

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**THE HONOURABLE
MR. JUSTICE CULLITY**

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THURSDAY, THE
28th DAY OF *APRIL*, 2005

B E T W E E N:

RONALD SUTHERLAND and JOHN SCOTT on their own behalf and
on behalf of the current members, retirees and other beneficiaries
of the defined benefit component of the Dumai Pension Plan,
CCRA Registration Number 0358572 (formerly,
the Simpsons, Limited Supplementary Pension Plan) who were members of the Simpsons,
Limited Supplementary Pension Plan as of January 1, 1988

Plaintiffs

- and -

**THE HUDSON'S BAY COMPANY LIMITED,
ROYAL TRUST CORPORATION, and
INVESTORS GROUP TRUST COMPANY LIMITED, and
PAMELA BHIKHARI, JOHN ENGLISH,
GERALD V. GAROSSINO, EDWARD E. SHIER,
HELEN FRIZZELL, GALE RITCHIE and ANGELA HOSMAR**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION, made by the plaintiffs, for an order certifying this action as a class proceeding was heard at the Court House, 361 University Avenue, Toronto, Ontario on January 12 and 13, 2005

ON READING the affidavits of Ronald Sutherland, John Scott, Jill M. Wagman, and Robyn Matlin, and Malcolm Hamilton, Harold J. Chmara and Ian Markham, filed, and the

pleadings and proceedings herein and on hearing the submissions of counsel for the plaintiffs and the defendants,

Certification

1. **THIS COURT ORDERS** that this action be certified as a class proceeding on behalf of the following Class (hereinafter referred to as the "Class" or the "Class Members"):

all members, retirees and beneficiaries of the Simpsons, Limited Supplementary Pension Plan as of the 1st of January, 1988, now known as the Dumai Pension Plan, CCRA Registration Number 0358572.

2. **THIS COURT ORDERS** that, subject to further order of the court, Ronald Sutherland and John Scott be and hereby are appointed as the representative plaintiffs on behalf of the Class.

Common Issues

3. **THIS COURT ORDERS** that the following are common issues for the Class:

- (1) Are the assets (the "Assets") in respect of the defined benefit component of the Dumai Pension Plan, formerly the Simpsons, Limited Supplementary Pension Plan (the "Dumai Plan"), impressed with a trust? If so, who are the beneficiaries of the trust under the Dumai Plan?
- (2) Was the Hudson's Bay Company ("HBC") amendment to the Dumai Plan effective January 1, 1994 to permit Zellers Inc. ("Zellers") employees to participate in the Dumai Plan on a defined contribution basis a valid amendment?
- (3) Was the HBC amendment to the Dumai Plan effective February 29, 1998 to permit K-Mart Canada Co. ("K-Mart") employees to participate in the Dumai Plan on a defined contribution basis a valid amendment?
- (4) If the Assets are impressed with a trust as described in question 1 above, was HBC entitled to utilize any part of the assets to meet its funding obligations with respect to:
 - (i) Zellers employees brought into the Dumai Plan effective January 1, 1994 (the "Zellers Employees"); or

- (ii) K-Mart employees brought into the Dumai Plan effective February 28, 1998, or has HBC committed a breach of trust or breach of fiduciary duty in so doing?
- (5) Did HBC commit any breach of trust or any breach of fiduciary duty by causing a transfer of the liabilities of certain members of the Dumai Plan, together with a pro-rata share of the Assets, to other pension plans sponsored by HBC, such as the Hudson Bay Company Pension Plan and the Hudson Bay Company Executive Plan?
- (6) If the Trust Assets are impressed with a trust as described in paragraph 1 above, did the defendants Royal Trust Corporation and/or Investors Group Trust Company Limited commit a breach of trust or breach of fiduciary duty by permitting the use of any of the assets for the purpose as set out in paragraphs 4 and 5 above?
- (7) What is the appropriate remedy if breaches of trust or fiduciary duty as described above took place? Should such remedy include:
 - (i) return of assets to the trust fund described in paragraph 1; or
 - (ii) repayment of assets improperly used, with interest, directly to the Class in the form of damages resulting from the partial revocation of the Simpsons Plan trust?
- (8) If the Class is entitled to damages, how are such damages to be allocated among Class Members?
 - (i) What is the basis for calculation of any interest with respect to payments to the Class?
- (9) Is this a case for punitive damages, and if so, in what amount?
- (10) Should any injunctive relief be granted, and if so, on what terms?

Notice

4. **THIS COURT ORDERS** that notice be provided to the Class by:

- (a) the plaintiffs causing notices substantially in the form attached hereto as Schedule "A" to this order to be published once in English in *The Globe and Mail* and in French in *La Presse* within 30 days of the issuance of this order;
- (b) the ^{HBC}defendants causing notices substantially in the form attached hereto as Schedule "A" to be mailed to the last known address of all Class Members;
- (c) the ^{HBC}defendants causing notices substantially in the form attached hereto as Schedule "A" to be mailed to the Defendant Group Members, as defined below, with their next pension statements from the Plan, to their last known address;
- (d) the plaintiffs causing a press release substantially in the form of the notice attached hereto as Schedule "A" to be issued within 15 days of the date of the issuance of the order; and
- (e) the plaintiffs causing the notice substantially in the form attached hereto as Schedule "A" to be posted on Koskie Minsky LLP's web site at www.koskieminsky.com until the final resolution of this action or until further order of the court.

5. **THIS COURT ORDERS** that the cost of mailing the above notice shall be borne by the Fund of the Dumai Pension Plan

Subject to any future orders of this Court for reimbursement by other parties to these proceedings.

6. **THIS COURT ORDERS** that the plaintiffs and defendants shall coordinate the notice program and agree on the incidental details of the notices provided that all notices to the Class Members, under 4(b) above, are published or mailed by June 30, 2005. Any disputes shall be summarily determined by the court.

Opt Out

7. **THIS COURT ORDERS** that a plaintiff Class Member may opt out of the proceeding by, delivering to Koskie Minsky LLP, the Opt Out Coupon contained in Schedule "A" or some other legible, written, signed request to opt out containing substantially the same information as the Opt Out Coupon on or before August 15, 2005.

8. **THIS COURT ORDERS** that Class Members may not opt out after August 15, 2005.

9. **THIS COURT ORDERS** that the plaintiffs serve on the defendants and file with the court, by no later than September 15, 2005, an affidavit exhibiting a list of plaintiff Class Members who have opted out of the class proceeding.

Amendments to the Litigation Plan

10. **THIS COURT ORDERS** that the Litigation Plan be amended as attached hereto as Schedule "B".

Amendments to the Amended Amended Statement of Claim

11. **THIS COURT ORDERS** that the Amended Amended Statement of Claim be amended as attached hereto as Schedule "C".

Representation Order for Defendant Groups

12. **THIS COURT ORDERS** that the persons that were added as defendants pursuant to the court order of May 13, 2004, be and hereby are appointed as representatives (the "Defendant Group Representatives") for the other individuals who are also members of their pension plans (the "Defendant Group Members"). The plans and the Defendant Group Representatives are as follows:

(a) Retirement Plan for Employees of Kmart Canada Co. – Kmart Canada (#269084):

- Pamela Bhikhari, 87 Braymore Blvd., Scarborough, Ontario M1B 2N6;

(b) Zellers Pension Plan (#345598):

- Helen Frizzej, 77 Falby Court, Apt. 707, Ajax, Ontario L1S 4G7; and
- Gale Ritchie, 20-153 Limeridge Rd. W., Hamilton, Ontario L9C 2V3; and
- Angela Hosmar, 386 Hillcroft St., Oshawa, Ontario L1G 2M2.

(c) HBC Executive Pension Plan (#0982322):

- John English, 1152 Casador Court, Burlington, Ontario L7S 3A2;

(d) HBC Pension Plan (#0291419):

- Gerald V. Garossino, 37 Lewin Crescent, Ajax, Ontario L1S 3A2; and

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the

- Edward E. Shier, 2478 Swinburne Ave. N., Vancouver, B.C. V7B 1L4.

Costs

13. **THIS COURT ORDERS** that the costs of the certification motion be addressed on further disposition by the Court.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

MAY 06 2005

AS DOCUMENT NO.:
À TITRE DE DOCUMENT NO.:

PER / PAR:



CERTIFIED TO BE A TRUE COPY THE ORIGINATING PROCESS ISSUED HEREIN DATED:	COPIE AUTHENTIQUE CERTIFIÉE ET CONFORME À L'ACTE IN-PRODUIT D'INSTANCE DÉLIVRÉ CI-INCLUS FAIT LE:
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SOLICITOR FOR THE AVOCAT POUR LE	PER: PAR:

SCHEDULE "A"

NOTICE OF CERTIFICATION OF A CLASS PROCEEDING

May ●, 2005

TO: All members, retirees and beneficiaries of the Simpsons, Limited Supplementary Pension Plan as of January 1, 1988, now known as the Dumai Pension Plan (the "Dumai Plan"), CCRA Registration # 0358572 (the "plaintiff class").

AND TO: All members, retirees and other beneficiaries as a result of the merger effective January 1, 2000 between the Dumai Plan and the Retirement Plan for Employees of K-Mart (the "K-Mart Plan defendant group").

AND TO: All members, retirees and other beneficiaries as a result of the merger effective January 1, 2002 between the Dumai Plan and the following pension plans:

- the Hudson's Bay Company Pension Plan (the "HBC Plan defendant group");
- the Hudson's Bay Company Executive Pension Plan (the "HBC Executive Plan defendant group"); and
- the Zellers Inc. Pension Plan (the "Zellers Plan defendant group").

RE: *Ronald Sutherland and John Scott v. The Hudson's Bay Company Limited, Royal Trust Corporation, Investors Group Trust Company Limited, and Pamela Bhikhari, John English, Gerald V. Garossino, Edward S. Shier, Helen Frizzell, Gale Ritchie and Angela Hosmar*

This notice is important to you. It is published by order of the Ontario Superior Court of Justice dated April 28, 2005.

A. THE PLAINTIFF CLASS

i) Representatives of the Plaintiff Class and Nature of the Proceeding

Ronald Sutherland and John Scott (the "representative plaintiffs") have commenced an action against the Hudson's Bay Company Limited ("HBC"), Royal Trust Corporation ("Royal Trust") and Investors Group Trust Company Limited ("Investors Group") on their own behalf and on behalf of the plaintiff class, being all members, retirees and beneficiaries of the Simpsons, Limited Supplementary Pension Plan as of January 1, 1988, now known as the Dumai Plan.

The action claims relief against HBC as a fiduciary and plan administrator and against Royal Trust and Investors Group as Trustees in respect of the usages of surplus assets in the Simpsons

Plan to pay for employer contributions for pensions of employees of Zellers Inc. and K-Mart Canada, as well as other possible diversions of surplus assets in the Simpsons Plan. The lawsuit seeks an accounting of those assets diverted, which are estimated by the representative plaintiffs to be approximately \$76,000,000.00 plus interest and administrative expenses charged to the fund of the Simpsons Plan. The representative plaintiffs seek punitive and exemplary damages of \$10,000.00 for each class member and various declarations and orders requiring the distribution of the funds diverted and other payments to members of the Simpsons Plan as of January 1, 1988. They also request injunctive relief preventing HBC from engaging in such activity again and requiring HBC to give a full accounting of the uses of surplus in the Simpsons Plan. Finally, the representative plaintiffs also seek their legal costs of the action.

The court has not yet determined whether the action will be successful. The defendants HBC, Investors Group and Royal Trust are resisting the action.

ii) Legal Representation and Legal Costs of the Plaintiff Class

The representative plaintiffs have retained Mark Zigler, Kirk M. Baert, Andrew Hatnay and Robyn Matlin of the law firm of Koskie Minsky LLP to represent them in these proceedings.

The representative plaintiffs have entered into a Retainer Agreement with Koskie Minsky LLP with respect to legal fees. Koskie Minsky LLP will only be paid their fees in the event of a successful result to the litigation, or a court approved settlement. The Retainer Agreement states that Koskie Minsky LLP is to be paid its legal fees as a percentage of amounts recovered by the plaintiffs. This Retainer Agreement is subject to the court's approval as are the amount of any legal fees payable if the action is successful.

The representative plaintiffs are, pursuant to the *Class Proceedings Act, 1992*, soliciting funds to help assist them in funding some of the disbursements of the litigation including the cost of obtaining expert actuarial evidence. They also seek to raise funds to help defray costs of the litigation other than legal fees which are subject to the contingent fee agreement outlined above. If you wish to contribute, the representative plaintiffs are seeking a contribution of \$100.00 or whatever amount you can donate to be sent to Koskie Minsky LLP, in trust. Such contributions may be sent to:

HBC Pension Class Action
c/o Koskie Minsky LLP, In Trust
20 Queen Street West, Suite 900, Box 52
Toronto, ON M5H 3R3

Telephone: 1-866-778-7986
Fax: 416-977-3316

iii) No Cost to Plaintiff Class Members

If the action is successful, or if a court-approved settlement is negotiated, the legal fees will be payable pursuant to the Retainer Agreement described above, subject to court approval. No

member of the class, other than the representative plaintiffs will be directly responsible for legal costs of the defendant if the action is unsuccessful.

If the action is successful, the court will determine how much the plaintiff class members should receive or how they should be compensated. The court will also determine how any award of equitable damages or payment, if any, should be allocated among the members of the plaintiff class or for their benefit. If the action is not successful, the members of the plaintiff class will not be responsible for any legal costs nor will they have any other financial obligations. However, individuals who have chosen to voluntarily donate funds in support of the plaintiffs action may not receive those funds back, unless the plaintiffs' disbursements are fully recovered.

iv) Questions for Plaintiffs' Counsel

If you have any questions or concerns, please contact Koskie Minsky LLP at the above-noted address or via email at hbcension@koskieminsky.com or by calling 1-866-778-7986. You may also obtain copies of court documents and more information about this case on the internet at www.koskieminsky.com.

B. THE DEFENDANT REPRESENTATIVES GROUPS

i) Representatives of the Defendant Groups and the Impact of the Proceeding on the Defendant Groups

Each of the four defendant classes are represented by representative defendants and counsel as follows:

- Pamela Bhikhari for the K-Mart Plan defendant group (counsel: Doane Phillips Young LLP; email: hbcension@dpylaw.com);
- Helen Frizzell, Gale Ritchie and Angela Hosmar for the Zellers Plan defendant group (counsel: Doane Phillips Young LLP; email: hbcension@dpylaw.com);
- Gerald V. Garossino and Edward E. Shier for the HBC Plan defendant group (counsel: Gardiner Roberts LLP and Lang Michener LLP; email: wrapoport@gardiner-roberts.com and/or hbcension@langmichener.ca); and
- John English for the HBC Executive Plan defendant group (counsel: Gardiner Roberts LLP and Lang Michener LLP; email: wrapoport@gardiner-roberts.com and/or hbcexecpension@langmichener.ca).

These persons are appointed under Rule 10 of the *Rules of Civil Procedure* by order of the Ontario Superior Court of Justice. The plaintiffs *are not seeking any relief* against the representative defendants nor the persons whom they represent. They are parties to this class action because the court found them to be "interested parties".

By order of the Ontario Superior Court of Justice, all reasonable legal fees and disbursements of the representative defendants are provisionally being paid from the assets of the appropriate

trusts under the (merged) HBC Plan from May 22, 2003 onwards. Orders for the reimbursement of these fees and disbursements by other parties to the proceedings may be made at the conclusion of the litigation.

ii) Questions for Defendants' Group Counsel

If you have any questions as a defendant group member, please contact the appropriate defendants' group counsel law firm, depending on which group you believe that you fall in. The email addresses are listed above. You may also refer to the websites of www.langmichener.ca and www.gardiner-roberts.com with specific reference to concerns of the HBC Plan Members and the website of www.dpylaw.com with specific reference to concerns of the Zellers and K-Mart Plan Members.

You may obtain copies of court documents on the internet at http://www.koskieminsky.com/client_links/HBC/home.aspx.

C. JUDGMENT BINDING ON THE MEMBERS OF THE PLAINTIFF CLASS AND DEFENDANT GROUPS

Any judgment ultimately obtained in these proceedings, whether favourable or not, will bind all members of the plaintiff class who do not opt out and all other parties to the litigation.

D. OPTING OUT FOR PLAINTIFF CLASS MEMBERS

If you are a member of the plaintiff class, you are entitled to opt out of the proceedings by delivering a *written notice to Koskie Minsky LLP counsel by August 15, 2005*. If you do not opt out prior to this date, you will be deemed to be a member of the class and bound by any judgment or settlement made in these proceedings. If you opt out, you may not be included in any settlement.

Whether or not the action is successful, plaintiff class members who do not opt out will be bound by the judgment. This means that, after this action is completed, you cannot start your own action for the same claim. All defendant group members are bound by any judgments.

The opt out coupon can be downloaded at: http://www.koskieminsky.com/client_links/HBC/home.aspx or can be requested by emailing hbcpension@koskieminsky.com or by calling 1-866-778-7986. If you wish to opt out, please return completed opt coupons to Koskie Minsky LLP via mail or fax *no later than August 15, 2005* at:

HBC Pension Class Action
c/o Koskie Minsky LLP
20 Queen Street West, Suite 900, Box 52
Toronto, ON M5H 3R3

Fax: 416-977-3316

E. RIGHT TO PARTICIPATE

You may be permitted to participate more actively, if you wish to do so, in the proceeding. Such participation is subject to the court's approval.

Schedule "A1"

ATTENTION ZELLERS AND KMART PENSION PLAN MEMBERS:

A court proceeding has been commenced against the Hudson's Bay Company ("HBC"), and others, by members of the Simpson's Pension Plan (now named the Dumai Pension Plan). Simpson's was purchased by HBC many years ago, and was gradually integrated into HBC's operations. The former Simpson's employees are claiming that, among other things, surplus funds from the Dumai Pension Plan were improperly used to pay employer contributions for Zellers and Kmart employees. The Plaintiffs' statement of claim indicates that the Plaintiffs are not seeking any relief against the Zellers and Kmart Pension Plan members, or to reduce their Pensions or remove any funds from their Pension Plans. Nevertheless, the Plaintiffs are seeking to undo the amendments made to the Dumai Pension Plan in 1994 and 1998, which brought Zellers and Kmart members into the Dumai Pension Plan. It is not clear at this stage whether or how your pension could be affected if the Plaintiffs are successful. We also note that in 2002 HBC filed a request to merge together the Dumai Pension Plan, the HBC Pension Plan, the HBC Executive Pension Plan, the Zellers Inc. Pension Plan and the Retirement Plan for Employees of K-Mart. Accordingly, you have an interest in the outcome of this proceeding.

Further particulars of the claim against HBC, and the documents filed with the court, can be found on the website of counsel for the Simpson's Pension Plan Members (www.koskieminsky.com), and you may also refer to the website of Doane Phillips Young LLP - www.dpylaw.com - for matters specific to the Zellers and Kmart employees.

By Order of the Court, the claim by the Simpson's Pension Plan members has been allowed to proceed by way of a class proceeding, meaning that the claims of all of the Simpson's Pension Plan members will be adjudicated collectively, without the necessity of parties bringing individual actions. Determination of the substantive issues involved in the dispute will now get underway.

In order to ensure that the interests of the Zellers and Kmart Pension Plan members were considered and protected in the course of this litigation, the Court appointed representatives from each of those plans to be added as parties to the litigation. The following people were added as Defendants pursuant to that order:

- Pamela Bhikhari – Kmart Pension Plan
- Angela Hosmar – Zellers Pension Plan
- Helen Frizzell – Zellers Pension Plan
- Gale Ritchie – Zellers Pension Plan

The Court has now made a Representation Order in respect of these Defendants, meaning that their presence in the litigation is intended to be on behalf of all members of their pension plans, and that all such pension plan members will be bound by the determinations of the Court in this action.

The Court has also appointed independent legal counsel to act for these Defendants, namely Doane Phillips Young LLP. Legal fees are to be paid out of the K-Mart and Zellers Pension Plans subject to any future orders of the Court for reimbursement by, or on behalf of other parties to the proceedings. Legal Counsel report regularly to the Representative Defendants and will post updates on their web page, but they are also available to respond to inquiries of members of the Zellers and Kmart Pension Plans. If you have any questions or concerns about this litigation, please feel free to contact your legal counsel (John Kingman Phillips or Laura Young).

Doane Phillips Young LLP
53 Jarvis St., Suite 300
Toronto, ON, M3A 2K9
Tel.416.366.3777
Fax.416.366.9197
www.dpylaw.com
hbcpension@dpylaw.com

SCHEDULE "A2"

ATTENTION: HUDSON'S BAY COMPANY ("HBC") PENSION PLAN MEMBERS AND HBC EXECUTIVE PENSION PLAN MEMBERS (the "HBC PLAN MEMBERS"):

A court proceeding has been commenced against HBC, and others, by members of the Simpson's Pension Plan (now named the Dumai Pension Plan). Simpson's was purchased by HBC in 1979, and was gradually integrated into HBC's operations. It is former Simpsons employees who are now bringing a claim against HBC claiming that (a) surplus funds from the Dumai Pension Plan were improperly used to pay employer contributions for Zellers and Kmart employees; and (b) excessive funds were transferred from the Dumai Pension Plan to the HBC Plans when certain employees of Simpson's were transferred to the HBC Plans. In addition, in 2002, HBC filed documents with the Financial Services Commission of Ontario seeking to merge together the Dumai Pension Plan, the HBC Plans, the Zellers Inc. Pension Plan and the Retirement Plan for Employees of K-Mart. Accordingly, the claims by members of the Dumai Pension Plan may affect the HBC Members because the claims could potentially negatively affect the assets in the HBC Plans. The representative members of the HBC Plans have objected to the merging of the pension plans and are resisting the claim that improper amounts were transferred from the Dumai Pension Plan to the HBC Plans. Accordingly, the members of the HBC Plans have an interest in the outcome of the claim by the members of the Dumai Pension Plan. Further particulars of the claim against HBC can be found on the website of counsel for the Simpson's Pension Plan Members (www.koskieminsky.com), and you may also refer to the websites of www.langmichener.ca and www.gardiner-roberts.com with specific reference to concerns of the HBC Plan Members.

By Order of the Court, the claim by the Simpson's Pension Plan members has been allowed to proceed by way of a class proceeding, meaning that the claims of all of the Simpson's Pension Plan members will be adjudicated collectively, without the necessity of parties bringing individual actions. Determination of the substantive issues involved in the dispute will now get underway.

In order to ensure that the interests of the HBC Plan Members were considered and protected in the course of this litigation, the Court appointed representatives from each of the HBC Plans to be added as parties to the litigation. The following people were added as Defendants pursuant to that Order:

John English - HBC Executive Pension Plan
Gerald V. Garossino - HBC Pension Plan
and Edward E. Shier

The Court has now made a Representation Order in respect of these Defendants (the "Representative Defendants"), meaning that their presence in the litigation is intended to

be on behalf of all members of the HBC Plans, and that all such HBC Plan Members will be bound by the determinations of the Court in this action.

The Court has also appointed independent legal counsel to act for these Defendants, namely Lang Michener LLP and Gardiner Roberts LLP. Legal fees are paid to be out of the HBC Plan and the HBC Executive Pension Plan, respectively, subject to any future orders of the court for reimbursement by, or on behalf of, other parties to the proceedings. Legal counsel report regularly to the Representative Defendants and will post updates on their web page, but they are also available to respond to inquiries of members of the HBC and HBC Executive Plans. If you have any questions or concerns about this litigation, please feel free to contact your legal counsel (Peter R. Hayden or Warren S. Rapoport) as set out below.

Peter R. Hayden
Lang Michener LLP, Toronto
E-mail : phayden@langmichener.ca

Warren S. Rapoport
Gardiner Roberts LLP, Toronto
E-mail : wrapoport@gardiner-roberts.com

SCHEDULE "B"

PLAINTIFFS' REVISED PROPOSED LITIGATION PLAN APRIL 2005

The plan to be filed pursuant to section 5(1)(e)(ii) of the *Class Proceedings Act, 1992* is as follows:

1) COMMUNICATION WITH MEMBERS OF THE PLAINTIFF CLASS

Both prior to and since this class proceeding was commenced, the plaintiffs' law firm, Koskie Minsky LLP ("plaintiffs' counsel"), have received many communications from affected proposed plaintiff class members who wish to be included in the proposed class proceeding.

Plaintiffs' counsel and their staff have responded to and will continue to respond to each inquiry as appropriate.

Plaintiffs' counsel are maintaining a database of all members of the proposed plaintiff class who have contacted plaintiffs' counsel. With respect to each inquiry, the individual's name, address, phone number, and e-mail address are added to the database. Copies of pertinent documents will be scanned and added to the database where appropriate.

a) Pre-Certification Status Reports

In addition to responding to individual inquiries, plaintiffs' counsel have created a web page concerning this proposed class proceeding at www.koskieminsky.com. Information on the status of this action is posted and is updated regularly. Copies of the publicly-filed court documents and court decisions are accessible from the web page. In addition, a toll-free phone number and an e-mail contact are provided.

b) Notification of Certification and the Right to Opt Out

If this proceeding is certified, plaintiffs' counsel proposes that notice to members of the plaintiff class be provided in the following ways (the "Notice"):

(i) *Mailing*

The Notice, attached as Schedule "A", will be mailed to all plaintiff class members by the Plan administrator following certification of this proceeding.

(ii) *Newspapers*

Counsel for the defendant Hudson's Bay Company ("HBC") will arrange to have the Notice published on one occasion in English in *The Globe and Mail* and in French in *La Presse* within 30 days of the certification order; such terms and at such times and places as the court considers just.

The publication of the Notice shall be paid for by the Fund of the Dumai Pension Plan, subject to any future order of the court for reimbursement by, or on behalf of, particular parties to the proceedings.

(iii) *Press Release*

Plaintiffs' counsel will issue a press release within 15 days of the certification order being issued.

The issuance of the press release shall be paid for by the Fund of the Dumai Pension Plan, subject to any future order of the court for reimbursement by, or on behalf of, particular parties to the proceedings.

(iv) *Internet*

The Notice shall be published on the web page maintained by plaintiffs' counsel in respect of the class proceeding.

c) Post-Certification Status Reports

In addition to responding to individual inquiries, plaintiffs' counsel will continue to update the web page dedicated to the class proceeding. The toll-free phone number and e-mail contact provided on the web page will remain in effect until the class proceeding is finally resolved.

2) THE IDENTITY OF THE PLAINTIFF CLASS

The defendant HBC is aware of the identity of the plaintiff Class Members. Upon certification, the court will be asked to order production of the names and addresses of the plaintiff Class Members. All information will be kept confidential by plaintiffs' counsel.

3) WITNESS INTERVIEWS AND EXPERTS

At present, it is anticipated that plaintiffs' counsel will call the plaintiffs and perhaps certain other members of the proposed plaintiff class, referred to in the plaintiffs' certification materials, as witnesses at the trial of the common issues, if necessary.

The parties will have a better sense of the witnesses they intend to call upon completion of the production and discovery process.

Expert actuarial evidence will be required.

4) DISCOVERY AND DOCUMENT MANAGEMENT

The plaintiffs and defendants should deliver affidavits of documents within 120 days of the certification order, unless ordered to do so earlier.

Plaintiffs' counsel will manage the productions with a document management system. All productions should be numbered and, if possible, scanned electronically. This will enable counsel to quickly access and organize the documents.

The plaintiffs and defendants will conduct and complete examinations for discovery within 120 days of the delivery of their affidavits of documents.

5) FINAL DETERMINATION OF THE COMMON ISSUES

Plaintiff's counsel anticipate that trial, trial of an issue or stated case in relation to the common issues will take place within twelve months, subject to the direction of the court, after completion of examinations for discovery, unless determined earlier by way of a motion or motions under rules 20 and 21.

6) DETERMINATION OF THE INDIVIDUAL ISSUES

If the common issues are resolved in favour of the plaintiff class, the plaintiffs do not currently anticipate any significant individual issues on liability. As this litigation progresses, if it appears that there will be any significant individual issues with respect to liability, the court can deal with them using section 25 of the *Class Proceedings Act, 1992*.

7) DAMAGES AND DISTRIBUTION OF AMOUNTS RECOVERED

If the common issues are resolved in favour of the plaintiff class, the following matters would need to be dealt with:

- (a) reference with respect to quantum to be distributed to, or for the benefit of, the plaintiff class;
- (b) a reference with respect to allocation formula of payments among plaintiff class and method of payment to plaintiff class members; and
- (c) payment of plaintiffs' legal fees from amounts received.

8) FUNDING

The plaintiffs' legal fees are to be paid on a contingency basis, as provided for in *Class Proceedings Act, 1992*, and are subject to the court's approval. Some funding of the disbursements has been through plaintiff class member contributions. Koskie Minsky LLP has funded the balance of the disbursements, and will continue to do so, to prosecute this action to a final and successful conclusion. The plaintiffs plan to make an application to the Class Proceedings Fund, if the action is certified, and to solicit funds from the plaintiff class members for funding of disbursements. Such solicitation is contained in the Notice.

9) SETTLEMENT

The plaintiff will serve an offer to settle and, if it appears worthwhile, conduct settlement negotiations with the defendants from time to time. The plaintiffs are willing to participate in mediation or non-binding dispute resolution efforts.

10) REVIEW OF THE PLAN

This litigation plan will be reconsidered and may be revised under the continuing case management authority of the court as the case progresses.

SCHEDULE "A"

NOTICE OF CERTIFICATION OF A CLASS PROCEEDING

May ●, 2005

TO: All members, retirees and beneficiaries of the Simpsons, Limited Supplementary Pension Plan as of January 1, 1988, now known as the Dumai Pension Plan (the "Dumai Plan"), CCRA Registration # 0358572 (the "plaintiff class").

AND TO: All members, retirees and other beneficiaries as a result of the merger effective January 1, 2000 between the Dumai Plan and the Retirement Plan for Employees of K-Mart (the "K-Mart Plan defendant group").

AND TO: All members, retirees and other beneficiaries as a result of the merger effective January 1, 2002 between the Dumai Plan and the following pension plans:

- the Hudson's Bay Company Pension Plan (the "HBC Plan defendant group");
- the Hudson's Bay Company Executive Pension Plan (the "HBC Executive Plan defendant group"); and
- the Zellers Inc. Pension Plan (the "Zellers Plan defendant group").

RE: *Ronald Sutherland and John Scott v. The Hudson's Bay Company Limited, Royal Trust Corporation, Investors Group Trust Company Limited, and Pamela Bhikhari, John English, Gerald V. Garossino, Edward S. Shier, Helen Frizzell, Gale Ritchie and Angela Hosmar*

This notice is important to you. It is published by order of the Ontario Superior Court of Justice dated April 28, 2005.

A. THE PLAINTIFF CLASS

i) Representatives of the Plaintiff Class and Nature of the Proceeding

Ronald Sutherland and John Scott (the "representative plaintiffs") have commenced an action against the Hudson's Bay Company Limited ("HBC"), Royal Trust Corporation ("Royal Trust") and Investors Group Trust Company Limited ("Investors Group") on their own behalf and on behalf of the plaintiff class, being all members, retirees and beneficiaries of the Simpsons, Limited Supplementary Pension Plan as of January 1, 1988, now known as the Dumai Plan.

The action claims relief against HBC as a fiduciary and plan administrator and against Royal Trust and Investors Group as Trustees in respect of the usages of surplus assets in the Simpsons

Plan to pay for employer contributions for pensions of employees of Zellers Inc. and K-Mart Canada, as well as other possible diversions of surplus assets in the Simpsons Plan. The lawsuit seeks an accounting of those assets diverted, which are estimated by the representative plaintiffs to be approximately \$76,000,000.00 plus interest and administrative expenses charged to the fund of the Simpsons Plan. The representative plaintiffs seek punitive and exemplary damages of \$10,000.00 for each class member and various declarations and orders requiring the distribution of the funds diverted and other payments to members of the Simpsons Plan as of January 1, 1988. They also request injunctive relief preventing HBC from engaging in such activity again and requiring HBC to give a full accounting of the uses of surplus in the Simpsons Plan. Finally, the representative plaintiffs also seek their legal costs of the action.

The court has not yet determined whether the action will be successful. The defendants HBC, Investors Group and Royal Trust are resisting the action.

ii) Legal Representation and Legal Costs of the Plaintiff Class

The representative plaintiffs have retained Mark Zigler, Kirk M. Baert, Andrew Hatnay and Robyn Matlin of the law firm of Koskie Minsky LLP to represent them in these proceedings.

The representative plaintiffs have entered into a Retainer Agreement with Koskie Minsky LLP with respect to legal fees. Koskie Minsky LLP will only be paid their fees in the event of a successful result to the litigation, or a court approved settlement. The Retainer Agreement states that Koskie Minsky LLP is to be paid its legal fees as a percentage of amounts recovered by the plaintiffs. This Retainer Agreement is subject to the court's approval as are the amount of any legal fees payable if the action is successful.

The representative plaintiffs are, pursuant to the *Class Proceedings Act, 1992*, soliciting funds to help assist them in funding some of the disbursements of the litigation including the cost of obtaining expert actuarial evidence. They also seek to raise funds to help defray costs of the litigation other than legal fees which are subject to the contingent fee agreement outlined above. If you wish to contribute, the representative plaintiffs are seeking a contribution of \$100.00 or whatever amount you can donate to be sent to Koskie Minsky LLP, in trust. Such contributions may be sent to:

HBC Pension Class Action
c/o Koskie Minsky LLP, In Trust
20 Queen Street West, Suite 900, Box 52
Toronto, ON M5H 3R3

Telephone: 1-866-778-7986
Fax: 416-977-3316

iii) No Cost to Plaintiff Class Members

If the action is successful, or if a court-approved settlement is negotiated, the legal fees will be payable pursuant to the Retainer Agreement described above, subject to court approval. No

member of the class, other than the representative plaintiffs will be directly responsible for legal costs of the defendant if the action is unsuccessful.

If the action is successful, the court will determine how much the plaintiff class members should receive or how they should be compensated. The court will also determine how any award of equitable damages or payment, if any, should be allocated among the members of the plaintiff class or for their benefit. If the action is not successful, the members of the plaintiff class will not be responsible for any legal costs nor will they have any other financial obligations. However, individuals who have chosen to voluntarily donate funds in support of the plaintiffs action may not receive those funds back, unless the plaintiffs' disbursements are fully recovered.

iv) Questions for Plaintiffs' Counsel

If you have any questions or concerns, please contact Koskie Minsky LLP at the above-noted address or via email at hbcension@koskieminsky.com or by calling 1-866-778-7986. You may also obtain copies of court documents and more information about this case on the internet at www.koskieminsky.com.

B. THE DEFENDANT REPRESENTATIVES GROUPS

i) Representatives of the Defendant Groups and the Impact of the Proceeding on the Defendant Groups

Each of the four defendant classes are represented by representative defendants and counsel as follows:

- Pamela Bhikhari for the K-Mart Plan defendant group (counsel: Doane Phillips Young LLP; email: hbcension@dpylaw.com);
- Helen Frizzell, Gale Ritchie and Angela Hosmar for the Zellers Plan defendant group (counsel: Doane Phillips Young LLP; email: hbcension@dpylaw.com);
- Gerald V. Garossino and Edward E. Shier for the HBC Plan defendant group (counsel: Gardiner Roberts LLP and Lang Michener LLP; email: wrapoport@gardiner-roberts.com and/or hbcension@langmichener.ca); and
- John English for the HBC Executive Plan defendant group (counsel: Gardiner Roberts LLP and Lang Michener LLP; email: wrapoport@gardiner-roberts.com and/or hbcexcpension@langmichener.ca).

These persons are appointed under Rule 10 of the *Rules of Civil Procedure* by order of the Ontario Superior Court of Justice. The plaintiffs *are not seeking any relief* against the representative defendants nor the persons whom they represent. They are parties to this class action because the court found them to be "interested parties".

By order of the Ontario Superior Court of Justice, all reasonable legal fees and disbursements of the representative defendants are provisionally being paid from the assets of the appropriate

trusts under the (merged) HBC Plan from May 22, 2003 onwards. Orders for the reimbursement of these fees and disbursements by other parties to the proceedings may be made at the conclusion of the litigation.

ii) Questions for Defendants' Group Counsel

If you have any questions as a defendant group member, please contact the appropriate defendants' group counsel law firm, depending on which group you believe that you fall in. The email addresses are listed above. You may also refer to the websites of www.langmichener.ca and www.gardiner-roberts.com with specific reference to concerns of the HBC Plan Members and the website of www.dpylaw.com with specific reference to concerns of the Zellers and K-Mart Plan Members.

You may obtain copies of court documents on the internet at http://www.koskieminsky.com/client_links/HBC/home.aspx.

C. JUDGMENT BINDING ON THE MEMBERS OF THE PLAINTIFF CLASS AND DEFENDANT GROUPS

Any judgment ultimately obtained in these proceedings, whether favourable or not, will bind all members of the plaintiff class who do not opt out and all other parties to the litigation.

D. OPTING OUT FOR PLAINTIFF CLASS MEMBERS

If you are a member of the plaintiff class, you are entitled to opt out of the proceedings by delivering a *written notice to Koskie Minsky LLP counsel by August 15, 2005*. If you do not opt out prior to this date, you will be deemed to be a member of the class and bound by any judgment or settlement made in these proceedings. If you opt out, you may not be included in any settlement.

Whether or not the action is successful, plaintiff class members who do not opt out will be bound by the judgment. This means that, after this action is completed, you cannot start your own action for the same claim. All defendant group members are bound by any judgments.

The opt out coupon can be downloaded at: http://www.koskieminsky.com/client_links/HBC/home.aspx or can be requested by emailing hbcpension@koskieminsky.com or by calling 1-866-778-7986. If you wish to opt out, please return completed out opt coupons to Koskie Minsky LLP via mail or fax *no later than August 15, 2005* at:

HBC Pension Class Action
c/o Koskie Minsky LLP
20 Queen Street West, Suite 900, Box 52
Toronto, ON M5H 3R3

Fax: 416-977-3316

E. RIGHT TO PARTICIPATE

You may be permitted to participate more actively, if you wish to do so, in the proceeding. Such participation is subject to the court's approval.

SCHEDULE "C"

Court File No. 02-CV-233990CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**RONALD SUTHERLAND and JOHN SCOTT on their own behalf and
on behalf of the current members, retirees and other beneficiaries
of the defined benefit component of the Dumai Pension Plan,
CCRA Registration Number 0358572 (formerly,
the Simpsons, Limited Supplementary Pension Plan) who were members of the
Simpsons, Limited Supplementary Pension Plan as of January 1, 1988**

Plaintiffs

- and -

**THE HUDSON'S BAY COMPANY LIMITED,
ROYAL TRUST CORPORATION, and
INVESTORS GROUP TRUST COMPANY LIMITED, and
PAMELA BHIKHARI, JOHN ENGLISH,
GERALD V. GAROSSINO, EDWARD E. SHIER,
HELEN FRIZZELL, GALE RITCHIE and ANGELA HOSMAR**

Defendants

PROCEEDING UNDER the *Class Proceedings Act, 1992.*

AMENDED AMENDED AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

**A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU
by the Plaintiffs. 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 Plaintiffs(s) lawyer(s) or, where the Plaintiffs(s)
do(es) not have a lawyer, serve it on the Plaintiffs(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.

IF YOU PAY THE PLAINTIFFS'S CLAIM, and for costs, within the time for serving and filing your Statement of Defence, you may move to have this proceeding dismissed by the Court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiffs' claim and \$1000.00 for costs and have the costs assessed by the Court.

Date:

Issued by: _____

Local Registrar
393 University Avenue
10th Floor
Toronto, Ontario M5G 1E6

TO: HUDSON'S BAY COMPANY LIMITED
401 Bay Street, Suite 500
Toronto, Ontario M5H 2Y4

AND TO: ROYAL TRUST CORPORATION
Royal Trust Tower, 77th Floor
77 King Street West
Toronto, Ontario M5W 1P9

AND TO: INVESTORS GROUP TRUST COMPANY LIMITED
447 Portage Avenue
Winnipeg, Manitoba R3C 3B6

AND TO: PAMELA BHIKHARI
87 Braymore Blvd.
Scarborough, ON M1B 2N6

AND TO: JOHN ENGLISH
1152 Casador Court
Burlington, ON L7S 2K5

AND TO: GERALD V. GAROSSINO
37 Lewin Cres.
Ajax, ON L1S 3A2

AND TO: EDWARD E. SHIER
2478 Swinburne Ave. N.
Vancouver, BC V7H 1L4

AND TO: HELEN FRIZZELL
77 Falby Court, Apt. 707
Ajax, ON L1S 4G7

AND TO: GALE RITCHIE
20-153 Limeridge Rd. W.
Hamilton, ON L9C 2V3

AND TO: ANGELA HOSMAR
386 Hillcroft Street
Oshawa, ON L1G 2M2

C L A I M

1. The Plaintiffs claim:

- (a) A DECLARATION and determination that the assets in respect of the defined benefit component of the Dumai Pension Plan, CCRA registration number 0358572 (formerly entitled, the "Simpsons, Limited Supplementary Pension Plan", hereinafter, the "Simpsons Plan") are impressed with a trust for the exclusive benefit of the Plaintiff Class, namely, the members, deferred vested members and retirees of the Simpsons Plan and their beneficiaries eligible to receive a benefit from the Simpsons Plan (the "Simpsons Plan Members"), and that all assets, including surplus assets, belong exclusively to the Simpsons Plan Members;
- (b) A DECLARATION and determination that no part of the assets in the trust fund of the Simpsons Plan belong to the Hudson's Bay Company (hereinafter, the "HBC"), nor may they be used to pay for the pension costs of persons who were not members of the Simpson Plan;
- (c) A DECLARATION and determination that the HBC, Royal Trust (hereinafter, "Royal Trust") and Investors Group Trust Company Limited (hereinafter, "Investors Group Trust") contravened the terms of the Trust Agreement effective December 18, 1971 which establishes and governs the pension fund of the Simpsons Plan and committed breaches of trust and breaches of fiduciary duty to the Simpsons Plan Members and partially revoked the trust fund of the Simpsons Plan by unlawfully diverting and using surplus assets in the trust fund of the Simpsons Plan for purposes other than the exclusive benefit of the Simpsons Plan Members and more specifically:
- (i) using the surplus assets in the trust fund of the Simpsons Plan to pay for the required employer contributions to the defined contribution pensions of Zellers Inc. employees since January 1, 1994; and

- (ii) using the surplus assets in the trust fund of the Simpsons Plan to pay for the required employer contributions to the defined contribution pensions of Kmart Canada employees since February 28, 1998;
- (d) AN ORDER for an injunction restraining the HBC, Royal Trust Corporation and any other current or future trustee of the Dumai Plan from diverting or using surplus assets in the trust fund of the Simpsons Plan to pay for the required employer contributions to the defined contribution pensions for Zellers and Kmart employees;
- (e) AN ORDER for an injunction restraining the HBC, Royal Trust, and any other current or future trustee of the Dumai Plan, from diverting or using the surplus assets in the trust fund of the Simpsons Plan to pay for the HBC's required employer contributions in respect of the pensions of any other employees or persons or for any purpose other than the exclusive benefit of the Simpsons Plan Members;
- (f) AN ORDER directing an accounting of the assets in the trust fund of the Simpsons Plan to determine the amount of surplus assets diverted out of the trust fund of the Simpsons Plan by the Defendants and used to pay for the HBC's required employer contributions to the defined contribution pensions for Zellers and Kmart employees;
- (g) AN ORDER that the Defendants, excluding the defendant class representatives or the persons whom they represent, are jointly and severally responsible for all of the surplus assets diverted out of the trust fund of the Simpsons Plan and an Order requiring the Defendants to re-pay forthwith the amount of surplus assets determined pursuant to the accounting in (f) above to the trust fund of the Simpsons Plan, with interest at the greater of the Simpsons Plan fund rate of return or the applicable rate pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, compounded annually, plus the related administrative expenses expended

and charged by the Defendants to the trust fund of the Simpsons Plan with interest, for distribution to the Plaintiffs as contemplated below;

(h) In the alternative:

i) damages or equitable compensation from the Defendants, excluding the defendant class representatives or the persons whom they represent, jointly and severally, for breach of fiduciary duty and breach of trust in the amount of \$76,000,000.00 being the sums diverted to date from the trust fund of the Simpsons Plan and any further or other amounts as may be determined by the Court, or on a reference ordered by the Court; and

ii) interest on the amounts payable pursuant to (h)(i) above, at the greater of the Simpsons Plan fund rate of return or the applicable rate pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, compounded annually;

(i) (a) AN ORDER directing an accounting of the assets in the trust fund of the Simpsons Plan to determine the amount of assets, including surplus assets, that were transferred out of the trust fund of the Simpsons Plan by the HBC and Investors Group Trust in the period from approximately 1989 to 1993, to the HBC Executive Plan and the HBC Pension Plan.

(b) AN ORDER directing the repayment of any amounts improperly transferred from the Dumai Plan to the HBC Plan or HBC Executive Plan, including;

(i) the repayment of at least \$2,568,947.00 as at December 31, 2002 (which consists of an overpayment of \$857,000.00 as at December 31, 1989 by HBC from the Dumai Plan to the HBC Plan plus interest at the historical rate of return) to the Simpsons component of the Dumai Plan; and

(ii) the repayment of at least \$1,731,000.00 as at December 31, 1989 plus

interest (which was overpaid by HBC from the Dumai Plan to the HBC Executive Plan) to the Simpsons component of the Dumai Plan.

(j) A DECLARATION and determination that the amendments to the Simpsons Plan made by the HBC, effective as of January 1, 1988, authorizing the HBC to obtain the surplus in the trust fund of the Simpsons Plan on any wind-up of the Simpsons Plan are invalid and of no force or effect;

~~(i) terminating the trust fund of the Simpsons Plan and amending the Dumai Pension Plan to provide for the termination of the Simpsons Plan component of that plan and the immediate distribution of all assets in the fund of the Simpsons Plan, including surplus assets, to the Simpsons Plan Members on a *pro rata* basis pursuant to the Rule in *Saunders v. Vautier*, or in the alternative;~~

~~(k) AN ORDER, varying the trust fund of the Simpsons Plan and amending the Dumai Pension Plan to provide for the immediate distribution of the surplus assets in the fund of the Simpsons Plan to the Simpsons Plan Members on a *pro rata* basis pursuant to the *Variation of Trusts Act*, R.S.O. 1990, c. V-1 that were unlawfully transferred out of the Simpsons Plan trust, together with such further surplus assets as may be distributed to the Plaintiff class by Order of the Court;~~

(l) Punitive and exemplary damages from the Defendants in the amount of \$10,000 for each Class Member;

(m) AN ORDER for certification of this proceeding as a class proceeding under the *Class Proceedings Act, 1992* and the appointment of Ronald Sutherland and John Scott as Representative Plaintiffs for the class of persons who were members of the Simpsons Plan and who

(i) retired under the Simpsons Plan and are receiving pension benefits;

- (ii) terminated from the Simpsons Plan and are currently entitled to a deferred pension from the Simpsons Plan; or
 - (iii) are active employees of the HBC and accruing pension benefits in the Simpsons Plan;
- (n) AN ORDER appointing:
- (a) Pamela Bhikhari as representative defendant for the class of persons who were members of the Kmart Plan and who are currently accruing benefits on a defined contribution basis in the Simpsons Plan;
 - (b) John English as representative defendant for the class of persons who were members of the HBC Executive Pension Plan (No. 0982322) and who are currently accruing benefits on a defined benefit basis in the Simpsons Plan;
 - (c) Gerald V. Garossino and Edward E. Shier as representative defendants for the class of persons who were members of the HBC Plan (No. 0291419) and who are currently accruing benefits on a defined benefit basis in the Simpsons Plan; and
 - (d) Helen Frizzell, Gale Ritchie and Angela Hosmar as representative defendants for the class of persons who were members of the Zellers Plan (No. 354498) and who are currently accruing benefits on a defined benefit basis in the Simpsons Plan.
- (o) AN ORDER for costs,
- (i) pursuant to the *Class Proceedings Act, 1992*;
 - (ii) paid by the Defendants on a full indemnity basis;
 - (iii) paid from the fund of the Simpsons Plan on a full indemnity basis; or
 - (iv) paid on a pre-emptive basis from the fund of the Simpsons Plan on a full indemnity scale; and

- (p) Such further and other relief as may be required by the *Class Proceedings Act, 1992*, or as this Honourable Court may deem just.

THE PARTIES

1. The Plaintiff, John Scott ~~is~~ was an active employee of the HBC working in the maintenance department on the date of issue of this claim. He subsequently retired on April 30, 2004. He began working for Simpsons in 1970 and joined the Simpsons Plan in 1971. In 1979, the HBC acquired Simpsons. ~~John Scott has continued his employment for the HBC from the time of the acquisition to the present.~~ John Scott continued working for HBC after the acquisition.

2. John Scott is currently a member of the Dumai Plan, the successor to the Simpsons Plan. The HBC changed the name of the Simpsons Plan to the "Dumai Plan" in 1994.

3. The Plaintiff, Ronald Sutherland is a retired employee of the HBC. He began working for Simpsons in 1970 as a retail salesperson and joined the Simpsons Plan in 1971. In 1979, the HBC acquired Simpsons. Ronald Sutherland continued his employment for the HBC from the time of the acquisition until he retired from the HBC in September 1999.

4. Ron Sutherland is currently a retired employee receiving pension benefits from the Dumai Plan, the successor to the Simpsons Plan.

THE PLAINTIFF CLASS

5. The Class that the Representative Plaintiffs seek to represent comprises all persons or beneficiaries who:

- (i) were members of the Simpsons Plan as of January 1, 1988, retired under the Simpsons Plan, and are receiving pension benefits;
- (ii) were members of the Simpsons Plan as of January 1, 1988, terminated from the Simpsons Plan, and are currently entitled to a deferred pension from the Simpsons Plan;
- (iii) were members of the Simpsons Plan as of January 1, 1988, are active employees of the HBC, and are accruing pension benefits in the Simpsons Plan; or
- (iv) are beneficiaries of the persons under (i),(ii) or (iii) and have an entitlement to payment from the Simpsons Plan.

THE DEFENDANTS

6. The HBC is a corporation incorporated pursuant to the laws of Canada with its head office in the City of Toronto, Ontario. The HBC is the current administrator of the Simpsons Plan which it re-named the "Dumai Plan" in 1994 (hereinafter, the "Dumai/Simpsons Plan").

7. Royal Trust is a trust company incorporated pursuant to the laws of Canada with its head office in the City of Toronto, Ontario. Royal Trust is the current custodial trustee of the fund of Dumai Plan and has been since at least September 1999.

8. Investors Group Trust is incorporated pursuant to the laws of Canada with its head office in Winnipeg, Manitoba. Investors Group was the custodial trustee of the fund of the Simpsons Plan from January 1984 until at least September 1998, after which Royal Trust became the trustee.

THE DEFENDANT CLASS REPRESENTATIVES

9. The proposed defendant class representative, Pamela Bhikhari, is a former member of the Kmart Plan, has been introduced into the Simpsons Plan by the HBC with other former members of the Kmart Plan, and is currently accruing benefits on a defined contribution basis in the Simpsons Plan.

10. The proposed defendant class representative, John English, is a former member of the HBC Executive Pension Plan (No. 0982322), has been introduced into the Simpsons Plan by the HBC with other former members of the HBC Executive Plan, and is currently accruing benefits on a defined benefit basis in the Simpsons Plan.

11. The proposed defendant class representatives, Gerald V. Garossino and Edward E. Shier, are former members of the HBC Pension Plan (No. 0291419), have been introduced into the Simpsons Plan by the HBC with other former members of the HBC Pension Plan, and are currently accruing benefits on a defined benefit basis in the Simpsons Plan.

12. The proposed defendant class representatives, Helen Frizzell, Gale Ritchie and Angela Hosmar, are former members of the Zellers Plan (No. 354498), have been

introduced into the Simpons Plan by the HBC with other former members of the Zellers Plan, and are currently accruing benefits on a defined benefit basis in the Simpson Plan.

13. Pursuant to the Order of Mr. Justice Cullity of May 16, 2003, the Court ordered that "all current members of the [Dumai] Plan be added as defendants to this action" by the plaintiffs. The addition of the defendant class representatives as described above has been done in order to comply with said Order. The Plaintiffs do not seek any relief or remedies against the defendant class representatives nor the class of persons they represent and do not seek to reduce their pensions or remove any funds from the defined contribution accounts of the Kmart or Zellers representative class members.

FACTUAL ALLEGATIONS

The Original Simpsons Pension Plan and Trust Agreement

14. The Simpsons Plan was set up by Simpsons, Limited as a defined benefit pension plan for its employees effective as of December 28, 1971 and was named the "Simpsons, Limited, Supplementary Pension Plan".

15. The original Simpsons Plan documents establish the Simpsons Plan as a trust fund with the Simpsons Plan Members as sole beneficiaries of the trust.

16. Simpsons entered into a trust agreement with the Canada Permanent Trust Company, dated December 18, 1971 relating to the trust fund of the Simpsons Plan (hereinafter, the "1971 Trust Agreement").

17. The 1971 Trust Agreement states "ALWAYS PROVIDED that no part of the trust fund may be used for, or diverted to any purposes other than those connected with the exclusive benefit of members of the Plan and their beneficiaries".

18. Further, the Trust Agreement provides that no amendments can be made to the trust that would permit any part of the trust assets to be used or diverted to purposes other than the exclusive benefit of the members, unless the approval of governmental authorities is obtained.

19. Neither the original Simpsons Plan text nor the 1971 Trust Agreement contain any provisions authorizing Simpsons or any successor employer to revoke any part of the Simpsons Plan trust.

20. The Simpsons Plan was set up as a non-contributory pension plan, that is, the members did not have to provide any contributions to the Plan. As of January 1, 1976, Simpsons amended the Simpsons Plan to require contributions by the members. Simpsons Plan Members have since been contributing a portion of their pay into the trust fund of the Simpsons Plan, thereby funding a portion of their own pension benefits and contributing to the surplus assets in the plan.

21. On January 31, 1979, the HBC acquired Simpsons and as part of the acquisition, became the administrator of the Simpsons Plan.

22. In 1984, the HBC removed Canada Trust as the trustee of the Simpsons Plan and replaced it with Investors Group Trust. The HBC entered into a Trust Agreement with Investors Group Trust effective January 1984 (the "1984 Trust Agreement") pursuant to which Investors Group Trust agreed to become the successor trustee for the trust fund of the Simpsons Plan.

23. In or about 1984, four years after acquiring Simpsons, the HBC ceased making further contributions to the Simpsons Plan and started taking "contribution holidays" each year which it continues to take to the present.

24. Effective January 1, 1988, the HBC froze participation in the Simpsons Plan to those members participating in the Plan as of that date. The Simpsons Plan Members thus became a closed group of trust fund beneficiaries with exclusive rights to the trust fund assets.

25. Effective January 1, 1988, the HBC amended the Simpsons Plan, and partially and unlawfully revoked the trust without notice to the Simpsons Plan Members, by stipulating that any surplus assets remaining after a wind up of the Simpsons Plan would be refunded to the HBC. In doing so, the HBC acted in breach of trust, in breach of its fiduciary duties to the Simpsons Plan Members, and contrary to section 22 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended.

26. Effective January 1, 1994, the HBC changed the name of the Simpsons Plan to the "Dumai Pension Plan".

27. In 1999, the HBC replaced Investors Group Trust with Royal Trust as the trustee of the Simpsons component of the Dumai/Simpsons Plan and Royal Trust remains the trustee to date.

28. By December 31, 1989, the Simpsons Plan had developed surplus assets of approximately \$83,000,000.

29. According to the most recent actuarial report on file at the Financial Services Commission of Ontario, the surplus assets in the Simpsons Plan as of December 31, 1997 are \$123,933,000.

30. Since 1997, the HBC has failed to file actuarial reports with the regulatory authorities, setting out the assets, including surplus assets, in the trust fund of the Dumai/Simpsons Plan.

31. Despite the surplus assets in the trust fund of the Simpsons Plan and despite taking contribution holidays since 1984, Class Members have received no pension benefit enhancements or cost of living increases during this time other than a minor improvement to pension benefits in or about 1997 that cost the pension fund approximately \$4.4 million in total. Further, contributions by members are still required to be made to the Simpsons Plan.

32. The Class Members claim that the HBC is in breach of its fiduciary duties to consider and provide pension benefit enhancements and cost of living increases for the Simpsons Plan Members, given the amount of surplus assets in the trust fund of the Simpsons Plan.

Use of Simpsons Plan Surplus to Fund Zellers Employees' Pensions

33. In 1978, the HBC acquired Zellers Inc. and took over administration of the Zellers Inc. Pension Plan, CCRA Registration Number 354498 (hereinafter, the "Zellers Plan"). The Zellers Plan is a defined contribution pension plan which requires on-going funding contributions by the HBC.

34. As of December 31, 1993, the HBC ceased all future contributions to the Zellers Plan. The HBC then amended the Dumai/Simpsons Plan on March 2, 1994, retroactive to January 1, 1994, whereby it unlawfully introduced the Zellers employees into the Dumai/Simpsons Plan, despite having closed the membership of the Simpsons Plan in 1988 which precluded the use of trust fund assets for any pensions other than those of the Simpsons Plan Members.

35. Specifically, the HBC resolved that:

- (i) the Dumai Plan was extended to cover all Zellers defined contribution employees and former Woodward employees, on a basis identical to the defined contribution provisions of the Zellers Plan and HBC Pension Plan;
- and

(ii) the HBC Plan was amended so that Zellers was no longer designated as a participating employer.

36. The HBC did not provide notice to the Simpsons Plan Members that it had introduced the Zellers employees and the provisions of the Zellers Plan into the Dumai/Simpsons Plan.

37. The following amounts of surplus assets have been diverted from the trust fund of the Simpsons Plan and used to pay for the required employer contributions to the Zellers employees' defined contribution pension accounts held in a separate trust fund with the National Trust Company or its successors as trustee:

<u>Year</u>	<u>Amount of Surplus Diverted</u>
1994-1997	\$12,500,000
1998	5,200,000
1999	6,400,000
2000	<u>7,100,000</u>
Total	\$31,200,000

38. As of January 1, 1994, the Defendants, HBC and Investors Group Trust, began to transfer and divert surplus assets from the trust fund of the Simpsons Plan to pay for the required employer contributions to the Zellers employees' defined contribution pensions held in a trust fund with the National Trust Company or its successors as trustee. This diversion of surplus assets constitutes a partial revocation of the Simpsons Plan Trust and is continuing to this day.

Use of Simpsons Plan Surplus to Fund Kmart Employees' Pensions

39. In 1998, the HBC acquired Kmart Canada and took over administration of the Retirement Plan for Employees of Kmart Canada Co. – Kmart Canada, CCRA Registration Number 269084 (hereinafter, the “Kmart Plan”). The Kmart Plan is also a defined contribution pension plan which requires on-going funding contributions by the employer.

40. As of February 28, 1998, the HBC ceased all future contributions to the Kmart Plan. The HBC then amended the Dumai/Simpsons Plan on April 30, 1998, retroactive to February 28, 1998, to introduce the Kmart employees into the Dumai/Simpsons Plan, despite having closed the membership of the Simpsons Plan in 1988.

41. Specifically, it was resolved that:

- (i) effective February 28, 1998, the Dumai/Simpsons Plan was extended to cover Kmart employees;
- (ii) Kmart employees were to participate in the Dumai/Simpsons Plan under eligibility, contribution and benefits provisions that are identical to the defined contribution provisions of the Kmart Plan as at February 28, 1998; and
- (iii) Sun Life of Canada was appointed as a funding agent under the Dumai/Simpsons Plan for the purpose of holding the fund that relates to Kmart employees.

42. The following amounts of surplus assets have been diverted from the trust fund of the Simpsons Plan and used to pay for the required employer contributions to the Kmart employees' pension accounts held in a separate trust fund with Sun Life of Canada as trustee:

<u>Year</u>	<u>Amount of Surplus Diverted</u>
1998	\$ 5,500,000
1999	7,600,000
2000	<u>8,500,000</u>
Total	\$21,600,000

43. The HBC did not provide any notice to the Simpsons Plan members that it had introduced Kmart employees and the provisions of the Kmart Plan into the Dumai/Simpsons Plan.

44. As of February 28, 1998, the Defendants began to transfer and divert surplus assets from the trust fund of the Simpsons Plan to pay for the required employer contributions to the Kmart employees' defined contribution pension accounts held in a separate fund with Sun Life of Canada.

45. This diversion of surplus assets from the trust fund of the Simpsons Plan is continuing to this day at the rate of approximately \$7 million per year in respect of the Zellers employees' pensions, and \$4.5 million per year in respect of the Kmart employees' pensions and constitutes a partial revocation of the Simpsons Plan trust.

46. Based on the figures set out above, by the end of 2000, the Defendants had diverted a total of \$52,800,000 in surplus assets out of the trust fund of the Simpsons Plan to pay for the required HBC employer contributions for Zellers and Kmart employees.

Current Structure of Dumai/Simpsons Plan

47. As a result of the amendments to the Dumai/Simpsons Plan introducing the Zellers and Kmart employees, the plan currently operates as one registered pension plan for regulatory purposes but has three components that operate separately and distinctly:

- provisions for the original Simpsons employees (defined benefit provisions),
- provisions for Zellers employees (defined contribution provisions); and
- provisions for Kmart employees (defined contribution provisions).

48. Royal Trust is the current trustee for Dumai/Simpsons Plan including the Simpsons Plan component. Originally, separate trusts existed for each plan now comprising a component of the Dumai Plan. The National Trust Company was the trustee for the Zellers employees' pensions and Sun Life of Canada was the funding agent for the Kmart employees' pensions.

49. All surplus assets in the trust fund for the Simpsons component of the Dumai/Simpsons Plan are attributable to and belong to the Simpsons Plan Members.

Transfer of Surplus Assets from the Dumai/Simpsons Plan to the HBC Executive Plan and HBC Pension Plan

50. In the period from 1989-1993, the HBC transferred approximately 550 Simpsons Plan Members from the Simpsons Plan into two other pension plans sponsored by the HBC (the HBC Pension Plan and the HBC Executive Plan). In conjunction with these transfers, over \$70 million was transferred from the trust fund of the Simpsons Plan by the HBC and the Defendant, Investors Group Trust, to the HBC plans.

51. (a) Any funds improperly diverted by HBC from the Dumai Plan to the HBC Executive Plan or the HBC Plan constitutes a breach of trust and/or breach of fiduciary duty on the part of HBC.

51. (b) The proposed Class Members seek an accounting of all funds that were transferred from the trust fund of the Simpsons Plan to the HBC Pension Plan and the HBC Executive Plan without regulatory approval. In the alternative, the plaintiffs seek that HBC pay damages in the amount of any improperly diverted funds, as a result of breaches of trust or fiduciary duty, as determined by the accounting, or return such funds to the Dumai Plan.

51. (c) In preparing the transfer reports, a computational error was found in the Dumai Plan transfer to the HBC Plan. An overpayment of \$857,000.00 as at December 31, 1989 was made from the Dumai Plan to the HBC Plan. The plaintiffs plead that this amount, with interest at the historical fund rate of return, being \$2,568,947.00 as at December 31, 2002, be returned to the Dumai Plan.

51. (d) Further, HBC made an overpayment in the amount of at least \$1,731,000.00, as at December 31, 1989, from the Dumai Plan to the HBC Executive Plan. The plaintiffs plead that this amount, with interest, be returned to the Dumai Plan.

BREACH OF TRUST

52. The Defendants have contravened the terms of the 1971 Trust Agreement and have committed a breach of trust and breach of fiduciary duty to the Plaintiffs by

diverting surplus assets from the trust fund of the Simpsons Plan to pay for the pensions of the Zellers and Kmart employees.

53. The Plaintiffs are entitled to an injunction restraining the Defendants from diverting the surplus assets from the trust fund of the Simpsons Plan to pay for the pensions of the Zellers and Kmart employees.

54. The Plaintiffs are also entitled to an accounting to determine the amount of surplus assets diverted out of the trust fund of the Simpsons Plan to date and an injunction requiring the Defendants to forthwith re-pay the amount plus interest determined by said accounting.

DAMAGES

55. The surreptitious transfer and diversion of surplus assets from the trust fund of the Simpsons Plan by the Defendant constitutes unacceptable corporate behaviour. The Defendants HBC acted and are continuing to act in a secretive and underhanded manner, diverting surplus assets from the fund of the Simpsons Plan to pay for their funding obligations for Zellers and Kmart employees. The Plaintiffs are entitled to damages or equitable compensation as a result of the Defendants' breach of trust and ~~and~~ breach of fiduciary duties, and unlawful partial revocation of the Simpsons Plan trust.

56. The Plaintiffs are also entitled to punitive and exemplary damages. The misconduct by the Defendants as described herein was planned and deliberate. The intent of the HBC was clearly to profit from the breach of trust and breach of fiduciary

duty. The Defendants' superior knowledge and position of power in relation to the Simpsons Plan Members enabled the Defendants to breach the 1971 Trust Agreement and their fiduciary duties to the Simpsons Plan Members which they continue to do so to the present.

~~APPLICATION FOR VARIATION OR TERMINATION OF THE TRUST OF
THE SIMPSONS PLAN~~

~~57. The Simpsons Plan Members' interests in the trust fund of Simpsons Plan are vested and they are entirely entitled to the trust property, including surplus assets.~~

~~58. The Plaintiffs are entitled to terminate the trust fund of the Simpsons Plan pursuant to the rule in *Saunders v. Vautier* and compel the immediate distribution of all assets in the fund of the Simpsons Plan, including surplus assets, to the Simpsons Plan Members on a *pro rata* basis.~~

~~59. The Plaintiffs are entitled, in the alternative, to vary the trust fund of the Simpsons Plan pursuant to the *Variation of Trusts Act*, R.S.O. 1990, c. V 1 and amend the Dumai/Simpsons Plan to provide for the immediate distribution of that portion of all surplus assets not required in the trust fund of the Simpsons Plan to the Simpsons Plan Members on a *pro rata* basis or, at the very least, a distribution of assets which have been unlawfully diverted and continue to be diverted from the Simpsons Plan trust fund.~~

~~60. A variation of the trust fund of the Simpsons Plan would benefit all Simpsons Plan Members. Such an arrangement would ensure that the Simpsons Plan Members'~~

~~basic pension benefits remain protected and at the same time, allow the members to obtain the surplus assets in the trust fund of the Simpsons Plan which would otherwise simply remain in the trust fund indefinitely.~~

61. The Plaintiffs and the Class they represent plead and rely upon section 22 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended.

~~62. The Plaintiffs and the Class they represent plead and rely upon the provisions of the *Variation of Trusts Act*, R.S.O. 1990, c. V-1.~~

63. The Plaintiffs and the Class Members plead and rely upon the provisions of the *Trustee Act*, R.S.O. 1990, c. T-23, as amended.

64. The Plaintiffs request that this action be tried in the City of Toronto.

~~August 6, 2002 March 6, 2003 June 8, 2004 April 27, 2005~~

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Plaintiffs

- and -

THE HUDSON'S BAY COMPANY LIMITED et al.

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**AMENDED AMENDED AMENDED
STATEMENT OF CLAIM**

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ORDER

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