

ONTARIO
SUPERIOR COURT OF JUSTICE

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**

Defendants

Proceeding under the Class Proceedings Act, 1992

**STATEMENT OF DEFENCE OF CIBC MELLON TRUST COMPANY,
CIBC MELLON GLOBAL SECURITIES SERVICES COMPANY, and
CANADIAN IMPERIAL BANK OF COMMERCE**

1. CIBC Mellon Trust Company (“CMTC”), CIBC Mellon Global Securities Service Company (“Global Securities”) and Canadian Imperial Bank of Commerce (“CIBC”) (collectively “the CIBC Defendants”) admit the allegations in the first two sentences of paragraph 4 and paragraphs 26, 42, 43, 46, 49, 53 and 77 (except the last sentence) of the Fresh as Amended Statement of Claim.

2. The CIBC Defendants deny the claim in paragraph 1 and the allegations in paragraphs 2, 3, 4 (except the first two sentences), 5-7, 27-33, 39, 47, 48, 50-52, 55-67, 69, 71-76, the last sentence of paragraph 77, 78-93, 110, 117-120, 122 and 125 of the Fresh as Amended Statement of Claim.

3. The CIBC Defendants have no knowledge of the allegations in paragraphs 8-25, 34-38, 40-41, 44, 45, 54, 68, 70, 94-109, 111-116, 121, 123, 124, and 126-130 of the Fresh as Amended Statement of Claim.

4. CMTC is a trust company incorporated under the laws of Canada. Contrary to the allegations in the Fresh as Amended Statement of Claim, CMTC did not purchase any aspect of the business of Canada Trust. CMTC has never had any involvement with the Participating Cooperatives of Ontario Trusteed Pension Plan (the "Plan"). CMTC has never, in any capacity, held any of the Plan's assets. CMTC accordingly asserts that all claims in this action as against it should be dismissed.

5. CIBC is a Canadian chartered Bank under the *Bank Act*, S.C. 1991 c.46.

6. Global Securities is an unlimited liability company incorporated under the laws of Nova Scotia which, *inter alia*, provides services in respect of pension and deferred income plans.

7. None of the CIBC Defendants had any involvement with the Plan or the Plan's assets prior to June 30, 1997.

8. Under an Agreement of Purchase and Sale made as of May 7, 1997 between Global Securities and Canada Trust, (the "Purchase Agreement"), Global Securities acquired

from Canada Trust on June 30, 1997 Canada Trust's defined benefit pension plan custodial and trust businesses. Pursuant to the Purchase Agreement, Global Securities agreed to cause CIBC to assume the "Custodian Liabilities" of Canada Trust (i.e. Canada Trust's obligations (excluding trust obligations) to provide safekeeping of client assets).

9. As at June 30, 1997, Canada Trust was a custodian of the assets of the Plan pursuant to a Custodianship Agreement dated June 1, 1994 between Canada Trust and the Board of Trustees of the Plan (the "1994 Custodianship Agreement"). Under the 1994 Custodianship Agreement, Canada Trust was appointed custodian of the Plan assets and was required to follow the instructions of the Plan's Board of Trustees in respect of all investment decisions. The 1994 Custodianship Agreement specifically provided:

The Custodian shall not be obliged to review or investigate any Property acquired or disposed of under the Fund or concern itself with the propriety of any investment but shall be responsible only for performing its duties as set out in this Agreement.

10. Between June 30, 1997 and December 31, 1999 Canada Trust remained custodian of the Plan assets. CIBC acted as a sub-custodian and Global Securities provided services as an agent of Canada Trust during this period.

11. In accordance with the Purchase Agreement, Global Securities caused CIBC to become custodian of the Plan assets pursuant to a new Custodial Services Agreement made as of January 1, 2000 (the "2000 Custodial Agreement") among CIBC, Global Securities, Mellon Bank N.A. and the Board of Trustees of the Plan. Pursuant to the 2000 Custodial Agreement:

(a) The Plan Trustees appointed CIBC custodian of the Plan assets.

- (b) CIBC appointed Global Securities as its agent to provide administrative services.
- (c) CIBC and Global Securities were designated the Service Providers and agreed to carry out instructions (“Authorized Instructions”) from persons designated by the Plan’s Board of Trustees. The 2000 Custodial Agreement provided that :

4.1 ...The Service Providers and sub-custodians shall be entitled to rely on and shall be fully protected in giving effect to instructions from persons or entities so identified until the Service Providers receive written notice from the Board or an Investment Manager as appropriate of a change of the identity or authority of such person or entities.

- (d) CIBC and Global Securities had no duties to make or review investment decisions. The 2000 Custodial Agreement provided, inter alia, that:

4.4 The Service Providers shall be under no duty or obligation to question any Authorized Instruction, to review any Securities or other Property held in the Account, to make any suggestions with respect to the investment and reinvestment of the Account, or to evaluate or question the performance of any Authorized Party. The Service Providers will be fully protected in acting in accordance with Authorized Instructions or for failing to act in the absence of Authorized Instructions.

...

5.1...The Service Providers shall not be responsible or liable for any loss or diminution of value of any Property held by the Custodian, its Affiliates, or its sub-custodians.

...

6.1 The Service Providers shall have no responsibility for the investment or reinvestment of the Account, or for failure to reinvest the Account and shall have no responsibility for any investment decision

- (e) CIBC and Global Securities could not act, except on Authorized Instructions, to settle transactions. Section 5.2 of the 2000 Custodial Agreement provided:

The Service Providers shall exercise the following powers and authority in the administration of the Account, only upon Authorized Instructions:

(a) Settle purchases and sales, and engage in other transactions, including receipts and deliveries, exchanges, exercises, conversions, subscriptions, and other voluntary corporate actions, with respect to Securities or other Property received by the Service Providers.

(b) Take any and all actions necessary with respect to derivative transactions including settling transactions in futures and/or options contracts, short selling programs, foreign exchange contracts, swaps and other derivative investments and execute any documents as directed pursuant to Authorized Instructions to give effect to the foregoing including custodial agreements with brokers/dealers or other entities to hold Account assets. Any such agents appointed pursuant to this Section shall not be agents of either Service Provider. The Service Providers shall, in giving effect to Authorized Instructions pursuant to this Section, be fully protected as described in Section 4, and shall not be liable for any act, omission, cost, expense or loss caused by such agents.

...

The Service Providers will be fully protected as described in Section 4 in exercising the foregoing powers and authority.

12. CIBC and Global Securities had no duties, responsibilities or liability to the plaintiffs for the acts or omissions of any prior custodian or their sub-custodians or agents.

13. At all times after June 30, 1997, CIBC and Global Securities faithfully executed the instructions of the Plan's Board of Trustees and they duly performed the responsibilities sub-

delegated to them under the 1994 Custodianship Agreement and the responsibilities delegated to them under the 2000 Custodial Agreement. CIBC and Global Securities played no role in any investment decisions involving the Plan's assets.

14. CIBC and Global Securities have never been trustees in respect of the Plan assets and have never owed trust obligations to anyone in respect thereof.

15. CIBC and Global Securities have never owed any duties to the plaintiffs. The only duties of CIBC and Global Securities in respect of the Plan and the Plan assets were owed to the Board of Trustees as prescribed and limited by the terms of the 1994 Custodianship Agreement and the 2000 Custodial Agreement. CIBC and Global Securities fulfilled their obligations to the Board of Trustees.

16. The CIBC Defendants deny that the rate of return on the Plan's assets between 1997 and 2000 was significantly worse than the rate of returns experienced by other investors including other pension plans during that period. The CIBC Defendants deny that the plaintiffs have suffered the losses alleged and put the plaintiffs to the strict proof thereof. Furthermore, or in the alternative, the CIBC Defendants deny that any losses suffered by the Plan or by the plaintiffs are the result of any breach of duty or contractual obligations by these defendants.

17. These defendants therefore request that this action be dismissed as against them with costs on a substantial indemnity basis.

February 24, 2004

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MARSHA MARTIN et al - and – MICHAEL BARRETT et al

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TRUST COMPANY, CIBC MELLON GLOBAL
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