



No. S-140490  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**GEORGE JABLONSKY**

PLAINTIFF

AND:

**TIMBERWEST FOREST CORP.**

DEFENDANT

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

**NOTICE OF APPLICATION**

Name of applicant: The Plaintiff, George Jablonsky

To: the Defendant, Timberwest Forest Corp.

TAKE NOTICE that an application will be made by the applicant to Justice Masuhara (seized) at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on June 26, 2015 at 9:45 a.m. for the orders set out in Part 1 below.

## **Part 1: ORDERS SOUGHT**

1. See the Draft Order at Appendix A to this Application.

## **Part 2: FACTUAL BASIS**

1. The Defendant Timberwest Forest Corp. ("Timberwest") provides post-retirement health and welfare benefits to many of its former salaried, non-union employees and the former salaried, non-union employees of its predecessors including Crown Zellerbach Canada Limited, British Columbia Forest Products Limited, Crown Forest Industries Limited, Canadian Pacific Forest Products Limited, CIP Inc., Avenor Inc., Pacific Forest Products Limited, Fletcher Challenge Canada Limited, TimberWest Forest Limited, 535950 British Columbia Ltd., TAL Acquisition Ltd., TFL Forest Ltd., TFL Holdings Limited, Timberwest Forest Holdings Ltd., Timberwest Forest Management Ltd., and TimberWest Forest Company (the "Predecessors")
2. On or about September 1, 2009, and again on or about May 1, 2010, Timberwest reduced the coverage and payment of those post-retirement health and welfare benefits.
3. In response to Timberwest's reduction of the coverage and payment of those post-retirement health and welfare benefits, George Jablonsky brought an action against Timberwest under the *Class Proceedings Act*, RSBC 1996, c. 50 ("CPA") on behalf of those persons affected by the reduction ("Class Members").
4. On January 27 and 28, 2015, the parties attended two full days of mediation with Marion Allan as mediator. As a result the parties reached an agreement recorded in Minutes of Settlement signed on January 28, 2015.
5. On March 10, 2015, the parties finalized their agreement in a Settlement Agreement.
6. On April 22, 2015, an Order was made approving the content of the Preliminary Notice of a Settlement Agreement (the "Preliminary Notice") and approving the methods by which the Preliminary Notice was to be communicated to potential Class Members.
7. On April 22 and 23, 2014, the Defendant provided the Plaintiff with the names and contact information for 896 potential Class Members.
8. The Preliminary Notice was communicated to potential Class Members in accordance with Mr. Justice Masuhara's April 22, 2015 order.
9. On May 13, 2015, the Defendant informed the Plaintiff that 19 persons identified as potential Class Members were not in fact potential Class Members. The Defendant has or will communicate with those persons to inform them that they are not potential Class Members.

10. As of the date of the filing of this Application, Class Counsel has received an objection from one potential Class Member.

### **Part 3: LEGAL BASIS**

1. The Applicant relies on section 35 of the *CPA*.

#### **Settlement Agreement**

2. In considering whether to approve the settlement agreement, the test to be applied is whether the settlement is fair, reasonable, and in the best interests of the class as a whole: *Dominguez v. Northland Properties Corporation*, 2013 BCSC 468 at para. 20 ("Dominguez").

3. Courts will consider a variety of factors in making this determination, although the factors to be considered and the weight to be placed on those factors will vary from case to case depending upon the circumstances. These factors include:

- (a) the likelihood of recovery or success;
- (b) the amount and nature of discovery evidence or investigation;
- (c) the settlement terms and conditions;
- (d) the recommendations and experience of counsel;
- (e) the future expense and likely duration of litigation and risk;
- (f) the recommendations of neutral parties, if any;
- (g) the number of objectors and nature of objections;
- (h) the presence of good faith, arms-length bargaining and absence of collusion;
- (i) the degree and nature of communications by counsel and the representative plaintiffs with Class Members during litigation; and
- (j) information conveying to the court the dynamics of the positions taken by the parties during the negotiation.

*Dominguez, supra*, at para. 21

#### *Likelihood of Success*

4. Both parties maintain their pleaded positions if the settlement is not approved. However, there is always risk to litigation, including the possibility of multiple appeals. The possibility of prolonged litigation is particularly detrimental to the potential Class Members as they are, for the most part, advanced in age and therefore risk never receiving the benefit of a successful claim.

5. The Plaintiff also faces risk that certification might be denied or that claims on behalf of spouses may not be permitted to proceed even if other claims are allowed. There are varying degrees of risk for certain groups of Class Members.

*Amount of evidence and investigation*

6. The Plaintiff obtained a substantial amount of documentary evidence from potential class members as part of its investigation. The Defendants also provided additional documentary evidence in response. Although neither party has prepared lists of documents, most of the relevant documents have been shared between the parties in the affidavits prepared in support of the motion for certification.

Affidavit #1 of Diane Irvine  
Affidavit #1 of Debbie McPhalen

7. In addition, the parties conducted interviews of potential Class Members to develop an understanding of the facts at issue in this case.

Affidavit #1 of Linda Bourcier

8. Both parties had sufficient opportunity to review the underlying documentation and statements relating to certification and the common issues.

*Settlement terms and conditions*

9. Taking into consideration the risks associated with pursuing the litigation further, the Settlement substantially addresses the primary concerns of Class Members.

10. Class Members were concerned with Timberwest's position that it had a unilateral right to reduce or eliminate post-retirement health and welfare benefits. The Settlement provides that benefits will not be reduced unless certain conditions are met and then there are limits on the reductions. The settlement provides for increases (within stated limits) in costs of benefits but benefits may not be eliminated entirely although they may be reduced if cost increases exceed the limits.

11. The Settlement also provides that all reasonable Class Counsel fees and disbursements will be paid by the Defendant, including the fees and disbursements associated with administering the Settlement. Accordingly no fees or disbursements are payable by the Class Members.

*Recommendations and experience of counsel*

12. Both Class Counsel and Defendant's counsel are experienced and reputable in litigating employment benefit matters and class actions. They both recommend the Settlement.

*Future expense and likely duration of litigation and risk*

13. The Settlement was reached at an early stage in this proceeding: prior to certification. Many steps remain outstanding in the litigation. This notwithstanding, the current proceeding has been ongoing for the past 18 months.

14. The Defendant is a large corporation which has retained experienced counsel to defend the class action and protect its interests. Should this class action proceed, there is a real risk that both the decision on certification and the decision on the merits of common issues would be appealed regardless of which party is successful at first instance. It is reasonable to anticipate that the trial of the common issues would not be heard for another two to three years.

15. The litigation costs in this matter are already sizeable. They would increase over the time it would take to pursue this matter to trial. If the Plaintiff succeeded, some provision would have to be made for payment of Class Counsel's fees, which would likely reduce future benefits available to the Class Members.

*Recommendations of neutral parties*

16. The Mediator did not opine on the Settlement; however, she is a well-respected and experienced mediator and adjudicator in a wide range of matters including labour and employment law matters, insurance matters and class actions.

*The number and nature of objections*

17. Class Counsel has received one objection to the Settlement out of 877 potential Class Members.

18. On May 12, 2015, Don and Cheryl Hoffman wrote an email to Class Counsel objecting to the Settlement and asking several questions. Following communications with Class Counsel the Hoffmans indicated they understood the Settlement and on June 9, 2015 withdrew their objection.

19. On June 9, 2015, May Lee wrote an email to Class Counsel objecting to the Settlement. Mrs. Lee stated that there was no real change to benefits provided under the Settlement. She expressed concern about the income tax implications of the settlement. Ms. Lee's email is not correct: there is a change to the benefits provided under the Settlement. Further, settlements cannot be driven by individual Class Members' tax issues.

*Good faith and absence of collusion*

20. The Settlement was reached in good faith. There was no collusion.

*Communication between Class Counsel and Settlement Class Members*

21. Class Counsel has communicated with many potential Class Members since litigation commenced.

22. Class Counsel has been aided in its communications with potential Class Members by the Catalyst-Timberwest Retired Salaried Employees Association (the “Committee”). The Committee maintains a list of contact information for its members, many of whom are retired salaried employees of Timberwest and who are potential Class Members. Representatives of the Committee are in regular contact with Class Counsel and regularly communicate updates with respect to this Class Action with their members.

23. Once the Defendant disclosed the list of potential Class Members to Class Counsel, Class Counsel made significant efforts to communicate the Preliminary Notice to potential Class Members, including:

- (a) posting the Preliminary Notice in the May 7, 2015 edition of the Vancouver Sun;
- (b) sending the Preliminary Notice by regular mail on May 7, 2015 to each of the 896 potential Class Members identified by the Defendant (including the 19 incorrectly so identified);
- (c) sending the Preliminary Notice by email on May 7, 2015 to those potential Class Members for whom the Committee had email addresses; and
- (d) posting the Preliminary Notice and Settlement on Class Counsel’s website.

24. Between May 7, 2015 and the date of this Application, Class Counsel and members of the Committee have answered dozens of phone calls and emails from potential Class Members regarding the Preliminary Notice and Settlement.

*Dynamics of negotiation*

25. Settlement discussions began in December 2014. The parties agreed to retain Marion Allan as a Mediator and agreed to two days of mediation. Both parties exchanged mediation briefs with each other and the Mediator and attended a pre-mediation telephone conference with the Mediator.

26. The negotiations facilitated by the Mediator on January 27 and 28, 2015 were adversarial, technical and protracted.

27. With the help of the Mediator, both parties made significant concessions to their respective positions in order to achieve the Settlement.

## **Class Counsel Fees**

28. Section 7 of the Settlement sets out that the Defendant will pay to Class Counsel \$175,000 for fees, plus disbursements and applicable taxes, for work on this matter to January 28, 2015. The Defendant will also pay Class Counsel \$50,000 for fees, plus disbursements and applicable taxes, for work on the administration of the settlement.

29. The approval of the settlement terms is not tied to the Court's consideration and approval of fees claimed by Class Counsel: *Dominguez, supra*, at ¶48.

30. In this case, the parties agree that the approval of the Settlement is contingent on the approval of Class Counsel fees.

31. The Court must determine whether the fee is fair and reasonable in light of the risk undertaken and the result achieved. In doing so, the Court is to be guided by the following factors:

- (a) the time expended by the solicitor;
- (b) the legal complexity of the matters to be dealt with;
- (c) the degree of responsibility assumed by the solicitor;
- (d) the monetary value of the matters in issue;
- (e) the importance of the matter to the client;
- (f) the degree of skill and competence demonstrated by the solicitor;
- (g) the results achieved;
- (h) the ability of the client to pay; and
- (i) the client's expectation as to the amount of the fee.

### *Time expended by Class Counsel*

32. Class Counsel has expended a substantial amount of time over approximately two years without compensation and without any assurance of compensation.

33. Since the Committee first approached Class Counsel about this matter, Class Counsel has expended a substantial amount in legal fees and disbursements.

### *Legal complexity*

34. This matter is factually and legally complex. There are issues regarding:

- (a) whether it is appropriate to try this matter as a class action given the individual nature of each retiree's employment contract;

- (b) liability of Timberwest to Class Members given a series of multiple corporate takeovers detailed in the pleadings;
- (c) the rights of spouses and dependents;
- (d) the effect of lifetime benefit maxima that have been exceeded for some potential Class Members; and
- (e) other issues.

*Degree of responsibility assumed by Class Counsel*

35. The Plaintiff retained Class Counsel on a contingency basis. Accordingly Class Counsel was exposed to significant financial risk had the Class Action not resulted in a Settlement.

*The monetary value of the matter*

36. The total monetary value of this matter cannot be determined as it depends on the length of time a Class Member and his or her spouse receives benefits. However, the healthcare spending account for post-1989 retirees is an improvement worth up to \$988 for a couple and \$558 for a single in the first year of the Settlement, increasing at 1% per year. That amount is also more tax efficient for the potential Class Members.

37. Pre-1990 retirees receive a lesser improvement but only because their loss was less; their Medical Services Plan premiums had been frozen at 2010 levels but under the Settlement beginning at the implementation date their premiums will be paid in full.

38. The most significant item of the Settlement is an assurance that Timberwest cannot unilaterally reduce or eliminate benefits and disputes may be arbitrated.

*Importance of the matter to the client*

39. The assurance of healthcare benefits in the future is particularly important to the potential Class Members who are mostly on fixed incomes, advanced in age and more likely than younger people to require medical assistance.

*Degree of skill and competence*

40. Class Counsel has demonstrated skill and competence in litigating this matter.

*Result achieved*

41. Under the Settlement, the Defendant will no longer be able to eliminate post-retirement health and welfare benefits or reduce them except in specified circumstances and within limits. This is a very important result for potential Class Members.



42. For the majority of potential Class Members, being those who retired after 1989, the Settlement provides an improved, flexible and tax efficient health benefit.

43. For potential Class Members who retired before 1990, the Settlement nearly completely restores them to the position they were in before the alleged breach.

*Ability of the client to pay*

44. The individual potential Class Members do not have sufficient resources to engage in litigation against a well-funded, large corporate Defendant such as Timberwest. The damages each member could recover from individualized litigation is less than the cost of bringing such an individual action.

*Client's expectation as to the amount of the fee*

45. The client signed a retainer agreement containing a contingent fee amount which was calculated as a percentage of the cost of benefits both from reduction to trial and also of the present value of any future entitlement to benefits payable to the Class Members, plus disbursements and taxes.

**Part 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Allison Tremblay made June 15, 2015;
2. Affidavit #1 of Diane Irvine made October 24, 2014;
3. Affidavit #1 of Debbie McPhalen made November 25, 2014;
4. Affidavit #1 of Linda Bourcier made November 25, 2014;
5. Affidavit #1 of David Blair made April 13, 2015;
6. Affidavit #2 of David Blair made April 22, 2015;
7. Affidavit #1 of George Jablonsky made October 24, 2014;
8. The pleadings and processes filed herein; and
9. Such further and other material as counsel may advise and the Court may allow.

The applicant estimates that the application will take one hour.

[ ] This matter is within the jurisdiction of the master.

[X] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date:

16/JUN/2015  
[dd/mmm/yyyy]

  
\_\_\_\_\_  
Signature of John Rogers, Q.C.  
Lawyer for applicant

**To be completed by the court only:**

Order made

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

with the following variations and additional terms:

Date: \_\_\_\_\_  
[dd/mmm/yyyy]

Signature of  Judge  Master

**APPENDIX**

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

**THIS APPLICATION INVOLVES THE FOLLOWING:** *[Specify the application type(s) included in this application.]*

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments

proceedings at trial

case plan orders: amend

case plan order: other

experts

NO. S-140490  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

GEORGE JABLONSKY

PLAINTIFF

AND:

TIMBERWEST FOREST CORP.

DEFENDANT

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

**ORDER MADE AFTER APPLICATION**

**BEFORE THE HONOURABLE \_\_\_\_\_, THE \_\_\_\_\_ DAY  
OF  
MR. JUSTICE MASUHARA \_\_\_\_\_, 2015**

ON THE APPLICATION of the Plaintiff coming on for hearing at Vancouver, British Columbia, on the \_\_\_ day of \_\_\_\_\_, 2015, AND ON HEARING David Blair and Allison Tremblay, counsel for the Plaintiff, and Craig A.B. Ferris, Q.C., Marko Vesely and Gordon Brandt, counsel for the Defendant;

THIS COURT ORDERS and BY CONSENT that:

**CERTIFICATION**

2. This action is certified as a class action pursuant to section 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50;
3. The “**Class**” includes all “**Settlement Class Members**” meeting the following definition:

All persons, wherever they reside, who are either:

- (a) retired, former salaried, non-unionized employees of TimberWest Forest Corp. or one or more of its corporate predecessors including Crown Zellerbach Canada Limited, British Columbia Forest Products Limited, Crown Forest Industries Limited, Canadian Pacific Forest Products Limited, CIP Inc., Avenor Inc., Pacific Forest Products Limited, Fletcher Challenge Canada Limited, TimberWest Forest Limited, 535950 British Columbia Ltd., TAL Acquisition Ltd., TFL Forest Ltd., TFL Holdings Limited, Timberwest Forest Holdings Ltd., Timberwest Forest Management Ltd., and TimberWest Forest Company (the “Predecessors”) and their estates (“Employee Class Members”); or
- (b) spouses and dependent children of either:
  - (i) living Employee Class Members;
  - (ii) deceased Employee Class Members; or
  - (iii) former salaried, non-unionized employees of TimberWest Forest Corp. or one or more of the Predecessors who died while so employed when they were pension-eligibleand their estates (“Non-Employee Class Members”)

who are or were in receipt of coverage and payment for post-retirement health and welfare benefits provided by TimberWest Forest Corp., which coverage and payment were reduced by TimberWest Forest Corp. on or about September 1, 2009, or May 1, 2010.

4. George Jablonsky is appointed as the “**Representative Plaintiff**” for the Class;

5. The common issues are:

1. **Is TimberWest bound by contract?**

1.1 Is TimberWest bound by contract to provide all or any of the Post-Retirement Health and Welfare Benefits (in this Common Issue description simply, the “Benefits”) in respect of Employee Class Members who retired from:

- (a) Predecessors?

(b) TimberWest?

1.2 If TimberWest is bound by contract to provide any or all of the Benefits described in paragraph 1.1 are the relevant contractual terms included in one or more of, including any combination of, the following:

(a) unwritten contracts of employment;

(b) written retirement agreements, or

(c) another form of contract

with TimberWest, or with a Predecessor to which TimberWest became bound?

1.3 Do any relevant contractual terms described in paragraph 1.2 permit TimberWest, after the retirement of an Employee Class Member, to eliminate a coverage included in the Benefits or pay for less than the full cost of the Benefits for that Employee Class Member or his or her associated Non-Employee Class Members?

## **2. Standing**

2.1 Do Non-Employee Class Members have standing to bring claims for damages to themselves, and for other remedies, for the breach by TimberWest of the contracts with Employee Class Members with whom they are associated?

2.2 Alternatively, do Employee Class Members have the right to enforce compliance by TimberWest with the terms of their contracts which benefit the Non-Employee Class Members associated with them?

2.3 Do the personal representatives of deceased Class Members have standing to bring claims for the damages to, and other remedies for, the Class Members they represent?

## **3. Damages**

3.1 Did the Class Members suffer damage as a result of TimberWest's breach of contract to

the date of trial, and will the Class Members suffer damage after the date of trial, as a result of TimberWest's alleged breach of contract unless declaratory relief and a mandatory order is made?

**4. Declaratory relief and mandatory order**

4.1 Are the Class members entitled to a declaration as to their right to provision by TimberWest, and a mandatory order directing TimberWest to provide, to every Class Member, Post-Retirement Health and Welfare Benefits for the life of the Class Member without eliminating a benefit coverage or reducing payment for any benefit?

**5. Unjust Enrichment- Alternative Claim**

5.1 Alternatively, if the Employee Class Members are successful in establishing a claim in breach of contract and the Non-Employee Class Members are not successful in establishing a breach of contract claim because they are found not have had a contractual relationship with TimberWest or its Predecessors, then was TimberWest unjustly enriched when it eliminated or reduced the Post-Retirement Health Benefits of Non-Employee Class Members?

**SETTLEMENT APPROVAL**

6. The Settlement Agreement in this action, dated March \_\_\_\_, 2015, and attached as Schedule "A" to this Order (the "**Settlement Agreement**"), is approved as fair, reasonable and in the best interests of those affected by it and shall be implemented in accordance with its terms;
7. The definitions set out in the Settlement Agreement apply to and are incorporated into this Order;
8. The Settlement Agreement with its attached schedules is incorporated by reference into and forms part of this Order and is binding upon the Representative Plaintiff, upon all Settlement Class Members, and upon the Defendant;



## **APPROVAL NOTICE**

9. The Approval Notice is approved in substantially the form attached as Schedule “C” to the Settlement Agreement.
10. The Approval Notice will be delivered to persons eligible to be Settlement Class Members no later than 14 days after the date of this Order in accordance with the Notice Plan in Schedule “D” to the Settlement Agreement.
- 11.

Persons eligible to be Settlement Class Members will be deemed to have received the Approval Notice two business days after the date the Plaintiff completes the tasks described in paragraph 10;

## **OPT OUTS**

12. BC residents who are eligible to be Settlement Class Members may opt out of this Proceeding by completing and submitting an Opt-Out Form before the Opt-In Deadline.

## **OPT INS**

13. Non-BC residents who are eligible to be Settlement Class Members may opt in to this Proceeding by completing and submitting an Opt-In Form before the Opt-In Deadline.

## **RELEASE**

14. All Settlement Class Members and all their successors, heirs, executors, administrators, trustees, and assigns, shall be deemed to have released and do hereby release and forever discharge the Releasees from the Released Claims in accordance with section 5 of the Settlement Agreement.

## **APPOINTMENT OF THE CLAIMS ADMINISTRATOR**

15. Class Counsel is appointed as the Claims Administrator.
16. The Claims Administrator will execute its obligations as set out in the Settlement Agreement.
17. Promptly after the Opt-In/Opt-Out Deadline, the Claims Administrator will file a report with the Court describing the number of validly completed Opt-Out Forms and Opt-In Forms received by the Opt-In/Opt-Out Deadline.
18. Any Party having issues or concerns with the administration of the Settlement may apply to the Court for directions.

## **CLASS COUNSEL FEES**

19. If the Settlement Agreement is implemented in accordance with its terms then Class Counsel's fees in the amount of \$175,000 for services to January 28, 2015, plus disbursements and taxes, are hereby approved in accordance with Part 5 of the *Class Proceedings Act* and Section 9 of the Settlement Agreement.
20. If the Settlement Agreement is implemented in accordance with its terms then a flat fee for Class Counsel acting as counsel and Claims Administrator of \$50,000, plus disbursements and taxes, is hereby approved in accordance with Part 5 of the *Class Proceedings Act* and Section 9 of the Settlement Agreement.

## **APPLICATION FOR DISMISSAL**

21. Following the Defendant's Optional Termination Deadline, the parties shall have liberty to apply, by consent, for an order dismissing the Proceeding without further notice to the Settlement Class.