**CITATION:** *Kidd v. The Canada Life Assurance Company*, 2014 ONSC 457
**COURT FILE NO.:** 05-CV-287556CP
**DATE:** January 21, 2014

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | |
| **DAVID KIDD, ALEXANDER HARVEY, JEAN PAUL MARENTETTE, GARRY C. YIP, LOUIE NUSPL, SUSAN HENDERSON and LIN YEOMANS** | *Mark Zigler, Clio M. Godkewitsch,* and *David B. Williams* for the Plaintiffs, David Kidd, Alexander Harvey, Jean Paul Marentette, Susan Henderson and Lin Yeomans |
| Plaintiffs | *Darrell Brown* for for the Plaintiffs, Garry C. Yip and Louie Nuspl |
| **– and –** | |
| **THE CANADA LIFE ASSURANCE COMPANY, A.P. SYMONS, D. ALLEN LONEY and JAMES R. GRANT** | *Jeff Galway* and *Doug Rienzo* for the Defendant, The Canada Life Assurance Company |
| Defendants | *John C. Field* for the Defendants A.P. Symons, D. Allen Loney, and James R. Grant |
| | *Patrick Mazurek* for certain objectors |
| | *Dan Anderson,* objector |
| Proceeding under the *Class Proceedings Act, 1992* | **HEARD**: January 10, 2014 |

**PERELL, J.**

## REASONS FOR DECISION

### A. INTRODUCTION AND OVERVIEW

[1] This is a class action with respect to the ownership of the surplus of a pension plan after several partial wind-ups and with respect to allegations of improper charging of expenses to the pension plan.

[2] This class action has become a saga. By order dated October 26, 2011, I certified the action as a class action for settlement purposes; see *Kidd v Canada Life*, 2011 ONSC 6324. By order dated February 6, 2012, I approved the settlement; see *Kidd v Canada Life*, 2012 ONSC 740. The settlement order remains in effect, but the settlement has never been implemented. The

unimplemented settlement became a huge disappointment largely because of unpredicted economic forces. In response to the disappointment, the parties negotiated a revised settlement. They brought a motion for a second settlement approval based on their revised agreement. However, by order dated March 28, 2013, I dismissed the motion for approval of the revised settlement; see *Kidd v. The Canada Life Assurance Company*, 2013 ONSC 1868. Then, with the support of the Plaintiffs, Canada Life appealed my decision refusing the revised settlement agreement, but the appeal was not argued, because the parties agreed to a third version of their settlement agreement.

[3] With some objectors opposing the motion, the parties now move for court approval of the third version of the settlement agreement pursuant to s. 29 of the *Class Proceedings Act, 1992,* S.O. 1992, c.6.

[4] For the reasons that follow, I approved the revised version of the settlement between the parties.

## B. FACTUAL AND PROCEDURAL BACKGROUND

[5] In 2003, The Great-West Life Assurance Company acquired The Canada Life Assurance Company. Subsequently, there was a partial winding up of the Canada Life Canadian Employees' Pension Plan known as the "Integration Partial Wind-up" or "IPWU." The effective date of the IPWU was June 30, 2005.

[6] The process of determining whether or not there is any surplus available for distribution following a partial wind-up involves the following steps: (1) identification of the plan members affected by the wind-up; (2) preparation of an actuarial estimate as at the date of the partial wind-up of the cost of the pension benefits to the persons affected by the wind-up; (3) preparation of an actuarial estimate of the cost of the pension benefits of all plan beneficiaries; (4) determination of the amount of the assets in the plan as at the partial wind-up date allocable to the partial wind-up group and allocable to the other members of the pension plan; (5) settlement from the allocable assets of the basic benefit entitlements of all members affected by the partial wind-up in accordance with their elections to stay in the plan (by purchase of an annuity) or by payment of a commuted value; (6) calculation of the amount, if any, left from the assets allocated for the partial wind-up members after accounting for investment returns and deducting wind-up expenses.

[7] The Plan actuary, Mercer, prepared an initial report for the IPWU, and it estimated that the pension plan assets were $273 million and the liabilities were $175 million. These estimates produced an estimated IPWU surplus of $93 million after payment of wind-up expenses.

[8] The surplus calculated by Mercer was an estimate because the actual surplus would depend upon how pension plan liabilities were actually settled in accordance with the *Pension Benefits Act,* R.S.O. 1990, c. P.8. The amount of the liabilities would depend, in part, upon whether plan members chose a commuted payment or chose to continue pension benefits from the plan. The election between commuted values and the value of pension plan benefits affects the calculation of plan liabilities because commuted values and the values of pension plan benefits are not numerical equivalents.

[9] In 2005, this class action was commenced. The Plaintiffs claim was for the pension surplus and for reimbursement from Canada Life of expenses alleged to have been wrongfully charged for administering the pension trust fund.

[10] It is very important to note that the class action was not about the calculation of the surplus, which was left to the actuaries, but was about who owned the surplus whatever its size. Colloquially speaking, the action was not about the size of the surplus pie but about who should get the pie. The settlement negotiations were about how to divide the surplus pie between Canada Life and the Class Members.

[11] In April 2007, Justice Winkler presided at a mediation session, and following the mediation Canada Life, the Plaintiffs and the Executive Committee of the Canada Life Canadian Pension Plan Members' Rights Group (the "CLPENS Executive") signed a Memorandum of Understanding establishing a non-binding framework for settlement of the litigation, but a final settlement was not reached.

[12] Meanwhile, in March 2008, the IPWU assets were segregated from the other assets of the Pension Plan and invested as a separate sub-fund. At this time, Mercer made assumptions as to how many employees would eventually 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. To foreshadow a point that will emerge later, the objectors to the settlement complain about how the segregated assets were managed and about how the surplus associated with the assets was sustained or preserved.

[13] In late 2010, the parties reached agreement on the terms of a Surplus Sharing Agreement. In addition to the IPWU matter, the Surplus Sharing Agreement addressed the claims with respect to three other partial wind-ups of the Pension Plan.

[14] In addition to the IPWU, the Surplus Sharing Agreement dealt with claims of members employed by Indago Capital Management Inc., Pelican Food Services Inc., and Adason Properties Limited. It may be noted here that unlike the IPWU part of the surplus, the Indago, Pelican, and Adason part of the surplus was barely affected by the subsequent economic forces that affected the calculation of the IPWU surplus.

[15] Under the Surplus Sharing Agreement (which was eventually approved by the Court but never implemented, 57.22% of the partial wind-up surpluses was payable to the partial wind-up Class Members, 12.44% of the partial wind-up surpluses was payable to the Inactive Eligible Non-PWU Group members (deferred vested and pensioners) and 30.34% was payable to Canada Life.

[16] The amount of surplus to be distributed to each member was based on his or her respective pension plan liabilities but the Surplus Sharing Agreement provided that the minimum share payable to an eligible Class member would be $1,000. The agreement further provided that active Class Members would have a two-year contribution holiday. The Surplus Sharing Agreement also provided 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 new pension plan.

[17] In March 2011, an information package about the Surplus Sharing Agreement was sent to Class Members and they were asked to vote on the proposed settlement. The information packages contained individual estimates of each member's surplus share under the proposed settlement. The information statements were premised on an estimated surplus of $62.2 million for the IPWU. This surplus estimate was based on an estimate of the cost of settling the basic benefit entitlements of the IPWU group depending on their choice of commuted value entitlements or pension plan benefits.

[18] Here, it may be noted that pursuant to the *Pension Benefits Act*, R.S.O. 1990, c. P.8, Canada Life was required to provide persons affected by the IPWU with an election for: (a) the transfer of the commuted value of their pension entitlement calculated in accordance with the policies of Financial Services Commission of Ontario ("FSCO"); or (b) a guaranteed deferred or immediate pension (the by-default choice). The commuted values were calculated in accordance with FSCO policy. FSCO, in a letter dated April 14, 2011, indicated its approval of the manner in which the commuted values were calculated.

[19] In July 2011, election forms were mailed to members affected by the IPWU. The members were advised of the amount of the commuted value of their pension entitlement. 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 guaranteed pension.

[20] On January 27, 2012 the Court approved the Surplus Sharing Agreement. At that time, Canada Life's most recent estimate of the IPWU surplus as at June 30, 2011 was $54 million. This estimate continued to be based on Mercer's assumption as to how many IPWU members would elect a lump sum transfer of the commuted value of their basic benefit entitlement versus a guaranteed pension. The estimated surplus for the Pelican, Indago, and Adason wind-ups was $2.9 million, $1.3 million, and $6.1 million respectively.

[21] When the approval was granted, the value of the settlement to the class was $49 million. The Court also approved payment of Class Counsel's legal fees of $4.667 million plus disbursements of approximately $60,000, plus up to $200,000 in additional legal fees to complete the matter.

[22] Unfortunately, within one month of the Court approval, Canada Life and its actuarial advisors advised that the estimated amount of the IPWU Surplus had dramatically decreased.

[23] On February 10, 2012, Canada Life was advised by Mercer that the estimated costs of settling the basic benefits of the IPWU members had increased significantly from previous estimates. Mercer advised Canada Life that this was mainly because: of (1) a drop in long-term interest rates, which increased the present value and thus the cost of settling basic benefits for members who elected to receive a guaranteed pension and (2) because fewer members than expected had elected to receive the commuted value of their pension benefits.

[24] The evidence at the time was that the value of the assets attributable to the IPWU had increased over time and thus poor investment performance was not the reason for the smaller surplus. Mercer subsequently advised that if it was assumed that all IPWU members who had not yet chosen their payment option were deemed to have elected to receive a guaranteed pension,

the estimated IPWU surplus available for distribution as at December 31, 2011 was under $10 million. This information was subsequently shared with Class Counsel and the court.

[25] In May 2012, Canada Life solicited bids for annuities to settle the benefits of those members of the IPWU who wished to continue with pension benefits, but all of the seven insurance providers who had been approached declined to bid. In these circumstances, Canada Life determined that its only option was to transfer the liability to the ongoing portion of the Pension Plan together with IPWU assets equal in value to that liability.

[26] 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 after notice to Class counsel and a court appearance on September 27, 2012.

[27] Meanwhile, the estimated IPWU surplus continued to drop. As at August 31, 2012, the estimated surplus was just $3.1 million.

[28] Following the September 27, 2012 motion, the parties attempted to address the situation that the estimated surplus continued to diminish.

[29] Justice Strathy presided at a mediation and in December 2012, Canada Life, the Plaintiffs and the CLPENS Committee, a group associated with the Representative Plaintiffs, agreed on the terms of an amendment to the Surplus Sharing Agreement. At that time, the estimated IPWU surplus was $2.6 million.

[30] The terms of the proposed Amended Surplus Sharing Agreement involved augmentation of the IPWU surplus by Canada Life waiving certain reimbursements (estimated at $1.3 million) and Class Counsel waiving reimbursement of $200,000 in legal fees. There were to be top-up payments to members so that everyone in the IPWU Sub-Class would receive the promised minimum $1,000 surplus share (estimated at $1.2 million). There was a potential second surplus distribution calculated as at December 31, 2014 subject to a $15 million cap.

[31] This amendment to the Surplus Sharing Agreement was conditional upon court approval. The fairness hearing was scheduled for March 18, 2013.

[32] Meanwhile, because Canada Life was unable to purchase annuities for those continuing with the Pension Plan, it was required by FSCO policy to provide those members who had not originally elected to receive commuted values a further opportunity to elect that option, and in early January 2013, new election forms were distributed and members were provided with the minimum statutory period of 90 days in which to elect. The result was that 142 IPWU members who had previously elected or were deemed to have elected to receive a deferred or immediate pension elected to receive a lump sum transfer of their commuted values.

[33] Pausing here, the effect of these elections is that Mercer has recalculated the available surplus under the Surplus Sharing Agreement as of December 31, 2013 to be approximately $11 million. Under the un-amended and not implemented Surplus Sharing Agreement, 69.66% of this $11 million is distributable to eligible Class Members.

[34] On March 28, 2013, I refused to approve the amendment. Although, the revised settlement was financially better than implementing the already approved Surplus Sharing Agreement, I concluded that it did not meet the test for approval under the *Class Proceedings*

*Act, 1992*. For the reasons expressed in my Reasons for Decision, I did not think the proposed amended agreement was fair as required by the *Act*.

[35] With the support of the Plaintiffs, Canada Life appealed my decision.

[36] In late March, 2013 Class Counsel was contacted by Patrick Mazurek, a lawyer who was retained by some of the Class Members who had objected to the amendments to the Surplus Sharing Agreement. Mr. Mazurek had several discussions and a meeting with Class Counsel, and he was later granted standing to intervene in the Court of Appeal, on consent of the parties.

[37] While the appeal of my disapproval decision was pending, the parties resumed negotiations. These renegotiations ultimately led to another and different amendment to the Surplus Sharing Agreement. The negotiations were arms-length and adversarial.

[38] The objectors and their counsel were not involved in the negotiations, although Class Counsel submit that they considered the objectors' concerns when negotiating with Canada Life.

[39] The amendment to the Surplus Sharing Agreement is the subject of this motion for approval. The terms of the new amendment include the following:

- There will be a single distribution of surplus to the Class that will occur immediately following court and regulatory approval.
- Each member of the IPWU group 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.
- 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 the above guaranteed payments.
- Class Counsel will waive a total of $1 million in legal fees that were previously approved by the court, and Class Counsel 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 group and the Inactive Eligible Non-PWU Sub Class Members exclusively, and will not be shared with Canada Life under the SSA provisions.
- 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.
- The entitlements of Class Members not involved with the IPWU is unchanged from the Surplus Sharing Agreement.

[40] Under the proposed amended settlement, practically speaking, Canada Life has given up its share of the pension surplus pie that is being distributed by the settlement of the class action.

[41] Under the proposed amended settlement, about 45% of Class Members will receive the same benefit as was estimated in the March 2011 information packages.

[42] Under the revised Surplus Sharing Agreement, Class Counsel will be paid $3.867 million in fees, which is $1 million less than the amount previously approved. This fee represents approximately 11% of the total recovery of the Class, and represents an estimated multiplier of 1.5 times the anticipated total fees. This multiplier will reduce if additional time must be expended by counsel to complete the matter with no additional fees charged.

[43] 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 Surplus Sharing Agreement as at December 31, 2013 is about $19.8 million.

[44] Class Counsel hosted two webinars on November 28 and December 2, 2013 to further describe the terms of the revised settlement. The webinars were attended by 91 and 47 members respectively via webcast. Class Counsel responded to dozens of questions submitted by email during those webinars and subsequently.

[45] Class counsel made a number of invitations to Mr. Mazurek to discuss any aspect of the settlement, but he did not accept the invitations.

[46] Mr. Mazurek appeared at the fairness hearing on behalf of a group of about 90 objectors and delivered a detailed factum objecting to the fairness of the proposed settlement.

[47] Class Member Dan Anderson also appeared and delivered a detailed factum.

## C. THE OBJECTIONS TO THE AMENDED SETTLEMENT

[48] Objections have been received from the following Class Members: (1) Dan Anderson; (2) Maggie Wong and Monica Rimler; (3) Patrick Garel; and (4) Mr. Mazurek, on behalf of 92 Class Members.

[49] The objectors do not suggest that the Amended Settlement is not an improvement from the outcome of the Surplus Sharing Agreement.

[50] I will address the objector's main objections in the following discussion and analysis.

## D. DISCUSSION AND ANALYSIS

[51] Section 29(2) of the *Class Proceedings Act, 1992* provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.), at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[52] The 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.

[53] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and, (i) the nature of communications by counsel and the representative plaintiff with Class Members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra* at para 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.), at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra,* at para. 45; *Kidd v. Canada Life Assurance Company*, *supra.*

[54] In considering whether to approve an amendment to an already approved settlement, the amendment must be all of substantively, procedurally, institutionally, and circumstantially fair: *Kidd v. Canada Life Assurance Company*, *supra.*

[55] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10. An objective and rational assessment of the pros and cons of the settlement is required: *Al-Harazi v Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

[56] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation: *Parsons v Canadian Red Cross Society* [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v Sun Life Assurance Company of Canada*, *supra.* A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: *Fraser v Falconbridge Ltd.* (2002), 24 CPC (5th) 396 at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.

[57] In my opinion, having regard to the various criteria used to determine whether to approve a settlement in a class action, the amended Surplus Sharing Agreement should be approved. The The amendments have a substantial value that will be delivered Class Members without further exposure to uncertain litigation and the potential for additional external economic and actuarial factors diminishing the recovery for the Class Members. Canada Life has made a substantial and decent contribution and the amendments go a significant distance in ameliorating the disappointed expectations of Class Members arising from the original incorrect estimates of the surplus.

[58] Recalling what the litigation was actually about; i.e., about who owns the surplus and whether Canada Life wrongfully charged for expenses, the amended Surplus Sharing Agreement is a good result for the Class Members and perhaps better than any judgment the Class Members could obtain by prosecuting the litigation, which choice, at the moment is not available because nobody has yet sought to set aside the existing approved settlement.

[59] Unlike the revised settlement agreement that I did not approve, there is no circumstantial unfairness. There is no opportunism by Canada Life and Canada Life and Class Counsel have made meaningful contributions that enhance the amount to be distributed to the IPWU group to assuage the disappointment of the Class Members who received information statements that contained estimates that turned out to be wrong.

[60] It is worth noting that lost in the discussion of any version of the Surplus Sharing Agreement is the fact that Canada Life had a reasonably strong argument that in accordance with the law about surplus sharing, which turns on the interpretation of the pension plan documents, Canada Life did not have to share the surplus at all.

[61] In the case at bar, the early trust documents stated that any surplus in the Plan on wind up belongs to Canada Life. Moreover, Canada Life's defence of the expense claim has now been improved by the Supreme Court of Canada's decision in *Nolan v. Kerry*, [2009] 2 S.C.R. 678, which was decided after the parties had reached an agreement in principle in the case at bar. In any event, even if successful on the Plan expenses claim, the remedy is reimbursement to the pension fund not direct payments to Class Members: *Potter v. Bank of Canada*, 2007 ONCA 234.

[62] With great respect to the objectors, some of their objections about the lack of merit to the settlement presuppose that the Plaintiffs' claim to the surplus and for a reimbursement of pension expenses would be inevitably successful if it were litigated to a judgment. The Plaintiffs' success in the Class Action, however, was no sure thing.

[63] The revised settlement is superior to all alternatives to settlement including the approved settlement, the rejected amended settlement, and, most particularly, it is superior to the risks of continued litigation were the approved settlement to be set aside, which to date has not been an alternative presented to the court.

[64] Having regard to the risks of the case, the delays which would be associated with ongoing litigation and external factors which could impact the case including, changes to actuarial guidance, the risk of adverse investment performance, and the future performance of key interest rates, the revised settlement agreement is in the financial best interests of the Class Members.

[65] Some of the objectors' objections concern matters that are tangential to the settlement and would indeed be tangential to a judgment had this case been litigated to a judgment.

[66] Some objectors objected to the diminished absolute value of the surplus. They note that before the litigation began, the surplus was well over 100 million dollars, all of which was claimed by the Class Members and all of which was being claimed by Canada Life, but under the currently approved but unimplemented settlement, the amount to be divided is 70% of around $11 million (albeit originally mistakenly estimated to be $62 million for the IPWU) and under the revised settlement, the Class gets 100% of around $33 million.

[67] However, as I noted above, the litigation was not about the amount of the surplus but rather about who owns it. The value of a pension plan surplus fluctuates up and down depending on future economic conditions, and in the case at bar, the value of the pension surplus always depended on a future date of assessment when the liabilities of the pension plan would be fixed by a settlement or a judgment. Unfortunately, the future in the case at bar saw a decline in the surplus, but the fluctuations in the value of the surplus was a risk for both parties and the realization of this risk does not change the calculus that the current settlement is in the best interests of the Class Members.

[68] The fluctuation of the surplus did produce what I regarded to be a circumstantial unfairness in the first attempt to amend the already approved settlement. The circumstantial unfairness was that, in my opinion, in the very unusual circumstance of this case where Class Members were actually asked to vote on the settlement and the variation of a trust and where in the campaign for votes, they were given estimates that turned out to be stunningly wrong, it was circumstantially unfair for Canada Life not to do more to assuage the disappointment that it's actuaries had caused. This was not a matter of Canada Life having any legal liability for misrepresentation, it rather was that it was circumstantially unfair, a sort of insult, for the Class Members to have to accept a gesture from Canada Life to make the revised settlement better than the already approved settlement. I see no circumstantial unfairness in the amendment now before the court. Practically speaking, the amount of the surplus has been guaranteed by Canada Life and this guarantee means that 100% of the surplus pie goes to the Class Members.

[69] By providing a guarantee, Canada Life has done something that I was told at a case conference many years ago by all the parties could not be done. However, circumstances are the mother of invention and in my view the guarantee is a very valuable attribute of the proposed amendment to the Surplus Sharing Agreement.

[70] Some objectors objected to the calculation of pension plan liabilities in the case at bar. Here, it needs to be recalled that as the calculation of liabilities increases, the surplus decreases. In particular, they objected that since the commuted value of a pension entitlement is less than the attributed value of the pension entitlement to a Class Member who stays with the plan, Canada Life was benefiting by the persons who choose to take a commuted value. This objection, however, is tangential to the settlement of the class action and is a normal incident of the regulation of pensions under the *Pension Benefits Act*, where plan members are given a choice between commuted values and ongoing pension benefits.

[71] Some objectors objected to the calculation of the surplus and attributed the decline in the surplus to the alleged mismanagement of the assets of the plan segregated for the purposes of calculating assets and liabilities. What evidence there is does not substantiate these objections and rather supports the conclusion that the fund was properly managed.

[72] Some objectors objected to the fact that Canada Life retains some benefits from the settlement including certainty about its right to charge expenses. The objectors, however, apparently do not appreciate that the court is being asked to approve a settlement not to make a decision on the merits of the underlying litigation. That Canada Life may also take some benefits from the settlement is not a reason to reject a settlement that is fair and in the best interests of the Class Members.

[73] Some objectors objected to the procedural fairness of the steps taken in the approval process especially in comparison to what had occurred before the approval of the original Surplus Sharing Agreement.

[74] As I noted above, the steps taken before the first fairness hearing were unprecedented and unusual. The run-up to this fairness hearing was more typical, with arms- length negotiations and the involvement of the representative plaintiffs, a notice program, disclosure of the settlement terms, and an opportunity to object. In my opinion, there was no procedural unfairness before this approval hearing.

[75] Moreover, a large group of objectors were represented by Mr. Mazurek, and his involvement and his scrutiny of the settlement proposal at the fairness hearing meant that there was a level procedural playing field for the objectors.

[76] I pause here to say that Mr. Mazurek should be paid for his services out of the settlement funds up to the $100,000 that was budgeted for this disbursement. If the parties cannot agree about Mr. Mazurek's fee, I will settle it by submissions in writing.

[77] I am satisfied that the revised settlement is all of substantively, procedurally, institutionally, and circumstantially fair. In the Plaintiffs' factum at paras. 84-85, the Plaintiffs state:

> 84. The settlement is circumstantially fair because it results in a strong reclamation of value in the form of guaranteed benefits to class members which will be delivered in a timely way. Further, as a corollary, the settlement averts the very substantial legal, procedural and practical risks which exist. It is noteworthy that Canada Life has made substantial contributions to the settlement and has guaranteed the resulting payments. Those contributions mark a significant departure from its rights under the original SSA in order to guarantee the results to class members. It is also worth noting that that class counsel have proposed to substantially reduce their fees to the direct benefit of class members (and without any benefit to Canada Life) under the RSA. To borrow from the exhortation of this court in its reasons denying approval of the ASSA – the disappointment has been demonstrably shared.
>
> 85. The RSA is also institutionally fair. It has substantial value which, on any objective basis, compares appropriately with the merits of class members legal claims. Further, the institutional processes associated with this settlement approval hearing reflect: i) a strong direct notice program to class members over a meaningful period of time; ii) thorough and regular postings of additional information online; iii) ongoing access to class counsel by phone and e-mail; iv) two interactive webinars, and; v) robust opportunity for participation by class members in the process – as has been demonstrated by the actions of the objectors here.

[78] I agree with those comments.

## E. CONCLUSION

[79] For the above reasons, I approved the proposed revised settlement agreement in accordance with s. 29 of the *Class Proceedings Act, 1992*.

Perell, J.

Released: January 21, 2014

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Plaintiff

**- and -**

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

Defendants

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**REASONS FOR DECISION**

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Perell, J.

Released: January 21, 2013.