

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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

**FACTUM OF THE PLAINTIFFS
(Motion to Vary Judgment, January 10, 2014)**

January 6, 2014

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PART I - INTRODUCTION AND OVERVIEW

1. This is a motion to approve a revised settlement agreement (the “RSA”) and variation to the judgment granted in this class proceeding. This motion follows the decision of this court in March, 2013 declining to approve an earlier proposed settlement known as the Amended Surplus Sharing Agreement (“ASSA”). As is known to this court, the ASSA was brought about by events which frustrated the implementation of the original Surplus Sharing Agreement (“SSA”) which was approved in January, 2012.

2. The RSA represents a very strong resolution of the matters in issue in this litigation. In particular, the RSA is valued at over \$33 million on a guaranteed basis, and has substantially recaptured significant value for class members relative to the original SSA which was approved in January of 2012. The recovery has been achieved notwithstanding the fact that the estimated

value of the Integration Partial Wind-Up Surplus ("IPWU Surplus") was greatly reduced by a combination of unforeseen factors.

3. In negotiating the terms of the RSA, the Plaintiffs have paid careful attention to: 1) the strengths and weaknesses of the facts and legal issues in the litigation, 2) the factors impacting the rights of class members, specifically those that influence the valuation of the IPWU Surplus; 3) the reasoning of this court in declining to approve the ASSA and; 4) the reasonable concerns of those class members who took the time to communicate with class counsel.

4. The RSA has very substantial value which will be delivered to class members without further exposure to uncertain litigation and the potential for additional external economic, actuarial and other factors which jeopardize the potential recovery of the class and create volatility and uncertainty. The RSA represents a worthy and reasonable outcome for class members in this litigation.

5. Notwithstanding the results achieved and the risks which persist, there remain a number of objections to the RSA. The substance of those objections can be distilled to the following:

(a) Canada Life used actuarial 'sleight of hand' to make the IPWU Surplus vanish and 'locked-in' the amount available for distribution on an effective date that operates to its own benefit and to the detriment of the Class;

(b) The RSA is unfair because Canada Life gains benefits from it, including the recaptured surplus associated with allegedly improper commuted value calculations for members of the IPWU group who so elected; and

(c) The Executive Committee of the Canada Life Pension Rights Group (“CLPENS”) has no authority to enter agreements, and communications with the class from CLPENS, the Plaintiffs and Class Counsel were infrequent and inadequate.

6. The objections have no basis in law, nor do they justify denying approval of the very valuable settlement benefits under the RSA. In addition, none of the objectors have proposed a viable alternative to resolve the litigation to the benefit of the Class as a whole.

7. There is no question that the changes to the estimated IPWU Surplus prepared by Canada Life and its advisors have created tremendous angst and confusion for all concerned. However, the factors which gave rise to the diminution of the IPWU Surplus, namely the performance of applicable key interest rates, the disappearance of a market for indexed annuities, anticipated changes to applicable actuarial surplus valuation standards, and the assumed level of commuted value elections, among others, are real. These factors cannot be ignored.

8. The objectors must understand and acknowledge the legal and other risks in this litigation. With appreciation for those things, the Plaintiffs have sought to create the greatest possible value for class members in a timely way. Although the Plaintiffs and the objectors *generally* want the same things, the difference between them is that the Plaintiffs have the duties and the responsibilities to observe and navigate the legal and factual landscape in protecting the interests of all class members.

9. In contrast, the position of the objectors reflects outcomes that they desire; however, there is little or no recognition of the risks of this litigation and the impact that those risks can have on the claims and outcomes for class members, or whether such outcomes are even attainable. The position of the objectors presumes success on the claims to surplus ownership

and recovery of expenses, which are not a foregone conclusion. There are real and material risks to the case if it is fully tried.

10. Further, the objectors do not appear to consider the other practical risks which persist against the value of the IPWU surplus. They consider that the IPWU Surplus will re-emerge in full with the bare recovery of interest rates. That position is simply incorrect. The fact is that while the recovery of surplus *may* occur, a series of moving factors will determine the extent of any recovery and there can be no certainty as to the timing of it. Even the recovery of the key interest rates is very difficult if not impossible to forecast with any certainty. Moreover, the opposite outcome – a disappearance of the IPWU surplus altogether – is also possible. Finally, the position of the objectors requires ignoring regulatory standards under the *Pension Benefits Act* for calculation of surpluses, something which is beyond the purview of this litigation.

11. The complaints by objectors concerning the communications made with the class are erroneously and unfairly made. The history of the communications with the class members in this matter reflects a very high rate of sustained, thorough and accountable communications directly with class members, first by the Plaintiffs through CLPENS over many years and subsequently through class counsel with the repeated approval of the court.

12. Class counsel has dutifully communicated with any class member who inquired of them throughout the entire conduct of this action since its commencement in 2005. Throughout the action, virtually every relevant piece of material was posted on class counsel's website for all class members to view. Ongoing 1-800 telephone lines and easily accessed email communication outlets have been made available to class members. Direct mailings to all members of the class have been a regular part of the communications process. Most recently, the

last round of direct notices pertaining to the settlement which is before the court for approval was supplemented by two interactive webinar sessions hosted by class counsel for class members.

13. Notably, Mr. Mazurek, counsel for the vast majority of objectors, ignored repeated invitations to communicate with class counsel and the Plaintiffs to discuss the RSA. Any statement by the affiants put forward by Mr. Mazurek that access to class counsel or information respecting the settlement was lacking is simply false and must be rejected.

14. Finally, the complaints of class members concerning the commuted values of their pensions are entirely misplaced. Commuted value pension calculations are regulated and approved by the Financial Services Commission of Ontario ("FSCO") pursuant to a series of legislative requirements, accepted actuarial practices and published policy documents. FSCO explicitly approved the transfer value calculations prepared by Canada Life for those class members who elected to receive them, and that matter is not part of this court proceeding.

15. Further, FSCO has received extensive complaints and communications from certain of the objectors to the proposed settlement. Those complaints reflect nothing but disagreement by the objectors with the long standing policies of FSCO as they are applied to commuted value calculations. FSCO confirmed and re-iterated its position to one objector directly in writing on December 17, 2013 and stated that the assumptions and methods applied by Canada Life are consistent with accepted actuarial practice, FSCO policies and the *Pension Benefits Act* and Regulations from which FSCO derives its powers.

16. In summary, the RSA should be approved. The settlement terms are hard-won and contain real value for class members. The results were achieved against a determined opponent

and have overcome substantial legal and practical risks. The RSA meets all requirements for settlement approval.

PART II - THE FACTS

A. Background

17. The action concerns the ownership and use of surplus assets in the Canada Life Canadian Employees' Pension Plan (the "Plan"). The action also sought declarations of partial wind ups of the Plan related to past events (except the IPWU, which has already been declared by the Canada Life).

18. The Judgment arose from approval of the settlement of this matter in accordance with the terms of the SSA between Canada Life, the Plaintiffs, and the Executive Committee of CLPENS. The SSA provides for the sharing and distribution of the surplus in the Plan among Canada Life and eligible former, retired, deferred vested, and Quebec resident members related to the following past events:

- (a) the termination, resignation and retirement of members of the Plan following the 2003 acquisition of Canada Life by the Great West Life Assurance Company (the "Integration Partial Wind Up" or "IPWU");
- (b) the termination of Plan members employed by Indago as a result of the February 26, 1999 merger of that company with Laketon Investment Management Ltd. (the "Indago Partial Wind Up");
- (c) the termination of Plan members employed by Pelican as a result of the outsourcing of operations by Canada Life in 2001 (the "Pelican Partial Wind Up"); and,

(d) the termination of Plan members employed by Adason between November 1, 1999 and February 28, 2001 (the “Adason Partial Wind Up”).¹

19. The SSA provided financial benefits for all members of the Class, based on the sharing of the IPWU Surplus and the Prior Partial Wind Up Surpluses, as follows:

(a) Partial Wind Up Members would receive 57.22% of the PWU Surplus attributable to them, paid proportionally based on the value of the pension benefits they earned under the Plan and subject to a \$1000 minimum;

(b) Non Partial Wind Up Members (who are pensioners and deferred/vested Plan members) would receive 12.44% of each PWU Surplus, paid to them proportionally based on the value of the pension benefits they earned under the Plan and subject to a \$1000 minimum.;

(c) Canada Life would receive 30.34% of each PWU Surplus; and

(d) Active Plan members would receive a two-year contribution holiday funded through the existing Plan surplus.²

20. In March, 2011 Canada Life sent information packages to all members of the Class which included Personal Information Statements containing individual estimates of the financial benefit they would receive under the SSA, premised on 90% of an estimated IPWU Surplus of \$62.2 million.³

¹ Exhibit A to the Affidavit of Alex Harvey, Plaintiffs’ Motion Record (“MR”) Tab 2A, p. 31.

² Affidavit of Alex Harvey, para. 6, MR Tab 2, p. 10.

³ Affidavit of W. Robinson para. 13, Canada Life’s Motion Record (“CL MR”), Tab 1 p. 4.

21. At the date of Judgment, the most recent information available and presented to the Court disclosed the following estimates of surpluses available for distribution (net of expenses) related to each of the PWUs:⁴

Integration PWU	\$54 million
Pelican PWU	\$2.9 million
Indago PWU	\$1.3 million
Adason PWU	\$6.1 million
Total	\$64.3 million

22. The IPWU surplus estimate was based on an approximation of the costs of settling the basic benefit entitlements of the IPWU group which used the interest rates applicable under the relevant actuarial standards and certain assumptions made by Mercer as to how the IPWU members would elect to receive their basic pension entitlements.⁵

23. When Judgment was granted in January, 2012, the estimated financial benefit to the Class as a whole (after Canada Life receives its share, and the Prior PWUs and contribution holiday are factored in) was **\$49 million**. The balance was payable to Canada Life. 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.⁶

⁴ Affidavit of Alex Harvey, para. 9, MR Tab 2, p. 12.

⁵ Affidavit of W. Robinson para. 14, Canada Life's Motion Record ("CL MR"), Tab 1 p. 4.

⁶ Affidavit of Alex Harvey, para. 10, MR Tab 2, p. 12.

B. The Decrease in Estimated IPWU Surplus and the ASSA

24. Within one month of the Court approving the SSA Canada Life and its external advisors advised that the estimated amount of the IPWU Surplus brought forward from June 30, 2011 to December 31, 2011 had decreased due to two factors: (i) a drop in long-term interest rates over the relevant period, and (ii) the fact that significantly more members in the IPWU group than anticipated had elected (or were deemed to have elected) a guaranteed pension as opposed to transferring the commuted value of their pension entitlement out of Plan.⁷ Canada Life subsequently advised that the estimated IPWU Surplus as at December 31, 2011 was under \$10 million.⁸

25. In the months following news of the decline in IPWU Surplus, the Plaintiffs and their advisors took steps to verify the information provided by Canada Life, and to keep the Class apprised of the change in circumstance. In June/July 2012, the Plaintiffs were advised that the purchase of annuities for members of the IPWU Sub-Class was impossible, notwithstanding the requirement of the SSA to do so.⁹

26. Canada Life decided to transfer the assets and liabilities related to the IPWU members who elected to receive an immediate or deferred pension to the ongoing portion of the Plan effective August 31, 2012.¹⁰ The Plaintiffs challenged the transfer by motion brought before this court. Meanwhile, the IPWU Surplus continued to drop through 2012. As at August 31, 2012, the estimated Surpluses for each of the PWUs (net of expenses) were as follows:

⁷ Affidavit of Alex Harvey, para. 11, MR, Tab 2, p. 13; Affidavit of W. Robinson para. 15, CL MR Tab 1, p. 4.

⁸ Affidavit of W. Robinson para. 16, CL MR Tab 1, p. 5.

⁹ Affidavit of Alex Harvey, para. 12-13, MR Tab 2, p. 13; Affidavit of W. Robinson para. 18, CL MR Tab 1, p. 6.

¹⁰ Affidavit of W. Robinson para. 18, CL MR Tab 1, p. 6.

Integration PWU	\$3.1 million
Pelican PWU	\$2.9 million
Indago PWU	\$1.1 million
Adason	\$6.2 million
Total	\$13.3 million

27. In September, 2012 the motion challenging the transfer was settled, and Justice Strathy was appointed to assist the parties in resolving their differences. The settlement of the motion was without prejudice to the rights of the Plaintiffs in the event that mediation failed. After a full day mediation and subsequent letter writing between the parties, an agreement to amend the SSA was reached in early 2013. The terms of the proposed Amended Surplus Sharing Agreement (“ASSA”) involved augmentation of the IPWU Surplus by Canada Life waiving certain reimbursements it was entitled to under the SSA (estimated at \$1.3 million); augmentation of the IPWU Surplus by Class Counsel waiving reimbursement of \$200,000 in legal fees; top-up payments to members so that everyone in the IPWU Sub-Class would receive the promised minimum \$1000 surplus share (estimated at \$1.2 million); and a potential second surplus distribution calculated as at December 31, 2014 subject to a \$15 million cap.¹¹

28. At the time the ASSA was presented to the Court for approval, the estimated aggregate value of benefits to be paid to the Class, if approved, would have been approximately **\$15.8 million**, including \$11.2 million in member shares of the IPWU and Prior PWU Surpluses and \$4.6 million in contribution holidays; but not including any possible second distribution of

¹¹ Affidavit of Alex Harvey para. 15, MR Tab 2, pp. 14-15.

surplus.¹²

29. The motion to approve the ASSA was dismissed. In its written reasons this Court held that the ASSA was substantively, procedurally, institutionally, and circumstantially unfair.¹³

C. Events Since March, 2013

30. In the wake of the Court's decision rejecting the ASSA, the Plaintiffs made an offer to Canada Life to settle any further litigation based on the suggestions put forth in this Court's written reasons, namely:

- a. to eliminate the cap on any future surplus distribution, and
- b. to postpone the calculation date for any future surplus distribution to members of the Integration Partial Wind Up Group and Deferred Vested/Pensioner Group to December 31, 2017.¹⁴

31. Canada Life appealed the dismissal of the motion to approve the ASSA to the Ontario Court of Appeal. The appeal hearing was scheduled to be heard on October 9, 2013.¹⁵ The Plaintiffs did not seek an appeal but supported the position of CLA in order to preserve the ASSA as an option for class members as superior settlement terms were pursued.

32. Over the Spring and Summer of 2013, the estimated IPWU Surplus increased by \$9.1 million to \$11.8 million as a result of 142 members of the IPWU Sub-Class electing commuted value transfers. All members of the IPWU Sub-Class who had elected an immediate or deferred

¹² Affidavit of Alex Harvey para. 16, MR Tab 2, p. 16.

¹³ Exhibit B to the Affidavit of Alex Harvey, MR Tab 2B.

¹⁴ Letter from Class Counsel to Canada Life's Counsel dated April 3, 2013, Exhibit C to the Affidavit of Alex Harvey, MR Tab 2C, p. 82.

¹⁵ Affidavit of Alex Harvey para. 24, MR Tab 2, p. 18.

pension had been given the option to change their election when the assets and liabilities of the IPWU group were transferred back to the ongoing portion of the Plan.¹⁶

33. In September 2013 negotiations to resolve the litigation between the Plaintiffs and Canada Life were revived without recourse to further mediation, and pursued in earnest to reach an agreement in advance of the October 9 hearing date in the Court of Appeal. There were several communications back and forth between Class Counsel and counsel to Canada Life, including phone calls and written offers to settle over a four-week period.¹⁷ The exchange of offers was adversarial and vigorously contested.¹⁸

34. Given the shift in the estimated IPWU Surplus, and the deflated expectations of Class members, the Plaintiffs were concerned with securing the financial outcome for Class members entitled under the SSA to benefits on a guaranteed and timely basis, and with observing the reasoning of this court in declining to approve the ASSA by fairly apportioning the “loss” between the parties and with Class Counsel.¹⁹

D. Terms of the RSA

35. The terms of the RSA are as follows:

- c. There will be a single distribution of surplus to the Class. Canada Life will contribute an estimated \$11.3 million such that each member of the IPWU Sub Class and each member of the Inactive Eligible Non-PWU Sub Class (i.e.

¹⁶ Affidavit of Marcus Robertson, paras. 11-12, MR Tab 4, p. 239; Affidavit of W. Robinson paras. 24-25, CL MR, Tab 1, p. 8.

¹⁷ Affidavit of Alex Harvey para. 30, MR Tab 2, p. 19; Affidavit of W. Robinson para. 27-28, CL MR Tab 2, p. 9.

¹⁸ Affidavit of Jonathan Foreman para. 15, MR Tab 3, p. 149.

¹⁹ Affidavit of Alex Harvey, para. 32, MR Tab 2, p. 20.

pensioners and deferred/vested members) is guaranteed to receive a surplus payment equal to the greater of 56% of the amount that was estimated on the Personal Information Statement in 2011, or \$1000;

- d. Canada Life will waive a portion of the Settlement Expenses payable to it under the SSA, in the amount of **\$500,000** and this amount will be added to the IPWU Surplus to be distributed;
- e. Canada Life will waive its entitlement to reimbursement of interest that would accrue between August 31, 2012 and December 31, 2013 on its outstanding expenses, in the amount of approximately **\$800,000**, and this amount will be added to the IPWU Surplus to be distributed; and
- f. Class Counsel will waive **\$1 million** in fees approved by the Court to be applied for the sole benefit of the Class, and will not seek any additional payment for completion of work on the case.²⁰

36. Under the RSA, the aggregate financial benefits to the Class will be as follows:

Amount	Description
\$11.8 million	IPWU Surplus as at August 31, 2012
(-) \$.8 million	Anticipated interest on expenses
(+) \$.8 million	CL waives interest on expenses to December 31, 2013
(-) \$.5 million	Additional anticipated fees of CL
(+) \$.5 million	CL waives addition fees of \$500,000
(+) \$.5 million	Interest income projected to December 31, 2013
(-) \$.1 million	Estimated fees for objectors

²⁰ Amendment #3 to the SSA dated October 1, 2013, Exhibit L to the Affidavit of Alex Harvey, MR Tab 2L.

\$12.3 million	Total IPWU Surplus Projected to December 31, 2013
\$8.57 million	69.66% Proportion of IPWU Surplus Payable to the Class
(+) \$1 million	+ Class counsel waiver of approved fees
(+) \$11.3 million	+ Estimated Contribution by CL
\$20.87 million	Subtotal of IPWU Surplus + Other Amounts Payable to Class
\$.8 million	Indago PWU Surplus (\$1.2 million x 69.66%)
\$4.6 million	Adason PWU Surplus (\$6.6 million x 69.66%)
\$2.2 million	Pelican PWU Surplus (\$3.1 million x 69.66%)
\$7.6 million	Subtotal of Prior PWU Surplus Distributable to Class
\$4.6 million	Active Member Contribution Holiday
\$33.07 million	Aggregate Financial Benefit to Class

37. Also under the RSA, it is proposed that Class Counsel be paid \$3.867 million in fees. This amount is \$1 million less than the amount which was previously approved by this Court. The proposed fee represents approximately 11% of the total recovery of the Class, and represents an estimated multiplier of 1.5 times the anticipated total fees.²¹ This multiplier will reduce if additional time must be expended by counsel to complete the matter with no additional fees charged.

E. Communications with the Class

38. Class Counsel has maintained a website, email address, and telephone hotline for members of the Class throughout this case. Class members have regularly contacted Class Counsel and received personal responses. In addition, there have been regular updates posted to

²¹ Affidavit of Jonathan Foreman, para. 26, MR Tab 3, p. 152.

Class Counsel's website detailing all procedural steps, decisions of the Court, the progress of the appeal, and the terms of the RSA. In addition, and all court documents have been posted for access by the Class.²²

39. There have also been several direct mail communications with the Class. Since January 2012, the court has approved the following notices sent by regular letter mail to all Class members:

- a. In May 2012, four versions of a letter sent by regular mail to the Class reporting that there had been a decrease in the amount of IPWU Surplus;
- b. In February 2013, four versions of a notice sent by regular mail to the Class regarding the proposed Amendment to the SSA, the Court hearing date, and members' rights to participate;
- c. In October 2013, a single form of notice sent by regular mail to all Class members regarding the proposed RSA, the Court hearing date, and members' rights to participate.²³

40. In late March, 2013 Class Counsel was contacted by Patrick Mazurek, a lawyer who was retained by some of the Class members who objected to the terms of the ASSA. Class Counsel have provided information and responded to questions in an open and timely manner with Mr. Mazurek, as well as individual objectors not represented by counsel.²⁴ Mr. Mazurek had several discussions and a meeting with counsel, and was later granted standing to intervene in the Court of Appeal, on consent of the parties.²⁵

²² Affidavit of Alex Harvey, para. 39, MR Tab 2. p. 23; Affidavit of Jonathan Foreman, para. 33, MR Tab 3, p. 154.

²³ Affidavit of Jonathan Foreman, para. 31, MR Tab 3, p. 154.

²⁴ Affidavit of Jonathan Foreman, para. 34, MR Tab 3 p. 156.

²⁵ Affidavit of Alex Harvey para. 29, MR Tab 2 p. 19; Affidavit of Jonathan Foreman para. 12, MR Tab 3, p. 148.

41. Although the objectors and their counsel were not involved in the negotiations leading to the RSA, their concerns about fairness to the Class, including obtaining a guaranteed outcome, were considered throughout the bargaining process.²⁶

42. Class Counsel hosted two webinars of November 28 and December 2, 2013 to further describe the terms of the RSA, attended by 91 and 47 members respectively via webcast.²⁷ Class Counsel responded to dozens of questions submitted by email during those webinars and subsequently.

43. Class counsel made a number of invitations to Mr. Mazurek to discuss any aspect of the RSA, which he has not taken up.²⁸

F. Objections to the RSA

44. Objections have been received from the following Class Members:

- (a) Dan Anderson, on his own behalf;²⁹
- (b) Maggie Wong and Monica Rimler, on their own behalf;³⁰ and
- (c) Patrick Mazurek, on behalf of 92 Class Members.³¹

45. The substance of the objections may be summarized as follows:

²⁶ Affidavit of Jonathan Foreman, para. 13, MR Tab 3, p. 149.

²⁷ Affidavit of Desi Skokleva, para. 2, Supplementary MR Tab 1, p. 1.

²⁸ Affidavit of Jonathan Foreman, para. 34, MR Tab 3, p. 156.

²⁹ Exhibit B to the Affidavit of Desi Skokleva, Supplementary Motion Record Tab 1B, p. 8.

³⁰ Exhibit A to the Supplementary Affidavit of Desi Skokleva, Second Supplementary Motion Record Tab 1A, p.

³¹ Exhibit C to the Affidavit of Desi Skokleva, Supplementary Motion Record Tab 1C, p. 165.

(a) Canada Life used actuarial ‘sleight of hand’ to make the IPWU Surplus vanish and ‘locked-in’ the amount available for distribution on an effective date that operates to its own benefit and to the detriment of the Class;³²

(b) The RSA is unfair because Canada Life gains benefits from it, including the recaptured surplus associated with allegedly improper commuted value calculations for members of the IPWU group who so elected;³³ and

(c) The Executive Committee of CLPENS has no authority to enter agreements, and communications with the class from CLPENS, the Plaintiffs and Class Counsel were infrequent and inadequate.³⁴

PART III - ISSUES

46. The only issue for determination is whether the RSA should be approved pursuant to this Court’s authority under section 29(2) of the *Class Proceedings Act, 1992*.

47. The Plaintiffs state that the RSA is fair, reasonable, and in the best interests of those affected by it, and this Court should approve a variation of its earlier Judgment in accordance with its terms.

PART IV - LAW AND ARGUMENT

48. Section 29 of the *Class Proceedings Act* (“CPA”) gives this Court jurisdiction to approve a settlement, and by extension, an amendment to a settlement that has already been approved by the Court. A settlement or amendment thereto is not binding unless approved by the Court, as

³² Affidavit of Fred Taggart, para. 2, Supplementary MR, Tab 1C, p. 286.

³³ Affidavit of Ann Carey, para. 15, Supplementary MR, Tab 1C, p. 171.

³⁴ Affidavit of Janice Durst, Supplementary MR, Tab 1C, pp.187-199.

per ss. 29(2) and (3) of the CPA which state:

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

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

49. To approve a proposed settlement in a class proceeding the Court must ask whether the settlement is fair, reasonable and 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. The proposed settlement need not be perfect in every respect, but must fall within the zone or range of reasonableness.³⁵

50. “Reasonableness” permits a range of possibilities, as a less than perfect settlement may be in the best interests of the Class when compared to the risks and costs of litigation. Compromise by the parties to a settlement is to be expected, and the resolution of complex litigation through the compromise of claims is to be encouraged by the courts and is supported by public policy.³⁶

51. Where a settlement has been negotiated at arm’s length by experienced counsel for a Class, there is a strong presumption of fairness. To reject the terms of a settlement and require

³⁵ *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.), per Winkler J. at para. 69, Plaintiffs’ Book of Authorities (“BOA”) Tab 1; *Dabbs v. Sun Life Assurance Co. of Canada*, 1998 CanLII 14855 (ON SC) (“*Dabbs*”), per Sharpe J., at para. 31, BOA Tab 2.

³⁶ *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673 (ON SC), per Winkler J., at para. 21, BOA Tab 3; *Sparling v. Southam Inc.*, [1988] O.J. No. 1745 (H.C.J.), per Callaghan J., at para. 17, BOA Tab 4.

litigation to continue, the court must conclude that the settlement does not fall within a range of reasonable outcomes.³⁷

52. In assessing the reasonableness of a proposed settlement, the courts have been guided by, among others, the following factors, with each factor bearing more or less weight depending on the nature of the action and the elements of the settlement:

- (i) the likelihood of recovery or success;
- (ii) the amount or nature of discovery, evidence or investigation;
- (iii) the settlement terms and conditions;
- (iv) the recommendation and experience of counsel involved;
- (v) the future expense of proceeding with litigation and the likely duration and risk of ongoing litigation;
- (vi) the number of objectors and the nature of any objections;
- (vii) the presence of good faith, arms-length bargaining and the absence of collusion;
- (viii) the degree and nature of communications by counsel and the Representative Plaintiff with Class Members during the litigation; and,
- (ix) information conveying to the court the dynamics of positions taken by the parties during the negotiations.³⁸

53. An analysis of each of the criteria above supports the approval of the RSA as procedurally, circumstantially, institutionally, and substantively fair to the Class as whole.

A. Application of Approval Criteria

54. The most important elements of the settlement approval criteria for the purposes of this

³⁷ *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, 2005 CanLII 8751 (ON SC) per Cumming J., at paras. 113-114, BOA Tab 5; *Dabbs*, *supra*.

³⁸ *Parsons*, *supra*, at paras. 71-73; *Frohlinger v. Nortel Networks Corp.*, 2007 CanLII 696 (ON SC), per Winkler J. at para. 8, BOA Tab 6.

motion are:

- (i) The merits of the settlement terms and conditions; and
- (ii) The objections made by class members.

(i) Merits of the Settlement Terms and Conditions

55. The proposed terms and conditions of the RSA have merit and reflect a strong outcome of the matters in issue. The unforeseen circumstances which diminished the value of the IPWU Surplus have been significantly mitigated because the RSA requires Canada Life to pay money out of its own funds and to effectively surrender the cash benefits which it would otherwise have received, all in order to guarantee the negotiated level of recovery to class members.

56. The estimated value of the benefits to the class members under the RSA is over \$33 million. Further, the settlement guarantees those benefits and will see them delivered to class members in a timely way following the necessary approvals.

57. It is important for the court and the class members to recall that the class members' claims to ownership of surplus in the Plan are far from certain and that there are considerable risk factors to consider. Among those risks are clauses in the early trust documents which state that any surplus in the Plan on wind up belongs to Canada Life. The Plaintiffs have resisted that interpretation and advanced a number of arguments successfully in order to negotiate the SSA.

58. Further, the expenses claim also had its risks in respect of the interpretation of the applicable trust documents. Those risks were compounded by the Supreme Court of Canada's

decision in *Nolan v. Kerry*³⁹ from the Supreme Court of Canada and subsequent decisions which substantially weakened (if not eliminated) the merits of that claim. In addition, even if successful on the Plan expenses claim, restitution to the pension fund is the only available remedy, not direct payments to class members.⁴⁰

59. It must be noted that the settlement benefits in the original SSA were negotiated before the release of the decision by the Supreme Court of Canada in *Nolan v. Kerry*. Substantial value was derived from the expenses claim in the negotiation of the SSA, including the contribution holiday for active employees, the benefits to class members not included in a partial wind-up, and the favourable ratio for the division of the surplus for partial wind-up members, among other benefits. That value persists in the settlement terms which are before the court for approval in the RSA.

60. The RSA is superior to all alternatives to settlement. The value of the RSA is superior by a substantial margin to the ASSA which was rejected by this court. Further the benefits of the RSA are guaranteed and will be paid without delay following approvals if granted.

61. The RSA is vastly superior to the terms of the original SSA if they were to be enforced based on the current value of IPWU Surplus and Canada Life was permitted to transfer the assets and liabilities into the ongoing Plan in lieu of purchasing annuities.

62. Finally, 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

³⁹ *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678, BOA Tab 7.

⁴⁰ *Potter v. Bank of Canada*, 2007 ONCA 234 (CanLII), BOA Tab 8.

actuarial guidance, the risk of adverse investment performance and the future performance of key interest rates, the RSA provides strong benefits for class members.

(ii) Objections

63. The objections by certain class members can be summarized as follows:

(a) Canada Life used actuarial ‘sleight of hand’ to make the IPWU Surplus vanish and ‘locked-in’ the amount available for distribution on an effective date that operates to its own benefit and to the detriment of the Class;

(b) The RSA is unfair because Canada Life gains benefits from it, including the recaptured surplus associated with allegedly improper commuted value calculations for members of the IPWU group who so elected; and

(c) The Executive Committee of CLPENS has no authority to enter agreements, and communications with the class from CLPENS, the Plaintiffs and Class Counsel were infrequent and inadequate

We will address each complaint in order.

Objection (a): Actuarial sleight of hand by Canada Life

64. There can be no question that the drop in the value of the IPWU Surplus caused tremendous concern for the class members, the Plaintiffs, and this Court. The inability to implement the original SSA created substantial uncertainty in this litigation and has challenged the parties and the Court.

65. However, the fact of the matter is that the surplus valuation issues are real and they cannot be ignored. This litigation concerns entitlement to the value of the pension surplus in the

Plan and the value of any surplus is inherently a moving target which reflects a large number of factors and variables which are very difficult to predict with certainty. Only when all liabilities of a pension plan are settled (usually through the purchase of annuities) can one determine the existence of a surplus with any degree of certainty. Prior to that time all calculations are estimates.

66. The Plaintiffs make no apologies for the conduct of Canada Life or its advisors. However, the Plaintiffs must take the facts and circumstances of the case as they and their expert advisors can objectively establish them after diligent investigation and analysis. Having done so, the Plaintiffs must also have regard to the actual strengths and weaknesses of the case. Further, the history of the matter teaches all concerned to have keen regard to additional practical factors which could threaten the interests of the class in the future absent an agreement.

67. Put simply, although the estimated IPWU Surplus put forward by Canada Life in connection with the SSA approval proved to be incorrect due to unforeseen economic forces, the Plaintiffs must accept this unfortunate circumstance and seek to salvage some meaningful value for class members. That is precisely what has been done with the creation of the RSA.

68. Recovery of the IPWU Surplus may be possible through an amended SSA, but it is not guaranteed. A number of factors are relevant to calculation of the estimated IPWU Surplus, including changes to the applicable actuarial surplus valuation guidelines, which have already adversely impact the IPWU Surplus.⁴¹ Moreover, the timing of any recovery cannot be predicted. Continuation of the litigation will not recreate the IPWU Surplus.

⁴¹ Affidavit of Marcus Robertson, para. 14, MR Tab 4, p. 239.

Objection (b): The ASSA is Unfair

69. The terms of the proposed settlement agreement are objectively fair and reasonable.

70. In some of the objectors' material it is said that Canada Life derives substantial benefit from the settlement. In reality, Canada Life has agreed to make a payment in order to support the 56% guarantee to class members which will negate any cash benefit out of the IPWU Surplus it was to receive under the original SSA. In addition Canada Life will pay sums beyond that amount of money in order to compensate class members.

71. Canada Life does obtain certainty with respect to some Plan interpretation matters. However, the objectors are incorrect to state that those benefits are unreasonable in the circumstances. As a matter of fact, the benefits negotiated by Canada Life in respect of the interpretation of rights under the Plan are consistent with recent precedents in pension litigation and in regulatory proceedings concerning those matters and related issues. They were found to be reasonable by this Honourable Court upon approval of the original SSA, and nothing in the jurisprudence has changed since January, 2012 to affect a different outcome.

72. A number of objections to the settlement are premised on an alleged unfairness to class members who elected and received commuted value pension payments.

73. The Plaintiffs wish to be clear on three points: First, the discharge of basic pension benefits on a partial plan wind-up is regulated by FSCO pursuant to the *Pension Benefits Act* and its regulations, FSCO policies, and accepted actuarial practice. Until the benefits are settled, there is no surplus. Second, FSCO has approved the assumptions employed by Canada Life in computing the commuted value amounts. Third, FSCO has confirmed as recently as December 17, 2013 that the process employed by Canada Life is consistent with all FSCO policies and

practice and that FSCO sees no basis on which to revisit the treatment of commuted value pension calculations in this case.

74. It is also worth noting that all members included in a partial wind up are statutorily entitled to a commuted value option for their basic pension benefits, which is a voluntary election to be made within a 90-day period. Failure to make an election results in an immediate or deferred pension option being selected. The basic pension benefit options and election process employed here are consistent with the practices in partial wind ups across the province.

75. The objections to the calculation of commuted value pension elections for members of the IPWU group is unfounded and presents no barrier to the approval and implementation of the very valuable settlement benefits under the RSA.

Objection (c): Communications with Class Members

76. The objectors also complain about the nature of the communications to the class members. It must first be said that no objector has had any difficulty at any time reaching class counsel or in making their views known. Further, class counsel have been responsive to those inquiries which have been received from class members and specifically the objectors and their counsel. While there may be disagreement on many points, the Plaintiffs and Class Counsel have done their best to be responsive.

77. Next, the class members and the court must be reminded that the notice programs implemented in this case have been direct, frequent, sustained and thorough.

78. At all times, class counsel has maintained email and toll-free phone lines for class members to access. Volumes of material have been posted to class counsel's website in a timely

way for class members to view throughout the case.

79. A staple of the formal court approved notice programs have been direct mailings to all class members. In the case of the current proposed settlement, notices were sent directly to all class members more than eight (8) weeks in advance of the approval hearing. Those notices were supplemented by two interactive webinars session hosted by class counsel as well as the ongoing access to the toll-free hotline and the e-mail conduits to counsel.

80. In short, the efforts made by counsel and the Plaintiffs to communicate with the class do not merit the derisive comments made by objectors and their counsel. The quality of the communications with the class has been professional and appropriate. The extent of those communications should be a factor which weighs in favour of settlement approval.

(iii) Other Settlement Approval Criteria

81. The application of the remaining settlement approval criteria can be described as follows:

(a) The matter has been thoroughly investigated over the long duration of this litigation. Simply put, the matter is very well understood. Knowledgeable advisors have assisted the Plaintiffs in the conduct of the case. The exchange of information has allowed for effective representation of the interests of all Class members, and all relevant material has been put before the Court.

(b) The settlement terms and conditions are recommended by counsel all of whom are experienced in class action matters, specifically including pension surplus litigation. Further, among the counsel team are lawyers who have extensive trial experience in the class action field. Counsel are very well positioned to evaluate the strengths and

weaknesses of this matter on its merits and to provide candid advice to the Plaintiffs and Class members.

(c) The settlement of this litigation under the RSA compares favorably against the future expense and likely duration of any litigation should all settlements fail and contested litigation be resumed. The alternatives to the RSA – litigation over enforcement of the SSA and/or implementation of the SSA - coupled with the uncertain likelihood of recovery, favour approval of a negotiated resolution which has significant financial benefit to the Class, and which will finally resolve this case sooner rather than later. Furthermore, setting aside the SSA and proceeding with the original action involves litigating over a smaller IPWU Surplus, taking on litigation risk over both the surplus ownership question and the expense claim, and incurring further cost and delay, none of which benefit the Class.

(d) The settlement benefits have been negotiated at arm's length and on an adversarial basis, without collusion.

(e) The dynamics of the negotiations and the long running history of this matter indicate that pension litigation (specifically pension surplus litigation) can have substantial and evolving risks and volatility which can quickly change the dynamics of a given case. Further, Canada Life has been a determined defendant which has been prepared to negotiate hard and to stand on its principles throughout the conduct of the case.

82. All of the above factors greatly favour the approval of the proposed settlement.

B. Procedural, Circumstantial, Institutional and Substantive Fairness of the Settlement

83. The proposed settlement is procedurally fair as it was the subject of a strong direct notice program supplemented by the ongoing availability of class counsel, the posting of all relevant material on class counsel's website and the hosting of two interactive webinar sessions. Further, those persons situated as objectors had the opportunity to and did engage counsel. They participated in case conferences in connection with notice approval and the setting of settlement approval motion timetable.

84. 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.

86. Finally, the settlement is substantively fair for the reasons already described. The settlement has strong value relative to the strengths and weaknesses of the case. The value is guaranteed to class members and is not subject to future fluctuations in the market place. In addition, the settlement benefits are to be delivered in a timely way immediately following all required approvals.

PART V - ORDER REQUESTED

87. The Plaintiffs respectfully request that an Order varying the Judgment dated January 27, 2012 in accordance with the RSA be approved by this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 6, 2014

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Per:

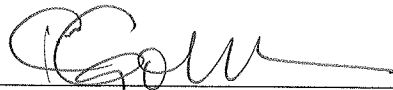


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SCHEDULE “A” - LIST OF AUTHORITIES

1. *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.)
2. *Dabbs v. Sun Life Assurance Co. of Canada*, 1998 CanLII 14855 (ON SC)
3. *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673 (ON SC)
4. *Sparling v. Southam Inc.*, [1988] O.J. No. 1745 (H.C.J.)
5. *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, 2005 CanLII 8751 (ON SC)
6. *Frohlinger v. Nortel Networks Corp.*, 2007 CanLII 696 (ON SC)
7. *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678
8. *Potter v. Bank of Canada*, 2007 ONCA 234 (CanLII)

SCHEDULE "B" - LIST OF STATUTES

1. *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss. 29(2).

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

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

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

DAVID KIDD, et al.
Plaintiffs

**THE CANADA LIFE ASSURANCE
COMPANY, et al.**
Defendants

Court File No: 05-CV-287556CP

ONTARIO

SUPERIOR COURT OF JUSTICE
Proceeding commenced at **Toronto**

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(Motion to Vary Judgment, January 10, 2014)

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