

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**DENNIS F. CAPONI**

Plaintiff

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

(Notice of Action issued on August 30, 2007)

1. The plaintiff claims on his own behalf and on behalf of the Class Members (defined below):
  - (a) a declaration that the defendants were not permitted to partially wind-up the Canada Life Canadian Supplemental Pension Plan (the "Supplemental Plan");
  - (b) a declaration that the defendants breached their fiduciary, trust, and contractual obligations to the Class Members by partially winding up the Supplemental Plan and in the improper implementation of the partial wind-up, including their failure to properly calculate and pay the correct amounts owing to the Class Members;
  - (c) damages payable by the defendants for breach of fiduciary duty, breach of trust and breach of contract in the amount of \$25,000,000 or such greater amount as may be determined by the court, or, in the alternative, an order directing an accounting, reference or other directions to determine the damages owing by

the defendants and/or to be paid out of the trust fund for the Supplemental Plan;

- (d) punitive damages of \$20,000 for each Class Member;
- (e) costs on a substantial indemnity basis, together with any goods and services tax, payable by the Canada Life Assurance Company (“Canada Life”), or, in the alternative, payable out of the trust fund for the Supplemental Plan;
- (f) prejudgment and postjudgment interest under sections 128 and 129 of the *Courts of Justice Act*, R.S.O 1990, C.-43, compounded annually or at the Supplemental Plan rate of return compounded annually, whichever is greater; and
- (g) such further and other relief as this Honourable Court may deem just.

### **THE PLAINTIFF**

2. The plaintiff, Dennis F. Caponi (“Caponi”) resides in Toronto, Ontario. He was employed by Canada Life from September 1970 until August 31, 1992. His participation in the Supplemental Plan began in 1981. Caponi was included in the partial wind-up of the Supplemental Plan as of January 31, 2005.

### **THE DEFENDANTS**

3. Canada Life is a corporation incorporated pursuant to the laws of Canada, carrying on business as a provider of life insurance, financial services and pension fund administration services. It maintains its headquarters in Toronto, Ontario. Canada Life is the former employer of the plaintiff and the other Class Members and is the sponsor and administrator of the Supplemental Plan.

4. The defendants, A.P. Symons, D. Allen Loney and James R. Grant are the trustees (the “Trustees”) of the fund for the Supplemental Plan. A.P. Symons resides in Markham, Ontario. D. Allen Loney resides in Toronto, Ontario. James R. Grant resides in London, Ontario. At all material times the Trustees were senior employees or retired senior employees of Canada Life.

### **THE CLASS**

5. The plaintiff brings this action under the *Class Proceedings Act, 1992*, S.O. 1992, c.6 on behalf of a class consisting of all persons, wherever resident, who are former employees of Canada Life, and who were included in the partial wind-up of the Supplemental Plan as of January 31, 2005, and their estates and beneficiaries (the “Class” or “Class Members”).

6. As of January 31, 2005, the Class Members were all former employees who had vested pension entitlements under the Supplemental Plan but had not started to receive a monthly pension.

### **OVERVIEW OF THE CLAIM**

7. This class proceeding arises out of the partial wind-up of the Supplemental Plan which was made retroactive to January 31, 2005. The defendants were not permitted to wind-up the Supplemental Plan, and in any event the partial wind-up was not properly implemented. The defendants breached their fiduciary, trust and contractual obligations owed to the Class Members who were beneficiaries of the Supplemental Plan. The defendants breached these duties in their failure to, among other things, provide timely and adequate notice of the partial wind-up and to properly calculate and pay the correct entitlements to the Class Members.

While certain amounts were ultimately distributed under the partial wind-up, these amounts were not properly calculated and were less than what the Class Members were entitled to receive. The defendants applied incorrect formulas and assumptions, utilized inappropriate interest rates, and failed to compensate the Class Members for possible adverse tax consequences. The Class Members have been underpaid in the distributions to them and seek damages for payment of the correct amounts and other losses.

## **THE SUPPLEMENTAL PLAN**

### **General**

8. The Supplemental Plan is a supplemental employee retirement plan. Canada Life pension benefits are payable first under the Canada Life Canadian Employees Pension Plan (the “Registered Plan”) up to the maximum amount permitted by the *Income Tax Act* (Canada) (the “*ITA*”) for a registered pension plan, with the remaining pension entitlements payable under the Supplemental Plan. All members of the Class were beneficiaries of the Registered Plan as well as the Supplemental Plan.

### **Pre-2001 Supplemental Plan Communications with Class Members**

9. Before 2001, the terms of the Supplemental Plan were summarized in annual statements and the benefits were paid directly by Canada Life. Each Class Member was entitled to the full benefits which would have been paid under the Registered Plan, *but for* the maximums set out under the *ITA*, which were also referred to as Department of National Revenue (“DNR”) maximums. The pension entitlements which exceeded the *ITA* maximums under the Registered Plan were to be paid to the Class Members under the Supplemental Plan.

10. The retirement benefit statement provided by Canada Life to Caponi for the year ended December 31, 1991 provided as follows:

“MAXIMUM PENSION

- The AMOUNT OF BENEFIT THAT CAN BE PAID OUT OF THE PENSION PLAN(S) IS LIMITED BY THE DEPARTMENT OF NATIONAL REVENUE REQUIREMENTS. THIS MAXIMUM IS EXPECTED TO BE EXCEEDED IN YOUR CASE. **THE BENEFITS SHOWN IN THE ABOVE TABLE HAVE BEEN CALCULATED WITHOUT TAKING INTO ACCOUNT THE DNR LIMITATIONS. WHEN YOUR RETIREMENT INCOME BECOMES PAYABLE, AN AMOUNT UP TO THE THEN PERMISSIBLE MAXIMUM WILL BE PAYABLE UNDER THE PENSION PLAN(S). THE EXCESS WILL BE PAYABLE FROM THE CANADA LIFE FUNDS AND SUBJECT TO CERTAIN FORFEITABILITY CONDITIONS WHICH WILL BE ESTABLISHED BEFORE YOUR NORMAL RETIREMENT DATE.**” [Emphasis added]

11. A “Retirement Income Benefit – Estimate” dated October 1, 1992 which was prepared for Caponi by Canada Life shortly after he terminated his employment with Canada Life in August 1992 described his entitlement under the Supplemental Plan as follows:

“Maximum Pension

The amount of benefit that can be paid out of the pension plan (s) is limited by Department of National Revenue requirements. This maximum is expected to be exceeded in the member’s case. **The amount of pension shown in this presentation has been calculated without taking into account the DNR limitation. This pension has been split into two components. The first component represents the pension up to the present DNR limitation and will be payable under the pension plan (s). The second component, if payable, represents the excess over the present DNR limitation and will be subject to certain forfeitability conditions and payable from Canada Life funds.** This has been shown as ‘Special Pension’ under Non-Trusteed Pension Plan. When the retirement income becomes payable, the two components will be determined using the DNR limitations applicable at that time.” [Emphasis added]

12. The other Class Members also received notices and annual statements which stipulated the same terms of the Supplemental Plan as those received by Caponi.

13. The benefits under the Supplemental Plan constituted deferred compensation earned by the Class Members in the course of their employment. The payment of benefits under the Supplemental Plan was a contractual obligation owed by Canada Life to the Class Members. Canada Life was not permitted to wind-up the Supplemental Plan, in whole or in part, in a manner separate from the Registered Plan.

#### **Creation of a Funded Trust for the Supplemental Plan**

14. In 2001, Canada Life created a funded trust (the "Trust Fund") for the Supplemental Plan. A memorandum dated February 14, 2001 from Canada Life described this change as follows:

**"I am pleased to announce two changes to our supplemental pension plan in Canada. Below is background information and detail regarding these changes. Pension benefits at Canada Life are basically in two parts:**

**There is the registered pension plan which, under government rules, allows for pension accumulation on base salary and bonus up to approximately \$93,650 in 2001. Pension accumulation on base salary and bonus above \$93,650 falls under the supplemental pension plan. This memo is being distributed to employees who are currently in the supplemental pension plan as well as those employees whose earnings may increase in the next few years to an amount where he or she becomes a member of the supplemental pension plan.**

**The registered pension plan is funded and secured by a registered trust. The supplemental pension plan was 'funded' on company books but money funding the plan was not in a secured trust.**

As of January 2, 2001, I am please [sic] to announce that we have set up a Retirement Compensation Arrangement (RCA) which provides for a funded trust for the supplemental pension plan. In this way, both pension commitments are funded and secured by trusts." [Emphasis added]

15. A written text for the Supplemental Plan was also developed effective January 1, 2001 (the “2001 Supplemental Plan Text”). The 2001 Supplemental Plan Text was not provided to the Class Members.

16. In 2005, the 2001 Supplemental Plan Text was revised by the defendants *retroactively* to January 31, 2005 (the “2005 Supplemental Plan Text”). The 2005 Supplemental Plan Text was also not provided to the Class Members.

17. The Supplemental Plan and Canada Life’s obligation to pay benefits pre-existed the drafting of the 2001 Supplemental Plan Text and the 2005 Supplemental Plan Text. To the extent that either text provided for any right to wind-up the Supplemental Plan, in whole or in part, in a manner separate from the Registered Plan, or otherwise reduced or negatively affected the entitlements owed to Class Members, such terms are invalid and cannot be relied upon by the defendants. Any such terms constituted an improper unilateral change by Canada Life of its employment obligations to the Class Members which changes were made without consideration to the Class Members or notice to them.

18. In the alternative, if either the 2001 or 2005 Supplemental Plan Texts were applicable, the plaintiff pleads that the defendants did not properly apply the relevant provisions. Any ambiguity in the documents is to be strictly construed in favour of the Class Members and against the interests of the defendants who were the drafters, in accordance with the doctrine of *contra proferentum*.

**Post 2001 – Communication to Class Members**

19. The Supplemental Plan was described in Caponi's Annual Employee Pension Benefit

Statement for the year ended December 31, 2001 as follows:

**“The Income Tax Act (ITA) limits the amount of pension that can be paid from a registered pension plan. The pension amounts quoted above have been calculated without any reference to this limitation.**

**If your pension benefit is higher than the maximum allowed by the ITA, any excess benefit will be paid from company funds, subject to certain forfeitability conditions, a description of which is available from Human Resources.” [Emphasis added]**

20. The same terms were set out in the benefit statements provided to the other Class Members.

21. Caponi's Annual Employee Pension Benefit Statement for the year ended December 31, 2001 indicated that his estimated total annual pension payable at his normal retirement date was \$93,601.59. Caponi's normal retirement date was December 31, 2005, the end of the month in which he turned age 60.

**Benefits under the Supplemental Plan**

22. The benefits payable under the Supplemental Plan are described in Section 5.02 (as contained in the 2001 Supplemental Plan Text and the 2005 Supplemental Plan Text) as follows:

**“5.02 Retirement Benefits**

**A Member who retires under section 5.01 shall receive from the Supplemental Plan an annual pension payable in equal monthly instalments in respect of Pensionable Service equal to:**

- (1) **the pension the Member would have received under the Registered Plan if such pension were determined without regard to the maximum pension limitations in section 13 of the Registered Plan;**

**reduced by**

- (2) **the pension payable to the Member under the Registered Plan;**

and increased by

- (3) any additional pension payable under a Special Arrangement<sup>1</sup>.” [Emphasis added]

23. The Supplemental Plan was funded exclusively by Canada Life. The Class Members were not required to contribute.

24. Prior to 2001, all benefits under the Supplemental Plan were paid directly by Canada Life. After 2001, all benefits were to be paid out of the Trust Fund, or, if insufficient assets were available from the Trust Fund, the Class Members were to be paid by Canada Life directly. Section 4.04 (as contained in the 2001 Supplemental Plan Text and the 2005 Supplemental Plan Text) entitles the Class Members to enforce their claims for the payment of benefits against the assets of the Trust Fund and, if insufficient, Canada Life.

### **Retroactive Wind-Up and Improper Notice**

25. As stated above, the defendants were not permitted to wind-up the Supplementary Plan separate from the Registered Plan.

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<sup>1</sup> “Special Arrangement” is defined in section 2.26 of the Plan as “an arrangement providing such amount of pension as the Company may, in its discretion, grant to a Member, as is evidenced in the records of the Company maintained for the purpose of determining Special Arrangements and certified as such by an officer of the Company and, for greater certainty, a Special Arrangement shall include a Change of Control Agreement.”

26. In 2005, the defendants improperly decided to implement a partial wind-up of the Supplemental Plan (without winding up the Registered Plan) in respect of former employees who were vested in the Supplemental Plan but had not started to receive a monthly pension. The defendants improperly chose to wind-up the Supplemental Plan *retroactively* to January 31, 2005 without notice to the Class Members.

27. Starting on or about September 15, 2005, about 8 months *after* the retroactive wind-up date chosen by the defendants, Canada Life began to send notices to certain Class Members (the "September 2005 Notice") advising of the partial wind-up of the Supplemental Plan. The Partial Wind-Up Notice was the first notice of the partial wind-up that was provided.

28. The September 2005 Notice provided that:

"With this wind-up, the Supplemental Plan provides that, as a deferred vested member on January 31, 2005, you will receive a lump sum payment in lieu of any future pension payments you may have been entitled to from the Supplemental Plan. This lump sum payment represents the present value of such future pension payments determined as at January 31, 2005 (with prescribed interest to the payment date) in accordance with the terms of the Supplemental Plan.

The value of your Supplemental Plan pension benefit is highly dependent upon the date chosen for commencement of your Supplemental Plan pension, because both the value of your total pension and the proportion that can be paid from the Registered Plan depend on your pension commencement age. **The terms of the Supplemental Plan specify that the value of your Supplemental Plan pension is calculated assuming that you elect to receive your Registered Plan benefits in a manner that maximizes the portion of your total benefit paid from the Registered Plan.** [Emphasis added]

29. Some of the Class Members, including Caponi, were not provided the September 2005 Notice. Caponi first received notice of the partial wind-up of the Supplemental Plan through a notice dated November 21, 2005 (the "November 2005 Notice"), about ten months after the

proposed effective date. Some Class Members of the Class first received notice of the partial wind-up more than ten months after the proposed effective date of the partial wind-up.

30. The defendants failed to provide proper, timely notice of the partial wind-up to the Class Members. Notice of the partial wind-up ought to have been provided by the defendants prior to, or coincident with, the partial wind-up.

31. The November 2005 Notice provided that:

“The Canada Life Canadian Supplemental Pension Plan (the “Supplemental Plan” or the “Plan” was designed to provide pension benefits in excess of what can be paid from the Canada Life Employees Pension Plan (the “Registered Plan”) because of the maximum pension limits imposed by the Income Tax Act (ITA). Where an individual’s full benefits can be paid out of the Registered Pension Plan, the Supplemental Plan provides no additional benefits.”

32. The November 2005 Notice further provided that:

“Earlier this year, Canada Life decided to wind-up, and thus settle its obligations under, the Supplemental Plan in respect of all former employees who, like you, have not yet commenced receiving their monthly pension benefits. Such a wind-up is contemplated under the terms of the Supplemental Plan.

With this wind-up, the Supplemental Plan provides that, as a deferred vested member on January 31, 2005, you will receive a lump sum payment in lieu of any future pension payments you may be entitled to from the Supplemental Plan. This lump sum payment represents the present value of such future pension payments determined as at January 31, 2005 (with prescribed interest to the payment date) in accordance with the terms of the Supplemental Plan. The value of your Supplemental Plan benefit is dependent upon the date chosen for commencement of your Supplemental Pension. **The terms of the Supplemental Plan deem a retirement age under the Registered Plan that maximizes the value of your registered pension.** If no such Supplemental Plan pension payments are necessary to ensure full receipt of your Registered Pension Plan entitlements under applicable tax rules, this lump sum will be nil.” [Emphasis added]

33. The November 2005 Notice indicates that, for the purpose of calculating the Class Members' pension benefits, the defendants deemed the Class Members' retirement age as the age which maximized the value of the portion of pension benefits payable under the Registered Plan only, but did consider the Supplemental Plan. This was an incorrect method of calculation as the retirement age which should have been used is the age at which the *combined* benefit under both plans would have the maximum value to the Class Member. The defendants' use of this incorrect method deprived the Class Members of the full entitlement under the partial wind-up and resulted in payments which were less than what was properly owed to the Class Members.

34. Class Members were provided with some additional information concerning their personal distributions following delivery of the initial notices. Caponi received this additional information through a letter dated January 30, 2006 from Canada Life.

35. The January 30, 2006 letter Caponi received from Canada Life provided, in part, that:

“The attached material summarizes your total Registered Pension Plan and Supplemental Plan pension benefits before and after the Supplemental Plan partial wind-up, as well as any lump sum entitlements to which you are entitled from the Supplemental Plan. It also summarizes the key data used in the calculation of any lump sum entitlements. This information was based on the information in Canada Life’s pension plan records.

...

We will mail you a cheque for the amount of your lump sum payment entitlement less the appropriate withholding tax on March 31, 2006. Interest from the partial wind-up date of January 31, 2005 to March 31, 2006 has been included in the calculation of the amount payable.”

36. The material presented to Caponi by Canada Life in January 2006 provided that:

“The following table summarizes what your monthly pension entitlements at various possible pension commencement ages were before the partial wind-up of the Supplemental Plan.

Pension Start Age	Portion Payable from the registered plan	Portion payable from the Supplemental Plan	Total Estimated Pension
59.12	\$1,614.58	\$5,591.87	\$7,206.45
60	\$1,614.58	\$6,007.63	\$7,622.21

**Your Lump Sum entitlement from the Supplemental Plan**

As can be seen in the above table, the portion of your total pension benefit that is payable from the supplemental plan is highly dependent on the age at which you elect to commence to receive your pension benefits. Your lump sum entitlement as of the partial wind-up at Jan 31, 2005 with interest to Mar 1, 2006 is \$1,470,222.17. This amount was determined based on the provisions of the Supplemental Plan regarding full or partial plan wind-up. These provisions include an assumption that you will elect to receive your Registered Plan benefits in a manner that will maximize the portion of your total benefit paid from the Registered Plan.”

37. The amounts distributed by the defendants to Caponi and the other Class Members were not properly calculated and were less than they were entitled, as set out more fully below.

**Use of Outdated Rules**

38. The retroactive, partial wind-up date of January 31, 2005 that was deliberately chosen by the defendants was one day before the Canadian Institute of Actuaries (“CIA”) new *Standard of Practice for Determining Pension Commuted Values effective February 1, 2005* (the “2005 Rules”) came into force for the calculation of commuted values for registered pension plans. The defendants chose this partial wind-up date deliberately to deprive the Class Members of the benefits of the 2005 Rules which reflect a revised actuarial basis. Despite the fact that the defendants calculated the Class Members' commuted values *after* February 1,

2005, the defendants wrongly used the CIA's *Recommendations for the Calculation of Transfer Values for Registered Pension Plans dated September 1, 1993* (the "1993 Rules"). The 1993 Rules provides for lower commuted values since they rely on an outdated actuarial basis. The defendants were fully aware of and ought to have used the 2005 Rules for the calculation of commuted values payable on the partial wind-up of the Supplemental Plan as these more accurately reflect the true value of the benefit entitlements under the Supplemental Plan on the date these entitlements were calculated as part of the partial wind-up.

### **Use of Inappropriate Interest Rates**

39. The defendants wrongly used the interest rates which were in effect as of January 31, 2005 to determine the Class Members' entitlements on the partial wind-up. They did so despite the fact that notice of the retroactive partial wind-up of the Supplemental Plan was not provided to the members of the Class until September 2005, at the earliest, and not paid until 2006.

40. Between January 31, 2005 and the date notice of the partial wind-up was provided to the Class Members, annuity rates and long term interest rates dropped. The use of interest rates that were in effect on January 31, 2005 resulted in lower commuted values being determined than would have been determined using the interest rates in effect when Class Members were advised of the partial wind-up of the Supplemental Plan, or when the distributions were made in 2006.

41. As a result, when Class Members were provided with their entitlements under the Supplemental Plan on its partial wind-up, the amounts provided were less than what the Class

Members were entitled to receive and were insufficient to allow them to purchase an annuity to replace the pension amounts that were otherwise payable under the Supplemental Plan.

**Incorrect Application of Section 5.06 of the Supplemental Plan**

42. As stated above, the 2001 Supplemental Plan Text and 2005 Supplemental Plan Text were drafted by the defendants and not provided to the Class Members. The terms of these texts, to the extent that a partial wind-up is provided or in any way otherwise reduces the entitlements of the Class Members which were previously communicated in annual statements, are not valid. In the alternative that the Plan texts are applicable, the defendants failed to properly implement the terms. In particular, the defendants wrongly applied Section 5.06 of the 2005 Supplemental Plan Text in calculating the entitlements payable to the Class Members on the partial wind-up of the Supplemental Plan. Section 5.06 provides that:

“Notwithstanding the foregoing, if a Member elects to receive the Commuted Value of his or her Registered Plan benefit, the Member shall be entitled to commence his or her pension from the Supplemental Plan on the last day of any month on or following the Member's Early Retirement Date and prior to his or her Normal Retirement Date as the Member may elect. The annual pension payable from the Supplemental Plan shall be calculated as:

(1) the pension the Member would have received under the Registered Plan as at the date his or her pension under the Supplemental Plan commences if such pension were determined without regard to the maximum pension limitations in section 13 of the Registered Plan;

multiplied by

(2) one minus the ratio of the Commuted Value of the benefits to which the Member is entitled under the Registered Plan, to the Commuted Value of the benefits to which the Member would be entitled under the Registered Plan if such benefits were determined without regard to the maximum pension limitations in section 13 of the Registered Plan.

and increased by

(3) any additional pension payable under a Special Arrangement.”

43. The defendants' reliance on section 5.06 in calculating the entitlement of Class Members on the partial wind-up was improper. The 2005 Supplemental Plan Text indicates that on partial wind-up members of the Supplemental Plan are entitled to a lump sum equal to the "Wind-Up Liability", which is described in section 2.32. Section 2.32 does not require or provide for section 5.06 to be applied in calculating the entitlement of an individual on wind-up of the Supplemental Plan. Further, the Class Members made no election to receive the commuted value of their entitlement from the Registered Plan. Accordingly, there was no basis for applying section 5.06 which resulted in Class Members receiving amounts which was less than they were entitled.

#### **Use of Inappropriate Assumptions**

44. In calculating the entitlement of the Class Members on the partial wind-up, the defendants were required by their fiduciary, trust and contractual obligations to use the formula and approach that would maximize the Class Members' total benefits from the Registered Plan and the Supplemental Plan. The defendants failed to do so, resulting in distributions to the Class Members which were less than those which they were entitled to receive.

45. In particular, the defendants were required but failed to assume, for the purposes of the commuted value calculation, that both the Registered Plan and the Supplemental Plan were being wound up simultaneously. The defendants were required to correctly calculate and pay the Class Members pension entitlements in two parts: the part from the Registered Plan, which would be subject to the maximum pension restrictions under the *ITA*, and the part from

the Supplemental Plan, which would be the amount in excess of what could be paid under the Registered Plan as a result of maximum pension restrictions under the *ITA*. The defendants were required to but failed to use the Class Members' retirement age at which the combined benefit under both plans would have the greatest value. The defendants were required but failed to calculate the Supplemental Plan benefit as being the difference between the greatest value of the combined benefit under both plans and the actual value of the Registered Plan benefit calculated as if it were being wound up in accordance with the requirements of the *Pension Benefits Act* and actuarial practice, which would have left the Class Members whole.

#### **Failure to Provide Compensation for Tax in respect of Lump Sum Payments**

46. The Class Members' entitlements on partial wind-up were distributed in the form of lump sum payments which were subject to tax in the year which they were paid. The members of the Class were not compensated for any adverse tax consequences of such lump sum payments. As result, the Class Members did not receive the benefits that had been promised to them by Canada Life.

#### **THE DEFENDANTS' BREACHES OF DUTY**

##### **Contractual Obligations**

47. Canada Life, as the employer of the Class Members, had a contractual obligation to the Class Members to calculate and pay the full benefits under the Supplemental Plan as summarized in the annual statements sent prior to 2001. The Supplemental Plan was funded through contributions made by Canada Life in lieu of salary or wages through the Class Members' working lives. The receipt of the correct benefits under the Supplemental Plan

constituted the delivery of deferred compensation earned by the Class Members in the course of their employment. Canada Life as employer and administrator of the Supplemental Plan was bound to act in the utmost good faith in its administration of the Supplemental Plan and to ensure that the Class Members were properly compensated in respect of any partial plan termination.

48. The Trustees also owed a contractual obligation to the Class Members to implement the terms of the Supplemental Plan in the utmost good faith. The Trustees were bound by the terms of the Trust Deed and the Supplemental Plan to make the correct distributions from the Trust Fund.

49. Class Members are entitled under Section 4.04 (of both the 2001 and 2006 Supplemental Plan Texts) to enforce claims for payment of distributions against the Trustees and Canada Life.

### **Trust and Fiduciary Duties**

50. All contributions made by Canada Life under the Supplemental Plan were to be held in trust by the Trustees in favour of the Class Members. The Trustees owed trust and fiduciary duties to the Class Members to act in their best interests. The Trustees were obligated, *inter alia*, to monitor the administration of the Supplemental Plan by Canada Life and ensure the Class Members received their full pension entitlements using the application of the correct interest rates and actuarial assumptions. Canada Life as the administrator of the Supplemental Plan also owed such duties to the Class Members in the implementation and administration of the Supplemental Plan.

51. Both the Trustees and Canada Life:

- (a) had the scope for the exercise of discretion or power over the Class Members' legal and practical interests in administering and making distributions under the Supplemental Plan; and
- (b) could unilaterally exercise such discretion over the Class Members' interests by virtue of their positions as Supplemental Plan administrator and/or trustees.

52. The Class Members relied on the expertise of the defendants in the implementation of the Supplemental Plan. The Class Members were in a vulnerable position to the defendants by virtue of the complete control held by the defendants in the administration of the Supplemental Plan.

53. Canada Life agreed to subordinate its interests to those of the Class Members in regard to the Supplemental Plan when it decided to create a funded trust arrangement. The Supplemental Plan stipulates amounts to be deposited by Canada Life to the Trust Fund to be used solely for the benefit of the Class Members.

**Breaches of Duty**

54. Canada Life and the Trustees breached their fiduciary, contractual and trust obligations owed to the members of the Class. The particulars of such breaches of duty include, *inter alia*, the following:

- (a) they elected to partially wind-up the Supplemental Plan;

- (b) they chose to wind-up the Supplemental Plan *retroactively* to a wind-up date which would deprive the Class Members of the revised actuarial basis set out in the 2005 Rules;
- (c) they failed to provide timely and adequate notice of the partial wind-up to the Class Members which notice ought to have been given prior to or co-incident with, the partial wind-up date;
- (d) they failed to apply the 2005 Rules;
- (e) they failed to apply appropriate actuarial assumptions and properly calculate and pay the correct amounts to the Class Members;
- (f) they applied incorrect formulas and assumptions and utilized inappropriate interest rates in the calculation of the Class Members' benefits; and
- (g) they failed to compensate the Class Members for possible adverse tax consequences.

55. The Trustees also breached their trust and fiduciary duties to monitor the administration of the Supplemental Plan by Canada Life to ensure the best interests of the Class Members were being protected. Canada Life, having the duty to make the required contributions to the Trust Fund, was in a conflict of interest in calculating the amounts owing to the Class Members, which therefore required the Trustees' oversight to protect the Class Members. Any surplus generated by the early termination of the Supplementary Plan would accrue to the benefit of Canada Life. In calculating the payments to the Class Members, Canada Life sought to maximize its interests at the expense of the Class. The Trustees

favoured the position of Canada Life as they were all senior employees or retired senior employees of Canada Life. The Trustees failed to ensure that the partial wind-up was properly implemented and they wrongly authorized the payment of distributions that were less than the Class Members' entitlement.

### **LOSS AND DAMAGES SUFFERED**

56. As a result of the defendants' breaches of their fiduciary, trust and contractual obligations, the plaintiff and the other Class Members have suffered damages, and have been deprived of their correct entitlements under the Supplemental Plan. In particular, Caponi's loss alone as a result of the defendants' breaches is approximately \$215,000.

57. The plaintiff seeks compensation on his own behalf and behalf of the other Class Members for the amounts they ought to have received had the partial wind-up been properly implemented by the defendants.

58. The defendants' conduct also warrants the sanction of this Honourable Court in the form of punitive damages. The defendants conducted their affairs with wanton and callous disregard for the best interests of the Class Members. The defendants abused their authority in administering the Supplemental Plan contrary to their duties. The Class Members were affected at a time when they were vulnerable as they were no longer employed by Canada Life but had already provided their consideration for the benefits under the Supplemental Plan. The defendants' improper choices in the formulas and assumptions applied were specifically designed to reduce the Class Members' distributions.

59. The plaintiff pleads and relies on the *Pension Benefits Act*, R.S.O. 1990, c. P.8. and the *Class Proceedings Act, 1992*, R.S.O. 1992, c. 6.

60. The plaintiff requests that this action be tried in Toronto.

September 26, 2007

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**STATEMENT OF CLAIM**

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