

Citation: Gregg v. Freightliner Ltd., et  
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2003 BCSC 241

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Docket: L021149  
Registry: Vancouver

**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

**REASONS FOR JUDGMENT**

**OF THE**

**HONOURABLE MADAM JUSTICE BENNETT**

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Date and Place of Hearing:

October 15-17, 2002  
Vancouver, BC

[1] Peter Gregg ("Gregg") was an employee of the defendant Freightliner Ltd., doing business as Western Star Trucks ("Freightliner"). He brings an application to certify as a class action a claim for, *inter alia*, wrongful dismissal against Freightliner. I will refer to this action as the wrongful dismissal claim, although the claim goes beyond allegations of wrongful dismissal. He also seeks class proceeding certification of a second claim against Freightliner, The Canada Trust Company and CIBC Mellon Trust Company (the "Trust Companies"), for claims relating to the pension plan.

[2] I have concluded that the wrongful dismissal claim will be certified. The pension claim will also be certified once representative plaintiffs for certain subclasses are appointed. The wrongful dismissal claim and the pension claim will be severed.

[3] The applications are governed by the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50. The following sections provide the guidelines for class action certification:

4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

(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;

(e) 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.

(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 the following:

(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;

(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.

. . .

7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

(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.

**BACKGROUND**

[4] The White Motor Company began business in British Columbia as "Western Star Division" in 1967. The company manufactured trucks. The applicant, Gregg, commenced employment with the company on June 23, 1973. Except for a layoff between December 31, 1982 and December 21, 1983, he has

been employed full-time with the company until his employment terminated on September 30, 2002.

[5] In 1981, the assets of the company were sold to Western Star Trucks ("WST"). The employees with the company at that time were members of the White Motor Corporation of Canada Limited Pension Plan ("1975 White Motors Plan"). The 1975 White Motors Plan had been created in 1975 by the merger of three prior pension plans: the White Trucks plan, the Cockshutt plan for employees of Cockshutt Farm Equipment of Canada Ltd. and the White Western Star Plan which was for the Kelowna employees.

[6] With the 1981 purchase, the assets were transferred from the White Motor plan to the Western Star Plan which, I am told, was intended to be a transfer for those employees who were non-bargaining White employees who then became Western Star employees.

[7] On June 30, 2001, WST amalgamated with the defendant, Freightliner.

[8] Gregg was a manager and not part of any bargaining unit. He had an oral contract with the company. His remuneration prior to termination consisted 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 made 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 could tax shelter 11-13 per cent of their annual salary (the "FlexPlan Benefits").

[9] On February 12, 2001, Gregg, along with a number of other similarly situated employees, received a letter from WST which purported to set out the details of a new "Salaried Compensation Program", created as a result of the integration with Freightliner. The letter set out his eligibility for a bonus program and an increase in salary. It also stated that, effective February 19, 2001, he and the other "exempt" employees would no longer be eligible to receive paid overtime.

[10] On September 27, 2001, Gregg received a letter headed:

To: All Freightliner LLC Non-represented Canadian Employees

[11] The letter advised the recipients that in order to maintain the viability of the company, salaries were to be reduced by 5 per cent effective January 6, 2002. According to the affidavit, all non-bargaining employees had their salaries reduced by 5 per cent. There is some suggestion that this money was returned. For now, however, it remains a live issue.

[12] In October 2001, Freightliner announced that it would be shutting down the Kelowna manufacturing plant.

[13] On December 3, 2001, Gregg and all but two non-union employees received a letter stating the following:

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".

In recognition of your service to the Company and the loss of your position; we have developed a severance package. It includes working notice, severance, benefits, and access to a career services office. The following outlines the package in more detail. Please note that you are not eligible for the severance package if you voluntarily resign from the Company.

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 **11** month's 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.

For the period of working notice, all benefits shall be continued. During the length of time equivalent to the severance period, you may continue your Life Insurance, Accidental Death & Dismemberment, BC Medical Services Plan, Extended Healthcare and Dental care benefits or take an in lieu of benefits payment, which will be determined at the time of your release.

In addition to the working notice and severance you will be entitled to a payment in lieu of all other benefits in the amount of column \$9,674.31.

To assist you in finding new employment, the Company has set up a Career Services Centre. In addition to equipment and office space there is in-house assistance to help employees write resumes and actively assist in job placement through local, provincial and federal agencies.

If you are offered employment with Freightliner LLC and you accept the position, you are not eligible to the severance package outlined in this letter.

You will receive a letter confirming your release date and details regarding the specifics of your final pay prior to your release date.

On behalf of everyone at the Company, I want to thank you for your efforts and dedication over the past years. We also want to thank you for your continued professionalism and support during a very difficult time.

Sincerely,

Trudy Houghton  
Manager, Human Resources

[14] The two exceptions were a person on long-term disability and the in-house counsel.

[15] The non-bargaining employees are split into two groups: those with written contracts and those without. Gregg had no written contract. According to Trudy Houghton, Manager of Human Resources for Freightliner, for those with written contracts, the amount of severance pay depended on the terms of the contract.

[16] On June 25, 2002, Gregg was sent a termination letter effective September 30, 2002. The letter also set out the terms of the severance package.

[17] On July 21, 2002, Freightliner gave notice to both the members of the Western Star Pension Plan (the plan for the non-bargaining employees) and to the Superintendent of Pensions for British Columbia that the Western Star Plan would be wound up September 30, 2002.

[18] The individual wrongful dismissal claims vary in amounts, but none are substantial. The pension claim would take approximately twenty days of trial for an individual claim.

**LAW**

[19] One of purposes of the *Class Proceedings Act* is to ensure access to the courts for citizens when they cannot resolve disputes or enforce their rights. Litigation is time-consuming and, more importantly in this context, expensive.

In the oft-quoted passage from *Campbell v. Flexwatt Corp.*

(1997), 44 B.C.L.R (3d) 343 (C.A.), Cumming J.A. said at para.

25:

...The Legislature enacted the *Class Proceedings Act* on 1 August 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, if 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. . . .

[20] In *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, the Supreme Court of Canada considered the nature of class actions and identified the importance of such actions to the administration of justice. The Chief Justice, speaking for the Court, said the following at para. 15:

The *Class Proceedings Act*, 1992, S.O. 1992, c. 6 reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), 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.

[21] Pursuant to s. 4 of the **Act**, as noted above, there are five requirements which must be met before proceedings will be certified. The language in the **Act** is mandatory: if the five requirements are met, the action must be certified.

**(a) the pleadings disclose a cause of action**

[22] The test as to whether the pleadings disclose a cause of action is not an onerous one. It is the same test that is applied in an application to strike pleadings pursuant to Supreme Court Rule 19(24), found in *Hunt v. Carey Canada Inc.*,

[1990] 2 S.C.R. 959 at p. 980:

[A]ssuming 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 others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[23] This test has been applied to the issue of certification by Winkler J. in *Ormrod v. Etobicoke (Hydro-Electric Commission)* (2001), 53 O.R. (3d) 285 at para. 19.

[24] The test was specifically stated in the context of a class action proceeding by Moldaver J. (as he then was), in *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 at p. 469:

The principles to be applied when considering whether pleadings support a legal cause of action are as follows:

- (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
- (b) The defendant, in order to succeed, must show that it is plain and obvious beyond doubt that the plaintiffs could not succeed;
- (c) The novelty of the cause of action will not militate against the plaintiffs; and
- (d) 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.

### **Wrongful Dismissal**

[25] The defendant Freightliner does not dispute that a cause of action has been pleaded in the context of the wrongful dismissal allegations.

**Pension Plan Claim**

[26] Freightliner disputes one aspect of the cause of action in the pension litigation: entitlement to a claim for surplus on winding-up. Freightliner submits that this claim has not been properly pleaded. It further submits that the claim is premature as it is unknown if there is any surplus.

[27] Although the pleadings are not exhaustive, they are sufficient within the test stated above. Further, there is evidence of a pension surplus in the not too distant past. Therefore, I conclude that this is not a speculative claim.

[28] The defendant Trust Companies submit that there is no cause of action with respect to the majority of the claims because they are barred due to limitation periods. I propose to deal with the issue of limitation periods later in these reasons.

[29] I have concluded that the pleadings are sufficient with respect to demonstrating a cause of action. These pleadings would not be struck out on the basis of an application pursuant to Supreme Court Rule 19(24). This does not say that there is not room for improvement; nor does it say there is not a proper basis for a demand for particulars by the defendant, or other applications. However, for the purpose of

certification, a cause of action exists within the pleadings as they relate to the pension claims.

**(b) there is an identifiable class of 2 or more persons**

[30] In order for a proceeding to be certified, there must be an identifiable class. This is a critical part of the certification process, for if the class cannot be defined with any certainty, the litigation becomes a nightmare and the application of the rulings may be impossible. In **Bywater v. Toronto Transit Commission** (1998), 27 C.P.C. (4<sup>th</sup>) 172 (Ont. Ct. (Gen.Div.)), Winkler J. discussed this requirement as follows, at para. 10:

The purpose of the class definition is threefold: 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 lastly, c) it describes who is entitled to notice pursuant to the **Act**. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad.

[31] The class must be defined on the basis of objective criteria in order to identify a member of the class without the necessity of resorting to the merits of the action.

[32] Differences which may arise within the original class during litigation may be resolved by forming a subclass or

proceeding on an individual basis: See ***Scott v. TD Waterhouse Investor Services (Canada) Inc.*** (2001), 94 B.C.L.R. (3d) 320 (S.C.) at para. 73.

[33] The legislation itself contemplates common issues not shared with other members of the class: See s. 7(e).

[34] On the other hand, the class should not be overly broad. It should not include persons who are outside of the common issue: See ***Hollick v. Toronto (City)***, *supra* at para. 21.

[35] In addition, the definition of the class must be informed by the common issue or issues: See ***Hollick v. Toronto (City)***, *supra* at para. 19.

#### **Wrongful dismissal**

[36] The plaintiff submits, and I summarize, that the class is defined by all persons employed by Freightliner in British Columbia under a contract of indefinite duration who received notice of termination on or after September 26, 2001. The class does not include employees who have executed a binding full and final release in favour of the defendant Freightliner; those dismissed for just cause; or those who are unionized employees in a bargaining unit.

[37] Freightliner submits that there is no rational reason to include persons who were terminated or who resigned between September 26, 2001 and the date of the December 2001 notice of termination. The September 26, 2001 date refers to the notice of a 5 per cent roll back of salary, which did not take effect until January 2002. I agree.

[38] Freightliner also submits that the word "binding" should be removed from the definition of "full and final release". The issue of whether a release was binding is not pleaded in this litigation. Indeed, Mr. Gregg has not signed a release, so it could not be pleaded by him.

[39] Therefore, I agree with the defendant that "binding" ought not to be included.

[40] The defendant's main point is the size of the class. The defendant submits that the class is overly broad as it includes employees with written contracts. There are 49 employees with oral contracts and some 146 employees with written contracts. The defendant submits that the latter employees are bound by the terms of the written contract and have no cause of action.

[41] I have reviewed the sample contract provided. I cannot say that it is "plain and obvious" that the termination letter

of December 2001 has no role to play in the notice provisions of those with written contracts. I find that, for the time being, those with written contracts are proper members of the class. It may be that at some point it will be necessary to form a subclass, and someone other than Mr. Gregg will be required to stand in as the representative plaintiff for the subclass. However, as noted, this is not a basis to refuse certification of this group at this time.

[42] Therefore the class is defined as follows:

All persons employed by the defendant Freightliner Ltd. in British Columbia under an oral or written contract of employment of indefinite duration who received notice of termination of their employment at any time on or after December 3, 2001 until final closure of the Kelowna truck plant. This class does not include employees

- (a) who have executed a full and final release in favour of the defendant;
- (b) who are dismissed for just cause;
- (c) who are unionized employees in a bargaining unit; and
- (d) who resigned prior to September 30, 2002.

#### **Pension Plan Claim**

[43] Both Freightliner and the Trust Companies submit that the proposed class for the pension plan claim is not sufficient.

The plaintiff has, in his original submission, not included several categories of members of the pension plan.

[44] The categories of potential members are "Current Plan Members", "Historical Plan Members", "Defined Benefit Members", "Defined Contribution Members", "British Columbia residents" and "Out of Province Members".

[45] The plaintiff has agreed to include "Historical Plan Members" and "Out of Province Members". He submits that "Defined Benefit Members" are included, as he is part of that plan. He further submits that, by law, "Defined Contribution Members" are not entitled to any surplus, so they have not been included.

[46] As noted above, the pension claim in this case is complex. There were a number of different plans, with several different companies and numerous employees.

[47] It is of utmost importance to properly define the class of those potentially affected by this litigation. This is the only way in which the defendants can properly defend any claims against the pension plan.

[48] I agree with the submission of the Trust Companies that the class for the pension plan claim needs to be redefined. The issue is whether the application should be adjourned, or

whether I should redefine the class. I have concluded that I have sufficient information to redefine the class, keeping in mind that these matters are subject to amendment during the course of the litigation if need be. I am also aware of s. 6(1) of the **Act**, set out as follows:

6 (1) Despite section 4 (1), if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court must not certify the proceeding as a class proceeding unless there is, in addition to the representative plaintiff for the class, a representative plaintiff who

(a) would fairly and adequately represent the interests of the subclass,

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

(c) does not have, on the common issues for the subclass, an interest that is in conflict with the interests of other subclass members.

Therefore the pension aspect of the litigation will not be certified until the subclasses are properly represented.

[49] I have concluded that the class needs to be broad enough to cover all of the potential claimants. "Current Plan

Members" will form the main class. "Historical Plan Members" will form a subclass and one or more representative plaintiffs will need to be appointed to represent this class. "Defined Benefit Members" will be a subclass and Mr. Gregg may represent this subclass. A subclass will need to be created for "Out of Province Members" and a representative plaintiff appointed for this class. This subclass may divide further, depending on who opts into the litigation.

[50] I have also concluded that there should be a subclass for "Defined Contribution Members", at least to litigate their entitlement. I am not prepared to exclude them from the litigation at this point without proper argument. A representative plaintiff will need to be appointed for this class.

[51] The classes will be clearly defined once representative plaintiffs are proffered.

**(c) common issues**

[52] A common issue is an issue of law or fact shared by the members of the class that will move the litigation forward. In *Campbell v. Flexwatt*, *supra*, Cumming J.A. said the following at paras. 51-54:

The *Class Proceedings Act* requires that the claims of the class members raise common issues

which, for reasons of fairness and efficiency, ought to be determined within one proceeding. Common issues can be issues of fact or law and do not have to be identical for every member of the class. Section 1 of the **Class Proceedings 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 facts.

This question of commonality of issues lies at the heart of a class proceeding, for the intent of a class proceeding is to allow liability issues to be determined for the entire class based on a determination of liability of the defendants to the proposed representative plaintiffs.

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. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.

Where there is a large number of individual issues arising out of the common issues to be addressed, courts have restricted the common questions in order to maintain the desirability of the class proceeding as the preferable procedure.

[53] In **Hollick v. Toronto (City)**, *supra*, the Chief Justice said, at para. 18, quoting her own comments in **Western Canadian Shopping Centres Inc. v. Dutton**, [2001] 2 S.C.R. 534, 2001 SCC 46:

...[A]n issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be common in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.

[54] To summarize, an issue is common if it is shared by all of the class members and it will meaningfully move the litigation forward.

#### **Wrongful Dismissal**

[55] The plaintiff proposes the following as common issues:

- i) 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?
- ii) 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?
- iii) Did Freightliner provide notice of termination to the class members?

iv) Are the members of the class entitled to damages equal to salary, bonuses and/or overtime they would have earned during the notice period?

v) 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?

vi) Are the class members entitled to compensation for the loss of all other benefits including FlexPlan benefits and the DaimlerChrysler New Vehicle Purchase/Lease Plan?

vii) 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?

viii) Are the members of the class entitled to compensation for loss of vacation pay?

ix) Are the class members who will be taking early retirement eligible for post retirement health and welfare benefits?

x) Is there a contract of employment guaranteeing that overtime would be paid for overtime worked by class members?

xi) Did the defendant Freightliner stop paying overtime to all class members, and if so, is that a breach of contract?

xii) Did the defendant Freightliner roll back wages for class members by 5 per cent, and if so, is that a breach of the employment contract?

xiii) Was it 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? If no bonus was paid, is that a breach of the employment contract?

[56] Freightliner does not disagree that the first two issues are common. Rather, it submits that the first is merely a statement of law and that the second should not give rise to certification.

[57] Freightliner says that none of the remaining issues are common as defined by the law. I will address issues (iii) through (ix) and then return to the other issues.

[58] Issue (iii) refers to other termination notices and is an issue incapable of determination in the context of a class.

The various members of the class received notices of termination (other than the December 3, 2001 letter) at various dates.

[59] Points (iv) to (ix) are damage issues which I conclude would quickly devolve into individual claims if certified. Indeed, some of the so-called common issues as framed do not affect all members of the class, and subclasses would have to be formed. It seems to me that these are individual issues which will need to be decided after the common issues have been determined. It is possible that the plaintiffs may be able to develop proper subclasses for some or all of these issues. For now, however, they will be treated as individual claims following the determination of the common issues.

[60] Issues (x) and (xi), relate to the withdrawal of overtime pay found in the letter of February 12, 2001. It is an issue which will affect Mr. Gregg and those employees with indefinite contracts. These are common issues that will move the litigation forward.

[61] Issue (xii) regarding the roll-back of salaries by 5 per cent affects all of the employees in the non-bargaining unit, regardless if they have oral or written contracts.

Freightliner submits that this amount was returned, however, I am not to decide the merits of the issue, only if the issue is

common. I find that it is a common issue, the resolution of which will advance the litigation as defined in the case law noted above.

[62] The final issue is whether it was a term of the employment contract that a bonus would be paid, and if so, whether a bonus was paid or whether the contract was breached by non-payment. The only issue that could be said to be common is whether it was a term of the employment contract that a bonus would be paid. Once that is decided, the issue of whether a bonus was in fact paid or whether there was a breach of contract is a matter for individual claims.

[63] Therefore, I conclude that the following issues are common issues to the class in that the resolution of the same will move the litigation forward; their resolution is necessary to the resolution of each class member's claim; and each issue is a substantial ingredient of each of the class members' claims:

1. 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?

2. Did the letter dated December 3, 2001 from Freightliner to each of the class members provide sufficient notice of the termination of the contracts of employment?

3. Did Freightliner roll-back wages for class members by 5 per cent, and if so, was that a breach of the employment contract?

4. Was it a contractual term that members of the class be paid overtime?

5. Did Freightliner stop paying overtime to the members of the class, and if so, was that a breach of contract?

6. Was it 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?

**Pension Plan**

[64] The plaintiff submits the following are common issues in the pension plan claim:

i) Is the defendant Freightliner required to wind-up the Pension Plan?

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

iii) In the event of winding up the Pension Fund, who is entitled to the surplus?

iv) 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 and CIBC Mellon Trust Company liable for this improper use?

v) 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, Canada Trust and CIBC Mellon liable for this improper conduct?

vii) Did Freightliner, or its predecessor companies, fail to implement the Standards of Investment, Policy and Procedures, properly monitor them and revise them in contemplation of the wind-up of the Pension Plan? If so, are the defendants Freightliner, Canada Trust and CIBC Mellon liable for this improper conduct?

viii) Are the class members entitled to an accounting and a repayment of funds for the wrongful conduct described above, together with interest at the rates that would have been earned if the funds had been part of the Pension Plan?

[65] Freightliner submits that issues (i) through (iii) are not common issues. The first two it says are academic causes of action that are not pleaded, while the answer to the third is not yet known. I have already dealt with the latter point at para. 27 of these Reasons, and am satisfied that the issue of entitlement is a common issue.

[66] However, I agree with Freightliner that the first two issues are not discrete issues. The pension plan is being wound-up, and there is no suggestion that it should continue. The second issue is a facet of entitlement and need not be stated separately. The pension plan is being evaluated and if there is a surplus, it will soon be apparent. If for some reason the amount of any surplus becomes an issue, then the question can then be stated.

[67] Freightliner does not object to the other points as being common issues, subject to the objection raised by the Trust Companies that most of the claims have not been brought within the statutory limitation periods.

[68] In his amended Notice of Motion, the plaintiff applied to certify issues relating to limitation periods. These are:

- i) What limitation periods, if any, apply to the causes of action in these proceedings?

ii) Do the doctrines of laches and acquiescence apply under the circumstances?

iii) Have any of the limitation periods been postponed by virtue of s. 6(1) of the **Limitation Act**, R.S.B.C. 1996, c. 266?

iv) Have any of the limitation periods been postponed by virtue of s. 6(4) of the **Limitation Act**?

v) Does the Notice attached to the Affidavit of Trudy Houghton as Exhibit "G" provide a basis for triggering the running of time under s. 6(4) of the **Limitation Act**?

vi) Have any of the limitation periods been postponed by virtue of s. 6(8) of the **Limitation Act**?

[69] The defendants submit that a number of the claims are statute barred by a six-year or ten-year limitation period. Further, the defendants submit that the issue of postponement (raised by the plaintiff) must be decided on an individual basis, resulting in the predominate issues being individual and not common: See ss. 6(1), (3) (e), (3) (h), (4) and (8) of the **Limitation Act**.

[70] Freightliner submits that the pleadings are not sufficient to establish the material facts upon which

allegations of misconduct are made to trigger postponement. I am not prepared to find that the pleadings are devoid of sufficient particulars of misconduct to the point of defeating the application for certification.

[71] There are several issues relating to limitation which can logically be characterized as common issues. The determination of the limitation defences, apart from any claim of postponement, would advance the litigation. The **Class Proceedings Act** is sufficiently flexible to take into account individual claims for postponement.

[72] I conclude that the following issues are common:

- i) What limitation periods, if any, apply to the causes of action in these proceedings?
- ii) Does the Notice attached to the Affidavit of Trudy Houghton as Exhibit "G" provide a basis for triggering the running of time under s. 6(4) of the **Limitation Act**?
- iii) Have any of the limitation periods been postponed by virtue of s. 6(8) of the **Limitation Act**?

**(d) preferable procedure**

[73] Section 4(2) of the **Class Proceedings Act** specifically states that all relevant matters must be considered when

determining whether a class proceeding is the preferable procedure. This includes the following factors which the court must take into account:

- (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;
- (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.

[74] The question of preferability is considered "through the lens of the three principal advantages of class actions - judicial economy, access to justice, and behaviour modification": See *Hollick v. Toronto (City)* at para 27.

[75] In *Hollick*, *supra* at para. 28, the Court found that the inquiry into the preferable procedure concerned two questions:

- i) whether or not the class proceeding would be a fair, efficient and manageable method of advancing the claim

without looking at the common issues in their context;  
and

ii) whether a class proceeding would be preferable in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on.

[76] This approach was adopted in the British Columbia context in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69, at para. 35.

[77] The issue of whether the class proceeding is preferable must be decided in the context of the importance of the common issues in relation to the claim as a whole: *Hollick* at para 30. All reasonably available options for determining a claim must be considered: See *Hollick* at para. 31.

[78] In *Koo v. Canadian Airlines International Ltd.*, [2000] B.C.J. No. 329 (Q.L.) (S.C.), 2000 BCSC 281, at para. 66, Allan J. quoted with approval the Reasons of Winkler J. in *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. Sup. Ct. Just.) at p. 239, reversed on other grounds (2000), 51 O.R. (3d) 236 (C.A.), on the issue of the correct approach to the question of 'preferable procedure':

The proper approach to be taken in considering whether a class proceeding is the preferable procedure for resolving the common issues is to have

regard to all of the individual and common issues arising from the claims in the context of the factual matrix. A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues which arise from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of the behaviour of wrongdoers.

[79] Another consideration in assessing the preferable procedure is whether the litigation will truly advance the goals of the class, or whether the litigation will "degenerate into individual inquiries": See *Koo v. Canadian Airlines*, *supra* at para. 76.

[80] An example of where a class proceeding was refused is found in *Tiemstra v. Insurance Corporation of British Columbia* (1997), 149 D.L.R. (4<sup>th</sup>) 419 (B.C.C.A.). This was an application for certification for persons who were refused insurance coverage on the "no crash-no cash" policy of ICBC. The court held that the resolution of the common issue did not settle an important element in the case, that being the validity of the claim. The court held that a declaratory action addressing the blanket policy of ICBC was the preferable procedure.

[81] There are many factors to consider when determining the preferable procedure. A number of factors are listed in

Maczko J.'s annotation of the *Class Proceedings Act*, (cases and citations omitted):

*Class Action Manual (Vancouver: CLE, October 1999) at p. 14-16*

- 1) What is the relative cost of the various proceedings?
  - 2) Will the class action be useful to modify the behaviour of the defendant?
  - 3) Will meritorious individual claims be lost if no class action is taken?
  - 4) Is the class action being used to force the defendant into settlements because the defendant cannot afford the litigation?
  - 5) Is the cost of the class action justified by the possible recovery?
  - 6) Will the class action enhance access to the courts?
- Access to justice is an important factor when the court considers the issue of preferable procedure. As a class, the class members are able to spread the cost of the proceedings among all the members. Economies of scale and access to the judicial system weigh heavily in favour of certification. Courts should err on the side of protecting people who have a right of access to the courts.

- 7) Are other similar cases being prosecuted or is there a potential for other similar cases?
- 8) Is there a risk of a series of inconsistent decisions on similar facts against the same defendant?
- 9) What other procedural alternatives are available to the plaintiff? Are there alternatives as good as a class action?
- 10) Will a class action put the plaintiff and defendant on a more equal footing in the conduct of the action? For example, could a wealthy defendant overwhelm an individual plaintiff if a class action is not initiated?
- 11) Will the cost of the proceeding consume all of the proceeds of the judgment if it is conducted by an individual plaintiff? Do the claims involve complex scientific or medical issues such that no individual plaintiff could possibly afford to litigate their claim?
- 12) Will there be a saving of judicial time?
- 13) Will the defendant lose important procedural safeguards such as discovery or the ability to collect costs? Will the procedure be fair to the parties?

14) Is the class such that a class proceeding will be unmanageable or impracticable? Will it become a monster of cost and complexity?

15) Do potential third party claims contain numerous individual issues that will make the class proceeding unmanageable?

16) Will the class proceeding break down into several individual claims? Issues such as limitation periods and laches must be assessed individually rather than on a class basis. However, the fact that some of the claims may be barred by a limitation period is not a reason to refuse certification on the common issue.

17) Does the determination at trial of any of the proposed common issues economically or efficiently decide and dispose of issues that would move the litigation forward for all class members? If the court concludes that the certification of a class proceeding would inevitably descend into individual inquiries that would increase the time, cost, and expense of proceedings, and frustrate the **Act**'s goals of access to justice and judicial efficiency, then the class proceeding cannot be the preferable procedure.

18) Are the constitutional issues to be resolved suitable for class proceedings?

19) Are the proceedings in the nature of *mandamus* to clarify the nature and extent of impugned public duties, and are these proceedings suitable for class action?

20) Is the litigation driven by the class counsel rather than by the class members?

[82] It is clear that when considering whether a class proceeding is preferable, the fact that other individual issues are also important to the litigation of each claim should not lead the court to refuse the application. A class action with "multi-staged proceeding[s], with trials of both common and individual issues" is contemplated by the **Act**: See ***Harrington v. Dow Corning Corp.*** (2000), 193 D.L.R. (4<sup>th</sup>) 67 (B.C.C.A.), 2000 BCCA 605 at para. 63-67.

**Wrongful Dismissal**

[83] Freightliner submits that the issue of the validity of the termination is the most important issue. If the notice is valid, submits the defendant, the remainder of the claim fails. In the company's view, this issue should be determined in advance of any certification by way of a summary trial.

Although that argument has its appeal, I have concluded that certification is the preferable procedure.

[84] I have listed above some of the many factors which come into play when determining whether a class proceeding is the preferable procedure. I have taken into account all of the relevant factors, including those set out in s. 4(2) of the **Act**. There are approximately 200 people in the class. A determination of the validity of the December 3, 2001 notice is critical to all of their claims. To require each person to litigate this issue separately is a waste of time and Freightliner does not argue otherwise. Its point is that by certifying the issue rather than deciding it summarily, the litigation will quickly result in a myriad of individual claims. However, this is not the only issue that has been certified. The resolution of this issue, while important, does not end the litigation one way or another. To try the issue summarily before certification would only delay matters.

[85] Freightliner is rightly concerned about this becoming litigation "out of control" once the common issues are determined. The court then has to look at individual claims, some of which may be small and some not. However, those matters may be resolved by careful planning and management and is not a reason to refuse certification in this case.

**Pension Plan**

[86] The defendant Freightliner does not contest that a class proceeding is the preferable procedure for the fair and efficient resolution of this claim. It submits, however, along with the Trust Companies, that the litigation plan submitted by the plaintiff is unworkable.

[87] Under s. 4(1)(e)(ii) of the **Act**, the representative plaintiff must produce a workable litigation plan, and its presence or absence is a factor to take into account when determining whether the litigation is manageable: See **Carom v. Bre-X Minerals Ltd.**, *supra* at p. 203. I have taken this into consideration in this context. I have concluded that the litigation plan, although not a model, is sufficient and amendable for the purpose of certification. The issue of the litigation plan will be dealt with more fully under the heading "Representative Plaintiff".

[88] The Trust Companies submit, as noted above, that the class proceeding is not the preferable procedure because the individual nature of the limitation issues predominate to such a degree that certification will not assist the litigation.

[89] The Trust Companies submit that it would be unfair to require them to defend substantial claims which may have no merit because of the limitation defence.

[90] It is not "plain and obvious" that the cause of action would fall due to the limitation defence.

[91] A class proceeding is preferable when it is a "fair, efficient and manageable method of advancing the claim". As noted earlier, this decision is informed by the goals of judicial economy, access to justice and the modification of the behaviour of wrongdoers.

[92] The pension litigation would be prohibitively expensive for a single litigant to pursue. It is agreed that the litigation of the issues would take at least a four week trial. If the litigation is not certified, it is unlikely that any claim will be made on any pension plan surplus, yet if there is a surplus, Freightliner could receive a windfall of a significant amount if the plaintiff is correct in his analysis.

[93] While the pension plan issues are complex, they are not unmanageable. It would be far more difficult for the system of justice to attempt to accommodate individual claims, even

recognizing that some of these claims may devolve into individual claims.

[94] It is clear that the class proceeding is the preferable procedure for the pension litigation.

**e) representative plaintiff**

[95] The **Act** defines the meaning of a representative plaintiff in s. 4(1)(e), which I will again reproduce below for convenience:

(e) 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.

[96] The representative plaintiff must truly represent the class and the claims of the class, however, differences in claims may be dealt with by creating subclasses: See **Collette v. Great Pacific Management Co.** (2001), 86 B.C.L.R. (3d) 92 (S.C.), 2001 BCSC 237, affirmed [2002] B.C.J. No. 253 (Q.L.)(C.A.), 2002 BCCA 195.

[97] The litigation plan will vary from case to case. The plan is not written in stone and may be modified as the litigation progresses. However, there must be a workable plan from the outset or the litigation runs the risk of devolving into an expensive and cumbersome process, thereby defeating the entire purpose of the class proceeding.

[98] Other factors include whether the proposed representative has any conflict of interest on the common issues, whether he or she has the financial and intellectual ability to litigate the matter to conclusion, or whether he or she has a strong financial interest in the outcome.

#### **Wrongful Dismissal and Pension Plan**

[99] The defendants make similar arguments with respect to the working plan produced by the plaintiff. It is convenient to address this issue *seriatim*. The defendants submit that there is an absence of a workable litigation plan.

[100] The defendants rely on the standard required by Nordheimer J. in *Pearson v. Inco Ltd.*, [2002] O.J. No. 2764 (Q.L) (Ont. Sup. Ct. Just.) at para. 144 and Winkler J. in *Carom v. Bre-X Minerals Ltd*, *supra* at p. 203. Both of these cases are far more complex in nature than the one before the court.

[101] The litigation plan produced is primarily a timeline of when certain events should occur. However, it does propose routes of resolution, such as an application by Rule 18A, and it sets out things that need to be done, such as discovery, cross-examination on affidavits and delivery of document lists. The time frames proposed are completely unrealistic, in particular with regard to the pension plan litigation.

[102] Since the litigation plan will have to be revised to take into account the severance of the litigation, the plaintiff will revise and produce two plans. First, he will remove the timelines from the plan entirely. The timelines will be agreed upon at a case management conference.

[103] An application pursuant to Rule 18A with respect to the validity of the December 3, 2001 notice will be the first order of business after the next case management conference. The plan will also include: the methods of gaining information, such as discovery of documents; the methods of discovery (including follow-up discovery and answering outstanding discovery questions); amendments to pleadings; adding new parties; the anticipated method of proof for the pension litigation, including what type of expert evidence is anticipated; method of notice to persons who may fall within the class or subclass both within British Columbia and outside

of British Columbia; and the method for dealing with individual claims.

[104] The Trust Companies also submit that the plaintiff is not a representative plaintiff due to conflicts of interest. Any conflict of interest at this stage is speculation only. In any event, any concerns about conflict of interest can be resolved by requiring other representative plaintiffs for certain subclasses.

**SUMMARY**

[105] In summary, the applications are severed. The wrongful dismissal claim is certified as a class proceeding. The class is defined as follows, with Peter Gregg as the representative plaintiff:

All persons employed by the defendant Freightliner Ltd. in British Columbia under an oral or written contract of employment of indefinite duration who received notice of termination of their employment at any time on or after December 3, 2001 until final closure of the Kelowna truck plant. This class does not include employees

- (a) who have executed a full and final release in favour of the defendant;
- (b) who are dismissed for just cause;
- (c) who are unionized employees in a bargaining unit; and
- (d) who resigned prior to September 30, 2002.

[106] The following matters are certified as common issues:

1. 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?
2. Did the letter dated December 3, 2001 from Freightliner to each of the class members provide sufficient notice of the termination of the contracts of employment?
3. Did Freightliner roll-back wages for class members by 5 per cent, and if so, was that a breach of the employment contract?
4. Was it a contractual term that members of the class be paid overtime?
5. Did Freightliner stop paying overtime to the members of the class, and if so, was that a breach of contract?
6. Was it 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?

[107] The plaintiff will prepare the certification order in compliance with s. 8 of the **Act**.

[108] The pension plan matter is adjourned to appoint representative plaintiffs for certain subclasses. Once that is concluded the matter will return to court for confirmation.

[109] The plaintiff will revise his litigation plan to take into account the severance order.

"E. Bennett, J."