IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Somerville v. Catalyst Paper Corporation,* 2011 BCSC 331

Date: 20110321
Docket: S103215
Registry: Vancouver

Between:

Darryl Somerville

Plaintiff

And

Catalyst Paper Corporation

Defendant

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for Plaintiff:	D. Gleadle and C. Forguson
Counsel for Defendant:	W. Milman
Place and Date of Hearing:	Vancouver, B.C. February 14-15, 2011
Place and Date of Judgment:	Vancouver, B.C. March 21, 2011

[1] This is an application by the plaintiff pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, for a motion certifying this action as a class proceeding.

[2] The plaintiff is an employee of Catalyst Paper at its pulp and paper mill in Powell River. The defendant operates three mills in British Columbia. They are in Crofton, Powell River and Port Alberni. In addition, there is a mill in Arizona. The defendant also has employees at its sales and administration office in Richmond, British Columbia.

[3] The plaintiff brought an action for breach of contract after the defendant introduced several changes to the compensation package for the plaintiff and other non-union employees in the mills and at its Richmond head office. The plaintiff alleges that these changes breach his contract of employment.

[4] The defendant is not properly named. The employees at the British Columbia mills are employed by Catalyst Paper, a general partnership of the defendant Catalyst Paper Corporation and Catalyst Pulp Operations Inc. The employees in Richmond are employed by Catalyst Pulp and Paper Sales Inc. The defendant does not oppose an amendment to the style of cause to reflect this reality. However, the plaintiff prefers not to agree to such an amendment because it wishes to bring a motion declaring these entities to be a “common employer”. Therefore the style of cause will remain as it is for the time being.

[5] The changes to the employees’ terms and conditions of employment are of three kinds. First, there was a change to the Short Term Incentive Plan (“STIP”). STIP is a system for paying bonuses to employees to reward performance. It has been in effect for several years. Since 2007, STIP has been paid out once a year based on the achievement of three targets: corporate targets, divisional targets, and individual targets.

[6] Second, there were changes to various benefits. Benefits encompass vacations with pay, health care, life insurance and so on.

[7] Third, there were changes to the pension plans. Prior to January 1, 2010, there were two pension plans. There was a “defined benefit” plan for employees hired prior to January 1, 1994. There were apparently 71 employees in this plan. It provided a fixed monthly pension benefit based on the formula in the plan. There was also a “defined contribution” plan. Prior to January 1, 2010, the company contributed 7% of an employee’s pensionable earnings to the pension account of the employees.

[8] The defendant’s case is that the global pulp and paper industry conditions were extremely adverse in 2009. Catalyst’s share price went from $7.00 in early 2002, to $3.60 in June 2007, to $0.20 at the end of 2009.

[9] The company decided to reduce its labour costs.

[10] In November 2009, the company advised its non-union employees that it was making changes to the benefit package and to the annual vacation and pension plan.

[11] Effective January 1, 2010, vacation entitlement was capped at 5 weeks. Vacation entitlement is based on length of service. Long service employees were previously able to earn up to 7 weeks vacation. This change had an immediate adverse effect on employees with more than 23 years of service.

[12] The company also eliminated a program of “extended vacations”. This was an extra week of vacation which was earned every five years. Further, the company decided that vacation credits could no longer be traded for “flex dollars”.

[13] In late January 2010, Catalyst announced it would not be paying a short term incentive plan for 2009.

[14] The employees who were in the defined benefit pension plan were transferred into the defined contribution plan. As well, the company’s contribution was reduced from 7% to 5%.

[15] Changes to the benefit plan took effect on March 1, 2010. Previously, the medical premium under the Medical Services Plan was paid entirely by the company. Commencing March 1, the premium was shared.

[16] Finally, post-retirement benefits changed for employees retiring after March 1, 2011. For those employees, there will be no benefits after they reach the age of 65.

[17] On May 10, 2010, the plaintiff brought this action under the C*lass Proceedings Act*. In the notice of civil claim, he alleges that the defendant's failure or refusal to make payments under the 2009 STIP is a breach of contract, "resounding in damages to all eligible employees." He also alleges that the reduction in benefits is in breach of contract with the same remedy.

[18] The plaintiff is seeking:

> 1. A declaration that the defendant breached the contracts of employment of the plaintiff and all of its employees by:
>
> (a) refusing to pay STIP due for service during the year 2009;
>
> (b) removing without proper advance notice valuable benefits as particularized in paragraph 18 of the Statement of Facts above;
>
> 2. An [sic] declaration that the defendant is in breach of an obligation to compensate the plaintiff for 2009 STIP and removal of the benefits particularized in paragraph 1.7; ...

[19] This application is governed by the *Class Proceedings Act*. Section 4(1) of the *Act* provides:

> 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:
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> (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.

[20] There is no dispute regarding the first requirement. The pleadings disclose a cause of action.

[21] The four matters in issue, then, are:

(1) whether there is an identifiable class;

(2) whether there are common issues;

(3) whether a class action is the preferable procedure for the resolution of the plaintiff's claims; and

(4) whether the plaintiff is able to and will adequately represent the claims and interests of the proposed class; has produced a workable plan; and does not have an interest in conflict with other class members.

IS THERE AN IDENTIFIABLE CLASS?

[22] The plaintiff's original motion proposed 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").

[23] The defendant opposed these definitions on a number of bases. The "most fundamental flaw," according to the defendant, was that the classes were overly broad as they did not exclude the large number of Catalyst non-union employees who had either settled or waived the kind of claim being put forward in this action:

> The most fundamental flaw in the definition of the proposed classes is that they are all overly broad for failure to exclude the overwhelming number of proposed class members who have either accepted an offer from Catalyst to receive a sum of money or extra vacation time (the "Special Bonus") in exchange for relinquishing their right to participate in this proceeding or have otherwise settled or waived the kinds of claims being advanced in this action (the "Settled Employees").

[24] This objection was based on the events following the commencement of the action. Catalyst's president and CEO wrote to the affected employees in 2010. He advised them that he considered the law suit to be "damaging" to the company and that he wanted to resolve the issues. He advised that the executive team had waived any claim. He offered a "special 2009 bonus", either in cash or in vacation days, to be taken by the end of 2013.

[25] Steve Bonifero, the defendant's senior vice president for human resources, deposed that the vast majority of the affected employees accepted the offer. He said there are some 556 employees in the description of Class A. After excluding executives who waived their claim for STIP and employees who accepted the offer, there are 26 persons remaining. Similarly, there are 488 employees in the literal definition of Class B; twenty-five of them have not accepted offers. Finally, 10 of the 72 persons affected by the changes to the pension plan, i.e. Class C, have not accepted offers.

[26] The plaintiff responded to this objection by agreeing to exclude from the three classes persons who accepted offers or waived their claim. The three proposed classes are now as follows:

(a) all persons that were permanent non-union employees of the defendant in 2009, and who were eligible to participate in a bonus remuneration program known as STIP, but excluding persons who have by this date signed a waiver, release, or who accepted a settlement offer finally determining on their behalf the claims advanced in this action ("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 were notified by the defendants that employment benefits they had enjoyed until that time would be eliminated or reduced, but excluding persons who have by this date signed a release, waiver, or who accepted a settlement offer finally determining on their behalf the claims advanced in this action ("Class B");

(c) All persons that were members of a defined benefit pension plan for the defendant's non-bargaining unit on December 31, 2009 but excluding persons who have by this date signed a release, waiver, or who accepted a settlement offer finally determining on their behalf the claims advanced in this action ("Class C").

[27] The requirements of s. 4(1)(b) are well established. It must be shown that membership in the class is capable of objective determination without reference to the merits of the action: *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46, [2001] 2 S.C.R. 534. Also, there must be some rational relationship between the class and the common issues. The class should not be defined in such a way that arbitrarily excludes persons who share their same interest in the resolution of the common issues: *Hollick v. Toronto (City),* 2001 SCC 68, [2001] 3 S.C.R. 158.

[28] There are two remaining objections to the new proposed class.

[29] First, the definitions assume that the defendant is the sole employer of the proposed class members, which is not the case.

[30] This is a valid objection. However, it is easily cured by amending the style of cause to name the proper corporate entities as the defendants. As explained above, this will be done before long.

[31] Second, the defendant argues that Class B, as amended, refers to persons who were employed on January 1, 2010, and who at that time were notified that employment benefits they had enjoyed would be eliminated or reduced.

[32] There is some issue as to when employees were notified and when the benefits would be reduced. The Class B definition is amended to delete the words "at that time". The uncontradicted evidence is that the change in benefits occurred on March 1, 2010.

ARE THERE COMMON ISSUES?

[33] The term "common issues" is defined in s. 1 of the *Class Proceedings Act* 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;

[34] The following provisions of the statute are also relevant:

> 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:
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> ...
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> ...
>
> (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.

[35] The question under s. 4(1)(c) of the *Act* is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis": *Western Canadian Shopping Centres Inc.* at 39. See also: *Hollick* at para. 18. This question is to be applied narrowly: *Rumley v. British Columbia,* 2001 SCC 69, [2001] 3 S.C.R. 184 at para. 33. In *Western Canadian Shopping Centres,* the Supreme Court of Canada described the analysis as follows, at para. 39:

> ...Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action.

[36] Huddart J.A., writing for the majority in *Harrington v. Dow Corning Corp,* 2000 BCCA 605, leave to appeal ref'd [2001] S.C.C.A. No. 21, described the extent of commonality required for an issue to be certified as a "common issue." At paras. 23-24, she wrote:

> 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 inevitably 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).
>
> More important to a determination of common issues is the requirement that they be "common" but not necessarily "identical". In the context of the *Act*, "common" means that the resolution of the point in question must be applicable to all who are to be bound by it. I agree with the appellants that to

> be applicable to all parties, the answer to the question must, at least, be capable of extrapolation to each member of the class or subclass on whose behalf the trial of the common issue is certified for trial by a class proceeding...

[37] The plaintiff need not demonstrate that the resolution of a common issue will, in and of itself, support relief: *Campbell v. Flexwatt Corp.,* [1997] B.C.J. No. 2477 (C.A.), leave to appeal ref'd [1998] S.C.C.A. No. 13. Nor does the plaintiff need to show that everyone in the class shares the same interest in the resolution or that the issue will be answered the same for each class member: *Hollick* at para. 21. See also: *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C.) at para. 40, rev'd on other grounds (1998), 157 D.L.R. (4th) 465 (B.C.C.A.).

[38] The test has been held to be a "low bar". The court in *Fresco v. Canadian Imperial Bank of Commerce*, 2009 CarswellOnt 3481 (S.C.J.), aff'd (2010), 323 D.L.R. (4th) 376 (Ont. S.C.J. Div. Ct.), emphasized this at para. 52:

> [52] The common issues criterion is not a high legal hurdle, but a plaintiff must adduce some basis in fact to show that issues are common: *Hollick* at para. 25. An issue can be common even if it makes up a very limited aspect of the liability question and although many individual issues remain to be decided after its resolution: *Cloud* [*v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 (Ont. C.A.)] at para. 53. It is not necessary that the answers to the common issues resolve the action or even that the common issues predominate. It is sufficient if their resolution will significantly advance the litigation so as to justify the certification of the action as a class proceeding.

[39] The significance of the common issues may be examined in relation to the individual issues: *Western Canada Shopping Centres* at para. 39. However, s. 4(1)(c) of the *Act* excludes an examination of the possible predominance of individual issues: *Harrington* at para. 23. See also: *Jones v. Zimmer,* 2010 BCSC 1504 at para. 10. The fact that there are numerous individual issues that remain to be litigated after the conclusion of the common issues trial is a consideration under the preferable procedure analysis: *Hollick*.

[40] An issue is not common where it raises questions that require an assessment of individual facts, specific to each class member, thereby necessitating a

determination on an individual basis: *Lam v. University of British Columbia,* 2010 BCCA 325. In *Egglestone v. Barker*, [2003] O.J. No. 3137, 38 C.P.C. (5th) 386 (S.C.J.), Cullity J. observed at para. 18:

> If, on the basis of the pleading and the minimum evidentiary record required, the court concludes that an issue cannot be determined on a class-wide basis at a trial – that it would have to be decided separately in the light of the particular circumstances of each member – certification on the basis of such an issue would not be justified. This would be so whether the defect is to be understood as detracting from the commonality of the issue, or as affecting the question of the preferable procedure...

[41] It is noteworthy that the list of common issues may be refined as the litigation progresses: *Brogaard v. AG Canada,* 2002 BCSC 1149, at para. 114. See also: *Hoy v. Medtronic,* 2001 BCSC 1343, aff'd 2003 BCCA 316. However, it is important to identify common issues at the certification stage: *Caputo v. Imperial Tobacco Limited* (2004)*,* 236 D.L.R. (4th) 348 at para. 56.

[42] In summary, a common issue is an issue of fact or law that is a substantial common ingredient of each class members' claim, and its resolution must be necessary to the resolution of each class member's claim. In that way, the certification and litigation of a common issue moves the litigation forward.

[43] The plaintiff asked the court to certify the following common issues:

Class A

(a) Were the members of Class A employed by the defendant? (After amendment, by each of the defendants.)

(b) 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?

(c) What were the corporate targets which, if achieved, would require a STIP payment to class members?

(d) What were the divisional targets which, if achieved, would require a STIP payment to class members?

(e) Were such targets achieved?

(f) If the targets were achieved, is there a lawful basis for the defendant not to make the STIP payments?

(g) What was the achievable pool of funds to pay out the aggregate STIP awards?

(h) If the available pool of funds is insufficient to pay out the aggregate STIP awards, are the cumulative claims to the available funds payable on a pro-rata basis?

Class B

(a) Were the members of Class B employed by the defendant? (After amendment, by each of the defendants.)

(b) What were the contractual terms relating to benefits for members of Class B?

(c) Did the contract of employment of each member of Class B require the defendant to provide notice of the “2010 Benefit Package Changes”?

(d) When did the defendant give notice of the “2010 Benefit Package Changes”?

(e) In particular, if the defendant communicated the likely future reduction of benefits at staff meetings held in November, 2009, were these communications effective notice in the absence of a specific date and particulars of the “2010 Benefit Package Changes”?

(f) Did the contract of employment of each class member require the defendant to give “reasonable notice” in advance of the “2010 Benefit

Package Changes", in the sense that "reasonable notice" is used in our courts when assessing wrongful dismissal ("Reasonable Notice")?

(g) Did the contract of employment of each class member permit the defendant to remove post-retirement benefits after an employee had qualified for such benefits as a result of having worked for the required period?

(h) If Reasonable Notice was required, and individual issues arise as to the amount of loss for any particular class member, should damages in favour of individual class members be assessed on the basis that they are entitled to be placed in the same position they would have been in if Reasonable Notice had been given?

(i) What impact, if any, did the defendant's financial circumstance have on the notice required to legally affect the "2010 Benefit Package Changes"?

(j) Did the fact that members of Class B were required to re-enrol in benefits plans each year have any impact on the required notice to legally implement the "2010 Benefit Package Changes"?

(k) Did the fact that the members of Class B elect to remain in the defendant's employ following the "2010 Benefit Package Changes" amount to a condonation of the changes?

(l) Did the fact that members of Class B elect to apply for and receive benefits under the changed terms amount to a condonation of the changes?

Class C

(a) Were the members of Class C employed by the defendant? (After amendment, by each of the defendants.)

(b) What were the contractual terms relating to Defined Benefit Pension Plan benefits for members of Class C?

(c) Did the contract of employment of each member of Class C require the defendant to provide notice of the Defined Benefit Pension Plan, in the sense of the ability of class members to accrue increased pension benefits by reason of additional years of service ("Closure")?

(d) Did the defendant give notice of the Closure, and if so, when?

(e) In particular, if the defendant communicated the likely future reduction of Defined Benefit Pension Plan at staff meetings held in November, 2009, were these communications effective notice in the absence of a specific date and particulars for implementation of the Closure, and without particulars of the manner in which the pension plan would be changed?

(f) Did the contract of employment of each class member require the defendant to give "reasonable notice" in advance of the Closure, in the sense that "reasonable notice" is used in our courts when assessing wrongful dismissal ("Reasonable Notice")?

(g) If Reasonable Notice was required, and individual issues arise as to the amount of loss for any particular class member, should damages in favour of individual class members be assessed on the basis that they are entitled to be placed in the same position they would have been in if Reasonable Notice had been given?

(h) What impact, if any, did the defendant's financial circumstance have on the notice required to legally affect the Closure of the Defined Benefit Pension Plan?

(i) Did the fact that members of Class C elected to remain in the defendant's employ following the Closure amount to a condonation of the Closure?

[44] Before proceeding with an analysis of the proposed common issues, it is pertinent to address a fundamental issue of contention between the plaintiff and the defendant regarding the certification of questions that ask the court to state general principles of law.

[45] The plaintiff submits that the proposed common issues seek to obtain the court's guidance on the legal principles involved in this matter; the court is not being asked to identify the legal questions that will remain to be answered following the common issues trial, or answers to issues of an individual nature. Specifically, the plaintiff argues that the common issues do not seek direction as to the amount of notice required for each class member, but the legal principles and appropriate process for determining the amount of required notice. The plaintiff says that a resolution of such issues advance the claims of each class member by providing guidance as to the legal principles to be applied when considering individual claims.

[46] The defendant argues that inquiries into general principle of law cannot possibly advance the litigation in a meaningful way. Further, the defendant argues that the plaintiff seeks to certify issues that are "common only when stated in the most general terms": *Rumley* at para 29.

[47] I agree with the defendant. Issues that are framed in overly broad language cannot be certified as common issues. McLachlin J., writing for the Supreme Court of Canada in *Rumley,* emphasized the importance of specificity for the purposes of a certification application at para. 29:

> There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in *Western Canadian Shopping Centres*, *supra*, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". It would not serve the ends of either fairness or efficiency to certify an action <u>on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.</u>
>
> [Emphasis added.]

See also: *Gregg v. Freightliner Ltd., et al,* 2003 BCSC 241 at para. 59, where the court denied the certification of two issues that were not sufficiently distinct.

[48] Thus, to the extent that the plaintiff seeks guidance on general legal principles applicable to this case, such issues will not be certified for the trial of common issues.

Class A proposed common issues

[49] The defendant does not take issue with the common issues associated with Class A. The issues, as written, are common to the class as required by the case law and s. 4(1)(c) of the *Act.*

Class B proposed common issues

[50] The defendant does not take issue with proposed common issues (a), (d), (j), (k) and (l) associated with Class B. They are issues of fact or law that will undoubtedly move the litigation forward. I am satisfied that the requirements of s. 4(1)(c) are met.

[51] The defendant argues that the other issues, i.e. issues (b), (c), and (e) to (i), are either not true issues as defined by the pleadings, or are not truly common to the members of the proposed classes.

[52] Proposed common issues (b) and (c) relate directly to the Class B members' contracts of employment. There is no comprehensive written employment contract in issue. To the best of Mr. Somerville's knowledge, each of the Class B members "have similar employment contracts in that their employment contracts are partly oral, evidenced by conduct and partly in writing": *Outline of Plaintiff's Submissions* at para. 7. Determining the terms of the employment contract relating to benefits of each member of Class B will decide an issue that is relevant to each member's claim and will avoid duplication of fact-finding and legal analysis. Thus, the resolution of issue (b) will advance the litigation for the benefit of the entire class.

[53] In contrast, issue (c) is not a common issue. Whether the contract of employment required the defendant to provide notice cannot be determined on a class-wide basis; it must be decided in light of the particular circumstances of each member of the group. Some circumstances noted by the defendant include "the impact of the changes on the individual class member relative to the value of the class member's benefits package as a whole..., character of employment, length of service and age": *Chamber Brief of the Defendant* at para. 123. Since the resolution of this issue requires a determination on an individual basis, issue (c) cannot be certified.

[54] Issue (f) effectively repeats issue (c). It too cannot be certified as a common issue.

[55] Despite the fact that the *Act* explicitly states that a claim of damages is not a bar to certification, I agree with the defendant that issue (h) is not a certifiable common issue. This issue asks, in its simplest terms, how damages should be assessed for each class member following the determination of the individual issues. The plaintiff seeks guidance from the court regarding general legal principles that are applicable to this case, which would not move this litigation forward in a meaningful way. Hinkson J. concluded the same on an issue of damages in *Gary Jackson Holdings Ltd. v. Eden,* 2010 BCSC 273. He wrote at para. 49:

> I do not regard the quantification of damages, however based, to be a matter of great difficulty if liability to the proposed class members is established, and so do not see it as an issue that will move the litigation forward significantly, and the individual interests of the proposed class members will ultimately, of course, become individual issues.

[56] To adopt the language of McLachlin J. in *Rumley,* "it would not serve the ends of either fairness or efficiency" to certify this issue: at para. 29.

[57] The defendant argues that issue (e) is not a common issue because it is redundant and, in part, already addressed by issue (d). Issue (e) asks the court to determine two things. First is whether the defendant communicated the likely future reduction of benefits at staff meetings held in November 2009. This is an issue of

fact which, on its own, may be certified as a common issue. Its resolution is an ingredient of each individual class member's claim, although it may not apply in the same manner to each member; i.e. to the members who attended the staff meeting in November 2009, in comparison to the members who did not. However, I agree with the defendant that the resolution of issue (d) essentially resolves this part of issue (e); it does not move the litigation forward in any meaningful way.

[58] The second part of issue (e) asks whether the communications at the November 2009 meeting constituted effective notice in absence of a specific date and particulars of the "2010 Benefit Package Changes." The comments above regarding the requirement that notice be given are of equal application here. Even absent specifics and particulars, an assessment of what constitutes effective notice must be determined on an individual basis.

[59] Issue (g) pertains to the plaintiff's claim that the defendant was in breach of the contract of employment by reducing post retirement benefits without proper notice to all eligible employees. Whether it was a term of the employment contract that eligible employees were entitled to post-retirement benefits is one consideration under common issue (b). However, once the terms of the contract are decided, the issue of whether the defendant was in breach of the contract of employment is a matter for individual claims. The distinction between the two issues is explained by the comments of Cumming J. in *Williams v. Mutual Life Assurance Company of Canada* (2000), 51 O.R. (3d) 54 (S.C.J.) at para. 39, cited with approval in *Gary Jackson Holdings Ltd.* at para. 39:

> The causes of action are asserted by all class members. But the fact of a common cause of action does not in itself give rise to a common issue. A common issue cannot be dependent upon findings of fact which have to be made with respect to each individual claimant. While the theories of liability can be phrased commonly, the actual determination of liability for each class member can only be made upon an examination of the unique circumstances with respect to each class member's [contract].

[60] Issue (g), as framed, is not "capable of extrapolation to all class members": *Brogaard* at 108. It is a common cause of action requiring an examination of each class member's circumstances. It will not move the litigation forward.

[61] Finally, issue (i) asks what impact, if any, the defendant's financial circumstances had on the notice required to legally affect the "2010 Benefit Package Changes." Having concluded that the amount of notice required is an inherently individual assessment, the resolution of issue (i) cannot be resolved in a fair or efficient manner at a trial of common issues: *Rumley* at para. 29. This issue is not sufficiently specific to satisfy the requisite standard of commonality required by law. Thus, the certification of issue (i) would not advance the litigation.

[62] In conclusion, issues (a), (b), (d), (j), (k) and (l) satisfy the requirements of s. 4(1)(c). They are common issues to Class B in that their resolution 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 member's claims.

Class C proposed common issues

[63] The issues associated with Class C are framed in similar language as those put forward for Class B. There is no dispute about issue (a), (d) and (i). They are common issues pursuant to s. 4(1)(c) of the *Act*. However, the defendant shares the same concerns regarding the Class B proposed common issues here and argues that issues (b), (c), (e), (f), (g) and (h) are not common issues.

[64] A determination of the contractual terms relating to the defined benefit pension plan, which is sought by issue (b), will affect Mr. Somerville and those employees falling under Class C. Resolving this issue at a trial of common issues will avoid a duplication of fact-finding and legal analysis by the trial judge, thereby moving the litigation forward in a meaningful way.

[65] Issues (c) and (f), which ask the court to determine what constitutes reasonable notice for members of Class C, and issue (e), which also pertains to notice requirements, are not common issues. As stated above under Class B, the resolution of these issues would inevitably break down into individual inquiries, which removes them from the umbrella of "common issues" as defined by the case law.

[66] Issue (g) here is effectively the same as issue (g) under Class B. For the same reasons, it cannot be certified. Similarly, issue (h) seeks the same answer as Class B issue (i); it is not a common issue.

[67] In sum, issues (a), (b), (d) and (i) may be certified as common issues.

IS THE CLASS PROCEEDING THE PREFERABLE PROCEDURE FOR THE FAST AND EFFICIENT RESOLUTION OF COMMON ISSUES?

[68] Section 4(2) of the *Act* lists several matters for consideration in this regard:

> 4. (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.

[69] In *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (C.A.), Cumming J.A. made several relevant observations. He said, at para. 25:

> ... The Legislature enacted the *Class Proceedings Act* on 1 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, 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. Trial court judges must be free to make the new procedure work for plaintiffs and defendants....

[70] Further, at paras. 65-66, Cumming J.A. said that the issue is whether this is the preferable procedure for resolving the common issues, not necessarily for

resolving the entire controversy. The task of the Chambers judge is in the nature of a cost/benefit analysis.

[71] In *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 at 364 (S.C.), varied (1998), 157 D.L.R. (4th) 465 (B.C.C.A.), Mr. Justice Smith made these remarks at para. 58:

> ... 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...

[72] Finally, one must have regard to s. 7 of the *Act*. It specifically states that the following 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.

[73] The plaintiff's position is that certification will create access to justice for the members of the class. The claims are each between a few hundred dollars and $60,000.

[74] A second reason is put forward in the circumstances of this case: it is awkward for the plaintiff to pursue a legal claim by himself while he is in an employment relationship with the defendant.

[75] I agree there is a measure of awkwardness, but a class proceeding is not a cure for this. There is no legal impediment to an employee bringing an action against her or his employer. It is not a breach of the employment contract. There is

simply a measure of awkwardness. In my view, this is not a factor to be weighed in the cost/benefit analysis.

[76] The level of damages is low in comparison to the cost of litigation. I agree with the plaintiff that for the majority and perhaps the entirety of members of the class, it is not economically feasible to proceed with an individual action. This is a compelling factor in the cost/benefit analysis.

[77] Allan J. stated in *Brogaard*, at para. 120:

> 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.

These comments are applicable here.

[78] The defendant argues that the plaintiff's position is that complex issues will require expert evidence from actuaries. The defendant says these issues will not be reasonably resolved at the common issues stage, and will only arise at the individual issue stage.

[79] There are two answers to this argument. First, if the defendant is correct, it remains the case that adjudication of the common issues would, in my view, advance the claims in a meaningful way. Second, if actuarial evidence is necessary to prove the question of individual issues, a class proceeding would likely result in limiting the number of actuaries the parties would need to engage.

[80] The defendants argue that an important consideration under this heading is whether the individual issues predominate. That is to say, preferability must take into account the importance of the common issues in relation to the claims as a whole: *Hollick* at para. 30.

[81] I conclude that the common issues are important in relation to the claims as a whole. Once the common issues are adjudicated (and they all must be adjudicated), individual determinations can be made.

[82] In any event, it is not a precondition to certification that common issues predominate over individual issues: *Western Canadian Shopping Centres* at para. 29.

[83] I am satisfied that certification of the class is the preferred procedure here.

THE REPRESENTATIVE PLAINTIFF

[84] Section 4(1)(e) of the *Class Proceedings Act* requires that before an action can be certified, the applicant must demonstrate 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 the other class members.

[85] In *Endean*, Smith J. explained that a class representative must share a common interest with the proposed class members, and must vigorously and capably prosecute the interests of the class.

[86] Mr. Somerville argues that he is a long-term employee. Thus he is well aware of the issues affecting the non-union employees.

[87] The defendant argues that the plaintiff is in a conflict of interest with respect to Class A. If the "available pool of funds" is inadequate to pay all STIP claims, the personal interest of the plaintiff would lie in minimizing the recovery of the rest of the class so that his share is maximized.

[88] In my view, the plaintiff has addressed this concern. He argues that the reduction would be *pro rata*. He is not seeking a larger share. Moreover, as pointed out by the Ontario Divisional Court in *L. (A.) v. Ontario (Minister of Community & Social Services)* (2005), 77 O.R. (3d) 422 at para. 22, rev'd on a different point 2006 CarswellOnt 3283, aff'd (2006), 80 O.R. (3d) 512, leave to appeal ref'd (2007), 239 O.A.C. 198 (note), the fact that different plaintiffs have larger claims than the

representative plaintiff does not, of itself, create a conflict of interest. The same is true where the representative plaintiff's claim is larger: *Capoin v. Canada Life Assurance Co.,* [2009] O.J. No. 114 (S.C.J.).

[89] Second, the defendant argues that the plaintiff has different interests from the majority of the members in Class B. The majority of the members of Class B participated in the defined contribution plan. The plaintiff was part of a smaller group that were members of the defined benefit plan. Moreover, the majority of the members will not be impacted by the vacation plan changes and the plaintiff will.

[90] This does not place the plaintiff in a conflict of interest. He has lost more vacation time than some employees. Similarly, he lost entitlement to the defined benefit plan. Some employees were already members of the defined contribution plan. Thus, not all employees are impacted in exactly the same way. That is insufficient to show that the plaintiff is in a conflict of interest of any kind.

[91] The defendant also argues that there is no workable litigation plan in effect. The lack of such a plan can result in a refusal to certify: *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.).

[92] The defendant argues that there is no real plan. Rather, there are simply a number of aggressive deadlines for a series of summary trials and no provision for adjudication of the individual issues.

[93] The plaintiff proposes a summary trial to deal with issues of liability. That seems sensible. If for any reason the issues are not suitable for summary disposition under Rule 9-7, a trial of the common issues will be necessary.

[94] When the common issues are decided, the Court will address individual issues.

[95] With the reduction in the classes to eliminate employees who have settled, this proposed class proceeding is not particularly complex. Following the adjudication of common issues, the individual issues will be addressed. Any

inadequacies in the plan and any necessary amendments can be addressed following certification: M.A. Eizenga, *Class Actions Law and Practice*, 2nd ed., looseleaf (Markham: LexisNexis, 2008) at para. 3.179.

[96] I conclude the litigation plan is sufficiently workable to proceed.

[97] I am satisfied that the requirements of s. 4(1) have been satisfied. The proceeding is therefore certified.

"Kelleher J."