



NO. S-140490
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

GEORGE JABLONSKY

PLAINTIFF

AND:

TIMBERWEST FOREST CORP.

DEFENDANT

APPLICATION RESPONSE

Application Response of: The Defendant (the "Application Respondent")

THIS IS A RESPONSE TO the Notice of Application of the Plaintiff filed October 24, 2014.

Part 1: ORDERS CONSENTED TO

The Application Respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms: NIL

Part 2: ORDERS OPPOSED

The Application Respondents opposes the granting of the orders set out in paragraphs 1 to 7 of Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondent takes no position on the granting of the orders set out in paragraphs of Part 1 of the Notice of Application. N/A.

Part 4: FACTUAL BASIS

1. On this application, the plaintiff seeks an order to certify this claim as a class proceeding. Such an order would be unprecedented in the circumstances of this case. Never before in Canada

has a claim been certified where the putative class members worked and retired for different employers, retired at different times with different plan terms, received different information during employment through different means regarding benefits, had different reservations concerning their employer's ability to alter the plan terms, and where it is admitted that many putative class members cannot even allege a contract with the defendant. This case is a hodgepodge of different and unique contractual allegations spanning over approximately 450 different individuals who have unique factual matrices with respect to their claims. In short, none of the policy goals which underlie Canadian class proceeding legislation would be advanced by an order certifying this action.

2. Since beginning operations in or about 1997, TimberWest Forest Corp. ("**TimberWest**") has made various forms of post-retirement healthcare benefits (the "**Post- Retirement Benefits**") available to certain retired employees and retired employees of the following companies and their predecessors: Crown Zellerbach Canada Limited ("**Crown Zellerbach**"), British Columbia Forest Products Limited ("**BC Forest Products**"), Crown Forest Industries Limited ("**Crown Forest**"), Fletcher Challenge Canada Limited ("**Fletcher Challenge**"), TimberWest Forest Limited ("**TWFL**"), and Pacific Forest Products Limited ("**Pacific Forest Products**").

3. The above companies are referred to collectively and for convenience as the "**Predecessors**" but without any admission by the use of that term as to the legal relationship between the respective companies and TimberWest.

4. TimberWest currently provides Post-Retirement Benefits to approximately 450 retirees (the putative "**Employee Class Members**"), and to their eligible spouses and dependants (the putative "**Non-Employee Class Members**"). The relevant retirement dates range from March 1, 1967 to January 31, 2010.

5. TimberWest maintains separate plans with separate sets of benefits for (a) its retirees and retirees of Predecessors other than Pacific Forest Products and its predecessors; (b) retirees of Pacific Forest Products and its predecessors; and (c) retirees resident outside of Canada.

6. Each of the plans and programs TimberWest and the Predecessors made available to retirees at various times contain a unique set of benefits and limitations. In particular, these plans and programs vary with respect to, *inter alia*, the specific expenses covered, the percentage of

coverage for such expenses, lifetime and annual maximums for overall benefits and/or specific categories of benefits, and eligibility criteria for retirees, spouses and dependants.

7. TimberWest provides Post-Retirement Benefits to retirees of the Predecessors and their spouses and beneficiaries as a result of various corporate transactions. The relevant transactions took place through various mechanisms, including amalgamations, the purchase and sale of shares, and the purchase and sale of assets. In asset transactions, the obligation to provide Post-Retirement Benefits, if any, was acquired by the vendor pursuant to the relevant purchase and sale agreement, and not as the result of any direct agreement with putative class members.

8. The putative class members' participation within the various plans and programs varies. Putative class members participate in all or some of (a) extended health benefits; (b) dental benefits; and (c) MSP premium coverage.

9. TimberWest and the Predecessors communicated with and/or made individual representations to putative class members with respect to the Post-Retirement Benefits. These communications and/or representations were made in the following ways, among others:

- (a) Some employees received booklets, brochures, guides or similar materials describing Post-Retirement Benefits, and others received no written materials at all;
- (b) Some putative class members received oral presentations with respect to Post-Retirement Benefits, which were provided by different resources staff of different corporate entities in different locations;
- (c) Some putative class members received written letters with respect to the benefits they would receive upon retirement. Some putative class members received such letters in connection with their upcoming retirement, while others received such letters in the period following their retirement;
- (d) Some putative class members negotiated and/or modified otherwise standard form letters or agreements addressing the benefits they would receive upon retirement;

- (e) Some putative class members entered into retirement agreements confirming the benefits they would be entitled to upon their retirement. Some such putative class members also entered into releases as part of such agreements;
- (f) Some putative class members received communications years after their retirement or their spouse's retirement which advised of (i) changes being made the Post-Retirement Benefits; and/or (ii) the terms and conditions on which the Post-Retirement Benefits were being made available, including the possibility of future changes to the benefits.

10. The content of the individual representations varied with respect to, among other things, (a) scope of coverage, (b) duration of coverage, (c) cost of coverage, (d) participation of spouses and dependants, and (e) potential future changes to the Post-Retirement Benefits. Examples of the differences in the content of these representations include the following:

- (a) Some putative class members appear to have received limited or no information about the specific Post-Retirement Benefits. Others received detailed materials describing the specific benefits, the contents of which vary chronologically and as between companies;
- (b) Some putative class members received communications or entered into agreements regarding Post-Retirement Benefits that did not address the duration of coverage. Others received communications or entered into agreements stating that coverage would continue (i) only for a fixed period of time; (ii) indefinitely, (iii) for the lifetime of the retiree, (iv) for the lifetime of the retiree and spouse, or (v) in certain respects for life and in other respects for a fixed period;
- (c) Some putative class members received communications or entered into agreements regarding Post-Retirement Benefits that did not address the cost of coverage. Others received communications or entered into agreements stating that (i) coverage would be free of charge, (ii) coverage was currently free of charge but the company was entitled to revise cost

arrangements, or (iii) the company specifically reserved the right to increase amounts for premiums or deductibles; and

- (d) Some putative class members received communications or entered into agreements regarding Post-Retirement Benefits that did not address potential future changes to coverage. Others received communications or entered into agreements that expressed in various ways the company's right to alter benefits in the future, including by the statements that (i) the company reserves the right to revise coverage arrangements, (ii) the company reserves the right to amend or discontinue coverage arrangements, or (iii) the Post-Retirement Benefits are contingent benefits that the company reserves the right to eliminate at any time. In addition, some putative class members were specifically advised at the time of retirement that some of the changes that are at issue in this litigation would be implemented post-retirement. [TIM001231]

11. At various times, including prior to the events at issue in this litigation, TimberWest and/or the Predecessors altered the Post-Retirement Benefits, including the Post-Retirement Benefits made available to putative class members or some putative class members who had already retired. These changes included (a) increasing and decreasing specific benefits, and (b) modifying the language used to express the company's right to make future changes to the Post-Retirement Benefits. Some or all putative class members agreed to, accepted, and/or acquiesced in these changes.

Part 5: LEGAL BASIS

Overview

1. The plaintiff has failed to discharge the burden on him to establish the elements set out in section 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*Act*"), that must be established before an action can be certified as a class proceeding.

2. In summary, the proposed common issues cannot be determined without an individualized inquiry into the circumstances of each member of the class. Resolution of the proposed common issues would not advance the litigation in any meaningful way given the

evidence of each individual's circumstances that would need to be considered. The proposed class members' disparate circumstances lead to fundamental differences in the alleged legal bases for relief, some of which do not disclose a valid cause of action. These differences also give rise to irreconcilable conflicts within the proposed class.

Section 4(1)(a) of the Act

3. Section 4(1)(a) of the *Act* requires that the plaintiff prove that "the pleadings disclose a cause of action". In other words, the plaintiff must show that it is not plain and obvious that the claim is bound to fail, even assuming that the facts pleaded are true.

4. In the Notice of Application, the plaintiff has alleged that "TimberWest is contractually obligated to maintain the Post-Retirement Health and Welfare Benefit Benefits of all of the prospective Class Members", and that TimberWest breached those obligations.

5. However, the plaintiff has alleged or admitted that:

- (a) Certain putative Employee Class Members have a contract with a Predecessor to provide Post-Retirement Benefits, and that TimberWest is obligated to the Predecessor (and not directly to the Employee Class Member) to continue such benefits; and
- (b) The putative class includes Non-Employee Class Members, who had no contract with TimberWest or any Predecessor.

6. The plaintiff's claim on behalf of putative class members who are not alleged to have a contract with TimberWest discloses no cause of action: a litigant cannot sue for a benefit under a contract to which he or she is not a party.

Holmes v. United Furniture Warehouse Limited Partnership, 2012 BCCA 227

7. The plaintiff's claim in unjust enrichment on behalf of Non-Employee Class Member also fails to disclose a cause of action. There can be no such claim in circumstances where no benefit is alleged to have flowed from the Non-Employee Class Members to TimberWest.

Kerr v. Baranow, 2011 SCC 10

Section 4(1)(b) of the Act

8. Section 4(1)(b) of the *Act* requires the plaintiff to show that “there is an identifiable class of 2 or more persons”. The plaintiff has failed to establish a class that is capable of clear definition as required by section 4(1)(b).

9. First, the purported class of employees “who were entitled to receive deferred compensation in the form of coverage and payment for post-retirement health and welfare benefits” turns on merits-based criteria that are insufficiently objective. One cannot determine at the outset who would be in the purported class without making findings on the merits of the common issues, and (as discussed below) those findings would require evidence of each employee’s individual circumstances.

10. Class definitions that are dependent on the outcome of litigation on the common issues are prohibited as “merits-based”.

Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Minister of Agriculture and Lands), 2012 BCCA 193, leave to appeal refused, [2012] S.C.C.A. No. 336

Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46

11. Second, the members of the proposed class do not have common claims asserted against TimberWest. In particular, no identifiable class can be shown in light of the significantly different factual and legal issues raised as among (a) individuals with only pre-retirement contracts of employment, (b) individuals with retirement agreements, (c) retirees of each of the above groups who are not alleged to have had any direct contractual relationship with TimberWest, and (d) surviving spouses of all of the above groups.

12. Third, there is no rational connection between the asserted common issues and “surviving spouses and dependants of ... former non-unionized employees of TimberWest Forest Corp. or one or more of the Predecessors who died while so employed while they were pension-eligible”. In particular, there is no basis on which to conclude that the asserted common issues would advance a claim brought on behalf of such individuals.

13. Absent a rational connection between the proposed class definition and the asserted common issues, the requirements of s. 4(1)(b) of the *Act* are not met.

Section 4(1)(c) of the *Act*

14. Section 4(1)(c) requires that “the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members”.

15. However, courts across Canada have held consistently that, where there is evidence that a contract was made up of various documents and oral representations, the claim does not raise common issues that can be decided on a class wide basis. A determination as to whether there has been a breach of an enforceable contractual promise can only be made after there has been an individualized inquiry into what discussions were had with each potential class member, the documentation each class member received or had access to, and what their understanding was.

Nadolny v. Peel (Region) (2009), 78 C.P.C. (6th) 252 (Ont. S.C.J.)

16. For an issue to be common, its answer cannot depend on individual findings of fact that have to be made with respect to each individual claimant.

McCracken v. Canadian National Railway, 2012 ONCA 445

Brown v. Canadian Imperial Bank of Commerce, 2012 ONSC
2377, aff’d 2013 ONSC 1284 (Div. Ct.)

17. Even if employees all receive the same written documents (which is clearly not the case here, as discussed below), such documents cannot be considered in isolation from the specific surrounding circumstances applicable to each individual employee, including the specific oral representations made to him or her. The words of a contract alone do not have an immutable or absolute meaning, and must be read consistently with the surrounding circumstances known to the parties. In those circumstances, there is no common issue with respect to the content of the employment contract that will move the litigation forward in a meaningful way, and certification should be denied.

Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53

Huras v. Com Dev Ltd. (1999), 46 C.C.E.L. 2d 67 (Ont. S.C.J.),
aff'd (2001), 8 C.P.C. (5th) 277 (Div. Ct.)

18. Certification will be denied where it is found that the contracts of employment, though having aspects that are similar or even identical across the class, also have aspects that individualize them.

Kafka v. Allstate Insurance Co. of Canada, 2012 ONSC 1035

19. The proposed common issues are not common to members of the purported class because the purported class includes people who are alleged to have had employment contracts or retirement agreements with TimberWest, as well as people who are not alleged to have had any direct contractual relationship with TimberWest, including (a) retirees of Predecessors whose obligations TimberWest did not assume directly; (b) the Non-Employee Class Members.

20. Further, the proposed common issues are not even common to members of the purported class who are alleged to have a direct contractual relationship with TimberWest because these purported class members include:

- (a) People who worked and retired at different times from different companies, and whose Post-Retirement Benefits at the time of retirement varied in material respects;
- (b) People whose contract of employment was defined solely by oral representations, and people who entered into written agreements and/or executed releases relating to the benefits they would be entitled to upon their retirement;
- (c) People who received oral representation at workplace seminars, people who attended workplace seminars but did not receive similar representations, and people who did not attend any seminars or receive any oral representations with respect to Post-Retirement Benefits;
- (d) People who may have asked specific questions about their retirement benefits during their employment and who would have received answers

from different human resources staff depending on their location and employer at the time;

- (e) People who received different forms of written representations prior to, at, and/or following retirement, including reservations of right on the part of different companies at different times that differed in material respects;
- (f) People with different understandings as to whether the company could change Post-Retirement Benefits in the future and to what extent; and
- (g) People who have benefitted from increases to specific benefits made from time to time, and in so doing agreed to, accepted, and/or acquiesced in TimberWest and the Predecessors' right to increase, decrease or eliminate (i) coverage for people and benefits; and (ii) amounts for premiums or deductibles.

21. For these reasons, the proposed common issues are not common to all members of the class and cannot be resolved without a detailed inquiry into the circumstances of each individual class member, including the written and oral representations made to them and their understanding of the scope of Post-Retirement Benefits.

22. Further, there are irreconcilable conflicts among putative class members as some class members have benefitted from increases to specific benefits made from time to time and would be adversely impacted if returned to the specific benefits (and payment structure) in effect at their respective dates of retirement. The different legal theories advanced as to the contractual bases of the claims also gives rise to conflicts within the class.

Section 4(1)(d) of the Act

23. Section 4(1)(d) of the *Act* requires that “a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues” based on all relevant matters, including the considerations listed in s. 4(2).

24. If it were found that there is an identifiable class with common issues (which is denied), then a class proceeding would not be the preferable procedure for the fair and efficient resolution

of those common issues. Detailed, factual enquires of the individual circumstances of each employee would need to be conducted in order to determine the extent to which those issues are truly common across the class, thereby defeating the recognized goals of access to justice, judicial economy and behaviour modification.

25. Further, this is not a case where individual actions would be economically unviable. It is feasible for individual plaintiffs, or groups of similarly situated plaintiffs, to bring claims in respect of the issues raised in this litigation. Indeed, plaintiffs have done so in the present context and in the context of changes to post-retirement benefits implemented by other employers.

Section 4(1)(e) of the Act

26. Section 4(1)(e) requires there to be “a representative plaintiff who (i) would fairly and adequately represent the interest of the class, (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.”

27. As set out above, there are irreconcilable conflicts of interest among the putative class members in this case. Given the documentary record, the manner in which some putative class members will need to frame their claim will be different and contradictory to how others will frame their claim. Accordingly, the proposed representative plaintiff cannot fairly and adequately represent the putative class. Furthermore, the proposed representative plaintiff does not share common issues with the putative Non-Employee Class Members or with Employee Class Members who did not enter into written retirement agreements.

28. If this proceeding is certified as a class proceeding, the plaintiff’s litigation plan will need to be revisited based on the terms of certification. At this point, the litigation plan is too vague and general, and the claim for certification is too tenuous, to provide a basis for the review of the litigation plan.

Part 6: MATERIAL TO BE RELIED ON

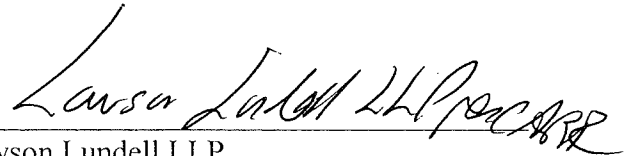
1. Affidavit #1 of Brenda Blue, sworn November 24, 2014;

2. Affidavit #1 of Debbie McPhalen, sworn November 25, 2014;
3. Affidavit #1 of Linda Bourcier, sworn November 25, 2014.

The Application Respondent estimates that the application will take 4 days.

- ☒ The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.
- ☐ The Application Respondent has not filed in this proceeding a document that contains an address for service. The Application Respondent's ADDRESS FOR SERVICE is:

Dated at the City of Vancouver, in the Province of British Columbia, this 25th day of November, 2014.



Lawson Lundell LLP
Solicitors for the Application
Respondent, TimberWest Forest Corp.

This Application Response is filed by Craig A.B. Ferris/Marko Vesely, of the law firm of Lawson Lundell LLP, whose place of business and address for delivery is 1600 – 925 West Georgia Street, Vancouver, British Columbia, V6C 3L2.

NO. NO. S-140490
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

GEORGE
JABLONSKY

PLAINTIFF

AND:

TIMBERWEST
FOREST CORP.

DEFENDANT

APPLICATION RESPONSE



Barristers & Solicitors
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
V6C 3L2

Phone: (604) 685-3456

Attention: Craig A.B. Ferris / Marko Vesely

CAB/MV/GBB