IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gregg v. Freightliner Ltd.,*
2012 BCSC 415

Date: 20120322
Docket: L021149
Registry: Vancouver

Between:

Peter Gregg, George Schieven, Peter Woolley,
John Langergraber, Terry Barker, James Gilchrist

Plaintiffs

And

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

Defendants

Before: The Honourable Madam Justice Ballance

Reasons for Judgment
(In Chambers)

Counsel for the Plaintiffs:	Dan Gleadle
Counsel for Defendants:	Mark Andrews, Q.C. Jennifer Francis
Place and Date of Hearing:	Vancouver, B.C. July 6-7, 2011
Place and Date of Judgment:	Vancouver, B.C. March 22, 2012

INTRODUCTION

[1] This class proceeding was commenced in 2002 by members of a defined benefits pension plan established in favour of non-union employees of Western Star Trucks Ltd. (the "Plan"). When the Plan was wound up effective September 30, 2002, it had no surplus. In this action, members of the Plan claimed a right to the Plan surplus which they alleged had been wrongfully depleted, used and/or misappropriated by their employer. In addition to seeking reinstatement of the surplus, the plaintiffs sought orders for the repayment of lost investment earnings occasioned by the alleged improper management of the assets of the Plan.

[2] Plan members were known to reside within and without British Columbia. As part of the certification process, Freightliner was ordered to mail a detailed form of notice to the prospective class members. Members residing outside of the Province were required to sign an opt in form by a fixed deadline (which was subsequently extended with respect to some of the members) in order to participate in the class proceeding.

[3] The action was ultimately settled through mediation in July 2008, and the settlement received court approval on October 31, 2008. Distribution of the settlement funds was to be carried out in two distinct stages. While the first phase of distribution was underway, a relatively small number of non-resident members of the Plan who had failed to opt-in within the compulsory timeframe, lodged complaints about their exclusion from participation in the distribution of the settlement monies. In the main, the complainants claimed that they had not received notice by mail or any other means and, therefore, had been unaware of the requirement to opt-in to the class action.

[4] The central issue on this application is whether one or more of those complainants ought to be permitted to share in the settlement. For the reasons that follow, I have ruled in favour of six of the eight complainants.

OVERVIEW

The Certification Order

[5] The action was certified as a class action by this Court on January 12, 2005 (the "Certification Order"). The subject "Class" was broadly defined and was divided into seven sub-classes. One of those sub-classes was comprised of Plan members who resided outside of British Columbia.

[6] The Certification Order stipulated that notice of the class action be given to potential class members using three methods: (i) regular mail; (ii) publication in two local newspapers as well as *La Presse* (Montréal) and the *Globe and Mail* (National ed.); and (iii) posting the notice on the website of class counsel. Personal delivery was not required.

[7] With respect to the mailout, the Certification Order provided that an approved form of notice was to be mailed "to all Class members for whom a name and address is contained in a computer database maintained by Freightliner or the present actuaries" of the Plan. Under the *Class Proceedings Act,* R.S.B.C. 1996*,* c.50 (the "*Act*"), members resident in British Columbia are automatically part of the class unless they opted-out. The opposite applies with respect to non-resident members; they must expressly opt-in to be eligible to participate. Accordingly, a special "opt out" form was attached to the notice mailed to members with addresses in British Columbia, and an "opt in" form was attached to those sent to members showing non-resident addresses. In each case, the deadline to take action was May 19, 2005.

[8] Believing that the most accurate list of the members' addresses would be in the hands of the current and past actuaries for the Plan, Freightliner used the addresses maintained by the actuaries for the mailing. I see that as a reasonable course to have taken in the circumstances.

[9] Freightliner completed the mandatory mailout by mid-February 2005 as ordered, and confirmed the particulars of the mailing to class counsel by way of

letter dated February 23, 2005. Enclosed with that letter were the spreadsheets that Freightliner had created showing the names and addresses obtained from the actuaries and used for the mailout.

[10] Problems with the mailout emerged early on. Soon into the process, class counsel became aware, and promptly informed Freightliner, that notice had not reached some of the intended recipients. At the suggestion of class counsel, Freightliner monitored the notice packages that were returned as undeliverable and advised class counsel who, in turn, informed the class representatives in an attempt to ascertain current addresses. In some instances, the returned notice mailings were rerouted to members who were still employed by Freightliner at its other plants. No record was kept of the notice packages that were redistributed internally.

[11] In early May 2005, class counsel raised with Freightliner his concern that notices may not have gone out to all current Plan members and pension recipients. He suggested that Industrial Alliance, a life and health insurance company that had offered members the option of receiving their pension benefits through the purchase of a life annuity contract, would have the most up-to-date address list. On May 23, 2006, the case management judge ordered that Freightliner re-send notices to approximately 35 members whose address shown on the list kept by Industrial Alliance differed from the one used in the original mailing (the “June 2006 Mailout”). The notice sent in the June 2006 Mailout was identical to the form of notice that had been mailed pursuant to the Certification Order, except that it extended the cut-off date to opt-in or opt-out from May 19, 2005 to September 5, 2006.

Settlement of the Action

[12] A four-week trial was scheduled to commence in the spring of 2009. The parties agreed to attempt to resolve the dispute by way of mediation. In the weeks leading up to an intensive three-day session, the parties exchanged detailed mediation briefs, made further document disclosure and separately participated in pre-mediation meetings with the mediator. Their focused efforts resulted in the

achievement of a settlement which was captured in a one-page agreement dated July 17, 2008 (the "Settlement Agreement").

[13] The Settlement Agreement provided for payment by the defendants of the sum of $5,750,000 (the "Settlement Amount") in full settlement of all claims raised in the action. The Settlement Amount was not broken down into or attributed to specific claims by individual members.

[14] Distribution of the Settlement Amount was addressed in general terms in paragraph 3 of the Settlement Agreement:

> The Settlement Amount will be paid to the persons and in the manner determined by the plaintiffs' counsel and their clients, as approved by the Court or in the absence of determination by plaintiffs' counsel and their client, as determined by the Court.

[15] The parties agreed, and the Court endorsed, the members having a window of time within which to voice an objection to the settlement and proposed distribution of the settlement funds. To that end, the settlement terms were posted and explained on the website of class counsel and, where feasible, were relayed by word of mouth and via email to members. The website notified readers that on October 31, 2008, the Court would be asked to approve the Settlement Agreement, including a proposed two-stage process for distribution.

Settlement Approval Order

[16] No objections were received in relation to the proposed settlement. It was approved by the Court on October 31, 2008 (the "Settlement Approval Order").

[17] Among other things, the Settlement Approval Order provided that all claims of members of the class were extinguished except for those who resided in British Columbia and had opted-out, and for non-resident members who did not opt-in. It further ordered as follows:

1. The Settlement Amount is to be distributed among members of the Class who were members of the Plan as at October 1, 2001, defined as the "Distribution Group";

2. Members of the Distribution Group shall share in the Settlement Amount "on the basis set out in a plan of distribution recommended by class counsel, attached hereto as Schedule C". The attached plan of distribution states that each member of the Distribution Group will share in the net Settlement Amount on a *pro rata* basis in accordance with his/her individual entitlement at the wind-up of the Plan, as determined by the Plan actuaries using a specified distribution formula. It contemplates that payments of individual settlement amounts are to be delivered to members of the Distribution Group at their last known address. In the event that a payment is returned as undeliverable and, using reasonable efforts class counsel is not able to ascertain an alternative address, the undelivered payment would be held in trust and available to be claimed by the rightful recipient until July 31, 2009. After that date, all payment amounts (plus accrued interest) not delivered or claimed are to be distributed among other members of the Distribution Group in proportion to their original share, so long as the amount of an individual distribution was not less than $100. After a six-month waiting period, any funds remaining undistributed would be donated to the United Way of the Central & South Okanagan/Similkameen. The plan of distribution received court approval pursuant to the Settlement Approval Order.

Initial Implementation of Plan of Distribution

[18] Of the Distribution Group, there were 230 members who were clearly entitled to share in the Settlement Amount. It was decided that they would receive cheques in the first wave of distribution. Phase 2 of the distribution was intended to deal with the approximately 302 remaining members of the class whose entitlement required further investigation and more data. That group would not be issued cheques in the first stage of distribution but, after further investigation as to their residency and other factors, might be entitled to payment in the second stage of distribution. It was

also envisioned that the 230 members who had received cheques in the first go-round could also be eligible to receive a further payment on the second distribution, depending on the results of the further investigations concerning the second group of potential recipients.

[19] Approximately $3 million of the Settlement Amount was distributed in the first distribution phase. An estimated holdback of roughly $1.3 million was retained to cover the second distribution and the projected costs of distribution.

Post-Settlement Member Complaints

[20] After the first branch of distribution was underway, approximately 14 Plan members advised they had not received notice of the requirement to opt-in to the class and complained about being excluded from the proposed distribution. Distribution was suspended and the parties sought directions from the Court concerning the steps to be followed in light of those complaints.

[21] A process and timeline to address the complaints was set by the Court in March 2011. Non-resident members of the Plan who claimed that they had not received notice were given an opportunity to provide an affidavit regarding their circumstances for consideration by the Court. Individuals were informed that in order to pursue judicial review, they may have to attend the hearing for cross-examination and would also be permitted to file written submissions in support of their position.

The Complainants

[22] In total, eight individuals chose to advance claims at the complainant hearing. Of those, four were cross-examined by class counsel at the hearing.

1. Richard Oliver

[23] Mr. Oliver continued working for Freightliner after the Kelowna plant closed and was employed at the Portland truck plant during the relevant period. The notice was mailed to him at two addresses: one in Kelowna and the other in Vancouver, Washington. At the time of the mailing, Mr. Oliver resided at the Washington state

address. The notice sent to his Kelowna residence was eventually returned as undeliverable. He was not included in the June 2006 Mailout.

[24] Even though notice was sent to his correct address in Washington, Mr. Oliver deposes that he did not receive it and was unaware of any “opt in notice”. He was cross-examined about that matter including any discussions he may have had with co-workers in relation to the class action. Some of Mr. Oliver’s evidence was directly contradicted by his former co-worker, Ernie Casorso. As will be seen, because notice was mailed to Mr. Oliver at his correct address in Washington, it is unnecessary to make a finding concerning his state of knowledge about the existence of the class action or the completion of an opt in form as a prerequisite to his becoming part of the class action.

[25] Mr. Oliver’s estimated share of the settlement amount is $35,000.

2. <u>Paul Foster</u>

[26] Like Mr. Oliver, Mr. Foster was employed by Freightliner at the material time. Notice was mailed both to his former Kelowna address and his then-current address in Washington state. He deposes that he received the notice package via Freightliner’s interoffice mail. Mr. Foster candidly admits that he understood the contents of the notice and the need to opt-in but, following discussions with fellow Freightliner employees, he felt “uncomfortable” about the class action and chose not to participate. He has since changed his mind and wishes to opt-in.

[27] Mr. Foster’s estimated share of the settlement amount is $26,000.

3. <u>Robert Mura</u>

[28] Mr. Mura did not continue his employment with Freightliner after the closure of the Kelowna plant. He was residing in Whitehorse, Yukon at the relevant time, however, the notice was sent to his former address in Kelowna, British Columbia. There is no record of his notice being returned as undeliverable. Mr. Mura was not included in the June 2006 Mailout.

[29] Mr. Mura deposes that he was never made aware of his potential eligibility to participate in the class action and, had he been aware, he would have elected to opt-in. No request was made to cross-examine Mr. Mura.

[30] The plaintiffs estimate that his share of the Settlement Amount is $15,000.

4. Frank Schauble

[31] Although Mr. Schauble had been terminated effective November 2001, he had resumed working for Freightliner and was residing in Vancouver, Washington during the relevant time. However, the notice was mailed to his former address in Ohio and was returned as undeliverable. He was not included in the June 2006 Mailout.

[32] It is clear that notice was never mailed to Mr. Schauble at his correct address. There is no cogent evidence that he received notice of the requirement to opt-in to the class action by way of Freightliner's interoffice mail or otherwise. I am satisfied that Mr. Schauble was not aware of the need to opt-in before the specified deadline, and that had he known of that requirement, he would have exercised his right to do so.

[33] Mr. Schauble's share of the Settlement Amount is estimated at $5,000.

5. Anthony Bliss

[34] Notice was mailed to Mr. Bliss at an old address in Kelowna, British Columbia. I am satisfied that at the material time he lived in Oakville, Ontario, where he held a managerial position in Freightliner's Toronto operation. There was no record of the notice being returned to Freightliner, and Mr. Bliss was not included in the June 2006 Mailout.

[35] Mr. Bliss is now deceased. His widow swore an affidavit for the purposes of this hearing. There is no evidence that notice was forwarded to Mr. Bliss at the Toronto office within the material period, or that he was otherwise notified of the requirement to opt-in by any other means. Long after the expiration of the deadline,

Mr. Bliss communicated with the administrator of the settlement funds to inform him that he had not received any correspondence regarding the class proceeding, and inquiring into the distribution of the settlement. When told that he was not eligible for distribution because he had failed to complete the mandatory opt in document in time, Mr. Bliss replied that he would have filled it in had he been aware of the requirement to do so. I am satisfied of that.

[36] Mr. Bliss's share of the Settlement Amount is estimated to be $35,000.

6. Len Eburne

[37] Mr. Eburne's notice was mailed to his former address in Kamloops, British Columbia; but he was residing in Whitehorse at the time. The notice sent to Kamloops was returned as undeliverable and he was not included in the June 2006 Mailout.

[38] Mr. Eburne deposes that he had no knowledge of the class proceedings until January 2009, when he read information pertaining to it on the internet. He says he would have opted in had he been given the chance. No request was made to cross-examine Mr. Eburne on his affidavit. I accept his evidence.

[39] The plaintiffs estimate his share of the Settlement Amount as $3,000.

7. John Box

[40] Notice was mailed to Mr. Box's incorrect address in Kelowna, British Columbia and was returned to Freightliner as undeliverable. He was not a recipient of the June 2006 Mailout.

[41] At the material time, Mr. Box was employed at Freightliner's Portland operations. There is no evidence that notice was subsequently forwarded to him via interoffice mail or through any other means, or that he was otherwise made aware of his need to opt-in within a prescribed time. Mr. Box says he became aware of the proceedings some years later, and sent an email to the administrator advising of his

desire to opt-in. He was informed that he was too late. Mr. Box was not cross-examined on his affidavit. I accept his evidence.

[42] No estimation of his potential share of the Settlement Amount was provided.

8. <u>Frank Day</u>

[43] Mr. Day's notice was mailed to his former address in Kelowna, British Columbia. At the time, he was residing in Vancouver, Washington and working at the Portland plant. There is no record of his notice being returned to Freightliner, nor was Mr. Day included in the June 2006 Mailout. His share of the Settlement Amount has been calculated as $45,000.

[44] Mr. Day deposes that he did not know that he had to complete any paperwork in order to participate in the class proceeding. He explained that his understanding, gleaned from discussions with former co-workers, was that he was automatically included in the class by virtue of his status as a former employee of Western Star.

[45] Mr. Casorso was a long-time employee of Freightliner. Mr. Day and Mr. Casorso have known each one another for more than 30 years. Mr. Casorso was part of an informal group that was actively involved in the class action. In conjunction with others of that group, he made a concerted effort to get the word out to non-resident members to ensure they knew about the need to opt-in.

[46] According to Mr. Casorso, when the initial mailing of notices was taking place, he contacted Mr. Day, as well as Mr. Oliver, to make sure that when they received the notice package, they would exercise their rights to opt-in to the class action. He insists that he told Messrs. Day and Oliver of that requirement on more than one occasion both over the telephone and during a visit to Vancouver, Washington. Mr. Casorso also deposes that Mr. Day was good friends with Trudy Houghton, the manager of the human resources department at the Kelowna facility and later at the Portland truck plant. The implication of his evidence, although he does not say so directly, is that Ms. Houghton would have likely told Mr. Day of the need to opt-in in

order to be part of the class. However, Ms. Houghton, who has sworn affidavits in these proceedings, does not address that point in her evidence.

[47] Mr. Day was cross-examined at the hearing. He readily agreed that he periodically spoke to Mr. Casorso about the class action, but denied that the opt-in requirement was ever explained to him. He was unshaken in his persuasive insistence that co-workers had advised him that he was automatically included as a member of the class. Based on that erroneous understanding, he called the administrator in October 2009 inquiring about payment of his share of the Settlement Amount, only to learn that he was not eligible because he had not submitted the opt in notice. Mr. Day deposes that he would have chosen to participate in the class proceeding had he known of the requirement to opt-in.

[48] Mr. Day presented as a credible and reliable witness under cross-examination. The email correspondence exchanged between him and the Plan administrator in 2009 bolsters his testimony to the effect that he was not aware of the opt-in requirement.

[49] In the end, I conclude that Mr. Casorso is mistaken in his recollection of advising Mr. Day of the need to opt-in to have standing as a class member, and find it more probable than not that Mr. Day was unaware of that prerequisite during the relevant period.

ANALYSIS

[50] Freightliner's application is framed in terms of whether the Certification Order and/or the Settlement Approval Order should be amended so as to incorporate within the Distribution Group, those of the complainants who were not notified of the need to opt-in to the class action, and would have exercised their right to do so before the expiration of the opt in period had they been aware.

[51] Freightliner's position is that the mailing of the notice was defective as it concerns the complainants. Stressing that the broad purpose of the *Act* is to provide a body of procedural rules aimed at ensuring access to justice and promoting the

effective and economical use of the judicial system by a group of similarly situated litigants, Freightliner argues that incorporating the complainants within the Distribution Group is fair and appropriate. It contends that the nature of the action, being a claim for surplus funds to which the Plan members were beneficially entitled as distinct from a claim for individual damages, and the fact that the Settlement Amount was negotiated as a global amount aimed at replenishing the value of the depleted surplus, rather than individualized compensation, favour inclusion.

[52] The plaintiffs oppose the relief sought by Freightliner based on what they contend are general principles applicable to all class proceedings, as well as the specific circumstances of the complainants. They contend that, given the potential size and diversity of the pensioner group which had taken form over a forty year span, it was recognized at the outset of the proceeding that perfect notice could not be achieved and that standard was not imposed by the Certification Order. They correctly make the point that the *Act* does not mandate perfect notice in any event.

[53] Building on that line of argument, the plaintiffs contend that if notice had been mailed to the recipient's address as shown in the database, then there has been compliance with the Certification Order and that should be the end of the matter. They also argue that, to the extent that there were any deficiencies with the notice, they were the fault of Freightliner. At a minimum, they submit that Freightliner is to be blamed for any inadequacy of notifying its current employees, who should have been sent notice at their last known addresses rather than the addresses found in the actuaries' database. While acknowledging that this was not an explicit term of the Certification Order, they submit that as a matter of common sense it was an implied term. Relying on that core contention, the plaintiffs submit that Freightliner should be held financially responsible for the consequences of the defective mailing in the form of legal and actuarial costs, expenses incurred in postponing distribution and any losses sustained by one or more of the complainants.

[54] That finger-pointing submission fails to appreciate that the plaintiffs very much collaborated with Freightliner with respect to designing the form and the methods of

notice with the joint objective of alerting as many potential members as possible to the existence of the class proceedings. Any dispute between the parties regarding notice was mostly about who would bear the costs of its implementation. Looking back, it may be unfortunate that greater thought was not given to the prospect that the databases might not be up to date, however, if that was a failing (and I make no finding that it was) it is to be laid at the feet of both parties.

[55] Raising the spectre of opening the floodgates, the plaintiff class warns that there would be significant implications for class actions were the Court to amend its prior orders to expand the Distribution Group so as to encompass the complainants at this late stage. Resting on policy grounds, they contend that there must an inviolable cut-off date for non-resident members to opt-in to a class action. Otherwise, they argue, the scope of the class can never be ascertained with certainty rendering the calculation of individual distributions of the Settlement Amount problematic, if not impossible.

[56] As a separate issue, the plaintiffs submit that, on the basis of the decision in *Rumley v. H.M.T.Q.*, 2005 BCSC 189 [*Rumley*], I no longer have jurisdiction to amend an order or otherwise add the complainants to the Distribution Group.

[57] In *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 [*Hollick*], the Chief Justice, writing for the Court, observed at para 14 that class proceedings legislation should be construed generously because it "was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than *ad hoc* basis, with the increasingly complicated cases of the modern era". Continuing at para. 15, her Ladyship stated that it is "essential ... that the 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". The Chief Justice identified the main purposes of class proceedings legislation as (1) serving judicial economy by avoiding unnecessary duplication; (2) improving access to justice by making economical the prosecution of claims that individuals would find too costly to prosecute on their own; and (3) serving efficiency

and justice by modifying the behaviour of potential defendants who might otherwise be tempted to ignore public obligations (at para. 15). The "Act " being referred to in *Hollick* is the *Ontario Class Proceedings Act*, however, the Chief Justice's instructive comments apply to class proceedings legislation at large.

[58] Similar observations can be found in decisions of this Court. For example, in *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158, 36 B.C.L.R. (3d) 350 (S.C.), reversed on other grounds (1998), 157 D.L.R. (4th) 465, 48 B.C.L.R. (3d) 90 (C.A.), Smith J. wrote at para. 58, that:

> ... the 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.

[59] In *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343, 98 B.C.A.C. 22, Cummings J.A. emphasized that the *Act* was enacted to provide a procedure for the fair resolution of claims that are either uneconomical to pursue individually or, if done so, could overwhelm judicial resources. At para. 25, he observed:

> 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.

[60] For obvious reasons, effective notification to potential class members is crucial in every class action. It is the intent of the *Act* generally, and was the goal of the Certification Order, that prospective members be given sufficient notice to enable them to make an informed decision about whether or not to participate in the proceedings. The content and modes of delivery of notice are meant to be tailored to fit the particular circumstances at hand. For that purpose, the *Act* empowers the court to determine when and by what means notice is to be given by reference to an array of factors, such as the entailing costs, the places of residence of class members and the number of class members.

[61] In this case, the Court combined a variety of notice methods modelled on formats used in the majority of certified class proceedings: direct mailing to the

identified class members and publication in newspapers and on the website of class counsel. Informal notice by means of word of mouth, by class representatives and others also occurred. In evidence are various emails from Mr. Gregg indicating that he and members of his steering committee made efforts to spread awareness about the opt-in requirement among the membership, beyond the modes of notice stipulated in the Certification Order. There was nothing in those emails specific to any of the complainants.

[62] It is understood that, short of requiring personal delivery, the chosen notification process may not be effective in every case. Therefore, it is not uncommon for the court to modify the initial notice requirements, or extend the notice period or vary the opt-in times: (see generally, *Hoy v. Medtronic, Inc.*, 2002 BCSC 1551). Indeed, that is what occurred in this case and prompted the June 2006 Mailout.

[63] Rectification of an inadequate notice process usually arises early on in the action. Had the issue of deficient notice been raised by the complainants in the pre-settlement era, I expect that the plaintiff class would not have objected to redress in the form of bringing all or some of the complainants within the Distribution Group.

[64] Here, however, the Court has been asked to confront the issue at a more advanced stage of the proceeding. Leaving aside the issue of *functus*, the jurisprudence does not appear to endorse an absolute bar on adding individuals who have not been notified of a class action before the stipulated deadline has passed or extending the time to opt-in after a settlement agreement has been reached. There is case authority that supports the extension of a registration deadline even after a settlement of the case has been attained in appropriate circumstances. The court is cloaked with a broad discretion and is expected to use it to advance the goals and purposes of the *Act:* (see generally, *Harrington v. Dow Corning Corporation*, 2001 BCSC 221; *Guglietti v. Toronto Area Transit Operating Authority*, [2000] O.J. No. 2144; *Boys and Girls Club of London Foundation v. Molson Coors Brewing Company et al*, [2010] Q.J. No. 14108).

[65] Tracking the language of s. 12 of the *Act*, Freightliner asks the question: does the fair conduct of the proceeding require that the Court deal with defective notice at this stage? An assessment of fairness necessarily entails the weighing of prejudice that could flow to one or other of the interested parties in consequence of permitting or denying the application at hand. Prejudice is determined in the context of the surrounding circumstances.

[66] It bears repetition that the fundamental claim in this class action concerned the Plan members realizing their pre-existing beneficial entitlement to a pension surplus which they claimed ought to have been intact when the Plan was wound up. The plaintiffs specifically sought orders that compelled the repayment of monies to the Plan to restore the allegedly improper withdrawals, expenditures and contribution holidays, and a declaration that the Plan members were entitled to that surplus. Consequently, had the claim been successfully pursued through trial and the surplus ordered to be reconstituted, by virtue of the declaration sought all of the Plan members with a vested interest at the time of the wind-up, being all of the beneficiaries of that surplus and not just the class members, would have been entitled to a share of it.

[67] The evidence shows that the parties negotiated the arm's length settlement on that footing. That is, they assessed what amount was owed in the form of wrongfully appropriated and depleted surplus having regard to the claims as pleaded and the defences raised, and arrived at a global amount. There was no evidence that had the complainants opted-in to the class, the Settlement Amount would have been any different. That is because the Settlement Amount was not calculated by tabulating the individual damages of the participating class members. Rather, it was intended to reflect the claims of all pension beneficiaries to the surplus, not just the participating members of the class. According to the uncontradicted evidence of Mitchell Cogen, who was Freightliner's in-house counsel at the time and who participated in the negotiation:

> At the time of the July 2008 mediation, I had no knowledge of the exact size of the class. There was no discussion of discounting the amount to be paid in settlement of claims to reflect the proportionate interest of class members in

> an alleged surplus. For my part, I agreed to the Settlement Amount on behalf of the defendant Freightliner as a general compromise of a potential claim to an alleged surplus, without discount, to reflect the size of the class.

[68] The settlement in this case is distinguishable from a settlement in the kind of class proceeding where the quantum of the settlement is directly tied to the actual or projected number of participating class members and their individual damages.

[69] Class counsel urges that the Court not be moved by the fact that the Settlement Amount has not been fully distributed. In his written brief, he submitted there was no evidence that there is any money available to pay the claims of persons other than those who were identified originally, which does not encompass non-residents who failed to opt-in, such as the complainants. At the hearing, he softened his position considerably on the point of whether there would be funds available to satisfy the entitlement of the complainants. His fundamental submission touching on the issue of prejudice was instead that the participating class members would receive less money if one or more of the complainants were permitted to share in the remaining funds.

[70] And yet at the hearing there was remarkably little evidence presented detailing the current status of the undistributed portion of the Settlement Amount. That evidence would have been readily accessible to class counsel who has been working in tandem with the Plan actuaries. It is possible to cobble together a relatively cogent picture of the status of the undistributed holdback however, from the various website postings of class counsel in evidence. Also in evidence was a reporting letter to class counsel from the actuaries dated January 26, 2010. As a whole, this evidence indicates that the holdback was available to a specified class of members, who were broken down into three subcategories, pending confirmation of their individual eligibility. The composition of two of those three subgroups had not been fully ascertained at the writing of the actuaries' letter. As matters then stood, it was clear to the actuaries that the amount of the holdback greatly exceeded the amount that would be required to make the appropriate *pro rata* payments in the second phase of distribution. They anticipated that, of the $1,084,702 segregated

holdback, only $476,381 would be needed to satisfy the claims of the second distribution group. Based on those figures, the sum of approximately $722,000 would be available to make another *pro rata* distribution among all of the participating class members. Class counsel did not object to the admission of this letter nor dispute the accuracy of its contents.

[71] The best estimate of the total share of the complainants in the Settlement Amount, excluding Mr. Box for whom no estimate was provided, is $164,000. This represents a very small proportion, approximately 2%, of the overall Settlement Amount. Even if the claims of the complainants were paid in full, the sum of approximately $558,000 would be left to be distributed to existing class members over and above their initial payments. There would be no need to claw back funds previously distributed. The arithmetic further points to a likelihood that by seeking to exclude the complainants from the ambit of distribution, the existing class would preserve for themselves somewhat of a windfall at the expense of their fellow Plan members. Even if that were not the case, the fact is there are more than sufficient undistributed funds to meet the claims of all of the complainants with little, if any, financial prejudice to the existing class members.

[72] Class counsel contends that denying the order sought by the complainants would not prejudice them because they are free to pursue their claims against Freightliner individually outside of the class action regimen. In theory, that is true. However, as was noted in the briefs filed by Freightliner and class counsel in support of obtaining the Settlement Approval Order, the claim to surplus in this case was legally and factually complex and the applicable law unsettled. Consequently, an appeal by the losing party was close to a certainty and there was a real possibility that the party who lost on appeal, would seek leave to the Supreme Court of Canada. The action had been ongoing for several years before it settled, and all parties had incurred significant legal expense. It is also common ground that the plaintiff class faced significant limitation hurdles based on the commencement of the lawsuit in 2002. The passage of another ten years only serves to magnify that real

obstacle. Still further, the value of the individual claims is relatively small, and would be uneconomic to pursue outside the class proceeding.

[73] In the circumstances, it is therefore not a practical answer to suggest that the complainants have an effective alternative remedy in the form of mounting separate claims against Freightliner. In reality, if the complainants are not brought within the Distribution Group, they will almost certainly be left without legal remedy. Against that must be balanced the potential prejudice, if any, which might be experienced by the existing class members if the complainants are admitted to the Distribution Group. I find that to the extent that the existing class would suffer some financial prejudice were the Court to grant the relief sought, it is outweighed by the clear prejudice to the complainants if the relief is denied.

[74] As mentioned, class counsel relies on *Rumley* to assert that once the Settlement Approval Order was entered the Court became *functus* and without jurisdiction to amend that order or the Certification Order to bring the complainants into the Distribution Group.

[75] *Rumley* concerned four applicants who sought to be added to a class for the purpose of participating in a settlement that had already been approved. The order approving settlement had been entered by the court. All of the applicants had previously accepted settlements in respect of the wrongdoing as part of a provincial compensation program, and three of them had expressly opted-out of the class action suit. The residency of the fourth complainant was unclear, but he had not taken the steps required of either a resident or non-resident potential class member. After settlement was reached, notice was sent to the applicants (and others) telling them that they were not approved as class members and allowing them 30 days to apply to court for review of their status. Although aware of this deadline, none of the applicants sought review within that time frame.

[76] Roughly six months after the deadline, the applicants applied to be joined in the class action. The stated reasons for their delay were not persuasive. Humphries J. dismissed the applications mainly on the ground that, after the order

approving the settlement was entered, she was *functus*. She recognized that the only leeway for an individual advocating late inclusion after that event was to have followed the procedure for judicial review contained in the settlement agreement, which was attached to the order. Had one or more of them done so, it is evident that Humphries J. considered herself to have jurisdiction to review their application, even though the order had been entered. Without having availed themselves of that opportunity, however, Humphries J. regarded herself as *functus* and without jurisdiction.

[77] *Rumley* is factually distinguishable from the case at bar on many fronts. In the first place, none of the complainants received compensation for the depletion of the surplus from any other source. Additionally, except for Mr. Foster, the complainants did not fail to adhere to a time-sensitive process about which they were informed. Because of the unforeseen problems with the mailing of the notice in this case, the majority of the complainants were in the dark about the need to take any steps in order to join the class. That those complainants did not conform to a deadline which they knew nothing about surely amounts to a technicality that ought to be overtaken by the more forgiving concept of what is fair in the circumstances. Adopting that approach is fortified by reference to the key objectives of the *Act* of improving access to justice for individuals whose claims might not otherwise be pursued and promoting the efficient handling of cases involving a mass wrong.

[78] Perhaps the most stand-out feature distinguishing *Rumley* from the case at hand is that here the Court is not *functus*. It was anticipated that the distribution of the Settlement Amount would present challenges along the way and involve an ongoing evaluation of entitlement, at a minimum with respect to the composition of those entitled in to second distribution. Section 3 of the Settlement Agreement, which forms part of the Settlement Approval Order, contemplates a continuing role for this Court in overseeing to whom and in what manner the settlement funds will be distributed.

[79] In my view, the threshold that must be satisfied in order to be considered for inclusion within the Distribution Group is that notice was *not* mailed to the member's proper address. There is no dispute that the requisite notice was mailed to the then correct addresses of Messrs. Oliver and Foster. The concepts of prejudice and fairness at play and consideration of the overall purposes of the *Act* do not provide a principled grounding to include them within the Distribution Group. This is particularly true in the case of Mr. Foster who admits to receiving notification and, for personal reasons, took a "wait-and-see" approach about whether to participate. This hearing was not intended to be in the style of a roving inquiry as to whether recipients had in fact received the prescribed notice that was sent to their correct address, or had read the notice, or had fully appreciated its contents at the relevant time. I share the view of class counsel that revisiting the issue of notice within such wide parameters would effectively undermine the essence of the notice regime stipulated in the Certification Order, and invite descent down the slippery slope.

[80] Where notice was mailed to the complainant's wrong address and the evidence satisfies me that he was not otherwise made aware of the need to opt-in before the applicable deadline and would have exercised that option had he known, permitting an amendment to expand the Distribution Group to include him resonates with the purposes of the *Act,* is supported by the forgoing analysis and, at the same time, sufficiently respects the integrity of the notice requirement. The complainants who qualify as such are: Mr. Mura, Mr. Schauble, Mr. Bliss (as represented by his estate), Mr. Eburne, Mr. Day and Mr. Box. With the disentitlement of Mr. Oliver and Mr. Foster, the financial impact on the members of the class resulting from inclusion of the complainants is even less than as described earlier.

[81] There is an additional issue unique to Mr. Box. Pursuant to the Settlement Agreement only members who were either pensioners of Western Star or were active or disabled employees of Western Star as at October 1, 2001 came within the class. Mr. Box was terminated effective September 26, 2001. There is evidence that the following January, he elected to transfer his basic pension entitlement and excess contributions to a non-locked in registered retirement savings plan.

Consequently, there is an issue as to whether he is a proper member of the class quite apart from the notice issue. There was only meagre evidence about the nature of his withdrawal from the Plan and the conversion of his entitlement to an RRSP, leaving the Court without a proper foundation to determine whether Mr. Box meets the definition of a member of the class. No doubt class counsel and the actuaries have had to evaluate the eligibility of numerous members, perhaps some in circumstances akin to those of Mr. Box. If they are unable to determine Mr. Box's eligibility, then on the filing of appropriate materials, they are at liberty to refer it to Court for determination. In the event that they are, or the Court is, satisfied that Mr. Box qualifies as a class member, for sake of clarity I reiterate that only then is he to be included as a member of the Distribution Group.

[82] The Settlement Approval Order is hereby varied as follows:

1. Each of the complainants, other than Mr. Oliver and Mr. Foster, is excluded from the category of "Non-BC Failure to Opt Ins" defined in paragraph 3 thereof;

2. Each of the complainants, other than Mr. Oliver and Mr. Foster, is included within the Distribution Group as defined in paragraph 7 thereof.

3. John Box falls within the above category of "complainants" in the event only that he otherwise qualifies as a member of the Class in that he did not cease to have an interest in the Plan (or any of its predecessor plans) on or before September 30, 2001.

[83] If the parties are unable to agree on costs they may file written submissions implementing a time table of their choosing that incorporates a final deadline of June 15, 2012.

"Ballance J."

S.K. Ballance, J.