NO. S-103215
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DARRYL SOMERVILLE

PLAINTIFF

AND:

CATALYST PAPER CORPORATION

DEFENDANT

Brought Pursuant to the *Class Proceedings Act*

Outline of the Plaintiff's Submissions on Motion for Certification

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Summary of Facts

1. The material background facts are set out in the Affidavit of Darryl Somerville sworn November 26, 2010 (the "Somerville Affidavit") and the Affidavit of Chris Forguson sworn November 26, 2010 (the "Forguson Affidavit").

Somerville Affidavit

2. The defendant Catalyst Paper Corporation ("Catalyst") is a company incorporated under the laws of Canada and registered in British Columbia with a head office located at 2nd Floor, 3600 Lysander Lane, Richmond, British Columbia.

3. Catalyst is a company created by the merger of three major BC forestry companies – MacMillan Bloedel Limited, British Columbia Forest Products Limited, and Crown Zellerbach Canada Ltd.

4. Catalyst carries on business at various locations in the province of British Columbia, and elsewhere. It has mills at Powell River, Crofton, and Port Alberni, BC, and elsewhere.

5. Mr. Somerville has been employed by the defendant Catalyst and its predecessors since 1977. He worked at the defendant's mill in Powell River, British Columbia since 1987. A summary of his employment over the years since 1977 is as follows:

a. In 1977 he was hired by MacMillan Bloedel Limited ("MacMillan Bloedel") in Vancouver;

b. In 1987 he was transferred within MacMillan Bloedel to the paper mill in Powell River that was then owned by MacMillan Bloedel (subsequently acquired by the defendant);

c. In 1998 the Powell River paper mill was acquired by Pacifica Papers Inc. ("Pacifica");

d. In 2001 Pacifica was acquired by Norske Skog Canada Ltd. and operated under the name "NorskeCanada"; and,

e. In 2005 Norske Skog Canada Ltd. changed its name to Catalyst Paper Corporation.

6. Mr. Somerville currently holds the position of Mechanical Pulping Operations Specialist at the defendant's Powell River mill.

7. His employment contract is partly oral, evidenced by conduct and partly written. He does not have a comprehensive written employment contract. The defendant employs unionized workers and non-union management and administrative employees. Mr. Somerville is not in a union. To the best of Mr. Somerville's knowledge, each of the defendant's other non-union employees have similar employment contracts to him in that their employment contracts are partly oral, evidenced by conduct and partly in writing.

8. The compensation program at Catalyst has been structured for many years as a combination of three elements of compensation in return for hard work and loyal service.

9. Those three elements making up the compensation program are set out in written and oral representations and are comprised of:

a. base salary;

b. Short Term Incentive Plan payments (referred to as "STIP");

c. benefits including:

i) vacation and holiday plan and payments;

ii) Defined Benefit Pension Plan for certain employees;

iii) Defined Contribution Pension plan for certain employees;

iv) Extended Health Care coverage;

v) Dental Care coverage;

vi) Short Term Disability coverage;

vii) Long Term Disability insurance; and,

viii) Life Insurance.

10. Mr. Somerville worked in exchange for this compensation program and in particular, he viewed the STIP as an incentive to provide a constant high level of performance and work above and beyond the minimum requirements of his job description.

11. Benefit providers have been changed from time to time, but to the best of Mr. Somerville's knowledge the value of the benefits have never been reduced.

Short Term Incentive Plan

12. The STIP is restated and rewritten periodically. Catalyst revises STIP goals and objectives from time to time, in accordance with its priorities for various business targets. These targets are selected by Catalyst in its discretion and in its best judgment and communicated to eligible employees in advance to provide incentive to eligible employees to achieve the selected business goals. In Mr. Somerville's experience, once STIP targets are set for a specific period, they are not amended or changed during that period. Mr. Somerville understood the specific STIP targets to be the targets he had to work towards in order to receive a STIP payment.

13. All permanent non-union employees are eligible for the STIP in the event that the targets defined by Catalyst are achieved. All part time employees are eligible on a prorated basis in accordance with their regular hours of work.

14. Commencing in 2007, the STIP was changed to include three components: corporate, divisional and individual. "Divisional in this context means the individual locations at which Catalyst carries on business. Powell River is a division for purposes of this STIP component. Thus, in 2007, Mr. Somerville's STIP was to be determined by the corporate performance of the defendant, the performance of the Powell River mill and his personal performance. Each of these components continued to be reviewed quarterly but the payouts changed such that there was one payout per year in the February of the following year.

15. At all times; the various components were independent in that failure to meet targets in one component would not disentitle a person from receiving an award if targets were achieved in other components.

16. Mr. Somerville estimated that there were approximately 388 employees of the defendant that were eligible to participate in the 2009 STIP. The defendant's response affidavit (Affidavit of S. Boniferro #1 at para. 34) estimates that there were 566 employees eligible to participate in the 2009 STIP.

17. Catalyst announced its 2009 STIP plan by way of its letter of May 4, 2009. The STIP continued to have three components: corporate, divisional and individual. These three components continued to be independent except for a new term whereby the total pool available to pay all STIP awards was now limited to 10% of what the defendant defined as "free cash flow". This limit was to be applied pro-rata to the cumulative STIP claims of all eligible employees.

18. The defendant's practice in implementing the STIP each year was to set divisional and individual performance goals for each division and eligible employee.

19. Mr. Somerville's individual goals for the 2009 were communicated to him by the defendant by email in July, 2009. On January 28, 2010 Catalyst advised all STIP eligible employees in writing that it was on track to achieve free cash flow of $36 million that would trigger a STIP payment to employees but that it had unilaterally decided that it would not pay any STIP awards for fiscal 2009. The defendant's audited financial statements for 2009 indicate that the defendant achieved a free cash flow of $29.3 Million for the relevant period. Pursuant to the terms of the 2009 STIP, the defendant should have allocated $2.93 Million towards a pool to fund STIP payments for eligible employees.

20. Because the defendant announced in January 2010 that it would not be paying a STIP for 2009, the defendant did not go through the formal process of calculating the various STIP entitlements for all employees but it was performed for some employees.

21. Based on Mr. Somerville's understanding of the defendant's practice relating to STIP awards, the calculation of corporate, divisional and individual awards can readily be made as the targets are objective and would have been set prior to the unilateral decision not to pay the STIP in January 2010.

22. In its response materials (Affidavit of S. Boniferro #1 at para. 45), the defendant states that Mr. Somerville would have achieved 100% on his individual award and 68.3 for the Powell River divisional/departmental award for a total of $8,039 prior to any reduction due to free cash flow limits.

23. In order to quantify Mr. Somerville's STIP payment for 2009, several issues would have to be determined, including issues which apply to other employees, such as:

a. what was the available pool for STIP awards based on 10% of free cash flow?;

b. did Catalyst achieve corporate targets that would result in a corporate STIP award?;

c. did Catalyst's Powell River division achieve performance targets?;

d. what is the cumulative amount of all STIP entitlements so that each can be adjusted pro-rata to fit within the available pool?

Unilateral Reduction in the value of Employee Benefits

24. In December 2009, Catalyst announced changes to salaried employee's benefits. These changes were summarized in two documents dated December 2009.

25. Catalyst also announced that it would unilaterally reduce the following benefits effective January 1, 2010:

a. Vacations would be reduced;

b. Holiday pay would be reduced;

c. Employee's interest in Catalyst's Defined Benefit Pension Plans would be ended and thereafter employees would be eligible for Defined Contribution Pension Plan benefits;

d. Employer contributions to the Catalyst Defined Contribution Pension Plan on behalf of individual employees would be reduced from 7% to 5% (of salary);

e. Catalyst's payments of MSP coverage for employees would be reduced, with employees thereafter having to pay a portion of such costs themselves;

f. Catalyst paid Life Insurance and Long Term Disability Insurance would be converted to fully employee paid programs;

g. Several other Catalyst paid insurance benefits would be converted to optional employee paid programs; and

h. Post Retirement Benefits would be reduced.

i. Catalyst estimated the cost savings from the announced changes to be $4.2 million annually.

Removal of continuing defined benefit pension participation

26. Mr. Somerville has been in a defined benefit pension plan since soon after commencement of his employment.

27. Mr. Somerville continued to participate in the Pacifica DB Plan until December 31, 2009 at which time Catalyst refused to allow him to continue to participate in it. The only alternative offered by the defendant was the ability to participate in Catalyst's Defined Contribution Pension Plan (the "Catalyst DC Plan").

28. Mr. Somerville has suffered a significant loss in that the Catalyst DC Plan is substantially less valuable to him than the Pacifica DB Plan.

Reduction in employer contributions to defined contribution pension plan

29. Prior to his removal by the defendant from the defined benefit pension plan effective January 1, 2010, the defendant operated a defined contribution pension plan to some employees (the "Catalyst DC Plan"). Effective January 1, 2009 Mr. Somerville has been enrolled in the Catalyst DC plan.

30. From its inception on or about January 1, 1994, the defendant contributed annually into the Catalyst DC Plan on behalf of each employee, an amount equivalent to 7% of each employee's pensionable earnings.

31. In December 2009, the defendant advised that, effective January 1, 2010, it would reduce the amount of its contributions to the Catalyst DC Plan to 5% of each employee's pensionable earnings.

32. This reduction will reduce the retirement benefits of every non-union employee as those former members of the defined benefit plans are now participating in the Catalyst DC Plan.

Defendant reduces payment of MSP premiums

33. In December, 2009 the defendant advised that, effective January 1, 2010, it would no longer pay 100% of employee's MSP premiums and would thereafter require employees to pay 50% of the cost.

34. The total cost per month of these premiums effective January 1, 2010 are:

a. $75 for an individual;

b. $102 for a family of 2; and

c. $114 for a family of 3 or more.

Long term disability and life insurance premiums

35. Prior to January 1, 2010, group benefits including life insurance and long term disability insurance were provided by the defendant through a plan that allowed employees to select individual group benefits based on a nominal dollar value known as a "flex dollar" plan. The defendant provided sufficient flex dollars such that, at a minimum, each employee would have MSP premiums, life insurance and long term disability insurance premiums paid by the defendant.

36. In December, 2009, the defendant advised all salaried employees that it was unilaterally changing the benefits program such that long term disability and life insurance premiums would be paid by the employees commencing January 1, 2010.

Reduction in post retirement benefits

37. In December 2009, the defendant advised all non-union employees that it would be reducing the post retirement benefits available to retiring employees effective March 1, 2011. The announced reduction cuts post retirement benefits off at age 65 whereas the previous entitlement was for life. This change will impact all non-union employees that retire with more than 5 years service after March 1, 2011.

Reduction of annual paid vacation

38. The impact of these changes on annual paid vacation time was such that employees with more than 24 years of service but less than 30 years of service would lose one week of paid vacation per year. Employees with more than 30 years of service (myself included) would lose two weeks of paid vacation per year.

39. The announced changes also eliminated a vacation benefit whereby employees would receive additional extended vacations every 5 years. For Mr. Somerville, he was granted an additional 5 weeks of vacation on his 30 year anniversary date and would have been entitled to another 5 weeks of vacation on his 35 year anniversary date.

Chris Forguson Affidavit

40. This action includes a number of common issues:

Class A (2009 STIP participants)

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

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

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

d. Were such targets achieved?

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

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

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

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

Class B (Employees impacted by benefits rollbacks)

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

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

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

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

Class C (Defined benefit pension plan participants moved to defined contribution plan)

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

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

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

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

41. Since the commencement of this action, TevlinGleadle has created a dedicated page on its website to provide information to the defendant's employees regarding the status of this action. To date, TevlinGleadle has received numerous inquiries from current and past employees of the defendant arising from publications on our website.

42. The defendant has distributed documents to its employees directing employees to the TevlinGleadle website for information regarding this action.

43. Employee's potential STIP claims would be in the range of $1,000 to $10,000 per eligible employee. The defendant's calculations (Affidavit of S. Boniferro #1 at para. 45) indicate that Mr. Somerville's STIP claim would be between $5,306 and $8,039.

44. Regarding the claims based on the rollback of benefits and the termination of the defined benefit pension plan, the defendant has estimated that it saved $4.2 Million annually by making these changes. While we do not know the precise number of employees that were affected by these changes, Mr. Somerville estimated that there were approximately 388 employees that were eligible to participate in the STIP. Because the criteria for participation in the STIP appears to be the same criteria as participation in the relevant benefits, the average saving per employee arising from the January 2010 rollback is $10,825 per year.

45. The defendant's response materials (Affidavit of S. Boniferro #1 at paras. 34-36, Affidavit #1 of B. Baarda at para. 15, the average savings per employee per year was in the $7,172 per year ($3.5 Million / 488 impacted employees)

46. While individual entitlement arising from these various claims will be different, the average aggregate claim appears to be in the range of $20,000 to $30,000 per employee. However, some employee's claims may be under $2,000.

47. If individual employees were to commence separate actions for these claims, some employees claims would be within the small claims jurisdiction and some would be within the monetary jurisdiction of the Supreme Court. Furthermore, there are 6 geographic locations where the various employees work and/or reside. Individual claims might be commenced in 6 different Supreme Court registries and 6 different Provincial Court registries.

48. Regarding the claim relating to the termination of the defined benefit pension plan, quantification will probably require the use of expert actuarial evidence. TevlinGleadle has relationships with several such actuaries whom have assisted in similar claims in the past. These actuaries typically charge in the range of $300 - $400 per hour. The plaintiff's plan for this claim as a class action would involve retaining actuaries only to review the calculation methodology of the defendant's actuaries. This would result in a significant savings to the plaintiffs as the cost this reduced level of engagement would be applied to the benefit of the entire class.

49. TevlinGleadle has experience in prosecuting employment related class action lawsuits in British Columbia. *Peter Gregg et al v. Freightliner et al.,* SCBC Vancouver Registry L021149 is an example of a class action involving a pension dispute that resulted in successful claims for class members.

50. Mr. Somerville is prepared to vigorously prosecute these claims as a representative. There are no known conflict between his interests and the common interests of the proposed classes except insofar as the quantification of the STIP claims may involve a pro-rata reduction of all claims if the available pool of funds is inadequate to pay all claims in full.

51. Included in the Case Management Plan is a proposal for ADR. The legal basis for the claims is rather settled law and the issues are amenable to negotiated settlement. If this action were certified, the defendant would then be in a position to enter into ADR with the ability to negotiate a binding settlement with all potential claimants.

Legal Argument

Overview of Class Proceedings

52. The plaintiff proposes that the following three classes be certified:

(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").

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

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

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

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

(e) there is a ***representative plaintiff*** who

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

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

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

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

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

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

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

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

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

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

58. These statements about the objects of the Ontario legislation have been held to apply equally to our British Columbia legislation in a number of British Columbia cases including *Endean v. Canadian Red Cross Society* [1997] B.C.J. No. 1209(B.C.S.C., per Smith J.), (appeal allowed with respect to issue of striking out pleadings on issue of claim of the tort of spoliation at [1998] B.C.J. No. 724, leave to appeal to S.C.C. granted, and appeal discontinued as a settlement was reached), and *Hoy v. Medtronic Inc.* [2001] B.C.J. No. 1968 (B.C.S.C., per Kirkpatrick J.) and *Brogaard v. AG Canada* [2002] B.C.J.No.1775 . There this Court relied on a direct analogy to the Ontario legislation, as follows:

"Class proceedings

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

… class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

> … In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> It is particularly important to keep this principle in mind at the certification stage…. Thus the certification stage is decidedly not meant to be a test of the merits of the action. Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action:
>
> [emphasis in original]

1: The Pleadings Disclose a Cause of Action

Law

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

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

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

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

> "Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as in the one that governs an application under R.S.C.O. 18. r.19; assuming that the facts as stated in the Statement of Claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence, should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the orders listed in Rule 19(24) of the British Columbia Rules of Court, should the relevant provisions of the plaintiff's statement of claim be struck out under Rule 19(24)(a).
>
> *Endean v. Canadian Red Cross Society* [1998] B.C.J. No. 724 (B.C.C.A.), per Braidwood J.A). [paras. 6 to 8]
>
> *Elms*, supra. [para. 21]
>
> *Brogaard*, supra. [para 31]

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

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

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

> "The applicable test

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

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

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

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

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

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

Application to the Plaintiff's Case

67. The plaintiff in his Notice of Civil Claim, Part 2, paras 1 to 3, advances a claim for declarations as follows:

(d) that the defendant breached the contracts of employment of the plaintiff and all of its employees by:

(i) refusing to pay STIP due for service during the year 2009;

(ii) removing without proper advance notice valuable benefits as particularized in paragraph 18 of the Statement of Facts above;

(e) that the defendant is in breach of an obligation to compensate the plaintiff for 2009 STIP and removal of the benefits particularized in paragraph 18; and

(f) that the plaintiff is entitled to compensation for loss of 2009 STIP and the removal of the benefits particularized in paragraph 18;

68. The issue on certification is whether the plaintiff has a sufficiently viable cause of action in accordance with the requirement of the statute and the guidance of the courts in the cases mentioned above.

69. The cause of action for the 2009 STIP award is related to the cause of action generally described as the benefit rollback issue. Both claims are based on the proposition that an employer cannot make unilateral detrimental amendments to an employment contract without express agreement from the employee or reasonable notice.

70. The case for the 2009 STIP is slightly different in that the defendant did not seek to amend the STIP but rather refused to perform its obligations. This claim really resolves to an issue of basic contract law. The defendant promised to pay the eligible employees a bonus based on specific measurable criteria in order to induce them to put extraordinary effort into those specific performance goals the defendant deemed to be important. The employees performed their obligation and the defendant elected to refuse to pay the agreed compensation.

71. That an employer must pay amounts earned when due is trite law. However, a specific example of this cause of action in the context of a bonus is found in the British Columbia Court of Appeal decision in *Poole v. Tomenson Saunders Whitehead Ltd*. 1987 CanLII 2647 (BC C. A.). . In this decision, the trial court held that the employer had promised to pay the plaintiff a bonus of at least 15% of his base salary which worked out to a minimum bonus of $13,500. The employer elected to pay him a bonus of $9,000. The plaintiff treated this failure to pay the agreed bonus as a repudiation of employment and the trial judge agreed that it amounted to a constructive dismissal. The Court of Appeal overturned the trial judge and held that the failure to pay the agreed minimum bonus was a breach of contract but not a fundamental breach (repudiation). The Court of appeal reduced the damage award to the difference between the paid bonus ($9,000) and the agreed minimum bonus ($13,500). Implicit in this result is the principle that a promised bonus, once earned, becomes a debt which the employee can sue to recover.

72. The cause of action relating to unilateral changes made to the employee benefit package is similarly based on settled law. In *Kussman v. AT & T Capital Canada, Inc.* 2002 BCCA 281 (CanLII), Mr. Justice Hall writing for the majority of the Court of Appeal stated:

> "Certainly an employer can give notice of a fundamental change to the employment relationship, provided sufficient notice is provided to the employee. I should think generally such notice would have to be of

> the same order as that constituting reasonable notice of termination of the employment relationship"

73. In *Belton et al. v. Liberty Insurance Company of Canada* 2004 CanLII 6668 (ON C.A.), the Ontario Court of Appeal considered the unilateral imposition by an employer of changed terms of employment on 9 commissioned sales employees. The Ontario Court of Appeal stated:

> "LICC had the undoubted right to terminate the PAGIC agreement. However, it was obliged to provide the appellants with reasonable notice for doing so, even though the termination of the PAGIC agreement was based on sound business reasons."

74. The defendant admits in its defence that it unilaterally imposed the changes which are the subject matter of this action and that it did so with a maximum of one to two months notice.

Submit

75. It is respectfully submitted that the claim advanced by Mr. Somerville against Catalyst is sufficient to satisfy the test set out in the Act, that the "pleadings disclose a cause of action".

2: An Identifiable Class of 2 or More Persons

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

77. In *Bywater v. Toronto Transit Commission* (1998) O.J. No. 4913 [Tab 49] at para. 10, Mr. Justice Winkler for the Ontario Court General Division described the purpose of the class definition to be three-fold: (a) it identifies those persons who have a potential claim for relief against the defendant; (b) it defines the parameters of the

lawsuit so as to identify those persons who are bound by its result; and (c) it describes who is entitled to notice.

78. The proposed classes are defined in the Notice of Application as follows:

(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").

79. The Somerville Affidavit in paragraph 19 provides an estimate of the number of persons within Class A to be somewhere in the range of 388 employees.

80. Affidavit No. 1 of Steve Boniferro on behalf of Catalyst, filed on December 20, 2010 (the "Bonifrero Affidavit") states that the number of persons in Class A, B, and C are 566, 488 and 72, respectively. Mr. Boniferro deposes further that certain of the persons who are in the various classes have "accepted offers".

81. The defendant's Response to Notice of Civil Claim does not refer to the issue of whether an employee's having accepted an offer to accept a "special bonus" payment in return for an acknowledgement that the payment satisfied claims within various categories of claim (2009 STIP, benefit rollback) – because Mr. Somerville did not accept. This will no doubt be an issue nevertheless in the class action if, as expected, Catalyst seeks to defeat claims of class members on the basis of an enforceable Release.

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

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

84. In *Brogaard*, supra, Allan J. was faced with a potential class of persons who had yet to go through a certain administrative procedure to determine eligibility for a pension (a problem which the plaintiffs here do not present). In such context this Court provided the following guidance, commencing at para 102, which again demonstrates a low threshold on this aspect of the test:

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

85. *Submit*: It is respectfully submitted that the requirement of the Class Proceedings Act that there be an identifiable class of 2 or more persons is satisfied.

3: The Common Issues

Law

86. Section 1 of the Class Proceedings Act defines common issues as:

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

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

87. Mr. Justice Cumming for the British Columbia Court of Appeal stated as follows in *Campbell v. Flexwatt Corp*.[1997] B.C.J. No. 2477, leave to appeal to the Supreme Court of Canada refused at [1998] S.C.C.A. No. 13)[Tab 50]:

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

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

> "I would have thought that the word "issue" simply meant a point in question, a point affirmed by the plaintiff and denied by the defendant. If the point of fact or law is necessary to the successful prosecution of the cause of action (or in some circumstances to its defence), then its resolution will inevitable move the litigation forward. The degree of materiality and the interplay among the

various common and individual issues is a matter for consideration under s.4(1)(d) and thus s.4(2), not a matter for consideration under s .4(1)(c)." [para. 23]

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

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

> …It is not uncommon to refine the list of common issues as the litigation progresses: Hoy v. Medtronic, Inc. (2001), 94 B.C.L.R. (3d) 169; 2001 BCSC 1343.

90. In *Chace v. Crane Canada Inc.*[1997] B.C.J. No. 2862 (BCCA) [Tab 51] the defendant argued that the negligent manufacture and sale of a toilet tank was not a common issue because the case involved the production and sale of tanks over a long period of time, and manufacturing processes and other circumstances had changed. The British Columbia Court of Appeal upheld the finding of the Chambers Judge, Mr. Justice Mackenzie, that the class members' claims were sufficiently similar throughout the period in question to satisfy the requirements for certification. Madam Justice Huddart, writing for the court, described the flexibility of certification proceedings as follows:

> "It seems excessively technical to argue at this stage of the proceedings that unpleaded time-limited defences founded on statutory limitation periods or varying states of knowledge on the part of Crane should prevent the certification of a class proceeding. The facts to found time-limited defences are likely always to be beyond the knowledge of the plaintiffs. If as discovery proceeds it becomes apparent that the representative plaintiffs cannot adequately represent a particular group of plaintiffs, then application may be made for the designation of an additional subclass or classes. If there is a need for the common issues to be more precisely defined, that need can be addressed by the requirement of particulars or a redefinition of the question, again as discovery proceeds and counsel refine their knowledge of the issues that divide them. If at some point it becomes apparent to the chambers judge responsible for the pre-trial proceedings that the action is in danger of degenerating into an unmanageable number of individual actions, as Crane maintains, he

> can decertify the proceedings or further restrict the common issues." [para. 19]
>
> "Section 11 of the Class Proceedings Act permits the determination of common issues for the entire class, common issues for subclasses, and individual issues, all at separate times. This flexibility permits the trial court to design procedures that will allow plaintiffs access to a fair and efficient way of litigating their claims while ensuring that defendants are permitted to examine whatever number of plaintiffs are required to properly address their defences."

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

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

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

Application to our Case

94. We proposed the following common issues, and deal with them in the order set out in the Notice of Application. A resolution of the common issues will advance the claim of the plaintiff, and be capable of extrapolation to all of the proposed class members

Class A

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

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

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

d. Were such targets achieved?

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

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

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

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

i. How does the 10% free cash flow "cap" operate, in the situation where some persons entitled to STIP have effectively released their entitlement to receive same?

Class B

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

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

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

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

Class C

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

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

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

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

All Classes

a. Did the persons who accepted the "special bonus" effectively give up any legal right to recover for 2009 STIP and damages for the benefit rollback?

95. It is respectfully submitted that resolution of these common issues will substantially advance the claims of each individual class member. Paraphrasing the words of Judge Allan in Brogaard (supra). - The common issues are issues which are necessary to the claims of each class member, and the resolution of these issues is a substantial ingredient of the individual class members' claims. Resolution of the common issues will move the litigation forward and the findings will be capable of resolution to all class members.

4: Is a Class Proceeding the Preferable Procedure?

Law

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

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

> "(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members,
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions,
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings,

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

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

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

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

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

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

> existence of individual issues is not necessarily determinative." (para. 61)
>
> "It is to be noted that a class proceeding does not have to be the preferable procedure for resolving the whole controversy, but merely the preferable procedure for resolving the common issues. Thus, fairness concerns about denial or individual discovery, and of the opportunity to seek contribution and indemnity become relevant only when issues are not common because they require examination of individual circumstances or defence claims not shared by class (or subclass) members." (para. 65)

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

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

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

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

> "[T]he object of the Act is not to provide perfect justice, but to provide a "fair and efficient resolution" of the common issues. It is a remedial, procedural statute and should be interpreted liberally to give effect to its purpose. It sets out very flexible procedures and clothes the court with broad discretion to ensure that justice is done to

all parties. As was said in *Bendall v. McGahn Medical Corp.* (1993), 14 O.R. 93 734 at 474, 106 D.L.R. (4th) 339 (Ont. Ct. (Gen.Div.)):

Certification is a fluid, flexible procedural process. It is conditional, always subject to decertification." [para. 58]

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

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

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

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

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

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

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

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

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

"In my view, the intention behind these provisions of the act is to put more emphasis on the goal of access to justice than on that of judicial economy. That was the approach taken in Harrington, supra., where a class proceeding was certified despite many unresolved, difficult, individual issues associated with establishing claims arising out of allegedly defective breast implants. Accordingly, the undoubted

predominance of individual issues here is not itself fatal to the application." [para. 54]

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

Endean, supra.
Harrington, supra.

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

> In *Scott v. TD Waterhouse* (2001), 94 B.C.L.R. (3d) 320; 2001 BCSC 1299, [Tab 66] at paras. 115-116, Madam Justice Martinson summarized the practical advantages of class proceedings, all of which apply to the plaintiffs' proposed class action:
>
> (a) case management is by a single judge (CPA, s.14);
>
> (b) the class is able to attract sophisticated lawyers through the aggregation of potential damages and the availability of contingency fee agreements (CPA, s.38);
>
> (c) class members may apply to participate in the class action (CPA s. 15);
>
> (d) a formal notice program alerts all interested persons to the status of the litigation (CPA, ss. 19-23);
>
> (e) simplified structures and procedures for individual issues can be designed by the court (CPA, s. 27);

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

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

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

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

Application to Present Case

109. By way of background to these proceedings we refer to the Affidavit of Chris Forguson sworn November 26, 2010 at paragraphs 2 to 5. Mr. Forguson explains that our firm was originally consulted in late 2009 by Mr. Somerville and a group of affected employees who learned of Catalyst's plans to make changes to their benefits. In early 2010 we learned that Catalyst had refused to pay amounts due in respect of a bonus for 2009.

110. After a number of meetings and discussions with various potential claimants we determined that the legal issues facing the persons we met with included various common issues which affected not only these persons, but a much larger group which was comprised essentially of all Catalyst non-union employees.

111. In the period before action was commenced, we were informed by Mr. Somerville that it would be awkward for him to pursue a legal claim against his employer by himself, while he was still employed.

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

113. The class action will create access to justice for the proposed class members. It is clear that there is a widely held demand for access to judicial relief by the class

members as is evident from the number of potential class members who initially consulted us.

114. By undertaking a cost/benefit analysis as suggested by Mr. Justice Cumming in Campbell, it is clear that the demand would be stifled by the expenses of individual litigation and this expense barrier could be eliminated by the class action proceedings.

115. With respect to Class A:

(a) According to Mr. Boniferro, there are 566 members in Class A who may have a claim for 2009 STIP. The individual claims may range from a few hundred of dollars, to a few thousands of dollars, to as much as $20,000.

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

116. With respect to Class B:

(a) According to Mr. Boniferro, there are 488 members in Class B. The average claim of each member of the class based is relatively small when compared to the costs of an individual action. Each member of this class experienced a rollback of some or all of various benefits, including:

(1) Vacation and holiday plan and payments;

(2) Defined Benefit Pension Plan for some employees;

(3) Defined Contribution Pension plan for other employees;

(4) Extended Health Care;

(5) Dental Care;

(6) Short term disability coverage;

(7) Long term disability insurance;

(8) Life Insurance; and,

(9) Post Retirement Benefits.

(b) It is difficult to assess the range of damages recoverable by the Class B members resulting from the benefit rollback, although some possible outcomes would that each member would receive a further $10,000.

(c) The pension issues in this litigation raise complex issues which require expert assessment by and actuary and legal counsel. There are currently thousands of pages of documents relating to the pension plan that will be reviewed and considered by legal counsel and the actuary. It is not feasible for each individual member of Class B to retain an actuary and legal counsel to resolve their claim with respect to the pension issues.

(d) It is estimated that a trial on the benefit rollback issue would last approximately 3 days, and that the cost of the litigation to an individual plaintiff could be as high as $35,000.

117. With respect to Class C:

(a) According to Mr. Boniferro, there are 72 members in Class C. The average claim of each member of the class based is relatively small when compared to the costs of an individual action. Each member of this class experienced the cessation of their ability to continue to participate as an active member in a defined benefit pension plan, and received in return the ability to participate in the less valuable defined contribution pension plan.

(b) It is difficult to assess the range of damages recoverable by the Class C members resulting from the closure of the defined benefit pension plan, although some possible outcomes might that each member would receive a further $20,000.

(c) The pension issues in this litigation raise complex issues which require expert assessment by and actuary and legal counsel. There are currently thousands of pages of documents relating to the pension plan that will be reviewed and considered by legal counsel and the actuary. It is not very practical, or likely possible for each individual member of Class B to retain an actuary and legal counsel to resolve their claim with respect to the pension issues.

(d) It is estimated that a trial on the defined benefit pension issue would last approximately 5 days, and that the cost of the litigation to an individual plaintiff could be as high as $60,000.

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

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

120. A class proceeding is also preferable in that it permit individuals to obtain the assistance of the court in disputes with their current employer in a manner less likely to cause harm to the relationship.

121. *Submit* – For all of these reasons, it is respectfully submitted that a class proceeding is the preferable procedure.

5: Appropriate Class Representative

Law

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

"there is a representative plaintiff who

(ii) would fairly and adequately represent the interests of the class,

(iii) 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

(iv) does not have, on the common issues, an interest that is in conflict with the interests of other class members."

123. In *Endean*, supra. Smith J. considered the representative plaintiff requirements and held that the two most important considerations in determining whether a plaintiff was appropriate were whether there was a common interest with other class members and whether the representative would "vigorously prosecute" the claim.

Application to Present Case

124. Darryl Somerville is an appropriate class representative. As indicated in the Somerville Affidavit. He has been employee with Catalyst or its predecessors since 1977. As a result he is well aware of developments and employment issues affecting the defendant's non-unionized employees.

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

126. The Plaintiff has presented a workable plan for the proceedings and the proposed notice.

Conclusion

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED: January 17, 2010

Counsel for the Plaintiff