NO. S-103215
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DARRYL SOMERVILLE

PLAINTIFF

AND:

CATALYST PAPER CORPORATION

DEFENDANT

Brought Pursuant to the *Class Proceedings Act*

NOTICE OF APPLICATION

Name of applicant: The Plaintiff
To: The Defendant

TAKE NOTICE that an application will be made by the applicant to the judge assigned to this proceeding at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on February 14 and 15th, 2011 at 9:45 am for the order(s) set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

At the application the plaintiff will seek an order:

1. certifying this action as a class proceeding;

2. defining the following three classes:

a. all persons that were permanent non-union employees of the defendant in 2009 and that were eligible to participate in a bonus remuneration program known as the Short Term Incentive Plan ("STIP") ("Class A");

b. all persons that were employed by the defendant in a permanent non-union position on January 1, 2010 and who at that time lost employment benefits pursuant to a unilateral decision by the defendant to reduce benefits without reasonable notice (Class B");

c. all persons that were members of a defined benefit pension plan for the defendant's non-bargaining employees on December 31, 2009 ("Class C").

3. appointing Darryl Somerville as the representative of each class;

4. certifying the following issues as common issues:

Class A

a. During the period from January 1, 2009 to December 31, 2009, did the defendant employ the members of the class on the basis that if certain targets were met, bonuses would be payable to each class member?

b. What were the corporate targets which, if achieved, would require a STIP payment to class members?

c. What were the divisional targets which, if achieved, would require a STIP payment to class members?

d. Were such targets achieved?

e. If the targets were achieved, is there any lawful basis for the defendant not to make the STIP payments?

f. What was the available pool of funds to pay out the aggregate STIP awards?

g. If the available pool of funds is insufficient to pay out the aggregate STIP awards, what is the method for paying out the available funds on a pro-rata basis?

h. On what principle should individual entitlements be assessed by reason of the defendant's refusal to pay STIP for 2009 service?

Class B

a. Did the contracts of employment of each member of Class B require the defendant to provide notice of any material reduction in the value of employment benefits?

b. If so, did the defendant materially reduce benefits without notice effective January 1, 2010?

c. If notice was required to materially reduce benefits, what is the method for determining the required amount of notice?

d. If so, on what principle should damages be assessed by reason of the defendant's unilateral reduction of benefits without notice?

Class C

a. Did the contracts of employment of each of the members of Class C require the defendant to provide notice of any material change to the defined benefit pension rights of class members?

b. If so, did the defendant materially change the pension rights of defined benefit class members?

c. If notice was required to make material changes in the pension rights of defined benefit class members, what is the method for determining the required amount of notice?

d. If so, on what principle should damages be assessed from the defendant's refusal to allow class members to continue to accumulate pensionable service in defined benefit pension plans?

Part 2: FACTUAL BASIS

A brief summary of the facts supporting the application follows:

STIP

1. The plaintiff is a permanent non-union employee of the defendant.

2. Every year, for many years, the plaintiff participated in an annual bonus program known as the STIP. The defendant set various performance targets and if these targets were achieved, the plaintiff received a bonus.

3. In 2009 the defendant set performance targets for the 2009 STIP for corporate, divisional and personal performance.

4. The plaintiff and other employees achieved the pre-determined targets.

5. The defendant has refused to pay the STIP to the plaintiff and other eligible employees. There are several hundred eligible employees.

Benefit Rollback

6. The plaintiff along with other permanent non-union employees received certain benefits as part of their remuneration for employment. In December, 2009 the defendant notified the plaintiff and all other permanent non-union employees that it would be reducing employee benefits in order to save money effective January 1, 2010. This cut-back reduced entitlements to annual vacation time and payouts, defined

contribution pension contributions, MSP premiums, life and long term disability insurance and post retirement benefits.

Defined Benefit Pension Plans

7. For many years, the plaintiff and other employees of the defendant have been members of defined benefit pension plans. In December 2009, the defendant advised the plaintiff and others that he would be removed from the defined benefit pension plan and his only source of continued pension participation would be through a defined contribution plan effective January 1, 2010, a substantially less valuable benefit.

Part 3: LEGAL BASIS

Overview of Class Proceedings

1. 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. Somerville 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 2 or 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.

2. 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.)/

3. 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.

4. 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)

5. 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.).

6. In this honourable Court, an authoritative recent 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. In that decision, this Court relied 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

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

8. 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) [Tab 8], Rowles, Ryan and Donald JJ.A. [para. 20].

9. 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]

10. 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..."

11. 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."

12. 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."

13. 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.

14. Furthermore, for the purpose of the certification application, the court must assume the validity of the factual allegations as set out in the pleadings. The pleadings must be read generously, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

See: *Collette .v Great Pacific Management Co.* [2002] B.C.J. No. 253 (B.C. S.C., per Macaulay J.) para. 36, remitted to trial court for further consideration at [2002] B.C.J. No. 651.

Application to the Plaintiff's Case

15. The plaintiff has valid causes of action against the defendant, and Catalyst is unable to show that "it is plain and obvious beyond doubt" the plaintiff could not succeed". The causes of action are:

(a) refusal to pay 2009 STIP benefits after they were earned;

(b) rolling back benefits without reasonable notice; and

(c) discontinuing defined benefit pension plan without reasonable notice.

2: An Identifiable Class of Two or More Persons

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

17. 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.

18. The Somerville Affidavit provides an estimate of the number of persons within the classes.

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

20. 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.

21. 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

22. 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.

23. 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)[Tab 50]:

> "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."

24. 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]

25. 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.

26. 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."

27. 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

28. 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.

29. 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.

30. Currently, in Canada, almost all of the class actions in the employment law context have been certified by the court. 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.)
- *Gregg v. Freightliner Ltd.*, 2003 BCSC 241

Application to our Case

31. Resolution of the common issues will advance the claim of the plaintiff, and be capable of extrapolation to all of the proposed class members

4: Class Proceeding as the Preferable Procedure

Law

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

33. 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."

34. 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]

35. 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)

36. 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]

37. 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.

38. 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]

39. 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.

40. 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."

41. The purpose of the class action legislation is also relevant to a determination of this issue. (Endean). These purposes where considered in Abdool, supra.

42. 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]

43. 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.

44. 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).

5: Appropriate Class Representative

Law

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

1. "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."

46. 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

47. Mr. Somerville is an appropriate class representative.

48. Mr. Somerville is a member of all of 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. Somerville and other members of the proposed classes.

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

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit of Darryl Somerville sworn on November 26, 2010;

2. Affidavit of Chris Forguson sworn on November 26, 2010.

The applicant estimates that the application will take two days, and is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must

(a) file an application response in Form 33 within 5 days after the date of service of this notice of application or, if the application is brought under Rule 9-7 of the Supreme Court Civil Rules, within 11 days after the date of service of this notice of application, and

(b) at least 2 days before the date set for the hearing of the application, serve on the applicant 2 copies, and on every other party one copy, of a filed copy of the application response and the other documents referred to in Rule 9-7 (12) of the Supreme Court Civil Rules.

Date: November 26, 2010

Counsel for the Plaintiff

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part 1 of this notice of application

[ ] with the following variations and additional terms:

.....

.....

.....

Date: .....[*dd/mmm/yyyy*]..... .....

Signature of [ ] Judge [ ] Master

APPENDIX

[*The following information is provided for data collection purposes only and is of no legal effect.*]

THIS APPLICATION INVOLVES THE FOLLOWING:

[*Check the box(es) below for the application type(s) included in this application.*]

[ ] discovery: comply with demand for documents
[ ] discovery: production of additional documents
[ ] extend oral discovery
[ ] other matter concerning oral discovery
[ ] amend pleadings
[ ] add/change parties
[ ] summary judgment
[ ] summary trial
[ ] service
[ ] mediation
[ ] adjournments
[ ] proceedings at trial
[ ] case plan orders: amend
[ ] case plan orders: other
[ ] experts

[B.C. Reg. 119/2010, Sch. A, s. 43]