CITATION: Kidd v Canada Life, 2012 ONSC 740
COURT FILE NO.: 05-CV-287556CP
DATE: February 6, 2012

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

David Kidd, Alexander Harvey, Jean Paul Marentette, Garry C.Yip, Louie Nuspl, Susan Henderson, and Lin Yeomans

Plaintiffs

- and -

The Canada Life Assurance Company, A.P. Symons, D. Allen Loney and James R. Grant

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

- M. Zigler, C. Godkewitsch, D.B. Williams for the Plaintiffs David Kidd, Alexander Harvey, Jean Paul Marentette, Susan Henderson, and Lin Yeomans
- D. Brown and L. Sokolov for the Plaintiffs Garry C. Yip and Louie Nuspl
- J. Galway for the Defendant The Canada Life Assurance Company
- J. Field for the Defendants A.P. Symons, D. Allen Loney and James R. Grant

HEARING DATE: January 27, 2012

REASONS FOR DECISION

PERELL, J.

A. INTRODUCTION

[1] In 2005, David Kidd, Alexander Harvey, and Jean Paul Marentette brought a proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992 against Canada Life Assurance Company and against A.P. Symons, D. Allen Loney, and James R. Grant, who are the trustees of the Canada Life Canadian Employees' Pension Plan. Messrs. Kidd, Harvey, and Marentette were proposed as Representative Plaintiffs, and since 2005, they were joined by Garry C. Yip, Louie Nuspl, Susan Henderson, and Lin Yeomans as additional Representative Plaintiffs.

[2] By order dated October 26, 2011, I certified the action as a class action. See *Kidd v Canada Life*, 2011 ONSC 6324.

[3] The law firms of Koskie Minsky LLP, Harrison Pensa LLP, and Sack Goldblatt Mitchell LLP, are Class Counsel.

[4] The Plaintiffs make three major claims. One claim concerns the ownership of the surplus assets of the Pension Plan. The Plaintiffs plead that amendments to the Pension Plan concerning the reversion of surplus assets to Canada Life on Plan and Fund termination are unlawful and are of no force or effect. The second claim concerns the payment out of surplus funds to certain groups of employees whose participation in the Pension Plan was terminated and who have a claim for a partial winding-up of the Pension Plan. The third claim concerns negating Canada Life's alleged entitlement to be reimbursed for expenses on behalf of the Pension Plan. The Plaintiffs plead that Canada Life should restore monies, estimated to be in excess of $41 million.

[5] After many years of negotiating, the parties reached a settlement known as the Surplus Settlement Agreement. Untypically and perhaps without precedent, the proposed Class Members have voted for or against the settlement. They now move for approval of the settlement under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. Approvals under pension legislation will be sought in other proceedings.

[6] As a part of the settlement, Canada Life also seeks an order approving a variation of trust pursuant to the *Variation of Trusts Act*, R.S.O. 1990, c. V.1 and the rule from *Saunders v. Vautier*, (1841), Cr. & Ph. 240, 41 E.R. 482.

[7] In one motion, Class Counsel Koskie Minsky LLP and Harrison Pensa LLP move for an order approving the retainer agreement and an order approving the fees of Class Counsel as fair and reasonable. With the support of the class representatives, Class Counsel seek court approval of a fee request in the amount of $4,667,845.00 plus applicable taxes and disbursements of $60,601.84.

[8] In another motion, Class Counsel Sack Goldblatt Mitchell LLP requests an Order: (a) approving the payment of Class Counsel's fees, taxes and disbursements in the amount of $119,911.47 for legal services to the Adason Representative Plaintiffs to January 27, 2012; and (b) permitting Class Counsel to be paid for future legal work in connection with the administration of the settlement on an hourly-rated basis, up to an amount of $105,100.00.

B. EVIDENTIARY BACKGROUND

[9] The settlement, variation of trust, and fee approval motions were supported by the following affidavit evidence:

- the affidavit of Alexander Harvey, a representative plaintiff, and a retired employee of Canada Life and a former member of the Pension Plan
- the affidavits of Susan Henderson, a representative plaintiff, a former employee of Indago Capital Management Inc., and a former member of the Pension Plan
- the affidavits of David Kidd, a representative plaintiff, and a retired employee of Canada Life and a former member of the Pension Plan
- the affidavit of Jean Paul Marentette, a representative plaintiff, a former employee of Canada Life and a former member of the Pension Plan
- the affidavit of Louie Nuspl, a representative plaintiff, a former employee of Adason Properties Limited and a former member of the Pension Plan
- the affidavits of Lin Yeomans, a representative plaintiff, a formal employee of Pelican Food Services Limited, and a former member of the Pension Plan
- the affidavits of Garry C. Yip, a representative plaintiff, a former employee of Adason Properties Limited, and a former member of the Pension Plan
- the affidavit of Wallace B. Robinson, Assistant Vice-President, Pension Benefits at Canada Life
- the affidavit of Ari Kaplan, a partner of Koskie Minsky LLP
- the affidavits of Jonathan Foreman, a partner of Harrison Pensa LLP
- the affidavits of Darrel Brown, a partner of Sack Goldblatt Mitchell LLP
- the affidavit of Uma Ratnam, a clerk at the Communications Department at Koskie Minksy LLP
- the affidavit of Anthony Guidon, a lawyer with Koskie Minsky LLP.

C. FACTUAL BACKGROUND

1. Pension Plan Agreements

[10] The original trust agreement for a Pension Plan for Canada Life employees was established on December 31, 1964. Canada Life is the sponsor and administrator of the Pension Plan. The Plan is funded through a trust agreement between Canada Life and the Trustees of the Fund. The individually-named defendants, A.P. Symons, D. Allen Loney and James R. Grant, are the current Trustees of the Fund.

[11] Article 8(b) of the 1964 Trust Agreement prohibited any amendments by the Trustees that would result in the return of any portion of the Fund to Canada Life. However, article 10 (c) of the 1964 Trust Agreement stated that if the Trust Fund was ever dissolved, any monies remaining in the Fund after paying for all the annuities and deferred annuities were to be returned to Canada Life. But, effective 1965, article 10 (c) was amended to preclude the reversion of trust assets upon dissolution of the fund.

[12] In 1989, a consolidated and restated Trust Agreement precluded any amendment to the Trust Agreement that would result in the return of any portion of the Fund to Canada Life. Nevertheless, in or about December 31, 1993, changes were made to the 1989 Trust Agreement. Article 8 was revised under the 1993 Trust Agreement to read:

> The Company may at any time, by instrument in writing and with notice to the Trustees, alter or modify any or all of the provisions of the Trust Deed, provided that, no alteration or modification shall increase the Clause 4 Duties, or the liabilities of the Trustees, without their prior written consent.

[13] Despite this change, Article 10 was not amended and continued to provide that should the Plan be dissolved, the Trustees are to use any surplus to purchase additional annuities for employees and pensioners.

[14] Effective January 1, 1997, the Plan was merged with The Canada Life Assurance Company Trust Canadian Staff Pension Fund (1958) and The Canada Life Assurance Company Trust Canadian Agents' Pension Fund. A single "consolidated" Plan was created, and the associated funds were merged into a single fund. The 1997 Plan contained new provisions relating to surplus assets in the Pension Fund. Sections 4.02(c) and 17.06 state:

> *Application of Surplus Assets*
>
> 4.02 (c) In the event there are Surplus Assets in the Pension Fund, according to the actuarial valuation report referred to in paragraph (a) above, the Company may, at its discretion, use such Surplus Assets or a portion thereof to offset the amount of Company contributions referred to in paragraph (a) above.
>
> *Surplus Assets*
>
> 17.06 If, after payment of all accrued benefits under the Plan as described in Section 5 (Retirement Benefits), Section 6 (Indexation of Pensions), Section 8 (Benefits on Termination of Employment), Section 9 (Pre-Retirement Death Benefits) and Section 10 (Benefits on Disability) to Members or Field Management Members, their respective Spouses, Beneficiaries and estates and payment of all expenses has been made, there remain Surplus Assets in the Pension Fund, such Surplus Assets shall revert to the Company or be used as the Company may direct, subject to the provisions of the Pension Benefits Act and the Income Tax Act.

[15] Article 10 of the 1997 Trust Agreement, however, still required that on dissolution or wind-up, any additional funds that are not required to pay for the annuities

and deferred annuities accrued under the Plan, are to be used to increase the annuities or deferred annuities of the Plan members.

[16] The Trust Agreement was again restated effective August 7, 2002 (the "2002 Trust Agreement"), and article 13 provides:

> 13. If the Plan is discontinued, in whole or in part, the assets of the Plan shall be distributed in accordance with the directions of the person who is the Plan Administrator for the purposes of the *Pension Benefits Act* (Ontario) provided that such Plan Administrator certifies to the Trustees that such distributions are in accordance with the terms of the Plan and any applicable approvals from the federal and/or provincial pension regulatory authorities that may be required under applicable federal and/or provincial pension legislation, regulations, policies and administrative practices.

[17] The most recent restated Plan text effective January 1, 2003, contains identical provisions with respect to reversion of surplus assets as contained in article 17.06 of the 1997 Plan.

[18] The Plaintiffs claimed that the 1997 amendments and other amendments relating to the possibility of reversion of surplus assets to Canada Life on Plan and Fund termination are unlawful, and of no force or effect.

2. Plan Expenses

[19] The 1964 Trust Agreement provided in article 7 that Canada Life shall pay all costs and expenses in connection with the Fund. At a date unknown to the Plaintiffs, between 1964 and 1988, expenses related to the investment and administration of the Fund began to be charged to the Fund.

[20] Under articles 4 and 5 of the 1993 Trust Agreement, the responsibility of payment for costs and expenses changed. These provisions required the Trustees to reimburse the Company for charges incurred in the operation of the Plan and the Fund.

[21] The 2002 Trust Agreement requires at Article 8(i) that the Trustees reimburse the Plan administrator for:

> any reasonable charges, fees, taxes and other expenses, including without limitation any internal expenses of the Plan Administrator and the usual reasonable expenses of any agents of the Plan Administrator incurred in the operation, review, design, amendment and administration of the Plan and investment of the Fund....

[22] The most recent restated Plan text is the 2003 Plan; it contains the following provision:

> *Plan Expenses*
>
> 14.05 All reasonable charges, fees, taxes and other expenses, including, without limitation, any internal expenses of the Plan Administrator and the usual and reasonable expenses of any

> agents of the Plan Administrator, incurred in the operation, review, design, amendment and administration of the Plan and the Trust Agreement or the review, administration, use and investment of the Pension Fund, including Surplus Assets, shall be paid from the Pension Fund unless paid directly by the Company. The Trustee shall, if requested, by the Company, reimburse the Company out of the Pension Fund for any such charges, fees, taxes and other expenses which the Company pays directly.

[23] Documents filed with the Financial Services Commission of Ontario disclose the following summary of total costs and expenses charged to the Fund since 1987:

Year	*Total Costs and Expenses*
1987	$2,987,000 (partial amount only)
1988	$3,370,000 (partial amount only)
1989	$4,529,000 (partial amount only)
1990	not available
1991	not available
1992	not available
1993	not available
1994	$2,542,000
1995	$1,734,000
1996	$2,055,000
1997	$2,345,000
1998	$2,342,000
1999	$3,692,000
2000	$4,937,000
2001	$4,344,000
2002	$3,356,000
2003	$2,848,000

[24] The Plaintiffs pleaded that the Plan Expense Amendments were and are contrary to the 1964 and 1989 Trust Agreements, which preclude any portion of the Fund being returned to the Company. The Plaintiffs alleged that the Plan Expense Amendments constituted a partial revocation and breach of trust.

3. Partial Wind-Up Claims

[25] Indago Capital Management Inc., a subsidiary of the Company, whose employees participated in the Plan, merged with Laketon Investment Management Ltd., effective February 26, 1999. As a result of the merger, 14 employees of Indago were terminated from employment with the Company.

[26] To date, no partial wind-up of the Plan with respect to the termination of the 14 employees of Indago, has been declared by the Company.

[27] Sue Henderson is a former member of the Pension Plan, and she worked for Indago between April 4, 1998 and March 3, 1999. She is the Representative Plaintiff for the Indago Subclass that has a claim for a partial winding-up.

[28] Between November 1, 1999 and February 28, 2001, 37 employees of Adason Properties Limited, a subsidiary of the Company) were terminated. The Company has not declared a partial wind-up of the Plan in relation to this termination of employees of Adason to date.

[29] Garry Yip and Louie Nuspl are both former members of the Pension Plan. Mr. Yip was employed by Adason between February 18, 1985 and February 9, 2001. Mr. Nuspl was employed by Adason between January 27, 1986 and February 9, 2001. Messrs. Yip and Nuspl are the Representative Plaintiffs for the Adason Subclass that has a claim for a partial winding-up.

[30] Employees of Pelican Food Services Limited, a subsidiary of the Company, participated in the Plan. In January of 2001, Canada Life decided to outsource food services, and as a result, 38 employees of Pelican were terminated from employment. No partial wind-up of the Plan has been declared in relation to the termination of former Pelican employees.

[31] Lin Yeomans is a former member of the Pension Plan, and was employed by Pelican between November 24, 1984 and December 31, 2000. Mr. Yeomans and two other former employees of Pelican met with lawyers at Koskie Minsky LLP on November 26, 2007 and subsequently retained Koskie Minsky LLP and Harrison Pensa LLP to seek a partial wind-up of the Plan in respect of former Plan members whose employment with Pelican was terminated as a result of the outsourcing of Pelican's food services. Mr. Yeomans is the Representative Plaintiff for the Pelican Subclass.

[32] A partial wind-up of the Plan within the meaning of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 was declared as of July 10, 2003 by Canada Life in relation to members of the Plan who were terminated from, retired or resigned voluntarily from the Company as a result of the integration with The Great-West Life Assurance Company ("The Integration Partial Wind-up").

[33] Canada Life's Partial Wind-up Report discloses an estimated partial wind-up surplus of $92,994,000 attributable to the Integration Partial Wind-Up as of June 30, 2005. The Report, however, does not make any proposal to the Integration Partial Wind-Up participants concerning surplus sharing.

[34] Messrs. Kidd, Harvey, and Marentette are part of the group of employees who were affected by the partial wind-up of the Plan. They are also members of Canada Life Canadian Pension Plan Members' Rights Group ("CLPENS") which is a voluntary, unincorporated association of members and former members of the Pension Plan.

[35] The Plaintiffs plead that Plan members affected by the Integration Partial Wind-Up are entitled to a distribution of surplus, and the Plaintiffs sought declarations

ascertaining the amount of surplus required to be distributed. Messrs. Kidd, Harvey, and Marentette are the Representative Plaintiffs for the Partial Wind-Up Subclass.

4. History of the Class Proceeding and Settlement Negotiations

[36] Each of the Representative Plaintiffs is a member or former member of the Plan. They are also members of Canada Life Canadian Pension Plan Members' Rights Group ("CLPENS") which is a voluntary, unincorporated association of members and former members of the Plan including active employees, pensioners, deferred vested pension member, and former employees terminated as a result of various partial wind-ups

[37] Mr. Kidd is a retired employee of Canada Life, whose pension began on January 31, 2005. Mr. Harvey is a retired employee of Canada Life, whose pension began on September 30, 2003.

[38] In September 2003, Messrs. Kidd and Harvey received a letter and a notice from Canada Life about a partial wind-up of the pension plan with respect to employees who were terminated by Canada Life or retired or resigned voluntarily between July 10, 2003 and the completion of the integration between Great-West Life/London Life and Canada Life, which was expected to be a two-year period. Neither the letter nor the Notice addressed the surplus assets in the Plan, and Mr. Kidd and other members became concerned about the rights of Plan members to surplus assets.

[39] Mr. Harvey was concerned about whether members affected by the Partial Wind-Up would receive surplus assets to which they may be entitled. He joined CLPENS and was elected to the Executive. Mr. Kidd also joined CLPENS.

[40] The Representative Plaintiffs Kidd and Harvey retained Koskie Minsky LLP and Harrison Pensa LLP for their advice and services in relation to the Partial Wind- up of the Plan and about the issue of plan expenses being charged to the Fund.

[41] Mr. Kidd commenced a class action by Notice of Action issued on April 12, 2005, and filed on May 11, 2005.

[42] Mr. Marentette commenced a similar action by Statement of Claim issued at the Ontario Superior Court of Justice on February 3, 2005 under Court File No. 05-CV-283395CP. He discontinued his action and was added as a Plaintiff to Mr. Kidd's action.

[43] This action was commenced after CLPENS had filed a complaint with the Ontario pension regulator. The complaint led to an investigation by the Financial Services Commission of Ontario, which investigation was suspended, pending the resolution of the class proceeding.

[44] The Plaintiffs filed material supporting a motion for certification in October, 2005. The motion for certification was scheduled to be heard in February, 2006, but was adjourned pending settlement discussions among the parties.

[45] In April 2007, the parties attended a two-day mediation facilitated by Justice Winkler. The mediation resulted in an agreement on the framework for a potential settlement. On November 9, 2007, after continued negotiations, the parties signed a Memorandum of Understanding.

[46] Between 2008 and 2010, the parties continued their negotiations towards a means for settling the proceeding. During these negotiations, the Indago, Pelican, and Adason Partial Wind-Ups claims were added to the agenda of matters to be settled.

[47] The negotiations were arms-length and adversarial. The parties were each represented by experienced legal counsel and took advice from their own independent actuarial advisors.

[48] The negotiations culminated in a Surplus Settlement Agreement. The Agreement was conditional on obtaining certain levels of consent from past and present Plan members.

[49] The Class definition, which has been agreed upon between the parties in the Surplus Settlement Agreement, is composed of the following main groups: (a) the four Partial Wind-Up Subclasses (Integration, Indago, Adason, and Pelican); and (b) all active Plan members as of June 30, 2005, plus any new members up to the date of certification as a class proceeding; and (c) deferred/vested Plan members and pensioners (or their surviving spouses) as at April 12, 2005, who are not part of the active Plan members or included in one of the Partial Wind-Up Subclasses.

[50] The class definition under the Surplus Settlement Agreement and under the court's certification order is as follows:

> (a) all persons, wherever resident, who are or were former members under the Canada Life Canadian Employees Pension Plan (the "Plan") and who were included in the partial wind-up of the Plan declared as at June 30, 2005 (the "Integration Partial Wind-Up") together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died (the "Integration Partial Wind-Up Subclass");
>
> (b) all persons, wherever resident, who are or were former members under the Plan who were employed by Indago Capital Management Inc. and whose employment ceased following (and as a result of) a merger of that company with Laketon Investment Management Ltd. on February 26, 1999 together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died (the "Indago Subclass");

(c) all persons, wherever resident, who are or were former members under the Plan who were formerly employed by Adason Properties Limited and who were notified of their termination of employment between November 1, 1999 and February 28, 2001 together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died (the "Adason Subclass");

(d) all persons, wherever resident, who are or were former members under the Plan who were employed by Pelican Food Services Limited and whose employment with Pelican Food Services Limited ceased as a result of the outsourcing in January 2001 of that company's operations by Canada Life together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died (the "Pelican Subclass");

(e) all persons, wherever resident, who are not included in subparagraphs (a) to (d) above and

(i) are or were active members of the Plan at any time between June 30, 2005 and the date of this order; or

(ii) were inactive members of the Plan on April 12, 2005; or

(iii) were persons otherwise entitled to benefits under the Plan on April 12, 2005;

together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died; and

(f). all persons, wherever resident, who were former members previously entitled to benefits or other payments under the Plan and who would have been included in the partial wind-up of the Plan declared June 30, 2005 (and therefore would have been part of the Integration Partial Wind-Up Subclass) but for the fact that their benefits under the Plan were governed by the laws of Québec, which at the relevant time did not recognize partial pension plan wind-ups in its pension legislation and who were not inactive members of the Plan on April 12, 2005, together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died.

[51] In March 2011, a detailed information package was sent to all persons included under the Surplus Settlement Agreement.

[52] Following mailing of the Information Packages, a total of 15 meetings were held in cities across Canada (Vancouver, Calgary, Regina, Toronto, London, Montreal and Halifax) to describe the Surplus Settlement Agreement and to provide an opportunity to proposed Class Members to ask questions. At each of the meetings, presentations were made by Canada Life, a CLPENS representative, and Mr. Kidd's counsel. In addition, there were question and answer sessions, where Canada Life representatives were absent from the room.

[53] There were also meetings held with active employees of Canada Life to respond to some of their concerns, on May 17, 18, and 19, 2011, in Regina, London, and Toronto respectively. At these meetings, Canada Life made a presentation, followed by a question and answer session in the absence of the Canada Life representatives.

[54] Based on the high levels of consent to the terms of the Surplus Settlement Agreement, the parties moved for certification of the action, which was granted.

[55] Under the certification order, the common issues are as follows:

> (a) Do the Plan and the Trust permit any Plan Expenses to be paid out of, charged to or reimbursed from the Fund?
>
> (b) Have Plan Expenses been invalidly paid from Fund assets? If so,
>
> > (i) what is the quantum of the Plan Expenses invalidly paid from the Fund assets?
> >
> > (ii) should all or any portion of the amount of such expenses be repaid by Canada Life to the Fund or to Class members?
> >
> > (iii) should the amount of any such expenses to be repaid to the Fund include interest, and if so how should such interest be calculated?
>
> (c) Should any injunctive relief in respect of the payment of Plan Expenses from the Fund be granted? If so, on what terms?
>
> (d) Did any predecessor to the Plan, and any trusts thereunder, permit the costs and expenses of administering such predecessor plan and the pension fund held in respect of such predecessor plan to be paid out of, charged to or reimbursed from the pension fund held in respect of such predecessor plan? If not, what if any relief should be granted?
>
> (e) Do the Plan and the Trust permit the Plan to be merged in whole or in part with another pension plan?
>
> (f) Do the Plan and the Trust permit the Fund to be merged with or transferred in whole or in part to the fund of any other pension plan?
>
> (g) Has Canada Life improperly taken any contribution holidays? If so,
>
> > (i) what is the quantum of the contribution holidays improperly taken?
> >
> > (ii) should all or any portion of the amount of such contribution holidays be paid by Canada Life to the Fund?
> >
> > (iii) should the amount of any such contribution holidays to be paid to the Fund include interest, and if so how should such interest be calculated?
>
> (h) Do the Plan and the Trust permit the Plan to be amended to include new classes of members?
>
> (i) Has Canada Life improperly funded benefit enhancements under the Plan from Fund assets including surplus? If so:

(i) what is the quantum of such benefit enhancements improperly funded?

(ii) should any amount be paid by Canada Life to the Fund in respect of such benefit enhancements?

(iii) should any such amount to be paid to the Fund include interest, and if so how should such interest be calculated?

[56] Under the certification order, for the Integration Partial Wind-Up Subclass, the common issues are as follows:

(a) Is the Integration Partial Wind-Up Subclass entitled to any portion of the Integration PWU Surplus?

(b) If so, how much is required to be distributed to the Integration Partial Wind-Up Subclass?

[57] Under the certification order, for the Indago Subclass, the common issues are as follows:

(a) Is the Indago Subclass entitled to any portion of any surplus in the Fund allocable to any partial wind-up of the Plan that may be declared as a result of the events described in paragraph 2(b) above?

(b) If so, how much is required to be distributed to the Indago Subclass?

[58] Under the certification order, for the Adason Subclass, the common issues are as follows:

(a) Is the Adason Subclass entitled to any portion of any surplus in the Fund allocable to any partial wind-up of the Plan that may be declared as a result of the events described in paragraph 2(c) above?

(b) If so, how much is required to be distributed to the Adason Subclass?

[59] Under the certification order, for the Pelican Subclass, the common issues are as follows:

(a) Is the Pelican Subclass entitled to any portion of any surplus in the Fund allocable to any partial wind-up of the Plan that may be declared as a result of the events described in paragraph 2(d) above?

(b) If so, how much is required to be distributed to the Pelican Subclass?

[60] The parties now jointly move for approval of the settlement of the class proceeding.

[61] Assuming court approval, there will be a regulatory approvals sought from the Financial Services Commission of Ontario to implement the settlement.

5. Retainer Agreements

[62] Mr. Marentette retained Harrison Pensa LLP and Koskie Minksy LLP on a contingency fee basis to represent him and other class members. He signed a Retainer Agreement. Messrs. Kidd, Harvey, Mr. Yeomans and Ms. Henderson, signed identical retainer agreements.

[63] The agreements provide that in the event of success, Class Counsel may apply to the court for approval of a multiplier of 3.0. Commencing one year after the execution of the retainer, an additional multiplier of 0.01 would be applied for each month until judgment or settlement up to a maximum multiplier of 3.5 and under no circumstances can legal fees exceed 25% of the total amount recovered.

[64] Notwithstanding the Retainer Agreement, Harrison Pensa LLP and Koskie Minksy LLP are seeking a multiplier of approximately 2.5. This produces a claim of $4,667,845. This amount is less than 10% of the value of the settlement on a net basis after payment of all expenses. They are also seeking payment for post-settlement work at an hourly rate without multiplier.

[65] The Representative Plaintiffs support Class Counsel's request for approval of the Retainer Agreements and of the counsel fee.

6. Legal Expenses

[66] As of December 2011, Canada Life's actual legal fees and disbursements in defending the litigation and in negotiating and implementing the settlement total $6,256,841. Canada Life has also incurred other expenses totaling $947,600.21. Canada Life estimates that it will incur further legal fees and other expenses in order to complete the settlement in the range of $1.1 million to $1.35 million.

[67] Koskie MinskyLLP, the lawyers with primary responsibility for the class action have docketed 1,789.9 hours, valued at $892,771.50 and other lawyers, students, and clerks docketed 2,646.7 hours, valued at $430,539.50. For the Indago and Pelican partial wind-up, there are docketed hours of 75.9 hours, valued at $23,128. Disbursements and applicable taxes total $60,601.84.

[68] The Representative Plaintiffs of the Adason Sub-Class and their Class Counsel Sack Goldblatt Mitchell LLP joined the negotiations with Canada Life in 2007. Garry C. Yip, a Representative Plaintiff of the Adason Sub-Class, entered into a written Retainer Agreement with Class Counsel on behalf of the Adason Group.

[69] As of January 27, 2012, Sack Goldblatt Mitchell LLP have fees and disbursements totalling $119,911.47 and they estimate that fees of approximately

$105,000 will be charged for the administration of the settlement and for legal services associated with the proceedings for regulatory approvals.

D. THE SURPLUS SETTLEMENT AGREEMENT

1. Terms of the Surplus Settlement Agreement

[70] The Surplus Settlement Agreement involves five key elements: (1) the assets of the Pension Plan will be transferred to a new Pension Plan; (2) administrative expenses will be paid from the assets of the new Pension Plan; (3) eligible active Plan members will be able to suspend their contributions to the Plan for two years; (4) former Plan members affected by a partial wind-up and other Plan members not included in a partial wind-up (deferred/vested members and pensioners) will each receive a share of the surplus assets related to the partial wind-ups of the Plan, estimated to be worth $49.4 million; and (5) Canada Life will also receive a share of the surplus related to the partial wind-ups, estimated to be worth $21.5 million.

[71] The Plan members who will participate in the Surplus Settlement Agreement, are as follows: (a) Plan Members included in the Integration Partial Winding-Up (2149); (b) Plan Members included in the Indago Partial Winding-Up (15); (c) Plan Members included in the Adason Partial Winding-Up (37); (d) Plan Members included in the Pelican Partial Winding-Up (38); (e) deferred/vested members of the Plan as of April 12, 2005 who are not part of the groups described above (452); (f) Members of the Plan in receipt of a monthly pension from the Plan as of April 12, 2005, or the surviving spouse of a member if the member has died and the spouse is receiving a pension from the Plan on that date, who are not part of the groups described in (a) to (d) above (826); (g) all active members of the Plan as at June 30, 2005, plus any new Plan members from that date up to date of certification as a class proceeding (1682); and (h) Former Plan members employed in Québec who would have been included in the Integration Partial Winding-Up but for their employment in Québec (29).

[72] In addition, Canada Life recently determined that 140 former Canada Life employees with defined contribution account balances under the Plan (but no entitlement to defined benefits) as at April 12, 2005 were inadvertently overlooked when information packages describing the proposed settlement were mailed to Class members in March of 2011. In accordance with the Order of this court dated January 10, 2012, information packages were sent to these members on or about January 16, 2012.

[73] The essential terms of the Surplus Settlement Agreement are as follows:

- Canada Life declares partial wind-ups for the termination of former Plan members from their employment with Indago, Adason, and Pelican.

- Surplus from the partial wind-ups allocable to Plan members as well as Plan members whose employment with Canada Life affected by the partial wind-up of the Plan declared as of June 30, 2005, will be shared.

- Members affected by the partial wind ups will receive 57.22% of the surplus allocable to these partial wind-ups.

- Inactive Plan members will receive 12.44% of the surplus allocable to these partial wind-ups.

- Members who are entitled to more than $15,000 in surplus may contribute all or part of their shares to a registered retirement savings plan (RRSP) without withholdings if, at the time of the surplus distribution, they confirm to the Company that they have available RRSP contribution room. Each PWU member will receive a minimum payment of $1,000.

- Canada Life will receive 30.34% of the surplus allocable to these partial wind-ups.

- Active Plan members who have consented to the settlement will receive a two-year contribution holiday, funded through the existing surplus in the Plan.

- The benefit accrual formula for consenting active Plan members under the New Plan will remain unchanged for two years following the settlement approval.

- Assets equal to the value of the benefits they have earned will be transferred to the New Plan, along with a proportional amount of surplus in the ongoing Plan.

- If the active member's employment is terminated before the end of the two-year contribution holiday period, or the member stops earning benefits under the New Plan for any other reason, a lump sum equal to the value of any remaining contribution holidays will be paid to the member, the member's spouse, or estate, as the case may be. A lump sum will also be paid for any approved leave of absence or any other period during which a member is not required to contribute to the Plan.

- In the event that a Class Member dies before receiving his or her surplus share or contribution holiday, payment will be made to his or her spouse, designated beneficiary or estate, provided that all necessary consents are obtained.

- The Québec Cash-Outs consist of Plan members who reported for work in Québec and who had their entitlements paid out of the Plan before April 12, 2005. They will be treated as members of the Integration Partial Wind-Up.

- Canada Life will establish a new pension plan and related new trust fund. Assets and a proportion of surplus from the Plan will be transferred to the New Plan on account of certain active, retired and deferred vested Plan members who have consented to the Surplus Settlement Agreement.

- The settlement does not preclude any future claim by Plan members to surplus ownership on Plan termination.

- Expenses incurred in the negotiation and implementation of the Surplus Settlement Agreement, and those generally related to the Partial Wind-Ups, will be deducted from the surpluses attributable to the Partial Wind-Ups.

[74] The value of the contribution holiday for active Plan members is $4.6 million. Thus, the total financial benefit to Class members is estimated at $54 million, plus payment of all of their legal fees and expenses estimated at $5 million.

[75] To achieve certainty under the New Plan, the parties have agreed under the Surplus Settlement Agreement to seek the following court declarations, for the benefit of Canada Life: (a) Canada Life is entitled to expand the membership of the Plan or New Plan by way of amendment or merger; (b) Canada Life is entitled to use assets in the Plan or New Plan (including surplus) to provide benefits for, and fund contribution holidays with respect to new members, including benefits transferred from another pension plan; (c) Canada Life is entitled to merge all or a portion of the Plan and/or the New Plan with other pension plans; (d) Canada Life is entitled to use all or part of any surplus to take contribution holidays in the Plan and/or New Plan with respect to past, current and future benefits; (e) Canada Life is entitled to fund benefit enhancements with respect to the Plan and/or New Plan from surplus; and (f) Canada Life is entitled to reimbursement from the Plan and/or New Plan of Plan Expenses that were incurred and paid prior to the Surplus Settlement Agreement and it can pay for future expenses from the Plan or New Plan, or be reimbursed from the Plan or New Plan, for such expenses that it pays directly.

2. Support for the Surplus Settlement Agreement

[76] There are 5,228 persons in the classes. As of January 3, 2012, 4,293 Class Members (82%) voted in favour of settling their claims in accordance with the Surplus Settlement Agreement.

[77] The opinion of Class counsel is that the Surplus Settlement Agreement is a fair and reasonable settlement of the action. They recommended approval to the Class.

[78] The Representative Plaintiffs recommend approval of the settlement as being fair, adequate, reasonable, and in the best interests of the Class.

3. Opposition to the Surplus Settlement Agreement

[79] As of January 3, 2012, Class Counsel has received 4 opt-out notices from Class members. One person subsequently was granted leave to rescind the opt-out.

[80] As of January 3, 2012, 57 decision forms indicating opposition to the settlement. Out of the 57 "No" voters, 47 are active Plan members.

[81] As of January 16, 2012, the deadline for objections, Class Counsel has not received any formal Notices of Objection.

4. The Settlement versus the Likelihood of Adjudicative Success

[82] In determining whether to recommend the settlement, Class Counsel had to compare the settlement with the likelihood of success of the various claims advanced in the class action.

[83] The leading case in Canada with respect to surplus ownership is *Schmidt v. Air Products*, [1994] 2 S.C.R. 611. In *Schmidt*, the Supreme Court of Canada sets out the following analytical framework to determine who, if anybody, is entitled to payment of surplus assets from a pension fund. The analytical framework involved five elements: (1) the court must examine the underlying pension plan text and funding vehicles to determine whether the pension fund is impressed with a trust; (2) if the pension fund is not subject to a trust, surplus entitlement is determined with reference to principles of contractual interpretation; (3) if the fund is impressed with a trust, it is governed by equity; (4) the trust will extend to surplus, but an employer may expressly limit the operation of the trust so that it does not apply to surplus; and (5) the employer may reserve a power of revocation; however, to be effective, the power must be clearly reserved at the time of the creation of the trust. A power of revocation cannot be implied from a general power of amendment.

[84] In *Schmidt*, the Supreme Court also held that, while a pension plan is ongoing, pension plan members have no immediate claim or right to a distribution of surplus from the pension fund.

[85] In *Buschau v. Rogers Communication*, 2006 SCC 28, discussed further below, the court held that the beneficiaries of a pension trust cannot invoke the rule in *Saunders v. Vautier* to compel a pension plan administrator to wind up a pension trust and distribute surplus assets to plan members. See also *Lomas v. Rio Algom Ltd.*, 2010 ONCA 175.

[86] In light of this case law, Class Counsel's opinion was that although there was a good argument to support a claim of surplus ownership for some Class Members, there were legal weaknesses. From a legal standpoint, the problems were: (1) the absence of language in the 1989 Trust Agreement stating that the funds are held for the exclusive

benefit of Plan members (See *Burke v. Hudson's Bay Company*, 2008 ONCA 394.); and (2) although the amendment to the 1964 Trust Agreement states that funds remaining after the purchase of annuities are to be applied to increase the amount of annuities paid to Plan members and former members, it does not state that those funds shall be distributed directly to Plan members.

[87] Given the legal weaknesses, Class Counsel's opinion was that a compromise with an immediate distribution of surplus from the Plan to the members of the Integration and Prior Partial Wind-ups was preferable to a common issues trial.

[88] Turning to the Class Members' claim with respect to the payment of administrative expenses out of the Plan, the law has changed since the commencement of the proposed class action. At the time of commencement, the Plaintiffs relied on *Markle v. Toronto (City of)* (2003), 63 O.R. 321 (C.A.), where the Court of Appeal ruled that an amendment to a pension plan requiring the trustees of the pension fund to pay plan administrative expenses out of the pension fund constituted a partial revocation of trust and was of no force or effect.

[89] However, in 2007, in *Kerry (Canada) Inc. v. DCA Employees Pension Committee* (2007), 86 O.R. (3d) 1 (C.A.), aff'd. 2009 SCC 39, the Court of Appeal ruled that each case would turn on the language of the pension plan documents and absent express language in a trust or plan document requiring a pension plan sponsor to pay the administrative expenses of a pension plan or pension fund. There is no requirement either under the *Pension Benefits Act* or under equitable principles that pension plan sponsors be responsible for paying the administrative expenses associated with administering a pension plan. See also: *Burke v. Hudson's Bay Company*, [2010] 2 S.C.R. 273, *Lieberman v. Business Development Bank of Canada*, 2009 BCSC 1312.

[90] Based on *Kerry, Burke,* and *Lieberman*, Class Counsel appreciated that there was a strong risk that the Plaintiffs would not succeed on the plan expenses claim. Class Counsel were also concerned about the impact of *Potter v. Bank of Canada*, 2007 ONCA 234, where the Court of Appeal ruled that "equitable allocation" and "direct distribution" were not proper remedies for an alleged breach of trust resulting from the payment of pension plan administrative expenses out of a pension plan and the proper remedy was restitution of pension plan assets to the pension fund.

[91] In light of *Potter*, Class Counsel concluded that members of the Class who are not members of the Integration or Partial Prior Wind-up sub-classes would have no right to any recovery from the Fund or Canada Life, even in the event that the Plaintiffs were successful in the Plan Expenses Claim through a common issues trial. The only remedy available would be restitution of assets to the pension trust fund.

[92] Class Counsel identified the following risks in the event of an adverse determination in the context of a common issues trial: (a) members of the Integration

Partial Wind-up may receive no surplus if they do not establish surplus ownership, and be subject to an adverse costs award; (b) members of the Prior Partial Wind-ups may not be entitled to a declaration of a partial wind-up; however, even if such partial wind-ups were declared, they may not receive any surplus is they cannot establish surplus ownership; and (c) members of the Non Partial Wind-Up Group would not receive a contribution holiday or surplus distribution, and no guarantee with respect to future service accrual rates under the Plan, and loss on the expenses claim could result in an adverse costs award.

[93] Members of the Non Partial Wind-up group face further risks, even in the event that the Class is successful in a common issues trial, as they have no entitlement to a distribution of surplus from the Plan, nor any right, based upon *Potter*, to a distribution of Plan expenses wrongfully paid from the Fund. In short, in the absence of the implementation of the Surplus Settlement Agreement, there is no prospect for any direct financial benefit to members of the Non Partial Wind-Up Group. Given the changes in the law, it was the opinion of Class Counsel that the results achieved on behalf of Class members with only a Plan Expenses claim was a fair and reasonable result.

E. VARIATION OF TRUST

[94] It is a condition of the Surplus Settlement Agreement that Canada Life have a right to use surplus in the New Plan for certain plan purposes. This condition, in turn, requires court approval of a variation of trust to be made before trust assets are transferred to a New Pension Plan.

[95] To segregate the Trust assets that are to be the subject of the variation of trust, Canada Life established a second trust under the Plan (the "Sub-Trust"), and effective January 25, 2012, Canada Life will transfer from the Trust to the Sub-Trust all of the Non-Partial Wind-Up Group members who have consented to the proposed variation of trust (the "Consenting Beneficiaries") and who are still in the Plan, along with those Trust beneficiaries whose rights in the Trust are based on their relationship to a Consenting Beneficiary, such as certain spouses (collectively with the Consenting Beneficiaries, the "Sub-Trust Beneficiaries").

[96] In accordance with this transfer, an amount of the Plan's assets equal to (a) the value of the Sub-Trust Beneficiaries' pension entitlements, and (b) a *pro rata* share of the surplus in the ongoing portion of the Plan will be transferred from the Trust to the Sub-Trust.

[97] The Sub-Trust mechanism is being used for the variation of trust because the transfer of the assets from the Plan to the New Plan will require regulatory approval, which will be sought after the parties obtain court approval of the settlement proposal (including the variation of trust order).

[98] A trust may be modified if all of the possible beneficiaries are in existence and *sui juris*. This principle is an extension of the rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482. In *Water's Law of Trusts in Canada* (3rd edition, 2005) at p.1176, Professor Waters describes the rule in *Saunders v. Vautier* as follows:

> The broader statement of the rule is this: if there is only one beneficiary, or if there are several (whether entitled concurrently or successively), and they are all of one mind, and he or they are not under disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees.

[99] The *Variation of Trusts Act* works in conjunction with the rule in *Saunders v. Vautier* and permits the court to provide consents on behalf of potential future or unascertained trust beneficiaries. As noted by Justice Cullity in *Sutherland v. Hudson's Bay Company* (2005), 74 O.R. (3d) 608 (S.C.J.) at para. 21:

> [The court's] role is limited to approving an arrangement placed before it and it is empowered to give approval on behalf only of beneficiaries within one or more of the four classes described in paragraph 1(1) of the statute. The jurisdiction is premised on an assumption that, by virtue of the rule in *Saunders v. Vautier* (1835-42), All E.R. Rep. 58 (M.R.), the beneficiaries of a trust will be able to effect a variation of its terms if they consent to it. The statute gives the court power to consent on behalf of specified categories of beneficiaries by approving a proposed variation. The variation, if approved, is effected by such consent and the consents of the other beneficiaries that do not fall within the specified categories.

[100] The *Variation of Trusts Act*, R.S.O. 1990, c. V.1 provides:

> 1. (1) Where any property is held in trusts arising under any will, settlement or other disposition, the Superior Court of Justice may, if it thinks fit, by order approve on behalf of,
>
> > (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting;
> >
> > (b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons;
> >
> > (c) any person unborn; or
> >
> > (d) any person in respect of any interest of the person that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined, any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.
>
> (2) The court shall not approve an arrangement on behalf of any person coming within clause (1) (a), (b) or (c) unless the carrying out thereof appears to be for the benefit of that person.

[101] All of the beneficiaries of the Sub-Trust who are active Plan members, pensioners, surviving spouses of deceased Plan members who are in receipt of a survivor pension, spouses of pensioners with potential rights to a survivor pension, or deferred vested Plan members (together with any adult designated beneficiaries of the foregoing) have consented to the proposed modification of the trust, as have former spouses of such persons who have pension rights under a court order or domestic contract.

[102] Canada Life, as the employer sponsoring the Plan, has consented. This is not a case where the pension plan beneficiaries are attempting to modify or terminate a pension trust over the objection of the plan sponsor. See *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973.

[103] The only other persons with a potential interest in the Sub-Trust are spouses or potential future spouses of consenting active and deferred vested members, potential future designated beneficiaries of consenting Plan members, designated beneficiaries of consenting Plan members who are not *sui juris*, persons who may receive a benefit from the Plan through the estate of a consenting Plan member, and future Plan members (and persons who may acquire interests through such future Plan members). This court has the jurisdiction under the *Variation of Trusts Act* to provide consent on their behalf: *Kidd v. Canada Life Assurance Co.*, 2010 ONSC 1097.

[104] In *Buschau v. Rogers Communications Inc.*, *supra,* the Supreme Court held that plan members cannot move to terminate a pension plan trust by invoking the rule in *Saunders v. Vautier*. I agree, however, with Canada Life's argument that this holding does not prevent parties from seeking to *vary* the terms of a pension trust in the circumstances of the case at bar where both the plan members and the employer wish the pension plan to be amended.

[105] In *Buschau* at paras. 27-31, Justice Deschamps concluded that the rule in *Saunders v. Vautier* was not applicable in the circumstances of a pension plan trust for four reasons:

- (1) The rule in *Saunders v. Vautier* was displaced by pension legislation regulating the termination of a registered pension plan and the distribution of the trust assets in a pension fund.

- (2) A pension trust fund cannot be collapsed without regard to the pension plan for which it was created and from which it is "indissociable".

- (3) The rule in *Saunders v. Vautier* does not take account of the legitimate interest of the employer in the continuation of a pension plan established by the employer in the context of providing occupational pensions as part of its workforce compensation package.

- (4) The capital of a pension trust fund cannot be distributed without defeating the social purpose of preserving the financial security of employees in their retirement by allowing them to receive periodic payments until they die.

[106] In the case at bar, the four reasons identified by Justice Deschamps are not present; visualize:

- (1) The Sub-Trust is subject to provincial pension legislation.

- (2) Although the Sub-Trust and the Plan are indissociable, it does not follow that a variation of the Sub-Trust under the rule in *Saunders v. Vautier* would disrupt the relationship between the Sub-Trust and the Plan. In contrast to the situation in *Buschau*, where the pension plan would have ceased to exist had the variation proceeded, the application of the common law rule in the context of the Plan would have no such adverse effect on the pension plan at issue.

- (3) In the present circumstances, the employer and sponsor under the Plan in question, Canada Life, supports (and in fact is initiating) the proposed variation to the Sub-Trust to facilitate the implementation of the settlement.

- (4) The variation at issue in this case does not defeat the social purpose of the Plan/New Plan as a registered pension plan or the Sub-Trust as a pension trust fund established in connection therewith. In the wake of the variation, Canada Life's employees who are Sub-Trust Beneficiaries will continue to be entitled to their accrued and accruing pension benefits in accordance with the provisions of the Plan/New Plan.

[1] In *Aegon Canada Inc. v. Abdool* (Toronto 07-CV-342288 PD1), in an unreported decision dated January 8, 2008, Justice Low granted an application (a) declaring that a pension trust fund had been varied in accordance with the rule in *Saunders v. Vautier* and (b) approving the variation on behalf of certain categories of beneficiaries under the *Variation of Trusts Act*.

[2] As I will conclude below, the Surplus Settlement Agreement is in the best interests of class members including the current Canada Life employees. Granting consent will permit the settlement to proceed.

[3] In my opinion, it is appropriate for the Court to consent to the proposed variation of the trust on behalf of the classes of persons identified in subsection 1(1) of the *Variation of Trusts Act* and to declare that the Sub-Trust has been effectively amended in accordance with the written consents signed by all *sui juris* persons with an actual or contingent interest in the Sub-Trust assets.

E. SETTLEMENT APPROVAL

[107] Under s. 29 (2) of the *Class Proceedings Act, 1992*, a settlement of a class proceeding must be approved by the court to be binding on the parties.

[108] To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.

[109] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[110] When considering the approval of negotiated settlements, the court may consider, among other things: (a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties, (g) if any; number of objectors and nature of objections; (h) the presence of good faith, arms length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (j) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at pp. 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[111] A reasonable and fair settlement is inherently a compromise and a reasonable and fair settlement will not be and need not be perfect from the perspective of the aspirations of the parties. That some class members are disappointed or unsatisfied will not disqualify a settlement because the measure of a reasonable and fair settlement is not unanimity or perfection. See: *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.) at para. 21; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at p. 440, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372.

[112] The parties engaged in extensive bargaining over several years to negotiate the financial benefits provided by the Surplus Settlement Agreement. Their agreement is supported by a large majority of Class Members and by Class Counsel. When the facts set out above are matched with the criterion that the court uses to assess the reasonableness of a settlement, the Surplus Settlement Agreement presents itself as a very good result for all the class members and it is also fair to Canada Life.

[113] In my opinion, the Surplus Settlement Agreement is in the best interests of the Class, and I approve it in accordance with s. 29 of the *Class Proceedings Act, 1992*.

G. FEE APPROVAL

[114] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or results achieved: *Maxwell v. MLG Ventures Ltd.* (1996), 30 O.R. (3d) 304 (Gen. Div.); *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.); *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038 (Gen. Div.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.).

[115] Where the fee arrangements are a part of the settlement, the court must decide whether the fee arrangements are fair and reasonable, and this means that counsel are entitled to a fair fee, which may include a premium for the risk undertaken and the result achieved, but the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the Class Members as a whole: *Sparvier v. Canada (Attorney General)*, [2006] S.J. No. 752 (Q.B.) at para. 43, aff'd [2007] S.J. No. 145 (C.A.).

[116] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well: *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at paras. 59-61.

[117] Factors relevant in assessing the reasonableness of the fees of Class Counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by Class Counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by Class Counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation and settlement: *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at

CITATION: Kidd v Canada Life, 2012 ONSC 740
COURT FILE NO.: 05-CV-287556CP
DATE: February 6, 2012

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

David Kidd, Alexander Harvey, Jean Paul Marentette, Garry C.Yip, Louie Nuspl, Susan Henderson, and Lin Yeomans

Plaintiffs

- and -

The Canada Life Assurance Company, A.P. Symons, D. Allen Loney and James R. Grant

Defendants

REASONS FOR DECISION

Perell, J.

Released: February 6, 2012

para. 67; *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.); *Wamboldt v. Northstar Aerospace (Canada)* [2009] O.J. No. 2583 (S.C.J.) at para. 33.

[118] In my opinion, considering the facts described above and the factors relevant to assessing the reasonableness of Class Counsel's fee request, there is no doubt that the retainer entered into by the representative plaintiffs should be approved and that Class Counsel's fee request should be approved and I do so in accordance with the *Class Proceedings Act, 1992*. The results achieved for the class members were good and were a product of diligent and productive legal work. Class counsel earned their fees and the fee request should be approved.

H. CONCLUSION

[119] Orders accordingly.

Perell, J.

Released: February 6, 2012