

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Plaintiffs (Respondents)

--and--

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

Defendants (Appellant)

Proceeding under the Class Proceedings Act, 1992

INTERVENORS BOOK AND COMPENDIUM

September 27, 2013

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DAVID KIDD, ~~and~~ ALEXANDER HARVEY
and JEAN PAUL MARENTETTE

Plaintiffs

- and -

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

Proceeding under the *Class Proceedings Act, 1992*

AMENDED STATEMENT OF CLAIM
(Notice of Action issued April 12, 2005)

AMENDED THIS Sept. 19, 2005 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT A
☐ RULE/LA RÉGLE 26.02 ()
☒ THE ORDER OF The Honourable Judge
L'ORDONNANCE DU
DATED / EN DATE Sept. 14, 2005 Justice MacDonald
.....
REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

1. The plaintiffs claim:
 - (a) an order certifying the action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, (the "CPA");
 - (b) an order appointing David Kidd, and Alexander Harvey and Jean Paul Marentette as representatives for :
 - (i) all persons, wherever resident, who are members, former members and other persons entitled to benefits or payments under the Canada Life Canadian Employees Pension Plan (Registration No. 354563) (the "Plan") between the date that the Canada Life Assurance Company (the "Company") ceased paying all costs and expenses in connection with the

pension trust fund held in respect of the Plan (the "Fund") and the date an order is made certifying this action as a class proceeding or such other date as this Court may determine, and their estates and beneficiaries (the "Class" or the "Main Class"); and

- (ii) all persons, wherever resident, who are members, former members and other persons entitled to benefits or payments under the Plan, and who were affected by the partial wind up of the Plan declared as at July 10, 2003 (the "Partial Wind Up Date"), and their estates and beneficiaries (the "Partial Wind Up Sub-Class");
- (c) a declaration ascertaining the amount of the surplus in the Plan, or in the alternative, a reference for an accounting of the amount of the surplus in the Plan as at the Partial Wind Up Date (the "Surplus") required to be distributed as a result of the partial wind up of the Plan (the "Partial Wind Up");
- (d) a declaration that the Fund comprises an irrevocable trust held exclusively for the benefit of the Class;
- (e) a declaration that the Company has no beneficial interest in any assets of the Fund and that no part of the corpus or income of the Fund shall ever revert to the Company;
- (f) a declaration that any amendments made to the Plan and the trusts thereunder that purport to allow surplus to revert to the Company or otherwise giving the Company the right to benefit directly or indirectly from the assets in the Fund (the "Surplus Reversion Amendments") are null and void;
- (g) an order requiring the Company to file a Partial Wind Up report with the Financial Services Commission of Ontario ("FSCO") that provides for the immediate distribution and payment of the Surplus to the Partial Wind Up Sub-Class, who have a statutory entitlement to an immediate distribution of Surplus;
- (h) a declaration that the Plan, and the trusts thereunder, do not permit the costs and expenses of administering the Plan and Fund (the "Plan Expenses") to be paid out

of, charged to or reimbursed from the Fund, such Plan Expenses being and including (but not limited to):

- (i) the fees and expenses of the pension fund trustees and custodian for the performance of their services in respect of the Plan and Fund;
 - (ii) the fees of investment managers and consultants for services in respect of the investment of Fund assets;
 - (iii) the fees of accounting firms in respect of their audits of the Fund;
 - (iv) the expenses of the Plan administrator and the fees of any agents necessary to calculate and pay pension benefits;
 - (v) miscellaneous expenses relating to the Plan and Fund, including filing fees charged by the pension regulatory authority and the tax authorities; and,
 - (vi) legal fees and the fees of actuarial and other consulting firms and other service providers relating to the Plan and Fund;
-
- (i) a declaration that the Company is responsible for payment of all Plan Expenses;
 - (j) a declaration that any and all amendments to the Plan and the trusts in respect of the Plan that purport to permit Plan Expenses to be paid out of, charged to or reimbursed from the Fund, or otherwise permit or require that Plan Expenses be borne by the Fund (the "Plan Expenses Amendments"), are void and of no effect;
 - (k) an interim and permanent injunction restraining the defendants from causing Plan Expenses to be paid out of, charged to or reimbursed from the Fund and from otherwise using any part of the Fund for purposes other than for the exclusive benefit of the Plan Members;
 - (l) a declaration that all Plan Expenses the defendants unlawfully caused to be paid out of, charged to or reimbursed from the Fund (the "Revoked Funds") constitute a breach or partial revocation of the trusts in respect of the Plan;
 - (m) an accounting of all Revoked Funds by the Company;

- (n) an order that all Revoked Funds, together with interest compounded annually at the rate of Fund return, be paid to the Class by the Company and that such funds be equitably allocated and distributed among the members of the Class in accordance with the direction of this Honourable Court;
- (o) in the alternative to (n), an order requiring the Company to make restitution to the Fund in respect of all Revoked Funds plus interest at the rate set out in (n);
- (p) damages payable by the Company for breach of trust and contract in the amount of \$150,000,000.00 in respect of the Revoked Funds, and such amounts to be determined by this Honourable Court;
- (q) costs on a substantial indemnity basis, together with any goods and services tax which may be payable on any amount pursuant to the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended, or any other legislation enacted by the Government of Canada, payable by the Company, or in the alternative, payable out of the Fund;
- (r) prejudgment and postjudgment interest under subsections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, compounded annually, or at the Plan rate of return compounded annually, whichever is greater; and
- (s) such further and other relief as this Honourable Court may deem just.

The Plaintiffs

2. The plaintiff, Alexander Harvey ("Harvey"), is an individual residing in Toronto, Ontario. Harvey is a former member of the Plan in receipt of his pension. He is part of the group of employees whose employment was terminated due to the Partial Wind Up. Harvey is also a member of Canada Life Canadian Pension Plan Members' Rights Group (CLPENS) which is a voluntary, unincorporated association of members and former members of the Plan. CLPENS represents approximately 900 members of the proposed Class and approximately 370 members of the proposed Partial Wind Up Sub-Class. Harvey worked for the Company from November 1971 and retired in September 2003.

3. The plaintiff, David Kidd ("Kidd"), is an individual residing in Weston, Ontario and is also a former member of the Plan and member of CLPENS. Kidd worked for the Company from January 1986 and retired on or about February 2004. He is also part of the Partial Wind Up.

4. The Plaintiff, Jean Paul Marentette ("Marentette"), is an individual residing in London, Ontario and is a former member of the Plan. Marentette worked for the Company between March 25, 2002 and April 12, 2004. He is also part of the Partial Wind Up.

The Plan

5. The Company entered into a Trust Agreement dated December 31, 1957 (the "1957 Trust Agreement") with three individual trustees, for the purpose of providing pension benefits to the Company's Canadian employees and agents. The coinciding pension plan provisions were set out under the Company's Canadian Staff Pension Fund Regulations which were attached as Schedule A to the 1957 Trust Agreement. This 1957 Trust Agreement, was referred to in later years as The Canada Life Assurance Company Trusteed Canadian Staff Pension Fund (1958). This was a defined contribution pension plan that became a defined benefit plan in 1988. The federal Registration Number is 23310.

6. Another pension fund called the Trusteed Canadian Agents' Pension Fund, a combination of a defined benefit and contribution plan, was established to cover agents' commissions which were not covered under the Company's Trusteed Canadian Staff Pension Fund (1958). In 1968, all agents changed their employment status from employee to self-employed and their pension credits earned while employees are held in the Trusteed Canadian Agents' Pension Fund. The federal Registration Number is 23002.

7. The Plan was established on or about December 31, 1964 as a defined benefit pension plan for the Company's Canadian office employees. The Plan was originally named the Canada Life Assurance Company Trusteed Canadian Staff Pension Fund (1965) but was renamed The Canada Life Canadian Employees Pension Plan effective January 1, 1997, following its merger with The Company's Trusteed Canadian Staff Pension Fund (1958) and The Company's Trusteed Canadian Agents' Pension Fund.

8. The benefits accrued since December 31, 1996 under the three merged pension plans, are now included under the Plan.

9. The Plan is registered as a pension plan under the Ontario *Pension Benefits Act*, R.S.O. 1990, c.P-8, as amended (the "PBA") and under the *Income Tax Act*, R.S.C. 1985, c.1, under Registration No. 354563.

10. The Plan is funded through a trust agreement between the Company and individual trustees of the Fund (the "Trust Agreement"). The current trustees are the defendants A.P. Symons, D. Allen Loney and James R. Grant (the "Trustees").

The Defendants

11. The Company is a corporation incorporated pursuant to the laws of Canada, carrying on business as a provider of life insurance, financial services and pension fund administration services. It is headquartered in Toronto, Ontario. The Company is the employer or former employer of each of the plaintiffs and the members of the class, and is the sponsor and administrator of the Plan.

12. As stated above, the defendants, A.P. Symons, D. Allen Loney and James R. Grant, are the current Trustees of the Fund. A. P. Symons resides in Markham, Ontario. D. Allen Loney resides in Toronto, Ontario. James R. Grant resides in London, Ontario.

The Class

13. The proposed class includes:

- (a) a Main Class comprised of all persons, wherever resident, who are members, former members and other persons entitled to benefits or payments under the Plan between the date the Company ceased paying all costs and expenses in connection with the Fund and the date an order is made certifying this action as a class proceeding or such other date as this Court may determine, and their estates and beneficiaries; and

- (b) a Partial Wind Up Sub-Class comprised of all persons, wherever resident, who are members, former members and other persons entitled to benefits or payments under the Plan, and who are affected by the Partial Wind Up declared as at July 10, 2003, and their estates and beneficiaries.

Summary of Claim

History of Plan and Trust

14. The original trust agreement for the Plan was established on December 31, 1964 (the "1964 Trust Agreement").

15. The earliest Plan provisions were "Regulations" dated February 12, 1965 that were attached as Schedule A to the 1964 Trust Agreement (the "1965 Regulations").

16. According to s. 2 of the 1965 Regulations, the Fund was established "for the purpose of providing pensions for employees eligible under these Regulations".

17. Article 8(b) of the 1964 Trust Agreement prohibits any amendments being made to the Trust Agreement by the Trustees that result in the return of any portion of the Fund to the Company. The provision reads:

(b) No such alteration or modification shall result in the return of any portion of the Fund to the Company.

18. Article 10 (c) of the 1964 Trust Agreement as originally drafted indicates that if the trust fund is ever dissolved, any monies remaining in the fund after paying for all the annuities and deferred annuities in terms of contributions made by any of the contributors, are to be returned to the Company. Article 10 in its entirety read:

10. If the Company goes into liquidation, whether voluntarily or compulsorily, otherwise than for the purpose of reconstruction or if the Company gives notice to the Trustees that it will cease to make payments to the Fund, the Trust shall be determined and the Fund shall be realized and, subject to the payment thereof of all costs, charges and expenses properly so payable, the net proceeds of such realization and any monies then in hand shall be applied by the Trustees (so far as the funds available permit) to the following purposes and with the respective priorities in the sequence in which they are set out -

- (a) in the purchase of annuities for each person then in receipt of a Retirement or Death Benefit from the Fund and each person who has then attained his normal retirement date but whose Retirement Benefit from the Fund has not commenced, such annuities to be as nearly as possible of the same kind, amount and duration as the benefit such person is or would be entitled to receive from the Fund.
- (b) in the purchase of deferred annuities for every other Contributor, such annuities to be as nearly as possible of the same kind, amount and duration as the benefit such person is or would be entitled to receive from the Fund based on the contributions he has made to the Fund.
- (c) all monies which remain after purposes (a) and (b) have been completed shall be returned to the Company.

All or part of the annuity to be purchased for any person as aforesaid may, at the option of the Trustees, be provided by assigning and transferring to such person any policy or policies in respect of such person obtained by the Trustees pursuant to Clause 6 hereof.

All annuities purchased or provided by policies assigned and transferred as aforesaid shall be non-commutable and non-assignable. [emphasis added]

19. This original version of article 10(c) did not comply with the applicable rules of the department of National Revenue at the time.

20. The Trust Agreement was amended at a date unknown to the Plaintiffs to preclude the reversion of funds to the Company in the event of the dissolution of the Fund, as had previously been provided in article 10(c). This change is evidenced by the consolidated and restated Trust Agreement and Plan Regulations adopted in February 1989 (the "1989 Trust Agreement") by the Board of Directors of the Company, with an effective date of 1965, in which article 10 reads as follows:

10. If the Company goes into liquidation, whether voluntarily or compulsorily, otherwise than for the purpose of reconstruction or if the Company gives notice to the Trustees that it will cease to make payments to the Fund, the Trust shall be determined and the Fund shall be realized and, subject to the payment thereof of all costs, charges and expenses properly so payable, the net proceeds of such realization and any monies then in hand shall be applied by the Trustees (so far as the funds available permit) to the following purposes and with the respective priorities in the sequence in which they are set out -

- (a) in the purchase of annuities for each person then in receipt of a Retirement or Death Benefit from the Fund and each person who has then attained his normal retirement date but whose Retirement Benefit from the Fund has not commenced, such annuities to be as nearly as possible of the same kind, amount and duration as the benefit such person is or would be entitled to receive from the fund.
- (b) in the purchase of deferred annuities for every other Contributor, such annuities to be as nearly as possible of the same kind, amount and duration as the benefit such person is or would be entitled to receive from the Fund based on the contributions he has made to the Fund.
- (c) all monies which remain after purposes (a) and (b) have been completed shall be applied in such manner as the Trustees may determine to increase the annuities and/or the deferred annuities described in purposes (a) and (b).
- (d) The annuities and deferred annuities to be provided under the terms of subparagraphs (a), (b) and (c) shall not exceed the maximums permitted under clause 9(g) of Revenue Canada Information Circular No. 72-13R8, or such successor federal law, Regulations or administrative rules as apply when such annuities or deferred annuities are established.

All or part of the annuity to be purchased for any person as aforesaid may, at the option of the Trustees, be provided by assigning and transferring to such person any policy or policies in respect of such person obtained by the Trustees pursuant to Clause 6 hereof.

All annuities purchased or provided by policies assigned and transferred as aforesaid shall be non-commutable and non-assignable. [emphasis added]

21. The 1989 Trust Agreement provides in article 10 that on dissolution of the Fund, all monies available after purchasing the annuities and deferred annuities required under the Plan, are to be used to increase the annuities. The amended Article 10(c) does not permit reversion of surplus funds to the Company in the event of Fund dissolution or wind up. When a pension plan does not provide for the withdrawal of surplus money on wind up, the law of trusts and s. 79(4) of the PBA, among other provisions, require that surplus money be distributed among the plan members, former members and any other persons entitled to payments under the pension plan on the date of the wind up.

22. The 1989 Trust Agreement also contains the following provisions:

8. The Trustees may at any time by instrument in writing signed by not less than three of them and with the consent in writing of the Board of Directors of the company alter or modify any or all of the provisions of the this Trust Deed or of the attached Regulations, provided that:

(a) No alteration or modification shall alter the main purpose of the scheme from that of the provision of pensions for the employees of the Company on retirement, and

(b) No such alteration or modification shall result in the return of any portion of the Fund to the Company. [emphasis added]

23. Pursuant to these provisions in the 1964 and 1989 Trust Agreements, the Fund was impressed with an irrevocable trust, effective December 31, 1964, to be held for the exclusive benefit of the members and former members of the Plan and their beneficiaries. The terms of the trust do not entitle the Company to any assets in the fund including surplus assets, nor does the Company have the power to revoke the terms of the trust to permit reversion of Fund assets to themselves.

24. According to the Actuarial Valuation prepared as at December 31, 1988, the Fund had a surplus of \$83,171,000. Since that time, the Company has not contributed to the Fund and has taken continuous contribution holidays. Despite the "holidays" the surplus in the Fund has grown.

25. On or about December 31, 1993, contrary to the terms of the 1964 and 1989 Trust Agreements, changes were made to the Trust Agreement (the "1993 Amendments"). Article 8 of the 1993 Trust Agreement was amended 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.

Accordingly, the irrevocable trust was amended unlawfully in that the possibility of reversions to the Company was raised.

26. Despite these changes, however, 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.

27. The 1993 Trust Agreement further allowed the Company to seek reimbursement for Plan Expenses contrary to the terms of the prior Trust Agreement. Article 4 of the 1993 Trust Agreement sets out the Duties of the Trustees which includes, in part, the following:

...(h) upon the request of the Plan Administrator, pay for any usual and reasonable expenses incurred in the administration of the Fund and the Plan within 18 months prior to the date of request, ...

28. Further, Article 5 of the 1993 Trust Agreement relating to the duties of the Plan Administrator, was amended to include the following duty:

...(d)(iii) obtain from the Trustees reimbursement of expenses and charges incurred by the Plan Administrator and the Company relating to the operation of the Fund and the Plan as and when requested by the Company...

29. The 1993 Amendments purporting to permit the Company to revoke surplus entitlement and permit payment of Plan Expenses from the Fund constitute an unlawful revocation of the trust that was established for the exclusive benefit of the members and former members of the Plan and their beneficiaries.

30. Effective January 1, 1997, the Plan was "merged" with The Canada Life Assurance Company Trusteed Canadian Staff Pension Fund (1958) and The Canada Life Assurance Company Trusteed Canadian Agents' Pension Fund. A single "consolidated" Plan was created and the associated funds were merged into a single fund.

31. The Plan, as consolidated and restated effective January 1, 1997 (the "1997 Plan"), contains new provisions relating to surplus assets in the Pension Fund. Section 4.02(c) reads:

(c) Application of Surplus Assets

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.

32. Section 17.06 of the 1997 Plan states:

17.06 Surplus Assets

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*. [emphasis added]

33. The plaintiffs plead such amendments to the Plan were unlawful and of no force and effect.

34. The Trust Agreement was also amended and restated effective January 1, 1997 (the "1997 Trust Agreement"). 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. The plaintiffs plead that the provisions of the Trust Agreement govern over those of the Plan text.

35. The Trust Agreement was restated effective August 7, 2002 (the "2002 Trust Agreement") and article 13 provides:

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.

36. The most recent restated Plan text effective January 1, 2003 (the "2003 Plan") contains identical provisions with respect to reversion of Surplus as contained in article 17.06 of the 1997 Plan, set out in paragraph 31 herein.

Entitlement to Surplus on Partial Wind Up

37. The plaintiffs plead that by gradual manipulation of the Plan and Trust Agreement, the Company and the Trustees have acted in bad faith and attempted to revoke an irrevocable trust to

permit the Company access to Surplus and defeat the rights of the Class, contrary to the terms of the trust as it stood before the unlawful amendments.

38. On or about July 10, 2003, The Great-West Life Assurance Company ("Great-West") acquired 100% of the outstanding common shares of Canada Life Financial Corporation, the holding company for the Company. The Company became a wholly-owned subsidiary of Great-West on or about July 10, 2003 and, beginning at that time, the operations of the Company and Great-West were combined.

39. On or about July 10, 2003, the Company announced its intention to partially wind up the Plan within the meaning of the PBA, in relation to members of the Plan who were terminated from, retired or resigned voluntarily from the Company as a result of the transaction with Great-West. Section 70(6) of the PBA, as confirmed by the Supreme Court in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, requires the immediate distribution of Surplus on the Partial Wind Up.

40. The notice provided to the plaintiffs and the Class with respect to the Partial Wind Up did not refer to the existence of the Surplus in the Fund or any potential entitlement that the Class, or the Partial Wind Up Sub-Class, may have to any surplus amounts in the Fund. The notice did not provide for the distribution of the Surplus.

41. According to an actuarial valuation of the Plan dated August 2003, the Plan had a solvency surplus of \$233,499,000 as at January 1, 2003 and a going concern surplus of \$179,911,000.

42. The plaintiffs seek a declaration ascertaining the amount of the Surplus in the Plan at the Partial Wind Up Date, and an accounting of the value of the Surplus required to be distributed as a result of the Partial Wind Up.

43. The plaintiffs seek a declaration that the Plan, and the trust in respect of the Plan, comprise an irrevocable trust held exclusively for the benefit of the members, former members, deferred vested members and their beneficiaries, and any other persons entitled to benefits under the Plan.

44. The plaintiffs further seek a declaration that the Company has no beneficial interest in any assets of the Fund and that no part of the corpus or income of the Fund shall ever revert to the Company.

45. The plaintiffs seek an order requiring the distribution of Surplus attributed to those members of the Partial Wind Up Sub-Class who have a statutory right to such distribution.

Plan Expenses Amendments

46. The 1964 Trust Agreement provided in article 7 that the Company shall pay all costs and expenses in connection with the Fund.

47. 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.

48. The Plan's Financial Statements since at least 1988 combine the three pension plans that were later merged in 1997, including the Plan, The Canada Life Assurance Company Trusteed Canadian Staff Pension Fund (1958) and The Canada Life Assurance Company Trusteed Canadian Agents' Pension Fund (the "Funds"). The Funds have been combined in the Financial Statements since at least 1988 because they have been under common trusteeship since 1965.

49. The earliest financial statement the plaintiffs have in their possession is dated December 31, 1988, which indicates that fees were charged to the Funds that year for specialty growth administration, real estate administration, mortgage services, investment management and other administration fees. Such charges were contrary to article 7 of the Trust Agreement.

50. The 1993 Amendments referred to in paragraphs 26 and 27 herein, require the Trustees to reimburse the Company for all plan expenses. Such amendments are contrary to article 8 of the 1964 and 1989 Trust Agreements which precludes any portion of the Fund being returned to the Company.

51. The Pension Commission of Ontario (later renamed FSCO) required the Company to notify the members of the Plan of the Plan Expenses Amendments. A Notice was sent to members, dated June 1, 1994 that explained that under the Previous Policy, the "Company paid

the expenses of the plan directly", but that under the New Policy, "[i]nvestment expenses and the cost of administering the plan will in future, if the Company requests, be paid from the pension fund."

52. The Company transmitted a letter addressed to Canada Life Pensioners and dated August 9, 1994, to the Pension Commission of Ontario. The letter reads:

One change [to the trust documents] permits the trustees to reimburse the Company for any expenses incurred by the Company in the administration of the fund and plans, a fairly normal condition for modern pension trusts. We expect the amount involved each year to be less than 1% of the current surplus.

53. Since the effective date of the Plan Expenses Amendments, more than 1% of the surplus has been used to reimburse the Company for expenses relating to investments and the administration of the Funds.

54. Pursuant to the 1994 Financial Statement, the Company began charging an annual fee to the Funds for administrative and other services rendered by the Company in 1994. The amount included in expenses for 1994, for the three Funds, was \$1,871,742 which included \$816,996 for 1993.

55. Further, according to the 1994 Financial Statement, Canada Life Investment Management Limited, a wholly owned subsidiary of the Company, began charging the Funds for investment management services rendered. The amount included in expenses for 1994, for the three Funds, was \$599,518 which included \$294,264 for 1993.

56. These amounts for Company administration and investment services were added to other costs and expenses that were charged to the Funds, for a total of \$2,542,000 in 1994.

57. The following is as complete a summary of the total costs and expense charged to the Funds since 1987, as the plaintiffs are able to provide and is based on the Financial Statements that have been filed by the Company at FSCO:

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

58. Since 1994, these total costs and expenses have included charges for the Company's administrative and investment fees. The following is a summary of just those Company fees, based on Financial Statements filed at the FSCO:

Year	Administrative Fee	Investment Fee
1994	\$1,871,742	\$599,518
1995	\$1,424,000	\$310,000
1996	\$1,598,000	\$457,295
1997	\$1,697,000	\$574,000
1998	\$1,560,000	\$694,000
1999	\$1,685,000	\$599,000
2000	\$2,280,000	\$720,000
2001	\$1,900,000	\$895,000
2002	\$1,362,000	\$669,000
2003	<u>\$814,000</u>	<u>\$504,000</u>
Totals	\$16,191,742	\$6,021,813

59. The most recent restated Trust Agreement dated August 7, 2002 requires in 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...".

60. The most recent restated Plan is effective January 2003 and contains the following provisions:

14.05 Plan Expenses

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.

61. These Plan Expenses Amendments constitute a partial revocation and a breach of trust because, among other reasons, they are an unlawful attempt to permit the Company to withdraw trust assets for the benefit of persons who are not beneficiaries of the trust. The Company has no power to revoke the trust held exclusively for the benefit of the Plan members.

Losses and Damages Suffered

62. Due to the defendants' breach of fiduciary obligations, breach of trust and breach of contractual obligations to members of the class, the class has suffered losses and damages. The plaintiffs seek payment of such amounts to all members of the class.

63. The plaintiffs plead and rely upon the provisions of the *Class Proceedings Act, 1992*, S.O. 1992, c. C-6 and the provisions of the *Pension Benefits Act*, R.S.O. 1990, Ch. P.8.

64. The plaintiffs propose that this action be tried at the City of Toronto.

May 9, 2005

KOSKIE MINSKY
Barristers & Solicitors
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Toronto, Ontario M5H 3R3

Mark Zigler (LSUC #19757B)
Ari N. Kaplan (LSUC # 42042S)
Alisa Kinkaid (LSUC #45993T)

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Fax: 416-977-3316
Solicitors for the Plaintiffs

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N6A 4K3

David B. Williams (LSUC #21482V)
Jonathan J. Foreman (LSUC # 45087H)

Tel: (519) 679-9660
Fax: (519) 667-3362

Solicitors for the Plaintiffs

TO: THE CANADA LIFE ASSURANCE COMPANY
330 University Avenue
Toronto, ON M5G 1R8

AND TO: A. P. SYMONS
58 Heatherwood Cres.
Markham, Ontario
L3R 8V6

AND TO: D. ALLEN LONEY
1132 Bay St.
Toronto, Ontario
M5S 2Z4

AND TO: JAMES R. GRANT
314 Oxford Street West
London, Ontario
N6H 4N8

DAVID KIDD, ALEXANDER HARVEY
and JEAN PAUL MARENTEITE
 Plaintiffs

THE CANADA LIFE ASSURANCE
 COMPANY, et al
 Defendants

Court File No: 05-CV-287556 *CP*

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

AMENDED STATEMENT OF CLAIM

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Solicitors for the Plaintiffs

TAB 2

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

**AFFIDAVIT OF WALLACE B. ROBINSON
(Sworn September 24, 2012)**

**I, WALLACE B. ROBINSON, of the City of London, in the Province of Ontario, MAKE OATH AND
SAY:**

1. I am Assistant Vice-President, Pension Benefits, at The Canada Life Assurance Company ("Canada Life"). I am a Fellow – Canadian Institute of Actuaries and a Fellow – Society of Actuaries and I am familiar with The Canada Life Canadian Employees Pension Plan (the "Plan") and the proposed settlement of this proceeding. I therefore have knowledge of the matters to which I swear in this affidavit, except where such knowledge is stated to be based on information and belief, in which case I believe those facts to be true.

Estimate of the Integration Partial Wind Up Surplus

2. As of the date of the settlement approval motion in this matter (January 27, 2012), the most recent Mercer estimates of the surplus in the Plan attributable to the Integration partial wind up (the "Integration PWU") and the Indago, Adason and Pelican proposed partial wind ups (the "Indago PWU", "Adason PWU" and "Pelican PWU", respectively) was approximately \$64.3M (Integration PWU \$54M; Pelican PWU \$2.9M; Indago PWU \$1.3M and Adason PWU \$6.1M). These estimates were as at a point in time namely as at June 30, 2011.

3. Between June 30, 2011 and December 31, 2011, however, there were two external events which significantly impacted the estimate of the Integration PWU surplus causing a decrease in the estimated surplus. As discussed in a memorandum entitled "Canada Life Canadian Employees Pension Plan –Partial Wind-Up Surplus

Update" (attached to my affidavit as Exhibit "A"), the two biggest factors contributing to the decrease in the estimated surplus attributable to the Integration PWU between June 30, 2011 and December 31, 2011 were the dramatic and persistent drop in interest rates over the relevant period and the fact that significantly more Integration PWU members than expected elected (or were deemed to have elected) a guaranteed pension as opposed to transferring the commuted value of their pension entitlement out of the Plan.

4. Subsequent to the settlement approval motion, Canada Life was advised by Mercer that as at December 31, 2011 the estimated surplus attributable to the Integration PWU had decreased from approximately \$54M to approximately \$8M (assuming all Integration PWU 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).

5. The most recent estimate of the Integration PWU surplus provided by Mercer (as at August 31, 2012) is \$3.1M. The assumptions used to generate this estimate are contained in a report prepared by Mercer dated September 12, 2012. A copy of this report is attached to my affidavit as Exhibit "B" (see scenario 2 – page 5).

Transfer of Integration PWU Members to Ongoing Plan

6. In May of this year, acting upon Canada Life's direction, Mercer approached seven annuity providers and asked them to quote on providing annuities for the Integration PWU members who had elected (or were deemed to have elected) to receive a guaranteed pension. None of the seven annuity providers in question were prepared to quote on this business.

7. As plan administrator, Canada Life is required under the *Pensions Benefits Act* (Ontario) to settle the basic benefits of persons affected by a partial wind up. Given the fact that no insurer was prepared to quote on providing annuities, in order to complete the Integration PWU and in order to implement the settlement, Canada Life's only option is to settle basic benefits by transferring the assets and liabilities related to these Integration PWU members into the on-going portion of the Plan and pay the pensions for this group out of the Plan. This transfer would be done in accordance with Financial Services Commission of Ontario ("FSCO") policy W100-233 (a copy of which is attached hereto as Exhibit "C"). As discussed in this policy, FSCO's position is that plan administrators are not required to purchase annuities for members affected by a partial plan wind-up; instead, administrators can settle the basic benefits of affected partial wind-up members by transferring the assets and liabilities of those members to the on-going portion of the pension plan.

8. As discussed at page 3 of the FSCO policy, where annuities are purchased for partial wind-up members through an insurance company, the cost to settle the liabilities is known and the partial wind-up surplus or deficit is the amount left after the annuity purchase cost and plan wind-up expenses are deducted from the partial wind-up assets.

9. The FSCO policy goes on to note that where an administrator chooses not to purchase annuities for the partial wind-up members, the transfer of assets and liabilities to the ongoing plan is based upon the estimated cost of purchasing annuities. This estimate is to be calculated based on guidance contained in Educational Notes published by the Canadian Institute of Actuaries' Committee on Pension Plan Financial Reporting (the "CIA Committee").
10. The estimated Integration PWU surplus of \$3.1M as at August 31, 2012 (referred to in paragraph 5 above) is based upon the estimated cost of purchasing annuities calculated in accordance with the CIA Committee's Educational Notes.
11. The amount of the pension payable to Integration PWU members will be the same whether their pension is provided by way of an annuity or is provided from the Plan.

Impending Change to the CIA Committee's Guidance on Estimating the Premium Cost of Indexed Annuities

12. In May of this year, in an Educational Note, the CIA Committee discussed its guidance in respect of estimating the cost of purchasing an indexed annuity. A copy of this note is attached hereto as Exhibit "D". In this note, the CIA Committee stated that while the data concerning the pricing of indexed annuities is extremely limited, information collected from insurers who provided illustrative quote data revealed that the premiums quoted were substantially higher than the estimated premiums calculated in accordance with the guidance provided by prior Educational Notes.
13. In this same Educational Note, the CIA Committee went on to state:
- The PPFRC intends to conduct further research in 2012 regarding the pricing of indexed annuities. The analysis will include confirmation as to whether the insurers would be willing to actually transact on the basis reflected in the illustrative annuity quotes. This research may result in the revision of future guidance for estimating the cost of purchasing indexed annuities.
14. In an Educational Note supplement dated August 16, 2012, the CIA Committee reiterated the point made in its earlier note that the illustrative premium quotes provided by insurers to the CIA Committee were substantially higher than the estimated premiums calculated in accordance with the guidance provided by prior Educational Notes, and that the Committee was in the process of conducting further research regarding the pricing of indexed annuities. The Committee again stated that this research may result in the revision of future guidance for estimating the cost of purchasing indexed annuities. A copy of the August 16, 2012 Educational Note supplement is attached hereto as Exhibit "E".

15. Based upon these Educational Notes, Canada Life is concerned that if there is a delay in transferring assets and liabilities related to the Integration PWU members to the ongoing Plan, the guidance provided by the CIA Committee that is used to estimate the cost of purchasing annuities may change in the interim. Given the CIA Committee's statements that the premium quotes provided by insurers for the illustrative quotes are "substantially higher" than the guidance provided by prior Educational Notes, any such change made to the CIA's Guidance will increase the estimated cost of purchasing indexed annuities.

16. By way of example, based upon the figures provided in the Mercer September 12, 2012 report (Exhibit "B" hereto), if the new CIA Committee's guidance resulted in a reduction of 50 bps (0.5%) in the net rate of return used to calculate the cost of purchasing indexed annuities, and had this new guidance been in effect as of August 31, 2012, then as at that date there would have been no Integration PWU surplus but an estimated Integration PWU deficit of approximately \$19.5M. For each additional 50 bps reduction in the net rate of return there would be a further increase in the estimated deficit of an additional \$22.5M. If a deficit arises in the Integration PWU prior to the transfer of Integration PWU assets and liabilities to the on-going Plan, that deficit will have to be funded in full by Canada Life prior to the transfer of the Integration PWU assets and liabilities to the on-going Plan.

17. I would note that if the Integration PWU assets and liabilities are transferred to the on-going Plan prior to any change in the CIA Committee's guidance, any subsequent change in the CIA Committee's guidance for indexed annuities could result in a solvency deficit arising in the on-going Plan (as the CIA Committee's guidance is also utilized by actuaries when they prepare an actuarial valuation). That said, any deficit that arises in respect of the on-going Plan as a result of a change in the CIA Committee's guidance would not have to be funded by Canada Life immediately, but could be funded over a five-year period starting from the date of the next actuarial valuation.

18. Given the likelihood (in my view) that there will be a change in the CIA Guidance which will lead to an increase (likely a significant increase) in the estimated cost of purchasing indexed annuities, there is some urgency in Canada Life effecting the transfer of Integration PWU assets and liabilities to the on-going plan prior to this change becoming effective so as to preserve some surplus for distribution to the Integration PWU members and to avoid the prospect of Canada Life having to fully fund a large Integration PWU deficit. In this regard, I note that changes in the CIA Committee's guidance can be announced with retroactive effect (as recently occurred when the CIA Committee changed its guidance with respect to estimating the cost of purchasing non-indexed annuities-see the August 16, 2012 Educational Note Supplement attached hereto as Exhibit "E").

Minimum Surplus Allocations Under the Surplus Sharing Agreement

19. At paragraphs 32-36 of his affidavit sworn September 20, 2012, Mr. Robertson speaks to the \$1000 minimum surplus allocation to Eligible PWU Group Members and Inactive Eligible Non-PWU Group Members. In his affidavit, Mr. Robertson indicates that Inactive Eligible Non-PWU members' share of available surplus based on Mercer's August 31, 2012 estimate would be insufficient to meet the minimum \$1000 payment under the SSA.

These statements by Mr. Robertson do not accurately reflect the terms of the SSA under which \$1.65M, not \$0.39M, would be allocated to Inactive Eligible Non-PWU Group Members based on the August 31, 2012 estimate.

20. Under the Surplus Sharing Agreement (the "SSA"), section 7(a) provides that the "Final Partial Wind Up Surplus" shall be shared 30.34%/69.66% between Canada Life and the Eligible PWU Group Members ("Eligible Member Group Surplus Share"). "Final Partial Wind Up Surplus" is defined in section 2(a)(iv) of the SSA to mean the aggregate (net of administrative and legal expenses) of the Integration PWU surplus, the Indago PWU surplus, the Adason PWU surplus and the Pelican PWU surplus.

21. Section 7(c) of the SSA goes on to provide that the Eligible Member Group Surplus Share shall be allocated as between Eligible PWU Group Members ("Eligible PWU Group Surplus Allocation") and the Inactive Eligible Non-PWU Group Members ("Inactive Eligible Non-PWU Group Surplus Allocation") on the following basis:

- (i) The Eligible PWU Group Surplus Allocation shall be 57.22% of the Final Partial Wind Up Surplus; and
- (ii) The Inactive Eligible Non-PWU Group Surplus Allocation shall be 12.44% of the Final Partial Wind Up Surplus.

22. Section 7(c) of the SSA then states that the Eligible Non-PWU Group Surplus Allocation shall be allocated and distributed among individual Inactive Eligible Non-PWU Group Members in accordance with section 8 of the SSA. Section 8(d) of the SSA provides that the Inactive Eligible Non-PWU Group Surplus Allocation shall be allocated among the Inactive Eligible Non-PWU Group Members *pro rata* to their wind up liabilities, subject to a minimum allocation of \$1,000.

23. Accordingly, the surplus to be allocated to the Inactive Eligible Non-PWU Group members is 12.44% of the aggregate of the surplus allocable to each of the Integration PWU, Indago PWU, Adason PWU and Pelican PWU.

24. Based upon the Mercer September 12, 2012 report, the estimated surplus for each of the Integration PWU, Indago PWU, Adason PWU and Pelican PWU as at August 31, 2012 was as follows:

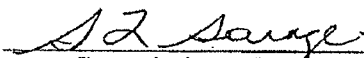
Integration PWU	\$3.1M
Indago PWU	1.1M
Adason PWU	6.2M
Pelican PWU	<u>2.9M</u>
	\$13.3M

25. Accordingly, based on the surplus estimates as at August 31, 2012 the Inactive Eligible Non-PWU Group Member surplus share under the SSA would have been 12.44% of \$13.3M or \$1.65M.

26. There are 1418 Inactive Non-PWU Group members. Not all of the 1418 Inactive Non-PWU Group members, however, are Inactive Eligible Non-PWU Group members (ie some of these individuals did not provide the requisite consent required under the SSA.) Even if the \$1.65M were distributed *pro rata* amongst the 1418 Inactive Non-PWU Group members, the result would be an individual surplus allocation of \$1,167 per Inactive Non-PWU Group member.

27. Given that section 7(d) of the SSA explicitly provides that for the Eligible PWU Group Members the Final Partial Wind Up Surplus is not to be shared as a common pool but allocated to each partial wind up, I agree with Mr. Robertson that based on the August 31, 2012 Mercer estimates, approximately \$1.77M in surplus would be allocated to the Integration PWU members resulting in an allocation of approximately \$825 per member.

SWORN BEFORE ME at the City of London,
in the Province of Ontario, on September 24,
2012.



Commissioner for Taking Affidavits



WALLACE B. ROBINSON

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*

AFFIDAVIT OF WALLACE B. ROBINSON
(Sworn September 24, 2012)

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Lawyers for the Defendant,
The Canada Life Assurance Company

Canadian bond yields: 10-year lookup

View or save this data in: [SDMX](#), [XML](#), [CSV](#)

View data for the past:

- 1 month
- 3 months
- 6 months
- 1 year

Monthly series

V122553: Real return bond - long term

Low	2012-07-01	0.33
Average	2005-01-01 — 2013-09-01	1.45
High	2008-11-01	2.68

Date	V122553
2005-01	2.03
2005-02	2.07
2005-03	2.08
2005-04	1.92
2005-05	1.86
2005-06	1.87
2005-07	1.93
2005-08	1.73
2005-09	1.64
2005-10	1.70
2005-11	1.65
2005-12	1.44
2006-01	1.54
2006-02	1.44
2006-03	1.59
2006-04	1.79
2006-05	1.83
2006-06	1.90
2006-07	1.80
2006-08	1.61
2006-09	1.66
2006-10	1.78
2006-11	1.63

2006-12	1.73
2007-01	1.79
2007-02	1.75
2007-03	1.77
2007-04	1.76
2007-05	2.02
2007-06	2.15
2007-07	2.09
2007-08	2.15
2007-09	2.15
2007-10	2.05
2007-11	2.14
2007-12	1.99
2008-01	1.98
2008-02	1.94
2008-03	1.67
2008-04	1.72
2008-05	1.57
2008-06	1.45
2008-07	1.60
2008-08	1.53
2008-09	2.06
2008-10	2.49
2008-11	2.68
2008-12	2.10
2009-01	2.26
2009-02	2.19
2009-03	2.00
2009-04	2.01
2009-05	2.34
2009-06	1.91
2009-07	1.89
2009-08	1.82
2009-09	1.74
2009-10	1.63
2009-11	1.56
2009-12	1.52
2010-01	1.55

2010-02	1.59
2010-03	1.56
2010-04	1.54
2010-05	1.44
2010-06	1.42
2010-07	1.55
2010-08	1.40
2010-09	1.17
2010-10	1.17
2010-11	1.30
2010-12	1.12
2011-01	1.35
2011-02	1.31
2011-03	1.13
2011-04	1.05
2011-05	0.99
2011-06	1.04
2011-07	0.84
2011-08	0.88
2011-09	0.88
2011-10	0.85
2011-11	0.61
2011-12	0.47
2012-01	0.53
2012-02	0.44
2012-03	0.52
2012-04	0.59
2012-05	0.37
2012-06	0.42
2012-07	0.33
2012-08	0.40
2012-09	0.35
2012-10	0.38
2012-11	0.34
2012-12	0.38
2013-01	0.54
2013-02	0.52
2013-03	0.48
2013-04	0.42

2013-05	0.68
2013-06	1.12
2013-07	1.02
2013-08	1.10
2013-09	1.16

MERCER

Mercer Benefits Processing Centre

70 University Avenue

P.O. Box 5

Toronto, Ontario M5J 2M4

June 22, 2011

Dear

**The Canada Life Canadian Employees Pension Plan
Partial Wind-Up Benefit Election Package**

You are included in the partial wind-up of the Canada Life Canadian Employees Pension Plan (the "Registered Plan"), Registration Number 0354563. The partial wind-up includes members of the Registered Plan (other than those in Quebec) whose employment with Canada Life (the "Company") terminated during the integration period following the acquisition of Canada Life by Great-West Life. The partial wind-up cannot be completed until regulatory approval to distribute all Registered Plan assets attributable to the partial wind-up has been obtained, and that regulatory approval will not be forthcoming until the court action commenced by certain former Registered Plan members has been resolved. However, Canada Life has received permission from the Superintendent of Financial Services to settle the basic benefits for partial wind-up members of the Registered Plan. The enclosed material outlines the options available to you with respect to your basic benefits.

The distribution of partial wind-up surplus will not proceed until the court action has been resolved and regulatory approval has been obtained. It is important to note that the option you elect with respect to your basic benefits will not affect any partial wind-up surplus allocation to which you may become entitled.

As you are included in the partial wind-up of the Registered Plan, you are fully vested in the pension benefits you have earned up to your date of termination of participation in the Registered Plan. The attached *Statement of Benefits and Election of Option* (the "Statement") (2 copies) outlines the value of your accrued pension and the options available to you in accordance with the Registered Plan provisions and the provincial pension legislation applicable to your province of employment.

Every effort has been made to ensure that the information shown on the enclosed package is correct. The Company reserves the right to amend the calculations in order to correct any data errors. If you believe any of the information in the Statement is

(over...)

MERCER

Page 2
June 22, 2011

incorrect or if you have any questions about your pension benefits, please call the Mercer Benefits Processing Centre at 1-888-841-7967.

Please complete one copy of the *Statement of Benefits and Election of Option* and any additional required forms as indicated under your elected option, and return it within **90 days** in the self-addressed envelope to the Mercer Benefits Processing Centre. **If you do not return the completed Statement postmarked by that date, you will be deemed to have chosen *Option 2 – Deferred Monthly Pension*.**

In order to ensure that you receive your entitlements in a timely manner, please complete and return the Statement, even if you wish to receive your benefits in the default form. Should you elect the Commuted Value Transfer option, it may take 4 to 6 weeks to process your election upon receipt of your completed Statement. **Please note that this is your only opportunity to elect the Commuted Value Transfer option.**

Please retain the other copy for your records.

Sincerely,

Mercer Benefits Processing Centre

Enclosure

KIDD et al.
Plaintiffs

- and -

CANADA LIFE et al.
Defendants

Court of Appeal File No.: C56999

COURT OF APPEAL FOR ONTARIO

Proceeding commenced in TORONTO

**EXHIBIT BOOK AND
COMPENDIUM**

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