

**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*

AFFIDAVIT OF JODY BROWN

I, **JODY BROWN**, of the City of Toronto, in the Province of Ontario MAKE OATH AND SAY:

1. I am a lawyer at Koskie Minsky LLP (“KM LLP”), Class Counsel in this action and I have also been involved in this action since 2009. Accordingly, I have knowledge of the matters herein deposed to below.
2. In accordance with the Order of this Court dated February 5, 2015 (the “Notice Order”), Class Counsel is required to file and serve an affidavit listing all persons who have submitted an objection with respect to the settlement approval or fee approval motions, along with copies of any objections. I provide this affidavit in accordance with the Notice Order.

Objections

3. On April 8, 2015, Class Counsel received a written objection to the fairness of the allocation formula from Ms. Karen Mason. Ms. Mason did not object to the aggregate settlement, only to the allocation based on commuted values. Class Counsel engaged in a telephone call with Ms. Mason and on April 1, 2015, provided Ms. Mason with an actuarial opinion from the Plaintiff's expert actuary, Mr. Tom Levy, in order to explain the fairness of the distribution formula. On April 21, 2015, Ms. Mason confirmed in writing that she was withdrawing her objection.

4. On April 19, 2015, Class Counsel received a written objection form from Mr. Fred Taggart. A copy of Mr. Taggart's objection form is attached as **Exhibit "A"** to my affidavit. In the objection, Mr. Taggart objects to the fairness and reasonableness of the quantum of the settlement, but states that it may still be in the best interests of the class.

5. On April 1, 2015, Class Counsel sent an E-mail to Mr. Taggart explaining that:

- (a) Class Counsel was fully aware of the range of outcomes concerning prejudgment interest at the mediation;
- (b) even if the case went to trial, there was a risk of losing, or obtaining a lesser recovery on the quantum of damages, as well as the appropriate rate of prejudgment interest; and
- (c) the settlement is a product of a consideration of all the risks in the case by the Plaintiff.

Support for the Settlement

6. Class Counsel has received several positive responses to the proposed settlement, including:

- (a) on March 8, 2015, Mr. Joe Ricciuti wrote to Class Counsel and stated "let me congratulate you and your firm, Koskie Minsky on your negotiations with Canada Life and the settlement agreement your reached on behalf of the class

action members. I fully support your recommendations and I look forward to the courts confirming the settlement agreement.”; and


(b) on March 10, 2015, Mr. John Deman wrote to Class Counsel and stated “Thank you for the letter of March 3, 2015, I’m in favor of this settlement.”.

7. I confirm that as of April 22, 2015, there are no outstanding objections to the settlement, apart from Mr. Taggart’s above.

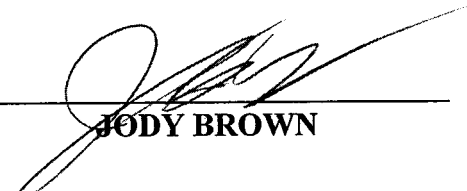
8. I confirm no objections to the fee request of Class Counsel have been received, as of April 22, 2015.

9. I make this affidavit in support of the settlement approval and fee approval motions and for no improper purpose.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, on April 22, 2015.


SCOTT ROBINSON

Commissioner for Taking Affidavits




JODY BROWN

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April 17, 2015

(submitted via email to Class Counsel)

The Honourable Justice Belobaba
Ontario Superior Court of Justice

This is Exhibit "A" referred to in the
affidavit of Jody Brown
sworn before me, this 22
day of April 2015

SCOTT ROBINSON
A COMMISSIONER FOR TAKING AFFIDAVITS

Background

I am a member of the Canada Life Pension Plan and was a member of the corresponding Supplemental Plan (SERP). I am a former executive at Canada Life and was employed there from 1973 until 2003. My last position at Canada Life was Vice President, Individual Insurance where I was responsible for the individual insurance operations in Canada. Prior to that, I was Vice President, Investments and Pensions and was responsible for Group Pension operations and Individual wealth accumulation products in Canada. I was part of the executive team that lost employment after the acquisition of Canada Life by Great-West Life in 2003. More than 2100 other employees of Canada Life also lost their jobs during this period.

I have followed this SERP litigation closely for the past eight years. In my opinion, the proposed settlement is neither fair nor reasonable. However, at this late stage, it may still be in the best interests of the Class members.

Where is the settlement unfair and unreasonable?

The settlement proposed is an amount of \$14.5m for the Class which Class Counsel argues is very close to the high end of the range, as suggested by the Plaintiff's expert. That is correct but it overlooks two key adjustments to that loss figure also suggested by the Plaintiff's expert, Mr. Levy.

1) Pre-judgment Interest

The loss incurred by the Class was calculated as at January 31, 2005. Pre-judgment interest to the end of 2014 would add approximately 25% to that loss amount. I calculated that figure using the pre-judgment interest rates available on the website of the Ontario Attorney General. My calculation assumes that interest is compounded (I was unable to confirm whether compound or simple interest is mandated, but compounding certainly seems logical). If simple interest is appropriate, then the pre-judgment interest should be approximately 22%.

Class Counsel claims that, at mediation, they used the plaintiff's estimate of \$7.6m which used a rate of 4.5% and then pointed out, quite correctly, that the 4.5% rate could not be defended at trial because the appropriate rates to use were 1.3% or lower since 2009 (see Paragraph 65 of Jody Brown's affidavit).

It is surprising that Class Counsel would not have come to the mediation knowing precisely the amount of interest in play and would instead rely on the Plaintiff's estimate. It is more surprising that, rather than spending two minutes with a calculator to determine the appropriate interest amount, the pre-judgment interest was conceded entirely or negotiated at a rate of zero percent.

2) Replacement cost of the lost income stream today

Mr. Levy points out that a second adjustment to his loss figure is necessary to reflect the cost of a (hypothetical) replacement annuity at the time the settlement amounts are actually distributed. Interest rates today are dramatically lower than the rates used to calculate the loss as at January 31, 2005. I do not have even an estimate of the magnitude of the appropriate adjustment but it is a very significant number. Interest rates fell dramatically between January 31, 2005 and the time that monies were dispersed to members in late 2005 and early 2006 and that drop in rates moved the calculated loss from \$15.2m to \$19.2m. One can surmise that at today's record low interest rates, the loss is magnified even further.

This second adjustment suggested by Mr. Levy seems to have been ignored completely when the settlement was negotiated.

The overall settlement number is significant but it is not, as characterized in the filings, an "excellent" result for class members. The \$14.5m settlement fund is reduced by \$4.5m to pay Class Counsel legal fees and disbursements, HST on those amounts, and the 10% levy to the Class Proceedings Fund. None of those costs would have been borne by the members if Canada Life (and/or Great-West) had simply honoured their SERP commitments. A back of the envelope estimate of the total loss incurred by class members [excluding fees, disbursements, taxes, and the CPF levy but including items 1) and 2) above] is at least \$25m. If approved, this settlement will put \$10m into members' pockets, or 40 cents on the dollar.

Why is the settlement in the best interest of Class Members?

The answer is simple. This case has dragged on for 8 years now. Some members died, others want to see some money while they are still young enough to enjoy it. I believe that, at trial, this case would be a slam dunk for the Plaintiff but I recognize that most plaintiffs probably feel that way about the merits of their case. There is risk involved with any litigation and Class Counsel has done a very good job of

enumerating all of those risks. Few would want to see this case continue for another 3-4 years with ever mounting legal fees eating into any potential win at trial.

A note on Class Actions in general

It may be that this case is a good example of what is wrong with class actions. Despite tremendous effort by the lead plaintiff, who should be commended for his tireless work and personal sacrifices on behalf of members, the only people walking away from this case feeling truly satisfied are the Defendants and the legal teams for both parties. Most Class members will feel relief that this litigation is drawing to a close, mixed with the realization that they've been denied the full pensions that they thought they had earned.

In Class Actions there is a strong bias for settlement rather than trial. The interests of Class Counsel are inherently in conflict with the interests of the Class, especially so in contingency fee arrangements. All parties are aware of this dynamic and members pay the price of this conflict during settlement negotiations.

In his reasons for certification, Justice Cullity states (Paragraph 48) "If the Plaintiff's allegations of improper conduct are upheld and liability is established, an important lesson should be learned by the Company's managers, and standards of conduct for other employers and pension trustees will have been reaffirmed. Certification would, in that sense, serve the interests of behavioural modification."

Sadly, with this settlement, a different lesson will be learned – ignore standards of conduct and eventually settle for a fraction of your real liability.

Respectively submitted,

Fred J Taggart

DENNIS F. CAPONI

AND THE CANADA LIFE ASSURANCE COMPANY et al.

COURT FILE NO: 07-CV-339254CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

Proceeding under the *Class Proceedings Act, 1992*

**AFFIDAVIT OF JODY BROWN
(SETTLEMENT APPROVAL
AND FEE APPROVAL
RETURNABLE MAY 1, 2015)**

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