

**FINANCIAL SERVICES TRIBUNAL**

Citation: Carey v. Ontario (Superintendent Financial Services),  
2016 ONFST 2  
Decision No. P0647-2015-1  
Date: 2016/02/03

**IN THE MATTER OF** the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the “Act”) as amended by the *Financial Services Tribunal of Ontario Act, 1997*, S.O. 1997, c.28;

**AND IN THE MATTER OF** a Notice of Intended Decision of the Superintendent of Financial Services to consent under section 78(1) of the Act relating to the payment out of the pension fund for The Canada Life Canadian Employees' Pension Plan, Registration Number 0354563 (the “Plan”);

**AND IN THE MATTER OF** a Hearing in accordance with subsection 89(8) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8.

**B E T W E E N:**

**ANNE MARIE CAREY and JANICE DURST**

**APPLICANTS**

**and**

**MAGGIE WONG, MONICA RIMLER, DAN ANDERSON,  
THOMAS LUK, STANLEY HO, KAREN HEYWOOD, OLIVER RAJMOOLIE,  
PHILLIPA MacKENZIE, and PATRICK GAREL**

**SELF-REPRESENTED APPLICANTS**

**and**

**SUPERINTENDENT OF FINANCIAL SERVICES**

**RESPONDENT**

**and**

**THE CANADA LIFE ASSURANCE COMPANY, ALEX HARVEY and DAVID KIDD,  
GARRY YIP and LOU NUSPL**

**ADDED PARTIES**

**and**

**ALLEN LONEY, AL SYMONS, and JAMES GRANT, TRUSTEES OF THE CANADA LIFE  
CANADIAN EMPLOYEES' PENSION PLAN**

**ADDED PARTIES**

## **BEFORE:**

Florence A. Holden  
Chair (Acting) of the Tribunal and Chair of the Panel

Patrick Longhurst  
Member of the Tribunal and of the Panel

Jeffrey Richardson  
Member of the Tribunal and of the Panel

## **APPEARANCES:**

Each of the Applicants was represented as follows:

For the Applicants – Anne Marie Carey and Janice Durst (“applicants”) - Patrick Mazurek

For the Self-Represented Applicants – Maggie Wong, Monica Rimler, Dan Anderson, Thomas Luk, Karen Heywood, Oliver Rajmoolie, Philippa MacKenzie, and Patrick Garel – Self-represented (the “self-represented applicants”)

For the Superintendent of Financial Services – Deborah McPhail and Jessica Spence

For The Canada Life Assurance Company (“Canada Life”) – Jeff Galway and Doug Rienzo

For Alex Harvey and David, Kidd - Clio Godkewitsch and John Foreman

For Garry Yip and Lou Nuspl – Darrell Brown

For Allen Loney, Al Symons and James Grant, trustees of the Canada Life Canadian Employees’ Pension Plan – John C. Field

## **DATES HEARD:**

December 4 and 7, 2015

## **I. BACKGROUND**

[1] At the commencement of the hearing, each of the self-represented applicants were reminded of his or her right to be represented by someone authorized under the *Law Society Act*.

[2] At a pre-conference hearing held on October 14, 2015, each of: The Canada Life Assurance Company, as Plan sponsor and administrator; Messers Loney, Symons and Grant, as trustees of the Plan; and Mr. Harvey and Mr. Kidd, who were two of the court-appointed representatives in a related class action and members of the Integration partial wind up group under the Plan; were granted full party status. Mr. Yip and Mr. Nuspl who were members of the Adason partial wind up group under the Plan were granted limited party status for the purpose of making submissions only, and appointed as parties in their personal capacity, as were Mr. Kidd and Mr. Harvey.

[3] At the pre-hearing conference of October 14, 2015, Mr. Mazurek consented to have his clients’ Requests for Hearing heard together. The self-represented applicants also consented to

have their Requests for Hearing heard together, and the Tribunal ordered that pursuant to Section 9.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, that it would combine the proceedings under these Requests for Hearing on consent of the applicants and self-represented applicants and added parties, and on the basis that they involve the same or similar questions of fact, law or policy.

[4] The self-represented applicants were reminded that the process determined at the October pre-hearing conference and communicated by order would be followed in accordance with the Tribunal's Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal ("Rules"). The applicants and their counsel and self-represented applicants were advised in October to familiarize themselves with the Rules and obey the orders issued at the pre-hearing conference. Contrary to the orders of the Tribunal, Mr. Anderson in particular had tried to raise numerous additional issues and filed a number of documents with the Registrar's office on issues not before us. The Tribunal declined to consider those correspondences as potentially unduly prejudicial to the future determination of any material issues related to the NOID, and the Tribunal has not considered them in the context of the preliminary motion described below. The applicants and self-represented applicants were advised both before and at the start of the hearing that no further motions or issues would be considered until the preliminary motion that was the subject of this initial hearing was decided. For clarity, the Tribunal noted that at no time was the December 4 and 7, 2015 hearing on the preliminary motion put forward by Canada Life to be an examination of additional issues or motions by applicants and self-represented applicants who were not as yet determined to be proper parties to the proceedings.

## **REASONS FOR DECISION**

### **II. INTRODUCTION**

[5] The Tribunal notes that these Requests for Hearing relate to a Notice of Intended Decision (NOID) of the Superintendent of Financial Services dated July 17, 2015 to consent to the surplus withdrawal application ("SWA") filed in respect of the Plan by The Canada Life Assurance Company ("Canada Life"), as the Plan sponsor and administrator. The Tribunal finds that the Surplus Sharing Agreement referred to in the NOID was made in the context of a class action concerning ownership of the Plan surplus. The class action was commenced in 2005 and certified in 2011. The initial settlement in that action was approved on January 27, 2012 by the Ontario Superior Court of Justice. The Tribunal accepts the undisputed affidavit evidence of Mr. Robinson that there were ultimately four partial wind ups of the Plan, and that the valuation report in respect of the Integration partial wind up pension benefits, effective June 30, 2005, was filed with the Superintendent on March 31, 2006. We were also advised and it was not disputed, that the Superintendent approved the partial wind up reports in respect of the other three groups (Adason, Indago and Pelican) on September 3, 2014.

[6] The Tribunal notes that a number of the self-represented applicants who filed a Request for Hearing (Form 1) also filed separate Applications for Party Status (Form 4) in respect of these same proceedings. The Tribunal advised that it would deal with the related completed Applications for Party Status made by Ms. Wong, Ms. MacKenzie, Ms. Heywood, Ms. Rimler, Mr. Luk, and Mr. Rajmoolie in this decision on the preliminary motion.

[7] On November 26, 2015, Mr. Stanley Ho filed with the Tribunal notice that he was withdrawing his request for a hearing related to this matter, and the Tribunal accepted his withdrawal on December 4, 2015.

### III. THE PRELIMINARY ISSUES

[8] On October 14, 2015, Canada Life put forward a motion for an order summarily dismissing the applicants' and self-represented applicants' Requests for Hearing without a hearing under s.36.01 of the Tribunal's Rules on the grounds that:

- a. the Requests are frivolous, vexatious or commenced in bad faith;
- b. the Requests relate to matters that are outside the jurisdiction of the Tribunal; or
- c. the statutory requirements for bringing these proceedings have not been met.

[9] At the pre-hearing conference, all the applicants and self-represented applicants and named parties consented to the jurisdiction of the Tribunal to determine the following issues related to the motion:

- a. Under the circumstances, does each of the applicants have status to request a hearing in this matter?
- b. Do any of the applicants have a right to request a hearing if none of them made written representations to the Superintendent regarding the surplus withdrawal application made by Canada Life, pursuant to subsections 78(3) and 89(3.1) of the Act?
- c. Does the Tribunal have jurisdiction in this proceeding to direct the Superintendent to re-open the 2011 approval of the Integration partial wind up report under the Plan?
- d. If the answer to any of issues (a), (b) or (c) is no, should the individual hearing requests be dismissed without further hearing?
- e. To what extent, if any, is the Tribunal bound by or limited by the Order of the Superior Court of Justice dated January 21, 2014?
- f. Does the Tribunal have jurisdiction to issue the order requested by the applicant Ms. Durst, that Canada Life be found negligent in their responsibility to protect the assets in the Plan?
- g. Do the Requests for Hearing and related Applications for Party Status of Mr. Anderson and the other self-represented applicants raise any justiciable issue for determination by the Tribunal?

[10] At the commencement of the hearing, Mr. Mazurek advised the Tribunal that he was withdrawing issue (f), which was part of his client Ms. Durst's Request for Hearing.

[11] The motion by Canada Life is generally supported by counsel for each of the Superintendent, the Plan trustees (Loney, Symons and Grant), and the Adason group representatives (Yip and Nuspl). Counsel for Messers Kidd and Harvey also support the dismissal of the Requests for Hearing, with slightly different arguments. The remaining applicants and self-represented applicants seek to have the Tribunal dismiss the motion.

[12] For the reasons discussed below, we grant the motion by Canada Life and thereby dismiss the applicants' and self-represented applicants' Requests for Hearing and consequently

the related subsequent Applications for Party Status filed by some of the same self-represented applicants in October 2015. Procedural and legislative requirements regarding party status and jurisdiction are important elements of law that cannot be ignored.

#### **IV. ADDITIONAL ISSUES**

[13] At the October 14, 2015 pre-hearing conference, the Tribunal had initiated a discussion regarding conflict of interest and advising the panel was not aware of any bias among its members. At the start of this hearing, the Tribunal was forced to raise the spectre of allegations of potential conflict of interest or lack of impartiality by the Tribunal and specifically its Chair, alleged by Mr. Anderson in correspondence filed with the Tribunal as part of his submissions. The correspondence was not evidence in these proceedings, but included various correspondence dated November 8, 2015 and November 25, 2015 from Mr. Anderson to approximately 650 former Plan members, the applicants and self-represented applicants, FSCO staff and to private members of the bar who were not participants in these proceedings. He invited those legal counsel to advise the Tribunal on its process and suggested undue influence by Financial Services Commission of Ontario ("FSCO") staff and other parties on the Tribunal without specifics. That correspondence also suggested a conflict of interest in particular due to the dual role of the Chair of the Tribunal as also being the Chair of the Financial Services Commission.

[14] The Chair acknowledged that the dual status is a matter of public record and generally known within the industry, and we further noted that it is in fact a statutory requirement of the Tribunal's enabling legislation, namely the *Financial Services Commission of Ontario Act*. While the Tribunal acknowledged that the unprecedented filing of such correspondence, which did not constitute evidence in this proceeding, was not helpful to the Panel or to the other applicants and self-represented applicants, it did invite Mr. Anderson at the start of the hearing to declare whether or not he wanted to pursue those allegations on the record, so as to permit the Tribunal to make a ruling in that regard. He declined to do so and advised that he was not now accusing the Chair or Tribunal of a conflict of interest. Consequently no ruling request or ruling was made.

#### **V. THE FACTS**

[15] There was no agreed statement of facts or agreed book of documents filed jointly by the parties. Evidence was limited to an affidavit of Wallace B. Robinson on behalf of Canada Life, the oral evidence given by each of the self-represented applicants, and on the exhibits filed at the hearing on the consent of the parties. Based on a careful consideration of all the evidence before us, we find the following key facts:

- a. In 2003, Canada Life declared a partial wind up of the Plan following Canada Life's acquisition by The Great-West Life Assurance Company (the "Integration PWU"). The effective date of the Integration PWU was June 30, 2005 and a related actuarial partial wind up report was filed with FSCO on March 31, 2006.
- b. A class proceeding was commenced in 2005 on behalf of the members of the Plan affected by the Integration PWU seeking, among other things, a distribution of surplus. After lengthy negotiations, the parties involved in that action reached agreement on the terms of a surplus sharing agreement (the "initial SSA") in late 2010. Although that document was not before us, we accept the testimony of Mr. Robinson that the final SSA sought to settle some other issues relevant to other members of the Plan not affected by

any partial wind up such as the granting of a surplus share to the non-partial wind up members.

- c. We further accept Mr. Robinson's evidence that under the terms of the initial SSA, information packages were sent to Plan members in 2011 and those members were given an opportunity to vote on the proposed settlement. Within that member package a Decision Form was provided to the members. Within Part I of the sample Decision Form filed with the Tribunal into evidence, by checking approval of the SSA and signing the end of the form, the Integration PWU member also authorized and accepted the services of Koskie Minsky LLP and Harrison Pensa LLP as "Members' Counsel" to do the following:
- i. To act as my lawyers in connection with *drafting, negotiating, settling and implementing a Surplus Sharing Agreement with Canada Life setting out the final terms of the Settlement Proposal*; (emphasis ours)
  - ii. To represent me in any proceeding before any body in connection with the Settlement Proposal;
  - iii. *To receive formal notices on my behalf related to Canada Life's surplus withdrawal application or asset transfer application to any regulatory body and/or related to the partial wind up of the Plan and/or related to any application to the courts or regulatory authorities in furtherance of the implementation of the Settlement Proposal*; (emphasis ours)
  - iv. To consent to the payment of amounts from the Plan to Canada Life pursuant to the Settlement Proposal;
  - v. To amend as necessary and sign the Surplus Sharing Agreement on my behalf, including any release, provided that the contents of the Surplus Sharing Agreement are substantially similar to the Settlement proposal described in the information package.

For simplicity we will refer to the above contents of the Decision Form as the "Retainer Agreement" in relation to the SSA. Based on the above clear and unambiguous language, we find as a fact, that a signed Retainer Agreement clearly contemplated a change in the terms of the initial SSA originally proposed in 2010, including surplus shares to be paid to non-partial wind up Plan members. Further, the variation of that initial SSA does not in our view support the assertions of some applicants and self-represented applicants that the Retainer Agreement was nullified or is of no relevance to the SSA referred to in the SWA in these proceedings.

- d. In the absence of any evidence to the contrary, we explicitly reject the arguments of the applicants and self-represented applicants that the revision to the 2010 initial SSA and changes to surplus calculations and surplus shares, resulted in the Retainer Agreement having no further application to the final SSA and now the SWA. The Retainer Agreement, on the direct evidence of each individual applicant and self-represented applicant was not rescinded or nullified by any subsequent action on their part. In our view the Retainer Agreement clearly, as drafted, contemplated continuing negotiations. We find as fact that Koskie Minsky LLP ("KM") and Harrison Pensa LLP ("HP") are class counsel who were retained by each of the applicants and self-represented applicants

and that each of them consented to the terms of the Retainer Agreement and by implication the SSA, and further each of the applicants and self-represented applicants are bound to the terms of the Retainer Agreement and the SSA as of the date of this hearing. Mr. Anderson also conceded that he had signed and not rescinded the Retainer Agreement. We shall hereinafter refer to KM and HP as "Class Counsel" in this decision.

- e. We accept the submissions of KM and HP as Class Counsel that they also represent roughly 3,700 Plan members who do not appear before us today, but are affected by the Requests for Hearing which have resulted in a delay in fully implementing the final SSA and SWA.
- f. We find that each of Anne Marie Carey, Maggie Wong, Monica Rimler, Thomas Luk, Karen Heywood, Oliver Rajmoolie, Philippa MacKenzie, Patrick Garel and Janice Durst, by their own admission were members of the Integration PWU group, and that each signed a Retainer Agreement in the form filed with the Tribunal, which Retainer Agreement we also find remained in full force and effect as at the Tribunal hearing date. Each of the applicants, self-represented applicants and Mr. Anderson, conceded to having consented to the Retainer Agreement and not having opted out to the final SSA. Further, each confirmed by their own testimony that they had not taken any action to rescind the Retainer Agreement before the hearing. In fact, Ms. Durst's own letter to FSCO dated November 29, 2014 acknowledged that KM "continue to represent us" notwithstanding her many complaints as to the scarcity of communications from KM, which complaints are clearly outside of our jurisdiction. In the case of the applicants, our finding is in contrast to the submissions of their legal counsel who suggested such consent was contingent on affecting only the 2010 initial SSA. We find no evidence for that assertion given that the Retainer Agreement, by its terms, clearly contemplated continuing negotiations to finalize the SSA.
- g. Based on the evidence of each individual applicant and self-represented applicant, we find that all consented to take their commuted value from the Plan, except Ms. Durst who retired and elected a pension, and Ms. Heywood who we were advised remains a deferred Plan member entitled to a future pension. For reasons discussed elsewhere, we find that the Retainer Agreements as outlined in paragraph (c) above, remained in full force and effect during negotiations that followed the 2011 member elections, until a final SSA was ultimately negotiated and approved by the court. The final SSA is the agreement referred to in the NOID.
- h. We accept Mr. Anderson's testimony that he was not a member of the Integration PWU group, nor a member of the other later partial wind ups declared under the Plan in respect of Plan members formerly employed by Indago Capital Management Inc., Adason Properties Limited or Pelican Food Services Limited. He, as a retiree under the ongoing Plan, did consent to the final SSA and related Retainer Agreement, and became entitled to a payment under the final SSA as a non-partial wind up Plan member. His entitlement under the final SSA is independent of any partial wind up itself or the related determination of surplus and we find any interest he may have is at best tangential to the SWA that forms the basis for the NOID.
- i. We find that in the period prior to the 2011 approval of the Integration PWU actuarial valuation report, the witness Mr. Robinson was in contact with FSCO in relation to the class action and Canada Life's request that the Superintendent **approve the assumptions and methodology used to calculate the commuted values of member**

**termination packages** (emphasis ours), and directed FSCO to contact Canada Life's actuary with any questions in that regard. We find that the FSCO letter to Canada Life's actuary of April 14, 2011 approved the Integration PWU report in respect of the "proposals set out in the report for the distribution of pension benefit entitlements (which) are acceptable for the purposes of the Act." Although the actual Integration PWU report was not before us, there was no suggestion that the calculation of commuted values would not be part of the estimated plan liabilities as would be required under s.70(1) of the Act and as contemplated in Regulation s.29(2) of the Act. No evidence was presented to indicate that any Plan member complained to FSCO about the calculation of their pension benefits or the commuted values of their pension benefits on the basis outlined in the report in 2011. We note that the Tribunal did not receive any related Requests for Hearing in respect of the approval of the Integration PWU report prior to the issuance of the NOID.

- j. Further we accept Mr. Robinson's testimony that Canada Life relied upon the 2011 FSCO approval letter to provide Plan members with their individual election options in respect of their pension benefits and commuted value calculations. Each applicant and self-represented applicant, except Mr. Anderson who was not part of any partial wind up group, testified that they received an election package and all but Ms. Heywood and Ms. Durst elected the commuted value transfer option and received that payment.
- k. Affirmation of FSCO approval of the Integration PWU report in respect of the underlying pension benefits, excluding surplus, was given to Mr. Anderson by letter dated December 17, 2013 in relation to the assumptions and methods shown in the report (as being) consistent with accepted actuarial practice, FSCO Policies and the Act and Regulations. This affirmation was contrary to Mr. Anderson's evidence that he was unaware of FSCO's final approval on the issue in relation to the commuted value calculations until October 2015. The FSCO letter advised that "FSCO sees no reason to interpret these policies as requiring the commuted values to be changed in the circumstances of this case". We find that language to be clear.
- l. The main thrust of Mr. Anderson's claims under the NOID, as well as those of the other self-represented applicants and applicants, relate to the calculation of the underlying commuted values of pension benefits under the wind up (and not the SSA or SWA itself). We find, based on all the evidence before us, that FSCO had as a matter of fact reviewed and made a decision as to the acceptability of the basis and methodology related to the commuted value calculations and did so as at April 14, 2011 in relation to the Integration PWU four years prior to the issuance of the NOID. This finding is consistent with Perell J.'s decision to approve the fairness of the SSA, in paragraph 18 of his judgement wherein he states:

"Here, it may be noted that pursuant to the *Pension Benefits Act*, R.S.O. 1990, c. P.8., Canada Life was required to provide persons affected by the IPWU with an election for: (a) the transfer of the commuted values of their pension entitlement calculated in accordance with the policies of Financial Services Commission of Ontario ("FSCO"); or (b) a guaranteed deferred or immediate pension (the by-default choices). The commuted values were calculated in accordance with FSCO Policy. FSCO, in a letter dated April 14, 2011, indicated its approval of the manner in which the commuted values were calculated."

- m. FSCO did not, as a result of subsequent requests for additional review made by various Plan members, Mr. Anderson and Ms. Carey included, come to a different conclusion in 2013. We find FSCO's 2011 approval of the valuation report and the basis and assumptions used for the calculation of commuted values of pension benefits under the Integration PWU final. Further, we find that this hearing and determination of these facts need not be delayed by or dependent upon any further August 2015 requests by the self-represented applicants and applicants for a reconsideration and additional Order by the Superintendent on this same commuted value issue, although we discuss this point further below. In paragraph 17 of Mr. Anderson's own submissions, he notes that at the time of the transmittal of the SWA notice to KM in November 2014, "FSCO and Canada Life representatives and all the parties were already well aware of the documented and unresolved concerns regarding the "CV issue".
- n. Not surprisingly in our view, final approval of the Integration PWU report in relation to the surplus assets would follow once the proposal with respect to the distribution of the surplus assets was found to be acceptable. Given the related class action which started in 2005, such final approval would have to wait until any SSA received court approval which we find it did in January of 2014. This does not, in our view, negate the approval of the calculation of the underlying partial wind up pension benefits by FSCO, including the commuted values, in 2011.
- o. The history of the related determination of surplus attributable to the partial wind ups and its diminishing value is clearly laid out in the judgement of Perell J. in his decision of January 21, 2014, which we append to this decision as Appendix A. We accept that the initial SSA was revised and ultimately the final SSA was accepted by Perell J. who determined the final SSA was "fair". We accept Ms. McPhail's undisputed assertion that no appeal of that decision or request for judicial review was filed by the parties or their representatives and that the order is final. Further we note paragraph 3 of the Court's judgement which states:
- "3. THIS COURT ORDERS that the Agreement (the Surplus Sharing Agreement) is valid and binding on the parties to this proceeding and on all members of the Class (as defined in the Certification Order) other than the Opt Outs (hereinafter "Class Member" or "Class Members") and that, following applicable Regulatory Approval, the distribution of surplus shall proceed in accordance with the terms of the Agreement amongst the Class and Canada Life."
- p. As per our findings above, the applicants and self-represented applicants did not opt out of the class action and were therefore bound by the SSA once approved by the court. The SSA was not before us so we make no finding as to its contents. However, we can make a reasonable inference from the above facts, and the undisputed representations of counsel for the Superintendent and Canada Life, that the implementation of the SSA would include an application for surplus withdrawal by Canada Life. Notice of that surplus withdrawal application we find was properly given in accordance with the Act and the Retainer Agreements on November 21, 2014 to KM and HP as Class Counsel on behalf of the Integration PUW members who had signed the Retainer Agreements and to the other Integration PWU members who had not signed such retainers on November 25, 2014, pursuant to subsection 78(2) of the Act. On a plain and ordinary reading of the Act, the 30-day statutory period to file submissions with the Superintendent we find runs in the case of the self-represented applicants and applicants who were represented by

KM and HP from November 21, 2014 to December 21, 2014. No evidence was before us that Class Counsel requested an extension of that deadline.

- q. Canada Life filed its surplus withdrawal application on January 9, 2015. We find that no written representations with respect to the SWA were made to the Superintendent or to FSCO by any of KM or HP as Class Counsel for the Integration PWU members (including the applicants and all of the self-represented applicants) who signed Retainer Agreements, or of the other added parties, the Plan trustees, Mr. Yip or Mr. Nuspl. Further we find on the evidence that none of the applicants or self-represented applicants made written representations to FSCO as to the SWA within the 30-day prescribed time period under the Act.
- r. We discuss the notice aspect further below, but reject the contention of some applicants and self-represented applicants that some Plan members responded to FSCO within 30 days of receipt of the notice of the SWA. Specifically, we refer to Mr. Mazurek's submission that Ms. Durst did make submissions to FSCO within 30 days after seeing the full notice of the SWA posted on the KM website. He conceded that KM posted information on the notice on December 16, 2014. FSCO's reply to Ms. Durst of December 23, 2014 clearly indicated that a copy of the notice was understood by FSCO to "(have) already been provided to members *or to their representatives*. If you did not receive a copy of the notice please contact your counsel that represented you during the class proceedings." (emphasis ours).
- s. In copies of letters filed into evidence with the Tribunal, Ms. Durst complained to FSCO on February 25, 2015 and in a "mirror" letter dated on March 13, 2015 about KM's representation and specifically KM's right to receive service, on her behalf or on behalf of any other member, of the notice. We note that KM was not copied on that correspondence and cannot be said in our view to have had its Retainer Agreement rescinded. At that point, Ms. Durst was outside the 30-day time period when calculated from the point at which notice was properly given (November 21, 2014). Further Ms. Durst's February 25, 2015 letter makes it clear that she was aware of the Canada Life SWA on November 21, 2014 since her letter indicates that she contacted KM on that same date in that regard. Her letter indicated no posting of the notice of the SWA on the KM website, but appears to contradict her own counsel's written submissions to us that she saw the notice of the SWA on the website at some point in December, 2014.
- t. In addition, we find that Ms. Carey's July 17, 2015 letter to FSCO offers various complaints about the valuation basis, surplus ownership, etc. but does not specifically ask for relief from the SWA, only a reconsideration of the related Integration PWU report. Even if we were to find it a submission on the SWA, it falls well outside the 30-day period.
- u. We also find that Mr. Anderson's first email to FSCO dated February 21, 2015 was focussed again on the commuted value issue, and did not clearly contest the SWA.
- v. On July 17, 2015, the Superintendent issued a Notice of Intended Decision (NOID) expressing his intention to consent to the SWA for the reasons indicated, and "once satisfied that any payments pursuant to the Surplus Sharing Agreement to which members, former members and any other persons are entitled, and any other payments to which the members, former members and any other persons are entitled have been paid, purchased or otherwise provided for". The NOID was properly served on counsel

for each of: Canada Life; the Integration PWU group via Ms. Godkewitsch of KM; the Adason PWU group via Mr. Brown of Sack Goldblatt Mitchell LLP; and for the trustees of the Plan, Mr. Field of Hicks Morley Hamilton Stewart Storie LLP.

- w. Various Requests for Hearing in respect of the NOID were subsequently filed by the applicants and self-represented applicants and are the basis of this proceeding.
- x. We find that the applicants' and self-represented applicants' primary requested remedy relates not to the SWA directly, but to a common request to re-calculate the underlying commuted value transfers of their pension benefits on a different basis than that approved under the Integration PWU report. The applicants' and self-represented applicants' claim is that the commuted value transfers should be re-calculated in accordance with the ongoing Plan provisions for normal member termination benefits rather than as wind up benefits. Such an approach in our experience would not constitute normal actuarial practice. We find that the Superintendent was aware of those arguments through various correspondences with Mr. Anderson since 2013 as well as through the SSA court-approval process since 2012. With the presumption that the proposed different actuarial basis and methodology would produce higher commuted transfer values, the self-represented applicants also at the hearing asked for any additional funding in respect of the purported higher commuted values to be provided by Canada Life directly to the Plan fund in addition to any amounts payable under the SSA. We make no finding on the potential impact or success of their argument, as there was no hearing on the merits of the commuted value issue.

[16] Only Ms. Carey's Request for Hearing specifically called for an order to refuse consent to the SWA or at least make it contingent on re-calculating the underlying commuted value calculations.

[17] Ms. Durst further requested that the original surplus amounts communicated to them in 2011 as part of the original SSA be paid, which based on Perell J.'s judgement would be somewhere in the order of an estimated \$62 million for the Integration PWU. The total value of the amended settlement to the Class was noted to be approximately \$33 million. However we make no determination as to the surplus amount, as this would be determined by the Plan actuary, subject to approval by FSCO of the related assumptions and methodology and affirmations regarding payment of liabilities and expenses.

## **VI. STATUTORY FRAMEWORK AND ANALYSIS**

[18] The motion and related issues essentially ask the Tribunal to address whether or not the applicants and self-represented applicants are proper parties before us, whether certain statutory preconditions related to the Requests for Hearing have been met, and whether or not the Tribunal has jurisdiction to grant the requested remedies. The motion asks the Tribunal to summarily dismiss the Requests for Hearing without a further hearing.

[19] As the Tribunal has noted in many prior decisions, the Tribunal is a statutory body which only has the jurisdiction conferred on it by the prevailing statute. In this particular matter, the Tribunal is limited to considering the issues addressed in the NOID by the Superintendent and the applicable provisions of the Act. As noted in the *Victorian Order of Nurses for Canada* case,

citing the *CBS case*<sup>1</sup>, any orders or direction “by the Tribunal to the Superintendent to take a particular action, in accordance with the Act or regulations, must be closely related to the subject matter of, or the circumstances underlying, the Superintendent’s proposed order”<sup>2</sup>. In other words the issues must be inextricably linked. Any requested orders that go beyond the orders proposed under the NOID must be exercised cautiously and in limited circumstances.

[20] Under the NOID, the Canada Life application for surplus withdrawal from the Plan clearly references the four partial plan wind ups and the related Report on the Updated Financial Positions for the June 30, 2005, Indago, Pelican Foods and Adason Partial Wind ups and the Transfer of the Remaining Liabilities of the Indago, Pelican Foods and Adason Partial Wind ups into the Ongoing Portion of the Plan as at August 31, 2014 (the “Report”) and estimates the surplus attributable in relation to the four partial wind ups to be approximately \$24,286,000 at the initial wind up dates. The NOID goes on to reference the provisions of the SSA that split the surplus between the Employer and the PWU members within each group and to certain non-PWU members such as Mr. Anderson who did not opt out of the SSA. We would expect that a “roll-forward” of surplus attributable to a PWU to a more current date would form part of the SWA in accordance with s.79 of the Act.

[21] The Tribunal’s authority for dismissing the hearing requests without a hearing is set out in Rules 33.01 and 36.01 of the Tribunal’s Rules:

“33.01 Where a party has initiated a proceeding that, in the opinion of the Tribunal, is:

- (a) frivolous, vexatious or commenced in bad faith;
- (b) relates to matters that are outside the jurisdiction of the Tribunal; or
- (c) some aspect of the statutory requirements for bringing the proceeding has not been met,

the Tribunal may give notice of intention to dismiss the proceeding without a hearing, setting out the reasons for the proposed dismissal. The notice will be given to all parties to the proceeding.

36.01 The Tribunal may exercise its powers under Rules 33, 34 or 35 either on its own motion or on the motion of any party. A party seeking summary dismissal of a proceeding shall initiate its request for dismissal by motion in accordance with Rule 14.”

[22] For clarity, we think it is useful to include a legal definition of “frivolous” which we take from Black’s Law Dictionary to mean an answer or plea which is “clearly insufficient on its face, and does not controvert the material points of the opposite pleading and is presumably interposed for mere purposes of delay or to embarrass the plaintiff.”

---

<sup>1</sup> *CBS Canada Co. v. Ontario (Superintendent of Financial Services)* (2002) Carswell Ont 2990 at para 11 and referred to in the *Victorian Order of Nurses for Canada v. Ontario* (2009), 78 C.C.P.B. 244 (F.S.T.) at para 15 and 19.

<sup>2</sup> *Victorian Order of Nurses for Canada v. Ontario (Superintendent of Financial Services)*, 2009, 78 C.C.P.B. 244 (F.S.T.), paragraph 19.

## **VII. ISSUE A) UNDER THE CIRCUMSTANCES, DOES EACH OF THE APPLICANTS HAVE STATUS TO REQUEST A HEARING IN THIS MATTER?**

[23] We accept the premise in administrative law that someone can only be a party to a proceeding if that person has a direct or substantial interest in the outcome of the proceeding. Mere knowledge or involvement in the subject matter of the proceeding is not sufficient.<sup>3</sup>

[24] In the case of Mr. Anderson, by his own admission he is not a member of any of the partial wind ups, but a pensioner under the continuing Plan. His attempts to characterize himself as a "member of the full wind up to new plan group" in reality is simply a reflection of his membership in the ongoing amended Plan, and does not place him within the status of a member of any of the four partial wind ups which are the basis for the SWA. We find that he has no direct or substantial interest in the outcome of the application for surplus withdrawal which is the subject matter of the NOID, or even in the requested remedy regarding the commuted value issue. We do not accept his contention that any Plan member has an interest in the SWA merely by their Plan membership with a theoretical right to future surplus. His unproven allegations that the surplus was funded by the non-partial wind up members are irrelevant to these proceedings; surplus ownership issues under the partial wind ups were resolved by the SSA to which he consented.

His involvement in prior unsuccessful submissions to FSCO and the court on the commuted value issue does not of itself in our view give him a direct and substantial interest in the outcome of these proceedings, beyond his use of them to delay the approved SWA. Notwithstanding his frequent interjections on behalf of other self-represented applicants during these proceedings and apparent authorship of submissions for the other self-represented members, Mr. Anderson has on more than one occasion made it clear that he is not representing anyone else in these proceedings other than himself.

Consequently his Request for Hearing is dismissed without further hearing under Rule 33.01(a) as being frivolous. Accordingly he has no status to participate or be heard as a party. We note that the trustees have also asked that his actions may also be considered in the alternative as vexatious. However as they have not provided us with full legal argument on this point, we need not rule on this alternative finding. His Request for Hearing may also be dismissed on other grounds as noted below.

[25] The other self-represented applicants and applicants were all members of the Integration PWU group, elected to participate in and be bound by the SSA, and as indicated above, retained KM and HP as Class Counsel with respect to the implementation of the SSA, including the related SWA. While we accept that they as individuals may have status initially to request a hearing, their Requests for Hearing are dismissed on other grounds as found below.

[26] In the case of Ms. Heywood, while a member of the Integration PWU, she elected a deferred pension not a commuted value, so we find that her interest in the proposed remedy to recalculate commuted values is also academic and not directly related to the SWA and is consequently dismissed both under Rule 33.01(a) as frivolous and under Rule 33.01(b) as discussed below in issue C.

---

<sup>3</sup>Blake, Sara, *Administrative Law in Canada*, 5<sup>th</sup> ed., LexisNexis Canada Inc., 2011

**VIII. UNDER ISSUE B) DO ANY OF THE APPLICANTS HAVE A RIGHT TO REQUEST A HEARING IF NONE OF THEM MADE WRITTEN REPRESENTATIONS TO THE SUPERINTENDENT REGARDING THE SURPLUS WITHDRAWAL APPLICATION MADE BY THE CANADA LIFE ASSURANCE COMPANY, PURSUANT TO SUBSECTIONS 78(3) AND 89(3.1) OF THE ACT?**

[27] The right of an applicant to request a hearing is governed by the applicable statute. In this case, Section 78 of the Act states in part:

78(1) No money that is surplus may be paid out of a pension fund to the employer without the prior consent of the Superintendent.

(2) An employer who applies to the Superintendent for consent to payment of money that is surplus to the employer out of a pension fund shall transmit notice of the application, containing the prescribed information, to,

(a) each member, former member and retired member of the pension plan to which the pension fund relates;

(b) each trade union that represents members of the pension plan;

(b.1) each trade union that represents the members, former members or retired members of the pension plan on the date of the wind up, if the pension plan is being wound up;

(c) any other individual who is receiving payments out of the pension fund; and

(d) the advisory committee of the pension plan.

(3) A person to whom notice has been transmitted under subsection (2) may make written representations to the Superintendent *with respect to the application* within thirty days *after receiving the notice*. (emphasis ours)

[28] We have already found under paragraph 15 above that the applicants and self-represented applicants, including Mr. Anderson, were already represented by Class Counsel in respect of the SSA and the related SWA and that Class Counsel for all of the applicants and self-represented applicants received the necessary notice under section 78(2) of the Act on November 14, 2014. Such notice was in accord with FSCO Policy 900-503 which specifically provides that:

"Instead of receiving individual notice of the surplus application under section 78(2), those represented by legal counsel may instruct the administrator, through counsel or otherwise, to transmit the notice of application and surplus distribution proposal to their legal counsel."

The 30-day period runs from that date in respect of the applicants and self-represented applicants represented by Class Counsel as part of the class proceedings. We reject the unsubstantiated suggestions in submissions made by the self-represented applicants that the 30-day period should run from the date on which they personally received copies of the SWA sometime around February 20, 2015.

[29] We find that on all the facts, that service on KM and HP as Class Counsel was sufficient notice of the SWA to all of the self-represented applicants and applicants, and that no individual notice was required under the Act in accordance with Policy 900-503. As a practical matter, such notice to counsel is a regular practice in proceedings under the Act for reasons of efficiency and cost. We are reminded that in this case the class action involved over 5,000 Plan members.

[30] We repeat our findings that no written representations with respect to the SWA were made to the Superintendent or to FSCO by any of KM or HP as Class Counsel for the Plan members (including all of the self-represented applicants and applicants) who each signed a Retainer Agreement, or by the other added parties, the Plan trustees, Mr. Yip or Mr. Nuspl. Further we find no individual applicant or self-represented applicant made written representations to FSCO as to the SWA within the 30-day prescribed time period under the Act deemed to have begun November 14, 2014. Requests for Hearing filed in August 2015 with the Tribunal do not correct this defect.

[31] Representations to FSCO made after that statutory 30-day time period by some applicants, namely Ms. Durst and Ms. Carey, were largely with respect to the commuted value calculation issue. Those later complaints and current claims do not of themselves grant them the ability to request a hearing in this matter under s.89(6) of the Act, nor does the Act grant them the right to individual notice by Canada Life of its SWA.

[32] Subsection 89(3.1) of the PBA provides:

(3.1) If an application is filed in accordance with subsection 78 (2) for the payment of surplus to the employer and the Superintendent intends to consent or refuse to consent under subsection 78 (1), the Superintendent shall serve notice of the intended decision, together with written reasons for it, on the applicant and on any person who made written representations to the Superintendent in accordance with subsection 78 (3).

[33] Subsections 89(6)-(8) of the PBA provide;

(6) A notice under subsection (1), (2), (3), (3.0.1), (3.1), (4) or (5) shall state that the person on whom the notice is served is entitled to a hearing by the Tribunal if the person delivers to the Tribunal, within thirty days after service of the notice under that subsection, notice in writing requiring a hearing, and the person may so require such a hearing. (Emphasis ours)

(7) Where the person on whom the notice is served does not require a hearing in accordance with subsection (6), the Superintendent may make the intended decision indicated in the notice.

(8) Where the person requires a hearing by the Tribunal in accordance with subsection (6), the Tribunal shall appoint a time for and hold the hearing.

[34] On a plain reading of the Act, we find that none of the individual applicants and self-represented applicants or their legal representatives made written representations pursuant to subsection 78(3) within the time frame provided for in the Act and none were entitled to be individually served with the NOID or to request a hearing in respect of the NOID approving the SWA. We find that the Superintendent did in fact provide Class Counsel with notice of the NOID. With respect to the applicants and self-represented applicants we have already held that:

- i) they were provided with the notice through their Class Counsel in accordance with the authorizations they provided under the Retainer Agreement which remained in force, but failed to make written representations in respect of the notice within the 30-day statutory period for submissions;
- ii) because they all failed to make written representations, they were not served and were not entitled to be served with the NOID; and
- iii) because they were not served with the NOID and had no right to such notice, they have no entitlement to request a hearing under s.89(6) of the Act.

[35] We note that Mr. Mazurek provided no legal authority for his proposition that the Tribunal could independently waive the 30-day period under ss.89(6). No evidence was before us that any applicant or self-represented applicant made an application to the Superintendent to extend the procedural time limits, as may be provided for under section 105(1) of the Act. Such extension is solely in our view at the Superintendent's discretion. There do not appear to be any reasonable grounds in our view on which the Superintendent would now be inclined to grant such delay at this late date. Even if an argument could be made that the delay was a procedural and not a substantive defect, the Tribunal has no jurisdiction to extend the time period under its own Rules without the consent of the Superintendent and the parties.

[36] Accordingly, we hold that all of the applicants' and self-represented applicants' Requests for Hearing before the Tribunal should be summarily dismissed as they have failed to satisfy the statutory preconditions for requesting a hearing before the Tribunal in respect of the July 17th NOID, and consequently the motion may be granted and the Requests for Hearing dismissed under Rule 33.01(c) and Rule 36.01.

#### **IX. UNDER ISSUE C), DOES THE TRIBUNAL HAVE JURISDICTION IN THIS PROCEEDING TO DIRECT THE SUPERINTENDENT TO RE-OPEN THE 2011 APPROVAL OF THE INTEGRATION PARTIAL WIND UP REPORT UNDER THE PLAN?**

[37] It would be possible in our view to cease our deliberations at this stage. However, we will proceed to address the remaining issues. We note that our discussion of this issue is inevitably linked to that of issue G: in other words, is a justiciable issue raised in these proceedings.

[38] There are two bases argued under this issue C) that the Tribunal lacks jurisdiction to re-open the 2011 approval of the Integration PWU report. The first relates directly to the NOID, the second to the application of the principle of *functus officio*.

[39] Under the first argument, we repeat our earlier comments that the Tribunal is a statutory body which only has the jurisdiction conferred on it by the prevailing statute. In this particular matter, the Tribunal is limited to considering the issues addressed in the NOID and the applicable provisions of the Act. Any orders or direction by the Tribunal to the Superintendent to take a particular action, in accordance with the Act or regulations, must be closely related to the subject matter of or the circumstances underlying the NOID. In other words the issues must be inextricably linked. Any requested orders that go beyond the orders proposed under the NOID must be exercised cautiously and in limited circumstances.

[40] Therefore we note Mr. Anderson's conflicting testimony and submissions that no one is challenging the NOID, while at the same time acknowledging that if the underlying commuted value calculations are changed, in his view to higher amounts, then the SWA would be impacted

as the surplus would fall and Canada Life would be required to put in higher amounts to meet the minimum shares allocated or try to void the SSA. As the SSA was not before us, we cannot comment on the likelihood of such an outcome. However, as we have already found as a fact that the 2011 approval of the Integration PWU report was final with respect to the underlying pension obligations, including the assumptions and methodology related to the commuted value calculations, we find that the Requests for Hearing are in fact primarily a request to re-open the 2011 FSCO approval of the Integration PWU report.

[41] There is no explicit reference in the NOID to the underlying individual PWU reports previously filed and in the case of the Integration PWU group which we have found was approved by the Superintendent in 2011. Subject to any disclosure of material error such as the failure to include members in a partial wind up group as was the case in *Marshall Steel Limited*,<sup>4</sup> the preparation of the Report would have, in our view, appropriately relied on the underlying approvals of the Integration PWU valuation and the payment out of commuted values in 2013.

[42] We do not find that the statement in the NOID that consent be effective “only after the Applicant satisfies me that any payments pursuant to the Surplus Sharing Agreement to which the members, former members and any other persons are entitled, and any other payments to which the members, former members and any other persons are entitled, have been paid, purchased, or otherwise provided for” should on its face be interpreted to open the door to re-calculate, on a different non-conventional basis, the underlying commuted value payments made in 2013. We hold that there is no requirement to reopen the CV issue as a pre-condition for the surplus withdrawal application, just for Canada Life to provide assurances that the elected commuted value payments and other payments to satisfy Plan obligations (such as pensions) were made in 2013, along with satisfaction of any other pension benefits which remain an obligation of the continuing Plan.

[43] As we have already found, the Superintendent made a determination in 2011 that the proposed actuarial assumptions and methodology used in the Integration PWU report were acceptable. He was aware of the applicant's and self-represented applicants' arguments in 2013-2015 as to the alternative approach proposed by certain applicants. We repeat that the applicants and self-represented applicants who accepted payments of their individual commuted values in 2013 made no objection at the time or prior to the 2011 approval, nor at the time they elected their payments, to the commuted value issue, nor did their Class Counsel. Before the Superintendent would have granted the SWA, under s.79(3)(b) of the Act, he would have had to satisfy himself that “provision has been made for the payment of all liabilities of the pension plan as calculated for the purpose of the termination of the plan”. The Report would have set out by virtue of s.70(1) of the Act the assets and liabilities of the Plan and the benefits to be provided to members, former members, retired members and other persons, among other required information. Such a determination by the Superintendent would necessarily have included in our view an assurance that the promised commuted value transfers had been paid. There is no evidence before us to suggest they were not paid. The applicants and self-represented applicants who elected commuted value payments have, by their own testimony, confirmed receipt of their promised commuted value payments. We find that the commuted value issue is not an outstanding issue or pre-condition under the SWA and NOID, and further that is not an implied or unresolved issue as Mr. Anderson contends. He simply does not accept the Superintendent's answer.

---

<sup>4</sup> *Marshall Steel Limited and Associated Companies v. Superintendent of Financial Services*, FST Decision No. P0150-2001-1, November 29, 2002.

[44] In this case the NOID deals with the SWA and not directly or indirectly with the 2011 approval of the Integration PWU report. We are not being asked by the applicants and self-represented applicants, other than indirectly by Ms. Durst, to review the terms of the SSA as it relates to the SWA, or address a pension matter connected directly to the NOID. The primary relief sought is to delay the SWA approval so as to first require the Superintendent to re-open the issue of the CV calculations. We see no compelling argument to indicate that we have jurisdiction to compel the Superintendent to re-open that 2011 Integration partial wind up report approval as it is not a condition of the SWA or the NOID. To do so would be to grant persons not properly before us as parties, a separate forum to attack a prior regulatory decision that is separate and distinct from the one under the NOID. To that we say no. It is not within our jurisdiction.

[45] Even if it was within our jurisdiction, we would decline to use our discretion under s.89(9) of the Act to make an order directing the Superintendent to re-open his review of the Integration PWU report. It is clear to us that the Superintendent had numerous opportunities to consider the assumptions and methodology related to the underlying pension obligations on wind up, including those related to the calculation of commuted values in 2006-2011, and even thereafter in 2013-2015. There is simply no evidence before us to suggest that the Superintendent did not consider those issues in exercising his discretion to approve the Integration PWU report or that the minimum standards under the Act were not met, as in the *Imperial Oil* case.<sup>5</sup>

[46] Further, Mr. Mazurek offered no legal basis for his assertion that the Superintendent should re-open the commuted value issue on the basis of an undefined and unsupported “fairness” argument suggesting that somehow the Tribunal should presume that the applicants’ argument of a different commuted value basis would be successful. We find no legal basis to accept such a presumption in advance of any hearing on the merits. The motion for dismissal therefore also succeeds under Rule 31.01(b).

[47] Under the second ground, certain parties argued that the Superintendent’s decision was *functus officio* with respect to the approval of the Integration PWU report. There is no evidence before us that any applicant or self-represented applicant or other Plan member sought to request a hearing before the Tribunal or sought judicial review of the Superintendent’s 2011 approval of the Integration PWU report. The legal argument at its core is that a final decision rendered by an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision, cannot afterwards alter its decision except to correct clerical mistakes or errors arising from an accidental slip or omission.<sup>6</sup> In this case the argument is applied to a decision by the Superintendent and case law before us is scant.

[48] If **all** decisions of the Superintendent are appealable, whether or not as the result of a NOID or notice of proposal, then we question at what time could anyone rely on a regulator’s decision? Chaos would result if all of the Superintendent’s decisions were appealable. If simply investigatory rather than a quasi-judicial function his decision is beyond the jurisdiction of the Tribunal in keeping with another *Imperial Oil* decision.<sup>7</sup> If quasi-judicial, it still must be in relation to the NOID.

---

<sup>5</sup> *Imperial Oil Limited v. Ontario (Superintendent Financial Services)*, 2010 ONFST 16 (CanLII), page 5.

<sup>6</sup> *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, para 40.

<sup>7</sup> *Imperial Oil Limited v. Ontario (Superintendent Financial Services)* 2009 ONFST 26 (CanLII), at page 6.

[49] It was not clear to us whether Canada Life and the Superintendent were arguing that the Superintendent's decision on the Integration PWU report was a quasi-judicial decision, as in *Chandler*.<sup>8</sup> If so, in the *Chandler* decision, the Tribunal was directed to the court's examination of the doctrine as it applied to quasi-judicial acts of a government body, to hold that decisions made in due form are irrevocable, to ensure "legal security in decisions". The court noted that there may be exceptions when there is a serious procedural defect, such as failure to observe the rules of natural justice. Even if the Superintendent's decision on the report is quasi-judicial, no such procedural defect occurs in this case. In line with the *functus officio* doctrine, the court held in *Chandler* that if the Board had discretion to consider making recommendations and chose not to, that should be the end of the matter. Here, in relation to the Integration PWU report, the Superintendent need only reasonably satisfy himself that the Act, Plan terms and relevant FSCO policies are applied: if alternative methodology and assumptions can be considered, his discretion to prefer one over another is **not** of itself the basis for the Tribunal to substitute its decision. In our view a final determination was made in 2011. Whether investigatory or quasi-judicial, as a general rule, under the *functus officio* doctrine no jurisdiction under s.89(9) exists in this instance to direct the Superintendent to re-open his review of the Integration PWU report, unless exceptional circumstances exist.

[50] The only Tribunal decision referred to us was the *Marshall Steel Ltd.* case, which applied the *functus officio* doctrine on facts distinguishable from this case. In that case, a partial wind up report was re-opened to include a plan member who was improperly excluded from the group on the basis of a denial of natural justice. No such similar facts were alleged in this case and *Marshall Steel* can be distinguished on this basis.

Further we disagree with the approach taken by the Tribunal in *Marshall Steel* in 2002. As a practical necessity, to determine any resulting surplus following a partial wind up, the assets and liabilities under the PWU report would first have to be determined under the approved basis and settled. The report would be final, as in this case, with respect to the underlying liabilities, subject to an inclusion or exclusion of members or changes in data on the basis of a denial of natural justice, as in *Marshall Steel*. Otherwise plan administrators would have no security in the regulator's approval of the partial wind up benefits and in their ability to settle such benefits.

[51] Consequently we find no legal or policy reasons to hold that the Tribunal has jurisdiction to direct the Superintendent to re-open the 2011 approval of the Integration PWU report as a collateral issue to the NOID, by persons not properly parties before us.

[52] Mr. Mazurek's allegations of "fairness" in relation to his client's complaints in respect of the diminishing surplus under the SSA in 2006-2011 find no ground here under the Act, and we find that matter has already been addressed by the court in our view in the Perell J. decision in assessing the context of fairness of the SSA.

[53] Under Rule 33.01(b), we dismiss all of the Requests for Hearing as being initiated by a party in relation to matters outside the proper jurisdiction of the Tribunal.

---

<sup>8</sup> *Chandler*, *ibid.*

**X. UNDER ISSUE D), IF THE ANSWER TO ANY OF ISSUES (A), (B) OR (C) IS NO, SHOULD THE INDIVIDUAL HEARING REQUESTS BE DISMISSED WITHOUT FURTHER HEARING?**

[54] For the reasons given under issues a) through c) above, the individual hearing requests are dismissed without further hearing under Rule 33.01.

**XI. UNDER ISSUE E), TO WHAT EXTENT, IF ANY, IS THE TRIBUNAL BOUND BY OR LIMITED BY THE ORDER OF THE SUPERIOR COURT OF JUSTICE DATED JANUARY 21, 2014?**

[55] For the most part, the Requests for Hearing do not seek to vary or alter the NOID in respect of the SWA.

[56] Only Ms. Durst's Request for Hearing, in part, requested that Canada Life be ordered to make payment of the initial surplus amounts communicated in 2011.

[57] All of the self-represented applicants and applicants testified that they were members of the class proceedings in respect of the surplus, had signed the Retainer Agreement discussed in para 15 above, which remain in our view valid to the date of this hearing and had not opted out of the class proceeding. Mr. Mazurek offered no legal arguments or case law to support his unsubstantiated argument that as a member of a class proceeding his clients were not bound by the court order approving the SSA and that the Tribunal had jurisdiction to deal with the SSA.

[58] We accept the added parties contention that the order of the court that "the Agreement is valid and binding on the parties to this proceeding and on all members of the Class (as defined in the Certification Order) other than the Opt Outs (hereinafter "Class Member" or "Class Members") and that, following applicable Regulatory Approval, the distribution of surplus shall proceed in accordance with the terms of the Agreement amongst the Class and Canada Life."

[59] No evidence was put before us to suggest an appeal from that judgement was taken. Approval by the Superintendent of the SWA is not an opportunity to re-visit the SSA itself or permit a collateral attack on the court's approval of the SSA. There was no argument or evidence before us that the SWA was contrary to the SSA.

[60] Subsection 27(3) of the *Class Proceedings Act*<sup>9</sup> states that a judgement on common issues of a class binds every class member who has not opted out of the class proceeding. The Class Counsel (KM and HP) were appropriate persons to receive notice of the SWA on behalf of the applicants and self-represented applicants in this case and to make any submissions to the Superintendent on their behalf. No such submissions or objections were made by KM or HP.

[61] No evidence disputed the Superintendent's assertion that the Certification Order included surplus entitlement as a common issue.

[62] We accept the argument that while the Court made its order conditional upon the Superintendent's consent to the SWA, this does not mean that the entire issue of surplus entitlement or any of the other issues determined in the class action are open for re-litigation

---

<sup>9</sup> *Class Proceedings Act*, S.O. 1992, c.6, s. 27(3)

before the Superintendent and the Tribunal. The Tribunal recognized this in *Montreal Trust*, setting out the reasons why the court's order is dependent on regulatory approval:

In our view, the reservations in the Order with respect to the involvement of regulatory requirements were not intended to leave the door open to re-litigation of the matter identified as the "common issue" in the class proceeding before Hoy J.: the issue of whether the plan permitted payment of surplus to the employer. That matter was settled by her Order. The only requirement for regulatory approval explicitly applicable to the amendment was the requirement for regulatory filing, a requirement which was fulfilled by the filing with the Regie in the province in which the Plan was registered. The other requirements for regulatory approval relate not to the question of surplus ownership, but to the question of whether or not any surplus can be paid out of the Plan, irrespective of the question of employer entitlement.<sup>10</sup>

[63] Section 79(3.1) of the Act sets out the criteria for the Superintendent to determine on a surplus withdrawal application with respect to a plan that is being partially wound up:

79(3.1) Subject to section 89, the Superintendent shall not consent to payment of surplus to an employer out of a pension plan that is being wound up in part unless,

- (a) all of the criteria described in clauses (3) (a), (c) and (d) are satisfied; and
- (b) the payment of surplus to the employer on the partial wind up of the pension plan is authorized either as provided in section 77.11 or by a court order declaring that the employer is entitled to the surplus when the plan is being wound up in part.

[64] We find that when there is a court order declaring that the employer is entitled to surplus on wind up, the Superintendent has no jurisdiction to inquire further into entitlement. In other words, the court order satisfies the criterion in clause 79(3.1)(b) of the Act. Consequently, the Court Order binds the Tribunal with respect to the criterion in clause 79(3.1)(b) of the Act.

[65] Therefore, the issues that are set out in the Requests for Hearing of the applicants regarding the payment of the original estimated surplus amounts under the initial SSA is not properly an issue before us. The court order issued by the Superior Court of Justice binds them and all of the self-represented applicants pursuant to the *Class Proceedings Act*. No one appealed that decision and it is therefore final. The court order of January 21, 2014 by Perell J. indicated that the related SSA does not determine the final amount of surplus available under the SSA: that is determined by the Plan actuary. It is not a matter before this Tribunal. The Requests for Hearing by the applicants on this alternative remedy amount to a collateral attack on the court's decision and therefore fall within Rule 33.01(a) as both frivolous and outside our jurisdiction.

---

<sup>10</sup> *Montreal Trust Company of Canada v. Ontario (Superintendent Financial Services)*, 2009 ONFST 1 (CanLII), p. 9

**XII. UNDER ISSUE G), DO THE REQUESTS FOR HEARING AND RELATED APPLICATIONS FOR PARTY STATUS OF MR. ANDERSON AND THE OTHER SELF-REPRESENTED APPLICANTS RAISE ANY JUSTICIABLE ISSUE FOR DETERMINATION BY THE TRIBUNAL?**

[66] For all the reasons given under the prior issues, none of the applications raise in our view a justiciable issue. The requested remedies are frivolous, unrelated to the NOID or do not seek to vary the NOID and are beyond the jurisdiction of the Tribunal.

**XIII. ADDITIONAL APPLICATIONS FOR PARTY STATUS**

[67] As noted previously, a number of the self-represented applicants who filed a Request for Hearing (Form 1) also filed separate Applications for Party Status (Form 4) in respect of these same proceedings in case their original Requests for Hearing were rejected by the Tribunal. The Tribunal advised that it would deal with the related completed Applications for Party Status made by Ms. Wong, Ms. MacKenzie, Ms. Heywood, Ms. Rimler, Mr. Luk, and Mr. Rajmoolie in this decision on the preliminary motion.

[68] Under the Tribunal's Rules, s. 37.04 permits the Tribunal to consider in respect of applications for party status:

- a. the nature of the proceeding
- b. the issues
- c. whether the person will be directly affected by the outcome of the proceeding;
- d. the likelihood of the person being able to make a useful and different contribution to the understanding of the issues;
- e. any delay or prejudice to the parties; and any other matter it considers relevant.

[69] These applications for party status reference a request made of the Superintendent in August 2015 after the initial Requests for Hearing were filed, to re-consider the commuted value issue and require Canada Life to make additional payments to the Plan members with respect to the Integration PWU report, as well as to ensure that the guaranteed minimum surplus payments under the SSA are also paid. Those requests are not before the Tribunal. However, these claims are not new and do not differ substantially from the claims made by the same persons under their original Requests for Hearing. We have already made our findings in respect of the 2011 approval of the Integration PWU report. In our view, the subsequent applications for party status were intended to merely delay these proceedings and further delay the implementation of the SSA and related SWA and are therefore frivolous in their purpose. As their original Requests for Hearing have been rejected on legal grounds, we do not accept the Applications for Party Status by the same self-represented applicants who we have found are not proper parties before us. As we intend to dismiss the proceedings before us based on the original Requests, there is no ability for applicants to apply for party status in respect of the same proceeding. Consequently the Applications for Party Status by Ms. Wong, Ms. MacKenzie, Ms. Heywood, Ms. Rimler, Mr. Luk and Mr. Rajmoolie are also dismissed.

#### XIV. ORDER

[70] We grant Canada Life's motion to dismiss this proceeding without a hearing for the reasons given above and hereby give the applicants and self-represented applicants and Added Parties notice of our decision and direction that the Superintendent may issue his final order in respect of the NOID.

[71] We make no order as to costs as none have been requested.

Dated at Toronto, this 3<sup>rd</sup> day of February, 2016.



---

Florence A. Holden

---

Patrick Longhurst

---

Jeffrey Richardson

#### XIV. ORDER

[70] We grant Canada Life's motion to dismiss this proceeding without a hearing for the reasons given above and hereby give the applicants and self-represented applicants and Added Parties notice of our decision and direction that the Superintendent may issue his final order in respect of the NOID.

[71] We make no order as to costs as none have been requested.

Dated at Toronto, this 3<sup>rd</sup> day of February, 2016.

Florence A. Holden

A handwritten signature in cursive script, appearing to read 'Patrick Longhurst', written over a horizontal line.

Patrick Longhurst

Jeffrey Richardson

#### XIV. ORDER

[70] We grant Canada Life's motion to dismiss this proceeding without a hearing for the reasons given above and hereby give the applicants and self-represented applicants and Added Parties notice of our decision and direction that the Superintendent may issue his final order in respect of the NOID.

[71] We make no order as to costs as none have been requested.

Dated at Toronto, this 3<sup>rd</sup> day of February, 2016.

---

Florence A. Holden

---

Patrick Longhurst

---

Jeffrey Richardson



# APPENDIX A

Page 1 of 12

*Case Name:*

**Kidd v. Canada Life Assurance Co.**

**Between**

**David Kidd, Alexander Harvey, Jean Paul Marentette, Garry C.  
Yip, Louie Nuspl, Susan Henderson and Lin Yeomans, Plaintiffs,**

**and**

**The Canada Life Assurance Company, A.P. Symons, D. Allen Loney  
and James R. Grant, Defendants**

**PROCEEDING UNDER the Class Proceedings Act, 1992**

[2014] O.J. No. 2108

2014 ONSC 457

12 C.C.P.B. (2d) 62

240 A.C.W.S. (3d) 215

2014 CarswellOnt 5778

56 C.P.C. (7th) 364

Court File No. 05-CV-287556CP

**Ontario Superior Court of Justice**

**P.M. Perell J.**

Heard: January 10, 2014.

Judgment: January 21, 2014.

(79 paras.)

*Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Settlements -- Approval -- Motion by representative plaintiffs for approval of third revised class proceeding settlement allowed -- Action related to distribution of pension plan surplus after several partial wind-ups -- Initial approved settlement was renegotiated after unexpected economic circumstances caused significant reduction in estimate of surplus -- Approval of revised agreement refused -- Third revised agreement approved -- Third agreement removed circumstantial unfairness and was superior to all prior agreements -- Agreement was in class members' financial best interests and was substantively, procedurally, institutionally, and circumstantially fair.*

Motion by the representative plaintiffs for approval of a third revised class proceeding settlement. The class proceeding related to distribution of the estimated \$93 million surplus of a pension plan after several partial wind-ups and with respect to allegations of improper charging of expenses to the pension plan. An initial \$49 million settlement was approved in February 2012. It remained in effect, but was never implemented due to unexpected economic circumstances that resulted in actuarial advisors stating the estimated amount of the surplus had dramatically decreased. In response, the parties negotiated a revised settlement. The motion for approval of the revised settlement was dismissed in March 2013. A third revised settlement agreement was reached for \$33 million with new distribution terms including waiver of \$1 million in legal fees by class counsel, and waiver by the defendant of a portion of its settlement expenses. The plaintiffs sought approval. The objectors raised issues regarding how segregated plan assets were managed and the manner in which the surplus associated with those assets was sustained or preserved.

HELD: Motion allowed. The amendments had a substantial value and included a significant contribution by the defendant that went toward ameliorating the disappointed expectations of class members arising from the original incorrect estimate of the surplus. The amended agreement was a good result for class members and was superior to all alternatives to settlement including the prior agreements. Unlike the prior refused agreement, there was no circumstantial unfairness. The revised settlement agreement was in the financial best interests of the class members and was substantively, procedurally, institutionally, and circumstantially fair.

#### **Statutes, Regulations and Rules Cited:**

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 29, s. 29(2)

Pension Benefits Act, R.S.O. 1990, c. P.8,

#### **Counsel:**

*Mark Zigler, Clio M. Godkewitsch, and David B. Williams* for the Plaintiffs, *David Kidd, Alexander Harvey, Jean Paul Marentette, Susan Henderson and Lin Yeomans.*

*Darrell Brown* for the Plaintiffs, *Garry C. Yip and Louie Nuspl.*

*Jeff Galway and Doug Rienzo* for the Defendant, *The Canada Life Assurance Company.*

*John C. Field* for the Defendants *A.P. Symons, D. Allen Loney, and James R. Grant.*

*Patrick Mazurek* for certain objectors.

*Dan Anderson*, objector.

---

### **REASONS FOR DECISION**

P.M. PERELL J.:--

#### **A. INTRODUCTION AND OVERVIEW**

- 1 This is a class action with respect to the ownership of the surplus of a pension plan after several partial wind-ups and with respect to allegations of improper charging of expenses to the pension plan.
- 2 This class action has become a saga. By order dated October 26, 2011, I certified the action as a class action for settlement purposes; see *Kidd v Canada Life*, 2011 ONSC 6324. By order dated February 6, 2012, I approved the settlement; see *Kidd v Canada Life*, 2012 ONSC 740. The settlement order remains in effect, but the settlement has never been implemented. The unimplemented settlement became a huge disappointment largely because of unpredicted economic forces. In response to the disappointment, the parties negotiated a revised settlement. They brought a motion for a second settlement approval based on their revised agreement. However, by order dated March 28, 2013, I dismissed the motion for approval of the revised settlement; see *Kidd v. The Canada Life Assurance Company*, 2013 ONSC 1868. Then, with the support of the Plaintiffs, Canada Life appealed my decision refusing the revised settlement agreement, but the appeal was not argued, because the parties agreed to a third version of their settlement agreement.
- 3 With some objectors opposing the motion, the parties now move for court approval of the third version of the settlement agreement pursuant to s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6.
- 4 For the reasons that follow, I approved the revised version of the settlement between the parties.

## **B. FACTUAL AND PROCEDURAL BACKGROUND**

- 5 In 2003, The Great-West Life Assurance Company acquired The Canada Life Assurance Company. Subsequently, there was a partial winding up of the Canada Life Canadian Employees' Pension Plan known as the "Integration Partial Wind-up" or "IPWU." The effective date of the IPWU was June 30, 2005.
- 6 The process of determining whether or not there is any surplus available for distribution following a partial wind-up involves the following steps: (1) identification of the plan members affected by the wind-up; (2) preparation of an actuarial estimate as at the date of the partial wind-up of the cost of the pension benefits to the persons affected by the wind-up; (3) preparation of an actuarial estimate of the cost of the pension benefits of all plan beneficiaries; (4) determination of the amount of the assets in the plan as at the partial wind-up date allocable to the partial wind-up group and allocable to the other members of the pension plan; (5) settlement from the allocable assets of the basic benefit entitlements of all members affected by the partial wind-up in accordance with their elections to stay in the plan (by purchase of an annuity) or by payment of a commuted value; (6) calculation of the amount, if any, left from the assets allocated for the partial wind-up members after accounting for investment returns and deducting wind-up expenses.
- 7 The Plan actuary, Mercer, prepared an initial report for the IPWU, and it estimated that the pension plan assets were \$273 million and the liabilities were \$175 million. These estimates produced an estimated IPWU surplus of \$93 million after payment of wind-up expenses.
- 8 The surplus calculated by Mercer was an estimate because the actual surplus would depend upon how pension plan liabilities were actually settled in accordance with the *Pension Benefits Act*, R.S.O. 1990, c. P.8. The amount of the liabilities would depend, in part, upon whether plan members chose a commuted payment or chose to continue pension benefits from the plan. The election between commuted values and the value of pension plan benefits affects the calculation of plan liabilities because commuted values and the values of pension plan benefits are not numerical equivalents.

9 In 2005, this class action was commenced. The Plaintiffs claim was for the pension surplus and for reimbursement from Canada Life of expenses alleged to have been wrongfully charged for administering the pension trust fund.

10 It is very important to note that the class action was not about the calculation of the surplus, which was left to the actuaries, but was about who owned the surplus whatever its size. Colloquially speaking, the action was not about the size of the surplus pie but about who should get the pie. The settlement negotiations were about how to divide the surplus pie between Canada Life and the Class Members.

11 In April 2007, Justice Winkler presided at a mediation session, and following the mediation Canada Life, the Plaintiffs and the Executive Committee of the Canada Life Canadian Pension Plan Members' Rights Group (the "CLPENS Executive") signed a Memorandum of Understanding establishing a non-binding framework for settlement of the litigation, but a final settlement was not reached.

12 Meanwhile, in March 2008, the IPWU assets were segregated from the other assets of the Pension Plan and invested as a separate sub-fund. At this time, Mercer made assumptions as to how many employees would eventually elect to receive a lump sum transfer of the commuted value of their pension entitlement and how many would elect to receive an immediate or deferred pension. To foreshadow a point that will emerge later, the objectors to the settlement complain about how the segregated assets were managed and about how the surplus associated with the assets was sustained or preserved.

13 In late 2010, the parties reached agreement on the terms of a Surplus Sharing Agreement. In addition to the IPWU matter, the Surplus Sharing Agreement addressed the claims with respect to three other partial wind-ups of the Pension Plan.

14 In addition to the IPWU, the Surplus Sharing Agreement dealt with claims of members employed by Indago Capital Management Inc., Pelican Food Services Inc., and Adason Properties Limited. It may be noted here that unlike the IPWU part of the surplus, the Indago, Pelican, and Adason part of the surplus was barely affected by the subsequent economic forces that affected the calculation of the IPWU surplus.

15 Under the Surplus Sharing Agreement (which was eventually approved by the Court but never implemented, 57.22% of the partial wind-up surpluses was payable to the partial wind-up Class Members, 12.44% of the partial wind-up surpluses was payable to the Inactive Eligible Non-PWU Group members (deferred vested and pensioners) and 30.34% was payable to Canada Life.

16 The amount of surplus to be distributed to each member was based on his or her respective pension plan liabilities but the Surplus Sharing Agreement provided that the minimum share payable to an eligible Class member would be \$1,000. The agreement further provided that active Class Members would have a two-year contribution holiday. The Surplus Sharing Agreement also provided for court approval of a variation of trust in connection with the transfer of plan assets to a new pension plan and for certain declarations in connection with the new pension plan.

17 In March 2011, an information package about the Surplus Sharing Agreement was sent to Class Members and they were asked to vote on the proposed settlement. The information packages contained individual estimates of each member's surplus share under the proposed settlement. The information statements were premised on an estimated surplus of \$62.2 million for the IPWU. This

surplus estimate was based on an estimate of the cost of settling the basic benefit entitlements of the IPWU group depending on their choice of commuted value entitlements or pension plan benefits.

18 Here, it may be noted that pursuant to the *Pension Benefits Act*, R.S.O. 1990, c. P.8, Canada Life was required to provide persons affected by the IPWU with an election for: (a) the transfer of the commuted value of their pension entitlement calculated in accordance with the policies of Financial Services Commission of Ontario ("FSCO"); or (b) a guaranteed deferred or immediate pension (the by-default choice). The commuted values were calculated in accordance with FSCO policy. FSCO, in a letter dated April 14, 2011, indicated its approval of the manner in which the commuted values were calculated.

19 In July 2011, election forms were mailed to members affected by the IPWU. The members were advised of the amount of the commuted value of their pension entitlement. Canada Life informed members that if they chose (or were deemed to have chosen) the guaranteed pension option, an annuity would be purchased from an insurance company on their behalf in order to provide that guaranteed pension.

20 On January 27, 2012 the Court approved the Surplus Sharing Agreement. At that time, Canada Life's most recent estimate of the IPWU surplus as at June 30, 2011 was \$54 million. This estimate continued to be based on Mercer's assumption as to how many IPWU members would elect a lump sum transfer of the commuted value of their basic benefit entitlement versus a guaranteed pension. The estimated surplus for the Pelican, Indago, and Adason wind-ups was \$2.9 million, \$1.3 million, and \$6.1 million respectively.

21 When the approval was granted, the value of the settlement to the class was \$49 million. The Court also approved payment of Class Counsel's legal fees of \$4.667 million plus disbursements of approximately \$60,000, plus up to \$200,000 in additional legal fees to complete the matter.

22 Unfortunately, within one month of the Court approval, Canada Life and its actuarial advisors advised that the estimated amount of the IPWU Surplus had dramatically decreased.

23 On February 10, 2012, Canada Life was advised by Mercer that the estimated costs of settling the basic benefits of the IPWU members had increased significantly from previous estimates. Mercer advised Canada Life that this was mainly because: of (1) a drop in long-term interest rates, which increased the present value and thus the cost of settling basic benefits for members who elected to receive a guaranteed pension and (2) because fewer members than expected had elected to receive the commuted value of their pension benefits.

24 The evidence at the time was that the value of the assets attributable to the IPWU had increased over time and thus poor investment performance was not the reason for the smaller surplus. Mercer subsequently advised that if it was assumed that all IPWU members who had not yet chosen their payment option were deemed to have elected to receive a guaranteed pension, the estimated IPWU surplus available for distribution as at December 31, 2011 was under \$10 million. This information was subsequently shared with Class Counsel and the court.

25 In May 2012, Canada Life solicited bids for annuities to settle the benefits of those members of the IPWU who wished to continue with pension benefits, but all of the seven insurance providers who had been approached declined to bid. In these circumstances, Canada Life determined that its only option was to transfer the liability to the ongoing portion of the Pension Plan together with IPWU assets equal in value to that liability.

26 The amount of the assets and liabilities to be transferred was calculated in the manner prescribed in the applicable FSCO policy. The transfer was effective August 31, 2012 after notice to Class counsel and a court appearance on September 27, 2012.

27 Meanwhile, the estimated IPWU surplus continued to drop. As at August 31, 2012, the estimated surplus was just \$3.1 million.

28 Following the September 27, 2012 motion, the parties attempted to address the situation that the estimated surplus continued to diminish.

29 Justice Strathy presided at a mediation and in December 2012, Canada Life, the Plaintiffs and the CLPENS Committee, a group associated with the Representative Plaintiffs, agreed on the terms of an amendment to the Surplus Sharing Agreement. At that time, the estimated IPWU surplus was \$2.6 million.

30 The terms of the proposed Amended Surplus Sharing Agreement involved augmentation of the IPWU surplus by Canada Life waiving certain reimbursements (estimated at \$1.3 million) and Class Counsel waiving reimbursement of \$200,000 in legal fees. There were to be top-up payments to members so that everyone in the IPWU Sub-Class would receive the promised minimum \$1,000 surplus share (estimated at \$1.2 million). There was a potential second surplus distribution calculated as at December 31, 2014 subject to a \$15 million cap.

31 This amendment to the Surplus Sharing Agreement was conditional upon court approval. The fairness hearing was scheduled for March 18, 2013.

32 Meanwhile, because Canada Life was unable to purchase annuities for those continuing with the Pension Plan, it was required by FSCO policy to provide those members who had not originally elected to receive commuted values a further opportunity to elect that option, and in early January 2013, new election forms were distributed and members were provided with the minimum statutory period of 90 days in which to elect. The result was that 142 IPWU members who had previously elected or were deemed to have elected to receive a deferred or immediate pension elected to receive a lump sum transfer of their commuted values.

33 Pausing here, the effect of these elections is that Mercer has recalculated the available surplus under the Surplus Sharing Agreement as of December 31, 2013 to be approximately \$11 million. Under the un-amended and not implemented Surplus Sharing Agreement, 69.66% of this \$11 million is distributable to eligible Class Members.

34 On March 28, 2013, I refused to approve the amendment. Although, the revised settlement was financially better than implementing the already approved Surplus Sharing Agreement, I concluded that it did not meet the test for approval under the *Class Proceedings Act, 1992*. For the reasons expressed in my Reasons for Decision, I did not think the proposed amended agreement was fair as required by the *Act*.

35 With the support of the Plaintiffs, Canada Life appealed my decision.

36 In late March, 2013 Class Counsel was contacted by Patrick Mazurek, a lawyer who was retained by some of the Class Members who had objected to the amendments to the Surplus Sharing Agreement. Mr. Mazurek had several discussions and a meeting with Class Counsel, and he was later granted standing to intervene in the Court of Appeal, on consent of the parties.

37 While the appeal of my disapproval decision was pending, the parties resumed negotiations. These renegotiations ultimately led to another and different amendment to the Surplus Sharing Agreement. The negotiations were arms-length and adversarial.

38 The objectors and their counsel were not involved in the negotiations, although Class Counsel submit that they considered the objectors' concerns when negotiating with Canada Life.

39 The amendment to the Surplus Sharing Agreement is the subject of this motion for approval. The terms of the new amendment include the following:

- \* There will be a single distribution of surplus to the Class that will occur immediately following court and regulatory approval.
- \* Each member of the IPWU group and each member of the Inactive Eligible Non-PWU Sub Class (i.e. pensioners and deferred/vested members) are guaranteed to receive a surplus payment equal to the greater of 56% of the amount that was estimated on his or her personal information statement in 2011, and \$1000.
- \* Canada Life will contribute an amount (estimated to be approximately \$11.3 million) which, when added to the existing amount of surplus and after taking into account certain specified adjustments to the original settlement, will provide the above guaranteed payments.
- \* Class Counsel will waive a total of \$1 million in legal fees that were previously approved by the court, and Class Counsel will not charge any legal fees incurred from January, 2012 to completion of this matter. Those amounts will be applied for the benefit of the IPWU group and the Inactive Eligible Non-PWU Sub Class Members exclusively, and will not be shared with Canada Life under the SSA provisions.
- \* Canada Life will waive its entitlement to reimbursement of a portion of its settlement expenses in the amount of \$500,000, and will also waive entitlement to a portion of the interest on its outstanding expenses (estimated at \$800,000), and these amounts will be added to the IPWU surplus to be distributed.
- \* The entitlements of Class Members not involved with the IPWU is unchanged from the Surplus Sharing Agreement.

40 Under the proposed amended settlement, practically speaking, Canada Life has given up its share of the pension surplus pie that is being distributed by the settlement of the class action.

41 Under the proposed amended settlement, about 45% of Class Members will receive the same benefit as was estimated in the March 2011 information packages.

42 Under the revised Surplus Sharing Agreement, Class Counsel will be paid \$3.867 million in fees, which is \$1 million less than the amount previously approved. This fee represents approximately 11% of the total recovery of the Class, and represents an estimated multiplier of 1.5 times the anticipated total fees. This multiplier will reduce if additional time must be expended by counsel to complete the matter with no additional fees charged.

43 The total value of the amended settlement to the Class will be approximately \$33 million. In the absence of the amendment, the estimated value of the Surplus Sharing Agreement as at December 31, 2013 is about \$19.8 million.

44 Class Counsel hosted two webinars on November 28 and December 2, 2013 to further describe the terms of the revised settlement. The webinars were attended by 91 and 47 members respectively via webcast. Class Counsel responded to dozens of questions submitted by email during those webinars and subsequently.

45 Class counsel made a number of invitations to Mr. Mazurek to discuss any aspect of the settlement, but he did not accept the invitations.

46 Mr. Mazurek appeared at the fairness hearing on behalf of a group of about 90 objectors and delivered a detailed factum objecting to the fairness of the proposed settlement.

47 Class Member Dan Anderson also appeared and delivered a detailed factum.

### C. THE OBJECTIONS TO THE AMENDED SETTLEMENT

48 Objections have been received from the following Class Members: (1) Dan Anderson; (2) Maggie Wong and Monica Rimler; (3) Patrick Garel; and (4) Mr. Mazurek, on behalf of 92 Class Members.

49 The objectors do not suggest that the Amended Settlement is not an improvement from the outcome of the Surplus Sharing Agreement.

50 I will address the objector's main objections in the following discussion and analysis.

### D. DISCUSSION AND ANALYSIS

51 Section 29(2) of the *Class Proceedings Act, 1992* provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.), at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

52 The court hearing a settlement approval motion has no ability to rewrite the settlement entered into by the parties or to impose terms on the parties that have not been agreed to: *Dabbs v. SunLife Assurance Co. of Canada*, *supra*, at paragraph 10; *Lavier v. MyTravel Canada Holiday Inc.*, [2011] O.J. No. 2340 (S.C.J.) at paragraph 32.

53 In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and, (i) the nature of communications by counsel and the representative plaintiff with Class Members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra* at para 59; *Corless v. KPMG LLP*, [2008] O.J. No.

3092 (S.C.J.), at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra*, at para. 45; *Kidd v. Canada Life Assurance Company*, *supra*.

54 In considering whether to approve an amendment to an already approved settlement, the amendment must be all of substantively, procedurally, institutionally, and circumstantially fair: *Kidd v. Canada Life Assurance Company*, *supra*.

55 In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10. An objective and rational assessment of the pros and cons of the settlement is required: *Al-Harazi v Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

56 The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation: *Parsons v Canadian Red Cross Society* [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v Sun Life Assurance Company of Canada*, *supra*. A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: *Fraser v. Falconbridge Ltd.* (2002), 24 CPC (5th) 396 at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.

57 In my opinion, having regard to the various criteria used to determine whether to approve a settlement in a class action, the amended Surplus Sharing Agreement should be approved. The amendments have a substantial value that will be delivered Class Members without further exposure to uncertain litigation and the potential for additional external economic and actuarial factors diminishing the recovery for the Class Members. Canada Life has made a substantial and decent contribution and the amendments go a significant distance in ameliorating the disappointed expectations of Class Members arising from the original incorrect estimates of the surplus.

58 Recalling what the litigation was actually about; i.e., about who owns the surplus and whether Canada Life wrongfully charged for expenses, the amended Surplus Sharing Agreement is a good result for the Class Members and perhaps better than any judgment the Class Members could obtain by prosecuting the litigation, which choice, at the moment is not available because nobody has yet sought to set aside the existing approved settlement.

59 Unlike the revised settlement agreement that I did not approve, there is no circumstantial unfairness. There is no opportunism by Canada Life and Canada Life and Class Counsel have made meaningful contributions that enhance the amount to be distributed to the IPWU group to assuage the disappointment of the Class Members who received information statements that contained estimates that turned out to be wrong.

60 It is worth noting that lost in the discussion of any version of the Surplus Sharing Agreement is the fact that Canada Life had a reasonably strong argument that in accordance with the law about surplus sharing, which turns on the interpretation of the pension plan documents, Canada Life did not have to share the surplus at all.

61 In the case at bar, the early trust documents stated that any surplus in the Plan on wind up belongs to Canada Life. Moreover, Canada Life's defence of the expense claim has now been improved by the Supreme Court of Canada's decision in *Nolan v. Kerry*, [2009] 2 S.C.R. 678, which was decided after the parties had reached an agreement in principle in the case at bar. In any event, even if successful on the Plan expenses claim, the remedy is reimbursement to the pension fund not direct payments to Class Members: *Potter v. Bank of Canada*, 2007 ONCA 234.

62 With great respect to the objectors, some of their objections about the lack of merit to the settlement presuppose that the Plaintiffs' claim to the surplus and for a reimbursement of pension expenses would be inevitably successful if it were litigated to a judgment. The Plaintiffs' success in the Class Action, however, was no sure thing.

63 The revised settlement is superior to all alternatives to settlement including the approved settlement, the rejected amended settlement, and, most particularly, it is superior to the risks of continued litigation were the approved settlement to be set aside, which to date has not been an alternative presented to the court.

64 Having regard to the risks of the case, the delays which would be associated with ongoing litigation and external factors which could impact the case including, changes to actuarial guidance, the risk of adverse investment performance, and the future performance of key interest rates, the revised settlement agreement is in the financial best interests of the Class Members.

65 Some of the objectors' objections concern matters that are tangential to the settlement and would indeed be tangential to a judgment had this case been litigated to a judgment.

66 Some objectors objected to the diminished absolute value of the surplus. They note that before the litigation began, the surplus was well over 100 million dollars, all of which was claimed by the Class Members and all of which was being claimed by Canada Life, but under the currently approved but unimplemented settlement, the amount to be divided is 70% of around \$11 million (albeit originally mistakenly estimated to be \$62 million for the IPWU) and under the revised settlement, the Class gets 100% of around \$33 million.

67 However, as I noted above, the litigation was not about the amount of the surplus but rather about who owns it. The value of a pension plan surplus fluctuates up and down depending on future economic conditions, and in the case at bar, the value of the pension surplus always depended on a future date of assessment when the liabilities of the pension plan would be fixed by a settlement or a judgment. Unfortunately, the future in the case at bar saw a decline in the surplus, but the fluctuations in the value of the surplus was a risk for both parties and the realization of this risk does not change the calculus that the current settlement is in the best interests of the Class Members.

68 The fluctuation of the surplus did produce what I regarded to be a circumstantial unfairness in the first attempt to amend the already approved settlement. The circumstantial unfairness was that, in my opinion, in the very unusual circumstance of this case where Class Members were actually asked to vote on the settlement and the variation of a trust and where in the campaign for votes, they were given estimates that turned out to be stunningly wrong, it was circumstantially unfair for Canada Life not to do more to assuage the disappointment that it's actuaries had caused. This was not a matter of Canada Life having any legal liability for misrepresentation, it rather was that it was circumstantially unfair, a sort of insult, for the Class Members to have to accept a gesture from Canada Life to make the revised settlement better than the already approved settlement. I see no circumstantial unfairness in the amendment now before the court. Practically speaking, the amount of the surplus has been

guaranteed by Canada Life and this guarantee means that 100% of the surplus pie goes to the Class Members.

69 By providing a guarantee, Canada Life has done something that I was told at a case conference many years ago by all the parties could not be done. However, circumstances are the mother of invention and in my view the guarantee is a very valuable attribute of the proposed amendment to the Surplus Sharing Agreement.

70 Some objectors objected to the calculation of pension plan liabilities in the case at bar. Here, it needs to be recalled that as the calculation of liabilities increases, the surplus decreases. In particular, they objected that since the commuted value of a pension entitlement is less than the attributed value of the pension entitlement to a Class Member who stays with the plan, Canada Life was benefiting by the persons who choose to take a commuted value. This objection, however, is tangential to the settlement of the class action and is a normal incident of the regulation of pensions under the *Pension Benefits Act*, where plan members are given a choice between commuted values and ongoing pension benefits.

71 Some objectors objected to the calculation of the surplus and attributed the decline in the surplus to the alleged mismanagement of the assets of the plan segregated for the purposes of calculating assets and liabilities. What evidence there is does not substantiate these objections and rather supports the conclusion that the fund was properly managed.

72 Some objectors objected to the fact that Canada Life retains some benefits from the settlement including certainty about its right to charge expenses. The objectors, however, apparently do not appreciate that the court is being asked to approve a settlement not to make a decision on the merits of the underlying litigation. That Canada Life may also take some benefits from the settlement is not a reason to reject a settlement that is fair and in the best interests of the Class Members.

73 Some objectors objected to the procedural fairness of the steps taken in the approval process especially in comparison to what had occurred before the approval of the original Surplus Sharing Agreement.

74 As I noted above, the steps taken before the first fairness hearing were unprecedented and unusual. The run-up to this fairness hearing was more typical, with arms-length negotiations and the involvement of the representative plaintiffs, a notice program, disclosure of the settlement terms, and an opportunity to object. In my opinion, there was no procedural unfairness before this approval hearing.

75 Moreover, a large group of objectors were represented by Mr. Mazurek, and his involvement and his scrutiny of the settlement proposal at the fairness hearing meant that there was a level procedural playing field for the objectors.

76 I pause here to say that Mr. Mazurek should be paid for his services out of the settlement funds up to the \$100,000 that was budgeted for this disbursement. If the parties cannot agree about Mr. Mazurek's fee, I will settle it by submissions in writing.

77 I am satisfied that the revised settlement is all of substantively, procedurally, institutionally, and circumstantially fair. In the Plaintiffs' factum at paras. 84-85, the Plaintiffs state:

The settlement is circumstantially fair because it results in a strong reclamation of value in the form of guaranteed benefits to class members which will be delivered in a timely way. Further, as a corollary, the settlement averts the very substantial legal, procedural and practical risks which exist. It is noteworthy that Canada Life has made substantial contributions to the settlement and has guaranteed the resulting payments. Those contributions mark a significant departure from its rights under the original SSA in order to guarantee the results to class members. It is also worth noting that that class counsel have proposed to substantially reduce their fees to the direct benefit of class members (and without any benefit to Canada Life) under the RSA. To borrow from the exhortation of this court in its reasons denying approval of the ASSA – the disappointment has been demonstrably shared.

85. The RSA is also institutionally fair. It has substantial value which, on any objective basis, compares appropriately with the merits of class members legal claims. Further, the institutional processes associated with this settlement approval hearing reflect: i) a strong direct notice program to class members over a meaningful period of time; ii) thorough and regular postings of additional information online; iii) ongoing access to class counsel by phone and e-mail; iv) two interactive webinars, and; v) robust opportunity for participation by class members in the process - as has been demonstrated by the actions of the objectors here.

78 I agree with those comments.

#### E. CONCLUSION

79 For the above reasons, I approved the proposed revised settlement agreement in accordance with s. 29 of the *Class Proceedings Act, 1992*.

P.M. PERELL J.