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

COURT OF APPEAL FOR ONTARIO

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
Defendant (Appellant)

- and -

A.P. SYMONS, D. ALLEN LONEY and JAMES R. GRANT
Defendants (Respondents)

Proceeding under the Class Proceedings Act, 1992

OBJECTOR-INTERVENOR (DA) FACTUM
September 27, 2013

Objector Class Member:
(unrepresented)
Dan Anderson
1284 Lewisham Drive
Mississauga, Ontario
L5J 3P7
905-823-4914
dan.anderson@sympatico.ca

TO: ONTARIO APPEAL COURT JUSTICES reviewing this case
via John Kromkamp, Senior Legal Officer, Ontario Court of Appeal

COPIES TO:

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto, ON M5L 1A9
Jeff Galway (LSUC #28423P)
jeff.galway@blakes.com
Tel: (416) 863-3859
Fax: (416) 863-2653

Lawyers for the Defendant (Appellant)
The Canada Life Assurance Company.

HICKS MORLEY HAMILTON STEWART STORIE LLP
Toronto-Dominion Tower,
Mail Room 32nd Floor or
30th Floor, Box 371, TD Centre
Toronto, ON M5K 1K8
John C. Field (LSUC #23695F)
john-field@hicksmorley.com
Tel: (416) 864-7301 - direct
Tel: (416) 362-1011 - office
Fax: (416) 362-9680

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

PATRICK MAZUREK
31 Prince Arthur Avenue
Toronto, ON M5R 1B2
416-646-1936 (ext148)
patrick@mazurek.ca
Lawyer for Objectors Anne Carey and Jan Durst.

CLASS COUNSEL
KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3
Mark Zigler (LSUC #19757B)
mzigler@kmlaw.ca
Clio M. Godkewitsch (LSUC #45412G)
cgodkewitsch@kmlaw.ca
Tel: (416) 595-2090
Fax: (416) 977-3316

HARRISON PENSA LLP
450 Talbot Street, P.O. Box 3237
London, ONN6A 4K3
David B. Williams (LSUC # 21482V)
dwilliams@harrisonpensa.com
Jonathan Foreman (LSUC #45087H)
jforeman@harrisonpensa.com
Tel: (519) 679-9660
Fax: (519) 667-3362

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

SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West
Suite 1100, Box 180
Toronto, ON M5G 2G8
Darrell Brown
dbrown@sgmlaw.com
Tel: (416) 979-4050
Fax: (416) 591-7333

Lawyers for the Plaintiffs (Respondents) Garry C. Yip and Louie Nuspl

OBJECTOR-INTERVENOR (DA) FACTUM - DAN ANDERSON
Court of Appeal File No. C56991
Court File No. 05-CV-287556CP
Kidd et al v. Canada Life et al

TABLE OF CONTENTS

Contents

PART I - NATURE OF OBJECTOR-INTERVENOR (DA) FACTUM

1. **Context.** This document addresses deficiencies in the arguments as presented in Canada Life`s May 27, 2013 appeal of the March 28, 2013 order by Justice Perell (the Motions Judge) that rejected the proposed amended Surplus Sharing Agreement (paSSA) as fundamentally unfair.
2. **No party respondents.** This document was motivated by the understanding that all the parties were jointly advocating to overturn the Judge`s decision, despite: a) the legitimacy of the Judge`s reasons and what seems the almost unanimous support among informed and affected Integration Partial Windup (IPWU) members and b) the availability of an effective and fair alternative.
3. **Objector.** I participated in the March 18, 2013 hearing as: a) an unrepresented IPWU class member (retired pensioner), and b) a former Canada Life employee whose prior work experience had included professional financial review responsibility for the valuation of all the group pension liability valuations, including responsibility for developing the asset and liability cash flow duration mismatch analysis for the $5.2 billion of Canadian and US insured annuity and GIC liabilities. [Appeal Exhibits pages 456, 543-544, 529-553, 511-521]
4. **Shared Objective.** This factum is presented within the context of a shared objective of determining appropriate amendments for the settlement implementation terms for the previously approved Surplus Sharing Agreement (SSA). The implementation of the SSA became circumstantially impaired as a result of events preceding and following the approval of the SSA and factors that had not been disclosed at the time that the SSA was approved.

5. **Scope of Document.** The wide range of issues addressed in this document reflects the fact that the Canada Life Appeal Factum does not simply address one or two points of law but puts forward arguments on a wide range of issues, including a re-presentation of the arguments presented by Class Counsel at the March 18, 2013 hearing, and arguing that the Motions Judge erred in more than 20 instances. Accordingly, even with a submission expected from Mr. Mazurek addressing some of the issues on behalf of some objectors and other class members, there was a wide range of appeal issues to address in this document.
6. **Focus.** The comments herein will primarily focus on the circumstances from the perspective of the Integrated Partial Windup (IPWU) class members, including both Partial Windup (PWU) and eligible non-partial-windup (non-PWU) members. The issues of circumstantial fairness addressed herein primarily impact IPWU class members, while there appears to be relatively little effect on the determination of the financial interests of the Indago-Pelican-Adason (IPA) class members and the active (non-eligible non-PWU) class members.
7. **Unrepresented objectors.** The views expressed in this document are presented to the Court as the views of one unrepresented objector who over the last six months has communicated extensively on the various issues with the parties to this action and with other objectors and class members. Subsequent to Aug 25, 2013 in an on-line petition which was an expanded version of the petition referenced in the Motions Judge's decision, 50 of the original objectors responded to that expanded petition and all except two of the responders has not only self-identified as an unrepresented objector but has also said yes to the question of whether a prior and lengthier draft of this intervenor factum as provided August 5, 2013 to the objectors and the parties, should be reviewed by the Appeal Justices as part of their deliberations. There is

no intent here to imply that those petitioners expressly reviewed and/or supported the specific content of this document or the prior draft version. The parties received updates of the petition results and the comments of the various petitioners.

8. **Limitations and compendium.** My apologies for any shortcomings herein. On September 23 the Court ruled under case management that, despite unconditional objection by Canada Life, an unrepresented objector intervenor factum could be filed, subject to the condition that a revised factum and compendium be served/filed by Sept. 27, 2013. The compendium is referenced as CompDA while the Appeal compendium is referenced as Appeal Book.

PART II - OVERVIEW

9. **Addressing Appeal Factum arguments.** This document addresses the key deficiencies in multiple Appeal Factum arguments that the Motions Judge erred in arriving at his decision.
10. **Circumstantial fairness.** This document addresses the legitimacy of the Motions Judge's decision to introduce the principle of circumstantial fairness as a reference framework for considering and weighting the various Dabbs criteria within the context of the unique circumstances of this case, and also addresses the various elements of circumstantial fairness contested by the Appellant.
11. **Motions Judge not limited to a forced choice.** This document addresses the legitimacy of the Motions Judge rejecting a proposed amended agreement despite the Appellant's explicit and implicit arguments that: a) the Motions Judge must make a forced choice based only on the fact that the amendments would improve on the impaired results from the originally approved agreement and b) the Motions Judge's decision must disregard the following: i) the

intent of the original agreement, ii) the extent to which the results had become impaired, iii) the extent to which the amendments improved the results, iv) the reasons why the results had become impaired and v) the apparent identification of an alternative amended settlement implementation process that would take into account all of those other considerations.

12. **Drop in surplus.** This document identifies the largely undisclosed role of: a) the speculative investment policy for the PWU fund and b) the financial implications regarding a dramatic asset-liability duration mismatch as the primary (and controllable) reason for such a large drop in surplus and the reason that much of the drop in surplus would be expected to be a temporary unrealized notional loss.
13. **Illustrative Objectors' Settlement.** This document addresses the Appellant's identified concerns regarding a proposed alternative settlement implementation process, and hopefully a shared objective, for determining appropriate amendments to the settlement implementation terms for the original surplus sharing agreement.

PART III - FACTS

14. **Appellant's description of facts.** This document will disagree with a number of the non-factual arguments presented as facts in the Appeal Factum: a) the extent of the non-disclosure of the surplus drop prior to the Court approving the SSA January 2012 [Appeal Factum 13], b) the most significant reasons for the drop in surplus [Appeal Factum 14], c) the testing of the reasons for the drop in surplus [Appeal Factum 15], and d) the purpose and effect of the August 31, 2012 asset transfer [Appeal Factum 17].

15. **2008 PWU fund investment policy and asset-liability duration mismatch.** Beginning in 2008 and extending to 2012, the PWU fund investment policy provided for 60% of the PWU assets to be invested in cash and short term bonds. That investment policy is referenced in two detail appeal exhibits but not referenced in any of the parties' communications regarding the drop in surplus. ~~[Appeal Exhibits pg 282-283, 380]~~ [CompDA pg 1-3]
16. **Drop in IPWU surplus.** It bears repeating, from the perspective of IPWU class members, that pursuant to class members signing written agreements April 2011 consenting to the implementation of a surplus sharing arrangement (and the transfer of ongoing pensioners to a new plan forfeiting certain rights regarding plan surplus), based on an estimated $62 million of distributable IPWU surplus, the reported surplus suddenly dropped without plausible explanation from $54 million (as estimated when the Court was asked to approve the agreement January 27, 2012) to $10 million as at Dec. 2011 (per May 2012 letter to class members), and then to $2.6 million as at August 2012 (per Feb. 2013 letter to class members, also advising that insured annuities would not be purchased for PWU members), with all parties in effect asserting that the drop in surplus was "beyond the control of the parties". [Appeal Book pg 404, 418}, ~~[Appeal Exhibits 115]~~ [CompDA pg 14]

PART IV - ISSUES AND ARGUMENTS AND DABBS CRITERIA

A. Appellant's Position - Likelihood of Success (e.g. Admin Expenses)

17. The Appellant argues that "most fundamentally the Motions Judge erred in his consideration of factors (a) and (c) of the Dabbs criteria — the likelihood of greater recovery if court

approval were withheld … (because) he erred in considering the position of the Class ... as against the expectations created by the earlier surplus estimates ... (even though) ... it has been conceded by the Representative Plaintiffs that in the wake of Nolan v. Kerry (Canada) Inc. the plaintiffs' claim in respect of administration expenses is now of little merit." [Appeal Factum 37, 33]

18. **Context of SSA amendments rather than original SSA.** The arguments regarding plan administration expenses illustrate various arguments that would have been resolved as a result of the establishment of the terms of the SSA, which includes provision for Canada Life to charge administration expenses against the new plan [Motions Judge's Reasons 48(2)] as distinct from charging it against the IPWU surplus. The matter at hand in the Appeal Court's deliberations would be the Motions Judge's rejection of the Proposed Amended SSA, in the context of encouraging the parties to negotiate good-faith amendments in the context of circumstantial fairness and the Dabbs criteria, without proposing that the parties revisit prior arguments such as the issue of prior administration fees. It would seem much more appropriate for the parties to consider what amendments would more likely result in recoveries consistent with the expected levels of distributable surplus communicated to plan members March 2011, taking into account issues regarding unrealized losses resulting from the asset and liability duration mismatches, as referenced herein.

B. Appellant's Position - Erred on Expected Surplus Payments vs. 'Fiction' Estimates

19. **Expected surplus amounts.** The Appellant argues that surplus estimates provided to class members were nothing more than a "fiction" because the values could change [Appeal Factum 40, 42, 46(b)(i), 46(c)]. Class members would have been generally aware that the specific dollar amounts (rounded to the nearest dollar) as identified in their March 2011 form E were not a guaranteed amount, but those dollar amounts did represent the amount of surplus they could EXPECT to receive. By definition an expected amount is an amount where it is deemed equally likely that the amount could be higher or lower. It was a best estimate amount based on the work of professional actuaries and in the context of professional asset management.

C. Appellant's Position - Erred on 'Fickle Fate' Reasons for Drop in Surplus and the Control of the Parties

20. **Fickle fate reasons.** The Motions Judge comments: "it is the position of both sides that the misfortune of false estimates was a matter of fickle fate and forces beyond their control ... (and partially for that reason) ... the objectors needed something more than the minimum standard to provide them with procedural fairness." [Reasons 166], [Appeal Factum 14, 17, 40, 42, 44, 46(b)(ii)]

21. **Speculative investment policy and duration mismatch.** There was in fact a decrease in interest rates, but the most significant (and controllable) reason for the drop in surplus appears to have been the relatively short-term nature of the assets in the PWU fund as

evidenced by the PWU investment policy of holding 60% of the PWU fund assets in cash and short term (while less than 5% of assets of the ongoing pension plan were targeted to be held in cash and short term), with the implications of a dramatic asset-liability duration mismatch. Such an investment policy is referenced herein as a speculative investment policy because it would not be consistent with the duration structure of the pension liabilities and because of the implied highly leveraged risk exposure to interest rate changes. . ~~[Appeal Exhibits pg 282-283, 380]~~ [CompDA pg 1-3]

22. **Focus Question for Canada Life, Plan Trustees and Plaintiffs.** The following question was highlighted, but unanswered, during the March 18 2013 hearing: ***"During your negotiations ... did you have any knowledge of the duration structure of the bond holdings in the windup plan assets, relative to the duration structure of the liabilities, and were you aware that the primary reason for the huge drop in surplus was because the duration structure of the assets was dramatically shorter than the duration structure of the liabilities, which would guarantee huge losses if interest rates fell (but would generate correspondingly large increases to surpluses if / when interest rates increased) ?"*** ~~[Appeal Exhibits 550]~~ [CompDA pg 24]
23. **Insurers' concerns about asset-liability duration mismatch.** Reasons cited for insurers not providing insured annuities for the PWU members included the longer liability durations implied by a high % of younger members "and **the difficulty in finding suitable assets to appropriately match the liability of this annuity obligation stream**". [CompDA pg 37]
24. **Asset Liability Duration Mismatch and Surplus Drop - the Basics.** The references herein to asset and liability duration mismatch and the implied effect of interest rate changes on

PWU surplus, involve some basic financial principles and terminology that are outlined in more detail in a corresponding reference section herein.

25. **Unrealized notional loss.** Such a surplus loss is very much a notional "unrealized" loss and is very different from an investment loss that would be experienced from a drop in equity values. Understanding those considerations is relevant to the issue of the likelihood of recovery and Canada Life positioning itself to benefit exclusively from the re-emergence of that hidden IPWU surplus when interest rates increase. **[illustration: CompDA pg 25]**
26. **Not arguing negligence.** There is no intention in this document to imply negligence or fund mismanagement with regards to the investment policy for the PWU fund, but there would be issues regarding the unilateral nature of the speculative investment policy, the extent to which there was not reasonable disclosure of the potential implications, and the adverse results relative to the expectations and intent of the original SSA, all of which collectively would seem to imply, at a minimum, a circumstantial onus on Canada Life to act in good faith in reaching agreement on an appropriately amended settlement implementation process. Presumably it is not the role of the Court of Appeal to rule on the extent to which Canada Life was responsible for the drop in surplus nor would the Court be expected to accept Canada Life's unsupported assertions that Canada Life had no responsibility and no control over such a large drop in surplus.
27. **Currently no independent financial and actuarial advisors.** None of the financial and actuarial resources currently involved as advisors, plaintiffs and defendants have claimed to be providing an independent role and none have provided disclosures to the Court and class members regarding the significance of the speculative PWU investment policy and the

duration mismatch of the PWU fund. On the contrary, various parties have made comments that contradict the facts (e.g. May 2012 letter to class members: "the plan is mostly immunized" and communications implying that the parties had no control over the drop in surplus). [e.g. ~~Appeal Exhibits pg 115-116]~~ [e.g. CompDA 14-15], [Appeal Factum 14].

D. Appellant's Position - Erred on Illustrative Objectors' Settlement

28. **Motions Judge not ruling pre-emptively.** When the Motions Judge states in Reasons paragraph 161: "the Objectors' Settlement as revised would be fair", he also notes "but it is a hypothetical settlement not before the court". Accordingly, the Appellant (and Class Counsel) would be misguided if they concluded that the Motions Judge had pre-emptively ruled that simply defining a longer point-in-time end date (and removing the $15 million cap) would in itself be sufficient to render a fair settlement under the circumstances. [Reasons 161], [Appeal Factum 38]

29. **Process during longer settlement implementation period.**

a) **Conditional Settlement versus Gamble Settlement.** As noted by the Appellant when suggesting that the Motions Judge erred [Appeal Factum 38 b)], depending arbitrarily on any single future point in time for only a single final pay-out would under the circumstances represent a relatively blind gamble for the class [Appeal Factum 38(b)]. It would be instead be preferable to have a settlement implementation process that was appropriately conditional on the re-emergence of the surplus.

b) **Implementation Period.** Extending the potential maximum recovery period to 2020 rather than 2017 would seem more appropriate since there are no guarantees, and Canada Life has significant control through the investment policies. Also, it would seem

appropriate to provide for annual payouts of distributable IPWU surplus during the settlement implementation period as it re-emerges and an earlier finalization of the settlement process can still take place if warranted by the extent of re-emergence

c) **Target Threshold to End Implementation Process Earlier.** With a longer maximum period it would be reasonable to finalize the settlement earlier if surplus has recovered sufficiently based on a pre-determined target threshold, making a distinction between surplus hidden by duration mismatches and surplus from commuted value decisions.

d) **Reasonable Cap on Cumulative Distributable Surplus per Original Expectations.** It would be reasonable to have a cap on the cumulative IPWU surplus payout consistent with the original expectations regarding distributable surplus, making a distinction between surplus hidden by duration mismatches and surplus from commuted value decisions. As noted by the Motions Judge, the Appellant's proposed $15 million cap does not seem reasonable. [Reasons 156, 157]

e) **Annual Surplus Payments during Implementation Period.** Administratively, the most practical approach would seem to be to provide for an annual calculation and payout of IPWU surplus to the extent that distributable IPWU surplus has re-emerged, with a determination as to whether the surplus threshold requirement has been reached, and subject to an overall cap.

f) **Automatic Annual Process rather than Member-Specific Options.** The above approach would be in lieu of the more administratively awkward process of each member deciding when to cash in their rights to the IPWU surplus.

E. Circumstantial Fairness and Dabbs Criteria - Unique Context

30. **Motions Judge's perspective.** In the context of the uniqueness of this case, the Motions Judge brought to the forefront of his decision process the notion of circumstantial fairness as a reference framework, not only for determining what considerations might apply to the various Dabbs criteria individually, but also determining the relative weighting of the outcomes. [Reasons 4, 23, 124, 128, 129, 133, 134, 137, 139, 149, 152, etc.].

31. **Appellant's position.** The Appellant argues that circumstantial fairness as a reference framework is an unwarranted departure from established jurisprudence, but the Appellant gives no consideration to the unique context of this case. [Appeal Factum 29, 42]

32. **Unique context.** The Motions Judge comments: "As far as I am aware, this is the first time that parties to an already approved settlement agreement in a class action have sought approval to an amendment to the agreement." [Reason 110] Accordingly, the intent and circumstances relative to the prior approved agreement provides a unique reference base for evaluating the fairness of proposed amendments compared to alternative identified solutions.

33. **Professor Catherine Piché citations on fairness.** Further to the Motions Judge's citations from Prof. Piché's text *Fairness in Class Action Settlements* (Toronto: Carswell, 2011), the following additional comments in her text are notable even though some are provided in reference to procedural and substantive fairness since she was not referencing the unique context of this case:

    - page 264: with regards to lawyers representing the interests of clients (which indirectly includes class members), she comments "when judges have concerns that

that maybe is not as complete a process as it might have been, the more weight has to be put on their own assessment of the overall circumstances"

- page 284, as part of her second recommendation: "instead of relying solely on counsel's arguments at the fairness hearing ... judges ... approve or deny proposed settlements (*or in this case, proposed amendments*) on facts they have actively elucidated for themselves by examination of the parties and witnesses."
- page 284, as part of her third recommendation: "judges not be required to rely upon standardized lists of settlement fairness factors, but that they instead ... balance larger-framed ... fairness inquiries" ... taking into account her page 266 comment: "given the judge's tendency to grade most of the factors with a '7' and above",
- pages 270-271: "In my view, settlement fairness should also be evaluated both before - ex ante - and after - ex post - the settlement's conclusion ... to consider the settlement as a true contract, in which fairness issues might arise at a pre-contractual stage and affect the parties' rights ex post, or in the parties unbalanced relationships."

34. **Presumed consistency between Dabbs criteria and the use of circumstantial fairness as a reference framework.** In the circumstances of this case, there seems to be no reason to presume there is a conflict between the Dabbs criteria and the Motions Judge's use of circumstantial fairness as a reference framework, and such an argument to the contrary by the Appellant begs the question whether it is more appropriate to do what the Appellant and has done and presented a version of the Dabbs criteria considerations without any reference to various elements of circumstantial fairness as referenced by the Motions Judge and/or as

evidenced by the Exhibit materials. The grid chart below illustrates the cross-applicability of various Dabbs criteria considerations and various issues regarding circumstantial fairness.

Factum Section	PRIMARY DABBS CRITERIA > APPEAL ISSUES:	(a) likelihood recovery	(b) discovery	(c) settlement terms	(d) counsel	(e) litigation risk	(f) neutral parties,	(g) objections	(h) good faith bargaining	(i) class communications	(j) information to Court
	a) General considerations										
>	Likelihood of success (e.g. prior admin expense & unique context).	X		X		X		X			
>	Objectors' settlement approach.	X		X			X	X	X	X	X
	Circumstantial Fairness - main										
>	Unique context.	X		X		X		X			
>	"Fiction" surplus estimates.	X		X		X		X	X		
>	"Fickle fate" drop in surplus.	X	X	X	X			X	X	X	X
	Circumstantial Fairness - other										
>	Unprecedented 2011 campaign.			X				X	X	X	
>	Drop in surplus paid to CLA.	X	X					X	X	X	X
>	Deficits funded by CLA.	~		~							
>	Other procedural irregularities.		X		X			X	X	X	X

F. Appellant's Position - Erred on (Other) Elements of Circumstantial Fairness

F1. Role of "Unprecedented" March 2011 Voting Campaign

35. **Appellant's position.** The Appellant argues that the Motions Judge erred ... because the voting campaign was "far from unprecedented", and cites five legal cases.

Appeal Factum [40, 42, 44, 46(a)]

36. **Appellant citation of legal cases.** The five legal cases cited by the Appellant were Sunnybrook, McMaster, Burleton, CBS and Reichhold, but the circumstances for those cases were very different from the current case. None of those cases involved voting on the allocation of surplus from the partial windup of a pension plan and none of them included the set of features described below for the March 2011 voting campaign.

    [Appeal Factum 46(a)]

37. **March 2011 Voting Campaign.** An information/marketing campaign was organized prior to the approval of the SSA. The campaign involved the March 2011 distribution of materials to class members, as well as April 2011 meeting presentations to class members at nine different locations across Canada. The following are features of the campaign that are notable in themselves but would also seem to justify the Motions Judge characterizing the campaign as "unprecedented" (square brackets [ ] reference March 2011 package materials:

- **Acceptance thresholds.** The purpose of the campaign was to encourage members to accept the proposed SSA and to reach <u>combined</u> consent thresholds of at least 75% of PWU class members and 90% of non-PWU class members.

    [March 2011 Information Package form C page 7 and form D pages 10-11]

- **Interdependence.** Canada Life would not agree to the terms for the split of the partial windup surplus unless the non-PWU class members agreed to the windup of the existing plan and the transfer of assets and liabilities to a new plan where Canada Life acquired exclusive rights to the use of surplus within the new plan. [C7, D10-11]
- **Compensation to eligible non-PWU members.** As compensation for agreeing to Canada Life acquiring exclusive surplus rights under the new plan, eligible non-PWU

members would not be paid any surplus from the non-IPWU fund but would instead be assigned a percentage of the IPWU surplus. [D10]

- **Estimate of each IPWU class member's surplus payment.** Each person was provided with an estimate of the surplus payment they would receive (before tax) and advised the amount could be higher or lower. [E2] *(Related arguments regarding this feature of the campaign have been addressed separately under "Appellant's Position – Erred on Expected Surplus Payments vs. 'Fiction' Estimates".)*
- **Non-PWU members consent forms.** The consent forms for non-PWU class members referred only to the transfer to the new plan and made no reference to being asked for their consent for IPWU surplus being paid out to Canada Life. Supposedly the rationale was that nothing in the proposed SSA dismissed the claim of the PWU members to all of the IPWU surplus, and the PWU class members had simply agreed to assign a portion of the IPWU surplus to Canada Life (and through Canada Life to the non-PWU members) in lieu of litigation. [D10]
- **PWU members consent forms.** The PWU member consent forms did agree to surplus being paid to Canada Life but the PWU members were not going to be members of the ongoing plan so they had no financial interest as to whether that portion of the IPWU surplus remained in the ongoing fund or was paid out to Canada Life. [D11]
- **Nondisclosure of speculative investment policy.** The campaign took place in the context that the dollar amount of the estimated surplus that was identified was dependent upon an undisclosed speculative investment policy for the PWU fund.

(Related arguments regarding this non-feature of the campaign have been addressed separately under "Appellant's Position - Erred on 'Fickle Fate' Reasons for Drop in Surplus and the Control of the Parties".)

[March 2011 materials, forms C, D, E and G >> CompDA pg 4-8]

F2. Significance of Drop in IPWU surplus payable to Canada Life

38. **Canada Life would be positioned by the paSSA to benefit exclusively from re-emergence of surplus.** The Motions Judge notes: "unlike the Integration Group they (Canada Life) have a temporally-unlimited ability to recapture the diminishment of the surplus … For Canada Life there is no arbitrary 2014 deadline for recalculating the surplus in light of what might be better economic conditions", where reference to economic conditions would suffice as just a reference to higher interest rates that would allow the temporarily hidden surplus to re-emerge. [Appeal Factum 40, 42, 44, 46(d)], [Reasons 156-157]

F3. Significance of Canada Life Funding Deficits

39. **Deficit funding.** The Appellant argues that the Motions Judge erred ... because "the Motions Judge completely overlooked the fact that Canada Life will bear 100% of the risk of a deficit developing in the Plan leading up to the date of any future surplus distribution" [Appeal Factum 40, 42, 44, 46(e)]. Canada Life's responsibility for deficits is consistent with its responsibility for investment policy and general obligations regarding the pension plan. That same investment policy has hidden a known quantity of Partial Windup (PWU) surplus. There may be fluctuations in the re-emergence of that surplus, but any deficit that occurs

following an annual surplus payment would be expected to be temporary, to not require immediate funding and was never intended to be funded by the IPWU surplus.

40. As per the terms of the paSSA [Appeal Book pg 398(c)(ii)], distributable surplus could be reduced for any special deficit funding assigned to the notionally segregated PWU fund.

41. **Margin of 10%.** The terms of the paSSA include Canada Life retaining a 10% margin from the re-emerging IPWU surplus. If any such margin was applied due to deficit considerations, it should be applied prior to taking account of the threshold and cap provisions proposed for the Objectors' settlement process. [Appeal Book pg 398(c)(i)]

F4. Procedural Irregularities and Communications to the Court and Class Members

42. This section deals with Appeal Factum 40(iii), 42, 44, 47.

43. **Nondisclosures.** Contrary to the view expressed by the appellant, there appear to be a significant number of irregularities without necessarily categorizing them distinctively between procedural and circumstantial fairness. Nondisclosures are an example, including nondisclosures to both the Court and class members regarding: a) the surplus drop prior to the date of the original settlement approval motion, b) the existence and significance of the speculative PWU investment policy and the corresponding asset-liability duration mismatch, c) misleading communications about the reasons for the drop in surplus and the assertions that the drop in surplus was beyond the control of the parties, and d) assertions that the PWU fund was "mostly immunized".

PART V - OTHER ISSUES PER APPEAL FACTUM

G. $15 Million Cap for Subsequent Surplus Distributions and Form of Surplus

44. **Cap on re-emerging surplus is too low.** The Appellant does not dispute that a $15 million cap would be inappropriately low in the context of the expectations for distributable IPWU surplus. Instead the Appellant creates an unwarranted argument that any subsequent surplus distribution is not to be considered a re-emergence of the original partial windup surplus. [Appeal Factum 33, 38(a)]

H. Non-disclosures Regarding Drop in Surplus Prior to Court Approval of SSA

45. The Appellant states that the IPWU surplus estimate of $54 million provided to the Court for the January 27, 2012 approval of the SSA was "the most recent information **available and presented** to the Court" (emphasis added). The Appellant does not state that the June 30, 2012 estimate of $54 million presented to the Court January 27, 2012, was in fact the most recent information available regarding estimated IPWU surplus. [Appeal Factum 13]

46. **Surplus drop prior to Court approval.** The very large drop in surplus measured as at Dec 31, 2011 was primarily a result of the pre-existing duration mismatch and a 58 basis point drop in the yield rates on real return bonds relative to June 30, 2011. Canada Life should have already been aware of: a) the extent of the duration mismatch, b) real return rates had declined significantly after June 30 and had already dropped by 43 basis points by the first week in November and c) the financial effect of individuals not taking commuted values.

    [Jeff Galway correspondence Feb 23, 2012 Appeal Book pg 381-383], [Real Return bond yield rates: http://www.bankofcanada.ca/rates/interest-rates/lookup-bond-yields]

47. **Non-disclosures prior to Court approval.** With regards to the large undisclosed drop in surplus that had already occurred prior to January 27, 2012, there is a lack of evidence and sworn affidavits regarding the timing of internal and external communications within and between the various parties and their advisors prior to the January 27, 2012 Court hearing.
48. **Not arguing SSA null and void.** This document is not arguing that the SSA is null and void and would not support arguments by Canada Life, Class Counsel (e.g. Respondent Factum paragraph 4), or Mr. Mazurek (multiple references but final factum not available) that the SSA can be terminated as a "frustrated" contract, since the circumstance of a huge drop in surplus would have been foreseeable as a result of Canada Life's speculative PWU fund investment policy, and it would also have been foreseeable that other insurers would not be willing to provide insured annuities since it is reasonable to assume that Canada Life had determined prior to 2012 that neither Great West Life nor Canada Life were prepared to convert the pension liabilities into insured annuities. Rather than argue the circumstance of a "frustrated" contract, the parties would seem to have a situation where there is a circumstantial onus on Canada Life to negotiate good faith amendments to the implementation terms for the SSA. Petitioner objectors expressed their view in the March 18, 2013 petition results presented to the Motions Judge that they do not seek cancellation of the original SSA but rather an extended settlement implementation process[CompDA pg 17].

PART VI - MISCELLANEOUS RELATED CONSIDERATIONS

M1. Implications of August 31, 2012 Asset Transfer - FSCO W100-233

49. **August 31, 2012 asset transfer.** As an initial part of the negotiations towards arriving at an amended SSA, PWU assets were transferred from one notionally segregated fund to a different notionally segregated fund. Class members were unaware that such a transfer was taking place and the reasons and implications of such a transfer do not appear to be disclosed in the Appellant's description of the facts. [Appeal Factum 17]

50. **Reason for August 31, 2012 asset transfer.** A Canada Life affidavit stated: "Canada Life is concerned ... if a deficit arises in the Integration PWU prior to the transfer of Integration PWU assets and liabilities to the on-going Plan, that deficit will have to be funded in full by Canada Life prior to the transfer of the Integration PWU assets and liabilities to the on-going Plan", while "any deficit that arises in respect of the on-going Plan ... would not have to be funded by Canada Life immediately, but could be funded over a five-year period starting from the date of the next actuarial valuation." The Motions Judge also noted that reason. [Wallace Robinson CompCap pg 29 paragraphs 15-17], [Reasons 72-73, 107]

51. **FSCO Policy W100-233 (March 10, 2010).** This FSCO policy is referenced in Wallace Robinson affidavit and specifies: "Distribution of Benefits on Partial Wind Up Where Immediate or Deferred Pensions are Not Purchased ... The notional split between the wound up and on-going portions of the pension plan must be maintained until all assets relating the partial wind up have been settled, including a surplus distribution, if any." That provision for

an ongoing notional split of the assets would indicate that the August 31, 2012 transfer did not "finalize" IPWU surplus. **[CompDA pg 26-31, 32-35]**

M2. Canada Life's % Share of IPWU Surplus 43.78% vs. 30.34%

52. **Canada Life assigns 12.44% of Canada Life's 43.78% to the non-PWU class members.** An issue that warrants clarification is why non-PWU class members would be paid a portion of the PWU surplus when a partial windup does not entitle them to such a payment. PWU members are receiving 57.22% of the IPWU surplus and Canada Life has in effect negotiated to take 43.78% of the IPWU surplus, and is assigning 12.44% of that entitlement to the eligible non-PWU members as compensation for Canada Life using the simultaneous windup of the ongoing plan to secure exclusive rights to the use of all of the surplus within the new plan, while not paying any of the non-PWU surplus to the non-PWU members.

M3. Surplus Attributable to Members Taking Commuted Values

53. **Two types of PWU Surplus.** The primary type of PWU surplus is simply the difference between the PWU assets and what the value of the PWU liabilities would be if none of the PWU members were going to take a commuted value. That is the type of surplus that has in effect become hidden by the plan's investment policy. The second type of surplus arises if individuals decide to take the commuted value and the commuted value they would take is less than their share of the pension liability that is used to calculate surplus.

54. **PWU compared to IPA.** Notably, but tangentially, there is a rather stark contrast between how the SSA will affect PWU members who have yet to receive their commuted values, compared to how it will affect the IPA group members who already received their commuted values. The latter would get back most of the funds that they forfeited when they took a commuted value, while the former must share their average forfeited amounts with the thousands of other PWU members who decided not to take a commuted value. For both the PWU and IPA groups, Canada Life takes its share of the funds forfeited when individuals take a commuted value.
55. **Commuted value basis.** Mr. Mazurek is expected to address what may become FSCO-related concerns about the contradictions between a) using a punitive 2005 basis for determining commuted values but b) not providing the commuted values and determining distributable PWU surplus until some future date.
56. **Redacted.** Noting Sept 22 2013 request to Class Counsel to remove references to controversial "new evidence" in Respondent Factum that lacks motion and full disclosures.

M4. Asset Liability Duration Mismatch and Surplus Drop - the Basics

57. **Basic financial principles.** The references herein to asset and liability duration mismatch and the implied effect of interest rate changes on PWU surplus, involves some basic financial principles and terminology.
58. **Duration of assets and liabilities.** Borrowing the Wikipedia definition of "bond duration": "In finance, the duration of a financial asset that consists of fixed cash flows, for example a

bond (a series of interest payments and a lump sum at maturity), is the weighted average of the times until those fixed cash flows are received." The same concept applies to the duration of an organization's pension liabilities which can be viewed as nothing more than an expected series of future annuity payments, although the payment stream is somewhat variable as a result of mortality, inflation and even commuted values. The duration of a bond would be shorter than the duration-to-maturity of a bond, but the longer the duration-to-maturity the longer the duration.

59. **Duration mismatch of assets and liabilities, or duration gap.** Borrowing the Wikipedia definition of "duration gap": "The duration gap is a financial and accounting term and is typically used by banks, pension funds, or other financial institutions to measure their risk due to changes in the interest rate. This is one of the mismatches that can occur and are known as asset liability mismatches. Another way to define Duration Gap is: it is the difference in the price sensitivity of interest-yielding assets and the price sensitivity of liabilities (of the organization) to a change in market interest rates (yields). The duration gap measures how well matched are the timings of cash inflows (from assets) and cash outflows (from liabilities)."

60. **Effect of market interest rates on changes in PWU surplus.** For illustrative simplicity, let us assume the PWU pension liabilities are predominantly backed up by a portfolio of only cash and fixed-yield bonds. Surplus is calculated as the difference in the present value of the assets and the liabilities. A decrease in interest rates will increase the value of both assets and liabilities, but the effect on surplus is uncertain because it depends on the relative changes in the values of the assets and liabilities. In other words, for all intents and purposes,

the effect of interest rate changes on surplus is completely dependent on the duration gap or duration mismatch, which in turn is primarily dependent on the duration of the assets.

61. **Effect of shorter-duration assets on changes in PWU surplus.** The shorter the duration of the PWU assets relative to the duration of the pension liabilities, the greater the notional "loss" (i.e. drop in surplus) that would result from a drop in interest rates, simply because the shorter the duration of the assets the less the assets will increase in value when interest rates decrease. As illustrated below, the loss effect can be very dramatic because the duration of a bond dramatically leverages the effect of a change in interest rates on the value of the bond, to the extreme that the value of a zero-duration-bond (i.e. cash) is unaffected by any change in interest rates while the value of the liabilities continue to be impacted (i.e. increased) by the decrease in interest rates.

62. **Simplified illustration.** The simplest way to illustrate the financial magnitude effect of asset duration is to consider what is called a strip bond where there are no annual bond interest payments but only a future maturity amount. In fact strip bonds are more appropriate investments for the PWU fund because of the very long term duration of the PWUI pension liabilities since most of the PWU members are many years away from retirement. A strip bond with a remaining duration to maturity of 30 years has a duration of 30 years while a regular 30 year bond with a duration to maturity of 30 years would have a much shorter duration because of the earlier timing of all the interest payments. Calculating the present value of a strip bond is very simple because there is only one future payment that needs to be present valued using a discount interest rate.

63. **Assets supporting the PWU pension liabilities**. If instead of being invested in shorter duration bonds and cash, the PWU assets supporting the liabilities were held in the form of, say, 30 year strip bonds in order to more closely match to the very long duration of the PWU pension liabilities, then decreasing the discount interest rate from, say, 3.5% to 2.5% would have resulted in an increase in those asset values of 34% (with a correspondingly beneficial effect on surplus), but if the funds were instead invested in a strip with a duration to maturity of only 2 years the increase in value would be only 2% rather than 34% and there would have been a correspondingly adverse financial effect.

64. **Assets supporting PWU surplus.** Assets that were earmarked as supporting PWU surplus, as distinct from assets held to fund the liabilities, might reasonably be held in the form of cash and short term bonds to avoid the values being affected by changes in interest rates. The surplus would have thereby been earmarked and protected, with the understanding that Canada Life was responsible for investing the assets that supported the liabilities and any deficits arising from those investment actions should be the responsibility of Canada Life rather than Canada Life continuing to draw upon the surplus that had been earmarked as at the windup date and held in the form of cash and short term bonds.

M5. Role of 'CLPENS Executive' Advocating for paSSA

65. **Role of CLPENS individuals.** [Appeal Factum 10, 15] While acknowledging the personal contributions of the individuals involved in the original SSA deliberations, the significance of the support of the 'CLPENS Executive' for the proposed amended SSA should not be

overstated, taking into account: a) issues related to not disclosing the control of the parties over the drop in surplus, b) the extent to which those individuals were restricted from or simply declined to communicate with CLPENS members, c) the individuals have not been accountable to CLPENS members and have not held elected office since Nov 2010 or earlier, and d) the undertaking that "CLPENS cannot bind the members of the group to a settlement without a vote and will not attempt to do so", where that undertaking should apply equally to their advocating for proposed amendments that are almost unanimously rejected by informed PWU members and deemed by the Motions Judge to be fundamentally unfair. http://www.clpens.com/FAQ.htm

M6. Role of Mercer Communicating on Reasons for Drop in Surplus

66. **Mistaken references to Mercer's role.** The Appellant invites the mistaken interpretation that the parties had no control over the drop in surplus and that Mercer provided a professional assessment of "the most significant reasons" for the drop in surplus, where those reasons do not disclose the dominant significance of the PWU investment policy and the asset-liability duration mismatch [Appeal Factum 14].

67. Canada Life actuaries, who would have reasons to not make full disclosure, appeared to be the authors for the identification of "the most significant reasons", and the assertions that the parties had no control over the drop in surplus. A September 20, 2012 affidavit by Koskie Minsky mistakenly references a "Mercer memorandum" attached to Jeff Galway's February 23, 2012 disclosure of a large drop in surplus and refers to "the most significant reasons

cited by Mercer for the reduction in surplus". [~~Exhibits pg 47~~ CompDA 9-12, paragraphs 3 and 4]. However, Jeff Galway's February 23, 2012 letter clearly states that the document, containing the assertions, was prepared by Canada Life and there appears to be no evidence that Mercer actuaries authored "the most significant reasons". [Appeal Book pg 381-383].

68. **Mercer surplus movement report.** Mercer does produce a standard surplus movement report but that report is not for the purpose of explaining <u>why</u> the increase in asset values was not much more in line with the increase in liability values. [e.g. ~~Exhibits 363~~ CompDA pg13]

M7. Terms of paSSA - Canada Life's Intention to Purchase Annuities for Some Partial Windup Members But Not Others

69. The significance of this issue is somewhat unclear, but subsequent to taking the position that insured annuities would not be purchased for PWU members, the terms of the paSSA anticipate that Canada Life might selectively purchase annuities for some PWU members but not others, and might do so in a manner that would draw from IPWU surplus during the settlement implementation period. [Appeal Factum 21], [Appeal Book pg 396, paragraph 9]

M8. Motions Judge's Terminology of 'Stark Reality' Settlement and 'Moral Duty'

70. **"Moral Duty" and "Stark Reality"** - As noted by the Appellant, the terms "Moral Duty" and "Stark Reality" are problematic because they appear to create some potential connotation confusion for the various readers despite the clarifications provided.

[Appeal Factum 46(c)], [Appeal Factum 29, 40, 44-46], [Reasons 149, 150], [Appeal Factum 29, 40, 44-46], [Reasons 18, 19, 140, 142-145, 150, 152, 161 and 174]

71. Preferable terminology would seem to be, respectively: a) Circumstantial Onus and b) unamended SSA (USSA), or perhaps temporarily-impaired SSA (TISSA) to reflect the understanding that circumstances such as the results of the PWU fund investment policies have resulted in the need for a good faith amendment to establish a more appropriate settlement implementation process that has a more reasonable likelihood that the parties would share in distributable surplus consistent with the original intent of the agreement.

PART VII – COSTS

72. The Objector-Intervenor respectfully notes that the case management Judge has identified that no costs would be awarded for or against.

PART VIII – REQUESTS / RECOMMENDATIONS TO THE COURT

73. The Objector-Intervenor respectfully notes that the case management Judge has advised that the period of time allocated for an oral presentation would be fifteen minutes in consideration of these matters, subject to the discretion of the Justices if less time was considered appropriate to the circumstances.

74. ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 27th day of September, 2013.

_____

Dan Anderson, September 27, 2013

Unrepresented Objector Class Member

DAVID KIDD, ALEXANDER HARVEY and JEAN PAUL MARENTETTE Plaintiffs (Respondents)	and	THE CANADA LIFE ASSURANCE COMPANY, et al Defendants (Appellants)

Court of Appeal File No. C56991

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at TORONTO

OBJECTOR-INTERVENOR (DA) FACTUM

Dan Anderson, Objector-Intervenor
(without legal representation)

Dan Anderson
1284 Lewisham Drive
Mississauga, Ontario
L5J 3P7
905-823-4914
dan.anderson@sympatico.ca