

**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 HUDSONS BAY COMPANY LIMITED,
ROYAL TRUST CORPORATION, and
INVESTORS GROUP TRUST COMPANY LIMITED**

Defendants

PROCEEDING UNDER the *Class Proceedings Act*, 1992.

**STATEMENT OF DEFENCE OF
HUDSON'S BAY COMPANY**

1. The defendant Hudson's Bay Company, incorrectly named in the Amended Statement of Claim as The Hudson's Bay Company Limited ("HBC") admits the allegations in the second paragraph numbered 1 and paragraphs 2, 4, 6-9, 21, and 36 of the Amended Statement of Claim.
2. HBC denies the claim in the first paragraph numbered 1 and the allegations in paragraphs 3, 5, 10-20, 22-35, 37-58 of the Amended Statement of Claim.

3. HBC is a Canadian corporation which owns and operates retail department stores across Canada. HBC acquired a majority interest in Zellers Inc. in 1978 (and the remaining interest in 1981), and acquired Simpsons Limited in 1979 and K-Mart Canada Co. – K-Mart Canada Cie in 1998.

4. HBC is the administrator of the Dumai Pension Plan (“the Plan”). The members of the Plan currently include:

- (i) former employees of Simpsons Limited who were members of the Plan on or before January 1, 1988 and
- (ii) present and former employees of Zellers Inc. and 3584747 Canada Inc. (formerly K-Mart Canada Co. – K-Mart Canada Cie) who otherwise qualify for membership under the terms of the Plan.

5. The Plan was created effective December 28, 1971. At that time it was known as the Simpsons Limited Supplementary Pension Plan. The assets of the Plan were originally held pursuant to a Trust Agreement between Simpsons Limited and Canada Permanent Trust Company dated December 28, 1971. The original Plan text is referred to herein as the 1971 Plan Text and the original trust agreement herein is referred to as 1971 Trust Agreement.

6. Article 12 of the 1971 Trust Agreement provided that in the event of discontinuance of the Plan, the trustee was to dispose of the assets as directed in writing by the employer in accordance with the provisions of the Plan. The 1971 Plan Text in article 16.02 contemplated that in the event that the Plan was terminated, surplus would revert to the benefit of

the employer once provision had been made for all pensions and other benefits in respect of service up to the date of such termination.

7. The 1971 Plan Text and the 1971 Trust Agreement thus permitted reversion of surplus assets in the Plan to the employer upon termination of the Plan. Subsequent amendments and restatements of the Plan reaffirmed (but did not change) the employer's entitlement to surplus on Plan termination. There has been no actual or purported revocation of any trust governing any of the assets of the Plan.

8. The Plan since its inception has permitted the employer to unilaterally amend the Plan provided that no amendment reduces any benefits which have accrued to members up to the date of such amendment. The power of amendment in the Plan has always included a power to expand the definition of those entitled to membership in the Plan.

9. Effective January 1, 1988, the Plan was amended to provide that no employee who was not a member of the Plan on January 1, 1988 would become a member of the Plan after that date. HBC at that time, however, retained its broad power to amend the provisions of the Plan including the criteria for Plan membership. Membership in the Plan was not irrevocably closed or frozen at this or any other time.

10. Effective January 1, 1994, HBC further validly and legally amended the Plan. At that time, the criteria for membership in the Plan was amended so as to include specified employees of Zellers Inc. This amendment was duly filed with Revenue Canada and the Pension

Commission of Ontario. This amendment neither purported to constitute nor constituted in fact a revocation, either full or partial, of any trust.

11. Effective February 28, 1998, HBC further validly and legally amended the Plan. The criteria for membership in the Plan was amended at that time to include specified employees of 3584747 Canada Inc., formerly K-Mart Canada Co.– K-Mart Canada Cie. This amendment was duly filed with Revenue Canada and the Pension Commission of Ontario. This amendment neither purported to constitute nor constituted in fact a revocation, either full or partial, of any trust.

12. All assets held in respect of the Plan have been held by Royal Trust since November 1, 1998. Between 1984 and November 1, 1998, all assets held in respect of the Plan were held by Investors Group Trust.

13. The beneficiaries of the trust holding the Plan assets includes the employer and all people with entitlements under the Plan including people who are members of the Plan as a result of the Plan amendments referred to in paragraphs 10 and 11 above. All of the assets held in the trust are available to meet the pension entitlements of everyone with a benefit entitlement under the Plan.

14. The Plan has, since its inception, permitted the employer to reduce or eliminate employer contributions to the Plan when assets in the Plan are, in the opinion of the actuary retained in respect of the Plan, more than sufficient to cover existing and accruing liabilities.

15. As a result of an actuarial surplus in the Plan, the employer has not since 1985 made or been legally required to make any contributions to the Plan. The actuarial reports and other documents in respect of the Plan that were regularly filed with the regulator fully disclosed the absence of any employer contributions.

16. HBC has at all times funded the Plan in accordance with its terms. No monies held in respect of the Plan have been used for any purpose other than to pay benefits to members and former members of the Plan and their beneficiaries or to pay expenses permitted by the terms of the Plan. No money held in respect of the Plan has been used or diverted to National Trust or Sun Life as alleged in paragraphs 32, 37 and 39 of the Amended Statement of Claim.

17. From time to time, the liabilities of Plan beneficiaries together with a pro-rata share of Plan assets have been transferred from the Plan to other pension plans sponsored by HBC. Such transfers were made in accordance with the reciprocal transfer provisions of the Plan. Such transfers were disclosed to the regulator and HBC has complied and is continuing to comply with all regulatory requests in respect of the transfers. The funding ratio of the Plan was not impacted by any such transfers and the Plan valuations continued at all time to show a substantial actuarial surplus in the Plan. Contrary to the allegation in paragraphs 1(i), 45 and 46 of the Amended Statement of Claim, the existing beneficiaries of the Plan have no interest in or claim in respect of the assets transferred.

18. The Plan has not been terminated and HBC has no plans to terminate the Plan.

19. HBC has made ad hoc enhancements to the pension benefits of retirees on two occasions since 1997. HBC denies that it owes or has ever owed any duty to members of the Plan to consider or approve benefit enhancements or cost of living increases.

20. HBC denies that it has breached any trust or fiduciary duty in respect of the Plan.

21. HBC denies that the Plaintiffs or any members of the purported class have suffered any loss or damage and denies that they are entitled to any damages, whether compensatory, exemplary or punitive in nature.

22. With specific reference to paragraphs 1(k) and 52 to 55 of the Amended Statement of the Claim, HBC states that:

- (a) HBC is a beneficiary of the trust holding assets in respect of the Plan and has not and will not consent to any variation of that trust.
- (b) The other current beneficiaries of the trust holding the assets in respect of the Plan have not unanimously (or even by a plurality) consented to a variation of the trust.
- (c) Plan members are continuing to accrue benefits under the Plan.
- (d) HBC retains the right to add people to the Plan and thus to add beneficiaries to the related trust.
- (e) A pension trust in respect of an ongoing pension plan cannot be varied without the employer's consent.

- (f) A variation of the trust in respect of the Plan would not be in the best interest of the trust beneficiaries.

23. All or parts of the claims asserted by the plaintiffs are barred by the *Limitations Act*, R.S.O. 1990 c. L-15. HBC further pleads and relies upon the doctrine of laches.

24. Accordingly, HBC requests that this action be dismissed with costs.

March 24, 2003

BLAKE, CASSELS & GRAYDON LLP
Box 25, Commerce Court West
Toronto, Ontario M5L 1A9

Neil N. Finkelstein LSUC#21640K
Tel: 416-863-2266

J.W. Galway LSUC#28423P
Tel: 416-863-3859
Fax: 416-863-2653

Solicitors for the Defendant Hudson's Bay
Company

TO: **KOSKIE MINSKY**
Barristers & Solicitors
20 Queen Street West
Suite 900, P.O. Box 52
Toronto, ON M5H 3R3

Mark Zigler (LSUC #19757B)
Andrew J. Hatnay (LSUC #31885W)

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

Solicitors for the Plaintiffs

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
P.O. Box 50
1 First Canadian Place
Toronto, ON M5X 1B8

J. Brett Ledger
Tel: 416-862-6687

Lawrence Ritchie
Tel: 416-862-4237

Vaso Maric
Tel: 416-862-4851

Solicitors for the Defendant
Royal Trust Corporation of Canada

RONALD SUTHERLAND and JOHN SCOTT, Plaintiffs v. THE HUDSONS BAY COMPANY LIMITED et al., Defendants

SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

STATEMENT OF DEFENCE

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
Box 25, Commerce Court West
Toronto, Ontario
M5L 1A9

Neil N. Finkelstein LSUC#21640K
Tel: 416-863-2266

J.W. Galway LSUC#28423P
Tel: 416-863-3859
Fax: 416-863-2653

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