

COURT FILE NO.: 99-CV-10694**DATE: 2007-11-30****SUPERIOR COURT OF JUSTICE - ONTARIO**

RE: Nicole Lacroix and Rosie Ladouceur vs. Canada Mortgage and Housing Corporation and Marc Rochon, Claude Poirier-Defoy, Jim Millar, Karen Kinsley, Gerald Norbraten, Jean-Guy Tanguay, David Metzack and Brian Knight being the Trustees of the Canada Mortgage and Housing Corporation Pension Fund

BEFORE: The Honourable Justice Michel Z. Charbonneau

COUNSEL: William Sammon et James Barnes, for the plaintiffs Lacroix et al
Brett Ledger and Denise Sayer, for the defendants
Paul N. Leaman, for the plaintiffs in the companion action No.07-CV-37862

ENDORSEMENT

[1] The plaintiffs bring a motion to compel the defendants to answer certain questions which the defendants refused to answer at Mr. Millar's cross-examination. The plaintiffs also seek an order for the production of certain documents which the defendants have refused to produce at that same cross-examination.

[2] It is often very difficult to decide where to draw the line as to what evidence is clearly not relevant for the pending motions. I am however satisfied that, for the most part, the defendants have correctly answered or refused to answer the specific questions which are the subject of this motion. My decision takes into account the fact that the plaintiffs already have at their disposal many of the documents they sought and will be able to obtain some clarifications from Mr. MacDonald.

[3] Insofar as the questions asking for production of documents are concerned, I have come to the conclusion that the plaintiffs are overreaching at this stage. To order the production of those documents at this time would be to allow full blown discoveries on the merits of the case.

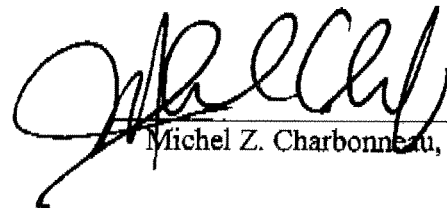
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This would be unfair to the defendants and it would unnecessarily increase the complexity of the two pending motions. Whether the documents must be produced or are exempt from production as privileged or otherwise will have to be decided on another day. I am satisfied that the contents of those documents, if admissible, go solely to the merits of the plaintiffs' claim and are not required to decide the two pending motion.

[4] I am of the opinion that question 129 is a proper question. The response to the effect that C.M.H.C. requires the specifics of the alleged conflict of interest is unresponsive. If the answer to the question is "yes", unless the defendants choose to reveal the exact and complete nature of the opinion, the plaintiffs will have to be satisfied with that answer for now as anything further would clearly go beyond the immediate issues of the two pending motions.

[5] The following questions were properly answered or properly refused on the basis of either irrelevance or privilege: questions 132, 145, 155, 212-213, 237, 240, 243, 132-133, 287, 304-305.

[6] I have annexed, in the same format as provided by counsel, a chart setting out the questions, answers or refusals and my decisions on each.



Michel Z. Charbonneau, Judge

DATE: November 30, 2007

APPENDIX

1. Refusals challenged by Lacroix Plaintiffs

REFUSALS					
Refusals to answer questions on the examination of Jim Millar, dated September 19, 2007.					
<i>Issue & relationship to pleadings or affidavit</i>	<i>Question No.</i>	<i>Page No.</i>	<i>Specific question</i>	<i>Answer or precise basis for refusal</i>	<i>Disposition by the Court</i>
<p>Entitled to information as prima facie beneficiaries of the plan</p> <p>Relevant to Proposed Common Issues</p> <p>Relevant to Jurisdiction Motion</p> <p>Proper Cross Examination on issues raised in Millar's Affidavit in paras. 27, 30, 36, 40, 47, 53, 89 and on documents produced by Defendants on 17th August, 2007</p>	42	26-31	To advise whether Buck Consultants was retained to deal with the partial termination issue.	<p>This question has been answered.</p> <p>Buck Consultants was not retained to provide input on whether CMHC should declare a partial termination. It remains CMHC's position that this is not relevant to the Pending Motions. CMHC submits that the rules of discovery should apply, and given this information is not relevant to the Pending Motions, production should be denied. In any event, the Plaintiffs do not have a free standing right to the advice as alleged "<i>prima facie</i> plan beneficiaries" as the documents contain evidence of discretionary decision making, an exception to the general trust principle relied upon by the Plaintiffs. Further, the cases relied upon by the Plaintiffs pre-date the Supreme Court's decision in <i>Buschau, supra</i> that not all trust principles were applicable in a pension context, and it is not clear that these trust</p>	This question has been answered.

				principles would apply.	
<p>Entitled to information as prima facie beneficiaries of the Plan</p> <p>Relevant to Proposed Common Issues</p> <p>Relevant to Jurisdiction Motion</p> <p>Proper Cross Examination on issues raised in Millar's Affidavit in paras. 27, 30, 35, 36, 40, 47, 53, 59, and in documents produced by Defendants on 17th August, 2007</p>	88	50-51	To produce any agreement between Buck Consultants and CMHC in relation to the service it provided.	<p>Refusal maintained, the contracts between CMHC and Buck Consultants, and the input provided by Buck Consultants are not relevant to the Pending Motions. CMHC submits that the rules of discovery should apply, and given this information is not relevant to the Pending Motions, production should be denied. In any event, the Plaintiffs do not have a free standing right to the advice as alleged "<i>prima facie</i> plan beneficiaries" as the documents contain evidence of discretionary decision making, an exception to the general trust principle relied upon by the Plaintiffs. Further, the cases relied upon by the Plaintiffs pre-date the Supreme Court's decision in <i>Buschau, supra</i> that not all trust principles were applicable in a pension context, and it is not clear that these trust principles would apply.</p>	<p>Irrelevant as clearly unnecessary for pending motions and premature documentary production.</p>
<p>Entitled to information as prima facie beneficiaries of the Plan</p>	129	68-69	To advise whether at any time prior to the end of December	We understand the Plaintiffs' position to be that CMHC was in a conflict on the question of whether it should	Answered

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<p>Relevant to Proposed Common Issues</p> <p>Relevant to Jurisdiction Motion</p> <p>Proper Cross Examination on issues raised in Millar's Affidavit in paras. 27, 33, 35, 39, 41, 51, 52, 53, 59, Exhibit Y</p>			<p>1998, did CMHC obtain an opinion from anyone on whether the Company was in conflict of interest under the PBSA?</p>	<p>declare a partial termination. The basis for that conflict remains unclear. In any event, no specific opinion on this issue was obtained. CMHC reiterates its position that CMHC was acting as plan sponsor and there was no conflict.</p>	
<p>Entitled to information as prima facie beneficiaries of the Plan</p> <p>Relevant to Proposed Common Issues</p> <p>Relevant to Jurisdiction Motion</p> <p>Proper Cross Examination on issues raised in Millar's Affidavit in paras. 27, 30, 35, 39, 47</p>	132	70-71	<p>To advise how much each of the named trustees received from the pension fund.</p>	<p>Refusal maintained, not relevant to the Pending Motions.</p> <p>The question of whether section 8(10) or (11) can confer jurisdiction on the Ontario Superior Court to determine the Partial Termination Allegations is a question of pure law. Further, the Court can assume for the purposes of the Pending Motions that the Plaintiffs can establish the necessary facts for a conflict of interest, and as such it is not necessary (nor relevant) to have this specific information.</p>	Irrelevant
<p>Entitled to information as prima facie beneficiaries of the plan</p> <p>Relevant to Proposed Common Issues</p>	146	75-76	<p>To advise whether CMHC obtained, from their legal department or actuaries or anyone else, advice as to whether or not a partial</p>	<p>CMHC did not seek or receive advice from Towers Perrin or Buck Consultants on whether a partial termination occurred or should be declared.</p> <p>No written opinion from external counsel was obtained, however, oral</p>	<p>The parties agreed during hearing that question had been answered.</p>

<p>Relevant to Jurisdiction Motion</p> <p>Proper Cross Examination on issues raised in Millar's Affidavit in para. 59 and in documents produced by Defendants on 17th August, 2007-11-02</p> <p>The Plaintiffs do not seek the substance of the legal advice at this time, but only ask whether such advice was in fact obtained</p>			<p>termination occurred or should be declared after the 1998 B. Ramdial memo was sent to R. MacDonald.</p>	<p>advice was provided between August and October 1998 on this issue. In-house counsel also provided oral advice.</p>	
<p>Entitled to information as prima facie beneficiaries of the Plan</p> <p>Relevant to Proposed Common Issues</p> <p>Relevant to Jurisdiction Motion</p> <p>Proper Cross Examination on issues raised on Millar's Affidavit in para. 37, 38, 39, 51</p> <p>The plaintiffs do not seek production of Osler's legal opinions</p>	<p>155</p>	<p>80-81</p>	<p>To produce a copy of any opinion any external consultant involved in the redesignation of contributions option provided CMHC.</p>	<p>Refusal to produce input maintained on basis of relevancy, goes to merits of claim.</p> <p>Draft opinions from Osler, Hoskin & Harcourt LLP, dated September 21 and September 30, 1998 relating to the redesignation were obtained and paid for by the Company, as employer and plan sponsor. The substance of these opinions is privileged and will not be produced.</p> <p>Refusal maintained on</p>	<p>Not relevant and premature documentary production.</p>

<p>but do seek production of the contracts and reports of the actuaries</p>				<p>the input obtained from other consultants. First, these documents are not relevant to the Pending Motions. CMHC submits that the rules of discovery should apply, and given this information is not relevant to the Pending Motions, production should be denied. In any event, the Plaintiffs do not have a free standing right to the advice as alleged "<i>prima facie</i> plan beneficiaries" as the documents contain evidence of discretionary decision making, an exception to the general trust principle relied upon by the Plaintiffs. Further, the cases relied upon by the Plaintiffs pre-date the Supreme Court's decision in <i>Buschau, supra</i> that not all trust principles were applicable in a pension context, and it is not clear that these trust principles would apply.</p>	
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2. Refusals challenged by McCann Plaintiffs

<i>REFUSALS</i>					
Refusals to answer questions on the examination of Jim Millar, dated September 19, 2007.					
<i>Issue & relationship to pleadings or affidavit</i>	<i>Question No.</i>	<i>Page No.</i>	<i>Specific question</i>	<i>Answer or precise basis for refusal</i>	<i>Disposition by the Court</i>

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Trust Interest & Conflict of Interest	212-213	108-109	To advise whether CMHC claims it owns the surplus.	Refusal maintained. This information is not relevant to the Pending Motions, as it goes to merits of common issues proposed by Plaintiffs. Further, CMHC has provided its position on surplus ownership. Any further detail would require an answer to a legal question that goes to ultimate issue as articulated by the Plaintiffs' proposed common issues.	Not relevant
Trust Interest & Conflict of Interest	237	119-120	To advise whether there is a power of revocation in the trust agreement? (i.e. power allowing the trustees to take money from the trust)	Refusal maintained. This information is not relevant to the Pending Motions, as it goes to merits of common issues proposed by Plaintiffs. Further, CMHC disagrees with Plaintiffs' characterization that it withdrew money from the trust, and has stated this position on the record. (Millar Cross-Examination Transcript, Q. 61, p. 39-40) The issue of revocation is only relevant if monies were withdrawn from the plan, and CMHC articulated its position that an examination of surplus ownership was unnecessary given it did not, nor planned to, withdraw funds from the plan. Any further detail on would require an answer to a legal question that goes to ultimate issue as articulated by the Plaintiffs' proposed common issues.	Not relevant
Trust Interest & Conflict of Interest	240	123-124	To advise what consideration CMHC gave to the	This question has been answered. The amendments in 1999 had nothing to do with the	Answered

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			<p>issues of the workforce adjustment plan and the existing surplus in the context of the amendments to the rules made in 1999 (relating to partial termination/wind up).</p>	<p>workforce adjustment plan and the existing surplus. Accordingly, no consideration was given. Further, clause 14 which is the provision dealing with termination, was not amended in 1999. In any event, CMHC submits this question is not relevant to the Pending Motions.</p> <p>CMHC may be able to provide further clarification on this issue, but requires a better understanding of what specifically the Plaintiffs are seeking.</p>	
Trust Interest & Conflict of Interest	243	125-126	<p>To advise what authority CMHC has to amend the rules to take any part of the surplus, for any reason.</p>	<p>Refusal maintained. This information is not relevant to the Pending Motions, as it goes to merits of common issues proposed by Plaintiffs. Further, CMHC disagrees with Plaintiffs' characterization that it withdrew money from the trust, and has stated this position on the record. (Millar Cross Examination Transcript, Q. 61, p. 39-40) The issue of revocation is only relevant if monies were withdrawn from the plan, and CMHC articulated its position that an examination of surplus ownership was unnecessary given it did not, nor planned to, withdraw funds from the plan. Any further detail on this issue would require an answer to a legal question that goes to ultimate issue as articulated by the Plaintiffs' proposed common issues.</p>	Not relevant

<p>Trust Interest & Conflict of Interest</p>	<p>244</p>	<p>126-127</p>	<p>To produce unredacted copies of the minutes of meetings of the trustees of the pension fund.</p>	<p>This question has been answered.</p> <p>The minutes of the meetings of the trustees attached as exhibits to the Affidavit of Jim Millar, has been redacted for information unrelated to the issues in question. Redacted portions, in general, include reports on economic outlook, quarterly reports on the fund's performance, reports on the performance of the foreign portfolios, report on the audit of financial statements, governance issues, budget amendments, review of the proposals for annual reports, presentation of business plans, reviews of statement of investment policies and goals, approval of the minutes from previous meetings, and reports on actuarial valuations of the pension fund.</p> <p>There is one exception of the October 7, 1998 meeting, in which introductory remarks regarding the Report of the Chairperson of the Pension Committee had been redacted. A version with this portion un-redacted was provided to the Plaintiffs.</p> <p>Further, CMHC maintains that this information is not relevant to the Pending Motions.</p>	<p>Answered -- Extent of redaction may be revisited at a later time, if need be.</p>
<p>Trust Interest & Conflict of</p>	<p>248</p>	<p>131</p>	<p>To produce a "package of meeting materials"</p>	<p>This question has been answered.</p> <p>The two documents which</p>	<p>The parties agreed during hearing that question had been answered.</p>

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Interest			that is referred to in the minutes of the December 3, 1997 meeting of the CMHC Trustees of the Pension Fund, page 2, item 3.	formed the "package of materials" relating to item 3 are attached at Tab 2. CMHC maintains that neither document is relevant for the purposes of the Pending Motions. CMHC subsequently determined that the "package of meeting materials" included two additional documents that do not relate to item 3, but which relate to the issues of workforce adjustment and/or surplus. Item 7, "Interim CMHC Pension Fund Business Plan" contained two documents (a presentation dated December 1997, and a memorandum dated November 17, 1997), both of which have been provided to the Plaintiffs.	
Trust Interest & Conflict of Interest	249-251	132-133	On what basis did CMHC assert that ownership of the surplus was not to be an issue?	This undertaking or refusal was not given on the transcript. However, is refused because the information is not relevant to the Pending Motions, as it goes to merits of common issues proposed by Plaintiffs. Further, CMHC has provided position on surplus ownership, and any further detail outside of its position is a legal question that goes to ultimate issue put in issue by the Plaintiffs.	Not relevant
Trust Interest & Conflict of Interest	287	153-154	To advise whether people at CMHC who were	This question has been answered in that the Company did obtain legal advice on this issue, obtained and paid for by the Company	Privileged – may be revisited on the merits.

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			making the decision regarding who would share in the surplus considered the question of whether employees who had taken commuted value should be included in the sharing group.	in its capacity as employer and plan sponsor. However, CMHC maintains its refusal to produce these opinions. The substance of these opinions are privileged and will not be produced. CMHC is under no obligation to produce legal advice that it obtained and paid for it its capacity as a plan sponsor/employer.	
Trust Interest & Conflict of Interest	305	161	To advise as to the amount Mr. Rochon received in either the first or second distributions	Refusal maintained on amount Mr. Rochon received. This information is not relevant to the Pending Motions. The Plaintiffs do not need a specific quantum to be received by Mr. Rochon to allege that a conflict of interest arose. CMHC has already stated that Mr. Rochon joined CMHC on August 21, 1995 and retired April 1, 2000, as such he would have shared in both distributions. Further, for the purposes of the Jurisdiction Motion, the Court must assume the Plaintiffs are able to establish the facts necessary to argue a conflict pursuant to s. 8 of the PBSA existed.	Not relevant
Relevancy of pension related discussions	334	174	What are the records of	This question was not identified as a refusal on the transcript but has been	Answered

<p>should be available for consideration by both parties</p>			<p>discussions where a decision was made to exclude departing WAP members from any share of the pension surplus?</p>	<p>answered. CMHC undertook to make inquires on the subject, but did not give an undertaking to provide "records of discussions". As the transcript demonstrates, this question was subsumed under two "previous undertakings", and the question is answered by CMHC's response to Q. 287, pp. 153-154 and Q. 340, pp. 183-184.</p>	
<p>Relevancy of pension related discussions should be available for consideration by both parties</p>	<p>335</p>	<p>174-175</p>	<p>Provide the relevant information and documents explaining the issues and considerations relating to the Corporation's examination of options for use of the surplus, as reflected, in part, in the Minutes of May 11, Tab 98, Tab Q of Millar Affidavit.</p>	<p>Plaintiffs' counsel characterizes question more broadly than CMHC, who articulated the question as "Produce the "further study" referred to in minutes of the May 11, 1998 Board of Directors meeting to the extent that that has any bearing on the departing employees. (Tab Q, CMHC Motion Record)".</p> <p>This question specifically related to the "further study" in the minutes of the May 11, 1998 Board meeting and has been answered by CMHC.</p> <p>See answer above to Question 248.</p>	<p>Answered</p>

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