CITATION: *Kidd v. The Canada Life Assurance Company*, 2013 ONSC 1868
COURT FILE NO.: 05-CV-287556CP
DATE: March 28, 2013

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
DAVID KIDD, ALEXANDER HARVEY, JEAN PAUL MARENTETTE, GARRY C. YIP, LOUIE NUSPL, SUSAN HENDERSON and LIN YEOMANS	*Mark Zigler* and *Clio M. Godkewitsch* for the Plaintiffs David Kidd, Alexander Harvey, Jean Paul Marentette, Susan Henderson and Lin Yeomans
Plaintiffs	*Darrell Brown* 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	*Jeffrey W. 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
Proceeding under the *Class Proceedings Act, 1992*	**HEARD:** March 18, 2013

PERELL, J.

REASONS FOR DECISION

1. INTRODUCTION

[1] In this class action, under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6, the court has already approved a settlement. I shall refer to that settlement as the "Approved Settlement."

[2] This is a motion, and the moving parties seek the court's approve for an amendment to the Approved Settlement. I shall refer to the amendment as the "Amended Settlement."

[3] On a motion to approve a class action settlement, the court's only choices are to approve or to reject the settlement using the test of whether the proposed settlement is

fair, reasonable, and in the best interests of the class members. The court does not have the choice of fixing or revising the settlement to make it fair, reasonable, or in the best interests of the class members. The court's only choices are to approve or to not approve the proposed settlement.

[4] Most unfortunately, in the case at bar, these choices of approval or disapproval present the court with a double bind, a choice between unpleasant and distressing alternatives. As the discussion below will reveal, the circumstances of the case at bar are such that the court is being asked to make a choice between two courses where neither course is substantively, procedurally, circumstantially, or institutionally fair to the class members.

[5] As I will detail below, in this class action, the Plaintiffs sued Canada Life Assurance Company for a declaration as to the ownership of pension plan surpluses and for damages for breach of the Pension Plan. In the class action, it was alleged that Canada Life employees owned any surplus in their Pension Plan and that Canada Life had wrongfully charged administrative expenses to the Pension Plan. There were also claims for partial wind-ups of the Pension Plan.

[6] In addition to resolving the claims of some Canada Life employees, the already Approved Settlement settled the claims of four discrete groups of claimants, who were identified with four different pension plan partial wind-ups; namely: (1) the Integration Partial Wind Up Group; (2) the Pelican Partial Wind Up Group; (3) the Indago Partial Wind Up Group; and (4) the Adason Partial Wind Up Group.

[7] Under the Approved Settlement: (a) plan members would receive 57.22% of the surplus for their designated part of the Pension Plan; (b) inactive plan members would receive 12.44% of the designated surplus; and (c) Canada Life would receive 30.34% of the surplus allocable to the partial winding ups.

[8] The Plaintiffs and Canada Life elaborately campaigned to secure the support of Class Members for the proposed settlement. There were organized meetings across the country and an elaborate information package. Untypically, and without precedent, the proposed Class Members were asked to vote for or against the Approved Settlement. As a part of the promotional campaign, without being given any guarantee, the Integration Group's members were told that it was estimated that they would be sharing about 70% of a surplus estimated for them to be worth $55 million.

[9] Unfortunately, after the Approved Settlement was approved by the court and after the parties set about to implement it, almost immediately, they discovered that their assumptions or predications about the value of the surplus to be distributed to the Integration Group were very-very wrong.

[10] The unhappy discovery was that the anticipated surplus of $55 million, upon which the Approved Settlement had been predicated and which, as noted above, was to be shared by the Integration Group and Canada Life was diminishing dramatically and quickly.

[11] The diminishment of the surplus came about mainly for two reasons. First, a decline in interest rates in the Canadian financial marketplace increased the notional liabilities of the Pension Plan for the Integration Group's members, which liabilities are calculated in accordance with prescribed actuarial principles. Second, a greater than anticipated number of Integration Group class members chose or were deemed to have chosen pension benefit annuities rather than choosing to take the accumulated value of their pension benefits. In other words, fewer Integration Group pensioners than predicted cashed out their benefits and this, in turn, increased the liabilities of the Pension Plan on an on-going basis and all this diminished the actuarially calculated surplus or deficit.

[12] And to further complicate matters, there was another surprise for the Integration Group and Canada Life, because the marketplace for annuities shut down, and annuities were not available for those who had chosen to stay with Canada Life's Pension Plan. The Plan's Administrators had to internalize the cost of the annuities rather than outsource this liability for the pension benefits.

[13] These problems did not, however, materially affect the Pelican, Indago, and Adason Groups' part of the Approved Settlement, nor did the surprises affect current employees of Canada Life, who were to enjoy a two-year contribution holiday under the Approved Settlement.

[14] The problems, however, were grave for the Integration Group because Canada Life proposed to implement the settlement without purchasing annuities. Canada Life intended to unilaterally transfer the assets and liabilities of the Integration Group from the old Pension Plan into the ongoing portion of a new Pension Plan, which had been established as a part of the overall settlement between the parties.

[15] The Integration Group moved to enjoin Canada Life from acting unilaterally to implement the Approved Settlement.

[16] Class Counsel preferred to delay the implementation of the settlement to see if interest rates would rebound and to allow a recalculation of the Pension Plan surplus for the Integration Group when the economy and interest rates might have bounced back. Nothing however could be done to change the impact of the unexpected numbers of Integration Members who had chosen to stay with the Pension Plan.

[17] The injunction motion, however, was not argued. Instead, the parties negotiated a settlement, the "Amended Settlement." The Plaintiffs now move for approval of the Amended Settlement. The Plaintiffs and Canada Life submit that the Amended Settlement is fair, reasonable, and in the best interests of the class members.

[18] The moving parties main argument is that the Amended Settlement is fair, reasonable, and in the best interests of the class members because it is better than the alternative of rejecting the Amended Settlement and just implementing the Approved Settlement, which I will later in this judgment rename the "Stark-Reality" Settlement.

[19] In other words, their argument is that under the Approved Settlement that became the Stark-Reality Settlement, the Integration Group will receive a terribly

disappointing monetary award, but under the Amended Settlement, they will receive a terribly disappointing monetary award with a "shot" at a second distribution of surplus re-calculated as at December 31, 2014 when interest rates may have rebounded. This shot at a second distribution – capped at $15 million - makes the Amended Settlement fair, reasonable, and in the best interests of the class members and better than the alternative of reviving the litigation, which would be purposeless.

[20] Numerous class members from the Integration Group object to the Amended Settlement, and they ask the court not to approve it. They submit that the Amended Settlement is unfair, unreasonable, and not in the best interests of the Class Members.

[21] Over 90 class members filed a petition with the court, also unprecedented, asking the court not to approve the Amended Settlement but rather to approve a settlement where there would be a temporally unlimited and uncapped second distribution of the surplus. As one petitioner expressed it: "I hope the Honourable Judge sees our petition and gives us some fairness."

[22] The double bind for the court, however, is that approving the unfair Amended Settlement is monetarily better than the alternative of not approving the Amended Settlement. Approving the unfair Amended Settlement also avoids renewed litigation and the collateral damage to the current employees of Canada Life and the Pelican, Indago, and Adason Groups, who are indifferent to the unfair Amended Settlement and who just want to have this litigation at an end and certainly not resumed.

[23] The court cannot make a fair settlement for the parties, and for the reasons that follow, my conclusion is that the Amended Settlement is not fair. The disappointment and anger of the objectors and the reasons for their objection are reasonable, and, I agree with them that the Amended Settlement is unfair. In my opinion, the Amended Settlement is all of substantively, procedurally, circumstantially, and institutionally unfair. Therefore, I shall not approve it. Approving an unfair settlement would be contrary to both the letter and the spirit of the *Class Proceedings Act,* 1992. It also would be inconsistent with the court's responsibilities when asked to review a settlement under the *Act.* I cannot in judicial good conscience put the court's endorsement to the Amended Settlement. Accordingly, I dismiss the motion.

II. FACTUAL BACKGROUND

[24] The Representative Plaintiffs are David Kidd, Alexander Harvey, Jean Paul Marentette, Garry C. Yip, Louie Nuspl, Susan Henderson, and Lin Yeomans.

[25] Each of the Representative Plaintiffs is or was a member or former member of the Pension 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. CLPENS includes active employees, pensioners, deferred vested pension members, and former Canada Life employees whose employment was terminated as a result of various partial wind-ups.

The members of the CLPENS Executive Committee have actuarial experience and are knowledgeable about the operation of the Canada Life Pension Plan.

[26] Class Counsel for the Plaintiffs Kidd, Harvey, Marentette, Henderson and Yeomans are Koskie Minsky LLP and Harrison Pensa LLP. Class Counsel for the Plaintiffs Yip and Nuspl is Sack Goldblatt Mitchell LLP.

[27] The Plaintiffs' action was against Canada Life and against A.P. Symons, D. Allen Loney, and James R. Grant, who are the trustees of the Canada Life Canadian Employees' Pension Plan.

[28] 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 Pension Plan is funded through a trust agreement between Canada Life and the Trustees of the Fund.

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

[30] A major issue in this class action is who owns the surplus in the Pension Plan. Pension surplus is the excess value of the assets in a pension plan over the value of the liabilities, both calculated in a manner prescribed by pension laws. The amount of surplus at any given time is actuarially determined under set guidelines and prescribed factors. It will become important to understand that at any given time, a pension surplus is a legal fiction. A pension surplus only becomes tangible and real when trust fund monies calculated at a particular date are actually paid out to the owners of the surplus.

[31] In this class action, the Plaintiffs claimed that the 1997 amendments to the Pension Plan and other amendments relating to the possibility of reversion of surplus assets to Canada Life on plan and fund termination were unlawful and of no force or effect. The Plaintiffs' position was that the Pension Plan surplus belonged to the Class Members.

[32] During the course of its administration of the Pension Plan, Canada Trust made certain amendments to the plan documents that permitted it to charge expenses to the pension fund. In the class action, the Plaintiffs alleged that the plan expense amendments were a breach of contract and a breach of trust.

[33] During the course of its administration of the Pension Plan, Indago Capital Management Inc., a subsidiary of Canada Life, whose employees participated in the Pension Plan, merged with another corporation. As a result of the merger, the employment of 14 employees of Indago was terminated, but there was no partial wind-up of the Pension Plan with respect to the termination of employment.

[34] During the course of its administration of the Pension Plan, the employment of 37 employees of Adason Properties Limited, a subsidiary of Canada Life, was

terminated, but there was no partial wind-up of the Pension Plan with respect to the termination of employment.

[35] During the course of its administration of the Pension Plan, the employment of 38 employees of Pelican Food Services Limited, a subsidiary of Canada Life, was terminated, but there was no partial wind-up of the Pension Plan with respect to the termination of employment.

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

[37] As of June 30, 2005, Canada Life's Partial Wind-up Report for the Integration Group disclosed an estimated partial wind-up surplus of approximately $93 million attributable to the Integration Group.

[38] In 2005, the Representative Plaintiffs Kidd and Harvey retained Koskie Minsky LLP and Harrison Pensa LLP for their advice and services in relation to the Integration Group Partial Wind-up and about the issue of Canada Life charging expenses to the fund.

[39] 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 on February 3, 2005. He discontinued his action, and he was added as a Plaintiff to Mr. Kidd's action.

[40] These actions were 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 ("FSCO"), which investigation was suspended, pending the resolution of the class action.

[41] In the class action, the Plaintiffs made three major claims: (1) they claimed that amendments to the Pension Plan concerning the reversion of surplus assets to Canada Life on Plan and Fund termination were unlawful; (2) they claimed that Canada Life had wrongfully been reimbursed for expenses charged to the Pension Plan in excess of $41 million; and (3) they claimed that certain groups of employees had a claim for a partial winding-up of the Pension Plan. The action sought winding up orders with respect to the Integration, Pelican, Indago, and Adason Groups.

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

[43] In April 2007, the parties attended a two-day mediation session facilitated by Justice Winkler, as he then was. The mediation resulted in an agreement on the framework for a potential settlement.

[44] Negotiations continued, and on November 9, 2007, the parties signed a Memorandum of Understanding.

[45] Between 2008 and 2010, the parties continued their negotiations about the details of the proposed settlement. During these negotiations, the Indago, Pelican, and Adason Partial Wind-Ups claims were added to the agenda of matters to be settled.

[46] It was part of the plan to settle that Canada Life would, in effect, restart its Pension Plan under a new trust, which would receive the assets from the Pension Plan. Implementation would also require a court application to obtain a variation of trust.

[47] The negotiations culminated in the Surplus Settlement Agreement, which I have labelled the Approved Settlement. The Surplus Settlement Agreement was conditional on obtaining certain levels of consent from past and present plan members.

[48] The Surplus Settlement Agreement (the Approved Settlement) involved five key elements:

(1) the assets of the Pension Plan would be transferred to a new Pension Plan;

(2) administrative expenses would be paid from the assets of the new Pension Plan;

(3) eligible active Plan members would be able to suspend their contributions to the Plan for two years; (The value of the contribution holiday for active Plan members is $4.6 million.)

(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) would each receive a share of the surplus assets (estimated to be worth $49.4 million) related to the partial wind-ups of the Pension Plan; and

(5) Canada Life would also receive a share of the surplus related to the partial wind-ups (estimated to be worth $21.5 million).

[49] Under the Approved Settlement: (a) plan members would receive 57.22% of the surplus for their designated part of the Pension Plan; (b) inactive plan members would receive 12.44% of the designated surplus; and (c) Canada Life would receive 30.34% of the surplus allocable to the partial winding ups.

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

[51] 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 agreement and to provide an opportunity to Class Members to ask questions. At each of the meetings, presentations were made by Canada Life, a CLPENS representative, and Mr. Kidd's counsel. 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.

[52] By order dated October 26, 2011, I certified this action as a class action for settlement purposes. See *Kidd v Canada Life*, 2011 ONSC 6324.

[53] There was a great deal of support for the proposed settlement. There are 5,228 persons in the classes. As of January 3, 2012, 4,293 Class Members in the Integration Group (82%) voted in favour of settling their claims in accordance with the Surplus Settlement Agreement. Overall, there were just 57 no votes. There was one objector.

[54] The parties moved for approval of the Approved Settlement, which I granted on January 27, 2012, for reasons released on February 6, 2012. See: *Kidd v Canada Life*, 2012 ONSC 740.

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

[56] I also approved: (a) Sack Goldblatt Mitchell LLP's fee request of $119,911.47 for legal services to the Adason Group plus $105,000 for future legal work; and (b) Koskie Minsky LLP and Harrison Pensa LLPs' fee request of $4,667,845 plus applicable taxes and disbursements of $60,601.84 plus payment for post-settlement work at an hourly rate without multiplier. Class Counsel was to receive approximately $5 million for fees and disbursements under the Approved Settlement.

[57] The value of the contribution holiday for active Plan members was $4.6 million. Thus, the total financial benefit to Class Members from the Approved Settlement was estimated to be $54 million, plus payment of all of their legal fees and expenses estimated at $5 million.

[58] However, one month after the settlement had been approved, Class Counsel were advised by Canada Life that the Integration Group's surplus had decreased to $23.7 million. The explanations for the decrease were that: (a) changes in interest and inflation assumptions with respect to annuity purchases had increased the actuarial cost of these expenses; and (b) a higher than assumed take-up rate of the guaranteed pension option for members of the Integration Group had increased the liabilities, depleting the surplus.

[59] To be more precise, on February 23, 2012, legal counsel to Canada Life provided to Class Counsel a memorandum reflecting updated information on the estimated actuarial surplus available for distribution under the Approved Settlement. The memorandum from Canada Life's actuary indicated that as at December 31, 2011, the Integration Partial Wind Up surplus had diminished from an estimated $54 million as at June 30, 2011 to approximately $23.7 million.

[60] The Plaintiffs and the CLPENS Executive Committee were sceptical about the truth of Canada Life's calculation of the Integration Group's surplus, and with the assistance and guidance of Class Counsel and the actuarial advisor; Class Counsel

investigated the information provided by Canada Life. They satisfied themselves that it was correct from an actuarial perspective.

[61] The Plaintiffs and Class Counsel also explored solutions, and two possible solutions were initially identified: (1) delay the implementation of the Approved Settlement to allow a recovery in interest rates with the hope that the surplus would recover; and (2) provide annuities to members of the Integration Group, with indexation provided through an inflation hedging product created and insured by a third party, with a view to reducing the plan liabilities.

[62] With these solutions in mind, Class Counsel approached counsel to Canada Life to initiate negotiations aimed at amending the Approved Settlement.

[63] The parties attended case management conferences before me on April 20 and May 7, 2012 to report on the situation and to obtain approval of a notice to update Class Members of the situation.

[64] Notices were approved and sent to Class Members by direct mail on or before May 15, 2012, and also posted to Class Counsel's website. The letters described the precipitous decline in the Integration Group's surplus and informed the Class Members that the parties were working together to address the situation. The letters were modified for each group because the problems mostly concerned the Integration Group.

[65] Meanwhile, the surplus continued to decline through 2012, and as of August 31, 2012, the Integration Groups' part of the surplus was estimated to be just $2.6 million.

[66] Based on the new estimates of the surplus and Class Members' share of 69.66% plus the value of the contribution holiday, the monetary value of the Approved Settlement to Class Members was $14.4 million, down from $54 million.

[67] Pausing here, in order to understand some of the arguments of the parties discussed below, it is important to appreciate that the reason the surplus in the Pension Plan for the Integration Group declined has nothing to do with a decline in the value of the assets held by the Pension Plan. In fact, the value of the assets has increased slightly.

[68] The reason that the surplus was vaporizing was that the actuarially estimated value of the cost of providing future pension benefits (which estimate is subtracted from the value of the assets to determine whether the plan is in a surplus or deficit position) had increased because of low interest rates and because most Integration Group Plan Members were electing to stay with the Pension Plan rather than choosing the option of taking the commuted value of their pension benefits.

[69] The principle reason for the increase in liabilities was the decline in yields on Government of Canada real-return, long-term bonds. For example, at December 31, 2008, this yield was reported at 2.10%, whereas at December 31, 2011, the yield was reported at 0.45%. At August 31, 2012, the yield on real-return, long-term bonds was 0.40%.

[70] Returning to the factual background, the Plaintiffs, Class Counsel, the CLPENS Executive Committee, and their expert actuarial advisor, Marcus Robertson, had

extensive discussions to analyze the information, to test its accuracy, and to consider next steps. Mr. Robertson is a fellow of the Canadian Institute of Actuaries, a former partner in the firm of Robertson, Eadie & Associates. He had been retained by the Plaintiffs to provide actuarial advice to the Plaintiffs and Class Counsel throughout the class action.

[71] In the interim, Canada Life proceeded to solicit bids for annuities for members of the Integration Group who elected a guaranteed pension option under the Approved Settlement. However, they were no bidders. Canada Life had approached seven Canadian insurance providers (including Canada Life) for immediate and deferred indexed annuities as required under the Approved Settlement. All seven annuity providers declined to take on the business, apparently because of the complicated indexing provisions in the Pension Plan, the number of deferred members, the deferral periods, the unavailability of assets to back the liabilities, and the size of the request.

[72] With no annuities to be had, Canada Life decided it could implement the Approved Settlement in another way. In August 2012, Canada Life proposed to unilaterally transfer the assets and liabilities of the Integration Group into the ongoing portion of the Pension Plan, and proceed with the implementation of the Approved Settlement. By this time, the anticipated surplus had continued its decline in value, and there was the prospect that there would be no surplus. Canada Life's plan would crystallize the surplus, stop the bleeding, and avoid the risk that the surplus would become a deficit, for which it as plan sponsor would become responsible under the *Pension Benefits Act*.

[73] In other words, because there was no market in Canada for the annuities, Canada Life proposed unilaterally to transfer the liabilities of the partial winding up to the ongoing portion of the Pension Plan, which had been re-established under the Approved Settlement in a way favourable to Canada Life. The Integration Group's surplus would be calculated, in part, on estimated rather than actual annuity prices.

[74] Canada Life took the position that no amendment to the Approved Settlement was necessary following the drop in the surplus, while Class Counsel viewed the Approved Settlement as unworkable and Canada Life's plans as a breach of contract.

[75] The Plaintiffs brought a motion returnable on September 27, 2012 objecting to Canada Life's plans about how to implement the Approved Settlement and seeking the appointment of a mediator.

[76] In their motion, the Plaintiffs sought a declaration that the unilateral actions proposed by Canada Life would breach the terms of the Approved Settlement. Both sides filed evidence that provided details about the circumstances leading to the reduction in the estimated Integration Group's surplus.

[77] The motion was not argued. I made the following endorsement.

> This motion for a declaration has been settled on the following terms that shall be incorporated into a court order:

1. Canada Life may proceed to file with FSCO the transfer report concerning the transfer of the Integration PWU assets and liabilities to the ongoing plan.

2. The Representative Plaintiffs shall not object to any such filing and transfer of assets and liabilities to the ongoing plan subject to paragraph 4 below.

3. If the parties do not reach an agreement on the implementation of the Surplus Sharing Agreement within 45 days from today, the court shall appoint a mediator to assist the parties in reaching an agreement; and

4. If no agreement is reached about implementing the Surplus Sharing Agreement, the Representative Plaintiffs reserve the right to take such action as they may be advised.

[78] Following the settlement of the motion, Justice Strathy agreed to act as mediator to assist the parties in resolving their dispute.

[79] In December 2012, the parties attended a one-day mediation, and negotiations in writing followed until the parties came to an agreement to revise the Approved Settlement. The main terms of the Amended Settlement are as follows:

- Canada Life will fund top-up payments (at an estimated cost of $1.2 million) in order to ensure that Integration Group will receive the promised minimum surplus shares of $1,000 required under the Approved Settlement.

- Canada Life will waive its right to any interest on the amount of its expense reimbursement under the Approved Settlement (estimated value $800,000).

- Canada Life will waive its right to reimbursement of $500,000 of its professional fees.

- The Plaintiffs and CLPENS Executive Committee will waive their entitlement to reimbursement of future legal fees (but not disbursements) previously approved by the Court (estimated at $200,000).

- For any member of the Integration Group who elected to receive a deferred or immediate pension, their portability rights would be satisfied by Canada Life transferring their assets to the ongoing portion of the Plan effective August 31, 2012.

- The assets and liabilities related to members of the Integration Group who elected a deferred or immediate pension will be notionally segregated (the "Segregated Portion") until the completion of a second distribution, if any.

- If a surplus exists for the notionally segregated Integration Groups assets as at December 31, 2014, there will be a second distribution to the Integration Group and Inactive Eligible Class Members subject to the conditions that:
    - 10% of the 2014 Gross Surplus shall be deducted off the top and remain in the Plan as a cushion;
    - The 2014 Gross Surplus will be reduced to take into account any contributions and other payments (together with interest at the Plan rate of return) made by Canada Life into the Plan after August 31, 2012 and that are notionally allocated to the Segregated Portion.
    - 69.66% of the net Surplus, to a maximum of $15 million, will be paid to the Integration Group and Inactive Eligible Class Members.
    - In order to avoid distributing numerous small amounts, the threshold for surplus payments under the possible second distribution is $100.
    - If any individual would be receiving $100 or less, no payment will be made to that individual and the individual's surplus share will instead be shared with the remaining members (if any) who are receiving $100 or more.

[80] Under the Amended Settlement, it is anticipated that the surplus for the first distribution for the Integration Group will be $4,116,740.

[81] I pause here to foreshadow that one of the major objections to the Amended Settlement are about the terms that circumscribe the possible second distribution to the Integration Group.

[82] With the approval of the court, letters were sent to all Class Members in February 2013, describing the proposed amendment to the Approved Settlement and giving notice of the next steps in the proceeding, including this fairness hearing.

[83] Since the mailing of the notices, Class Counsel has fielded over 70 inquiries by Class Members, and Class Counsel has communicated with the objectors.

[84] The Representative Plaintiffs, Class Counsel, and their actuarial advisor believe that the Amended Settlement is the best agreement that can be achieved. They recommend the Amended Settlement as fair, reasonable, and in the best interests of the Class, given the circumstances.

[85] It was Mr. Robertson's opinion that the dramatic reduction in the estimated value of the surplus was directly related to the decline in yields on Government of Canada real-return, long-term bonds and that this decline was a direct result of economic forces beyond the control of the parties. It was his opinion that giving some Class Members the possibility of a future surplus distribution ameliorates this economic misfortune and that overall Amended Settlement presents a better outcome than if the Approved Settlement were implemented without any amendment.

[86] As of the date of the fairness hearing, Class Counsel had received 15 written objections to the Amended Settlement and a petition from over 90 objector-Class Members was filed with the court. I will describe the nature of the objections later in these Reasons for Decision.

[87] In addition, Class Counsel exchanged emails with Class Member Dan Anderson. Mr. Anderson, who has an actuarial background, also participated in two lengthy conference calls with Ms. Clio Godkewitsch of Koskie Minsky LLP and Mr. Robinson, the actuary for the Plaintiffs.

[88] Mr. Anderson's concerns about the Amended Settlement were not placated, and he set them out in two information sheets his concerns. Several of the objectors relied on Mr. Anderson's information sheets that were made attachments to some of the written objections.

[89] At the fairness hearing I spent several hours listening and speaking with the objectors. I heard from five objectors: Paul Ludzki, Fred Taggart, Anne Carey, Dan Anderson, and Emily Truong.

III. THE POSITION OF THE PLAINTIFFS

[90] The Plaintiffs and Class Counsel believe that the Amended Settlement presents the best set of terms that could be negotiated under unanticipated circumstances that seriously undermined implementation of the Approved Settlement.

[91] They submit that Class Counsel, who are very experienced in pension matters and class proceedings, diligently investigated the reasons for the diminution of the surplus and sought to negotiate a reasonable set of amendments in adversarial arm's length negotiations. In their view, these factors favour approving the Amended Settlement.

[92] They point out that mediation and negotiations continued over almost nine months and each of the parties were independently represented and advised by sophisticated legal and actuarial professionals. They note that the terms of the Amended Settlement were reached with the assistance of Justice Strathy in his capacity as a neutral mediator.

[93] On the merits of the settlement, the Plaintiffs submit the analytical question for the court is whether the proposed Amended Settlement is better for the class than the *status quo* of implementing the Approved Settlement to the extent that this is even possible. In this regard, they submit that the question for the court is whether Class Members are likely to recover more from the proposed Amended Settlement than under the Approved Settlement.

[94] The proponents submit that the answer to this question is yes, because under the Approved Settlement, the Integration Group would recover $1.8 million (its share of $2.6 million), assuming that the surplus does not diminish further before distribution. Under the Approved Settlement, there will be insufficient funds to pay the minimum

$1,000 surplus payments and there would be no possible future distribution. In contrast, under the Amended Settlement, the Integration Group will receive at least $1,000 per eligible member and there is the possibility of a future distribution of surplus in 2014, if available.

[95] Further, Class Counsel submits that approval of the Amended Settlement is superior to the alternative of revived litigation. Class Counsel and the Plaintiffs believe that without the Amended Settlement, the Approved Settlement cannot be implemented because it requires Canada Life to purchase indexed annuities for members of the Integration Group, which Canada Life cannot do and it requires eligible Class members to receive a minimum cash distribution of $1,000, which is impossible, given the status of the Integration Group's surplus. However, Canada Life disputes that the Approved Settlement cannot be implemented and obviously it disagrees that it is breaching the Approved Settlement.

[96] Canada Life's position raises the issue of whether or not there is a means of challenging any future steps taken by Canada Life to implement the Approved Settlement over the objections of the Plaintiffs. For present purposes, more significantly, the Plaintiffs and Class Counsel assert that Amended Settlement is better for the class than the alternative of litigation about the Approved Settlement or about the original claims in the class action.

[97] The Plaintiffs submit that continued litigation does not represent a viable alternative, as no litigation can restore the surplus. They point out that the estimates of surplus were always variable and dependent on factors such as interest rates and the cost of purchasing annuities and thus the amount of the surplus was never guaranteed, nor could it ever be guaranteed. Further, they note that the plan expense claim of the Plaintiffs has already been compromised, and stands a very limited chance of success given the decision of the Supreme Court of Canada in *Nolan v. Kerry (Canada) Inc.* [2009] 2 S.C.R. 678.

[98] The Plaintiffs submit that revived litigation would be lengthy and expensive and would not have the result of increasing the surplus. Indeed, they submit that the situation may get worse and even the current small surplus may vanish.

[99] The Plaintiffs submit that it would not be fair to the Indago, Pelican, and Adason Groups to hold up the Approved Settlement because of the plight of the Integration Group. In a message from the CLPENS Executive Committee dated March 12, 2013 to class members, the Executive stated:

> What to do?
>
> Technically, CLPENS could have asked the Court to set aside the previously-approved settlement on the grounds that it could not be implemented as written. It is not clear that the Court would have done so and, even if the Court agreed to this course of action, we would have been back to the scenario of returning to court to argue about the ownership of the (much diminished) surplus. However, by doing do so, no Class Member would receive any current payment. Although members of the IPWU Group had little to lose and may have wished to pursue this strategy,

> members of the other partial wind-up groups (Indago, Adason, Pelican Foods) had a lot to lose. As Non-Partial Wind-up members (retirees, deferred vested members and active members) would be part of any subsequent court action, they would receive nothing. Accordingly, CLPENS did not think it right to pursue a solution that eliminated all current payouts in return for the possibility of the partial wind-up groups being declared owners of whatever plan surplus existed at an unknown future date. ... In conclusion, while the outcome of our class action is disappointing, it is the result of unprecedented market developments and your Executive Committee believes that the amended settlement is the best result achievable in the circumstances.

[100] The Plaintiffs and Class Counsel submit that the outcome is fair and reasonable and in the best interests of the Class. They submit that the Amended Settlement ought to be approved.

IV. THE POSITION OF THE OBJECTORS

[101] All of the objectors request the court to not approve the Amended Settlement.

[102] Several of the objectors objected to the approval process, and they submit that they have been denied natural justice. They dispute that they have been properly apprised on the situation after the settlement was initially approved, and they complain that they have not been given ample time or ample information about the causes of the problems and about the merits of the Amended Settlement. This objection is well expressed by Fred J. Taggart in his letter to the court dated March 8, 2013. Mr. Taggart states:

> All this is being done via an amendment to the settlement, with no further information sessions for plan members, no opportunity to ask questions, and no opportunity to vote – yet members are bound by all of the terms and conditions and concessions that they agreed to in the original settlement when they would share in $62 million rather than $5 million.

[103] Ms. Carey, one of the objectors who spoke at the fairness hearing, asked for an adjournment in order to hire a lawyer to provide her with independent legal advice.

[104] Several objectors found it incomprehensible that the Representative Plaintiffs and Class Counsel did not foresee the problem caused by declining interest rates and the low numbers of class members choosing not to take the commuted value of their pension benefits. Some objectors suggested that Canada Life duped or tricked or schemed to deny them the surplus by purposely delaying the litigation precisely because they knew that the surplus would be depleted.

[105] Several objectors felt that they had been deceived when they agreed to the Approved Settlement and that the Amended Settlement amounts to a revocation of the Approved Settlement. An example of this objection is provided by Ms. Anne Carey in her e-mail message dated March 12, 2013. She writes:

> With respect to the substance of the matter, I think it is necessary to emphasize as strongly as possible that the resolution which is being presented at this time does not constitute a minor change or "amendment" but rather represents a virtual rescind of everything that was proposed as late as 2011, when we were asked to agree on the settlement proposed. Specifically, it had been previously confirmed in written communication that I was entitled to approximately $38,000 of surplus, at this point, the "amendment" is offering me a meagre $1,000 in lieu of this $38,000, and others I know stand to lose upwards of $57,000 to $98,000.

[106] Several objectors expressed the view that the Integration Group was being singled out for unfair treatment. Objector Mary-Anne Matthews is representative of this view point. In her objection, she wrote:

> While I can appreciate and understand that Koskie Minsky, the Plaintiffs and the CLPENS group has done on the members' behalf, particularly over the past year, I feel that the proposed amendment to the settlement is not the best for all of us and I would have preferred a delayed settlement for the [Integration Group] until the economy and interest rates recover to a degree that would afford us an increase in the surplus. It appears to me as though Canada Life/Great West Life will continue to enjoy the benefits afforded to them in the original settlement while those of us in the [Integration Group] (excluding Indago, Pelican Foods and Adason, as well as the current Canada Life employees) will be sacrificing their [benefits]. If the group had an opportunity to come together with one voice, I believe that as a group we would be opposed to the amended proposal being put forth on March 18, 2013. This settlement is not what we voted for in 2011.

[107] Several objectors found the proposal under the Amended Settlement for a second distribution of surplus unfair and unreasonable. This objection is again well expressed by Mr. Taggart in his letter, where he states:

> Now that the assets and liabilities have been transferred to the on-going plan, what happens if and when interest rates recover to a historically normal level? Don't the liabilities shrink as rapidly as they ballooned, thus restoring the healthy surplus that the plan has enjoyed for decades? With a certain set of assumptions, we've seen nearly $100 million disappear in the last 6 years. With a different set of assumptions, might we see the $100 million reappear in the next 6 years? It is unlikely that we will see a rebound by December 31, 2014 as the US Fed is on record to hold interest rates steady until at least mid-2014. However, if it did magically occur, why would the second surplus distribution be capped at $15 million?
>
> It seems to this observer that Canada Life has seen a window of opportunity to move assets and liabilities to the ongoing plan, temporarily value the liabilities at historically low interest levels, distribute a severely diminished surplus to the plan members, and then wait for rising interest rates to restore the healthy surplus that the plan has enjoyed for many years. ... Canada Life has locked the members' surplus claims into these tough economic circumstances while insulating their own share and in fact the entire PWU surplus from those same economic circumstances.

[108] Many of the objectors, were upset that the Amended Settlement was vastly different from what they expected when they voted for approval of the Accepted Settlement. Susan Marles made the point neatly in her e-mail message. She wrote:

> I am a [Integration Group] member. Like many other members, I am greatly concerned, confused and highly suspicious in the huge drop in surplus. I had agreed to the original surplus settlement based on the amount of surplus what was detailed to me at that time. I understand now that amount in the proposed settlement will be $1,000, which is vastly different from the amount in which I made the decision to support the surplus settlement. I am objecting to the amendment to the original settlement.

[109] All of the objectors were disappointed; some were angry. Several objectors found the commitments of Class Counsel and Canada Life under the Amended Settlement to augment what remains of the surplus paltry and insulting.

V. DISCUSSION

1. Jurisdiction to Vary an Approved Settlement in a Class Proceeding

[110] As far as I am aware, this is the first time that parties to an already approved settlement agreement in a class action have sought approval to an amendment to the agreement. The Plaintiffs submit that the court has the jurisdiction to grant this relief from two sources; namely: (a) under Rule 59.06(2)(d) of the *Rules of Civil Procedure*; and (b) under s. 12 of the *Class Proceedings Act, 1992.*

[111] Rule 59.06(2)(d) of the *Rules of Civil Procedure* states:

> 59.06(2) A party who seeks to, [. . .]
>
> (d) obtain other relief than that originally awarded,
>
> may make a motion in the proceeding for the relief claimed.

[112] Section 12 of the CPA states:

> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[113] I do not think that s. 12 of the *Class Proceedings Act, 1992* applies to the circumstances of this case, because I do not regard settlement approval to be an order respecting the conduct of a class proceeding to ensure its fair and expeditious determination, and it would be odd to resort to this section of the Act, when s. 29 (2) deals expressly with the approval of any settlement. Section 29 (2) states: "A settlement of a class proceeding is not binding unless approved by the court."

[114] It seems obvious to me that s. 29 (2) applies to the circumstances of this case. The parties have entered into a settlement and they seek court approval.

[115] In my opinion, I have jurisdiction under s. 29 (2) to approve or deny approval of the proposed Amended Settlement, and I do not need to resort to rule 59.06 (2).

2. Is the Amended Settlement Fair, Reasonable, and in the Best Interests of those Affected by It?

[116] The design of North American class action regimes is to advance access to justice through a representative action with (a) a genuine claimant, the representative plaintiff, who is the party with legal standing to advance the class members' claims and to represent the class members; and (b) an entrepreneurial Class Counsel, who bears the financial risk of failure but who shares in the class members' aggregate success. Most class actions settle, and under s. 29 (2) of the *Class Proceedings Act, 1992*, a settlement of a class proceeding must be approved by the court to be binding on the parties.

[117] As I noted, in *Berry v. Pulley*, 2011 ONSC 1378 at para. 80, Class Counsel is confronted with an inherent conflict of interest when proposing a settlement of a class action. I stated:

> 80. As is well known, the settlement of class actions raises very difficult ethical problems for class counsel because of the inherent conflicts of interest that arise because class counsel has an enormous financial interest in the class members' causes of action. There is also the potential conflict of interest of class counsel of having legal and ethical responsibilities to class members whose interests are not homogeneous.

[118] Settlement approval is the most important and difficult task for a judge under all class action regimes, including Ontario's *Class Proceedings Act, 1992*. Since most class actions settle, the integrity and the legitimacy of class actions as a means to secure access to justice largely depend upon the court properly exercising its role in the settlement approval process. In scrutinizing a settlement, the court is called on to protect the interests of the class members who are to be bound by the outcome and who will be compelled to release their claims against the defendant in exchange for their participation in the class action settlement.

[119] The design of the approval process requires the court to carefully scrutinize any proposed settlement. The design of the approval process: (a) requires the proponents of the settlement to justify it; (b) provides an opportunity for those affected by the settlement to be heard: and (c) requires the court to evaluate the settlement and make a formal order. This design is meant both to deter bad settlements and also to ensure good ones that achieve the goals of the class action regime; namely: access to justice, behaviour modification, and judicial economy.

[120] Of these goals of class actions, the most important for the approval process is access to justice, because a settlement always achieves judicial economy, and a settlement may sometimes not achieve behaviour modification yet still be a good settlement. However, a settlement will be a bad settlement if it does not achieve procedural and substantive access to justice. The court's job is to review a proposed

settlement to ensure that the class members have achieved access to justice through a representative action.

[121] The judge's task is difficult because judges are more accustomed and more comfortable adjudicating in the context of an adversarial system, but at the time of the settlement approval process, the active parties to the class action are no longer adversarial, and they all will be recommending the settlement.

[122] I think judges are up to the task, but they are required to be more inquisitorial and to compensate for the adversarial void by being diligent in testing the one-sided arguments of the proponents of the settlement and by being attentive to the views of objectors who may provide cogent counter-arguments to the united front promoting the settlement.

[123] There is a great deal of academic literature and criticism about the law and practice of class action settlements, most of it from the United States, but there are valuable Canadian studies including: C. Piché, *Fairness in Class Action Settlements* (Toronto: Carswell, 2011); J. Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LL.M. Thesis: University of Toronto, 2009); G. Watson, "Settlement Approval – The Most Difficult and Problematic Area of Class Action Practice" (NJI Conference on Class Actions, 2008); C. Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003). There are also some settlement approval manuals for judges including: S. Marcus (ed,), *Manual for Complex Litigation* (4th) (Washington, D.C.: Federal Judicial Centre, 2004) and B.J. Rothstein and T.G. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (2nd ed.) (Washington, D.C.: Federal Judicial Center, 2009).

[124] In the case at bar, it was not a difficult task analyzing and approving the initial settlement of this action, the Accepted Settlement. The various factors favoured settlement, and there were no warning signs. I did not undertake a detailed explanation of my decision to approve the Approved Settlement. However, in order for me to explain my judgment not to approve the Amended Settlement, it will be necessary for me to review more fulsomely the law and the literature about settlement approval then I did when I approved the Approved Settlement, which was at a time when the parties and the court's understanding of the circumstances of the Integration Group were different.

[125] With respect to the law to be applied under s. 29 (2), I will begin by repeating what I said at paragraphs 108 to 111 of my reasons for granting approval to the Approved Settlement. I stated:

> 108. To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.
>
> 109. In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of

> the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.
>
> 110. When considering the approval of negotiated settlements, the court may consider, among other things: (a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties, (g) if any; number of objectors and nature of objections; (h) the presence of good faith, arms' length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (j) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at pp. 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.
>
> 111. A reasonable and fair settlement is inherently a compromise and a reasonable and fair settlement will not be and need not be perfect from the perspective of the aspirations of the parties. That some class members are disappointed or unsatisfied will not disqualify a settlement because the measure of a reasonable and fair settlement is not unanimity or perfection. See: *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.) at para. 21; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at p. 440, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372.

[126] As may be observed from this brief discussion of settlement approval, courts have developed a test for settlement approval and courts have developed a non-exhaustive list of factors to use to apply the test. As it happens, the test for settlement approval is almost identical in Canadian and American class actions, and the test involves determining whether the settlement is fair, reasonable, and in the best interests of class members.

[127] Professor Piché in her text *Fairness in Class Action Settlements*, *supra* at pp. 179-80 summarizes the various factors for the settlement approval test into seven factors; i.e.: (1) judicial risk analysis: likelihood of recovery, or likelihood of success on the merits weighed against amount and form of settlement relief; (2) future expense, complexity and likely duration of litigation; (3) class reaction: number and nature of objections; (4) recommendations and experience of counsel and opinion of interested persons; (5) adequacy of representation: good faith and absence of collusion; (6) discovery evidence sufficient for "effective representation" and (7) adequacy of notice of proposed settlement to absent class members. Professor Piché observes that the first

four factors are pertinent to substantive fairness and the remaining three factors are pertinent to procedural fairness.

[128] Professor Piché's summary is very helpful, but I would add to it by suggesting that in addition to using the various factors to determine substantive and procedural fairness, the court should also examine circumstantial fairness and institutional fairness.

[129] By circumstantial fairness, I mean the fairness of the settlement to the parties and the class members in their particular circumstances, and by institutional fairness, I mean the fairness of the settlement from the perspective of a robust notion of access to justice that includes an outcome that objectively should satisfy the class members' entitlement to justice for their grievances.

[130] Having regard to institutional fairness will elevate the standard for approval and send the message that courts will not rubber stamp settlements and turn a blind eye to what are in truth strike suits or suits where the defendant or the defendant's insurer pays a modest price for buying peace rather than paying a fair price to compensate the class members for their injuries. Having regard to institutional fairness will send the message that the court will not rubber stamp settlements where the law suit is genuine but Class Counsel are content to take a low-ball offer because it suits their entrepreneurial business model. Having regard to institutional fairness will send the message that the court will not approve a settlement if through misadventure, incompetence, opportunism, lassitude, or fatigue the Representative Plaintiff and Class Counsel do not achieve a settlement that is truly fair, reasonable, and in the best interests of class members.

[131] *Epstein v. First Marathon Inc.* [2000] O.J. No. 452 (S.C.J.) is one of the very few cases where a settlement has been rejected, and it provides an example of a case where the proposed outcome would have been institutionally unfair. The proposed settlement was that Class Counsel would receive $190,000 in legal fees and that the class members would receive nothing. The court viewed the settlement as demonstrating that the action was a strike suit, and the court would not approve the settlement.

[132] In Canada, a few settlements have been initially rejected but subsequently approved after the parties fixed an apparent unfairness. See: *Burnett Estate v. St. Jude Medical Inc.*, [2009] B.C.J. 2403; *G.M. v. Associated Selwyn House*, 2008 QCCS 395 and 2009 QCCS 989. Very few settlements have been rejected, and it would be salutary for the institution of class actions if the standard for settlement approval was elevated by having regard to the institutional fairness of the settlement.

[133] With these comments as background, I turn now to evaluate the Amended Settlement and to explain why in my opinion, it is not substantively, procedurally, circumstantially, or institutionally fair. I will begin this part of the discussion by noting the factors that were not particularly helpful.

[134] In determining the fairness of the Amended Settlement, the following factors are not particularly helpful or they are neutral, at best; namely: (a) amount and nature of discovery, evidence or investigation; (b) recommendation and experience of counsel; (c)

recommendation of neutral parties, if any; (d) the presence of good faith, arms' length bargaining and the absence of collusion; and (e) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation.

[135] The fact that a judge, in this case, Justice Strathy, or an experienced mediator facilitated a settlement is in my opinion, nothing more than a narrative fact. I do not know what Justice Strathy's views are about the fairness of the Amended Settlement and his involvement is no testimonial for the Amended Settlement.

[136] The overall thrust of the unhelpful factors is that they are designed to satisfy the court that Class Counsel, which has most to gain and most to lose in taking on a class action, is not acting in their own self-interest in recommending a settlement, and they are designed to ensure the court that the proposed settlement is the product of hard-bargaining and a genuine and intelligent evaluation of the merits of the litigation and the substantive merits of the settlement.

[137] In the case at bar, I have no doubt that Class Counsel tried its best, but in light of the surprises since the Approved Settlement, this is not one of those cases where the court should give the Amended Settlement an "A" for effort.

[138] Thus, the factors associated with the substantive merits of the Amended Settlement are the most weighty factors in the case at bar. It is because of the importance I place on the substantive merits of the Amended Settlement, that I regard the weighty factors to be: (a) the settlement terms and conditions; (b) number of objectors and nature of objections; (c) likelihood of recovery or likelihood of success; and (d) future expenses and likely duration of litigation and risk.

[139] In the circumstances of the immediate case, I also regard the degree and nature of communications by counsel and the representative parties with class members during the litigation as an important factor, but it is a factor that is more pertinent to procedural and circumstantial fairness than it is to substantive fairness.

[140] I turn now to the matter of substantive fairness. Having the above factors in mind, it is analytically helpful to consider not only the substantive fairness of the Amended Settlement but also the fairness of three other settlements, one of which is hypothetical. The other three settlements to consider are: (1) the Approved Settlement; (2) what I shall call the Stark-Reality Settlement; and (3) what I shall call the Objectors' Settlement. An analysis of these four settlements informs why I conclude that the Amended Settlement is substantively unfair.

[141] In my opinion, at the time of its approval, the Approved Settlement was substantively fair. In other words, since the dispute was about who owned a pension plan surplus estimated to be worth $64.3 million and whether Canada Life should pay $41 million for wrongful expense charges, a substantively fair settlement was for the class to receive 70% of the surplus, the current employees to receive a two-year contribution holiday, and Class Counsel to receive $5 million in fees and disbursements.

[142] As explained above, the Approved Settlement, however, was based on mistaken assumptions about future participation in the Pension Plan and about the availability of

annuities and on a false estimate of the surplus. The Approved Settlement has become the Stark-Reality Settlement.

[143] In my opinion, the Stark-Reality Settlement, which is the first branch of the court's double-bind decision, is unfair. In other words, if the litigation were being settled today but without the mistakes and false estimates, the settlement would be the Stark-Reality Settlement. Under this settlement there is only one distribution of surplus and Class Members would recover 70% of a small surplus and Class Counsel is paid $5 million in legal fees. In my opinion, the Stark-Realty Settlement is unfair.

[144] A 70:30 split was fair in dividing up an estimated surplus of $64 million. A 70:30 split is not fair in dividing up a surplus of $14 million, particularly when only Canada Life is in a position to weather the economic storm and where Canada Life achieves significant benefits under the Stark-Reality Settlement (from a new trust arrangement that indisputably allows it to charge for services) and where its own right to claim 100% of any future surplus is unaffected. If there was some component of behavior modification in conceding 70% of an estimated surplus of $64 million, there is very little in conceding 70% of a surplus of $14 million, especially when Canada Life is left in a position to economically recover all of what it gives away once the economic conditions right themselves.

[145] Further, a $5 million counsel fee under the Stark-Reality Settlement is unfair. The value of the Stark-Reality Settlement to the Class Members is $14.4 million. In hindsight, knowing what I know now and did not know then, I would not have approved the counsel fee because in the disappointing circumstances of this case, it would be disproportionate (35%) to the value to the class of the settlement. See *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92.

[146] This brings the analysis to a hypothetical settlement that I shall call the Objectors' Settlement. As noted above, the objectors propose a different settlement than the one before the court. With two exceptions, the objectors would accept the terms of the Amended Settlement. The exceptions to the Amended Settlement are to remove the cap of $15 million and to extend the time period for a second distribution beyond the re-calculation date of December 31, 2014.

[147] Analyzing the Objectors' Settlement, in my opinion, an open-ended calculation date for the second distribution would be unreasonable and unfair, but if the re-calculation date of December 31, 2014, at the choice of the Class Members, could be waived and extended to December 31, 2017, then in my opinion, the Objector's Settlement would be fair, reasonable, and in the best interests of the Class Members.

[148] Recalling that the action commenced in 2005, when the surplus was closer to $100 million, and that it took seven years to more or less deplete the surplus in 2012, a re-calculation date of 2017 is a fairer date to allow the economy to turn over again than is 2014.

[149] The Objector's Settlement Proposal addresses two manifestly unfair elements of the Amended Settlement, the $15 million cap and the 2014 re-calculation date,

discussed further below, but it does more. The Objector's Settlement addresses Canada Life's moral duty to take more responsibility for the fact that it campaigned for the Approved Settlement with an unprecedented procedure that included a vote by Class Members.

[150] In talking about moral duty, I do not mean to suggest a want of integrity or any moral turpitude. I am rather alluding to Canada Life doing the decent, honourable, and right thing even though there may be no legal obligation to do anything. I say nothing about whether there is a legal responsibility for the estimates and the promotional material, but it seems to me that when Canada Life mounts an elaborate cross-country campaign for the Approved Settlement, there is a moral responsibility to fully share the disappointment when the Approved Settlement becomes the Stark-Reality Settlement even in the absence of a legal obligation.

[151] To show itself as the better corporate citizen, Canada Life cannot simply wash its hands of the matter and say it never guaranteed there would be a significant surplus and that it has exculpated itself from liability by making no promises. There is a circumstantial unfairness if Canada Life does not adequately share the pain of the disappointment of its inaccurate estimates of the surplus and as I will explain below, Canada Life does not adequately share the pain.

[152] I wish to be clear, I am making no finding about whether Canada Life has any legal responsibility for inducing the Approved Settlement, and I am making no finding that the Class suffered any damages as a result of what occurred in the making of the Approved Settlement. I also do not mean to shame Canada Life or Class Counsel. The circumstances were unfair, and it simply strikes me and many objectors that it is circumstantially unfair to persuade the Class Members to endorse the Approved Settlement and then not do more to soften the disappointment of the electorate in the substantive outcome of the campaign, which is the Stark-Reality Settlement.

[153] With this background analysis, I now turn to the substantive fairness of the Amended Settlement.

[154] The apparent purpose of the Amended Settlement is to lessen the pain of the disappearance of the surplus that was to be shared by the Integration Group and Canada Life. However, under the Amended Settlement Class Counsel and Canada Life, the proponents for the Amended Settlement, do very little to share the pain of the Integration Group.

[155] Class Counsel for the Integration Group are to be modestly commended for their $200,000 indirect contribution to the Amended Settlement, but the fact remains that they shall receive $4.6 million in counsel fees. I do not see much sharing of the pain by Class Counsel.

[156] As for Canada Life's sharing the pain, under the Amended Settlement with its $15 million cap, Canada Life's proportionate share of any surplus is potentially increased, and unlike the Integration Group they have a temporally-unlimited ability to recapture the diminishment of the surplus.

[157] For Canada Life, there is no arbitrary 2014 deadline for recalculating the surplus in light of what might be better economic conditions. Should there be a second distribution, the taking of 10% off the top of any second distribution and the cap of $15 million is a disguised way for Canada Life to increase its share of the surplus from the 30.34% originally allocated to it.

[158] I appreciate that that Canada Life's share of the Integration Group's surplus also declined. It declined to 30.34% of $3.9 million. Thus, Canada Life's share of the surplus is now around $1.2 million, which I observe is precisely the sum that Canada Life is contributing to top up the surplus for the first distribution under the Amended Settlement. Thus, Canada Life is not necessarily contributing its own money to the Amended Settlement because there has never been a judicial determination of who actually owns the surplus. The issue of ownership was settled not resolved by the Approved Settlement.

[159] One may admire the negotiating acumen of Canada Life, but its acumen does not make the Amended Settlement reasonable or fair or in the best interests of the Integration Group

[160] Further, I regard the 2014 date for re-calculating the surplus as arbitrary and unfair. It is an offer of a faint hope.

[161] Thus, in my opinion, the Accepted Settlement was fair but is no longer fair. Nevertheless, transformed into the unfair Stark-Reality Settlement, it remains a binding settlement. In my opinion, the Objectors' Settlement as revised would be fair, but it is a hypothetical settlement not before the court. In my opinion, the Amended Settlement is not substantively fair.

[162] In my opinion, the Amended Settlement is also not procedurally fair.

[163] In the context of a representative action, procedural fairness is a nebulous concept. It is nebulous because as a matter of civil procedure, the class members are bound by the result but typically, they are not actively involved in the prosecution of the case, and they have ceded the control of the litigation to their representative and to Class Counsel. In these circumstances, the standards for procedural fairness are unclear.

[164] At the settlement approval stage, procedural fairness is usually achieved by a class member receiving adequate notice of the terms of the settlement, having an opportunity to voice support or opposition, and having a right to make representations at the fairness hearing.

[165] This minimum standard for procedural fairness was met in the case at bar. However, in my opinion, the minimum standard was not good enough for the circumstances of the Amended Agreement.

[166] Having regard to such things as the unprecedented campaign for approval of a settlement agreement and the fact that it is the position of both sides that the misfortune of false estimates was a matter of fickle fate and forces beyond their control, the objectors needed something more than the minimum standard to provide them with

procedural fairness. In my opinion, the proponents of the Amended Agreement ought to have paid for a lawyer to provide the objectors independent legal representation.

[167] While the objectors, particularly the five who spoke at the fairness hearing, proved themselves to be good advocates, their arguments would have been better made if they had been made by legal counsel with the skills to match those of Class Counsel and counsel for Canada Life.

[168] This last comment brings the discussion to the matter of circumstantial fairness and to the matter of what weight should be given to the arguments and positions of the objectors and petitioners.

[169] I do not think that the Amended Agreement is circumstantially fair. First, there is the unfairness, discussed above, of Class Counsel and Canada Life not sharing the disappointment caused by the false estimates. Second, it was not fair for Canada Life, in circumstances where it had campaigned for the Approved Settlement and obtained significant benefits, to potentially improve its proportionate share of the surplus by imposing a cap on the surplus to be shared. Third, there is the unfortunate circumstance that the Pelican, Indago, and Adason Groups are being used as ransom for the Amended Agreement. Fourth, and most significantly, the objectors oppose the Amended Settlement.

[170] Historically, objectors to class action settlements have been few in number, perhaps because they cannot afford to pay for legal representation and are intimidated by the process or perhaps because the harm they individually suffered was never that much in the first place. Nevertheless, the proponents for a settlement, typically, rely on the absence of opposition as a point in favour of settlement approval. In the case at bar, there was almost no opposition to the Approved Settlement.

[171] However, this is no longer the case. There is fierce opposition to the Amended Settlement, and the objectors as individuals had a substantial personal interest to protect. While some of the criticism is misguided, much of the criticism is telling against the fairness of the Amended Settlement.

[172] In my opinion, in the circumstances of this case, considerable weight should be given to the views of the objectors, and they believe the Amended Settlement to be unfair.

[173] Finally, I come to the matter of institutional fairness, which places the settlement approval process in the context of the institutional purposes of class proceedings legislation.

[174] In my opinion, from the perspective of institutional fairness, there is little to commend the Amended Settlement. The best that can be said for it is that it is monetarily better than the Stark-Reality Settlement that is the Approved Settlement and better than the futility of renewed litigation.

[175] However, I do not think that a court should approve an unfair settlement because it is the best monetary choice in a double bind. The court should not approve a

settlement unless it is all of fair, reasonable, and in the best interests of the class. If the proposed settlement is not fair, the court should reject it. The court should not approve an unfair settlement simply because it's the better of two unfair choices.

[176] In this case, the Amended Settlement is substantively, procedurally, circumstantially, and institutionally unfair. I do not approve it.

[177] Some good may yet come of not approving the Amended Settlement. It is open to the parties to come back with a fair settlement. But even if they do not, it will be a good thing for others to know that under the *Class Proceedings Act, 1992*, the court will not approve an unfair settlement. If that has the effect of elevating the standard for other settlements, then the institutional purposes of the class proceedings legislation of achieving meaningful access to justice will be served.

VI. CONCLUSION

[178] For the above reasons, I dismiss the motion.

[179] There should be no order as to costs.

Perell J.

Perell, J.

Released: March 28, 2013

CITATION: *Kidd v. The Canada Life Assurance Company*, 2013 ONSC 1868
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

REASONS FOR DECISION

Perell, J.

Released: March 28, 2013.