Court of Appeal File No. 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 (Appellants)

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFFS (RESPONDENTS) (DAVID KIDD, ALEXANDER HARVEY, JEAN PAUL MARENTETTE, LIN YEOMANS and SUSAN HENDERSON)

August 12, 2013

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PART I – OVERVIEW

1. This is the factum of the Plaintiffs (Respondents) David Kidd, Alexander Harvey, Jean Paul Marentette, Lin Yeomans, and Susan Henderson, supporting Canada Life's appeal from a final order of Justice Perell (the "Motions Judge") in which he refused to approve an amendment to a court-approved class action settlement. This class action concerns the ownership and use of surplus assets in the Canada Life Employee Pension Plan ("the Plan"). The action was settled by way of a Surplus Sharing Agreement ("SSA"). The SSA was originally approved by the Motions Judge in January, 2012 (the "Settlement").

2. Within one month following the approval of the Settlement, the Defendant Canada Life advised the Plaintiffs that the net estimated surplus available for distribution under the SSA had decreased dramatically. Due to this abrupt change in circumstances, the Settlement became impossible to implement. The parties advised the Court, a motion was brought for directions, and the parties re-entered negotiations in an attempt to restructure the settlement to preserve and enhance the benefits of the settlement to the greatest extent possible. After lengthy bargaining, motions and case conferences, including a mediation before the Honourable Justice Strathy (as he then was), a revised agreement was reached and the Plaintiffs moved in March, 2013 on consent of all parties to amend the SSA in accordance with the Amended Surplus Sharing Agreement (or "Amended SSA"). The notices to Class members and the timing of the notice program and the approval motion were overseen and approved by the Motions Judge.

3. The terms of the Amended SSA can be summarized as follows:

a. Canada Life will augment the Integration Partial Wind Up Surplus ("IPWU Surplus) for sharing between Canada Life and the Class by waiving certain costs and expenses valued at $1.3 million;

b. The Plaintiffs will augment the amount of the IPWU Surplus distributable solely to the IPWU Sub Class and Inactive Eligible Class Members by waiving certain fees, estimated at $200,000;

c. Canada Life will fund any top-up payments to ensure all members of the IPWU Sub-Class receive minimum $1000 payments, valued at $1.2 million[1]; and

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[1] This contribution by Canada Life will not be made in light of the revised amount of IPWU Surplus because there is sufficient surplus to make all promised minimum $1000 payments to the Class.

d. There will be the potential for a second surplus distribution to the IPWU Sub Class and Inactive Eligible Class Members if a surplus exists as at December 31, 2014, subject to certain conditions, and subject to a maximum payment of $15 million to the Class;

4. The Amended SSA terms improve the position of Class members relative to the reduced benefits that would flow from the frustrated original SSA. Also, in the opinion of the Plaintiffs and Class Counsel, the Amended SSA terms compared favourably against the risks of resumed litigation over an uncertain surplus amount.

5. Notwithstanding the benefits of the Amended SSA and the Motions Judge's supervision and explicit approval of the process leading up to the hearing of the motion, the Amended SSA was rejected on the basis that it was substantively, procedurally, circumstantially and institutionally unfair to the Class members.

6. Canada Life appeals the Motions Judge's rejection of the Amended SSA. Despite the Plaintiffs' own frustration and empathy with several Class members' vocal disappointment about the drop in the distributable IPWU Surplus, and their shared desire to see a greater amount of surplus to be shared among the Class, the Plaintiffs fought hard for the Amended SSA which presents a reasonable resolution in the face of a difficult set of circumstances for the Class as whole. The Motions Judge erred in branding the Amended SSA as "unfair" when the Class is in fact *better off* than it would be under the SSA, which he also held is still binding. Further, the Amended SSA is also fair when compared against all other alternatives, including resumed litigation between the parties concerning an uncertain and diminished surplus, with uncertain results. The effect of the Motions Judge's decision is to force the Class into a worse deal, or face costly and indeterminate litigation to pursue a pension surplus that

no longer exists.

7. The Amended SSA is the best settlement available in the circumstances, is fair and reasonable, and ought to have been approved by the Motions Judge.

PART II – FACTS

8. The Plaintiffs accept as correct the summary of facts contained in Canada Life's factum, and add the following facts which were accepted by the Motions Judge:

a. The negotiations between the Plaintiffs and Canada Life culminating in the Amended SSA were adversarial, hard fought, and took place over several months.[2]

b. Canada Life takes the position that the original SSA is in force and will take steps to implement it in the absence of a negotiated resolution.[3]

c. The Plaintiffs' position is that the SSA is incapable of implementation, but that litigating the case will not produce a better result. Faced with these competing views, and in the absence of a negotiated amendment to the original SSA, the Plaintiffs have the following options:

i. seek to set aside the SSA because it is impossible to implement without the ability to purchase annuities for members of the IPWU group; or

ii. seek to restrain Canada Life from implementing the SSA until annuities may be purchased for members of the IPWU group, which would take an indefinite amount of time and may produce even less surplus.[4]

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[2] Affidavit of A. Harvey, Exhibit Book Vol. III, Tab 3, p. 431; Reasons of Perell, J., dated March 28, 2013 ("Reasons"), paras. 91-92, Appeal Book and Compendium, Vol. I. Tab 3, p. 23.
[3] Reasons, paras. 14-15, Appeal Book and Compendium, Vol. I. Tab 3, p. 13
[4] Reasons, para. 16, Appeal Book and Compendium, Vol. I. Tab 3, p. 13.

9. After learning of the diminution in the IPWU Surplus in early 2012, the parties met with the Motions Judge on April 20 and May 7, 2012 to report on the change in circumstances, and to obtain approval on a notice to update the Class on this development.[5] The parties appeared before the Motions Judge again in September 2012, at which time he agreed to appoint a mediator.[6] After arriving at the negotiated resolution captured in the Amended SSA, the parties convened with the Motions Judge on January 28, and again on February 12, 2013 to discuss notice to the Class, and approve written notices prior to the March 18, 2013 Motion.[7]

10. The Class was explicitly invited to ask questions and Class Counsel responded to dozens of inquiries from the Class, as well as facilitated the submission of Objectors' views to the Motions Judge.[8]

11. After commencement of this appeal, the Plaintiffs were advised by Canada Life in June, 2013 that the IPWU Surplus as at August 31, 2012 increased from an estimated $2.6 million (net of expenses) to an estimated $11.8 million. When the assets and liabilities of the IPWU Group were transferred to the ongoing portion of the Plan, members who had previously elected to receive an immediate or deferred pension were required by law to be given the option to change their election and elect to transfer the commuted value of their benefits out of the Plan. As a result of 142 additional members electing a commuted value transfer of their pension benefits, the net estimated Integration Partial Wind Up Surplus increased by $9.1 million. The Plaintiffs intend to introduce this information as fresh evidence in advance of the appeal hearing.

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[5] Affidavit of J. Foreman, para. 18, Exhibit Book Vol. I, Tab 1, p. 5.
[6] Exhibit C to Affidavit of J. Foreman, Exhibit Book Vol. I, Tab 1C, p. 185.
[7] Affidavit of J. Foreman, para. 40, Exhibit Book Vol. I, Tab 1, p. 11.
[8] Exhibits A-K to the Affidavit of A. Guindon, Exhibit Book Vol. III, Tabs 4A-K.

PART III – ISSUES AND ARGUMENT

12. The Motions Judge erred by analyzing the Amended SSA against unfounded precepts of "fairness" which ignore the well-established legal test for approval of a class proceeding settlement, and are not supported by the facts of this case. Specifically, the Motions Judge:

a. erred in concluding that that the Amended SSA is *substantively unfair* even though he also found that approving the Amended SSA is monetarily better than the alternative of not approving it and better than the risks of renewed litigation[9]. Further, approval the Amended SSA avoids collateral damage to the sub-classes of active employees and the members of the Prior Partial Wind Ups[10] whose settlement benefits are largely unaffected;

b. erred in concluding that the Amended SSA is *procedurally unfair*, even though he oversaw and approved the procedural elements leading up to the motion, including the notices to Class members and the timing of the publication of those notices. The Motions Judge also appointed the mediator who assisted the parties reaching the Amended SSA. It should also be noted that the Motions Judge was asked to adjourn the motion by at least one objector and the adjournment was not granted;

c. erred in concluding that the Amended SSA is *institutionally unfair*, which is not a factor recognized by the *Class Proceedings Act, 1992* ("CPA") or the Courts in evaluating a class action settlement; and

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[9] Reasons paras. 22, 174, Appeal Book and Compendium, Vol. I, Tab 3, p. 14, 36.
[10] Reasons para. 22, Appeal Book and Compendium, Vol. I, Tab 3, p. 14.

d. erred in concluding that the Amended SSA is *circumstantially unfair*, which is also not a factor recognized in the jurisprudence for assessing settlements or in the CPA.

13. The Motions Judge also erred in the weight he ascribed to some of the relevant factors in assessing a class proceeding settlement, and failed to assess the Amended SSA in the prevailing circumstances as a whole.

I. Fairness

(a) Dabbs Test Generally

14. The Motions Judge correctly identified *Dabbs v. Sun Life* as the seminal authority on approval of settlements in class actions, and the ultimate determination as whether, in the prevailing circumstances, the settlement is fair, reasonable, and in the best interests of Class members. The same test applies in considering approval of an amendment to a settlement.

15. The relevant factors in assessing a settlement are:

a. the settlement terms and conditions;

b. the number of objectors and nature of the objections;

c. the likelihood of recovery or likelihood of success

d. future expense and likely duration of litigation;

e. recommendation of neutral parties, if any;

f. the degree and nature of communication with class members;

g. amount and nature of discovery;

h. recommendation and experience of counsel;

i. the presence of arms' length bargaining and absence of collusion;

j. the dynamics of the negotiation.

16. Importantly, perfection is not the standard against which a settlement should be measured. A settlement is, by definition, a compromise that is not fully satisfactory to either party:

> Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.[11]

17. Reasonableness is described to fall within a "zone."[12] To reject the terms of a settlement and require litigation to continue, the court must conclude that the settlement does not fall within a range of reasonable outcomes.[13] Compromise by the parties to a settlement is to be expected, and the resolution of complex litigation through the compromise of claims is to be encouraged by the courts and is supported by public policy.[14]

18. Given that there was already a Judgment approved by the Motions Judge, his analysis of the Amended SSA and *Dabbs* factors ought to have been exercised with explicit reference to the existing Settlement. In other words, the question was whether the Amended SSA was fair, reasonable, and in the best interests of the Class as compared to the Judgment, and/or compared to the litigation alternatives available to the Plaintiffs. This question could only be answered in the affirmative.

19. It is not the function of a court in reviewing a settlement to reopen the debate and negotiations between the parties with the hope of possibly improving the terms of settlement,

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[11] *Dabbs v. Sunlife Assurance Company of Canada*, [1998] O.J. No. 2811 (Gen.Div.) (QL) at para. 34, 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, Appellant's Book of Authorities ("BOA"), Tab 3.
[12] *Fraser v. Falconbridge* [2002] O.J. No. 2383 (S.C.J.) (QL) at para 13, Plaintiffs Book of Authorities ("BOA") Tab 1.
[13] *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.) (QL) per Cumming J., at paras. 113-114, Plaintiffs' BOA, Tab 2.
[14] *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.) at para. 21, Appellant's BOA, Tab 2; *Sparling v. Southam Inc.*, [1988] O.J. No. 1745 (H.C.J.), at para. 17, Plaintiffs' BOA Tab 3.

which is precisely what the Motions Judge did by stating the precise terms he believed would be "fair."[15] On a proper consideration and weighing of the *Dabbs* factors, the Amended SSA should be approved.

(b) Substantive Fairness

20. The Motions Judge held that the Amended SSA was substantively unfair for 3 reasons, each of which is addressed in more detail below:

a. The cap of $15 million on a future surplus distribution is unfair; and

b. The December 31, 2014 date for recalculating the surplus for the purposes of a second distribution is arbitrary and unfair.

c. Class Counsel's fee of $4.6 million is unfair;

21. In the mediation and negotiations the Plaintiffs fought for more generous terms, but did not get all that they asked for.[16] The Motions Judge erred in assessing the substantive fairness of the Amended SSA in a vacuum, rather than against the only viable alternatives:

a. the SSA, under which the Class would receive far less money; or

b. continued litigation, which would not serve to restore the surplus.

(i) $15 million Cap on Future Surplus Distribution

22. The potential for a second, future surplus distribution was not a part of the original Settlement, which only provided for a single distribution based on the IPWU Surplus at one point in time. Under the Amended SSA, there will be a second calculation of surplus in the Segregated Portion of the Plan, and subject to certain conditions, a second surplus distribution. The proposed future distribution under the Amended SSA was a significant

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[15] *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, *supra,* at para. 127, Plaintiffs' BOA Tab 2.
[16] Affidavit of A. Harvey, para. 11, Exhibit Book Vol. III, Tab 3, p. 431.

concession bargained for by the Plaintiffs, which provides *additional* financial benefits to the members of the Class who are most affected by the decrease in distributable IPWU Surplus. No Class Member objected to a possible second distribution of surplus.

23. The imposition of a cap on the potential future surplus distribution was the cost of obtaining this commitment from Canada Life. It was improper of the Motions Judge to find that this term of the Amended SSA was "unfair" simply because there was a ceiling on a future distribution, when the possibility of a second distribution was a significant improvement over the existing SSA under which the position of the class would be constrained to a single surplus distribution under disappointing economic conditions.

(ii) December 31, 2014 Recalculation Date is Arbitrary

24. The very circumstances that gave rise to the motion to vary the Judgment – a large drop in the IPWU Surplus which drove the parties back to the bargaining table - underscores that fact that predicting the amount of surplus in the pension plan which will be available for distribution at any particular point in time is impossible, and necessarily arbitrary. None of the parties or their experts is better positioned to make this prediction, and neither is the Motions Judge. The selection of the December 31, 2014 date *is* arbitrary, but it affords some time for economic conditions to improve and it is a benefit to class members when the alternative is no second surplus distribution at all. The date also coincides with the next required Plan actuarial valuation under the *Pension Benefits Act*.

25. The Motions Judge further erred when he stated that a "recalculation date of 2017 is a fairer date to allow the economy to turn over again"[17], without any factual basis or support for choosing this date. The Motions Judge's selection of a date is equally arbitrary, and no more

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[17] Reasons, para. 147, Appeal Book and Compendium, Vol. 1. Tab 3, p. 33.

sustainable than what the parties bargained for. It is improper for the Motions Judge to engage in "armchair quarterbacking" of the settlement[18], or to speculate on when long term interest rates will rise or fall. That is, it is not appropriate for the court to rewrite or modify the terms of the settlement, but only to accept or reject it.

(iii) Class Counsel Fee

26. Class Counsel's fee was approved by the Motions Judge in the original Settlement approval in January 2012, and included a multiplier to reflect the risk assumed in taking on the case. It was not addressed as part of the Amended SSA, nor were the fees of Canada Life.

27. Class counsel are prepared to voluntarily reduce their fee, and indeed agreed to forego $200,000 in fees and work for no further fees to implement the Amended SSA. However, any further compromise on fees must be conditional on those amounts being paid solely to the benefit of Class. As the settlement concerns a sharing of total surplus between the Class and Canada Life, if Class Counsel's fee is simply reduced (and the net IPWU Surplus correspondingly increases), then approximately 30% of the reduction will be paid to Canada Life, which subverts the Motions Judge's desire to "share the pain."

(c) Procedural Fairness

28. The Motions Judge described four of the *Dabbs* criteria as pertinent to the procedural fairness of a settlement: 1) adequacy of representation, good faith and absence of collusion; 2) discovery evidence sufficient for effective representation; 3) adequacy of notice of proposed settlement to absent class members; and 4) the degree and nature of communications by counsel and the representative parties with class members during the litigation. He ultimately

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[18] *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (S.C.J.) at para. 45, Plaintiffs' BOA at Tab 4.

concluded that "...the objectors needed something more than the minimum standard to provide them with procedural fairness... the proponents of the Amended Agreement ought to have paid for a lawyer to provide the objectors independent legal representation."[19]

29. The timing and manner of notice provided to the Class in advance of the Motion was consistent with past practice in this proceeding, and the practice in class proceedings generally.[20] The volume of inquiries demonstrates that the notice was effective. Only about a dozen objectors prepared written material or attended personally before the Motions Judge out of a Class of over 5,000.

30. The Motions Judge supervised this class proceeding for several years, and presided over and approved all procedural steps and notices to Class members, including in advance of the Motion. A request for an adjournment of the hearing to obtain counsel was made by one of the Objectors,[21] which the Motions Judge did not grant. The characterization of the Amended SSA as procedurally unfair is simply belied by the active supervisory role taken by the Motions Judge, and the extensive communications between Class Counsel and the Class. All written communications with the entire Class were approved by the Motions Judge. There were no procedural missteps or oversights and the Motions Judge erred in rejecting the Amended SSA on this basis.

(d) Institutional Fairness

31. The requirement that a settlement meet a standard of "institutional fairness" in order to be approved is unprecedented. The Motions Judge's introduction of this vague and obtuse

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[19] Reasons, para. 166, Appeal Book and Compendium, Vol. 1. Tab 3, p. 36.
[20] See for example *Axiom Plastics Inc. v. E.I. DuPont Canada Company*, [2013] O.J. No, 2049 (S.C.J.), where notice was mailed to the Class three weeks prior to a settlement approval hearing; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) where notice was mailed to former employees and published one month in advance of a motion for certification and settlement, Plaintiffs BOA, Tabs 5 and 6.
[21] Reasons, para. 103, Appeal Book and Compendium, Vol. 1. Tab 3, p. 25.

notion of fairness is confusing, and relates only to abstract ideas about "...access to justice that includes an outcome that objectively should satisfy the class members' entitlement to justice for their grievances."[22]

32. The Motions Judge erred in crafting a new benchmark for approval which departs from the *Dabbs* criteria, and only serves to distract from assessing whether the Class is in fact better off under the Amended SSA. The Court must review the Amended SSA on established legal principles to determine whether it is fair, reasonable, and in the best interests of the Class as a whole.[23] Concerns about Class members' perceptions and other extra-legal concerns may be valid in a social or political context, but are outside the ambit of a Court's review of a settlement.[24] In any event the Plaintiffs have provided the Class with a reasonable outcome.

(e) Circumstantial Fairness

33. The *Dabbs* test does not identify "circumstantial fairness" as a criterion for approval of a class proceeding settlement. The "circumstances" of the case are integral to the assessment of a proposed settlement's fairness, but here, the Motions Judge went beyond *considering* the circumstances in his fairness analysis, to *judging* the circumstances to be unfair. The "circumstances" in question were triggered by economic events, namely a significant drop in long term interest rates and their impact on the surplus given the investment profile of the pension fund.

34. The drop in the IPWU Surplus and inability to implement the Settlement was surprising and utterly disappointing to the Plaintiffs. The Plaintiffs acknowledge the deflated

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[22] Reasons, para. 129, Appeal Book and Compendium, Vol. I, Tab 3, p. 31.
[23] *Baxter*, *supra*, at para. 9
[24] *Parsons v. Canadian Red Cross Society*, [1999] O.J. 3572 (S.C.J.), Appellants' BOA, Tab 5, at para. 77

expectations and the anger expressed by some Class Members. It is precisely these circumstances that favour a resolution which puts more money in the hands of the Class sooner than the alternatives.

II. Improper Weighing of Factors

35. The Motions Judge erred in undervaluing the following *Dabbs* factors in this case as "not particularly helpful, or they are neutral, at best":

a. recommendation of neutral parties; when the evidence disclosed that the independent actuarial advisor to the Plaintiffs, who has been involved throughout these proceedings, recommended the Amended SSA as fair, reasonable, and in the best interests of the Class;[25]

b. presence of good faith, arms' length bargaining and the absence of collusion; when the evidence disclosed that the negotiations were lengthy and adversarial, and facilitated by an experienced Judge and mediator, and neither party got all that they wanted;[26] and

c. likelihood of recovery or likelihood of success; when the evidence establishes that if litigation were to continue, it would not restore the amount of IPWU Surplus, even if 100% of it belonged to the Class and approximately one half of the Class (the active employee Class Members, pensioners and deferred/vested members) would have no reasonable chance of success in their claim regarding Plan expenses.[27]

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[25] Affidavit of M. Robertson, para. 16, Exhibit Book Vol. II, Tab 2 p. 235.
[26] Affidavit of A. Harvey, paras. 9-11, Exhibit Book Vol. III, Tab 3, p. 431
[27] Reasons, Appeal Book and Compendium, Vol. 1, Tab 3, p. 14.

36. The Motions Judge also did not give appropriate weight to the most significant prevailing circumstance, which is the fact that there is considerably less money to share because of the diminution in IPWU Surplus. The Amended SSA is a genuine, bona fide compromise between the parties to give effect to the intentions under the original SSA based on the much lower estimated surplus available for distribution, and gives hope for a future distribution if the underlying economic assumptions improve. A litigation solution will not produce more surplus, and is thus not a viable option.

37. The Amended SSA falls well within a "zone of reasonableness" and the Motions Judge was incorrect in rejecting it, and should be overturned by this Court.

PART IV – ADDITIONAL ISSUES

38. There are no additional issues.

PART V – ORDER REQUESTED

39. The Plaintiffs request that the Order of the Motions Judge below be set aside and that an order be granted in substantially the form attached as Schedule "A" to the Notice of Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Koskie Minsky LLP

per Harrison Pensa LLP

CERTIFICATE

Counsel for the Plaintiffs (Respondents), David Kidd, Alexander Harvey, Jean Paul Marentette, Susan Henderson and Lin Yeomans hereby certify that:

(i) An order under subrule 61.09(2) is not required; and

(ii) An estimated time of 1½ hours is required for the Plaintiffs' (Respondents) oral argument, not including reply.

Koskie Minsky LLP

Harrison Pensa LLP

Schedule "A"

List of Authorities

1. *Dabbs v. Sunlife Assurance Company of Canada*, [1998] O.J. No. 2811 (Gen.Div.)
2. *Fraser v. Falconbridge* [2002] O.J. No. 2383 (S.C.J.)
3. *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.) (QL)
4. *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.)
5. *Sparling v. Southam Inc.*, [1988] O.J. No. 1745 (H.C.J.) (QL)
6. *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (S.C.J.)
7. *Axiom Plastics Inc. v. E.I. DuPont Canada Company*, [2013] O.J. No, 2049 (S.C.J.),
8. *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.)

Schedule "B"

Text of Statutes

None.

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