Court File No. 05-CV-287556CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE DEFENDANT, THE CANADA LIFE ASSURANCE COMPANY
(Plaintiffs' Motion Approval of Amendment #3 January 10, 2014)

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FACTUM OF THE DEFENDANT THE CANADA LIFE ASSURANCE COMPANY (Plaintiffs' Motion For Approval of Amendment #3 January 10, 2014)

PART I - OVERVIEW

1. This is a motion seeking approval of an amendment to a previously approved class action settlement. If the new amendment is approved, the Class will receive significantly greater benefits than it will receive under the existing court approved settlement.

2. This action was commenced in 2005 and involved claims related to the ownership of surplus arising from the partial wind-up of The Canada Life Canadian Employees Pension Plan (the "Plan") following the acquisition of The Canada Life Assurance Company ("Canada Life") by The Great–West Life Assurance Company ("Great-West Life") in 2003 (the "Integration

Partial Wind-up" or "IPWU"). The action also involved claims relating to the payment of Plan expenses from Plan assets.

3. The parties were able to reach a settlement of the issues in this action and the terms of the settlement were incorporated in a surplus sharing agreement (the "Surplus Sharing Agreement" or "SSA"). The SSA provides, *inter alia*, for the sharing and distribution of any surplus arising from the IPWU between the IPWU members, inactive members of the Plan (i.e. deferred vested members and pensioners) and Canada Life.

4. In a judgment dated January 27, 2012 (the "Judgment"), the court approved the settlement in accordance with the SSA. That Judgment remains in effect and is binding on all Class members.

5. As of the date of the settlement approval motion, the most recent estimate by Canada Life's actuarial advisor of the surplus in the Plan attributable to the IPWU and available for distribution under the SSA was $54 million. This estimate was as at June 30, 2011.

6. Within a month of the settlement having been approved, however, Canada Life received an update from its actuarial advisor indicating that as at December 31, 2011 the estimated value of the surplus available for distribution under the IPWU had decreased dramatically.

7. After extensive negotiations throughout most of 2012, the parties reached agreement on an amendment to the SSA ("Amendment No. 2") which increased the estimated amount of surplus available for distribution to IPWU members and certain other Class members and provided for the possibility of a future surplus distribution if surplus arose in the Plan in the future. The court declined to approve Amendment No. 2.

8. The parties subsequently renewed negotiations and have entered into a new amendment to the SSA for which court approval is sought. The new amendment ("Amendment No. 3") guarantees that members of the IPWU subclass and members of the Inactive Eligible Non-PWU sub-class will receive a surplus payment equal to the greater of 56% of the amount that was estimated in his or her March 2011 information package and $1,000 and preserves the benefits that other Class members were to receive under the SSA. In addition to other concessions by Canada Life and Class counsel, and in order to effect these payments, Canada Life will contribute approximately $11.3 million under Amendment No. 3 that it is not required to contribute under the existing court approved SSA.

9. In Canada Life's submission, Amendment No. 3 is fair and reasonable and offers significant benefits to the Class over either the status quo or a resumption of litigation.

PART II - FACTS

The IPWU

10. In 2003, Canada Life declared the IPWU following Canada Life's acquisition by Great-West Life. The effective date of the IPWU was June 30, 2005.

> Affidavit of Wallace Robinson sworn November 27, 2013 (Robinson Affidavit), paragraph 2, Responding Motion Record of Canada Life ("CL Record") Tab 1, pp. 1-2

11. The initial partial wind-up report, prepared by the Plan actuary, Mercer, identified the value of the Plan assets allocable to the partial wind-up as at the wind-up date of June 30, 2005 as $273,124,000 and estimated the liabilities of the Plan members affected by the IPWU to be $175,130,000.

Robinson Affidavit, paragraphs 3-4. CL Record Tab 1, p.2

12. The initial partial wind-up report estimated that the assets allocable to the IPWU exceeded the estimated liabilities and estimated wind-up expenses by approximately $93 million. This estimate of the surplus was dependent upon the assumptions used to estimate the liabilities of the members affected by the IPWU. The actual surplus which would ultimately be available for distribution could not be determined at the date of the initial partial wind-up report since surplus is the amount (if any) actually remaining from the allocated assets after the pension liabilities of the IPWU members have been settled in a manner permitted by the *Pension Benefits Act* (the "PBA") and after all partial wind-up expenses have been paid.

Robinson Affidavit, paragraph 5, CL Record Tab 1, p.2

13. The IPWU assets were segmented from the other assets of the Plan in March, 2008 and invested according to a separate investment strategy that was based on the expected distribution of the IPWU assets. In particular, Mercer made assumptions as to how many members of the IPWU would elect to receive a lump sum transfer of the commuted value of their pension entitlement and how many would elect to receive an immediate or deferred pension. The value of the IPWU assets grew from $273,124,000 at June 30, 2005 to $319,573,000 as at August 31, 2012.[1]

Robinson Affidavit, paragraph 6, CL Record Tab 1, p. 2

The SSA

14. This proceeding was commenced in 2005. Following a mediation before Justice Winkler in April 2007, Canada Life, the Plaintiffs and the Executive Committee of the Canada Life

[1] This latter number includes an asset transfer of $6,557,000 not reflected in the June 30, 2005 value.

Canadian Pension Plan Members' Rights Group (the "CLPENS Executive") signed a Memorandum of Understanding establishing a non-binding framework for settlement of the litigation. After a lengthy period of negotiations, the parties reached agreement on the terms of the SSA in late 2010. The SSA provides for the sharing and distribution of the surplus in the Plan among Canada Life and eligible Class members related to the IPWU, as well as the surplus related to the termination of Plan members employed by Indago Capital Management Inc, Pelican Food Services Inc., and Adason Properties Limited (respectively the proposed "Indago PWU", "Pelican PWU" and "Adason PWU", and collectively, the "Prior PWUs").

Robinson Affidavit, paragraph 7, CL Record, Tab 1, pp. 2-3

Reasons for Decision of Perell J dated March 18, 2013, paragraphs 6, 33-36, Motion Record, Tab 2B, pp. 54, 57-58

Judgment dated January 27, 2012

15. The Class members include[2]:

MEMBERS	NUMBER
IPWU Members	2149
Prior PWU Members	90
Inactive Non-PWU Members (retirees and deferreds)	1418
Active Members	1682
Quebec Cash Outs	29
Total:	5368

[2] These numbers have been adjusted since the date of Perell J's Reasons dated February 6, 2012 but the changes are not material.

Reasons for Decision of Perell J. dated February 6, 2012, paragraphs 71 and 72.

16. Under the SSA, 57.22% of the partial wind-up surpluses (after expenses) is payable to the partial wind-up Class members, 12.44% of the partial wind-up surpluses is payable to the Inactive Eligible Non-PWU Group members (deferred vested and pensioners) and 30.34% is payable to Canada Life. The amount of surplus to be distributed to each member is based on his or her respective Plan liabilities but the SSA provides that the minimum surplus share payable to an eligible Class member will be $1,000. The SSA further provides active Class members with a two-year contribution holiday and provides for court approval of a variation of trust in connection with the transfer of Plan assets to a new pension plan and for certain declarations in connection with the Plan and the new pension plan.

Affidavit of Alexander Harvey ("Harvey Affidavit"), paragraphs 6-8, Motion Record, Tab 2, pp. 10-12

Reasons, paragraphs 48-49, Motion Record, Tab 2B, p. 59

Judgment dated January 27, 2012

Member Elections - Basic Benefits

17. Under the PBA, Canada Life was required to provide persons affected by the IPWU the opportunity to elect either to transfer the commuted value of their pension entitlement to a qualified locked-in arrangement or to receive a guaranteed deferred or immediate pension (the guaranteed pension being the default should a member fail to make an election). Before Canada Life provided this election to members, Canada Life sought and received confirmation from the Financial Services Commission of Ontario ("FSCO") that the commuted values were to be calculated using the assumptions and methodology set out in the initial partial wind-up report which was consistent with FSCO policy.

Robinson affidavit, paragraphs 8-10, CL Record Tab 1, p. 3

18. In July 2011, election forms were mailed to members affected by the IPWU to advise them of the amount of the commuted value of their pension entitlement and providing them with the opportunity to make their election. Canada Life informed members that if they chose (or were deemed to have chosen) the guaranteed pension option, an annuity would be purchased from an insurance company on their behalf in order to provide that pension.

Robinson Affidavit, paragraph 11, CL Record, Tab 1, pp. 3-4

The Information Packages

19. The settlement entered into between Canada Life, the Plaintiffs and the CLPENS Executive provided for information packages to be sent to Plan members and an opportunity for members to vote on the proposed settlement.[3] The information packages were prepared and sent to Class members in March 2011 and contained individual estimates of each member's surplus share under the proposed settlement.[4] These estimates were premised on the total estimated

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[3] Such votes have been the norm in class actions involving pension surpluses because of the regulatory requirement that any payment of any surplus to a plan sponsor have a prescribed level of support from plan beneficiaries: *Pension Benefits Act Regulations*, R.R.O. 1990, Reg. 909, s. 8 (revoked O. Reg. 178/12); *Pension Benefits Act*, R.S.O. 1990, c.P-8 as amended, ss. 77.11(7) and (8); *Sunnybrook Health Sciences Centre v. Lorenz*, [2009] O.J. 3268 (S.C.J.) at paragraph 8; *McMaster University v. Robb*, [2001] O.J. No. 5480 (S.C.J.) at paragraph 4; *Burleton v. Royal Trust Corp. of Canada*, [2003] O.J. 2168 (S.C.J.) at paragraphs 24, 31; *CBS Pictures Canada Inc. v. Dillon*, [2006] O.J. 3669 (S.C.J.) at paragraph 3;*Reichhold Ltd. v. Boyer*, [2000] O.J. 290 (S.C.J.) at paragraphs 8-10.

[4] The information package sent to Class members in March 2011 describing the original settlement contained a number of statements to the effect that the surplus amounts referenced therein were estimates only and were subject to change. For example, the Questions and Answers section of the information package contained the following: **"24. Why does my Personal Information Statement show only an estimate of my possible surplus share? How and why could the estimate change?"** The response to this question stated: "The amount of surplus that you actually receive, should the Proposal proceed, will likely be different (higher or lower) than the estimate shown on your Personal Information Statement for various reasons. First of all, until all of the pension benefits earned by members affected by the Partial Wind-Ups are paid or provided for, the value of those benefits will fluctuate (for various reasons, including changes in interest rates), which will affect the amount of the Partial Wind-Up surplus (the more valuable the benefits, the less surplus will remain, and vice versa). Also, the assets of the Plan fund are invested in stocks, bonds and other investments, and therefore the total amount of Partial Wind-Up surplus will also fluctuate depending on the returns on those investments. As the overall Partial Wind-Up surplus fluctuates, so will the amount to be shared by the eligible members." See the information package sent to Class members, Exhibit "S"

amount of surplus available for distribution under the SSA in respect of the IPWU being $62.2 million and were based on 90% of that amount. This surplus estimate was based on an estimate of the cost of settling the basic benefit entitlements of the IPWU group which used the interest rates applicable under the relevant actuarial standards and assumptions made by Mercer as to how IPWU members would elect to receive their basic pension entitlements.

Robinson Affidavit, paragraphs 12-14, CL Record. Tab 1, pp. 4-5

Court Approval

20. On January 27, 2012 the Court approved the settlement of this proceeding in accordance with the terms of the SSA. At that time, Canada Life's most recent estimate of the IPWU surplus available for distribution was the surplus estimate that had been prepared by Mercer as at June 30, 2011 of $54 million. This estimate continued to be based on the previously-referenced assumption as to the percentage of members affected by the IPWU who would exercise their right to receive a lump sum transfer of the commuted value of their basic benefit entitlement versus a guaranteed pension.

Robinson Affidavit, paragraph 15, CL Record, Tab 1, p. 5

21. On February 10, 2012, Canada Life was first advised by Mercer that the estimated costs of settling the basic benefits of the IPWU members had increased significantly as at December 31, 2011 from the previous estimate as at June 30, 2011. Mercer advised Canada Life that this was mainly because of (i) a drop in long-term interest rates over the relevant period (which increased the present value and thus the cost of settling basic benefits for members who

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to January 4, 2012 Affidavit of David Kidd. (Exhibit "B" to Supplementary Affidvait of Wallace Robinson sworn January 2, 2014, Supplementary Responding Motion Record of Canada Life, pp. 10-11)

elected to receive a guaranteed pension) and (ii) because fewer members than expected had elected to receive the commuted value of their pension benefits in lieu of a guaranteed pension.[5]

22. Mercer subsequently advised that if it was assumed that all IPWU members who had not yet chosen their payment option with respect to their basic benefits were deemed to have elected to receive a guaranteed pension, the estimated IPWU surplus available for distribution under the SSA as at December 31, 2011 was under $10 million. This information was subsequently shared with Class counsel and the court.

Robinson Affidavit, paragraph16. CL Record. Tab 1, pp. 5-6

Transfer of IPWU Assets and Liabilities to the Ongoing Portion of the Plan

23. In May 2012, Canada Life solicited bids for annuities to settle the basic benefits of those members of the IPWU who had not elected to receive their commuted values. When all of the seven insurance providers who had been approached declined to bid, Canada Life determined that its only option was to instead provide for the basic benefits of these members by transferring the liability to satisfy these pension rights to the ongoing portion of the Plan together with IPWU assets equal in value to that liability. The amount of the assets and liabilities to be transferred was calculated in the manner prescribed in the applicable FSCO policy. The transfer was effective August 31, 2012 following notice to Class counsel and a court appearance on September 27, 2012.

Robinson Affidavit, paragraphs 17-18, CL Record, Tab 1, p. 6

[5] Currently, the cost of satisfying a member's basic benefit entitlement by way of an annuity/guaranteed pension is higher than the commuted value payable to a member.

24. Of immediate concern at the time the decision to undertake the transfer was made was a pending change to the Canadian Institute of Actuaries' actuarial Guidance which, if implemented before the liabilities of the IPWU members were transferred to the ongoing portion of the Plan, would have increased the liabilities of the IPWU members and resulted in there being no surplus in the IPWU segment of the Plan. By effecting the transfer to the ongoing portion of the Plan as at August 31, 2012, Canada Life not only assumed the risk of having to fund any increase in liabilities resulting from a change in the actuarial Guidance as part of its overall funding obligation for the ongoing Plan, but also ensured that there would be some surplus available for distribution remaining in the IPWU segment of the Plan.

Robinson Affidavit, paragraph 19, CL Record, Tab 1, pp. 6

Robinson Affidavit, Exhibit H, CL Record, Tab 1H, pp. 121-162

25. Effective June 30, 2013, the change in actuarial Guidance referred to above was in fact implemented by the Canadian Institute of Actuaries' Committee on Pension Plan Financial Reporting. The immediate effect of this change was to increase the liabilities of the ongoing portion of the Plan in respect of the transferred IPWU members by approximately $45 million. Had there been no transfer of assets and liabilities, this change would have reduced the IPWU surplus by approximately $45 million resulting in a significant deficit.

Robinson Affidavit, paragraph 20, CL Record, Tab 1, p. 7

Proposed SSA Amendment (Amendment No. 2)

26. Following the September 27, 2012 motion and a mediation with Justice Strathy in December 2012, Canada Life, the Plaintiffs and the CLPENS Committee agreed on the terms of an amendment to the SSA that sought to ameliorate the position of Class members (Amendment

No. 2). At that time, the estimated IPWU surplus was $2.6 million. This amendment to the SSA was conditional upon court approval. On March 28, 2013 the Court declined to approve the amendment.

Robinson Affidavit, paragraphs 21-22, CL Record, Tab 1, p. 7

2013 Elections By IPWU Members

27. Because the election forms provided in 2011 to Plan members affected by the IPWU had contemplated that annuities would be purchased for those who did not elect a lump sum transfer of their commuted values, Canada Life was required pursuant to FSCO policy to provide those members who had not originally elected to receive commuted values a further opportunity to elect that option if they wanted to do so. Benefit statements and election forms were re-mailed to these members in early January 2013 and members were provided with the minimum statutory period of 90 days in which to elect. By the end of the 90-day period referred to above, 142 IPWU members who had previously elected or were deemed to have elected to receive a deferred or immediate pension had elected to instead receive a lump sum transfer of their commuted values (with interest).

Robinson Affidavit, paragraphs 23-24, CL Record, Tab 1, pp. 7-8

28. Because the commuted value payable to a member is less than the amount that must be transferred to the ongoing portion of the Plan in respect of any member who elects (or is deemed to elect) to receive a pension from the Plan, the effect of the 142 new commuted value elections was to reduce the overall liabilities of the IPWU members and hence increase the estimated IPWU surplus. As a result, Mercer has calculated that the effect of these elections was to

produce an IPWU surplus available for distribution under the SSA as at August 31, 2012 of approximately $11.8 million.

Robinson Affidavit, paragraph 25, CL Record, Tab 1, p. 8

29. The projected IPWU surplus available for distribution under the SSA as at December 31, 2013 is estimated to be $11 million. The IPWU assets are now held in short-term investments in order to protect the assets from declines due to market forces. Since all of the pension liabilities of the IPWU members have now been provided for, going forward, the only two factors that will impact this surplus estimate are investment returns in respect of the IPWU assets (which will not be significant given the asset class in which the funds are invested) and the expenses associated with the partial wind-up and settlement. Under the SSA, 69.66% of this amount is distributable to eligible Class members.

Robinson Affidavit, paragraph 26, CL Record, Tab 1, p. 8

November 2013 Proposed Amendment to SSA (Amendment No. 3)

30. While pursuing an appeal of the March 28, 2013 decision, Canada Life decided to explore the possibility of a revised settlement with the Plaintiffs and the CLPENS Committee. On September 11, 2013, Canada Life offered to contribute an additional $8 million to top up the payments contemplated by the SSA.

Robinson Affidavit, paragraph 27, CL Record, Tab 1, p. 8

31. The Plaintiffs and CLPENS Executive did not accept Canada Life's offer but there followed negotiations and counter-offers which ultimately produced the new amendment to the SSA that is the subject of this motion for approval. The terms of the new amendment include the following:

(a) There will be a single distribution of surplus to the Class which will occur immediately following court and regulatory approval;

(b) Each member of the IPWU Sub Class and each member of the Inactive Eligible Non-PWU Sub Class (i.e. pensioners and deferred/vested members) are guaranteed to receive a surplus payment equal to the greater of 56% of the amount that was estimated on his or her personal information statement in 2011, and $1000;

(c) Canada Life will contribute an amount (estimated to be approximately $11.3 million) which, when added to the existing amount of surplus and after taking into account certain specified adjustments to the original settlement, will provide these guaranteed payments;

(d) Class counsel will waive a total of $1,000,000 in legal fees which were previously approved by the court, and will not charge any legal fees incurred from January, 2012 to completion of this matter. Those amounts will be applied for the benefit of the IPWU Sub Class and the Inactive Eligible Non-PWU Sub Class members exclusively, and will not be shared with Canada Life under the SSA provisions; and

(e) Canada Life will waive its entitlement to reimbursement of a portion of its settlement expenses in the amount of $500,000, and will also waive entitlement to a portion of the interest on its outstanding expenses (estimated at $800,000), and these amounts will be added to the IPWU surplus to be distributed.

Robinson Affidavit, paragraphs 28-30, CL Record, Tab 1, p. 9

32. Under the proposed amended settlement, about 45% of Class members will receive the same benefit as was estimated in the March 2011 information packages that they received. The following chart summarizes the position of Class members (excluding those in the Prior PWUs) under the proposed amendment as compared to the estimate they received in March 2011.

	Number of Class members	**Estimated Benefit per March 2011 Information Packages**	**Proposed Settlement in Relation to the March 2011 Information Packages**
Active Eligible Class Members	1378	Two-year contribution holiday	100%
IPWU Members and Inactive Eligible Non-PWU Members	707	$1000	100%
IPWU Members and Inactive Eligible Non-PWU Members	380	$1000 - $1786	56% - 100%
IPWU Members and Inactive Eligible Non-PWU Members	2165	> $1786	56%

Robinson Affidavit, paragraphs 34 and 35, CL Record, Tab 1, pp. 10 and 11

33. In addition, the entitlements of members of the Prior PWUs under the SSA are unaffected by the new amendment.

34. The total value of the amended settlement to the Class will be approximately $33 million. In the absence of the amendment, the estimated value of the existing court approved settlement (as at December 31, 2013) is only about $19.8 million. The table below illustrates the value of the existing settlement versus the amended settlement to eligible Class members.

Value of Settlement to Eligible Class Members

	$ million	
	Existing S SA	**Amended S SA**
IPWU surplus for distribution to Class Members *(69.66% of $11.0 million)*	$7.7	$7.7
Additional amounts for amended settlement		
69.66% of reduction in CL expenses of $1.3 million		$0.9
$1 million reduction in KM expenses		$1.0
CL estimated contribution of $11.3 million		$11.3
Subtotal	$7.66	$20.87
Prior PWU surpluses for distribution to Members *(69.66% of $10.9 million)*	$7.6	$7.6
Value of 2 year contribution holiday to Active Eligible Class Members	$4.6	$4.6
TOTAL PAYOUT TO CLASS MEMBERS	**$19.86**	**$33.07**

Harvey Affidavit, paragraphs 37, 57-58, Motion Record, Tab 2, pp. 22, 27-28

Affidavit of Jonathan Foreman, paragraphs 28-30 and Exhibit D, Motion Record, Tab 3, pp. 152-154, 213-218

35. Even if the SSA were set aside (and there have been no requests by any party to do so nor in Canada Life's submissions would there be a basis to do so), the result would be ongoing litigation over the actual reduced IPWU surplus where the claim in respect of Plan expenses is considered even by the plaintiffs to be of little or no value.

PART I - ISSUES

36. The issue on this motion is whether it is fair and reasonable and in the best interests of the Class to vary the Judgment so as to give effect to Amendment No. 3.

PART II - ARGUMENT

Dabbs Criteria

37. In assessing whether to approve the new amendment to the settlement, the Court must be guided by the same test that applies in respect of a motion to approve a class action settlement, namely is the amendment fair, reasonable and in the best interests of the class as a whole. In assessing the reasonableness of a proposed settlement, the Court does not, and cannot, seek perfection in every aspect. As noted by Winkler J. (as he then was) in *Baxter v. Canada (A.G.)*:

> ...perfection is not the standard by which the settlement must be measured. Settlements represent a compromise between the parties and it is to be expected that the result will not be entirely satisfactory to any party or class member.
>
> *Baxter v. Canada (A.G.)*, [2006] O.J. 4968 (S.C.J.) at paragraph 21
>
> See also *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.) (QL) at paragraph 9 (as per Sharpe J. as he then was)

38. In assessing whether a settlement (or in this case, an amendment to a settlement) satisfies the requirement of being fair, reasonable and in the best interests of the class, the courts have recognized the following relevant considerations:

(a) likelihood of recovery or likelihood of success;

(b) amount and nature of discovery evidence;

(c) the settlement terms and conditions;

(d) recommendation and experience of counsel;

(e) future expense and likely duration of litigation;

(f) recommendation of neutral parties, if any;

(g) the number of objectors and nature of the objections;

(h) the presence of arms' length bargaining and absence of collusion;

(i) the degree and nature of communications with class members; and

(j) the dynamics of the negotiation.

(collectively the "*Dabbs* criteria")

Dabbs v. Sun Life Assurance Co. of Canada, supra, at paragraphs 13-14

Parsons v. Canadian Red Cross Society, [1999] O.J. 3572 (S.C.J.) at paragraphs 71-72

39. When these factors are considered in the context of the new amendment to the SSA, it is submitted that it is clear that Amendment No. 3 is fair and reasonable and in the best interests of the Class. In particular:

(a) With respect of factor (a) **(likelihood of recovery or likelihood of success)**:

(i) a motion to approve an amendment differs in an important respect from a motion to approve a settlement in the first instance. In a typical class action settlement approval motion, the court is called upon to assess the position of the class under the settlement in comparison to its position if the litigation were permitted to proceed. In a motion to approve an amendment to an already-approved class action settlement, the court must necessarily compare the position of the class under the amended

settlement to its position under the existing and binding unamended settlement. This Court has acknowledged that the previously approved settlement remains binding. It is manifest that that Class members will be much better off under the amended settlement than under the existing settlement. In particular:

- As is apparent from paragraphs 31 and 34 above, under the amended settlement, more money would be available for distribution to the Class than would be available under the existing SSA.

- If the SSA were to be implemented without any variation or amendment based upon the surplus estimate as at December 31, 2013, members of the IPWU Sub-class and Eligible Inactive Members would receive 69.66% of the estimated $11 million of IPWU Surplus, or $7.66 million.

- Under Amendment No. 3, members of the IPWU Sub-class and Eligible Inactive Members will receive approximately $20.87 million.

- Members of the Indago Partial Wind-Up Sub-class, the Adason Partial Wind-Up Sub-class, the Pelican Partial Wind-Up Sub-class and active Class members are largely unaffected by the factors impacting the IPWU surplus and the terms of Amendment No. 3

but clearly would be affected to the extent implementation of the SSA was delayed or not implemented at all.

Reasons for Decision of Perell J dated March 18, 2013, paragraph 161, Motion Record, Tab 2B, p. 77

Harvey Affidavit, paragraph 37, Motion Record, Tab 2, p. 22

(ii) In considering this factor, the position of the Class under the amended settlement must be weighed against the potential recovery by the Class if the Judgment stands. It would be an error to evaluate Amendment No. 3 against members' unachievable expectations rather than against what might actually be recovered if the existing Judgment remains in place.

(iii) Even if the amended settlement is evaluated against the possibility that someone will successfully move to set aside the Judgement, 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. As a result, if the Judgment were set aside and this action permitted to proceed, the stakes in the litigation would be effectively limited to the reduced amount of the actual IPWU surplus. The previously-estimated surplus amount will not be restored by continuation of the action.

(b) With respect to factor (b) (**amount and nature of discovery evidence**), in the context of both the initial disclosure of the diminution of the IPWU Surplus and the subsequent negotiations between the parties, there has been a substantial

amount of actuarial and other information provided to permit the Representative Plaintiffs and their advisors to assess the reasons for the changes in the estimated IPWU surplus and to negotiate amendments to the SSA.

(c) With respect to factor (c) (**the settlement terms and conditions**), the provisions of Amendment No. 3 give effect to the terms negotiated under the original SSA, while providing Class members affected by the drop in estimated IPWU surplus with a guarantee of significantly more money than they would otherwise receive under the original SSA. When the amendment is evaluated in the context of the existing binding settlement where further recovery in the underlying action is precluded by the final Judgment, the terms and conditions of the amendment are clearly beneficial to the Class members.

(d) With respect to factor (d) (**recommendation and experience of counsel**), Class Counsel are very experienced in matters involving pension plans and class proceedings, and have brought both pension law and class proceedings expertise to this case. The effective collaboration of two law firms has provided the Representative Plaintiffs with strong legal representation in both fields. Class Counsel and the Representative Plaintiffs recommended the approval of Amendment No. 3.

(e) With respect to factor (e) (**future expense and likely duration of litigation**), consideration of the cost, duration and risk of ongoing litigation raises unique issues in the context of a motion to amend a previously approved settlement. The underlying action has been fully disposed of. In order for members to pursue a

remedy beyond that provided for in the existing unamended SSA, they would have to successfully move to have the Judgment set aside. No such motion has been brought. Even if such a motion were to succeed, the result would be prolonged litigation in respect of entitlement to a smaller surplus and with respect to a plan expense claim which in the wake of the Supreme Court of Canada decision in *Nolan v. Kerry (Canada) Inc.* the Representative Plaintiffs have conceded has little or no chance of success. In short, any such litigation would be lengthy and expensive, and in any event, would not have the effect of increasing the IPWU surplus.

(f) In respect of factor (g) (**the number of objectors and nature of the objections**), it is noteworthy that the Class consists of approximately 5368 members, 2,149 of whom are in the IPWU Sub-class. Of these numbers, relatively few have indicated any objection to Amendment No. 3. While the objectors are understandably disappointed that the surplus to be distributed is smaller than originally anticipated, they do not allege, let alone establish, that Class members would be better off under the existing settlement than under the amended settlement. Moreover, it is important to recognize that the number of objectors and the nature of the objections is but one of the factors to be considered in assessing the appropriateness of a class action settlement and cannot alone be the determining factor.

(g) In respect of factor (h), (**the presence of arms' length bargaining and the absence of collusion**), the record establishes the presence of extensive arms'

length bargaining and absence of collusion in reaching both the original SSA and the terms of the amendment now before the court.

(h) In respect of factor (i) (**the degree and nature of communications with class members**), the record establishes that there have been frequent and detailed communications from Class counsel to members of the Class (including those who objected to Amendment No. 2).

(i) In respect of factor (j) (**the dynamics of the negotiation**), Canada Life took the position that no amendment to the SSA was necessary following the drop in the IPWU surplus to implement the SSA, while Class counsel viewed the SSA in its current form as unworkable. Notwithstanding these diametrically opposed views, and with the assistance of Justice Strathy, the parties over the course of many months negotiated a compromise that addressed not only the issues in implementing the SSA in its existing form but also increased the amount available for immediate distribution to Class members. When that amendment failed to receive court approval, the parties undertook another round of arms' length negotiations with offers and counteroffers which ultimately resulted in Canada Life increasing its contribution to the revised settlement and guaranteeing a fixed amount for each member of the IPWU Sub-class and each of the Eligible Inactive Members.

The Four-Pronged Fairness Approach Applied in the March 28, 2013 Decision

40. The Court in its reasons dated March 28, 2013 refusing to approve Amendment No. 2 considered whether the amendment was substantively fair, procedurally fair, institutionally fair

and circumstantially fair. Although Canada Life submits that this motion falls to be determined pursuant to the *Dabbs* criteria, it is submitted, to the extent relevant, that Amendment No. 3 also satisfies the criteria articulated by the Court in its March 28, 2013 reasons.

41. The elements of substantive and procedural fairness are fully captured by the *Dabbs* criteria. For the reasons set out above, Amendment No. 3 is both substantively and procedurally fair. In respect of procedural fairness, it is noteworthy that Class counsel has communicated with the Class in respect of the new amendment both through its website and through a court-approved notice and that the Class members, through two webinars, have had an opportunity to ask questions and voice concerns. Class members wishing to retain counsel in respect of the amended settlement have had an opportunity to do so and such counsel has had an opportunity to fully participate in this motion.

42. The new amendment also addresses the concerns of institutional and circumstantial fairness raised by the Court in its reasons of March 28, 2013. The new amendment confers significant benefits on Class members at significant cost to Canada Life. In no sense does the new amendment reflect acceptance of a "low-ball" offer. The "pain" arising from the change in circumstances relating to the IPWU surplus has been shared both by Canada Life (to the extent of approximately $12.2 million) and Class counsel (to the extent of $1 million in reduced fees).

Objectors' Submissions

43. In respect of the issues raised by those objecting to Amendment No. 3 (the "Objectors"), it is the submission of Canada Life that:

(i) The Objectors misconceive how the surplus attributable to the partial wind-up of a pension plan must be calculated and distributed.

(ii) The Objectors misconceive the nature and scope of the entitlement of persons affected by a partial wind-up to elect to receive an amount on account of the commuted value of their pension rights.

(iii) The Objectors misconceive the regulatory approval process of the Superintendent of Financial Services (the "Superintendent").

(iv) The Objectors disregard the fact that the Judgment approving the original unamended settlement remains in force and that no steps have been taken by anyone to set it aside.

(v) The Objectors misconceive the role of the court on a settlement approval and fail to recognize the inability of the court to rewrite a proposed settlement or to impose revised settlement terms.

(vi) The Objectors make allegations in respect of the management of the partial wind-up assets which are incorrect, unsupported by the evidence and, in any event, irrelevant in the context of the current proceeding.

(vii) The Objectors misconceive the purpose and effect of the new condition added by paragraph 8 of the new amendment to the SSA.

(viii) The Objectors misconceive the relevance of the current or future funded status of the ongoing Plan.

44. Canada Life will address each of these issues below.

(i) The Objectors misconceive how the surplus attributable to the partial wind-up of a pension plan must be calculated and distributed.

45. Since the 2004 decision of the Supreme Court of Canada in *Monsanto Canada Inc. v Ontario (Superintendent of Financial Services)*, it has been necessary to distribute to the employer and/or pension plan beneficiaries, in accordance with their respective rights, any surplus allocable to the partial wind-up.

46. Contrary to the apparent position of the Objectors, the determination of the surplus (if any) to be distributed following a partial wind-up is not fixed on the date of the partial wind-up. Rather, surplus is the actual amount (if any) remaining from the assets allocated to the partial wind-up group after the all of benefit entitlements have been settled in one of the prescribed ways and all expenses associated with the partial wind-up have been paid. What is "allocated" as at the partial wind-up date is not the estimated or notional surplus as at that date but rather, the plan assets.

Financial Services Commission of Ontario Policy S900-401

Financial Services Commission of Ontario Policy W100-102

47. The process of determining whether or not there is any surplus available for distribution following a partial wind-up effectively involves the following steps:

(i) identification of the plan members affected by the partial wind-up;

(ii) preparation of an actuarial estimate as at the date of the partial wind-up of (a) the cost of satisfying the pension promise to the persons affected by the wind-up (i.e. their estimated "wind-up liabilities") and (b) the cost of

satisfying the pension promise of all plan beneficiaries - and determination of the proportion that the former is of the latter;

(iii) determination of the amount of the assets in the plan as at the partial wind-up date allocable to the partial wind-up by applying the ratio determined in (ii) to the value of all plan assets as at the partial wind-up date (following which these allocated partial wind-up assets are separately tracked and accounted for);

(iv) settlement from the assets determined in (iii) of the basic benefit entitlements of all members affected by the partial wind-up in accordance with their elections (e.g. by purchase of an annuity, payment of a commuted value, etc.);

(v) ascertainment of the amount (if any) left from the assets referred to in (iii) (after accounting for investment returns) after all basic benefit entitlements of those affected by the partial wind-up have been satisfied and all partial wind-up expenses have been paid.

48. The amount of surplus ultimately available for distribution, if any, will inevitably be different from the estimate of the surplus that was made as at the partial wind-up date because the actual surplus reflects the *actual* cost of settling pension entitlements under the plan and the payment of expenses, and not an estimate of such costs based on assumptions.

49. The IPWU surplus has been calculated in accordance with the above methodology. The amount of the surplus is less than earlier estimates mainly due to the fact that the cost of

providing for the basic benefits of IPWU members turned out to be higher than the amount estimated by the Plan actuary at the time of the estimates. This was due in large part to a reduction in long term interest rates and to the fact that fewer members than had been assumed by the actuary elected to settle their basic benefits by electing to receive a lump sum transfer.

Robinson Affidavit, paragraphs 3, 5, 16 and Exhibit A, CL Motion Records, Tabs 1 and 1A, pp. 2, 5, 24

50. There is no basis in law or practice for the Objectors' position that the amount of the partial wind-up surplus should have been determined in any other way or that it should have been based on historical actuarial estimates rather than actual experience. Neither the PBA, regulatory practice, nor the decision in *Monsanto* provides for such a result.

51. While a partial wind-up report based on the calculations referred to in paragraph 47 above must be approved by the Superintendent, the Superintendent requires the above method of calculating partial wind-up surplus to be employed.

Financial Services Commission of Ontario Policy S900-401

Financial Services Commission of Ontario Policy W100-102

52. The Objectors' apparent premise that withholding approval of Amendment No. 3 somehow leaves open the possibility of the partial wind-up surplus being found to be $93 million based on estimates done in 2005 is thus without foundation. The amount of the partial wind-up surplus is now a fixed amount (subject to expenses and future returns on the assets) – it is the amount now remaining from the assets allocated to the partial wind-up following satisfaction of all of the liabilities (pension promises) and expenses associated with the partial wind-up

members. The amount of that surplus will not be changed by the outcome of this motion or by a failure of the original settlement.

(ii) The Objectors misconceive the nature and scope of the entitlement of persons affected by a partial wind-up to elect to receive an amount on account of the commuted value of their pension rights.

53. The Objectors appear to suggest that there was something improper or nefarious in providing members of the IPWU with the right to elect to transfer a commuted value from the Plan rather than preserving their right to future periodic pension payments. In fact, section 73 of the *Pension Benefits Act* provides that a person entitled to a pension benefit on the wind-up of a pension plan, other than a person who is receiving a pension, is "entitled" to "require" the plan administrator to pay an amount equal to the commuted value of the former member's deferred pension into a designated locked-in arrangement.

Pension Benefits Act, sections 42 and 73

54. Not only was Canada Life required to make the option of payment of a commuted value available to members of the IPWU group, the manner in which such commuted values is to be calculated is prescribed and requires the use of "methods and actuarial assumptions that are consistent with accepted actuarial practice" as of the effective date of the wind-up. In this case, Canada Life specifically sought and received FSCO's confirmation as to the manner in which the commuted values were calculated. FSCO has recently confirmed that it sees no reason to require the commuted values to be changed in the circumstances of this case.

Pension Benefits Act, section 1(1) ("commuted value")

Pension Benefits Act Regulation 909, section 19(1.2) and 29(2)

Robinson Affidavit, paragraphs 8 and 11, CL Motion Record, Tab 1, pp. 3-4

Supplemental Affidavit of Wallace sworn January 2, 2014, paragraph 2,
Supplemental Responding Motion Record of Canada Life

55. As a result, the commuted value option provided to members was mandated by law and neither that option nor the calculation of the commuted value amounts was the result of any discretionary decision by Canada Life. There is simply no basis for any suggestion by the Objectors that the commuted value option was improper or that commuted value amounts were improperly calculated.

56. It should be noted that the choice by a member to receive a commuted value rather than maintaining the right to a future periodic benefit may, for any particular member, be the better option. For example, a member's own investment expertise and investment risk tolerance and/or his or her reasonable expectation as to his or her own life expectancy may make receipt of an immediate lump sum payment the more attractive and valuable option.

57. There is, accordingly, no basis for the Objectors' attempt to characterize the commuted value option as improper or as having the purpose or effect of taking advantage of Plan members. Nor is there any basis for characterizing as "false surplus" any assets remaining in the Plan as a result of members exercising their statutory right to receive a commuted value (calculated in a prescribed manner) rather than a current or future periodic pension.

58. While the assumption originally made by the Plan actuary as to the number of IPWU members who would elect to take the commuted value option proved with hindsight to be high (with the result that the surplus originally estimated was higher than the ultimate actual surplus), there is absolutely no evidence to suggest that the original estimate was unreasonable or not made in good faith.

(iii)The Objectors misconceive the regulatory approval process of the Superintendent of Financial Services.

59. The Objectors appear to incorrectly assume that the Superintendent may require that the amount of surplus to be distributed on the partial wind-up be determined based on the 2005 surplus estimate (which was dependent upon actuarial assumptions) rather than in the manner set out above. There is no basis for this assumption. FSCO Policies S900-401 and W100-102 refute any suggestion that this is the case. The Superintendent does not "allocate" surplus, he ensures that the plan administrator has properly allocated plan assets (including those which form part of the actuarial or estimated surplus) as at the partial wind-up date and then reviews and approves the Plan actuary's determination as to whether any of those allocated assets remain after satisfaction of all of the plan's pension promises to persons affected by the partial wind-up.

60. While the Superintendent must approve the final partial wind-up report, his jurisdiction in respect of surplus extends only to ensuring compliance with subsection 77.4(2) of the PBA which provides that on a partial wind-up affected members "shall have rights and benefits that are not less than the rights and benefits they would have on a full wind-up of the pension plan". On a full wind-up, it can only be the actual surplus remaining which is distributable (since no other assets exist), and subsection 77.4(2) does not authorize or require the distribution of any greater amount on a partial wind-up.

61. While any payment of surplus to a plan sponsor requires the specific approval of the Superintendent (and thus the contemplated distribution under the SSA requires the Superintendent's approval), there is no separate requirement for regulatory approval of a distribution of surplus where the surplus is paid to the plan beneficiaries.

Pension Benefits Act, sections 78 and 79

62. Nothing in Amendment No. 3 purports in any way to limit or control the Superintendent's statutory or regulatory powers over the IPWU.

(iv)The Objectors disregard the fact that the order approving the original un-amended settlement remains in force and that no steps have been taken by anyone to set it aside

63. It is important to recognize that there has been no motion to set aside the Court's Judgment approving the unamended SSA. It remains, as recognized by this Court, a valid and binding Judgment. Its existence and legitimacy have not been challenged. If an attempt were made to set aside the original Judgment, Canada Life would respond to such challenge with the appropriate evidentiary record. The current motion, however, is a motion to approve the amendment to the settlement, not set aside the existing settlement; the motion record has been assembled accordingly.

64. The issue in the current proceeding is only whether the amendment proffered to the original SSA is fair, reasonable and in the best interests of the Class.

65. This motion is not the appropriate forum for a collateral attack on the original Judgment providing the settlement approval. As such, allegations as to the supposed strength of the Plaintiffs' claims, allegations as to what Canada Life knew or should have known at the time of the original settlement approval motion and allegations of a similar nature are irrelevant to the issue at hand.

(v) The Objectors misconceive the role of the court on a settlement approval and fail to recognize the inability of the court to rewrite a proposed settlement or to impose revised settlement terms.

66. The focus of the comments received from certain Objectors has been directed at what they say would be a better amended settlement.

67. In this regard, it must be recognized that a court hearing a settlement approval motion has no ability to rewrite the settlement entered into by the parties or to impose terms on the parties that have not been agreed to.

> *Dabbs v. SunLife Assurance Co. of Canada*, supra, at paragraph 10
>
> *Lavier v. MyTravel Canada Holiday Inc.*, [2011] O.J. No. 2340 (S.C.J.) at paragraph 32

68. In addition, as noted above, it is well established that the test for settlement approval is not one of perfection.

> *Baxter v. Canada (A.G.)*, supra at paragraph 21

69. Accordingly, there is no basis for this Court to accept an invitation from the Objectors to re-craft the amended settlement. The Court has no jurisdiction to do so. The choice before the Court is to either approve or reject the amendment. For the reasons set forth above, it is submitted that the amendment should be approved since it confers upon Class members benefits substantially superior to those that they will receive under the existing court approved settlement.

(vi)The Objectors make allegations in respect of the management of the partial wind-up assets which are incorrect, unsupported by the evidence and, in any event, irrelevant in the context of the current proceeding.

70. The uncontradicted actuarial evidence is that the major reason that the actual IPWU surplus is less than earlier estimates of the surplus is that the cost of settling the basic benefit entitlements of IPWU members was higher than estimated because of (i) a decline in long term interest rates which increased the cost of providing the future stream of promised periodic pension payments to those IPWU members who did not elect to receive a transfer of their commuted value and (ii) the fact that fewer IPWU members than estimated elected to receive a

transfer of the commuted value of their entitlement. Significantly, the evidence is that the value of the assets attributable to the IPWU has increased over time and that poor investment performance is not the reason for the smaller surplus size.

71. Allegations have been made on the issue of an alleged "duration mismatch". As noted by Mr. Robinson in his affidavit, the IPWU assets were invested according to a separate investment strategy with a view to matching the nature and duration of the investments to Mercer's assumption as to how many members of the IPWU would elect to receive a lump sum transfer of their commuted values and how many would elect to receive an immediate or deferred pension. There is no evidentiary basis for the allegations of duration mismatch and Mr. Anderson's submissions do not and cannot constitute such evidence.

> Robinson affidavit, paragraph 6, CL Motion Record, Tab 1, p. 2

72. Moreover, the management of the partial wind-up assets is not an issue in this proceeding and is irrelevant to the disposition of this motion.

(vii) The Objectors misconceive the purpose and effect of the new condition added by paragraph 8 of the new amendment to the SSA.

73. Paragraph 8 of the new amendment makes it a further condition of the settlement that:

> The Settlement can be implemented on the basis that the distributable surplus related to the Integration PWU has been determined based on the liabilities of those members who exercised their portability rights having been calculated using the methodology and assumptions in the partial wind-up report dated March 31, 2006 as approved by the Superintendent of Financial Services on April 14, 2011;

74. As noted above, the commuted values were calculated in accordance with FSCO policy and FSCO has already confirmed by its letter dated April 14, 2011 its approval of the manner in which the commuted values were calculated. However, it is apparent that some Objectors

continue to take issue with those calculations. In Amendment No. 3 Canada Life has undertaken to guarantee minimum payments to all members of the IPWU sub-class and all Inactive Eligible Non-PWU Members and it did so based on an estimate that the cost of honouring that guarantee would be approximately $11.3 million. If the cost of settling the basic benefits of IPWU members were to unexpectedly increase for any reason, that would alter the amount of the existing IPWU surplus (estimated to be $11 million as at December 31, 2013) and thus the amount that Canada Life would have to pay under the new amendment to honour its guarantee.

75. The condition added by section 8 of the new amendment to the SSA is simply a necessary protection for Canada Life given the issues raised by the Objectors and the guarantee extracted from Canada Life as part of the negotiation of that amendment. The condition does not purport to restrict in any way the ability of FSCO to review the commuted value calculations to the extent it otherwise has jurisdiction to do so. It simply provides that if for some unexpected reason a change in the commuted values payable to IPWU members is required then, absent a waiver by Canada Life, the settlement will not proceed and the litigation will continue.

(viii) The Objectors misconceive the relevance of the current or future funded status of the ongoing Plan

76. The only surplus at issue in this action is the IPWU surplus. Although certain IPWU assets were transferred to the ongoing portion of the Plan effective August 31, 2012, the transferred assets were in an amount prescribed and were the notional equivalent of the cost of an annuity to satisfy the basic benefits of the affected IPWU members. The transfer occurred to provide for the basic benefit entitlements of the IPWU members who had not elected to receive a lump sum commuted value payment. No amount was transferred to the ongoing Plan on account of any IPWU surplus entitlements.

77. Once transferred, the assets became part of the Plan fund related to the ongoing portion of the Plan and subject to different investment considerations and criteria.

78. Furthermore, subsequent to the transfer, the ongoing portion of the Plan (and ultimately Canada Life as its sponsor) bears the risk that due to inadequate investment returns, increasing life expectancies or other factors, the transferred amount will ultimately prove insufficient to pay for all of the benefits owing to the affected IPWU members and their beneficiaries.

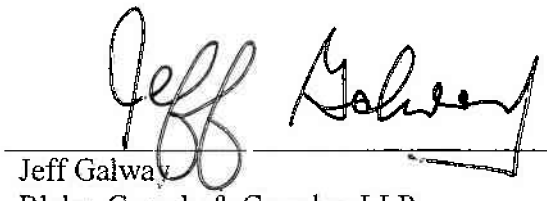
79. The surplus in the ongoing portion of the Plan either now or at some point in the future is irrelevant to what the potential recovery of the IPWU members would have been in the action and is irrelevant to any determination of the fairness or reasonableness of Amendment No. 3. On this motion the issue is not what impact another hypothetical amendment to the SSA might have but whether the amendment that has been agreed to is fair, reasonable and in the best interests of the Class. For all of the reasons set out above, it is submitted that the current amendment meets that test.

80. In any event, there can be no assurance that if the transferred assets and liabilities were separately tracked within the ongoing Plan they would disclose a surplus at any given point in time nor any assurance that any such surplus that might be so disclosed would not subsequently evaporate with evolving circumstances or changing actuarial standards and assumptions.

PART III - ORDER REQUESTED

81. Canada Life requests an order in the form attached as Appendix A approving the amended settlement and varying the Judgment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS THE 6TH DAY OF JANUARY, 2014.



Jeff Galway
Blake, Cassels & Graydon LLP
Lawyers for The Canada Life Assurance Company

APPENDIX A

Court File No. 05-CV-287556CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR. JUSTICE PERELL	)))	FRIDAY, THE 10th DAY OF JANUARY, 2014

BETWEEN:

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

Plaintiffs

- and -

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

Defendants

Proceeding Under the *Class Proceedings Act, 1992*

ORDER

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

ON READING the Settlement Approval Order;

AND ON being advised that as a result of facts which occurred or became known after the date of the Settlement Approval Order the parties have agreed to amend the agreement attached as Schedule "B" to the Settlement Approval Order (the "Agreement"), which amendment is dated as of October 1, 2013 (the "Surplus Sharing Agreement – Amendment #3"), a copy of which is attached as Schedule "A";

AND ON READING the affidavits of Wallace Robinson sworn November 27, 2013 and January 2, 2014 , the affidavits of Alexander Harvey sworn November 27, 2013, Marcus Robertson sworn November 27, 2013, Jonathan Foreman sworn November 27, 2013, Desi Skokleva sworn December 23, 2013, Anne Carey sworn December 20, 2013, Janice Durst sworn December 20, 2013 and Fred Taggart sworn December 23, 2013 and hearing the submissions of counsel for the parties as well as submissions made by certain objectors;

AND ON being satisfied that the changes to be effected by Surplus Sharing Agreement – Amendment #3 are for the benefit of the Class and are fair and reasonable;

1. **THIS COURT ORDERS** that the Settlement Approval Order be and is hereby varied as of the date hereof to provide that the word "Agreement" in paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10 and 11 of the Settlement Approval Order means the Agreement as amended by the Surplus Sharing Agreement – Amendment #3.

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

> 10A. THIS COURT FURTHER ORDERS that should the Superintendent of Financial Services refuse to provide his consent pursuant to the *Pension Benefits Act* necessary for implementation of the Settlement, as of the date of such refusal or denial this Judgment shall be null and void and without prejudice to the rights of the parties to proceed with this action and any agreement between the parties incorporated in this Judgment shall be deemed in any subsequent proceedings to have been made without prejudice.
>
> 10B. THIS COURT FURTHER ORDERS that should (i) Court Approval of the Quebec Superior Court (as contemplated in paragraph 6(c)(vii) of the Agreement) be denied or (ii) the condition in paragraph 6(a)(i)(B) of the Agreement not be satisfied, then subject to such condition being waived by Canada Life within 60 days of becoming aware of such condition not being satisfied, this Judgment shall be null and void and without prejudice to the rights of the parties to proceed with this action and any agreement between the parties incorporated in this Judgment shall be deemed in any subsequent proceedings to have been made without prejudice

DAVID KIDD et al.
Plaintiffs

- and -

THE CANADA LIFE ASSURANCE COMPANY et al.
Defendants

Court File No. 05-CV-287556CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

ORDER

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The Canada Life Assurance Company

SCHEDULE "A"

LIST OF AUTHORITIES

Cases

1. *Sunnybrook Health Sciences Centre v. Lorenz*, [2009] O.J. 3268 (S.C.J.)
2. *McMaster University v. Robb*, [2001] O.J. No. 5480 (S.C.J.)
3. *Burleton v. Royal Trust Corp. of Canada*, [2003] O.J. 2168 (S.C.J.)
4. *CBS Pictures Canada Inc. v. Dillon*, [2006] O.J. 3669 (S.C.J.)
5. *Reichhold Ltd. v. Boyer*, [2000] O.J. 290 (S.C.J.)
6. *Baxter v. Canada (A.G.)*, [2006] O.J. 4968 (S.C.J.)
7. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.) (QL)
8. *Parsons v. Canadian Red Cross Society*, [1999] O.J. 3572 (S.C.J.)
9. *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39
10. *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152
11. *Lavier v. MyTravel Canada Holiday Inc.*, [2011] O.J. No. 2340 (S.C.J.)

FSCO Policies

1. Financial Services Commission of Ontario Policy S900-401
2. Financial Services Commission of Ontario Policy W100-102

SCHEDULE "B"

LIST OF STATUTES

Pension Benefits Act

R.S.O. 1990, CHAPTER P.8

Interpretation

Definitions

1. (1) In this Act,

"commuted value" means the value calculated in the prescribed manner and as of a fixed date of a pension, a deferred pension, a pension benefit or an ancillary benefit; ("valeur de rachat")

Transfer

42. (1) A former member of a pension plan is entitled to require the administrator to pay an amount equal to the commuted value of the former member's deferred pension,

(a) to the pension fund related to another pension plan, if the administrator of the other pension plan agrees to accept the payment;

(b) into a prescribed retirement savings arrangement; or

(c) if the pension plan so permits, for the purchase for the former member of a life annuity that will not commence before the earliest date on which the former member would have been entitled to receive payment of pension benefits under the pension plan. R.S.O. 1990, c. P.8, s. 42 (1); 2010, c. 9, s. 29 (1); 2011, c. 9, Sched. 35, s. 3 (1).

Limitation

(2) The entitlement under subsection (1) is subject to the prescribed limitations in respect of the transfer of funds from pension funds. R.S.O. 1990, c. P.8, s. 42 (2).

Application

(3) Subsection (1) does not apply to a former member who is entitled to immediate payment of a pension under the pension plan or under section 41 unless the pension plan provides such an entitlement. 2010, c. 9, s. 29 (2).

Direction

(4) A former member may exercise his or her entitlement under subsection (1) by delivering a direction to the administrator within the prescribed period. 2010, c. 9, s. 29 (3).

Compliance with direction

(5) Subject to compliance with the requirements of this section and the regulations, the administrator shall comply with the direction within the prescribed period of time after delivery of the direction. R.S.O. 1990, c. P.8, s. 42 (5).

Terms of arrangement or deferred annuity

(6) The administrator shall not make payment,

(a) under clause (1) (b) unless the retirement savings arrangement meets the requirements prescribed by the regulations; or

(b) under clause (1) (c) unless the contract to purchase the deferred life annuity meets the prescribed requirements. R.S.O. 1990, c. P.8, s. 42 (6).

Lump sum payment

(6.1) If the amount of the commuted value of the deferred pension of the former member to be paid into a prescribed retirement savings arrangement under clause (1) (b) is greater than the amount prescribed under the *Income Tax Act* (Canada) for such a transfer, the administrator shall pay the portion that exceeds the prescribed amount as a lump sum to the former member. 1999, c. 15, s. 6.

Purchase of life annuity

(6.2) If a life annuity is purchased under clause (1) (c) for a former member and if the amount of the commuted value of the former member's deferred pension that is used to purchase the life annuity is greater than the amount permitted under the *Income Tax Act* (Canada) for such a purchase, the administrator shall pay to the former member as a lump sum the portion of the commuted value that exceeds the amount permitted under that Act for the purchase of the life annuity. 2010, c. 26, Sched. 15, s. 1 (2); 2011, c. 9, Sched. 35, s. 3 (2).

Approval

(7) If a payment under subsection (1) does not meet the limitations prescribed in relation to transfers of funds from pension funds, the administrator shall not make the payment without the approval of the Superintendent. R.S.O. 1990, c. P.8, s. 42 (7).

Terms and conditions

(8) The Superintendent may approve the payment subject to such terms and conditions as the Superintendent considers appropriate in the circumstances. R.S.O. 1990, c. P.8, s. 42 (8).

Order for repayment

(9) If a payment that does not meet the limitations prescribed in relation to transfers of funds from pension funds is made without the approval of the Superintendent or there is failure to comply with a term or condition attached to the approval, the Superintendent by order, subject to section 89 (hearing and appeal), may require any person to whom payment under subsection (1) has been made to repay an amount not greater than the amount of the payment together with interest thereon. R.S.O. 1990, c. P.8, s. 42 (9).

Enforcement

(10) Subject to section 89 (hearing and appeal), an order for payment under subsection (9), exclusive of the reasons therefor, may be filed in the Superior Court of Justice and is thereupon enforceable as an order of that court. R.S.O. 1990, c. P.8, s. 42 (10); 2006, c. 19, Sched. C, s. 1 (1).

Discharge of administrator

(11) The administrator is discharged on making the payment or transfer in accordance with the direction of the former member if the payment or transfer complies with this Act and the regulations. R.S.O. 1990, c. P.8, s. 42 (11).

Determination of entitlements

73. (1) For the purpose of determining the amounts of pension benefits and any other benefits and entitlements on the winding up of a pension plan,

(a) the employment of each member of the pension plan shall be deemed to have been terminated on the effective date of the wind up;

(b) each member's pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and

(c) provision shall be made for the rights, if any, under section 74. R.S.O. 1990, c. P.8, s. 73 (1); 2010, c. 9, s. 55 (1-3).

Transfer rights on wind up

(2) A person entitled to a pension benefit on the wind up of a pension plan, other than a person who is receiving a pension, is entitled to the rights under subsection 42 (1) (transfer) of a member who terminates employment and, for the purpose, subsection 42 (3) does not apply. R.S.O. 1990, c. P.8, s. 73 (2).

Purchase of annuities on partial wind up

(3) Except as provided under subsection (2), the administrator is not required to purchase life annuities for members, former members, retired members or other persons entitled to benefits under the pension plan in order to distribute the assets of the pension fund in connection with a partial wind up. 2010, c. 9, s. 55 (4).

Distribution of assets

(4) If the administrator does not purchase life annuities in the circumstances described in subsection (3), the administrator shall comply with such requirements as may be prescribed in connection with the distribution of the assets of the pension fund in connection with a partial wind up. 2010, c. 9, s. 55 (4).

Repeal

(5) Subsections (3) and (4) are repealed on a day to be named by proclamation of the Lieutenant Governor. 2010, c. 9, s. 55 (4).

Application

(6) This section applies if the effective date of the wind up is on or after April 1, 1987. 2010, c. 9, s. 55 (5).

Rights and benefits

77.4 (2) On a partial wind up, the members, former members, retired members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up. 2010, c. 9, s. 61.

Agreement about surplus

s.77.11 (7) A written agreement among the following persons may provide for payment of surplus to the employer in the circumstances specified in the agreement and as of the date specified in the agreement:

1. If the surplus is to be paid to the employer while the pension plan continues in existence,
   i. the employer,
   ii. at least two-thirds of the members of the pension plan (and, for this purpose, a trade union that represents members may agree on behalf of those members), and
   iii. the number which is considered appropriate in the circumstances by the Superintendent of former members, retired members and other persons who are entitled to payments under the pension plan as of the specified date for payment of the surplus.
2. If the surplus is to be paid to the employer on the wind up of the pension plan in whole,
   i. the employer,

ii. at least two-thirds of the members of the pension plan (and, for this purpose, a trade union that represents or represented members on the date of the wind up may agree on behalf of those members), and

iii. the number which is considered appropriate in the circumstances by the Superintendent of former members, retired members and other persons who are entitled to payments under the pension plan as of the date of the wind up.

3. If the surplus is to be paid to the employer on the partial wind up of the pension plan,

i. the employer,

ii. at least two-thirds of the members of the pension plan affected by the partial wind up (and, for this purpose, a trade union that represents or represented affected members on the date of the partial wind up may agree on behalf of those members), and

iii. the number which is considered appropriate in the circumstances by the Superintendent of former members, retired members and other persons who are affected by the partial wind up and who are entitled to payments under the pension plan as of the date of the partial wind up. 2010, c. 24, s. 26 (1, 5).

Effect of agreement

(8) A written agreement prevails over any document that creates and supports the pension plan and pension fund, it prevails over subsections (2), (3) and (4), and it prevails despite any trust that may exist in favour of any person. 2010, c. 24, s. 26 (1).

Payment out of pension fund to employer

78. (1) No money that is surplus may be paid out of a pension fund to the employer without the prior consent of the Superintendent. R.S.O. 1990, c. P.8, s. 78 (1); 1997, c. 28, s. 200; 2010, c. 24, s. 28 (1).

Application for payment

(2) An employer who applies to the Superintendent for consent to payment of money that is surplus to the employer out of a pension fund shall transmit notice of the application, containing the prescribed information, to,

(a) each member, former member and retired member of the pension plan to which the pension fund relates;

(b) each trade union that represents members of the pension plan;

(b.1) each trade union that represents the members, former members or retired members of the pension plan on the date of the wind up, if the pension plan is being wound up;

(c) any other individual who is receiving payments out of the pension fund; and

(d) the advisory committee of the pension plan. R.S.O. 1990, c. P.8, s. 78 (2); 1997, c. 28, s. 200; 2010, c. 9, s. 62 (1, 2).

Representations

(3) A person to whom notice has been transmitted under subsection (2) may make written representations to the Superintendent with respect to the application within thirty days after receiving the notice. R.S.O. 1990, c. P.8, s. 78 (3); 1997, c. 28, s. 200.

(4), (5) Repealed: 2010, c. 24, s. 28 (2).

Payment of surplus

Continuing pension plan, payment to employer

79. (1) Subject to section 89, the Superintendent shall not consent to payment of surplus to an employer out of a continuing pension plan unless,

(a) the Superintendent is satisfied, based on reports provided with the employer's application for payment of the surplus, that the pension plan has a surplus;

(b) the withdrawal of surplus by the employer while the pension plan continues in existence is authorized either as provided in section 77.11 or by a court order declaring that the employer is entitled to the surplus while the plan continues;

(c) where all pension benefits under the pension plan are guaranteed by an insurance company, an amount equal to at least two years of the normal cost of the pension plan, determined in accordance with the regulations, is retained in the pension fund as surplus;

(d) the greater of the following amounts is retained in the pension fund as surplus:

(i) the sum of "A" and "B" where,

"A" is an amount equal to twice the normal cost of the pension plan, and

"B" is an amount equal to 5 per cent of the liabilities of the pension plan, determined in accordance with the regulations, and

(ii) an amount equal to 25 per cent of the liabilities of the pension plan, determined in accordance with the regulations; and

(e) Repealed: 2010, c. 24, s. 29 (1).

(f) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund. R.S.O. 1990, c. P.8, s. 79 (1); 1997, c. 28, s. 202 (1, 2); 2010, c. 9, s. 63 (1, 2); 2010, c. 24, s. 29 (1).

(2) Repealed: 2010, c. 24, s. 29 (2).

Wind up, payment to employer

(3) Subject to section 89, the Superintendent shall not consent to payment of surplus to an employer out of a pension plan that is being wound up unless,

(a) the Superintendent is satisfied, based on reports provided with the employer's application for payment of the surplus, that the pension plan has a surplus;

(b) the payment of surplus to the employer on the wind up of the pension plan is authorized either as provided in section 77.11 or by a court order declaring that the employer is entitled to the surplus when the plan is being wound up;

(c) provision has been made for the payment of all liabilities of the pension plan as calculated for purposes of the termination of the pension plan; and

(d) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus. 2010, c. 24, s. 29 (3).

Same, partial wind up

(3.1) Subject to section 89, the Superintendent shall not consent to payment of surplus to an employer out of a pension plan that is being wound up in part unless,

(a) all of the criteria described in clauses (3) (a), (c) and (d) are satisfied; and

(b) the payment of surplus to the employer on the partial wind up of the pension plan is authorized either as provided in section 77.11 or by a court order declaring that the employer is entitled to the surplus when the plan is being wound up in part. 2010, c. 24, s. 29 (6).

(3.2) Repealed: 2010, c. 24, s. 29 (6).

Wind up, payment to members, etc.

(4) If a pension plan is being wound up in whole or in part, payment from surplus may be made to or for the benefit of members, former members, retired members and other persons, other than an employer, who are entitled to payments under the plan as of the date of the wind up or partial wind up. 2010, c. 24, s. 29 (9, 10).

(5)-(8) Repealed: 1997, c. 28, s. 202 (5).

Pension Benefits Act

R.R.O. 1990, REGULATION 909

GENERAL

8. Revoked: O. Reg. 178/12, s. 11.

19 (1.2) For purposes other than those of subsection 42 (1) of the Act and subsection 29 (2), the commuted value of a pension, deferred pension or ancillary benefit shall be calculated using methods and actuarial assumptions that are consistent with accepted actuarial practice. O. Reg. 144/00, s. 14.

29 (2) If a pension plan is being wound up in whole or in part, the minimum commuted value of a pension, deferred pension or ancillary benefit in respect of a person who exercises his or her entitlement under subsection 73 (2) of the Act is the amount determined as of the effective date of the wind up in accordance with section 3500 ("Pension Commuted Values") of the *Standards of Practice* of the Actuarial Standards Board, published by the Canadian Institute of Actuaries, as that section read upon being revised on June 3, 2010. O. Reg. 178/12, s. 29 (1).

Court File No. 05-CV-287556CP

DAVID KIDD et al.
Plaintiffs

– and –

THE CANADA LIFE ASSURANCE COMPANY et al.
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at TORONTO
Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE DEFENDANT,
THE CANADA LIFE ASSURANCE COMPANY
(Plaintiffs' Motion Approval of Amendment #3
January 10, 2014)

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