

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**THE HONOURABLE        )  
MR. JUSTICE WINKLER    )**

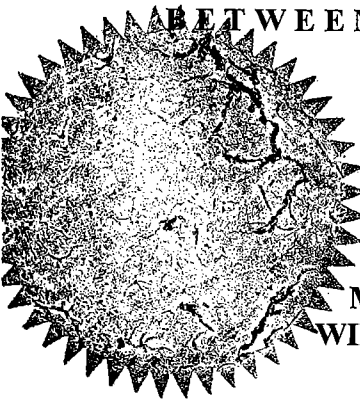
**THURSDAY, THE  
TENTH DAY OF FEBRUARY, 2005**

**B E T W E E N :**

**MARSHA MARTIN and FERN CAMIRAND**

**Plaintiffs**

**- and -**



**MICHAEL BARRETT, JOHN REBRY, LLOYD CRAWFORD,  
WILLIAM DEMERLING, CLAUDE GAUTHIER, CLARE HAYES,  
JIM MADILL, MICHAEL STEVENS, BRIAN ASHFORD,  
JOHN BLACK, JOHN HILL, CHARLES MACDAID,  
JOSEPH MARTIN, JUNE MCFARLANE, LARRY MELNYK  
JOHN STAFFORD, as trustees of the Participating Co-Operatives  
of Ontario Trusteed Pension Plan (FSCO Reg. No. 345736),  
THE CANADA TRUST COMPANY, CIBC MELLON TRUST COMPANY,  
CIBC MELLON GLOBAL SECURITIES SERVICES COMPANY,  
CANADIAN IMPERIAL BANK OF COMMERCE,  
MARK EDWARD WORKMAN carrying on business as  
WHITTACAT CONSULTING ASSOCIATES,  
WHITTACAT HOLDINGS LTD., TURNBULL AND TURNBULL LTD.,  
THE ESTATE OF JOHN A. TURNBULL, deceased, LOUIS ELLEMENT,  
ANTHONY F. COOPER and ANTHONY F. COOPER  
ACTUARIAL SERVICES LIMITED and TORYS LLP**

**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 and providing notice to the class, was heard at the Court House, 361 University Avenue, Toronto, Ontario.

**ON READING** the affidavits of Marsha Martin, Fern Camirand, and Ari Kaplan, 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 maintained as a class proceeding on behalf of the following class (hereinafter referred to as the "Class" or the "Class Members"):

all persons, wherever resident, who, after June 1, 1994, were entitled to payments, current or deferred, under the Participating Co-Operatives of Ontario Trusteed Pension Plan (the "Plan")

with respect to the following claims against the defendants:

- (a) an accounting of the assets in the trust fund (the "Fund") of the Plan and of the losses to the Fund caused by the actions, errors and omissions of the defendants;
- (b) an order for restitution in such amount as may be determined pursuant to the accounting directed under subparagraph (a);
- (c) in the alternative, damages, including damages for negligence, breach of trust and breach of fiduciary duty, in the amount of \$100,000,000.00 or such amount as may be determined pursuant to the accounting directed under subparagraph (a);
- (d) a mandatory order removing the defendant trustees responsible for administering and managing the Plan and the Fund (the "Co-Op Trustees") who are currently holding office, and an injunction enjoining them from committing any further acts in respect of the Plan and the Fund;
- (e) an order appointing or directing the appointment of a new administrator for the Plan and the Fund, with all necessary orders and directions to facilitate the appointment of the new administrator;
- (f) a declaration and determination that the defendants, or any one of them, are not entitled to seek recovery of their costs and any expenses, directly or indirectly, related to the defence of this action from the Fund ("Defence Costs"), and an injunction prohibiting the payment of any Defence Costs in respect of this action

out the Fund, including an order that any Defence Costs already paid out of the Fund be repaid to the Fund;

- (g) a declaration that all amendments to the Plan made by the Co-Op Trustees after June 1, 1994 purporting to reduce pension and ancillary benefits are null, void and of no effect;
- (h) a declaration that the pensions promised to "UCO Members" (as defined in the amended statement of claim) on termination from the Plan were in accordance with the Plan terms, an order restoring the pensions of UCO Members to their original levels subject to the requirements of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 and regulations, as amended and an order enjoining the Co-Op Trustees from collecting alleged "overpayments" pertaining to UCO members;
- (i) costs of this action on a substantial indemnity basis, plus any Goods and Services Tax which may be payable on any amount pursuant to the *Excise Tax Act*, R.S.C. 1985, Chap. E-15, as amended, or any other legislation enacted by the Government of Canada;
- (j) prejudgment and postjudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended; and
- (k) such further and other relief as to this Honourable Court may seem just.

2. **THIS COURT ORDERS** that, subject to further order of the court, Marsha Martin and Fern Camirand be and hereby are appointed as the representative plaintiffs on behalf of the Class.

### **Common Issues**

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

#### **A. *The Co-Op Trustees***

##### **Negligence**

1. Did the Co-Op Trustees, or any of them:

- (i) owe Class Members a duty of care as alleged in the Amended Amended Statement of Claim in relation to Plan Assets? If so, what was the nature and scope of that duty?
  - (ii) fall below the applicable standard of care in respect of any such duty? and
  - (iii) breach their duty in the manner alleged in paragraph 74 of the Amended Amended Statement of Claim?
2. If any of the Co-Op Trustees breached their duty of care, as alleged in the Amended Amended Statement of Claim, what damages, if any, were caused by such breach of duty to the Class Members, and how are those damages to be measured? Were appropriate steps taken to mitigate the damages?

### **Fiduciary Duty**

3. Did the Co-Op Trustees, or any of them, owe Class Members a fiduciary duty in relation to Plan Assets as alleged in the Amended Amended Statement of Claim? If so, what was the nature and scope of the duty?
4. Were the Co-Op Trustees, or any of them, in breach of their fiduciary duty as alleged in paragraph 74 of the Amended Amended Statement of Claim? If so, how and what harm was caused by that breach, and what is the appropriate remedy?

### **Breach of Trust**

5. Did the Co-Op Trustees, or any of them, breach any specific provision of the Trust Agreement? If so, which provision, what harm was caused by the breach and what is the appropriate remedy?

## **B. *Mark Edward Workman* ("Workman")**

### **Negligence**

1. Did Workman:
  - (i) owe Class Members a duty of care as alleged in the Amended Amended Statement of Claim in relation to Plan Assets? If so, what was the nature and scope of that duty?
  - (ii) fall below the applicable standard of care in respect of any such duty? and
  - (iii) breach his duty in the manner alleged in paragraph 81 of the Amended Amended Statement of Claim?
2. If Workman breached his duty of care, as alleged in the Amended Amended Statement of Claim, what damages, if any, were caused by such breach of duty to the

Class Members, and how are those damages to be measured? Were appropriate steps taken to mitigate the damages?

**Fiduciary Duty**

3. Did Workman owe Class Members a fiduciary duty in relation to the Plan Assets as alleged in the Amended Amended Statement of Claim? If so, what was the nature and scope of the duty?
4. Was Workman in breach of his fiduciary duty as alleged in the Amended Amended Statement of Claim? If so, how and what harm was caused by that breach and what is the appropriate remedy?

**C. *Custodian Defendants***

**Negligence**

1. Did any of the Custodian Defendants (being The Canada Trust Company, CIBC Mellon Global Securities Services Company, and Canadian Imperial Bank of Commerce):
  - (i) owe Class Members a duty of care as alleged in the Amended Amended Statement of Claim in relation to Plan Assets? If so, what was the nature and scope of the duty?
  - (ii) fall below the applicable standard of care in respect of any such duty? and
  - (iii) breach their duty by failing to warn the Class Members when appropriate?
2. If any of the Custodian Defendants breached their duty of care as alleged in the Amended Amended Statement of Claim, what damages, if any, were caused by such breach of duty to the Class Members, and how are those damages to be measured? Were appropriate steps taken to mitigate the damages?

**Fiduciary Duty**

3. Did the Custodian Defendants or any of them owe Class Members a fiduciary duty in relation to Plan Assets as alleged in the Amended Amended Statement of Claim? If so, what was the nature and scope of the duty?
4. Were the Custodian Defendants or any of them in breach of their fiduciary duty as alleged in the Amended Amended Statement of Claim? If so, how and what harm was caused by that breach, and what is the appropriate remedy?

**D. Actuaries**

1. Did any of the Actuaries (being Turnbull and Turnbull Ltd., The Estate of John A. Turnbull (deceased), Louis Ellement, Anthony F. Cooper, and Anthony F. Cooper Actuarial Services Limited):
  - (i) owe Class Members a duty of care as alleged in the Amended Amended Statement of Claim in relation to Plan Assets? If so, what was the nature and scope of the duty?
  - (ii) fall below the applicable standard of care in respect of any such duty? and
  - (iii) breach their duty by failing to warn the Class Members when appropriate?
2. If any of the Actuaries breached their duty of care as alleged in the Amended Amended Statement of Claim, how, and what damages, if any, were caused by such breach of duty to the Class Members and how are those damages to be measured? Were appropriate steps taken to mitigate the damages?

**Fiduciary Duty**

3. Did the Actuaries, or any of them, owe Class Members a fiduciary duty in relation to Plan Assets as alleged in the Amended Amended Statement of Claim? If so, what was the nature and scope of the duty?
4. Were the Actuaries, or any of them, in breach of their fiduciary duty as alleged in the Amended Amended Statement of Claim? If so, how and what harm was caused by that breach, and what is the appropriate remedy?

**E. Torys LLP ("Torys")**

**Negligence**

1. Did Torys:
  - (i) owe Class Members a duty of care as alleged in the Amended Amended Statement of Claim in relation to Plan Assets? If so, what was the nature and scope of that duty?
  - (ii) fall below the applicable standard of care in respect of any such duty? and
  - (iii) breach its duty in the manner alleged in paragraph 116(c) of the Amended Amended Statement of Claim?
2. If Torys breached its duty of care as alleged in the Amended Amended Statement of Claim, what damages, if any were caused by such breach of duty to the Class Members, and how are those damages to be measured? Were appropriate steps taken to mitigate the damages?

### **Fiduciary Duty**

3. Did Torys owe Class Members a fiduciary duty in relation to the Plan Assets as alleged in the Amended Amended Statement of Claim? If so, what was the nature and scope of the duty?
4. Was Torys in breach of its fiduciary duty in the manner alleged in paragraph 116(c) of the Amended Amended Statement of Claim? If so, how and what harm was caused by that breach, and what is the appropriate remedy?

### **Notice**

4. **THIS COURT ORDERS** that notice be given to the Class by:
  - (a) the plaintiffs causing notices substantially in the form attached hereto as Schedule "A" to this order to be sent by prepaid first class mail to each Class Member; and
  - (b) 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](http://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 notice referred to in sub-paragraph 4(a) shall be apportioned between and borne as to 50% by the plaintiffs and as to 50% by all defendants except the Actuaries, subject to further order of this court. The notice shall be mailed by no later than April 15, 2005.
6. **THIS COURT ORDERS** that the plaintiffs and defendants shall coordinate the notice program and agree on the incidental details of the notices. Any disputes shall be summarily determined by the court.
7. **THIS COURT ORDERS** that the Co-Op Trustees shall forthwith provide the plaintiffs with the last-known names, addresses of the persons referred to in the class definition in paragraph one above.

### **Opt Out**

8. **THIS COURT ORDERS** that a class member may opt out of the proceeding by, delivering to Koskie Minsky LLP, the Opt Out Coupon attached as Schedule "B" or some other legible, written, signed request to opt out containing substantially the same information as the Opt Out Coupon on or before June 30, 2005.

9. **THIS COURT ORDERS** that Class Members may not opt out after June 30, 2005.

10. **THIS COURT ORDERS** that Koskie Minsky LLP serve on the defendants and file with the court, by no later than July 15, 2005, an affidavit exhibiting a list of persons who have opted out of the class proceeding.

### **Dismissal of the Action Against the Defendants Michael Barrett and John Rebry**

11. **THIS COURT ORDERS** that this action and all cross-claims are hereby dismissed against Michael Barrett and John Rebry without costs.

### **Discontinuance of the Action Against the Defendant Actuaries**

12. **THIS COURT ORDERS** that this action be and hereby is discontinued against Turnbull and Turnbull Ltd., The Estate of John A. Turnbull, deceased, Louis Ellement, Anthony F. Cooper, and Anthony F. Cooper Actuarial Services Limited, without costs.

### **Dismissal of the Action Against the Defendant CIBC Mellon Trust Company**

13. **THIS COURT ORDERS** that this action be and hereby is dismissed against CIBC Mellon Trust Company without costs.

14. **THIS COURT ORDERS** that the cross-claims of Torys and the Co-Op Trustees be and hereby are dismissed against CIBC Mellon Trust Company without costs.

### ***Trustee Act***

15. **THIS COURT ORDERS** that the Honourable Mr. Justice Winkler (or a judge of the Ontario Superior Court of Justice designated by him) will hear an application under s. 60 of the *Trustee Act* to determine whether, after June 1, 1994: (a) the Plan terms permitted a reduction of



pension and ancillary benefits to any Class Members; and (b) whether reductions to U.C.O. Members' pensions were in accordance with Plan terms.

**Costs**

16. **THIS COURT ORDERS** that the costs of the certification motion are reserved to the trial judge or such other judge who finally disposes of the action by way of settlement or judgment.

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

APR 11 2005.

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

PER/PAR:

A smaller handwritten signature in black ink, appearing to be a stylized 'D' or similar character, located below the 'PER/PAR:' text.

## SCHEDULE "A"

ONTARIO SUPERIOR COURT OF JUSTICE

### NOTICE OF CERTIFICATION AS A CLASS PROCEEDING

Court File No. 03-CV-244195CP

**TO: All persons, wherever resident, who, after June 1, 1994, were entitled to payments, current or deferred, under the Participating Co-Operatives of Ontario Trusteed Pension Plan (the "Plan").**

This Notice of Certification is published by order of the Honourable Mr. Justice Winkler of the Ontario Superior Court of Justice.

#### **Representatives of the Class**

Marsha Martin and Fern Camirand (the "Representative Plaintiffs") have commenced an action against the defendants listed below.

#### **The Defendants**

The defendants in this action (collectively the "Defendants") are the current and former trustees of the Plan, current and former Plan custodians, former investment consultant and asset manager, former actuaries of the Plan and legal counsel.

##### *a) Trustees of the Plan*

The trustees of the Plan are Lloyd Crawford, William Demerling, Claude Gauthier, Clare Hayes, Jim Madill, Michael Stevens, Brian Ashford, John Black, John Hill, Charles MacDaid, Joseph Martin, June McFarlane, Larry Melnyk, and John Stafford.

The action was dismissed against Michael Barrett and John Rebry by court order dated February 10, 2005.

##### *b) Custodians*

The custodians of the Plan are Canada Trust Company, CIBC Mellon Global Securities Services Company, and Canadian Imperial Bank of Commerce. The action was dismissed against CIBC Mellon Trust Company by court order dated February 10, 2005.

##### *c) Investment Manager of the Plan*

The investment manager of the Plan was Mark Edward Workman, carrying on business as Whittacat Consulting Associates, and Whittacat Holdings Ltd.

*d) Plan Actuaries*

The actuaries of the Plan were Turnbull and Turnbull Ltd., The Estate of John A. Turnbull, Louis Ellement, Anthony F. Cooper, and Anthony F. Cooper Actuarial Services Limited. The action was discontinued against all of these actuaries by court order dated February 10, 2005].

*e) Legal Counsel*

Legal counsel to the Plan is Torys LLP.

**The Class**

The Representative Plaintiffs commenced this action on behalf of all persons, wherever resident who, after June 1, 1994 were entitled to payments, current or deferred, under the Plan (the "class" or "class members").

**The Action**

In the action, the Representative Plaintiffs seek:

- (a) an order directing a reference for an accounting of the assets in the Fund of the Plan and of the losses to the Fund caused by the actions and omissions of the Defendants;
- (b) an order for restitution in the amount of \$100,000,000.00 to the Fund or such amount as may be determined pursuant to the aforementioned accounting;
- (c) damages, in the alternative, for negligence, breach of trust and breach of fiduciary duty, in the same amount as may be determined pursuant to an accounting;
- (d) a mandatory order removing the defendant Co-Op Trustees currently holding office and an injunction enjoining them from committing any further acts in respect of the Plan and the Fund;
- (e) an order appointing new trustees to be responsible for the Plan and the Fund, with all necessary orders and directions to facilitate the appointment of a new Board of Trustees;
- (f) a declaration and determination that the Defendants, or any one of them, are not entitled to seek recovery of their costs and any expenses related to the defence of this action from the Fund ("defence costs") and an injunction prohibiting payment of any Defendants' defence costs in respect of this action out of the Fund, including an order that any such defence costs already paid out of the Fund be repaid to the Fund;
- (g) a declaration that all amendments made to the Plan by the Co-Op Trustees after June 1, 1994, purporting to reduce pension and ancillary benefits, are void and of no effect;

- (h) a declaration that the pensions promised to United Co-Operative (“UCO”) Members (defined below) on termination from the Plan were in accordance with the Plan terms and an order restoring the pensions of UCO Members to their original levels subject to the requirements of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 and regulations, as amended, and an order enjoining the Co-Op Trustees from collecting alleged “overpayments” pertaining to UCO Members; and
- (i) costs on a substantial indemnity basis; and
- (j) prejudgment and postjudgment interest.

The court has not yet determined whether the action will be successful.

### **Legal Representation**

The Representative Plaintiffs have retained Kirk M. Baert and Michael Mazzuca of the law firm of Koskie Minsky LLP to represent them in these proceedings.

### **Legal Costs**

The Representative Plaintiffs have entered into a Retainer Agreement with Koskie Minsky LLP with respect to legal fees. Koskie Minsky LLP has been retained on a contingency fee basis, whereby they will only be paid their fees in the event of a successful result to the litigation or a court approved settlement. Koskie Minsky LLP is proposing a multiplier of 3.0 times their regular hourly rate. This Retainer Agreement is subject to the court's approval. The amount of the legal fees paid to Koskie Minsky LLP is subject to the court's approval.

### **Judgment Binding on All Members of the Class**

Any judgment ultimately obtained in these proceedings, whether favourable or not, will bind all members of the class.

### **Opting Out**

You are entitled to opt out of the proceedings by delivering a written notice to Koskie Minsky LLP on or before June 30, 2005. Koskie Minsky LLP's address is set out below. If you do not opt out prior to this date, you will be deemed to be a member of the class and will be bound by any judgment made in these proceedings.

### **Right to Participate**

If you do not wish to be part of the class, you may still be entitled to participate in the proceeding. Such participation is subject to the court's approval. You may wish to obtain independent legal advice with respect to this matter.

### **Cost to You**

If the action is successful, or if a court approved settlement is reached, the legal fees will be payable pursuant to the Retainer Agreement described above. No class member, other than the

Representative Plaintiffs, will be responsible for the legal costs of the defendants if the action is unsuccessful.

This proceeding is receiving financial support from the Class Proceedings Fund (the "Fund"). In exchange, the Fund is entitled to 10% of any award or settlement funds to which the class members may become entitled.

If the action is successful, the court will go on to determine how much the people affected should receive or how they should be compensated. The court will also determine how the damages should be distributed to or for the benefit of the people affected. If the action is not successful, the members of the class will not be responsible for any legal costs of the action and will not have any other financial obligations because of the action.

Whether or not the action is successful, all members of the class who do not opt out will be bound by the judgment. This means, for example, that after this action is over, you could not start your own class action for the same claim.

If you have any questions or concerns, please contact Koskie Minsky LLP at the following address:

**Participating Co-operatives Pension Plan Class Action**  
**c/o KOSKIE MINSKY LLP**  
Barristers & Solicitors  
20 Queen Street West  
Suite 900, Box 52  
Toronto, ON M5H 3R3

Telephone: 1-866-474-1740  
Facsimile: 416-977-3316  
Email: [cooperativespension@koskieminsky.com](mailto:cooperativespension@koskieminsky.com)  
Firm Website: [www.koskieminsky.com](http://www.koskieminsky.com)

**PLEASE DO NOT CONTACT MR. JUSTICE WINKLER OR THE REGISTRAR OF THE COURT REGARDING THIS CASE. THEY WILL NOT BE ABLE TO ANSWER YOUR QUESTIONS.**

## OPT OUT COUPON

To: **Participating Co-operatives Pension Plan Class Action**  
**c/o Koskie Minsky LLP**  
Barristers & Solicitors  
20 Queen Street West  
Suite 900, Box 52  
Toronto, ON M5H 3R3

I wish to opt out of the *Marsha Martin and Fern Carmirand v. Michael Barrett et al.* class proceeding.

\_\_\_\_\_  
Signature

Name:

*Please print*

Address:

Postal Code:

Telephone:

*Note: To opt out, this coupon must be properly completed and received at the above-address no later than June 30, 2005.*

**MARSHA MARTIN and FERN CAMIRAND**

- and -

**MICHAEL BARRETT et al.**

Court File No: 03-CV-244195CP

Plaintiffs

Defendants

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceedings commenced at TORONTO

**ORDER**

**KOSKIE MINSKY LLP**

Barristers & Solicitors

20 Queen Street West

Suite 900, P.O. Box 52

Toronto, ON M5H 3R3

**Kirk M. Baert** (LSUC# 309420)

**Michael Mazzuca** (LSUC# 33377A)

**Robyn Matlin** (LSUC# 47206P)

Tel: (416) 977-8353

Fax: (416) 977-3316

Solicitors for the plaintiffs