Court of Appeal File No. C56991
Court File No. 05-CV-287556CP

COURT OF APPEAL FOR ONTARIO

BETWEEN:

DAVID KIDD, ALEXANDER HARVEY,
JEAN PAUL MARENTETTE, GARRY C. YIP, LOUIE NUSPL,
SUSAN HENDERSON and LIN YEOMANS

Plaintiffs (Respondents)

– and –

THE CANADA LIFE ASSURANCE COMPANY,
A.P. SYMONS, D. ALLEN LONEY and JAMES R. GRANT

Defendants (Appellant)

Proceeding under the *Class Proceedings Act, 1992*

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PART I - NATURE OF THE APPEAL

1. This is an appeal by The Canada Life Assurance Company ("Canada Life") from an order of Justice Perell (the "Motions Judge") in which he refused to approve an amendment to a previously approved class action settlement notwithstanding that the amendment was supported by the Representative Plaintiffs and the Motions Judge's own acknowledgment that the Class members would be better off under the amended settlement than under the previously approved and still binding settlement.

PART II - OVERVIEW

2. This action was commenced in 2005 and involved claims related to the ownership of surplus arising from the partial wind up of The Canada Life Canadian Employees' Pension Plan

(the "Plan") following the acquisition of Canada Life by the Great–West Life Assurance Company in 2003 (defined below as the "Integration Partial Wind Up" or "IPWU"). The action also involved claims relating to the payment of Plan expenses from Plan assets.

3. The parties were able to reach a settlement of the issues in this action and the terms of the settlement were incorporated in a surplus sharing agreement (defined below as the "Surplus Sharing Agreement" or "SSA"). The SSA provides, *inter alia*, for the sharing and distribution of any surplus arising from the IPWU between the IPWU members and Canada Life.

4. In a judgment dated January 27, 2012 (the "Judgment"), the Motions Judge approved the settlement that had been reached between the parties in this class proceeding.

5. As of the date of the settlement approval motion, the most recent estimate by Canada Life's actuarial advisor of the surplus in the Plan attributable to the IPWU was $54 million. This estimate was at a point in time, namely as at June 30, 2011.

6. Within a month of the settlement having been approved, however, Canada Life received an update from its actuarial advisor indicating that as at December 31, 2011, the estimated value of the surplus available for distribution under the IPWU had decreased dramatically. The two biggest factors contributing to the decrease in the estimated surplus attributable to the IPWU between June 30, 2011 and December 31, 2011 were the dramatic drop in interest rates over the relevant period and the fact that significantly more IPWU members than expected elected (or were deemed to have elected) to stay with the Plan rather than choosing the option of taking a commuted value of their pension entitlement out of the Plan.

7. After extensive negotiations throughout most of 2012, the parties reached agreement on amendments to the SSA (the "Amended SSA") which increased the estimated amount of surplus available for distribution to IPWU members and certain other Class members and provided for the possibility of a future surplus distribution if surplus arose in the Plan in the future.

8. The parties sought the Court's approval of the Amended SSA. The Motions Judge, despite concluding that Class members would be better off under the Amended SSA than under the previously approved SSA (which he acknowledged continued to be binding), dismissed the motion. Canada Life asserts he erred in doing so.

PART III - FACTS

9. The action concerned the ownership of surplus assets in the Plan and the use of such assets to pay plan administration expenses. The action also sought declarations of three other potential partial wind ups of the Plan (in addition to the IPWU, which had already been declared by Canada Life).

> Reasons of Perell J. dated March 28, 2013 ("Reasons"), paras. 5, 30-36, 41, Appeal Book and Compendium, Vol. 1, Tab 3, pp. 12, 15-16

10. The Judgment approved the settlement of this matter in accordance with the terms of the SSA between, *inter alia*, Canada Life, the Representative Plaintiffs, and the Executive Committee of the Canada Life Canadian Pension Plan Members' Rights Group ("CLPENS"). The SSA provides for the sharing and distribution of the surplus in the Plan among Canada Life and eligible Class members related to the following past events:

(a) the termination, resignation and retirement of members of the Plan following the 2003 acquisition of Canada Life by The Great-West Life Assurance Company (the "Integration Partial Wind Up" or "IPWU");

(b) the termination of Plan members employed by Indago Capital Management Inc. as a result of the February 26, 1999 merger of that company with Laketon Investment Management Ltd. (the proposed "Indago Partial Wind Up");

(c) the termination of Plan members employed by Pelican Food Services Limited as a result of the outsourcing of operations by Canada Life in 2001 (the proposed "Pelican Partial Wind Up"); and,

(d) the termination of Plan members employed by Adason Properties Limited (notified of their termination between November 1, 1999 and February 28, 2001) (the proposed "Adason Partial Wind Up").

Reasons, paras. 6, 33-36, Appeal Book and Compendium, Vol. 1, Tab 3, pp. 12, 15-16

Judgment dated January 27, 2012 ("Judgment"), Appeal Book and Compendium, Vol. 1, Tab 5, pp. 46-55

11. The Class members who will participate in the settlement include:

(a) Plan members included in the Integration Partial Wind Up (2,149);

(b) Plan members included in the Indago Partial Wind Up (15);

(c) Plan members included in the Adason Partial Wind Up (37);

(d) Plan members included in the Pelican Partial Wind Up (38);

(e) deferred/vested members of the Plan as of April 12, 2005 who are not part of the groups described above (452);

(f) members of the Plan in receipt of a monthly pension from the Plan as of April 12, 2005, or the surviving spouse of a member if the member has died and the spouse is receiving a pension from the Plan on that date, who are not part of the groups described in (a) to (d) above (826);

(g) all active members of the Plan as at June 30, 2005, plus any new Plan members from that date up to date of certification as a class proceeding (1,682); and

(h) former Plan members who would have been included in the Integration Partial Wind Up but for their employment in Quebec (29).

Reasons for Decision of Perell J. dated February 6, 2012, para. 71, Appeal Book and Compendium, Vol. 2, Tab 7, p. 359

12. Under the SSA, 69.66% of the partial wind up surpluses (after expenses) is payable to Class members (other than the active Class members) and 30.34% is payable to Canada Life. The amount of surplus to be distributed to each member is based on his or her respective Plan liabilities but the SSA provides that the minimum share payable to an eligible Class member will be $1,000. The SSA further provides active Class members with a two-year contribution holiday and contemplates the court approving a variation of trust in connection with the transfer of Plan assets to a new pension plan and making certain declarations in connection with the Plan and the new pension plan.

Reasons, paras. 48-49, Appeal Book and Compendium, Vol. 1, Tab 3, p. 17

13. At the date of Judgment, the most recent information available and presented to the Court disclosed that as of June 30, 2011, the estimated surplus attributable to the IPWU (the "IPWU Surplus") available for distribution was $54 million (net of projected expenses and legal fees).

Reasons, paras. 57, 59, Appeal Book and Compendium, Vol. 1, Tab 3, p. 18

14. Within one month after the Judgment, Canada Life's actuarial advisor advised Canada Life that the estimated value of IPWU Surplus had dropped to below $10 million as of December 31, 2011 (net of projected expenses and legal fees). The IPWU Surplus continued to decline through 2012 and as of August 31, 2012 was estimated to be $2.6 million. The principal reasons for the decrease were:

(a) a decline in interest rates over the relevant period which substantially increased the estimated cost of purchasing annuities for members of the IPWU Group; and

(b) a higher than assumed take-up rate among members of the IPWU Group who elected or were deemed to elect to receive their pension benefit in the form of a guaranteed deferred or immediate pension instead of transferring a lump sum commuted value out of the Plan (annuity purchase prices have been greater than the commuted values of pension benefits).

These factors were outside the control of the parties.

Affidavit of Jonathan Foreman sworn March 8, 2013 ("Affidavit of Jonathan Foreman"), paras. 6-7, Exhibit Book, Vol. 1, Tab 1, pp. 2-3; Appeal Book and Compendium, Vol. 2, Tab 8, pp. 370-371

Exhibit B to Affidavit of Jonathan Foreman, Exhibit Book, Vol. 1, Tab 1(B), pp. 110-112; Appeal Book and Compendium, Vol. 2, Tab 9, pp. 381-383

Affidavit of Marcus Robertson sworn March 8, 2013, paras. 8-11, 15, Exhibit Book, Vol. 2, Tab 2, pp. 230-234; Appeal Book and Compendium, Vol. 2, Tab 10, pp. 386-390

Reasons, paras. 10-11, 58-59, 65, 67-69, Appeal Book and Compendium, Vol. 1, Tab 3, pp. 12-13, 18-19

15. The Representative Plaintiffs, CLPENS Executive Committee, Class Counsel and their expert actuarial advisor Marcus Robertson had extensive discussions to analyze this new information, test its accuracy, and consider next steps. The Court approved letters sent to the Class in May 2012 which described the decline in IPWU Surplus, and told the Class that the parties were working together to address the situation, and would keep the Class informed of any developments.

Reasons, paras. 60, 64, 70, Appeal Book and Compendium, Vol. 1, Tab 3, pp. 18-20

16. In the interim, as contemplated by the SSA, Canada Life proceeded to solicit bids for the provision of immediate and deferred indexed annuities for members of the IPWU Sub-class who elected the guaranteed pension option. All of the annuity providers approached to submit a bid declined to do so.

Reasons, para. 71, Appeal Book and Compendium, Vol. 1, Tab 3, p. 20

17. Because annuities were not available for members of the IPWU Sub-class, to implement the settlement and to comply with its obligations under the *Pension Benefits Act* (Ontario), in August 2012 Canada Life proposed transferring the assets and liabilities of the IPWU Sub-class members to the ongoing portion of the Plan (thereby preventing further erosion of the surplus).

Reasons, paras. 72-73, Appeal Book and Compendium, Vol. 1, Tab 3, p. 20

Affidavit of Jonathan Foreman, paras. 20-21, Exhibit Book, Vol. 1, Tab 1, pp. 5-6; Appeal Book and Compendium, Vol. 2, Tab 8, pp. 373-374

18. The Representative Plaintiffs filed a motion (which was scheduled to be heard on September 27, 2012) objecting to Canada Life's intention to transfer the assets and liabilities of the IPWU Sub-class to the ongoing portion of the Plan, and sought the appointment of a mediator. This motion was settled on the basis that, *inter alia*, the Representative Plaintiffs would not object to this transfer. Justice Strathy (as he then was) subsequently agreed to assist the parties in resolving their differences in respect of the SSA.

Reasons, paras. 75-78, Appeal Book and Compendium, Vol. 1, Tab 3, pp. 20-21

19. The parties attended a one-day mediation facilitated by Justice Strathy in December 2012, and negotiations in writing (which were further facilitated by Justice Strathy) continued until the parties came to an agreement to amend the SSA. The amendments to the SSA are captured in the Amended SSA.

Reasons, para. 79, Appeal Book and Compendium, Vol. 1, Tab 3, pp. 21-22

Affidavit of Jonathan Foreman, paras. 24-25, Exhibit Book, Vol. 1, Tab 1, p. 6; Appeal Book and Compendium, Vol. 2, Tab 8, p. 374

20. The Amended SSA augments the amount of IPWU Surplus which is otherwise available for distribution to the Class and also provides for a potential future distribution of surplus to the IPWU Sub-class if a surplus develops in the Plan in the future.

21. The main terms of the Amended SSA are as follows:

(a) Canada Life would augment the amount of IPWU Surplus through:

(i) waiving its right to any interest on the amount of its expense reimbursement under the SSA that accrues during the period from August 31, 2012 to December 31, 2013 (estimated at $800,000); and

(ii) waiving its right to reimbursement of $500,000 of its professional fees;

(b) The Representative Plaintiffs and CLPENS Executive Committee would augment the amount of IPWU Surplus available for distribution by waiving their entitlement to reimbursement of future legal fees (but not disbursements) previously approved by the Court (estimated at $200,000), which would be directed to the benefit of the IPWU Sub-class and Inactive Eligible Class Members;

(c) For any member of the IPWU Sub-class who elected to receive a deferred or immediate pension, their portability rights are satisfied by Canada Life transferring their assets to the ongoing portion of the Plan effective August 31, 2012;

(d) The assets and liabilities related to members of the IPWU Sub-class who elect a deferred or immediate pension would be notionally segregated (the "Segregated Portion") until the completion of the second distribution (discussed below), if any;

(e) Canada Life would fund top-up payments (at an estimated cost of $1.2 million) in order to ensure that IPWU Sub-class receive the minimum surplus shares of $1,000 contemplated under the SSA;

(f) There would be the potential for a second surplus distribution to members of the IPWU Sub-class and Inactive Eligible Class Members if a surplus exists in the Segregated Portion of the Plan as at December 31, 2014, subject to the following conditions:

(i) 10% of the 2014 Gross Surplus would be deducted off the top and remain in the Plan as a cushion;

(ii) the 2014 Gross Surplus would be reduced to take into account any contributions and other payments (together with interest at the Plan rate of return) made by Canada Life into the Plan after August 31, 2012 and that are notionally allocated to the Segregated Portion; and

(iii) 69.66% of the net Surplus, to a maximum payment of $15 million, would be paid to the IPWU Sub-class and Inactive Eligible Class Members, in accordance with the percentages set out in the SSA.

Reasons, para. 79, Appeal Book and Compendium, Vol. 1, Tab 3, pp. 21-22

Affidavit of Jonathan Foreman, para. 28, Exhibit Book, Vol. 1, Tab 1, pp. 7-8; Appeal Book and Compendium, Vol. 2, Tab 8, pp. 375-376

Exhibit D to the Affidavit of Jonathan Foreman, Exhibit Book, Vol. 1, Tab 1(D), pp. 187-196; Appeal Book and Compendium, Vol. 2, Tab 11, pp. 393-402

22. The aggregate value of benefits to be paid to the Class under the Amended SSA (excluding any potential second surplus distribution), if approved, was estimated at the time of the motion below to be:

Integration Partial Wind Up Surplus		$2,600,000
	+CL Interest waived:	$800,000
	+CL Legal fees waived:	$500,000
	Total IPWU Surplus:	$3,900,000
	Member share:	$2,716,740
	+Estimated CL Top Up:	$1,200,000
	+KM/HP Legal Fees:	$200,000
	Member Share:	**$4,116,740**
	TOTAL:	**$4,116,740**
Indago Partial Wind Up Surplus		$1,100,000
	Member Share:	**$766,260**
Adason Partial Wind Up Surplus		$6,200,000
	Member Share:	**$4,318,920**
Pelican Partial Wind Up Surplus		$2,900,000
	Member Share:	**$2,020,140**
Total Member Share of Estimated Surplus		**$11,222,060**
Value of Contribution Holidays for Active Class Members		**$4,600,000**
Total Estimated Benefit to Class Members Under the Amended SSA		**$15,822,060**

Reasons, paras. 79-80, Appeal Book and Compendium, Vol. 1, Tab 3, pp. 21-22

Affidavit of Jonathan Foreman, para. 28, Exhibit Book, Vol. 1, Tab 1, pp. 7-8; Appeal Book and Compendium, Vol. 2, Tab 8, pp. 375-376

23. Under the SSA, the member share of the estimated IPWU surplus is $1,811,160 (69.66% x $2,600,000). In comparison, under the Amended SSA, the member share of the estimated IPWU surplus is $4,116,740. Total estimated benefits to Class members under the Amended SSA are $15,822,060 (excluding any potential second surplus distribution).

24. Following the conclusion of negotiations in respect of the Amended SSA, the parties appeared before the Motions Judge on February 12, 2013 and obtained approval to distribute notices to the Class advising them that amended settlement terms had been agreed upon. Court-

approved letters were sent to all Class members in February 2013, describing and explaining the decline in the IPWU Surplus and the effect on the particular Sub-classes, the terms of the Amended SSA, and giving notice of the next steps in the proceeding.

> Affidavit of Jonathan Foreman, para. 40, Exhibit Book, Vol. 1, Tab 1, p. 11; Appeal Book and Compendium, Vol. 2, Tab 8, p. 379
>
> Exhibit E to Affidavit of Jonathan Foreman, Exhibit Book, Vol. 1, Tab 1(E), pp. 198-211; Appeal Book and Compendium, Vol. 2, Tab 12, pp. 403-416

25. Class Counsel, the Representative Plaintiffs, and Marcus Robertson (the Representative Plaintiffs' actuarial advisor), recommended the Amended SSA as fair, reasonable and in the best interests of the Class.

> Reasons, para. 84, Appeal Book and Compendium, Vol. 1, Tab 3, p. 22

26. A motion was brought before Justice Perell on March 18, 2013 seeking court approval of the amendment to the SSA. While the Motions Judge held that the Amended SSA was monetarily better than the alternative of not approving it, avoids potential renewed litigation and collateral damage to the active Class members as well as to members of the Pelican, Indago and Adason Partial Wind Up groups, he nevertheless refused to approve the Amended SSA.

> Reasons, paras. 22-23, Appeal Book and Compendium, Vol. 1, Tab 3, p. 14

PART IV - ISSUES AND ARGUMENT

27. The fundamental issues on this appeal are:

(i) Did the Motions Judge err in law in his consideration and application of the *Dabbs* criteria (as defined below) in considering whether the

amendment to the settlement is fair, reasonable and in the best interests of the Class?

(ii) Even if the Motions Judge failed to properly apply the *Dabbs* criteria in assessing whether the amendment to the settlement is fair, reasonable and in the best interests of the class, was the Motions Judge nevertheless correct in withholding approval of the amendment?

28. Canada Life asserts that the first issue must be answered in the affirmative and the second issue in the negative.

Standard of Review

29. In considering whether the amendment to the settlement is fair, reasonable and in the best interests of Class members, the Motions Judge discounted the significance of a number of the *Dabbs* criteria and over-emphasized others. In addition, he developed a new test for assessing whether a class action settlement is fair (based upon notions of "circumstantial" and "institutional" fairness) and took into account irrelevant considerations ("moral duty"). These are questions of law where the applicable standard of review is correctness.

Housen v. Nikolaisen, 2002 SCC 33 at para. 8, Book of Authorities, Tab 1

Issue 1 - Amendment Satisfies the *Dabbs* Criteria

30. In assessing whether to approve the amendment to the settlement, the Court must be guided by the same test that applies in respect of a motion to approve a class action settlement, namely is the amendment fair, reasonable and in the best interests of the class as a whole. In

assessing the reasonableness of a proposed settlement, the Court does not, and cannot, seek perfection in every aspect. As noted by Winkler J. (as he then was) in *Baxter v. Canada (A.G.)*:

> ...perfection is not the standard by which the settlement must be measured. Settlements represent a compromise between the parties and it is to be expected that the result will not be entirely satisfactory to any party or class member.
>
> *Baxter v. Canada (A.G.),* [2006] O.J. 4968 (S.C.J.) at para. 21, Book of Authorities, Tab 2
>
> See also *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Div.) (QL) at p. 9 (per Sharpe J. as he then was), leave to appeal to C.A. denied, [1998] O.J. No. 3622 (C.A.), leave to appeal to S.C.C. denied, [1998] S.C.C.A. No. 372, Book of Authorities, Tab 3

31. In assessing whether a settlement (or in this case, an amendment to a settlement) satisfies the requirement of being fair, reasonable and in the best interests of the class, the courts have recognized the following relevant considerations:

(a) likelihood of recovery or likelihood of success;

(b) amount and nature of discovery evidence;

(c) the settlement terms and conditions;

(d) recommendation and experience of counsel;

(e) future expense and likely duration of litigation;

(f) recommendation of neutral parties, if any;

(g) the number of objectors and nature of the objections;

(h) the presence of arms' length bargaining and absence of collusion;

(i) the degree and nature of communications with class members; and

(j) the dynamics of the negotiation.

(collectively the "*Dabbs* criteria")

> *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. 1598 (Gen. Div.) at paras. 13-14, Book of Authorities, Tab 4
>
> *Parsons v. Canadian Red Cross Society*, [1999] O.J. 3572 (S.C.J.) at paras. 71-72, Book of Authorities, Tab 5

32. When these factors are considered in the context of the amendment to the SSA, it is submitted that it is clear that the amendment is fair and reasonable and in the best interests of the Class. In particular:

(a) With respect of factor (a) (likelihood of recovery or likelihood of success), a motion to approve an amendment differs in an important respect from a motion to approve a settlement in the first instance. In a typical class action settlement approval motion, the court is called upon to assess the position of the class under the settlement in comparison to its position if the litigation were permitted to proceed. In a motion to approve an amendment to an already-approved class action settlement, the court must necessarily compare the position of the class under the amended settlement to its position under the existing and binding unamended settlement. The Motions Judge acknowledged that the previously approved settlement remained binding (Reasons, para. 161). He also correctly found and acknowledged that Class members were better off under the amended settlement than under the existing settlement. This was manifestly the case since:

(i) As is apparent from the chart in paragraph 22 above, under the Amended SSA, more money would be available for distribution to the Class than would be available under the SSA.

(ii) If the SSA were to be implemented without any variation or amendment, members of the IPWU Sub-class and Eligible Inactive Members as at the date of the motion below would have received 69.66% of the estimated $2.6 million of IPWU Surplus, or $1.8 million, assuming that the surplus did not diminish further prior to distribution. There would be insufficient funds to pay the minimum $1,000 surplus payments (at least for members of the IPWU Sub-class), and there would be no possible future distribution of surplus.

(iii) Under the Amended SSA, members of the IPWU Sub-class would receive at least $1,000 and would have the possibility of a future distribution of surplus after 2014, if available. The Eligible Inactive Members (i.e. retirees and deferred vested members) would also receive surplus shares and the possibility of a future surplus distribution.

(iv) Members of the Indago Partial Wind Up Sub-class, the Adason Partial Wind Up Sub-class, the Pelican Partial Wind Up Sub-class and active Class members are largely unaffected by the factors impacting the IPWU surplus (described in paragraph 14 above) and the terms of the Amended SSA (but clearly would be affected to the extent the Amended SSA was

not approved and implementation of the SSA was delayed or not implemented at all).

Given that the underlying action is over and subject to a final Judgment, absent an amended settlement, the Class has no likelihood of reaping any additional benefits to those provided by the previously approved settlement.[1]

(b) With respect to factor (b) (amount and nature of discovery evidence), in the context of both the initial disclosure of the diminution of the IPWU Surplus and the subsequent negotiations between the parties, there has been an exchange of actuarial and other information to permit the Representative Plaintiffs and their advisors to assess the reasons for the decline in the estimated IPWU Surplus and to negotiate amendments to the SSA. All relevant material was put before the Court.

(c) With respect to factor (c) (the settlement terms and conditions), the provisions of the Amended SSA give effect to the terms negotiated under the original SSA, while providing Class members affected by the drop in estimated IPWU Surplus with more money than they would otherwise receive under the original SSA together with some hope of additional future payment.

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[1] The only theoretical possibility of further recovery would have been had the original settlement approval order been set aside. No party has sought such relief. In any event, the Representative Plaintiffs concede that the claim in respect of plan administration expenses has little prospect of success in the wake of the Supreme Court of Canada decision in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, Book of Authorities, Tab 6 (see Reasons, para. 97). Furthermore, any ongoing dispute is respect of surplus would have been a dispute about the surplus that actually exists, not that which was once estimated to exist.

(d) With respect to factor (d) (recommendation and experience of counsel), Class Counsel are very experienced in matters involving pension plans and class proceedings, and have brought both pension law and class proceedings expertise to this case. The effective collaboration of two law firms has provided the Representative Plaintiffs with strong legal representation in both fields. Class Counsel and the Representative Plaintiffs recommended the approval of the Amended SSA.

(e) With respect to factor (e), consideration of the cost, duration and risk of ongoing litigation raises unique issues in the context of a motion to amend a previously approved settlement. The underlying action has been fully disposed of. In order for members to pursue a remedy beyond that provided for in the existing unamended SSA, they would have to successfully move to have the Judgment set aside. No such motion has been brought. Even if such a motion were to succeed, the result would be prolonged litigation in respect of entitlement to a smaller surplus and with respect to a plan expense claim which in the wake of the Supreme Court of Canada decision in *Nolan v. Kerry (Canada) Inc.* the Representative Plaintiffs have conceded has little or no chance of success. In short, any such litigation would be lengthy and expensive, and in any event, would not have the result of increasing the IPWU surplus.

(f) In respect of factor (g) (the number of objectors and nature of the objections), it is noteworthy that the Class consists of approximately 5,228 members, 2,149 of whom are in the IPWU Sub-class. Of these numbers, approximately 105 members of the IPWU Sub-class indicated, either directly or by signing a petition,

some objection to the Amended SSA. The objectors thus represented just two percent of the total Class and less than five percent of the IPWU Sub-class. While the objectors are understandably disappointed that the surplus to be distributed is smaller than originally anticipated, they do not allege, let alone establish, that Class members would be better off under the existing settlement than under the amended settlement.

Reasons, paras. 21, 53, 86, Appeal Book and Compendium, Vol. 1, Tab 3, pp. 14, 18, 23

Reasons for Decision of Perell J. dated February 6, 2012, para. 71, Appeal Book and Compendium, Vol. 2, Tab 7, p. 359

(g) In respect of factor (h), the record establishes the presence of extensive arms' length bargaining and absence of collusion in reaching both the original SSA and the terms of the amendment considered on the motion which is the subject of this appeal.

(h) In respect of factor (i) (the degree and nature of communications with class members), the record establishes that in May 2012, Class counsel mailed court-approved notices to all Class members, advising of the diminution in value of the IPWU Surplus, and the reasons for that decline. Class counsel further distributed court-approved notices to the Class by regular mail in English and French, advising of the Amended SSA and the March 18, 2013 motion date to approve the variation to the Judgment. Subsequent to the mailing of these notices, Class counsel fielded over 70 inquiries by Class members, and communicated with all of the objectors.

Reasons, paras. 82-83, Appeal Book and Compendium, Vol. 1, Tab 3, p. 22

(i) In respect of factor (j) (the dynamics of the negotiation), Canada Life took the position that no amendment to the SSA was necessary following the drop in the IPWU Surplus, while Class counsel viewed the SSA in its current form as unworkable. Notwithstanding these diametrically opposed views, and with the assistance of Justice Strathy, the parties over the course of many months negotiated a compromise that addressed not only the issues in implementing the SSA in its existing form but also increased the amount available for immediate distribution to Class members and provided the potential for further future payment to eligible Class members.

33. By refusing, notwithstanding the foregoing, to approve the amendment to the settlement as fair, reasonable and in the best interests of the Class, the Motions Judge erred in his application of the *Dabbs* criteria.

34. In his reasons the Motions Judge discounted the significance of factors (b), (d), (h) and (j). There was no reason for him to have done so.

Reasons, para. 134, Appeal Book and Compendium, Vol. 1, Tab 3, pp. 31-32

35. The Motions Judge was greatly influenced by the objectors. In this respect, it is important to recognize that the number of objectors and the nature of the objections is but one of the criteria to be considered in assessing the appropriateness of a class action settlement. It is submitted that the Motions Judge erred by elevating the weight given to this one factor at the expense of the other relevant considerations. Moreover, in doing so, the Motions Judge failed to

recognize that the objectors represented a very small proportion of the Class and of the IPWU Sub-class, with the result that all members of the IPWU Sub-class have been deprived of the additional benefits conferred by the Amended SSA because of the objections of the relatively few.

36. In addition, in giving undue weight to the position of the objectors, the Motions Judge failed to consider the impact of his decision on active Class members and on members of the Pelican Partial Wind Up Sub-class, the Indigo Partial Wind Up Sub-class and the Adason Partial Wind Up Sub-class. The benefit to be received by these Sub-class members under the SSA has not been impacted to the same extent by the events which have impacted the IPWU Sub-class members or by the Amended SSA, but all of these Class members will potentially lose those benefits if, as a consequence of the Court's refusal to approve the Amended SSA, the settlement does not proceed.

37. Most fundamentally, the Motions Judge erred in his consideration of factors (a) and (c) of the *Dabbs* criteria – the likelihood of greater recovery if court approval were withheld and the settlement terms and conditions. His errors in this regard were twofold:

(a) In considering *Dabbs* criteria (a) and (c), the Motions Judge effectively asked himself whether if the amended settlement were before him in March 2013 as a matter of first instance he would conclude that it was fair and reasonable having regard to its terms and conditions and the likelihood of recovery if the action proceeded. In doing so he erred. There already existed a settlement which the Motions judge acknowledged was binding. As such, he was required to consider the position of the Class if the amendment was approved in comparison to the

position of the Class under the terms of the existing binding SSA. By failing to be guided by the comparative benefits to the Class under the Amended SSA in relation to the Class' position under the unamended SSA, the Motions Judge fundamentally misdirected himself with respect to factors (a) and (c) of the *Dabbs* criteria. For the reasons set out above, when the amendment is properly evaluated in the context of the existing binding settlement where further recovery in the underlying action is precluded by the final Judgment, the terms and conditions of the amendment were clearly beneficial to the Class members and *Dabbs* factors (a) and (c) weighed heavily in favour of judicial approval of the amendment.

(b) Even if, contrary to the submission above, it was not an error to evaluate the Amended SSA in terms of whether its terms and conditions would be considered fair and reasonable today under prevailing circumstances without reference to the unamended SSA, it is submitted that the Motions Judge erred in considering the position of the Class under the amended settlement as against the expectations created by the earlier surplus estimates rather than in comparison to the Class' potential recovery if the action had proceeded to trial. It has been conceded by the Representative Plaintiffs that in the wake of *Nolan v. Kerry (Canada) Inc.* the plaintiffs' claim in respect of administration expenses is now of little merit. As a result, the stakes in the litigation would effectively be limited to the partial wind up surplus amounts, whatever they might be. The previously-estimated surplus amount will not be restored by further litigation. By effectively evaluating the Amended SSA (and the SSA) against members' unachievable expectations rather

than against what might actually be recovered in the action should it proceed forward, the Motions Judge committed a fundamental error.

38. Finally, the Motion Judge's misapplication of the *Dabbs* criteria is highlighted by his comments with respect to two aspects of the Amended SSA, the $15 million cap on any future surplus distribution and the December 31, 2014 deadline for any future surplus distribution (Reasons, paras. 156-160). His errors in this regard are as follows:

(a) with respect to the $15 million cap, the Motion Judge's analysis misses the point that any second distribution of surplus is not part of the IPWU surplus but is *in addition* to the IPWU surplus (any future surplus distribution comes out of the ongoing Plan, not the IPWU surplus which will have been distributed) and further ignores the fact that Canada Life, as Plan sponsor, is the party responsible for funding any deficit that arises in the Plan; and

(b) with respect to the December 31, 2014 deadline, any future deadline selected is by its nature arbitrary. In this case, the December 31, 2014 deadline (which is almost three years after the original settlement approval date) was a reasonable compromise reached between the parties with advice from their advisors.

39. Consequently, when evaluated against the *Dabbs* criteria, it is submitted that the amendment was fair, reasonable and in the best interests of the Class and that the Motions Judge made fundamental errors in failing to so conclude.

Issue 2 – There Are No Other Reasons to Refuse Court Approval of the Amendment

40. Although many Class members would be manifestly better off with the amended settlement than the original settlement, and although the *Dabbs* factors weighed heavily in favour

of finding that the amendment was fair reasonable and in the best interests of the Class, the Motions Judge refused to approve the amendment. In doing so it is submitted that he erred not only through his misapplication of the *Dabbs* criteria but also by:

(i) devising a new test to approve a proposed class action settlement (or an amendment to an approved settlement) which significantly elevated the standard and scope of the test for such approval;

(ii) considering irrelevant factors including the alleged "moral duty" or "moral responsibility" of the Appellant to more fully share in the Class members' "disappointment"; and

(iii) characterizing the settlement as procedurally unfair where the Motions Judge supervised, presided over, and approved all preceding procedural steps and notices to Class members in the matter.

The New Test

41. The *Dabbs* criteria, which have been applied by the courts for 15 years in assessing the fairness of proposed class action settlements, address matters of substantive and procedural fairness. In his decision, the Motions Judge purported to introduce for the first time requirements of "circumstantial fairness" and "institutional fairness". Despite the Motions Judge's attempts at paragraphs 129 and 130 of his Reasons to explain these newly-created concepts, they remain amorphous and ill-defined, although they are in the Motions Judge's words intended to "elevate the standard for approval".

42. In introducing into his analysis new concepts of "circumstantial fairness" and "institutional fairness", the Motions Judge intentionally departed from the substantial body of case law that has been developed and followed by the courts since the *Dabbs* decision in 1998. It is respectfully submitted that this departure from the established jurisprudence was both unwarranted and constitutes a reversible error. The circumstances of class members is already an important part of several factors in the *Dabbs* criteria including (a) likelihood of recovery or likelihood of success, (c) the settlement terms and conditions and (h) the degree and nature of communications with class members. The concern that courts may rubber stamp unfair settlements or turn a blind eye to strike suits that underlay the Motions Judge's introduction of a review for "institutional fairness" is already addressed not only by the *Dabbs* requirement that the Court consider (a) likelihood of recovery or likelihood of success and (c) the settlement terms and conditions, but also by the requirement that the Court consider (g) the presence of arms' length bargaining and absence of collusion and (h) the dynamics of the negotiation.

43. It is submitted that the concerns that underlay the Motions Judge's invention of the concepts of "circumstantial fairness" and "institutional fairness" can be and have historically been addressed through the application of the *Dabbs* criteria and that the Motions Judge erred in attempting to superimpose on these criteria some new and elevated (but ill defined) tests of "circumstantial fairness" and "institutional fairness".

Irrelevant Factors

44. In his reasons (see paragraphs 149 and 150 of the Reasons), the Motions Judge held that Canada Life had a "moral duty" to share the disappointment of Class members (beyond a

corresponding decrease in its own surplus share) when the surplus turned out (without any fault by Canada Life) to be lower than originally estimated.

45. The notion of "moral duty" is not a relevant consideration. The issue is whether the position of the Class is improved by the proposed amendment to the Court approved SSA and whether the amendment is thus fair, reasonable and in the best interests of the Class. If a settlement (or in this case an amendment) otherwise satisfies the substantive and procedural fairness requirements of the *Dabbs* criteria, for a court to refuse to approve the settlement based on a perceived "moral duty" of one of the parties is without jurisprudential support and would be tantamount to the Court disregarding the long-established *Dabbs* test.

46. The Motions Judge's finding that a "moral duty" existed was ill-conceived and without foundation for the following reasons:

(a) The Motions Judge appeared to found Canada Life's alleged "moral duty", at least in part, on what he three times described as the "unprecedented" fact that Class members had been invited in advance to vote on the terms of the proposed class action settlement. Far from being "unprecedented", such votes have been the norm in class actions involving pension surpluses because of the regulatory requirement that any payment of any surplus to a plan sponsor have a prescribed level of support from plan beneficiaries.

Pension Benefits Act Regulations, R.R.O. 1990, Reg. 909, s. 8 (revoked O. Reg. 178/12), at Schedule B

Pension Benefits Act, R.S.O. 1990, c.P-8 as amended, ss. 77.11(7) and (8), at Schedule B

Sunnybrook Health Sciences Centre v. Lorenz, [2009] O.J. 3268

(S.C.J.) at para. 8, Book of Authorities, Tab 7

McMaster University v. Robb, [2001] O.J. No. 5480 (S.C.J.) at para. 4, Book of Authorities, Tab 8

Burleton v. Royal Trust Corp. of Canada, [2003] O.J. 2168 (S.C.J.) at paras. 24, 31, Book of Authorities, Tab 9

CBS Pictures Canada Inc. v. Dillon, [2006] O.J. 3669 (S.C.J.) at para. 3, Book of Authorities, Tab 10

Reichhold Ltd. v. Boyer, [2000] O.J. 290 (S.C.J.) at paras. 8-10, Book of Authorities, Tab 11

(b) The finding of an alleged "moral duty" unduly discounted (i) the evidence that members were always told that the surplus amounts referred to in communications were estimates which could change[2] and (ii) the fact that the reason that the estimates were not realized was not due to any act or omission of Canada Life but due to external factors including a change in prevailing interest rates and the elects of class members.

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[2] The information package sent to Class members in March 2011 describing the original settlement contained a number of statements to the effect that the surplus amounts referenced therein were estimates only and were subject to change. For example, the Questions and Answers section of the information package contained the following: **"24. Why does my Personal Information Statement show only an estimate of my possible surplus share? How and why could the estimate change?"** The response to this question stated: "The amount of surplus that you actually receive, should the Proposal proceed, will likely be different (higher or lower) than the estimate shown on your Personal Information Statement for various reasons. First of all, until all of the pension benefits earned by members affected by the Partial Wind-Ups are paid or provided for, the value of those benefits will fluctuate (for various reasons, including changes in interest rates), which will affect the amount of the Partial Wind-Up surplus (the more valuable the benefits, the less surplus will remain, and vice versa). Also, the assets of the Plan fund are invested in stocks, bonds and other investments, and therefore the total amount of Partial Wind-Up surplus will also fluctuate depending on the returns on those investments. As the overall Partial Wind-Up surplus fluctuates, so will the amount to be shared by the eligible members." See the information package sent to Class members, Exhibit "S" to January 4, 2012 Affidavit of David Kidd, Exhibit Book, Vol. 3, Tab 8, pp. 555, 584, 600, 603-604; Appeal Book and Compendium, Vol. 2, Tab 13, pp. 417-421.

(c) Finally, the Motions Judge incorrectly treated the "Approved Settlement" and the "Stark Reality Settlement" as separate and distinct. There was always only one settlement. The Approved Settlement did not change with the passage of time and become the Stark-Reality Settlement (defined by the Motions Judge to be the settlement if it had occurred in March 2013 taking into account updated surplus estimates). The SSA never promised Class members any specific amount but only a share of whatever surplus attributable to the IPWU and the Indago, Pelican and Adason Partial Wind Ups actually existed after deduction of projected expenses and legal fees. As the Motions Judge himself recognized, at any point in time, pension surplus is a legal fiction and only becomes tangible and real when trust fund monies calculated at a particular date are actually paid out.

Reasons, paras. 30, 143, 150, Appeal Book and Compendium, Vol. 1, Tab 3, pp. 15, 33-34

(d) The Motions Judge's finding of a breach of "moral duty" also discounted the impact of the decline in the surplus value on the amount of Canada Life's own surplus share.

(e) Finally, in criticizing the terms on which a second surplus distribution may be made to Class members pursuant to the terms of the amendment, the Motions Judge completely overlooked the fact that Canada Life will bear 100% of the risk of a deficit developing in the Plan leading up to the date of any future surplus distribution.

Procedural Fairness

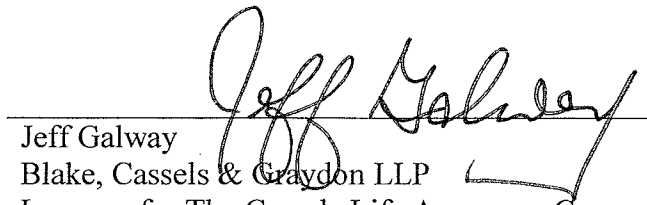
47. The record and reasons of the Motions Judge clearly establish that the Court was kept fully advised of developments subsequent to the date of the original settlement approval motion. Subsequent to the original settlement approval, the parties attended before the Motions Judge on April 20 and May 7, 2012 to report on the situation. Furthermore, as discussed above, the parties attended before the Motions Judge on February 12, 2013 to obtain Court approval of the notices to be sent to the Class describing the terms of the amendment to the SSA and next steps.

48. In these circumstances, and in light of the *Dabbs* analysis above, it is submitted that there were no procedural issues or irregularities which justified withholding approval of the Amended SSA.

PART V - ORDER REQUESTED

49. Canada Life requests that the Order below be set aside and that an order be granted substantially in the form attached as Schedule "A" to the Notice of Appeal approving the amendment to the settlement herein and varying the Judgment of Justice Perell dated February 27, 2012.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27TH DAY OF MAY, 2013



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Court of Appeal File No. C56991
Court File No. 05-CV-287556CP

COURT OF APPEAL FOR ONTARIO

BETWEEN:

DAVID KIDD, ALEXANDER HARVEY,
JEAN PAUL MARENTETTE, GARRY C. YIP, LOUIE NUSPL,
SUSAN HENDERSON and LIN YEOMANS

Plaintiffs (Respondents)

– and –

THE CANADA LIFE ASSURANCE COMPANY,
A.P. SYMONS, D. ALLEN LONEY and JAMES R. GRANT

Defendants (Appellant)

Proceeding under the *Class Proceedings Act, 1992*

CERTIFICATE

Counsel for the Appellant certifies that an order under subrule 61.09(2) is not required.

Counsel for the Appellant estimates that 2 hours will be required for oral argument, not including reply.

Jeff Galway

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Housen v. Nikolaisen,* 2002 SCC 33
2. *Baxter v. Canada (A.G.),* [2006] O.J. 4968 (S.C.J.)
3. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Div.), leave to appeal to C.A. denied, [1998] O.J. No. 3622 (C.A.), leave to appeal to S.C.C. denied, [1998] S.C.C.A. No. 372
4. *Dabbs v. Sun Life Assurance Co. of Canada,* [1998] O.J. 1598 (Gen. Div.)
5. *Parsons v. Canadian Red Cross Society,* [1999] O.J. 3572 (S.C.J.)
6. *Nolan v. Kerry (Canada) Inc.,* 2009 SCC 39
7. *Sunnybrook Health Sciences Centre v. Lorenz,* [2009] O.J. 3268 (S.C.J)
8. *McMaster University v. Robb*, [2001] O.J. No. 5480 (S.C.J.)
9. *Burleton v. Royal Trust Corp. of Canada,* [2003] O.J. 2168 (S.C.J.)
10. *CBS Pictures Canada Inc. v. Dillon,* [2006] O.J. 3669 (S.C.J.)
11. *Reichhold Ltd. v. Boyer,* [2000] O.J. 290 (S.C.J.)

SCHEDULE "B"

LIST OF STATUTES

Class Proceedings Act, 1992, S.O. 1992, c. 6

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

Discontinuance, abandonment and settlement

Settlement without court approval not binding

29. (2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Pension Benefits Act Regulations, R.R.O. 1990, Reg. 909, s. 8 (revoked O. Reg. 178/12)

8. (1) No payment may be made from surplus out of a pension plan that is being wound up in whole or in part unless,

(a) the payment is to be made to or for the benefit of members, former members and other persons, other than an employer, who are entitled to payments under the pension plan on the date of wind up; or

(b) the payment is to be made to an employer with the written agreement of,

(i) the employer,

(ii) the collective bargaining agent of the members of the plan or, if there is no collective bargaining agent, at least two-thirds of the members of the plan, and

(iii) such number of former members and other persons who are entitled to payments under the pension plan on the date of the wind up as the Superintendent considers appropriate in the circumstances.

(2) Despite subsection (1), a payment may be made from surplus out of a pension plan that is being wound up in whole or in part if,

(a) the payment would have been permitted by this section as it read immediately before the 18th day of December, 1991; and

(b) notice of proposal to wind up the pension plan was given to the Superintendent of Pensions before December 18, 1991.

(3) Subsections (1) and (2) do not apply after December 31, 2011.

Pension Benefits Act, R.S.O. 1990, c.P-8 as amended, ss. 77.11(7) and (8)

Entitlement to surplus

Agreement about surplus

77.11 (7) A written agreement among the following persons may provide for payment of surplus to the employer in the circumstances specified in the agreement and as of the date specified in the agreement:

1. If the surplus is to be paid to the employer while the pension plan continues in existence,
   i. the employer,
   ii. at least two-thirds of the members of the pension plan (and, for this purpose, a trade union that represents members may agree on behalf of those members), and
   iii. the number which is considered appropriate in the circumstances by the Superintendent of former members, retired members and other persons who are entitled to payments under the pension plan as of the specified date for payment of the surplus.
2. If the surplus is to be paid to the employer on the wind up of the pension plan in whole,

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 2 is amended by striking out "on the wind up of the pension plan in whole" in the portion before subparagraph i and substituting "on the wind up of the pension plan". See: 2010, c. 24, ss. 26 (6), 49 (4).

   i. the employer,
   ii. at least two-thirds of the members of the pension plan (and, for this purpose, a trade union that represents or represented members on the date of the wind up may agree on behalf of those members), and
   iii. the number which is considered appropriate in the circumstances by the Superintendent of former members, retired members and other persons who are entitled to payments under the pension plan as of the date of the wind up.
3. If the surplus is to be paid to the employer on the partial wind up of the pension plan,
   i. the employer,
   ii. at least two-thirds of the members of the pension plan affected by the partial wind up (and, for this purpose, a trade union that represents or represented affected members on the date of the partial wind up may agree on behalf of those members), and
   iii. the number which is considered appropriate in the circumstances by the Superintendent of former members, retired members and other persons who are affected by the partial wind up and who are entitled to payments under the pension plan as of the date of the partial wind up.

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 3 is repealed. See: 2010, c. 24, ss. 26 (7), 49 (4).

Effect of agreement

(8) A written agreement prevails over any document that creates and supports the pension plan and pension fund, it prevails over subsections (2), (3) and (4), and it prevails despite any trust that may exist in favour of any person.

DAVID KIDD et al. - and -	**THE CANADA LIFE ASSURANCE COMPANY et al.**	Court of Appeal File No. C56991 Court File No. 05-CV-287556CP
Plaintiffs (Respondents)	Defendants (Appellant)	

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at TORONTO

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE DEFENDANT (APPELLANT), THE CANADA LIFE ASSURANCE COMPANY

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