

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

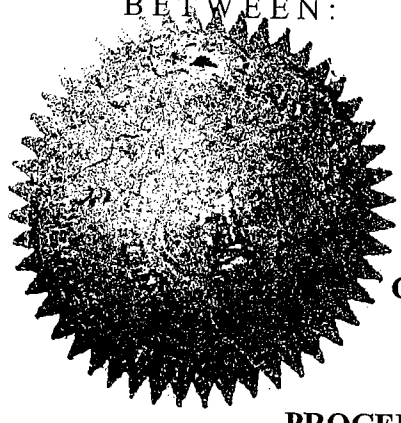
DONALD WATERSTON

Plaintiff

- and -

CANADIAN BROADCASTING CORPORATION

Defendant



PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

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' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, 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.

AMENDED THIS March 31, 2006 PURSUANT TO
 MODIFIÉ CE March 31, 2006 CONFORMÉMENT À

RULE/LA RÉGLE 26.02 (_____)

THE ORDER OF Mr. Justice Cullity
 L'ORDONNANCE DU March 10, 2006

DATED / FAIT LE March 10, 2006

Diana R. O'Neil
 REGISTRAR GREFFIER
 SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$2,500 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 plaintiff's claim and \$500 for costs and have the costs assessed by the court.

Date November 10, 2004
~~March 10, 2006~~ NM

Issued by


 Local registrar

Address of 393 University Avenue 1107#12
 court office Toronto, ON M5G 1E6

TO: Osler Hoskin & Harcourt
Barristers & Solicitors
Box 50, 1 First Canadian Place
Toronto, Ontario M5X 1B8

Attention: Mr. David Stamp

Tel: 416 862-6422

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Solicitors for the Defendant,
Canadian Broadcasting Corporation

CLAIM

1. The Plaintiff claims the following relief:

- (a) An order certifying this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, (the "CPA");
- (b) An order appointing Donald Waterston as the representative for:
 - (i) those people, wherever resident, together with their survivors, who were in receipt of an annuity or pension from the Canadian Broadcasting Corporation under the CBC Pension Plan on December 31, 2002 and/or on December 31, 2005 (the "Class" or "Class Members");
- (c) A Declaration that, at a minimum, the Class Members are entitled to the amortization of ongoing actuarial surplus identified on triennial valuations over a ten (10) year period and the allocation of such surplus between the CBC and the beneficiaries of the Canadian Broadcasting Corporation Pension Plan (the "CBC Pension Plan"), including the Class Members, based upon historical levels of the employer/employee contributions to the CBC Pension Plan in accordance with the Surplus Allocation Formula, as described in the Statement of Claim herein;
- (d) A Declaration that the CBC breached the terms of the Surplus Allocation Agreement and committed breaches of trust and fiduciary duties and has misappropriated funds in respect of the Class Members by applying three-tenths (30%) of the ongoing actuarial surplus (the "Available Surplus") identified on the actuarial valuation report on the CBC Pension Plan as at December 31, 2002 (the "2002 Valuation Report") entirely for its own benefit and without regard for the Surplus Allocation Agreement;
- (e) A Mandatory Order directing the CBC to return to the CBC Pension Plan three-tenths (30%) of the Available Surplus identified on the 2002 Valuation Report used by the CBC to reduce its required employer contributions to the CBC Pension Plan for 2003 and 2004;

- (f) A Mandatory Order directing the CBC to administer the surplus funds identified on the 2002 Valuation Report, any surplus funds identified on the 2005 Valuation Report, and any future surplus identified in triennial valuations, in accordance with the Surplus Allocation Agreement;
- (g) In the alternative, damages for breach of contract, misappropriation, breach of trust, breach of fiduciary, and/or unjust enrichment in an amount calculated in accordance with the Surplus Allocation Agreement, as hereinafter defined, as at December 31, 2002, and as at December 2005, with a reference to determine the allocation of damages amongst the Class Members;
- (h) Punitive, aggravated and exemplary damages in the sum of \$3,000,000.
- (i) Costs on a substantial indemnity basis;
- (j) Any Goods and Services Tax which may be payable on any amount pursuant to the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended, or any other legislation enacted by the Government of Canada;
- (k) any transaction levy which may be payable; and
- (l) Such further and other relief as this Honourable Court may deem just.

THE PLAINTIFF

2. The Plaintiff, Donald Waterston is an individual residing in the Province of British Columbia. Mr. Waterston is a retiree of the CBC who has been in receipt of a pension under the CBC Pension Plan from 1996, and in receipt of a pension on December 31, 2002 and December 31, 2005. Mr. Waterston is a member of the Class as defined herein.
3. Mr. Waterston is the President of the CBC Pensioners National Association (the "Association") which is a corporation, incorporated under the *Canada Corporations Act*, R.S. 1970 c. C-32, under the name THE CBC PENSIONERS' NATIONAL ASSOCIATION/L'ASSOCIATION DES RETRAITÉS DE LA SRC, having its head office in Ottawa, Ontario.

4. Membership in the Association is open to all persons in receipt of an annuity or pension from the Canadian Broadcasting Corporation (the "CBC") Pension Plan ("CBC Pensioners"), together with their survivors. Approximately 4,900 persons, or 64% of CBC Pensioners, are dues paying members of the Association.
5. Virtually all of the Association Members are members of the Class as defined herein.
6. The Association's mandate is to support the general and economic well-being of CBC Pensioners and to represent the interest and concerns of all CBC Pensioners.
7. In fulfillment of this mandate, the Association makes representations to the CBC concerning pension and other benefit issues on behalf of all CBC Pensioners.
8. In recognition of the Association's representation of all CBC Pensioners, including but not limited to, dues paying members of the Association, the CBC has entered into a Memorandum of Understanding with the Association under which the CBC agrees to:
 - (a) consult the Association on issues affecting CBC Pensioners;
 - (b) consider reasonable proposals and options put forth by the Association for improvement to CBC Pensioners' benefit programs; and
 - (c) provide for the automatic deduction of Association dues from the CBC Pension Plan fund in respect of members of the Association.

THE DEFENDANT

9. The CBC is a Canadian federal crown corporation constituted pursuant to the *Canadian Broadcasting Act* and having its head office in Ottawa, Ontario.
10. The CBC is the sponsor and administrator of the CBC Pension Plan.

The CBC Pension Plan

11. The CBC Pension Plan was established effective September 1, 1961, pursuant to the *Broadcasting Act*.

12. The CBC Pension Plan, which forms Part I of Schedule "B" to the "Canadian Broadcasting Corporation Pension Plan and other related Schedules", is registered with the federal Office of the Superintendent of Financial Institutions pursuant to the *Pension Benefits Standards Act*, 1985, R.S. 1985, c.32 and the Regulations thereunder (the "PBSA").
13. Since its inception, the CBC Pension Plan, as amended, has been a contributory defined benefit pension plan. That is, members of the CBC Pension Plan are required to contribute a portion of their wages into the trust fund of the CBC Pension Plan, thereby funding a portion of their own pension benefits and contributing to the surplus assets in the CBC Pension Plan. The CBC, as employer, is required to make contributions sufficient to fund the benefits promised under the CBC Pension Plan, in accordance with the recommendations of its actuaries.
14. All contributions to the CBC Pension Plan are held, irrevocably, in trust for the benefit of members, former members, retirees and all of their beneficiaries (the "Pension Fund").
15. The Pension Fund consists of all contributions made under the terms of the CBC Pension Plan and any and all income and interest thereon.
16. Under the terms of the CBC Pension Plan, the CBC is the administrator of the CBC Pension Plan, acting through the CBC Pension Board of Trustees (the "Board of Trustees").
17. The Board of Trustees administers the CBC Pension Plan in accordance with the terms of Schedule "C" to the CBC Pension Plan (the "Trust Deed").
18. The Board of Trustees is comprised of two (2) representatives of unions representing active employees who are members of the CBC Pension Plan both of whom are appointed by the CBC; one (1) representative of all CBC Pensioners, appointed by the CBC; and four (4) representatives of the CBC, also appointed by the CBC.
19. The representative of CBC Pensioners that sits on the Board of Trustees is currently, and has been since the creation of the Association, an executive member of the Association.

20. The Board of Trustees is empowered, *inter alia*, to hold the assets of the Pension Fund and to make recommendations to the CBC with respect to all matters relating to the CBC Pension Plan and the Pension Fund.
21. As the administrator of the CBC Pension Plan, the CBC owes statutory and common law trust and fiduciary duties to all Plan Beneficiaries, including the Class Members.

The Surplus Allocation Agreement

22. Since at least 1991, ongoing actuarial surplus in the CBC Pension Plan has been apportioned amongst the CBC₁ active employee members and CBC Pensioners (the “Plan Beneficiaries”). The amount available for distribution amongst the Plan Beneficiaries was determined based on the application of the following formula: $A = (V \times \frac{3}{10} S)$

Where:

- S = Surplus identified on a triennial value report;
- A = Surplus amount to be allocated between the CBC Pensioners and active members of the CBC Pension Plan
- V = Ratio of employee contributions to the CBC Plan, expressed as a percentage, and determined as at the valuation date of the valuation report that identified a surplus

(the “Surplus Allocation Formula”)

23. The Surplus Allocation Formula was based on the historical ratio of employer and employee contributions to the CBC Pension Plan.
24. In or around the early to mid-1990s, the Board of Trustees recommended the Surplus Allocation Formula as a fair, equitable and even-handed approach to utilization of ongoing actuarial surplus which was adopted by way of a resolution of the CBC Board of Directors.

25. The Surplus Allocation Formula was recommended by the Board of Trustees and subsequently adopted and implemented by the CBC in recognition and consideration of the contributions made by Plan Beneficiaries, including Class Members, to the advancement of the CBC and, in the particular case of Class Members, their continued contributions as ambassadors on behalf of the CBC in the community.
26. Upon its adoption, the Surplus Allocation Formula became a binding contractual agreement as to the minimum surplus allocation to be shared as between the CBC and the Plan Beneficiaries, including the Class Members (the "Surplus Allocation Agreement").
27. Under the Surplus Allocation Agreement, ongoing actuarial surplus identified on regular triennial valuations of the CBC Pension Plan is to be amortized over a ten (10) year period and three-tenths of the surplus identified on any particular triennial valuation report may be made available for utilization during the inter-valuation period (the "Available Surplus"). The Available Surplus is to be allocated between the CBC and the Plan Beneficiaries, including Class Members, based on historical employer and employee contributions to the CBC Pension Plan.
28. When the Surplus Allocation Agreement was initially proposed and implemented, the CBC determined that the ratio of historical contributions to the CBC Pension Plan at that time, was 60:40 in favour of the CBC.
29. Throughout their employment with the CBC, the Class Members contributed a percentage of their wages to the CBC Pension Plan. Their contributions contributed significantly to the accumulation of surplus assets in the Plan.
30. The Surplus Allocation Agreement has been confirmed, in writing, by the CBC and has been applied to ongoing actuarial surpluses identified on regular triennial valuation reports on the CBC Pension Plan since the mid-1990s.
31. Specifically, in correspondence to the CBC Pensioners dated January 20, 1993 (the "1993 Note to Pensioners"), then President and CEO of the CBC, Gerard Veilleux ("Veilleux"), acting on behalf of the CBC in its capacity as administrator of the CBC Pension Plan, stated that, in respect of the valuation report as at December 31, 1993: "if the valuation

indicates that the fund is in "surplus", then the employer is entitled to reduce its level of contributions...**not for the entire amount of the surplus, but only for the portion that represents the Corporations fair share based on the ratio of contributions...**".
(emphasis added)

32. The 1993 Note to Pensioners advised pensioners that, at the request of the Board of Trustees, the CBC Pension Plan actuaries were costing a number of options for the utilization of the surplus for the benefit of the CBC Pensioners and, further, that it would be up to the Board of Trustees, which includes a representative of the CBC Pensioners, to find the balance among the available options.
33. Finally, the 1993 Note to Pensioners specifically referred to the fact that the CBC Pensioners were all, at one time, loyal and supportive employees who had left a legacy and a mark on the CBC and expressed appreciation for the continued efforts of CBC Pensioners to ensure that the CBC was recognized as an excellent broadcaster, valued by all Canadians.
34. Since the adoption and implementation of the Surplus Allocation Agreement, CBC has utilized its share of the Available Surplus to take contribution holidays and the portion allocated to Plan Beneficiaries has been distributed in the form of cash, increased benefits, and reductions to the active employees' contribution rate.
35. Most recently, the CBC applied the Surplus Allocation Agreement to the surplus identified on the December 31, 1999 valuation report of the CBC Pension Plan (the "1999 Valuation Report").

36. In an electronic communication dated June 20, 2000 (the "June 20, 2000 Letter"), Robert Rabinovitch, CBC President and CEO ("Rabinovitch"), acting on behalf of the CBC in its capacity as administrator of the CBC Pension Plan, advised Plan Beneficiaries that, as a result of the application of the Surplus Allocation Agreement, of the \$616 million of surplus identified in the 1999 Valuation Report, \$185 million was available for allocation between the CBC and the Plan Beneficiaries. Rabinovitch based his calculations on the historical ratio of contributions as determined by the CBC when the Surplus Allocation Formula was first introduced.
37. In the June 20, 2000 Letter Rabinovitch further advised that, in the normal course, \$111 million (60% of \$185 million) would be allocated to the CBC and the remaining \$74 million (40% of \$185 million) would be allocated for distribution amongst Plan Beneficiaries.
38. However, after assessing the economic risks associated to the Pension Fund associated with increasing the amount of surplus to be distributed, the CBC had increased the amount of surplus to be distributed from \$185 million to \$334 million (the "1999 Surplus Distribution Amount").
39. The 1999 Surplus Distribution Amount was determined first by application of the Surplus Allocation Formula and then, after assessing the risk of doing so, increasing the amounts to be allocated and distributed to both the CBC and Plan Beneficiaries such that the amounts distributed continued to represent the historical contribution ratios of 60/40 in favour of the CBC.
40. In the June 20, 2000 Letter, Rabinovitch further advised that the CBC portion of the 1999 Surplus Distribution Amount, being \$200 million, would be used by the CBC to take a contribution holiday and the Plan Beneficiaries portion of the 1999 Surplus Distribution Amount, being the remaining \$134 million, would be distributed as cash refunds to both retirees and active employees and applied to fund a reduction in the contribution rate for current employees.

41. In or about March, 2000 Rabinovitch, acting on behalf of the CBC in its capacity as administrator of the CBC Pension Plan, confirmed, in writing, the CBC's continued application of the Surplus Allocation Agreement and advised the Board of Trustees that should there be a surplus identified on the next actuarial valuation of the CBC Pension Plan, another three-tenths of such surplus would be allocated (the "March 2000 Letter").
42. In the March 2000 Letter, Rabinovitch further confirmed the Surplus Allocation Agreement in stating that the CBC would:
- (a) amortize the calculated surplus over 10 years;
 - (b) since the next evaluation is due in three years, apportion three-tenths of the calculated surplus between the Corporation and the Pension Fund (active members and retirees) in a fair and equitable manner;
 - (c) use its share by way of a contribution holiday;
 - (d) not support any permanent increase to benefits since it could result in a permanent increase to the ongoing costs which, inevitably, would have to be funded out of the CBC's current appropriation; and
 - (e) support a fair and equitable sharing between the active members of the CBC Pension Plan and the CBC Retirees.
43. The next regular triennial valuation of the CBC Pension Plan was to occur as at December 31, 2002.

Breach of Surplus Allocation Agreement and Misappropriation of Assets

44. Historically, Section 8(A) of the Trust Deed required the Board of Trustees to obtain triennial actuarial reports on the financial condition of the CBC Pension Plan and, within sixty (60) days following receipt of such report, submit a copy to the CBC with a recommendation as to the action to be taken with respect to the funded status of the CBC Pension Plan as identified on the valuation report.

45. Pursuant to section 8(A) of the Trust Deed, the Board of Trustees would make recommendations to the CBC regarding the utilization of surplus identified on any triennial actuarial report.
46. In making its recommendations on surplus utilization to the CBC, the Board of Trustees considered the input received from representatives of Plan Beneficiaries, including the Class Members.
47. In the past, the CBC consistently followed the recommendations for surplus utilization made by the Board of Trustees.
48. In response to the Board of Trustees' concern that the CBC, as Plan administrator, should directly consult with Plan Beneficiaries on the issue of surplus utilization, on or about June 18, 2002, the Board of Trustees adopted a resolution amending the Trust Deed to remove Section 8(A).
49. On or about October 17, 2002, subsequent to the CBC, as Plan administrator, assuming responsibility for making all decisions related to surplus utilization, Rabinovitch wrote to Plan Beneficiaries in response to questions about the utilization of any surplus identified on the 2002 Valuation Report.
50. As at this date, the CBC, therefore, assumed full responsibility for making all decisions related to surplus utilization in its capacity as Plan administrator, without the benefit of recommendations from the Board of Trustees.
51. Acting on behalf of the CBC as administrator of the CBC Pension Plan, Rabinovitch represented to Plan Beneficiaries that, due to adverse market conditions, the CBC expected that most of the surplus identified in the 1999 Valuation Report would have vanished and that, as a result, the CBC did not expect that any surplus would be allocated to Plan Beneficiaries.
52. In fact, contrary to Rabinovitch's representations, the 2002 Valuation Report identified a surplus of \$156 million (the "2002 Surplus").

53. Notwithstanding the existence of the 2002 Surplus and the Surplus Allocation Agreement as hereinbefore described and previously adhered to, the CBC made a unilateral decision to utilize three-tenths (30%) of the 2002 Surplus for the purpose of funding contribution holidays for itself in 2003 and 2004; thereby utilizing 30% of 2002 Surplus entirely for its own benefit, and failing to make any distribution of the Surplus to the Plan Beneficiaries, including the Class Members, contrary to the Surplus Allocation Agreement.
54. The remaining 7/10th of the 2002 surplus remains in the Pension Fund and the CBC has refused to make the any distribution of the 2002 Surplus to any of the Plan Beneficiaries, including the Class Members, notwithstanding repeated demands therefore.
55. In so refusing, the CBC has failed to apply the Surplus Allocation Agreement to the Surplus identified on the 2002 Valuation Report.
56. In failing to apply the Surplus Allocation Agreement in respect of the 2002 Surplus, the CBC has breached, and continues to breach, its contractual obligation to all Plan Beneficiaries, including the Class Members, and has misappropriated the assets of the CBC Plan Beneficiaries including the Class Members.

Breach of Trust and Fiduciary Duties

57. The CBC, as employer and administrator of the CBC Pension Plan, is in a fiduciary relationship with the Plan Beneficiaries, including the Class Members.
58. As such, at all material times, the CBC owed fiduciary duties to the Plan Beneficiaries, including the Class Members, to act exclusively in the best interest of Plan Beneficiaries when dealing with the assets under the CBC Pension Plan. In particular, the CBC had a duty to act even-handedly as between Plan Beneficiaries, and to avoid conflicts of interests.
59. The CBC's unilateral breach of the Surplus Allocation Agreement and utilization of the 2002 Surplus solely for its own benefit, constitutes a conflict of interest which amounts to a breach of trust and fiduciary duty.

60. The CBC's breach of trust and fiduciary duty includes, but is not limited to:
- (a) unjust enrichment of itself through the use of the 2002 Surplus solely for its own benefit and for purposes that do not benefit the Plan Beneficiaries, including the Class Members;
 - (b) conflict of interest in implementing a course of action that put its corporate interests ahead of those of the Plan Beneficiaries, including the Class Members; and
 - (c) failure to properly protect the interests and rights of the Plan Beneficiaries, including the Class Members, by giving careful consideration to their interests.

Unjust Enrichment

61. The improper conduct of the CBC, as hereinbefore described, has resulted in the unjust enrichment of the CBC, to the detriment of the Plan Beneficiaries, including the Class Members.
62. In particular, at all material times,
- (a) the CBC was enriched while Plan Beneficiaries continued making their contributions to the CBC Pension Plan which contributed to the maintenance of the surplus. The CBC has enjoyed the benefit of utilizing the 2002 Surplus solely for its own benefit;
 - (b) the Plan Beneficiaries were deprived of a benefit as a result of the CBC's failure to apply the Surplus Allocation Agreement to the 2002 Available Surplus, that is, that 3/10ths of the 2002 Available Surplus be distributed among all of the Plan Beneficiaries, including the Class Members, in accordance with the Surplus Allocation Formula; and
 - (c) there is no juristic reason for CBC's enrichment. Specifically, given the Surplus Allocation Agreement, there is no basis in law for CBC to utilize the 2002 Available Surplus for its own benefit.

63. Further, but for the Surplus Allocation Agreement, the CBC Pensioners' National Association, and one or more of the Plan Beneficiaries, would have pursued a claim for entitlement to the surplus in the CBC Pension Plan on behalf of the Plan Beneficiaries, including the Class Members.
64. The Plaintiff pleads and rely upon section 8 of the Pension Benefits Standards Act, 1985, R.S., 1985, c.2, (2d Supp.).
65. The Plaintiff states that it would be inequitable to permit the CBC to appropriate any portion of the Surplus without regard to the CBC's contractual, common law and equitable obligations to the Plan Beneficiaries, including the Class Members, as set out in the Surplus Allocation Agreement.
66. The Plaintiff proposes that this action be tried in the City of Toronto.

DATE November 10, 2004
~~March 10, 2006~~
 N.M

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Solicitors for the Plaintiff

DONALD WATERSTON

CANADIAN BROADCASTING
and
CORPORATION

Plaintiff

Defendant

Court File No: 04-CV-278718 ~~CMH~~

CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

AMENDED STATEMENT OF CLAIM

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