



No. L041024  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

LUCIEN LIEBERMAN AND MARJORY MORRIS

Plaintiffs

AND:

BUSINESS DEVELOPMENT BANK OF CANADA

Defendant

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c.50

**STATEMENT OF CLAIM**

**The Parties**

1. The Plaintiff, Lucien Lieberman is a retired employee of the Defendant Business Development Bank of Canada ("BDC") and resides in Vancouver, British Columbia.
2. The Plaintiff, Marjory Morris is a retired employee of the BDC, and resides in Vancouver, British Columbia.
3. The BDC is a corporation established by the *Federal Business Development Bank Act* and continued by the *Business Development Bank of Canada Act*, R.S.C. 1995, c. 28.
4. The BDC carries on business in British Columbia, including at the BDC Tower – Bentall Centre, 1 – 505 Burrard, Vancouver, British Columbia and the Plaintiffs were employed by the BDC in British Columbia.

**The Pension Plan**

5. The BDC is the administrator of a pension plan for employees of the BDC (the "Pension Plan"). The Pension Plan is registered with the federal Office of the

- Superintendent of Financial Institutions pursuant to the *Pension Benefits Standards Act*, R.S. 1985, c. 32 ("PBSA").
6. The Pension Plan was established as of January 1, 1976 as the Federal Business Development Bank Pension Fund. The Pension Plan is a successor plan to the Bank of Canada Pension Plan, which was originally established as of March 12, 1936.
  7. The Pension Plan is a defined benefit pension plan.
  8. The Pension Plan expressly provides that the Pension Plan fund (the "Fund") includes contributions and earnings on investment of the contributions and that the Pension Plan is vested in the trustees.
  9. Since inception, the Pension Plan has been implicitly impressed with a trust for the individuals entitled to present or future benefits from the Fund.
  10. The following three categories of individuals (collectively referred to herein as "Plan Members") are among those entitled to present or future pension benefits from the Fund:
    - (a) a person employed by the BDC who is a member of the Pension Plan and is accruing credits under the Pension Plan (referred to herein as "active members");
    - (b) a person who has ceased membership in the Pension Plan, but the value of his or her accrued benefits was left in the Pension Plan such that the individual has a future entitlement to pension benefits from the Fund (referred to herein as "deferred vested members"); and
    - (c) a person who previously participated in the Pension Plan and is receiving benefits from the Fund (referred to herein as "retired members").
  11. Pre-retirement and post-retirement survivor benefits are payable from the Pension Plan to surviving spouses, beneficiaries and estates of Plan Members.

12. On about June 4, 1991, the BDC entered into a trust agreement relating to the Fund (the "Trust Agreement"). The recitals to the Trust Agreement provide that the Pension Plan and Fund are for the benefit of employees of the BDC and their surviving spouses and beneficiaries.
13. All contributions made to the Fund and any income generated from those contributions are irrevocably contributed for the sole benefit of the Plan Members and their surviving spouses and beneficiaries.

### **The Proposed Class**

14. Each Plaintiff is a retired member of the Pension Plan. The proposed class in this action are persons who were:
  - (a) retired members, entitled to benefit payments from the Plan with respect to credited service prior to April 9, 1997;
  - (b) surviving spouses entitled to receive post-retirement survivor benefits with respect to retired members' credited service prior to April 9, 1997;
  - (c) deferred vested members, entitled to benefit payments from the Plan with respect to credited service prior to April 9, 1997;
  - (d) spouses, beneficiaries and/or estates who are entitled to pre-retirement or post-retirement survivor benefits due to a relationship with persons in paragraphs 13(a) or 13(c); and
  - (e) the beneficiaries and/or estates of persons in paragraphs 13(a) - 13(d) who died prior to any settlement or judgement in this action.
15. Throughout their employment with the BDC, the Plaintiffs and class members who were employed by the BDC were required to be members of the Pension Plan. Further, throughout their employment, the Plaintiffs and class members who were employed by the BDC were obligated to make, and did make, contributions to the

Pension Plan. Their contributions contributed significantly to the accumulation of the surplus in the Pension Plan.

16. The Plaintiffs are unaware of the exact number of class members. According to a report on the actuarial valuation of the Pension Plan as at December 31, 1997 the Pension Plan had approximately 714 pensioners, including the Plaintiffs, or surviving spouses in receipt of a monthly pension payment, 18 children of former members entitled to benefits, 253 deferred vested members and 1,098 active members.

### **Fiduciary Responsibilities**

17. Section 8(3) of the PBSA imposes the duties of a trustee on the administrator of a pension plan and pension fund with respect to Plan Members and any other persons entitled to pension benefits or refunds under the plan. Thus, the BDC owes statutory fiduciary duties to the Plaintiffs and plaintiff class. Section 8(4) of the PBSA requires that the trustees exercise the care, diligence and skill that a person of ordinary prudence would exercise when dealing with the property of another person.
18. The BDC, as Pension Plan administrator, is in a fiduciary relationship to the Plaintiffs and plaintiff class. In consequence, at all times material to this litigation, the BDC owed the Plaintiffs and plaintiff class all the private law duties of a fiduciary.
19. At all material times, the BDC had a responsibility to administer the Fund, including any surplus, in accordance with its statutory and private law fiduciary duties.
20. The fiduciary duties owed by the BDC include the duties:
  - (a) to act in the best interests of the Plan Members and other beneficiaries when dealing with the Fund;
  - (b) to act even-handedly as between Plan Members and other beneficiaries; and
  - (c) to avoid any conflicts of interest between itself and any Plan Members and other beneficiaries.

### The Surplus

21. The Pension Plan has had a surplus for some time. The surplus is the amount by which the Pension Plan's assets and projected income exceed the Pension Plan's projected liabilities. As at December 31, 2001, the actuarial report filed by the BDC in respect of the Pension Plan valued the Pension Plan surplus at \$127,000,075.00 on a going concern basis and at \$114,358,000.00 on a solvency basis.
22. Effective January 1, 1987 the Pension Plan documents were amended (the "1987 Amendments") to provide that:
  - (a) the BDC shall receive any surplus upon termination or winding up of the Pension Plan after all liabilities are met; and
  - (b) the BDC may, on an ongoing basis, apply all or any portion of the surplus to reduce the contribution requirements and to receive any amounts of surplus permitted to be refunded in accordance with the PBSA and its regulations.
23. In 1994, the BDC reduced its contributions to the Pension Plan. In 1995, the BDC ceased making contributions to the Pension Plan.
24. Effective April 9, 1997, by resolution of the BDC Board of Directors (the "Board"), the contributions of active members to the Pension Plan were suspended on a temporary basis (the "1997 Amendments"). The suspension of contributions is referred to herein as the "Contribution Holiday."
25. On May 6, 1998, by resolution of the Board, the Contribution Holiday for active members was made permanent, subject to reintroduction if the Pension Plan surplus is less than ten percent of liabilities or the Board decides to reintroduce contributions (the "1998 Amendments").
26. The 1997 and 1998 Amendments also included other benefit enhancements, including, without limitation, increased survivor benefits, for active members.

27. On about May 6, 1998, by resolution of the Board, the BDC resolved to make a one-time \$2 million cash distribution to retired members and beneficiaries.
28. An equitable allocation of the surplus should have been made to all Plan Members and beneficiaries in proportion to the actuarial value of the Pension Plan's liabilities to each Plan Member.
29. The value of the BDC's total contribution holidays is in excess of \$22.8 million. The value of the contribution holiday for members is not known, but prior to 1997, employee contributions were 7.5% of salary. The value of the contribution holiday and additional benefits that were given to the employer and the active members greatly exceeds the \$2 million distribution of surplus that was made to the plaintiff class.
30. The 1987, 1997 and 1998 Amendments disproportionately benefit the BDC, active members as of those dates, and subsequent hires at the expense of the plaintiff class.

#### **Administrative Expenses**

31. As stated above, since inception, the Pension Plan has been implicitly impressed with a trust for the beneficiaries of the Pension Plan and the Pension Plan is vested in the trustees.
32. At the time the trust was created, no provision was made for administrative expenses to be paid from the Fund and no power of revocation was reserved to the settlor.
33. In about June 4, 1991, the Trust Agreement purported to partially revoke the power of the trustees by requiring that, on the written direction of the BDC, fees and expenses must be paid out of the Fund by the trustees and that the monies paid out of the Fund would no longer constitute part of the Fund.

34. Since 1991, without limitation, the BDC has caused the following fees and expenses (collectively, the "Plan Expenses") to be paid out of the Fund in connection with the administration of the Pension Plan and Fund:
- (a) the fees and expenses incurred by the administrators and trustees for performance of their duties in connection with the Pension Plan;
  - (b) custodial fees;
  - (c) the fees of investment managers and consultants for services in respect of the investment of Fund assets;
  - (d) the fees of accounting firms in respect of their audits of the Fund;
  - (e) the expenses of the Pension Plan administrator and the fees of any agents necessary to calculate and pay pension benefits;
  - (f) miscellaneous expenses relating to the Pension Plan and Fund; and,
  - (g) legal fees and the fees of actuarial and other consulting firms and other service providers relating to the Pension Plan and Fund.
35. The payment of the Plan Expenses constitutes a partial revocation of trust, unjustly enriching the BDC to the detriment of the Plaintiffs and Plaintiff class.

### **Breach of Fiduciary Duties**

36. The BDC has breached the statutory and private duties owed to the Plaintiffs and plaintiff class by amending the Pension Plan in its own corporate interest, acting in conflict with the interests of Plan Members and beneficiaries, and unjustly enriching itself to the detriment of the Plan Members and beneficiaries. More specifically, but without limitation:
- (a) The 1987 Amendments constitute an attempt to divert funds from the Pension Plan to the benefit of the BDC and to the detriment of the Plaintiffs and the plaintiff class. The Pension Plan was impressed with an irrevocable trust for the benefit of the Plan Members and their surviving spouses and beneficiaries,

- and as such the 1987 Plan Amendments are an unauthorized revocation of the Pension Plan trust fund.
- (b) The Contribution Holidays for the BDC were of significant financial benefit to the BDC. The BDC breached the irrevocable trust by relieving itself of its obligation to make several million dollars in employer contributions to the financial detriment of Plan Members and survivors.
  - (c) The diversion of money from the Fund, to pay the Plan Expenses is a partial revocation of trust. It unjustly enriched the BDC at the expense of the Plaintiffs and class members and constitutes a breach of fiduciary duty.
37. In breach of its duty of even-handedness, the BDC has amended the Plan in a disproportionate fashion, favouring active and future members as at April 9, 1997, to the detriment of retired and deferred vested members, and their beneficiaries as of that date. More specifically, but without limitation:
- (a) The contribution holidays created by the 1997 and 1998 Plan Amendments and other benefits to active members were of significant financial benefit to active members and future members as of the dates of those amendments, but provided no benefit to the Plaintiffs and the other class members.
  - (b) The BDC did not provide a corresponding benefit to the Plaintiffs and plaintiff class. The \$2 million cash distribution was not equivalent to the value of the substantial benefits created by the contribution holidays for active members and future members.

### **Relief Claimed**

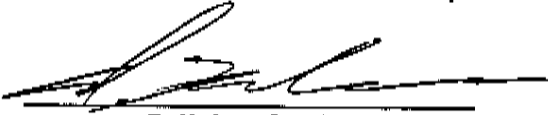
38. As a result of the Defendant's breaches of fiduciary duty the Plaintiffs and plaintiff class have suffered financial loss and damages.
39. The Plaintiffs claim on their own behalf and on behalf of the plaintiff class:
- (a) an order certifying this proceeding as a class proceeding;



- (b) general, special and equitable damages for breach of trust, breach of fiduciary duty, breach of statutory duty, and revocation of trust;
- (c) an order that the surplus in the Fund be allocated impartially and even-handedly amongst the Plaintiffs and Plaintiff Class by granting those Members, with service prior to April 9, 1997 payments of proportionate share of the surplus, pro rata to their April 9, 1997 liabilities;
- (d) an accounting and lump sum and/or periodic cash distributions of the surplus in the Fund to the members of the plaintiff class in accordance with the actuarial liabilities which they represent;
- (e) a reference for an accounting of all Plan Expenses that the BDC unlawfully caused to be paid out of, charged to or reimbursed from the Fund (the "Revoked Funds");
- (f) an order that all Revoked Funds, together with interest compounded at the rate of Fund return, be equitably allocated and distributed among the Plan Members in accordance with the direction of this Honourable Court;
- (g) in the alternative to (f), an order requiring the BDC to make restitution to the Fund in respect of all Revoked Funds;
- (h) pre-judgment and post-judgment interest at the Fund valuation rate compounded annually;
- (i) costs; and
- (j) such further and other relief as to this Honourable Court seems just.

PLACE OF TRIAL: VANCOUVER, BRITISH COLUMBIA

DATED at Vancouver, November 29, 2004



Solicitor for the Plaintiffs

**THIS STATEMENT OF CLAIM** is issued by David A. Klein of the firm of KLEIN LYONS, Barristers and Solicitors, whose place of business and address for service and delivery is at #1100 - 1333 West Broadway, Vancouver, B.C. V6H 4C1. Telephone: (604) 874-7171. Fax: (604) 874-7180.

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