

SUPERIOR COURT OF JUSTICE

BETWEEN:

NICOLE LACROIX and ROSIE LADOUCEUR ~~and DAVID GUFFIE,~~
~~FRANK MCCANN and ROBERT BRAYBROOK~~

Plaintiffs

AND:

CANADA MORTGAGE AND HOUSING CORPORATION and
MARC ROCHON, CLAUDE POIRIER-DEFOY, JIM MILLAR,
KAREN KINSLEY, GERALD NORBRATEN, JEAN-GUY
TANGUAY, DAVID METZAK, BRIAN KNIGHT and GEORGE HENDELA,
being the Trustees of the CANADA MORTGAGE
AND HOUSING CORPORATION PENSION FUND

Defendants

Proceedings under the **Class Proceedings Act**, 1992

AMENDED AMENDED AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff(s).
The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff(s) lawyer(s) or, where the plaintiff(s) do(es) not have a lawyer, serve it on the plaintiff(s), and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date."20 July 1999"

Issued by "J. Saikaly"
Local Registrar

TO:
Canada Mortgage and Housing
Corporation,

Address of court office:
161 Elgin Street,
Ottawa, Ontario.
K2P 2K1

AND TO:
The Trustees of Canada Mortgage
and Housing Corporation Pension Fund
National Office,
700 Montreal Road,
Ottawa, Ontario.
K1A 0P7.

~~THIS ACTION IS BROUGHT AGAINST YOU UNDER THE SIMPLIFIED PROCEDURE
PROVIDED IN RULE 76 OF THE RULES OF CIVIL PROCEDURE.~~

C L A I M

1. The Plaintiffs claim, on behalf of themselves and all class members:
 - (a) Damages for breach of trust and fiduciary duty and negligence and breach of statutory duty in the amount of \$120 million;
 - (a.1) A declaration that the work force adjustment program and/or pension surplus review as hereinafter described amounted to a partial termination of the CMHC pension plan and/or a crystallization of the surplus thereby entitling the Plaintiffs to a distribution of the pension surplus;
 - (a.2) Punitive and/or exemplary damages in the amount of \$100 million dollars.
 - (b) Pre-judgment and post-judgment interest pursuant to the provisions pursuant to the provisions of the **Courts of Justice Act**, R.S.O. 1990, c. 43;
 - (c) Costs on a solicitor and client basis;

(d) Such further and other relief as to this Honourable Court shall deem just.

2. The Plaintiffs are the former employees of Canada Mortgage and Housing Corporation (CMHC).

2.1 The Plaintiff, Nicole Lacroix, was employed by CMHC from 1981 through to January of 1998 when she was downsized by CMHC's workforce adjustment program.

2.2 The Plaintiff, Rosie Ladouceur, was employed by CMHC from 1978 through to July of 1997 when she was downsized by CMHC's workforce adjustment program.

2.3 The Plaintiffs, Lacroix and Ladouceur, both took the commuted value of their pension when they left CMHC with neither one receiving their full proportionate share of the existing pension fund surplus.

2.4 The Plaintiffs, Lacroix and Ladouceur, state that on the first distribution of surplus Rosie Ladouceur received nothing, while Nicole Lacroix received a small amount of the surplus that was based on her transfer restriction annuity.

2.5 The Plaintiff, David Guffie, was employed by CMHC from 1979 through to June of 1998 when he was downsized by CMHC's workforce adjustment program.

- 2.6 The Plaintiff, Frank McCann, was employed by CMHC from 1974 through to April of 1998 when he was downsized by CMHC's workforce adjustment program.
- 2.7 The Plaintiff, Robert Braybrook, was employed by CMHC from 1975 through to the 3rd December, 1999 when he was downsized by CMHC's workforce adjustment program.
- 2.8 The Plaintiffs, Guffie, McCann and Braybrook, were members of the CMHC pension fund until the 1st January, 1999 and, accordingly, shared in the first distribution of surplus which took place in the early part of 1999.
- 2.9 After receiving their share of the first distribution of surplus, the Plaintiffs, Guffie, McCann and Braybrook, elected to take their commuted value out of the pension fund but would have remained members of the plan to the extent they retained a transfer restriction annuity.
- 2.10 The Plaintiffs, Guffie, McCann and Braybrook, state that prior to electing to take their commuted value, the Defendants made a common representation to all employees that the planned distribution of surplus which was to take place in early 1999 was a one time distribution of surplus only.
- 2.11 The Plaintiffs, Guffie, McCann and Braybrook, state that in May of 2001, the Defendants made a further distribution of surplus in the amount of \$62 million to existing employees and retirees contrary to its common representation to all employees that the first distribution of

surplus in early 1999 was one time only.

2.12 The Plaintiffs, Guffie, McCann and Braybrook, further state that by relying on the common representation that the first distribution of surplus was one time only, the Defendants have wrongfully deprived them of any share in subsequent distributions of surplus including the one made in May of 2001.

2.13 The Plaintiffs, Guffie, McCann and Braybrook, further state that they would have been required to sign standard form releases after July of 1998 which are hereinafter referred to in paragraph 30.3.

3. CMHC is a Crown corporation founded in 1946 to assist Canadians across the country gain access to affordable and quality housing. It has offices nation wide and had a work force of approximately 2600 in 1996.
4. The current trustees of the CMHC Pension Fund being Marc Rochon, Claude Poirier-Defoy, Jim Millar, Karen Kinsley, Gerald Norbraten, Jean-Guy Tanguay, David Metzak, Brian Knight and George Hendela are collectively “the trustees”.
5. The class members are all former employees who left CMHC after the 1st of January, 1995 due to CMHC’s work adjustment (downsizing) program and who did not receive all or part of their share of a pension surplus which stood at \$240 million as of the 1st October, 1998.

THE FACTS

6. CMHC and the trustees entered into a trust agreement dated the 14th day of October, 1992 whereby the trustees agreed to manage and administer a pension fund (PF) and undertook to make all payments to the beneficiaries of the PF called for by the PF rules.
7. It is clear by a company by-law enacted on the 13th February 1959 that the beneficiaries of the PF are the officers and employees of CMHC and their dependents.
8. It is also clear from the original Trust Agreement entered into between CMHC and the original trustees that the PF consisted not only of employer and employee contributions but income and interest derived from the funds invested and hence surplus.
9. Although the Trust Agreement and PF rules have been amended from time to time to meet changing circumstances, the basic Trust Agreement has never been amended or repealed and, accordingly, CMHC and the trustees hold all of the funds in the PF, including surplus, in trust for the beneficiaries, including the Plaintiffs and class members.
10. When the PF was established in 1946, there was no general power reserved to CMHC to revoke this continuing trust obligation, nor can it be implied from a general or unlimited power of amendment.

11. Under ss. 8(1)(c)(ii) of the **Pension Benefits Standards Act**, C.P.-7.01 R.S. 1985, c. 32 (PBSA), CMHC is required to keep all monies in the PF, including surplus, in trust for members of the PF, former members and any other persons entitled to pension benefits.
12. Under ss. 10(5) of the PBSA, a pension plan cannot be amended so as to reduce or have the effect of reducing a pension benefit accrued to the date of amendment or pension benefit credits relating to pension benefits prior to the date of the amendment unless otherwise permitted by the Superintendent.
13. From 1980 through to 1996, CMHC employees, including the Plaintiffs and class members, contributed 42% of the Pension Funds' total contributions while CMHC contributed 58%. The employees, including the Plaintiffs and class members, made all of the contributions for 1990, 1996 and 1997 while CMHC paid nothing while taking a contribution holiday based on surplus.
14. By the 1st of January, 1996 CMHC's budget was approximately \$268.7 million which included a provision for \$55.9 million for downsizing which it planned for 1997 through to 1999 but which process informally started in 1995.
15. From 1995 to now, CMHC has downsized by approximately 1400 employees, or approximately fifty percent of its workforce, including the Plaintiffs and class members. The downsizing was to make CMHC more entrepreneurial and cost effective.

- 15.1 In December 1997, CMHC commenced a pension surplus review which ultimately resulted in a division of surplus as hereinafter described.
- 15.2 The Plaintiffs state that the downsizing and/or pension surplus review resulted in a crystallization of the pension surplus and/or a partial termination of the CMHC pension plan.
- 15.3 Pursuant to s. 29(12) of the *PBSA* where a plan is terminated in part, the rights of members affected shall not be less than what they would have been if the whole of the plan had been terminated on the same date as the partial termination.
- 15.4 The Plaintiffs state that the workforce adjustment program and/or the pension surplus review were events which resulted in the crystallization of the pension fund surplus and/or a partial termination of the pension fund which would have imposed upon the Defendants a duty to divide the pension fund into two parts: assets and liabilities relating to the downsized employees being the Plaintiffs and assets and liabilities relating to the ongoing members and would have required the Defendants to transfer to the downsized employees, including the Plaintiffs and class members, their proportionate share of the pension fund surplus either as of the date of the partial windup or the date of the crystallization of the pension fund surplus.
- 15.5 In other words, if the plan had partially terminated on the 1st January, 1999 or at some other time as declared by the Court, the surplus standing to the credit of the plan of \$240 million as of January 1, 1999 or such other time as declared by the Court should have been divided

between the downsized employees and the ongoing members in the plan on a proportionate and equitable basis.

15.6 The Plaintiffs state that the Defendants, as administrator and trustees of the CMHC pension fund, had a trust and fiduciary obligation to them to objectively consider whether the workforce adjustment program and/or the pension surplus review may have amounted to a partial termination of the pension fund and, if so, to advise the Superintendent of Financial Institutions so that the Superintendent could take appropriate steps to protect the interest of the downsized employees in the pension fund surplus.

15.7 The Plaintiffs further allege that the Defendants, as administrator and trustees of the CMHC pension fund had a duty to them to objectively consider whether the workforce adjustment program and/or the pension surplus review may have amounted to a partial termination of the pension fund and, if so, to advise the Superintendent of Financial Institutions so that the Superintendent could take appropriate action to protect the interest of the downsized employees in the pension fund surplus.

15.8 The Plaintiffs state that the Defendants as administrator and trustees of the pension fund breached their trust and fiduciary obligations along with their commonlaw duty of care to them by failing to objectively consider whether the workforce adjustment program and/or the pension surplus review may have amounted to a partial termination of the pension fund and by their failure to advise the Superintendent of same which breach and failure prevented

the Superintendent from protecting the interest of the downsized employees in the pension fund surplus.

15.9 In the alternative, the Plaintiffs allege that the Defendants breached their trust, fiduciary, and statutory duty to them and were negligent by failing to treat the workforce adjustment program and/or the pension surplus review as a partial termination of the pension fund which would have allowed the downsized employees to receive their full share of the pension surplus on such partial termination.

15.10 The Plaintiffs further allege that by failing to treat the workforce adjustment program and/or the pension surplus review as a partial termination of the pension fund, the Defendants, contrary to their statutory duty under the *PBSA*, were not acting in the best interest of the members of the pension fund, particularly the downsized employees.

15.10.1 Given the large surplus that existed in the pension fund trust at the beginning of work force adjustment program on the 1st of January 1995, the Plaintiffs state that CMHC was presented with a choice of acting in its own interest by keeping the entire surplus in the pension fund trust and using that surplus later on for its own benefit or acting in the best interest of the pension fund members who were about to be downsized, by declaring a partial termination of the pension fund trust pursuant to s.29(5) of the *PBSA*, so that those members who were about to be downsized would receive their full pro rata share of the existing surplus when those members took their commuted value and left the pension plan.

15.10.2 The Plaintiff and class members state that CMHC elected to keep the entire surplus in the pension fund trust and use it for its own benefit thereby acting in a conflict of interest contrary to its trust, fiduciary and statutory obligations to the pension fund members.

15.10.3 The Plaintiff and class members state that the only way CMHC could have avoided this conflict of interest was by declaring a partial termination of the pension fund trust effective as of the beginning of the work force adjustment program in January 1995, so that those pension fund members, including the Plaintiffs and class members, would have received their full pro rata share of the surplus when those members took their commuted value and left the plan.

15.10.4 The Plaintiff and class members state that CMHC breached its trust, fiduciary and statutory obligations to the Plaintiff and class members by failing to declare a partial termination of the pension fund trust effective as of the beginning of the work force adjustment program.

15.11 The Plaintiffs and class members state that they should have received on partial termination of the pension plan and/or crystallization of the surplus approximately \$120 million but were deprived of same through the breach of trust, breach of fiduciary duty, breach of statutory duty and/or negligence of the Defendants as described above.

15.12 The Plaintiffs plead and rely on the subsections 8(1), 8(10), 8(11) and 29(5) of the PBSA.

16. In its downsizing campaign, CMHC offered the Plaintiffs and class members several alternatives, including:
 - a) a transfer of commuted value of a deferred pension;
 - b) a deferred pension payable at sixty;
 - c) transfer of pension contributions to an eligible employer; and
 - d) if qualified, early retirement.

17. In making these offers during this downsizing campaign, CMHC and the trustees never advised the Plaintiffs and the class members that:
 - e) the huge surplus that existed was part of a Pension Fund that was subject to a Trust Agreement where the Plaintiffs and other class members were beneficiaries of that trust along with other current or retired employees of CMHC;
 - f) CMHC and the trustees were planning to use this huge surplus not only to enhance benefits of current and retired employees but to pay for the cost of downsizing.

18. Contrary to its trust obligations, CMHC and the trustees represented to the Plaintiffs and other class members that this surplus belonged solely to CMHC and that CMHC could do what it wanted with it. This misrepresentation was contrary to the true nature of the surplus which was impressed with a trust arising out of the Trust Agreement.

19. During an internal review of the Pension Plan, PF, and surplus by CMHC, it was suggested to the Corporation and the trustees that the interest of the Plaintiff and other class members

be safeguarded by appointing one of their number as a member of the pension plan committee. This request was rejected by CMHC and the trustees.

20. On the 23rd of October, 1998, as part of a pension surplus review, CMHC and the trustees announced that part of the pension surplus, being \$128.7 million, was to be shared by allocating \$44 million from the surplus to current employees and retired employees with the balance being retained by the Corporation. Of the balance retained by the Corporation, \$59.4 million was retained by CMHC to pay for the cost of downsizing.
21. In other words, CMHC's cost in downsizing was paid for by monies taken by CMHC from the surplus which the Plaintiff and other class members not only helped create through their contributions but in which they had a beneficial interest under the Trust Agreement.
22. In making these decisions, CMHC and the trustees preferred their own interest over that of the Plaintiffs and other class members as those decisions had the effect of:
 - g) ensuring that CMHC employees, including all senior executives and some trustees who stayed with the Corporation, received enhanced pension benefits at the expense of the Plaintiffs and class members;
 - h) ensuring that CMHC was able to pay for the cost of downsizing the Plaintiffs and other class members from monies in which they had a beneficial interest in and had contributed to;
 - i) ensuring that CMHC retirees received enhanced pension benefits at the expense of

the Plaintiffs and class members;

- j) allowed CMHC to attract new employees through enhanced pension benefits at the expense of the Plaintiffs and class members;
- k) allowed CMHC to give its current employees a 50% reduction in employee pension contribution on 1st July, 1998 (which resulted in a \$3 million windfall to these employees) while taking a contribution holiday for itself, all at the expense of the Plaintiffs and other class members.

23. The Plaintiffs and other class members claim they are entitled to share in the surplus in the pension fund and that their share of the pension surplus amounts to approximately \$120 million. In the alternative, the Plaintiffs and class members claim that they are entitled to share in the past and future pension fund surplus distributions to the same degree and extent as existing and retired employees.

24. The Plaintiff and other class members state that CMHC and the trustees were in a fiduciary relationship with them as it:

- l) had the exercise of some discretion or power over them;
- m) unilaterally exercised that power or discretion to effect their legal and practical interests;
- n) they were particularly vulnerable given the power dependency relationship between CMHC and the trustees on the one hand and the Plaintiffs and other class members on the other.

25. In addition to the allegations made in paragraph 15.6 through paragraph 15.12, the Plaintiffs and other class members state that CMHC and the trustees breached their fiduciary obligations to them in that:

- o) they put their own interest before that of the Plaintiffs and other class members;
- p) they did not advise the Plaintiffs or other class members of the beneficial nature of the surplus in timely fashion or at all;
- q) they failed to take into consideration when dealing with the pension surplus the interest of the Plaintiffs and other class members;
- r) they failed to provide any representation on the pension review committee or the steering committee to the Plaintiffs and other class members;
- s) they failed to share the pension surplus in an equitable manner with the Plaintiff and other class members;
- t) they advised the Superintendent of Financial Institutions that the benefit enhancement decision did not amount to a withdrawal of surplus by CMHC even though a 59.4 million dollar loan owing to the pension fund by CMHC was forgiven.

26. Accordingly, the Plaintiffs and other class members state that CMHC and the trustees are jointly and severally liable to them for breach of fiduciary duty in the amount of approximately \$120 million.

27. In addition to the allegations made in paragraph 15.6 to paragraph 15.12, the Plaintiffs and other class members state that both CMHC and the trustees were in an express trust

relationship with them and breached that trust relationship by:

- u) failing to advise the Plaintiffs and other class members in a timely fashion of the nature of the surplus;
 - v) failing to advise the Plaintiffs and other class members in a timely fashion that they were beneficiaries of the pension surplus;
 - w) failing to protect the beneficial and equitable interests of the Plaintiffs and other class members when deciding to divide the pension surplus;
 - x) agreeing to share the pension surplus amongst CMHC, present and retired employees without regard to the beneficial or equitable interest of the Plaintiffs and other class members;
 - y) they advised the Superintendent of Financial Institutions that the benefit enhancement decision did not amount to a withdrawal of surplus by CMHC even though a 59.4 million dollar loan owing to the pension fund by CMHC was forgiven.
28. The Plaintiffs and other class members state that as a result of CMHC's and the trustees' breach of trust and negligence as described in paragraphs 15.7, 15.8 and 15.9 and breach of statutory duty as described in paragraphs 15.10 and 15.11, they are entitled to recover from them jointly and severally the sum of approximately \$120 million being their proportionate share in the pension surplus.
29. Because of the foregoing, the Plaintiffs and other class members state that any compromise agreements they may have executed on leaving the employ of CMHC are void or voidable

in relation to their claim for their proportionate share in the pension surplus and, in any event, such compromise agreements specifically noted they did not affect the benefit provisions pertaining to the CMHC Pension Fund.

30. Further, in failing to advise the Plaintiffs and other class members of their beneficial interest in the pension surplus, the Defendants deprived the Plaintiffs and class members of the option of remaining in the PF or taking an enhanced deferred benefit based on the surplus in the Plan. In this regard, the Plaintiffs and other class members plead and rely on s. 17(1)(a) of the PBSA.

30.1 The Plaintiffs state that CMHC required all downsized employees to sign a standard release drafted by CMHC before they were paid the commuted value of their pension.

30.2 The Plaintiffs state that before July 1998, the standard releases read:

“I, the undersigned, for and in consideration of the sum of _____ paid by Canada Mortgage and Housing Corporation to me (the receipt of which sum is hereby by me acknowledged) give complete and final release to Canada Mortgage and Housing Corporation of all sums due or which might have been due to me, except for the benefit provisions pertaining to the CMHC Pension Fund, deriving from my employment with the Corporation”.

30.3 The Plaintiffs state that after July 1998, the standard release read:

“I, the undersigned, for and in consideration of the sum of _____, paid by Canada Mortgage and Housing Corporation to me, give complete and final release to Canada Mortgage and Housing Corporation of all sums due or which might have been due to me, except for any right, entitlement, claim, action or cause of action with respect to the CMHC Pension Plan which might exist or arise by reason of the undersigned’s employment with CMHC or the undersigned’s membership in the CMHC Pension Plan.”

30.4 The Plaintiffs state that the releases as drafted by CMHC represented to those employees who signed the releases they were not giving up any rights to future pension benefits, including surplus, which representation the Plaintiffs relied on to their detriment.

30.5 The Plaintiffs and class members state that the Defendants are therefore estopped from alleging that any beneficial interest the Plaintiffs and class members may have had in the pension fund surplus was terminated when they elected to take the commuted value and leave the plan.

30.6 The Plaintiffs and class members state that the Defendants are further estopped from alleging that any beneficial interest the Plaintiffs and class members may have had in the pension fund surplus was terminated when they elected to take their commuted value and leave the plan, and that such estoppel arises out of one or all of the following facts:

a) The Defendants’ failure to advise the Plaintiffs and class members that they had a

beneficial interest in the pension fund surplus:

b) By the Defendants taking the position that CMHC owned the surplus to the exclusion of the Plaintiffs and class members:

c) By failing to advise the class members that by taking their commuted value they were giving up any right they may have to the pension fund surplus:

~~d) By advising class members that the first distribution of surplus was one time only:~~

30.7 The plaintiffs and class members state that given the defendants trust, fiduciary and statutory obligations to them as administrators and trustees of the pension fund reliance by the plaintiffs and class members on the conduct of the defendants as set out in paragraph 30.6 above will be presumed.

31. The Plaintiffs plead and rely upon the **Class Proceedings Act** S.O. 1992, c. 6.

32. The Plaintiffs propose that the action should be tried in the City of Ottawa in the Province of Ontario.

Date of Issue: "20th July 1999"

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