

**DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE**

BETWEEN:

NICOLE LACROIX and ROSIE LADOUCEUR

Plaintiffs  
(Appellants)

-and-

CANADA MORTGAGE AND HOUSING CORPORATION and  
MARC ROCHON, CLAUDE POIRIER-DEFOY, JIM MILLAR,  
KAREN KINSLEY, GERALD NORBRATEN, JEAN-GUY  
TANGUAY, DAVID METZAK and BRIAN KNIGHT  
being the Trustees of the CANADA MORTGAGE  
AND HOUSING CORPORATION PENSION FUND

Defendants  
(Respondents)

Proceeding under the **Class Proceedings Act, 1992**

**NOTICE OF APPEAL**

**THE PLAINTIFFS APPEAL** to the Divisional Court from the Decision of the Honourable Mr. Justice Charbonneau dated the 26<sup>th</sup> day of January, 2009 made at Ottawa.

**THE APPELLANT ASKS** that the Order be set aside and an Order be granted for the relief set out in the Plaintiffs' Notice of Motion dated March 2007 by which the Plaintiffs seek to amend the Statement of Claim and the Certification Order dated the 4<sup>th</sup> May 2000.

**THE GROUNDS FOR APPEAL** are as follows:

**Partial Termination**

- (a) The learned motions judge erred in law by failing to find a cause of action based on the employer/administrator's conflict of interest under s.8(10) and 8(11) of the *Pension Benefits*

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*Standards Act* and the employer/administrator's failure to voluntarily declare a partial termination of the pension fund pursuant to s.29(5) of the Act for the benefit of the plan members, where it acted in its own interest by appropriating \$252 million dollars of the surplus for its own benefit.

(b) The learned motions judge erred in law by failing to consider in his analysis of this issue the employer/administrator's concession that for the purposes of the Jurisdiction and Certification Motions only the Court could assume that CMHC had breached its trust and fiduciary obligations under s.8(10) and 8(11) of the *Pension Benefits Standard Act*.

(c) The learned motions judge erred in applying *Cousins v. Canada (Attorney General)* [2008] O.J. No. 1011 as in that case entitlement was an unresolved issue to be left for another time,

“Given this admission by all parties that it takes negotiations to determine an entitlement to surplus and that those negotiations occur after there has been a termination, it is hard to conclude that a member has any right to surplus at the time of the termination.”

(See *Cousins*, at para. 48)

(d) The learned motions judge erred by failing to assume the Plaintiffs' entitlement to surplus for the purpose of certification and instead found the issue of entitlement was still a live issue.

(e) The learned motions judge thereby also erred by failing to certify the ownership common issue in relation to the partial termination claim.

(f) The learned motions judge erred in finding that the Supreme Court of Canada Decision in *Monsanto* has no application to s.29(12) of the *Pension Benefits Standards Act*.

(g) The learned motions judge erred in law by failing to appreciate that the employer/administrator's obligation to avoid conflicts under s.8(10) of the *PBSA* and to carry out its

common law trust obligations would extend equally to partial termination and partial windup under the *PBSA*.

- (h) The learned motions judge erred in law by failing to find that the Plaintiffs would have a cause of action against the employer/administrator in damages.
- (i) The learned motions judge erred in finding that the Court could not determine the threshold issues of value of the surplus, the effective date of termination and the exact number of members affected by the partial termination.
- (j) The learned motions judge erred in law in his analysis on this issue by ignoring the uncontradicted evidence obtained from the Office of the Superintendent of Financial Institutions.
- (k) The learned motions judge erred in law in his analysis of this issue by failing to consider or ignoring the evidence that demonstrated OSFI was not an impartial tribunal to determine the issues in this case.
- (l) The learned motions judge erred in law by misinterpreting and misapplying the Federal Court of Appeal decision in *Cousins, supra* which decision confirmed the uncontradicted evidence obtained from OSFI that the Superintendent has never used and will never use his/her discretionary power under s.29(2)(a)(b)(c) to declare a partial termination of a pension fund which is in surplus.
- (m) The learned motions judge erred in law by failing to follow or properly apply Justice Lax's decision in *McGee v. London Life Assurance Company* [2008] O.J. No. 1760 which held that issues relating to ownership and distribution of surplus should not be bifurcated between the Court and the Regulator but should be determined by the Court.
- (n) The learned motions judge erred in law by creating a irreconcilable conflict between his decision on the Defendant's Jurisdiction motion and his decision on the Plaintiffs' Certification Motion, as in the Jurisdiction motion he found the Plaintiffs had a cause of action under s.8(10)(11)

of the *PBSA* and that the court had jurisdiction to hear it.

(o) The learned motions judge erred in law by ignoring Justice Maranger's decision on the Defendants leave to appeal the Jurisdiction decision where Justice Maranger found that the jurisdiction decision "...simply allows for an action pursuant to section 8(10) and 8(11) when improper conduct is being alleged in not declaring a partial termination. The jurisdiction seems clear."

(p) The learned motions judge's decision on this Certification Motion also creates an irreconcilable conflict with his earlier decision dated the 15<sup>th</sup> January 2002 where he found it was far from obvious that the decision as to whether there was a partial termination must or even ought to be left to the Superintendent.

(q) The learned motions judge erred in finding that OSFI was the preferable procedure when OSFI had no jurisdiction to determine the plaintiffs' claim for damages, including punitive damages, for breach of fiduciary duty and negligence.

(r) The learned motions judge erred in failing to find that the partial termination issue was a certifiable common issue.

(s) The learned motions judge erred in law by finding no rational relationship between the proposed common issue dealing with partial termination and the class definition.

(t) The learned motions judge erred in law where he found that the class definition arbitrarily excluded individuals who would have the same claim.

(u) The learned motions judge erred in finding that potential conflicts of interest would likely arise in determining the effective date of termination, the total value of the surplus and the amount of surplus which must be set aside for division amongst the on-going members.

(v) The learned motions judge erred in law by failing to appreciate that the Superintendent

would approve any voluntary proposal by the employer/administrator to partially terminate the plan as long as the proposal did not put the pension benefits at risk.

(w) The learned motions judge erred in law by failing to appreciate that in the employer/administrator's proposal for a voluntary partial termination of a pension fund trust it would have to include all of the beneficiaries of the plan who were entitled to share being the Plaintiffs and class members.

(x) The learned motions judge's finding that there was substantial doubt that the Superior Court is the preferable procedure to determine the partial termination issue or that one of the applicable provisions will more than likely be s.29(2) of the *PBSA* creates an irreconcilable conflict with his Jurisdiction Decision dated the 4<sup>th</sup> March 2008 and thus cannot be sustained.

(y) The learned motions judge erred in finding that the Superintendent acting under the purview of the statutory framework is the preferable procedure to decide issues with regard to the effective date of termination, the members specifically affected by the termination and the value of the surplus.

(z) The learned motions judge erred in law when he found that the Plaintiffs had not set out a workable formula in relation to individual damages as the formula was based on expert actuarial evidence and set out a simple method of determining such damages.

(aa) The learned motions judge erred in finding that the Plaintiffs' litigation plan is vague and incomplete.

(bb) The learned motions judge erred in finding that the proceeding would soon become unmanageable.

(cc) The learned motions judge erred by failing to find that any potential conflicts could be resolved through the creation of sub-classes or through the opt-out provisions of the *Class*

*Proceedings Act.*

(dd) The learned motions judge erred by failing to certify the punitive damage common issue in relation to the partial termination claim.

(ee) The learned motions judge erred in law by taking an overly restrictive approach in his analysis of the various provisions of the *Class Proceedings Act* and their relationship to the issues raised in this action.

**Estoppel Issue**

(ff) The learned motions judge erred in finding that the Plaintiffs had not plead all of the essential elements of the estoppel.

(gg) The learned motions judge erred in law in his analysis of this issue as he failed to assume, as he was required to do, that the Plaintiffs could prove the surplus was held in trust by CMHC as employer/administrator for their benefit.

(hh) The learned motions judge erred in law in his analysis of this issue as he failed to assume, as he was required to do, that the Plan Members had a beneficial interest in the on-going surplus.

(ii) The learned motions judge erred in finding that there was no evidentiary record of any type to support the Plaintiffs' claims in estoppel.

(jj) The learned motions judge erred in law by misinterpreting and misapplying the principles enunciated by the Court of Appeal for Ontario in *Hembruff v. Ontario Municipal Employees Retirement Board* (2005) 78 O.R. (3d) 562.

(kk) The learned motions judge erred in law by misinterpreting and misapplying the law relating to estoppel when used as a shield which, in this case, was meant to parry the employer/administrator's anticipated defence that when the pension plan members voluntarily left the plan, they gave up any future right to surplus.

- (ll) The learned motions judge erred in law by failing to appreciate that when a fiduciary such as the employer/administrator in this case makes a representation either orally or through silence, reliance will either be assumed or the onus will shift to the defendants to show non-reliance and that in either case litigation would be advanced.
- (mm) The learned motions judge erred in finding that the success on the estoppel common issue would not mean success for all.
- (nn) The learned motions judge erred in finding that the individual issues would overwhelm any common aspect of the estoppel issue.
- (oo) The learned motions judge erred in finding that a class proceeding was not a preferable procedure to resolve the estoppel issue.
- (pp) The learned motions judge erred in failing to find that the estoppel issue was a certifiable common issue.
- (qq) The learned motions judge's finding on this issue is inconsistent with his earlier decision in *Lacroix v. Canada Mortgage and Housing Corporation* [2001] O.J. No. 6251 at para. 55 where he held that the Plaintiffs could lead evidence relating to the employer/administrator's representation that the surplus belongs solely to the employer and that the members had no beneficial interest in it and that the surplus was not subject to a trust.

#### **Amendments to Statement of Claim**

- (rr) The learned motions Judge erred in failing to allow the Plaintiffs' proposed amendments to the Amended Amended Statement of Claim in their entirety.

*This Appeal is being brought pursuant to s.30 of the Class Proceedings Act, S.O. 1992 c. 6*

The Appellant requests that this Appeal be heard at Ottawa.

DATED at Ottawa this 25th day of February, 2009.

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Defendant(s)(Respondents)

Court File No.

**DIVISIONAL COURT  
SUPERIOR COURT OF JUSTICE**

Proceedings commenced in Ottawa

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