

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

STEPHEN APS

Plaintiff

- and -

FLIGHT CENTRE TRAVEL GROUP (CANADA) INC.

Defendant

PROCEEDING UNDER THE CLASS PROCEEDING ACT, 1992

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL

AMENDED THIS 18-Nov-19 PURSUANT TO MODIFIE CE CONFORMEMENT A RULE/LA REGLE 26.02 (A) THE ORDER OF L'ORDONNANCE DU DATED / FAIT LE REGISTREAR GREFIER ROYAL SUPREME DE JUSTICE

FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: February 20, 2019

~~Amended: November 18, 2019~~ *RE*

Issued by "M. GODIN"
Local registrar

Address of court office 393 University Avenue,
10th Floor
Toronto, ON, M5G 1E6

TO: FLIGHT CENTRE TRAVEL GROUP (CANADA) INC.
1 Dundas Street West, Suite #200
Toronto, Ontario
M5G 1Z3

CLAIM

1. The Plaintiff, Stephen Aps (the "Plaintiff") claims:
 - (a) an order certifying this proceeding as a class proceeding and appointing the Plaintiff as representative plaintiff for the Class (as described below);
 - (b) \$100 million in general damages for the Class, or such other sum as this Honourable Court deems just;
 - (c) a declaration that the Defendant breached the Class Members' contracts of employment by:
 - (i) failing to ensure that the Class Members' hours of work were monitored and accurately recorded;
 - (ii) failing to implement and maintain an effective, reasonable and accurate Class-wide system or procedure, which is centrally and uniformly controlled and applied, for, among other things, recording all hours worked by the Class Members and ensuring that the Class Members are compensated for all hours worked;
 - (iii) failing to record and maintain accurate records of all actual hours worked by the Class Members;
 - (iv) failing to advise the Class Members of their entitlement to overtime pay for hours worked in excess of the overtime threshold under the applicable employment standards legislation;
 - (v) imposing on the Class Members an overtime policy that purports to create an unlawful barrier to payment of overtime;
 - (vi) creating and/or permitting and/or suffering a working environment and circumstances in which the Class Members are: (i) required and/or permitted and/or suffered to work hours in excess of those scheduled, including hours both below and in excess of the overtime threshold

under the applicable employment standards legislation, in order to carry out the duties assigned to them; (ii) dissuaded from reporting hours worked in excess of those scheduled, including both hours below and in excess of the overtime threshold under the applicable employment standards legislation; and (iii) dissuaded from claiming or obtaining compensation for their unpaid hours worked, including hours both below and in excess of the overtime threshold under the applicable employment standards legislation; and

- (vii) requiring and/or permitting and/or suffering the Class Members to work hours in excess of those scheduled, including hours both below and in excess of the overtime threshold under the applicable employment standards legislation, but failing to appropriately compensate the Class Members as required for all hours worked.
 - (viii) imposing on Class Members illegal and/or inapplicable overtime and/or excess weekly hours of work agreements;
- (d) an interim, interlocutory and final order that the provisions of the applicable employment standards legislation, as applicable, are express or implied terms of the contracts of employment of the Class Members (as described below);
- (e) an interim, interlocutory and final order for specific performance directing that the Defendant comply with the contracts of employment with the Class Members, in particular, to:
- (i) ensure that the Class Members' hours of work are monitored and accurately recorded;
 - (ii) advise the Class Members of their entitlement to overtime pay for hours worked in excess of the overtime threshold under the applicable employment standards legislation;

- (iii) ensure that the Class Members are appropriately compensated for all hours worked;
 - (iv) advise the Class Members that they are not required to enter into agreements to work excess hours or to average hours worked for overtime purposes as a condition of continued employment;
- (f) a declaration that the Defendant was unjustly enriched, to the deprivation of the Class Members, in that it received the value of the unpaid hours worked by the Class Members, including hours both below of and in excess of the overtime threshold under the applicable employment standards legislation, without providing the appropriate compensation, with no lawful basis, and an order requiring the Defendant to disgorge to the Class all amounts withheld by it in respect of such unpaid hours;
- (g) a declaration that the Defendant was negligent in the performance of its contracts of employment with the Class Members by, among other things:
- (i) failing to monitor, record and maintain records of all hours worked by the Class Members;
 - (ii) failing to pay for all hours worked by the Class Members, including hours both below and in excess of the overtime threshold under the applicable employment standards legislation, despite requiring and/or permitting and/or suffering such hours to be worked;
 - (iii) failing to advise the Class Members of their right to receive appropriate compensation for such unpaid hours and, in particular, of the express or implied terms of their contracts under the applicable employment standards legislation;
 - (iv) retaining for itself the benefit of amounts due to the Class Members in respect of such unpaid hours;

- (v) creating and/or permitting and/or suffering a working environment and circumstances in which the Class Members are: (i) required and/or permitted and/or suffered to work hours in excess of those scheduled, including hours both below and in excess of the overtime threshold under the applicable employment standards legislation, in order to carry out the duties assigned to them; (ii) dissuaded from reporting hours worked in excess of those scheduled, including hours both below and in excess of the overtime threshold under the applicable employment standards legislation; and (iii) dissuaded from claiming or obtaining compensation for their unpaid hours worked, including hours both below and in excess of the overtime threshold under the applicable employment standards legislation;
- (vi) imposing on the Class Members an overtime policy that purports to create an unlawful barrier to payment of overtime;
- (vii) failing to implement and maintain an effective, reasonable and accurate Class-wide system or procedure, which is centrally and uniformly controlled and applied, for, among other things, recording all hours worked by the Class Members and ensuring that the Class Members are appropriately compensated for all hours worked;
- (viii) imposing on Class Members illegal and/or inapplicable overtime and/or excess weekly hours of work agreements;
- (h) an order pursuant to s. 23 of the *Class Proceedings Act, 1992*, admitting into evidence statistical information, including statistical information concerning or relating to hours of work performed by members of the Class, and an order directing the Defendant to preserve and disclose to the Plaintiff all records, in any form, relating to hours worked by members of the Class;
- (i) an order, pursuant to s. 24 of the *Class Proceedings Act, 1992*, directing an aggregate assessment of damages;

- (j) an order directing the Defendant to preserve and disclose to the Plaintiff all records (in any form) relating to the hours of work, including hours of work both below and in excess of the overtime threshold under the applicable employment standards legislation, performed by the Class Members;
- (k) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*;
- (l) punitive, aggravated and exemplary damages in the amount of \$10 million, or such other amount as this Honourable Court deems just;
- (m) costs of this action on a substantial indemnity basis, together with applicable HST, or other applicable taxes, thereon;
- (n) the costs of administering the plan of distribution of the recovery in this action in the sum of \$1 million or such other sum as this Honourable Court deems appropriate; and
- (o) such further and other relief as this Honourable Court may deem just.

THE DEFENDANT

2. Flight Centre Travel Group (Canada) Inc. (“Flight Centre” or the “Defendant”) is the largest brick and mortar travel retailer in Canada, with approximately 150 stores in Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Newfoundland. Flight Centre is a “big box” retailer, with highly standardized work locations, job descriptions, policies and practices.
3. Flight Centre is the Canadian subsidiary of Flight Centre Travel Group Ltd. (“Flight Centre Travel Group”), a global travel retailer founded in 1982. Flight Centre Travel Group consists of 40 corporate and wholesale brands, located in Australia, New

Zealand, the United Kingdom, South Africa, India, United Arab Emirates, Singapore, China, United States and Canada. Flight Centre began operating in Canada in 1995.

4. Flight Centre Travel Group is publicly traded on the Australian Securities Exchange and according to its 2018 Annual Report, its global operations earned \$2.95 billion AUS in revenue and \$264.2 million AUS in after-tax income in the year ending June 30, 2018.

THE PLAINTIFF AND THE CLASS

5. The Plaintiff lives in the City of Brampton and was employed by Flight Centre as an International Travel Consultant from April 2014 to January 2015 at its Dixie Mall location in Mississauga, Ontario (the “Dixie Mall store”).
6. The Plaintiff brings this action pursuant to the *Class Proceedings Act, 1992* on his own behalf and on behalf of the following class of persons:

All current or former Travel Consultants (including Corporate Travel Consultants and International Travel Consultants) employed by Flight Centre at its retail locations in the Provinces of Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Newfoundland, for the period from ~~October 2010~~ December 2008 to the date certification is granted in this action.

7. Travel Consultants are retail sales employees responsible for selling vacation and business travel packages to Flight Centre Canada’s clients. Travel Consultants who serve business/corporate clients may be referred to as Business or Corporate Travel “Managers”, though they do not perform managerial functions.

8. The Class Members sell vacation products to the Defendant's customers at their retail sales locations. The Class Members serve clients via email, telephone, and face-to-face at the Defendant's retail locations.
9. Travel Consultants are paid a base salary of \$27,000 per year, plus commission. Commission constitutes a significant portion of the Class Members' total compensation. The Defendant's commission structure is designed so that as Travel Consultants surpass various monthly sales targets, they earn a larger percentage of their total sales as commission. This structure incentivizes Travel Consultants to work longer and harder in order to sell more vacation products, so that they can take home a higher percentage of their sales as commission.
10. The Class Members are regularly required to work beyond their scheduled hours of work due to the client-centred nature of their sales positions. The Class Members are frequently required to work through their unpaid lunch breaks and forgo their lunch break altogether to serve clients entering the store or contacting them via email and telephone. Furthermore, the Class Members are regularly required to work beyond their scheduled hours of work in order to serve clients who enter the store or call or email them at or near the end of their scheduled shifts.
11. In addition to the above, once the Defendant's retail hours have ended and the Class Members are no longer catering to the Defendant's customers, the Class Members are regularly required to work beyond their scheduled hours in order to perform administrative and paperwork duties which they are unable to perform during their

scheduled hours of work. Class Members are also expected to attend training and company events, such as the monthly “Buzz Nights,” which are also unpaid.

12. The Class Members are provided monthly schedules by the Defendant which schedule them to work full-time hours at the Defendant’s retail stores; however, while the Class Members regularly work significantly in excess of their scheduled hours, the Defendant has no system in place to track, monitor, record or compensate the Class Members for their *actual* hours worked.
13. The Class Members are employed pursuant to standard written employment agreements for each job classification.
14. The Class Members’ employment contracts are subject to the applicable employment standards legislation, and the terms of the applicable employment standards legislation are incorporated into the contracts of employment as a matter of law.
15. The Class Members plead that as a matter of law, Flight Centre owed them a duty of good faith that was incorporated into their contracts of employment, including a duty to advise the Class Members they were eligible for overtime compensation in respect of all overtime hours worked.
16. At all material times, the policies and practices of the Defendant that affect the conditions of the Class Members’ employment were materially uniform and consistent across the Defendant’s stores.

17. At all material times, the duties performed by and associated with each job classification within the Class were materially uniform and consistent across the Defendant's stores.
18. The Class Members are required, as a condition of continued employment, to sign standard averaging hours agreements and excess weekly hours of work agreements, which are incorporated into the terms of their contracts of employment.
19. The Class Members are subject to standard written employment policies, including with respect to overtime, and hours of work and breaks. These policies apply uniformly to all Class Members and are incorporated into the terms of their contracts of employment.
20. There are common factors that routinely and consistently contribute to the Class Members working hours above those set out in their schedules, including hours both below and in excess of the overtime threshold, including the following:
 - (a) Unrealistic sales and profitability targets;
 - (b) The linking of commissions, which represent a significant portion of their compensation, to unrealistic sales and profitability targets;
 - (c) The structure of the commission scheme, which incentivizes Travel Consultants to work longer and harder in order to sell more vacation products, so that they can take home a higher percentage of their sales in commission;
 - (d) The need to cater to the scheduling demands of clients and prospective clients;

- (e) The additional administrative duties assigned to Travel Consultants, over and above their duties to serve clients, that must be completed before they finish work for the day;
 - (f) A requirement to attend meetings, training, and other events outside of scheduled hours;
21. As the Defendant directs and/or permits and/or suffers, and as it knows or should know, the Class Members are consistently required to work unpaid hours, including hours above the overtime threshold under the applicable employment standards legislation, in order to satisfy the duties and meet the sales goals and/or performance targets associated with their positions, including the duty to accommodate the time demands and schedules of the Defendant's customers.
22. As a matter of systemic policy and practice, and without lawful excuse, the Defendant strictly discourages its employees from requesting payment for hours of work in excess of those scheduled, including hours worked both below and in excess of the overtime threshold under the applicable employment standards legislation. Where pay is requested for hours worked in excess of the overtime threshold, the Defendant regularly refuses to pay same. The Defendant also systemically discourages the reporting of, and denies the payment and/or compensation for, hours of work in excess of the overtime threshold under the applicable employment standards legislation, which are in excess of those scheduled.

THE DEFENDANT'S HOURS OF WORK AND OVERTIME POLICIES AND PRACTICES

23. The Defendant requires the Class Members to sign standard form employment contracts and excess hours of work and overtime averaging agreements.

24. The Class Members' standard form contracts of employment updated December 2008
provide as follows:

Hours of Work

You will be required to work full time hours. To meet the demands and supervision of our work environment, the work hours are to be assigned by your team leader, with one unpaid lunch break daily at a time that works best for the team and business.

You may choose to work additional hours to increase your Commissions. No overtime is payable for such efforts.

In addition, you will be required to attend regular staff meetings, monthly buzz nights and conferences during the course of your work. Attendance may also be required at seminars and functions that are work related.

24.25. The Class Members' standard form contracts of employment updated October 2010
and thereafter provide as follows:

8. HOURS OF WORK AND OVERTIME:

8.1 You will be required to work full time unless otherwise set out in Schedule "A".

8.2 If applicable, your initial hours of work in this position are set out in Schedule "A". You agree that your hours of work may be changed, will vary to meet the needs of the business and may include evenings and weekends. In addition, you will be required to attend regular staff meetings, monthly buzz nights, seminars and conferences during the course of your work. To meet the demands and supervision of our work environment, the work hours are to be assigned by your team leader, with one unpaid break daily at a time that works best for the team and business.

8.3 **[For Overtime Eligible Employees:** Overtime pay will only be paid where required by Employment Standards and is subject to any applicable

exemptions, including averaging agreements. You agree to accept time off in lieu of overtime pay. No overtime compensation is payable except as specifically agreed with Company management in writing or provided in Company policy. In some cases, the Company may offer special Incentives as compensation for overtime.

8.4 **[For overtime Exempt Positions:** As an overtime exempt employee, you will not be entitled to additional compensation or time off for hours worked in excess of regular work schedule.

8.5 No overtime compensation is payable except as specifically agreed with Company management in writing or provided in Company policy.

[Emphasis in original]

~~25-26.~~ In addition to its standard form employment contracts, and as a condition of continued employment, Class Members are required to sign averaging hours of work agreements for overtime pay purposes and excess weekly hours of work agreements.

~~26-27.~~ The excess hours of work agreements require the Class Members to agree to work above the maximum hours under the applicable employment standards legislation, and up to a maximum number of hours a day and a week (above the normal limits under applicable employment standards legislation).

~~27-28.~~ The overtime averaging agreements require the Class Members to agree to average their hours of work for purposes of entitlement to overtime compensation over a period of two or more weeks, depending on the jurisdiction and the year.

~~8-29.~~ The averaging hours agreements provide, among other things:

We will continue to provide time off in lieu of overtime pay for any hours worked in excess of the standard hours or the averaged hours as applicable.

Work in excess of the extra or standard hours will continue to require prior approval from your Team Leader and Area Leader through our Time Off Tracker (TOT) system.

~~29-30.~~ The hours of work provisions in the standard form employment contracts, together with the averaging hours agreement and the excess hours agreement together constitute the Employer's "overtime policy."

31. As set out above, the Defendant's overtime policy effective December 2008 unlawfully denies overtime compensation to the Class Members, stipulating that "You may choose to work additional hours to increase your Commissions. No overtime is payable for such efforts." While the Defendant has subsequently amended its overtime policy, it has continued to deny overtime compensation in this manner in practice.

~~30-32.~~ As set out above, the Defendant's overtime policy effective October 2010 and thereafter unlawfully restricts payment of overtime to those situations specifically agreed with Company management in writing or where employees have requested and received prior written authorization to work overtime. It does not allow for payment of overtime to persons who are routinely required or permitted to work overtime to fulfill the basic duties of their employment absent such advance authorization.

~~31-33.~~ Moreover, even assuming, without admitting, that restricting overtime compensation to time off in lieu could be legal in some jurisdictions, the Defendant's overtime policy effective October 2010 and thereafter unlawfully restricts compensation for overtime by time off in lieu to those situations specifically agreed with Company management in writing or where employees have requested and received prior written

authorization to work overtime. It does not allow for time in lieu to be granted to Class Members who are routinely required or permitted to work overtime to fulfill the basic duties of their employment absent such advance authorization. Furthermore, and without limitation, the overtime policy fails to provide that lieu time that cannot be taken will be otherwise compensated.

~~32-34.~~ The overtime policy effective October 2010 and thereafter is also unlawful to the extent which it purports to provide “special incentives” as compensation for overtime.

~~33-35.~~ By purporting to limit the Defendant’s obligation to pay overtime, as set out above, the Defendant’s Overtime Policy creates unlawful barriers to claims for payment for hours of overtime worked, and is in violation of the applicable employment standards legislation.

~~34-36.~~ The application of the Defendant’s Overtime Policy will continue to violate the overtime protections provided in the applicable employment standards legislation, unless prevented from doing so by Court Order.

~~35-37.~~ By virtue of the power imbalance inherent to the employee employer relationship the Class Members are powerless to challenge the unlawful aspects of the Defendant’s Overtime Policy. In attempting to do so they would risk discharge and/or employment and career-related sanctions. The class members are an inherently vulnerable group vis-à-vis the Defendant as employer.

~~36-38.~~ Despite its acknowledgement it requires the Class Members to work overtime hours, including those that exceed the maximum hours of work provisions under the

applicable employment standards legislation, the Defendant has no system whatsoever in place to track and record the *actual* hours of work of the Class Members. The so-called “Time off Tracker”, tracks only pre-approved hours requested through the system and does not track *actual* hours worked.

~~37-39.~~ Furthermore, the Defendant provides its employees with no procedure whatsoever to track, record, or claim payment for their *actual* overtime hours worked. By virtue of this common design, the Class Members could not exercise their rights to accurate overtime entitlement or proceed with complaints regarding unpaid time.

~~38-40.~~ The Defendant has a systemic practice and policy of failing to track the Class Members hours of work and compensate them for their *actual* hours of work, including for their overtime hours worked.

EMPLOYMENT STANDARD LEGISLATION PROHIBITS OFF-THE-CLOCK UNPAID WAGES

~~39-41.~~ The Class Members are systemically prevented from claiming and/or receiving overtime compensation in accordance with the applicable employment standards legislation as a result of Flight Centre’s Overtime policy and practices.

~~40-42.~~ The applicable employment standards legislation in each jurisdiction contain materially the same provisions which require employers to pay their employees overtime pay for all overtime hours worked:

- (a) Section 22(1) of Alberta’s *Employment Standards Code*, R.S.A. 2000, c. E-9 states that “An employer must pay an employee overtime pay of at least 1.5 times the employee’s wage rate for overtime hours.”;
- (b) Section 28(1) of British Columbia’s *Employment Standards Act*, R.S.B.C. 1996, c. 113 states that “An employer must pay an employee overtime wages

in accordance with section 40 if the employer requires, directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week.”;

- (c) Section 17(1) of Manitoba’s *Employment Standards Code*, C.C.S.M. c. E110 states that “Subject to section 18 and the regulations, an employer must pay an employee a wage for overtime at an hourly rate that is not less than 150% of the employee's regular wage rate.”;
- (d) Section 25 of Newfoundland’s *Labour Standards Act*, R.S.N.L. 1990, c.L-2 states that “Where an employee works in excess of the standard working hours as permitted by this Part, the employer shall pay to the employee the rate of wages for overtime that may be set out in the regulations by prescribed formula, which may differ for different classes of employees in different undertakings or a part of them.”;
- (e) Section 40(4) of Nova Scotia’s *Labour Standards Code*, 1989, R.S.N.S. c. 246 states that “Notwithstanding anything contained in this Act, where an employee is required to work more than forty-eight hours in a week, that employee shall be paid one and a half times the employee’s regular hourly wage for each additional hour worked in that week in excess of forty eight hours.”;
- (f) Section 22(1) of Ontario’s *Employment Standards Act, 2000*, S.O. 2000, c. 41 states that “An employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each work week or, if another threshold is prescribed, that prescribed threshold.”; and
- (g) Section 2-17(1) of *The Saskatchewan Employment Act*, S.S. 2014, c. S-15.1 states that “An employer shall pay an employee overtime pay for each hour or part of an hour in which the employee is required or permitted to work or to be at the employer’s disposal that exceeds the hours determined in accordance with sections 2-18, 2-19 and 2-20.”.

41.43. Furthermore, the applicable employment standards legislation in each jurisdiction contains materially the same provisions which require employers to keep records which track and monitor their employees’ hours of work:

- (a) Section 14 of Alberta’s *Employment Standards Code*, R.S.A. 2000, c. E-9 states that “Every employer must keep an up-to-date record of the following information for each employee: (a) regular and overtime hours of work; (b) wage rate and overtime rate;...”

- (b) Section 4 of British Columbia's *Employment Standards Act*, R.S.B.C. 1996, c. 113 states that: "28 (1) For each employee, an employer must keep records of the following information: ... (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis; (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
- (c) Subsection 135(1) of Manitoba's *Employment Standards Code*, C.C.S.M. c. E110 state that "An employer shall keep and maintain at the principal place of business of the employer in the province records of the following information, in English or French, about each employee: ... (d) subject to subsection (2), the regular hours of work and overtime, recorded separately and daily" Subsection 135(2) states that "Regular hours of work are not required to be recorded daily if they do not vary from day to day. But any additional hours worked must be recorded daily." The act also states that "An agreement to work for less than the applicable minimum wage, or under any term or condition that is contrary to this Code or less beneficial to the employee than what is required by this Code, is not a defence in a proceeding or prosecution under this Code."
- (d) Section 63(1) of of Newfoundland's *Labour Standards Act*, R.S.N.L. 1990, c.L-2 states that "An employer shall keep complete, continuous and accurate records setting out in respect of each employee... (b) the rate of wages of the employee, the number of hours worked by the employee in each day, the amount paid to the employee showing all deductions made from wages paid;"
- (e) Section 15(1) of Nova Scotia's *Labour Standards Code*, 1989, R.S.N.S. c. 246 states that "Every employer shall keep and maintain, at the employer's principal place of business for at least thirty-six months after the work was performed, records from which it may be ascertained whether or not the employer is complying with this Act, including ... (f) the number of hours worked by each employee each day and each week;"
- (f) Section 15(1) of Ontario's *Employment Standards Act*, 2000, S.O. 2000, c. 41 states that "An employer shall record the following information with respect to each employee, including an employee who is a homemaker: ... 4. The number of hours the employee worked in each day and each week." Section 15(3)(a) states that "An employer is not required to record the information described in paragraph 3.1 or 4 of subsection (1) with respect to an employee who is paid a salary if, (a) the employer records the number of hours in excess of those in his or her regular work week and, (i) the number of hours in excess of eight that the employee worked in each day, or (ii) if the number of hours in the employee's regular work day is more than eight hours, the number in excess;"
- (g) Section 2(38)(1) of *The Saskatchewan Employment Act*, S.S. 2014, c S-15.1 states that "No employer shall fail to keep (c) records showing the following with respect to each employee: ... (vi) the total number of hours worked by the

employee each day and each week as well as the total number of hours each day and each week that the employee is required to be at the disposal of the employer;”

42-44. In addition to legislating overtime pay for all overtime hours worked and requiring employers to track the hours of work of their salaried employees, the applicable employment standards legislation in each jurisdiction also contains materially the same provisions which prevent employers from contracting out of their obligations under the applicable employment standards legislation:

- (a) Section 4 of Alberta’s *Employment Standards Code*, R.S.A. 2000, c. E-9 states that “An agreement that this Act or a provision of it does not apply, or that the remedies provided by it are not to be available for an employee, is against public policy and void.”;
- (b) Section 4 of British Columbia’s *Employment Standards Act*, R.S.B.C. 1996, c. 113 states that “The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements....has no effect.”;
- (c) Sections 3 and 4 of Manitoba’s *Employment Standards Code*, C.C.S.M. c. E110 state that “This Code prevails over any enactment, agreement, right at common law or custom that (a) provides to an employee wages that are less than those provided under this Code; or (b) imposes on an employer an obligation or duty that is less than an obligation or duty imposed under this Code.” The act also states that “An agreement to work for less than the applicable minimum wage, or under any term or condition that is contrary to this Code or less beneficial to the employee than what is required by this Code, is not a defence in a proceeding or prosecution under this Code.”.
- (d) Section 3 of Newfoundland’s *Labour Standards Act*, R.S.N.L. 1990, c.L-2 states that “A term or condition in a contract of service that confers upon an employee conditions less favourable than the rights, benefits or privileges conferred upon the employee under this Act is void and of no effect.”;
- (e) Section 6 of Nova Scotia’s *Labour Standards Code*, 1989, R.S.N.S. c. 246 states that “This Act applies notwithstanding any other law or any custom, contract or arrangement, whether made before, on or after the first day of February, 1973, but nothing in this Act affects the rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to him than his rights or benefits under this Act.”;

- (f) Section 5(1) of Ontario's *Employment Standards Act*, 2000, S.O. 2000, c. 41 states that "Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void."; and
- (g) *The Saskatchewan Employment Act*, S.S. 2014, c S-15.1, s. 2-6 states that "No provision of any agreement has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Part."

~~43-45.~~ As a result of the Defendant's systemic policies and practices, the Class Members are required and/or permitted and/or suffered to work many additional hours each week above their scheduled hours, including hours worked above the overtime threshold under the applicable employment standards legislation, despite the fact that these hours are not properly tracked or monitored and the Class Members are not compensated for these additional hours of work.

~~44-46.~~ In addition, the Defendant imposes on Class Members inapplicable and/or illegal overtime averaging and excess hours of work agreements, in violation of employment standards legislation.

THE PLAINTIFF'S EMPLOYMENT WITH FLIGHT CENTRE

~~45-47.~~ Throughout his employment with the Defendant, the Plaintiff was regularly directed and/or required and/or permitted by Flight Centre to work and/or Flight Centre suffered him to work unscheduled hours for which he was not compensated, in addition to his scheduled hours of work, including hours above the overtime threshold.

~~46-48.~~ The Plaintiff worked many hours per week above his regular scheduled hours of work, performing sales, customer service and administrative duties, for which he was not compensated. The Plaintiff worked an average of 45 to 50 hours per week, and even more during busy periods. The Defendant never compensated the Plaintiff for the

overtime hours he worked. That is, he was never paid for his overtime hours, nor was he given time off in lieu.

THE CLAIMS

~~47-49.~~ Flight Centre breached the Class Members' contracts of employment.

~~48-50.~~ The Class Members raise the following claims and causes of action.

BREACH OF THE APPLICABLE EMPLOYMENT STANDARDS LEGISLATION

~~49-51.~~ The Defendant has systemically breached the provisions of the applicable employment standards legislation, which are incorporated into the contracts of employment of the Class Members, with respect to all Class Members by:

- (a) Failing to ensure that the Class Members' hours of work are monitored and accurately recorded;
- (b) Failing to advise the Class Members of their entitlement to overtime pay for hours worked in excess of the overtime threshold;
- (c) Imposing on the Class Members an overtime policy that purports to create an unlawful barrier to payment of overtime; and
- (d) Requiring and/or permitting and/or suffering the Class Members to work hours in excess of those scheduled or stipulated in their contracts of employment, including hours both below and in excess of the overtime threshold, but failing to compensate the Class Members as required for all hours worked.
- (e) Imposing on Class Members illegal and/or inapplicable overtime averaging agreements and excess hours of work agreements.

SYSTEMIC BREACH OF EMPLOYMENT CONTRACTS

~~50-52.~~ The Defendant has breached the express or implied terms of its contracts of employment with the Class Members, as set out above, including that it compensate for all hours worked, including its obligation to pay overtime for hours worked in excess of the overtime threshold at a rate of 1.5 times the Class Members' regular hourly rates, or the rate specified under the applicable employment standards legislation in their province of employment, whichever is higher.

~~51-53.~~ In the alternative, the Defendant has breached an implied term of the contracts of employment with the Class Members by failing to comply with its obligations under the applicable employment standards legislation to record and pay for all hours worked, including its obligation and duty to pay overtime, or, in the alternative, its duty to prevent the Class Members from working hours, including overtime, that the Defendant did not intend to compensate.

BREACH OF DUTY OF GOOD FAITH

~~52-54.~~ The Class Members are in a position of vulnerability in relation to the Defendant. As a result and otherwise, the Defendant owes a duty to the Class Members to act in good faith, which includes a duty to honour its statutory and contractual obligations to them.

~~53-55.~~ The Defendant has breached its duty of good faith by, among other things:

- (a) Failing to ensure that the Class Members' hours of work are monitored and accurately recorded;
- (b) Requiring and/or permitting and/or suffering the Class Members to work hours in excess of those scheduled, including hours both below and in excess of the

overtime threshold under the applicable employment standards legislation, but failing to compensate the Class Members as required for all hours worked;

- (c) Failing to advise the Class Members of their right to recover for such unpaid hours and, in particular, of the express or implied terms of their contracts under the applicable employment standards legislation;
- (d) Retaining for itself the benefit of amounts due to the Class Members in respect of such unpaid hours;
- (e) Failing to advise the Class Members of their entitlement to overtime pay for hours worked in excess of the overtime threshold under the applicable employment standards legislation;
- (f) Failing to implement and maintain an effective, reasonable and accurate Class-wide system or procedure, which is centrally and uniformly control and applied, for, among other things:
 - (i) Recording all hours worked by the Class Members;
 - (ii) Ensuring that the Class Members are compensated at the appropriate rates for all hours worked or otherwise prevented from working overtime that the Defendant did not intend to compensate; and
 - (iii) Recording all lieu time accumulated and taken by the Class Members and correlating same with all overtime hours worked by the Class Members (if "lieu time" is a lawful alternative to overtime pay which is not admitted but denied);
- (g) Failing to maintain accurate records of all actual hours worked by the Class Members; and
- (h) Imposing on the Class Members an overtime policy that purports to create an unlawful barrier to overtime.

- (i) Imposing on Class Members illegal and/or inapplicable overtime averaging agreements and excess hours of work agreements.

UNJUST ENRICHMENT

~~54.56.~~ The Defendant has been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the Plaintiff and the other members of the Class. The precise value of such unpaid hours of work is not known to the Plaintiff but is within, or should be within, the exclusive knowledge of the Defendant as the Defendant is required under the applicable employment standards legislation to accurately record the hours worked by the Class Members.

~~55.57.~~ The Plaintiff and the other members of the Class have suffered a deprivation, in the form of wages corresponding to the unpaid hours that they have worked.

~~56.58.~~ There is no juristic reason why the Defendant should be permitted to retain the benefit of the unpaid hours worked by the Plaintiff and the other members of the class. The Defendant's current Overtime Policy is unlawful and does not provide a juristic reason. The Defendant's systemic policies and practice of discouraging the reporting of, and denying the payment for, hours of work below the overtime threshold under the applicable employment standards legislation but in excess of those scheduled are similarly unlawful and do not provide a juristic reason.

NEGLIGENCE

~~57.59.~~ The Defendant owes a duty of care to the Plaintiff and the other Class Members to ensure that they were and are properly compensated for all hours worked at the appropriate rates. The Defendant has breached this duty by, among other things:

- (a) Failing to ensure that the Class Members' hours of work are monitored and accurately recorded;
- (b) Requiring and/or permitting and/or suffering the Class Members to work hours in excess of those scheduled, including hours both below and in excess of the overtime threshold under the applicable employment standards legislation, but failing to compensate the Class Members as required for all hours worked;
- (c) Failing to advise the Class Members of their right to recover for such unpaid hours and, in particular, of the express or implied terms of their contracts under the applicable employment standards legislation;
- (d) Retaining for itself the benefit of amounts due to the Class Members in respect of such unpaid hours;
- (e) Failing to advise the Class Members of their entitlement to overtime pay for hours worked in excess of the overtime threshold under the applicable employment standards legislation;
- (f) Failing to implement and maintain an effective, reasonable and accurate Class-wide system or procedure, which is centrally and uniformly controlled and applied, for, among other things:
 - (i) Recording all hours worked by the Class Members;
 - (ii) Ensuring that the Class Members were compensated at the appropriate rates for all hours worked or otherwise prevented from working overtime that the Defendant did not intend to compensate; and
 - (iii) Recording all lieu time accumulated and taken by the Class Members and correlating same with all overtime hours worked by the Class Members (if "lieu time" is a lawful alternative to overtime pay which is not admitted but denied);

- (g) Failing to maintain accurate records of all actual hours worked by the Class Members;
- (h) Imposing on the Class Members an overtime policy that purports to create an unlawful barrier to overtime; and
- (i) Imposing on Class Members illegal and/or inapplicable overtime averaging agreements and excess hours of work agreements.
- (j) Such further particulars as known to the Defendant will be provided at discovery and prior to the trial herein.

PREFERABLE PROCEDURE

~~58-60.~~ A class proceeding is preferable to a multitude of individual employment standards complaints or individual claims in Small Claims Court.

~~59-61.~~ A class proceeding will advance the three goals of the *Class Proceedings Act, 1992*, namely, judicial economy, access to justice, and behaviour modification.

~~60-62.~~ A class proceeding will advance the goal of judicial economy by preventing the need for thousands of individual employment standards complaints, and potential appeals thereof.

~~61-63.~~ A class proceeding will advance the goal of access to justice by providing a remedy for Flight Centre's employees, who, as non-unionized employees, face well-documented systemic barriers to enforcing their rights under the applicable employment standards legislation.

~~62-64.~~ Finally, a class proceeding will promote behaviour modification by addressing the systemic policies and practices of Flight Centre.

~~63-65.~~ Accordingly, a class proceeding is the preferable procedure for addressing the Plaintiff's claims.

AGGRAVATED, EXEMPLARY, AND PUNITIVE DAMAGES

~~64-66.~~ The Plaintiff pleads that the actions, conduct and omissions of the Defendant as aforesaid are unlawful, high-handed and carried out in bad faith. Moreover, they are carried out to enrich the Defendant and with a complete disregard for the rights and interests of the Class Members, who were and are to the knowledge of the Defendant vulnerable to the actions, decisions and power of the Defendant.

~~5-67.~~ The actions, conduct and omissions as aforesaid warrant awards of aggravated, exemplary and punitive damages.


RELEVANT LEGISLATION

~~66-68.~~ The Plaintiff pleads and relies on the following statutes and regulations:

- a. *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
- b. The applicable employment standards legislation:
 - i. *Employment Standards Code*, R.S.A. 2000, c. E-9 (Alberta);
 - ii. *Employment Standards Act*, R.S.B.C. 1996, c. 113 (British Columbia);
 - iii. *Employment Standards Code*, C.C.S.M. c. E110 (Manitoba);
 - iv. *Labour Standards Act*, R.S.N.L. 1990, c.L-2 (Newfoundland);
 - v. *Labour Standards Code*, 1989, R.S.N.S. c. 246 (Nova Scotia);
 - vi. *Employment Standards Act, 2000*, S.O. 2000, c. 41 (Ontario);
 - vii. *The Saskatchewan Employment Act*, S.S. c.S-15.1 (Saskatchewan); and
 - viii. Their respective regulations.

The Plaintiff proposes that this action be tried in Toronto.

Issued: February 20, 2019

~~Amended: November 18, 2019~~ 

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1039
Toronto ON M5G 2C2

Charles Sinclair LSUC#: 43178A

Tel: 416-979-4234

E-mail: csinclair@goldblattpartners.com

Joshua Mandryk – LSUC#: 68823D

Tel: 416-979-6970

E-mail: jmandryk@goldblattpartners.com

Nadine Blum – LSUC#52772G

Tel: 416-979-6971

E-mail: nblum@goldblattpartners.com

Fax: 416-591-7333

Lawyers for the Plaintiff

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*

AMENDED STATEMENT OF CLAIM

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1039
Toronto ON M5G 2C2

Charles Sinclair LS#: 43178A
csinclair@goldblattpartners.com
Nadine Blum – LSUC#52772G
E-mail: nblum@goldblattpartners.com
Joshua Mandryk LS#: 68823D
jmandryk@goldblattpartners.com
Tel: 416-977-6070
Fax: 416-591-7333

Lawyers for the Plaintiff