

**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

CLAIM**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~~, 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

KOSKIE MINSKY LLP
20 Queen Street West
Suite 900, P.O. Box 52
Toronto, ON M5H 3R3

Mark Zigler (LSUC #19757B)
Kirk M. Baert (LSUC #30942O)
Andrew J. Hatnay (LSUC #31885W)

Tel.: 416-977-8353
Fax: 416-977-3316

Solicitors for the Plaintiffs

RONALD SUTHERLAND and JOHN SCOTT et al.

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**

KOSKIE MINSKY LLP
Barristers & Solicitors
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Mark Zigler (LSUC# 19757B)
Kirk M. Baert (LSUC# 30942O)
Andrew J. Hatnay (LSUC# 31885W)

Tel: 416-977-8353
Fax: 416-977-3316

Solicitors for the plaintiffs