



No. L021149
Vancouver Registry

In The Supreme Court Of British Columbia

Between:

Peter Gregg

Plaintiff

And:

Freightliner Ltd., doing business as Western Star
Trucks, Trust Company A, The Canada Trust
Company and CIBC Mellon Trust Company

Defendants

Brought Pursuant to the *Class Proceedings Act*

AFFIDAVIT OF DAGMAR DLAB

I, Dagmar Dlab, Barrister & Solicitor of 111 Smithe Street, in the City of Vancouver, Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am, with Murray Tevlin and Dan Gleadle, counsel for the Plaintiff, and as such have knowledge of the facts and matters hereinafter deposed to except where stated to be made on information and belief, and where so stated I verily believe them to be true.

DEFINED BENEFIT PLANS AND DEFINED CONTRIBUTION PLANS

2. The following quote from an article titled “Pension Plans and the Law of Trusts” by Eileen E. Gillese, a former lawyer specializing in pension law and the law of trusts, former Dean of the Faculty of Law, University of Western Ontario, and now an Ontario Court of Appeal judge, provides an explanation of defined contribution and defined benefit plans:

“In a defined contribution pension plan, the amount to be contributed by and on behalf of a member is specified. The contributions are credited to each plan member and accumulated with interest. At retirement, the pension consists of the funds in the account (i.e. the contributions plus investment income). The funds are used to purchase an annuity and it is the annuity which is paid on a monthly basis to the retired member as a pension. Defined benefit pension plans are so termed because the benefit to be paid to each member of the pension plan on retirement is a set, or defined, amount. The amount is calculated based on a formula, found in the plan document, related to the member’s length of service, or length of service plus earnings.”

HISTORY OF THE WESTERN STAR PENSION PLAN FOR BRITISH COLUMBIA EMPLOYEES

3. I have reviewed the documents relevant to the Freightliner defined benefits pension plan for non-bargaining unit employees, and its various predecessor plans, which I received from the Pension Standards Branch of British Columbia, the Ontario Financial Services Commission Pension Division, and the defendant Freightliner Ltd. (“Freightliner”). Based on my review, I have prepared the following historical summary of pension plans in place from time to time for Freightliner’s non-bargaining unit employees.

1. The White Western Star Division Pension Plan (1967 to December 31, 1974)

4. In about 1967, the White Motor Corporation of Canada Limited (“White Motor”), a British Columbia company, began carrying on business in British Columbia, as the “Western Star Division”, a business unit that manufactured trucks at it’s a new truck plant in Kelowna, British Columbia.

5. White Motor established a pension plan for its British Columbia employees called the White Western Star Division Pension Plan. It appears that the plan was not registered with any regulatory authority. We have had limited success to date in compelling the production of documents regarding this plan.

6. Prior to and after commencement of this proceeding, counsel for the plaintiff made efforts to obtain historical pension plan documents from the pension regulatory authorities in British Columbia, Ontario, and from Freightliner. In disclosure with respect to the predecessor plans for the Western Star Trucks Pension Plan for the period preceding January 1, 1975, we did not receive any documents expressly stated to relate to the White Western Star Division Plan, but received the plan texts for:

- (a) the Cockshutt Farm Equipment of Canada Limited Pension Plan effective February 1, 1962 (the “Cockshutt Pension Plan effective February 1, 1962), a copy of the relevant portions of which is attached hereto and marked Exhibit “A”; and
- (b) the Cockshutt Farm Equipment of Canada Limited Pension Plan effective January 1, 1966 (“Cockshutt Pension Plan effective January 1, 1966”), a copy of the relevant portions of which is attached hereto and marked Exhibit “B”.

2. The White Motor Pension Plan (January 1, 1975 to March 30, 1981)

7. Effective January 1, 1975, the Board of Directors of White Motor amalgamated the following three pension plans into the White Motor Corporation of Canada Limited Pension Plan for Salaried and Hourly Non-Bargaining Employees (the “White Motor Pension Plan”):

- (a) the White Farm Equipment – Cockshutt Plan (1966), registered in Ontario under C-877 (the “White Farm Equipment Plan”);
- (b) the White Trucks, a Division of White Motor Corporation of Canada Retirement Plan, registered in Quebec under c-18086 (the “White Trucks Plan”); and

(c) the White Western Star Division Pension Plan (referred to above at part 1), which appears to have been unregistered.

Attached hereto and marked Exhibit "C" is a copy of the Resolution of the Board of Directors dated May 12, 1976 in that regard.

8. The Resolution shows that the Canada Trust Company was appointed trustee effective January 1, 1975.

9. The new amalgamated plan was restated. A copy of relevant portions of the White Motor Pension Plan effective January 1, 1975 is attached hereto and marked Exhibit "D".

10. A trust agreement between White Motor and the Canada Trust Company made as of June 21, 1976 (the "Trust Agreement dated June 21, 1976") provided for the transfer of the funds held in the White Western Star Division Pension Plan and certain assets held in the White Trucks Plan, into the fund for the White Farm Equipment Plan. Attached hereto and marked Exhibit "E" is a copy of relevant portions of the Trust Agreement dated June 21, 1976.

11. Attached hereto and marked Exhibit "F" is a copy of relevant portions of the Employee Handbook for the White Motor Corporation of Canada Limited Pension Plan for Salaried and Hourly Non-Bargaining Employees as amended through January 1, 1978.

3. The Western Star Trucks Pension Plan effective April 1, 1981

12. In January 1981, via an agreement entitled "Truck Asset Purchase Agreement", White Motor sold the assets associated with the operation of the Kelowna truck plant to Western Star Trucks Inc. ("Western Star Trucks"), a new company incorporated in British Columbia. At or about that time, Western Star Trucks agreed to employ the persons who had until then been employed by White Motor in its truck operations. It is the plaintiff's position in this proceeding that Western Star Trucks became the successor employer for all of the employees it employed, who had prior White Motor service. Pursuant to the purchase agreement between White Motor and Western Star Trucks, Western Star Trucks agreed to assume responsibility for the continued payment of benefits due or to become due under the White

Motor Pension Plan. Attached hereto and marked Exhibit "G" is a copy of an extract from the Minutes of a Meeting of the Board of Directors of Western Star Trucks on February 11, 1982 in that regard. Attached hereto and marked Exhibit "H" are the relevant provisions of the Asset Purchase Agreement relating to the White Motor Pension Plan.

13. Effective April 1981, the White Motor Pension Plan was amended and restated in a plan entitled the "Western Star Trucks Inc. Pension Plan for Salaried and Non-Bargaining Employees" (the "Western Star Plan effective April 1, 1981"). Attached hereto and marked Exhibit "I" is a copy of relevant portions of the plan text for the Western Star Plan effective April 1, 1981.

14. The Western Star Plan effective April 1, 1981 was funded pursuant to a trust agreement between Western Star and the Canada Trust Company made as of April 1, 1981 (the "Trust Agreement dated April 1, 1981"). Attached hereto and marked Exhibit "J" is a copy of relevant portions of the Trust Agreement dated April 1, 1981.

4. The Western Star Trucks Pension Plan effective January 1, 1985

15. The Western Star Plan effective April 1, 1981 was amended and restated effective January 1, 1985 (the Western Star Plan effective January 1, 1985). Attached hereto and marked Exhibit "K" is a copy of relevant portions of the plan text for the Western Star Plan effective January 1, 1985. The Trust Agreement dated April 1, 1981 continued in effect at this time.

5. The Western Star Trucks Pension Plan effective January 1, 1988

16. The Western Star Plan effective April 1, 1985 was amended and restated effective January 1, 1988 (the Western Star Plan effective January 1, 1988). Attached hereto and marked Exhibit "L" is a copy of relevant portions of the plan text for the Western Star Plan effective January 1, 1988. The Trust Agreement dated April 1, 1981 continued in effect at this time.

17. Attached hereto and marked Exhibit "M" is a copy of the relevant portions of the Summary Booklet for the Western Star Trucks "Pension Plan for Non-Bargaining Employees" dated January 1, 1988 for those employed after January 1, 1985. There is also a booklet for those employed prior to January 1, 1985. The provisions attached hereto as Exhibit K are the same in both versions of the booklet.

6. The Western Star Trucks Pension Plan effective January 1, 1998

18. The Western Star Plan effective January 1, 1985 was again amended and restated effective January 1, 1998. Attached hereto and marked Exhibit "N" is a copy of relevant portions of the plan text for the Western Star Plan effective January 1, 1998. This is the current plan text for the non-bargaining Western Star employees in British Columbia.

19. The Western Star Pension Plan is currently funded pursuant to a trust agreement between Western Star Trucks and the defendant CIBC Mellon Trust Company made as of March 1, 2000 (the "Trust Agreement dated March 1, 2000"), a copy of relevant portions of which is attached hereto and marked Exhibit "O" .

20. Attached hereto and marked Exhibit "P" is a copy of the relevant portions of the Summary Booklet for the Western Star Trucks Inc. Pension Plan for Non-Bargaining Employees for those employed after January 1, 1985. There exists a Summary Booklet for those employed prior to January 1, 1985. The provisions attached as Exhibit N are the same for both versions of the Summary Booklet.

21. On June 30, 2001 Western Star Trucks amalgamated with the Defendant Freightliner Ltd. ("Freightliner"). Attached hereto and marked Exhibit "Q" is the corporate search for Freightliner.

DEFENDANTS' CONDUCT

22. I have reviewed the Actuarial Reports and Annual Information Returns filed by Western Star Trucks with the pension authorities, and have prepared a chart summarizing the information shown on the face of those documents, in easily accessible format. The chart is

attached hereto and marked Exhibit "R". The information contained in the various columns of the spreadsheet shows the following:

(a) the amount of employer contributions on an annual basis for the period 1981 to 2000; and

(b) the expenses charged by the employer to the pension fund for the period 1988 to 2000.

A blank space signifies that we did not have reliable information for that particular entry.

23. The Annual Information Returns, and where available, supporting financial information filed in support, with respect to the Western Star Plan effective January 1, 1998 and predecessor plans from the years 1981 to the year 2000, demonstrate, that the employer took contribution holidays in the following years: 1981, 1982, 1983, 1984, 1985, 1986, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995 and 1996. Western Star Trucks took partial contribution holidays in 1998, 1999 and 2000. It appears on the face of the documents that the employer made full contributions to the plan only in three years, being 1982, 1987 and 1997 in the course of the period 1981 to 2000.

24. At all times since at least 1988, the employer used monies from the pension funds to cover expenses relating to these funds. These expenses have ranged from \$37,244 to \$386,209 per year. We do not have financial information for the years preceding 1988 regarding the expenses of the fund. The expenses charged to the fund include legal fees associated with Western Star Trucks' application to the Pension Commission of Ontario in 1993 for consent to withdraw surplus funds.

25. In March 1985 Western Star Trucks withdrew \$2,813,000 from the surplus assets of the Western Star Pension Plan. Attached hereto and marked Exhibit "S" is a copy of relevant portions of the Actuarial Report as at January 1, 1985 confirming this withdrawal.

26. In 1992 Western Star Trucks filed an application with the Pension Commission of Ontario for consent to withdraw a surplus in the pension fund of \$2,761,200 out of an

estimated surplus of \$3,651,000 as a June 30, 1992. The Pension Commission of Ontario, Chaired by Eileen Gillese, later the Dean at the Faculty of Law at the University of Western Ontario, and now a Justice of the Ontario Court of Appeal, heard the application on March 25 and May 27, 1993 and in written reasons, denied the relief sought by Western Star Trucks. Attached hereto and marked Exhibit "T" is a copy of the Reasons for Decision of the Pension Commission of Ontario dated September 21, 1993 in that regard. This document is a very helpful review of historical transactions relating to this pension plan.

27. The most recent actuarial valuation we have reviewed in respect of the Western Star Trucks Pension Plan conducted by actuaries appointed by Western Star Trucks as at December 31, 2000 showed that the Western Star Trucks Pension Plan had an actuarial surplus of \$3,416,775 on a going concern basis and an actuarial surplus of \$4,864,064 on a solvency basis after providing for all of the plan's liabilities. In the calculation of the solvency surplus the actuaries included a reserve for plan solvency expenses of \$481,500. Attached hereto and marked Exhibit "U" is a copy of the relevant portions of the Actuarial Valuation for the Western Star Plan as at December 31, 2000.

28. We have been unsuccessful to this date in compelling production of annual returns or financial statements or actuarial valuations since the December 31, 2000 valuation. However at the time of the last valuation the actuarial value of assets was stated to be \$24,484,844, and a going concern actuarial surplus of \$3,416,775.

29. Mr. Gregg recently received a form of statement showing the present plan assets to be "approximately \$21 million". The apparent difference between the December 31 2000 plan asset value and the recent approximate asset value is apparently the same amount as the plan surplus was in as at December 31, 2000. Attached hereto and marked Exhibit "V" is a copy of the relevant portion of the said statement.

CLASS ACTION PROCEEDINGS

30. I have identified the following common issues in these proceedings:

Class A:

- a. Was the employment of each of the class members subject to a contract of employment of indefinite duration, terminable upon notice and/or pay in lieu of notice, if dismissed without cause?
- b. Did the letter dated December 3, 2001 from the Defendant Freightliner to each of the class members provide “working notice” that was sufficiently clear and unequivocal as to constitute working notice for the purposes of determining notice in the termination of the contracts of employment?
- c. Did Freightliner provide notice of termination to the class members?
- d. Are the members of the class entitled to damages equal to salary, bonuses and/or overtime they would have earned during the notice period?
- e. Are the members of the class entitled to damages for loss of benefits during the notice period equal to the costs of benefit replacement or their out-of-pocket losses suffered as a consequence of being without insurance coverage during the notice period?
- f. Are the class members entitled to compensation for the loss of all other benefits including FlexPlan benefits and the Daimler Chrysler New Vehicle Purchase/Lease Plan?
- g. Are the members of the class who participate in Freightliner’s defined benefit pension plan (the “Pension Plan”) entitled to compensation for the difference in value between their accounts at termination and at the end of the notice period?
- h. Are the members of the class entitled to compensation for loss of vacation pay?
- i. Are class members who will be taking early retirement, eligible for post retirement health and welfare benefits?
- j. Is there a term in the contract of employment that overtime would be paid for overtime worked by class members?
- k. Did the Defendant Freightliner stop paying overtime, and if so is that a breach of the contract?

- l. Did the Defendant Freightliner roll back wages for class members by 5%, and if so is that a breach of the employment contract?
- m. Was there a term of the employment contract that a bonus would be paid dependent upon the performance of the employee and the performance of the company, and if so was any such bonus paid, and if not, is that a breach of the employment contract?

Class B:

- a. Is the Defendant Freightliner required to wind up the Pension Plan?
- b. Is there a surplus of funds in the Pension Plan, and if so what is the amount?
- c. In the event of winding up the pension fund, who is entitled to the surplus?
- d. Did Freightliner, or its predecessor companies, improperly use funds from the Pension Plan to administer the plan? If so, are the Defendants Freightliner, The Canada Trust Company ("Canada Trust") and CIBC Mellon Trust Company ("CIBC Mellon") liable for this improper use?
- e. Did Freightliner, or its predecessor companies, improperly remove monies, at various times, from the Pension Plan, or any of its predecessor plans? If so, are the Defendants Freightliner, The Canada Trust and CIBC Mellon liable for this improper conduct?
- f. Did Freightliner, or its predecessor companies, improperly take contribution holidays with respect to the Pension Plan, or any of its predecessor plans? If so, are the Defendants Freightliner, Canada Trust and CIBC Mellon liable for this improper conduct?
- g. Did Freightliner, or its predecessor companies, fail to implement the Statement of Investment Policy and Procedures, properly monitor it and revise it in contemplation of the wind up of the Pension Plan? If so, are the Defendants Freightliner, Canada Trust and CIBC Mellon liable for this improper conduct?
- h. Are the class members entitled to an accounting, and a repayment of funds for the wrongful conduct described in paragraphs d. to g. above, together with interest at the rates that would have been earned if the funds had been part of the Pension Plan?

31. Messrs. Tevlin and Gleadle were originally retained by a group of four employees who had been given a letter advising of their possible dismissal from employment from Freightliner and its predecessors. I was retained by Messrs. Tevlin and Gleadle to assist with this matter.

32. By Spring 2002 we had been retained by about 30 such employees.

33. We were concerned with the administrative and professional burden on us, as a small group of specialized lawyers, to be able to launch and prosecute some 30 lawsuits containing many common issues, against the same Defendants. We were also concerned with the cost of the litigation to each individual plaintiff, and the total cost of the litigation to all plaintiffs, when added up.

34. At the same time more and more individual plaintiffs were seeking to retain us, almost on a daily basis. We were concerned that the burden of all these actions on the Court system, on us and on the individual plaintiffs would be too large to be practical or efficient, if taken one by one, as individual actions. As at a certain date in the Spring 2002 we stopped taking individual retainers and determined to proceed under the Class Proceedings Act, and we amended our web site (www.tevlingleadle.com) to give information to other employees who might otherwise have retained us individually.

35. As a result we did research into the proper basis for invoking the provisions of the Class Proceedings Act as a responsible and practical way of seeking access to justice for the plaintiffs and at the same time conserving scarce judicial resources.

36. I have reviewed the severance packages and personal circumstances of over 30 members of the proposed Class A. In my opinion the damages claimed by each of the employees on the various issues in this action, beyond that which is provided by the Severance Letters dated December 3, 2001, include proper notice or severance at common law and by contract; overtime claims; bonus claims; and benefits or compensation in lieu thereof.

37. An employee in Class A may have a claim in any one of the categories listed above. The individual claims may range from a few hundreds of dollars, to a few thousands of dollars, to as much as \$50,000.00.

38. There are over 200 persons in Class A, however Freightliner has been demanding releases from dismissed employees in exchange for severance payments, and the Class may have been reduced as a result.

39. I have received from the Pension Standards Branch of British Columbia and the Ontario Financial Services Commission Pension Division two large boxes containing relevant documentation with respect to the Freightliner defined benefits pension plan for non-bargaining unit employees, and its various predecessor plans. There are an estimated 3500 documents. We anticipate that many more documents will be disclosed in the course of the litigation.

40. From my review of these documents, it appears that the current actuarial surplus was in the range of \$3,416,775 as at December 30, 2000. With an estimated 400 people in Class B the average portion attributable to each member of the class of this surplus would be about \$8,500.00. I cannot today assess the range of damages recoverable by Class B members on the other issues relating to the pension, although some possible outcomes would produce that much money again, on average, for each Class B member.

41. The pension issues in this litigation raise complex issues which require expert assessment by an actuary and legal counsel. There are thousands of pages of documents relating to the pension plan that will be reviewed and considered by legal counsel and the actuary. An actuary dealing with pension surplus issues typically charges in excess of \$300 per hour. It is not feasible for each individual member of Class B to retain an actuary and legal counsel to resolve their claim with respect to the pension issue.

42. It is estimated that each individual claim under Class A would require at least a three day trial, and that the total cost of the litigation for each individual plaintiff would be approximately \$35,000, or more. As to the issues raised by Class B, it is estimated at this stage

Western Star and Predecessor Pension Plans

Fiscal Year	Employer Contributions			Fiscal Year	Expenses Charged to Fund									
	Required Employer Contributions	Surplus Used for Employer Contributions	Actual Employer Contributions for Current Service		Actuarial and Consulting Expenses	Audit Expenses	Custodial Expenses	Filing Fees	Investment Counselling Expenses	Legal Expenses	Source Document for Expense Data	Total Expenses		
1965				1965										
1966				1966										
1967				1967										
1968				1968										
1969				1969										
1970				1970										
1971				1971										
1972				1972										
1973				1973										
1974				1974										
1975				1975										
1976				1976										
1977				1977										
1978				1978										
1979				1979										
1980				1980										
1981	206,200.00	206,200.00	0.00	1981										
1982	265,400.00	0.00	265,400.00	1982										
1983	233,600.00	233,600.00	0.00	1983										
1984	260,700.00	260,700.00	0.00	1984										
1985	263,300.00	263,300.00	0.00	1985										
1986	267,950.00	267,950.00	0.00	1986										
1987	186,000.00	0.00	186,000.00	1987										
1988	354,517.00	354,517.00	0.00	1988	37,244.00							FS	37,244.00	
1989	348,106.00	348,106.00	0.00	1989	70,131.00							FS	70,131.00	
1990	321,576.00	321,576.00	0.00	1990									0.00	
1991	0.00	0.00	0.00	1991										
1992	276,924.84	276,924.84	0.00	1992	114,208.59	4,280.00	7,131.55		27,700.37	30,710.31		AS	184,030.82	
1993	287,107.00	287,107.00	0.00	1993	134,792.18		20,172.34		38,309.80	27,289.91		AS	220,564.23	
1994	454,212.00	454,212.00	0.00	1994	108,075.35	6,420.00	22,863.30		36,982.93	21,408.19		AS	195,749.77	
1995	483,592.00	483,592.00	0.00	1995	69,548.93		21,121.24		46,455.32			AS	137,125.49	
1996	729,926.26	729,926.26	0.00	1996	76,649.45		25,190.06		53,325.76	2,394.46		AS	157,559.73	
1997	1,298,313.14	0.00	1,298,313.12	1997			26,307.34					AS	26,307.34	
1998	859,323.00	346,082.00	513,241.00	1998	200,020.00	6,500.00	29,583.00	2,415.00	73,165.00	3,439.00		AS	315,122.00	
1999	1,234,020.00	466,567.00	787,453.00	1999	81,143.00	6,979.00	26,965.00	4,460.00	77,230.00	10,657.00		FS	207,434.00	
2000	1,340,545.84	346,082.00	954,463.84	2000	168,892.00	6,035.00	124,834.00	0.00	84,985.00	1,463.00		FS	386,209.00	
2001				2001										
2002				2002										
	9,671,313.08	5,646,442.10	4,004,870.96		1,060,704.50	30,214.00	304,167.83	6,875.00	438,154.18	97,361.87			1,937,477.38	

This is Exhibit "R" referred to in the affidavit of James D. Deb sworn before me at Vancouver this 23 day of July 2002

[Signature]
A Commissioner for Taking Affidavits for British Columbia