



Electronically issued : 05-Oct-2018
Délivré par voie électronique
Toronto

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ANNA BOURQUE

Plaintiff

and

CINEFLIX; CINEFLIX & DESIGN; CINEFLIX (PROPERTY BROTHERS 6) INC.; CINEFLIX (AIR HEROES) INC.; CINEFLIX (ANIMALS) INC.; CINEFLIX (BELIEVE ME) INC.; CINEFLIX (BIKERS 2) INC.; CINEFLIX (BIZARRE) INC.; CINEFLIX (BW) INC.; CINEFLIX (CAPTIVE) INC.; CINEFLIX (CHEF WANTS) INC.; CINEFLIX (CITIES) INC.; CINEFLIX (COOLER FACTS) INC.; CINEFLIX (COPPER) INC.; CINEFLIX (COPPER-DOC) INC.; CINEFLIX (COUNTDOWN 2) INC.; CINEFLIX (COUNTDOWN) INC.; CINEFLIX (DEED 2) INC.; CINEFLIX (DEED) INC.; CINEFLIX (DETECTIVES) INC.; CINEFLIX (GOURMET) INC.; CINEFLIX (HOLIDAY BATTLE) INC.; CINEFLIX (HOME) INC.; CINEFLIX (HOME FACTORY) INC.; CINEFLIX (I SURVIVED) INC.; CINEFLIX (ICC) INC.; CINEFLIX (JACKMAN) INC.; CINEFLIX (KARMA) INC.; CINEFLIX (LAWMEN) INC.; CINEFLIX (LIES AND ALIBIES) INC.; CINEFLIX (LKA) INC.; CINEFLIX (LOADED) INC.; CINEFLIX (MAYDAY 10) INC.; CINEFLIX (MAYDAY 12) INC.; CINEFLIX (MAYDAY 13) INC.; CINEFLIX (MAYDAY 14) INC.; CINEFLIX (MAYDAY 15) INC.; CINEFLIX (MAYDAY 16) INC.; CINEFLIX (MAYDAY 17) INC.; CINEFLIX (MAYDAY 18) INC.; CINEFLIX (MAYDAY 19) INC.; CINEFLIX (MAYDAY-COMP) INC.; CINEFLIX (MEDICAL EXAMINER) INC.; CINEFLIX (MEDICAL EXAMINER 2); CINEFLIX (MISSING SEARCH) INC.; CINEFLIX (MITCHELL STORY) INC.; CINEFLIX (MOST WANTED) INC.; CINEFLIX (MOTIVES 2) INC.; CINEFLIX (MOTIVES 3) INC.; CINEFLIX (MOTIVES 4) INC.; CINEFLIX (MOTIVES 5) INC.; CINEFLIX (NATURE) INC.; CINEFLIX (OCEAN MYSTERIES) INC.; CINEFLIX (PLANET) INC.; CINEFLIX (PROPERTY 5) INC.; CINEFLIX (PROPERTY 6) INC.; CINEFLIX (PROPERTY 7) INC.; CINEFLIX (PROPERTY 11) INC.; CINEFLIX (PROPERTY 12) INC.; CINEFLIX (PURE EAST) INC.; CINEFLIX (RAILROAD 2) INC.; CINEFLIX (RAILROAD) INC.; CINEFLIX (RICH) INC.; CINEFLIX (RICHPICK) INC.; CINEFLIX (RV) INC.;

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**CINEFLIX (STORY) INC.; CINEFLIX (STYLE FACTORY) INC.;
CINEFLIX (SUPER SWAT) INC.; CINEFLIX (T & D) INC.; CINEFLIX
(THE ELEVEN) INC.; CINEFLIX (TINY HOUSE) INC.; CINEFLIX
(TITUSS) INC.; CINEFLIX (TOP COLLECTOR) INC.; CINEFLIX
(TYRANNOSAURUS) INC.; CINEFLIX (UNSELLABLES 2) INC.;
CINEFLIX (UTG) INC.; CINEFLIX (VEGAS 911) INC.; CINEFLIX BIRTH
INC.; CINEFLIX INC.; CINEFLIX LIBRARY INC.; CINEFLIX MEDIA INC.
MEDIA CINEFLIX INC.; CINEFLIX PRODUCTIONS (AWAKENING) INC.;
CINEFLIX PRODUCTIONS (BLASTERS) INC.; CINEFLIX
PRODUCTIONS (EA) INC.; CINEFLIX PRODUCTIONS (FASHION) INC.;
CINEFLIX PRODUCTIONS (GHG) INC.; CINEFLIX PRODUCTIONS
(GUADALCANAL) INC.; CINEFLIX PRODUCTIONS (JONESTOWN)
INC.; CINEFLIX PRODUCTIONS (LEGENDS) INC.; CINEFLIX
PRODUCTIONS (MADLAB) INC.; CINEFLIX PRODUCTIONS
(PARADISE) INC.; CINEFLIX PRODUCTIONS (PROPERTY) INC.;
CINEFLIX PRODUCTIONS (UNSELLABLES) INC.; CINEFLIX STUDIOS
CANADA INC.; LES PRODUCTIONS CINÉFLIX INC.; LIBRAIRIE
CINEFLIX INC.; PRODUCTIONS CINEFLIX (AWAKENING) INC.;
PRODUCTIONS CINEFLIX (BLASTERS) INC.; PRODUCTIONS
CINEFLIX (EA) INC.; PRODUCTIONS CINEFLIX (FASHION) INC.;
PRODUCTIONS CINEFLIX (GUADALCANAL) INC.; PRODUCTIONS
CINEFLIX (JONESTOWN) INC.; PRODUCTIONS CINEFLIX (LEGENDS)
INC.; PRODUCTIONS CINEFLIX (MADLAB) INC.; PRODUCTIONS
CINEFLIX (PARADISE) INC.; PRODUCTIONS CINEFLIX (PROPERTY)
INC.; PRODUCTIONS CINEFLIX (UNSELLABLES) INC.**

Defendants

STATEMENT OF CLAIM

PROCEEDING UNDER the *Class Proceedings Act*, 1992

TO THE DEFENDANTS

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

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office,

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WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

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

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$750 for costs, within the time for serving and filing your Statement of Defence you may move to have this proceeding dismissed by the Court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff's claim and \$400 for costs and have the costs assessed by the Court.

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

Date _____ Issued by _____
Local Registrar

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

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TO: Cineflix (Property 6) Inc.
110 Spadina Avenue
Suite 400
Toronto, ON M5V 2K4

AND TO: Cineflix Productions Inc.
3510 Saint-Laurent Boulevard
Suite 202
Montreal, QC H2X 2V2

AND TO: **CINEFLIX**
110 Spadina Avenue
Suite 400
Toronto, ON M5V 2K4

AND TO: **CINEFLIX & DESIGN**
110 Spadina Avenue
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110 Spadina Avenue
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AND TO: **CINEFLIX (PLANET) INC.; CINEFLIX (PROPERTY 5) INC.**
110 Spadina Avenue
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110 Spadina Avenue
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AND TO: **CINEFLIX STUDIOS CANADA INC.**
110 Spadina Avenue
Suite 400
Toronto, ON M5V 2K4

AND TO: **LES PRODUCTIONS CINÉFLIX INC.**
3510 Saint-Laurent Boulevard
Suite 202
Montreal, QC H2X 2V2

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110 Spadina Avenue
Suite 400
Toronto, ON M5V 2K4

AND TO: **PRODUCTIONS CINEFLIX (UNSELLABLES) INC.**
110 Spadina Avenue
Suite 400
Toronto, ON M5V 2K4

CLAIM

1. The Plaintiff claims:

- (a) an order certifying this proceeding as a class proceeding and appointing the Plaintiff as representative plaintiff for the Class Members, as defined below;
- (b) \$35,000,000 in general damages for the Class, or such other sum as this Honourable Court deems just;
- (c) a declaration that the provisions of the *Employment Standards Act, 2000*, , S.O. 2000, c. 41 ("*ESA*"), as applicable, are express or implied terms of the contracts of employment of the Class Members;
- (d) a declaration that the Class Members are employees of the Defendants who are operating as a common employer, for the purposes of the *ESA*;
- (e) a declaration that the Defendants violated the terms of the *ESA*, breached the Class Members' contracts of employment and duty of good faith owed to the Class Members, and/or breached the duty of care owed to the Class Members by:
 - (i) failing to ensure that Class Members were properly classified as employees;

- (ii) failing to advise class members of their entitlement to compensation equal to or above the minimum wage as stipulated by the *ESA* (the "Minimum Wage");
- (iii) failing to compensate Class Members at a rate equal to or above the Minimum Wage;
- (iv) failing to advise Class Members of their entitlement to overtime pay for hours worked in excess of 44 hours per week in accordance with the *ESA* (the "Overtime Threshold") and Special Rules and Exemptions for Film and Television (the "Regulations") ;
- (v) requiring and/or permitting the Class Members to work overtime hours but failing to compensate the Class Members as required for hours worked in excess of the Overtime Threshold ("Overtime Pay");
- (vi) failing to ensure that the Class Members' hours of work were monitored and accurately recorded;
- (vii) failing to advise Class Members of their entitlement to vacation pay at a rate of 4 percent of wages in accordance with the *ESA* ("Vacation Pay");
- (viii) failing to compensate Class Members for Vacation Pay;

- (ix) failing to advise Class Members of their entitlement to public holiday pay and premium pay in accordance with the *ESA* (the "Public Holiday and Premium Pay");
 - (x) failing to compensate Class Members for Public Holiday and Premium Pay;
 - (xi) failing to monitor and record or otherwise track the Class Members hours of work; and,
 - (xii) failing to compensate the Class Members for all hours worked.
- (f) an interlocutory and a final mandatory order for specific performance directing that the Defendants comply with the *ESA* and/or the contracts of employment with the Class Members, in particular, to:
- (i) ensure that Class Members are properly classified as employees;
 - (ii) advise Class Members of their entitlement to the Minimum Wage, Overtime Pay for hours worked in excess of the Overtime Threshold, Vacation Pay and Public Holiday and Premium Pay;
 - (iii) ensure that the Class Members' hours of work are monitored and accurately recorded; and,
 - (iv) ensure that Class Members are appropriately compensated at a rate equal to or above the Minimum Wage, for Overtime Pay, for Vacation Pay and for Public Holiday and Premium Pay.

- (g) a declaration that the provisions of any applicable independent contractor agreement which may purport to exclude certain Class Members from the provisions of the *ESA* including from eligibility for the Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay are void and unenforceable;
- (h) a declaration that the Defendants are liable for any consequential damages resulting from the determination that the Class Members are/were employees of the Defendants and not independent contractors;
- (i) a declaration that the Defendants are liable for any adverse tax liability sustained by the Class Members resulting from a determination that the Class Members are/were employees of the Defendants and not independent contractors;
- (j) a declaration that the Defendants are liable, and must reimburse the Class Members, for any *Canada Pension Plan* ("CPP") or *Employment Insurance Act* ("EI") contributions which may have been paid or are owed resulting from a determination that the Class Members are/were employees of the Defendants and not independent contractors;
- (k) a declaration that the Defendants were unjustly enriched, to the deprivation of the Class Members, in that they received the value of compensating class members at rates below the Minimum Wage, without paying Overtime Pay, without paying Vacation Pay and without paying

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Public Holiday and Premium Pay, and an order requiring the Defendants to disgorge to the Class Members all amounts withheld by them in respect of such unpaid hours and entitlements;

- (l) an order, pursuant to s. 24 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*Class Proceedings Act*") directing an aggregate assessment of damages;
- (m) an order directing the Defendant to preserve and disclose to the Plaintiff all records (in any form) relating to the identification of Class Members and the hours of work performed by the Class Members;
- (n) punitive, aggravated and exemplary damages in the amount of \$10,000,000;
- (o) prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (p) postjudgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (q) the costs of this action on a substantial indemnity basis, together with applicable HST, or other applicable taxes, thereon;
- (r) the costs of administering the plan of distribution of the recovery in this action; and,
- (s) such further and other relief as this Honourable Court may deem just.

THE PARTIES

2. The Plaintiff, Anna Bourque ("Bourque"), resides in Toronto. She worked as a Story Editor and was retained as such by the Defendants ("Cineflix") from September 2017 to February 2018. Bourque worked as a Story Editor at the Toronto production office location of Cineflix.

3. Cineflix is a global media production company, creating and producing factual / reality television programs as well as dramas. It has offices in the United Kingdom, United States, and Toronto.

4. The Defendants carry on business in common in respect of the hiring, supervision and control of the Class Members. Specifically, for each production Cineflix produces, it incorporates a separate corporation. The Defendants hold themselves out to the public and to their staff as a single entity known as "Cineflix".

5. Particulars of the names of each of the separate corporations utilized by Cineflix to carry out its operations are more particularly within Cineflix's knowledge.

6. The production activities of Cineflix and of its workers are provincially regulated and are therefore governed by the *ESA*.

THE CLASS

7. The Plaintiff brings this Action pursuant to the *Class Proceedings Act, 1992* on her own behalf and on behalf of the following class of persons (together, the "Class" or "Class Members"):

All non-managerial persons who, since 2000, worked or continue to work for the Cineflix Defendants in Ontario in pre-production, and/or production, and/or post-production job classifications.

EMPLOYMENT RELATIONSHIP

8. The duties performed by the Class Members and the supervision and control imposed on the Class Members by Cineflix creates an employment relationship with Cineflix. Particulars of such relationship include, *inter alia*:

- (a) Class Members must adhere to a production schedule determined by Cineflix;
- (b) Class Members are told by Cineflix when and where they may perform their work duties;
- (c) Class Members are required to attend meetings, including but not limited to, development meetings, production meetings, and post-production meetings, which are held at locations and times determined by Cineflix;
- (d) Class Members are required to provide exclusive services to Cineflix while engaged by Cineflix;

- (e) Cineflix prohibits Class Members from assigning or contracting out their duties to other individuals;
- (f) Class Members must submit invoices for their services based on Cineflix's two-week payroll cycle;
- (g) Class Members must obey directions from Producers, Executive Producers, Series Producers, Production Managers and Post Production Managers;
- (h) Cineflix maintains complete creative and editorial control over the content produced by Class Members;
- (i) Class Members must adhere to various internal policies, guidelines, and instructions in respect of performing their duties, including, but not limited to "picture lock" instructions and a "style guide";
- (j) Class Members must use Cineflix's tools at its production office in Toronto, including, but not limited to, desktop computers, laptop computers, monitors, editing software, editing hardware, and telephones;
- (k) Class Members are assigned desks and edit suites at Cineflix's Toronto production office;
- (l) Class Members are assigned Cineflix email accounts to send and receive email correspondence;
- (m) Class Members must request unpaid days off in advance of taking such days off as "vacation" or "sick days";

- (n) Class Members are required from time to time to obtain passports, visas, and/or work permits in order to perform their work duties for Cineflix and are reimbursed the cost of same by Cineflix;
- (o) Class Members are eligible to enroll in Cineflix's corporate fitness plan; and,
- (p) Class Members are invited to attend routinely scheduled staff events (e.g. Bagel Breakfast and Beer O'Clock).

9. The Defendants had no overtime policy in place to monitor, record, or compensate overtime hours.

ESA AND CLASS MEMBERS' CONTRACTS OF EMPLOYMENT

10. The provisions of the *ESA* are implied terms, in fact or by law, as minimum terms of the contracts of employment of the Class Members.

11. At all material times, the Class Members were not and are not exempt from the *ESA* and, further or in the alternative, are not and were not exempt from Part VIII to Part XII of the *ESA*.

12. As a result, the contracts of employment of the Class Members expressly or impliedly provide that Class Members shall be compensated:

- (a) At a rate equal to, or greater than, the Minimum Wage;
- (b) With Overtime Pay for hours worked in excess of the Overtime Threshold;
- (c) With Vacation Pay on all amounts paid, and unpaid; and,
- (d) With Public Holiday and Premium Pay.

CONTRACTUAL DUTIES OWED TO CLASS MEMBERS

13. As vulnerable employees under the direct control and supervision of the Defendants, the Class Members relied on the Defendants to advise them properly regarding their employee status and eligibility for Minimum Wage, Overtime Pay, Vacation Pay, Public Holiday and Premium Pay and to fulfill their contractual and statutory employment responsibilities to keep track of and pay the Class Members at or above the Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay. Cineflix is/was in a position of power and direct control over the Class Members and the Class members were and are in a vulnerable position vis-à-vis the Defendants.

14. The Defendants owe and owed contractual duties to the Class Members, including a contractual duty of good faith, all of which required, and continue to require, the Defendants to:

- (a) ensure that Class Members are properly classified as employees;

- (b) advise Class Members of their entitlement to the Minimum Wage, Overtime Pay and Vacation Pay;
- (c) ensure that the Class Members' hours of work are monitored and accurately recorded; and,
- (d) ensure that Class Members are appropriately compensated at, or above, the Minimum Wage, for Overtime Pay , for Vacation Pay and for Public Holiday and Premium Pay.

DUTY OF CARE

15. Cineflix owed and owes the Class Members a duty of care based upon the special relationship that developed between them as a consequence of Cineflix's retaining the Class Members to perform production work on Cineflix's behalf.

16. Cineflix owed and owes the Class Members a duty to take reasonable steps to properly characterize the employment relationship when retaining the Class Members to perform work on Cineflix productions.

17. The Defendants' duty of care requires and required the Defendants to:

- (a) ensure that Class Members are properly classified as employees;

- (b) advise Class Members of their entitlement to the Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay;
- (c) ensure that the Class Members hours of work are monitored and accurately recorded; and,
- (d) ensure that Class Members are appropriately compensated at, or above, the Minimum Wage, for Overtime Pay, for Vacation Pay and for Public Holiday and Premium Pay.

RESPONSIBILITIES OF CLASS MEMBERS AND TREATMENT BY CINEFLIX

18. From September 6, 2017 to February 2018, Bourque worked for Cineflix as a Story Editor.

19. Bourque's duties and responsibilities as a Story Editor included:

- (a) Attending the Cineflix production office in Toronto five days per week in order to:
 - (i) attend scheduled post-production meetings in respect of assigned episodes of *Property Brothers 6*;
 - (ii) screen, transcribe and organize show footage for assigned episodes of *Property Brothers 6*;

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- (iii) supervise and direct the editing of assigned episodes of *Property Brothers 6* in conjunction with editors;
 - (iv) write voice-over narration for assigned episodes of *Property Brothers 6*; and,
 - (v) attend any other meetings or perform any other duties as directed by Cineflix.
- (b) Producing the animation for assigned episodes of *Property Brothers 6* by directing the work of an outside animation company on behalf of Cineflix; and,
 - (c) Shaping the story for assigned episodes of *Property Brothers 6*.

20. Bourque was expected to follow the formula developed for prior seasons of the *Property Brothers* series when performing her work duties.

21. Bourque was expected to report to Cineflix's production office in Toronto in advance of editors with whom she worked in order to meet Cineflix's pre-determined production schedule for *Property Brothers 6*.

22. Bourque was further required to submit her work product to the Series Producer for approval or modification.

23. The Defendants required or permitted Bourque to work between approximately 50 and 70 hours per week.

24. Bourque relied on the Defendants in good faith and was unaware while working for the Defendants or afterwards that she was an employee and entitled to the Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay. At the time, Bourque relied on the Defendants to properly classify her regarding her status as an employee and her entitlement to Minimum Wage, Overtime Pay, Vacation Pay, and Public Holiday and Premium Pay and was misled by the Defendants that she was not an employee of the Defendants.

25. Bourque did not become aware that she was eligible as an employee for Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay because the Defendants had continually misrepresented her actual eligibility and entitlement to such pay.

26. Bourque's relationship with Cineflix and its production schedules is consistent with the relationships of all Class Members with Cineflix.

27. At all material times, Bourque and the other Class Members were explicitly directed as to how, where and when they could perform their duties for Cineflix.

28. At all material times, Bourque and the other Class Members were explicitly and incorrectly informed they were not employees of Cineflix.

29. The Defendants required Bourque and the other Class Members to work hours in excess of the Overtime Threshold without Overtime Pay, contrary to their contractual terms.

30. The Defendants failed to compensate Bourque and the other Class Members for Vacation Pay, contrary to their contractual terms.

31. The Defendants failed to compensate Bourque and the other Class Members for Public Holiday and Premium Pay, contrary to their contractual terms.

SYSTEMIC CLASSIFICATION AS "INDEPENDENT CONTRACTORS"

32. The Defendants systemically classified many Class Members as "independent contractors" and required Class Members to incorporate their own companies in order to obtain employment with Cineflix.

33. Cineflix further required and/or permitted the Class Members to regularly work hours without receiving the Minimum Wage, Overtime Pay, Vacation Pay or Public



Holiday and Premium Pay, under the misrepresentation from Cineflix that Class Members were independent contractors.

34. The Defendants were aware that the Class Members relied on the Defendants to advise them properly of their employment status and eligibility for Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay, and to fulfill their contractual and statutory employment responsibilities to keep track of and pay the Class Members for their hours worked.

35. The Defendants exerted pervasive pressure on Class Members to work hours in excess of the Overtime Threshold. Particulars of such pressure include the fact that Cineflix managers would insist upon Class Members meeting the deadlines set by Cineflix's pre-determined production schedules, regardless of the number of hours of work required in a day or week in order to meet those deadlines.

SYSTEMIC BREACH OF THE *ESA*

36. The Defendants have systemically breached the provisions of the *ESA* with respect to all Class Members by:

- (a) failing to ensure that all Class Members were properly classified as employees;

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- (b) failing to advise Class Members of their entitlement to Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay;
- (c) failing to ensure that the Class Members' hours of work were monitored and accurately recorded;
- (d) requiring and/or permitting the Class Members to work hours for which it failed to compensate at a rate equal to, or above, the Minimum Wage;
- (e) requiring and/or permitting the Class Members to work hours in excess of the Overtime Threshold but failing to ensure that Class Members were compensated for Overtime Pay;
- (f) failing to compensate Class Members for Vacation Pay; and,
- (g) failing to compensate Class Members for Public Holiday and Premium Pay.

37. Cineflix's misclassification of Class Members as purported independent contractors and denial of Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay to Class Members is in violation of the *ESA* and is unlawful.

38. To the extent that any contracts purport to designate the Class Members as independent contractors or individual corporations and exclude the Class Members from eligibility for the Minimum Wage, Overtime Pay, Vacation Pay, Public Holiday and



Premium Pay or any other minimum requirement of the *ESA*, such contracts and or provisions are void and unenforceable.

SYSTEMIC BREACH OF CONTRACT AND BREACH OF DUTY OF GOOD FAITH

39. The Defendants have systemically breached and continue to systemically breach the contracts with the Class Members and the contractual duty of good faith owed to the Class Members by:

- (a) improperly and arbitrarily misclassifying many Class Members as independent contractors;
- (b) misrepresenting to the Class Members that the Class Members were independent contractors;
- (c) failing to monitor and keep track of the hours worked by the Class Members; and,
- (d) requiring and/or permitting the Class Members to work regular hours and hours in excess of the Overtime Threshold but failing to compensate the Class Members as required for the Minimum Wage, Overtime Pay, Vacation Pay or Public Holiday and Premium Pay.

40. There was no legitimate basis for the Defendants' arbitrary designation of many Class Members as independent contractors and ineligibility for Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay, which was contrary to the employees' express or implied terms of contract with the Defendants. Such classification and exclusion is contrary to the terms of the *ESA*, which are incorporated as express or implied terms of the contracts.

41. Such breaches have been and are ongoing and continuous in respect of the Class Members since at least approximately 2000.

SYSTEMIC NEGLIGENCE

42. Cineflix owed Bourque and the Class Members a duty to take reasonable steps to properly characterize the employment relationship when retaining the Class Members to perform work on its productions. Cineflix systemically breached that duty by:

- (a) improperly and arbitrarily misclassifying certain Class Members as independent contractors;
- (b) misrepresenting to the Class Members that the Class Members were independent contractors;
- (c) failing to monitor and keep track of the hours worked by the Class Members; and,

- (d) requiring and/or permitting the Class Members to work regular hours and hours in excess of the Overtime Threshold but failing to compensate the Class Members as required for the Minimum Wage, Overtime Pay, Vacation Pay or Public Holiday and Premium Pay.

43. As a result of Cineflix's negligence in mischaracterizing the relationship between Cineflix and the Class Members, the Class Members have suffered damages and losses, including lost Minimum Wages, Overtime Pay, Vacation Pay, Public Holiday and Premium Pay, and any consequential damages resulting from the determination that the Class Members are/were employees of the Defendants and not independent contractors, all of which were reasonably foreseeable to Cineflix.

UNJUST ENRICHMENT

44. The Defendant has been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the Class Members.

45. The Class Members have suffered a corresponding deprivation, in the form of the Minimum Wages, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay that is owed to them.

46. There is no juristic reason for the Defendants' unjust enrichment and the Class Members' corresponding deprivation. The systemic exclusion of the Class Members from their contractual and statutory entitlements is unlawful.

47. The Defendants' unjust enrichment has been continuous and ongoing since at least approximately 2000.

48. As a result of the Defendants' breaches of the *ESA*, breaches of contract, negligence, and/or unjust enrichment, the Class Members have suffered damages and losses, including lost Minimum Wages, Overtime Pay, Vacation Pay, Public Holiday and Premium Pay, and any consequential damages resulting from the determination that the Class Members are/were employees of the Defendants and not independent contractors.

49. Furthermore, the Defendants' arbitrary and incorrect misclassification of certain Class Members as independent contractors and exclusion from Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay, coupled with the Defendants' requirement that the Class Members work hours in excess the Overtime Threshold, was high handed and callous. The Defendants were in a position of power over vulnerable employees and owed them a duty of good faith, which the Defendants

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flagrantly breached to increase its profits at the expense of the Class Members. Such conduct warrants an award of punitive damages.

50. Moreover, the Defendants' arbitrary and incorrect misclassification of the Class members as independent contractors caused the Class Members to erroneously pay the employer component of CPP and/or EI contributions on their income. Such employer contributions ought to have been made by Cineflix on their behalves, instead the Class Members paid those contributions directly. The Defendants' misclassification thereby caused compensable damages to the Class Members for which sufficient reimbursement should be awarded.

51. The Plaintiff pleads and relies on upon the following statutes and regulations:

- (a) the *Employment Standards Act, 2000*, S.O. 2000, c. 41;
- (b) the *Employment Standards Act, 2000*, S.O. 2000, c. 41, O. Reg. 285/01;
and,
- (c) the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

52. The Plaintiff proposes that this action be tried in Toronto.

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(Date of issue)

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CINEFLIX PRODUCTIONS INC. ET AL.

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO**

**STATEMENT OF CLAIM
(PROPOSED CLASS PROCEEDINGS)**

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