

AMENDED THIS May 25/01 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À

RULE/LA RÉGLE 3.02 ()

THE ORDER OF Justice Cumming
L'ORDONNANCE DU

DATED / FAIT LE March 13, 2001

Court File No.97-CV-135179

REGISTRAR / GREFFIER
SUPERIOR COURT OF JUSTICE / COUR SUPÉRIEURE DE JUSTICE

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**PATRICK BERRY, JAMES DELUCE,
JEFFREY KARELSEN, ROBERT JAMES SIMERSON
AND ERNEST ZURKAN**

Plaintiffs

- and -

**CHRIS PULLEY, TOM FRASER, LARS T. JENSEN,
JAMES GRIFFITH, PETER WALLACE, GEORGE COCKBURN,
DENIS BELHUMEUR, GREG MUTCHLER,
GARY DEAN, YVES FILION, HOWARD MALONE,
KEVIN VAILLANT and GORDON GREIG**

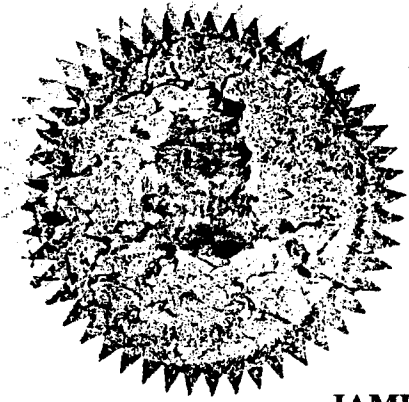
Defendants

FRESH STATEMENT OF CLAIM
Proceeding under the *Class Proceedings Act, 1992*

TO THE DEFENDANTS

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 plaintiff's lawyer or, where the plaintiff does not have a lawyer,



serve it on the plaintiff, 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.

Date: *Nov. 4, 1994*

Issued by: 
Local Registrar

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Solicitors for the Defendants,
Chris Pulley, Tom Fraser, Lars T. Jensen
and James Griffith

CLAIM

1. The plaintiffs claim, pursuant to the *Class Proceedings Act, 1992*, on behalf of themselves and all pilots employed by Air Ontario who were so employed and were members of the Canadian Airline Pilots Association on March 28, 1995:

- (a) a declaration that the defendants have breached their contract with the plaintiffs as pleaded herein;
- (b) damages for breach of contract, conspiracy, interference with economic interests and interference with contractual relations in the sum of \$300,000,000.00;
- (c) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act, R.S.O. 1990, c.C.43*, as amended;
- (d) their costs of this action on a solicitor and client basis; and
- (e) such further and other relief as to this Honourable Court seems just.

The Plaintiffs

2. Patrick Berry and Robert James Simerson reside in the Town of Wasaga Beach in the County of Simcoe. James Deluce, Jeffrey Karelsen and Ernest Zurkan reside in the City of London in the County of Middlesex.

3. The plaintiff pilots were employed by Air Ontario and were members of the Canadian Airline Pilots Association (“CALPA”) at all material times. The plaintiffs bring this action on behalf of themselves and all other pilots who were employed by Air Ontario and were members of CALPA on March 28, 1995, the date upon which Arbitrator Michel G. Picher released his Award described in paragraph 39 herein.

The Defendants

4. The defendants Chris Pulley resides in the City of Mississauga in the Regional Municipality of Peel, Tom Fraser resides in the City of Guelph in the County of Wellington, Lars T. Jensen resides in the Town of Orangeville in the County of Dufferin and James Griffith resides in the Town of Niagara-on-the-Lake in the Regional Municipality of Niagara. Peter Wallace resides in the City of Toronto in the Province of Ontario, George Cockburn resides in the City of Montréal in the Province of Québec, Denis Belhumeur resides in the City of Montréal in the Province of Québec, Greg Mutchler resides in the City of Toronto in the Province of Ontario, Gary Dean resides in the City of Winnipeg in the Province of Manitoba, Yves Filion resides in the City of Montréal in the Province of Québec, Howard Malone resides in the City of Toronto in the Province of Ontario, Kevin Vaillant resides in the City of Toronto in the Province of Ontario and Gordon Greig resides in the City of Toronto in the Province of Ontario.

5. The named defendants were pilots employed by Air Canada, including pilots on furlough and were members of CALPA on March 28, 1995.

6. The defendant Chris Pulley ("Pulley") was the Chairman of the Air Canada Master Executive Council (the "Air Canada MEC") on and before March 28, 1995 until September 1995 and a member of CALPA on and before March 28, 1995 until November 14, 1995. Pulley was also a Merger Representative of the Air Canada pilots until September, 1995. Pulley is sued as Chairman of the Air Canada MEC and as a Merger Representative.

7. The defendant Tom Fraser was a member of Local Council 11 (Toronto), a member of its Local Council Executive and a member of the Air Canada MEC on and before March 28, 1995 until November 14, 1995. The defendant Peter Wallace was a member of the Air Canada MEC on and before March 28, 1995 until November 19, 1995. The defendants Tom Fraser

and Peter Wallace are sued as a representative defendants of those members of the proposed defendant class who were members of the Air Canada MEC.

8. The defendant George Cockburn was a member of the Local Executive Council of Local Council 14 (Montréal) and is sued as a representative defendant of those members of the proposed defendant class who were members of the Local Executive Councils of Local Councils 1, 7, 11, and 14.

9. The defendants Denis Belhumeur and Greg Mutchler were members of the Negotiating Committee of Air Canada pilots on and before March 28, 1995 until November 14, 1995 and are sued as representative defendants of those members of the proposed defendant class who were members of the Negotiating Committee of Air Canada pilots.

10. The defendants Gary Dean and Yves Fillion were members of the Special MEC Merger Advisory Committee of Air Canada pilots and are sued as representative defendants of those members of the proposed defendant class who were members of the Special MEC Merger Advisory Committee of Air Canada pilots.

11. The defendant Howard Malone was a Merger Representative of the Air Canada pilots on or before March 28, 1995 until in or about the month of September, 1995. Howard Malone is sued as a representative defendant of those members of the proposed defendant class who were Merger Representatives of the Air Canada pilots.

12. The defendants Lars T. Jensen, James Griffith and Kevin Vaillant were Local Council members of CALPA until November 14, 1995. The defendants James Griffith and Kevin Vaillant are sued as representative defendants of members of the defendant class who did not hold positions on the Air Canada MEC, Local Executive Councils, the Negotiating Committee of Air Canada pilots, the Special MEC Merger Advisory Committee or a position

as a Merger Representative and who acted to prevent implementation of the Picher Award by communicating directly or indirectly with representatives on Local Executive Councils, Chris Pulley, the Air Canada MEC, the Negotiating Committee or Merger Representatives to encourage or direct them to reject the Picher Award, to refuse to negotiate the Picher Award or to use any means to stop the implementation of the Picher Award or who communicated their opposition to the Picher Award to Air Canada.

13. The defendant Gordon Greig is sued as a representative defendant of the defendants who are not described in paragraphs 7 to 12 herein and who took no steps to encourage the implementation of the Picher Award in the face of the clear intention of the remaining defendants to reject the Picher Award.

14. The proposed classes of persons to be represented by the defendants are all pilots who were employed by Air Canada, including pilots on furlough, and who were members of the Air Canada bargaining unit and were members of CALPA on March 28, 1995.

The Canadian Air Line Pilots Association

15. CALPA is a trade union founded in 1937 and certified under the provisions of the *Canada Labour Code* and was the exclusive bargaining agent for pilots employed by Air Canada and its connector airlines including pilots employed by Air Ontario until November 14, 1995. On or about November 14, 1995 CALPA ceased to be the exclusive bargaining agent of pilots employed by Air Canada.

16. The objectives of CALPA include establishing and exercising the right of collective bargaining as a means of entering into collective agreements with respect to the terms and conditions of work and determining fair rates of compensation, optimum working conditions

and uniform principles of seniority for the airline piloting profession and seeking their adoption.

17. Seniority is a matter of great importance to civil airline pilots as it affects a pilot's compensation, retirement benefits, progress to command, choice of routes, rosters and holidays as well as his or her opportunity to choose types of aircraft to fly and training to fly new types of aircraft.

CALPA Constitution and Administrative Policy

18. CALPA adopted a Constitution and Administrative Policy which, among other things, defined the procedure to be followed for the integration of pilot seniority lists of affected airlines when, in the opinion of the President of CALPA, a merger or consolidation of two or more airlines is pending.

19. The CALPA Constitution and Administrative Policy constitutes a contract between each and every member of CALPA throughout the relevant time period. The defendants were bound by the terms of the Constitution and Administrative Policy.

20. By the terms of the CALPA Constitution and Administrative Policy, Pulley and the members of the proposed defendant classes were members of Local Councils of CALPA at Air Canada bases. Local Councils were governed by Local Executive Councils. The Chairmen and Vice Chairmen of the Local Executive Councils were members of the Air Canada MEC.

21. The Air Canada MEC was elected by CALPA members employed by Air Canada, pursuant to the CALPA Constitution, and functioned as the highest governing body in all matters affecting, exclusively, the active membership of CALPA employed by Air Canada.

Contractual obligations on the members of the proposed defendant classes

22. The contractual obligations imposed on members of the proposed defendant classes under the CALPA Constitution and Administrative Policy, which were to be performed in good faith, included:

- (a) Each member of CALPA, by being a member of CALPA, agreed and subscribed, without reservation to all the provisions, conditions and stipulations in the CALPA Constitution and Policy Manuals;
- (b) The members of Local Executive Councils were responsible for implementing and administering the policies of CALPA as it pertained to the Local Council;
- (c) The Chairman of the Air Canada MEC was responsible for the negotiation and administration of the collective agreement between CALPA and the airline, for the implementation and administration of the policies of CALPA as it pertained to the Air Canada MEC and was to be CALPA's representative to Air Canada for the purpose of implementing the objectives and policies of CALPA;
- (d) The members of the Air Canada MEC were responsible for selecting the Negotiating Committee and approving all proposals for negotiation with the airline; and
- (e) The members of the Negotiating Committee were responsible for the formulation of contract negotiation demands, based upon the direction of the Air Canada MEC.

Merger Policy of CALPA

23. The Administrative Policy of CALPA directs that it is the policy of CALPA that when, in the opinion of the President of CALPA, a merger or consolidation of one member airline with another is pending, the pilot seniority lists of the affected airlines shall be integrated.

24. The Master Executive Council (the "MEC") is the governing body of the active members of CALPA employed by a particular airline. The Administrative Policy defines a specific Merger Policy to be followed by the members of CALPA and imposes specific obligations on the President of CALPA, the Chairmen of Master Executive Councils and CALPA members upon the declaration by the President of CALPA that a merger of one member airline with another is pending. The Merger Policy includes the following procedures and obligations to negotiate or mediate a merged seniority list of the affected airlines:

- (a) The President shall establish an effective date for activation of the Merger Policy;
- (b) The President is directed to notify the Master Executive Councils of the affected airlines that it is their responsibility to activate procedures set out in the Administrative Policy for the integration of their pilot seniority lists;
- (c) Master Executive Councils shall appoint Merger Representatives who shall assemble relevant data on each pilot on their current seniority lists;
- (d) The President shall convene a meeting of the Merger Representatives of the affected airlines. The Merger Representatives shall attempt to compile an integrated seniority list by direct negotiation in good faith; and
- (e) The President may invoke mediation if a negotiated list has not been achieved.

25. The Merger Policy further directs the members of CALPA to proceed to mandatory binding arbitration should a merged seniority list not be negotiated or mediated. The Merger Policy provides:

- (a) If the procedure in the Administrative Policy does not result in an integrated seniority list then arbitration, conducted in accordance with the Administrative Policy, shall be mandatory;

- (b) The decision of the Arbitration Board shall be final and binding on all parties to the arbitration;
- (c) The integrated pilot seniority list shall be accepted by CALPA; and
- (d) The stated intention of CALPA will be to negotiate the integrated pilot list as the seniority list to be used by the successor airline.

Letters of Understanding 17 and 18

26. The Air Canada Master Executive Council was elected by CALPA members employed by Air Canada, pursuant to the CALPA Constitution, and functioned as the highest governing body in all matters affecting, exclusively, the active membership of CALPA employed by Air Canada.

27. On December 6, 1986, the Air Canada MEC asked the President of CALPA to declare a merger of the Air Canada, Air Ontario Ltd., Austin Airways Ltd. and Air B.C. pilot groups and on the same day the CALPA President declared a merger of the respective pilot groups.

28. In June, 1987 Air Ontario Ltd. and Austin Airways Ltd. were amalgamated to form Air Ontario Inc.

29. On or about July 19, 1988 the Air Canada MEC negotiated a Letter of Understanding 17 and a Letter of Understanding 18 (hereinafter referred to as "LOU 17" and "LOU 18" respectively), with Air Canada and requested the President of CALPA to execute the two LOU's pursuant to the CALPA Constitution.

30. LOU 17 prohibited Air Canada from entering into or continuing with a feeder arrangement with any regional or connector carrier that used aircraft having a configuration

in excess of 85 passenger seats or a combined passenger/freight or freight payload in excess of 25,000 lbs. The LOU also provided that a regional carrier would not be permitted to replace Air Canada on a route where Air Canada had withdrawn from the route without prior consultation between Air Canada and CALPA.

31. LOU 18 provided a mechanism for Air Canada to hire a limited number of pilots from their regional airlines. Pilots hired by Air Canada from the regional airlines would be placed at the bottom of the Air Canada Pilot seniority list.

32. The CALPA Constitution limited the jurisdiction of Master Executive Councils, including the Air Canada MEC, to matters affecting, exclusively, the active members of CALPA employed by the particular airline. The board of directors of CALPA were concerned that LOU 17 and LOU 18 affected not only Air Canada pilots, but also Air Ontario pilots, due to the merger of the pilot groups of Air Canada and Air Ontario Inc., and that it was therefore outside the jurisdiction of the Air Canada MEC to negotiate LOU 17 and LOU 18. Accordingly, the board of directors of CALPA passed resolutions on July 19, 1988 that the provisions of LOU 17 and LOU 18 did not affect, exclusively, the pilots of Air Canada as a result of the merger of Air Canada and Air Ontario Inc. referred to in paragraph 27 herein. The CALPA President refused to execute LOU 17 and LOU 18.

33. In order to alleviate the concerns of Air Ontario pilots and the board of directors of CALPA, and to induce the President of CALPA to execute LOU 17 and LOU 18, an agreement was made on August 9, 1988 by Norman Bindon, the President of CALPA and P.J. Maloney, the Air Canada MEC Chairman acting on behalf of the Air Canada pilots, that LOU 17 and LOU 18 were not a substitute for the merger of Air Canada and Air Ontario Inc. pilot groups and that the merger would proceed.

34. The agreement referred to in paragraph 33 herein was subsequently ratified by a resolution of the board of directors of CALPA at its meeting held August 16-18, 1988.

35. In reliance upon the agreement described in paragraph 33 herein and induced by the agreement of the Air Canada pilots to proceed with the merger of the Air Canada and Air Ontario pilot groups, the CALPA President executed LOU 17 and LOU 18 on behalf of CALPA in November, 1988. As a result, the amount of flying available to the plaintiffs and other regional and connector pilots was restricted.

36. The agreement to proceed with the merger of the Air Canada and Air Ontario pilot groups described in paragraph 33 herein was a further binding obligation on the defendants to proceed in accordance with the Merger Policy as described in paragraphs 24 and 25 herein.

The Declaration of Merger

37. On or about March 1, 1991 the Chairmen of the Master Executive Councils of Air Canada and Air Canada's connector airlines, Air Alliance, Air B.C., Air Nova, Air Ontario and N.W.T. Air unanimously requested that the President of CALPA declare a merger of their airlines pursuant to the Merger Policy of CALPA in order to integrate the pilot seniority lists of their respective airlines. The CALPA President declared a merger of the pilot seniority lists of the airlines on March 1, 1991.

38. The representatives of the Master Executive Councils of Air Canada and its connector airlines were unable to achieve a merged seniority list through negotiation or mediation. The merger of the seniority lists was arbitrated through mandatory arbitration before Arbitrator Michel G. Picher in 1994. The Master Executive Councils of the affected airlines including Air Canada participated in the arbitration process. On March 28, 1995, Arbitrator Picher

released his award merging the seniority lists of the affected airlines (“Picher Award”). The Merger Policy provides that the Arbitrator’s Award is final and binding.

39. The President of CALPA formally accepted the Picher Award on behalf of CALPA on April 5, 1995 and served formal notice to Air Canada of the decision of Mr. Picher and served notice of CALPA's intention to implement the merged seniority list with Air Canada through direct negotiations with Air Canada and CALPA as soon as possible. The Air Canada Master Executive Council took steps to oppose the negotiation with Air Canada of the merged seniority list.

40. The Chairman of the Air Canada Master Executive Council announced the refusal of the Council to be bound by the Picher Award and on November 9, 1995 the Air Canada pilots voted in favour of certifying the Air Canada Pilots Association (“ACPA”) as their exclusive bargaining agent thereby withdrawing from CALPA.

Breach of Contract

41. Pulley and the members of the proposed defendant classes breached their contracts with the members of the proposed plaintiff class described in paragraphs 18 through 36 herein. The particulars of the breaches include the following:

- (a) the defendants did not take any steps to cause the negotiation in good faith of the merged seniority list with Air Canada;
- (b) the defendants refused to be bound by the Award of Arbitrator Picher dated March 28, 1995 and took steps in an effort to avoid being bound by the Award; and
- (c) the defendants refused to support and opposed the negotiation of the merged seniority list with Air Canada.

- (d) the members of the proposed defendant classes, including the Special MEC Merger Advisory Committee and the Local Executive Councils instructed their representatives on the Air Canada MEC to reject the Picher Award, to refuse to negotiate the Picher Award and to use any and all means to stop the implementation of the Picher Award;
- (e) in the alternative to subparagraph (d), the members of the proposed defendant classes failed to take steps to prevent their representatives from rejecting the Picher Award, refusing to negotiate the Picher Award or using any and all means to stop the implementation of the Picher Award, when they knew that their representatives planned to do those acts;
- (f) the Air Canada MEC members declared the Picher Award to be unacceptable, refused to be bound by the Picher Award and refused to act to implement the Picher Award;
- (g) Pulley, the Air Canada MEC Chairman, the Air Canada MEC members and the Air Canada Merger Representatives refused to participate in meetings to fashion the seniority and bidding list in accordance with the Picher Award;
- (h) the Air Canada MEC members authored a newsletter directed to pilots in the proposed defendant class which improperly advised the pilots in the proposed defendant class that the Picher Award would not govern them unless they voted in favour of it;
- (i) Pulley, the Air Canada MEC Chairman, the Air Canada MEC members and the members of the Negotiating Committee refused to negotiate the Picher Award with Air Canada in contract negotiations in 1995;
- (j) Pulley, the Air Canada MEC Chairman, instructed the Negotiating Committee of the Air Canada MEC that no proposal for the implementation of the Picher Award could be made to or discussed with Air Canada in the contract negotiations in 1995; and
- (k) the Air Canada MEC members did not replace their Merger Representatives after the Merger Representatives resigned in September 1995.

42. Each of the acts taken or failed to be taken by the Air Canada MEC members, including its Chairman, the Merger Representatives and the members of the Negotiating Committee pleaded in paragraphs 41(f) through 41(k) herein was directed or authorized by the members of the proposed defendant classes or alternatively was ratified by the members of the proposed defendant classes.

43. Each of the members of the proposed defendant classes is liable to the members of the proposed plaintiff class for his own breach of contract and is liable for the breach of contract by the Air Canada MEC members, including its Chairman, the Merger Representatives and the members of the Negotiating Committee.

44. As a result of the breaches of contract by the members of the proposed defendant classes, the members of the proposed plaintiff class have suffered loss of seniority and consequent remuneration and other benefits to which they would have been entitled had the merged seniority list been negotiated with Air Canada and many of the Air Canada pilots who were members of CALPA on March 28, 1995 have received remuneration and other benefits at the expense of the plaintiffs.

45. The damages suffered by the members of the proposed plaintiff class include loss of seniority rights, loss of income and loss of pension benefits. The plaintiffs will provide particulars of such claims prior to trial.

Conspiracy

46. From March 28, 1995 until November 14, 1995, Pulley and the members of the proposed defendant classes conspired with each other by expressly or impliedly entering into an agreement or agreements to prevent the implementation of the Picher Award. Further:

- (a) They acted with unlawful means, the particulars of which are described in paragraphs 41 and 42 above;
- (b) They knew or ought to have known that injury would result to the members of the proposed plaintiff class as a result of their conduct as pleaded herein;
- (c) Their predominant purpose was to cause injury to the members of the proposed plaintiff class.

Unlawful Interference with Economic Interests

47. The CALPA Merger Policy, to which each member of the proposed defendant class agreed and subscribed, expressly stated that it was the intention of CALPA to negotiate the integrated pilot list as the seniority list to be used by the successor airline.

48. Pulley and the members of the proposed defendant classes knew or ought to have known that the members of the plaintiff class had an expectancy interest (i) that CALPA, and in particular Pulley and the Air Canada Negotiating Committee directed by the Air Canada MEC, would attempt in good faith to negotiate the integrated pilot list in the Picher Award with Air Canada and (ii) that Air Canada would agree to such an integrated pilot list if negotiated in good faith.

49. Pulley and the members of the proposed defendant classes intentionally and unlawfully interfered with the expectancy of the members of the proposed plaintiff class.

50. The particulars of the conduct of Pulley and the members of the proposed defendant classes are described in paragraphs 41 and 42 herein.

Interference with Contractual Relations

51. To the knowledge of Pulley and all members of the proposed defendant classes, the Air Canada MEC members, including its Chairman, the Merger Representatives and the members of the Negotiating Committee were obligated under the CALPA Constitution and Administrative Policies to fulfill the obligations described in paragraph 18 through 25 herein.

52. To the knowledge of Pulley and all members of the proposed defendant classes, the Air Canada MEC members and the proposed members of the defendant classes were further bound by the agreement described in paragraph 33 herein to proceed in accordance with the Merger Policy.

53. The members of the proposed defendant classes knowingly and intentionally induced the Air Canada MEC members, including its Chairman, the Air Canada Merger Representatives and the members of the Negotiating Committee to breach their obligations as described in paragraphs 52 and 53 herein. In particular, the members of the proposed defendant classes instructed Pulley and their representatives on the Air Canada MEC to reject the Picher Award, to refuse to negotiate the Picher Award and to use any and all means to stop the implementation of the Picher Award. In the alternative, the members of the proposed defendant classes failed to take steps to prevent their representatives from rejecting the Picher Award, refusing to negotiate the Picher Award or using any and all means to stop the implementation of the Picher Award, when they knew that their representatives planned to do those acts.

54. The Air Canada MEC members, including its Chairman, knowingly and intentionally induced the remaining members of the proposed defendant classes to breach their contracts by authoring a newsletter directed to the proposed defendant class which improperly advised

the proposed defendant class that the Picher Award would not govern them unless they voted in favour of it.

Damages from Conspiracy, Interference with Economic Interests and Interference with Contractual Relations

55. As a result of the conspiracy, interference with economic interests and interference with contractual relations, as aforesaid, the members of the proposed plaintiff class have suffered loss and damage as described in paragraphs 44 and 45 herein.

56. The plaintiffs rely on Rules 17.02(f), (g), (h) and (o) of the *Rules of Civil Procedure* to support service outside Ontario.

57. The plaintiffs propose that this action be tried at the City of Toronto

DATE: June 26, 1998

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PATRICK BERRY et al
Plaintiffs

- and - **CHRIS PULLEY et al**
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO

FRESH STATEMENT OF CLAIM

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