

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 (Appellants)

Proceeding under the Class Proceedings Act, 1992

NOTICE OF APPEAL

THE CANADA LIFE ASSURANCE COMPANY APPEALS to the Court of Appeal from the Order of Justice Perell dated March 28, 2013, made at Toronto.

THE APPELLANT ASKS that the Order be set aside and an Order be granted substantially in the form attached hereto as Schedule "A" approving the amendment to the settlement herein and varying the Judgment of Justice Perell dated January 27, 2012 (the "Judgment").

THE GROUNDS OF APPEAL are as follows:

- (a) Having found the original settlement to be fair, the Motions Judge erred in dismissing the motion despite having concluded that the Judgment if varied would be more favourable to the Class than the original settlement, and preferable to litigation.

- (b) The Motions Judge erred in finding that the original settlement which he approved on January 27, 2012 is unfair today when that issue was not before him and the only issue was whether the amendment to the Judgment approving the original settlement was fair, reasonable and in the best interests of class members.
- (c) The Motions Judge erred in devising a new test to approve a proposed class action settlement (or an amendment to an approved settlement) which significantly elevates the standard and scope of the test for such approval.
- (d) The Motions Judge erred in considering the fairness of the proposed amendment to the approved settlement in the abstract rather than in the context of the available alternatives.
- (e) The Motions Judge erred in failing to accord appropriate weight to the factors relevant to the determination of the fairness and reasonableness of a proposed class action settlement and whether the settlement is in the best interest of the class members including (a) the amount and nature of discovery, evidence or investigation; (b) recommendation and experience of counsel; (c) recommendation of neutral parties, if any; (d) the presence of good faith, arm's length bargaining and the absence of collusion; and (e) information conveying to the Court the dynamics of and the positions taken by the parties during the negotiation; (f) the settlement terms and conditions; (g) likelihood of recovery or likelihood of success; and (h) future expenses and likely duration of litigation and risk.
- (f) The Motions Judge erred in considering irrelevant factors including the alleged "moral duty" or "moral responsibility" of the Appellant to more fully share in the class members' disappointment.
- (g) The Motions Judge erred in giving undue weight to the number of objectors and the disappointment of objectors in the size of the pension surplus to be distributed.

- (h) The Motions Judge erred in failing to give any weight or sufficient weight to the best interests of members of the Class who were not members of the Integration Partial Wind-Up sub-class.
- (i) The Motions Judge erred in finding that the proposed amendment to the settlement was substantively, circumstantially and institutionally unfair.
- (j) The Motions Judge further erred in describing the settlement as procedurally unfair where the Motions Judge supervised, presided over, and approved all preceding procedural steps and notices to Class members in the matter.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS that the Order is final and an appeal lies to this Court pursuant to section 6(1)(b) of the *Courts of Justice Act*. (If the Court determines otherwise, the Appellant requests an order extending the time to file a Notice of Motion for leave to appeal to the Divisional Court.)

Leave to appeal to this Honourable Court is not required.

Date: April 26, 2013

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Schedule "A"

Court File No. 05-CV-287556CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE)
MR. JUSTICE PERELL) MONDAY, THE 18TH DAY
) OF MARCH, 2013
)

BETWEEN:

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

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

ORDER

THIS MOTION for an order varying the Judgment herein dated January 27, 2012 (the "Settlement Approval Order") was heard this day in the presence of counsel for the Plaintiffs, counsel for The Canada Life Assurance Company, counsel for the individual Trustee defendants as well as the presence of certain objecting class members;

ON READING the Settlement Approval Order;

AND ON being advised that as a result of facts which occurred or became known after the date of the Settlement Approval Order the parties have agreed to amend the agreement

attached as Schedule "B" to the Settlement Approval Order (the "Agreement"), which amendment is dated as of February 1, 2013 (the "Surplus Sharing Agreement – Amendment #2"), a copy of which is attached as Schedule "A";

AND ON READING the affidavits of Jonathan Foreman sworn March 8, 2013, Marcus Robertson sworn March 8, 2013, Alexander Harvey sworn March 7, 2013 and Anthony Guindon sworn March 12, 2013 and hearing the submissions of counsel for the parties as well as submissions made by certain objectors;

AND ON being satisfied that the changes to be effected by Surplus Sharing Agreement – Amendment #2 are for the benefit of the Class and are fair and reasonable;

1. **THIS COURT ORDERS** that the Settlement Approval Order be and is hereby varied as of the date hereof to provide that the word "Agreement" in paragraphs 1, 2, 3, 4, 5, 6, 7, 10 and 11 of the Settlement Approval Order means the Agreement as amended by the Surplus Sharing Agreement – Amendment #2.

2. **THIS COURT FURTHER ORDERS** that paragraph 10 of the Settlement Approval Order is hereby deleted and is replaced by the following paragraph:

10. **THIS COURT FURTHER ORDERS** that should any of the conditions in paragraph 6(a)(i) of the Agreement not be satisfied, then subject to such conditions being waived by Canada Life within 60 days of becoming aware of the condition in question not being satisfied, this Judgment shall be null and void and without prejudice to the rights of the parties to proceed with this action and any agreement between the parties incorporated in this Judgment shall be deemed in any subsequent proceedings to have been made without prejudice.

DAVID KIDD et al.
Plaintiffs

- and -

THE CANADA LIFE ASSURANCE COMPANY et al.

Defendants
Court File No. 05-CV-287556CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

ORDER

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DAVID KIDD et al. - and -
Plaintiffs (Respondents)

**THE CANADA LIFE ASSURANCE
COMPANY et al.**
Defendants (Appellants)

Court of Appeal File No.
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APPELLANT'S CERTIFICATE RESPECTING EVIDENCE

THE APPELLANT, THE CANADA LIFE ASSURANCE COMPANY, certifies that the following evidence is required for the appeal, in the appellant's opinion:

1. Affidavit of Jonathan Foreman sworn March 8, 2013, and the exhibits thereto;
2. Affidavit of Marcus Robertson sworn March 8, 2013, and the exhibits thereto;
3. Affidavit of Alexander Harvey sworn March 7, 2013, and the exhibits thereto;
4. Affidavit of Anthony Guindon sworn March 12, 2013, and the exhibits thereto;
5. Supplementary documentation prepared by Dan Anderson dated March 18, 2013;

6. Letter from Susan Marles dated March 12, 2013; and
7. Letter from Mary-Anne Matthews dated March 14, 2013.

Date: April 26, 2013

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**APPELLANT'S CERTIFICATE
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