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*

DRAFT OUTLINE OF THE PLAINTIFF'S SUBMISSIONS ON MOTION FOR CERTIFICATION

Summary of Facts

1. The background facts to this case are outlined in the Affidavit of Peter Gregg sworn July 22, 2002 (the "Gregg Affidavit") insofar as the wrongful dismissal issues are concerned and the Affidavit of Dagmar Dlab sworn July 24, 2002 (the "Dlab Affidavit") insofar as the pension issues are concerned.

A. Overview of Mr. Gregg's Employment with the Defendant Freightliner

2. Mr. Gregg is currently an employee of the Defendant Freightliner. He was initially employed by a predecessor company, White Motor Co. ("White Motor") commencing on about June 23, 1973.

3. White Motor, commencing in about 1967, began carrying on business in the province of British Columbia as the "Western Star Division", a business unit that manufactured trucks at its Kelowna truck plant.

4. In about 1981, during Mr. Gregg's employment, White Motor sold its assets to Western Star Trucks Inc. ("Western Star Trucks"), which continued to manufacture trucks at its Kelowna truck plant. Western Star Trucks was amalgamated with Freightliner on or about June 30, 2001.

> See Exhibit "A" to the Gregg Affidavit for a copy of a corporate search for Freightliner showing the amalgamation

5. With the exception of a lay-off for just under a year, from December 31, 1982 to December 21, 1983, Mr. Gregg was continuously employed by White Motor, Western Star Trucks, and after the amalgamation, by Freightliner.

6. Mr. Gregg's current position with Freightliner is Project Manager, Major Projects. Throughout his career he has directed warehouse personnel, manufacturing personnel, military project personnel and project personnel. Mr. Gregg's office is located in the main office area to accommodate his responsibilities, which include liasing with all departments and employees. As a result, he is well aware of developments and employment issues affecting employees within the Kelowna plant.

7. Mr. Gregg's employment with Freightliner and its predecessors has at all times been subject to an oral contract of indeterminate term. His employment is also subject to a term that in the event of his termination, for reasons other than cause, he will be provided with reasonable notice of such termination, or pay in lieu of notice.

8. Mr. Gregg's current remuneration from Freightliner consists of the following:

(a) an annual base salary;

(b) an annual performance bonus depending on his performance and the performance of the truck plant;

(c) health and welfare benefits, including Medical Services plan coverage, extended health and dental coverage, life insurance coverage, and short and long term disability coverage;

(d) participation in a defined benefits pension plan to which the employer makes contributions on his behalf (the "Pension Plan");

(e) post-retirement benefits;

(f) vacation pay;

(g) participation in the DaimlerChrysler New Vehicle Purchase/Lease Plan;

(h) A pension enhancements program similar to, and in addition to, an RRSP, in which employees may tax shelter 11-13% of their annual salary (the "FlexPlan Benefits").

9. Mr. Gregg became a member of the Pension Plan soon after he commenced his employment with White Motor in 1973.

10. Before the formal amalgamation between Freightliner and Western Star, a series of meetings took place attended by all employees, where Freightliner representatives stated their firm intention of continuing and even expanding and updating, the Kelowna plant operations, including the employees within the DaimlerChrysler "family" and allowing them benefits such as enrolment in the DaimlerChrysler vehicle purchase plan, among other attractive advantages.

11. The non-bargaining unit employees of WSTI received a letter from their employer dated February 12, 2001 providing that commencing on February 19, 2001 WSTI would cease paying them for overtime work (the "February 12, 2001 Letter"). Western Star Trucks, and subsequently Freightliner, stopped paying its employees for overtime work as of February 19, 2001 as stated in the February 12, 2001 Letter. Although the February 12, 2001 Letter provides that exempt employees are eligible for the Freightliner Exempt Bonus Program beginning immediately based on 2001 performance, Mr. Gregg has deposed that he has not received any bonuses as promised, that he has spoken to

approximately 150 employees about this issue, and knows of no other employees who have received any bonuses at the Kelowna truck plant.

> See Exhibit "B" to the Gregg Affidavit for a copy of the February 12, 2001 letter.

12. The employees also received from Freightliner a memorandum dated September 27, 2001 addressed to Freightliner's non-bargaining unit employees advising that effective January 6, 2002 individual salaries and wages will be reduced by 5%. Commencing on January 6, 2001, Freightliner reduced all the salaries of non-bargaining unit employee by 5%.

> See Exhibit "C" to the Gregg Affidavit for a copy of the memorandum dated September 27, 2001.

13. In early October 2001 Freightliner announced that it would eventually be shutting down the Kelowna truck plant, and all operations associated with the manufacture of trucks in British Columbia.

14. On or about December 3, 2001 the Freightliner non-bargaining unit employees received letters concerning the termination of their employment effective September 30, 2002, unless "advised otherwise" (the "Severance Letters").

> See Exhibit "D" to the Gregg Affidavit for a copy of the Severance Letter provided to Mr. Gregg.

15. Due to the uncertainty caused by the letters dated December 3, 2001 concerning the future of their employment, many of employees have been unable to make plans for future employment without a clear understanding of when their employment will end.

16. All employees were advised that job offers might be made to various people for a transfer to the Freightliner plant in Portland Oregon. There will be between 60 and 70 persons transferred to Portland, Oregon in this way. It is still uncertain who these people will be.

17. A substantial number of non-union employees who would have received a Severance Letter, have been terminated prior to September 30, 2002. These people include the following:

(a) December 14, 2001: Jeff Bartel.

(b) December 21, 2001: Andrea Peterson, Darlene Heickel, Bruce Goett, Cheryl Stewart, Dawn McLaughlan, Holly Haverkamp, Helen Pinkney, Bob Harris, Chantal Ashwood, Linda Garand, Terry Magas, Marie Buray, Pam Van Hees, Cea Mavritsakis, Adam Schulhauser, Leslie Zambano, Chris Tilley.

(c) January 4, 2002: Bob Appleyard.

(d) March 28, 2002: Bob Juzwishyn and Terry Mitchner.

(e) April 12, 2002: Valda Fisher.

(f) April 26, 2002: Ellen Wilson and Peter Cimbaro.

(g) May 24, 2002: Karen Polson.

(h) May 31, 2002: Bob Clark.

(i) June 28, 2002: Dan Klein, Vada Martelli, Jack Maffin, Kerstin Gattwinkel, Howard Cunning, Darren Turner.

18. Mr. Gregg believes that most, if not all of the said persons listed with 2002 termination dates have been asked to sign a release of all claims in order to receive severance payments.

19. Since the commencement of the class action, Freightliner has altered its release to specifically require terminated employees from participating in the class action including the pension claims, as a condition of receiving a severance payment.

> See Exhibits "E", "F" and "G" to the Dlab Affidavit for copies of the form of Release requested from employees by Freightliner prior to the commencement of this class action, and two forms of release requested after the commencement of the class action.

20. Mr. Gregg knows of two particular individuals who have been told that they would not receive their severance payment unless a release is signed. Karen Polson and Howard

Cunning refused to sign off and as a result they have received no severance payment. Valda Fischer and Kerstin Gattwinkel were put in a position where they had to sign due to financial pressures, but they excluded the pension claim from the release.

21. Mr. Gregg recently received a letter dated June 25, 2002 advising him that his employment will cease on September 30, 2002.

> See Exhibit "H" to the Gregg Affidavit for a copy of the June 25, 2002 letter.

22. According to Peter Gregg there were, as at May 2, 2002, 217 non-bargaining unit employees employed at the Kelowna plant. In September 2000 there were 439 such employees. As of May 2, 2002 there were also approximately 440 members and beneficiaries under the Pension Plan.

23. The plaintiff seeks various declarations against the defendant Freightliner arising from the circumstances of their employment:

(a) that the notice of termination contained in the Severance Letter is invalid;

(b) that the plaintiff is entitled to reasonable notice and compensation for benefits in addition to those set out in the Severance Letter;

(c) that the plaintiff is entitled to payment of all unpaid overtime since February 19, 2001; and

(d) that the plaintiff is entitled to compensation for the 5% salary reduction since January 5, 2002.

B. History of the Pension Plan

24. The complex history of Freightliner's pension plan is explained in the Dlab Affidavit at paragraphs 4 to 29. The Affidavit was prepared based on Ms. Dlab's review of the documents she received from the Defendant Freightliner, the Pension Standards Branch of British Columbia and the Ontario Financial Services Commission Pension Division.

25. The Dlab Affidavit sets out six separate time periods since inception of the defined pension plan for the benefit of the Kelowna plant employees, corresponding to the current pension plan and the various predecessor plans since 1967:

(a) The White Western Star Division Pension Plan (1967 to Dec. 31, 1974)

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

(c) The Western Star Trucks Pension Plan effective April 1, 1981

(d) The Western Star Trucks Pension Plan effective January 1, 1985

(e) The Western Star Trucks Pension Plan effective January 1, 1988

(f) The Western Star Trucks Pension Plan effective January 1, 1998

26. The plan and trust agreement provisions for these various plans will be reviewed fully below. They are considered in the Dlab Affidavit at paragraphs 3 to 21, and the relevant provisions are at Exhibits "A" to "P" thereto.

27. Ms. Dlab reviewed the Actuarial Reports and Annual Information Returns filed by Western Star Trucks with the pension authorities, and prepared a chart summarizing the information shown on the face of those documents, in easily accessible format. The chart is attached to the Dlab Affidavit as Exhibit "R".

28. 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, 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.

29. During the course of the existence of the various plans, there accrued a substantial surplus of funds. Western Star Trucks on at least one occasion, in March 1985, withdrew $2,813,000 from the surplus assets of the Westerns Star Trucks Pension Plan.

See Dlab Affidavit paragraph 25 and Exhibit "S"

30. 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 at June 30, 1002. 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.

> See Exhibit "T" to the Dlab Affidavit or a copy of the Reasons for Decision of the Pension Commission of Ontario dated September 21, 1993.

31. 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.

32. 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.

> See Exhibit "U" to the Dlab Affidavit for a copy of the relevant portions of the Actuarial Valuation for the Western Star Plan as at December 31, 2000.

33. 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.

34. 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 about the same amount as the plan surplus was as at December 31, 2000.

> See Exhibit "V" to the Dlab Affidavit for a copy of the relevant portion of the said statement.

35. As Freightliner's operations will be shutting down in Kelowna on or about September 30, 2002, it is expected that the company will be winding-down its pension plan as required pursuant to the Pension Benefits Standards Act, R.S.B.C. 1996, c.352.

36. The plaintiff claims breach of trust and breach of fiduciary duty against all the defendants and seeks the following relief with respect to the pension issues:

(a) a declaration that the beneficiaries of the Freightliner pension plan are entitled to the existing surplus and that no part of the fund belongs to Freightliner;

(b) an accounting and repayment of all monies used for the administration of the Freightliner and predecessor plans;

(c) an accounting and repayment of all monies paid out to Freightliner or its predecessors at various times from the pension plan surplus;

(d) an accounting for and repayment of all contributions to the pension plan that should have been made by Freightliner or its predecessors, but were not; and

(e) an accounting and repayment of investment earnings that would have accrued to the pension plan but did not due to the failure of Freightliner and/or CIBC Mellon to implement a Statement of Investment Policy and Procedures ("SIIP"), monitor and revise it in contemplation of the wind-up of the pension plan.

Legal Argument

Overview of Class Proceedings

37. The plaintiff proposes that the following two classes be certified:

(a) all persons employed by the Defendant Freightliner Canada in British Columbia under a contract of indefinite duration who have received, or who will receive, notice of termination of their employment at any time on or after September 26, 2001 until final closure of the Kelowna truck plant. This class does not include employees who have executed a binding full and final release in favour of the Defendant Freightliner Canada, or who are proven dismissed for just cause, or who are unionized employees in a bargaining unit ("Class A"); and

(b) all persons who are members or former members of the pension plan for non-bargaining unit employees of Freightliner Canada, Western Star Trucks division, their respective surviving spouses, former spouses, designated beneficiaries, personal representatives, and all other persons who are beneficiaries of the said pension plan ("Class B").

38. The proposed common issues are set out in the Notice of Motion and will be considered fully below.

39. The Class Proceedings Act, R.S.B.C. 1996, c.50 (the "Act") governs this action. Part 2 of this legislation deals with certification. The requirements to be met by Mr. Gregg are described in section 4 of the Act. Section 4(1) provides as follows:

> 4. (1) The court must certify a proceeding as a class proceeding on an application under section 2or 3 if
>
> (a) the pleadings disclose a cause of action,
>
> (b) there is an identifiable class of 2 or more persons,
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members,

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, and

(e) there is a representative plaintiff who

a. would fairly and adequately represent the interests of the class

b. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

c. does not have, on the common issues, an interest that is in conflict with the interests of other class member.

40. The statutory language is mandatory. Thus the court must certify the proceedings if the requirements under s. 4 are met. This was highlighted for our guidance by Madam Justice Huddart for the majority in *Harrington v. Dow Corning Corp* [2000] B.C.J. No. 2237 (B.C.C.A.), leave to appeal to S.C.C. denied at [2001] S.C.C.A. at para. 10 and Mr. Justice Mackenzie in *Rumley v. British Columbia* [1999] B.C.J. No. 689 (B.C.C.A.) at para. 25, appeal dismissed at [2001] S.C.J. no. 39 (S.C.C.).

41. We submit that all the criteria have been met by the plaintiff, and that accordingly the class action must be certified as set out in the Notice of Motion filed by the plaintiff.

42. In considering this case the court will be mindful of the objectives of the Act. In the case of *Abdool v. Anaheim Management Ltd.* [1995] O.J. No. 16 the Divisional Court of the Ontario Court (General Division) per O'Brien J. considered the purpose of the equivalent legislation in Ontario as follows:

"It seems clear the three main objects of the class proceeding legislation are:

a. judicial economy, or the efficient handling of potentially complex cases of mass wrongs;

b. improved access to the courts for those whose actions might not otherwise be asserted. This involved claims which might have merit but legal costs of proceeding were disproportionate to the amount of each claim and hence many plaintiffs would be unable to pursue their legal remedies;

c. modification of behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore public obligations." (page 7)

43. These statements about the objects of the Ontario legislation have been held to apply equally to our British Columbia legislation in a number of British Columbia cases including *Endean v. Canadian Red Cross Society* [1997] B.C.J. No. 1209(B.C.S.C., per Smith J.), appeal allowed with respect to issue of striking out pleadings on issue of claim of the tort of spoliation at [1998] B.C.J. No. 724, leave to appeal to S.C.C. granted, and appeal discontinued as a settlement was reached, and *Hoy v. Medtronic Inc.* [2001] B.C.J. No. 1968 (B.C.S.C., per Kirkpatrick J.).

44. In this honourable Court, the latest statement on the subject is the judgement of Allan J., handed down July 31, 2002 in *Brogaard v. AG Canada* [2002] B.C.J.No.1775. There this Court relies on a direct analogy to the Ontario legislation, as follows:

"Class proceedings

[27] In *Hollick v. Toronto* (2001), 205 D.L.R. (4th) 19; 2001 SCC 68, at paras. 15 and 16, Chief Justice McLachlin, considering provisions of the Ontario class proceedings legislation similar to ours, underscored the intrinsic value of class proceedings:

> … class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.
>
> … In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> It is particularly important to keep this principle in mind at the certification stage…. Thus the certification stage is decidedly not meant to be a test of the merits of the action. Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether

> the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action:
>
> [emphasis in original]

1. The Pleadings Disclose a Cause of Action

Law

45. Section 4(1) (a) of the Act requires that the pleadings disclose a cause of action.

46. The test under s. 4(1)(a) of the Act to determine whether a cause of action exists is similar to the test applied in an application to dismiss a claim on the ground that it fails to disclose a cause of action. The only difference between the two tests is that the onus to show a cause of action falls upon the party bringing the class action, rather than on the party challenging the proceeding.

> *Elms v. Laurentian* [2001] B.C.J. No. 1284 (BCCA), Rowles, Ryan and Donald JJ.A. [para. 20].

47. When considering this issue, the courts have therefore considered the principles laid out in *Hunt v. Carey Canada Inc.* (1990) 49 B.C.L.R. (2d) 273 (SCC) in the context of an application to strike out pleadings. In that case, Madam Justice Wilson, writing for the Court, set out the test as follows:

> "Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as in the one that governs an application under R.S.C.O. 18. r.19; assuming that the facts as stated in the Statement of Claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence, should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the orders listed in Rule 19(24) of the British Columbia Rules of Court, should the relevant provisions of the plaintiff's statement of claim be struck out under Rule 19(24)(a).

Endean v. Canadian Red Cross Society [1998] B.C.J. No. 724 (B.C.C.A.), per Braidwood J.A). [paras. 6 to 8]

Elms, supra. [para. 21]

Brogaard, supra. [para 31]

48. The courts have adopted a low threshold for this requirement. Mr. Justice Winkler stated in *Edwards v. Law Society of Upper Canada* [1995] O.J. No. 2900 at para. 3 that:

> "There is a very low threshold to prove the existence of a cause of action…the court should err on the side of protecting people who have a right of access to the courts…"

49. Also, Allan J. in *Brogaard,* supra, at para 30 recently stated as follows:

> "The applicable test
>
> It is beyond dispute that the Court will refuse to certify an action on the basis that the pleadings do not disclose a cause of action only if it is plain and obvious that the plaintiffs cannot succeed… The threshold is a very low one."

50. In *Abdool*, supra. Moldaver J. stated the following with respect to this issue:

> "The principles to be applied when considering whether pleadings support a legal cause of action are as follows:
>
> i. All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
>
> ii. The defendant, in order to succeed, must show that it is plain and obvious beyond doubt that the plaintiffs could not succeed;
>
> iii. The novelty of the cause of action will not militate against the plaintiffs; and
>
> iv. The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies."

51. This passage from *Abdool*, supra. was cited with approval by the Mr. Justice Smith of the British Columbia Supreme Court in *Endean*, supra. at para. 26 and by Madam Justice Allan in *Brogaard,* supra. at para 33.

Application to the Plaintiff's Case

Declaration that the Working Notice is Invalid.

52. The issue is whether the Severance Letter dated December 3, 2001 from the Defendant Freightliner to each of the class members provided "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.

- **The notice is not specific and unequivocal.**

53. The notice given by Freightliner to its employees was set out in the Severance Letter as follows:

> "This letter will confirm that your employment with Western Star Trucks, A Division of Freightliner Ltd. (the "Company") will cease, effective September 30, 2002 unless you are advised otherwise. The final date of your employment will be referred to as your "release date"…
>
> " The combined amount of working notice and severance pay is based upon your date of hire as well as other factors. The severance payment shall equal [amount] months' salary. Your working notice will be from the date of this letter to your release date. For example, if your release date is September 30, 2002, you will have been given 10 months working notice and the above severance payment…
>
> You will receive a letter confirming your release date and details regarding the specifics of your final pay prior to your release date". [our emphasis]

54. It is submitted that this notice is unclear, equivocal and uncertain.

55. To be effective a notice of termination must be specific and unequivocal. It must clearly communicate to an employee that his or her employment will end on a certain date. This principle has been stated by Mr. Justice Wood in *Yeager v. R.J. Hastings Agencies Ltd.*, [1984] B.C.J. No. 2722 (B.C.S.C.):

> "Notice of dismissal must be specific and unequivocal and it must be clearly communicated to the employee if it is to be effective in law. The onus of proving that such a notice has been given rests upon the

> employer who seeks to raise it as a defence to an action for damages for wrongful dismissal."

56. In *Gibb v. Novacorp International Consulting Inc.*, [1990] B.C.J. No. 1705 (B.C.C.A), Mr. Justice Wood considered this same issue further and stated at page 3 that:

> "I do not think that in order to be specific and unequivocal, the notice given must necessarily use the words "you are hereby dismissed effective …" or some such equivalent. If the words used are such as would lead a reasonable person to the clear understanding that his employment is at an end as of some date certain in the future, it may well be that specific, unequivocal notice has been clearly communicated. It must in every case depend on all of the circumstances in evidence."

57. Mr. Justice McFarlane of the British Columbia Court of Appeal applied the above principles in his majority decision in *Kalaman v. Singer Valve Co.* [1997] B.C.J. No. 1393, and found that a notice given to an employee that his future employment with the company would be determined after a review of medical information was equivocal and therefore did not constitute effective working notice.

58. Professors Geoffrey England and Roderick Wood in *Employment Law in Canada*, Butterworths 3rd ed., explain the policy behind the above principles as follows:

> "The policy is to ensure that the employee has clear foreknowledge of exactly when his work or her work is to end so that he or she can make the necessary preparations."

59. The authors state that normally a valid notice of termination must specify the exact date when employment will end, but in exceptional circumstances this may not be necessary. One such exception, they say, can be found in *Gibb v. Novacorp*, supra. They conclude as follows:

> "Nevertheless, employers are well advised to specify the exact date of dismissal in order to avoid any doubts that notice to terminate is being served."

60. Evidence of surrounding circumstances may be considered in determining whether notice is clear and unequivocal.

Kalaman, B.C.C.A. decision, supra. at para. 44.

61. In *Royster v. 3584747 Canada Inc.* [2001] B.C.J. No. 136 the British Columbia Supreme Court, per Kirkpatrick J., recently found in circumstances similar to the present case, that the purported notice was invalid.

62. More recently, on July 9, 2002, the Ontario Court of Appeal in *Prinzo v. Baycrest Centre for Geriatric Care*, [2002] O.J. No. 2712 considered notice contained in two letters dated November 27 and January 29, that did not provide a date certain about when the plaintiff's position would be eliminated. Mr. Justice Weiler, writing for the court, held that such notice was not clear and unequivocal, and was therefore invalid. Referring to one of the letters he noted:

> "While the letter of January 29 confirmed the layoff as being permanent, it too indicated that the effective date of termination was to be arranged, and therefore did not contain a date certain for termination of employment. No one at Baycrest ever gave Prinzo a date certain for termination of her employment until she was given the March 11 letter stating that her last day of employment would be March 31, 1998."

The court therefore found that notice of termination wasn't effective until March 11, 1998.

63. In *Brunette v. A.V. Carlson Construction Co.* [1993] B.C.J. No. 20 (B.C.S.C.) Mr. Justice Holmes for this court found that various discussions about the employee's termination did not constitute effective notice because a specific date of termination was not given to the employee.

64. In *Lee v. BICC Phillips Inc.* [1997] B.C.J. No. 1282 Madam Justice Boyd of this court found that notice of termination was not provided or confirmed until a clear end date was given to the employee.

65. In determining whether the notice given by Freightliner is effective it is submitted that the court should be mindful of the purpose for which reasonable notice is given in case such as the present one.

66. It is submitted that the circumstances in the present case speak of uncertainty and of a "wait and see attitude" as described in *Kalaman*, B.C.C.A. decision, supra. at para. 47.

67. The Gregg Affidavit outlines some of the difficulties the employees have faced due to the uncertainty created by the Severance Letters. Furthermore as explained in the Gregg Affidavit at least 32 employees have been in fact released from their employment prior to September 30, 2002.

Gregg Affidavit paragraphs 22 to 28.

- **The notice has been made equivocal by subsequent conduct.**

68. Where the expectations of further employment with the company in an alternate form are raised, notice has been found to be equivocal. A "climate of uncertainty" with respect to the plaintiff's employment has been created.

Reynolds v. First City Trust Co. [1989] B.C.J. no. 1684 (B.C.S.C.)

Kalaman v. Singer Valve Co., [1996] B.C.J. No. 814 (B.C.S.C. Stromberg-Stein J.) (upheld on appeal)

Luchuk v. Sport B.C. [1984] B.C.J. No. 2878 (B.C.S.C., per Spencer J.)

69. Where there are assurances by an employer to an employee that he has not been terminated and would be re-employed in the event of the non-completion of the sale of the company, notice of termination in a severance offer was found to be equivocal.

Ostick v. Novacorp International Consulting Inc. [1989] B.C.J. No. 165 (B.C.S.C. per Sheppard L.J.S.C.)

70. In *Holmes v. Irving Shipbuilding Inc.* [2001] N.B.J. No. 307 (New Brunswick Court of Queen's Bench-Trial Division per Glennie J.) notice of termination became equivocal after the employee was granted a new position with the employer, but later was terminated.

71. In the Western Star case there were suggestions to many employees of continued employment with Freightliner in Portland. In addition the severance letter implies the possibility that employment would extend beyond September 30, 2002.

72. It is clear the Plaintiff has satisfied the requirement that it has a cause of action on the above grounds against Freightliner, and Freightliner is unable to show that "it is plain and obvious beyond doubt" the plaintiff could not succeed.

Entitlement to Notice: Declaration that the Plaintiff is entitled to reasonable notice and compensation for benefits in addition to those set out in the proposal contained in the Severance Letter:

73. The Supreme Court of Canada has recognized the employment relationship as one of the most fundamental aspects of a person's identity, the imbalance of power between employers and employees, especially at termination, and has stated that employees are entitled and deserving of the court's full protection: *Wallace v. United Grain Growers Ltd.* [1997] 3 SCR 701 per Iacobucci J.

74. In *Wallace*, supra. at paras. 65 and 66, Iacobucci J. summarized the principle governing reasonable notice a follows:

> "In the absence of just cause, an employer remains free to dismiss an employee at any time provided that reasonable notice of termination is given. In providing the employee with reasonable notice, the employer has two options: either to require the employee to continue working for the duration of the period or to give the employee pay in lieu of notice….
>
> In the event that an employee is wrongfully dismissed, the measure of damages for wrongful dismissal is the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled…"

75. The determination of the reasonable period of notice is made with regard to various factors set out in the case law. The classic statement regarding reasonable notice is *Bardal v. The Globe & Mail* (1960), 24 DLR (2d) 140 (Ont. High Court)(per McRuer CJHC):

> "The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."

76. The assessment of damages for reasonable notice includes not just salary but other benefits incidental to the employment being terminated.

Ansari v. BC Hydro and Power Authority [1986] BCJ No. 3005.

Mandell v. Apple Canada Inc., [1990] BCJ No. 1444

Nygard v. Robinson [1990] BCJ No. 1155

Gillies v. Goldman Sachs Canada Inc., [2000] B.C.J. No. 410

77. In his text regarding Canadian employment law, Levitt states:

> "In addition to the loss of salary which an employee would have earned during the period of notice, courts have awarded damages to compensate for the following losses:
>
> (a) bonuses;
>
> (b) stock dues;
>
> (c) club dues;
>
> (d) stock options;
>
> (e) pension, insurance, medical plans;
>
> (f) moving expenses;
>
> (g) vacation pay, and
>
> (h) other prerequisites which the employee could reasonably have expected if employment had continued." (pp.335-336).

78. The precedential and practical basis compelling the award of compensation for all lost benefits in the case of a wrongful dismissal in well understood through judgements of this Court and of our Court of Appeal. A good summary appears in the trial decision in Gillies v. Goldman Sachs Canada, supra (appeal increasing notice period and damages allowed, and appeal on other aspects of the judgement dismissed – see [2001] B.C.J. No. 2542, 2001 BCCA 683)commencing at Para 57 of the trial judgement, as follows:

> [56] The plaintiff's period of employment with the defendant given the requirement that he receive one year's notice results in his employment being extended to April

30, 1999, and the plaintiff submits that the plaintiff is entitled to his total compensation up to that date from all sources.

[57] Southin J.A. in *Nygard International Limited v. Robinson* (1990), 46 B.C.L.R. (2d) 103, a 1990 decision of the British Columbia Court of Appeal, wrote the following passage in her reasons for judgment at page 106;

> I approach the matter this way. When a contract is repudiated and the innocent party accepts the repudiation, which in my opinion is what happened here, the contract remains alive for the purpose of assessing the compensation to be paid. That compensation, that is to say, damages for the breach are what the innocent party would have received or earned depending on the nature of the contract had it been performed according to its terms. Here had it been performed according to its terms it would have been terminated within 30 days and thus, in my opinion, the defendant, the respondent in this Court, was entitled to whatever amount he would have earned in that 30 days according to the evidence. In this case that is approx-imately a month's salary and commission.

[58] I refer to *Mandell v. Apple Canada Inc.* (1991), 34 C.C.E.L. 319 (B.C.S.C.), a decision of Huddart J., as she then was. At page 326 of her reasons for judgment Huddart J. opined as follows:

> Madam Justice Southin made it clear that damages are to be measured by "what the innocent party would have received or earned depending on the nature of the contract had it been performed according to its terms"...

[59] Huddart J. continued with the following observations:

> If one of those terms is reasonable notice of termination, the notice of termination cannot be effective immediately for the purpose of determining the benefits to which the employee would have been entitled had his employment continued according to the terms of the contract. The contract must remain alive for the purpose of determining the value of those benefits. Otherwise the innocent party would not be adequately compensated for the harm the breach of contract has done him.

[60] Had Mr. Mandell received eight months' notice, he would have remained an employee until the end of that eight month period. In the headnote of Mandell there appears the following passage:

> Had the plaintiff received adequate notice of his termination, effective August 12, 1990, he would have been entitled to participate in the employee stock purchase plan for the second half

> of 1990. He was entitled to be compen- sated for the loss of the opportunity to participate in the plan.

[61] It would appear that the law is as enunciated by Southin J.A. and Huddart J. (as she then was) in *Nygard* and in *Mandell*, and those authorities have been cited with approval by subsequent decisions.

Cases on loss of bonus:

79. In *Gillies v. Goldman Sachs* Canada, supra., the learned trial Judge went on to summarize the following in respect of the law as it applies to bonus due to a wrongfully dismissed employee, commencing at para 62:

> 62] With respect to the plaintiff's bonus entitlement counsel for the plaintiff describes the issue as not being whether the bonus is discretionary or not, but whether it was an integral part of his compensation. He submits that damages are awarded for bonuses earned during the notice period if the bonuses are found to be an integral part of an employee's compensation.
>
> [63] I have accepted the submission of counsel for the plaintiff that the bonuses in question here must be considered to be an integral part of the plaintiff's compensation. Amongst the factors submitted by counsel for the plaintiff as germane to this issue are the following:
>
> > 1. A bonus is received each year although in different amounts;
> >
> > 2. Bonuses are required to remain competitive with other employers;
> >
> > 3. Bonuses were historically awarded and the employer had never exercised his discretion against the employee;
> >
> > 4. The bonus constituted a significant component of the employee's overall compensation.
>
> [64] I find all of the aforesaid factors to apply with respect to the bonus situation of this plaintiff. There are many authorities post 1985 which have applied the aforesaid factors and two are Ryshpan v. Burns Fry Limited, (1995), 10 C.C.E.L. (2d) 235 (Ont. Gen. Div.4) and Hannan v. Methanex Corp. (1998), 37 C.C.E.L. (2d) 228 (B.C.C.A.). Having accepted the plaintiff's submission that the bonus was integral to his compensation, I find that the plaintiff is entitled to damages for his bonus during the notice period.
>
> See also *Robinson v.Nygard* ,(BCCA), supra, and *Mandell v. Apple* (BCSC) supra.

80. Our Court of Appeal, in *Gillies v Goldman Sachs* 2001 BCCA 683, approves of the trial judges approach as to benefits generally, as can be seen at paragraphs 16 through to 20, reviews some evidence and concludes, on this point at para 25, as follows:

> [25] In my view, it is an inevitable conclusion that everyone employed by Goldman Sachs on both March 30 and May 3, 1999 was entitled to formula restricted stock units under the terms of the IPO and I have no hesitation in concluding that Mr. Gillies was entitled to participate in the formula restricted stock unit portion of the IPO in the same way as other employees, if the period of reasonable notice extended past May 3, 1999.

81. This approach is equally applicable to all benefits which the wrongfully dismissed employee would probably have received, during the proper notice period.

Loss of Pension

82. Relying on the same solid and established legal theory, a wrongfully dismissed employee will be compensated for the loss to the value of her pension as result of not being permitted to remain in the plan during the period of proper notice. This is, of course, in addition to a payout for pension earned up to dismissal, properly calculated. This is also separate from any claim which may be established in respect of pension surplus, or any improper or unlawful withdrawals, missed contributions or administration on the pension by the employer or others.

83. See the language of Southin J.A. in *Nygard v. Robinson*, supra, as applied by Justice Huddart in *Mandell v. Apple* supra, in this court and as applied in *Gillies v. Goldman Sachs*,supra both in this Court and in our Court of Appeal.

84. And see on this specific issue:Loss of pension compensible:

(a) *Bardell v. Globe & Mail* [1960] OWN 253, 24 DLR (2d) 140 (HC) (McRuer);

(b) *Siddall v. Interlake* (1980) 1 ACWS (2d) 264

Loss of Vacation

85. In the recent case of *Bavaro v. North America Tea, Coffee & Herbs Trading Co*. [2001] B.C.J. No. 381, Mr. Justice Finch speaking for the British Columbia Court of Appeal recognized the human reality that in most circumstances loss of vacation is compensable, as follows:

> [16] With deference, I do not think that in the great majority of cases a discharged employee sees the notice period as anything like a vacation. Either the employee is looking for a new job or has found one and must report for work. The prospect of taking a vacation is likely not even a consideration. The employee cannot predict when a new job will come along and there is no guarantee that the employee will find a new job before the notice period expires. If his or her dismissal has resulted in a lawsuit, the employee does not know when it will be resolved or what the outcome will be. Also, with no money coming in, the expense of taking a vacation may seem imprudent, even if the employee has savings to draw on for that purpose. The uncertainties faced by the employee, when appreciated from the employee's angle of vision, tend to contradict the notion of the notice period as a time of worry-free leisure.

Overtime: Declaration that the Plaintiff is entitled to payment of all unpaid overtime since February 19, 2001

86. Cases on loss of overtime: On the same principles discussed above, loss of overtime which would probably have been earned is compensable:

(a) *Scott v. Lilloet School District No. 29* (1991) 47 CPC (2d) 202, 55 BCLR (2d) 264

(b) *McLennon v. Appollo ForestProducts* (1993) 49 CCEL 172 (BCSC)

(c) *Brendon v. Kellog Salada* (1989) 24 CCEL 179

87. It is clear the Plaintiff has satisfied the requirement that it has a cause of action on the above grounds against Freightliner, and Freightliner is unable to show that "it is plain and obvious beyond doubt" the plaintiff could not succeed.

Existing Surplus: Declaration that the members of the Pension Plan are entitled to the existing surplus and that no part of the fund belongs to the Defendant Freightliner.

88. The most recent actuarial valuation of the Western Star Trucks Inc. Pension Plan stated that as at December 31, 2000 the plan had a surplus of about $3.5 million on a going concern basis and about $4.8 million on a solvency basis. (SOC para. 47)

89. There has been a pension plan in effect for workers at the Kelowna truck plant operated by White Trucks/Freightliner since the plant opened in 1966. (SOC para. 12)

90. Peter Gregg has been a member of the Western Star Trucks pension plan since shortly after he began working at the Kelowna truck plant in 1973. (SOC paras. 12 to 14)

91. The initial pension plan for workers at the Kelowna truck plant was implemented by White Motor Company in or about 1966. It was named the White Motor Co. Western Star Division Pension Plan. It was a contributory, defined benefits pension plan, the beneficiaries of which were the company's non-unionized employees. A trust fund was constituted under the plan, and it was administered by a trust company identified herein as Trust Company A. It provided that any surplus belonged to the employee beneficiaries on windup. (SOC paras. 31, 32.)

92. In about 1981, Freightliner (then named Western Star Truck Inc.) purchased the assets of the Kelowna truck plant from White Motor Co, and assumed the employment contracts of the non-unionized employees. The assets acquired by Freightliner included the interest of White Motor Co. in the pension fund. (SOC para. 35)

93. It is alleged in the Statement of Claim that by reason of its having received the pension fund assets from White Motor Co., Freightliner assumed the obligations of White Motor Co. to its employees with respect to the pension plan. (SOC para 35)

94. Exhibits attached to the Dlab affidavit deal with the manner in which Freightliner assumed the obligations of White Motor Co. with respect to the pension plan:

(a) Exhibit "G" – Minutes of Board Meeting Feb. 23, 1982

(b) Exhibit "H" – selected extracts from "Truck Asset Purchase Agreement"

95. Freightliner instituted a pension plan for its non-unionized employees. That plan was a successor plan to the White Motor Co. plan. (SOC para. 37) and was also a contributory, defined benefits pension plan. A trust fund was constituted under the plan, and it was administered at various times by the defendant The Canada Trust Company and CIBC Mellon Trust Company, at different times. It is alleged in the Statement of Claim

that under this plan, any surplus belonged to the employee beneficiaries on wind-up. (SOC paras. 36, 37.)

96. Two very useful articles summarizing the legal principles governing pension claims, including entitlement to pension surpluses on wind-up, were written by Eileen E. Gillese, then Dean of the Faculty of Law at the University of Western Ontario, now the Honourable Gillese J. of the Ontario Court of Appeal:

> *"Pension Plans and the Law of Trusts" [1996] Vol. 75 CBR p. 221*
>
> *"Contribution Holidays" [1995] Vol. 15 p. 136, Estates, Trusts and Pensions Journal*

97. Another helpful article regarding pensions, focusing on appropriateness of use of pension trust funds for plan administration costs, is by Dona L. Campbell:

> *"Costs and Expenses of Pension Plan Administration" (1997) Vol. 17, No. 2 Estates, Trusts and Pension Journal*

98. The leading authority in the area of entitlement to pension plan surpluses on wind-up is the Supreme Court of Canada decision:

(a) *Schmidt v. Air Products* [1994] S.C.J. No. 48 per Cory J.

99. A review of the plan documents supports a finding that the fund was at all times impressed with a trust:

(a) there is certainty of intention to create a trust;

(b) the subject matter of the trust is identifiable;

(c) the beneficiaries are ascertainable.

100. It is submitted that the pension plans and pension trusts under consideration in this case are "classic" trusts, and that therefore issues as to surplus entitlement and other similar issues ought to be resolved by reference to ordinary trust principles.

Review of Plan Texts regarding treatment of Surplus

101. Submissions in this case regarding entitlement to pension surplus are complicated by the absence of conclusive evidence regarding the language of the earliest relevant plan document. Considerable efforts have been undertaken by plaintiff's counsel to locate the plan text governing workers at the Kelowna truck plant from 1966 to 1975.

102. Schedule A sets out extracts from the plans in place from time to time, concerning entitlement to surplus on wind-up.

(a) **1966 to 1975:** Insofar as plaintiff's counsel has yet been able to determine the provisions of the initial pension plan for workers of the Kelowna truck plant, the plan provided that surplus belonged exclusively to the employees. Dlab Affidavit, Exhibit "T".

(b) **1975 to 1981:** trust fund belongs exclusively to employees, except that on termination assets attributable to employer contributions – to employer;

(c) **1981 to 1984**: trust fund belongs exclusively to employees, except that on termination assets attributable to employer contributions – to employer;

(d) **1985 to 1987:** on plan termination, assets remaining after satisfaction of plan liabilities to be distributed to employer;

(e) **1988 to 1998:** on plan termination, assets remaining after satisfaction of plan liabilities to be distributed to employer;

(f) **1988 to present:** on plan termination, assets remaining after satisfaction of plan liabilities to be distributed to employer.

103. It can be seen from this historical summary that the first relevant plan (probably) required all surplus to be provided to the employees, the next material change in 1975 provided that surplus would still go to the employees, except for return of assets attributable to employer contributions, with later the 1985 amendment purporting to give surplus entirely to the employer.

Ineffective attempts to amend surplus clauses

104. It is submitted that all changes to the plan, implemented unilaterally by the employer, are illegal and thus ineffective, because no sufficient amendment power was reserved to the employer when the trust was created.

105. A number of decisions have followed Schmidt and the courts have found amendments to the plan text purporting to provide the employer with the surplus on wind-up were illegal, and constituted a revocation of the trust.

> *Kent v. Tecsyn International Inc. [2000] O.J. No. 1826* (Ont.Sup.Ct.Jus.) O'Driscoll J.
>
> *Sadler v. Watson Wyatt & Co*. [2001] B.C.J. No. 289 (B.C.S.C.) Low J.
>
> *Bathgate v. National Hockey League Pension Society* [1994] O.J. No. 265 (Ont.C.A.) Morden, Holden and Goodman, JJA

106. These authorities mandate a careful review of original plan documents to determine whether the sponsor expressly reserved a power of amendment wide enough to permit it to eliminate the right of beneficiaries to surplus.

107. From a review of the plan language in Appendix A, it is submitted, no power of revocation was reserved to the plan sponsor.

108. It is clear that the employer amended the provisions relating to entitlement to surplus over the course of the existence of the trust. It is submitted that all these amendments are illegal. The surplus does not revert to the employer.

109. Specifically, it is submitted that the following amendments are illegal:

(a) Article 16.03 of the Western Star Trucks Plan effective January 1,

(b) Article 14.08 of the Western Star Trucks Plan effective January1, 1988

(c) Article 13.08 of the Western Star Trucks Plan effective January 25, 1985.

110. In 1992, Freightliner applied to the Ontario Pension Commission for an order permitting is to withdraw a portion of a then existing surplus balance. The application was rejected on technical grounds regarding notice, but in the tribunals reasons, many useful comments are made regarding entitlement to surplus.

111. Freightliner chose not to bring the application for surplus disposition before the Tribunal again.

112. The reasons of the Pension Commission (Chaired by Eileen E. Gillese) are attached as Exhibit "T" to the Dlab affidavit.

113. To summarize, it is submitted that the plaintiff's pleadings disclose a cause of action against Freightliner for entitlement to a declaration that the current plan members are entitled to the current surplus on wind-up and that no part of the fund belongs to Freightliner.

Contribution Holidays: Accounting and repayment of the monies applied towards contribution holidays.

114. The pension plans in effect from time to time for non-bargaining employees of the Kelowna truck plant were contributory – contributions were required to fund benefits, and contributions were to be made by the employer. For many years, the employees too have been required to make contributions.

115. From year to year, actuarial assessments were made by actuaries engaged by the Trustees, and estimates were made of the level of contributions required to fund ongoing trust obligations.

116. The plaintiff alleges in the Statement of Claim that Freightliner breached its obligations to the pension plan beneficiaries by taking contribution holidays. (SOC para. 38 (b), 42, 43)

117. The Dlab Affidavit, paragraph 23 and Exhibit "R" shows that the employer took many years of contribution holidays. In the 20 years between 1981 and 2000, Freightliner made no contributions at all in 14 years, made partial contributions in 3 years, and full contributions in only 3 years.

118. A useful summary of legal decisions surrounding the appropriateness of a pension sponsor taking contribution holidays is contained in the article entitled *"Contribution Holidays"* written by Eileen Gillese (supra).

119. Other authorities on the subject of when contribution holidays are or are not appropriate include:

(a) *Hockin v. Bank of British Columbia* [1995] BCJ No. 688 (BCCA, Cumming, Hollinrake & Finch JJA)

(b) *Buschau v. Rogerscablesystems Inc.* [2001] BCJ No. 50 (BCCA, Newbury JA)

(c) *CUPE v. Ontario Hydro* [1989] OJ NO. 679 (OCA, Robins JA)

(d) *Schmidt* (supra)

(e) *Trent University Faculty Association v. Trent University* [1997] OJ N0. 3417 (OCA, Laskin JA, for majority)

(f) *Bathgate (supra)*

120. A review of the plan language in effect since 1981 demonstrates, it is submitted, in the context of the authorities, that Freightliner had no legal entitlement to take contribution holidays, and breached its obligation to the trust beneficiaries by doing so.

121. It is submitted that the Plaintiff has satisfied the requirement that it has a cause of action on the above grounds against Freightliner, and Freightliner is unable to show that "it is plain and obvious beyond doubt" the plaintiff could not succeed.

Past Withdrawals from Fund: Accounting and repayment of the monies improperly paid out to the Defendant Freightliner's predecessors.

122. It is alleged in paras. 38 (a) and (c) of the Statement of Claim that the defendant Freightliner:

(a) permitted Peat Marwick, the receive of White Motor Co., to improperly withdraw $2,067,012 from the pension trust in 1983;

(b) withdrew $2,813,000 from the pension trust in 1985.

123. The submissions set out above to the effect that any pension surplus belonged exclusively to the employee beneficiaries, are relevant to the plaintiff's submission that these surplus withdrawals were unlawful, and in breach of obligations to the beneficiaries.

124. It is respectfully submitted that the Plaintiff has a cause of action against Freightliner for unlawful withdrawal of surplus.

Administration Fees: Accounting and repayment of monies improperly charged as administration fees against the fund.

125. It is alleged in para. 38 (d) of the Statement of Claim that the defendant Freightliner improperly used monies from the pension trust to pay pension plan administration expenses.

126. Partial particulars of the amount of pension trust monies used for administration expenses are provided in the Dlab affidavit, at paras. 22 through 24.

127. A review of the plan language summarized in Appendix A demonstrates that, initially, the plan sponsor was not expressly authorized to use pension fund monies to pay pension expenses.

128. In her article, Dona Campbell poses the question, If the plan documentation includes no provision for the payment of costs, can administrative costs still be charged to the fund? Her answer is, no they cannot. See page 114.

129. In *Markle v. City of Toronto* [2002] O.J. No. 1396 (Ont. S.C.J.), Mr. Justice Pepall found that an amendment to plan provisions such that the employer could charge administrative expenses to the fund, where no such provisions existed previously, was a partial revocation of the trust and hence a breach of the trust.

130. In *Markle*, the court considered and followed the principles stated in an article by Dona L. Campbell entitled *"Costs and Expenses of Pension Plan Administration" (1997) Estates, Trusts & Pensions Journal, Vol. 17 No.2, p. 113:*

> "If the plan documentation includes any such limitation to the use of trust assets for the purposes of payment of administrative costs, then a

> change to the use of the assets could be considered a partial revocation of trust. If this is the case, the amending power found in the documentation would not provide the necessary authority to permit the change… Only if the plan documentation included a provision specifically permitting revocation of the trust can ca change be made affecting the rights of the beneficiaries."

131. *Burke v. Governor and co. of Adventures of England Trading* [2002] O.J. No. 2468 (Per Greer J. of the Ontario Superior Court of Justice) is a recent authority where issues relating to use of pension trust monies to pay administration expenses was considered, and it was determined that the appropriateness of this activity was a matter to be determined after full process, and a trial if necessary.

132. See also *Hockin v. Bank of British Columbia [1995] BCJ No. 688 (BCCA, Cumming, Hollinrake & Finch JJA)*

133. A further point that requires exploration through the discovery process in this case is whether, if any expenses could properly be taken from the fund – were the expenses actually taken appropriate. There is evidence, for example, that the expenses (including legal fees) relating to Freightliner's unsuccessful attempt to remove surplus in 1992 were paid from the fund. (Dlab affidavit, at para. 24, and exhibit R)

134. It is respectfully submitted that the Plaintiff has a cause of action against Freightliner for unlawful withdrawal of surplus.

Statement of Investments, Policy and Procedure: Failure to implement, revise and monitor the Statement of Investments, Policy and Procedure ("SIPP") & monitor investments.

135. In the Statement of Claim, it is alleged that Freightliner failed to establish a SIPP for the fund and monitor the investments held in the fund (SOC para. 38 (f)) and that CIBC Mellon Trust permitted this (SOC para. 40 (d)), and that Freightliner failed to revise the SIPP to reflect closure plans in December, 2001 (SOC para. 41).

136. The plaintiff has requested documents relating to the administration of the trust since December, 2001, but as of this date, requested documents have not been obtained.

137. See Dlab Affidavit, para. 29, preliminary information suggesting diminution of surplus since December, 2000.

138. It is respectfully submitted that the Plaintiff has a cause of action against Freightliner and against CIBC Mellon in this regard.

Claims against the Trust Companies :

139. In the Statement of claim the plaintiff alleges that the defendant Trust Companies breached their trust obligations as a result of the allegations dealt with in more detail above.

140. In *Sadler*, Madam Justice Newbury of the BCCA considered the liability of pension fund trustees, and said, citing *Froese*, cited below:

> … It is common in Canada for trust companies to be named as "trustees" of pension plans but for their roles to be limited by contract to be limited by contract to carrying out the directions of their employer/sponsors of the plans. In the absence of authority on the point, it should not be assumed such a limitation of the trustees role does away with the fiduciary duty owed to beneficiaries of the trust. Even where the trustee's stated role is really akin to that of a custodian, this court has already stated that " … there is what academics call 'overarching' obligation upon a custodial or administrative trustee to pay attention to the interests of the beneficiaries additional to the duties provided in the trust indenture.",

141. See also *Froese v. Montreal Trust Co. of Canada* [1996] BCJ No. 1091 BCCA at para. 39.

142. It is respectfully submitted that the Plaintiff has a cause of action against the defendant trust companies, sufficient at this stage to permit the court to grant certification of this proceeding as a class action.

2. An identifiable class of 2 or more persons

143. Section 4(1) (b) of the Act provides that there must be an identifiable class of 2 person or more.

144. In *Bywater v. Toronto Transit Commission* (1998) O.J. No. 4913 at para. 10, Mr. Justice Winkler for the Ontario Court General Division described the purpose of the class

definition to be three-fold: (a) it identifies those persons who have a potential claim for relief against the defendant; (b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and (c) it describes who is entitled to notice.

145. The proposed classes are defined in the Notice of Motion as follows:

> (a) all persons employed by the Defendant Freightliner Canada in British Columbia under a contract of indefinite duration who have received, or who will receive, notice of termination of their employment at any time on or after September 26, 2001 until final closure of the Kelowna truck plant. This class does not include employees who have executed a binding full and final release in favour of the Defendant Freightliner Canada, or who are proven dismissed for just cause, or who are unionized employees in a bargaining unit ("Class A"); and
>
> (b) all persons who are members or former members of the pension plan for non-bargaining unit employees of Freightliner Canada, Western Star Trucks division, their respective surviving spouses, former spouses, designated beneficiaries, personal representatives, and all other persons who are beneficiaries of the said pension plan ("Class B").

146. The Gregg Affidavit provides an estimate of the number of persons within Class A to be somewhere in the range of 200 employees and for Class B to be about 440 people.

147. There are therefore at least two people in each of the proposed classes.

148. The proposed class definitions provide a basis by which members of the class can reasonably be identified in an objective manner. The definitions allow the court to assess whether or not a particular person falls within the class.

149. In ***Brogaard,*** supra, Allan J. was faced with a potential class of persons who had yet to go through a certain administrative procedure to determine eligibility for a pension (a problem which the plaintiffs here do not present). In such context this Court provided the

following guidance, commencing at para 102, which again demonstrates a low threshold on this aspect of the test:

> ***Is there is an identifiable class of two or more persons?***
>
> The plaintiffs must show that a class of two or more persons can be identified and that the class has been clearly defined by reference to stated, objective criteria. In ***Western Canadian Shopping Centres Inc. v. Dutton***, [2001] 2 S.C.R. 534 at para. 38. McLachlin C.J. explained that class definition is critical, because it identifies the individuals who are entitled to notice, who are entitled to relief (if granted) and who are bound by the judgment.
>
> The plaintiffs appreciate the fact that, if successful, each class member will have to satisfy the criteria for qualification for a past and/or future Survivor's Pension through an objective administrative procedure. The "relief" that the potential class members seek is the right to "stand in the line" for their assessment.
>
> The fact that the evidence as to the size of the class is admittedly sparse does not preclude certification.

3. The Common Issues

Law

150. Section 1 of the Act defines common issues as:

(a) common but not necessarily identical issues of fact; or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical fact.

151. Mr. Justice Cumming for the British Columbia Court of Appeal stated as follows in *Campbell v. Flexwatt Corp*.[1997] B.C.J. No. 2477, leave to appeal to the Supreme Court of Canada refused at [1998] S.C.C.A. No. 13):

> "When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief."

152. A common issue need not dispose of the litigation. A common issue is sufficient if it is an issue of fact or law common to all claims, and that its resolution in favour of the plaintiffs will advance the interests of the class, leaving individual issues to be litigated later in separate trials, if necessary. In the British Columbia Court of Appeal decision of *Harrington*, supra., Huddart J.A, for the majority noted the following:

> "I would have thought that the word "issue" simply meant a point in question, a point affirmed by the plaintiff and denied by the defendant. If the point of fact or law is necessary to the successful prosecution of the cause of action (or in some circumstances to its defence), then its resolution will inevitable move the litigation forward. The degree of materiality and the interplay among the various common and individual issues is a matter for consideration under s.4(1)(d) and thus s.4(2), not a matter for consideration under s .4(1)(c)." [para. 23]

153. In *Brogaard*, (A.G.), supra, Allan J. supports this reasoning in this way:

> [108] The question for determination at the certification stage is whether the resolution of a common issue is necessary to the resolution of each class member's claim and whether that common issue is a substantial ingredient of each of the class member's claim. The latter requirement is satisfied if the resolution of the issue, either for or against the class members, will advance the case or move the litigation forward and is capable of extrapolation to all class members: Western Shopping Centres, supra, at para. 39; Hollick, supra, at para. 18; Harrington v. Dow Corning Corp. (2000), 193 D.L.R. (4th) 67 (B.C.C.A.) at paras. 20-24, leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 21 (Q.L.); Campbell v. Flexwatt Corp. (1998), 44 B.C.L.R. (3d) 343 (C.A.) at para. 53, leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 13 (Q.L.).
>
> …I have already determined that those claims should not be struck for failing to disclose a cause of action. It is inappropriate at this stage to delve further into the merits of the plaintiffs' claims. The issue for consideration under this heading is whether the plaintiffs' pleadings, as they stand, raise common issues.
>
> …
>
> …Moreover, they may decide to amend their statement of claim to plead that those sections are also unconstitutional.
>
> …It is not uncommon to refine the list of common issues as the litigation progresses: Hoy v. Medtronic, Inc. (2001), 94 B.C.L.R. (3d) 169; 2001 BCSC 1343.

154. In *Chace v. Crane Canada Inc*.[1997] B.C.J. No. 2862 (BCCA) the defendant argued that the negligent manufacture and sale of a toilet tank was not a common issue because the case involved the production and sale of tanks over a long period of time, and manufacturing processes and other circumstances had changed. The British Columbia Court of Appeal upheld the finding of the Chambers Judge, Mr. Justice Mackenzie, that

the class members' claims were sufficiently similar throughout the period in question to satisfy the requirements for certification. Madam Justice Huddart, writing for the court, described the flexibility of certification proceedings as follows:

> "It seems excessively technical to argue at this stage of the proceedings that unpleaded time-limited defences founded on statutory limitation periods or varying states of knowledge on the part of Crane should prevent the certification of a class proceeding. The facts to found time-limited defences are likely always to be beyond the knowledge of the plaintiffs. If as discovery proceeds it becomes apparent that the representative plaintiffs cannot adequately represent a particular group of plaintiffs, then application may be made for the designation of an additional subclass or classes. If there is a need for the common issues to be more precisely defined, that need can be addressed by the requirement of particulars or a redefinition of the question, again as discovery proceeds and counsel refine their knowledge of the issues that divide them. If at some point it becomes apparent to the chambers judge responsible for the pre-trial proceedings that the action is in danger of degenerating into an unmanageable number of individual actions, as Crane maintains, he can decertify the proceedings or further restrict the common issues." [para. 19]
>
> "Section 11 of the Class Proceedings Act permits the determination of common issues for the entire class, common issues for subclasses, and individual issues, all at separate times. This flexibility permits the trial court to design procedures that will allow plaintiffs access to a fair and efficient way of litigating their claims while ensuring that defendants are permitted to examine whatever number of plaintiffs are required to properly address their defences."

155. In *Peppiatt v. Nicol* [1993] O.J. No. 2722 Mr. Justice Chilcott for the Ontario Court of Justice (General Division) certified a class action where the claims arose from alleged misrepresentations contained in brochures distributed by the defendant. The brochures were issued at times different. The class members claim was based on a reading of different brochures. The court determined this to be no bar to certification. Furthermore, when the defendant later applied to have the action decertified, raising the issue of different versions of the representations, Mr. Justice Chilcott did not decertify the proceeding but instead divided the class into various sub-classes depending on which publication they had read, see *Peppiatt v. Royal Bank* [1996] O.J. No.118.

156. Mr. Justice Cumming for the British Columbia Court of Appeal considered this manner of proceeding in *Campbell v. Flexwatt*, supra. found this to be a viable option.

157. In *Rumley*, supra., the British Columbia Court of Appeal overruled the decision of the chambers judge not to certify a proposed class proceeding brought by alleged sexual abuse victims who were students at a provincial residential school. Mr. Justice Mackenzie noted that the proposed common issues were limited (see para. 4) and would advance the claims of the plaintiffs. Thereafter if the plaintiffs succeeded on a common issue, each class member would then have to prove that he or she was sexually abused at the school at a later stage. The Supreme Court of Canada upheld this decision.

Application to our Case

158. We proposed the following common issues, and deal with them in the order set out in the Notice of Motion. Most of these issues, as we will show, have been certified in other class proceedings in either Ontario, British Columbia or Quebec.

159. Currently, in Canada, almost all of the class actions in the employment law context have been certified by the court. Specifically, in Ontario, the following employment law disputes have been certified:

- *Kumar v. Sharp Business Forms Inc.*, [2001]) O.J. No. 1729 (Sup. Ct. Jus., per Cumming J.)
- *Ormrod v. Etobicoke (Hydro-Electric Commission)*, {2001]).J. No. 754 (Sup. Ct. Jus. per Winkler J.)
- *Dillon v. Novi Canadian Ltd.* [1999] O.J. No. 3055 (Sup. Ct. Jus., per Sharpe J.)
- *Joncas v. Spruce Falls Power and Paper Co.* [1999] O.J. No. 2359 (Sup. Ct. Jus., per Sharpe J.)
- *Schweyer v. Laidlaw Carriers Inc.*, [2000] O.J. No. 575 (Sup. Ct. Jus., per Cumming J.)
- *Webb v. K-Mart Canada Ltd* [1999] O.J. No. 2268 (Sup. Ct. Jus., per Brokenshire J., see also [1999] O.J. No. 3285.
- *Wicke v. Canadian Occidental Petroleum Ltd.*, [1998] O.J. No. 2818 (Gen. Div., per Jenkins J.)
- *Scott v. Ontario Business College (1977) Ltd.* [1999] O.J. No. 3441 (Sup. Ct. Jus., per Shaughnessy J.)

- *Isaacs v. Nortel Networks Corp* [2001] O.J. No. 4851 (Sup. Ct. Jus., per Charbonneau J.)

160. In British Columbia, this is the first employment law dispute to proceed to a certification hearing. The case of *Royster*, supra. is a British Columbia employment law case which has not yet fully been heard on the issue of certification.

161. Furthermore, in Canada, most cases involving pension fund issues have been certified as class actions. For example:

In British Columbia:

- *Sadler v. Watson*, (unreported November 20, 1998) No. C982281 (B.C.S.C. per Brenner J.)

In Ontario:

- *Authorson v. Canada*, [1999] O.J. No. 5557 (Sup.Ct. Jus., per Brokenshire J.)
- *McLaughlin v. Falconbridge Ltd.*, [1999] O.J. No. 2403 (Sup. Ct. Jus., per Winkler J.)

162. Ward Branch in the Appendix to his book *Class Actions in Canada*, also notes that the following unreported pension cases were certified in Ontario:

- *McMaster University v. Robb*
- *Reichold v. Boyer*
- *Rivett v. Hospitals of Ontario Pension Plan*
- *CF Kingsway Inc v. Goetz*
- *Hinds v. Colgate-Palmolive Canada Inc.*

163. Ward Branch notes the following pension cases that were certified in Quebec:

- *Assoc provincial des retraites d'Hydro –Quebec v. Hydro-Quebec*
- *Belisle v. Commission Scolaire de Montreal*
- *Brochu v. lac d'amiante du Quebec Ltee*
- *Bourque v. Laboratoires Abbott*
- *Chateauneuf v. Cie Singer du Canada*
- *LaValee v. Cogena (1980) Inc.*

- *Syndicat Canadien de la Fonction Publique v. Outremont (Ville)*
- *Syndicat des fonctionnaires municipaux de Montreal*
- *Vachon v. Mines d'Amiante Bell Ltee.*

A resolution of the common issues will advance the claim of the plaintiff, and be capable of extrapolation to all of the proposed class members

Class A:

(a) Was the employment of each of the class members subject to a contract of employment of indefinite duration, terminable only 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 to all class members, 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:

(n) Is the Defendant Freightliner required to wind-up the Pension Plan?

(o) Is there a surplus of funds in the Pension Plan, and if so what is the amount?

(p) In the event of winding up the pension fund, who is entitled to the surplus?

(q) 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?

(r) 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?

(s) 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, The Canada Trust and CIBC Mellon liable for this improper conduct?

(t) Did Freightliner, or its predecessor companies, fail to implement the Standards 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, The Canada Trust and CIBC Mellon liable for this improper conduct?

(u) 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?

164. In the listed cases, class actions were certified with common issues the same as or very similar to the common issues suggested for determination in this matter.

4. Class Proceeding as the Preferable Procedure

Law

165. Section 4(1)(c) provides that the class proceeding be the preferable procedure for the fair and efficient resolution of the common issues.

166. Section 4(2) of the Act sets out several factors for consideration on the issue of whether a class action would be the preferable procedure:

> " (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members,

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions,

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings,

(d) whether other means of resolving the claims are less practical or less efficient, and

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means."

167. In *Campbell*, supra., Cumming J.A., for the court, made a note of the underlying purposes of the Act and the fact that trial judges must be given the flexibility to make the proceedings work for the parties:

> "The Legislature enacted the class proceedings Act on August 1 1995 to make available in this province a procedure for the fair resolution of meritorious claims that are uneconomical to pursue in an individual proceeding, or, of pursued individually, have the potential to overwhelm the courts' resources. Class proceedings are an efficient response to market demand only if they can resolve disputes fairly. Trial court judges must be free to make the new procedure work for plaintiffs and defendants." [para. 25]

168. The requirement is that this be the "preferable" procedure, differing from the U.S. requirement that the class proceeding be "superior" to other available methods to resolve the controversy. Mr. Justice Cumming rejected the predominance test in *Campbell*, supra:

> "Although the issue of predominance still arises as a factor for consideration when determining whether or not a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, nowhere does the Act mandate that is an individual issue should predominate, and action must not be certified. Instead, the Act sets out a variety of factors to be considered. The existence of an individual issues is not necessarily determinative." (para. 61)

> "It is to be noted that a class proceeding does not have to be the preferable procedure for resolving the whole controversy, but merely the preferable procedure for resolving the common issues. Thus, fairness concerns about denial or individual discovery , and of the opportunity to seek contribution and indemnity become relevant only when issues are not common because they require examination of individual circumstances or defence claims not shared by class (or subclass) members." (para. 65)

169. The BCCA (Cumming J. in *Campbell*) has stated that this part of the judge's task is in the nature of a cost/benefit analysis. [para. 66]

170. This sort of balancing was done by Allan J. in *Brogaard*, supra, at para 120, in language readily applicable to the instant case, as follows:

> In the absence of a class proceeding, there could be a proliferation of individual actions seeking virtually identical relief. On the other hand, the prohibitive expense of complex litigation relative to the amount recoverable would likely preclude many legitimate claims.

171. Furthermore, the role of the Chambers judge in managing the certification of a class proceeding was described in *Endean*, supra. by Mr. Justice Smith as follows:

> "[T]he object of the Act is not to provide perfect justice, but to provide a "fair and efficient resolution" of the common issues. It is a remedial, procedural statute and should be interpreted liberally to give effect to its purpose. It sets out very flexible procedures and clothes the court with broad discretion to ensure that justice is done to all parties. As was said in *Bendall v. McGahn Medical Corp.* (1993), 14 O.R. 93 734 at 474, 106 D.L.R. (4th) 339 (Ont. Ct. (Gen.Div.)):
>
> Certification is a fluid, flexible procedural process. It is conditional, always subject to decertification." [para. 58]

172. This statement by Mr. Justice Smith was cited with approval by the British Columbia Court of Appeal in *Elms v. Laurentian Bank of Canada*, supra.

173. The B.C. legislation at section 7 specifically contemplates that the following matters are not a bar to certification:

"(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not known;

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members."

174. The purpose of the class action legislation is also relevant to a determination of this issue. (*Endean*). These purposes where considered in *Abdool*, supra. as set out herein at paragraph [ ].

175. Smith J. in *Endean*, supra.:

> "In my view, the intention behind these provision of the act is to put more emphasis on the goal of access to justice than on that of judicial economy. That was the approach taken in Harrington, supra., where a class proceeding was certified despite many unresolved, difficult, individual issues associated with establishing claims arising out of allegedly defective breast implants. Accordingly, the undoubted predominance of individual issues here is not itself fatal to the application." [para. 54]

176. Thus the British Columbia courts have certified cases where the class action presented serious difficulties of management and of proof. Despite that the actions were certified, in part because the of the complexity and cost of establishing liability, which were such that they would preclude the large majority of class members from access to the court in individual actions.

Endean, supra.

Harrington, supra.

177. Finally, on this point, we draw the Court's attention to the judgement of Allan J. in *Brogaard* , supra, where the Judge adopts an earlier statement of this Court, which is appropriate to the instant case, as follows:

> In *Scott v. TD Waterhouse* (2001), 94 B.C.L.R. (3d) 320; 2001 BCSC 1299, at paras. 115-116, Madam Justice Martinson summarized the practical advantages of class proceedings, all of which apply to the plaintiffs' proposed class action:
>
> (a) case management is by a single judge (CPA, s.14);
>
> (b) the class is able to attract sophisticated lawyers through the aggregation of potential damages and the availability of contingency fee agreements (CPA, s.38);
>
> (c) class members may apply to participate in the class action (CPA s. 15);
>
> (d) a formal notice program alerts all interested persons to the status of the litigation (CPA, ss. 19-23);

(e) simplified structures and procedures for individual issues can be designed by the court (CPA, s. 27);

(f) the court approves any settlement (CPA, s.35);

(g) class members are protected from adverse cost awards during the common issues stage of the case (CPA, s.37);

(h) the limitation period applicable to the claim may be tolled for the entire class (CPA, s.39); and

(i) orders and settlements accrue to the benefit of the entire class without resorting to principles of estoppel (CPA, s.26).

Application to Present Case

178. By way of background to these proceedings we refer to the Affidavit of Dagmar Dlab sworn July 24, 2002 at paragraphs 31 to35. Ms. Dlab explains that our firm was originally retained by a group of four employees who had been given a letter advising them of their possible dismissal from employment from Freightliner and its predecessors, and that by Spring 2002 we had been retained by 30 such employees.

179. It is out of concern for the burden individual actions would place on the court system and on the individuals that this class action was started.

180. The class action will create access to justice for the proposed class members. It is clear that there is a widespread demand for access to judicial relief by the class members as is evident from the number of potential class members who initially retained us.

181. By effecting a cost/benefit analysis as suggested by Mr. Justice Cumming in Campbell, it is clear that the demand would be stifled by the expenses of individual litigation and this expense barrier could be eliminated by the class action proceedings. The Affidavit of Ms. Dlab at paragraphs 36 to44 sets out the facts necessary to effect this cost/benefit analysis.

182. With respect to Class A:

(a) There are over 200 members in Class A who may have a claim in any one of the categories listed as common issues. The individual claims may range from a few hundred of dollars, to a few thousands of dollars, to as much as $50,000.

(b) It is estimated that each individual claim under Class A will necessitate a three-day trial, and that the total cost of the litigation for each individual plaintiff would be approximately $35,000 or more.

183. With respect to Class B:

(a) There are an estimated 400 members in Class B. The average portion attributable to each member of the class based on the surplus of $3,416,775 as it was reported effective December 31, 2000 is about $8,500.

(b) It is difficult to assess the range of damages recoverable by the Class B members on the other pension issues, although some possible outcomes would that that each member would receive a further $8,500.

(c) The pension issues in this litigation raise complex issues which require expert assessment by and actuary and legal counsel. There are currently thousands of pages of documents relating to the pension plan that will be reviewed and considered by legal counsel and the actuary. 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 issues.

(d) It is estimated that the trial would last approximately 4 weeks, and that the cost of the litigation to an individual plaintiff could be as high as $200,000.

184. It is therefore clear that the level of damages for Class A and Class B members is relatively low in comparison to the potential cost of litigation. It is not economically feasible for an individual employee to proceed with an action to Court.

185. In the present case, we know of no court actions that have been commenced with respect to any of the common issues.

186. We refer to our submission above about the overwhelming majority of all class actions in the employment law context being certified.

187. Although the employees may have an overtime claim that could be brought before the Director of Employment Standards at relatively little cost, such a proceeding is greatly

time consuming due to government cutbacks. In any case, such a process would only resolve a small part of the proposed class members' claims arising out of the termination of their employment. Furthermore, it is clear that the issue of the overtime payment is linked to the issue of the bonus payment, which is not a matter within the Director's jurisdiction. This is clear from the form letter dated February 12, 2001 from Western Star Trucks to its employees, a copy of which is attached as Exhibit "B" to the Affidavit of Peter Gregg.

188. In the Ontario decision, *Kumar v. Sharp Business Forms* [2001] O.J. No. 1729, the plaintiffs brought forth a claim against their employer for failure to pay overtime pay, public holiday pay. And vacation pay as required under the Ontario Employment Standards Act. The action was certified as a class action, despite the possible availability of recourse under the ESA. The court noted in particular that the ESA did not provide for a consolidation of complaints. Also it provided that an employee who commenced a civil action for lost wages, was then precluded from filing a complaint under the ESA.

189. We refer to our earlier submission herein about all cases involving pension fund issues having been certified.

5. Appropriate Class Representative

Law

190. Section 4(1) (e) of the Act mandates that :

> "there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members."

191. In *Endean,* supra. Smith J. considered the representative plaintiff requirements and held that the two most important considerations in determining whether a plaintiff was

appropriate were whether there was a common interest with other class members and whether the representative would "vigorously prosecute" the claim.

Application to present case

192. Peter Gregg is an appropriate class representative. As indicated in the Gregg Affidavit, Mr. Gregg has enjoyed considerable responsibility overseeing other employees, and his duties have included liasing with all departments and employees. He has been employee with Freightliner or its predecessors since 1973. As a result, he deposes, that he is well aware of developments and employment issues affecting employees within the Kelowna plant.

193. Mr. Gregg is a member of both the proposed classes, he has common interests with the unnamed members of these classes, and he will vigorously prosecute the interests of the class through his legal counsel There is no conflict between Mr. Gregg and other members of the proposed classes.

194. The Plaintiff has presented a workable Plan for the proceedings and the proposed notice.

CONCLUSION

195. It is respectfully submitted that in all the circumstances, for all the reasons mentioned, this action should be certified as a class proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED: _____

Counsel for the Plaintiff

Counsel for the Plaintiff