

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 THE CANADA TRUST COMPANY

1. The Canada Trust Company (“Canada Trust”) admits the allegations in the first two sentences of paragraph 4 and paragraphs 26, 46, 49 and 53 of the Fresh as Amended Statement of Claim.
2. Canada Trust denies 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, 71-93, 110, 117-120, 122 and 125 of the Fresh as Amended Statement of Claim.
3. Canada Trust has no knowledge of the allegations in paragraphs 8-25, 34-38, 40-45, 54, 68, 70, 94-109, 111-116, 121, 123-124, and 126-130 of the Fresh as Amended Statement of Claim.

4. Canada Trust is a corporation organized and existing under the laws of Canada. Canada Trust's head office is located in Toronto, Ontario.

5. Prior to June 30, 1997, Canada Trust provided custodial services in respect of the assets of the Participating Co-operatives of Ontario Trusteed Pension Plan (the "Plan"). On June 30, 1997, CIBC Mellon Global Securities Service Company acquired Canada Trust's defined benefit pension plan custodial businesses, including Canada Trust's business relating to the Plan.

6. Canada Trust did not owe any duties to the plaintiffs in respect of the Plan or the Plan's assets. Canada Trust's custodial duties were prescribed by the terms of a custodianship agreement between itself and the Board of Trustees of the Plan made as of June 1, 1994 (the "1994 Custodianship Agreement").

7. The 1994 Custodianship Agreement exhaustively defined Canada Trust's obligations in relation to the Plan and circumscribed any affected party's reasonable expectations with respect to Canada Trust's role as custodian. Canada Trust performed its custodial obligations pursuant to its instructions, as expressly described and confined by the terms of the 1994 Custodianship Agreement. Section 3.13 of that Agreement provided in relevant part as follows:

In general, the Custodian [*i.e.*, Canada Trust] shall attend to all non-discretionary details in connection with the sale, exchange, substitution, purchase, transfer, exercise of rights or other dealing with the Property in accordance with the rules and regulations, if any, of any applicable statutory or regulatory body.

The Custodian shall not be obliged to review or investigate any Property acquired or disposed of under the Fund nor concern itself with the propriety of any such investment but shall be responsible only for performing its duties as set forth in this Agreement. [Emphasis added.] ...

The Custodian shall be under no duty to take any action other than specified in this Agreement with respect to any Property lodged hereunder unless specifically agreed to by the Custodian in writing, or to appear in or defend any suit unless requested by the Board and indemnified to the Custodian's satisfaction.

8. Canada Trust had no independent discretion or power of decision with respect to the actions complained of in the plaintiffs' claim. In particular, pursuant to section 2 of the 1994

Custodianship Agreement, Canada Trust was required to act in accordance with instructions received from the Plan's Board of Trustees. Section 2 provided in relevant part as follows:

The Custodian shall act in accordance with Instructions and shall only be liable for its acts of negligence, fraud, bad faith, wilful misconduct or reckless disregard of duties ("Misconduct"). The Custodian in executing all Instructions will take relevant action in accordance with accepted industry practice and local settlement practices.

9. Section 5.1 of the 1994 Custodianship Agreement required Canada Trust to act in accordance with the following standard of care (the "Standard of Care"):

In performing its obligations and duties hereunder, the Custodian shall exercise the powers and duties conferred upon it by this agreement and in connection therewith shall exercise the degree of care, diligence and skill that a reasonably prudent institution acting as custodian would exercise in dealing with the property of another person.

10. Apart from the provisions of the 1994 Custodianship Agreement that make it clear that Canada Trust had no duty to monitor the propriety or prudence of the Plan's investments, Canada Trust states that accepted industry practice in the custodial industry was that a custodian has no duty to monitor the propriety or prudence of the investments that a custodian is instructed to implement. Canada Trust acted in compliance with its obligations under the 1994 Custodianship Agreement and in accordance with accepted industry practice.

11. Canada Trust's fees in respect of its performance of the 1994 Custodianship Agreement were those of a custodian, and not the much higher fees of an investment manager, precisely because Canada Trust's duties in relation to the Plan were not those of an investment manager. The Trustees, at no time, contracted with or expected Canada Trust to act as an investment manager. As a result, because Canada Trust had no investment management duties, and its fees were low, the administrators at Canada Trust responsible for the account were not expected to be, nor were they, investment management professionals.

12. Canada Trust further states that at all times during its tenure, it acted in good faith and in accordance with the Standard of Care, the terms of the 1994 Custodianship Agreement and pursuant to the directions of the Plan's Board of Trustees. Canada Trust specifically denies the allegations made in paragraphs 84 to 93 of the Fresh as Amended Statement of Claim and, in

particular, denies that it owed the plaintiffs any fiduciary responsibilities or duties. Specifically, Canada Trust played no role in any investment decisions involving the Plan's assets and was not responsible for decision-making in regard to the administration of the Plan, Plan design and amendment, or the interpretation of the Plan.

13. Furthermore, Canada Trust was never a trustee of the Plan's assets and has never owed trust obligations to anyone in respect thereof. In the alternative, Canada Trust denies that it breached any trust or fiduciary duties or responsibilities, to the extent that any such duties exist.

14. Canada Trust states that when in June 1997 it sold its defined benefit pension plan custodial businesses, including its business relating to the Plan, there was no deficit in the Plan and the Plan was, in fact, in a surplus position. Canada Trust states that it bears no responsibility or liability to the plaintiffs for the acts or omissions of any subsequent custodian of the Plan's assets.

15. Canada Trust denies that the rate of return on the Plan's assets between 1997 and 2000 was significantly worse than the rates of return experienced by other investors including pension plans during that period. Canada Trust denies that the plaintiffs have suffered or will suffer any of the damages alleged in the Fresh as Amended Statement of Claim, and puts them to the strict proof thereof. In the alternative, the damages claimed are exaggerated, excessive and remote.

16. In the further alternative, Canada Trust denies that any losses suffered by the Plan or the plaintiffs are the result of any breach of duty or contractual obligations by Canada Trust.

17. Canada Trust therefore requests that the claim against it should be dismissed with costs.

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Court File No: 03-CV-244195CP

Ontario
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

**STATEMENT OF DEFENCE OF THE CANADIAN
TRUST COMPANY**

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