

**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, returnable March 18, 2013)**

March 11, 2013

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3

Mark Zigler (LSUC#: 19757B)
Tel: (416) 595-2090
Fax: (416) 204-2877

Clio M. Godkewitsch (LSUC#: 45412G)
Tel: (416) 595-2120
Fax: (416) 204-2827

HARRISON PENZA LLP
450 Talbot Street, P.O. Box 3237
London, ON N6A 4K3

David B. Williams (LSUC#: 21482V)
Tel: (519) 679-9660
Fax: (519) 667-3362

Lawyers for the Plaintiffs, David Kidd,
Alexander Harvey, Jean Paul Marentette,
Susan Henderson and Lin Yeomans

SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West
Suite 1100, Box 180
Toronto, ON M5G 2G8

Darrell Brown
Tel: (416) 979-4050
Fax: (416) 591-7333

Lawyers for the Plaintiffs, Garry C. Yip
and Louie Nuspl

TO: **BLAKE, CASSELS & GRAYDON LLP**
Box 25, Commerce Court West, 199 Bay Street
Toronto, ON M5L 1A9

Jeffrey W. Galway
Tel: (416) 863-3859
Fax: (416) 863-2653

Lawyers for the Defendant, The Canada Life Assurance Company

AND TO: **HICKS MORLEY HAMILTON STEWART STORIE LLP**
77 King Street West, 39th Floor
Box 371, TD Centre
Toronto, ON M5K 1K8

John C. Field
Tel: (416) 864-7301
Fax: (416) 362-9680

Lawyers for the Defendants, A.P. Symons, D. Allen Loney
and James R. Grant

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(Motion to Vary Judgment, March 18, 2013)**

PART I - INTRODUCTION AND OVERVIEW

1. This is a motion to vary the Judgment in this class proceeding. The case was commenced in 2005 and involved claims related to the Canada Life Employees' Pension Plan (the "Plan"). This factum is filed on behalf of five of the seven Representative Plaintiffs: David Kidd, Alexander Harvey, Jean Paul Marentette, Susan Henderson and Lin Yeomans (together, the "Plaintiffs").
2. This motion arises as a result of a change in circumstances since settlement was approved by Judgment dated January 27, 2012 (the "Judgment"). The Judgment incorporated a Surplus Sharing Agreement ("SSA"). Following the issuance of the Judgment, two significant events put the implementation of the SSA into question: 1) there was a dramatic decline in the estimated value of the Plan surplus available for distribution, principally resulting from a decline in interest

rates, coupled with a greater than anticipated annuity take-up rate among certain members of the Class; and, 2) Canada Life was unable purchase annuities for members of the Integration Partial Windup Group (described below), which it was required to do under the SSA.

3. After extensive negotiations throughout most of 2012, the parties reached an agreed set of terms to amend the Surplus Sharing Agreement (the “Amended Surplus Sharing Agreement”, or “ASSA”) which gives effect to the intentions under the original SSA based on the much lower estimated surplus available for distribution, but gives hope for a future distribution if the underlying economic assumptions improve.

4. The parties seek this Court’s approval of a variation of the Judgment, to give effect to the ASSA. The Plaintiffs submit that the relief should be granted because:

(a) the drop in estimated surplus available for distribution since Judgment presents a change in the premises underlying the SSA which justifies a variation; and

(b) the proposed variation to incorporate the terms of the ASSA is fair, reasonable and in the best interests of the Class.

PART II - THE FACTS

5. The action concerned the ownership and use of surplus assets in the Plan. The action also sought declarations of partial wind ups of the Plan (except the Integration Partial Wind Up, which has already been declared by the Canada Life, noted below).

6. The Judgment approved the settlement of this matter in accordance with the terms the SSA between Canada Life, the Representative Plaintiffs, and the Executive Committee of the Canada Life Pension Rights Group (“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”).

7. The SSA also provides active employee members of the Class with a two-year contribution holiday.

8. 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:¹

Integration PWU	\$54 million
Pelican PWU	\$2.9 million

¹ Affidavit of J. Foreman, para. 5, Plaintiffs’ Motion Record (“MR”) Vol. I Tab 2, p. 11.

Indago PWU	\$1.3 million
Adason PWU	\$6.1 million
Total	\$64.3 million

9. Within one month of the Judgment, Class Counsel was advised that the estimated value of the surplus attributable to the IPWU (the “IPWU Surplus”) as of December 31, 2011 had decreased to \$23.7 million, which amounted to less than \$10 million available for distribution net of expenses. The principal reasons described for the decrease were:

- (a) changes in interest and inflation assumptions regarding annuity purchases; and
- (b) a higher than assumed take-up rate of the guaranteed pension option for members of the IPWU Sub-Class.²

10. The Plaintiffs, CLPENS Executive Committee, Class Counsel and their expert actuarial advisor Marcus Robertson, had extensive discussions to analyze this new information, test its accuracy, and consider next steps.³ The Court approved letters sent to the Class in May 2012 which described the precipitous decline in IPWU Surplus, and told the Class that the parties were working together to address the situation, and would keep the Class informed of any developments.⁴

11. In the interim, Canada Life proceeded to solicit bids for the provision of immediate and deferred indexed annuities for members of the IPWU Sub-Class who elected a guaranteed

² Affidavit of J. Foreman, para. 7; MR Vol. I Tab 2, p. 11; Affidavit of M. Robertson, para. 8, MR Vol II Tab 3, p. 239.

³ Affidavit of J. Foreman, paras. 9-18; MR Vol. I Tab 2, p. 12-14; Affidavit of A. Harvey, para. 6, MR Vol II Tab 4, p. 439.

⁴ Exhibit B to Affidavit of J. Foreman, MR Vol. I Tab 2B, p. 1.

pension option, as required by the SSA. In July, 2012, Canada Life advised that all of the annuity providers approached to submit a bid declined to do so.⁵

12. In short, there is currently no market in Canada for the indexed annuities that replicate the pensions of the IPWU Sub-Class.⁶ A key term of the SSA thus became impossible to implement.

13. After reviewing numerous reports prepared by the Plan actuary,⁷ receiving advice from their actuarial advisor Marcus Robertson, and discussions between the parties and among counsel, the Plaintiffs came to the disappointing conclusion that the decrease in the estimated IPWU Surplus was primarily driven by prevailing market forces and reflected in the documents provided by the Plan actuary and Canada Life.⁸

14. In August 2012 Canada Life proposed to unilaterally transfer the assets and liabilities of the IPWU Sub-Class to the ongoing portion of the Plan, and proceed with the implementation of the SSA. Canada Life proposed to do this notwithstanding the fact that the estimated IPWU Surplus had further decreased and it was unclear whether the terms of the SSA could be fulfilled, including minimum surplus share payments.⁹

15. The Plaintiffs filed a motion scheduled to be heard on September 27, 2012 objecting to Canada Life's intention to transfer the assets and liabilities of the IPWU Sub-Class to the ongoing portion of the Plan, and seeking appointment of a mediator. This motion was settled,

⁵ Affidavit of J. Foreman, para. 19, MR Vol. I Tab 2, p. 14.

⁶ Affidavit of M. Robertson, para. 12, MR Vol. II Tab 3, p. 243

⁷ Affidavit of M. Robertson, para. 5, MR Vol II, Tab 3, p. 238.

⁸ Affidavit of M. Robertson, para. 11, MR Vol II Tab 3, p. 243.

⁹ Affidavit of J. Foreman, para. 20, MR Vol. I Tab 2, p. 14.

and Justice Strathy was subsequently appointed by the Court to assist the parties in resolving the differences between them.¹⁰

16. The parties attended a one-day mediation facilitated by Justice Strathy in December 2012, and continued negotiations with His Honour's assistance afterward in writing. The negotiations were hard fought, and the Plaintiffs did not obtain all of what they sought.¹¹

17. The culmination of these negotiations was an agreed set of terms to amend the SSA, captured in the ASSA. The main terms of the ASSA may be summarized as follows:

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

- (i) waiving its right to any interest on the amount of its expense reimbursement under the SSA that would have accrued during the period from August 31, 2012 to December 31, 2013 (estimated at \$800,000); and
- (ii) waiving its right to reimbursement of \$500,000 of its professional fees;

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

¹⁰ Affidavit of J. Foreman, paras. 21-23, MR Vol. I Tab 2, p. 14-15.

¹¹ Affidavit of A. Harvey, paras. 8-11, MR Vol. II Tab 4, p. 439-440.

- (c) For any member of the IPWU Sub-Class who elected to receive a deferred or immediate pension, their portability rights were satisfied by Canada Life transferring their assets to the ongoing portion of the Plan effective August 31, 2012;
- (d) The assets and liabilities related to members of the IPWU Sub-Class who elect a deferred or immediate pension will be notionally segregated (the "Segregated Portion") until the completion of the second distribution (discussed below), if any;
- (e) Canada Life will fund top-up payments (at an estimated cost of \$1.2 million) in order to ensure that IPWU Sub-Class will receive the promised minimum surplus shares of \$1,000 required under the SSA;
- (f) There is the potential for a second surplus distribution to members of the IPWU Sub-Class and Inactive Eligible Class Members, if a surplus exists as at December 31, 2014, subject to the following conditions:
 - (i) 10% of the 2014 Gross Surplus shall be deducted off the top and remain in the Plan as a cushion;
 - (ii) The 2014 Gross Surplus will be reduced to take into account any contributions and other payments (together with interest at the Plan rate of return) made by Canada Life into the Plan after August 31, 2012 and that are notionally allocated to the Segregated Portion;
 - (iii) 69.66% of the net Surplus, to a maximum of \$15 million, will be paid to the IPWU Sub-Class and Inactive Eligible Class Members, in accordance with the percentages set out in the SSA;

- (iv) The amounts distributed to members of the IPWU Sub-Class and to Inactive Eligible Class Members will be calculated in accordance with a formula which takes into consideration amounts paid under the initial surplus distribution;
- (v) In order to avoid distributing numerous small amounts, the threshold for surplus payments under the possible second distribution is \$100: if, based on the formula under the ASSA, any individual would be receiving \$100 or less, no payment will be made to that individual and the individual's surplus share will instead be shared with the remaining members (if any) who are receiving \$100 or more.¹²

18. The ASSA gives effect to the intentions of the SSA under the new reality of a far smaller IPWU Surplus. The ASSA serves to augment the amount of IPWU Surplus which would otherwise be available for distribution to Canada Life and to the Class, and also provides for a future distribution of surplus if economic circumstances improve.

19. Court-approved letters were sent to all Class Members in February 2013, describing and explaining the decline in the IPWU Surplus and the effect on the particular Sub-Classes, the terms of the ASSA, and giving notice the next steps in the proceeding.¹³

20. Class Member response to the February 2013 communication has been one disappointment on the part of many individuals.¹⁴ This disappointment is shared by the

¹² Exhibit D to the Affidavit of J. Foreman, MR Vol. I Tab 2D, p. 196.

¹³ Exhibit E to the Affidavit of J. Foreman, MR Vol. I Tab 2E, p. 207.

¹⁴ Affidavit of J. Foreman, para. 42, MR Vol. I Tab 2, p. 20.

Representative Plaintiffs and CLPENS Executive Committee, many of whom are members of the IPWU Sub-Class.¹⁵ The response was not unexpected, and it is anticipated that there will be a number of written and/or oral objections to this motion.¹⁶ The Plaintiffs, through their counsel and actuarial advisor, have attempted to respond to all inquiries and believe that in the circumstances, the ASSA is the best agreement that can be achieved.

21. The estimated aggregate value of benefits to be paid to the Class under the ASSA, if approved, will be:

Integration PWU Surplus		\$2,600,000
	+CL Interest waived:	\$800,000
	+CL Legal fees waived:	\$500,000
	Total IPWU Surplus:	\$3,900,000
	Member share:	\$2,716,740
	+Estimated CL Top Up:	\$1,200,000
	+KM/HP Legal Fees:	\$200,000
	TOTAL: \$4,116,740	
Indago PWU Surplus		\$1,100,000
	Member Share:	\$766,260
Adason PWU Surplus		\$6,200,000
	Member Share:	\$4,318,920
Pelican PWU Surplus		\$2,900,000
	Member Share:	\$2,020,140
Total Member Share of Estimated Surplus		\$11,222,060

¹⁵ Affidavit of A. Harvey, para. 3, MR Vol. II Tab 4, p. 439.

¹⁶ Affidavit of J. Foreman, para. 43 and Exhibit "F", MR Vol. I Tab 2, p. 21 and Tab 2F.

In addition, active Plan members who participate will receive a contribution holiday valued at \$4.6 million, bringing the total estimated benefits to the Class under the ASSA to in excess of **\$15 million.**¹⁷

22. Class Counsel, Marcus Robertson, and the Plaintiffs recommend the ASSA as fair, reasonable and in the best interests of the Class, given the circumstances.¹⁸

PART III - ISSUES

23. The issues on this motion are as follows:

- (a) Does this Court have jurisdiction to approve an variation to the settlement, given that it has been approved by a final Judgment?; and,
- (b) If yes, should the proposed variation to the settlement be approved pursuant to section 29(2) of the *Class Proceedings Act, 1992*.

24. In summary, the Plaintiffs submit that both issues should be answered in the affirmative. This Honourable Court has jurisdiction under both the *Rules of Civil Procedure* and the *Class Proceedings Act, 1992* (“CPA”) to vary its judgment, and in light of the facts which have arisen since the approval of the SSA, should exercise its discretion to do so. Further, the Plaintiffs submit that the terms of the ASSA are fair, reasonable and in the best interests of the Class as a whole, and should be approved.

PART IV - LAW AND ARGUMENT

(a) Jurisdiction of the Court to Vary the Judgment

25. This Court’s jurisdiction to vary its Judgment is derived from two sources:

¹⁷ Affidavit of J. Foreman, para. 29, MR Vol. I Tab 2 p. 18.

¹⁸ Affidavit of A. Harvey, para. 13, MR Vol. II Tab 4 p. 440, Affidavit of J. Foreman, para. 46, MR Vol. I Tab 2 p. 21; Affidavit of M. Robertson, para. 16, MR Vol. II Tab 3, p. 244.

- (a) Rule 59.06(2)(d) of the *Rules of Civil Procedure*; and
- (b) section 12 of the CPA.

26. Rule 59.06(2)(d) of the *Rules of Civil Procedure* states as follows:

59.06(2) A party who seeks to,
[. . .]
(d) obtain other relief than that originally awarded,
may make a motion in the proceeding for the relief claimed.¹⁹

27. Relief under Rule 59.06(2) is discretionary, and is not contingent upon a finding of mistake, misrepresentation, fraud, unconscionability or incapacity.²⁰ Variation of an order or judgment pursuant to rule 59.06(2) may be granted on the basis of facts which have arisen after the order was made.²¹

28. Section 12 of the CPA states as follows:

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.²²

29. The Plaintiffs submit that there is no question that the Court is empowered to vary its own Judgment, as is being sought on this motion.

¹⁹ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 59.06(2)(d).

²⁰ *Smith v. Kearns*, 2012 ONSC 1355 (S.C.J.) (CanLII) at para. 6, per Beaudoin J, Book of Authorities (“BOA”) Tab 1.

²¹ *Relco Inc. v. Carbone*, 2000 CarswellOnt 4565 (S.C.J.) at para. 17, per Rivard J., BOA Tab 2.

²² *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 12.

(b) Applicable Test: Fairness and Reasonableness of the Settlement

30. The settlement of a class proceeding is not binding upon the Class unless it is approved by the Court pursuant to subsection 29(2) of the CPA.²³

31. In order to approve a proposed settlement, the Court must determine “whether the settlement is fair, reasonable and in the best interests of the class as a whole,” and not whether the proposed settlement is perfect in every respect. In order to be approved, the settlement must fall within the zone or range of reasonableness.²⁴

32. A determination of 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.²⁵

33. In assessing the reasonableness of a proposed settlement, the court does not, and cannot, seek perfection in every aspect, nor can it insist that all persons or class of persons within the Class be treated equally.²⁶

34. 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

²³ *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss. 29(2).

²⁴ *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.), per Winkler J. at para. 69, BOA Tab 3; *Dabbs v. Sun Life Assurance Co. of Canada*, 1998 CanLII 14855 (ON SC) (“*Dabbs*”), per Sharpe J., at para. 31, BOA Tab 4.

²⁵ *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673 (ON SC), per Winkler J., at para. 21, BOA Tab 5; *Sparling v. Southam Inc.*, [1988] O.J. No. 1745 (H.C.J.), per Callaghan J., at para. 17, BOA Tab 6.

²⁶ *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (S.C.J.) (“*Fraser*”) per Winkler J., at para. 13, BOA Tab 8.

litigation to continue, the court must conclude that the settlement does not fall within a range of reasonable outcomes.²⁷

35. 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.²⁸

36. The Plaintiffs submit that an analysis of the above factors weighs heavily in favour of varying the Judgment in accordance with the ASSA, in place of the SSA. The anticipated financial benefits to the Class under the ASSA will be less than what Class Members expected under the SSA; however this loss is not because the ASSA is a worse deal, it is because the

²⁷ *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, 2005 CanLII 8751 (ON SC) per Cumming J., at paras. 113-114, BOA Tab 8; *Dabbs*, *supra* note 24.

²⁸ *Parsons*, *supra* note 24, at paras. 71-73; *Frohlinger v. Nortel Networks Corp.*, 2007 CanLII 696 (ON SC), per Winkler J. at para. 8, BOA Tab 9.

notional surplus on which the SSA was premised – which was never guaranteed – has diminished under forces beyond the control of the parties.

i. The Likelihood of Success or Recovery

37. The analysis of the likelihood of success or recovery in the context of the present motion is unique because of the change in circumstances giving rise to it. Given that the SSA has already been approved by this Honourable Court, the Plaintiffs submit that this analysis should be conducted with reference to the existing Judgment of this Court. In other words, the question is whether the members of the Class are likely to recover *more* as a result of the proposed ASSA than if the SSA were to be implemented in its present form (if this is even possible). The Plaintiffs submit that this question can only be answered in the affirmative.

38. There are two key ways in which the ASSA improves the recovery, or potential recovery, of Class Members:

(a) by the reduction of payments to Canada Life for interest on its expense reimbursement; and,

(b) by a possible second distribution of surplus to eligible members of the Class if long-term interest rates rise slightly.

39. If the SSA were to be implemented without any variation or amendment, members of the IPWU Sub-Class and Eligible Inactive Members would receive 69.66% of the estimated \$2.6 million of IPWU Surplus, or \$1.8 million, assuming that the surplus does not diminish further prior to distribution. There would be insufficient funds to pay the minimum \$1000 surplus

payments (at least for members of the IPWU Sub-Class), and there would be no possible future distribution.

40. Under the ASSA, members of the IPWU Sub-Class will receive at least \$1000; and have the possibility of a future distribution of surplus after 2014, if available. The Eligible Inactive Members will also receive surplus shares, and the possibility of a future surplus distribution. In short, the IPWU Sub-Class and the Eligible Inactive Members are *better off* under the ASSA.

41. Members of the Prior Partial Wind Ups and active employees are largely unaffected, and are neither better nor worse off under the ASSA than the SSA.

42. Under the ASSA, more money is available for distribution to the Class than would be available under the SSA, which is a concrete, measurable improvement in benefits for the Class.

43. Continued litigation does not represent a viable alternative, as no litigation can restore the surplus. Further, the Plan expense claim of the Plaintiffs has already been compromised, and stands a very limited chance of success given the decision of the Supreme Court of Canada in *Nolan v. Kerry (Canada) Inc.*²⁹

ii. The Amount or Nature of Discovery, Evidence or Investigation

44. In the context of both the initial disclosure of the diminution of the IPWU Surplus and the subsequent negotiations between the parties, there has been an exchange of actuarial and other information to permit the Plaintiffs and their advisors to assess the reasons for the decline in the IPWU Surplus and to negotiate a reasonable set of amendments to the SSA. Further, all relevant material has been put before the Court.

²⁹ [2009] 2 S.C.R. 678.

iii. The Settlement Terms and Conditions

45. The terms of the ASSA are set out above.

46. The provisions of the ASSA give effect to the terms negotiated under the original SSA, while providing Class Members affected by the drop in IPWU Surplus some hope of future recovery. There has been no change to the proportionate shares of surpluses between Canada Life and the Class, and the minimum surplus share payments to members of the IPWU Sub-Class and Eligible Inactive Class Members have been preserved. The Plaintiffs and Class Counsel believe that the ASSA presents the best set of terms that could be negotiated under unanticipated circumstances which seriously undermined implementation of the SSA. The terms are fair and reasonable, and ought to be approved.

47. Although the Plaintiffs would have liked more generous terms, these were subject to negotiation, and Canada Life remains responsible for funding any shortfalls in the Plan given the failure to purchase annuities.

iv. The Recommendation and Experience of Counsel Involved

48. Class Counsel are very experienced in matters involving pension plans and class proceedings, and have brought both pension law and class proceedings expertise to this case. The effective collaboration of two law firms has provided the Plaintiffs with strong legal representation in both fields. Class Counsel and the Plaintiffs recommend the approval of the ASSA.

v. The Future Expense of Proceeding with Litigation and the Likely Duration and Risk of Ongoing Litigation

49. Class Counsel and the Plaintiffs believe that the SSA, without the additional terms of the ASSA, cannot be implemented, because 1) the SSA requires Canada Life to purchase indexed annuities for members of the IPWU Sub-Class, which Canada Life cannot do; and, 2) the SSA requires eligible Class members to receive a minimum cash distribution of \$1,000, which is impossible given the current status of the IPWU Surplus. Canada Life disputes this position.

50. The parties agreed to settle the Plaintiffs' September, 2012 motion on the condition that the parties would proceed to mediation. They did so, leading to the terms of the ASSA. If the ASSA is not approved, the parties will likely revert to their positions of September 2012.

51. The Plaintiffs remain of the view that the SSA cannot be implemented, at least not without amendment. This raises the issue of whether or not there is a means of challenging any future steps taken by Canada Life to implement the SSA over the objections of the Plaintiffs. However, the more pressing concern from the Plaintiffs' perspective is whether or not such a challenge would have the potential of achieving any meaningful recovery for members of the Class.

52. If, as Class Counsel and the Plaintiffs believe, the SSA cannot be implemented in the form approved by this Honourable Court, there is a possibility that future litigation regarding the IPWU Surplus could proceed, either before this Court, or before the Financial Services Tribunal of Ontario. Such litigation would be lengthy and expensive, and in any event, would not have the result of increasing the IPWU Surplus.

53. In fact, time weighs against the adoption of any such strategy by the Plaintiffs, in light of a number of factors, including further future changes in capital, bond and annuity markets and the ever increasing costs associated with the administration of benefits and surplus in the Plan associated with members of the IPWU Sub-Class. The bottom line is that such litigation will not have the effect of restoring the surplus to its previously estimated levels, and militates against any further litigation in this matter.

54. Accordingly, the Plaintiffs submit that the Judgment should be varied in accordance with the terms of the ASSA.

vi. The Number of Objectors and The Nature of any Objections

55. As of March 8, 2013, Class Counsel has received notice from a number of Class Members indicating an intention to object to the ASSA. The substance of the objections are anticipated to express the disappointment and surprise on the part of Class Members regarding the decrease in distributable surplus of events, and a demand for accountability from Canada Life and its advisors.

vii. The Presence of Good Faith, Arms-length Bargaining and the Absence of Collusion

56. The negotiations surrounding the ASSA terms were at all times conducted on an arm's length and adversarial basis, consuming approximately 9 months. Each of the parties were independently represented and advised by sophisticated legal and actuarial professionals. The ASSA terms were reached with the assistance of the Honourable Justice Strathy in his capacity as a neutral mediator.

viii. The Degree and Nature of Communications by Counsel and the Representative Plaintiff with Class Members During the Litigation

57. In May, 2012, Class Counsel mailed notices to all Class Members, advising of the diminution in value of the IPWU Surplus, and the reasons for this decline. Class Counsel distributed Court-approved notices to the Class by regular mail in English and French, advising of the ASSA and the March 18, 2013 motion date to approve the variation to the Judgment.

58. Since the mailing of the notices, Class Counsel has fielded over 70 inquiries by Class Members, and has communicated with all of the objectors.

ix. Information Conveying to the Court the Dynamics of Positions taken by the Parties During the Negotiations

59. As has already been noted, Canada Life took the position that no amendment to the SSA was necessary following the drop in the IPWU Surplus, while Class Counsel viewed the SSA in its current form as unworkable. Notwithstanding these diametrically opposed views, and with the assistance of the Honourable Justice Strathy, the parties have negotiated a compromise which goes some way to addressing not only the difficulties in implementing the SSA in its current form, but also provides some potential for further future recovery for eligible Class members.

PART V - ORDER REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 11, 2013

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900, Box 52
Toronto, ON M5H 3R3

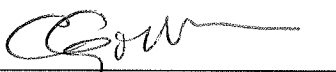
Per: 

Mark Zigler (LSUC#: 19757B)

Clio Godkewitsch (LSUC#: 45412G)

Anthony Guindon (LSUC#: 53995T)

HARRISON PENZA
450 Talbot Street, P.O. Box 3237
London, ON N6A 4K3

Per: 

David B. Williams (LSUC#: 21482V)

SCHEDULE "A"

SCHEDULE "A" - LIST OF AUTHORITIES

1. *Smith v. Kearns*, 2012 ONSC 1355 (S.C.J.) (CanLII)
2. *Relco Inc. v. Carbone*, 2000 CarswellOnt 4565 (S.C.J.)
3. *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.)
4. *Dabbs v. Sun Life Assurance Co. of Canada*, 1998 CanLII 14855 (ON SC)
5. *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673 (ON SC)
6. *Sparling v. Southam Inc.*, [1988] O.J. No. 1745 (H.C.J.)
7. *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (S.C.J.)
8. *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, 2005 CanLII 8751 (ON SC)
9. *Frohlinger v. Nortel Networks Corp.*, 2007 CanLII 696 (ON SC)
10. *Nolan v. Kerry (Canada) Incl*, [2009] 2 S.C.R. 678

SCHEDULE "B"

SCHEDULE "B" - LIST OF STATUTES

1. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 59.06(2):

59.06(2) A party who seeks to,

[. . .]

(d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

2. *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s 12:

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

3. *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

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

Court File No: 05-CV-287556CP

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF THE PLAINTIFFS

(Motion to Vary Judgment, returnable March 18, 2013)

KOSKIE MINSKY LLP

20 Queen Street West, Suite 900
Toronto, ON M5H 3R3

Mark Zigler (LSUC#: 19757B)

Tel: (416) 595-2090
Fax: (416) 204-2877

Clio M. Godkewitsch (LSUC#: 45412G)

Tel: (416) 595-2120
Fax: (416) 204-2827

HARRISON PENZA LLP

450 Talbot Street, P.O. Box 3237
London, ON N6A 4K3

David B. Williams (LSUC#: 21482V)

Tel: (519) 679-9660
Fax: (519) 667-3362

Lawyers for the Plaintiffs, David Kidd, Alexander Harvey, Jean
Paul Marentette, Susan Henderson and Lin Yeomans

SACK GOLDBLATT MITCHELL LLP

20 Dundas Street West
Suite 1100, Box 180
Toronto, ON M5G 2G8

Darrell Brown

Tel: (416) 979-4050
Fax: (416) 591-7333

Lawyers for the Plaintiffs, Garry C. Yip and Louie Nuspl