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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Plaintiffs (Respondents)

--and--

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

Defendants (Appellant)

Proceeding under the Class Proceedings Act, 1992

FACTUM OF OBJECTORS/INTERVENORS
(see attached Schedule "A")

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PART I - NATURE OF THE APPEAL

1. The defendant Canada Life ("CLA") appeals from the Order of Justice Perell, dismissing a motion made jointly by the parties to this action for an Order varying his January 27, 2012 Judgment in this action - 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 class. As none of the named parties intended to provide a genuine response to the appeal, these Objectors have intervened in order to do so. These Objectors submit that the Court of Appeal does not have jurisdiction to hear this appeal at this time, as the ruling is not a "final order" (see PART V below).

PART II - OVERVIEW

2. It is the position of these Objectors that the primary members of this class (the integrated partial wind-up group - "IPWU Group") have a very strong claim to the wind-up portion (approximately 40%) of the Plan surplus, as it was actuarially estimated to be on the effective date of the wind-up - and that there is a strong case that CLA should have to return at least some of the administrative expenses they had previously removed from the Plan (in early years) - adding to the surplus position of the Plan. These Objectors emphasize 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

3. 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. 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, Intervenors Book of Authorities, Tab 1 & 2.

4. After a gradual process between 2007-2011 the parties eventually entered into an Agreement to settle the action ("SSA"). A majority share of "the surplus" was to be distributed to the IPWU members - while CLA would get the minority share, and be permitted all of the expense deductions, and would indirectly benefit from all future surplus in the ongoing Plan (eg. by way of ongoing contribution holiday). The SSA was remarkably unclear as to exactly how (and when) "the surplus" would be calculated - and in any event the SSA was subject to a condition precedent that it was to be null and void unless the statutory regulator ("FSCO") approved of the surplus allocation. The ***amount*** of IPWU surplus that CLA proposes to be distributed pursuant to the SSA (which remains subject to FSCO and Quebec Court approval) has (since 2012) become the central aspect of this dispute, and the essential reason this case is before this Court.

5. 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 below) 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.

6. Substantively, these Objectors emphasize that the terms of the SSA regarding how the amount to be allocated to the IPWU Group (and shared) are not clear - and that in any event the SSA provides that the allocation is ultimately what FSCO agrees to approve as appropriate (presumably 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, the proposed amended version of it - the "ASSA") massively unfair to the IPWU members on a substantive level. Simply put, these Objectors take the position that the SSA 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 Partial Wind-Up Report 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/ASSA a*nd if* you accept the notional transfers at mismatched values as proffered by CLA - in which case the SSA is for that very reason patently unfair - and should not be approved (by FSCO or the Court), particularly as it would preclude members from holding anyone to account for such massive disappearance of Plan value.

7. Procedurally, these Objectors emphasize that when the SSA was presented for member and Court approval, estimates provided by CLA suggested that the SSA provided 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 summary of the proposed settlement 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 - absolutely central to the approval processes with the members and the Court (and will be at FSCO).

> Reasons of Perell J. dated March 28, 2013, ("Reasons - 2013"), para. 36-37 and 142-144, Appeal Book and Compendium,Vol. 1, Tab 3, 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.
> Exhibit Book Vol III, Tab 8. pp. 554-619

8. Within weeks of Court 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 (in early 2012) 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")
Appeal Book and Compendium, Vol.11, Tab 9, pp. 381-383

9. In this case it is clear that there was a very large surplus in the Plan ($200 m. plus) when CLA terminated the employment of these members (July 2003 to June 2005) - with $93 m. allocable to the IPWU Group in the Partial Wind-Up Report CLA filed with FSCO in 2006 (effective June 30, 2005). When the SSA was presented for the approval of members in 2011 CLA presented an estimate of $62.2 m. (as determined for the 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 (effective June 2011). The estimate produced by CLA three 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
Intervenors Compendium Tab 2.

10. The apparent approval of the members, and the significantly incorrect estimates of surplus available for distribution pursuant to the SSA, were clearly relied upon by Justice Perell when he approved the SSA. Justice Perell has now indicated that if he had the correct estimates at the time he would not have approved the SSA. In any event, both SSA and Judgment are clearly subject to approval from FSCO (and the Quebec Court).

11. The surplus estimates presented to the members and the Court (as above) included estimations of the amount 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 below 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 conclusively by September 2011.

12. The SSA provides that it will resolve all claims between the parties (not just those presently advanced in the Claim). While this provision seemed relatively innocuous when the SSA was presented for member and Court approval - and hence received little attention from Justice Perell in January 2012 - it is now of central importance (and of great advantage to CLA and the Trustees) if the amended version of the SSA/ASSA 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 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.

13. 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"
> Interveners Compendium, Tab 3

14. Against this backdrop, the parties asked the Court in March 2013 to approve of the ASSA. It is submitted that in making this request the representative plaintiffs and/or Class Counsel were put 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)

15. It is the position of these Objectors that Justice Perell was entirely correct in refusing to grant the relief requested in March 2013 on the grounds that it constituted a settlement

that was fundamentally unfair (substantively and procedurally) to the IPWU members - not only for the Reasons he provided, but also for other fundamental reasons not articulated in his Reasons (as they were not presented to him for consideration, due to the extremely limited opportunity for class member input). In these circumstances, PART III will primarily emphasize those other unarticulated factors.

16. These Objectors reject the Appellant's characterization of the March 2013 motion as a request for "approval of an amendment" - and challenge their corollary contention that the considerations relevant to such a motion are more limited than those relating to a motion for approval of a settlement itself, as having no basis in law. In any event, it is unrealistic to present the ASSA as an amendment when it provides such a fundamentally different practical outcome for the class. Furthermore, in this case there is very good reason to conclude (as per Perell, J) that the SSA itself is not (and was not) fair.

17. In summary, Court approval of the ASSA (and the presently 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 a negligible amount on their seemingly strong claim to a surplus share of at least $93 m. (while at the same time giving up all of their other claims, including the pre-1994 expenses). It 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. In

addition, it would result in an outcome for the IPWU Group that would be inconsistent with be inconsistent with the provisions of section 70(6) of the *PBA*.

18. 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.

19. It is therefore submitted that it was not only reasonable but correct for the Court to reject the request of the parties in March 2013. In the alternative that this Court is inclined to allow this appeal in any respect, it is submitted that the appropriate remedy (in the very unique circumstances of this case) would be to refer the March 2013 request (and perhaps other issues as well) back to the Superior Court, with guidance.

PART III - FACTS

20. 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"). On or about July 10, 2003 CLA was purchased by Great-West Lifeco ("GWL"). Between mid-2003 and mid-2005 over 2,100 employees of CLA (approximately 40% of the pre-buyout work force) were terminated. On or about July 10, 2003 CLA also declared a "partial wind-up" of the Plan, within the

meaning of the *PBA*. An actuarial valuation estimated that the Plan had a solvency surplus of more than $233 m as at January 1, 2003. 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.

21. The "effective date" of the partial wind up (for the purposes of the *PBA*) has been identified as June 30, 2005 - although ultimately subject to FSCO discretion. 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 $93 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

22. 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.

23. 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").

24. 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

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.

25. The parties reached an agreement in principle in 2007, as reflected in a MOU of November 9, 2007. It appears very little happened with respect to this action for the next three years. Eventually the very complicated SSA was signed. As the name implies, the SSA contemplated as it's primary feature a sharing between the parties (on a curiously specific 69.66/30.34 basis) of what was understood to be a very significant surplus as verified in the presentations made to class members in 2011. The presentation did not describe how the amount to be shared was to be determined under the SSA - nor the fact that those estimates 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.

26. 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". In this regard it is important to note that FSCO has not yet approved the SSA arrangements, including the matter of these "late CV offers" and it is suggested there is good reason to doubt that they will do so.

[1]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.

27. As 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 some form of "contracting out" of the members' minimum statutory rights, that is patently unfair.

28. Notwithstanding the considerations set out above, the current proposal to amend the SSA appears to be predicated on an assumption that SSA (and a particular surplus allocation for this IPWU) has been approved by FSCO - although there is no evidence either is 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.

29. As noted, the SSA gives full approval to the CLA expense deductions (past, present and future) - despite the noted considerations about the large pre-1994 expense payments. While this concession by class members may (arguably) be justified within a context of a concrete payment of all (or most) of a surplus of the magnitude estimated in 2005 - or

perhaps even the amounts presented to the Court in January 2012 - it does not make any sense if it is to be traded off for a share of an allegedly negligible surplus.

30. 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".

31. As indicated, when the parties asked the Court for approval of the SSA on January 27, 2012 they provided the Court with specific estimates as to the amounts that would be available for IPWU surplus sharing under the SSA (presuming FSCO approval of same) - with the amount for the IPWU Group said to be $62.2 m. The presentation was clear and unequivocal (although perhaps mistaken regarding the net figure)

> "*The SSA provides financial benefits for all members of the Class.* ***T****he amount of PWU surpluses to be distributed, net of estimated expenses, as of June 30, 2010 are: IPWU Surplus $62.2 m".*
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> Affidavit of J. Foreman, sworn January 5, 2012, Para 33.
> Exhibit Book Vol I, Tab 1A. pp. 21
> Affidavit of D.Kidd, sworn January 4, 2012, Para 58.
> Exhibit Book Vol III, Tab 3A. pp.446

32. These estimates were clearly presented with the full intention that the Court would rely on them, and the Court did, in very explicit terms (and it is reasonable to surmise that Perell J. was also paying attention to the relationship between the proposed payouts and the $93 m. actuarial estimate effective June 30, 2005, which he specifically mentions in his later Reasons). 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.

33. 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 the 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.

[2]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.

34. 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, Appeal Book and Compendium, Tab 9, pp.381-383

35. These Objectors submit that it is reasonable to suggest that a more accurate estimate of the anticipated IPWU 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) to accurately track the effect of such changes without the assistance

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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 2011
> Intervenors Compendium Tab 4.
> Affidavit of W.Robinson, sworn September 24, 2012, Para 16.
> Intervenors Compendium Tab 2.

36. 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. In this regard it is noted that CLA's factum (para. 13) describes the estimates as "the most recent information available and presented to the Court". 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 they intended to make pursuant to the SSA, at the time of the approval hearing.

37. As noted in para. 5 above, CLA appears to argue that the surplus funds allocable to the IPWU Group under the SSA, as interpreted by CLA) 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

38. It is submitted that Perell J. weighed the relevant factors appropriately (Issue #1) and he was right and reasonable to find the ASSA unfair (Issue #2). Before addressing those issues, submissions will be made as to the appropriate standard of review, and as to general principles of the law relating to the settlement approval process.

I. Standard of Review: The decision of Justice Perell J attracts significant deference

39. The approval of a proposed settlement is a discretionary decision and thus attracts a standard of substantial deference. The supervisory role of the court in class action

matters has consistently been interpreted as providing the presiding motion judge with judicial discretion. This has been found in the context of decisions on certification, costs, and settlement approval.[3] This is consistent with the discretion that is afforded to judges on similar procedural issues.[4]

40. This Court has adopted the statement of Lord Asquith in *Bellenden* to describe the nature and appellate standard of review for a discretionary decision:

> *We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.*[5]

41. The judicial discretion to approve a settlement is a question of mixed fact and law. It involves the application of findings of fact to a legal standard. The Supreme Court of Canada held in *Housen v Nikolaisen* that questions of mixed fact and law fall on a spectrum. If a legal question can be isolated, it is reviewed on a standard of correctness. Otherwise, questions of mixed fact and law will not be overturned unless there is a palpable and overriding error.[6] Palpable and overriding error has been described as:

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[3] Certification: *Pearson v Inco Ltd.* (2005), 78 OR (3d) 641 at para 43, 261 DLR (4th) 629, Interveners BOA Tab 3; Costs: *Lavier v MyTravel Canada Holidays Inc*, 2013 ONCA 92 at paras 20-21 (available on CanLII), Appellant's BOA, Tab 4; Settlement Approval: *Abdulrahim v Air France*, 2010 ONCA 403 at para 16, 189 ACWS (3d) 313, Interveners BOA, Tab 5

[4] Motion to set aside a default judgment: *Laredo Construction Inc v Sinnadura* (2005), 78 OR (3d) 321 at para 37 (Ont CA) (available on CanLII), Interveners BOA, Tab 6; Motion to dismiss an action for delay: *Clairmonte v Canadian Imperial Bank of Commerce* (1970), 3 OR 97 at 111, 12 DLR (3d) 425 (Ont CA) [Laskin JA], Interveners BOA, Tab 7

[5] *Silver v Silver* (1985), 54 OR (2d) 591 at 591 (Ont CA) (available on WLCan) citing *Bellenden (formerly Satterthwaite) v Satterthwaite*, [1948] All ER 343 at 345 (CA), Interveners BOA, Tab 8

[6] *Housen v Nikolaisen*, 2002 SCC 33 at paras 36-37, [2002] 2 SCR 235, Appellant's BOA, Tab 1. See also *Fulawka v Bank of Nova Scotia*, 2011 ONSC 530 at para 17, rev'd by 2012 ONCA 444 (but endorsing the Divisional Court's elaboration of the standard of review at para 77), Interveners BOA, Tab 9.

> *The word "palpable" means "clear to the mind or plain to see" and "overriding" means "determinative" in the sense that the error "affected the result". The Supreme Court has held that other formulations capture the same meaning as "palpable error": "clearly wrong", "unreasonable" or "unsupported by the evidence".*[7]

42. The only extricable purely legal question on appeal is Perell J.'s description of 'institutional fairness' and 'circumstantial fairness' as potentially new sub-categories for consideration under the broad "fair, reasonable and and in the best interests" consideration, when assessing the fairness of a class settlement. These Objectors concede that this aspect of the decision may be subject to review on a standard of correctness, but stress that the comments on those sub-categories were *additional* findings of unfairness. Even if Perell J. was erred about these sub-categories, his extensive findings regarding procedural and substantive unfairness are still to be accorded substantial deference.

II. Overview of Settlement Approval

43. The purpose of judicial approval as mandated by s.29 of the *Class Proceedings Act*[8] (*"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.[9] The

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[7] John W Morden & Paul M Perell, *The Law of Civil Procedure in Ontario* (Toronto: LexisNexis Canada, 2010) at 822 [citations omitted], Interveners BOA, Tab 10.

[8] *Class Proceedings Act,* 1992, SO 1996, c. 6, s. 29, Appellant's Factum, Schedule "B".

[9] *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_

onus is on the parties proposing the settlement to satisfy the court that it ought to be approved.[10]

44. In this case Justice Perell correctly noted the relevant *Dabbs* considerations in his reasons and gave due consideration to each. 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

> "*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.*"[11]

Sharpe, J. (as he then was) affirmed that settlements "must be seriously scrutinized by judges" and "viewed with some suspicion".[12] It is submitted that academic commentary has generally been critical of the insufficient level of scrutiny at fairness hearings.[13]

45. Following the approval of a settlement, the court remains seized of the matter. The administrators of a settlement must be autonomous, independent, and neutral.[14]

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

[11] *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.

[12] *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.

[13] 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.

[14] *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.

46. 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*, there is an enormous potential for conflict of interest. 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 the ASSA is approved, particularly as the parties did not request 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 Perell J. explicitly stated that he 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 he had the information in January 2012 that he had in March 2013.[15]

47. Similarly, as noted above, the circumstances were such that a potentially very significant conflicts of interests had 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 members (who are the original and by far the most significant constituent element in the class).

III. Issue 1. The Dabbs Factors Were Weighed Properly and Support the Decision

48. The ruling under appeal does not result from any error made in weighing the *Dabbs* considerations. Perell J. was right in judging certain factors to be unhelpful or neutral at best. The considerations relied upon by CLA and Class Counsel do not discharge their

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

onus to establish that the settlement was fair. He was also right to accord significant weight to the number and nature of the objections.

49. Perell J. considered, but found unhelpful or neutral at best: degree of discovery; recommendation of counsel; recommendation of neutral parties; presence of arms-length bargaining and absence of collusion; and dynamics of bargaining.[16] No neutral party recommended the settlement, and all the parties can indicate with regard to the degree of discovery and investigation is that they exchanged actuarial information. As noted above, much remains unknown, unexplained, and unexamined.[17]

50. The parties had the onus to persuade that other considerations - settlement terms and conditions; likelihood of success; and expense and duration of litigation - are so compelling that it would be unreasonable for a judge to refuse to approve the ASSA. It is submitted that none of these considerations come anywhere close to discharging the onus to prove that the ASSA is fair - particularly to the IPWU members.

51. At the settlement approval stage, the views of class members are "certainly relevant and entitled to great weight"[18]as it is their rights and entitlements that are being decided. To do otherwise threatens to turn 'Access to Justice' on its head.[19] The number of objectors

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[16] Reasons of Perell J, March 28, 2013, at para 134, Appeal Book & Compendium, Vol 1, Tab 3, p 21 &22.

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

[18] *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.

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

to the ASSA is quite significant (105 objections prior to fairness hearing)[20] - as are the nature of their objections. In contrast, the parties have not identified any members of the class actively supporting the ASSA, 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 the ASSA or amended agreement were to be re-submitted for member approval the proposal would be massively rejected by the membership.

52. Although Perell J. found the ASSA to be procedurally & substantively & circumstantially & institutionally unfair - it is emphasized that single finding of unfairness is all that is needed to justify a refusal to approve. These submission will therefore focus on the findings of procedural & substantive unfairness.

53. **Procedural fairness** cannot be assessed in a vacuum, rather it must be judged in context - in this case a very unique context. As noted by Perell J., many steps were taken prior to the SSA to ascertain member approval. For reasons indicated, the input solicited by that process should now be considered invalid (and in fact misleading). To put it plainly, the parties were completely aware that the benefits they were intending to deliver pursuant to the ASSA were utterly different than the benefits they had purported to deliver when they sought and obtained approval for the SSA. Class Counsel and the parties had

[20] Appellant's Factum at para 32 (f).

numerous methods readily available to increase the procedural fairness of the proposed ASSA, but they chose not to employ them (eg. independent counsel, allowing for a second opt-out, or repeated procedures to obtain the fresh approval and/or updated information packages).[21] Any of these would have increased the procedural legitimacy of the ASSA. Instead the parties did very little to keep members informed after January 2012 until the short notice of the March 2013 hearing (with the exception of the May 2012 Notice to members which effectively advised them to "stand by") and then tried to blitz the ASSA through the court approval process.

54. As the onus was on the parties to establish that the ASSA was procedurally fair they cannot fault the Court because it approved their notice form. The Court cannot properly assess procedural fairness until the fairness hearing itself, especially without the views and input of the class members. In view of all the considerations noted above, it was quite reasonable for Perell J to be deeply concerned about the lack of procedural fairness relative to the ASSA, and to refuse approval for this reason alone.

55. **The ASSA was also substantively unfair**. For reasons set out above, these Objectors assert that *Monsanto* should be the starting point for a consideration of the merits of their claims - and hence strongly reject the contention of CLA that they have no prospect of successfully invoking their statutory rights by this action. CLA has implied that the class has reason to be concerned that CLA may proceed with the SSA, unamended - and that

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[21] Reasons of Perell J, March 28, 2013, at para 8, Appeal Book & Compendium, Vol 1, Tab 3, p 12

the ASSA is therefore a "less bad" option. These Objectors submit that these considerations are groundless, noting that there are many reasons why the viability of the unamended SSA (at least as interpreted by CLA) is dubious. It is also noted that Class Counsel maintains that the SSA is frustrated and cannot be implemented.[22] Also, if FSCO allocates the surplus as these Objectors argue it should, the SSA may not cause as much unfairness.

56. There are a number of reasons the unamended SSA may be frustrated, void, or unenforceable - including the need for FSCO and Quebec approval. These approvals may be particularly problematic for the future of an unamended SSA (as interpreted by CLA) as such approvals will be asked (or others) for something the Ontario Court has already found to be unfair. There is also the real prospect that the prior approval of the SSA may be set aside, given the circumstances at the time it was approved.

57. As noted in detailed analyses above, the ASSA provides massive real and potential benefits to CLA, lets the Trustees off the hook entirely for a large number of questionable actions (or inaction) on their part, provides a lot of money to Class Counsel and the other lawyers, while providing almost nothing to members of the class - especially those in the central (and original, and by far largest) IPWU Group. Perell J. was right to refuse to approve the ASSA on the grounds that it was substantively unfair.

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[22] Respondents' Factum at paras 2, 4, 8(c).

58. **In summary,** Justice Perell should be afforded a high degree of deference to protect the interests of the absent class members. Moreover, his decision to refuse to grant the relief sought on the March 2013 motion was not only reasonable, it was the correct and just decision to make. The appropriate course is for the action to be returned to the jurisdiction of the Superior Court, where the parties can sort the case out in the normal course, unless of course they come to a fair agreement in the meantime.

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

59. It is submitted that there are numerous reasons why the March 2013 motion should have been dismissed, many outlined above. Although Perell J. may have used unfamiliar terms to describe some of his considerations, he did not create a new test, or elevate the standard for approval. He applied the central test of *Dabbs* - was the proposed settlement fair, reasonable and in the best interests of the parties? To the extent he might be thought to have considered factors he should not have, there is no reason to conclude that affected his ultimate conclusion, as it is completely justified on numerous grounds.

PART IV – ADDITIONAL ISSUES

Preliminary Issue: Does the Court of Appeal have jurisdiction to hear this appeal?

60. It is submitted that any appeal from the March 2013 ruling of Justice Perell must be made to the Divisional Court, with leave.

61. Section 30(3) of the *Class Proceedings Act*[23] does not apply in this case 1) because the order being appealed is not a Judgment; and 2) because s.30(3) only applies to judgments on common issues, not judgments by way of settlement agreements. Thus, jurisdiction is determined under the *Courts of Justice Act*, RSO 1990, c C43. An appeal lies to the Divisional Court from an interlocutory order *with leave*, while this Court has jurisdiction over appeals of a final order.[24] The order under appeal is best characterized as an interlocutory order. The **test** for determining whether an order is final or interlocutory is: *"Does the judgment or order as made finally dispose of the rights of the parties?* If it does, then ... it ought to be treated as a final order, but if it does not, it is then ... an interlocutory order."[25]

62. This Court has consistently stated that it is the legal effect of the particular order, and not its practical effect upon the proceeding, that is considered in determining whether an order is final or interlocutory, most recently in *Locking v Armtec Infrastructure Inc*.[26], a ruling that is quite parallel to the circumstances in this case.

63. Justice Perell's refusal to approve the ASSA and to vary his previous Judgment in order to amend the original agreement, which is itself a conditional, cannot be properly

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[23] *CPA*, s.30(3), *supra note* __, text of statute reproduced in Schedule "B".

[24] *Courts of Justice Act*, RSO 1990, c C.43, s. 19(1)(b) & s. 6(1)(b), respectively [sections reproduced in Schedule "B"].

[25] *Hendrickson v Kallio,* [1932] OR 675 at 678, 4 DLR 580 (Ont CA) citing *Bozson v Altrincham Urban District Council,* [1903] 1 KB 547 at 548-49 (UKCA), Interveners BOA, Tab 14

[26] *Locking v Armtec Infrastructure Inc,* 2012 ONCA 774, 299 OAC 20, Interveners BOA, Tab 15. See also Sharpe J's explanation on the effect of the particular order in *Inforica Inc v CGI Information Systems and Management Consultants*, 2009 ONCA 642 at paras 25-26, Interveners BOA, Tab 16

characterized as a final order. Class counsel and the defendants were, and are, free to return to seek approval of another proposed amendment to the SSA. The order cannot be considered to dispose of any rights of the parties. On the contrary, absolutely no rights were disposed of. In fact, Perell J concluded his reasons by stating "[i]t is open for the parties to come back with a fair settlement."[27]

PART V – ORDER SOUGHT

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

1) That the appeal of Perell J's decision dated March 28, 2013 be dismissed, with costs;

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. Specifically, it is requested that in the alternative this Court remit the matter to the Superior Court for a reconsideration of the motion that was before the Court in March, and other issues in the action (including the status of other rulings made to date in this action - including those as to costs), on fair and proper notice to all members who may wish to participate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 27, 2013

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Patrick Mazurek
Lawyer for the Intervenors/Objectors

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27 Reasons of Perell J, March 28, 2013, at para 177, Appeal Book & Compendium, Vol 1, Tab 3, p 37

Court of Appeal File No.: C56991
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 (Respondents)

- and -

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

Defendants (Appellant)

Proceeding under the *Class Proceedings Act, 1992*

CERTIFICATE

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

Counsel for the interveners estimates that __ hours will be required for oral argument.

_____
Patrick Mazurek