

COURT FILE NUMBER	2103 10542
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFFS	Evan Martindale, Matthew Baker, Michael Rempel, Merit OpenShop Contractors Association of Ontario, Merit Contractors Association of Nova Scotia, Merit Contractors Association Inc., and Merit Contractors Association of Manitoba Inc. as REPRESENTATIVE PLAINTIFFS
DEFENDANTS	Mercon Benefit Services, Merit Contractors Association, and Merit Contractors Association Benefit Plan Trust
DOCUMENT	<b>STATEMENT OF CLAIM</b>
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	<p>Rice Harbut Elliott LLP Attn: Anthony Leoni &amp; John M. Rice #820-980 Howe Street Vancouver, BC V6Z 0C8 Tel: (604) 682-3771 Fax: (604) 682-0587</p> <p>Murphy Battista LLP Attn: Angela Bespflug &amp; Janelle O'Connor #2020-650 West Georgia Street Vancouver, BC V6B 4N7 Tel: (604) 683-9621 Fax: (604) 683-5084</p>



**A Class Proceeding pursuant to the *Class Proceedings Act*, SA 2003, c C-16.5**

## **NOTICE TO THE DEFENDANTS**

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

## **STATEMENT OF FACTS RELIED ON:**

### **I. PARTIES**

#### **A. PLAINTIFFS**

1. The Plaintiff, Evan Martindale, is an individual residing in Saskatchewan. At all material times, Mr. Martindale was a carpenter and an employee of RNF Ventures Ltd. in Prince Albert, Saskatchewan, a company that was participating in the Merit Contractors Association Benefit Plan (the “Plan”) administered by the Defendants.
2. The Plaintiff, Matthew Baker, is an individual residing in Nova Scotia. At all material times, Mr. Baker was a Red Seal Journeyman Sheet Metal Worker and an employee of L.E. Cruickshanks Sheet Metal Ltd. in Halifax, Nova Scotia, a company that was participating in the Plan.
3. The Plaintiff, Michael Rempel, is an individual residing in Manitoba. At all material times, Mr. Rempel was a construction surveyor and an employee of M.D. Steele Construction Limited in West St. Paul, Manitoba, a company that was participating in the Plan.
4. The Plaintiff, Merit Contractors Association Inc. (“Merit Saskatchewan”) is a non-profit corporation incorporated under the laws of Saskatchewan and has an address for service in this proceeding of 820 – 980 Howe Street, in the City of Vancouver, in the Province of British Columbia.
5. The Plaintiff, Merit OpenShop Contractors Association of Ontario (“Merit Ontario”), is a non-share corporation incorporated under the laws of Ontario and has an address for service in this proceeding of 820 – 980 Howe Street, in the City of Vancouver, in the Province of British Columbia.
6. The Plaintiff, Merit Contractors Association of Manitoba Inc. (“Merit Manitoba”) is a non-profit corporation incorporated under the laws of Manitoba and has an address for service in this proceeding of 820 – 980 Howe Street, in the City of Vancouver, in the Province of British Columbia.

7. The Plaintiff, Merit Contractors Association of Nova Scotia (“Merit Nova Scotia”), is a society incorporated under the laws of Nova Scotia and has an address for service in this proceeding of 820 – 980 Howe Street, in the City of Vancouver, in the Province of British Columbia.

## **B. DEFENDANTS**

8. The Defendant, Merit Contractors Association (“Merit Alberta”), is a non-profit public company incorporated under the laws of Alberta with a registered office at #2800 – 10060 Jasper Avenue NW, in the City of Edmonton, in the Province of Alberta.
9. The Defendant, Mercon Benefit Services (“Mercon”), is a non-profit private company incorporated under the laws of Alberta with a registered office at #2800 – 10060 Jasper Avenue, in the City of Edmonton, in the Province of Alberta.
10. The Defendant, Merit Contractors Association Benefit Plan Trust (“Merit Trust”), is a Trust established under the laws of Alberta.
11. At all material times, the Defendants were jointly responsible for funding and administering the Plan and for providing third party health and welfare benefits to member employees, their families, and their dependants.

## **C. THE CLASS**

12. The Plaintiffs bring this action on their own behalf and on behalf of all individuals and companies resident in Canada who participated and/or benefited in the Plan (the “Class” or “Class Members”, to be further defined in the Plaintiffs’ application for certification).

## **II. FACTS AND BACKGROUND**

### **A. THE TRUST**

13. “Merit” organizations have existed in Canada for decades. Merit organizations are provincial “open shop” construction associations that represent member firms who employ workers who construct industrial, commercial, institutional, and residential projects in Canada.

14. On May 1, 1986, Merit Alberta entered into a Declaration of Trust causing the creation of the Merit Trust which, since that time, has been administered for the purpose of providing – through the Plan – an hour bank benefits program for Merit member firms and their field employees.
15. Mercon was incorporated on December 17, 2002 for the purpose of acting as third party administrator of the Plan on behalf of the Merit Trust. The Memorandum of Association for Mercon states that an object of Mercon is to “establish and support or aid in the establishment and support of associations, funds, trusts or otherwise to benefit members and employees of the construction industry”.
16. On May 30, 2005, the Merit Trust was continued by a Declaration of Trust which stated:

WHEREAS:

[...]

C. The Plan has been created for the purpose of providing health and welfare benefits for Employees of Members and for Employees of non-Members who are entitled to participate in the Plan.

[...]

D. The Fund has been established and continued for the purposes of providing payment of certain Benefits and to fund the costs and expenses of providing insurance coverage to pay other Benefits and to pay for all costs and expenses associated with or relating to the Trust and the Plan.

3.03 The Fund shall be vested with the Board of Trustees and the Fund shall be received, held and administered by the Board of Trustees in trust in accordance with the provisions of this Declaration and for the general purpose of placing, acquiring, obtaining, maintaining and providing the Insurance Paid or Self-Funded health and welfare Benefits (restricted to a group sickness or accident insurance plan, private health, dental and eye care services plans, a group term life insurance policy or any combination thereof) for Employees, their family and dependents (as defined by the appropriate policy or plan in effect from time to time), which Benefits, without restricting the generality of the foregoing, may include:

- (a) Group Term Life Insurance;

- (b) Accidental Death and Dismemberment Insurance;
- (c) Extended Health Care;
- (d) Dental Care;
- (e) Vision Care; and
- (f) Group Sickness and/or Accident Insurance

together with such other health and welfare Benefits as the Trustees may from time to time approve or determine. Benefits to be paid to Eligible Employees shall be paid or funded on an Insurance Paid basis or a Self-Funded basis, as determined by the Trustees in their sole discretion. Notwithstanding the generality of the within Declaration:

- (i) the Association shall not act as an insurer;
- (ii) except as otherwise set forth herein, all Benefits payable to Eligible Employees shall be paid from the monies, dividends, profits, bonuses, annuities or other entitlements as are payable under a contract of insurance issued by an insurer, properly authorized and licensed to carry on the business of insurance in Canada; and
- (iii) except as otherwise set forth herein, neither the Association nor the Trust nor the Trustees shall have any obligation to pay any Insurance Paid Benefits to Eligible Employees except to the extent that they or any of them receive monies, dividends, profits, bonuses, annuities or other entitlements under a contract of insurance that was obtained or was issued to pay the Benefit.

## **B. THE BENEFIT AGREEMENT**

17. On November 14, 2002, Merit Saskatchewan entered into a benefit agreement with Merit Trust. The Benefit Agreement stated:

**WHEREAS** the Association wishes to provide an hour bank style of group insurance to its members and their employees in the Province of Saskatchewan;

**AND WHEREAS** the Merit Contractors Association Benefit Plan has been established by the Trust for the purpose of providing health and welfare benefits for employees of companies, corporations and other businesses and organizations that agree to participate in the Plan and that are accepted as participants in the Plan....

18. On November 27, 2002, Merit Ontario entered into a benefit agreement with the Merit Trust to have the Trust provide an hour bank style of group insurance to its members and their employees in the province of Ontario.
19. On December 3, 2002, Merit Manitoba entered into a benefit agreement with the Merit Trust to have the Trust provide an hour bank style of group insurance to its members and their employees in the province of Manitoba.
20. On December 5, 2002, Merit Nova Scotia entered into a benefit agreement with the Merit Trust to have the Trust provide an hour bank style of group insurance to its members and their employees in the province of Nova Scotia (collectively with the Saskatchewan, Ontario, and Manitoba benefit agreements, the “Benefits Agreement”).

### **C. THE PLAN**

21. The Plan provides for an hour bank account (the “Hour Bank”) for each employee of a member company that has agreed to participate in the Plan and that has been accepted as a participant in the Plan.
22. An employee’s initial coverage under the Plan takes effect on the first day of the second month after an employee’s Hour Bank has accumulated 300 hours.
23. 150 hours are deducted from an employee’s Hour Bank of the first day of each month to provide benefit coverage.
24. Coverage under the Plan terminates the last day of the month following the month in which the employee’s balance in the Hour Bank falls below 150 hours, subject to limited rights of the employee to self-pay for their continued participation in the Plan for up to six consecutive months. Employees may accumulate up to 1200 hours in their Hour Bank.
25. The most recent version of the Plan, dated February 2016, is titled “Hour Bank Benefit Plan – Merit Contractors Association” and states:

Merit Contractors Association is pleased to introduce to you a comprehensive benefit program. Your employer understands the

need for such a service and is committed to making this plan available for all hourly paid field or shop employees. Yours is a portable hour bank program that enables you to continue receiving benefits when you work for any firm participating in the Merit Contractors Association Benefit Plan.

The Merit plan contains life insurance, long term disability and accidental death and dismemberment coverage. Should you have a spouse and/or dependents, further life insurance protection for them is included. In addition, your plan contains a comprehensive dental program, an extended health package including reimbursement for prescription drugs, eyeglasses and out-of-country medical expenses, to name a few of the services. Also, coverage under the plan includes free access to the Employee and Family Assistance Program and Best Doctors services for you and your eligible dependents.

Consistent with the objective of providing a high quality program, the plan is constantly under review. We have added additional benefits numerous times since the plan was developed in 1986. Together with your employer, we continue to be responsive to your suggestions.

[...]

### **Benefit Plan Administrator**

Mercon Benefit Services is the administrator of your benefit plan. Mercon Benefit Services' staff can assist you in a variety of ways, including answering questions about your eligibility for benefits, answering questions about the benefits provided by the plan and helping you complete claim forms.

### **Initial Eligibility**

Your employer has agreed to report hours worked and remit payments for all hourly paid field or shop employees in your company. The hours you work each month are reported to Mercon Benefit Services, who maintain the balance of hours in your hour bank account. Initial coverage under the benefit plan takes effect on the first day of the second month after your hour bank account has accumulated 300 hours (e.g. if your employer has reported 150 hours for each of July and August, you would have accumulated 300 hours at the end of August and would be eligible for benefits October 1 — the first day of the second month after you had accumulated 300 hours). So long as you work for a company participating in the Merit benefit plan, hours will accumulate in your account. You have up to nine months to accumulate 300 hours. Once your account reaches 300 hours, a letter will be sent to you by Mercon Benefit Services, advising you of the date your coverage under the benefit plan takes effect. If you fail to reach 300 hours in the nine-month period, your hours

will be forfeited. For more details on how the hour bank operates, please see question #2 in Questions & Answers section. (p. 5-6)

### **Termination of Coverage**

Your coverage under the benefit plan (except coverage for disability benefits) will terminate the last day of the month following the month the balance in your account falls below 150 hours, subject to the self-pay option outlined in the following section. Your coverage for disability benefits will terminate on the last day on which you are at work for a Merit company. You cannot receive a refund for any hours that have been reported by your employer, when you terminate employment. All hours reported will remain to your credit and will continue to provide coverage so long as you have a minimum of 15 hours in your hour bank account.

#### **1. How do I become enrolled under this plan?**

- (a) you must be employed by a participating employer;
- (b) an enrolment card must be completed and returned to your employer;
- (c) an hour bank account is established in your name once your employer has reported hours worked by you and remitted contributions for the hours worked.

#### **2. What is an hour bank account?**

Mercon Benefit Services, the plan administrator, keeps a record of all hours worked for each employee and reported by an employer participating in this plan. Your hour bank account operates like a bank account except hours are recorded instead of dollars. As long as you are working for a participating employer, all hours worked by you are “deposited” into your account. To “pay” for benefits, 150 hours are deducted or withdrawn from the account for each month of coverage. (p. 57)

#### **5. Are my hours portable?**

Mercon Benefit Services keeps records based on your Member Identification Number. Your hour bank account is kept in your name regardless of which participating employer you work for. Participating employers are required to make contributions to this plan for all hourly paid employees so that if you work for another participating employer your hours will be credited to your individual hour bank account. (p. 58)

#### **14. If I participate in the Christian Labour Association of Canada (CLAC) benefit plan, can I consolidate my accounts in the CLAC and Merit plans?**

Yes, there is an agreement in place between Merit and CLAC in Alberta that permits consolidation, either through a transfer to the CLAC plan or to the Merit plan. Please contact Mercon Benefit Services if you wish to do so.



**15. Can I get a refund if I go to work for a non-Merit company?**

No, Merit Plan does not permit a refund for any hours that have been submitted by your employer to the Hour Bank plan. Your benefits under the Hour Bank plan will continue so long as you have a minimum of 150 hours in your Hour Bank account. (page 61)

**D. THE REPRESENTATIONS**

26. At all material times, the Defendants represented to the Plaintiffs and other Class Members that the Plan was portable between all Merit member companies across Canada, thus providing the employees of member companies with the security of knowing that they had benefit coverage even when they were between jobs and even when they had been laid off.
27. The Defendants maintain a website at [www.meritalberta.com](http://www.meritalberta.com) that contains the following representations:

Merit is dedicated to the overall well-being of our people. Administered by Merit Benefits, our health benefits and extended health benefit plans designed exclusively for Canada's construction workers, industry partners and their families. [sic]

BENEFIT PLAN DETAILS

## Benefits plans built for you

Our team is pleased to answer any of your questions or concerns from 7:30 a.m. to 4:30 p.m. Mountain Time. They are available at:

P: 780.455.5845 (Edmonton Area)  
TF: 1.877.263.7266  
E: [merit@meritbenefits.ca](mailto:merit@meritbenefits.ca)

### Hour Bank Benefit Plan

Designed for hourly hands-on construction workers in the field or shop, the Hour Bank Benefit Plan is portable between all Merit member companies across Canada.

Employers report each hour worked by each employee, which is banked in the employee's account. To pay for benefits, 150 hours are deducted monthly from employee's Hour Bank account. Excess hours are banked and can be used for future use to pay for benefits during periods of unemployment or reduced work hours, for example. When Hour Bank account falls below 150 hours, the employee may self pay benefits for up to six consecutive months.

For more information on the Hour Bank Benefit Plan for existing members, contact Merit Benefits. To inquire about joining the Hour Bank Benefit Plan and becoming a Merit member, click **Join Now** above, or contact your local Merit Contractors Association office.

28. As part of their communication with the Plaintiffs and other Class Members, the Defendants sent a regular monthly email update called “Mercon Messenger”. In the January 2020 Mercon Messenger email to the Plaintiffs and other Class Members, the Defendants made the following representations:

Our comprehensive benefit plans are not only industry leading, cost-effective, simple to use and easy to access – they’re portable too. This means workers are always covered on the job, between work – even during layoffs.

29. And, as stated above, the Plan expressly provides that an employee’s Hour Bank is kept in their name regardless of which participating employer they work for, so that if an employee works for another participating employer, their hours will be credited to their Hour Bank.

#### **E. WRONGFUL CONDUCT OF DEFENDANTS LEADING TO TERMINATION**

30. In or around 2016, the Defendants commenced a course of wrongful conduct that lead to significant strains in the relationship between Merit Alberta and the Plaintiffs, Merit Saskatchewan, Merit Manitoba, Merit Ontario, and Merit Nova Scotia (collectively, the “Plaintiff Associations”).
31. In or around November 2018, Merit Alberta withdrew from the “Merit Canada” national association.
32. On December 7, 2018, Merit Alberta demanded that Merit Canada cease use of the “Merit” name, despite the fact that the various Plaintiff Associations had been using the “Merit” name for several decades without any formal registration.
33. In or around early 2019, when asked by Merit Ontario for copies of provincial distribution agreements, Merit Alberta claimed to not have copies of these agreements and further claimed that certain agreements did not even exist, when Merit Alberta knew or ought to have known that these statements were untrue.
34. In or around the fall of 2019, Merit Canada asked Merit Alberta to relinquish control over the meritcanada.ca domain name, which – prior to Merit Alberta’s withdrawal from the

national association – was being administered by Merit Alberta for the benefit of Merit Canada. Merit Alberta refused.

35. In or around November 2019, Merit Alberta presented the Plaintiff Associations with an “Affiliation Agreement” that contained terms that were in breach of previous agreements – including the Benefits Agreement and the Declaration of Trust, in breach of the business duty of good faith and contrary to the Defendants’ fiduciary duties. The proposed provincial Affiliation Agreement had:
- no transparency on the pricing model;
  - no service level commitments from Mercon;
  - onerous reporting and audit requirements;
  - a five-year non-compete term which would prevent the Plaintiff Associations from marketing any health and welfare benefits program for 5 years after leaving the Plan;
  - a requirement that the Plaintiff Associations surrender any rights to ownership of word “Merit”;
  - restrictions on the use of certain “Merit” trademarks and branding; and
  - a requirement that the Plaintiff Associations prioritize growth in their strategic plans.
36. The Plaintiff Associations attempted to negotiate in good faith, but were met with unilateral, harsh, and high-handed conduct by the Defendants.
37. As a result of the Defendants’ breach of previous agreements, breach of business duty of good faith, and breach of fiduciary duties, Merit Ontario was the first provincial Merit association to terminate its Benefits Agreement with the Merit Trust, which it did on January 31, 2020, with an effective date of April 30, 2020.
38. In or around April 2020, during the middle of the Covid-19 pandemic, Merit Alberta pressured the Plaintiff Associations to fill out, sign, and agree to new Affiliation Agreements, often giving the Plaintiff Associations very little time to respond. Merit Alberta threatened to terminate access to benefits under the Plan for members and their employees unless the new agreements were signed within days of being provided.

39. As a result of the Defendants' breach of previous agreements, breach of business duty of good faith, and breach of fiduciary duties, Merit Saskatchewan and Merit Manitoba terminated their respective Benefits Agreements with the Merit Trust on June 1, 2020, with an effective date of August 31, 2020.
40. On May 18, 2020, Merit Nova Scotia notified Merit Alberta that it would not be signing Merit Alberta's proposed Affiliation Agreement, and on May 20, 2020, the Merit Trust provided Merit Nova Scotia with notice that Merit Nova Scotia's Benefits Agreement would terminate in 90 days, effective August 20, 2020.
41. On May 1, 2020, the Ontario Construction Industry Benefit Plan ("OCIBP") was launched. Subsequently, Merit Saskatchewan, Merit Manitoba, and Merit Nova Scotia also launched provincial benefit plans.
42. Out of approximately 11,300 employees with Hour Banks through the Mercon Hour Bank Plan in early 2020, approximately 8,000 individuals, employed by 500 companies – resident in Saskatchewan, Manitoba, Ontario, and Nova Scotia – are now the beneficiaries of the new provincial benefit plans offered by the Plaintiff Associations.

## **F. DENIAL OF TRANSFER OF HOUR BANK AND BENEFITS COVERAGE**

### ***Evan Martindale***

43. At all material times, Mr. Martindale has been an employee of RNF Ventures Ltd. – which has continuously been a member of Merit Saskatchewan since 1997. Prior to Merit Saskatchewan terminating its Benefits Agreement with the Merit Trust, RNF Ventures Ltd. had agreed to participate in the Plan and was accepted as a participant in the Plan.
44. Between 1997 and 2020, RNF Ventures Ltd.: 1) reported to Mercon – on a monthly basis – the number of hours worked by Mr. Martindale and its other employees in a given month; and 2) collected and remitted contributions to Mercon on behalf of Mr. Martindale and its other employees – on a monthly basis – for the hours worked by Mr. Martindale and its other employees, so they would have access to health and welfare benefits under the Plan, assuming their Hour Bank had 150 hours or more in it.

45. On June 30, 2020, RNF Ventures Ltd. provided 30 days' notice of termination of participation in the Plan. As of July 31, 2020, the time of transition, Mr. Martindale had 149 hours in his Hour Bank under the Plan.
46. On December 7, 2020, Mr. Martindale wrote to Mercon requesting that the hours in his Hour Bank under the Plan be transferred to his new benefits plan – also through Merit Saskatchewan. Mr. Martindale noted that the Defendants' website represented that the Hour Bank benefit Plan was portable between all Merit member companies across Canada, and that he was still working for a Merit company.
47. On December 11, 2020, Mercon advised Mr. Martindale that it would not transfer the hours in his Hour Bank to his new benefits plan since Merit Saskatchewan was no longer affiliated with the Plan.

***Michael Rempel***

48. At all material times, Mr. Rempel was an employee of M.D. Steele – which has continuously been a member of Merit Manitoba since 1998. Prior to Merit Manitoba terminating its Benefits Agreement with Merit Trust, M.D. Steele had agreed to participate in the Plan and was accepted as a participant in the Plan.
49. Between November, 2017 when Mr. Rempel began his employment and June 2020, M.D. Steele: 1) reported to Mercon – on a monthly basis – the number of hours worked by Mr. Rempel and its other employees in a given month; and 2) collected and remitted contributions to Mercon on behalf of Mr. Rempel and its other employees – on a monthly basis – for the hours worked by Mr. Rempel and its other employees, so they would have access to health and welfare benefits under the Plan, assuming their Hour Bank had 150 hours or more in it.
50. On June 29, 2020, M.D. Steele elected to join Merit Manitoba's new benefits plan. At that time, Mr. Rempel had 1,192 hours in his Hour Bank under the Plan.
51. On February 11, 2021, Mr. Rempel wrote to Mercon requesting that the hours in his Hour Bank under the Plan be transferred to his new benefits plan – also through Merit Manitoba. Mr. Rempel noted that the Defendants' website represented that the Hour Bank

benefit Plan was portable between all Merit member companies across Canada, and that he was still working for a Merit company.

52. On February 15, 2021, Mercon advised Mr. Rempel that his benefits under the Plan would end on February 28, 2021, and that it would not transfer the 142 hours in his Hour Bank to his new benefits plan since Merit Manitoba was no longer affiliated with the Plan.

***Matthew Baker***

53. At all material times, Mr. Baker was an employee of L.E. Cruickshanks Sheet Metal Ltd. – which has continuously been a member of Merit Nova Scotia since 1994. Prior to Merit Nova Scotia having its Benefits Agreement with Merit Trust terminated, L.E. Cruickshanks Sheet Metal Ltd. had agreed to participate in the Plan and was accepted as a participant in the Plan.
54. Between February 2018 and June 2020, L.E. Cruickshanks Sheet Metal Ltd.: 1) reported to Mercon – on a monthly basis – the number of hours worked by Mr. Baker and its other employees in a given month; and 2) collected and remitted contributions to Mercon on behalf of Mr. Baker and its other employees – on a monthly basis – for the hours worked by Mr. Baker and its other employees, so they would have access to health and welfare benefits under the Plan, assuming their Hour Bank had 150 hours or more in it.
55. In July, 2020, L.E. Cruickshanks Sheet Metal Ltd. elected to join Merit Nova Scotia's new benefits plan. At that time, Mr. Baker had 143.25 hours in his Hour Bank under the Plan.
56. On February 2, 2021, Mr. Baker wrote to Mercon requesting that he be paid for the hours in his Hour Bank under the Plan or that the hours be transferred to his new benefits plan since his company was still with Merit.
57. On February 2, 2021, Mercon advised Mr. Baker that his Hour Bank balance was terminated as of October 1, 2020.

## G. THE CLAIM

### ***Legislation***

58. The Plaintiffs plead and rely the *Class Proceedings Act*, SA 2003, c C-16.5; the *Competition Act*, RSC 1985, c C-34; the *Consumer Protection Act*, RSA 2000, c C-26.3; the *Judgment Interest Act*, RSA 2000, c J-1; the *Excise Tax Act*, SC 1985, c E-14, Part IX; and the *Alberta Rules of Court*.

### ***Misrepresentations***

59. As set out in the whole of this claim, at all material times, the Defendants made representations to the Plaintiffs and other Class Members about the portability of their Hour Banks and about the health and welfare benefits available to them under the Plan.
60. Despite requests from the Plaintiffs and other Class Members to port their Hour Banks to their new provincial benefit plans, the Defendants did not transfer the Plaintiffs' and other Class Members' Hour Banks to their new benefit plans, even though their employers were still Merit companies in Canada, and even though the Plaintiffs and other Class Members had, at all material times, available hours in their Hour Banks.
61. The Defendants also denied paying health and welfare benefits to Class Members, even though their employers were still Merit companies in Canada, and even though the Class Members had, at all material times, a minimum of 150 hours in their Hour Banks.
62. The Defendants' conduct was contrary to the representations that it had made to the Plaintiffs and other Class Members, which included:
- (a) their Hour Banks were "portable between all Merit member companies across Canada";
  - (b) their benefits under the Plan would continue so long as they had a minimum of 150 hours in their Hour Bank;
  - (c) their benefits under the Plan would continue so long as their employer was a Merit member company in Canada;
  - (d) their Hour Bank was kept in their name, regardless of which participating employer they worked for;

(e) the Plan was “portable” which meant that they were “always covered on the job, between work – even during layoffs”; and

(f) such further misrepresentations and omissions as will be proven at trial (collectively, the “Misrepresentations”).

63. The Misrepresentations were untrue, inaccurate, deceptive, and misleading and were of such a nature that they might reasonably have deceived or misled the Plaintiffs and other Class Members – and the Misrepresentations did, in fact, deceive and mislead them.

### ***Breaches of the Competition Act***

#### *Section 52*

64. For the purpose of promoting – directly or indirectly – the use of the Plan and for the purpose of promoting – directly or indirectly – the Defendants’ business interests, the Defendants knowingly or recklessly made the Misrepresentations to the public, including to the Plaintiffs and other Class Members.
65. The Misrepresentations were false or misleading in a material respect and were contrary to section 52(1) of the *Competition Act*.
66. Although section 52(1.1) of the *Competition Act* does not require the Plaintiffs and other Class Members to have been deceived or misled by the Misrepresentations, they were – in fact – deceived or misled by the Defendants’ Misrepresentations.

#### *Section 52.01*

67. For the purpose of promoting – directly or indirectly – the use of the Plan and for the purpose of promoting – directly or indirectly – the Defendants’ business interests, the Defendants knowingly or recklessly sent, or caused to be sent, in emails to the Plaintiffs and other Class Members the Misrepresentations (including but not limited to the January 2020 Mercon Messenger email).
68. The Misrepresentations were false or misleading in a material respect and were contrary to section 52.01(2) of the *Competition Act*.



69. Although section 52.01(4) of the *Competition Act* does not require the Plaintiffs and other Class Members to have been deceived or misled by the Misrepresentations, they were – in fact – deceived or misled by the Defendants’ Misrepresentations.

*Section 36 – Statutory Damages*

70. As set out in the whole of this claim, the Defendants’ conduct – including the Misrepresentations – was contrary to Part VI of the *Competition Act*.
71. The Plaintiffs and other Class Members have suffered loss and damage because of the Defendants’ conduct.
72. Pursuant to section 36 of the *Competition Act*, the Plaintiffs and other Class Members can sue for and recover from the Defendants an amount equal to the loss or damage they have suffered, together with an additional amount the Court may allow for the cost of any investigation in connection with the Defendants’ statutory breaches and the cost of this proceeding.

***Breach of the Consumer Protection Act***

73. The Defendants were, at all material times, residents of Alberta, within the meaning of section 5 of the *Consumer Protection Act*.
74. The Plaintiffs and other Class Members had the right to the hours in their Hour Banks and had the right to receive health and welfare benefits and services under the Plan for their benefit and for the benefit of their dependants and families. Each individual Plaintiff and each Class Member was a “consumer” within the meaning of section 1 of the *Consumer Protection Act*.
75. In the course of the Defendants’ business, they provided health and welfare benefits and coverage and other services to the Plaintiffs and other Class Members. They also promoted the use of the Plan and benefits under the Plan. The Defendants were each a “supplier” within the meaning of section 1 of the *Consumer Protection Act*.

76. The Defendants' services under the Merit Trust and under the Plan and otherwise were provided to each individual Plaintiff and each Class Member primarily for personal, family, or household purposes and were "services" within the meaning of section 1 of the *Consumer Protection Act*.
77. The supply of services by the Defendants to each individual Plaintiff and each Class Member pursuant to the Merit Trust and the Plan and otherwise was a "consumer transaction" within the meaning of section 1 of the *Consumer Protection Act*.
78. As set out above and in the whole of this claim, the Misrepresentations were relied on by the individual Plaintiffs and other Class Members in connection with the consumer transactions when they decided to use the Defendants' services primarily for personal, family, or household purposes.
79. As set out above and in the whole of this claim, the Defendants' conduct and the Misrepresentations, which were directed at the individual Plaintiffs and other Class Members, were of such a nature that they might reasonably have deceived or mislead the Plaintiffs and other Class Members. And the Defendants, through the Misrepresentations, represented that the Plan involved rights that were different from the fact. The Defendants' conduct and the Misrepresentations constituted an "unfair practice" within the meaning of sections 6(3) and 6(4) of the *Consumer Protection Act*.
80. The individual Plaintiffs and other Class Members suffered damage or loss as a consequence of the Defendants' unfair practice and are entitled to statutory damages and restitution pursuant to sections 7, 13, and 142.1 of the *Consumer Protection Act*.

***Tort of Deceit***

81. The Defendants made the Misrepresentations to the Plaintiffs and other Class Members.
82. The Defendants knew of the falsehood of the Misrepresentations or, alternatively, the Defendants were reckless and ought to have known that the Misrepresentations were false.

83. The Misrepresentations caused the Plaintiffs and other Class Members to act and to pay premiums and other remittances to the Defendants.
84. The Plaintiffs and other Class Members suffered losses as a result of their actions.

***Unjust Enrichment***

85. The Defendants received financial gain and were enriched by the premiums and remittances paid by the Plaintiffs and other Class Members under the Plan and by the interest the Defendants earned on those monies. The Defendants were also enriched by the value of the hours in Class Members' Hour Banks after the Defendants unlawfully refused to transfer the Hour Banks to other Merit member companies. And the Defendants were enriched by the value of any health and welfare benefits that they unlawfully denied paying under the Plan.
86. The Plaintiffs and other Class Members suffered a corresponding deprivation, being the amount paid to the Defendants in premiums and remittances and the value the hours in Class Members' Hour Banks after the Defendants unlawfully refused to transfer the Hour Banks to the newly-formed provincial Merit association plans.
87. There was no juristic reason for the Defendants' enrichment or for the Plaintiffs' and other Class Members' corresponding deprivation.
88. The Plaintiffs and other Class Members are entitled to restitution equal to the Defendants' financial gain, including the increase in the value of the reserves held by the Defendants.

***Breach of Contract***

89. Both the Plan and the Benefits Agreement were contracts to which the Defendants and the Plaintiff Associations were parties.
90. The Plaintiffs and other Class Members were the beneficiaries of these contracts.
91. It was a term of both the Plan and the Benefits Agreement that:

- (a) the Defendants would be responsible for the cost of health and welfare benefits for the Plaintiffs and other Class Members and their dependants and their families so long as the Class Member's Hour Bank had a minimum of 150 hours in it (or was self-paid by the Class Member as permitted by the Plan);
- (b) the Plan would provide security to the Plaintiffs and other Class Members, and Class Members' benefits under the Plan would continue so long as their employer was a Merit company in Canada;
- (c) the Defendants would be responsible for the cost of health and welfare benefits under the Plan, even if a Class Member was between work or laid off;
- (d) the Hour Banks were portable between all Merit member companies across Canada; and
- (e) a Class Member's Hour Bank was kept in their name regardless of which participating employer they worked for.

- 92. The Defendants breached the terms of the Plan and the Benefits Agreement.
- 93. As set out in the whole of this claim, despite demand and in breach of the terms of the Plan and the Benefits Agreement, the Defendants wrongfully denied the Plaintiffs' and other Class Members' right to have their Hour Banks transferred to newly-formed provincial Merit association plans. The Defendants retained the value of those hours.
- 94. As set out in the whole of this claim, despite demand and in breach of the terms of the Plan and the Benefits Agreement, the Defendants failed to pay for health and welfare benefits to which the Plaintiffs and other Class Members were entitled under the terms of the Plan.
- 95. The Defendants knew, or ought to have known, of the Plaintiffs' and Class Members' entitlement to benefits under the Plan yet refused to honour their obligations and duties to make payment for same. And the Defendants failed to investigate the Plaintiffs' and Class Members' circumstances with due diligence to properly determine entitlement.

96. The Defendants retained the value of these benefits and the value of the premiums and remittances paid by the Plaintiff Associations and the employers of Class Members. And the Defendants retained the value of the interest made on these monies.
97. The Plan and the Benefits Agreement must be interpreted in accordance with the principles of *contra proferentem*. The Defendants drafted the Plan and the Benefits Agreement, so any ambiguities must be resolved in favour of the Plaintiffs and other Class Members.
98. If there are any contractual terms permitting the Defendants to deny paying benefits under the Plan or permitting the Defendants to deny transferring the Hour Banks, which is denied, these terms are unjust and unreasonable and are not binding.
99. The Defendants acted in bad faith, and their conduct constituted a breach of their duty of good faith and fair dealing.
100. The Defendants gained financial benefits from their wrongdoing and the Plaintiff Associations are entitled to disgorgement of the Defendants' wrongful financial gains, including the increase in the value of the reserves held by the Defendants.
101. In the alternative, the Plaintiff Associations are entitled to expectation damages.

### ***Negligent Misrepresentation***

102. As set out in the whole of this claim, the Misrepresentations were negligently made by the Defendants and were relied on by the Plaintiffs and other Class Members to their detriment.
103. The Plaintiffs and other Class Members suffered damages as a result of the Defendants' negligence and the Misrepresentations.

### ***Breach of Trust and Breach of Fiduciary Duty***

104. As Trustees, the Defendants, or alternatively Mercon and the Merit Trust, gave an undertaking of responsibility to act in best interests of Class Members.

105. The Defendants had discretionary power over the Plaintiffs and other Class Members, who were the beneficiaries of the Merit Trust and the Plan. The Defendants' power affected the legal or substantial practical interests of the Plaintiffs and other Class Members as beneficiaries.
106. The Defendants assumed responsibility for the Merit Trust, and they had title or control over the property of Merit Trust, including the premiums and remittances made by the Plaintiffs and other Class Members to the Plan.
107. The Memorandum of Association for Mercon states that an object of Mercon is to "establish and support or aid in the establishment and support of associations, funds, trusts or otherwise to benefit members and employees of the construction industry".
108. Contrary to the object of Mercon's Memorandum of Association and contrary to the purposes of the Merit Trust and the Plan, the Defendants acted in their own self-interest and to the detriment of the members and employees of the construction industry by:
  - (a) Wrongfully engaging in a course of conduct with the Plaintiff Associations that was designed and/or intended to lead to the termination of the relationship between the Defendants and the Plaintiff Associations and the Benefits Agreement, in such a fashion that the Defendants would retain reserves built on contributions by the Plaintiffs and other Class Members;
  - (b) wrongfully denying the Plaintiffs' and other Class Members' right to have their Hour Banks transferred to the Plaintiff Associations or to other Merit member companies in Canada, and by wrongfully failing to pay for health and welfare benefits to which the Plaintiffs and other Class Members were entitled under the terms of the Plan.
109. As a result of the Defendants' breach of trust and/or breach of fiduciary duty, the Plaintiffs and other Class Members claim disgorgement of the value of the premiums and remittances made by the Plaintiffs and other Class Members to the Plan and to the increase in value of the reserves held by the Defendants flowing from these payments by the Plaintiffs and other Class Members.

### **III. DAMAGES**

110. As a result of the Defendants' conduct, including the Misrepresentations, the Plaintiffs and other Class Members have suffered loss and damage.
111. The loss or damage suffered by the Plaintiffs and other Class Members includes but is not limited to:
- (a) entering into the Plan when they would not have otherwise done so;
  - (b) the cost of premiums and remittances paid to the Defendants;
  - (c) the increase in the value of the reserves held by the Defendants as a result of the premiums and remittances paid to the Defendants and the interest earned on those monies;
  - (d) the value of the hours left in the Hour Banks that the Defendants refused to transfer to the Plaintiff Associations or their member firms or to Class Members' new benefit plans, despite the Class Members' employers being Merit member companies; and
  - (e) other losses as may be proven at trial.

### **IV. REMEDIES SOUGHT**

112. As against the Defendants, the Plaintiffs and other Class Members claim the following relief, with such amounts to be allocated among the Plaintiffs and other Class Members as this Honourable Court deems fit:
- (a) an order certifying this action as a class proceeding pursuant to the *Class Proceedings Act*, SA 2003, c C-16.5 and appointing the Plaintiffs as Representative Plaintiffs for the Class;
  - (b) a declaration that the denial of the transfer of Plaintiffs' and other Class Members' Hour Banks was contrary to the terms of the Plan;
  - (c) a declaration that the refusal to pay benefits to the Plaintiffs and other Class Members was contrary to the terms of the Plan;
  - (d) compensatory damages, including general and special damages;

- (e) statutory damages pursuant to the *Competition Act*, RSC 1985, c C-34 and the *Consumer Protection Act*, RSA 2000, c C-26.3;
- (f) restitution equal to the Defendants' wrongful financial gains, including the increase in the value of the reserves held by the Defendants;
- (g) disgorgement of the Defendants' wrongful financial gains, including the increase in the value of the reserves held by the Defendants;
- (h) interest on the amount of the judgment pursuant to the terms of the *Judgment Interest Act*, RSA 2000, c J-1;
- (i) any applicable Goods and Services Tax pursuant to the terms of the *Excise Tax Act*, SC 1985, c E-14, Part IX, including a gross-up sufficient to satisfy any Goods and Service Tax levy (GST), which the Plaintiffs and other Class Members may be obliged to pay on any amounts awarded;
- (j) an order for distribution, among the Plaintiffs and other Class Members, of the aggregate assessment of monetary relief awarded;
- (k) costs of this action on a solicitor/client basis or on such other basis as this Honourable Court may see fit;
- (l) costs of this action and the costs of any investigation into the Defendants' conduct pursuant to the *Competition Act*, RSC 1985, c C-34; and
- (m) such further and other relief as counsel may advise and this Honourable Court may allow.

113. The Plaintiffs propose that this action be tried in the City of Edmonton in the Province of Alberta.

#### **NOTICE TO THE DEFENDANTS**

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada



You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Edmonton, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's(s') address for service.

**WARNING** If you do not file and serve a statement of defence or a demand of notice within your time period, you risk losing the lawsuit automatically. If you do not file, or do not serve, or are late in doing either of those things, a court may give a judgement to the plaintiff(s) against you.