

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JAMES WELDON and LEONARD BLEIER

suing on their own behalf and in a representative capacity on behalf of all former members of defined benefit pension plans sponsored, directed administered or advised by the Defendants and their predecessors who were caused by the Defendants and their predecessors to cease to participate in those defined benefit pension plans and to participate only in defined contribution pension plans commencing on or about January 1, 1993, wherever they reside

Plaintiffs

AND:

TECK METALS LTD. and TOWERS PERRIN INC.

Defendants

Brought under the *Class Proceedings Act*, RSBC 1986, c. 50

NOTICE OF APPLICATION
RE: ADDITIONAL COMPENSATION FOR THE REPRESENTATIVE PLAINTIFFS

Name of Applicants: James Weldon and Leonard Bleier, the Representative Plaintiffs

TO: The Defendants, Teck Metals Ltd. and Towers Perrin Inc.

TAKE NOTICE that an application will be made by the applicants to the Honourable Mr. Justice N. Smith at the courthouse at 800 Smithe Street, Vancouver, B.C. V6Z 2E1 on Friday, July 24 2015 at 9: 45 a.m. for the order(s) set out in Part 1 below.

PART 1: ORDERS SOUGHT

1. Orders approving additional compensation of \$10,000 to each of James Weldon and Leonard Bleier, the representative plaintiffs, to be paid as a disbursement from the Settlement Funds, dispensing with the endorsement of counsel for the defendant and for further and other relief as counsel may request and this Court may consider just.

PART 2: FACTUAL BASIS

Genesis of the action — James Weldon

2. Mr. Weldon led the group that commenced this action in 2009 and, with the later assistance of Mr. Bleier, saw it through to its end about 6 years later. They are not financially sophisticated but understood their transfers to the DC Plan had led to problems. They have been the leaders in the effort to resolve them.

3. Mr. Weldon first laboured for Cominco (now the defendant, Teck) in 1971, became full-time in 1974, moved to a staff (non-union) job in 1978. Beginning in 2008 he learned that his dissatisfaction with the staff benefit program, particularly the DC Plan, was shared by others.

Affidavit #4 of J. Weldon, made July 10, 2015 (Weldon #4") at ¶¶3, 4, 6, 7.

4. Mr. Weldon suggested the formation of a group of staff to present their concerns to management. He prepared a survey questionnaire listing concerns and asking respondents to rank them. A group of over 100 employees met in September 2008. At the meeting, Mr. Weldon distributed his questionnaire, collected and tabulated the responses and became a member of a committee of eight staff employees meeting with senior management to present their concerns, particularly their top priority, the DC Plan. They met but no change to the DC Plan resulted. This led to the creation of a DC Plan Committee ("Committee") comprised of Mr. Weldon and three others which decided to seek legal advice on DC Plan improvement.

Weldon #4 at ¶8-13

Starting and assisting in the action — James Weldon

5. The Committee contacted David Blair, lawyer at Victory Square Law Office (“VSLO”), for advice and over several conference calls involving Mr. Weldon it emerged that a class-action might be feasible for those who been employed and made transfer decisions in 1992. Mr. Weldon volunteered to be representative plaintiff as he was in the proposed class of transferors in 1992. He volunteered to be the representative plaintiff in a class action. There were limitation concerns; the number affected and the losses suffered were unknown. It was important to start the action quickly despite not yet being confident that a class action was viable. As a result Mr. Weldon agreed to the issue of the writ of summons personally, not by counsel. He was aware of the risk of personal liability for costs and apprehensive about the effect of his doing so on his employment with Teck at the time when he was not in a position to retire comfortably. Mr. Weldon provided the information that VSLO required and was the primary contact in completing the writ.

Weldon #4 at ¶14-21

6. Mr. Weldon’s apprehension about his employment security was increased when, soon after the issue of the writ a notice titled “Trouble” advising of the issue of the writ appeared on the internal company news system for staff. About a month after the writ was served the Defendant Teck advised VSLO that it would seek an order for costs against him.

Weldon #4 at ¶22-23, 32

7. As representative plaintiff Mr. Weldon has been the main liaison between class counsel, the Committee and interested class members. That communication load was partly shared by Mr. Bleier when he became representative plaintiff in a separate action in October 2011 (later joined with this action).

Weldon #4 at ¶24

8. The writ was not immediately served. More information was sought but not much had been obtained by June, 2010. Mr. Weldon assisted Mr. Blair in providing information for an affidavit by Mr. Blair in support of the application. Mr. Weldon searched Cominco archives for, and found, documents touching on the 1993 transfers.

Affidavit # 1 of J. Winstanley, made July 15, 2015 at ¶¶11
Weldon #4, at ¶ 25-27

9. Mr. Weldon was instrumental in finding possible class members willing to provide information about their losses due to the transfer which required asking them to send very personal information to VSLO — birthdates, salary information, initial and current DC plan account balances — and to warn them it was possible that information would become public. Mr. Weldon found this stressful but his efforts produced sufficient information for VSLO to join with Camp Fiorante Matthews (now Camp Fiorante Matthews Mogerma) as class counsel in the action and serve the writ.

Weldon #4, at ¶¶25, 28-32

10. Mr. Weldon assisted in responding to the Defendants' challenges to the order extending time for service of the writ and to dismiss the action or strike claims in the action. Mr. Weldon assisted at all stages in various ways — by preparing and completing affidavits in response on the challenge to the writ extension, in support of the motion for certification, and in response to the motion to strike; by providing instructions to respond to the Defendants' appeals from the dismissal of its motion; and by assisting in communication with interested staff employees about the litigation process and its progress.

Weldon #4, at ¶¶34-38, 41

The second action and representative plaintiff — Mr. Bleier joins Mr. Weldon

11. Leonard Bleier, a retired employee (but still working at Teck a casual basis) agreed to be representative plaintiff in a separate but similar action (subsequently consolidated with this action) started in October, 2011. After that Mr. Weldon shared the communication work with Mr. Bleier and other interested staff members but Mr. Weldon continued to do the majority of it.

Weldon #4, at ¶39 & 40

12. Through work and study Mr. Bleier became a second class steam engineer before employment at Cominco in the Northwest Territories for two years, later followed by employment at Cominco, Kimberley Operations in 1976. In 1978 he transferred to a staff job, as superintendent in one of the steam plants at Cominco, Trail Operations and remained employed there until his retirement in late 2006, followed by return to work at Cominco on a casual basis as a project coordinator at which he worked intermittently until 2012.

Affidavit #3 of L. Bleier made July 13, 2015 ("Bleier #3"), at ¶3-5

13. In 2010 Mr. Bleier became a representative plaintiff in a separate class action on learning that Class Counsel considered it necessary to start a separate action with a representative plaintiff who had retired after 2003. To this point Mr. Bleier had attended one or two of the staff group meetings that Mr. Weldon had initiated but was not otherwise active. Mr. Bleier was aware of Teck's threat of seeking costs in the Weldon action. The risk of cost liability was a continuing concern to him until certification. He was aware he was making a significant commitment that could last a long time.

Bleier #3, at ¶6-8

14. Mr. Bleier worked with Class Counsel to assist the progress of the action in several ways – reviewing the draft notice of civil claim; being interviewed for several hours by a journalist resulting in the publication of an article in *Business in Vancouver* magazine about plan conversions; reviewing and suggesting changes to the amended notice of civil claim for the consolidated action; providing age, service, income and DC Plan data for a damage assessment; preparing and completing affidavits in support of the application for certification and in response to the Defendants' application to strike; assembling his documents for discovery going back to 1978 including obtaining statements from bank and brokers not in his possession; and communicating with class members about the action. Mr. Bleier sent and received 840 emails in connection with his activity as representative plaintiff.

Bleier #3, at ¶¶9-16, 18(a) & (f), 19 & 25

Following consolidation

15. Mr. Weldon and Mr. Bleier were provided with the names of about 50 class members for whom the Defendants could not provide contact information. Mr. Weldon, with Mr. Bleier and the Committee searched for contact information for them with success for about 30% of them.

Weldon #4, at ¶43

Bleier #3, at ¶18(e)

16. Class Counsel visited Trail to meet with class members, a meeting organized by Mr. Weldon and Mr. Bleier with the assistance of the Committee.

Weldon #4, at ¶45; Bleier #3, at ¶18(b)

17. Both Mr. Weldon and Mr. Bleier travelled to Vancouver from Trail for preparation with class counsel and one half day each of examination for discovery. This required review of many documents in preparation.

Weldon #4, at ¶46

Bleier #3, at ¶18 (g)

18. As the trial approached, settlement discussions commenced. Mr. Weldon and Mr. Bleier worked closely with Class Counsel in framing each of several settlement proposals. Mr. Weldon found the negotiation stressful as many others were hoping for more substantial compensation but agreed to it after discussion with Class Counsel and separately with a former Justice of the Court of Appeal.

Weldon #4, at ¶48-50

Bleier #3, at ¶ 22

19. Mr. Bleier participated in the early rounds of settlement discussions while helping his nephew harvest his crop in Saskatchewan, by telephone conference, once from his tractor and on other occasions by leaving the field to do so. He and Mr. Weldon participated in discussions with Class Counsel in each step of the settlement discussions. They were particularly concerned about the settlement amount being low in relation to the losses suffered and the expectations of class members. Mr. Bleier missed three days of the harvest in order to attend in Vancouver with Mr. Weldon and

Class Counsel to discuss the Defendants' settlement offer. Mr. Bleier negotiated under the added stress of a recent diagnosis of a significant medical problem.

Bleier #3, at ¶¶20, 21 – 23

20. Since the settlement Mr. Weldon and Mr. Bleier have worked with Class Counsel by communicating the details of the settlement to class members, and by reviewing the distribution protocol and the "frequently asked questions" posted on class Counsel's websites.

Weldon #4, at ¶¶51-52
Bleier #3, at ¶¶24, 26 & 27

Recoveries

21. Mr. Weldon's proposed allocation is near \$16,500, towards the higher end of the allocated amounts. He is now 64 and will continue to work at Teck to age 65. He would have retired earlier but for the low value of his DC Plan account. By comparison to the pension of a friend with similar age and service he expects his DB Plan pension would have been near \$72,000 per year, far beyond what Mr. Weldon can expect from his DC Plan account.

Weldon #4, at ¶ 53

22. Mr. Bleier, who retired in 2006, has a proposed allocation near \$5200, about one quarter of the highest allocations. He draws the maximum amount permitted from his pension fund, which he must still manage. Mr. Bleier continued to work at Teck on a casual basis through 2012 because of the low value of his DC Plan account.

Bleier #3, at ¶¶28

Part 3: Legal Basis

23. In *Parsons v. Coast Capital Savings Credit Union*, the only issue before the Court of Appeal was the appropriate additional compensation for a representative plaintiff. It remains the leading case in BC. The representative plaintiff applied for additional compensation of \$10,000. The Court of Appeal allowed additional compensation of

\$3,500 for what we submit was for competent service as a recruited representative plaintiff, far less than the contributions made by Mr. Weldon and Mr. Bleier.

Parsons v. Coast Capital Savings Credit Union, 2010 BCCA 311 [*Parsons*] at ¶¶4, 6 & 25

24. The Court held that a plaintiff seeking additional compensation is required to establish that:

- (a) the settlement is in the interests of all the class;
- (b) he or she has fulfilled the duties of the representative plaintiff; and
- (c) the amount is not disproportionate to the benefit derived by the class members, his or her effort and risks assumed.

Parsons at ¶19

25. The Court held that, with those cautions considered, “services of special significance beyond the usual responsibilities” are not required. Rather, to achieve “a modest award” the plaintiff must “[fulfil] his or her duties” including attendance for examination in discovery and providing instructions at all steps including settlement. Additional justifications are exposure to costs assumed by the representative plaintiff, there being “a real exposure to costs assumed on commencing the action” and intangible costs including the weight of being the leader. Exceptional service is not required. Competent service accompanied by positive results is sufficient while weighing the quantum of personal benefit with the overall benefit for the class.

Parsons at ¶¶20-21

26. *Parsons* was applied by this Court in *MacKinnon* to award two representative plaintiffs compensation in the amount of \$7,500 each in recognition of their services to the class.

MacKinnon v. National Money Mart Company, 2010 BCSC 1008 [*MacKinnon*] at ¶¶51–60

27. *MacKinnon* was resolved seven years after commencement with court approval of the settlement between the parties in July, 2010. The parties appeared before this

Court and the Court of Appeal on a number of occasions in the course of the litigation. Each of the representative plaintiffs fulfilled their duties by taking an active involvement in the proceedings, providing one and two affidavits respectively, participating in instructing counsel during settlement negotiations, and providing personal information with respect to the subject matter of the litigation.

Mackinnon at ¶¶8, 42 & 55-56

28. On at least three other instances this court has approved compensation to a representative plaintiff in the amount of \$10,000 for their services and contributions.

Casavant v. Cash Money Cheque Cashing Inc., 2010 BCSC 148 [*Casavant*].
Bodnar v. The Cash Store Inc., 2010 BCSC 145 [*Bodnar*].
Pro-Sys Consultants Ltd. v. Infineon et al. (3 March 2015), Vancouver No. L043141 (B.C.S.C.) [*Pro-Sys*].

29. *Casavant* was a class proceeding that was resolved in 2 years, without a contested certification application. It acquired several hearings, including an unsuccessful application by the defendants seeking disclosure of the representative plaintiff's medical records, which was affirmed on appeal. On review of the settlement to the court awarded Ms. Casavant \$10,000 citing her involvement in achieving a successful outcome for the class, her exposure to adverse costs arising from the pre-certification applications, and the personal nature of the application brought with respect to her medical records.

Casavant, supra at ¶¶8, 31.

30. *Bodnar* was commenced in March, 2004. It was certified as a class proceeding against some defendants in 2005, a decision that was affirmed on appeal. It was certified against the remaining defendants in 2008. On application for settlement approval, the plaintiffs sought compensation of \$10,000 for Mr. Bodnar and Mr. Bartolome, two of the three representative plaintiffs, and \$5,000 for Mr. Wournell. The court approved, citing their respective participation, the necessity of Messrs. Bodner and Bartolome participating in two separate examinations for discovery, and their contributions to settlement negotiations.

Bodnar, supra at ¶¶3, 7 and 42-49.

31. No reasons have been issued in *Pro-Sys*.

32. The factors that emerge from these cases accord with a non-exhaustive list of factors set out by Justice Strathy (as he then was) for this type of application in *Robinson v. Rochester Financial Limited*:

- (a) active involvement in the initiation of the litigation and retainer of counsel;
- (b) exposure to a real risk of costs;
- (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation;
- (d) time spent and activities undertaken in advancing the litigation;
- (e) communication and interaction with other class members; and
- (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.

Robinson v. Rochester Financial Limited, 2012 ONSC 911 [Robinson] at para. 43.

33. Mr. Weldon's concern and leadership led to this action, and since then he, and subsequently Mr. Bleier, have sustained it and lead it for the class.

34. Both Mr. Weldon and Mr. Bleier have been active representative plaintiffs throughout. Both faced litigation cost risks and, most unusually compared to other cases, employment risk when they needed to continue their employment in their 60s.

35. Mr. Weldon made difficult calls to people he knew a little or not at all to ask for the disclosure to the lawyers of sensitive personal financial information necessary to determine the damages suffered and therefore the viability of the action.

36. Mr. Bleier became involved later but shared the extensive task of class communication, organized a class member meeting with Class Counsel, completed document discovery, extensive preparation for and attendance at examination for discovery, and swore necessary affidavits and provided information for affidavits in the litigation which has lasted six years for Mr. Weldon and almost 4 years for Mr. Bleier.

37. Mr. Bleier additionally assisted with media publications about the action and was closely involved in settlement discussions by telephone from Saskatchewan. Despite the pressure of personal medical issues and the harvest work he was doing he travelled to Vancouver for discussion, and eventual acceptance, of the recommended settlement agreement.

38. Given the extensive involvement of Mr. Weldon and Mr. Bleier in this litigation, and the degree of success achieved for the benefit of the Class, Class Counsel propose that each be paid an honorarium of \$10,000 to be paid out of the Settlement Funds.

PART 4: MATERIAL TO BE RELIED ON

Affidavit #4 of James Weldon made July 10, 2015

Affidavit #3 you and Leonard Bleier made July 13, 2015

Affidavit # 1 of Jennifer Winstanley, made July 15, 2015

The applicant estimates that the application will take 45 minutes.

This matter is within the jurisdiction of the master.

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/JUL/2015



Signature of David Blair
Lawyer for applicants

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

THIS APPLICATION INVOLVES THE FOLLOWING:

- 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