to clarify the class definition.¹⁴

B. Towards Certification

14. The matter was scheduled for hearing of the plaintiff's motion for certification on November 9 and 10, 2020.¹⁵
15. The evidentiary record put forward by the plaintiff contained affidavits from five Flight Centre employees (including the plaintiff) who had store-level experience spanning nine (9) store locations, four provinces, two Flight Centre brands and multiple years during the class period. The plaintiff also tendered evidence detailing the 237 unique registrations from individuals working at over 50 store locations received on Class Counsel's registration website. The plaintiff's motion record contained copies of Flight Centre's standard employment policies with respect to hours of work and overtime, as well as standard job descriptions and employment contracts.¹⁶
16. The affiants deposed to working an average of between 45-50 hours per week and that they were not paid for any hours above the applicable overtime threshold nor received time off in lieu, except in rare circumstances. The affiants also described having to attend mandatory monthly meetings and "Buzz Nights" for which they were also not paid. Critically, the affiants were unanimous in their belief that Flight Centre did not have in place a system to

¹⁴ Mandryk Affidavit, PMR, Tab 2, p 26, para 12.

¹⁵ Mandryk Affidavit, PMR, Tab 2, p 28, para 17.

¹⁶ Mandryk Affidavit, PMR, Tab 2, p 28, para 18.

track and record their actual hours of work beyond their scheduled hours. The plaintiff's certification record was served and filed in November 2019.¹⁷

17. Conversely, Flight Centre's evidence, as set out in its Responding Record, served and filed in May 2020, was that Class Members could in fact track their approved overtime (and be compensated through time in lieu) through Flight Centre's "Time Off Tracker", a system the company used to track and approve employees' time off. Class Counsel subsequently served a Reply record in which the plaintiff's affiants denied that Time Off Tracker was intended to be used in this manner.¹⁸

C. Mediation and Settlement

18. Following the commencement of the action in 2019, Flight Centre implemented a new Working Hours and Overtime Policy applicable to the Class Members, effective November 1, 2019.¹⁹ After the defendant introduced its new policy, Class Counsel formed the view that Flight Centre had addressed some (but not all) of the plaintiff's policy concerns and that there may be some appetite for settlement discussions, based on how similar significant policy changes precipitated mediation and settlement in *Fulawka v Bank of Nova Scotia* and *Eklund v GoodLife Fitness Centres Inc.*, two class actions in which Class Counsel also represented the plaintiff class.²⁰

¹⁷ Mandryk Affidavit, PMR, Tab 2, pp 28-31, paras 18-19.

¹⁸ Mandryk Affidavit, PMR, Tab 2, pp 32-33, paras 20-21.

¹⁹ Mandryk Affidavit, PMR, Tab 2, p 33, para 22; Exhibit "C": Email from John Beauvais dated September 30, 2019, Mandryk Affidavit, PMR, Tab 2C, pp 129-130; Exhibit "D": Working Hours and Overtime Policy, Mandryk Affidavit, PMR, Tab 2D, pp 122-147.

²⁰ Mandryk Affidavit, PMR, Tab 2, p 33, para 23.

19. The parties subsequently agreed to attend a mediation with Joel Wiesenfeld, an experienced mediator that had recently mediated other employment class actions, which was held on July 22-23, 2020. The parties exchanged detailed mediation briefs in advance of the mediation, including a reply brief on behalf of the plaintiff.²¹
20. The mediation continued for the two full scheduled days with the mediator. A deal was ultimately reached, and the parties entered into a term sheet at the conclusion of the second day of mediation. The proposed settlement was recommended to both parties by the mediator.²²
21. The parties stayed into the evening on the second day of the mediation in order to finalize the term sheet. The term sheet contemplated the parties entering into comprehensive Minutes of Settlement to resolve the Action, which the parties ultimately signed off on August 21, 2020. The Minutes of Settlement were amended on consent on September 23, 2020 to permit the delay of the payment of the *cy-pres* distribution, if any, until 30 days after receipt of final Notices of Assessment from the Canada Revenue Agency by Class Counsel (the “proposed settlement”).²³
22. By the time of the mediation in July 2020, the COVID-19 pandemic had already negatively impacted Flight Centre’s operations. The pandemic, and its material impact on Flight Centre’s business, was influential (but not determinative) in Class Counsel’s advice and the plaintiff’s decision to settle this claim.²⁴

²¹ Mandryk Affidavit, PMR, Tab 2, pp 33-34, paras 25-27.

²² Mandryk Affidavit, PMR, Tab 2, pp 34-35, paras 28-29.

²³ Mandryk Affidavit, PMR, Tab 2, p 35, para 30.

²⁴ Mandryk Affidavit, PMR, Tab 2, p 35, paras 31-32.

23. The proposed settlement provides for certification, for settlement purposes, of the following class:

All current or former Travel Consultants employed by Flight Centre in the Provinces of Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Newfoundland, for the period from December 2008 to the date certification is granted in this action (the “Class” and “Class Members”)²⁵

24. For certification purposes, Schedule “A” to the proposed settlement identifies the common issues as follows:

1. What are the relevant terms of the Class Members’ contracts of employment with the Defendant respecting:

- a. Regular and overtime hours of work?
- b. Recording of the hours worked by Class Members?
- c. Compensation for hours worked by Class Members?

2. Did the Defendant breach any of the foregoing contractual terms?²⁶

25. The proposed settlement provides that Flight Centre will pay \$7,000,000 (the “Settlement Amount”) to the Class within ten (10) business days from the date when the Order received from the Court approving the proposed settlement has become a Final Order. The Settlement Amount is non-reversionary.²⁷

²⁵ Mandryk Affidavit, PMR, Tab 2, pp 35-36, para 34; Exhibit “E”: Proposed Settlement Agreement, Mandryk Affidavit, PMR, Tab 2E, p 155, para 11.

²⁶ Exhibit “E”: Proposed Settlement Agreement, Mandryk Affidavit, Tab 2E, PMR, p 164, Schedule “A” – Common Issues.

²⁷ Mandryk Affidavit, PMR, Tab 2, p 36, para 36; Exhibit “E”: Proposed Settlement Agreement, Mandryk Affidavit, PMR, Tab 2E, pp 153, 156, ss 5(z), 14.

26. Pursuant to the proposed settlement, Flight Centre also agreed to implement a Timekeeping System, as defined in section 5(aa) of the proposed settlement, which will track and record the daily hours of work for all employees in the job classifications covered by the proposed settlement. Flight Centre agreed to make best efforts to implement this Timekeeping System by January 31, 2021.²⁸
27. The desire to make policy changes to improve working conditions for the Class Members at Flight Centre was a crucial motivator for the plaintiff in bringing the class action and was a key term in the settlement. This policy change was central to Mr. Aps' demands at the mediation. In the absence of Flight Centre's agreement to implement this policy change, this class action would not have settled. Both the policy change and the Settlement Amount were the subject of considerable negotiation.²⁹
28. To the knowledge of Class Counsel, Flight Centre's agreement to the policy change marks the first time that a plaintiff has *ever* been able to negotiate a policy change in an employment class action. In this regard, this settlement sets an important precedent in terms of the capacity of non-unionized workers to use class actions not only as a mechanism to recover back pay, but also to negotiate important policy changes with their employers.³⁰
29. The implementation of the Timekeeping System will result in a significant benefit to the Class Members who continue to work for Flight Centre and for future employees of Flight Centre, either in the form of proper compensation for any overtime hours worked, or

²⁸ Mandryk Affidavit, PMR, Tab 2, p 36, para 37; Exhibit "E": Proposed Settlement Agreement, Mandryk Affidavit, PMR, Tab 2E, p 153-154, 157 ss 5(aa), 17.

²⁹ Mandryk Affidavit, PMR, Tab 2, pp 36-37, paras 38, 41.

³⁰ Mandryk Affidavit, PMR, Tab 2, p 37, para 39.

through working less hours, meaning that they have more personal time and better work-life balance.³¹

30. The proposed settlement contains an opt-out threshold. The proposed settlement contemplates that if the number of opt-outs exceeded the threshold, Flight Centre would have the option to unilaterally terminate the settlement. The opt-out period was 30 days and expired on October 30, 2020. The proposed settlement provides that Class Members who do not opt out will grant Flight Centre a release from any claims in relation to the action and the issues raised or which could have been raised therein, whether known or unknown.³²
31. Lastly, the proposed settlement provides for Class Counsel fees in the amount of 25% of the Settlement Amount and disbursements, plus HST, as well as an honorarium for the representative plaintiff in the amount of \$10,000.³³
32. Even in the absence of the COVID-19 pandemic and the deleterious effects it has wrought on the travel industry and on Flight Centre, Class Counsel and the representative plaintiff believe that the proposed settlement – particularly in light of the Settlement Amount and Flight Centre’s commitment to implement a new timekeeping system for tracking actual hours of work – represents a good result for the Class Members.³⁴

³¹ Mandryk Affidavit, PMR, Tab 2, p 37, para 40.

³² Mandryk Affidavit, PMR, Tab 2, p 38, paras 42-44; Exhibit “E”: Proposed Settlement Agreement, Mandryk Affidavit, PMR, Tab 2E, pp 153-154, ss 5(t), 6.

³³ Mandryk Affidavit, PMR, Tab 2, p 38, para 45; Exhibit “E”: Proposed Settlement Agreement, Mandryk Affidavit, PMR, Tab 2E, pp 157-158, s 20.

³⁴ Mandryk Affidavit, PMR, Tab 2, p 35, para 32.

D. Administration of the Settlement

33. The proposed Distribution Protocol is designed to meet the following principal objectives: (a) to reach as many Class Members as possible with notice of the settlement; (b) to provide an easy, barrier-free and efficient method for Class Members to make claims; and (c) to facilitate the expeditious and cost-effective payment of claims. The overall goal of the Distribution Protocol is to encourage the highest possible take-up rate among Class Members with reasonable and proportionate administrative costs.³⁵
34. Class Counsel believe that the proposed Distribution Protocol achieves the above objectives. First, the notice campaign informing Class Members of the motion to approve the proposed settlement, the Distribution Protocol, Class Counsel's fees and the plaintiff's honoraria, was highly successful. We are confident that a significant percentage of Class Members are aware of the proposed settlement and of the approval motion scheduled for November 9, 2020 and that they will therefore participate in the proposed settlement, should it be approved by the Court. Second, Class Counsel have hired an experienced and effective claims administrator, Trilogy Class Action Services, with particular expertise in administering settlements in employment-related class actions. Third, the proposed Distribution Protocol does not require Class Members to prove their overtime hours but instead calculates their respective entitlements based on a formula dependent on the length or their tenure (both before and after the applicable limitation period) and on the province in which they worked.³⁶

³⁵ Mandryk Affidavit, PMR, Tab 2, p 39, para 47.

³⁶ Mandryk Affidavit, PMR, Tab 2, p 39, para 48.

35. Class Members will be compensated based on their weeks of service within the class period and the province(s) in which they were employed at Flight Centre. Compensation will be adjusted to discount pre-limitation period work by 75% relative to post-limitation period work. Class Counsel chose to discount the time Class Members worked outside the two-year limitation period given the difficulties of obtaining recovery for this category of damages.³⁷
36. Each Class Member's relative share will be calculated in general as follows:
- (a) Proportionate value of each week worked in the Class Period is weighted by Province, having regard to the following Overtime Thresholds under the Applicable Employment Standards Legislation:
 - (i) Alberta and Ontario: 44 hours
 - (ii) British Columbia, Saskatchewan, Newfoundland and Manitoba: 40 hours
 - (iii) Nova Scotia: 48 hours

Based on a hypothetical 50-hour work week, the ratio of overtime hours worked in these provinces is 3:5:1, which is reflected in the relative value attributable to each week worked in the Class Period. Based on the evidence obtained from class members, there was a range in the weekly number of overtime hours class members worked. However, Class Counsel assumed a 50-hour work week for the purposes of the calculations as this number was reasonably within the range of hours worked by the plaintiff's affiants, and assuming this value would ensure that all class members, including those subject to a 48-hour overtime threshold, would receive

³⁷ Mandryk Affidavit, PMR, Tab 2, p 39, para 49; Exhibit "F": Proposed Distribution Protocol, Mandryk Affidavit, PMR, Tab 2F, p 169, para 14.

compensation pursuant to the proposed settlement, while still allowing for different levels of entitlement based on the provincial overtime thresholds.

- (b) Given the unique statutory exemption for commissioned salespeople in British Columbia, the value of each British Columbia work week will be discounted by 65%.
- (c) Time worked pre-limitation period will be discounted by 75% relative to time worked post-limitation period to account for the two-year statutory limitation period.³⁸

37. For any Class Member, the value of their claims will be the total post-limitation period weeks plus pre-limitation period weeks, taking into account the factors impacting on the value of a given week of service described above, and summarized in Table 1, below.³⁹

Table 1

	Nova Scotia	Alberta/Ontario	British Columbia	Manitoba /Saskatchewan /Newfoundland
Value of post-limitation period week	X	3x	0.35 (5x)= 1.75x	5x
Value of pre-limitation period week	0.25(x)	0.25(3)(x)	0.25(1.75)(x)	0.25(5)(x)

38. An example of the operation of the compensation calculation is below:

If a Class Member from Alberta worked 50 weeks pre-limitation period plus 50 weeks post limitation period, their share would be:

³⁸ Mandryk Affidavit, PMR, Tab 2, pp 39-40, para 50; Exhibit “F”: Proposed Distribution Protocol, Mandryk Affidavit, PMR, Tab 2F, p 169, para 15.

³⁹ Mandryk Affidavit, PMR, Tab 2, pp 40-41, para 51; Exhibit “F”: Proposed Distribution Protocol, Mandryk Affidavit, PMR, Tab 2F, pp 169-170, para 16.

$$= 50(3)(x) + 50(0.25)(3)(x)$$

$$= 150x + 37.5x$$

$$= 187.5x$$

To determine the value of “x” and therefore determine the exact share for each Class Member, the Claims Administrator will add up the total of all Class Members’ shares as a function of “x” and divide that number into the total value of the Claim Fund.⁴⁰

39. Every Class Member who completes an Administrative Form shall indicate their length of service within the class period, including their start date(s) and end date(s), and the province(s) in which they were employed at Flight Centre at all relevant times during the Class Period and confirm that they were employed as a Travel Consultant at such times.⁴¹
40. The amounts paid pursuant to this settlement are income and the Claims Administrator shall deduct/remit employee and employer portions of CPP, EI and income tax, and prepare T4A forms as necessary. The defendant is not responsible to withhold any amounts. The Claims Administrator and each member of the Class are responsible for any tax or other amounts payable and will indemnify the defendant for any liability in this regard.⁴²

⁴⁰ Mandryk Affidavit, PMR, Tab 2, p 41, para 52; Exhibit “F”: Proposed Distribution Protocol, Mandryk Affidavit, PMR, Tab 2F, p 170, para 17.

⁴¹ Mandryk Affidavit, PMR, Tab 2, p 41, para 53; Exhibit “F”: Proposed Distribution Protocol, Mandryk Affidavit, PMR, Tab 2F, p 170, para 18; Exhibit “G”: Proposed Administrative Form, Mandryk Affidavit, PMR, Tab 2G.

⁴² Mandryk Affidavit, PMR, Tab 2, pp 41-42, para 54; Exhibit “F”: Proposed Distribution Protocol, Mandryk Affidavit, PMR, Tab 2F, p 170, para 19.

41. Class Counsel is proposing Trilogy Class Action Services (“Trilogy”) as Claims Administrator. Trilogy was selected after a tendering process and in consultation with counsel for Flight Centre.⁴³
42. Trilogy’s duties include the following:
- (a) providing notice(s) to the Class Members as may be required;
 - (b) receiving information from the defendant, including Class Members’ contact information and dates of employment;
 - (c) developing, implementing and operating the administration process including an online claim submission process and website;
 - (d) making timely calculations of Class Members’ Relative Share of the Claim Fund and notifying Class Members;
 - (e) arranging payment to Class Members in a timely fashion;
 - (f) reporting the results of the administration process and the intended distributions to Class Counsel in a timely fashion;
 - (g) maintaining the administration information so as to permit Class Counsel to audit the administration at the discretion of Class Counsel or if ordered by the Court;
 - (h) responding to Class Member inquiries and communications with Class Counsel;
 - (i) calculating the withholding of both employee and employer portions of CPP, EI and income tax and remitting same;
 - (j) preparing and distributing T4A forms to Class Members;

⁴³ Mandryk Affidavit, PMR, Tab 2, pp 45-46, paras 63-66.

- (k) reporting to Class Counsel respecting Claims received and administered and administration expenses;
 - (l) holding the Claim Fund in an interest-bearing trust account at a Canadian Schedule 1 bank in Canada and making all payments from the Claim Fund from that account as authorized;
 - (m) cash management and audit control;
 - (n) preparing and submitting reports and records as directed by Class Counsel or the Court; and
 - (o) other steps as directed by Class Counsel or the Court, as needed.⁴⁴
43. Trilogy shall administer the Distribution Protocol in accordance with the provisions of the Orders of the Court, the Settlement Agreement and the ongoing authority and supervision of the Court.⁴⁵
44. Generally, the Claims Administration Process will be as follows:

Step 1: Receipt of Administrative Forms and any confirmation of Class Member status/eligibility.

Step 2: Determination of the number of eligible Class Members, confirmation of the amounts available for distribution, and relative share of Class Members.

Step 3: Preparation/distribution of Notification Letters.

Step 4: Distribution to Class Members who submitted timely Administration Forms, and remittances to CPP/EI/CRA as necessary.

Step 5: The Claims Administrator will provide a report on the results of the Administration and Distribution to Class Counsel.

⁴⁴ Mandryk Affidavit, PMR, Tab 2, pp 42-43, para 56; Exhibit "F": Proposed Distribution Protocol, Mandryk Affidavit, PMR, Tab 2F, pp 167-168, para 5.

⁴⁵ Mandryk Affidavit, PMR, Tab 2, p 43, para 57; Exhibit "F": Proposed Distribution Protocol, Mandryk Affidavit, PMR, Tab 2F, p 167, para 4.

Step 6: If there are sufficient funds (i.e. due to stale cheques, amounts leftover from holdback, etc.), Class Counsel may direct the Claims Administrator to make a further distribution to individuals who submitted late Administrative Forms.

Step 7: If any amount is remaining from the Settlement Amount and the Administrative Holdback after the distribution set out above and the payment of any taxes on account of interest earned in the Trust Account, such amount shall be paid to the Ontario Employment Education & Research Centre (OEERC) within 30 days of Class Counsel's receipt of final Notices of Assessment from the Canada Revenue Agency, or as directed by the Court.⁴⁶

45. The exact amount for each Class Member will depend on the number of eligible Class Members, after opt-outs, who make a claim, and the number of weeks worked during the class period, in which province, and the amount of time that was worked before or after February 21, 2017.⁴⁷
46. Class Counsel's rough estimate is that if 3,500 Class Members submit claims (70.25% of the total class members), the average payment to the Class Members would be \$1,320. These funds are taxable and subject to employment-related deductions such as CPP/EI.⁴⁸
47. In reality, the \$1,320 estimate is likely an overly conservative estimate of the average payment to the Class Members as it is based on a 70.25% take-up rate and thus overestimates the amount of Class Members that will participate in the settlement. Based on Class Counsel's combined experience in claims administration, the take-up rate is anticipated to be between 45% to 65%.⁴⁹

⁴⁶ Mandryk Affidavit, PMR, Tab 2, pp 43-44, para 58; Exhibit "F": Proposed Distribution Protocol, Mandryk Affidavit, PMR, Tab 2F, pp 171-172, para 24.

⁴⁷ Mandryk Affidavit, PMR, Tab 2, p 44, para 59.

⁴⁸ Mandryk Affidavit, PMR, Tab 2, p 44, para 60.

⁴⁹ Mandryk Affidavit, PMR, Tab 2, p 44, para 61.

48. The below charts illustrate the anticipated average gross and net recovery of the Class Members, assuming 45% and 65% take-up rates, and the 70.25% take up rate estimated in the Notice:⁵⁰

Recovery on \$4,620,000 Net Settlement			
	45% take-up	65% take-up	70.25% take-up
Claimant Pool Size	2,242	3,238	3,500
Average Gross Compensation per Class Member	\$2,060.66	\$1,426.81	\$1,320.00

E. Assessment of Settlement Quantum

49. Class Counsel believe that the quantum of the Settlement Amount is reasonable when measured against:

- (a) Canadian overtime settlements;
- (b) US overtime settlements; and
- (c) realistic potential damages in light of the risks.⁵¹

(i) Canadian Overtime Settlements

50. The most comparable class action settlement in Canada appears to be that reached in *Eklund v GoodLife Fitness Centres Inc.*, which was a class action brought against Goodlife Fitness for unpaid wages (including overtime) on behalf of all current and former non-managerial employees who worked in Goodlife's Ontario clubs since October 2014. *Eklund* is similar

⁵⁰ Mandryk Affidavit, PMR, Tab 2, p 45, para 62.

⁵¹ Mandryk Affidavit, PMR, Tab 2, p 49, para 77.

to this case because it concerned low-wage workers, largely engaged in high-pressure sales work.⁵²

51. *Eklund* was settled prior to certification for \$8.5 million (net \$7.5 million), on behalf of 22,000 class members, none of whom had claims prior to the 2-year presumptive limitation period. Justice Morgan approved the settlement in *Eklund*⁵³, finding that the settlement met the criteria for court approval. The *Eklund* settlement provided for an average payout of \$386/class member (assuming 100% take-up rate, based on the gross settlement amount).⁵⁴
52. The proposed settlement in this case, by comparison, provides a much higher average payout to Class Members, of approximately \$1405/Class Member (assuming a 100% take-up rate, based on the gross settlement amount).⁵⁵

(ii) American Overtime Settlements

53. *Bredbenner v Liberty Travel*⁵⁶ was a class action brought on behalf of travel agents employed by Liberty Travel in Delaware, Maryland and New York, in respect of a two-year period (i.e., August 31, 2006 – September 1, 2008). Liberty Travel became a subsidiary of Flight Centre in 2008.⁵⁷
54. Liberty Travel's travel agents were compensated on the basis of a weekly base pay, plus commissions, bonuses and overtime hours worked in excess of 40 hours/week. However, the claim alleged that the calculation of overtime pay was improper. It was not fixed, but

⁵² Mandryk Affidavit, PMR, Tab 2, p 49, para 78.

⁵³ [2018 ONSC 4146](#) [*Eklund*].

⁵⁴ Mandryk Affidavit, PMR, Tab 2, p 49, para 79.

⁵⁵ Mandryk Affidavit, PMR, Tab 2, p 50, para 80.

⁵⁶ 2011 US Dist Lexis 38663 (NJ Dist Ct).

⁵⁷ Mandryk Affidavit, PMR, Tab 2, p 50, para 81.

instead eligible employees received 1/2 of their hourly rate, based on a composite of their weekly base pay and the total number of hours worked that week. Because the overtime rate was dependant on the sum total of hours accumulated each week, overtime pay progressively decreased as the number of hours spent working overtime increased.⁵⁸

55. The case settled for \$3 million, which included approximately \$1M in class counsel fees and a \$10,000 honorarium for each named plaintiff (for a net amount of \$1,930,000 to the class). The putative class included 1,283 class members, which works out to an average payout of \$1,504 (US) per class member.⁵⁹
56. Unlike in the case at bar, this American case did not involve presumptively limitation-barred time, and the overtime threshold for all workers was 40 hours per week, which is much lower than many of the relevant Canadian jurisdictions. In addition, there did not appear to be concerns about statutory overtime exemptions, such as the British Columbia exemption for commissioned employees at issue in this case.⁶⁰

(iii) \$7 Million Represents a Reasonable Recovery in Light of Risks

57. At the time of the commencement of the within action, Class Counsel were not in possession of data regarding the number of Class Members and full-time equivalents at issue in the class period. In advance of the mediation, Flight Centre's counsel provided Class Counsel with an excel spreadsheet listing all of the FTEs employed during each year of the class period, across both corporate and retail brands.⁶¹

⁵⁸ Mandryk Affidavit, PMR, Tab 2, p 50, para 82.

⁵⁹ Mandryk Affidavit, PMR, Tab 2, p 50, para 83.

⁶⁰ Mandryk Affidavit, PMR, Tab 2, p 50, para 84.

⁶¹ Mandryk Affidavit, PMR, Tab 2, p 51, para 86

58. Upon a review of this data, which was received in advance of the July 2020 mediation, Class Counsel determined that the *actual* potential damages were not in range of \$100 million, as was claimed in the Statement of Claim. Rather, as detailed below, the likely measure of damages was more in the range of \$15 million, or less.⁶²
59. There are a number of factors that significantly limit or reduce the damages in this class proceeding. These factors are as follows:⁶³
- (d) **Significantly fewer Class Members than anticipated:** Class Counsel and the plaintiff had initially estimated that the class contained approximately 10,000 members. As it turned out, however, the Class contained less than 5000. Furthermore, the actual number of positions across Canada ranged from slightly over 500 to slightly under 1050 full-time equivalents in any given year. The fact that there are many times more class members than positions is explained by the high employee turnover, which means that most class members did not work a long time with Flight Centre;
 - (e) **Most of class is presumptively limitation barred:** The plaintiff's discoverability argument in this type of case, where there is no dispute that the Class Members were employees, and where their contracts of employment specifically address issues of overtime pay, is more difficult than in other employment-related cases involving the misclassification of employees, such as *Omarali v. Just Energy*;⁶⁴
 - (f) **The British Columbia portion of the class is likely exempt from overtime pay:** In British Columbia, a unique statutory exemption significantly reduces overtime

⁶² Mandryk Affidavit, PMR, Tab 2, p 51, para 87.

⁶³ Mandryk Affidavit, PMR, Tab 2, pp 51-53, para 88.

⁶⁴ [2016 ONSC 4094](#) [*Omarali*].

entitlement for commissioned salespeople.⁶⁵ Section 37.14.(1) of the British Columbia *Employment Standards Act*⁶⁶ states as follows:

37.14. (1) A salesperson paid entirely or partly by commission is excluded from sections 35 and 40 and Part 5 of the Act on the condition that all wages earned by the employee in a pay period exceed the wages that would be payable under those provisions when calculated at the greater of the employee's base rate or the minimum wage under the Act.

Those who are not caught by this exemption from overtime pay are only entitled to the difference between their commissions and their overtime pay owing, significantly reducing any damages that may be owing to such individuals.⁶⁷ British Columbia had the second most number of Class Members in the class, next to Ontario, and the lowest overtime threshold in the class, at 40 hours per week;

- (g) **Many additional unpaid hours of work of the Class Members are not compensable overtime:** Because the Class Members were paid on a salaried rather than an hourly basis, and because their regular scheduled hours of work were 37.5 hours per week and, later in the class period, 40 hours per week, many of their additional unpaid hours above their scheduled hours of work were not in fact “overtime”, and they had no claim to payment for these hours. In this regard, the law is clear that a salaried employee’s salary compensates them for all hours up to the overtime threshold, so long as it exceeds minimum wage. In reality, Class Counsel understood that the Class Members could be working many additional hours which they believed was “overtime” in lay terms, but for which there was no legal claim; and

⁶⁵ Government of British Columbia “Guide to the Employment Standards Act and Regulation: Commission Sales - Regulation Part 7, Section 37.14” (accessed 28 October 2020), online: <<https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/esr-part-7-section-37-14>>.

⁶⁶ RSBC 1996, c 113.

⁶⁷ Government of British Columbia, “Commission Sales Factsheet” (accessed 28 October 2020), online: <<https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/commission-sales>>.

- (h) **All-in compensation of Class Members was very low:** While the Statement of Claim alleged that the base salary for the Class Members was \$27,000, and that commission made up a “significant” portion of their overall compensation, in reality, Class Members’ all-in compensation remained very low, in the low- to mid-thirty thousands.⁶⁸ The low pay of these workers serves to reduce the value of their overtime claims.

60. The plaintiff’s damages estimates incorporated the above factors as well as the following assumptions, based on the evidence in the plaintiff’s certification motion record and on the data provided to Class Counsel by Flight Centre:

- (a) all Flight Centre operations were included in the spreadsheet provided by the defendant, including its corporate brands;
- (b) all data for all brands from 2008 – 2019 (where given) was included. Class Counsel have estimated the Full-Time Equivalents (“FTEs”) for a particular year by adding the FTEs provided for each month in the year and dividing by the number of months;
- (c) the Class Members work an average of 50 hours per week;
- (d) the Class Members’ total compensation, inclusive of all commissions, equals \$33,000 per year;
- (e) the regular hourly rate for the Class Members was calculated by dividing their \$33,000 annual income by 52 weeks in the year and then dividing this number by the applicable overtime threshold for each province. We then multiplied this number by 1.5 to get the hourly overtime rate. This figure fluctuates based on the applicable provincial overtime threshold;

⁶⁸ Exhibit “A” to Affidavit of Anastasia Quinn, sworn November 22, 2019, Plaintiff’s Motion Record (Certification) [“**PMR (certification)**”], Tab 5, p 643; Exhibit “A” to Affidavit of Hilary Choi, sworn November 22, 2019, PMR (certification), Tab 6, pp 661-662.

(f) the hourly overtime rate was multiplied by the total number of hours worked over the applicable overtime threshold for each province to calculate the damages;

(g) time worked prior to 2017 was discounted by 75% to account for the strong likelihood that this time is ultimately limitation barred; and

(h) time worked in British Columbia was discounted by 65% to account for the strong likelihood that the British Columbia time is ESA-exempt, or at best the damages to the British Columbia portion of the class are drastically reduced.⁶⁹

61. Based on these considerations, the damages assuming an average work week of 50 hours per week along with a 75% discount for limitation-barred time and a 65% discount for time worked in the British Columbia portion of the class totals approximately **\$25,644,276**.⁷⁰

62. However, even on the plaintiff's evidence, not all of the Class Members worked an average of 50 hours every week. The plaintiff's own evidence was that he worked an average of 45-50 hours per week. Class counsel also spoke to other Class Members whose evidence was that they worked less additional unpaid hours than the plaintiff. There was significant variance across the hours estimates in the plaintiff's motion record. Having spoken with countless Class Members of the proposed class, Class Counsel recognized that the estimate of an average of 50 hours per week might be unduly high.⁷¹ Consequently:

(a) using an average of 45 hours worked per week by the class, the \$7,000,000 settlement amount exceeds the likely actual damages of approximately **\$6,737,386** with the limitation period and British Columbia discounts applied;

⁶⁹ Mandryk Affidavit, PMR, Tab 2, pp 53-54, para 89.

⁷⁰ Mandryk Affidavit, PMR, Tab 2, p 54, para 90.

⁷¹ Mandryk Affidavit, PMR, Tab 2, p 54, para 91.

- (b) using a mid-point estimate of an average of 47.5 hours worked per week, the damages total approximately **\$15,315,737** with the limitation period and British Columbia discounts applied. The \$7,000,000 settlement amount therefore reflects a 45.7% recovery of the likely actual damages.⁷²
63. On a gross basis (before legal fees, disbursements and taxes), at a 65% take-up rate and applying the discounts for time worked in British Columbia and prior to the two-year limitation period, the Class is recovering on average 42% of the value of their estimated potential damages assuming a 50 hour week, 70.3% of the value of their estimated potential damages assuming a 47.5 hour week, and 159.8% of their estimated damages assuming a 45 hour week. If the 45 hour week was used, at a 65% take-up rate, the average Class Member is recovering approximately 105.5% of the estimated damages even after legal fees, taxes, disbursements, and levies.⁷³
64. In addition, these estimates do not account for the fact that most of the Class Members were subject to overtime averaging agreements, which averaged their overtime entitlement over several pay periods for the purposes of overtime pay. For instance, the plaintiff was subject to overtime averaging over a four-week period, and thus was only entitled to overtime for hours worked above 176 hours over a four-week period, rather than 44 hours in any given week. To the extent the actual hours of employees fluctuated on a weekly basis, this could reduce the amount of overtime owing.⁷⁴

⁷² Mandryk Affidavit, PMR, Tab 2, p 55, paras 92-93.

⁷³ Mandryk Affidavit, PMR, Tab 2, p 55, para 94.

⁷⁴ Mandryk Affidavit, PMR, Tab 2, p 55, para 95; see also Exhibit "I" to the Affidavit of Stephen Aps, sworn November 18, 2019, PMR (certification), Tab 2, pp 263-266.

F. Benefits of Settlement

65. There are a number of significant benefits to the proposed settlement. These benefits include that the proposed settlement:

- (i) avoids delays associated with trial and appeals, if successful;
- (ii) achieves behaviour modification;
- (iii) provides for pro-rata payments without the requirement that individuals prove their damages;
- (iv) achieves a benefit for all Class Members;
- (v) avoids litigation funding costs;
- (vi) avoids the risk that Flight Centre will be unable to satisfy a judgement; and
- (vii) provides recovery for Class Members whose claims may now be otherwise barred.⁷⁵

(i) Settlement Avoids Delays Associated with Trial and Appeals if Successful

66. The proposed settlement of this action at this juncture avoids the delays associated with, amongst other things, appeals, a common issues trial, possible individual assessments of damages, etc., all of which may imperil the possibility of obtaining recovery for Class Members given the current COVID-19 crisis.⁷⁶

⁷⁵ Mandryk Affidavit, PMR, Tab 2, pp 55-56, para 96.

⁷⁶ Mandryk Affidavit, PMR, Tab 2, p 56, paras 97-98.

(ii) Settlement Achieves Behaviour Modification

67. The proposed settlement provides for Flight Centre to implement a Timekeeping System to track and record hours of work for, *inter alia*, overtime purposes. This is a very significant behaviour modification achievement.⁷⁷
68. In addition, following the commencement of this action, Flight Centre implemented significant changes to its compensation practices including the introduction of a new Working Hours and Overtime Policy in November 2019. As a result of these changes, many of the issues in the class action are now “historical”, and a determination on the merits with respect to such issues would not necessarily affect working conditions or compensation going forward.⁷⁸

(iii) Settlement Provides for Pro-Rata Payments Without Individual Proof of Damages

69. Under the proposed settlement, Class Members will receive a pro rata payment based on the number of weeks worked during the class period, the province in which they were employed, and whether and how much of their work was before or after February 21, 2017. The amount paid to Class Members will not vary based on their actual claimed hours of work during the class period and does not require the Class Members to positively prove any unpaid hours of work.⁷⁹
70. An award of aggregate damages was not a certainty in this case. The plaintiff recognized that individual damages calculations would be complex, and that damages would be

⁷⁷ Mandryk Affidavit, PMR, Tab 2, p 56, para 99.

⁷⁸ Mandryk Affidavit, PMR, Tab 2, p 57, para 100.

⁷⁹ Mandryk Affidavit, PMR, Tab 2, p 57, para 101.

challenging to prove in light of the limited records of Flight Centre and individual Class Members (if any). A major benefit of the proposed settlement, therefore, is that it provides for damages to every Class Member based on readily-ascertainable information, i.e. the employee's length of time worked in any particular jurisdiction.⁸⁰

(iv) Settlement Achieves Benefit for All Class Members

71. From the very outset of this matter, it was important to Class Counsel and to Mr. Aps that any recovery include individuals who worked prior to February 2017 (i.e. outside the two-year limitation period) and for Class Members who worked in British Columbia and Nova Scotia.⁸¹

72. During the course of litigation, it became apparent that there were several Flight Centre brands which may not be captured by the class definition, and for which the plaintiff had not tendered evidence. It appeared to Class Counsel that there was a very real possibility of not being certified for Flight Centre's corporate brands. In these circumstances, Class Counsel would be required to launch a completely new class action on behalf of this group if it wished to pursue damages for these employees. Class Counsel anticipated difficulty locating a plaintiff and tendering evidence on behalf of this group as a stand-alone class, even if Class Counsel determined that it was economically viable to do so.⁸²

(v) Settlement Avoids Litigation Funding Costs

73. Settling the claim at this stage of the proceeding rather than after a contested certification proceeding meant that the Settlement Amount would not be subject to a 10% payment to

⁸⁰ Mandryk Affidavit, PMR, Tab 2, p 57, para 102.

⁸¹ Mandryk Affidavit, PMR, Tab 2, p 58, para 104.

⁸² Mandryk Affidavit, PMR, Tab 2, p 58, para 105.

the Class Proceedings Fund. At the time of the mediation, in accordance with the Retainer Agreement, Class Counsel had prepared an application to the Class Proceedings Fund, which would have been filed in advance of the motion for certification had the mediation been unsuccessful. Had the action settled at a later stage following certification, 10% of the damages would have been payable to the CPF rather than to the Class Members.⁸³

(vi) Settlement Avoids Risk that Flight Centre Will Be Unable to Satisfy a Judgement

74. There is a real risk that Flight Centre may be unable to satisfy a judgement in this case if the matter does not settle and instead goes to trial, whether in 2021 or 2022, or thereafter. Simply put, the COVID-19 crisis⁸⁴ changed everything with respect to this class action, given the unique and unparalleled economic impact of COVID-19 on the international travel industry.⁸⁵
75. Flight Centre, its parent company and its affiliates have posted significant losses and undertaken huge layoffs in 2020 as a direct result of the COVID-19 pandemic.⁸⁶
76. On September 30, 2020, Flight Centre permanently terminated the employment of the majority of its Canadian employees.⁸⁷

⁸³ Mandryk Affidavit, PMR, Tab 2, pp 58-59, para 107.

⁸⁴ The World Health Organization declared COVID-19 a pandemic on March 11, 2020.

⁸⁵ Mandryk Affidavit, PMR, Tab 2, p 59, paras 108-111; Exhibit “L”: Articles reviewed by Class Counsel regarding the impact of the COVID-19 pandemic on Flight Centre and Flight Centre’s response, Mandryk Affidavit, PMR, Tab 2L; Exhibit “M”: Articles regarding the impact of the COVID-19 pandemic on the travel industry more broadly, Mandryk Affidavit, PMR, Tab 2M.

⁸⁶ Mandryk Affidavit, PMR, Tab 2, pp 59-63, paras 111-125.

⁸⁷ Mandryk Affidavit, PMR, Tab 2, p 60-63, paras 117-123; Exhibit “N”: Travel Pulse Article dated October 1, 2020, Mandryk Affidavit, PMR, Tab 2N; Exhibit “O”: Travelweek.ca Article: “‘Extremely difficult decision’: Flight

77. By the time of the mediation, approximately half of Flight Centre’s Canadian “shops” had closed. As of October 2020, there were only 14 Canadian “locations” left.⁸⁸
78. With no end to the current pandemic in sight, Class Counsel are concerned that Flight Centre will continue to lose money going forward and that even if the plaintiff is ultimately successful in this case, there is a real risk that Flight Centre will not be able to satisfy any judgement.⁸⁹

(vii) Settlement Provides Recovery for Class Members Whose Claims May Now Be Otherwise Barred

79. On or about Wednesday, September 30, 2020, Flight Centre issued a mass termination notice to its employees, the majority of whom were already on layoff. The employees have been offered severance packages, in exchange for which they have been asked to sign a form of release which purports to release Flight Centre from, *inter alia*, all claims arising from:

the employment of the Releasor by the Releasees, including entitlement to expense reimbursement, wages, bonuses, overtime, commissions, statutory holiday and vacation pay, benefits (including disability benefits) and all other compensation for services [...] ⁹⁰

Centre addresses layoffs”, dated October 1, 2020, Mandryk Affidavit, PMR, Tab 2O; Exhibit “P”: PAX News Article: “A ‘very painful step’: Flight Centre lays off 600+ in Canada”, dated October 1, 2020, Mandryk Affidavit, PMR, Tab 2P.

⁸⁸ Mandryk Affidavit, PMR, Tab 2, p 63, paras 124-125.

⁸⁹ Mandryk Affidavit, PMR, Tab 2, p 63, para 126.

⁹⁰ Mandryk Affidavit, PMR, Tab 2, pp 63-64, paras 127-128; Exhibit “Q”: Release, Mandryk Affidavit, PMR, Tab 2Q.

80. There is no dispute that Class Members who receive a severance package from Flight Centre and sign the requested release may also participate in the proposed settlement (if approved). However:

(a) Class Members who accept a severance offer from Flight Center and sign the release in favour of the company then opt out of the proposed settlement (as is their right) may be barred from pursuing Flight Centre in an individual proceeding by virtue of the signed release; and

(b) if the proposed settlement is not approved, Flight Centre may take the position that the claims in this proposed class action are effectively resolved for all of those who sign a release. If successful, Flight Centre's position in this regard could significantly reduce the potential damages to the Class.⁹¹

81. These post-settlement developments accentuate the risks of non-recovery in the event that this settlement is not approved.⁹²

G. Notice to and Response by Class Members

(i) Notice of the Settlement to the Class

82. In accordance with the plan of dissemination approved by the Court, the Notice of Certification and Settlement Approval Hearing was mailed and emailed to the Class Members at their last known mailing addresses and email addresses, as well as mailed and emailed to all purported Class Members who registered on Class Counsel's confidential database at flightcentreclassaction.com.⁹³

⁹¹ Mandryk Affidavit, PMR, Tab 2, p 64, paras 129-130.

⁹² Mandryk Affidavit, PMR, Tab 2, p 64, para 131.

⁹³ Mandryk Affidavit, PMR, Tab 2, p 66, para 136.

83. A copy of the Notice of Certification and Settlement Approval Hearing was also posted on goldblattpartners.com, flightcentreclassaction.com and flightcentresettlement.com. In addition, Class Counsel used its social media (Twitter and Facebook) to publicize the proposed settlement.⁹⁴
84. The parties put out a national joint media statement concerning the proposed settlement and articles about the proposed settlement appeared in numerous publications. Class Counsel received hundreds of emails and phone calls from Class Members following the release of the joint media statement but prior to the delivery of the Notice of Certification and Settlement Approval Hearing.⁹⁵
85. Following the delivery of the Notice of Certification and Settlement Approval Hearing, Class Counsel received dozens if not hundreds of calls and emails from Class Members about the action and proposed settlement along with hundreds of new registrations to its confidential registration database.⁹⁶
86. The proposed settlement has come to the attention of Class Members.⁹⁷

⁹⁴ Mandryk Affidavit, PMR, Tab 2, p 66, para 137.

⁹⁵ Mandryk Affidavit, PMR, Tab 2, pp 66-67, para 138; Exhibit “R”: Joint Press Release: “\$7 Million Settlement Reached in Class Action Against Flight Centre Travel Group Canada”, dated August 24, 2020, Mandryk Affidavit, PMR, Tab 2R; Exhibit “S”: Toronto Star and Globe and Mail Articles: “Travel Agents reach \$7-million settlement in class action against Flight Centre” dated August 24, 2020, Mandryk Affidavit, PMR, Tab 2S.

⁹⁶ Mandryk Affidavit, PMR, Tab 2, p 67, para 139.

⁹⁷ Mandryk Affidavit, PMR, Tab 2, p 67, para 140.

(ii) Communications with Class Members Since Notice of the Settlement

87. Class Counsel have received 39 statements in support of the settlement and 4 statements opposing the settlement.⁹⁸ The plaintiff's Motion Record includes 65 affidavits from Class Members who support the settlement.
88. In addition, as of the date herein, Class Counsel have received a total of 826 unique registrations on their website, 560 of which were received after August 24, 2020, the date upon which the parties released their joint press release regarding the conclusion of the proposed settlement. These registrations provide a comments section where the registrant can provide further information. None of the registrants provided any comments indicating that they were dissatisfied with the proposed settlement. To the contrary, many indicated their eagerness to participate in the settlement.⁹⁹
89. The response from Class Members has been overwhelmingly in support of the proposed settlement.

(iii) Opt-outs

90. The confidential opt-out threshold has not been exceeded. The total number of opt-outs was 22, representing less than 0.45% of the class.¹⁰⁰
91. None of the individuals who have opted out from the proposed settlement have indicated a desire or intention to pursue their own proceeding against Flight Centre.¹⁰¹

⁹⁸ Significantly, 2 of the 4 objections were from individuals who denied that Flight Centre owed compensation to the Class Members and who expressed that they were "grateful" to Flight Centre. Mandryk Affidavit, PMR, Tab 2, p 67, para 142; Exhibit "T": Statements in Support / in Opposition of Settlement, Mandryk Affidavit, PMR, Tab 2T.

⁹⁹ Mandryk Affidavit, PMR, Tab 2, pp 67-68, para 144.

¹⁰⁰ Mandryk Affidavit, PMR, Tab 2, p 68, para 148.

¹⁰¹ Mandryk Affidavit, PMR, Tab 2, p 68, para 149.

H. Retainer and Fees Sought

92. The plaintiff and Class Counsel entered into a contingency retainer agreement on February 9, 2019. The plaintiff reviewed and understood the Retainer Agreement before signing it. The retainer agreement provides that in the event that an agreement to settle the action is reached prior to the commencement of the certification hearing, as is the case in the within matter, Class Counsel shall be entitled to 25% of the amount recovered by the Class Members pursuant to any settlement agreement, plus disbursements and taxes.¹⁰²
93. The representative plaintiff was at all times aware of the nature of the Retainer Agreement and that Class Counsel would be remunerated, in the event of the successful resolution of the action, in a manner which recognizes the risk they assumed in taking this case on.
94. Class Counsel assumed significant risk in pursuing this action on a contingency fee basis. In particular, while there have been a few other unpaid hours/overtime class actions that have been commenced, there was not, at the time this action was commenced, any decision on the merits in any of these cases addressing issues such as the legality of a pre-approval policy for overtime or the scope of an employer's duty of care to an employee with respect to compensation. There continues to be uncertainty as to the likelihood that claims like this one would be successful.¹⁰³

¹⁰² Exhibit "A": Retainer Agreement between Stephen Aps and Goldblatt Partners LLP dated February 19, 2019, Mandryk Affidavit, PMR, Tab 2A; Mandryk Affidavit, PMR, Tab 2, pp 25, para 8; Aps affidavit, PMR, Tab 3, p 352, 357, paras 7, 23.

¹⁰³ Mandryk Affidavit, PMR, Tab 2, p 70, para 155.

95. Pursuant to the proposed settlement and the contingency fee retainer agreement with the plaintiff, Class Counsel is seeking a contingency fee of 25% of the Settlement Amount which comes to **\$1,750,000 plus HST and disbursements.**¹⁰⁴
96. The retainer agreement provided for payment based on one of two methods, at Class Counsel's discretion. Method "A" provided for a base fee plus multiplier of not less than 2 in the event of settlement before the hearing of the certification motion. Method "B" provided for a percentage amount of 25% in the event of settlement before the hearing of the certification motion. Class Counsel's fees are based on Method "B".¹⁰⁵
97. In addition to the fees incurred to date in the amount of \$481,000, and disbursements incurred to date in the amount of \$38,533 (including HST), Class Counsel anticipates based on our past experience that up to \$110,000 in additional fees will be required throughout the settlement administration period to deal with issues including answering inquiries from Class Members and the claims administrator, providing advice and assistance to the claims administrator regarding the distribution protocol and the claims process, and reviewing the reports of the claims administrator. The total actual fees are therefore anticipated to ultimately be more in the range of approximately \$591,000, not inclusive of HST.¹⁰⁶

¹⁰⁴ Mandryk Affidavit, PMR, Tab 2, p 69, para 150.

¹⁰⁵ Mandryk Affidavit, PMR, Tab 2, p 69, para 151; Exhibit "A": Retainer Agreement between Stephen Aps and Goldblatt Partners LLP dated February 19, 2019, Mandryk Affidavit, PMR, Tab 2A.

¹⁰⁶ Mandryk Affidavit, PMR, Tab 2, p 69, para 152; Exhibit "U": Class Counsel Fee and Disbursement Chart, Mandryk Affidavit, PMR, Tab 2U.

I. Honorarium for Representative Plaintiff

98. The proposed settlement also contemplates an honorarium for the representative plaintiff in the amount of \$10,000. Class Counsel supports the payment of an honorarium to the representative plaintiff in recognition of his vital role and efforts in advancing the claims of the Class. The representative plaintiff spent considerable hours on this case and also suffered negative career consequences as a result of his involvement in the action.¹⁰⁷
99. As of the date herein, no Class Member has objected to the proposed payment to Mr. Aps.¹⁰⁸

PART III - ISSUES AND THE LAW

A. Certification

100. In accordance with the terms of the proposed settlement, the certification of this action as a class proceeding and the appointment of Mr. Aps as representative plaintiff are proceeding on consent.
101. The language of section 5 of the *Class Proceedings Act, 1992*, SO 1992, c 6 (“CPA”) is mandatory. The court is required to certify an action as a class proceeding where the requirements of s 5(1) are met. Courts have emphasized that the CPA is remedial legislation, to be interpreted in a manner to give full effect to its benefits.¹⁰⁹ The certification motion is a procedural inquiry, requiring only a low evidentiary threshold.¹¹⁰ The plaintiff must show

¹⁰⁷ Mandryk Affidavit, PMR, Tab 2, p 71-72, paras 152-165; Aps Affidavit, PMR, Tab 3, pp 358-362, paras 24-40.

¹⁰⁸ Mandryk Affidavit, PMR, Tab 2, p 72, para 166.

¹⁰⁹ *Hollick v Toronto (City)*, 2001 SCC 68 [*Hollick*] at paras [15-16](#); *Griffin v Dell Canada Inc.*, [2009] OJ No 418 (SCJ) (CanLII) at para [43](#).

¹¹⁰ *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at paras [102](#), [105](#) [*Pro-Sys*].

“some basis in fact” to discharge the evidentiary burden on certification.¹¹¹ Moreover, certification cannot be defeated simply because individual determinations, including whether particular class members actually worked uncompensated time and how much each person worked, may still be required after the common issues have been addressed.¹¹²

(i) *Section 5(1)(a)*

102. The test under s. 5(1)(a) is the same as under Rule 21, namely that the claim should be permitted to proceed unless it is “plain and obvious” that it cannot succeed.¹¹³ The following general principles apply:¹¹⁴

- (a) no evidence is admissible for the purposes of determining the section 5(1)(a) criterion;
- (b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
- (c) matters of law which are not fully settled by the jurisprudence must be permitted to proceed; and
- (d) the pleading must be generously read to allow for drafting inadequacies.

103. Mr. Aps’ Amended Amended Statement of Claim discloses the following causes of action:

- (a) systemic breach of provincial employment standards legislation: the plaintiff claims that Flight Centre systemically breached the provisions of the employment standards

¹¹¹ *Lambert v Guidant Corporation*, [2009] OJ No 1910 (SCJ) (CanLII) at paras [60](#), [63-65](#), [68-71](#), [77](#), [81-82](#), [111](#) & [118](#).

¹¹² *Fresco v Canadian Imperial Bank of Commerce*, 2012 ONCA 444 [*Fresco* (C.A.)] at para [106](#).

¹¹³ *Rosen v BMO Nesbitt Burns Inc.*, 2013 ONSC 2144 [*Rosen*] at para [29](#).

¹¹⁴ *Fulawka v Bank of Nova Scotia*, 2010 ONSC 1148 at para [70](#) [*Fulawka* (S.C.)], aff’d [2012 ONCA 443](#) [*Fulawka* (C.A.)], leave to appeal to SCC ref’d [2012] SCCA No 326 ([CanLII](#)).

legislation in the provinces in which they operate which are incorporated into the contracts of the class members;¹¹⁵

(b) systemic breach of contract and breach of duty of good faith: the plaintiff claims that Flight Centre breached the terms of its contracts with class members, including to compensate for all hours worked, and breached the duty of good faith by, *inter alia*, permitting or suffering class members to work hours in excess of those scheduled but failing to compensate all hours worked;¹¹⁶

(c) systemic negligence: the plaintiff asserts that Flight Centre owed a duty of care to class members to ensure they were properly compensated for their hours of work at appropriate rates, which it breached by, *inter alia*, permitting or suffering class members to work hours in excess of those scheduled but failing to compensate all hours worked;¹¹⁷ and

(d) unjust enrichment: the plaintiff claims that Flight Centre was unjustly enriched as a result of receiving the benefit of class members' unpaid hours, without juristic reason;¹¹⁸

104. These causes of action have been routinely certified in other employment class actions, and there is no reason to depart from this trend.¹¹⁹

(ii) Section 5(1)(b)

105. Section 5(1)(b) requires that there is an identifiable class of two or more persons. The purpose of the class definition is to identify the persons who are entitled to notice and who will be bound by any judgment or settlement if they do not opt out. The test to be applied to the existence of an identifiable class is whether the plaintiff has defined the class by

¹¹⁵ Exhibit "B": Amended Amended Statement of Claim filed September 3, 2020 ["AASOC"], Mandryk Affidavit, PMR, Tab 2, p 129, para 51.

¹¹⁶ AASOC, Mandryk Affidavit, PMR, Tab 2, pp 120-122, paras 52-55.

¹¹⁷ AASOC, Mandryk Affidavit, PMR, Tab 2, p 122-124, para 59.

¹¹⁸ AASOC, Mandryk Affidavit, PMR, Tab 2, p 122, paras 56-58.

¹¹⁹ *Rosen*, *supra* note 113 at paras [29-34](#); *Fulawka* (S.C.), *supra* note 114 at paras [72-81](#), [143](#), *aff'd* *Fulawka* (C.A.), *supra* note 114; *Baroch v Canada Cartage*, 2015 ONSC 40 [*Canada Cartage*] at paras [21](#), [38-42](#); [43-48](#); *Fresco* (C.A.), *supra* note 112 at para [103](#).

reference to objective criteria such that a person can be identified to be a class member without reference to the merits. The class must be rationally related to the common issues, and neither unnecessarily broad nor arbitrarily under-inclusive.¹²⁰

106. The proposed class definition is as follows:

All current or former Travel Consultants employed by Flight Centre Travel Group (Canada) Inc. in the Provinces of Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Newfoundland, for the period from December 2008 to the date of certification.

107. The proposed class definition satisfies the above-noted criteria. The class period begins with the introduction of Flight Centre’s overtime policy in December 2008 and ends with the certification of the action. The proposed class definition includes the employees who share an interest in a determination of the common issues pertaining to the employment contracts and pay practices for the employees at Flight Centre. The definition in this matter is analogous to those approved in other employment class actions.¹²¹

(iii) Section 5(1)(c)

108. Section 5(1)(c) of the *CPA* requires that the proposed class proceeding raise common issues of fact or law. Appellate courts have emphasized that the common issue criterion represents a “low bar”.¹²² 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

¹²⁰ *Hollick*, *supra* note 109 at para [17](#); *Defazio v Ontario (Ministry of Labour)*, [2007] OJ No 902 (SCJ) (CanLII) at para [92](#); *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 (CA) (CanLII), rev’g, (2003), 65 OR (3d) 492 (Div Ct) ([CanLII](#)), leave to appeal to SCC ref’d, [2005] SCCA No 50, [*Cloud*] at para [45](#); *1291079 Ontario Limited v Sears Canada Inc.*, 2014 ONSC 5190 at para [38](#); *Dumoulin v Ontario*, [2005] OJ No 3961 (SCJ) (CanLII) at para [13](#).

¹²¹ *Rosen*, *supra* note 113 at paras [20-21](#); *Sayers v Shaw Cablesystems Limited*, 2011 ONSC 962 at para [9](#) [*Sayers*].

¹²² *Cloud*, *supra* note 120 at para [52](#).

its resolution. The critical question is whether resolution of the common issues would significantly advance the action.¹²³ The plaintiff need only proffer a minimal evidentiary basis of “some basis in fact” to establish the existence of common issues.¹²⁴

109. The Supreme Court has also held that it is open to a trial judge to provide a nuanced answer for different groups of class members, if necessary.¹²⁵ Subgroup analysis is unnecessary and irrelevant at the certification stage.¹²⁶ All that must to be shown is some basis in fact for the common question, not necessarily an identical answer. The fact that the answers to the common issues may be nuanced and varied will not defeat certification. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent.¹²⁷

110. As is set out in the Settlement Agreement, the proposed common issues are the following:

1. What are the relevant terms of the Class Members’ contracts of employment with the Defendant respecting:
 - a. regular and overtime hours of work?
 - b. recording of the hours worked by Class Members?
 - c. compensation for hours worked by Class Members?

¹²³ *Cloud*, *supra* note 120 at para [53](#).

¹²⁴ *Pro-Sys*, *supra* note 110 at paras [99-105](#); *Cloud*, *supra* note 120 at para [50](#).

¹²⁵ *Vivendi Canada Inc. v Dell’Aniello*, 2014 SCC 1 at para [77](#) [*Vivendi*]. Similarly, in *Noble v North Halton Golf and Country Club*, 2016 ONSC 2962 at paras [40-42](#), in which Your Honour relied on *Vivendi* for commonality purposes, the liability common issue was universal, but the remedy may have varied since it was dependent upon class member preference. It was found that it was open to the trial judge to make a nuanced answer on the eventual remedy that may not be the same for each class member, none of which vitiated the value of the proposed common issue.

¹²⁶ *Vivendi*, *ibid* at para [77](#).

¹²⁷ *Ibid* at para [46](#).

2. Did the Defendant breach any of the foregoing contractual terms?

111. The first issue seeks to determine the terms of Class Members' contracts with respect to overtime hours of work, recording of hours, and compensation. This can be determined with reference to the common "template" employment documents, including the Overtime Policy. There is no evidence that class members had individualized terms of employment, and to the contrary, Flight Centre's intention was to treat the class members consistently across the country.
112. The second common issue seeks to determine whether Flight Centre did in fact breach any of the foregoing contractual terms in its employment agreements with the Class Members. Similar common issues have been certified in numerous employment class actions.¹²⁸

(iv) *Section 5(1)(d)*

113. A class proceeding is 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 behaviour modification.¹²⁹
114. In *Fischer*, the Supreme Court emphasized that at its core, a certification motion is a comparative analysis between the proposed class proceeding and the alternative proceeding (if any) offered by the defendant.¹³⁰ The onus lies on a defendant to demonstrate that there

¹²⁸ *Rosen*, *supra* note 113, Certified Common Issues at [Appendix](#); *Fulawka* (C.A.), *supra* note 114, Certified Common Issues at [Appendix](#); *Canada Cartage*, *supra* note 119 at para [21](#). *Berg v Canadian Hockey League*, [2017 ONSC 2608](#) (Sup Ct), additional common issues certified on appeal [2019 ONSC 2106](#) (Div Ct). *Omarali* at [Appendix](#).

¹²⁹ *Rosen*, *supra* note 113 at para [66](#).

¹³⁰ *AIC Limited v Fischer*, 2013 SCC 69 at paras [22-26](#).

is a better way to resolve the common issues than by way of a class proceeding. Where a defendant leads no evidence of any alternate mechanism, arguments that no litigation is preferable to a class proceeding cannot be given effect.¹³¹

115. In employment class actions, courts have not hesitated to find that class proceedings are a preferable procedure.¹³² There is no reason to depart from this trend. In the circumstances of this case, there are thousands of class members, each with relatively modest employment standards claims. Common determinations will significantly advance the litigation and provide access to justice to thousands of vulnerable employees.
116. As set out in the affidavit of Joshua Mandryk filed on this motion, Class Counsel have been inundated with inquiries, the overwhelming majority of which were in favour of the proposed settlement, regarding this matter since the notice of the settlement approval was delivered to the Class Members. At no point have any of the individuals who contacted Class Counsel indicated that they have or planned to pursue their own proceeding against Flight Centre.
117. In employment class actions, courts have rejected defendants' contentions that individual actions under the small claims or simplified rules were a preferable procedure,¹³³ or that employment standards administrative proceedings, such as those under the Ontario *ESA*, were a preferable procedure. These decisions have recognized the power imbalance between employee and employer, which is heightened by the importance that society

¹³¹ *Whitehouse v BDO Canada LLP*, 2020 ONSC 144 at paras [140-143](#).

¹³² *Fulawka (C.A.)*, *supra* note 114 at paras [151-171](#); *Fresco v CIBC*, [2009] OJ No 2531 (SC) (CanLII) at paras [92-98](#).

¹³³ *Rosen*, *supra* note 113 at para [70](#).

attaches to employment, and the fact that many employees do not pursue claims against their employer despite the availability of administrative schemes.

118. Even if some or all class members would pursue their claims in the absence of a class proceeding, resolving all issues at once will enable the Court to manage what would otherwise be burdensome, repetitive litigation. Furthermore, the availability of aggregate or simplified procedures for the assessment of damages pursuant to ss. 23, 24 or 25 of the *CPA* ensures that class members' claims can be efficiently and manageably adjudicated in a class proceeding.

119. The plaintiff therefore submits that in accordance with the case law established by *Bozsik*, *Rosen*, *Fresco* and *Fulawka*, the proposed class action is a preferable means of dealing with the claims of the class members, and the test under s. 5(1)(d) has been met.¹³⁴

(v) ***Section 5(1)(e) – Representative Plaintiff***

120. The proposed representative need not be 'typical' of the class but must be 'adequate' in the sense that she will vigorously prosecute the claim.¹³⁵ Mr. Aps has undertaken all the essential steps of a class representative in litigating this action, including reviewing evidence served to date, retaining and instructing class counsel and providing evidence. He shares common interests with the other class members and is a suitable representative plaintiff.

¹³⁴ *Ibid* at paras [66-72](#); *Bozsik v Livingston*, 2019 ONSC 5340 at paras [166](#), [262-266](#) [*Bozsik*]; *Fresco* (C.A.), *supra* note 112 at para [111](#), *Fulawka* (C.A.), *supra* note 114 at paras [151-171](#).

¹³⁵ *Rosen*, *supra* note 113 at paras [73-74](#).

B. Settlement Approval

(i) General

121. Class action settlements are subject to court approval. The settlement must be fair, reasonable, and in the best interests of the settlement class.¹³⁶
122. On a settlement approval motion, “the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.”¹³⁷ An objective and rational assessment of the pros and cons of the settlement is required.
123. A settlement must fall within a zone of reasonableness. “Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.” A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.¹³⁸
124. It is not the court's responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented by reputable counsel with expertise in class action litigation, the Court is

¹³⁶ *Dabbs v Sun Life Assurance Co. of Canada* (1998) 40 OR (3d) 429 (Gen Div) ([CanLII](#)) [*Dabbs*], aff'd (1998) 41 OR (3d) 97 (CA) ([CanLII](#)), leave to appeal to SCC refused.

¹³⁷ *Farkas v Sunnybrook & Women's College Health Sciences Centre*, 2009 CanLII 44271 (Ont Sup Ct) at para [44](#) (citations omitted) [*Farkas*].

¹³⁸ *Parsons v Canadian Red Cross Society*, [1999] OJ No 3572 (Sup Ct) at para 70 [*Parsons*]; *Dabbs*, *supra* note 136 at para [30](#); and *Mancinelli v Royal Bank of Canada*, 2016 ONSC 6953 at para [32](#) [*Mancinelli* 2016].

entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking their reputation and experience on the recommendation.¹³⁹

125. It is well understood that a settlement, being a compromise of the positions of both parties, is unlikely to represent a complete victory in favour of the plaintiff. It is in that context that the reasonableness of the settlement must be assessed.¹⁴⁰

126. The following factors are relevant in determining whether a settlement falls within the zone of reasonableness and is in the best interests of the class:

- (a) the likelihood of recovery or likelihood of success;
- (b) the amount and nature of discovery, evidence or investigation;
- (c) the proposed settlement terms and conditions;
- (d) the recommendation and experience of counsel;
- (e) the future expense and likely duration of the litigation;
- (f) the number of objectors and nature of objections;
- (g) the presence of good faith, arm's-length bargaining and the absence of collusion;
- (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and

¹³⁹ *Toronto Community Housing Corporation v Thyssenkrupp Elevator (Canada) Limited*, 2012 ONSC 6626 at para [29](#); and *Dabbs*, *supra* note 136 at para [32](#).

¹⁴⁰ *Bozsik*, *supra* note 134 at para [6](#).

(i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.¹⁴¹

(ii) *Settlement Benefits and Recommendation of Counsel*

127. It is respectfully submitted that the Settlement Agreement in this case is a good settlement and ought to be approved. Amongst other things, the proposed settlement:

- (a) avoids delays associated with trial and appeals, if successful;
- (b) achieves behaviour modification;
- (c) provides for pro-rata payments without the requirement that individuals prove their damages;
- (d) achieves a benefit for all Class Members, including Class Members with claims outside the limitation period and/or who live in BC or Nova Scotia, jurisdictions with limitations on overtime recovery;
- (e) avoids litigation funding costs;
- (f) avoids the risk that Flight Centre will be unable to satisfy a judgement;
- (g) provides recovery for Class Members (who were terminated and signed releases in favour of Flight Centre) whose claims may be otherwise barred if the settlement is not approved.
- (h) stipulates that no Class Member will be required to do anything to prove their overtime;
- (i) is non-reversionary; and

¹⁴¹ *Fantl v Transamerica Life Canada*, [2009] OJ No 3366 (Sup Ct) (CanLII) at para [59](#); *Corless v KPMG LLP*, 2008 CanLII 39784 (Ont Sup Ct) at para [38](#); *Farkas*, *supra* note 137 at para [45](#); and *Mancinelli* 2016, *supra* note 138 at para [30](#).

- (j) achieved after arm's-length negotiations by experienced counsel and involving an experienced mediator.
128. Even in the absence of the COVID-19 pandemic and its impact on Flight Centre, the Settlement Amount represents an objectively reasonable recovery for the Class Members given the overall measure of the likely damages in this case. In particular:
- (a) the \$7 million Settlement Amount is within the range of the amounts recovered in comparable cases in both Canada and the U.S.;
 - (b) the likely measure of damages in this case is \$15 million (assuming an average of 47.5 hours worked per week and a 75% discount for limitation barred time and a 65% discount for Class Members who worked in BC); and
 - (c) based on a \$4.62 million Settlement Fund, the Class Members stand to receive average payments ranging from \$1,320 (with a 70.25% take up rate) to \$2,100 (with a 45% take up rate). For Class Members who worked at Flight Centre for the majority of the Class Period, their recoveries will be far in excess of these amounts as the average is no doubt dragged down by the many Class Members who worked less than one (1) year at Flight Centre during the Class Period.
129. However, the impact of COVID-19 and the risks it imposes on Flight Centre, and therefore the Class Members, in the event that the proposed settlement is not approved, cannot be discounted. Indeed, it is submitted that the financial well-being of the defendant is a valid consideration in favour of the approval of this settlement.

130. Courts have recognized that in the face of the potential insolvency of a defendant, whether guaranteed or likely, an earlier guaranteed settlement is preferable to litigating toward “an arid victory to obtain a judgment from a defendant unable or made unable to pay it.”¹⁴²
131. Class Counsel have always been of the view that this case was strong on the merits. However, Class Counsel, who have a wealth of experience in employment class actions and in fighting for workers’ rights, also believed that there were serious risks in pressing forward with the case and not settling it at the time they did.
132. Class Counsel firmly believe that the proposed settlement is in the best interests of the Class and ought to be approved. It is submitted that this Court ought to take comfort from the fact that Class Members have demonstrated, in overwhelming numbers, their support for the proposed settlement.

C. **Distribution Protocol Approval**

(i) *Overview*

133. Distribution protocols are an essential element of class actions,¹⁴³ which bridge the gap between settlement approval and Class Members receiving compensation. An approved settlement is only as good as the method by which it ultimately reaches class members. Distribution protocols are assessed under the same legal test as settlement approval: namely, whether the protocol is fair, reasonable and in the best interests of the class.¹⁴⁴

¹⁴² *General Motors of Canada Limited v Abrams*, 2011 ONSC 5338 at para [99](#).

¹⁴³ *Eidoo v Infineon Technologies AG*, 2014 ONSC 6082 at para [23](#) [*Eidoo*].

¹⁴⁴ *Zaniewicz v Zungui Haixi Corp.*, 2013 ONSC 5490 at para [59](#) [*Zaniewicz*]; *Eidoo*, *ibid* at para [74](#); *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc.*, 2018 ONSC 6447 at para [72](#).

134. This Court’s authority to approve the Protocol is grounded in the Settlement Agreement.¹⁴⁵

The Settlement Agreement states, “The Distribution Protocol as agreed to by the parties ... shall form part of this Settlement Agreement.”¹⁴⁶

(ii) *Proposed Distribution Protocol Meets the Test for Approval*

135. It falls upon Class Counsel to develop a distribution protocol that is reasonable, fair and in the best interests of the class. The consideration of the distribution protocol follows a consideration of the proposed settlement, considering similar factors, as held by this Court:

Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members’ claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the scheme of distribution under the proposed settlement.¹⁴⁷

136. This motion is concerned with the second exercise described above. The test for approving a distribution protocol is analogous to the test that the Court applies when deciding whether to approve a settlement.¹⁴⁸ A settlement must fall within a zone of reasonableness to be

¹⁴⁵ *Mancinelli v Royal Bank of Canada*, 2018 ONSC 4192 at para 49 [*Mancinelli* 2018].

¹⁴⁶ Exhibit “E”: Proposed Settlement Agreement, Mandryk Affidavit, PMR, Tab 2, p 159, para 25.

¹⁴⁷ *Welsh v Ontario*, 2018 ONSC 3217 at para 86 [*Welsh*]. See also *Mancinelli* 2018, *supra* note 145 at para 50.

¹⁴⁸ *Zaniewicz*, *supra* note 144 at para 59; *Eidoo*, *supra* note 143 at para 74; and *Mancinelli* 2018, *supra* note 145 at para 49.

approved.¹⁴⁹ Deciding what is fair and reasonable can involve considerations of what is economical and practical on the facts of a particular case.¹⁵⁰

137. The zone of reasonableness assessment allows for variation between settlements depending upon the subject matter of the litigation and the nature of the damages for which settlement provides compensation.¹⁵¹ A settlement is to be reviewed on an objective standard which accounts for the inherent difficulty in crafting a universally satisfactory settlement.¹⁵²

138. The proposed Protocol is well within the zone of reasonableness. It strikes a balance between individual compensation and an efficient and expeditious distribution. With the services of the Claims Administrator, the Protocol aims to reach as many Class Members as possible to ensure the highest possible take-up. It provides compensation to all Class Members who submit a claim. For those Class Members who do submit claims, the claims process has been designed in such a way as to make it as simple and easy as possible.

(iii) *Barrier-Free Distribution Warrants Approval*

139. The fundamental allegation at the core of this proceeding is that Flight Centre did not have in place a system for tracking and recording Class Members' actual hours of work and not just their scheduled hours of work. Barring Class Members taking it upon themselves to keep track of their unpaid overtime, no records exist upon which a determination could be made of individual overtime entitlements.

¹⁴⁹ *Rosen v BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 at para [12](#); *Leslie v Agnico-Eagle Mines*, 2016 ONSC 532 at para [8](#).

¹⁵⁰ *Mancinelli* 2018, *supra* note 145 at para [49](#); and *Pro-Sys Consultants Ltd. v Infineon Technologies AG*, 2014 BCSC 1936 at para [34](#).

¹⁵¹ *Parsons*, *supra* note 138 at para 70.

¹⁵² *Ibid* at para 80.

140. Providing compensation on a *pro rata* basis, without the need for individuals to provide documents in support of their claims or to prove the quantum of their damages, removes significant barriers to take-up. The proposed Distribution Protocol does not require proof from any individual Class Member to establish an entitlement to compensation beyond providing the time period and the location at which they worked for Flight Centre, as set out in the Administration Form.

(iv) Discounts for Weaker Claims are Appropriate

141. The proposed protocol contemplates discounting limitation-barred time by 75% and time worked by Class Members in British Columbia by 65%. Class Counsel submit that these proposed discounts are entirely appropriate in this case given the challenges of (a) recovering damages incurred outside the limitation period and (b) overcoming the overtime exclusion in the BC *ESA* with respect to commission-based employees.

142. In approving plans of distribution, courts have found that distinguishing between different types of claimants is reasonable and appropriate.¹⁵³ For example, in *Gould v BMO Nesbitt Burns Inc.*, a securities class action, Justice Cullity approved a protocol discounting certain categories of purchasers “to reflect increased certification and substantive litigation risks affecting their claims.”¹⁵⁴

¹⁵³ *Mancinelli* 2018, *supra* note 145 at para 51.

¹⁵⁴ *Gould v BMO Nesbitt Burns Inc.*, 2007 CanLII 6914 (Ont Sup Ct) at paras 2, 19-23.

(v) Compensation for Class Members in Nova Scotia and British Columbia is Appropriate

143. Courts have held that it is not appropriate to release class member claims for no compensation.¹⁵⁵ In *Zaniewicz v Zungui Haixi Corp*, this Court held that it was inappropriate and unfair to include persons as class members but exclude those individuals from the distribution.¹⁵⁶
144. The Protocol addresses this principle of fairness. Here there are no “bargaining chips” – i.e., Class Members who release their litigation rights but are not included in the distribution. All Class Members – in every province, and who worked before and after February 2017 – will be eligible to receive compensation from the Settlement Fund.

(vi) Conclusion

145. The proposed Distribution Protocol’s barrier-free approach to claims combined with a robust notice campaign, should achieve an efficient distribution to as many Class Members as possible. It is respectfully submitted that the proposed Distribution Protocol is in the best interests of the Class and should be approved.

D. Fee Approval

(i) Approval of the Retainer Agreement

146. The plaintiff seeks approval of the Retainer Agreement.

¹⁵⁵ *Welsh*, *supra* note 147 at para [13](#).

¹⁵⁶ *Zaniewicz*, *supra* note 144 at paras [87-88](#); see also *Mancinelli* 2018, *supra* note 145 at para [51](#).

147. Pursuant to section 32 of the *Class Proceedings Act, 1992*, retainer agreements are not enforceable unless approved by the court. A retainer agreement must be in writing and must:

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary, or otherwise.¹⁵⁷

148. The Retainer Agreements complies with these requirements of the *Class Proceedings Act, 1992*.¹⁵⁸

149. The plaintiff read and understood the Retainer Agreement.¹⁵⁹

(ii) Fee Approval

150. Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the

¹⁵⁷ *Class Proceedings Act, 1992*, SO 1992, c 6, s 32.

¹⁵⁸ See Exhibit "A": Retainer Agreement between Stephen Aps and Goldblatt Partners LLP dated February 19, 2019, Mandryk Affidavit, PMR, Tab 2A.

¹⁵⁹ Mandryk Affidavit, PMR, Tab 2, p 25, para 8; Aps affidavit, PMR, Tab 3, pp 352, 357, paras 7, 23.

amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.¹⁶⁰

151. The predominant factors in determining the fairness and reasonableness of Class Counsel's fees are: (1) the degree of success or result achieved; and (2) the risk undertaken by Class Counsel in conducting the litigation.¹⁶¹
152. The risks involved in pursuing class action litigation must be assessed as they existed when the litigation commenced and as the litigation continued.¹⁶²
153. The Court must be satisfied that the proposed fees are consistent with the retainer agreement and not unreasonable in the circumstances.¹⁶³ The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.¹⁶⁴
154. Class Counsel are seeking a fee award of 25% of the Settlement Amount, plus HST. This is in keeping with the Retainer Agreement and the fact that the action was resolved in advance of certification.
155. Class Counsel also seeks approval of the following:

¹⁶⁰ *Brazeau v Attorney General (Canada)*, [2019 ONSC 4721](#) [*Brazeau*].

¹⁶¹ *Mancinelli v Royal Bank of Canada*, 2017 ONSC 2324 at para [57](#) [*Mancinelli* 2017].

¹⁶² *Vitapharm Canada Ltd. v F. Hoffmann-La Roche Ltd.*, 2005 CanLII 8689 (SCJ) at para [71](#); *Mancinelli* 2017, *ibid* at para [56](#).

¹⁶³ *Brown v Canada*, 2018 ONSC 3429 at paras [56-57](#); *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at paras [2, 4-5, 7-9, 12](#) [*Cannon*].

¹⁶⁴ *Mancinelli v Royal Bank of Canada*, 2020 ONSC 4240 at para [11](#).

- (a) Class Counsel's disbursements plus HST, in the all-inclusive amount of \$38,533; and
- (b) notice and administration expenses, as incurred.

156. In this case:

- (a) the percentage sought by Class Counsel is not excessive, having regard to contingency fees previously approved by this Court,¹⁶⁵ as well as other judges in Ontario¹⁶⁶ and elsewhere in Canada¹⁶⁷;
- (b) the representative plaintiff understood and accepted the Retainer Agreement and the fee arrangement specified therein and supports the fee request¹⁶⁸; and
- (c) the Settlement Amount is not so large as to make Class Counsel's fee request unseemly or unreasonable.

#1: Class Counsel's fee request is in accordance with the Retainer Agreement

157. Class Counsel's request for a 25% fee is in keeping with the Retainer Agreement which specifically provides that Class Counsel will be entitled to a 25% fee in the event that the matter resolves before the certification motion is argued.

158. Class Counsel's docketed time comes to approximately \$481,000. Class Counsel estimates that it will incur an additional \$110,000 in time in the event that the proposed settlement is approved by this court. If one takes this nearly \$600,000 in total fees / docketed time, the

¹⁶⁵ See, for example, *Brazeau; Eidoo v Infineon Technologies AG*, [2016 ONSC 3628](#); *Frank v Caldwell*, [2014 ONSC 1484](#); *Sayers*, *supra* note 121 at paras 30-40.

¹⁶⁶ See, for example, *Abdulrahim v Air France*, [2011 ONSC 512](#); *Cannon*, *supra* note 163; *Ramdath v George Brown College*, [2016 ONSC 3536](#); *Charette v Trinity Capital Corporation*, 2019 ONSC 3153 at paras 81-87; *Bozsik*, *supra* note 134.

¹⁶⁷ See, for example, *Condon v Canada*, [2018 FC 522](#); *Verna Doucette v Eastern Regional Integrated Health Authority*, [2010 NLTD 29](#); *Anderson v Canada (Attorney General)*, 2016 NLTD(G) 179 (SC) ([CanLII](#)).

¹⁶⁸ Mandryk Affidavit, PMR, Tab 2, p 71, para 159; Aps Affidavit, PMR, Tab 3, pp 352, 357, paras 7, 22-23.

multiplier that results in the total fee being requested by Class Counsel herein (\$1.75 million) comes to just under 3, which is reasonable on its face and lower than the multipliers that courts have seen fit to award in other cases.¹⁶⁹

159. The plaintiff reviewed and agreed to the Retainer Agreement before it was signed. He was consulted at the mediation about Class Counsel's proposal for a 25% fee based on the \$7 million Settlement Amount and approved of it prior to the execution of the Settlement Agreement.¹⁷⁰

160. These considerations, in Class Counsel's submission, demonstrate that the fee request is neither excessive nor unseemly, and that it represents a fair award to Class Counsel in light of the results achieved and the risks of the case.

#2: Class Counsel achieved a good result

161. The Settlement Amount, \$7 million, is a good result for the Class. It represents a near 50% recovery of the likely measure of damages, being \$15 million. It also comes at a time that the travel industry is in peril due to the COVID-19 pandemic and when Class Members have lost their jobs.

162. Also, Flight Centre's commitment to implement a new timekeeping system to track employees' actual hours of work is a significant achievement as it concerns the goal of behaviour modification. The impact of this term in the Settlement Agreement cannot be overstated.

¹⁶⁹ Mandryk Affidavit, PMR, Tab 2, p 69, para 152; Exhibit "U": Fee and Disbursement Chart, Mandryk Affidavit, PMR, Tab 2U, pp 348-349.

¹⁷⁰ Mandryk Affidavit, PMR, Tab 2, p 71, para 159; Aps Affidavit, PMR, Tab 3, pp 352, 357, paras 8, 23.

#3: The litigation involved certain risks

163. As described above, although Class Counsel believed in the merits of this claim at all times, this case involved certain risks from the outset. There is a paucity of decisions in employment class actions. In particular, at the time this action was commenced in February 2019, there were no decisions on the merits addressing issues such as the legality of a pre-approval policy for overtime or the scope of an employer's duty of care to an employee with respect to compensation. There continues to be uncertainty as to the likelihood that claims like this one would be successful.
164. The COVID-19 pandemic, which was officially declared in March 2020, changed the risk analysis for Class Counsel and the Class as it concerns the future of the travel industry and of Flight Centre in particular.

#4: Response by the Plaintiff and Class Members

165. The representative plaintiff supports Class Counsel's fee request.¹⁷¹
166. The Notice of Certification, Settlement Approval, Distribution and Fee Approval Hearing, which was delivered to Class Members pursuant to the dissemination plan approved by this Court, specifically details Class Counsel's 25% (plus HST and disbursements) fee request. To date, only one (1) objection has been received from Class Members to Class Counsel's fee request.¹⁷²

¹⁷¹ Aps Affidavit, PMR, Tab 3, p 357, paras 22-23.

¹⁷² The thrust of this objection was that "[t]he settlement should be 100m and they should pay ALL fees separate [sic] from the settlement amount." Mandryk Affidavit, PMR, Tab 2, p 71, para 160.

(iii) *Conclusion*

167. For the forgoing reasons, Class Counsel respectfully submits that the proposed fee is fair and reasonable in the circumstances of this case and should be approved.

E. Honorarium Approval

168. Class Counsel also requests approval of a \$10,000 honorarium recognizing the efforts of the representative plaintiff.

169. In *Dow v 407 ETR Concession Company Limited*, Justice Perell approved an honorarium of \$10,000 on the following basis:

Mr. Dow, Ms. Miron, and Mr. Teolis were actively involved in the litigation and in giving instructions to Class Counsel. They were willing to expose their personal financial circumstances to public scrutiny in order for the litigation to advance. It is unlikely that the issues in the action would have ever been litigated on an individual basis given the relatively small amounts in issue, the nature of the constitutional question and necessary declaratory relief, the legal complexities and the unique vulnerability of the Class Members as insolvent persons. Were it not for their efforts, no litigation would likely have been commenced and there would have been no recovery in favour of the Class.¹⁷³

170. Honoraria were similarly approved in other class actions involving unpaid hours and overtime. In *Rosen*, a settlement of an overtime misclassification matter, Belobaba J. approved an honorarium for the representative plaintiff in the amount of \$10,000, commenting as follows:

Mr. Rosen assisted in the preparation of the case and contributed to the success of the action. He retained and instructed counsel. He helped with the statement of claim. He was cross-examined on his certification affidavit and in doing so was obliged to disclose personal financial and employment information. Mr. Rosen maintained contact and solicited input from other

¹⁷³ *Dow v 407 ETR Concession Company Limited*, 2016 ONSC 7086 at para 26; see also *Gerard v Detour Gold Corporation*, [2017 ONSC 3966](#); *Horgan v Lakeridge Health Corporation*, [2014 ONSC 5209](#).

class members. In a word, he participated in every step of the six-year litigation including settlement discussions, the mediation and the finalization of the settlement agreement.

171. In *Fulawka*, the court approved a \$15,000 honorarium for the representative plaintiff.¹⁷⁴

The court also approved a \$10,000 honorarium for the representative plaintiff in *Eklund*, a case which bears many resemblances to the case at bar.¹⁷⁵

172. It is respectfully submitted that an honorarium is appropriate in this matter because of the extent of Mr. Aps' efforts in bringing forward and prosecuting this action on behalf of the Class. He devoted a considerable amount of time to the success of this action and provided invaluable advice and instructions at the mediation. He communicated with other Class Members, many of whom reached out to him directly, and with members of the press.¹⁷⁶ The extent of his involvement is similar to the cases above where honoraria have been approved.

173. What is more, Mr. Aps' involvement in this case also came at a personal cost as his career suffered as a *direct* result of him being the public face of this lawsuit.¹⁷⁷ In *Eklund*, in which Justice Morgan approved a \$10,000 honorarium to the plaintiff, His Honour specifically referenced the personal cost to the plaintiff when he made his decision, as follows:

[49] As indicated earlier, class counsel also seek approval of a modest \$10,000 honorarium for Carrie Eklund as representative plaintiff. In *Fulawka* (2014), *supra*, at para 24, an honorarium was approved where the representative plaintiff had "devoted a great deal of time and effort to this litigation and played a key role throughout." Class counsel advises that the same can be said of Ms. Eklund. She was apparently instrumental in communicating with class members, **and willingly exposed herself to the prejudicial**

¹⁷⁴ *Fulawka v Bank of Nova Scotia*, 2014 ONSC 4743 at paras 24.

¹⁷⁵ *Eklund*, *supra* note 53 at paras 49-50.

¹⁷⁶ Aps Affidavit, PMR, Tab 3, pp 358-361, paras 25-36.

¹⁷⁷ Aps Affidavit, PMR, Tab 3, pp 361-362, paras 37-40.

ramifications of being the named plaintiff. Indeed, this exposure materialized when she was turned down for a new job after the prospective employer questioned her about her role in suing her previous employer.

[50] Like other representative plaintiffs who have been awarded honoraria, Ms. Eklund appears to have “participated in every step of the...litigation including settlement discussions, the mediation and the finalization of the settlement agreement”: *Rosen, supra*, at para 26. She deserves the honorarium that class counsel seeks on her behalf.¹⁷⁸

174. It is submitted that being the representative plaintiff in an employment-related class action is particularly difficult. Because there is a personal element to one’s employment – the Supreme Court has previously noted how it goes to the root of one’s very identity and dignity¹⁷⁹ – there is a risk and a stigma that can attach to a representative plaintiff that is not present in the consumer context, for example.

175. Indeed, there is a well-documented fear of reprisals and a resulting reluctance among workers to enforce their *ESA* rights. Honoraria in the context of employment class actions help overcome this barrier and facilitate access to justice. As stated in Ontario’s Final Report of the Changing Workplaces Review:

The literature is also clear that fear of reprisals reduces the number of complaints that are made by employees. Unfortunately, there is a widespread fear of reprisal among employees if they complain about violation of their *ESA* rights, and this inhibition contributes to non-compliance.¹⁸⁰

¹⁷⁸ *Eklund, supra* note 53.

¹⁷⁹ *Machtiger v HOJ Industries Ltd.*, [1992] 1 SCR 986 at 1002.

¹⁸⁰ C. Michael Mitchell & John C. Murray, “The Changing Workplaces Review: An Agenda for Workplace Rights – Final Report” *Ontario Ministry of Labour, Training and Skills Development* (May 2017), online: <https://files.ontario.ca/books/mol_changing_workplace_report_eng_2_0.pdf> at p 58.

176. Class counsel supports the payment of the honorarium and no class member has objected to it.¹⁸¹

PART IV - ORDERS REQUESTED

177. The plaintiff requests three (3) Orders:

- (a) certifying this action as a class proceeding and appointing the plaintiff Stephen Aps as the representative plaintiff and approving the Settlement Agreement;
- (b) approving the Distribution Protocol; the appointment of Trilogy Class Action Services as Settlement Administrator; and, the distribution of the notice of settlement approval in accordance with the plaintiff's notice plan;
- (c) approving the Retainer Agreement; Class Counsel's legal fees in the aggregate amount of \$1,750,000.00, HST on fees in the amount of \$227,500.00, plus disbursements of \$34,589.07 (plus applicable taxes); and notice and administration expenses as incurred; and
- (d) an honorarium of \$10,000.00 to the plaintiff Stephen Aps.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of November, 2020. _____,



GOLDBLATT PARTNERS LLP

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Toronto ON M5G 2C2

Charles Sinclair / Nadine Blum / Joshua Mandryk
/ Melanie Anderson

Lawyers for the Plaintiff

¹⁸¹ Mandryk Affidavit, PMR, Tab 2, p 72, para 166.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Eklund v Goodlife Fitness Centres Inc.*, [2018 ONSC 4146](#)
2. *Bredbenner v Liberty Travel*, 2011 US Dist Lexis 38663 (NJ Dist Ct)
3. *Omarali v Just Energy*, [2016 ONSC 4094](#)
4. *Hollick v Toronto (City)*, 2001 SCC 68 ([CanLII](#))
5. *Griffin v Dell Canada Inc.*, [2009] OJ No 418 (SCJ) ([CanLII](#))
6. *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 ([CanLII](#))
7. *Lambert v Guidant Corporation*, [2009] OJ No 1910 (SCJ) ([CanLII](#))
8. *Fresco v Canadian Imperial Bank of Commerce*, [2012 ONCA 444](#)
9. *Rosen v BMO Nesbitt Burns Inc.*, [2013 ONSC 2144](#)
10. *Fulawka v Bank of Nova Scotia*, [2010 ONSC 1148](#)
11. *Fulawka v Bank of Nova Scotia*, [2012 ONCA 443](#)
12. *Fulawka v Bank of Nova Scotia*, [2012] SCCA No 326 ([CanLII](#))
13. *Baroch v Canada Cartage*, [2015 ONSC 40](#)
14. *Defazio v Ontario (Ministry of Labour)*, [2007] OJ No 902 (SCJ) ([CanLII](#))
15. *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 (CA) ([CanLII](#))
16. *Cloud v Canada (Attorney General)* (2003), 65 OR (3d) 492 (Div Ct) ([CanLII](#))
17. *Cloud v Canada (Attorney General)*, [2005] SCCA No 50
18. *1291079 Ontario Limited v Sears Canada Inc.*, [2014 ONSC 5190](#)
19. *Dumoulin v Ontario*, [2005] OJ No 3961 (SCJ) ([CanLII](#))
20. *Sayers v Shaw Cablesystems Limited*, [2011 ONSC 962](#)
21. *Vivendi Canada Inc. v Dell’Aniello*, 2014 SCC 1 ([CanLII](#))
22. *Noble v North Halton Golf and Country Club*, [2016 ONSC 2962](#)
23. *Berg v Canadian Hockey League*, [2017 ONSC 2608](#) (Sup Ct)

24. *Berg v Canadian Hockey League*, [2019 ONSC 2106](#) (Div Ct)
25. *AIC Limited v Fischer*, 2013 SCC 69 ([CanLII](#))
26. *Whitehouse v BDO Canada LLP*, [2020 ONSC 144](#)
27. *Fresco v CIBC*, [2009] OJ No 2531 (SC) ([CanLII](#))
28. *Bozsik v Livingston*, [2019 ONSC 5340](#)
29. *Dabbs v Sun Life Assurance Co. of Canada* (1998), 40 OR (3d) 429 (Gen Div) ([CanLII](#))
30. *Dabbs v Sun Life Assurance Co. of Canada* (1998), 41 OR (3d) 97 (CA) ([CanLII](#))
31. *Farkas v Sunnybrook & Women's College Health Sciences Centre*, [2009 CanLII 44271](#) (Ont Sup Ct)
32. *Parsons v Canadian Red Cross Society*, [1999] OJ No 3572 (Sup Ct)
33. *Mancinelli v Royal Bank of Canada*, [2016 ONSC 6953](#)
34. *Toronto Community Housing Corporation v Thyssenkrupp Elevator (Canada) Limited*, [2012 ONSC 6626](#)
35. *Fantl v Transamerica Life Canada*, [2009] OJ No 3366 (Sup Ct) ([CanLII](#))
36. *Corless v KPMG LLP*, [2008 CanLII 39784](#) (Ont Sup Ct)
37. *General Motors of Canada Limited v Abrams*, [2011 ONSC 5338](#)
38. *Eidoo v Infineon Technologies AG*, [2014 ONSC 6082](#)
39. *Zaniewicz v Zungui Haixi Corp.*, [2013 ONSC 5490](#)
40. *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc.*, [2018 ONSC 6447](#)
41. *Mancinelli v Royal Bank of Canada*, [2018 ONSC 4192](#)
42. *Welsh v Ontario*, [2018 ONSC 3217](#)
43. *Rosen v BMO Nesbitt Burns Inc.*, [2016 ONSC 4752](#)
44. *Leslie v Agnico-Eagle Mines*, [2016 ONSC 532](#)
45. *Pro-Sys Consultants Ltd. v Infineon Technologies AG*, [2014 BCSC 1936](#)
46. *Gould v BMO Nesbitt Burns Inc.*, [2007 CanLII 6914](#) (Ont Sup Ct)

47. *Brazeau v Attorney General (Canada)*, [2019 ONSC 4721](#)
48. *Mancinelli v Royal Bank of Canada*, [2017 ONSC 2324](#)
49. *Vitapharm Canada Ltd. v F. Hoffmann-La Roche Ltd.*, [2005 CanLII 8689](#) (SCJ)
50. *Brown v Canada*, [2018 ONSC 3429](#)
51. *Cannon v Funds for Canada Foundation*, [2013 ONSC 7686](#)
52. *Mancinelli v Royal Bank of Canada*, [2020 ONSC 4240](#)
53. *Eidoo v Infineon Technologies AG*, [2016 ONSC 3628](#)
54. *Frank v Caldwell*, [2014 ONSC 1484](#)
55. *Abdulrahim v Air France*, [2011 ONSC 512](#)
56. *Ramdath v George Brown College*, [2016 ONSC 3536](#)
57. *Charette v Trinity Capital Corporation*, [2019 ONSC 3153](#)
58. *Condon v Canada*, [2018 FC 522](#)
59. *Verna Doucette v Eastern Regional Integrated Health Authority*, [2010 NLTD 29](#)
60. *Anderson v Canada (Attorney General)*, 2016 NLTD(G) 179 (SC) ([CanLII](#))
61. *Dow v 407 ETR Concession Company Limited*, [2016 ONSC 7086](#)
62. *Gerard v Detour Gold Corporation*, [2017 ONSC 3966](#)
63. *Horgan v Lakeridge Health Corporation*, [2014 ONSC 5209](#)
64. *Fulawka v Bank of Nova Scotia*, [2014 ONSC 4743](#)
65. *Machtinger v HOJ Industries Ltd.*, [1992] 1 SCR 986 ([CanLII](#))

Secondary Sources

66. Government of British Columbia “Guide to the Employment Standards Act and Regulation: Commission Sales - Regulation Part 7, Section 37.14” (accessed 28 October 2020), online: <<https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/esr-part-7-section-37-14>>.
67. Government of British Columbia, “Commission Sales Factsheet” (accessed 28 October 2020), online: <<https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/commission-sales>>.

68. C. Michael Mitchell & John C. Murray, “The Changing Workplaces Review: An Agenda for Workplace Rights – Final Report” *Ontario Ministry of Labour, Training and Skills Development* (May 2017), online: <https://files.ontario.ca/books/mol_changing_workplace_report_eng_2_0.pdf>.

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Class Proceedings Act, 1992, SO 1992, c 6

Certification

5 (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences 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) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1); 2020, c. 11, Sched. 4, s. 7 (1).

[...]

Discontinuance, abandonment and settlement

29 (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

[...]

Fees and disbursements

32. (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. 1992, c. 6, s. 32 (3).

Determination of fees where agreement not approved

(4) If an agreement is not approved by the court, the court may,

- (a) determine the amount owing to the solicitor in respect of fees and disbursements;
- (b) direct a reference under the rules of court to determine the amount owing; or
- (c) direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

Employment Standards Act, RSBC 1996, c 113 – Employment Standards Regulation

[Last amended September 1, 2020 by B.C. Reg. 206/2020 and includes amendments by B.C. Reg. 209/2020]

Commission sales

37.14 (1) A salesperson paid entirely or partly by commission is excluded from sections 35 and 40 and Part 5 of the Act on the condition that all wages earned by the employee in a pay period exceed the wages that would be payable under those provisions when calculated at the greater of the employee's base rate or the minimum wage under the Act.

(2) Section 16, Part 4 except section 39, and Part 5 of the Act do not apply to a salesperson who is paid entirely or partly by commission and who is employed to sell, or sell a lease arrangement for, any of the following products:

(a) Repealed. [B.C. Reg. 118/2003, s. 1 (a).]

(b) heavy industrial or agricultural equipment;

(c) Repealed. [B.C. Reg. 118/2003, s. 1 (a).]

(d) sailing or motor vessels.

(3) Part 4 of the Act, except section 39, does not apply to a salesperson who is paid entirely or partly by commission and who is employed to sell, or sell a lease arrangement for, automobiles, trucks, recreation vehicles or campers.

(4) Part 5 of the Act does not apply to a salesperson who is paid entirely or partly by commission and who is employed to sell, or sell a lease arrangement for,

(a) automobiles or trucks, on condition that the employer pays that salesperson, in place of statutory holiday pay, 4% of gross earnings for the pay period on each paycheck, or

(b) recreation vehicles or campers.

(5) For the purpose of section 16 of the Act, a salesperson who is paid entirely or partly by commission and who is employed to sell, or sell a lease arrangement for, automobiles, trucks, recreation vehicles or campers must be paid each month according to the following requirements:

(a) despite the amount earned in commission or other wages, the first payment referred to in section 17 (1) of the Act must be equal to at least the minimum wage for all hours worked, at the request of the employer, in the pay period;

(b) the final payment referred to in section 17 (1) of the Act must be equal to the greater of

(i) all wages earned in the month, or

(ii) the minimum wage for all hours worked, at the request of the employer, in the month to a maximum of 160 hours,

minus the amount paid under paragraph (a).

[en. B.C. Reg. 307/2002, s. 23; am. B.C. Regs. 118/2003; 21/2013, s. 2; 36/2019, s. 4.]

STEPHEN APS
Plaintiff

-and-

FLIGHT CENTRE TRAVEL GROUP (CANADA) INC.
Defendant

Court File No. CV-19-00614755-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFF
(Certification, Settlement, Distribution and Fee Approval)

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