Court File Number: 05-CV-287556CP

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 RESPONDENT OBJECTORS
(see attached Schedule "A")

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PART I - NATURE OF THE MOTION

1. The Plaintiffs have ostensibly moved for "an Order varying the January 27, 2012 Judgment" in this action "in a form to be provided", apparently supported by all defendants. These Objectors state that the motion is more properly considered to be a request for approval of a settlement of a class action pursuant to Section 29 of the *Class Proceedings Act, 1992,* S.O. 1992, c.6 ("*CPA*"), as the agreement now presented for approval (being an original Agreement made in September 2011, as amended by further terms said to have been agreed to October 1, 2013, but first presented November 7, 2013 - which will be referred to as the "New Proposal") is fundamentally different than the agreement presented to this Court for approval in January 2012 - and as this Court has already indicated that it would not have approved of that agreement in January 2012 had it been aware of the correct facts and figures at that time.

2. The motion is also, de facto, a request for approval of a revised class counsel fee payment - as this Court has already indicated that it would not have approved of the fees approved in January 2012 had it been aware of the correct facts and figures at that time - and as the New Proposal incorporates revised terms as to class counsel fees.

3. These Objectors take the position that this Court should not approve of this New Proposal, nor grant the relief sought - on the grounds that granting the relief sought would result in a settlement of this class action that is not fair, reasonable, and in the best interests of the core members of this class (the 2,149 members of the Integration Wind-Up Group, or "IPWU Group") - and is manifestly unfair to a few hundred members of that IPWU Group who unwittingly accepted grossly undervalued commuted value buy-

out offers ("CV Offers"). As none of the named parties intend to provide a genuine response to this motion, these (and other) Objectors have come forward to do so.

4. These Objectors submit that this Court does not have jurisdiction to grant at least some of the relief sought, as: i) the New Proposal purports to impose on class members a Release of all claims they may now or in future have against some or all of the parties with respect to matters that were never part of the matters in issue in this action (including the failure to provide timely or correct CV Offers, and the ostensibly catastrophic mismanagement of the notional portion of the Plan relating to the IPWU Group); and ii) the New Proposal is said to be entirely contingent on Canada Life Assurance ("CLA") and the Fund/Trustees ultimately being found to be entitled to retain the very significant benefits accruing to them as a result of some IPWU Group members having unwittingly accepted the grossly undervalued CV Offers presented to them by those parties.

PART II - OVERVIEW

5. It is the position of these Objectors that the New Proposal is not at all fair or reasonable or in the best interests of this class generally, and of the primary members of this class (being the IPWU Group) in particular. In this regard these Objectors submit that the New Proposal is very deficient on a substantive level - and has been arrived at as a result of a process that has been very deficient on a procedural level. They submit that in a very real and substantial way the class members have been denied access to justice - as some very central (and highly adjudicable) issues have simply not been advanced or litigated, even

though the dispute between the parties appears to revolve largely or entirely around those issues - including what will be referred to as the "paradigm issue" as to whether the amount to which the IPWU Group has staked a surplus claim is variable at all, or is fixed at approximately $98 m. (plus accrued interest); and also including the issue of "expense payments" which CLA took from the Fund, particularly with respect to pre- July 1994.

Very Unique and Perjorative History and Circumstances

6. These Objectors also emphasize that the New Proposal is presented within an extremely unique and complicated context. First and foremost, it is presented after this Court had agreed to approve of the original settlement agreement in January 2012 (referred to here as either "the original settlement" or the "SSA") based on a deeply flawed presentation as to the amounts that would be available for distribution to class members by way of "surplus sharing" as a result of that agreement. It is patently obvious that the presented amounts were absolutely central to the apparent approval of (many of) the class members in 2011, and to the subsequent approval of this Court in January 2012 (in substantial reliance on the apparent approval of most class members).

7. It cannot be stressed enough that these amounts did not "become wrong" due to subsequent events. *The amounts presented to the Court on January 27, 2012 were wildly incorrect at the time they were presented* (see discussion below, and elaboration in paragraphs 33-36 of these Objectors' Factum for the Court of Appeal ("Appeal Factum"). It is the position of these Objectors that the January 2012 approval of the original settlement (and the parallel approval of the legal fees of *both* class counsel and,

implicitly, CLA and the Trustees) should therefore be considered unfair and of no force and effect (or at least open to review at this time) - particularly in light of the fact that the original settlement was (and remains) a contingent deal, subject to approvals from the regulator ("FSCO") and the Quebec Court, neither of which have been obtained to date.

8. Secondly, major potential issues have emerged since the February 2012 disclosure of the drastically reduced 2011 estimates of the "surplus" in the notional sub-fund which CLA has apparently set up with respect to the pension entitlements of the IPWU group, a couple of which are highlighted in the paragraphs immediately below. Before describing these, it is noted that if the position of these Objectors regarding the "paradigm issue" (alluded to above, and further set out below) is accepted, these revised estimates of a varying level of "surplus" in this notional sub-fund are of limited or no relevance.

9. The February 2012 disclosures revealed that CLA (and, presumably, the Trustees) had apparently been aware that the CV Offers they had presented to IPWU Group members in 2011 (and would again present to such members later, in early 2013) were very substantially less than the value that CLA was itself ascribing to those same future liabilities for all other purposes of the administration of the Fund - including the "surplus estimates" for the notional sub-fund. In essence, there was (and remains) a *fundamental incoherence* in how CLA (and, presumably, the Trustees) are purporting to deal with the estimation of the very same future liabilities of each and every IPWU Group member (and in this case, that incoherence is the basis for using figures that work to the advantage of CLA, and to the detriment of those members, in both the CV Offer and notional sub-fund surplus calculations).

10. Those February 2012 disclosures also necessarily implied that CLA and/or the Trustees had managed (or mismanaged?) the notional sub-fund in a spectacularly ineffective way - since 2005 (i.e. after the start of this claim), and in particular since the agreement in principle to pay approximately 70% of surplus to certain class members (i.e. after it was clear that the primary portion of such surplus would not be for the benefit of CLA, the company for whom the Trustees remained senior managers). The magnitude of such ineffective management is revealed by the core figures set out below.

The Pardigm Issue - The Amount in Issue in the Surplus Claim

11. The *Pension Benefits Act ("PBA")* as in force at the time of this wind-up required that the Plan administrator file a Wind-Up Report (WUR), setting out (inter alia) the actuarial estimate of the assets and liabilities of **the Plan** (note: the *entire* Plan - not some kind of notional sub-group of the Plan) - effective June 30, 2005, being the effective date of the wind-up. That WUR was completed and filed with FSCO in March 2006. It determined that the total assets of the entire Plan (rounded) were $753 m., while total liabilities were estimated at $483 m., yielding a surplus of $270 m.. The Fund therefore had assets equivalent to 156% of what was required at the time. In other words, this was a huge surplus - not just in gross dollar terms, but even more so when expressed as a percentage of aggregate liabilities. It was indicated that the appropriate pro-rated portion of those amounts (being 36.27%, calculated using the liability valuations *at that time*) attributable to the IPWU Group were: assets: $273 m.; liabilities: $175 m.; surplus: $98 m. (i.e. same ratios as set out above). A sum of $5 m. was indicated to be the estimated costs of the

partial wind-up and such amount was said to be deducted from the surplus (on what basis is not entirely clear) to yield a net surplus pro-rated amount of $93 m. for the portion of the Plan being wound up.

12. These Objectors submit that it is very important to bear in mind that these WUR surplus estimations in no way contemplated or factored in any amounts for additional surplus to be derived from acceptance of undervalued CV Offers - it was entirely "genuine surplus". Indeed, there would be no reason to anticipate any such additional surplus as the *PBA* and regulations required such CV Offers to be made promptly after termination, and at rates that were accurate to the time of termination (i.e. accurate to the time they were presented). In such circumstances the number of members choosing to take such CV Offers would be entirely neutral to the surplus calculation.

13. Although the figures cited in paragraph 11 above are necessarily based upon actuarial estimates (as the entire Fund was clearly not going to be actually wound up), it is the position of these Objectors that once identified in the WUR ***these estimates become the fixed amount of surplus*** to which the IPWU Group members can stake (and have staked) an ownership claim. It is the position of these Objectors that this is necessarily so, given the provisions of the *PBA* (in particular subsection 70(6)), as clearly and unequivocally interpreted by the Supreme Court of Canada in the leading case of *Monsanto v. Ontario (Superintendent of Financial Services)* - see discussion of "paradigm issue", below. As such, any changes to the asset/liability/surplus estimations beyond June 2005 (up or down) - while understandably of concern of the Plan sponsor, administrator and members (and the regulator) - are simply not relevant to the rights of

the IPWU Group members, who had ceased to be active (contributing) members of the Plan - or active employees of the company - since at least 2003-2005.

14. The construct of a notional sub-fund for the "wind-up portion" of the Fund is not specifically contemplated by the *PBA* - nor by the interpretation of those statutory provisions in *Monsanto.* Indeed, the *PBA,* as interpreted and applied in *Monsanto,* contemplate pretty much the exact opposite - i.e. that the quantification of the surplus for the purposes of a partial wind-up must be done for the *entire* Plan. This is in part because it is logically necessary to do so in order to give effect to the subsection 70(6) requirement that the IPWU Group members "*...shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up."* That provision has been interpreted to apply to their claim to any available surplus as of the effective date of the wind-up - and as a provision designed to ensure that the members being removed from the Plan on the wind-up do not in any way fare any worse than the members of the ongoing Plan.

15. It is submitted that the allegedly prodigious (and notional, and temporary) "loss of surplus" that the parties point to as the reason for the New Proposal is at most only a change in the estimation of the amount that may be payable pursuant to the convoluted provisions of the original settlement - it is *not* a change in the amount of surplus to which the IPWU Group is entitled to stake (and has staked) a claim in this action. The substantive fairness of that original settlement therefore depended very much on the representations made to the members and the Court as to the amounts that would be distributed pursuant to that approach (i.e. whether it would generate payments that bore

some sensible relationship to the amounts to which the IPWU members had a right to claim in the action). It is especially for that reason that the approvals of that original settlement in 2011/January 2012 lack validity - given that the amounts available for distribution to members under that agreement (as of the time of the January 2012 approval hearing) were in fact well under $10 m., as opposed to the amounts of approximately $50 m. represented by the parties at that time.

Potential Claims Not Advanced in this Action

16. To the extent that the amount for distribution under the SSA was to be calculated based upon some sort of "actual" (but in fact, largely notional) performance of the notional sub-fund, then it is clear that time would be "of the essence" and that the matter of the appropriate ongoing management of that notional sub-fund becomes of paramount importance. In this case the sponsors/administrators/trustees appear to have paid very little attention to the effect that long and unexplained delays (in providing CV Offers and in otherwise tying down the liabilities of the fund) would have on the interests of those entitled to the surplus - and, by their own estimation, they managed to parlay a 156% cushion into a situation where they allege that they have effectively no surplus (and in fact, given the apparent influx of $20-30 m. or more in "false surplus" from systematic underpayment of CV Offers, they appear to have in fact managed the rest of the notional sub-fund into a significant deficit).

17. It is the position of these Objectors that no such "surplus losses" have in fact occurred in any actual sense - certainly not to the entire Fund (details of which have inexplicably not been disclosed), but not even in the notional sub-fund. The alleged losses have occurred

only on a notional basis - and even in that respect only temporarily. If the same notional transfers were effected today (as opposed to the arbitrary date of August 31, 2012) the amount of such losses would be dramatically less than what CLA is now presenting as a "locked in" loss of surplus. However, in the alternative that such notional losses are in any way determined to have adversely affected the entitlements of the class members anticipating "surplus sharing", these members should have a right to challenge the defendants (and perhaps others) as to legal liability for allowing such things to occur - and it would be inappropriate (or at least very unfair to them) for the New Proposal to impose on them any form of Release of such potential claims.

New Proposal Not Fair to Class According to Traditional Factors

18. In light of the unique context set out above, these Objectors submit that the New Proposal is in any event manifestly unfair to them on both a substantive and procedural level - and effectively denies them access to justice with regard to the matters in issue in this case. In addition, they submit that in view of the unique circumstances set out above, it might also be considered that the New Proposal is also unfair to them on the institutional and circumstantial levels identified by this Court in rejecting the previous amendment proposal in March 2013. The reasons for such positions are addressed further in Part IV below.

19. Briefly, these Objectors submit that the IPWU Group members have a very strong substantive claim to ownership of the wind-up portion (approximately 36.3%) of the entire Plan surplus, as it was actuarially estimated to be on the effective date of the wind-

up (i.e. $98 m., plus significant interest accrued since 2005). They also submit that the class as a whole has a strong case that CLA should be compelled to return at least some of the administrative expenses they had previously removed from the Plan (specifically those paid out of the Fund in the earlier years before mid-1994) - adding to the surplus position of the Plan (for the benefit of all members) by an amount that is likely at least $30 m. - $50 m., after huge interest considerations. These Objectors also emphasize the very significant practical factor that most of the money in the Plan has come from the members, as CLA has not made any contributions for at least the last quarter century.

Amended Statement of Claim, Intervenors Compendium, Tab 1, at para 24

20. A key factor in assessing substantive fairness is the "paradigm issue" of how the amount of surplus is to be determined for the purpose of adjudicating the common issue identified as "*if so, how much is required to be distributed to the IPWU subclass*". It is submitted that this is essentially a question of law - as the pertinent facts are clear and undisputed. As noted, the method for determining the quantum of surplus to be distributed in such cases was clarified by the Supreme Court of Canada in *Monsanto* - to be based on an actuarial estimate of the surplus in the *entire* Plan as of the effective date of the wind-up. It is potentially highly relevant to this action that the Court explicitly indicated that *the wind-up members should not be subject to the risks of the Plan* after they have been terminated from it.

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), 2004 SCC 54 at paras. 41-48, Objectors Book of Authorities, Tab 1 & 2.

21. As the terms of the original settlement are well known to this Court they will not be identified here. However it may be quite relevant to note that it was remarkably unclear

as to exactly how (and when) "the surplus" would be calculated - and ultimately defined the amount as being the amount proposed (and presumably accepted) by FSCO (see in particular note 2 after paragraph 26 in these Objectors' Appeal Factum). It is also relevant to note that in any event the original settlement was subject to a condition precedent that it was to be null and void unless FSCO (and the Quebec Court) approved of the proposed surplus allocation - neither of which has occurred to date. Although it was not identified as a contentious issue between the parties in the Amended Statement of Claim, the ***amount*** of IPWU surplus that CLA proposes to be distributed pursuant to the SSA has (since 2012) become the central aspect of this dispute, and the essential reason this motion is before this Court.

22. CLA appears to take the position that "the surplus" allocable to the IPWU Group (pursuant to the SSA) is to be determined through a process (still underway) by which the SSA surplus is determined separate from the Plan surplus. That process (further described at paragraph 37 of these Objectors' Appeal Factum) appears to be based on notional transfers of the IPWU liabilities into and back out of a notional sub-category of the Plan - using significantly different (or, mismatched) actuarial assessments on the way in and out. CLA contends that this process has resulted in a situation where the portion of the surplus allocable to the IPWU Group (pursuant to the SSA) - as opposed to the estimated surplus in the Plan as a whole - has essentially disappeared.

23. These Objectors emphasize that the terms of the SSA regarding how the surplus amount to be allocated to the IPWU Group (and shared) are not at all clear - and that in any event the SSA provides that the allocation is ultimately what FSCO agrees to approve as

appropriate (which has not yet occurred, and which will presumably may be done in a way attentive to the law as clarified in *Monsanto*). Alternatively (i.e. if the CLA method of SSA allocation is deemed to be correct) that allocation necessarily makes the SSA (and even more so, this New Proposal) massively unfair to the IPWU members.

24. Simply put, these Objectors take the position that the New Proposal can only be fair and reasonable *if* it provides for an allocation of Plan surplus to the IPWU Group that is similar (or reasonably close) to the allocation as set out in the WUR filed with FSCO in March 2006, effective June 30, 2005. The parties are effectively suggesting that "the surplus is gone". These Objectors flatly deny this - emphasizing that it is only "gone" *if* you calculate it as per the SSA/New Proposal a*nd if* you accept the notional transfers at mismatched values as proffered by CLA - in which case the SSA/New Proposal is for that very reason patently unfair - and should not be approved (by FSCO or this Court), particularly as it would ostensibly preclude members from holding anyone to account for putatively massive disappearance of Plan value.

25. Procedurally, these Objectors emphasize that when the SSA was presented for member and Court approval, estimates provided by CLA suggested that the SSA would provide a distributable surplus of a magnitude that brought it sufficiently close to the 2005 figures as to justify a conclusion that it was "fair and reasonable" to the IPWU Group that is the primary constituent of the class. Specifically, each member received a complicated and somewhat incomprehensible summary of the proposed SSA in 2011, along with a (comprehensible) specific dollar estimate of what that member would receive by way of surplus sharing under the SSA - and the Court was given an estimate that suggested the

IPWU members would receive most of those amounts. It is strongly submitted that those estimated distributions had to be, and were meant to be, and were in fact absolutely central to the approval processes with the members and the Court.

> Reasons of Perell J. dated March 28, 2013, ("Reasons - 2013"), para. 36-37 and 142-144, Motion Record, Tab 2(B), pp. 16 and 32-33.
>
> Information Package Sent to Members in 2011. ("Member Info Package")
> Exhibit S to Affidavit of D.Kidd, sworn January 4, 2012.
> Motion Record, Tab 2(A)

26. Within weeks of this Court's approval of the SSA in January 2012 CLA revealed updated estimates that made it apparent the estimates that had been presented to the members (in 2011) and the Court (less than four weeks previously) were in fact hugely incorrect (and were so as of the dates they were presented). Although these Objectors have very significant concerns about how this may have come to pass, they emphasize for present purposes that the fact those estimates were so hugely incorrect makes any approvals based on them procedurally invalid, and makes the entire process fundamentally unfair to the IPWU class members on a procedural level.

> Exhibit B to Affidavit of J.Foreman sworn March 8, 2013 ("February 23, 2012 Email")
> Motion Record, Exhibit 4(C)

27. When the SSA was presented for the approval of members in 2011 CLA presented an estimate of $62.2 m. of distributable surplus (as determined for the notional IPWU sub-category separately, under the SSA, as interpreted by CLA). When Court approval of the SSA was requested (and granted) in late January 2012, CLA provided an analogous estimate of $54 m (based on calculations done effective June 2011). The estimate produced by CLA a few weeks later (effective December 31, 2011 - i.e. four weeks

before the approval hearing) was actually only $8 m. (less than 15% of the figure presented to the Court less than one month earlier).

Affidavit of W. Robinson, sworn, September 24, 2012, para 4

28. The surplus estimates presented to the members and the Court (as above) included estimations as to the amount by which the notional sub-group of the Plan would benefit from some members accepting commuted value ("CV") buy-out offers at amounts far lower than the values ascribed to those liabilities in the actuarial assessments current to the time of the offers (characterized here as "false surplus"). Such estimates are not actuarial, as a key component was a guesstimate as to how many members would accept such undervalued offers. It is the position of these Objectors that presenting such offers 6 to 8 years after termination - at discounted, non-market values - is not fair to those members, and may not be approved by FSCO. Fairness aside, it is clear such estimates were substantially incorrect - as would have been known by September 2011.

29. The SSA provides that it will resolve all claims between the parties (not just those presently advanced in the Claim, or noted as issue in the certification Order). While this provision seemed relatively innocuous when the SSA was presented for Court approval - and hence received little attention in January 2012 - it is now of central importance (and of great advantage to CLA and the Trustees) if the New Proposal were to be approved and implemented as presented by CLA - i.e. with payment to IPWU Group members of effectively none of the $93 million genuine surplus identified as of 2005. Such a complete "loss of surplus" necessarily raises huge issues about the manner in which the Fund was managed (or mismanaged) by the defendants during the interval from 2005 to

the present (and in particular after the MOU in late 2007). In any event, significant liability issues may arise because CV offers were not made until 2011, nor were any steps taken to finalize liabilities until 2012.

30. As noted, in the fall of 2012 CLA ostensibly attempted to "finalize" the liabilities of the notional partial wind-up sub-category by transferring those liabilities back into the continuing Plan (in effect, unwinding the wind-up). These Objectors stress that the relevant surplus should be the one in the Plan as a whole. They in any event deny that the SSA surplus is in any real way gone - but has rather been made to disappear by a notional transfer into and then (years later) out of a notional sub-category, using dramatically different assessment assumptions. They also stress that surplus will likely "reappear" in the continuing Plan (for the benefit of CLA) as relevant rates return to historical averages, from the historical lows of 2012.

> Government of Canada - Summary of Rates on "Real Return Bonds - Long Term"
> Affidavit of Durst, Objectors Record, Tab 2(W)., Tab 3

31. It is submitted that in making this request the representative plaintiffs and/or Class Counsel are in a position of conflict in that they apparently decided not ask the Court to set aside the SSA (even though they acknowledged that the 2,149 IPWU Group members may have wished to do so) because they perceived potential for loss for other class members (specifically the 89 members of the Indago, Adason and Pelican groups) who are oddly proposed to get much more than the 2,149 IPWU Group.

> Reasons of Perell J. dated March 28, 2013 ("Reasons"), para. 99. pp. 24-25
> (citing CLPENS February, 11, 2012 Communication)

32. It is the position of these Objectors that this New Proposal is not sufficiently better than the previous amended settlement which this Court correctly refused to approve in March 2013 - as it essentially quantifies the amount of additional surplus to be distributed at an amount quite similar to the $15 m. "cap" that had been proposed on the potential "subsequent distribution" in that rejected deal (and was noted by this Court to be particularly unfair) - while at the same time eliminating any chance for such a "subsequent distribution".

33. These Objectors reject the characterization of this motion as a request for "an Order varying a Judgment" - and challenge the implied contention that the considerations relevant to such a motion are more limited than those relating to a motion for approval of a settlement under the *Class Proceedings Act, 1992 ("CPA")*, as having no basis in law. In any event, it is unrealistic to present this New Proposal as an amendment or variation when it provides such a fundamentally different practical outcome for the class, and where there is very good reason to conclude that the SSA itself is not (and was not) fair.

34. In summary, Court approval of this New Proposal (and the requested variation of Judgment) would yield a massively unfair result for the IPWU Group on a substantive level - as it would result in them being paid approximately 20% of their seemingly strong claim to a surplus share of at least $98 m. plus significant interest (while at the same time giving up all of their other claims, including their strong claim regarding pre-1994 expenses). In addition, it would result in an outcome for the IPWU Group that would be inconsistent with the provisions of subsection 70(6) of the *PBA*. In any event, it involves payments of very large legal fees and expenses to *all* parties (including what

is apparently a significant multiplier to class counsel) that cannot be justified in light of the meagre results that class members would obtain if this New Proposal were to be implemented.

35. Approval of this New Proposal would also sanction a process that makes a mockery of concepts of procedural fairness - in that both class approval and the initial Court approval were obtained based on massively inaccurate estimates (provided by CLA) as to the critical matter of how much surplus would be shared.

36. These Objectors characterize this as a case where an extremely slow and highly technocratic approach has been used to try to grind away the legal rights and entitlements of honest hard working people - with the potential result (if the ASSA were approved and implemented as proffered by CLA) that surplus monies arising out of their payments into the Plan (not CLA's) will be taken from then, but left for the benefit of the company that fired them after many years of dedicated service.

37. The onus is squarely on the parties to satisfy this Court that the New Proposal is fair, reasonable and in the best interests of the class members. In this case there remain very significant gaps in the information necessary to properly consider the fairness of the New Proposal - and for that matter to even determine if it is in compliance with the "equal treatment" requirements of the *PBA*. It is therefore submitted that this Court should reject the request of the parties and refuse approval of this New Proposal. Rather, it is submitted that this Court should undertake a reconsideration of some or all of the approval decisions of January 2012.

PART III - FACTS

38. There are a large number of factual matters potentially relevant to the disposition of this motion. As this Court is already well-acquainted with many of these facts, most of those will not be repeated here. In any event, there is a fairly detailed recitation of some of that factual record in the Objector/Intervenor Factum that was filed at the Court of Appeal in September 2013 by me on behalf of many of the Objectors - which Factum has been included in the Responding Motion Record as Exhibit "Q" to the Affidavit of Ms J. Durst. The Court's attention is directed to that Factum for reference. In the balance of this Part we will call attention to certain specific facts that may not have been fully called to the Court's attention previously.

39. The pension plans giving rise to this action first came into being in 1958 and 1964 and merged into a single plan in 1997 (the "Plan"). The Plan had been in a strongly surplus position for many years, as evidenced by the fact that CLA had been on an indefinite "contribution holiday" since at least 1988 (and likely well before). Thus most of the money in the Fund has been put there by the (not on holiday) members.

40. The "effective date" of the partial wind up is June 30, 2005. All of the affected workers were terminated prior to or by that date. In April 2006 CLA filed a "Partial Wind-Up Report" with FSCO stating *the estimated solvency surplus in the Plan as of June 30, 2005 allocable to the partial wind-up group was approximately $98 m.*

> Affidavit of M.Robinson, sworn September 20, 2012, Para 18.
> Exhibit Book Vol II , Tab 2A
> Affidavit of A.Quindon, sworn September 20, 2012, Para 3
> Exhibit Book Vol I, pp. 46-7
> *Pension Benefits Act,* R.S.O. 1990, c.P.8, s. 68 (5) and (6), Schedule "A"

41. This action was commenced for the IPWU Group (not Indago, Adason or Pelican) in April 2005. There have been no formal steps in the action, apart from mediation. Specifically, there have been no examinations for discovery or formal pre-trial disclosure. As indicated below, there remain quite significant factual and evidentiary matters about which there is still relatively significant confusion and uncertainty.

42. There is no indication that any steps were taken by CLA or the Trustees of the Plan to finalize the liabilities of the IPWU before 2011 (when commuted value options were first presented) and 2012 (when steps were apparently taken for the first time to try to buy annuities to replace the pension benefit entitlements of all others). No explanation has been offered as to why these steps were not taken well before that time, even though the *PBA* contemplates that these actions are to be taken promptly after the wind-up is declared. Had such steps been taken in a timely way, the alleged (not admitted) "drop in surplus" (that gave rise to the ASSA) would simply not have been possible. Similarly, there is no indication that any steps were taken by CLA or the Trustees to manage the Fund in a manner that would stabilize the Fund in the event of significant changes in the estimation of future liabilities (for example, by adopting an investment strategy that linked asset appreciation rates to changes in estimated liabilities - i.e. "hedging").

43. Regarding the expense claim issue, the allegations in the Statement of Claim (supported by uncontroverted evidence in the Record) establish a very strong argument that there was a clear agreement between all relevant parties that all pre-1994 costs and expenses were to be borne by CLA - and that although the exact amount of payments withdrawn by CLA prior to that cannot be determined (because the has not yet been disclosed) the

amount is at least $11 m (and likely at least double that, and possibly much more) before consideration of (potentially very significant) interest considerations.

Affidavit of D.Kidd, sworn January 4, 2012, Para 28-42
Exhibit Book Vol III, Tab 3A, pp. 440-444

[1]At all points in time prior to 1994 (and possibly later) the Trust Agreement for the Plan explicitly required that CLA "pay all costs and expenses in connection with the Fund" and the regulator required CLA to send a Notice to all Plan members in the summer of 1994 which explicitly confirmed that prior to that Notice CLA "paid the expenses of the Plan directly" but that "the expenses and costs of administering the plan will, in the future, if the Company requests, be paid from the pension fund". Setting aside the question of what was properly requested after 1994 - and the other trust documentation that was not changed until 2002 and 2003 - it is difficult to imagine a more clear indication that CLA was obligated to provide administration of the Plan at no cost to the Plan. The Record also contains uncontroverted evidence as follows: i) that at a date unknown to the plaintiffs, sometime between 1964 and 1988, CLA began to charge administration and investment expenses to the Fund; ii) that FSCO records show an aggregate amount of at least $13.4 m. being charged to the Fund by CLA in the years 1987, 1988, 1989 and 1994; iii) that no figures were available (from FSCO) for the years 1990 - 1993, inclusive; and iv) the plaintiffs do not have expense information for years before 1988. There is therefore good reason to conclude that (likely unauthorized) pre-1994 expenses of at least $11 m were removed from the Fund by CLA in just the 3.5 years for which information is available, and that expenses of a similar amount were likely charged in the four years 1990-1993, and that unknown amounts may have been charged in some or all of the 23 years before 1987. This suggests a minimum of about $22 m (plus huge potential interest for 20 plus "high interest" years, likely doubling those amounts) of highly questionable deductions, and possibility double or triple that amount. A complaint about this issue was made to FSCO in 2005, but the investigation was put on hold due to the commencement of this action. It has never been resumed, nor concluded.

44. The presentations made to members in 2011 did not describe how the amount to be shared was to be determined under the SSA - nor the fact that the estimates included with those packages were higher than they otherwise would have been because they included amounts that were predicated on unsupported non-actuarial guesstimates (ultimately demonstrated to have been quite inaccurate, on the high side) that many members would take up the undervalued CV option - although there is no logical basis to have expected any take-up rate whatsoever (as the offers were well below market values when they were made). A prudent and logical estimate would have been zero.

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45. The parties clearly understood that as time went on between 2005 and 2011 there was an increasing potential to generate "false surplus" if a member (presumably unwittingly) elected to take one of these highly delayed and undervalued buyouts, when they were finally offered (in 2011). It is emphasized that if these CV offers had been made at the time the members were terminated - as contemplated by the *PBA* - there would have been no such undervaluation and the effect on the surplus would have been entirely neutral. It is reasonable to conclude that as of this time all of the amounts CLA proposes to "share" come from such "false surplus".

[2]These Objectors submit that wording of the SSA is remarkably obscure regarding this absolutely key matter of "what is to be shared" - and that the parties have not been very clear about this matter in their communications with the members and with the Court. It is submitted that the convoluted provisions of the SSA ultimately provide that the amount to be "shared" is: a) the amount set out in the Partial Wind-Up Report (less costs); but b) ultimately subject to whatever FSCO is prepared to approve by way of an allocation of surplus to the IPWU Group (which has not yet happened). As to item a), while the name suggests this means the March 2006 Report to FSCO (effective June 30, 2005) the SSA actually defines the term to mean "the *final* report or reports filed with FSCO relating to the Partial Wind-Ups" (which do not appear to have yet been filed - and which presumably mean such reports as accepted/approved by FSCO). Ostensibly, the terms seem straightforward - providing (in para. 7(a)) for a sharing of the "Final Partial Wind Up Surplus" (a defined term). However, the definition of that term (in para. 1(xxiii)) becomes confusing - specifically that it "has the meaning set out in para. 2(a)(iv)". In that sub-para. it is described (in a confusing and grammatically inverse way) as: "Following the application of paragraphs 2(a)(i), 2(a)(ii), and 2(a)(iii), the surplus *allocable* to each Partial Wind-Up....following Regulatory Approval and Court Approval". Sub-para. 2(a)(i) appears to be the crucial starting point for determining the amount, but with very unclear words that describe the "Surplus *allocable* to each Partial Wind-Up ***shall be set out in the Partial Wind Up Report"*** (a defined term, but importantly also the exact term used to describe the key filing CLA was required to make to FSCO in April 2006 - setting out the mandatory assessment of the estimated Plan surplus of approximately $233 m as of June 30, 2005). However, the definition of Partial Wind Up Report in the SSA (in para. 1(xxxix)) says that it means "the ***final*** report or reports filed with FSCO relating to the Partial Wind-Ups" (emphasis added). It is not clear what final report this refers to - although it would appear to be a report

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which has yet been filed (more than 10 years later) as the FSCO approval process is still pending.

46. As noted, the amount of surplus to be allocated to the IPWU Group for "sharing" is the amount that FSCO ultimately approves as an appropriate allocation. In that regard, there is good reason to argue that FSCO should not approve an allocation unless it is consistent with the provisions of the *PBA* - as clarified by *Monsanto* - particularly the provisions of Section 70(6). It is noted that the SSA contains a specific provision (S. 11) referencing s. 70(6) of the *PBA*. If CLA intends this "acknowledgment" provision as a "contracting out" of the members' minimum statutory rights, that is patently unfair.

47. Notwithstanding the considerations set out above, the New Proposal appears to be predicated on an assumption the SSA (and a particular surplus allocation for this IPWU) has been approved by FSCO - although this is not the case. Given the that entire SSA (and the Court ruling approving it) makes it clear that it is null and void without FSCO approval, it is submitted that it is not appropriate for CLA to act as though such approval is not necessary, or is perfunctory.

48. As noted above, the SSA also provides full releases for all defendants regarding all claims that might be made against them by class members. The putative consent of the members, and the approval of the Court in January 2012, were all obtained prior to CLA divulging that the amounts they proposed to share under the SSA were relatively negligible. To the extent CLA proffers that "the surplus is (almost) gone" (not admitted) that very proposition may give rise to multiple potential bases for liability on the part of (one or more of) the defendants to the IPWU Group. For this reason as well it is both

procedurally and substantively unfair to obtain approval of the SSA prior to disclosure of such massive "surplus reduction".

49. The surplus estimates were clearly presented with the full intention that the Court would rely on them, and the Court did, in very explicit terms. These estimates were clearly based on calculations effective seven months prior to the hearing - which should be considered extremely dated in this industry and in these circumstances. It is noted that none of the parties indicated to the Court that there was any reason to doubt the (then) current accuracy of the figures they were presenting - and there is no evidence about what steps the parties took to provide up to date figures, or to wait until such figures were available.

50. Less than four weeks after the Court's approval/Judgment of January 27, 2012 CLA acknowledged that (assuming their non-statutory model of allocation was accepted) the estimated SSA surplus for distribution was down to approximately $8 m. (i.e. less than 13% of the previously presented total of $54 m.) - and that it was so a*s of the time of the approval hearing*. (Six months later the amount was said to be down to $2.6 m). The Record is therefore clear that this Court was relying on fundamentally incorrect information when it approved of the SSA - and that the inaccuracy of that information was not just relevant to but determinative in the granting of that approval. For these reasons alone, the approval of the SSA should be considered unjust, invalid (and subject to being rescinded) - *if* FSCO in fact approves of the CLA's proposed allocation.

[3]Although it is acknowledged that the "summary memo" provided shows a figure of $23.7 m. (which figure appears to have been accepted by Justice Perell in his March 2013 Reasons) the body of the

memo makes it clear that if the deemed refusals (which had already taken place in September 2011) are added into the calculation, the figure is down to $8 m.

51. This $46 m. decrease in the estimated IPWU surplus figures (from $54 m. to $8 m.) was due to two factors: 1) increased liability estimates due primarily to declining real interest rates; and 2) the CV take-up rate being less than what had been estimated. The latter factor apparently accounted for about $25.9 (or roughly half) of the reported decrease (see next paragraph). The former factor can be assumed to account for the other $20 m.

February 23, 2012 Email

52. These Objectors submit that it is reasonable to suggest that a more accurate estimate of the anticipated surplus sharing amounts could (and should) have been presented to the Court in January 2012. Specifically, a quantification of the exact amount of "false surplus" derived from CV take-ups could (and should) have been presented, as that program had been completed five months earlier. As regards the interest rate factor, the relevant rates are published on a regular basis, and the CLA actuary Mr. W. Robinson has set out a formula for computing with considerable accuracy the effect that changes in those rates will have on the (cautious) actuarial estimates of the present value of Plan liabilities (and hence on surplus). It is also suggested that regular tracking of movement of such rates (and the implications) is integral to the business of CLA - allowing CLA (eg. Mr. Robertson, or the Trustee Mr. Loney) to accurately track the effect of such changes without the assistance of independent consultants such as Mercer's. In subsequent material it is stated that later in 2012 the movement of these estimates was being monitored and tracked regularly.

Mercer Mailing to Members re Commuted Values Options 201

Affidavit of W.Robinson, sworn September 24, 2012, Para 16.

53. It is noted that no where in the Record does CLA state that it understood that the June 30, 2011 estimates were still approximately accurate as of January 2012, (although the circumstances would seem to have called for such clarification). The message of February 23, 2012 from counsel for CLA states:

> *"Canada Life has* ***recently*** *received from Mercer an update as at December 31, 2011....As you will see from the attached memorandum prepared by Canada Life...".*

There is (notably) no indication of when it was received, nor when it was requested, nor why it was not requested prior to the Court hearing (or the Court hearing delayed until it was ready). Also, the crux of the information is in fact delivered in a "Memo prepared by Canada Life" - as opposed to a document directly from Mercer. The full communication trail with Mercer does not appear to have been provided. It is submitted that in the circumstances CLA had an obligation to the Court (and to the class members) to obtain and present accurate and up to date information to the Court about the estimated payouts, at the time of the approval hearing.

54. As noted above, CLA appears to argue that the surplus funds allocable to the IPWU Group under the SSA, is to be determined as follows: an appropriate portion of Plan assets and liabilities were (notionally, not actually) transferred to a notional (not actual) sub-fund (using estimates based on historically higher interest rates), where they notionally sat for a number of years while CLA and the Trustees took no steps to actually wind-up that portion of the Plan, and then were notionally (not actually) transferred back into the Fund at dramatically higher estimated liabilities (on the grounds that at the time of the notional re-adsorption interest rates on real return bonds were at historic lows) -

leading to the CLA contention that there is no "actual surplus" to share pursuant to the SSA. As all of these transfers are notional, *the actual status of the Fund has not actually changed as no actual transactions have occurred* with the result that the "lost" surplus can reappear. This has been described by objector Fred Taggart as an "actuarial sleight of hand".

PART IV - ISSUES AND ARGUMENT

General Principles Applicable to *CPA* Settlement Approval

55. The purpose of judicial approval as mandated by s.29 of the *Class Proceedings Act , 1992 ("CPA")* is to safeguard the interests of absent class members by filling the "adversarial void" that often arises in such circumstances. For a settlement to be approved, "the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it." including any relevant sub-group within the class.[4] The onus is on the parties proposing the settlement to satisfy the court that it ought to be approved.[5]

56. The relevant considerations in determination of fairness in this context have been set out in the leading case of *Dabbs v. Sun Life,* as outlined below. It is stressed that those considerations are not separate tests or considerations, but rather an attempt to delineate the kinds of things that may come into play in applying the broader test

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[4] *Dabbs v Sun Life Assurance Co of Canada,* [1998] OJ No 1598 (Ont Gen Div) at para 9 (available on WL Can), Sharpe J [*Dabbs* 1], Appellant's BOA, Tab 4_

[5] *Dabbs* 1, *supra* note 9 at para 7, Appellant's BOA, Tab 9.

> *"a guide in the process and no more. Indeed, in a particular case, it is likely that one or more factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process."*[6]

Sharpe, J. (as he then was) affirmed that settlements "must be seriously scrutinized by judges" and "viewed with some suspicion".[7] It is submitted that academic commentary has generally been critical of the insufficient level of scrutiny at fairness hearings.[8]

58. Following the approval of a settlement, the court remains seized of the matter. The administrators of a settlement must be autonomous, independent, and neutral.[9]

59. The New Proposal should not be approved unless this Court is satisfied that it is all of procedurally and substantively (and perhaps also circumstantially & institutionally) fair. It is emphasized that a single finding of lack of evidence of fairness in any of these respects is sufficient to justify a refusal to approve. These submission will focus on the assessment of certain aspects of procedural and substantive fairness (or lack thereof) in the circumstances of this case - following the "seven point" summary (four primarily substantive, three primarily procedural) proposed by Professor Piche, previously identified by this Court as "very helpful".

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[6] *Parsons v Canadian Red Cross Society* (1999), 40 CPC (4th) 151 (available on WL Can) at para 73 (Ont Gen Div) Winkler J, Appellant's BOA, Tab 5.

[7] *Dabbs v Sun Life Assurance Co of Canada* (1998), 40 OR (3d) 429 at para 31, [1998] OJ No 2811, Sharpe J [*Dabbs* 2], Appellant's BOA, Tab 4.

[8] Jasminka Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LL.M. Thesis: University of Toronto, 2009) [forthcoming] ch. 4 at p8 ["Kalajdzic, Access to Justice for the Masses?"], Interveners BOA, Tab 11; Catherine Piché, *Fairness in Class Action Settlements* (Toronto: Thomson Reuters, 2011) chapter III, parts III & IV, in particular, Intervenors BOA, Tab 12.

[9] *Baxter v Canada (AG)* (2006), 83 OR (3d) 481 at paras 31-39, 40 CPC (6th 129) (Ont Sup Ct), Winkler RSJ, Appellant's BOA, Tab 2.

Substantive Fairness

i) Likelihood of Success vs. Settlement Relief - "Does it Appear to be a Decent Deal?"

60. As indicated above, there are reasonable grounds for concluding that the claim for surplus ownership is a strong one. There is little evidence to the contrary. It is submitted that the factors noted as possible problematic factors (in paragraph 86 of the February 2012 approval reasons) are rather modest risk factors when viewed in light of the clear language in the various trust documents that surplus is not to revert to CLA - and in view of the practical reality that all available evidence is that the vast majority of the monies contributed to the Fund were contributed by the members.

61. As also noted above, there is a significant "paradigm issue" as to whether the amount that would be subject to such ownership claim is in fact set at $98 m. (plus, potentially, a significant amount of accrued interest). Given the rather unequivocal provisions of the *PBA* and the clear analysis of the highest Court in *Monsanto,* it is submitted that there is good reason to conclude that it is probable that paradigm issue would be determined in favour of the members. That said, this is clearly not the forum for determination of that issue. For present purposes it is submitted that if there is even a decent prospect of success for the class members on that issue then the rights of the class members to access to justice in that regard are being substantially denied - particularly in a context where that issue has apparently become absolutely central to as assessment of what is a fair outcome of this aspect of this action - and particularly where the New Proposal contemplates a payment of less than 20% of what might be potentially at issue in the surplus claim.

62. As to the expense deduction claim, it is submitted that the available evidence relating to this issue (which is much less than it should be) supports a reasonable conclusion that the class members may have a relatively weak (although by no means groundless) claim regarding such deductions taken after July1994 - but for virtually the same reasons have a correspondingly strong claim for reimbursement of amounts deducted before July 1994. It is known that at lest $11 m. was deducted before that date, and based on the available evidence it is reasonable to conclude that the amount may well be double or triple that amount. All of these amounts would potentially (and likely) be subject to prodigious amounts of interest (at least 100%) - given the time frames involved. In the circumstances it is not unrealistic to suggest that available evidence is that the pre-July 1994 claims alone may well exceed $50 m.. In view of this, there appears to be significant substantive unfairness in the New Proposal, as it offers class members nothing whatsoever with regard to the expense deduction claim.

63. On this subject, it is noted that previous consideration was given to the *Potter* ruling as some form of adverse consideration regarding the expense deduction claim. These Objectors strongly challenge that suggestion. There is still great value to the class members even if the remedy is for CLA to repay the monies into the Fund - and for those members entitled to a claim on the surplus such remedy will directly translate into a significant increase in the amount of surplus to which they can stake their claim.

64. As previously discussed, there is also the very unique and very significant factor that the New Proposal is contingent on the systemic and significant underpayment of CV Offers being used to pay for all or most of the proposed "surplus distribution" - with the potential for massive unfairness to those persons who accepted those Offers.

65. For all of these reasons these Objectors submit that the New Proposal is very significantly unfair to them, and in some respects denies (rather than enhances) their access to justice.

ii) Future Expense and Duration of Litigation

66. It appears the parties are relying in part on this consideration. It is submitted that this should not be a significant consideration in this case. The significant delays to date have not been due to any actual litigation (there does not appear to be even any Statements of Defence), and in any event were not the doing of the class members. Some of the more central issues (eg. the "paradigm issue") are primarily questions of law and interpretation, which should be capable of litigation without undue delay or expense. In any event, the costs component of the New Proposal are themselves commensurate with what the full costs of actual litigation of some or all of the issues might realistically be expected to be. Although "fatigue" appears to be the biggest selling point for the New Proposal at this point, it is submitted this is not a valid consideration.

iii) Class Reaction

67. At the settlement approval stage, the views of class members are "certainly relevant and entitled to great weight"[10]as it is their rights and entitlements that are being decided. To do otherwise threatens to turn 'Access to Justice' on its head.[11] As noted below, the number of objectors to the New Proposal is quite significant - as are the nature of their objections. In contrast, the parties have not identified many members of the class actively supporting the New Proposal, nor taken any steps to ascertain levels of support, although they are the ones with the capacity to do so (and arguably with a duty to do so, given their previously erroneous presentations when seeking the previous approvals, which they are still indirectly seeking to rely upon). These Objectors firmly advance the proposition that if this New Proposal were to be re-submitted for member approval (with a sensible level of information disclosure and an opportunity for debate) the proposal would be massively rejected by the membership.

68. The class members were given very adequate chance to indicate their views (although less adequate information) when they received mailings in 2011. What is now being proposed is something no better than half of what they were told at that time, yet no effort has been made to allow the affected class members to have further input - even though the vehicle for such input (the CLPENS apparatus) has been sitting unused for the last number of years. The representative plaintiffs and Class Counsel could have determined the wishes of the class members (especially those maintaining an active and informed interest in these matters) rather easily, but they have chosen not to do so. The

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[10] *Ford v F. Hoffman – La Roche Ltd* (2005), 74 OR (3d) 758 at para 179, 12 CPC (6th) 252 (Ont Sup Ct), Interveners BOA, Tab 13.

[11] Kalajdzic, Access to Justice for the Masses?, *supra* note __ at ch. 4 at p8, Interveners BOA, Tab 11.

two so called "Webinars" did not provide any opportunity for member exchanges about the current situation, and were not informative about the many important questions that had been clearly raised by the objectors (in March, and especially in careful written submissions to the Court of Appeal).

69. Notwithstanding the fact that they have not been granted access to (or the contact information for) other members, a relatively significant number of well-informed members - approximating 100 at this time - have come forward to express significant and carefully considered objections. It is reasonable to infer that these objectors represented the majority of the modest number of persons who participated in the "Webinars", and in fact represent a significant portion of the class members who had maintained an active interest in this action (and who previously were among the 200 or so active members of the CLPENS group, when it was active). It is submitted that this is a very significant level of objections, given all of the circumstances, and that the Court should weigh this as a significant factor in considering this approval request.

70. It is noted that there is very little to indicate that any named members have come forward in support of the New Proposal, despite an overt request by a (former) CLPENS representative that they do so.

iv) Recommendations of Counsel/Interested Persons

71. This Court has previously indicated that this was not a significant factor in assessing the previous request for amendment - and it is simply submitted that this should still be the orientation of the court, given the circumstances at this stage. Rather, it is submitted that

the focus should be on a reasoned and informed analysis of the issues, and on the procedures which have been followed to date.

Procedural Fairness

v) Good faith and Absence of Collusion - And the Costs Issue

72. It is difficult to assess this factor in the absence of any transparency as to how this New Proposal came into being. The objectors were not invited to participate in the process of forming the New Proposal (despite their requests, and despite the obvious conflicts regarding items like legal fees, and undervalued CV Offers) and the parties have not shared much if anything about the process. Indeed, available evidence suggests there was likely very little involved in the process, as it apparently took place over a very short period of time after the objectors' efforts to argue against the pending appeal of this Court's March 2013 ruling.

73. As this Court has noted previously, there is an inherent tension or conflict in the interests of class members in many or most class action settlement proposals. It is submitted that this is especially so in cases of this sort, where there is an approved settlement *and* approval of legal expenses, followed by a substantial amendment to the settlement *alone*. With no disrespect to any of the counsel involved, it is simply noted that there is a potential for their interests to be substantially better if this New Proposal is approved, particularly as the parties have not formally requested a review of the fee order. Concerns in this regard do not necessarily involve any actual conflict/misconduct, but also extend to the *perception* of conflict. It is also noted that this Court has explicitly

stated that it would not have approved of Class Counsel's relatively generous legal fees (and presumably the payment of any other legal fees out of the Fund) if it had the more accurate information about the magnitude of surplus distribution back in January 2012.[12]

74. In this regard it is noted that prior rulings of this Court have made it clear that it is not appropriate for settlement agreements to be contingent on fee or costs approval (see discussion of *Stewart v GM* and *Garland* in Professor Kalajdzic's paper at Tab 3). Because the New Proposal does not expressly reopen consideration of the matter of counsel fees - it is in effect tying the costs approval into the requested approval of the New Proposal. It is submitted that this is not an appropriate method of dealing with costs - both procedurally and substantively.

75. On a substantive level it is submitted that the prior consideration of appropriate fees and costs lacks validity, and that the only fair thing to do is to reassess costs "from the ground up". It is submitted that this should include a reconsideration of whether (and/or how much) costs should be made available to the defendants out of the (allegedly) meagre amount of surplus funds to be delivered. Substantively, the "incorporated" costs request in the New Proposal appears to still involve a significant degree of "multiplier" on costs that have already been calculated at generous rates ($500/hr. average) over generous amounts of hours - notwithstanding the very significantly reduced (alleged) benefit to the class - which seems high in the circumstances. The CLA costs are inexplicably much higher. Given the substantively significant amounts, it is submitted that the procedural concerns noted above are of that much greater importance.

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[12] Reasons of Perell J, March 28, 2013 at para 145, Appeal Book & Compendium, Vol 1, Tab 3, p 33.

76. Apart the costs issues, it is noted that the circumstances are such that potentially very significant conflicts of interests have arisen within the different groups within the very broad class, making it more difficult for the named plaintiffs and Class Counsel to fully represent the interests of the IPWU Group members (who are the original and by far the most significant constituent element in the class) - and especially those involved in the CV Offer problem.

vi) Discovery Evidence and Sufficient Disclosure

77. It is submitted that this is a significant consideration on this motion. As indicated, there appear to have been no formal litigation steps in this action at all, apart from issuing. the Claim. While it is appreciated that there has likely been very significant exchanges of information on a less formal level, it is emphasized that there are a very large number of important matters about which there are huge gaps in the information that has been made available (at least to class members). Examples include: what expenses were charged and taken our pre- July 1994?; who knew what and when regarding the surplus estimates?; what if any communications occurred regarding the undervaluation of the CV Offers?; what is the status of the rest of the Fund and how does it compare to the status of the notional sub-fund?; what investment/management/hedging decisions were made with respect to the sub-fund, and how do those compare to the parallel matters with respect to the rest of the fund?; what communications have occurred with FSCO?

78. It is submitted that the members (and this Court) have not been provided with enough information to support a conclusion that the New Proposal is fair. The lack of

comparable evidence as between the sub-fund and the fund is itself enough to prevent any analysis of whether the New Proposal is even in compliance with the provisions of subsection 70(6) of the *PBA*. As noted by this Court in March 2013, much remains much remains unknown, unexplained, and unexamined.[13]

vii) Adequacy of Notice to Class Members - Opt Outs

79. The terms of the New Proposal were first made public November 7, 2013. Class members have been provided with notice of this hearing - although not with enough information to allow them to make an informed decision about what to do in response to such notice. Nor have they been allowed to voice their views as to how the class should react to what are clearly fundamental changes to the understanding of what was to happen pursuant to the agreement described in 2011.

80. A significant consideration with respect to notice is the manner in which the "opt out" option has been dealt with in this case. Specifically, that option was apparently presented back at a time when all of the parties were representing that the parties had entered into an agreement that would yield an outcome quite different from what is now being proposed. However, the parties have not provided for any further opportunity to consider that option. Given the huge change in circumstances which the New Proposal contemplates, it is procedurally unfair for the members to have no further opt out rights.

[13] Reasons of Perell J, March 28, 2013, at paras 101-109, Appeal Book & Compendium, Vol 1, Tab 3, p 15-17.

Institutional Fairness

81. It is submitted that in the absence of any steps to actually seek a determination of the key issues, a settlement that on a practical level delivers only a very small portion of the amounts potentially at issue in the claim would amount to a denial of the members access to justice. This is particularly so if the settlement includes terms that prevent those members from pursuing further claims - particularly claims that were not advanced in this action (in both a literal and a practical sense).

Circumstantial Fairness

82. Although there may be some uncertainty as to the exact ambit of this consideration in these assessments, it is submitted that this is a sensible rubric within which to place all of the many unique and pejorative (to certain class members) circumstances of this case. For all of the reasons identified (and perhaps others) this has become a highly unique situation, and it is submitted that any consideration of the fairness of a proposed settlement must take account of these many unique circumstances. Whether this is called a separate form of fairness or not is immaterial - as long as those unique circumstances are properly taken into account. It is submitted that each of those unique circumstances lend further support to the conclusion that the New Proposal is not a fair resolution of the claims of the members in this action.

Conclusion

83. The parties have the onus of persuading the Court that their New Proposal is fair and reasonable and in the best interests of the class members - including any relevant group

within the class (which in this case would include the CV Offer acceptors). It is submitted that they have not come even anywhere close to discharging that onus.

84. In this regard these Objectors note that the parties have put forward this New Proposal for approval in a "package deal" way that does not allow for any flexibility or discretion on the part of this Court. It is submitted that they could have presented an agreement that allowed for some judicial input into crafting a solution - as was done recently in *Zaniewicz v. Zungui Haixi* - and it is suggested that in these unique circumstances there is much to commend such a flexible approach. Rather the parties have presented a fixed package that only permits of a yes or no response from the Court. It is submitted that the answer should be no.

85. It is also noted in closing that the New Proposal is being marketed as having the virtue of providing for some sort of guaranteed (and presumably, quick) payment - but it appears that the Proposal is in fact stated to be contingent on many things, including some form of affirmation that the undervalued CV Offers are valid (and that the monies gleaned from that source can therefore be made available to fund the payouts contemplated by the New Proposal. Given the nature of the CV Offer underpayments, and the stated intention of persons to challenge the validity of those at FSCO (and perhaps elsewhere) it is suggested that it is not accurate to present the New Proposal as having the virtue of certitude, and the Court should in fact consider the marked absence of certitude (arising out of these contingencies) to be a significant factor in assessing the fairness of the proposed settlement. In the alternative that the Court sees fit to approve of the New

Proposal, these Objectors request that the Court consider including conditions on that approval to address the difficulties presented by such contingencies.

86. In closing, these Objectors submit that the New Proposal is effectively a repackaged version of the amended settlement that was rejected by this Court in March 2013. To the extent it might hold out hope for a better payout on the "surplus sharing" that was supposed to be at the heart of the original settlement, it would only be a modestly improved payout - and it would "lock in" the losses alleged to have been incurred. Furthermore, such modest payouts are proposed to be made largely or entirely with the money garnered from the systematic underpayment of the CV Offers many years after they should have been made - which is manifestly contrary to the spirit and purpose of the relevant statutory and regulatory provisions. These Objectors ask theis Court to refuse to provide judicial approval to such as scheme as "fair and in the best interests of the class members".

PART V – ORDER SOUGHT

86. For reasons indicated these Objectors therefore request that this Honourable Court order:

1) That the request for approval of the New Proposal be denied;

2) In the alternative that this Court allows this appeal, these Objectors urge this Court to give great care to the appropriate type of order to make in the very unique circumstances of this case;

3) That the Court set up a process to reconsider the approvals provided by this Court in January 2012.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 6, 2014

Patrick Mazurek
Lawyer for the Listed Objectors

Court File No.: 05-CV-287556CP

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*

CERTIFICATE

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

Counsel for the Respondent Objectors estimates that 5 hours will be required for oral argument.

_____
Patrick Mazurek

SCHEDULE "A"

LIST OF RESPONDENT OBJECTORS

Agnes Safran
Aida Napady
Alyce Machado
Angie Rabang
Anne Carey
Antoinette Garcia
Arminda Lopes
Bill Davis
Bill McIlwaine
Bob Mcdonough
Bruce Brewer
Bruce Tushingham (Estate)
Carlo Merenda
Cecil Adams
Charles Cooper
Christopher Labossiere
Connie Sturge
Custodia Savino
Danny Mak
Dave Newton
Debbie Heidel
Debbie Simpson
Diane Johns
Dorothy Pang
Elize Blodgett
Eric Mills
Eugenio Da Silva (Estate)
Evelyn Emond (Estate)
Flora Hu
Francis Howse
Fred Taggart
Gene Kitagawa
Hedy Samek
Henrietta Harvey
Henry Rachfalowski
Howard Newman
James L. Thomson
Janice Durst
Jason Webber
Jennifer Mahoney
Jim Bowery

Jim Evel
Joan Frantschuk
Joanne Scott
John Bond
John Orviss
John Rudd
Judy Foran
Karen Bordne
Karen Lubinsky
Karen Mace
Karen Mason
Karl Keil
Kathy Chapman
Kelly Gibbs
Kelly Giusti
Kim Gadd
Linda Joll
Linda Lawlor
Lisa Choy
Lyndsey Breslow
Lynn Nugent
Marc Prymack
Margaret Verdis
Margarita Gelowitz
Maria Farolan
Maria Maiato
Maria Puno
Maria Silva
Maria Uncao
Marilyn Rudd
Marquerite Hacala
Mary Walker
Mary-Anne Matthews
Nancy Collins
Norm Daly (Estate)
Oksana Maslabey
Patrick Gallagher
Paul Ludzki
Phil Davy
Piri Horvath
Rafaela Da Silva
Richard Chong
Rob Kennedy
Sam Aston
Scott Maher

Shirley Badcock (MacMillan)
Susan Marles
Suzanne Conquer
Teddie Brown
Timothy Kitigawa
Tom Strickland
Val Ashton
Viola Kirmiziyan
William Bambury

SCHEDULE "B" – TEXT OF LEGISLATION NOT INCLUDED IN PLAINTIFF'S FACTUM

Class Proceedings Act, 1992, SO 1992, c. 6, s. 29(1,2,3,4)

Discontinuance, abandonment and settlement

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. 1992, c. 6, s. 29 (1).

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

Pension Benefits Act, **RSO 1990, c P8, s1, 68, 70, 73, 78(1)**
Version in force on June 30, 2005
Historical version for the period June 13, 2005 to December 14, 2005

1. In this Act,
   "partial wind up" means the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of the pension plan;
   "surplus" means the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan, both calculated in the prescribed manner;
   "wind up" means the termination of a pension plan and the distribution of the assets of the pension fund

Winding up

68.(1)The employer or, in the case of a multi-employer pension plan, the administrator may wind up the pension plan in whole or in part.

Notice

(2)The administrator shall give written notice of proposal to wind up the pension plan to,

(a) the Superintendent;

(b) each member of the pension plan;

(c) each former member of the pension plan;

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

(e) the advisory committee of the pension plan; and

(f) any other person entitled to a payment from the pension fund.

Notice of partial wind up

(3)In the case of a proposal to wind up only part of a pension plan, the administrator is not required to give written notice of the proposal to members, former members or other persons entitled to payment from the pension fund if they will not be affected by the proposed partial wind up.

Information

(4)The notice of proposal to wind up shall contain the information prescribed by the regulations.

Effective date

(5)The effective date of the wind up shall not be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension benefits, or, in any other case, on the date notice is given to members.

Order by Superintendent

(6)The Superintendent by order may change the effective date of the wind up if the Superintendent is of the opinion that there are reasonable grounds for the change.

Wind up report

70.(1)The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

(a) the assets and liabilities of the pension plan;

(b) the benefits to be provided under the pension plan to members, former members and other persons;

(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and

(d) such other information as is prescribed.

Payments out of pension fund after notice of proposal to wind up

(2)No payment shall be made out of the pension fund in respect of which notice of proposal to wind up has been given until the Superintendent has approved the wind up report.

Application of subs. (2)

(3)Subsection (2) does not apply to prevent continuation of payment of a pension or any other benefit the payment of which commenced before the giving of the notice of proposal to wind up the pension plan or to prevent any other payment that is prescribed or that is approved by the Superintendent.

Approval

(4)An administrator shall not make payment out of the pension fund except in accordance with the wind up report approved by the Superintendent.

Refusal to approve

(5)The Superintendent may refuse to approve a wind up report that does not meet the requirements of this Act and the regulations or that does not protect the interests of the members and former members of the pension plan.

Rights and benefits on partial wind up

(6)On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

Determination of entitlements

73.(1)For the purpose of determining the amounts of pension benefits and any other benefits and entitlements on the winding up of a pension plan, in whole or in part,

(a) the employment of each member of the pension plan affected by the winding up shall be deemed to have been terminated on the effective date of the wind up;

(b) each member's pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and

(c) provision shall be made for the rights under section 74.

Transfer rights on wind up

(2)A person entitled to a pension benefit on the wind up of a pension plan, other than a person who is receiving a pension, is entitled to the rights under subsection 42 (1) (transfer) of a member who terminates employment and, for the purpose, subsection 42 (3) does not apply.

Payment out of pension fund to employer

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

SCHEDULE "C"

LIST OF AUTHORITIES

1 *Monsanto v Superintendent of Financial Services* (2004) SCC 54, [2004] 3 SCR 152

2 *Monsanto v Superintendent of Financial Services* (2002) 17842 (ON CA)

3 I. Jasminka Kalajdzic, Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario

4 J. Catherine Piche, Fairness in Class Action Settlements

5 *K. Ford v F. Hoffman - La Roche Ltd* (2005), 74 OR (3d) 758 at para 179, 12 CPC (6th) 252

6 O'Neill v General Motors of Canada, 2013 ONSC 4654

7 Zaniewicz v Zungui Haixi Corporation, 2013 ONSC 5490, Perell J

Dabbs v Sun Life Assurance Co. of Canada, [1998] O.J. No. 2811 (Gen.Div.), leave to appeal to C.A. denied, [1998] O.J. No. 3622(C.A.), leave to appeal to S.C.C. denied, [1998] S.C.C.A. No. 372

D*abbs v Sun Life Assurance Co. of Canada*, [1998] O.J. 1598 (Gen. Div.)

Parsons v Canadian Red Cross Society, [1999] O.J. 3572 (S.C.J.)

Baxter v Canada (A. G.) [2006] O.J. 4968 (S.C.J.)

KIDD et al.
Plaintiffs

- and -

CANADA LIFE et al.
Defendants

Court File No.: 05-CV-287556CP

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced in TORONTO

FACTUM

OF

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