CITATION: Davis v. Amazon Canada Fulfillment Services, ULC, 2023 ONSC 3665
COURT FILE NO.: CV-20-00642361-00CP
DATE: 20230619

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
DENVER DAVIS	)	
Plaintiff	)	*Louis Sokolov* and *Jean-Marc Leclerc* for the Plaintiff
- and –	)	
AMAZON CANADA FULFILLMENT SERVICES, ULC, AMAZON.COM, INC. and AMAZON.COM.CA, INC.	)	*David Di Paolo, Nadia Effendi, Laura M. Wagner, Graham Splawski* and *Haddon Murray* for the Defendants
Defendants	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: May 9-11, 2023

PERELL, J.

REASONS FOR DECISION

Contents

A. Introduction

[1] This is a proposed class action pursuant to the *Class Proceedings Act, 1992*.[1] Denver Davis sues Amazon.Com, Inc., Amazon.Com.Ca, Inc., and Amazon Canada Fulfillment Services, ULC (collectively "Amazon"). The claim of the approximately 73,000 putative class members is for general damages of $200 million and for $50 million in aggravated, exemplary, and punitive damages.

[2] There are two distinct branches to Mr. Davis's theory of a case against Amazon. In effect, he has combined two distinct proposed class actions against Amazon. In one action, Amazon is sued as an "employer", and in the other action, Amazon is sued as a "common employer," without naming the other common employers.

[3] In the first branch of his action, Mr. Davis sues Amazon as an "employer" of approximately 16,000 putative class members. These workers have a direct contractual worker relationship with Amazon, and they deliver its parcels. These putative class members are known as Delivery Partners (DPs). Mr. Davis is not and has never been a DP. The first branch of the theory of Mr. Davis's proposed class action is that Amazon is an online product retailer that has a part-time workforce of approximately 16,000 DPs with whom Amazon contracts. Mr. Davis's allegation is that these drivers from across the country (actually just British Columbia, Alberta, and Ontario) are employees who have been misclassified as independent contractors, so that Amazon can avoid its statutory and common law obligations as an employer.

[4] In the second branch of his action, Mr. Davis sues Amazon as a "common employer" of approximately 57,000 putative class members. These workers have an indirect contractual relationship with Amazon. These putative class members are known as Driver Associates (DAs), and they are workers for Delivery Service Partners (DSPs). The DSPs are logistics companies that are contracted to provide delivery services for Amazon. There were 126 DSPs. Mr. Davis is a former DA. The second branch of the theory of Mr. Davis's proposed class action is that Amazon is an online retailer that has outsourced the delivery of its goods to 126 logistics companies, the DSPs. Mr. Davis alleges that Amazon did this outsourcing to avoid having to comply with Amazon's statutory and common law obligations as a "common employer" of these drivers. Mr. Davis submits that as a common employer, Amazon is jointly and severally liable for the failures of the 126 logistics companies to comply with the employment law of British Columbia, Alberta, Manitoba, Ontario, Québec, and Nova Scotia, which is where the DSPs carry on their businesses.

[5] The DSPs range from small family businesses, which have a handful of drivers, to large public companies with hundreds of drivers. The DSPs have a driver workforce of approximately 57,000 DAs, which suggests that the average workforce size is around 444 drivers per DSP, but

[1] S.O. 1992, c. 6

there is insufficient information to determine what the median size might be. None of the co-common employers are joined as co-defendants to the proposed class action.

[6] For both branches of his proposed class action, Mr. Davis alleges that Amazon is liable to the DPs and DAs for: (a) breach of employment contracts including the terms of Ontario's *Employment Standards Act, 2000*[2] and its regulations[3] and the equivalent provincial statutes[4] and provincial regulations[5] from across the country; (b) breach of duties of good faith; (c) unjust enrichment; (d) negligence; and (e) a declaration that any agreement excluding the putative class members from the employment law statutes is void and unenforceable.

[7] Amazon has a two-pronged attack to resist the certification of the two-branched theory of Mr. Davis's proposed class action. First, Amazon moves to have the proposed class action stayed in favour of arbitration for the 16,000 Delivery Partners (the "DPs") and for at least 21,000 of the 57,000 Delivery Associates (the "DAs") who have arbitration provisions in their work contracts. All the DAs governed by a contract known as DSP 2.0 have arbitration provisions in their work contracts and more than half of the 36,000 DAs that are governed by a contract known as DSP 1.0 have an arbitration provision in their work contracts. Second, Amazon submits that none of the certification criteria are satisfied, and therefore, the certification motion should be dismissed.

[8] For the reasons that follow, I stay the action against Amazon as an employer or as a co-employer for the DAs that have signed arbitration agreements. Had I not stayed the action, I would have conditionally certified it as a class action for the DPs but not for the DA class members. The conditions would have been the appointment of a representative plaintiff and the amendment of the class definition. In the DP action, I would not have certified aggregate damages or punitive damages as a common issue. I would not have certified the claims for breach of a duty of good faith, unjust enrichment, or negligence.

[9] For the reasons that follow, I would dismiss the action as against Amazon as a common employer. The cause of action, common issues, and preferable procedure criteria are not satisfied. The representative plaintiff criterion would have been satisfied and the identifiable class criterion would have been satisfied subject to an amendment to disqualify the approximately 21,000 DAs who signed arbitration agreements that enure to the benefit of Amazon as a covered party.

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[2] S.O. 2000, c. 41.

[3] Ont. Reg 285/01 (*Exemptions, Special Rules and Establishment of Minimum Wage*); Ont. Reg 288/01 (*Termination and Severance of Employment*); Ont. Reg 375/18 (*Public Holiday Pay*).

[4] *Employment Standards Act*, RSBC 1996, c 113; *Employment Standards Code*, RSA 2000, c E-9; *The Saskatchewan Employment Act*, SS 2013, c S-15.1; *The Employment Standards Code*, CCSM c E110; *Act respecting labour standards*, CQLR c N-1.1; *Civil Code of Québec*, CQLR c CCQ-1991; *Employment Standards Act*, SNB 1982, c E-7.2; *Labour Standards Act*, RSNL 1990, c L-2; *Labour Standards Code*, RSNS 1989, c 246; *Employment Standards Act*, RSPEI 1988, c E-6.2.

[5] BC Reg 396/95 (*Employment Standards Regulation*); Alta Reg 14/1997 (*Employment Standards Regulation*); RRS c s-15.1 Reg 3 (*The Minimum Wage Regulations, 2014*); RRS c S-15.1 Reg 5 (*The Employment Standards Regulations*); Man Reg 6/2007 (*Employment Standards Regulation*); CQLR c N-1.1, r 6 (*Regulation respecting a registration system or the keeping of a register*); CQLR c N-1.1, r 3 (*Regulation respecting labour standards*); NB Reg 85-179 (*General Regulation*); NB Reg 2019-2 (*Minimum Wage*); CNLR 781/96 (*Labour Standards Regulations*); NS Reg 298/90l (*General Labour Standards Code Regulations*); NS Reg 5/99, Sch A (*Minimum Wage Order (General)*); PEI Reg EC572/98 (*Minimum Wage Order*); PEI Reg EC588/10 (*Employment Standards Act General Regulations*).

B. Procedural and Evidentiary Background

1. Chronology

[10] On **June 12, 2020**, Mr. Davis commenced this proposed class action.

[11] Proposed Class Counsel is Sotos LLP.

[12] Amazon's counsel is a collective of Borden Ladner Gervais LLP and Gowling WLG (Canada) LLP.

[13] The proposed class definition is:

> Persons who delivered packages for Amazon in Canada during the Class Period (i.e., January 1, 2016 and the final determination of certification of this lawsuit as a class proceeding); encompassing:
>
> > (i) all persons who have worked for a Delivery Service Partner in Canada, delivering packages for Amazon during the Class Period; and
> >
> > (ii) all persons who worked directly for Amazon in Canada, delivering packages for Amazon through the Amazon Flex App during the Class Period.

[14] The causes of action are noted above. Mr. Davis alleges that Amazon failed to pay for all hours worked, the minimum wage, overtime pay, vacation pay, public holiday pay, premium pay, for meal breaks not taken, for out-of-pocket expenses, and termination pay. Further, Mr. Davis alleges that Amazon failed to comply with its statutory obligations including record keeping and notifying employees of their statutory rights.

[15] Mr. Davis proposes fifteen common issue questions. The proposed common issues are as follows:

> PROPOSED COMMON ISSUES
>
> *Common Employer*
>
> 1. Are the Defendants a common employer of Class members, with Amazon DSPs, for the purposes of the ESA and equivalent legislation, and/or at common law?
>
> *Misclassification of the Subclass Employment Relationship*
>
> 2. Are the Subclass members "employees" of the Defendants pursuant to the ESA and equivalent legislation?
>
> *Breach of Contract and ESA and Equivalent Legislation*
>
> 3. What are the terms (express or implied or otherwise) of the Class members' and Subclass members' contracts of employment respecting:
>
> > (a) Payment of hours worked by Class members?
> >
> > (b) Recording of the hours worked by Class members?
> >
> > (c) Breaks?
> >
> > (d) Vacation Pay?

(e) Payment for work on statutory holidays?

(f) Notice of termination and severance?

4. Should the vehicle operating expenses incurred by the Subclass members be considered in calculating whether the Subclass members were paid minimum wage?

5. Do the minimum requirements of the ESA and equivalent legislation with regard to minimum wage, overtime pay, vacation pay, statutory holiday pay, premium pay, meal breaks not taken, termination pay and severance pay form express or implied terms of the contracts with the Class members and Subclass members?

6. Did the Defendants breach any of the foregoing contractual terms? If so, how?

(a) If "yes", what damages are Class members and Subclass members entitled to?

Breach of Duty of Good Faith

7. Do the Defendants owe contractual duties and/or a duty of good faith to:

(a) Advise Class members of their entitlements under the ESA and equivalent legislation?

(b) Ensure that Class members' hours of work are or were monitored and accurately recorded?

(c) Ensure that Class members are or were paid overtime pay for hours worked in excess of the applicable overtime threshold?

(d) Ensure that the Class members are or were compensated with the wages equivalent to at least minimum wage under the ESA and equivalent legislation?

(e) Ensure that Class members are or were paid vacation pay?

(f) Ensure that Class members are or were paid premiums for working during statutory holidays?

(g) Ensure that Class members were provided with breaks?

(h) Ensure that Class members who were terminated were provided with notice and severance?

8. Did the Defendants breach any of their contractual duties and/or a duty of good faith? If so, how?

(a) If "yes", what, if any, damages are Class members and Subclass members entitled to?

Negligence

9. Do the Defendants owe a duty of care to the Subclass members to:

(a) ensure that Subclass members are properly classified as employees?

(b) advise Subclass members of their entitlement to minimum wage, overtime pay, vacation pay, statutory holiday pay, premium pay, meal breaks not taken, termination pay and severance pay?

(c) ensure that Subclass members are appropriately compensated with wages equivalent to at least minimum wage, overtime pay, vacation pay, statutory holiday pay, premium pay, meal breaks not taken, and termination pay and severance pay?

and

(d) ensure that Subclass members are appropriately compensated with wages equivalent to at least minimum wage, overtime pay, vacation pay, statutory holiday pay, premium pay, meal breaks not taken, termination pay and severance pay?

10. Did the Defendants breach any of the duties of care found to exist above? If so, how?

(a) If "yes", what, if any, damages are Class members and Subclass members entitled to?

Unjust Enrichment

11. Have the Defendants been unjustly enriched by failing to pay Class members appropriately for all their statutory entitlements? If "yes":

(a) Did the Class members suffer a corresponding deprivation?

(b) Was there no juristic reason for the enrichment?

12. Have the Defendants been unjustly enriched by misclassifying Subclass members and for failing to pay Subclass members appropriately for all their statutory entitlements and contributions required under the CPP and EI legislation? If "yes":

(a) Did the Subclass members suffer a corresponding deprivation?

(b) Was there no juristic reason for the enrichment?

Aggregate Damages and Remedy

13. If the Defendants' liability (or potential liability) to the Class members (or any part of the Class) is established, what remedies are the Class members (or any part of the Class) entitled to?

14. If the Class members are entitled to an award of monetary damages, can damages be assessed on an aggregate basis for all or part of the Class, for all or part of the Class Period? If "yes":

(a) What is the most efficient method to assess those aggregate damages? Without limiting the generality of the foregoing, can aggregate damages be assessed in whole or part on the basis of statistical evidence, including statistical evidence based on random sampling?

(b) What is the quantum of aggregate damages owed to Class members or any part thereof?

(c) What is the appropriate method or procedure for distributing the aggregate damages award to Class members?

15. Are Class members entitled to an award of aggravated, exemplary, or punitive damages based upon the Defendants' conduct? If yes?

(a) Can these damages awards be determined on an aggregate basis?

(b) What is the appropriate method or procedure for distributing any aggregate aggravated, exemplary, or punitive damages to Class members?

[16] On **August 4, 2021**, Mr. Davis delivered his Certification Motion Record (716 pages). It was comprised of: (a) the affidavit dated July 16, 2021 of Michael Carbonnier; (b) the affidavit dated April 10, 2021 of Denver Davis; (c) the affidavit dated July 22, 2021 of Arash Khayamian; (d) the affidavit dated July 30, 2021 of Dr. Brian Kriegler; (e) the affidavit dated July 15, 2021 of Michelle Logasov; and (f) the affidavit dated July 22, 2021 of Brettan Wingerter.

a. **Michael Carbonnier** of Vancouver, B.C. is an Amazon Flex driver, a DP, who began work in September 2020. He signed the Amazon Flex Independent Contractor Terms of Service.

b. **Denver Davis** of Toronto, Ontario is the plaintiff. He is a DA. He was employed by All Canadian Courier, a DSP, for approximately seven months from September 2017 to March 2018. Prior to that he worked for Amazon but not as a delivery person.

c. **Arash Khayamian** of Markham, Ontario is a former driver for DEC Fleet Services, a DSP. Mr. Khayamian is a DA.

d. **Brian Kriegler** of Los Angeles, California, is the Managing Director at Econ One Research, Inc., an economic and statistical consulting firm. He has an M.S. and a Ph.D. in statistics from UCLA and a B.A. in mathematics/economics from Claremont McKenna College. He was retained to describe methodologies to calculate aggregate damages.

e. **Michelle Logasov** of Toronto, Ontario is a former associate lawyer at Sotos LLP.

f. **Brettan Wingerter** of Calgary, Alberta is a former delivery driver for Charis Courier Inc., a DSP. Mr. Wingerter is a former DP.

[17] On **November 15, 2021**, Amazon delivered its Motion Record (117 pages) for a motion to stay the proposed class action in favour of arbitration. The motion was supported by: (a) the affidavit dated November 13, 2021 of Alexander Gallagher; (b) the affidavit dated November 15, 2021 of Imran A. Khokhar; (c) the affidavit dated November 15, 2021 of Yasir Malik; and (d) the affidavit dated November 15, 2021 of Jordan O'Leary.

a. **Alexander Gallagher** of Pincourt, Québec is the President of Urban Box Logistics, which is a DSP under Amazon's DSP 2.0 program. His logistics company entered into a Delivery Service Partner Program Agreement with Amazon Canada Fulfillment Services ULC effective July 12, 2021.

b. **Imran A. Khokhar** of Coquitlam, B.C. is the Director of KXPRESS Enterprises Inc., which is a DSP that employs 79 employees in Surrey and New West Minister, B.C. As part of the DSP 2.0 program, Mr. Khokhar's logistics company entered into a Delivery Service Partner Program Agreement with Amazon Canada Fulfillment Services, ULC effective June 10, 2020.

c. **Yasir Malik** of Burlington, Ontario is a Senior Program Manager for the Amazon Flex program in Canada.

d. **Jordan O'Leary** of the City of Bellevue, in the State of Washington, U.S.A. is employed by Amazon.com Services LLC as a Senior Product Manager, Delivery Associates.

[18] On **May 16, 2022**, Amazon delivered its Responding Motion Record of Volume 1 (623 pages), Volume 2 (739 pages) and Volume 3 (570 pages) comprised of: (a) the affidavit dated May 10, 2022 of Uchechukwuka (Helen) Adetunji; (b) the affidavit dated May 12, 2022 of Joel Andre; (c) the affidavit dated May 13, 2022 of Patrick Che; (d) the affidavit dated May 13, 2022 of Mikael James Clarkson; (e) the affidavit dated May 13, 2022 of Albert Adam Dalton; (f) the affidavit dated May 13, 2022 of Kathryn (Katie) Anne Dion; (g) the affidavit dated May 13, 2022 of Rehaaz Gafoor; (h) the affidavit dated May 14, 2022 of Alexander Gallagher; (i) the affidavit dated May 14, 2022 of David Julian Aguilar Garavito; (j) the affidavit dated May 13, 2022 of

Marie-Hélène Jetté; (k) the affidavit dated May 13, 2022 of Elias Kebbab; (l) the affidavit dated May 13, 2022 of Imran A. Khokhar; (m) the affidavit dated May 13, 2022 of Yasir Malik; (n) the affidavit dated May 13, 2022 of Jeffery Mattingley; (o) the affidavit dated May 13, 2022 of George McQueen; (p) the affidavit dated May 12, 2022 of Joseph Olubokun; (q) the affidavit dated May 15, 2022 of Mark Christopher Reid; (r) the affidavit dated May 16, 2022 of Daniel J. Slottje; (s) the affidavit dated May 12, 2022 of Ajohn Sunny; and (t) the affidavit dated May 16, 2022 of Eun Ji Yoon.

a. **Uchechukwuka (Helen) Adetunji** of Calgary, Alberta, works at Charis Courier Inc., which provides delivery services under a DSP agreement with Amazon Canada Fulfillment Services, ULC. Ms. Adetunji is a DA.

b. **Joel Andre** of Vaughan, Ontario is the Director of Human Resources at TFI International Inc., the parent company to two companies that formerly contracted with Amazon Canada Fulfillment Services, ULC as DSPs in the Greater Toronto Area; namely: (i) All Canadian Courier Corp. ("ACC"); and (ii) TForce Direct Canada, Inc.

c. **Patrick Che** of Mississauga, Ontario is the Vice President, Operations with FleetOptics Inc., a DSP in Mississauga. He joined the company as Operations Manager in 2017. Before that he worked as a dispatcher and as an Operations Manager at Dicom Transportation Group, a former DSP in Toronto, Ontario.

d. **Mikael James Clarkson** of Squamish, B.C. began working for Amazon in 2018, where he was a Senior Operations Manager. In 2020, he became an On the Road Operations Manager, and he was part of the launch of the DSP 2.0 program. In September 2021, he became a General Manager responsible for the operations at Amazon delivery stations, which are the central point from which DAs pick up packages to deliver to customers in British Columbia, Alberta, and Manitoba.

e. **Albert Adam Dalton** of Mississauga, Ontario began working for Amazon in August 2018 as a Human Resources Assistant. In 2021, he became Senior Human Resources Business Partner for the Amazon Fulfillment Centre in Brampton, Ontario.

f. **Kathryn (Katie) Anne Dion** of Dundas, Ontario was a principal and founder of DEC Fleet Services, a DSP company that specialized in offering fleet solutions, supplying vehicles for delivery and transportation services to various clients including Amazon Canada Fulfillment Services, ULC. Before she founded DEC Fleet Services, she worked for DEC Express, a Burlington-based company that provided delivery services to Amazon in 2016.

g. **Rehaaz Gafoor** of London, Ontario is the On the Road Operations Manager with Amazon for the DLC4 Delivery Station.

h. As noted above, **Alexander Gallagher** of Pincourt, Québec is the President of Urban Box Logistics, which as part of the DSP 2.0 program. His company entered into a Delivery Service Partner Program Agreement with Amazon Canada Fulfillment Services, ULC effective July 12, 2021.

i. **David Julian Aguilar Garavito** of Etobicoke, Ontario is an Amazon Flex Delivery Partner, a DP, in the Greater Toronto Area since July 2021.

j. **Marie-Hélène Jetté** of Montréal, Québec is a partner and head of the labour and

law group at Langlois Avocats in Montréal. She is a member of the Barreau du Québec. She was called to the bar in 1995. She is also a Certified Human Resources Professional.

k. **Elias Kebbab** of Laval, Québec is the sole director and President of d'Alliance T&S Ltée, which is a delivery company that employs 60 drivers in Laval in the greater Montreal area in Québec.

l. As noted above, **Imran A. Khokhar** of Coquitlam, B.C. is the Director of KXPRESS Enterprises Inc. which is a DSP that employs 79 employees in Surrey and New West Minister, B.C. As part of the DSP 2.0 program, it entered into a Delivery Service Partner Program Agreement with Amazon Canada Fulfillment Services, ULC effective June 10, 2020.

m. As noted above, **Yasir Malik** of Burlington, Ontario is a Senior Program Manager for the Amazon Flex program in Canada.

n. **Jeffery Mattingley** of Paris, Ontario is the owner and Director of Northern Touch Inc. which in June of 2020, became a DSP for Amazon in the Kitchener, Ontario area.

o. **Joseph George McQueen** of Surrey, B.C., after his retirement from thirty years employment in the transportation industry in management at various shipping and logistics companies including Coast Pacific Express, Loomis Courier, and Purolator became a DP in the Surrey area.

p. **Joseph Olubokun** of Mississauga, Ontario is the owner and founder of Omardunet Logistics Inc. which is family-run business that is a DSP.

q. **Mark Christopher Reid** of Vancouver, B.C. is the founder and the Chief Executive Officer of Wyngit Delivery Inc., which is a delivery company. It hires drivers to delivery packages in the Vancouver area.

r. **Daniel J. Slottje** of Dallas, Texas is a Senior Advisor at Analysis Group, Inc., an international economics consulting firm. He is an economist with expertise in the areas of labour and employment. He has a B.A. in economics from Clemson University and a Ph.D. in economics from Texas A&M University.

s. **Ajohn Sunny** of Kitchener, Ontario is a DP in the Kitchener and Cambridge area.

t. **Eun Ji Yoon** of Toronto, Ontario is a law clerk at Borden Ladner Gervais LLP, lawyers for Amazon.

[19] Also on **May 16, 2022**, Amazon delivered a Supplementary Motion Record (55 pages) for its motion for a stay. The motion record was comprised of: (a) an Amended Notice of Motion; and (b) the affidavit dated May 16, 2022 of Jordan O'Leary.

[20] On **July 29, 2022**, Mr. Davis delivered a Reply Motion Record (171 pages) comprised of: (a) the affidavit dated July 28, 2022 of Michel Coutu; (b) the affidavit dated July 26, 2022 of Mr. Davis; (c) the affidavit dated July 27, 2022 of Mr. Khayamian; (d) the affidavit dated July 28, 2022 of Dr. Kriegler; and (e) the affidavit dated July 23, 2022 of Mr. Wingerter.

a. **Michel Coutu** of Montréal is Professor Emeritus of Labour Law at the School of Industrial Relations of the Université de Montréal, which he joined in 2002. Previously, he was legal advisor to the Québec Human Rights Commission. He is a member of Barreau du Québec. He was called to the bar in 1980.

[21] Also on **July 29, 2022**, Mr. Davis delivered his Responding Motion Record (171 pages) in response to Amazon's motion to stay in favour of arbitration. This motion record was comprised of: (a) the affidavit dated July 27, 2022 of Mark. D. Gough; (b) the affidavit dated July 29, 2022 of Mr. Carbonnier; and (c) the affidavit dated July 23, 2022 of Mr. Wingerter.

a. **Mark D. Gough** of the Town of Port Matilda, State of Pennsylvania, U.S.A. is an Associate Professor and Director of Undergraduate Studies in the School of Labour and Employment Relations at Pennsylvania State University. He obtained his B.A. in Economics and Labour Studies and Employment Relations from Pennsylvania State University and his Ph.D. from Cornell University. He was retained by Mr. Davis to provide an opinion as to: (a) whether it is more likely than not that there is an inequality of bargaining power between Amazon and Flex drivers and/or DSP drivers; and (b) whether the Amazon Flex Arbitration Provision and/or the Mutual Arbitration Agreement unduly advantages Amazon or disadvantages the drivers with respect to the resolution of their employment related disputes.

[22] In **October 2022**, Amazon delivered a Sur-Reply Motion Record (35 pages) comprised of: (a) the affidavit dated October 31, 2022 of Ms. Jetté; and (b) the affidavit dated October 31, 2022 of Dr. Slottje.

[23] On **November 7, 2022**, Amazon delivered its Reply Motion Record (104 pages) for its motion to stay comprised of the affidavit dated November 7, 2022 of Anthonius Ryley-Justin Daimis.

a. **Anthonius Ryley-Justin Daimis** is a professor at the University of Ottawa, Faculty of Law. He was asked by Amazon's counsel to review the affidavit of Dr. Gough to provide an opinion about Dr. Gough's opinion that the Amazon Flex Arbitration Provision and the DSP 2.0 Mutual Arbitration Agreement disadvantage drivers with respect to resolving employment disputes.

[24] In **December 2022**, Mr. Davis delivered an affidavit dated **December 16, 2022 (**21 pages) from Dr. Gough.

[25] On **February 10, 2023**, Amazon brought a motion for: (a) an order striking out all or part of paragraphs 7-32 of the affidavit dated July 28, 2022 of Mr. Coutu in the certification motion; and (b) an order striking paragraphs 2-19 and Exhibits "A"-"O" of the affidavit dated July 15, 2021 of Ms. Logasov in the certification motion.

[26] Also on **February 10, 2023**, Amazon brought a motion for an order striking out all or part of pages 14, 18-26 and 33 of the expert report of Dr. Gough, being Exhibit "A" to his affidavit dated July 27, 2022 in the motion for a stay in favour of arbitration.

[27] On **February 13, 2023,** Professors Daimsis and Slottje were cross-examined.

[28] On **February 27, 2023**, Messrs. Clarkson, Gafoor, and Malik were cross-examined.

[29] On **February 28, 2023**, Dr. Gough was cross-examined.

[30] On **March 1, 2023**, Messrs. Davis and Gallagher were cross-examined.

[31] On **March 16, 2023**, Mr. Davis delivered a supplementary Motion Record comprised of the affidavit dated March 16, 2023 of Ms. Whibley. Ms. Whibley's affidavit attached the transcripts of the cross-examinations of: Professors Daimsis and Slottje and the transcripts of the

cross-examinations of Messrs. Clarkson, Gafoor, Gallagher, and Malik.

a. Karen Whibley is a senior law clerk with Sotos LLP.

[32] On **March 20, 2023**, Mr. Davis delivered a second supplementary Motion Record (15 pages) containing an Amended Notice of Motion.

[33] On **April 6, 2023**, Amazon delivered a Supplementary Responding Motion Record (1333 pages) comprised of the affidavit dated April 5, 2023 of Eun Ji Yoon containing the transcripts of the cross-examinations of Dr. Gough and of Mr. Davis.

2. The Motion to Strike the Evidence of Michel Coutu

[34] Amazon moved to strike portions of the reply report from Mr. Davis's Québec law expert, Professor Coutu, on the basis that parts of the report are improper reply and state legal conclusions.

[35] The parties agreed not to argue this motion as a preliminary motion. Accordingly, I admit Professor Coutu's report, and I shall give it the weight it deserves as may appear from the discussion and analysis of these Reasons for Decision.

3. The Motion to Strike the Evidence of Michelle Logasov

[36] Amazon moved to strike portions of the affidavit of Ms. Logasov, and the exhibits attached to those paragraphs, as inadmissible hearsay because she refused to identify the source of her information about the documents and Amazon was unable to authenticate the documents in the absence of this information.

[37] The parties agreed not to argue this motion as a preliminary motion. Accordingly, I admit Ms. Logasov's report, and I shall give it the weight it deserves as may appear from the discussion and analysis of these Reasons for Decision.

4. The Motion to Strike the Evidence of Mark Gough

[38] On the stay motion, Amazon moved to have portions of Dr. Gough's report struck because it stated legal conclusions and/or its opinions were not relevant to the stay motion.

[39] The parties agreed not to argue this motion as a preliminary motion. Accordingly, I admit Dr. Gough's report, and I shall give it the weight it deserves as may appear from the discussion and analysis of these Reasons for Decision.

C. Facts

1. The Defendants, the non-Defendants, and the Class Members

[40] The Defendants that form the collective of "Amazon" are: (a) Amazon.com, Inc.; (b) Amazon.com.ca, Inc.; and (c) Amazon Canada Fulfillment Services, ULC.

[41] Amazon.com, Inc. and Amazon.com.ca, Inc. are incorporated under Delaware law and headquartered in Seattle, Washington. Amazon.com Inc. carries on business as an online retailer. Amazon.com.ca Inc. is a subsidiary that operates the online store www.amazon.ca and is the seller of record for Amazon retail goods. Amazon.com Inc. and Amazon.com.ca Inc. have no direct role

in the delivery of packages in Canada apart from bundling the packages and readying them for pick-up.

[42] Amazon Canada Fulfillment Services, ULC ("ACFSU" or "Amazon Fulfillment") is incorporated under British Columbia law and operates through headquarters in Toronto, Ontario. It operates fulfillment centres and delivery stations in Canada, and it is responsible for the logistics of Amazon's local delivery services.

[43] The Defendants submit that Amazon.com, Inc. and Amazon.com.ca, Inc. ought not to have been joined as parties because it is only Amazon Canada Fulfillment Services, ULC that has contracts with the Delivery Service Partners and the Delivery Partners. This is a very debatable submission because it is arguable that Amazon Canada Fulfillment Services, ULC is the agent of its associated corporations, or it is arguable that all the Amazon corporations are a common enterprise, or it is arguable that the Amazon corporations are third-party beneficiaries or privies of one another. It is far too early to decide whether Amazon.com, Inc. and Amazon.com.ca, Inc. are proper parties to this litigation. For present purposes it is appropriate to treat them as a collective known as Amazon.

[44] As an online retailer in Canada Amazon sells millions of goods every month. Amazon takes the orders and prepares the goods for delivery, and it plans how its goods are to be delivered. To complete the delivery of Amazon's goods, Amazon Canada Fulfillment Services contracts with:

a. logistics contractors such as Canada Post, FedEx, and UPS.

b. contractors – known as "Delivery Service Partners" ("DSPs") – who use Amazon's DSP 1.0 Program. Their driver workers are known as "Driver Associates" ("DAs").

c. contractors – known as "Delivery Service Partners" ("DSPs") - who use Amazon's DSP 2.0 program. Their driver workers are also known as Driver Associates ("DAs").

d. contractor-drivers using Amazon's Flex Program. These drivers are known as "Delivery Partners" "DPs".

[45] The drivers of the logistic contractors such as Canada Post, are not putative Class members.

[46] The drivers of the DSPs using the DSP 1.0 Program or the DSP Program 2.0 (the DAs), which all use Amazon's Flex App, and the contractor-drivers using Amazon's Flex App (the DPs) are putative Class members.

[47] Four highly relevant facts are common for all of the drivers (DAs and DPs) that deliver goods for Amazon. One, they all use Amazon's technology, the Flex App. Two, the drivers all pick up the goods at an Amazon warehouse facility (delivery station) where Amazon has assembled the goods to be delivered to a predetermined list of purchasers. Three, Amazon provides the driver with a detailed delivery route for the list of purchaser's deliveries. Four, the Flex App records by scans and photos the deliveries and tracks and times the performance of the delivery assignments.

[48] Mr. Davis's allegation is that the DAs and the DPs are all employees of Amazon.

[49] Amazon's position is that the DAs are not its employees; i.e., it says that it has no worker relationship with the DAs, whose worker relationship is with the Delivery Service Partners. Further it is Amazon's position that the DPs are independent contractors.

[50] The logistics contractors using Amazon's DSP 1.0 Program or DSP 2.0 do have worker relationships with their drivers, the DAs. Under DSP 1.0, the possible worker relationships are as (a) employees, (b) independent contractors, (c) dependent contractors, and (d) "temps", i.e., persons retained to work through an employment agency. Under DSP 2.0, it is mandatory that the drivers (the DAs) be employees.

[51] DSP 1.0 contractors enter into a Transportation Agreement and one or more work orders setting out the terms and conditions under which they provide services to deliver Amazon's packages to Amazon's online customers.

[52] Between 2016 and May 5, 2022, there were 67 logistic contractors providing services under the DSP 1.0 Program. In 2021, all eight DSP 1.0s in British Columbia ceased operating as DSP 1.0s and joined the DSP 2.0 Program. Since 2021, the DSP 1.0 Program operates only in Ontario. As of May 5, 2022, there were 52 active DSP 1.0 contractors operating in Ontario.

[53] The total number of current and former drivers who worked for DSP 1.0 Contractors and who delivered packages to Amazon's customers is approximately 36,000 DAs.

[54] DSP 2.0 contractors enter into a Delivery Service Partner Program Agreement. This agreement incorporates different program policies than found in the DSP 1.0 Program. DSP 2.0 contractors are obliged to pay their drivers on an hourly basis, whereas the DSP 1.0 agreements are silent in this regard. DSP 2.0s may opt into Amazon's branded program, in which case, the DSPs lease Amazon-branded vehicles from a third-party fleet rental company and purchase Amazon-branded uniforms for their workers to wear while making deliveries. In exchange, the DSP 2.0s receive an additional per piece rate for their deliveries. These options are not available under the DSP 1.0 Program.

[55] In 2020, Amazon Fulfillment introduced the DSP 2.0 Program. As of May 5, 2022, there were 67 active DSP 2.0s. There were 20 operating in British Columbia, 17 in Alberta, five in Manitoba, 23 in Québec and two in Nova Scotia. There are no DSP 2.0s operating in Ontario. The total number of current and former drivers who worked for DSP 2.0s and delivered packages to Amazon customers is approximately 21,000 DAs.

[56] Since 2019, Amazon Canada Fulfillment Services contracted with individual drivers through the Amazon Flex Program. The Flex contractors are known as "Delivery Partners" ("DPs" or "Flex DPs"). Subject to the parameters of the Flex App, these workers control their own activities, including their hours or work, what delivery blocks they accept, and how they choose to deliver the packages. Each of the DPs signs the Amazon Flex Terms of Service ("TOS"), which includes an arbitration provision.

[57] All the Delivery Service Partners (DSPs), none of whom are defendants: (a) make their own hiring, training, discipline, promotion, and termination decisions; (b) keep their own worker records that indicate time of work; (c) pay their workers and keep their own payroll records; (d) set the terms of work for their drivers and schedule, manage, and monitor worker performance; and (e) are subject to provincial employment law statutes.

[58] It is worth emphasizing that none of the DSPs are in the online retail business of selling goods and that unlike the DSPs under DSP 2.0, which logistics businesses are both contractually and statutorily bound to comply with the provincial employment law statutes and are obliged to retain their drivers as employees, the DSPs under DSP 1.0 have different types of legal relationships with their workers. It is also worth noting that the DSPs under DSP 1.0 use different

ways to remunerate their workers. Some DSP 1.0s pay daily rates, others pay on an hourly basis, some pay minimums even if the shift is completed early, some pay only for the hours actually worked. The rates are set by the DSPs which compete for workers. Some DSP 1.0s offer benefits and pay bonuses, with varying eligibility criteria.

[59] It is Mr. Davis's allegation that all the DSPs are common employers with Amazon, which are joined as defendants. It is not clear whether Amazon is alleged to have one common employer status with 126 co-employers or 126 distinct common employer relationships.

2. The Delivery Partners ("DPs")

[60] Amazon retains drivers, i.e., Delivery Partners or "DPs", through its Amazon Flex Program, which it launched in 2019. As noted above, Mr. Davis contends that the drivers are employees. Amazon contends that the drivers are independent contractors. As of May 5, 2022, over 16,000 DPs had contracted with Amazon Canada Fulfillment Services and accepted at least one delivery block.

[61] Prospective DPs download the Flex App onto their smartphone and apply to sign up for the program. As part of the registration process, they agree to the Flex Terms of Service ("TOS") setting out the terms of the contract with Amazon Canada Fulfillment Services and they undergo a background check. The TOS includes an arbitration provision. The Amazon Flex Program recruits drivers for British Columbia, Alberta, and Ontario.

[62] Once registered, a DP using the Flex App has the option of signing up for or "accepting" delivery blocks offered through the Flex App. Each block offered is estimated to take two to four hours to complete. The Flex App shows the location, the date, the estimated duration of the block, and the total amount payable for completing the block. A DP can choose to accept a block as early as four days in advance and up to the start time of the delivery and can cancel up to 45 minutes in advance of start time without impacting their DP rating. There is surge (higher) pricing when the demand for deliveries is high.

[63] Once a Delivery Partner accepts a block, he or she goes to the delivery station before the start of the route, scans each package using the Flex App. He or she load the packages. The DP is given a detailed route with road and turn directions through the Flex App, but he or she is free to deviate from the route and the driver can make deliveries up to 10:00 p.m. local time. The drivers take breaks or make non-delivery stops, and they can conduct personal business at their discretion. When a delivery is made, the driver uses the Flex App to scan the packages and there is a photo function for the driver to record where the packages are left. Drivers are directed to never turn the Flex App off.

[64] The DPs using the Flex Program are paid on a block fee basis, with no provision for additional pay when the work cannot be completed within the allotted block, and Amazon does not make any contributions to Canada Pension Plan ("CPP") or Employment Insurance ("EI") accounts. Amazon does not pay anything in respect of the expenses of the DP.

3. The Work of the Delivery Associates ("DAs")

[65] Drivers hired by contractors using Amazon's DSP 1.0 system are recruited through job postings on websites like Indeed.com, and drivers hired by contractors using DSP 2.0 are recruited through postings on websites and through Amazon Fulfillment's "Fountain" program which

provides a pool of potential candidates available, or open hiring events organized by Amazon Canada Fulfillment Services. The DSP makes the hiring decision. Some drivers are hired as employees. Some drivers are hired as independent contractors. Some are retained through employment agencies. Mr. Davis's position is that all the drivers are common employees of Amazon.

[66] Some drivers have written contracts, and some do not. Where the DSP provides logistics services to other clients, some DSPs use the same worker contract for the DAs as they have with their other workers. Some DSPs use a special contract with their DAs.

[67] With respect to compensation, some DSP 1.0s pay daily rates, whereas others pay on an hourly basis. Some DSP 1.0s offer benefits and pay bonuses, with varying eligibility criteria. DSP 2.0s pay hourly rates. The DSPs set the rates. Some DSPs pay for hours worked, while others pay for a full shift or a minimum number of hours per shift. Amazon does not pay the DAs.

[68] The Delivery Service Partners set and implement their own idiosyncratic policies and procedures for training, retraining, providing equipment and uniforms, scheduling, managing, monitoring, record keeping. While all the DSPs use Amazon's Flex Program with respect to the delivery of Amazon's goods, some follow the program strictly, while others follow it with flexibility and adaptability. The DA drivers are given route information through the Flex App and use it much the same way as the DPs do while performing deliveries.

[69] Amazon's standard form contracts for the DSP 2.0 Program prescribes terms of employment to be followed by the Delivery Service Partner. In other words, Amazon prescribes how in addition to complying with the minimum employment requirements of the provincial employment statutes the DSP must employ its workers. Visualize, the standard DSP 2.0 Program contract provides as follows:

> *Wage, Hour, and Benefits Requirements*
>
> The below requirements are in addition to the minimum employment standards requirements with which your company must comply under applicable Law:
>
> Your company must pay its non-exempt employees on the basis of an hourly compensation structure and pay any applicable overtime, and not on a per route, per block, or per day basis.
>
> The hourly wage rate that your company pays its non-exempt employees must be no less than the greater of (i) the minimum wage required by applicable law, and (ii) the hourly wage specified in the Delivery Service Partner Program Wage Table that can be found on the Portal;
>
> Your company will not make any non-mandatory deductions from its employees' wages, charge its employees or job applicants for any costs, or require any security deposits from employees or job applicants including any deductions, charges, or deposits for uniforms or delivery devices, background checks, drug tests, vehicle damages, vehicle repairs, parking tickets, insurance deductibles, or any other insurance related costs;
>
> Your company must electronically track and record the hours worked by your company's employees (including unpaid breaks, e.g. meal breaks) and accurately pay each of your company's employees in a timely manner that complies with all applicable laws. Unless otherwise permitted in writing by Amazon, your company must adopt ADP payroll and time tracking software and allow Amazon to access your company's data;
>
> Your company must offer all of its employees working scheduled shifts of eight hours or longer, an unpaid, uninterrupted meal break of at least 30 minutes, including a longer meal break if required

> by provincial or federal law, as well as two paid 15 minute rest breaks. To the extent applicable law requires your company to provide employees with additional breaks, your company will comply with those requirements. Your company's employees must record these breaks within the time tracking and attendance applications within ADP.
>
> Your company is required to offer health and dental care coverage that, at a minimum, meets the requirements indicated by Amazon to all of your employees who, with respect to any month, are employed on average at least 30 hours of service per week. The waiting period for such coverage must be no longer than 30 days from date-of-hire;
>
> Your company must offer all DAs vacation time and vacation pay:
>
> DAs with less than 5 years of service must be entitled to a minimum of two weeks' vacation time after each 12 month vacation year, and 4% of the DAs wages (as defined by applicable provincial law) for that year;
>
> DAs with more than 5 years of service must be entitled to a minimum of three weeks' vacation time after each 12 month vacation year, and 6% of the DAs wages (as defined by applicable provincial law) for that year; and
>
> If provincial law requires you to offer greater amounts of vacation time or pay, you must at a minimum offer the greater amount.

[70] It is worth emphasizing that the standard form DSP 2.0 Program does not directly hire the DAs as working for Amazon and rather directs the DSP, an autonomous logistics company to comply with local employment laws and then obliges the DSP as to how it should employ and supervise its drivers as employees. The DAs are on the payroll of the DSP. The DAs are not on the payroll of Amazon.

[71] Amazon provides the DSPs with weekly performance reports about how the DAs performed. Amazon, on a weekly basis, provides each of its logistics companies with a "DSP Scorecard". This scorecard provides an overall rating for the DSP, as well as individual ratings for each driver, ranging from "Poor" to "Fantastic" on a number of different metrics, including delivery completion rate; scan compliance, photo on delivery compliance; contact compliance; and delivery anomalies.

4. The Work of Mr. Davis

[72] Mr. Davis is a resident of Ontario. He was a full-time inside employee of Amazon Canada Fulfillment Services where he assembled shipments. In the summer of 2017, he resigned from Amazon and in August 2017, he was hired by All Canadian Courier ("ACC"), a subsidiary of TFI International, Canada's largest over-the-road transportation company which is listed on the Toronto and New York Stock Exchanges. ACC is a courier company that provides services to multiple clients, including Amazon pursuant to the DSP 1.0 Program. Mr. Davis's employment was as a driver. He was a DA. He worked at ACC from August 2017 until March 2018.

[73] Mr. Davis deposed that he routinely worked more than 50 hours per week for which he did not receive overtime. He said he worked on Boxing Day and other public holidays, for which he was not paid holiday or premium pay.

[74] The facts are disputed, but it appears that Mr. Davis last worked for ACC on March 8, 2018 and that he received his last pay cheque from ACC on March 27, 2018. Based on these facts, Amazon submits that Mr. Davis's claim is statute-barred because he discovered his claim on

March 8, 2018, at which time he already knew that he had been underpaid by ACC, but he commenced his proposed class action on June 12, 2020.

[75] Mr. Davis, however, asserts that he did not discover his claim until he got his last pay cheque on March 27, 2020 which, because of the intervention on March 16, 2020of legislation extending limitation periods because of the Covid-19 pandemic, meant that he had the benefit of an extension of time that makes his June 12, 2020 Statement of Claim timely.

[76] Thus, there is a compound discovery issue in the immediate case about when Mr. Davis discovered his claim. As I shall explain below, notwithstanding this dispute about the facts of Mr. Davis's personal claim, my conclusion is that he is qualified to be a representative plaintiff for the DAs class members but not for the DP class members.

5. The Aggregate Damages Methodology

[77] In this case, Dr. Kriegler was retained to develop a methodology to calculate aggregate damages. He proposes a five-part process for ascertaining aggregate damages:

a. First, obtain data generated from class members' use of Amazon Canada's Flex App which records a series of events, corresponding geographic location, and corresponding date/timestamps.

b. Second, for each class member, estimate the number of hours worked per day and per workweek, by using a combination of data extracted from Amazon's Flex App and Google Maps, as well as other relevant data, if available.

c. Third, calculate the amount of wages to which class members would have been entitled, based upon the statutory entitlement in their province of residence.

d. Fourth, calculate the difference between actual and alleged pay to cover (i) all hours worked, (ii) overtime, (iii) vacation pay and (iv) statutory holiday pay.

e. Fifth, use route and customer data from the Flex App, as well distance estimates from Google Maps if necessary, to determine the number of kilometres driven. The calculated distance will be multiplied by a standard automobile allowance rate, such as that promulgated by the Canada Revenue Agency, to determine out-of-pocket expenses incurred by Flex drivers.

[78] Based on Dr. Kriegler's methodology, Mr. Davis proposed two applications of the methodology. For the drivers working under the DSP 1.0 Program or the DSP 2.0 Program, the DAs, the methodology is to compare the time-stamped records collected by the Flex App showing when DSP drivers worked, as against the payroll records of the 126 Delivery Service Partners to the extent that the drivers worked time before and/or after the time captured by the Flex App, such as the time spent driving to the Amazon delivery station, this would be estimated using digital tools such as Google maps.

[79] For the DP drivers, the methodology is to compare the time-stamped records collected by the Flex App with the records of payment, also maintained by Amazon. If the court determines that the expenses incurred by DPs drivers are relevant in determining whether they were paid minimum wage, this would be estimated in the aggregate, through the use of a standard mileage charge.

6. The Arbitration Provision

For the Delivery Partners (the DPs), the Flex App's Terms of Service (TOS) includes an arbitration provision. The Flex Arbitration Provision requires the parties to resolve by binding arbitration "any dispute or claim" arising out of or relating in any way to the Flex TOS, the driver's participation in the Flex Program, or the driver's performance of services for Amazon Fulfilment.

[80] The current version of the Arbitration Provision, in effect since September 2021, but which is not materially different from the earlier versions states:

> YOU AND AMAZON AGREE TO RESOLVE DISPUTES BETWEEN YOU AND AMAZON ON AN INDIVIDUAL BASIS THROUGH FINAL AND BINDING ARBITRATION SUBJECT TO THE EXCEPTIONS DESCRIBED BELOW IN SECTION 11(n). YOU AND AMAZON WAIVE THE RIGHT TO PURSUE THE RESOLUTION OF ANY SUCH DISPUTE IN A COURT AND WAIVE THE RIGHT TO A TRIAL BY JURY.
>
> If you do not agree with these terms, do not use the Amazon Flex app or participate in the Program or provide any Services.
>
> […]
>
> 11. Dispute Resolution, Submission to Arbitration.
>
> By clicking "I agree and accept" in the box below or by providing any Service after the Effective Date, you agree to the following arbitration agreement ("Arbitration Agreement"):
>
> (a) THE PARTIES WILL RESOLVE BY FINAL AND BINDING ARBITRATION, RATHER THAN IN COURT OR TRIAL BY JURY, ANY DISPUTE OR CLAIM, WHETHER BASED ON CONTRACT, COMMON LAW, OR STATUTE, ARISING OUT OF OR RELATING IN ANY WAY TO THIS AGREEMENT, INCLUDING TERMINATION OF THIS AGREEMENT, TO YOUR PARTICIPATION IN THE PROGRAM, OR TO YOUR PERFORMANCE OF SERVICES. TO THE EXTENT PERMITTED BY LAW, THE PRECEDING SENTENCE APPLIES TO ANY DISPUTE OR CLAIM THAT OTHERWISE COULD BE ASSERTED BEFORE A GOVERNMENT ADMINISTRATIVE AGENCY.
>
> (b) TO THE EXTENT PERMITTED BY LAW, THE PARTIES AGREE THAT ANY DISPUTE RESOLUTION PROCEEDINGS WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND NOT ON A CLASS OR COLLECTIVE BASIS.
>
> (c) TO THE EXTENT PERMITTED BY LAW, THE PARTIES FURTHER AGREE THAT NO DISPUTE RESOLUTION PROCEEDING WILL BE CONDUCTED ON A REPRESENTATIVE BASIS.
>
> (d) TO THE EXTENT PERMITTED BY LAW, THE PARTIES WAIVE ANY RIGHT TO PARTICIPATE IN OR RECEIVE ANY RELIEF FROM ANY NON-INDIVIDUAL PROCEEDING REFERENCED ABOVE, AND THIS ARBITRATION AGREEMENT DOES NOT PROVIDE FOR, AND THE PARTIES DO NOT CONSENT TO, ARBITRATION ON A CLASS OR COLLECTIVE OR REPRESENTATIVE BASIS.
>
> (e) NO ARBITRATOR SELECTED TO ARBITRATE ANY DISPUTE BETWEEN THE PARTIES IS AUTHORIZED TO ARBITRATE ANY DISPUTE ON A CLASS, COLLECTIVE ORREPRESENTATIVE BASIS. FURTHER, NO ARBITRATOR IS AUTHORIZED TO CONSOLIDATE CLAIMS OF MORE THAN ONE INDIVIDUAL UNLESS ALL PARTIES EXPRESSLY AGREE IN WRITING TO ANY SUCH CONSOLIDATION.

(f) THIS ARBITRATION AGREEMENT SHALL NOT BE INTERPRETED AS REQUIRING EITHER PARTY TO ARBITRATE DISPUTES ON A CLASS, COLLECTIVE OR REPRESENTATIVE BASIS, EVEN IF A COURT OR ARBITRATOR INVALIDATES OR MODIFIES OR DECLINES TO ENFORCE THIS ARBITRATION AGREEMENT IN WHOLE OR IN PART.

(g) AN AWARD IN ARBITRATION SHALL DETERMINE THE RIGHTS AND OBLIGATIONS BETWEEN THE NAMED PARTIES ONLY, AND ONLY IN RESPECT OF THE CLAIMS IN SUCH ARBITRATION AND SHALL NOT HAVE ANY BEARING ON THE RIGHTS AND OBLIGATIONS OF ANY OTHER PERSON OR ON THE RESOLUTION OF ANY OTHER DISPUTE OR HAVE PRECLUSIVE EFFECT AS TO ISSUES OR CLAIMS IN ANY OTHER DISPUTE. YOU AGREE THAT ANY ARBITRATION, INCLUDING ITS EXISTENCE, ANY DOCUMENT EXCHANGED IN THE ARBITRATION, AND ANY AWARD, ORDER, OR DECISION ISSUED BY THE TRIBUNAL SHALL BE CONFIDENTIAL TO THE FULLEST EXTENT PERMITTED BY THE APPLICABLE LAW.

(h) You and Amazon agree that, at least 30 days before commencing any legal action relating in any way to this Agreement or to the Services, the aggrieved party will provide the other party a notice of the aggrieved party's claims and at least 30 days in which to cure an alleged breach of this Agreement or other alleged act or omission, if the same is reasonably capable of being cured. Notice shall be provided as set forth in Section 14 of this Agreement. The applicable statute of limitations shall be tolled for 30 days following the provision of such notice.

(i) A party demanding arbitration under this Arbitration Agreement must file a written Notice of Request to Arbitrate with ADR Institute of Canada ("ADRIC") and deliver the notice to the other party by hand or by registered mail within the applicable statute of limitations. Any demand for arbitration made to Amazon must be directed to Amazon's registered agent, Service Company, at 300 Deschutes Way SW, Suite 304, Tumwater, WA 98051. For Amazon to begin an arbitration proceeding, it will send a letter requesting arbitration and describing its claim to the last known address of your residence or domicile. The demand must be ADRIC's required and must describe each demanding party. The arbitration will be conducted under the ADRIC Arbitration Rules ("ADRIC Rules") in effect at the time the arbitration demand is filed. None of ADRIC's simplified arbitration procedures will apply to the arbitration unless you and Amazon agree in writing to such simplified procedures after the Notice of Request to Arbitrate has been filed. The ADRIC rules are available at www.adric.ca. If the ADRIC rules are inconsistent with this Arbitration Agreement, this Payment of all commencement, case service, filing, administration, arbitrator, and other fees will be governed by the ADRIC Rules. However, if you initiate the arbitration, you will pay for the commencement fee as required by reimburse you for any portion of the commencement fee over CAD 200. For example, if the 180 you will be responsible for the entire commencement fee in that instance. But, if the CAD 350, you will be responsible for paying CAD 200 and Amazon will pay the difference (CAD 150 in instance). Amazon will also pay all other costs and expenses unique to arbitration, including the arbitrator's fees. The arbitration hearing will take place at a mutually convenient location within 70 kilometres from your domicile at the time this Agreement was entered into, or at another mutually convenient location order by the arbitral tribunal.

(j) Notwithstanding any provision in the ADRIC Rules or applicable law, the parties agree that, to the extent permitted by law, a court of law must resolve any dispute regarding the validity, enforceability or interpretation of the provisions in subsections (b) through (g) of this Section 11. The arbitrator must resolve all other disputes regarding the Arbitration Agreement, including the arbitrability of claims pursuant to such other provisions.

(k) If you assert a claim against Amazon that is not subject to individual arbitration pursuant to this Section 11, and there is then pending or later filed any claim against Amazon asserted by you or on your behalf that is subject to individual arbitration, then you agree and consent that any claim not subject to individual arbitration must be stayed until the resolution of such other claim unless such stay is contrary to applicable law.

> (1) Notwithstanding the foregoing Section 11, subsections (a) through (k) do not preclude you from pursuing remedies prescribed by statute ("Statutory Remedies") in a forum prescribed by statute ("Statutory Forum") where the same statute precludes waiving Statutory Remedies or pursuing Statutory Remedies in a Statutory Forum. In the event that you elect to pursue a Statutory Remedy in a Statutory Forum as to an alleged breach of this Agreement, you agree that you waive all rights, entitlements, and remedies in excess of the Statutory Remedy and waive your right to pursue arbitration as to the same alleged breach.

[81] It should be noted that the arbitration provision in the Flex TOS preserves the DPs' rights under provincial employment statutes. It provides, however, that if a complaint is made, all rights and remedies in excess of the statutory remedy are waived. This provision codifies for example s.97 of Ontario's *Employment Standards Act, 2000*, which provides that "an employee who files a complaint under this Act with respect to an alleged failure to pay wages … may not commence a civil proceeding with respect to the same matter." The arbitration provision precludes resort to court proceedings with respect to resolving disputes between the DP and Amazon and mandates arbitration. The arbitrator is precluded from deciding any dispute other than on a individual claim basis and is not authorized to consolidate claims or to arbitrate any dispute any dispute on a class, collective, or representative basis.

[82] With respect to the Driver Associates, the DAs, Amazon Canada Fulfillment Services provides each DSP 2.0 contractor with the Mutual Agreement to Individually Arbitrate Disputes as a template agreement to be executed by the drivers. It is in material respects similar to the arbitration provision in the Flex TOS. Like the Flex App's TOS, the arbitration provision contains a waiver of class, collective, consolidated and representative action claims. The Mutual Arbitration Agreement as of March 2022 states:

> MUTUAL AGREEMENT TO INDIVIDUALLY ARBITRATE DISPUTES It is [INSERT NAME OF DSP COMPANY HERE] (the "Company")'s goal to provide you (the "Employee") with a rewarding work environment. Disputes related to work can arise, however, and, if not resolved informally, can be disruptive, costly, and time consuming to resolve. Arbitration is an alternative to the traditional lawsuit and may resolve disputes more quickly and with less cost. In a traditional lawsuit, issues are resolved in court by a judge or a jury. In arbitration, issues are resolved outside of court by an independent third-party, known as an arbitrator.
>
> MANDATORY ARBITRATION. THE EMPLOYEE AND COMPANY AGREE THAT ANY COVERED CLAIM (DEFINED BELOW), WHETHER BASED IN CONTRACT, TORT, CIVIL LIABILITY, STATUTE, COMMON LAW, FRAUD, MISREPRESENTATION OR ANY OTHER LEGAL OR EQUITABLE THEORY, AND WHETHER BROUGHT AGAINST ANY OF THE EMPLOYEE, THE COMPANY, OR ANY COVERED PARTY (DEFINED BELOW) SHALL BE SUBMITTED TO INDIVIDUAL BINDING ARBITRATION.
>
> **Covered Claims**. Except as explained in the section "Claims Not Covered" below, this Mutual Agreement to Individually Arbitrate Disputes (this "Agreement") covers all past, current, and future grievances, disputes, claims, issues, or causes of action (collectively, "claims") under applicable federal, provincial or local laws, arising out of or relating to (a) Employee's application, hiring, hours worked, services provided, and/or employment with the Company or the termination thereof, and/or (b) a Company policy or practice, or the Company's or Employee's relationship with or to a customer, vendor, or third party, including any Covered Party, including without limitation claims Employee may have against the Company and/or any Covered Parties, or that the Company may have against Employee; and (c) claims involving minimum wages, overtime, unpaid wages, expense reimbursement, wage statements, and claims involving meal and rest breaks, whether brought against the Company or any Covered Party alone or together.

The claims covered by this Agreement include, but are not limited to claims asserted under or relating to: (i) the applicable provincial employment standards and human rights legislation in the Employee's province of residence and in which the Employee provides Services; (ii) injuries you believe are attributable to the Company under theories of product liability, strict liability, intentional wrongdoing, gross negligence, negligence, or respondeat superior; (iii) actions or omissions of third parties you attribute to the Company; (iv) claims brought pursuant to actual or alleged exceptions to the exclusive remedy provisions of provincial workers compensation laws; (v) federal and provincial antitrust law; (vi) issues regarding benefits, bonuses, wages, penalties, co-employment, or joint employment; (vii) contracts between you and the Company; (viii) personal or emotional injury to you or your family; (ix) federal, provincial, local, or municipal regulations, ordinances, or orders; (x) any common law, or statutory law issues relating to discrimination by sex, race, age, national origin, sexual orientation, family or marital status, disability, medical condition, weight, dress, or religion or other characteristic protected by applicable law; (xi) wrongful retaliation of any type, including retaliation related to workers' compensation laws or employee injury benefit plan actionable at law or equity; and (xii) misappropriation of confidential information or other acts or omissions by you. Without limiting the above, the Employee and the Company each specifically acknowledges and agrees that all, Covered Claims shall be subject to arbitration under this Agreement, with any in-person hearing(s) to take place in the province in which the Employee resides and works for the Company or is domiciled at the time of entering into this agreement, or at a mutually convenient location within 45 miles of the last location in which the Employee provided services to the Company. The Employee and the Company each specifically acknowledges and agrees that any claims brought by the Employee against any of the Covered Parties, whether brought jointly or severally with claims against the Company, shall be subject to arbitration under this Agreement. "Covered Parties" means the Company, any entity formerly or currently owned, affiliated, controlled or operated by the Company (a "company entity"), clients of the Company or a company entity, and the former and current officers, directors, managers, employees, owners, attorneys, agents, and vendors of the Company and/or a company entity and/or clients of the Company including Amazon and its affiliates and subsidiaries.

Claims Not Covered. This Agreement does not apply to: (i) claims for workers' compensation or unemployment benefits; (ii) claims expressly precluded from being arbitrated by a governing federal or provincial statute; (iii) claims that, under applicable law, the parties cannot agree to arbitrate; (iv) claims that are subject to any statutory governmental or non-judicial complaint, investigation, and dispute resolution process under the relevant employment or human rights legislation; (v) claims that must be brought before a specific administrative tribunal; (v) actions to confirm, vacate, modify, or correct an arbitrator's award; (vi) sexual harassment or sexual assault claims, except if the Employee chooses to submit them to arbitration under the terms of this Agreement; and (vii) nothing in this Agreement prohibits the filing any claim or charge with a government administrative agency. To the extent such a claim is not resolved before the agency, it is subject to arbitration under this Agreement rather than proceeding in court. For clarity, this Agreement does not preclude you from pursuing remedies prescribed by statute ("Statutory Remedies") in a forum prescribed by statute ("Statutory Forum") where the same statute precludes waiving Statutory Remedies or pursuing Statutory Remedies in a Statutory Forum. In the event that you elect to pursue a Statutory Remedy in a Statutory Forum as to an alleged breach of this Agreement, you agree that you waive all rights, entitlements, and remedies in excess of the Statutory Remedy and waive your right to pursue arbitration as to the same alleged breach.

Waiver of Class, Collective, Consolidated and Representative Action Claims. Each of the Employee and the Company expressly intends and agrees, to the absolute maximum extent permitted by law, that: (a) class action, collective action, or consolidated action procedures are hereby waived and shall not be asserted in arbitration or in court, nor will they apply in any arbitration pursuant to this Agreement including against any Covered Party; (b) representative action procedures are hereby waived and shall not be asserted in arbitration or in court, nor will they apply in any arbitration pursuant to this Agreement including with any Covered Party; (c) each will not assert class action, collective action, consolidated action or representative action claims against the other in arbitration or court or otherwise including against any Covered Party; and (d) the Employee

and the Company shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person including against any Covered Party. No arbitrator selected to arbitrate any claim covered by this Agreement is authorized to arbitrate any claim on a class, collective, consolidated, or representative basis. To the extent permitted by law, the Employee and the Company waive any right to participate in or receive any relief from any non-individual proceeding.

In the event the waiver of representative actions is found to be unenforceable in whole or in part, then the representative action will be heard in court, not arbitration, as to the portion of the representative claim to which the waiver is found to be unenforceable and all other Covered Claims will remain subject to arbitration. In that event, the representative claim in court shall be stayed until the arbitration is concluded, unless such stay is contrary to applicable law.

Further, in the event the Employee pursues any statutory recourse for a Covered Claim and simultaneously seeks to arbitrate said Covered Claim, the arbitration shall be stayed unless the Employee chooses to withdraw or discontinue the statutory recourse process.

Notwithstanding any provision in the applicable arbitration rules, a court of law must resolve any dispute concerning the validity and enforceability of the Agreement, and the validity, enforceability or interpretation of the provisions pertaining to class, collective, and representative action waivers. The arbitrator may resolve all other disputes within his or her jurisdiction, pursuant to the applicable arbitration rules and arbitration law.

Neutral Arbitrator. The arbitration will be administered by a single independent and neutral arbitrator under the Arbitration Rules of the ADR Institute of Canada, Inc. (the "ADR Rules") available online at https://adric.ca/rules-codes/arbrules/ (or to be provided upon request), except as modified in this Agreement. If, however, the ADR Rules are inconsistent with the terms of this Agreement, the terms of this Agreement shall govern. The arbitrator to be appointed shall have no relationship with the Employee, the Company, or any Covered Party that is a party to the arbitration and, just as a judge in a lawsuit would, will provide an impartial resolution to the dispute. Notwithstanding the ADR Rules, the arbitrator will be selected by mutual agreement of the parties and if the parties cannot reach agreement on the arbitrator, either party may apply to a court of competent jurisdiction for the appointment of an arbitrator.

Claims Procedure. Demand for arbitration under this Agreement must be made in writing, must describe the nature of all claims asserted and the material facts upon which such claims are based, and must be delivered to the other party or parties by hand or by first class mail within the applicable statute of limitations. Written notice of any Company claim and subsequent demand for arbitration will be delivered by certified or registered mail, return receipt requested, to the last known address or domicile of the Employee when the employee entered this agreement. Any notice and demand for arbitration made to Amazon, as a Covered Party, must be directed to Amazon's registered agent, Corporation Service Company, at 300 Deschutes Way SW, Suite 304, Tumwater, WA 98051. A written notice of any Employee claim and subsequent demand for arbitration must be directed to the domicile of the Company when it entered into this agreement. A demand for arbitration must be in writing and shall be initiated within the same time limitations that federal or provincial law applies to those claim(s). The language of the demand and arbitration shall be English, unless the Employee resides in Quebec, in which case the language of the demand and arbitration may be either English or French.

Arbitration Fees and Costs. Payment of all filing, administration, and arbitrator fees will be governed by the ADR Rules, except that if the Employee initiates the arbitration, the Employee will pay for only the first CAD $200 of the total ADR Rules filing fee. For example, if the ADR Rules filing fee is CAD $180 the Employee will be responsible for paying the entire ADR Rules filing fee in that instance. But, if the ADR Rules filing fee is CAD $570 the Employee will be responsible for paying CAD $200 and the Company, jointly and severally with any Covered Party who is a party to the arbitration, will pay the difference (CAD $370 in this instance). The Company and/or any

Covered Party, if any Covered Party is a party to the arbitration, will also pay all other costs and expenses unique to arbitration, including the arbitrator's fees.

Applicable Law and Effect of Decisions

- This Agreement and any arbitration hereunder shall be governed by the law of the Province of Ontario including the common law and the *Arbitration Act*, 1991 S.O. 1991, c.17, excluding s. 7(6) thereof, unless the Employee resides in Quebec as of the time the Employee enters into this Agreement, in which case the applicable provincial statutes apply, excluding any rule or provision that would preclude an appeal of a judicial decision on a motion to stay arbitration proceedings. The Employee's rights and Company's obligations in any arbitration hereunder shall comply with mandatory and applicable rights and obligations set out in the relevant provincial employment legislation, and to the extent such mandatory and applicable rights and obligations in such legislation are irreconcilable with those in this Agreement, the rights and obligations in the applicable provincial employment legislation shall apply.

- Substantive Law: The arbitrator shall apply the substantive provincial or federal law (and the law of remedies, if applicable) applicable to the claim(s) asserted.

- Pre-hearing Motions: Only claims that are recognized under existing law may be heard by the arbitrator. Any party to the arbitration shall have the right to file a motion to dismiss and/or a motion for summary judgment and/or summary trial, which the arbitrator shall decide by application of the standards under the relevant provincial rules of civil procedure governing such motions.

- Written Decisions and Awards: The arbitrator shall render a written decision explaining his or her findings and conclusions. The arbitrator's decision shall be final and binding upon the parties to the arbitration, and the parties agree that there shall be no appeal from the arbitrator's decision.

- No Preclusive Effect or estoppel: The arbitrator's decisions and awards shall have no preclusive effect as to issues or claims in any other arbitration or court proceeding, unless all of the parties in the other proceeding were also a named party in the arbitration in which the award or decision was issued.

Severability. If any provision of this Agreement to arbitrate is adjudged to be void or otherwise unenforceable, in whole or in part, the void or unenforceable provision shall be severed and such adjudication shall not affect the validity of the remainder of this Agreement to arbitrate. The only exception is that this Agreement is not, and shall never be construed as, reformed to be, or enforced as if it were, an agreement to arbitrate claims on a class, collective, consolidated, or representative basis. Stated differently, under no circumstance will a claim be allowed to proceed in arbitration as a class action, collective action, consolidated action, or representative action against any party including any Covered Party.

Waiver of Trial by Jury. Each of the Employee and the Company understands and fully agrees that by entering into this Agreement to arbitrate, each agrees to resolve all Covered Claims through arbitration and is giving up the right to have a trial by jury and the right of appeal following the rendering of a decision except to the extent provided by applicable provincial or common law.

Term of Agreement. This Agreement to arbitrate shall survive the termination of Employee's employment.

Entire Agreement. This Agreement constitutes the entire agreement between the Company and Employee regarding the subject matter herein and supersedes any and all prior agreements and understandings regarding the subject matter. This Agreement cannot be amended or modified except by a written agreement between the parties.

> **Employee Acknowledgment**. I understand that by signing below that I agree to the terms of, and agree to be bound by, this Agreement. I further agree and acknowledge that my acceptance of or continuing employment with the Company provides further evidence of my agreement to accept and be bound by the terms of this Agreement. I understand that this Agreement will remain in effect after my employment ends and that nothing in this Agreement modifies the at-will nature of my employment.

[83] Some DSP 1.0 contractors have chosen to have some or all of their drivers execute the arbitration agreement or a similar arbitration agreement even though it is not required by their Transportation Agreements.

[84] Under the arbitration agreement with the DSP 2.0 logistics companies, the Mutual Arbitration Agreement provides that the Driver Associate and the Delivery Service Partner agree to submit to binding individual arbitration of claims involving minimum wages, overtime, unpaid wages, expense reimbursement, wage statements, and meal and rest breaks, whether brought against the Delivery Service Partner or against Amazon.

[85] Under the arbitration agreement with the DSP 2.0 logistics companies, Amazon and its affiliates are included within the definition of "Covered Parties". Thus, Amazon and its affiliates and subsidiaries are parties or privies or third-party beneficiaries with the standing to enforce the arbitration agreement. The relevant provisions of the Mutual Arbitration Agreement about "covered claims" states:

> "[A]ll past, current, and future grievances, disputes, claims, issues, or causes of action [...] arising out of or relating to (a) Employee's application, hiring, hours worked, services provided, and/or employment with the Company or the termination thereof, and/or (b) a Company policy or practice, or the Company's or Employee's relationship with or to a customer, vendor, or third party**,** including any Covered Party [...]; and (c) claims involving minimum wages, overtime, unpaid wages, expense reimbursement, wage statements, and claims involving meal and rest breaks whether brought against the Company or any Covered Party alone or together."

[86] The Mutual Arbitration Agreement expressly stipulates that the drivers are not precluded "from pursuing remedies prescribed by statute ("Statutory Remedies") in a forum prescribed by statute ("Statutory Forum") where the same statute precludes waiving Statutory Remedies or pursuing Statutory Remedies in a Statutory Forum."

[87] The arbitration agreements, which are available online, stipulate that the ADR Institute of Canada rules apply and provide a link to the rules.

[88] The Arbitration Agreements cap claimant fees at $200.

[89] The Mutual Arbitration Agreement provides for arbitration within 45 miles of the last location in which the claimant provided services, and the Flex Arbitration Provision provides for a mutually convenient location within 70 kilometres of where services were recently rendered or the claimant's domicile at the time of agreement.

D. The Motion to Stay for Arbitration of the Disputes of the DAs and the DPs

[90] Amazon brings a motion to stay the claims being advanced by Mr. Davis on behalf of: (a) the DPs, all of whom have signed an arbitration agreement; (b) the DAs governed by DSP 2.0, all of whom have signed an arbitration agreement; and (c) those DAs governed by DSP 1.0 that have signed an arbitration agreement. (There are some DAs governed by DSP 1.0 that have not signed an arbitration agreement.)

1. Legal Background

[91] Pursuant to s.7 of the *Arbitration Act, 1991*, when a party brings a court action, his or her opponents may bring an application to have the civil action stayed on the ground that the parties have agreed that their dispute be arbitrated. The court's jurisdiction to stay a civil action and allow the arbitration to proceed is set out in s.7 which states:

> *Stay*
>
> 7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.
>
> *Exceptions*
>
> (2) However, the court may refuse to stay the proceeding in any of the following cases:
>
> 1. A party entered into the arbitration agreement while under a legal incapacity.
>
> 2. The arbitration agreement is invalid.
>
> 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
>
> 4. The motion was brought with undue delay.
>
> 5. The matter is a proper one for default or summary judgment.
>
> *Arbitration may continue*
>
> (3) An arbitration of the dispute may be commenced and continued while the motion is before the court.
>
> *Effect of refusal to stay*
>
> (4) If the court refuses to stay the proceeding,
>
> (a) no arbitration of the dispute shall be commenced; and
>
> (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.
>
> *Agreement covering part of dispute*
>
> (5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
>
> (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
>
> (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.
>
> *No appeal*
>
> (6) There is no appeal from the court's decision.

[92] In the context of deciding the stay application, the court will decide whether the arbitrator

has or may have jurisdiction to decide the parties' dispute. Pursuant to what is known as the competence-competence principle, the court may decide to let the arbitrator rule on his or her own jurisdiction to decide the dispute. Thus, in the context of deciding whether to stay the action, the court must first decide whether there is an arguable case that the dispute between the parties is covered by an existing arbitration agreement, in which case the court will not stay the action and defer to the arbitrator.[6] Further, in defined circumstances, the court may not stay the civil action for statutorily defined reasons, such as the case is suitable for a summary judgment in which cases, practically speaking, the court will decide the dispute and the arbitrator's jurisdiction, if any, is preempted.

[93] In *Haas v. Gunasekaram*,[7] the Court of Appeal for Ontario set out a five-part analytical framework for determining whether an action should be stayed for arbitration: (1) Is there an arbitration agreement? (2) What is the subject matter of the dispute? (3) What is the scope of the arbitration agreement? (4) Does the dispute arguably fall within the scope of the arbitration agreement? (5) Are there grounds on which the court should refuse to stay the action?

[94] Earlier cases about s.7(1) of the *Arbitration Act, 1991* had summarized the approach to take when deciding whether an action should be stayed as first interpreting the arbitration provision, second analyzing the claim to determine whether it is encompassed by the arbitration provision and third, if so, then the court must allow the arbitration to proceed, unless one of the exceptions in s.7(2) applied to the circumstances of the case.[8] In the seminal English case of *Heyman v. Darwins Ltd*.,[9] Lord Macmillan stated at p. 370:

> Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause.

[95] The parties to the arbitration agreement, the privies of the parties to the arbitration, and third-party beneficiaries of the arbitration agreement even if non-signatories to the agreement are bound by the agreement to arbitrate.[10]

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[6] *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41; *Kore Meals LLC v. Freshii Development LLC*, 2021 ONSC 2896; *Haas v. Gunasekaram*, 2016 ONCA 744; *Ontario Medical Assn. v. Willis Canada Inc.*, 2013 ONCA 745; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34.

[7] 2016 ONCA 744 at para. 17. See also: *Pezo v. Pezo*, 2021 ONSC 5406; *Leon v. Dealnet Capital Corp.*, 2021 ONSC 3636 (Master); *Gupta v. Lindal Cedar Homes Ltd.* 2020 ONSC 6333; *Grandfield Homes (Kenton) Ltd. v. Chen* 2020 ONSC 5230; *Leeds Standard Condominium Corp. No. 41 v. Fuller*, 2019 ONSC 3900; *Rhinehart v. Legend 3D Canada Inc.*, 2019 ONSC 3296.

[8] *MDG Kingston Inc. v. MDG Computers Canada Inc*., 2008 ONCA 656 at para. 14; *Stone v. Polon,* [2006] O.J. No. 2981 (C.A.); *Woolcock v. Bushert*, [2004] O.J. No. 4498 (C.A.); *Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 505 at para. 17, (C.A.), leave to appeal ref'd [2003] S.C.C. No. 344; *T1T2 Limited Partnership v. Canada* (1994), 23 O.R. (3d) 66 (Gen. Div.); *International Semi-Tech Microelectronics Inc. v. Provigo Inc*. (1990), 75 O.R. (2d) 724 (Gen. Div.); *Heyman v. Darwins Ltd*. [1942] A.C. 356 (H.L.).

[9] [1942] A.C. 356 at p. 370 (H.L.).

[10] *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41; *Ontario Medical Assn. v. Willis Canada Inc*., 2013 ONCA 745 *Smith Estate v. National Money Mart Co*., [2008] O.J. No. 2248 (S.C.J) aff'd 2008 ONCA 746, leave to appeal refused [2008] S.C.C.A. No. 535; *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.).

[96] Arbitration clauses are to be given a large and liberal interpretation.[11]

[97] In *TELUS Communications Inc. v. Wellman*,[12] and *Seidel v. TELUS Communications Inc.*,[13] the Supreme Court of Canada held that absent legislative language to the contrary, courts must enforce arbitration agreements.[14] The court should only refuse a reference to arbitration if it is clear that the matter falls outside the arbitration agreement.[15]

[98] In *TELUS Communications Inc. v. Wellman*,[16] Wellman brought a proposed class action on behalf of consumer and non-consumer purchasers of mobile phone service contracts with TELUS. The consumer purchasers were not subject to an arbitration agreement because it had been invalidated by the provisions of the *Consumer Protection Act*. The non-consumer, i.e., the business purchasers of TELUS's services were, however, subject to an arbitration agreement. The Supreme Court held that under the *Arbitration Act, 1991,* a stay was mandatory for the non-consumer class members.

[99] As may be noted from the excerpt from the statute set out above, under the *Arbitration Act, 1991*, the exceptions to granting a stay are that the court may refuse to stay its own proceedings: (a) if a party entered into the arbitration agreement while under a legal incapacity; (b) if the arbitration agreement is invalid; (c) if the subject matter of the dispute is not capable of being the subject of arbitration under Ontario law; (d) if the motion was brought with undue delay;[17] or (e) if the matter is a proper one for default or summary judgment.[18]

[100] In the immediate case, Mr. Davis argues that the DAs' and the DPs' arbitration agreements are invalid: (a) as unconscionable agreements; and (b) on grounds of public policy. Mr. Davis submits that the arbitration agreements are contrary to public policy because they constitute an illegal contracting out of the employment law statutes, which expressly prohibit contracting out from the protections of the Act. Mr. Davis also submits that the arbitration provisions are contrary to public policy because they deny the putative class members access to court proceedings, most particularly access to class proceedings. He argues that the arbitration provisions are contrary to

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[11] *Haas v. Gunasekaram*, 2016 ONCA 744; *Hopkins v. Ventura Custom Homes Ltd*., 2013 MBCA 67; *Dancap Productions Inc. v. Key Brand Entertainment, Inc.*, 2009 ONCA 135; *Woolcock v. Bushert*, [2004] O.J. No 4498 (C.A.); *Desputeaux c. Éditions Chouette (1987) inc.*, 2003 SCC 17.

[12] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19.

[13] *Seidel v. TELUS Communications Inc.* 2011 SCC 15. See also: *Difederico v. Amazon*, 2022 FC 1256: *Pokornik v. SkipTheDishes Restaurant Services Inc.*, 2020 MBQB 181; *Williams v. Amazon.com Inc*., 2019 BCSC 1807.

[14] *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41; *Trade Finance Solutions Inc. v. Equinox Global Ltd.*, 2018 ONCA 12; *Haas v. Gunasekaram*, 2016 ONCA 744; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35; *Dell Computer Corp. v. Union des consommateur*s, 2007 SCC 34; *Éditions Chouette (1987) inc. v. Desputeaux*, 2003 SCC 17.

[15] *Patel v. Kanbay International Inc.*, 2008 ONCA 867; *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.).

[16] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19.

[17] *Allied Accounting & Tax Services Ltd. v. Pacey*, 2017 ONSC 4388; *v. Slipacoff* (2009), 94 O.R. (3d) 741; *MDG Kingston Inc. v. MDG Computers Canada Inc*., 2008 ONCA 656; *Lansens v. Onbelay Automotive Coatings Corp.*, [2006] O.J. No. 5470 (S.C.J.); *ABN Amro Bank of Canada v. Krupp Mak Maschinenbau GmbH* (1994), 21 O.R. (3d) 511 (Gen. Div.).

[18] *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 7(2). *Smith v. National Money Mart Co.*, [2008] O.J. No. 2248 (S.C.J.), aff'd on other grounds [2008] O.J. No. 4327 (C.A.), leave to appeal refused [2008] S.C.C.A. No. 535; *Dewshaf Investments Inc. v. Buckingham Hospitality*, [2005] O.J. No. 6190 (S.C.J.), var'd [2006] O.J. No. 1724 (C.A.); *407 ETR Concession Co. v. Ontario (Minister of Transportation)*, [2004] O.J. No. 4516 (S.C.J.); *Sigfussion Northern Ltd. v. Cantera Mining Ltd.*, [2003] O.J. No. 1040 (C.A.); *Kanitz v. Rogers Inc.*, [2002] O.J. No. 665 (S.C.J.); *Kallaur v. Baranick*, [1996] O.J. No. 2135 (Gen. Div.); *Ottawa Rough Riders Inc. v. Ottawa (City)*, [1995] O.J. No. 3797 (Gen. Div.).

public policy because of the waiver of class proceedings.

[101] As established by the Supreme Court of Canada in *Heller v. Uber Technologies Inc.*,[19] the test for unconscionability is that: (a) there was an inequality of bargaining power when the parties entered into the agreement and (b) the agreement was an improvident bargain i.e., that the weaker party was unduly disadvantaged by terms they did not understand or appreciate.

2. Discussion and Analysis

[102] Mr. Davis has no arguments to dispute that Amazon has satisfied the onus on it to establish the first four elements of the test set out in *Haas v. Gunasekaram* and in the other cases in the Court of Appeal for Ontario and in the Supreme Court of Canada. Visualize: In the immediate case, there is an arbitration agreement that has been signed by (a) all of the 16,000 DPs, (b) all of the 18,000 DAs under DSP Agreement 2.0, and (c) some presently unknown number of DAs under DSP Agreement 1.0. The subject matter of the dispute is whether the DAs and the DPs have suffered a breach of their employment contracts with Amazon as their direct employer or as a common employer. The scope of the arbitration agreements clearly falls with the scope of the arbitration agreement.

[103] Thus, the battleground in the immediate case is over whether there are grounds for this court to refuse to stay the action. In my opinion, Mr. Davis loses that battle and also the war over the arbitration provision.

[104] The explanation why the arbitration provision prevails in the immediate case can be elucidated in part by comparing the immediate case to *Heller v. Uber Technologies Inc.*, which I am continuing to case manage. In that case, a similar battle was won by the class members; however, the outcome of the war remains to be determined sometime in the distant future after the parties resume hostilities about the subject matter of the dispute.

[105] The case at bar is much more complicated and elaborate than *Heller v. Uber Technologies Inc.*, but the cases are similar in many respects. In *Heller v. Uber Technologies Inc.*, the representative plaintiff, Mr. Heller, much like Mr. Davis in the immediate case, argued and claimed that the drivers who delivered passengers, packages, and food takeout orders from restaurants were employees of Uber's business. Like the case at bar, in *Heller,* it was alleged that the terms of the *Employment Standards Act, 2000* were incorporated in the employment contracts with Uber and that Uber had breached the employment contracts and the Act. The immediate case is more complicated and elaborate than *Heller v. Uber Technologies Inc.* because Mr. Davis also alleges that Amazon is the common employer of the DAs, who are the workers for the 126 logistics companies and because the immediate case involves the statutes of six provinces and not just Ontario's statute and regulations.

[106] For the present purposes of discussing the battle over arbitration or a class action, the major similarity between the cases is that in both cases, the defendants rely on an arbitration provision to stay the class proceeding. In the *Heller* case, the defendant attempted to stay the action for all drivers who used the Uber App which contained a mandatory arbitration agreement. In the immediate case, the defendant seeks a stay for the class members (the DPs) who signed an arbitration agreement with the defendant or class members (the DAs) who signed an arbitration

[19] *Heller v. Uber Technologies Inc.,* 2020 SCC 16.

agreement that covers disputes about their work for Amazon.

[107] In the first battle in *Heller v. Uber Technologies Inc.*,[20] Uber was victorious, and I enforced the arbitration provision, and I stayed the proposed class action.

[108] In the second battle, Mr. Heller was victorious. My decision was reversed by the Ontario Court of Appeal, which held that the arbitration agreement was unenforceable because it was unconscionable and because it was contrary to public policy because it contracted out of the *Employment Standards Act, 2000*.[21]

[109] In the third battle, Mr. Heller was again victorious. The Supreme Court of Canada refused to stay the action because it ruled that the arbitration agreement was an unconscionable contract of adhesion.[22] It shall be important to keep in mind that the Supreme Court did not need to and did not rule on the public policy ground that was the alternative *ratio* for the Court of Appeal's decision to rule the arbitration provision in *Heller v. Uber Technologies Inc.* unenforceable on grounds of public policy.

[110] While the decisions of the Court of Appeal and the Supreme Court of Canada were major victories for Mr. Heller, Uber did not surrender and the war about the arbitration clause rages on. In response to the Supreme Court of Canada's decision, in the fourth battle of the litigation, at the certification motion, Uber amended its arbitration provision in ways that it submitted made it a conscionable contract of adhesion, i.e., it submitted that the new arbitration agreement was not unconscionable and not contrary to public policy.[23] The revised arbitration agreement had removed the provisions that the Supreme Court had elucidated as unreasonable and unconscionable. Uber included a right to opt out of the arbitration provision along with its class action waiver provision.

[111] At the certification motion battle, Uber argued in a new battle that the Class Members who had not exercised their right to opt out of the arbitration provision should be bound by it and they should be excluded from class membership. However, on the certification motion and on subsequent motions to revise the common issues,[24] I did not exclude the class members who signed the arbitration agreement and left this issue to be raised, if necessary, after the common issues trial to determine whether the class workers were employees deprived of their entitlements to overtime and other pay as prescribed by Ontario's *Employment Standards Act, 2000*.

[112] With that background about *Heller v. Uber Technologies Inc.*, the law explicated in that case can be applied to the immediate case. In this regard, the first point to note is that none of the decisions in *Heller v. Uber Technologies Inc.* retracted or qualified the fundamental principle from *TELUS Communications Inc. v. Wellman*,[25] *Seidel v. TELUS Communications Inc.*[26] and a slew of cases that absent legislative language to the contrary, courts must enforce arbitration agreements.[27] In the immediate case, none of the employment statutes in British Columbia,

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[20] *Heller v. Uber Technologies Inc.*, 2018 ONSC 718.
[21] *Heller v. Uber Technologies Inc.* 2019 ONCA 1.
[22] *Heller v. Uber Technologies Inc.,* 2020 SCC 16.
[23] *Heller v. Uber Technologies Inc*., 2021 ONSC 5518.
[24] *Heller v. Uber Technologies Inc*., 2023 ONSC 1942, 2022 ONSC 1998, 2022 ONSC 1997, and 2022 ONSC 1996.
[25] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19.
[26] *Seidel v. TELUS Communications Inc.* 2011 SCC 15.
[27] *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41; *Trade Finance Solutions Inc. v. Equinox Global Ltd.*, 2018 ONCA 12; *Haas v. Gunasekaram*, 2016 ONCA 744; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35; *Dell Computer Corp. v. Union des consommateur*s, 2007 SCC 34; *Éditions Chouette (1987) inc. v. Desputeaux*, 2003 SCC 17.

Alberta, Manitoba, Ontario, Québec, and Nova Scotia rule out arbitration for employment law claims. Thus, the class members who are subject to arbitration provisions (not Mr. Davis, who is not subject to an arbitration provision in his contract with ACC) are bound to arbitrate unless they establish that the arbitration provision in the immediate case is unconscionable or unenforceable on grounds of public policy.

[113] The second point to note from the background of *Heller v. Uber Technologies Inc.* is that unlike the original arbitration provision in *Heller*, which was ruled to be unacceptable by both the Ontario Court of Appeal and the Supreme Court of Canada, the arbitration provision is not unconscionable. The arbitration agreements in the immediate case are not exceptional or abnormal and they do not have the features of time, place, cost, and procedure that were unacceptable in the *Heller v. Uber Technologies Inc.* case. In particular, there is nothing unconscionable about the mandatory nature of an arbitration provision or that an arbitration provision precludes access to the courts. Those aspects of an arbitration provision are inherent to all agreements to arbitrate. The fact that the arbitration agreements in the immediate case spell out in paranoic detail Amazon's desire to avoid a class action is a redundancy of the agreement because a class action is just a type of court proceeding and all types of court proceedings are to be stayed for arbitration subject to the exceptions found in the arbitration legislation.

[114] For present purposes, I do not propose to weigh in on the dispute between the parties about Dr. Gough's opinion evidence that there was an inequality of bargaining power when the DPs and the DAs entered into their respective arbitration agreements. I will assume that this is the case and focus on whether the weaker party, the DPs and DAs were unduly disadvantaged by terms they did not understand or appreciate. As I see it, treating the drivers as adults competent to contract, the terms of the contract are understandable and unless arbitration or resort to the administrative proceedings for statutory remedies is *per se* disadvantageous, which is not the case, the arbitration agreements in the immediate case are not unconscionable.

[115] I shall, however, weigh in on Dr. Gough's opinion, which amounts to an assertion that in the employment context all arbitration provisions are *per se* disadvantageous. I am not persuaded by this opinion, which is based on U.S. employment cases and U.S. academic literature. I am not persuaded that in Canada, it is impossible to fashion an arbitration provision to resolve employment disputes because arbitration in the employment context is inherently biased in favour of the employer. In Canada, except where it is expressly precluded for certain kinds of disputes, arbitration is accepted as a fair and efficient dispute resolution mechanism for all disputes including disputes between an employer and an employee or between a business and its independent contractor workers. There is nothing in the *Heller v. Uber Technologies Inc.* decisions that suggests that in the employment sector, arbitration agreements are *per* se disadvantageous and therefore *per se* unconscionable.

[116] The third point to note from the background of *Heller v. Uber Technologies Inc.* is that unlike the original provision in *Heller*, which was ruled to be contrary to public policy because it contracted out of the *Employment Statutes Act, 2000*, there is no contracting out in the immediate case. The arbitration provisions in the immediate case expressly do not preclude the DPs or the DAs from pursuing remedies prescribed by statute in a forum prescribed by statute. And, it may be noted that it is a requirement of Amazon's 2.0 DSP Agreement that the logistics company comply with its statutory obligations under employment statutes.

[117] To repeat, it is not against public policy to preclude access to class actions when arbitration

is provided as an alternative dispute resolution mechanism. The rule of law is that absent legislative language to the contrary, courts must enforce arbitration agreements. Unlike the situation for consumers advancing consumer protection claims, there is no legislative bar to arbitration in employment law cases.

[118] Thus, in accordance with s. 7(1) the *Arbitration Act, 1991*, if the DPs and the DAs are parties to an arbitration agreement, which they are, and if they commence a proceeding in respect of a matter to be submitted to arbitration under the agreement, which they have done, then on the motion of another party to the arbitration agreement, which is what Amazon has done, the court in which the proceeding is commenced shall, stay the proceeding, which is what this court in the immediate case must do unless the arbitration provision is unconscionable or illegal as contrary to public policy or unless one of the statutory exceptions applies. In the immediate case, since I conclude that the arbitration provision is not unconscionable and not contrary to public policy, I therefore must stay the proposed class action brought on behalf of the DPs and the DAs that are subject to arbitration agreements.

[119] By way of further elucidation as to why the arbitration provisions must be enforced in the immediate case, it is helpful to emphasize the extraordinarily subtle points in the immediate case that the class action waiver in the immediate case is not detached from the mandatory submission to arbitration, where it is actually superfluous because the arbitration provision precludes all manner of court proceedings, including class actions.

[120] To unpackage the subtleties, it needs to be observed that there is a strong argument that a free-standing waiver or preclusion of class proceedings detached from an arbitration provision is contrary to public policy because there is a long standing principle that contracts that interfere with the administration of justice are illegal. In *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*,[28] I held that a free-standing class action waiver clause was unenforceable and in effect ousted by the provisions of the *Class Proceedings Act, 1992* that require an action to be certified if the certification criteria are satisfied. In British Columbia, class action waivers have been held to be both unconscionable and also contrary to public policy. However, my decision in *Quizno's* and the *Pearce v. 4 Pillars Consulting Group Inc* .[29] decision in British Columbia are about free-standing class action waivers that were not a part of an arbitration agreement.

[121] In the immediate case, the DPs and the DAs agree to arbitrate their disputes and then the arbitrator is precluded from dealing with their individual cases as a collective, class, consolidated, or representative proceeding. This is a pure matter of contracting and does not interfere with access to the court, which has already been legally precluded by the submission to arbitration. Assuming that the arbitration agreement was not unenforceable on the grounds of unconscionability, there is no general principle that would make a contract term in an arbitration agreement specifying the procedures available or not available to the arbitrator illegal on the grounds of public policy, which public policy rather favours the freedom of contract.

[122] Applying this line of reasoning to the immediate case. Since its arbitration agreements are not unconscionable and since its arbitration agreements do not contract out of the remedies of the employment standards legislation, there is nothing illegal about having the arbitration proceedings

[28] *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, (2008), 89 O.R. (3d) 252 (S.C.J.), rev'd on other grounds 96 O.R. (3d) 252 (Div. Ct.). See also *Young v. Dollar Financial Group Inc.*, 2012 ABQB 601, aff'd, 2013 ABCA 264, leave to appeal to S.C.C. ref'd, [2013] S.C.C.A. No. 400.
[29] *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198, aff'g 2019 BCSC 1851.

proceed as individual claims.

[123] For present purposes, I need go no further than saying that there is a strong argument that a free-standing waiver of class proceedings detached from an arbitration provision may be illegal. However, I need not decide the point because in the immediate case the waiver of class, collective, consolidated, and representative proceedings is attached to a submission to arbitration which is not unconscionable or illegal on grounds of public policy. I, therefore, conclude that the arbitration clause in the immediate case is enforceable and pursuant to the *Arbitration Act, 1991*, I am obliged to enforce the provision.

3. The "At Will" Reference

[124] Before concluding this discussion, there is one further issue or problem that I have yet to mention that requires attention in the immediate case.

[125] The version of the Mutual Arbitration Agreement in use between the launch of the DSP 2.0 Program in Canada in March 2020 and April 2021, and the version in use from April 2021 to March 2022, included the following language at the very end of the agreement:

> Employee Acknowledgement. I understand that by signing below that I agree to the terms of, and agree to be bound by, this Agreement. I further agree and acknowledge that my acceptance of or continuing employment with the Company provides further evidence of my agreement to accept and be bound by the terms of this Agreement. I understand that this Agreement will remain in effect after my employment ends and that nothing in this Agreement modifies the at-will nature of my employment.

[126] The underlined sentence was removed from the Mutual Arbitration Agreement in March 2022.

[127] I agree with Amazon's argument that the underlined language is a mistake because Canada is not an "at will" employment jurisdiction. Thus, as a matter of interpreting the agreement in its factual nexus, no operative meaning can be given to this sentence. Further, the provision could be struck as a mistake and the agreements rectified. Moreover, I agree with Amazon's argument that if the sentence had some operative meaning, it would be an illegal provision that would be severable pursuant to the Mutual Arbitration Agreement's severability clause.

[128] It is also worth noting that, in any event, the "at will" provision is not a part of the arbitration agreements of the 16,000 DPs, the unknown number of DAs working for an employer under a 1.0 DSP Agreement, and the unknown number of the DAs working for an employer under a 2.0 DSP Agreement who continued to work or worked for the first time after the "at will" sentence was removed from the arbitration agreement.

E. The Certification Motion

[129] Although the putative Class members with valid arbitration agreements cannot be class members,[30] the above conclusion that the action on behalf of the DPs and the DAs governed by DSP 2.0 is stayed does not dispose of the certification motion.

[130] There is the likelihood of an appeal of my stay decision, and there are approximately

[30] *Williams v. Amazon.com Inc.*, 2019 BCSC 1807; *1146845 Ontario Inc. v. Pillar to Post Inc.*, 2014 ONSC 7400.

18,000 of the 36,000 DAs that are governed under DSP 1.0 who did not sign an arbitration provision. I shall, therefore, proceed to decide the certification motion on the assumption that there is no stay order.

1. Certification General Principles

[131] The court has no discretion and is required to certify an action as a class proceeding when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) 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 (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[132] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.[31] The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) to provide access to justice for litigants; (2) to encourage behaviour modification; and (3) to promote the efficient use of judicial resources.[32] That said, in *Pro-Sys Consultants Ltd v. Microsoft Corp.*,[33] the Supreme Court of Canada stated that although not a merits determination, certification was meant to be a meaningful screening device, that does not "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny".

[133] For certification, the plaintiff in a proposed class proceeding must show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading discloses a cause of action.[34] The some-basis-in-fact standard sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.[35] In particular, there must be a basis in the evidence to establish the existence of common issues.[36] To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.[37]

[134] The some-basis-in-fact standard does not require evidence on a balance of probabilities

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[31] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.
[32] *Hollick v. Toronto (City),* 2001 SCC 68 at paras. 15 and 16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29.
[33] *Pro-Sys Consultants Ltd v. Microsoft Corp*., 2013 SCC 57 at para. 103.
[34] *Hollick v. Toronto* (City), [2001] 3 S.C.R. 158 at para. 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99-105; *Taub v. Manufacturers Life Insurance Co*., (1998) 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).
[35] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *McCracken v. CNR Co*., 2012 ONCA 445.
[36] *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 at para. 140; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 at para. 21 (S.C.J.); *Dumoulin v. Ontario*, [2005] O.J. No. 3961 at para. 25 (S.C.J.).
[37] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 110.

and does not require that the court resolve conflicting facts and evidence at the certification stage and rather reflects the fact that at the certification stage the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight and that the certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action.[38]

[135] Although it has recently garnered renewed attention, it has been for a long time, and it continues to be a fundamental principle that for an action to be certified as a class proceeding there must be some evidence that two of more putative Class members suffered compensatory harm.[39]

F. Identifiable Class Criterion

[136] For reasons that will shortly become apparent, it is both necessary and convenient to discuss the second certification criterion, the identifiable class criterion first. The proposed class definition is set out above under the Procedural and Evidentiary Background heading.

1. Identifiable Class Criterion: General Principles

[137] The second certification criterion is the identifiable class criterion. The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice.[40]

[138] In defining the persons who have a potential claim against the defendant, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive.[41] An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable.[42] The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise.[43] A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a successful claim against the defendants.[44]

[139] The class must also not be unnecessarily narrow or under-inclusive. A class should not be defined wider than necessary, and where the class could be defined more narrowly, the court

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[38] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102.
[39] *Marcinkiewicz v. General Motors of Canada Co*., 2022 ONSC 2180; *MacKinnon v. Volkswagen*, 2021 ONSC 5941; *Maginnis v. FCA Canada Inc* 2021 ONSC 3897 (Div. Ct.), aff'g 2021 ONSC 3897, leave to appeal dismissed April 8, 2022 (C.A.); *Setoguchi v. Uber B.V.*, 2021 ABQB 18; *Atlantic Lottery Corp Inc. v. Babstock*, 2020 SCC 19; *Richardson v. Samsung Electronics Canada Inc.*, 2018 ONSC 6130, aff'd 2019 ONSC 6845 (Div. Ct.); *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42.
[40] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).
[41] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 at para. 57 (CA), rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (SCJ).
[42] *Robinson v. Medtronic Inc*., [2009] O.J. No. 4366 at paras. 121-146 (SCJ).
[43] *Frohlinger v. Nortel Networks Corporation,* [2007] O.J. No. 148 at para. 22 (SCJ).
[44] *Silver v. Imax Corp*., [2009] O.J. No. 5585 at para. 103-107 (SCJ) at para. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Div. Ct.); *Boulanger v. Johnson & Johnson Corp*., [2007] O.J. No. 179 at para. 22 (SCJ), leave to appeal ref'd [2007] O.J. No. 1991 (Div. Ct.); *Ragoonanan v. Imperial Tobacco Inc.* (2005), 78 O.R. (3d) 98 (S.C.J.), leave to appeal ref'd [2008] O.J. No. 1644 (Div. Ct.); *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10 (Gen. Div.).

should either disallow certification or allow certification on condition that the definition of the class be amended.[45]

2. Discussion and Analysis – Identifiable Class Criterion

[140] Mr. Davis's proposed class definition is defective, but it is not irreparably defective. Therefore, I conclude that with modifications to the definition, the identifiable class criterion has been satisfied in the immediate case.

[141] A major defect in the class definition is that Mr. Davis purports to be the representative plaintiff for class members in what are two discrete proposed class actions, but he qualifies as a representative for only the common employer class action; Mr. Davis would qualify as a representative plaintiff because he was a DA. The other class action is on behalf of the DPs who are alleged to be employees of only Amazon. The DPs' lawsuit does not involve a common employer; the DPs sue only Amazon. Mr. Davis, however, was never a DP. This defect is fixed by joining an additional representative plaintiff.

[142] The second major defect is that the class definition purports to bring together two distinct class actions. However, by combining the two separate class actions into one class definition, the class definition is technically over-inclusive because it includes DAs in the DP class action and it includes DPs in the DA class action. This mess is not tied up by creating a subclass. If the members of a proper subclass were illustrated by a Venn diagram, then they would be a circle within the large circle of the class. In the immediate case, the DAs and the DPs are separate circles, although it is conceivable that an individual putative class member could find himself as a member of either class, in which case, the circles would partially overlap. The fix to this problem is to have the two representative plaintiffs represent two separately defined classes of workers.

[143] The third major defect is that the definition of the DAs includes temporary workers (temps) who were retained through an employment agency. During argument, Class Counsel stated that there was no intention to include temps as class members. The fix here is to exclude the temps from the class definition.

[144] The result of these fixes is the following class definitions; visualize:

> Persons, other than temporary workers from an employment agency: (a) who worked for a Delivery Service Partner; and (b) who delivered packages for Amazon in Canada during the Class Period (i.e., January 1, 2016 and the final determination of certification of this lawsuit as a class proceeding).
>
> Persons: (a) who were accepted as Delivery Partners (DPs) for Amazon and (b) who delivered packages for Amazon in Canada during the Class Period (i.e., January 1, 2016 and the final determination of certification of this lawsuit as a class proceeding).

[145] With these amendments and assuming that (a) no claims are stayed; and (b) there are two qualified representative plaintiffs, I conclude that the identifiable class criterion is satisfied.

[146] Before moving on to the other criterion, I must note that I did not agree with Amazon's argument that the originally proposed class definitions impermissibly reference the merits of the action and prevented class members from self-identifying. Amazon argues that this is a merits

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[45] *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110 at paras. 12-13 (SCJ), aff'd [2003] O.J. No. 3918 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21.

definition because it describes the putative Class members as having "worked for Amazon," which Amazon submits obscures the fundamental issue of whether the drivers work for themselves, the DSPs, a staffing agency, or Amazon.

[147] I disagree, the reference to working for Amazon as a DA or a DP is not objectionable and is not a merits-based definition. It is a neutral definition that leaves the classification of the putative Class members to be determined on the merits.

[148] The fact that the classification of the putative Class members remains to be determined does raise an issue that I need not presently address but I shall simply flag. Were Mr. Davis's action to be certified, then it would be extremely important to have a robust and effective opt out notice explaining the implications of not opting out of the class action. There will be DPs, how many I cannot say, who for their own contractual autonomy and for their own idiosyncratic financial, income tax, and retirement planning purposes do not want to be bound by a settlement or a judgment that binds them to being employees as opposed to independent contractors.

[149] Also, before moving on to the other criterion, I must note that removing the assumption that no claims are stayed means that: (a) there are no members of the class for the DP Class members; and (b) the putative DA Class members with valid arbitration agreements cannot be class members and they must be removed from the class definition. For reasons to be found below, it also necessary to remove the class members from British Columbia and Nova Scotia.

[150] The result of these amendments is the following class definition that would satisfy the certification criterion:

> Persons, other than temporary workers from an employment agency: (a) who worked for a Delivery Service Partner; (b) who delivered packages for Amazon in Alberta, Manitoba, Ontario, and Québec during the Class Period (i.e., January 1, 2016 and the final determination of certification of this lawsuit as a class proceeding); and (c) who did not sign an agreement to arbitrate their disputes about their work for Amazon.

G. Cause of Action Criterion: General Principles

[151] The first criterion for certification is that the plaintiff's pleading discloses a cause of action.

[152] The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada*,[46] is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.[47] The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. To satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect, or it is plain and obvious that it could not succeed.[48]

[153] In *R. v. Imperial Tobacco Canada Ltd*.,[49] the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with

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[46] *Hunt v. Carey Canada,* [1990] 2 S.C.R. 959.
[47] *Wright v. Horizons ETFS Management (Canada) Inc*., 2020 ONCA 337 at para. 57; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68.
[48] *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 19 (S.C.J.), leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at p. 679 (C.A.), leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476.
[49] *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 at paras. 17-25.

considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success. Chief Justice McLachlin stated:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) introduced a general duty of care to one's neighbor premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd*., [1963] 2 All E.R. 575 (U.K. H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[154] In *Atlantic Lottery Corp. Inc. v. Babstock*,[50] the Supreme Court stated that the test applicable on a motion to strike is a high standard that calls on courts to read the claim as generously as possible because cases should, if possible, be disposed of on their merits based on the concrete evidence presented before judges at trial. However, Justice Brown stated that it is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings.[51]

[155] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously, and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed.[52]

[156] Bare allegations and conclusory legal statements based on assumption or speculation are not material facts; they are incapable of proof and, therefore, they are not assumed to be true for the purposes of a motion to determine whether a legally viable cause of action has been pleaded.[53]

[157] Matters of law that are not fully settled should not be disposed of on a motion to strike an action for not disclosing a reasonable cause of action,[54] and the court's power to strike a claim is exercised only in the clearest cases.[55] The law must be allowed to evolve, and the novelty of a

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[50] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 87–88.
[51] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19.
[52] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 41 (C.A.), leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 at p. 469 (Div. Ct.).
[53] *Deluca v. Canada (AG)*, 2016 ONSC 3865; *Losier v. Mackay, Mackay & Peters Ltd.*, [2009] O.J. No. 3463 at paras. 39-40 (S.C.J.), aff'd 2010 ONCA 613, leave to appeal ref'd [2010] SCCA 438; *Grenon v. Canada Revenue Agency,* 2016 ABQB 260 at para. 32; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para. 34.
[54] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).
[55] *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).

claim will not militate against a plaintiff.[56] However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law.[57] In the Ontario Court of Appeal's decision in *Darmar Farms Inc. v. Syngenta Canada Inc.*,[58] Justice Zarnett stated:

> The fact that a claim is novel is not a sufficient reason to strike it. But the fact that a claim is novel is also not a sufficient reason to allow it to proceed; a novel claim must also be arguable. There must be a reasonable prospect that the claim will succeed.

1. The Common Employment Doctrine

[158] The heart of the second branch of Mr. Davis's proposed class action is that Amazon is the "common employer" of approximately 57,000 DAs that have contracted with 126 logistics companies that have contracts with the DAs as employees, independent contractors, or workers from an employment agency (temps). Paragraph 69 of the Statement of Claim pleads: "Amazon and Amazon DSPs should be treated as one employer for the purposes of the ESA and Equivalent Legislation and the Plaintiff and Class members' entitlement to statutory minimum payments under it and their entitlements at common law." As pleaded, Amazon and 126 separate logistics companies are to be treated as one common employer.

[159] In its argument about the common issues criterion for certification, Amazon submits that there is no basis in fact for a commonality that Amazon and 126 logistics companies are a common employer; i.e., Mr. Davis's action fails the common issues criterion. As discussed later in these Reasons for Decision, I agree with that submission. Amazon also argues that the premise of a one common employer for the approximately 73,000 putative class members fails the preferable procedure criterion. As discussed later in these Reasons for Decision, I agree with that submission.

[160] Moreover, as I shall now explain, Amazon's argument against a common employer cause of action also succeeds under the cause of action criterion. It succeeds because accepting the facts as they have been pleaded as proven, Mr. Davis's common employer claim is doomed to failure. Reading the Statement of Claim generously, it is plain, obvious, and beyond a reasonable doubt that the putative Class Members alleged to be employed by a logistics company and simultaneously be employed by Amazon cannot succeed. Thus, as I shall explain below, the beating heart of this branch of Mr. Davis's proposed class action arrives thrice stillborn.

[161] In so far as the common employer doctrine is concerned, the relevant legislation is s. 4 of Ontario's *Employment Standards Act, 2000*, which states:

> *Separate persons treated as one employer*
>
> 4 (1) Subsection (2) applies if associated or related activities or businesses are or were carried on by or through an employer and one or more other persons.

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[56] *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n.
[57] *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).
[58] *Darmar Farms Inc. v. Syngenta Canada Inc*., 2019 ONCA 789 at para. 51.

Same

(2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.

Businesses need not be carried on at same time

(3) Subsection (2) applies even if the activities or businesses are not carried on at the same time.

Exception, individuals

(4) Subsection (2) does not apply with respect to a corporation and an individual who is a shareholder of the corporation unless the individual is a member of a partnership and the shares are held for the purposes of the partnership.

Exception, Crown

(4.1) Subsection (2) does not apply to the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown.

Joint and several liability

(5) Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee of any of them.

[162] There are analogous provisions to section 4 in British Columbia, Alberta, Manitoba, Nova Scotia and Québec,[59] which for present purposes and notwithstanding Amazon's arguments to the contrary, I shall assume these provisions are *para materia* and indistinguishable from the law in Ontario. And, for present purposes, I shall assume that the civil law has a doctrine similar to the common employment doctrine of the common law.

[163] There is also a common law doctrine of common employer. The relevant paragraphs of Mr. Davis's Statement of Claim are paragraphs 3, 67, 68, 69, and 70, which state:

> 3. In substance, however, Amazon effectively functions as the employer, or a common employer, of Class members. It exercises substantial control over conditions of their working lives through the imposition of mandatory policies and practices on the DSP program. In particular, and without restricting the generality of the forgoing:
>
> > (a) Under the DSP program, Amazon retains effective control over DSPs and Class members through the use of the Amazon Flex App which all Amazon DSPs and Class members are required to use in the performance of their job duties. The Amazon Flex App is the primary source of direction for Class members in performing their job duties and monitors Class members' movements continuously.
> >
> > The Amazon Flex App:
> >
> > > (i) requires Class members to input data concerning their starting mileage prior to making any deliveries;
> > >
> > > (ii) provides Class members with an exact itinerary to follow in delivering packages for Amazon, including turn-by-turn driving directions, time required to

[59] *Employment Standards Act*, RSBC 1996, c 113, s. 95; *Employment Standards Code*, RSA 2000, c E-9, ss. 80, 81; *The Employment Standards Code*, CCSM c E1110, s. 126; *Labour Standards Code*, RSNS 1989, c 246, s. 11; *Act respecting labour standards*, n-1.1., s. 95.

travel from one location to another, and the order in which the packages must be delivered;

(iii) provides Class members with notes and instructions from Amazon customers regarding where packages should be left or phone numbers to call upon arrival;

(iv) requires Class members to input data concerning failed delivery attempts, customer service issues, road accidents, physical injuries, or technical difficulties with the Amazon Flex App; and,

(v) monitors Class members movements through the use of GPS technology linked to the Amazon Flex App and Class members' devices including the "Rabbit", allowing Amazon to instruct Class members to pick up the pace of their deliveries if it is noted that they are falling behind schedule or are stationary in one location for a duration that Amazon determines is too long;

(b) Amazon will impose sanctions against Amazon DSPs for Amazon policy violations by Class members; and,

(c) Amazon DSPs will typically have Amazon as their sole or primary "client" and coordinate the delivery of Amazon packages subject to Amazon's policies, surveillance and control.

[…]

F. AMAZON IS THE COMMON EMPLOYER OF THE PLAINTIFF AND THE CLASS

67. Amazon and Amazon DSPs are related or common employers of the Plaintiff and Class members at common law and under the *ESA* and Equivalent Legislation.

68. Amazon carries on its business of delivering Amazon packages to its customers through the use of Amazon DSPs and the Amazon Flex App.

69. Amazon and Amazon DSPs should be treated as one employer for the purposes of the *ESA* and Equivalent Legislation and the Plaintiff and Class members' entitlement to statutory minimum payments under it and their entitlements at common law.

70. The relationship between Amazon and Amazon DSPs is intertwined, proximate and characterized by Amazon exerting effective control over both Amazon DSPs and Class members because:

(a) Class members must use the Amazon Flex App which provides Class members with an exact itinerary to follow in delivering packages for Amazon, including turn-by-turn driving directions, time required to travel from one location to another and the order in which the packages must be delivered;

(b) Class members' movements are closely monitored and recorded by the Amazon Flex App;

(c) Class members must use the Rabbit or their personal mobile phone to call an Amazon representative if they encounter any issues in the course of making a delivery or to report customer service issues, road accidents, physical injuries, or technical difficulties with the Amazon Flex App. Amazon then directly provides Class members with direction on what course of action to take;

(f) Amazon DSPs must follow Amazon's polices in respect of their business operations;

(g) Class members must follow Amazon's policies in the performance of their job duties;

> (h) Amazon will issue "concession cards" to Amazon DSPs and may refuse to supply delivery routes to Amazon DSPs if Amazon determines that the Amazon DSP and/or Class members employed by the Amazon DSP are violating Amazon policies;
>
> (i) Amazon and Amazon DSPs operate out of the same premises or premises that are located in close geographical proximity to facilitate the high level of integration of their operations and to exert common control over Class members;
>
> (j) Amazon and Amazon DSPs serve a common market which is Amazon customers;
>
> (k) Class members receive instruction in their training to identify themselves as representatives of Amazon and are further instructed to make Amazon's logo visible at the time of making deliveries; and,
>
> (l) Class members are surveilled by Amazon when they are at Fulfilment Centres through the use of video technology and through direct managerial oversight from Amazon managerial staff.

[164] Under the common employer doctrine, an employee may simultaneously have more than one employer.[60] An employee will have more than one employer when the employer with whom the employee has directly contracted to work is related to one or more others who can also be said to have also entered into a contract of employment with the employee.

[165] The relationship necessary to establish a common employer group is not based on a corporate law relationship of a subsidiary company or an associated company or companies connected by some common ownership; rather the relationship is based on the evidence (the material facts) demonstrating that there was an intention to create an employer/employee contractual relationship between the worker and the company related to his or her direct employer.

[166] To understand the common employee doctrine, it is important to keep in mind that it is a doctrine of contract formation and the intention to contract may be, but need not be, reflected in a written contract and a contract of common employment may be reflected by conduct reflecting an intention to contract between the employee and the common employer(s).

[167] In *Downtown Eatery (1993) Ltd. v. Ontario,*[61] the Court of Appeal described the common employment doctrine at para. 30 as follows:

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[60] *Rahman v. Cannon Design Architecture Inc*., 2022 ONCA 451; *Scamurra v. Sandy Scamurra Contracting Ltd.* 2022 ONSC 4222; *Flesch v Apache Corporation*, 2022 ABCA 374; *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385; *Koscianska v. Lipson Shirtmakers Inc.*, 2020 ONSC 6871; *Liebreich v. Farmers of North America*, 2019 BCSC 1074; *Talbot v. Nourse*, 2018 ONSC 1061; *Montague v Pelletier*, 2018 ABQB 1047; *Rowland v. VDC Manufacturing Inc*., 2017 ONSC 3351; *Shoolestani v. Ichikawa*, 2016 BCSC 347; *Mazza v. Orange Corporate Services Inc*., 2015 ONSC 7785, aff'd 2016 ONCA 753; *de Kever v. Nemato Corp*., 2014 ONSC 6576; *King v. 1416088 Ontario Ltd*., 2014 ONSC 1445; *Reeves v. Eddy*, 2013 ONSC 2311; *Asselin v. Gazarek Realty Holdings Ltd.*, 2011 ONSC 5871; *Carmanah Pacific International Industries Corp. v. Westex Timber Mills Ltd.*, 2009 BCSC 1102; *Dumbrell v. The Regional Group of Companies Inc*., 2007 ONCA 59; *Jakl v. Russell Tire & Automotive Centre* (*1990) Inc*. (2005), 193 O.A.C. 259 (C.A.); *Bartholomay v. Sportica Internet Technologies Inc.*, 2004 BCSC 508; *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R (3d) 161 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 397; *Sinclair, Jacobs v. Harbour Canoe Club Inc*., [1999] B.C.J. No. 2188 (S.C.); *Gray v. Standard Trustco Ltd.* (1994), 8 C.C.E.L. (2d) 46 (Ont. Gen. Div.); *Jones v. CAE Industries Ltd.*, [1991] O.J. No. 2295 (Gen. Div.); *Sinclair v. Dover Engineering Services Ltd.* (1988), 49 D.L.R. (4th) 297 (B.C.C.A.).

[61] *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R (3d) 161 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 397.

30. The common employer doctrine, in its common law context, has been considered by several Canadian courts in recent years. The leading case is probably *Sinclair v. Dover Engineering Services Ltd.* (1987), 11 B.C.L.R. (2d) 176 (S.C.), aff'd (1988), 49 D.L.R. (4th) 297(B.C.C.A.) ("Sinclair"). In that case, Sinclair, a professional engineer, held himself out to the public as an employee of Dover Engineering Services Ltd. ("Dover"). He was paid by Cyril Management Limited ("Cyril"). When Sinclair was dismissed, he sued both corporations. Wood J. held that both companies were jointly and severally liable for damages for wrongful dismissal. In reasoning that we find particularly persuasive, he said, at p. 181:

> The first serious issue raised may be simply stated as one of determining with whom the plaintiff contracted for employment in January of 1973. The defendants argue that an employee can only contract for employment with a single employer and that, in this case, that single entity was obviously Dover.
>
> I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting and tax considerations.
>
> There is nothing sinister or irregular about the apparently complex inter-corporate relationship existing between Cyril and Dover. It is, in fact, a perfectly normal arrangement frequently encountered in the business world in one form or another. Similar arrangements may result from corporate take-overs, from tax planning considerations, or from other legitimate business motives too numerous to catalogue.
>
> As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.

[168] *O'Reilly v. ClearMRI Solutions Ltd.*,[62] is now the leading case about the formation of a common employment under the common employee doctrine. Mr. O'Reilly was the CEO of ClearMRI Solutions Ltd. ("ClearMRI Canada") and of its wholly owned subsidiary ClearMRI Solutions Inc. ("ClearMRI USA"). Mr. O'Reilly had an employment contract with ClearMRI Canada, but he reported to and was directed by ClearMRI USA. When his employment ended, Mr. O'Reilly sued the two ClearMRI corporations and also Tornado Medical Systems Inc., which was the majority shareholder of ClearMRI Canada as common employers. He obtained a default judgment against the ClearMRI corporations, and he succeeded in obtaining a summary judgment against Tornado Medical based on the common law common employer doctrine. The Court of Appeal, however, reversed the judgment against Tornado Medical, because the evidence did not establish that there was a common employer agreement between Mr. O'Reilly and Tornado Medical.

[169] In *O'Reilly v. ClearMRI Solutions Ltd.*, Justice Zarnett in the Ontario Court of Appeal explained how conduct may demonstrate that there are common employers. He stated at

[62] *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385.

paragraphs 55-57, and 68:

> 55. A variety of conduct may be relevant to whether there was an intention to contract between the employee and the alleged common employer(s). As they bear upon this case, two types of conduct are important. One is conduct that reveals where effective control over the employee resided. The second is the existence of an agreement specifying an employer other than the alleged common employer(s).
>
> 56. The conduct most germane to showing an intention that there was an employment relationship with two or more members of an interrelated corporate group is conduct which reveals that effective control over the employee resided with those members: *Downtown Eatery*, at paras. 32-33. This is consistent with how the law distinguishes employment from other types of relationships. Control over such matters as the selection of employees, payment of wages or other remuneration, method of work, and ability to dismiss, can be important indicators of an employer/employee relationship: […]
>
> 57. A written agreement that specifies an employer other than the corporation(s) alleged to be the common employers may also be relevant. The extent of its relevance depends on how the existence and terms of the written agreement, in light of the facts, informs the question of whether there was an intention that others were also employers.
>
> […]
>
> 68. To summarize, the doctrine of common employer liability exists consistently with the principle of corporate separateness because it holds related corporations liable for obligations they actually undertook to perform in favour of the employee. It does not hold them liable simply because they have a corporate relationship with the nominal employer. Whether the related corporations actually undertook to perform those obligations is a question of contractual formation – did the parties objectively act in a way that shows they intended to be parties to an employment contract with each other, on the terms alleged? Of central relevance to that question is where effective control over the employee resided. The existence of a written agreement specifying an employer other than the alleged common employer(s) will also be relevant; the extent of the relevance will depend on the terms and the factual context.

[170] I disagree with Amazon's submission that the common law doctrine of common employer is confined to relationships between corporations. An allegation of corporate affiliation *simpliciter* is neither necessary nor sufficient to bring the common employer doctrine into play. Corporate affiliation is relevant but not determinative of a common employer. Common employers could be comprised of two or more corporations, a sole proprietor and a corporation, a partnership and a corporation, two or more partnerships, two or more sole proprietorships. Common employers could be any combination or permutation of a group of entities that have common employees.

[171] There are, therefore, two prongs to the test used to determine whether the doctrine of common employer applies. First, mere allegations of a corporate law affiliation are insufficient and the Court must determine whether there is a significant degree of interrelationship *simplicite*r and or common control between the alleged common employers. Second, the Court must assess whether the employee held a reasonable expectation that each of the alleged common employers were parties to the employment arrangement governing the particular employee at all relevant times.[63]

[172] In the immediate case, it may be noted that there is no corporate law relationship between

[63] *Scamurra v. Sandy Scamurra Contracting Ltd.* 2022 ONSC 4222; *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385; *Mazza v. Orange Corporate Services Inc.*, 2015 ONSC 7785, aff'd 2016 ONCA 753; *Asselin v. Gazarek Realty Holdings Ltd.*, 2011 ONSC 5871.

Amazon and the 126 logistics companies, the DSPs. For some DSPs, Amazon is the only customer of its delivery services. For some of the logistics companies, Amazon is the major customer but the company has other customers. For some of the logistics companies, Amazon is just an important client.

[173] In the immediate case, it may be noted that as pleaded (and as shown by the evidence on the certification motion and the stay motion), Amazon and the 126 autonomous DSP logistics companies are not an integrated or seamless group of companies operating together as one business. The 126 autonomous logistics companies are not involved in owning or exercising control over Amazon's online consumer business, and Amazon is only involved in the business of the logistics companies to the extent that it sets performance standards for the delivery of Amazon's goods to consumers. Either way, it cannot be said that Amazon and the 126 autonomous logistics companies were carrying on a singular enterprise. Amazon and each of the 126 autonomous logistics companies were not carrying on business together; they were doing their own respective businesses. It is true that Amazon's contracts with the DSPs affect how the 126 autonomous logistics companies carry out their role as employer, but Amazon's role is different, it is a client of the 126 autonomous logistics companies that demands a level of performance to complete its own business as an online retailer.

[174] In the immediate context of determining the availability of the common employment doctrine based on the pleadings, it may be noted that as pleaded (and as shown by the evidence on the certification and stay motions), there is a worker contract between the DAs and the 126 autonomous logistics companies, which contract for present purposes may be taken to be an employment contract (and not a contract with an independent contractor, dependent contractor, or with an employment agency). In the immediate case, as pleaded (and as shown by the evidence on the certification and stay motion), there is a separate contract between the 126 logistics companies, the DSPs, and that contract does exclude Amazon as an employer. The contract between the DSPs and Amazon disavows that Amazon is the employer and actually directs that the 126 logistics companies promise to comply with their own employment law obligations including compliance with employment law statutes.

[175] In *O'Reilly v. ClearMRI Solutions Ltd.*, Justice Zarnett noted at paragraphs 66-67 that common employer allegations may but do not necessarily fail due to the presence of a written employment agreement that specifies who is the employer and that it will depend on the precise terms of the employment contract and the other facts of the case; Justice Zarnett stated:

> 66. In other cases, a common employer allegation has failed due to the presence of a written employment agreement that specified that only one company within the corporate group was the employer: *Dumbrell v. The Regional Group of Companies Inc*., 2007 ONCA 59, 85 OR (3d) 616, at para. 83; *Mazza v. Ornge Corporate Services*, 2015 ONSC 7785, 52 B.L.R. (5th) 51 ("Mazza (ONSC)"), at paras. 93-99, aff'd 2016 ONCA 753, 62 B.L.R. (5th) 211 ("Mazza (ONCA)"). In each of these cases, the facts were such that the court could conclude that the employee knew the only entity to whom he could look for fulfillment of employment obligations: *Dumbrell*, at para. 83; *Mazza* (ONSC) at paras. 90, 93-94. […] In other words, the written agreements in those cases, in light of all the facts, did not permit the conclusion that there was an intention to create an employer/employee relationship with anyone beyond the employer specified in the written agreement.
>
> 67. Nonetheless, as *Downtown Eatery* shows, a written agreement will not always preclude a finding of common employers. It depends on the terms of the written agreement, and the other facts of the

> case. The circumstances must reasonably permit the inference that there was an intention that the alleged common employers were also parties to the employment agreement.

[176] In the immediate case, as pleaded (and as shown by the evidence on the certification and the stay motions), it is plain and obvious that the written agreements and the other material facts do not reasonably permit the inference that there was an intention that Amazon was also parties to the employment agreements with 126 logistics companies each of which in a non-homogeneous way was exclusively responsible for hiring, contracting, setting terms of work, scheduling, managing, paying, making payroll deductions, reporting to governing authorities, promoting, laying off, disciplining, and firing their workers.

[177] In the immediate case, as pleaded (and as shown by the evidence on the certification and the stay motions), the consumer pays Amazon for goods and Amazon pays the 126 autonomous DSP logistics companies for a service and the 126 autonomous DSP logistics companies pay their workers for working either as employees, independent contractors, or temps in which case the payment is made to the worker's employment agency. In the supply chain that ultimately underlies Mr. Davis's common employment claim, Amazon is a retailer that is paid by a consumer, and what Amazon pays the DSP logistics company is an expense of carrying on a retail business. The 126 autonomous logistics contractors alleged to be co-employers are not suppliers of goods; rather, they are in the business of providing a delivery serve for which they are paid by Amazon, who is their customer. What Amazon pays the DSPs is income for their business, and the 126 autonomous logistics companies pay their workers as an expense of carrying on a delivery business not a retail business.

[178] Amazon has a direct contractual relationship with the consumer as a revenue stream, a direct contractual relationship with the logistics supplier as a business expense and no direct worker relationship with the workers of the logistics company. The logistics company has no relationship with the consumer of the goods delivered, a direct relationship with Amazon as a revenue stream, and a direct relationship with the drivers who are an expense of doing business. The logistics companies are in the business of making deliveries, they are not retailers; making deliveries is how they earn revenue and is not an expense of doing business. The point of illuminating the supply chain is that the drivers would not naturally see themselves as being in the retail trade providing goods to consumers (which is Amazon's business, their alleged co-employer), they would naturally see themselves as being in the logistics trade providing a service to a business in the retail trade.

[179] The examination of the supply chain distinguishes the common employer branch of the case from the employer branch of the case. And it distinguishes the common employer branch of the case from the employment law class actions like *Heller v. Uber Technologies Inc., Berg v. Canadian Hockey League,*[64] *Walter v. Western Hockey League,*[65] *and Fresco v. Imperial Bank of Commerce,* and *Fulawka v. Bank of Nova Scotia*. In all of these cases, there was no doubt about the trade of the employee and about whether their boss was carrying on the same trade.

[180] In the immediate case, it is plain and obvious that as pleaded, (and as shown by the evidence on the certification motion and the stay motion), Amazon did not undertake as a matter of contract formation that it promised to fulfill any obligations as an employer to the workers of 126 logistics companies. The pleaded material facts rather indicate that Amazon's intention was

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[64] *Berg v. Canadian Hockey League,* 2017 ONSC 2608*,* var'd 2019 ONSC 2106 (Div. Ct.).
[65] *Walter v. Western Hockey League*, 2017 ABQB 382, aff'd 2018 ABCA 188.

not to be a party to a common employment contract with the employees of an autonomous company. In the immediate case, it is plain and obvious as pleaded that there was not any intention to create an employer/employee relationship with Amazon, 126 logistics companies, and 57,000 DAs. If you asked the 57,000 DAs with whom they contracted for employment, they would answer they respectively worked for the 126 logistics companies. Ironically, it appears that Mr. Davis quit his employment at Amazon to join ACC, which has multiple clients, to bring a class action based on the allegation that he never left the employment of Amazon, which is only one among many ACC clients.

[181] Each of the common law and statutory common employee cases, including the proposed or certified class actions, is fact specific. Therefore, not very much turns on the caselaw save to say that from a factual perspective none of the common employment cases come a lightyear close to the ambition of making a combined workforce of 57,000 workers, the employees of Amazon (three corporately related retail businesses from Canada and the United States) and 126 corporately independent and diverse logistics companies from six Canadian provinces.

[182] There is a second corroborating reason for concluding that the common law employer doctrine is not available in the factual circumstances of the immediate case. The second reason is that the 126 logistics companies, which are the primary employer, have not been joined as co-defendants with Amazon, which is being sued as a common employer. In assessing the pleaded merits of Mr. Davis's allegation that there is a common employer relationship in the immediate case, it is notable that in all of the other common employer cases, all the proposed co-employers were joined as co-defendants, which is understandable because the co-employer is at least a proper party and arguably may be a necessary party to the action.

[183] To determine whether a person is a proper party, the court must determine whether the rights of that person would likely be affected or prejudiced by the order being sought, and to determine whether a proper party is a necessary party, the court must determine whether the person should be bound by the result which will enable the court to effectually and completely resolve the dispute.[66] A person with liability that is joint and several is at least a proper party, so where there are jointly and severally liable defendants to a contract claim, joinder is permissive.[67] My research has not discovered any case where an action was dismissed because of the failure to join a person who is jointly and severally liable with the defendant. However, the absence of a decided case begs the question about the circumstances of the immediate case where it is arguable that the 126 logistics companies are necessary parties.

[184] A proper party is necessary party if the party's rights would be affected by the outcome, making the party's joinder necessary to prevent re-litigation that carries the risk of inconsistent outcomes.[68] Parties have an obligation to join other parties who are necessary to enable the court to effectively and completely adjudicate the issues in the proceeding. This obligation comes from

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[66] *York Region Condominium Corporation No. 890 v. Market Village Markham Inc*., 2020 ONSC 3993; *Ontario Federation of Anglers and Hunters v. Ontario (Minister of Natural Resources and Forestry),* 2015 ONSC 7969; *Air Canada v. Thibodeau*, 2012 FCA 14; *School of Dance (Ottawa) Pre-Professional Programme Inc. v. Crichton Cultural Community Centre*, [2006] O.J. No. 5224 (S.C.J.); *Shubenacadie Indian Band v. Canada (Attorney General),* 2002 FCA 509; *Stevens v. Canada (Commission of Inquiry)*, [1998] 4 F.C. 125 (Fed .C.A.); *Amon v Raphael Tuck & Sons Ltd.*, [1956] 1 All E.R. 273 (Eng. Q.B.).

[67] Rule 5.02.

[68] *Abrahamovitz v. Berens*, 2018 ONCA 252; *McLaine v. London Life Insurance Company*, [2007] O.J. No. 5035 (Div. Ct.).

rule 5.03(1) of the *Rules of Civil Procedure*,[69] which states that: "[e]very person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding."

[185] In the immediate case, in my opinion, the 126 logistics companies are necessary parties notwithstanding that they are just jointly and severally liable and their joinder as proper parties is permissive.

[186] In the immediate case, notwithstanding that it is the 126 DSPs that are alleged to breach their employment contracts (and also their contracts with Amazon, which require them to comply with the local employment law) and notwithstanding that Mr. Davis's expert's methodology for aggregate damages depends on work and payroll data from the 126 DSPs, Mr. Davis has not joined the DSPs. However, it is their alleged failure to properly pay the 57,000 DAs that is what this litigation is all about. It is their alleged failure to comply with the employment law statutes that is what this litigation is all about. It is their time and payment records that are necessary to calculate the damages of each individual DA, and it is their time and payment records that are necessary to calculate aggregate damages under Mr. Davis's theory of aggregate damages. It is their alleged misdeeds for which Amazon is made jointly and severally liable, but the DSPs are not involved as parties to the proposed class action.

[187] If a necessary party is not a party to the proceeding, then the proceedings will be improperly constituted, and the court may dismiss the claim unless the party is added,[70] which Mr. Davis has not done and is not seeking to do. In the immediate case, it may or may not be too late to add the 126 logistics companies whose direct claim by their workers may be statute-barred, but the request is not being made, and, therefore, in the circumstances of the immediate case, there is a necessary party that is not before the court. This circumstance provides a second reason for concluding that the common employment cause of action does not satisfy the cause of action criterion.

[188] I appreciate that this second reason would disappear if Mr. Davis successfully applied to have the DSPs joined as co-defendants or if Amazon joined the DSPs as third parties. It is quite likely that a court would allow the joinder of the DSPs, but if the second reason were to disappear, the first reason would remain.

[189] Since all of the discrete causes of action in the immediate case that Mr. Davis advances on behalf of the DAs depend on the material facts of a common employer relationship, and since it is plain and obvious that Amazon could not be the common employer of the 57,000 DAs working for 126 DSPs, Mr. Davis fails to satisfy the cause of action criterion for the DA class members for all of the alleged causes of action.

2. Breach of Employment Contracts and Provincial Employment Law

[190] The above conclusion about the common employment doctrine disposes the breach of employment contract claims of the DAs. The above analysis, however, does not apply to Mr. Davis's claim on behalf of the DPs, although Mr. Davis is not qualified to be a representative plaintiff for the DPs, and a substitute plaintiff would need to be found and joined as a party to the action.

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[69] R.R.O. 1990, Reg. 194.
[70] *Muscat v. Camilleri* (1974), 2 O.R. (2d) 459 (H.C.J.).

[191] In this section of my Reasons for Decision, I shall explain why save with respect to British Columbia and Nova Scotia, in so far as there is a claim made on behalf of the DPs for breach of their alleged-to-be employment contracts with Amazon, the cause of action criterion is satisfied.

[192] Put somewhat differently, there is a cause of action for breach of contract for the DPs who have a direct contractual worker relationship with Amazon, with the exception for the workers in British Columbia and Nova Scotia.

[193] The cause of action against a direct employer for misclassifying its employees as independent contracts or as management without the benefits of employment standards legislation has been certified in numerous class actions.[71]

[194] At paragraphs 74 to 77 of the Statement of Claim, Mr. Davis alleges that Amazon breached its express or implied contractual obligations to provide the class members with their minimum statutory entitlements under the *Employment Standards Act, 2000* and the equivalent legislation. In *Le Feuvre v. Enterprise Rent-A-Car Canada Company*,[72] an overtime class action, Justice Morgan held that the plaintiff did not satisfy s. 5 (1) of the certification test for a breach of contract for British Columbia Class members. Justice Morgan relied on the British Columbia Court of Appeal's decision in *Macaraeg v. E Care Contract Centers Limited*,[73] where the Court held that the exclusive jurisdiction to remedy a failure to pay statutory minimums lies with the Director under British Columbia's *Employment Standards Act* and that statutory minimums are not enforceable as implied terms of an employment contract as any judicial enforcement is supplanted by the regulatory mechanism".

[195] In Manitoba, there is *Rivard v. Assiniboine Credit Union Ltd*.,[74] and in Nova Scotia, there is *Fredericks v. 2753014 Canada Inc.*,[75] that also conclude that a plaintiff does not have a civil action for breach of his or her employment contract because of the exclusivity of the statutory scheme. There is, however, case law in Manitoba that holds that it may be possible to enforce the statutory rights of administrative employment law by a civil action.[76]

[196] It is immediately important to understand that *Macaraeg v. E Care Contract Centers Limited* and the cases that follow it are decisions about a court's jurisdiction. The British Columbia Court of Appeal has made a jurisdictional decision, and I would follow it, for the British Columbia and for the Nova Scotia putative Class members.

[197] Relying on *Walter v. Western Hockey League*,[77] which is a decision by an Alberta Court, that was affirmed by the Alberta Court of Appeal in a western Canada region employment law

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[71] *Cunningham v. RBC Dominion Securities,* 2022 ONSC 5862; *Curtis v. Medcan Health Management Inc*., 2022 ONSC 5176 (Div. Ct.), rev'g 2021 ONSC 4584; *Heller v. Uber Technologies Inc.,* 2021 ONSC 5518; *Montague v. Handa Travel Student Trip Ltd.*, 2020 ONSC 6469; *Bozsik v. Livingston International Inc.*, 2016 ONSC 7168; *Sondi v. Deloitte,* 2018 ONSC 271 and 2017 ONSC 2122; *Berg v. Canadian Hockey League,* 2017 ONSC 2608*,* var'd 2019 ONSC 2106 (Div. Ct.); *Walter v. Western Hockey League*, 2017 ABQB 382, aff'd 2018 ABCA 188; *Omarali v. Just Energy*, 2016 ONSC 4094; *Baroch v. Canada Cartage,* 2015 ONSC 40; *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144, leave to appeal to Div. Ct. refused, [2013] O.J. No. 6258 (Div. Ct.); *Fresco v. Canadian Imperial Bank of Commerce,* 2012 ONCA 444; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443.

[72] *Le Feuvre v. Enterprise Rent-A-Car Canada Company,* 2022 ONSC 4136.

[73] *Macaraeg v. E Care Contract Centers Limited,* 2008 BCCA 182.

[74] *Rivard v. Assiniboine Credit Union Ltd*., 2014 MBQB 30.

[75] *Fredericks v. 2753014 Canada Inc.*, 2008 NSSC 377.

[76] *Hutletu v. 4093887 Canada Ltd.*, 2015 MBCA 82, aff'g 2014 MBQB 223.

[77] *Walter v. Western Hockey League*, 2017 ABQB 382, aff'd 2018 ABCA 188.

class action, Mr. Davis submits that it is not plain and obvious that the British Columbia DPs are precluded from bringing a breach of contract claim. I would not, however, follow *Walter v. Western Hockey League,* which relied on *Dominguez v. Northland Properties Corporation*,[78] a lower British Columbia court's decision that distinguished *Macaraeg* and allowed the British Columbia *Employment Standards Act* claims to proceed. In his decision in *Walter v. Western Hockey League*, Justice Hall allowed the claims to proceed because a class action was the most practical and efficient means to resolve the claims of the British Columbia Class members. With respect, while the efficiency of a class action is undoubtedly true, either a court has jurisdiction, or it does not. The British Columbia Court of Appeal decided that a breach of contract claim for breach of its statutory employment law regime is not available. I am persuaded that the law is the same for DP class members in Nova Scotia. Jurisdictionally, the matter may be different in Manitoba keeping in mind that ultimately the question of the court's jurisdiction is a matter of statutory interpretation of the Manitoba statute.

[198] Thus, to summarize, save with respect to British Columbia and Nova Scotia, in so far as there is a claim made on behalf of the DPs for breach of their alleged-to-be employment contracts with Amazon, the cause of action criterion is satisfied.

3. Breach of Duty of Good Faith

[199] The above conclusion about the common employment doctrine disposes of the breach of a duty of good faith claim brought on behalf of the DAs. The above analysis, however, does not apply to Mr. Davis's claim on behalf of the DPs, although Mr. Davis is not qualified to be a representative plaintiff for the DPs and a substitute plaintiff would need to be found and joined as a party to the action.

[200] In so far as there is a claim made on behalf of the DPs (or for the DAs as well assuming there was a viable common employer claim) for a breach of a duty of good faith, it is plain and obvious that Mr. Davis has not and could not plead a reasonable cause of action. The pleading of a breach of duty of good faith does not satisfy the cause of action criterion for certification.

[201] The essence of Mr. Davis's class action is that Amazon as employer (or common employer) has breached its employment contract with the DPs (and the DAs) by failing to comply with the terms of the contract that incorporate the employment standards of the provincial legislation. To that fundamental premise or foundation, Mr. Davis "purports" to add a breach of a duty of good faith in the performance of the contract of employment. I say purports because it is plain and obvious that he has failed to add a separate claim for breach of duty of good faith in the performance of the employment contract.

[202] For a duty of good faith claim to be legally viable, it must be a separate breach of contract claim animated by the organizing principle that contracts should be performed honestly and reasonably and not capriciously or arbitrarily.[79] In the immediate case, there are no pleaded material facts nor could there be any material facts pleaded that support the proposition that Amazon performed its contract dishonestly, unreasonably, capriciously, or arbitrarily. Amazon

[78] *Dominguez v. Northland Properties Corporation*, 2012 BCSC 328.
[79] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7; *2161907 Alberta Ltd. v. 11180673 Canada Inc.*, 2021 ONCA 590; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45; *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26; *Bhasin v. Hrynew*, 2014 SCC 71.

was honest and transparent that it was performing its side of the bargain with the DPs as independent contractors. It may be that Amazon was legally mistaken in that characterization but that would be an honest mistake and not a breach of a duty of good faith. Amazon did not mislead the DPs. It candidly told them that they were independent contractors.

[203] In 2014, in *Bhasin v. Hrynew*,[80] the Supreme Court of Canada accepted and began the development a doctrine of good faith in the performance of contracts. *Bhasin v. Hrynew* is authority that the common law of contract includes an organizing principle based on recognizing good faith as an operative principle in the performance of contracts. *Bhasin v. Hrynew* is authority for the proposition that the common law of contract includes as a rule of law a duty of performing contractual obligations honestly. In *Bhasin v. Hrynew,* Justice Cromwell stated at paragraphs 63, 65, and 70:

> 63. The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.
>
> […]
>
> 65. The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.
>
> [...]
>
> 70 The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another -- even intentionally -- in the legitimate pursuit of economic self-interest: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd*., *2014 SCC 12*, *[2014] 1 S.C.R. 177*, at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co*., *2002 SCC 43*, *[2002] 2 S.C.R. 601*, at para. 31. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

[204] What emerges from Justice Cromwell's judgment is that in performing a contract, a contracting party should have appropriate regard to the legitimate contractual interests of the other contracting party, but what amounts to having appropriate regard will vary depending on the context of the contractual relationship and performance in good faith does not necessarily require acting to serve the other contracting party's interests. Good faith requires that a party not seek in bad faith to undermine the other's interests. Good faith requires that a contracting party perform his or her promises with a basic level of honesty and not to lie or mislead the other party about

[80] *Bhasin v. Hrynew*, 2014 SCC 71.

one's contractual performance. Unlike fiduciary duties, good faith performance does not engage loyalty to the other contracting party or a duty to put the interests of the other contracting party first. The principle of good faith is applied in a manner that is consistent with the fundamental commitments of the common law of contract that places great weight on the freedom of contracting parties to pursue their individual self-interest. The development of the principle of good faith is not an opportunity for *ad hoc* judicial moralism or to be used as a pretext for scrutinizing the motives of contracting parties.

[205] It is plain and obvious that insofar as the DPs are concerned, there may have been a breach of employment contract, but there are no pleaded facts that support the notion that Amazon also breached a duty of good faith in contract performance.

[206] Moreover, there is another fundamental flaw in Mr. Davis's pleading on behalf of the DPs (or for the DAs) that in the immediate case there has been a breach of a duty of good faith in the performance of contracts. He has not pleaded nor could he plead material facts that separate his breach of contract claim from a free-standing breach of a duty of good faith. The Supreme Court of Canada's recent decision in *Matthews v. Ocean Nutrition Canada Ltd.*[81] demonstrates that the breach of the contract promises claim and the breach of the duty of good faith in performing the contract claim are distinct and separate claims. That separation and distinctness does not exist in the immediate case.

[207] In *Matthews v. Ocean Nutrition Canada Ltd.*, Mr. Matthews was a senior executive in Ocean Nutrition. After what the trial judge described as a lying, dishonest, back-stabbing campaign to marginalize and ignore him, Mr. Matthews sued for constructive dismissal and for a breach of a duty of good faith. In advancing his claim, he did not seek compensation for other than what he would be entitled based on the common law wrongful dismissal claim based on compensation in lieu of reasonable notice. He did not claim the damages that would be an incident on the breach of good faith in the manner of his constructive dismissal nor did he claim damages for a breach of the good faith during the performance of his employment contract based on the campaign to marginalize and ignore harm. Therefore, Justice Kasirer, who delivered the judgment from the Supreme Court, decided the case based on the established law for a claim based on wrongful dismissal. In *obiter dicta,* Justice Kasirer clarified the law about the relationship between a breach of contract and a breach of the duty of performing a contract in good faith.

[208] Justice Kasirer explained that the violation of the duty good faith is a distinct contractual breach distinct from the breach of the duty to provide reasonable notice to a dismissed or constructively dismissed employee whose employment is terminated without cause. He explained that the duty of honest performance, which applies to all contracts, including employment contracts, means that parties must not lie to or otherwise knowingly mislead their counterparty about matters directly linked to the performance of the contract.

[209] As already mentioned above, in the immediate case, there is no distinct contractual breach associated with dishonesty or bad faith in the performance of the contract. It follows that it is plain and obvious that Mr. Davis's breach of a duty of good faith claim is legally untenable and does not satisfy the cause of action criterion for certification.

[81] *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26.

4. Unjust Enrichment

[210] Technically speaking, Mr. Davis has adequately pleaded the constituent elements of an unjust enrichment claim for the DAs and the DPs. However, it is plain and obvious that the unjust enrichment claim as pleaded does not satisfy the cause of action criterion.

[211] The elements of a cause of action for unjust enrichment are: (1) the defendant has been enriched; (2) the plaintiff has suffered a deprivation that corresponds to the defendant's enrichment; and (3) the absence of any juristic reason justifying the defendant's retention of that transfer of value.[82]

[212] In *Moore v Sweet*,[83] the Supreme Court of Canada stated that for an unjust enrichment, it must be shown that something of value – a tangible 'benefit' – passed from the plaintiff to the defendant.[84] For an unjust enrichment claim there must be a correspondence between the defendant's enrichment and the plaintiff's deprivation in the sense that the plaintiff made a direct contribution causing the defendant's unjust enrichment or the plaintiff made an indirect contribution causally connected to the defendant obtaining a benefit that rightfully ought to have accrued to the plaintiff.[85]

[213] The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason, which is to say that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case.[86]

[214] Juristic reasons to refute an unjust enrichment include: (a) a gift;[87] (b) a valid un-breached contract;[88] and (c) a valid statutory provision.[89]

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[82] *Moore v. Sweet,* 2018 SCC 52; *Kerr v. Baranow*, 2011 SCC 10; *Garland v. Consumers' Gas Co*., 2004 SCC 25; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Pettkus v. Becker*, [1980] 2 S.C.R. 834.

[83] *Moore v Sweet,* 2018 SCC 52 at para. 41.

[84] See also *Apotex Inc. v. Eli Lilley and Company*, 2015 ONCA 305 at paras 39-46.

[85] *Sharp v. Royal Mutual Funds Inc*., 2021 BCCA 307 at paras. 82-93, aff'g 2020 BSCS 1781; *Moore v. Sweet*, 2018 SCC 52 at para. 41 at para. 41; *Apotex Inc. v. Eli Lilly and Company*, 2015 ONCA 305 at para. 45.

[86] *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 30; *Peter v. Beblow*, [1993] S.C.R. 980 at p. 987; *Peel (Regional Municipality) v. Canada,* [1992] 3 S.C.R. 762 at pp. 784, 788; *Sorochan v. Sorochan* [1986] 2 S.C.R. 38 at p. 44; *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at p. 848; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 at p. 456.

[87] *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 44; *Peter v. Beblow*, [1993] S.C.R. 980 at pp. 990-91; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 at p. 455.

[88] *676083 B.C. Ltd. v. Revolution Resource Recovery Inc* 2021 BCCA 85; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 *Moore v. Sweet,* 2018 SCC 52; *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252 at para. 496, aff'd 2012 ONCA 867; *Kerr v. Baranow*, 2011 SCC 10; *Re*Collections Inc. v. Toronto Dominion Bank*, 2010 ONSC 6560; *Brouilette Building Supplies v. 1662877 Ontario Inc.*, [2009] O.J. No. 92 (S.C.J.); *Georgian (St. Lawrence) Lofts Inc. v. Market Lofts Inc*., [2007] O.J. No. 81 (S.C.J.); *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 44; *Murray v. TDL Group Ltd.*, [2002] O.J. No. 5095 (S.C.J.); *Pak v. Reliance Resources Group Canada Inc*., [2002] O.J. No. 684 (S.C.J.); *Windisman v. Toronto College Park Ltd.* (1996), 28 O.R. (3d) 29, (Gen. Div.); *CIBC v. Melnitzer* [1993] O.J. No. 3021 (S.C.J.), aff'd [1997] O.J. No. 4634 (C.A.); *Peter v. Beblow*, [1993] S.C.R. 980 at pp. 990-91; *Kiss v. Palachik*, [1983] 1 S.C.R. 623, *Becker v. Pettkus*, [1980] 2 S.C.R. 834; *Rathwell v. Rathwell*, [1978] S.C.R. 436 at p. 455.

[89] *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 44; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.); *Peter v. Beblow*, [1993] S.C.R. 980 at pp. 990-91; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 at p. 455. *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445.

[215] The juristic reason requirement is considered in stages. First, the plaintiff must establish a *prima facie* case that the defendant's enrichment cannot be justified on the basis of a juristic reason from an established category. If the plaintiff is successful, then at the second stage of the analysis, the defendant can show that there is another reason to deny recovery, based on the reasonable expectations of the parties or public policy considerations, and the court may conclude that a new category of juristic reason should be established, or the court may conclude that there was no juristic reason for the defendant's enrichment.[90]

[216] The point is subtle and difficult, but the presence of a contract may preclude a claim in unjust enrichment. If the contract is legal and not being breached, it may provide the juristic reason to dismiss the unjust enrichment claim altogether. If the contract between the parties is legal and being breached, and the plaintiff's impoverishment (the plaintiff's direct or indirect transfer of wealth to the defendant), is equal to the plaintiff's breach of contract claim, then there is no concurrent claim in restitution. This is not a matter of redundancy of the unjust enrichment claim, it is a matter that there is no unjust enrichment claim at all.

[217] Applying this law to the circumstances of the immediate case, the DAs and the DPs have claims for breach of alleged employment contract. Assuming that they succeed in that claim, they would also not have a claim for unjust enrichment.

[218] The analysis in the immediate case is supported by the recent decision of the British Columbia Court of Appeal in *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*[91] In this proposed class action, 676083 B.C. Ltd. sued Revolution for unjust enrichment and breach of contract. Revolution was a waste disposal company, and it was alleged that Revolution charged its customers, the putative class members, by routinely billing them for a municipal waste site tipping charge that it never actually incurred. Upholding the decision of the motions judge on the certification motion, the British Columbia Court of Appeal concluded that the Class members' remedy was only in contract and not in unjust enrichment.

[219] The reasoning of Justice Voith for the Court was as follows. The existence of a contract is one of the established categories of juristic reason for an unjust enrichment. The reason that a contract is a juristic reason for an unjust enrichment is to protect the integrity of contractual relationships which allow parties to determine the benefits and burdens of a transfer of wealth and the law of restitution should not be used to rewrite the parties' bargains.[92] Justice Voith summarized the law at paragraphs 50-51 of his judgment, where he stated:

> 50. The common theme in cases where claims in unjust enrichment have been allowed to proceed in the presence of a contractual arrangement is that in each case, the purported benefit was found […] to have been provided to the defendant extra contractually, or beyond the scope of the contract. This is consistent with the underlying principle of respecting the contractual allocations of benefits and burdens. Where a benefit is conferred beyond the scope of the negotiated terms of

[90] *Fairview Donut Inc v. The TDL Group Corp*., 2012 ONSC 1252, aff'd 2012 ONCA 867; *Kerr v. Baranow*, 2011 SCC 10; *Garland v. Consumers' Gas Co*., 2004 SCC 25; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762.
[91] *676083 B.C. Ltd. v. Revolution Resource Recovery Inc*., 2021 BCCA 85.
[92] *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85, *Kosaka v. Chan*, 2008 BCCA 467.

> a contract, there is no concern that the contractual allocation of benefits and burdens will be disturbed.
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> 51. The second broad set of circumstances where claims in contract and unjust enrichment can be pleaded concurrently is where some issue in relation to the validity or enforceability of the contract in question is raised. This may arise, for example, when issues of illegality, capacity, or frustration are raised.

[220] In *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.,* Justice Voith concluded that neither common theme was present in the circumstances of the case and therefore while the putative Class members had a claim for breach of contract, they did not have an unjust enrichment claim. Other courts have recognized that employees' contractual claims against their employer cannot give rise to claims for unjust enrichment.[93]

[221] There is a second reason why it is plain and obvious that there is no unjust enrichment claim based on the material facts pleaded in Mr. Davis's Statement of Claim. There has been no direct or indirect transfer of money, goods, or valuable services from the DAs as individuals or as a class to Amazon.

[222] The only possible transfers of wealth of the DPs to Amazon are the costs of gas, insurance, maintenance, parking fines and cell phone data in connection with the DPs' use of their personal vehicles and/or mobile phones. While these costs might arguably qualify as a transfer of wealth, they would not qualify for a claim for unjust enrichment and only would qualify for damages for a breach of contract claim, for the reasons expressed above.

[223] I appreciate that in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[94] the Supreme Court of Canada did not close the door on a transfer of wealth that was indirect between the plaintiff and the defendant as providing the basis for an unjust enrichment claim. There, however, is no direct or indirect transfer of wealth in the immediate case between the DAs and Amazon.

[224] Thus, I conclude that it is plain and obvious that Mr. Davis's unjust enrichment claim does not satisfy the cause of action criterion and cannot be certified.

5. Negligence

[225] Mr. Davis's negligence claim is on behalf of the DPs whom he alleges are employees not independent contractors who provide delivery services for Amazon.

[226] It is plain and obvious that Mr. Davis has no claim in negligence. The DPs' claim is pure economic loss, and this claim does not fall into one of the recognized categories for which a duty of care in negligence has been found to exist nor does it satisfy a duty of care analysis.[95]

[227] I performed that duty of care analysis in my certification decision in *Heller v. Uber*

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[93] *Flesch v. Apache Corporation*, 2022 ABCA 374; *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38, leave to appeal ref'd, 2020 CanLII 84092; *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288, aff'd 2022 ONCA 115; *Windisman v. Toronto College Park Ltd.,* [1996] O.J. No. 552, (Div. Ct.); *Morrison-Knudsen Co. Inc. v. British Columbia Hydro & Power* Authority [1978] B.C.J. No. 1218 (B.C.C.A.).

[94] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57.

[95] *Heller v. Uber Technologies Inc*., 2021 ONSC 5518; *1688782 Ontario Inc. v. Maple Leaf Foods Inc.,* 2020 SCC 35; *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.,* [1995] 1 S.C.R. 85.

Technologies Inc.,[96] which was not appealed. Mr. Davis, however, says that the Divisional Court's reasons in *Berg v. Canadian Hockey League*,[97] which was a certification decision of mine that was varied by the Divisional Court and *Fulawka v. Bank of Nova Scotia* are binding precedent for the proposition that negligence claims have been certified on the basis that such negligence claims constitute a viable cause of action for the purposes of s. 5(1)(a) and that a plaintiff is entitled to plead concurrent causes of action in a class action and redundancy is not a reason to refuse to certify one of the concurrent causes of action.

[228] That argument, which I am bound to accept, however, misses the point, that the cause of action criterion was not in issue in *Berg v. Canadian Hockey League*. The defendants did not dispute that the class members had claims for (1) breach of statute; (2) breach of contract; (3) breach of duty of honesty, good faith and fair dealing; (4) negligence; (5) conspiracy; and (6) unjust enrichment and waiver of tort. I did not do a duty of care analysis in reaching my decision in *Berg v. Canadian Hockey League*. Had I done one, I might have decided, as I have done in the immediate case, that there are no viable causes of action for breach of a duty of good faith, negligence, and unjust enrichment. (I note in parenthetical passing that the Supreme Court of Canada has ended waiver of tort as a cause of action.[98])

[229] Thus, *Berg v. Canadian Hockey League* does not stand in the way of my decision that it is plain and obvious based on Supreme Court of Canada authorities that there is no negligence claim to be concurrent with the breach of contract claim in the immediate case.

[230] I, therefore, conclude that Mr. Davis's negligence claim brought on behalf of the DPs, for whom he is in any event not qualified to be a representative plaintiff, does not satisfy the cause of action criterion and is not certifiable.

H. Common Issues Criterion

1. General Principles

[231] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[99]

[232] The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.[100]

[233] An issue is not a common issue, if its resolution is dependent upon individual findings of fact that would have to be made for each class member.[101] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.[102] All members of the class

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[96] 2021 ONSC 5518.
[97] *Berg v. Canadian Hockey League,* 2019 ONSC 2106 (Div. Ct.), var'g 2017 ONSC 2608.
[98] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19.
[99] *Hollick v. Toronto (City),* 2001 SCC 68 at para. 18.
[100] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 39 and 40.
[101] *Fehringer v. Sun Media Corp*., [2003] O.J. No. 3918 at paras. 3, 6 (Div. Ct.).
[102] *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 at para. 126 (S.C.J.), leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 at paras. 50-

must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.[103]

[234] The common issue criterion presents a low bar.[104] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.[105] Even a significant level of individuality does not preclude a finding of commonality.[106]A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.[107]

[235] From a factual perspective, the plaintiff must show that there is some basis in fact that: (a) the proposed common issue actually exists; and (b) the proposed issue can be answered in common across the entire class, which is to say that the Plaintiff must adduce some evidence demonstrating that there is a colourable claim or a rational connection between the Class members and the proposed common issues.[108]

2. Discussion and Analysis – Common Issues Criterion

[236] Mr. Davis proposes fifteen common issues, which are set out earlier in these Reasons for Decision. Because of my findings with respect to the cause of action criterion, all of the common issues questions are not certifiable with respect to the DAs. However, for the purpose of the analysis that follows, I shall assume that there was a viable common employer cause of action and

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52 (S.C.J.); *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 at para. 51 (B.C.S.C.), var'd on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.).

[103] *Batten v. Boehringer Ingelheim (Canada) Ltd*., 2017 ONSC 53, aff'd, 2017 ONSC 6098 (Div. Ct.), leave to appeal refused (28 February 2018) (C.A.); *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City),* 2015 ONCA 572 at para. 48; *McCracken v. CNR,* 2012 ONCA 445 at para. 183; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *Ernewein v. General Motors of Canada Ltd.,* 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 at para. 40.

[104] *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp*., [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Carom v. Bre-X Minerals Ltd*. (2000), 51 O.R. (3d) 236 at para. 42 (C.A.).

[105] *Cloud v. Canada (Attorney General),* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

[106] *Hodge v. Neinstein*, 2017 ONCA 494 at para. 114; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 54.

[107] *Harrington v. Dow Corning Corp.,* [2000] B.C.J. No. 2237 (C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

[108] *LaSante v. Kirk*, 2023 BCCA 28; *Engen v. Hyundai Auto Canada Corp.,* 2021 ABQB 740, aff'd (on this point) 2023 ABCA 85; *Jensen v. Samsung Electronics Co. Ltd.,* 2023 FCA 89; *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 6; *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338; *Ewert v. Canada (Attorney General*), 2022 BCCA 131; *Simpson v. Facebook*, 2022 ONSC 1284 (Div. Ct.); *Simpson v. Goodyear Canada Inc*., 2021 ABCA 182; *Canada v. Greenwood*, 2021 FCA 186; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19; *Kuiper v. Cook (Canada) Inc.*, 2020 ONSC 128 (Div. Ct.); *Batten v. Boehringer Ingelheim (Canada) Ltd*., 2017 ONSC 53, aff'd 2017 ONSC 6098 (Div. Ct.); *Shah v. LG Chem Ltd*., 2015 ONSC 6148, , aff'd 2017 ONSC 2586 (Div. Ct), rev'd on other grounds 2018 ONCA 819; *Sherry Good v. Toronto Police Services Board*, 2014 ONSC 4583 aff'd 2016 ONCA 250; *MacInnis v. Bayer Inc*., 2020 SKQB 307; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140.

a viable action by the DPs against Amazon.

(a) <u>Common Employer: Question No. 1</u>

[237] Davis asserts that he has shown a basis in fact that the common issue about a common employer relationship exists and that it can be decided commonly for the DAs because it is indisputable that Amazon's Flex App and its policies are implemented over the entirety of the DSP class of 126 logistics companies.

[238] I agree with Mr. Davis that there is some basis in fact there is an issue about whether Amazon is a common employer, but it is not, as he would have it to be, a common issue. He submits that common employment is a common issue because of the ubiquitousness of the Flex App, which controls the work of the DPs and the DAs.

[239] The Flex App, however, is just a tool and tools can be used in many ways or misused in many ways, and there is no basis in fact that how the Delivery Service Partners ("DSP") used the Flex App was a common exercise of control that would entail that the DAs were employed by a common employer comprised of their particular DSP and Amazon.

[240] Indeed, Amazon has established that is no basis in fact that the issue cannot be decided uniformly for the putative Class members. The basis-in-fact evidence is that while 57,000 putative Class members use the Flex App, they can and do use it idiosyncratically and they are directed to use it idiosyncratically by their particular DSP. The basis-in-fact evidence is that some DAs behave consistently and compliantly with the directives of the Flex App, some DAs behave in ways that depart from the directives of the Flex App, or in ways that may or may not comply with their direct employer's contractual arrangement with Amazon. The basis-in-fact evidence is the DSPs, who are the direct employers of the DAs workers: (a) do not use the Flex App uniformly; (b) do not manage the use of the Flex App uniformly; (c) do not monitor the use of the Flex App uniformly, and (d) do not administer the use of the Flex App uniformly. There is no commonality.

[241] Moreover, assuming that the common employer doctrine was applicable between Amazon and the 126 logistics companies, the basis-in-fact evidence is that it would be 126 discreet common-employer relationships. Once again, there is no commonality.

[242] Mr. Davis argues that the case at bar is like the employment law cases *Fresco v Canadian Imperial Bank of Commerce*,[109] and *Fulawka v Bank of Nova Scotia*,[110] where the court rejected the defendant banks' argument that the individual bank branches operated independently because the plaintiff's pleading focused on the systemic aspects of the banks' overtime systems. Mr. Davis argues that just as the banks had numerous branches that all were governed by the same systems and directives from the head office, all 126 logistics companies are under the control exercised by Amazon through its DSP contracts and the Flex App.

[243] Mr. Davis's analogy, however, does not withstand analysis. In *Fresco* and *Fulawka,* the evidence was that the policies of the bank were being misused and there was no issue about whether the branches were independent entities controlling their own employees; the branches as such were not the employers of the Class Members. The branches were emanations of a single legal tree that was controlling its own branches. The case at bar is about a diverse forest of legal

[109] *Fresco v Canadian Imperial Bank of Commerce*, 2012 ONCA 444.
[110] *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443.

entities. If anything, the case at bar is more like *McCracken v. Canadian National Railway Company*,[111] where the same panel of the Court of Appeal that certified *Fresco* and upheld the certification of *Fulawka* refused to certify an employment law case on the grounds of want of commonality. The case at bar is not an example of a defendant atomizing a commonality in an attempt to deny commonality. The case at bar is one in which there is no commonality as to whether Amazon is a common employer with 126 logistics companies.

[244] Thus, in addition to my finding above that the common employment cause of action does not satisfy the cause of action criterion, I conclude that Common Issue No. 1 is not certifiable because it does not satisfy the common issues criterion.

(b) <u>Misclassification of the Subclass Employment Relationship: Question No. 2</u>

[245] Amazon also challenges the commonality of Question No. 2, which focuses on the DPs, which Mr. Davis argues are employees of Amazon. This time Amazon's challenge fails. The issue of whether the DPs are independent contractors as they have been categorized in their worker contracts is a common issue for each and every one of them. For this group of Class members, the ubiquitousness of the Flex App is relevant, but it is not by itself necessary or sufficient to establish the commonality of the issue to be determined in common. There is some basis in fact for the prospect that all the DPs are employees notwithstanding that Amazon purports to make them independent contractors.

[246] The branch of the proposed class action involving the direct worker relationship between the DPs and Amazon is obviously far less complicated and ambitious than the common employer branch of the proposed class action. This branch is essentially an employment misclassification case. Whether commonality is present in this type of case depends upon the particular facts of the case. In some proposed misclassification cases, it is apparent at the certification motion that: (a) the factual circumstances of the putative class members are idiosyncratic and classification cannot be determined in common; and (b) therefore, the proposed class action is not certifiable.[112] In other proposed misclassification class actions, it is apparent at the certification motion that: (a) there is some basis in fact to conclude that at a common issues trial, the court may be able to classify all the putative class members as having the same contractual rights or to decide that their classification is indeed idiosyncratic; and (b) therefore, assuming the other certification criterion are satisfied, the proposed classification common issue is certifiable.[113]

[247] In my opinion, the immediate case is of the type where the court at a common issues trial may be able to classify all of the DPs as independent contractors or as employees or decide that their classification remains to be determined at individual issues trials. In my opinion, the branch of the proposed class action involving the direct worker relationship between the DPs and Amazon satisfies the common issues criterion for certification.

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[111] *McCracken v. Canadian National Railway Company*, 2012 ONCA 445.
[112] *Le Feuvre v. Enterprise Rent-A-Car Canada Company*, 2022 ONSC 4136; *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677; *McCracken v. Canadian National Railway Company*, 2012 ONCA 445.
[113] *Heller v. Uber Technologies Inc*., 2021 ONSC 5518; *Rallis v. Approval Team Inc*., 2020 ONSC 4197; *Berg v. Canadian Hockey League*, 2017 ONSC 2608, var'd 2019 ONSC 2106 (Div. Ct.); *Walter v. Western Hockey League*, 2017 ABQB 382, aff'd 2018 ABCA 188; *Rosen v. BMO Nesbitt Burns Inc*., 2013 ONSC 2144; *Fresco v Canadian Imperial Bank of Commerce*, 2012 ONCA 444; *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443.

(c) Breach of Contract, Duty of Good Faith, and ESA and Equivalent Legislation: Question Nos. 3-8

[248] Since the duty of good faith action does not satisfy the cause of action criterion, there can be no common issues associated with that cause of action. Accordingly, Question No. 7 and Question 10 insofar as it refers to good faith do not satisfy the common issues criterion.

[249] Subject to one qualification or clarification, Question Nos. 3, 4, 5, 6, and 8, which concern breach of contract, do satisfy the common issues criterion.

[250] The qualification or clarification is that these questions are relevant only to the claims of the DPs because the DAs' claims do not satisfy the cause of action criterion, the common issues criterion, and the preferable procedure criterion.

(d) Negligence: Question Nos. 9-10

[251] Since the negligence action does not satisfy the cause of action criterion, there can be no common issues associated with that cause of action. Accordingly, Question Nos. 9 and 10 do not satisfy the common issues criterion.

(e) Unjust Enrichment: Question Nos. 11-12

[252] Since the unjust enrichment action does not satisfy the cause of action criterion, there can be no common issues associated with that cause of action. Accordingly, Question Nos. 11 and 12 do not satisfy the common issues criterion.

(f) Aggregate Damages: Question Nos. 13-14

[253] Pursuant to section 24 of the *Class Proceedings Act, 1992,* Mr. Davis seeks to certify the issue of the availability and the calculation of aggregate damages as a common issue. Section 24 of the Act states:

> *Aggregate assessment of monetary relief*
>
> 24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> *Average or proportional application*
>
> (2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

[254] In the discussion that follows, it is also relevant to consider s. 23 of the Act, which permits the use of statistical evidence and sampling. Section 23 states:

Statistical evidence

23 (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

[…] Idem

Cross-examination

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information.

Production of documents

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure.

[255] To certify a common issue about aggregate damages, a plaintiff must show that it is reasonably likely that the pre-conditions in s. 23 (1) of the *Class Proceedings Act, 1992* can be satisfied.[114] Section 24 (1)(c) sets out the condition that the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. Moreover, as the Court of Appeal observed in *Markson v. MBNA Canada Bank*, s. 24 (3) contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis, which may be impractical or inefficient.[115]

[256] Under s. 24 (1) of the *Class Proceedings Act*, *1992,* a court may award aggregate damages where: (i) monetary relief is claimed on behalf of some or all class members; (ii) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined; and (iii) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. A plaintiff must be able to prove all the elements of his or her cause of action at the common issues trial to have a common

[114] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para. 111.
[115] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at paras. 48- 56, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346. See also *Cuzzeto v. Business in Motion International Corporation*, 2014 FC 17 at paras. 101-109.

issue about aggregate damages.[116]

[257] For there to be an award of aggregate damages, the plaintiff must advance a methodology or show that there is a reasonable likelihood of assessing the defendant's aggregate liability to the class without proof by individual class members. Aggregate damages cannot be ordered where "individual questions of fact relating to the determination of each class member's damages remain to be determined", or where there is no available data to determine what individual class members were owed.[117] Aggregate damages are not appropriate where the use of non-individualized evidence is not sufficiently reliable, or where the use of that evidence will result in unfairness or injustice to the defendant, such as overstatement of its liability for damages.[118] In other words, the Plaintiff must present a methodology that offers a realistic prospect of establishing aggregate damages on a class-wide basis.[119]

[258] In *Ramdath v. George Brown College*,[120] the Ontario Court of Appeal recognized three factors to guide the fairness and reasonableness of an aggregate damages award. The factors were: (a) whether the global evidence presented by the plaintiff was sufficiently reliable; (b) whether use of the evidence would result in unfairness or injustice to the defendant; and (c) whether denial of an aggregate approach would result in a wrong eluding an effective remedy and a denial of access to justice.

[259] The *Class Proceedings Act, 1992* is a procedural statute, and it does not create a new type of damages known as aggregate damages. All that s. 24 (1) of the *Class Proceedings Act* does is that it recognizes that in certain circumstances depending upon the nature of the class members' claims, it may be possible to avoid individual assessments of damages and arrive at a calculation of damages equal to what the defendant would have to pay if there were individual assessments.

[260] In *Fulawka v. Bank of Nova Scotia*,[121] Chief Justice Winkler described the nature of aggregate damages at paragraph 122 as follows:

> 122. Finally, s. 24(1)(c) states that the aggregate of the defendant's liability "can reasonably be determined without proof by individual class members." This provision is directed at those situations where the monetary liability to some or all of the class is ascertainable on a global basis and is not contingent on proof from individual class members as to the quantum of monetary relief owed to them. In other words, it is a figure arrived at through an aggregate assessment of global damages, as opposed to through an aggregation of individual claims requiring proof from individual class members. I would describe the latter calculation as a "bottom-up" approach whereas the statute envisages that the assessment under s. 24(1) be "top down".[122]

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[116] *Spina v. Shoppers Drug Mart Inc*., 2023 ONSC 1086 at paras. 630-638; *Palmer v. Teva Canada*, 2022 ONSC 4690 at para. 291; *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443 at paras. 111-114, 139, leave to appeal ref'd, [2012] SCCA No 326.

[117] *Le Feuvre v. Enterprise Rent-A-Car Canada Company,* 2022 ONSC 4136; *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518; *Shah v. LG Chem Ltd*., 2018 ONCA 819; *Pro-Sys Consultants Ltd v. Microsoft Corp*., 2013 SCC 57.

[118] *Ramdath v. George Brown College*, 2014 ONSC 3066, aff'd 2015 ONCA 921.

[119] *Le Feuvre v. Enterprise Rent-A-Car Canada Company,* 2022 ONSC 4136; *Heller v. Uber Technologies Inc.,* 2021 ONSC 5518.

[120] *Ramdath v. George Brown College*, 2015 ONCA 921.

[121] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443.

[122] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443. 126. See also: *Le Feuvre v. Enterprise Rent-A-Car Canada Company,* 2022 ONSC 4136. *Omarali v. Just Energy*, 2016 ONSC 4094.

[261] In the immediate case, the prerequisites for an aggregate award have not been satisfied for the DA class members because liability cannot be established on a class wide basis assuming that there was a viable cause of action against Amazon as a common employer, which there is not.

[262] In other words, as explained above, Mr. Davis is attempting to join 126 class proceedings into one proceeding and then use the Flex App tracking data and the payroll data from the 126 DSPs to aggregate damages. But for the reasons expressed above, liability cannot be established making Amazon the common employer along with 126 DSPs at all because the cause of action criterion is not satisfied, and, in any event, there is no common issue to establish that Amazon is liable for the employment law misdeeds of 126 autonomous logistics companies.

[263] Moreover, and in any event, in the immediate case, Mr. Davis has not established a viable methodology for quantifying aggregate damages for both the DA class members and also for the DP class members because the assessment of damages is inherently idiosyncratic in either case. And Mr. Davis has not established a methodology for a base line minimum award because it is not the case that each and every DA and DP has suffered damages consequent on a breach of their contracts of employment that incorporate the protections of the employment law statutes.

[264] Further still, in the immediate case, there is no class-wide data that can be used to determine whether any individual class member was actually underpaid—and therefore whether Amazon was liable for breach of the contractual duties the plaintiff alleges it owed—and if any class member was underpaid, by how much.

[265] Save for the approximately 16,000 DP class members, who work for Amazon for whom there is payroll data, the payroll data from the remaining 57,000 DA class members who work for 126 DSPs is not all available because some DSPs are no longer in existence and the payroll data that might be in the power and control of Amazon to have produced is idiosyncratic to the record keeping practices of the 126 DSPs.

[266] Further-further still, even assuming that comprehensive and reliable data could be retrieved, it would still be necessary to ask the individual class members whether they had a claim for a breach of their employment contract. Aggregate damages questions will not be certified where it is necessary to make inquiries of individual class members.[123]

[267] It is true in the immediate case that data can be derived from Amazon's Flex App, but that data only reveals when a job started and when it finished. However, when the job starts and when the job is finished is entirely idiosyncratic. There is no demarcation or a definition of the hours of the workday and so each and every DA or DP driver must be asked did his or her workday start before the Flex App was switched on. Then each and every DA or DP driver must be asked for each and every block of packages that they delivered, whether and for how long they took health or lunch breaks or were engaged in personal business during the course of the delivery run. Then, with that idiosyncratic information being provided, the DAs' idiosyncratic payroll data from 126 logistics companies would have to be examined to determine whether or not there was a breach of the employment contract. In short, there is no conceivable top down methodology in the immediate case.

[123] *Le Feuvre v. Enterprise Rent-A-Car Canada Company,* 2022 ONSC 4136; *Heller v. Uber Technologies Inc.,* 2021 ONSC 5518; *Omarali v. Just Energy*, 2016 ONSC 4094; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443.

[268] Mr. Davis relies on Justice Belobaba's decision in *Fresco v. Canadian Imperial Bank of Commerce* where he certified a common issue for aggregate damages. The case, however, settled before the viability of the aggregate damages methodology could be tested so its utility is marginal at best.

[269] But even assuming that the decision to certify a common issue about aggregate damages was correct in *Fresco*, the liability in *Fresco* depended in part on a common negligence claim, which is not extant in the immediate case, and perhaps more to the point, in *Fresco,* there were benchmarks to define the workday that do not exist in the immediate case. The bank tellers had no discretion about the hours of business or their shifts at the branches of a singular employer similar to the flexibility of accepting a delivery block pursuant to the Flex App.

[270] For what it is worth, I would not have certified the aggregate damages methodology in *Fresco* for a variety of reasons, including but not limited to the expert's apparent reliance on statistical sampling, which the Court of Appeal held was a no-no as an aspect of an aggregate damages award.[124] The immediate case also uses impermissible statistical sampling to calculate averages to fill lacunae in the bottom- up assessment of damages that is proposed by Dr. Kriegler.

[271] The damages assessment in *Fresco*, which usefully led to the settlement in that case was very clever, but it was not a useful methodology for aggregate damages. The damages methodology in *Fresco* used sampling and some clever manipulation of information from the time stamps of the class members to inform the defendant what its potential exposure to liability would be if class members with individual claims proceeded to prove their claims at individual issues trials. That estimate of a bottom up methodology to opine about potential exposure to liability is not a bottom down methodology to determine the defendant's actual exposure to liability.

[272] I conclude that if either branch of Mr. Davis's proposed class action were certifiable, aggregate damages would not be certified as a common issue.

(g) Exemplary or Punitive Damages: Question No. 15

[273] Mr. Davis seeks to certify exemplary or punitive damages as a common issue. Given my other conclusions set out above, this issue could be common only to the DP class members who were directly employed by Amazon through the Flex App program.

[274] In *Palmer v. Teva Canada Ltd.*,[125] I endorsed the approach to punitive damages in class actions that has been developed in British Columbia. In several judgments, the British Columbia Court of Appeal held that a court should not certify punitive damages as a common issue based solely on the allegations contained in the pleadings.[126] The Court held that the plaintiffs must point to material beyond the pleadings to establish a basis in fact for the certification of a common issue on punitive damages.

[275] In the immediate case, Mr. Davis cannot and does not point to material facts beyond the pleadings to establish a basis in fact for the certification of a common issue on punitive damages.

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[124] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443.
[125] *Palmer v. Teva Canada Ltd.*, 2022 ONSC 4690.
[126] *MacKinnon v. Pfizer Canada Inc*.2022 BCCA 151, var'g 2021 BCSC 1093; *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307.

He just pleads that the DPs are entitled to punitive damages because Amazon intentionally developed a scheme to not comply with its obligations if it is a common employer or an employer, which is the precise matter of the pleadings. I, therefore, shall not certify exemplary or punitive damages in the immediate case.

[276] As I said in *Palmer v. Teva Canada,* I appreciate that even with the low some-basis-in-fact standard, it will be difficult for a plaintiff like Mr. Davis to go beyond the allegations in the pleadings to foray into the merits and show a basis for a common issue about the repugnance of Amazon's conduct, but there is an answer to this plight. The answer is to not certify the punitive damages question but to do so without prejudice a representative for the DPs after examinations for discovery to have the common issues amended to add a question about punitive damages.

I. Preferable Procedure Criterion

1. General Principles

[277] Under the *Class Proceedings Act, 1992*, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.[127]

[278] In *AIC Limited v. Fischer*,[128] the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.[129] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.[130] To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.[131]

2. Discussion and Analysis – Preferable Procedure Criterion

[279] As explained above, the proposed class action on behalf of the DAs is not certifiable because it does not satisfy the cause of action and the common issues criterion. If those criteria

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[127] *Markson v. MBNA Canada Bank,* 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, 2001 SCC 68.
[128] *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 24-38.
[129] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).
[130] *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Hollick v. Toronto (City)*, 2001 SCC 68.
[131] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901; *AIC Limited v. Fischer*, 2013 SCC 69; *Hollick v. Toronto (City)*, 2001 SCC 68.

had been satisfied, the proposed class action for the DAs would not have satisfied the preferable procedure criterion.

[280] The ambitious action on behalf of the DAs is unmanageable with or without the 126 logistics companies being joined as co-defendants or as third parties brought in by Amazon asserting claims for contribution and indemnity. What Mr. Davis's proposed common employer cause of action attempts to hide is that it is really 126 discrete proposed class actions that have been joined together.

[281] It is conceivable that the court could manage each of these 126 alleged common employer causes of action. For example, the court could manage Mr. Davis's discrete cause of action that he was the employee of ACC and Amazon. But the resolution of that cause of action would not be determinative for class member Arash Khayamian, who was employed by DEC Fleet Services and Amazon.

[282] In any event and, strictly speaking, whether the DAs' claims satisfy the preferable procedure criterion is moot because of the absence of a common issue, but the situation is different for the DPs who do have a conventional and discrete employment law claim that does not involve evidence from co-defendants or third parties.

[283] In my opinion, if the DPs' action was not stayed, then it would be manageable and it would satisfy the preferable procedure criterion.

J. Representative Plaintiff Criterion

1. General Principles – Representative Plaintiff Criterion

[284] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan. The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.[132]

2. Discussion and Analysis

[285] In a pure demonstration that gallantry and chivalry are dead, but that pedantry is alive and well, Amazon concedes that Mr. Davis is a perfectly fine person to represent the DA drivers, but Amazon submits that Mr. Davis is disqualified from being a representative plaintiff because his claim arguably is statute-barred by 96 days.

[286] Amazon has not delivered its Statement of Defence. Therefore, it is presently unknown whether it actually intends to rely on limitation period defences. As described above, there is a contested issue as to whether or not Mr. Davis's claim is statute-barred, and thus it is not plain and obvious that his claim is statute-barred. In these circumstances, I would not disqualify Mr.

[132] *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 at paras. 36-45 (S.C.J.); *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 at para. 40 (S.C.J.), aff'd [2003] O.J. No. 4708 (C.A.).

Davis as a representative plaintiff for the DA class members, which in no way prejudices.

[287] For the reasons noted above, Mr. Davis is not qualified to be a representative plaintiff for the DP class members.

[288] I conclude that the representative plaintiff criterion is satisfied or could be satisfied in the immediate case.

K. Conclusion

[289] For the above reasons, I grant Amazon's motion to stay, and I dismiss Mr. Davis's motion to certify his proposed class action(s).

[290] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Amazon's submissions within twenty days of the release of these Reasons for Decision followed by Mr. Davis's submissions within a further twenty days.

Perell, J.

Released: June 19, 2023

CITATION: Davis v. Amazon Canada Fulfillment Services, ULC, 2023 ONSC 3665
COURT FILE NO.: CV-20-00642361-00CP
DATE: 20230619

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DENVER DAVIS

Plaintiff

- and –

AMAZON CANADA FULFILLMENT SERVICES, ULC, AMAZON.COM, INC. and AMAZON.COM.CA, INC.

Defendants

REASONS FOR DECISION

PERELL J.

Released: June 19, 2023