

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

In the matter of a Claim under the
Class Proceedings Act, 1992, S.O. 1992, c. 6

B E T W E E N:

JAMES COTTON and SUZETTE KENNEDY

Plaintiff

and

MICHAELS STORES, INC.
AND MICHAELS OF CANADA, INC.

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff.

The claim made against you is set out in the following pages.

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

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

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

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local legal aid office.

Date: December 20, 2002

Issued by _____
Local registrar

Address of court office:
45 Main Street East, Suite 110
Hamilton, Ontario
L8N 2B7

TO: MICHAELS STORES, INC.
8000 Bent Branch Drive
IRVING, Texas
USA
75063

TO: MICHAELS OF CANADA, INC.
8000 Bent Branch Drive
IRVING, Texas
USA
75063

CLAIM

1. The Plaintiffs claim on their own behalf and on behalf of all Class Members:
 - a. A declaration that the Defendants are in breach of the provisions of the *Employment Standards Act*, S.O. 2000, c.41, and equivalent/similar legislation in other provinces and territories, in failing to make payment to the Plaintiffs and Class Members for all overtime hours worked in excess of 44 hours per week in any given week at the rate of one and one-half times the regular rate of pay for all such weeks;
 - b. Damages for breach of contract as set-out below;
 - c. Payment to the Plaintiffs and all Class Members for all overtime hours worked in excess of 44 hours per week in any given week at the rate of one and one-half times the regular rate of pay, for all such weeks;
 - d. Punitive, aggravated and exemplary damages;
 - e. Pre and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C43 as amended;

- f. Costs on a substantial indemnity basis;
- g. Such further and other relief as this Honorable Court may deem just and appropriate in the circumstances.

THE PARTIES

- 2. The Plaintiff, James Cotton is an individual residing in the City of Burlington, Ontario and was formerly an employee of the Defendant.
- 3. The Plaintiff, Suzette Kennedy is an individual residing in the City of Hamilton, Ontario and was formerly an employee of the Defendant.
- 4. The Defendant, Michaels Stores, Inc. (“Michaels”) is a publicly-traded company on the New York Stock Exchange (NYSE) under the symbol “MIK”.
- 5. The Defendant, Michaels of Canada, Inc. is a wholly-owned subsidiary of Michaels.
- 6. Michaels is the world’s largest retailer of arts, crafts, framing, floral, decorative wall decor and seasonal merchandise for the hobbyist and do-it-yourself home decorator.
- 7. Michaels owns and operates approximately 750 Michaels stores in the United States and Canada, including approximately 35 stores in Canada.

THE STATUTORY/REGULATORY SCHEME

8. Part VIII of the *Employment Standards Act*, S.O. 2000, c. 41 (the “Act”), specifically Subsection 22(1) provides as follows:

“An employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each week or, if another threshold is prescribed, that prescribed threshold.”

9. Subsection 22(9) of the Act provides as follows:

“If an employee who performs work of a particular kind or character is exempted from the application of this Section by the regulations or the regulations prescribe an overtime threshold of other than 44 hours for an employee who performs such work, and the duties of an employee’s position require him or her to perform both that work and work of another kind or character, this Part shall apply to the employee in respect of all work performed by him or her in a work week unless the time spent by the employee performing that other work constitutes less than half

the time that the employee spent fulfilling the duties of his or her position in that work week”.

10. Subsection 5(1) of the Act provides as follows:

“Subject to Subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void”.

11. Subsection 8(1) of the Act provides as follows:

“Subject to Section 97, no civil remedy of an employee against his or her employer is affected by this Act”.

12. O. Reg 285/01, amended to O. Reg 361/01, provides in Subsection 8(b) that Part VIII of the Act does not apply to a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis.

13. Equivalent/similar legislation exists in other provinces and territories.

SITUATION OF THE PLAINTIFFS

14. The Plaintiff, James Cotton, was employed by the Defendants from the period 1993 to approximately July, 2002.
15. The Plaintiff, Suzette Kennedy, was employed by the Defendants from the period September, 1995 to approximately July, 2002.
16. The Plaintiff, James Cotton, was employed in the capacity of "Store Manager" for a number of years.
17. The Plaintiff, Suzette Kennedy, was employed in the capacity of "Assistant Manager" for a number of years.
18. The Plaintiffs state that even though they had managerial titles, the titles were for purposes external to the Defendants, namely, to leave customers with the impression that the Plaintiffs had greater authority than they in fact did.
19. The Plaintiffs state that while they had some supervisory/managerial responsibility, the majority of their employment hours were spent on non-supervisory/non-managerial tasks.

20. The Plaintiffs state that their normal employment duties included the following:

- a. Control of stocking and pricing of merchandise;
- b. Assisting customers on the retail sales floor;
- c. Sales of product to customers;
- d. Cashier duties;
- e. Stocking of shelves and pricing of merchandise;
- f. Handling customer complaints and returns;
- g. Movement of product from stockroom/warehouse to retail sales floor;
- h. Arranging displays of product for sale;
- i. Physical layout and presentation of product on retail sales floor;
- j. Physical posting of signage, displays, promotions, etc.;

- k. Customer complaint resolution;
 - l. Freight removal including loading and unloading trailers;
 - m. Clearance and preparation of stock room as required including manual labor;
and
 - n. Various other non-supervisory/non-managerial tasks/responsibilities as were
required.
21. The Plaintiffs state that they routinely worked in excess of 44 hours per week on behalf of the Defendants and indeed state that the Defendants specifically required that they work 50 hours per week at specific times and 60 hours or more during busy peak sales periods.
22. The Plaintiffs state that they did not at any time receive payment of overtime pay from the Defendants as required under the Act and its Regulations set-out above.

THE CLASS

23. The Plaintiffs state that the Defendants employed/employ many individuals across Canada in their various retail stores classifying those employees as “salaried”, “supervisory/managerial” employees. Said employees were/are not paid for overtime hours worked in excess of 44 hours per week at a rate of one and one-half times the regular rate of pay as required pursuant to the Act and its Regulations and equivalent/similar legislation in other provinces and territories.
24. The Plaintiffs state that the Defendants required/require that employees with the title of “Managers”, “Assistant Managers”, and “Management Trainees” regularly work in excess of 44 hours per week on behalf of the Defendants.
25. The Plaintiffs furthermore state that the Defendants required/require that such employees perform non-supervisory/non-managerial tasks and that the Defendant were/are aware that those tasks occupy the majority of the employment hours worked by those employees.
26. The Plaintiffs propose that the class herein be defined as follows:

Any person in Canada who was/is a former employee/employee
of the Defendants who worked in excess of 44 hours in any given

week without receiving overtime pay in accordance with the Act and its Regulations, and equivalent/similar legislation in other provinces and territories, at the rate of one and one-half times the regular rate of pay.

BREACH OF CONTRACT

27. The Plaintiffs state that as between the Defendants and the Plaintiffs/Class Members, the parties intended the minimum standards of the Act, and equivalent/similar legislation in other provinces and territories, to govern with respect to payment for overtime.
28. The Plaintiffs state that the minimum standards mandated by the Act and equivalent/similar legislation in other provinces and territories, in respect of overtime pay, are implied terms of the employment contracts between the Defendants and the Plaintiffs/Class Members.
29. The Plaintiffs state that the Defendants are in breach of the said employment contracts in that they failed to make payment to the Plaintiffs and Class Members of overtime pay in accordance with the minimum standards mandated by the Act and equivalent/similar legislation in other provinces and territories,.

DAMAGES

30. The Plaintiffs state that they and Class Members have suffered damages as a result of the breach of contract of the Defendant as described above, specifically, the Defendants have failed to make payment to the Plaintiffs and Class Members for each hour worked in excess of 44 hours per week at the rate of one and one-half times the regular rate of pay.
31. The Plaintiffs state that the Defendants are liable and responsible to them and Class Members for that loss and such further and other damages for breach of contract as the Plaintiffs and Class Members will stipulate and provide particulars prior to trial.
32. The Plaintiffs state that the Defendant knew or ought to have known that by classifying their employees as “salaried”, “supervisory” and “managerial”, the Defendants were avoiding liability for proper payment of overtime pay as required pursuant to the minimum standards mandated by the Act, and equivalent/similar legislation in other provinces and territories, and that accordingly, an award of punitive, aggravated and exemplary damages is appropriate in the circumstances.

LEGISLATION

33. The Plaintiffs plead and rely upon the provisions of the *Class Proceedings Act, 1992*, S.O. 1992, c. C6, the *Employment Standards Act*, S.O. 2000, c. 41 and Regulations and equivalent/similar legislation in provinces and territories outside Ontario.

SERVICE OUTSIDE ONTARIO

34. The Plaintiffs anticipate that it might be necessary to serve this Statement of Claim on the Defendants outside the Province of Ontario and in that regard pleads and relies upon the provisions of Rule 17.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 as amended, and in particular:
- a. Rule 17.02 (f) - a contract made in Ontario and/or breached in Ontario; and
 - b. Rule 17.02 (h) - damages sustained in Ontario.

35. The Plaintiffs propose that this action be tried at the City of Hamilton, Province of Ontario.

December 20, 2002

SCARFONE HAWKINS ^{LLP}

Barristers & Solicitors

120 King Street West

Suite 1050

HAMILTON, Ontario

L8N 3P9

DAVID THOMPSON (28271N)

Tel : (905) 523-1333

Fax: (905) 523-5878

Solicitors for the Plaintiffs