CITATION: Kidd v Canada Life, 2011 ONSC 6324
COURT FILE NO.: 05-CV-287556CP
DATE: October 26, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

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

HEARING DATE: October 18, 2011

REASONS FOR DECISION

PERELL, J.

A. INTRODUCTION AND OVERVIEW

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

they have been joined by Garry C. Yip, Louie Nuspl, Susan Henderson, and Lin Yeomans as additional proposed Representative Plaintiffs.

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

[3] After many years of negotiating, the parties have reached a settlement known as the Surplus Settlement Agreement.

[4] After an elaborate and untypical process to obtain the direct approval of the putative Class Members to the Surplus Settlement Agreement, the parties take the first step to implementing their settlement, which is this motion for a consent certification of the action for settlement purposes. Untypically and perhaps without precedent, the proposed Class Members have voted for or against the settlement. Assuming certification, a settlement approval hearing under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 and regulatory approvals under pension legislation will be sought.

[5] However, Brenda McEachern, a current Canada Life employee, and a putative Class Member, has filed an objection to the certification of the action and to its settlement in accordance with the Surplus Settlement Agreement. Participation of a proposed Class Member at a certification hearing is also untypical.

[6] Ms. McEachern does not object so much to certification but rather submits that the current Canada Life employees cannot be fairly represented by the currently nominated Representative Plaintiffs, who are allegedly in a position of conflict of interest with respect to the settlement that they have endorsed. She requests that a new subclass be constituted and that Daryl Clegg, another active employee of Canada Life, be appointed a Representative Plaintiff for the subclass of current Canada Life employees, who then can obtain independent advice about the settlement.

[7] The Defendants, but not the Plaintiffs, take the position that Ms. McEachern does not have standing to participate in the certification motion and that her rights are either to opt-out of the class action or to accept certification and then object to the approval of the settlement, as she may be advised. The Defendants also submit that there is no genuine conflict that requires the creation of an additional subclass for the current Canada Life employees and that if a subclass is necessary, then Wilbert Antler should be the Representative Plaintiff for the subclass. Mr. Antler has been involved in the settlement negotiations with the other proposed Representative Plaintiffs from the outset.

[8] The position of the proposed Representative Plaintiffs and proposed Class Counsel is that they do not oppose Ms. McEachern having standing on the certification motion, but they join cause with the Defendants in submitting that Ms. McEachern should either (a) opt-out; or, (b) accept certification - without the creation of a new subclass - and that she should take her grievances about the settlement to the settlement approval hearing, where there is no doubt that she would have standing. In the alternative, they also support the appointment of Mr. Antler as a Representative Plaintiff.

[9] For the Reasons that follow, it is my conclusion that Ms. McEachern does not have standing to participate in the certification motion and that she ought not to be granted what would amount to intervener or necessary party status.

[10] Assuming, however, that she has standing and the right to apply for the creation of a new subclass, then, in my opinion, for the purposes of certification, there is no conflict of interest that requires an adjustment to the composition of the class and subclasses. In my opinion, Ms. McEachern's genuine grievance is not about representation but rather about the fairness of the settlement, and her objections about the formation and substance of the settlement can be raised at the settlement approval hearing, providing that she does not opt-out of the class.

[11] Further, I am satisfied that the conditions for certification are satisfied, and, therefore, I certify this action as a class action for settlement purposes. Ms. McEachern's objection to the settlement and whether the settlement should be approved will be the subject matter of the settlement approval hearing, which is to be scheduled with appropriate notice to Ms. McEachern and the others who may wish to oppose the settlement.

B. FACTUAL BACKGROUND

1. *Pension Plan Agreements*

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

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

[14] In 1989, a consolidated and restated Trust Agreement precluded any amendment to the trust agreement that would result in the return of any portion of the fund to Canada

Life. Nevertheless, in or about December 31, 1993, changes were made to the 1989 Trust Agreement. Article 8 was revised under the 1993 Trust Agreement to read:

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

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

[15] 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. The 1997 Plan contained new provisions relating to surplus assets in the Pension Fund. Sections 4.02(c) and 17.06 state:

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

[16] 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.

[17] The Trust Agreement was again 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.

[18] 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.

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

2. *Plan Expenses*

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

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

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

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

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

> *Plan Expenses*
>
> 14.05 All reasonable charges, fees, taxes and other expenses, including, without limitation, any internal expenses of the Plan administrator and the usual and reasonable expenses of any agents of the Plan Administrator, incurred in the operation, review, design, amendment and administration of the Plan and the Trust Agreement or the review, administration, use and investment of the Pension Fund, including Surplus Assets, shall be paid from the Pension Fund unless paid directly by the Company. The Trustee shall, if requested, by the Company, reimburse the Company out of the Pension Fund for any such charges, fees, taxes and other expenses which the Company pays directly.

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

Year	*Total Costs and Expenses*
1987	$2,987,000 (partial amount only)
1988	$3,370,000 (partial amount only)
1989	$4,529,000 (partial amount only)

1990	not available
1991	not available
1992	not available
1993	not available
1994	$2,542,000
1995	$1,734,000
1996	$2,055,000
1997	$2,345,000
1998	$2,342,000
1999	$3,692,000
2000	$4,937,000
2001	$4,344,000
2002	$3,356,000
2003	$2,848,000

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

3. *Partial Wind-Ups*

[26] Indago Capital Management Inc., a subsidiary of the Company whose employees participated in the Plan, merged with Laketon Investment Management Ltd., effective February February 26, 1999. As a result of the merger, 14 employees of Indago, were terminated from employment with the Company. To date, no partial wind-up of the Plan in respect of the termination of the 14 employees of Indago has been declared by the Company. Sue Henderson is a former member of the Pension Plan, and worked for Indago between April 4, 1998 and March 3, 1999. She is the proposed Representative Plaintiff for the Indago Subclass that has a claim for a partial winding-up.

[27] Between November 1, 1999 and February 28, 2001, 37 employees of Adason Properties Limited, a subsidiary of the Company) were terminated. The Company has not declared a partial wind-up of the Plan in relation to this termination of employees of Adason to date. Garry Yip and Louie Nuspl are both former members of the Pension Plan. Mr. Yip was employed by Adason between February 18, 1985 and February 9, 2001. Mr. Nuspl was employed by Adason between January 27, 1986 and February 9, 2001. Messrs. Yip and Nuspl are the proposed Representative Plaintiffs for the Adason Subclass that has a claim for a partial winding-up.

[28] Employees of Pelican Food Services Limited, a subsidiary of the Company, participated in the Plan. In January of 2001, Canada Life decided to outsource food services, and as a result, 38 employees of Pelican were terminated from employment. No partial wind-up of the Plan has been declared in relation to the termination of former Pelican employees. Lin Yeomans is a former member of the Pension Plan, and was employed by Pelican between November 24, 1984 and December 31, 2000. Mr. Yeomans and two other former employees of Pelican met with lawyers at Koskie Minsky LLP on November 26, 2007 and subsequently retained Koskie Minsky LLP and Harrison Pensa LLP to seek a partial wind-up of the Plan in respect of former Plan members whose

employment with Pelican was terminated as a result of the outsourcing of Pelican's food services. Mr. Yeomans is the proposed Representative Plaintiff for the Pelican Subclass.

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

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

[31] Messrs. Kidd, Harvery, and Marentette are part of the group of employees who were affected by the partial wind-up of the Plan. They are also members of Canada Life Canadian Pension Plan Members' Rights Group ("CLPENS") which is a voluntary, unincorporated association of members and former members of the Pension Plan, of which more will be said below. The Plaintiffs plead that Plan members affected by the Integration Partial Wind-Up are entitled to a distribution of surplus, and seek a declarations ascertaining the amount of surplus required to be distributed. Messrs. Kidd, Harvery, and Marentette are the proposed Representative Plaintiffs for the Partial Wind-Up Subclass.

4. *History of the Class Proceeding*

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

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

[34] Mr. Harvey was concerned about whether members affected by the Partial Wind-Up would receive surplus assets to which they may be entitled. He joined CLPENS and was elected to the Executive. Mr. Kidd also joined CLPENS, which is an association of over 900 members or former members of the Pension Plan. CLPENS was established in October 2004 to advance the interest of current and former Pension Plan Members including active employees, retirees, deferred vested members and their spouses or dependents.

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

[36] Mr. Kidd commenced a class action by Notice of Action issued on April 12, 2005, and filed on May 11, 2005. Mr. Marentette commenced a similar action by Statement of Claim issued at the Ontario Superior Court of Justice on February 3, 2005 under Court File No. 05-CV-283395CP. He discontinued his action and was added as a Plaintiff to Mr. Kidd's action.

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

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

[39] In April 2007, the parties attended a two-day mediation facilitated by Justice Winkler. The mediation resulted in an agreement on the framework for a potential settlement. On December 1, 2007, after continued negotiations, the parties signed a Memorandum of Understanding.

[40] Between 2008 and 2010, the parties continued their negotiations towards a proposal for settling this proceeding, which culminated in a Surplus Settlement Agreement.

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

[42] The Agreement is conditional on obtaining certain levels of consent from past and present Plan members.

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

[44] The proposed class definition under the Surplus Settlement Agreement is as follows:

> (a) all persons, wherever resident, who are or were former members under the Canada Life Canadian Employees Pension Plan (the "Plan") and who were included in the partial wind-up of the Plan declared as at June 30, 2005 (the "Integration Partial Wind-Up") together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died (the **"Integration Partial Wind-Up Subclass"**)
>
> (b) all persons, wherever resident, who are or were former members under the Plan who were employed by Indago Capital Management Inc. and whose employment ceased following (and as a result of) a merger of that company with Laketon Investment Management Ltd. on February 26, 1999 together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died (the **"Indago Subclass"**);
>
> (c) all persons, wherever resident, who are or were former members under the Plan who were formerly employed by Adason Properties Limited and who were notified of their termination of employment-between November 1, 1999 and February 28, 2001 together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died (the **"Adason Subclass"**);
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> (d) all persons, wherever resident, who are or were former members under the Plan who were employed by Pelican Food Services Limited and whose employment with Pelican Food Services Limited ceased as a result of the outsourcing in January 2001 of that company's operations by Canada Life together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died (the **"Pelican Subclass"**);
>
> (e) all persons, wherever resident, who are not included in subparagraphs (a) to (d) above and
>
> > (i) are or were active members of the Plan at any time between June 30, 2005 and the date of this order; or
> >
> > (ii) were inactive members of the Plan on April 12, 2005; or
> >
> > (iii) were persons otherwise entitled to benefits under the Plan on April 12, 2005
>
> together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died; and
>
> (f). all persons, wherever resident, who were former members previously entitled to benefits or other payments under the Plan and who would have been included in the partial wind-up of the Plan declared June 30, 2005 (and therefore would have been part of the Integration Partial Wind-Up Subclass) but for the fact that their benefits under the Plan were governed by the laws of Québec, which at the relevant time did not recognize partial pension plan wind-ups in its pension legislation and who were not inactive members of the Plan on April 12, 2005, together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died.

[45] In March 2011, a detailed information package was sent to all persons included under the Surplus Settlement Agreement. Following mailing of the Information Packages, a total of 15 meetings were held in cities across Canada (Vancouver, Calgary, Regina,

Toronto, London, Montreal and Halifax) to describe the Surplus Settlement Agreement and to provide an opportunity to proposed Class Members to ask questions. At each of the meetings, presentations were made by Canada Life, a CLPENS representative, and Mr. Kidd's counsel. In addition, there were question and answer sessions, where Canada Life representatives were absent from the room.

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

[47] There are 5,192 persons in the proposed classes. As of October 14, 2011, 4,244 putative Class Members (82%) have voted in favour of settling their claims in accordance with the Surplus Settlement Agreement. Of the proposed Class Members, 1,107 are current employees of Canada Life. Of these, 874 persons (79%) have voted in favour of the settlement. Of the current Canada Life employees, 45 (1% of the total class, 4% of the current employees) have voted against the settlement.

[48] Based on the high levels of consent to the terms of the Surplus Settlement Agreement, the parties are proceeding to the implementation stage. Implementation involves certification of this action as a class proceeding, followed by an opt-out period. Assuming this action is certified as a class proceeding, and subject to staying within agreed upon levels of opt-outs, the parties will jointly move for approval of the settlement of the class proceeding.

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

5. *The Intervention of Brenda McEachern*

[50] Brenda McEachern of Vancouver, British Columbia, is a current employee of Canada Life. Having reviewed the information package provided to the proposed class members and having attended the information meetings, she hired Lawson Lundell LLP for independent advice.

[51] In May 2011, Ms. McEachern's counsel contacted Koskie Minsky LLP and counsel for the Defendants and advised that she represented a number of active employees of Canada Life. She requested and was provided with documentation with respect to the action, as well as, copies of the proposed Surplus Sharing Agreement and historical pension plan documents.

[52] On September 15, 2011, Ms. McEachern's counsel contacted Koskie Minsky LLP and advised that Ms. McEachern would oppose the proposed settlement and might take steps to become involved in this proceeding. She did so by filing delivering motion materials and a factum on October 13, 2011 and October 14, 2011, respectively.

[53] Ms. McEachern is concerned whether the interests of the active members of the Plan had been considered appropriately in the negotiation of the Settlement Proposal. She is concerned that no active member of the Plan is a proposed Representative Plaintiff.

[54] Ms. McEachern believes that the interests of the proposed Representative Plaintiffs conflict with the current employees who will have an ongoing concern about whether the fund will have adequate resources after surpluses are paid out in partial wind-ups. She desires a healthy actuarial surplus to help prevent erosion of benefit entitlements. She notes that none of the Representative Plaintiffs will be members of the new pension plan, and that they have no interest in the terms of that plan or the declarations being sought about that new plan. Ms. McEachern understands that Daryl Clegg another active employee of Canada Life, currently out of the country, would be prepared to be a representative plaintiff.

[55] In response to Ms. McEachern's objection, Wilbert Antler of Toronto, Ontario, delivered an affidavit and volunteered, if necessary, to be another representative plaintiff on behalf of the current employees. He is a pensioner and he is the President of CLPENS.

[56] Mr. Antler deposes that although CLPENS and the original proposed Representative Plaintiffs (Messrs. Kidd and Harvey) sought to include an active Plan member as a representative plaintiff, they found no active Plan member who was willing to act. He says that they consulted with active employees. He states that the CLPENS executive committee was active in assisting the proposed representative plaintiffs in negotiating the proposed settlement and ensured that the interests of its entire membership, regardless of category of Plan membership, were considered during these negotiations. He denies that the representative plaintiffs have a conflict and submits that all Plan members are adequately represented by the proposed representative plaintiffs.

[57] During the oral argument of the certification motion, Ms. McEachern's counsel conceded that it is only in respect of how the proposed Representative Plaintiffs propose to settle the class action that there is an alleged conflict of interest. In other words, if there was no settlement and this was a certification for the purposes of prosecuting an action against the Defendants, there is no conflict of interests in the proposed class and subclass structure. Ms. McEachern's position, however, is that for the purposes of determining whether and how this particular proposed class action should be certified, - a class action in which the putative Class Members have voted before the certification motion - the negotiation of the Surplus Settlement Agreement cannot be ignored and a new subclass with independent legal representation is necessary.

C. THE STANDING OF MS. MCEACHERN

[58] At the commencement of the oral argument of the certification motion, I advised the parties that I was concerned whether Ms. McEachern had the standing to make her request that Mr. Clegg be appointed a representative plaintiff for a new subclass for current Canada Life employees. For the Reasons that follow, it is my opinion, that she does not have standing and that it would be dysfunctional and contrary to the operation of the *Class Proceedings Act, 1992* to grant her standing.

[59] Class members and putative class members are not typical litigants that control and participate in their own litigation. In many proposed class actions, putative class members may not even be aware that litigation has been commenced on their behalf, and even if they are aware, they may have to take the initiative to find out about the progress of the litigation by making inquiries of the plaintiff's lawyer, perhaps by examining internet postings about the case. It is the proposed representative plaintiff who instructs counsel and who prosecutes the litigation on behalf of the proposed class.

[60] The class action statutes do not treat proposed class members or certified class members as normal litigants. Proposed class members have no assigned role before certification and after certification they are notified about the case and provided with an opportunity to opt out. If they become class members, they are not examined for discovery for the purposes of the common issues trial without a court order. (See *Class Proceedings Act, 1992,* s. 15 (2).) They are not liable for costs except for their own individual issues trial. (See *Class Proceedings Act, 1992,* s. 31 (2).) They do, however, have the right to object to any settlement that requires court approval if the court exercises its discretion under s. 29 (4) of the Act to direct that notice be given of the settlement approval hearing. If the settlement is approved, the objectors are nevertheless bound just like everybody else in the class.

[61] Thus, typically, proposed class members do not participate in the class action until individual issues trials or a settlement approval hearing.

[62] There is one major exception, a proposed class member that wishes to bring a class action of his or her own may start a rival action. Then, however, there will be a carriage fight to determine which class action is to proceed and which is to be stayed.

[63] In the case at bar, proposed Class Members were given advance notice of the certification hearing, and untypically, they were asked to vote for or against a settlement that included a consent certification. In these circumstances, Ms. McEachern, without bringing a carriage motion, requests an order that Mr. Clegg be appointed for an additional subclass for current Canada Life employees.

[64] Practically speaking, Ms. McEachern's request is a request for carriage of a class action for the proposed new subclass. However, it is very late for a carriage contest, and she has not made a case to have carriage. Her request is more a co-opting than a competition for carriage. It is a disruptive request and not consistent with the scheme of the legislation.

[65] Granting her request could undermine the settlement approval process. Assuming the court granted the request, on the one hand, were Mr. Clegg to oppose settlement, I do not see how the matter could proceed to an approval hearing given the opposition of the representative plaintiff for the current employees. On the other hand, were Mr. Clegg to give instructions to seek approval of the settlement, then his participation would have been redundant.

[66] The late arriving request for carriage of a subclass disrupts the settlement approval process, which will provide an opportunity for objectors to the settlement to object. Objections may be based on both the substance of the proposed settlement and the manner in which the settlement was reached. I, therefore, conclude that Ms. McEachern does not have the standing to make this request. She does, however, have standing to make an objection to the settlement's approval, if she does not opt-out of the action.

D. CERTIFICATON AS A CLASS PROCEEDING

1. *The Test for Certification*

[67] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims or defences of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and there is a workable litigation plan.

[68] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22. However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements: *Bellaire v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 16; *National Trust Co. v. Smallhorn*, [2007] O.J. No. 3825 (S.C.J.) at para. 8; *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.) at para. 9.

2. *The Cause of Action Criterion*

[69] The first criterion for certification is that the pleadings disclose a cause of action. The Fresh as Amended Statement of Claim raises claims to the ownership and use of surplus assets in the Fund, based on the original Plan documents. The claims for relief arise out of allegations of breach of fiduciary duty, breach of trust and breach of contract in relation to Canada Life and the Trustees' administration of the Plan and the Fund.

[70] Pension surplus claims of this nature have been found to satisfy the first criterion for certification as a class proceeding. See: *Paramount Pictures (Canada) Inc. v, Dillon*, [2006] O.J. No. 2368 (S.C.J.); *Sutherland v. Hudson's Bay Co.* (2005), 76 O.R. (3d) 608 (S.C.J.); *CBC Pensioners' National Association v. Canadian Broadcasting Corporation* (S.C.J.); *Lieberman and Morris v. Business Development Bank of Canada*, 2005 BCSC 389.

[71] I am satisfied that the first criterion for certification has been satisfied.

3. *The Identifiable Class Criterion*

[72] The second criterion for certification is that there is an identifiable class.

[73] Putting aside for the moment the issue of whether there should be a subclass for current Canada Life employees, the question of surplus ownership applies equally to all Class members, as defined above. All Class members share common claims in respect of surplus ownership and Plan administration issues, including payment of Plan Expenses out of the Fund.

[74] Putting aside for the moment the issue of whether there should be a subclass for current Canada Life employees, the question of entitlements in the partial wind-ups applies to all members of the respective subclasses, as defined above.

[75] Thus, once again putting aside for the moment the issue of whether there should be subclass for current Canada Life employees, I am satisfied that the second criterion for certification is satisfied.

[76] Turning now to the issue of introducing a new subclass and assuming that Ms. McEachern has standing to make this request, the contested issue with respect to the second criterion for certification is whether there should be a subclass for the current Canada Life employees. (Defining this subclass would not be a problem.)

[77] Section 5 (2) of the *Class Proceedings Act, 1992* speaks to the matter of subclasses; it states with emphasis added:

> Despite subsection (1), **where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members**, so that, in the opinion of the court, **the protection of the interests of the subclass members requires that they be separately represented**, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,
>
> (a) would fairly and adequately represent the interests of the subclass;
>
> (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and
>
> (c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

[78] Under s. 5(2) of the *Class Proceedings Act, 1992*, where the class includes a subclass whose members have claims that raise common issues not shared by all members of the class, if necessary to protect their interests, a separate representative plaintiff should be appointed. Subclasses are required to be included in an order certifying the proceedings only if, in the opinion of the court, separate representation is required for the protection of the interests of their members: *Elliott v. Boliden Ltd.*, [2006] O.J. No. 4116 (S.C.J.) at para. 15. In order to justify the creation of a subclass, the subclass must have issues that are not shared by all class members and those claims will be subject to defences that are not applicable to all class members: *578115 Ontario Inc. v. Sears Canada Inc.*, 2010 ONSC 5673 at para. 7.

[79] Subclasses are properly certified where there are both common issues for the class members as a whole and other issues that are common to some but not all of the class

members: *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (S.C.J.) at para. 45. Circumstances that necessitate defining subclasses at the certification stage include the circumstance where a subclass of the generally described class raises common issues that could be determined in the class proceeding but are not shared by other members of the class: *Wuttunee v. Merck Frosst Canada Ltd.*, [2009] S.J. No. 179 (Sask. C.A.) at paras. 121-124, rev'g [2007] S.J. No. 7 (Q.B.) and [2008] S.J. No. 101 (Q.B.) and [2008] S.J. No. 324 (Q.B.), leave to appeal to C.A. granted [2008] S.J. No. 378 (C.A.), leave to appeal to S.C.C. ref'd [2008] S.C.C.A. No. 512. The statute envisions that there should be a single, over-riding class, with its set of issues common to all members, some of whom might form a subclass with a distinct additional set of issues common to its members but not other members of the class as a whole: *Wuttunee v. Merck Frosst Canada Ltd., supra,* at para. 125.

[80] If the differences between the situation of the representative plaintiff and the class members do not impact on the common issues, then the differences do not affect the representative plaintiff's ability to adequately and fairly represent the class and they do not create a conflict of interest: *Hoy v. Medtronic*, [2001] B.C.J. No. 1968 at paras. 83-85, aff'd [2003] B.C.J. No. 1251 (C.A.); *Endean v. Canadian Red Cross Society*, [1997] B.C.J. No. 1209 (S.C.), rev'd in part (1998), 157 D.L.R. (4th) 465 (C.A.), leave to appeal granted but appeal abandoned, [1998] S.C.C.A. No. 260 (S.C.C.); *T.L. v. Alberta (Director of Child Welfare)*, [2008] A.J. No. 157 (Q.B.) at para. 40, aff'd [2009] A.J. No. 512 (C.A.); *Reid v. Ford Motor Co.*, [2003] B.C.J. No. 2489 (S.C.) at para. 73.

[81] As conceded by Ms. McEachern during argument, if this action were being litigated towards a judgment as opposed to being settled in accordance with a settlement agreement, then the current Canada Life employees have no different position with respect to the common issues than the rest of the Class Members. The current Canada Life employees do not have their own claim not shared by all Class members. There are no special or discrete set of common issues for this proposed class. There is no conflict with respect to the claims or the common issues raised by all Class Members. All proposed Class Members have an equal and identical interest in the claim with respect to the administration of the trust fund, and they are all equally interested in determining who has an entitlement to the surplus on a full or partial wind-up of the Plan. After the resolution of the issues of concern to all Class Members, the proposed Subclasses then have partial wind-up claims, and it is these claims that differentiates them from the Class Members who will continue to have an interest in the new Pension Plan but who have no right to object to the Partial Winding-Ups of the old Plan.

[82] The proposed Representative Plaintiffs argue that the "conflict" alleged by McEachern is not about the composition of a subclass but actually concerns the probity of the proposed settlement and the fact that Ms. McEachern and a few other active Canada Life employees are unhappy with the terms of that proposed settlement. Further, the proposed Representative Plaintiffs argue that if these employees are dissatisfied with the terms of a proposed settlement, they may opt-out of the class proceeding or challenge the merits of the proposed settlement at the settlement approval hearing in this matter. I agree with this argument.

[83] Put shortly, the requirements for an additional subclass for the current Canada Life Employees are not satisfied in the case at bar.

[84] The untypical circumstance of the notoriety of the certification motion and the fact that Class Members have voted for or against the settlement does not, in my opinion, alter the fact that the Canada Life employees do not have claims that raise common issues not shared by all the class members. Moreover, the complaint of the dissenters is really about the propriety of the settlement not the constitution of the representation.

[85] I conclude, therefore, that the second criterion is satisfied without the introduction of a new subclass definition.

4. *The Common Issues Criterion*

[86] The third criterion for certification is that the claims of the class members raise common issues of fact or law. The following common issues have been agreed to by the parties and are proposed for certification in this proceeding:

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

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

(h) Do the Plan and the Trust permit the Plan to be amended to include new classes of members?

(i) Has Canada Life improperly funded benefit enhancements under the Plan from Fund assets including surplus? If so:

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

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

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

[87] Separate common issues in respect of each of the partial wind-ups have been proposed. For the Integration Partial Wind-Up Subclass, the following common issues are proposed:

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

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

[88] For the Indago Subclass, the following common issues are proposed:

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

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

[89] For the Adason Subclass, the following common issues are proposed:

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

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

[90] For the Pelican Subclass, the following common issues are proposed:

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

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

[91] The determination of the above common issues will effectively determine all of the matters at issue between the Class and Subclasses and Canada Life in relation to the matters pleaded in the Fresh as Amended Statement of Claim.

[92] I am satisfied that the third criterion for certification has been satisfied.

5. *The Preferable Procedure Criterion*

[93] The fourth criterion for certification is that a class proceeding would be the preferable procedure. This criterion is informed by the policies of the *Class Proceedings Act, 1992* of: (1) access to justice; (2) judicial economy; and (3) behaviour modification.

[94] In the case at bar, a class proceeding is not only an efficient and cost-effective means for determining the issues in dispute between the parties, but it is the only practical procedure. An alternative procedure is by way of a regulatory proceeding before the Financial Services Tribunal; however, the adjudication of surplus entitlement in relation to four separate partial wind-ups and the issues of administration which have been raised in the class proceeding would be more cumbersome for the Tribunal. Given that a single pension plan is at issue, adjudication of this matter through a single class proceeding would constitute a more efficient means of resolving the claims of the Class Members.

[95] I am satisfied that the fourth criterion for certification is satisfied.

6. *The Representative Plaintiff Criterion*

[96] The fifth criterion for certification is that there is a representative plaintiff(s) who would adequately represent the interests of the class and there is a workable litigation plan, which in this case would involve the administration of the settlement.

[97] In assessing the adequacy of a proposed Representative Plaintiff, the court must be satisfied that the individual has retained adequate representation, has developed a workable litigation plan, and has no conflict of interest with other members of the class on the common issues: *Pearson v. Inco, et al.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 92.

[98] In the case at bar, each of the Plaintiffs is suitable for the role of Representative Plaintiff. Each has sworn that they understand the nature of the litigation and their responsibilities to fairly and adequately represent class members. They state they do not have any conflict of interest in relation to the interests of other class members and are committed to fulfilling their responsibilities. As discussed above, I have found no conflict of interest. They state that they are satisfied that they have retained suitable Class Counsel to pursue this litigation on their behalf; I agree with them.

[99] I am satisfied that the fifth criterion for certification is satisfied.

E. CONCLUSION

[100] According, I grant the motion for certification.

[101] There should be a case conference to settle the terms of the Certification Order, to fix a date for the settlement approval hearing and to resolve any issues about the procedure for the settlement approval hearing. Ms. McEachern is invited to participate in that case conference.

[102] If there is a claim for costs, it can be made at the case conference. My present inclination is that there should be no order as to costs for the certification motion. Ms. McEachern's request for standing arose in novel circumstances and she was in a sense invited to voice her objections at the certification hearing.

[103] Order accordingly.

Perell, J.

Released: October 26, 2011

CITATION: Kidd v Canada Life, 2011 ONSC 6324
COURT FILE NO.: 05-CV-287556CP
DATE: October 26, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

- and -

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

Defendants

REASONS FOR DECISION

Perell, J.

Released: October 26, 2011