CITATION: Jeffery v. London Life Insurance Company, 2011 ONCA 683
DATE: 20111103
DOCKET: C52858

COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., Blair and LaForme JJ.A.

BETWEEN:

James Jeffery and D'Alton S. Rudd

Plaintiffs/Respondents

and

London Life Insurance Company and The Great-West Life Assurance Company

Defendants/Appellants

Proceeding Under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6

AND BETWEEN:

John Douglas McKittrick

Plaintiff/Respondent

and

The Great-West Life Assurance Company and Great-West Lifeco Inc.

Defendants/Appellants

Proceeding Under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6

Sheila R. Block, Wendy M. Matheson and Crawford G. Smith, for the appellants

Paul J. Bates, David B. Williams, Jonathan J. Foreman, and Robert L. Gain, for the respondents

Heard: June 6, 7 and 8, 2011

On appeal from the judgment of Justice Johanne N. Morissette dated October 1, 2010, with reasons reported at 2010 ONSC 4938, 74 B.L.R. (4th) 83.

TABLE OF CONTENTS

By the Court:

I. OVERVIEW

[1] The two class actions that underlie this appeal stem from the acquisition of London Life Insurance Company ("London Life") by The Great-West Life Assurance Company ("Great-West Life") in 1997. The members of the classes consist of holders of the participating life insurance policies of the two companies.

[2] It was anticipated that the merger of the two companies' operations would lead to substantial synergistic benefits that would result in reduced expenses, which in part would benefit the companies' participating insurance policy accounts ("PAR accounts").

[3] At issue on this appeal is the validity of what are referred to as the participating account transactions ("PATs"), whereby $220 million in cash from the PAR accounts was exchanged for what were called pre-paid expense assets ("PPEAs"), which represented the anticipated expense savings to be realized by those accounts over a 25-year period. The $220 million was used to finance approximately 7.5 percent of the $2.9 billion acquisition price.

[4] After a common issues trial, the trial judge found that the PATs breached four provisions of the *Insurance Companies Act*, S.C. 1991, c. 47 ("*ICA*"):

- s. 462, which prohibits "transfers" from a participating account except in certain defined circumstances;

- s. 458, which deals with the allocation of expenses to participating accounts;
- s. 331(4), which requires that financial statements be prepared in accordance with generally accepted accounting principles ("GAAP"); and
- s. 166(2), which requires directors, officers and employees to comply with the *ICA*. (For easy reference, these and other relevant provisions are set out in full at Appendix "A".)

[5] As part of her analysis, the trial judge found that the PPEAs were not assets under GAAP.

[6] The trial judge made a number of remedial orders pursuant to s. 1031 of the *ICA*. Most significantly, she ordered Great-West Life and London Life to pay approximately $390 million to the PAR accounts, which represented the return of the contributions of $220 million made in 1997 together with a reasonable rate of return on that money. The trial judge also ordered that litigation trusts be created with a view to distributing the approximately $390 million to the participating policyholders.[1]

[7] Great-West Life and London Life appeal the trial judge's findings of statut*ory* breaches and the remedies she ordered.

[1] The trial judge's orders were made against all of the defendants, which in the McKittrick action include Great-West Lifeco Inc., Great-West Life's parent company. We discuss its role under the remedies section of these reasons.

[8] For the reasons that follow, we would not interfere with the trial judge's findings that ss. 331(4), 458 and 462 were breached, but conclude that she erred in her s. 166(2) analysis and in formulating the remedy pursuant to s. 1031 of the *ICA*. While we are interfering with some of her conclusions, we recognize the difficulty of this case and commend her for her clear and thorough reasons.

II. FACTS

(1) Participating Policies

[9] Life insurance policies are either participating or non-participating policies. Participating policies are, in essence, a contract of life insurance and an investment contract.

[10] Participating policies are for life regardless of changes in insurability. They have guaranteed premiums, guaranteed death benefits and guaranteed cash surrender values. They also provide participation in the profits of the company - hence their name. Participating policyholders pay higher premiums than non-participating policyholders.

[11] Life insurance companies that issue participating policies are required, pursuant to s. 456 of the *ICA*, to maintain accounts in respect of participating policies separately from those maintained in respect of the companies' other businesses. In other words, PAR accounts are maintained separately from what are referred to as shareholder accounts. PAR accounts are not legal entities; they are the accounting records that record the debits

and credits, and assets and liabilities, associated with the participating policy business. Segregation of assets is not required.

[12] Under ss. 457 and 458 of the *ICA*, an insurance company that has participating policies must allocate income and expenses of the company to its PAR account according to approved "allocation methods". These allocation methods are designed to ensure that the income and expenses of the company are divided between PAR accounts and shareholder accounts in a manner that is fair and equitable.

[13] The capital in a PAR account may only be invested in accordance with the *ICA*. Section 464 of the *ICA* provides that dividends or bonuses may be paid out to participating policyholders in accordance with dividend or bonus policies established pursuant to s. 165(2)(e) of the *ICA*. Directors of companies with participating policies decide the amount of dividends or bonuses to be paid to participating policyholders.

(2) PATs

[14] In November 1997, Great-West Life acquired London Life. In doing so, Great-West Life anticipated that the acquisition would give rise to significant synergies because both companies are large life insurers. The potential expense savings included savings in the participating businesses of both companies. In structuring the acquisition, Great-

West Life considered whether the PAR accounts should contribute to the financing of its bid and, if so, how. Great-West Life's appointed actuary[2] developed the PATs approach.

[15] In brief, the PATs involved a contribution by the PAR accounts of Great-West Life and London Life to the financing of the acquisition in exchange for PPEAs in the same amounts as the contributions plus a return on investment of 6.91 percent per annum. The Great-West Life and London Life PAR accounts transferred $40 million and $180 million respectively to their companies' shareholder accounts. The London Life shareholder account loaned Great-West Life the $180 million it had received from its PAR account in order for Great-West Life to use the monies as part of the purchase price. That loan was repaid by Great-West Life to the London Life shareholder account within a few months of the closing of the transaction. Neither the $180 million nor the $40 million paid from the Great-West Life shareholder account was repaid to the PAR accounts.

[16] In each of the PAR accounts, the funds were exchanged for a PPEA in the same amount. In each shareholder account, the funds were received and a deferred revenue liability in the same amount was recorded on the books.

[17] Going forward, it was anticipated (and it turned out to be the case) that acquisition related savings would flow through to the PAR accounts over a 25-year period starting in 1997, in amounts sufficient to offset the financing. The present value of the expense

[2] Under the *ICA*, a life insurance company is required to appoint an actuary. An appointed actuary has special

savings was calculated in 1997 using a discount rate of 6.91 percent. While the rate was challenged at trial, the trial judge rejected the argument that the rate was too low.

[18] Also going forward, the PPEAs were to be amortized (reduced) each year for 25 years as the annual expense savings were realized by the PAR accounts. The annual amortized amounts were to be equal to the annual merger expense savings attributed to the PAR accounts.

[19] An adjustment mechanism was put in place to check the estimates of expense savings after five years of actual experience. This mechanism was referred to as the PAR Account Experience Rating Adjustment or ERA. We will come back to the ERA shortly.

[20] The purpose of the PATs was to require the PAR accounts to pay for their share of the expense savings realized from the merger synergies for 25 years.

[21] William M. Mercer Limited ("Mercer") was appointed as an independent actuary to review the proposed PATs. In a report prepared at the time of the transaction, Mercer described the PATs as follows:

> The transfer will be considered, initially, to be a prepaid expense item, offset by creation of the prepaid expense asset, which is the present value of expense reductions to be realized in the future. In later years, the writing down of this asset will represent an allocation under section 458. The expenses allocated to the participating funds will incorporate the savings from synergies as they are realized. Any form of

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obligations, including opining on the expense and income allocation methods of the company.

> future experience rating adjustment to this arrangement would also represent an allocation under section 458.
>
> This transaction is similar to the purchase by the participating account of a capital asset which will be used over a number of future years to the benefit of the operation of the business. The capital outlay is offset by a book asset whose value is written down over time as the benefit of the capital asset is realized. Thus the expense of purchasing the capital asset is recognized over time as the value is written down.

[22] While the Mercer report justifies the PATs on the basis of s. 458 of the *ICA*, the appellants accept that s. 458 does not provide authorization for the transfer of cash from the PAR accounts.

(3) Review of the PATs

[23] In August 1997, Great-West Life announced its intention to make a bid for London Life for $2.9 billion. This bid was a half a billion dollars higher than the then outstanding bid by the Royal Bank of Canada largely because of the anticipated expense savings.

[24] On September 11, 1997, Great-West Life sent its bid to the London Life shareholders. The bid disclosed that the PAR accounts of both companies would contribute to the purchase price.

[25] Great-West Life obtained an external actuarial opinion from Tillinghast-Towers Perrin, a leading actuarial firm. It opined that the proposed PATs were fair and equitable

to participating policyholders and noted that the risk of an adverse impact on participating shareholders was significantly reduced by the ERA mechanism.

[26] Before the acquisition could proceed, Great-West Life was required to obtain approvals from the Office of the Superintendent of Financial Institutions ("OSFI") and the Minister of Finance. OSFI has a statutory mandate to supervise financial institutions to determine whether they are complying with their governing statute, in this case the *ICA*. OSFI required an independent actuary's report on the fairness of the proposed PATs as they affected participating policyholders of Great-West Life and London Life.

[27] As mentioned above, Mercer was appointed to be the independent actuary and reviewed the proposed PATs. In its report, Mercer concluded that the PATs were fair and equitable to participating policyholders:

> In principle, the involvement of the participating accounts in the financing of the transaction is structured so that, as long as basic dividend policies are kept in place and adhered to, policyholders can have essentially the same expectations under the transaction as they might have had had if the transaction never took place.
>
> In our opinion, the participating policyholders play no part in effecting the transaction and in producing the expected expense savings. Moreover, we do not believe it is reasonable to assume that they would have had realistic expectations that a transaction of this type, with its associated savings, would occur.
>
> …

> It therefore seems reasonable and equitable that the benefit of expense savings over the first twenty five years with respect to participating policies, as well as the value of reduced Great-West Life shareholders transfers over twenty five years, should accrue to the Great-West shareholders.
>
> Therefore, we are of the opinion that the arrangement is in principle fair and equitable to participating policyholders.

[28] The nub of Mercer's fairness principle was that the PATs were fair and equitable to participating policyholders as long as the policyholders were no worse off than they would have been had no transaction taken place.

[29] OSFI considered the Mercer report as part of its review of the PATs. The evidence at trial about OSFI's review was limited by an order of this court protecting OSFI's deliberative secrecy. However, the Deputy Superintendent of Financial Institutions was permitted to testify that OSFI considered that the PATs complied with the *ICA*. On October 29, 1997, OSFI recommended that the Minister of Finance approve the transaction. In doing so, OSFI specifically referred to the contribution of the PAR accounts to the acquisition price as well as to the view expressed in the Mercer report that the PATs were fair and reasonable. The Minister approved the acquisition on November 4, 1997.

[30] The sale was completed on November 13, 1997.

[31] On November 26, 1997, after a joint presentation to the boards of directors of London Life and Great-West Life by the companies' appointed actuaries, the boards authorized the PATs.

[32] On November 27, 1997, the PATs were implemented.

[33] In summary, those who reviewed the transaction on behalf of Great-West Life and London Life concluded that the arrangement was fair and equitable to the participating policyholders.

(4) The ERA

[34] Since the amounts paid by the PAR accounts were estimates based on anticipated savings over 25 years, an adjustment mechanism was put in place to check the estimates of expense savings after five years of actual experience under the PATs. The ERA provided a look-back as of 2002 to enable the companies to measure whether the expected expense savings had been achieved.

[35] In technical terms, as the Mercer report explained, the ERA was to be "calculated as the sum of a) the present value of the difference between the revised view of the expense savings and the previously assumed level of expense savings over the remainder of the twenty-five year period and b) the accumulated value of the difference between the actual expense savings and the previously assumed expense savings for the period up to the date of the experience rating adjustment". As explained in the Mercer report and the

testimony of Mr. Edwards, if it turned out that the estimates were off by +/- 10 percent, the PPEAs and the amortization schedules were to be adjusted accordingly.

[36] Recall that the goal of the PATS was to see that the PAR accounts paid for their share of the anticipated expense savings realized from the merger. The effect of the ERA mechanism, then, was to ensure that the PAR accounts both received the benefit of any unanticipated additional expense savings and that they did not pay too much – or too little – for their share of the anticipated and unanticipated savings.

[37] The ERA report was completed on March 9, 2004. It revealed that the present value of the savings achieved to the end of 2002 and expected to be achieved over the next 20 years was higher than the original estimate done in 1997. Specifically, it showed that the present value of the actual and expected expense synergies in the London Life PAR account as of December 31, 1997, net of restructuring charges, was $248.2 million compared to the $180 million originally paid by the London Life PAR account.[3] As a result, since the difference exceeded 10 percent of the original $180 million paid, the ERA mechanism dictated that the London Life PPEA should be increased by $68.2 million as of that date.

[38] An additional $27.1 million in expense savings was identified in a subsequent review conducted by Allan Edwards, the appointed actuary of London Life, in 2008. As

[3] The ERA calculation also demonstrated a marginal increase in anticipated Great-West Life expense savings, but the increase was less than 10 percent of the original $40 million paid by the Great-West Life PAR account, and therefore did not qualify for an adjustment.

he explained at trial, these additional unanticipated expense savings, which were not identified by the ERA process, were to accrue to the PAR accounts without additional payment.

[39] Despite the $68.2 million surplus identified by the ERA, no adjustments were made to the PPEA or its amortization schedules to increase the contribution to be made by the London Life PAR account in light of this ongoing litigation. At trial, however, the appellants reserved the right to take the additional savings identified by the ERA from the PAR accounts should the directors decide to do so at the conclusion of the litigation.

[40] Whether they were entitled to do this and how the surplus expense savings identified by the ERA were to be treated was not dealt with at trial, but the trial judge directed that she would remain seized of these matters and hear submissions at a later date. The respondents say that the present value of the disputed savings in now something in excess of $130 million.

(5) Class Members' Complaints

[41] In early 1998, class representative D'Alton Rudd attended London Life's Annual General Meeting. At the meeting, he raised his concerns about the use and the legality of the PATs. Over time, Mr. Rudd expressed his concerns to OSFI, the federal Minister of Finance, and the appointed actuaries of Great-West Life and London Life. He also discussed his concerns with class representative James Jeffery, an actuary who had

retired from London Life. Mr. Jeffery reviewed the PATs and in time also expressed concerns about protecting the interests of the participating policyholders.

[42] Eventually, counsel was retained and the litigation that underlies this appeal was commenced. Mr. Jeffery testified at trial as to his concerns about the PATs. His primary concern is not that the PAR accounts were required to make a contribution, but rather that if the accounts were to make a contribution, they should receive more benefits than those provided by the PATs, as structured, and also should receive those benefits more immediately than those provided.

[43] He recognized that at the end of 25 years, continuing synergistic expense benefits would flow to the PAR accounts with no offsetting amortization of the PPEAs. In the meantime, however, there would be no net benefit to the PAR accounts. Had the $220 million in cash remained in the accounts, it would have been invested and received a return on investment.

[44] He felt that the PATs created intergenerational problems, as policyholders during the first 25 years would receive no net benefit. He accepted that if the PAR accounts were not to make a contribution to the acquisition costs of London Life, then it was fair that those accounts not receive the synergistic expense savings flowing from that acquisition. In cross-examination he was asked whether he "wanted to see more sharing of benefits within the 25 year period." He responded: "contribution and benefits or no contribution for no benefits."

III. THE TRIAL JUDGE'S DECISION

[45] The trial judge found that the PATs breached s. 462. The relevant portion of s. 462 reads as follows:

> The only transfers that may be made from a participating account maintained pursuant to s. 456 are …

The section then sets out three exceptions that are not relevant to this case.

[46] The trial judge concluded that the payments of $220 million from the PAR accounts in 1997 constituted "transfers" within the meaning of s. 462. The trial judge rejected the appellants' argument that the PATs were an exchange of $220 million in cash for the PPEAs, which were assets of equal value, and as such did not involve a "transfer" within the meaning of the section.

[47] The trial judge also rejected the appellants' argument that she should accord deference to OSFI's decision approving the transactions. Her primary reason was that OSFI had relied on the Mercer report and that the report was flawed as it wrongly concluded that the payment of the $220 million from the PAR accounts was justified under s. 458 of the *ICA*.

[48] In summary, the trial judge concluded that: "As a matter of common sense, the PATs involved transfers of capital from PAR to the shareholders' accounts."

[49] Accordingly, she found that the $220 million payment involved a transfer of cash in contravention of s. 462 of the *ICA*.

[50] The trial judge also found that the PATs contravened s. 331(4) of the *ICA*. The relevant portion of that section reads as follows:

> The financial statements referred to in subsection (1), paragraph (3)(b) and subsection 333(1) shall … be prepared in accordance with generally accepted accounting principles …

[51] The trial judge concluded on the evidence before her that the financial statements were not prepared in accordance with GAAP, as the PPEAs were not assets for GAAP purposes. We will discuss her reasons for this conclusion in more detail below.

[52] Having reached the conclusion that the PATs did not comply with GAAP, the trial judge found that the appellants had breached s. 458 as well, since the amortization charges stemming from the unlawful assets would not be proper expenses within the meaning of s. 458.

[53] Finally, the trial judge concluded that, given her findings that Great-West Life and London Life had breached ss. 462, 458 and 331(4) of the *ICA*, they had also breached s. 166(2) of the *ICA*, which requires that every director, officer and employee of the company comply with the *ICA*.

[54] Section 1031 of the *ICA* sets out the remedial powers of a court upon finding breaches of the *Act*. Upon application, a court may direct a company to comply with a provision of the *Act*, or may restrain a company from acting in breach of a provision, and it may make any further order "it thinks fit."

[55] The trial judge concluded that the respondents were entitled to a "reasonable award compensating for all foregone investment income" on the $220 million together with a gross up for taxes. Accordingly, she ordered Great-West Life and London Life to pay approximately $390 million to the PAR accounts. She further ordered that a litigation trust be created to facilitate payment of this amount to the participating policyholders.

[56] In addition, the trial judge ordered that the amortization of the PPEAs terminate as of January 1, 2011, thereby allowing the future merger synergies to flow through naturally in accordance with the existing expense allocation methods.

[57] The trial judge declined the respondents' request that Great-West Life and London Life restate their financial statements retroactive to 1997 in order to remove the expenses charged against the PAR accounts resulting from the amortization of the PPEAs. The trial judge reasoned that to do so could result in the PAR accounts obtaining a "windfall" in addition to the foregone investment income included in her repayment order.

IV. ISSUES

[58] The issues raised on appeal are whether the trial judge erred in concluding that there was a breach of s. 331(4), s. 458, s. 462 and s. 166(2) of the *ICA*, and whether the trial judge erred in granting the remedies she did under s. 1031 of the *ICA*.

[59] We shall begin with an examination of the s. 331(4) GAAP compliance issue first, as the trial judge's finding that the PPEAs were not assets for GAAP purposes is significant for the issues that follow.

V. SECTION 331(4)

[60] At issue under s. 331(4) of the *ICA* is whether Great-West Life's and London Life's financial statements were prepared in accordance with GAAP. More specifically, the question is whether the PPEAs are assets for GAAP purposes.

[61] The term GAAP refers to the "conventions, rules and procedures that define approved accounting practices at a particular time." They are used by accountants in the preparation of financial statements: Bryan A. Garner, ed., *Black's Law Dictionary*, 9th ed. (St. Paul: West, 2004), at p. 753. For our purposes, GAAP specifically refers to the accounting principles encoded in the *Canadian Institute of Chartered Accountants' Handbook*.

[62] The trial judge concluded, at para. 323, that while the PPEAs "could be characterized as 'creative accounting' … they are not assets recognized by GAAP." We

will examine her decision concerning GAAP compliance in detail below. First, however, we will review the appellants' objections to her findings and analysis.

(1) Parties' Submissions

[63] The appellants submit that the trial judge's analysis of s. 331(4) is confused and not based on the admitted facts. They begin by asserting that the trial judge's decision that the PPEAs were not assets for GAAP purposes was based on her erroneous decision on s. 462 - that is, she found that the PATs were illegal and proceeded to analyze the PPEAs as though those transactions had never taken place.

[64] At the heart of the appellants' complaints is the submission that the trial judge was in error in concluding that, since Great-West Life and London Life did not change their expense allocation methods, the PPEAs were not assets. (As explained above, s. 458 requires companies to allocate their expenses between the PAR accounts and shareholder accounts in accordance with approved "expense allocation methods".)

[65] The appellants advance several arguments that they say reveal the trial judge's error.

[66] First, they submit that there was no support for the trial judge's approach in either the respondents' or the appellants' expert accounting evidence. They say that on the facts as found by the trial judge, the accounting for the PATs actually complies with GAAP.

[67] On their reading of the trial judge's reasons, the trial judge concluded that the PAR accounts did not have an entitlement to benefit from savings arising from the acquisition absent a contribution. They rely on the trial judge's comments, at para. 157, that "[n]o fault can be found in the *business concept* of a contribution for a benefit, as one of the plaintiffs' representatives, Mr. Jeffery, said so well" (emphasis added). The trial judge says she agrees with Mr. Jeffery that "it is necessary to make a contribution in order to receive a benefit."

[68] Secondly, the appellants argue that the trial judge erred in focusing on the expense allocation methods because, in their view, it is irrelevant and there was no need to change the companies' expense allocation methods.

[69] Thirdly, they say that the trial judge erred in finding that because no steps had been taken to change the expense allocation methods, the PAR accounts would have received the expense savings without a contribution.

[70] In addition, the appellants assert that the trial judge erred in refusing to give any weight to the expert evidence of Patricia O'Malley, who testified on behalf of the appellants, on the basis that she used an assumption to formulate her opinion.

[71] Finally, the appellants take issue with the trial judge's comments that: (i) Deloitte & Touche, auditors for Great-West Life, lost the working papers from Great-West Life's

1997 audit; and (ii) Ernst & Young, auditors for London Life, relied on Deloitte's work in respect of the PATs.

[72] We reject each of the appellants' submissions. As we will explain, on the evidence before the trial judge, it was open to her to find that the PPEAs were not assets for purposes of GAAP and we would not give effect to this ground of appeal.

(2) Trial Judge's s. 331(4) Analysis and Findings

[73] In assessing whether there was compliance with GAAP, the trial judge considered a large body of evidence. This included evidence from three experts, two accountants who were involved in auditing the appellants' 1997 financial statements, and the appellants' CFO, Mr. Lovatt.

[74] We agree with the trial judge's observation, at para. 119, where she notes that, "[w]hile the obligation to comply with GAAP with respect to the annual statements is a legal matter; the determination of whether or not there has been compliance with GAAP is an accounting matter". In other words, the question for the trial judge was one that had to be decided on the evidence that was before her.

(a) Expert Evidence

[75] Three experts gave evidence on the GAAP compliance issue. Professor Gordon Richardson, an expert in financial accounting, testified on behalf of the respondents. Professor Dan Thornton, an expert in financial accounting and financial transactions, also

testified on behalf of the respondents. Finally, Patricia O'Malley, the Chair of Canada's Accounting Standards Board, was qualified to provide opinion evidence on the accounting of the PATs on behalf of the appellants.

[76] While the experts considered a number of GAAP issues, the trial judge's decision essentially turns on a single aspect of GAAP - that is, whether the PPEAs are properly characterized as assets for GAAP purposes.

[77] At the outset, there was no dispute between the experts about the three requirements for an asset under GAAP. For there to be an asset, all three of the following requirements must be met:

1. the transaction or event giving rise to the entity's right to, or control of, the benefit has already occurred (also known as the past transaction requirement);
2. the entity can control access to the benefit; and
3. the "asset" granted embodies an incremental claim on cash – a future benefit that involves a capacity to contribute directly or indirectly to future cash flows.

[78] In this case, it was the third requirement that was the most contentious. Under this requirement, a potential asset provides a future benefit, if alone or in combination, it gives rise to incremental net cash flows through an increase in net cash inflows or

through a reduction in net cash outflows. "Incremental" means that the entity must not already be entitled to the cash flows.

[79] The trial judge was very much aware that the third requirement was key:

> Ms. O'Malley testified that the key issue between her opinion and that of Dr. Thornton is whether there would have been incremental cash flows to the PAR accounts with or without the PATs. She agreed that if the merger synergies would have flowed into the PAR account even without a transaction then there could be no incremental claim on cash and therefore it was not a valid asset.

[80] The main evidence concerning the incremental cash flow issue came from Professor Thornton and Ms. O'Malley. While Professor Richardson also gave evidence concerning whether PPEAs were assets for GAAP purposes – evidence which the trial judge refers to at paras. 122 – 125 of her reasons – a great deal of his evidence dealt with other GAAP issues, such as proper disclosure.

[81] Both Professor Thornton and Ms. O'Malley agreed that their starting premises were crucial to their opinions.

[82] Ms. O'Malley, as instructed, based her opinion on two assumptions: (1) that the purpose of the PATs "was to put the [PAR] accounts in the same position as if the acquisition had not taken place"; and (2) that had the PATs "not proceeded, the [PAR] accounts would not have received the savings contemplated by the acquisition and forming the basis of the [PATs]". She was asked to "[p]lease proceed on the assumption

that other steps would have been taken and those savings would not have been experienced in the [PAR] accounts." Ms. O'Malley testified that she was comfortable accepting these assumptions based on her review of the documents provided to her.

[83] In contrast, Professor Thornton based his opinion on his understanding that the "default" was that the merger synergies resulting from Great-West Life's acquisition of London Life (i.e., the reduction in expenses) would have been shared by the PAR accounts pursuant to Great-West Life's and London Life's existing allocation methods. His understanding was based on his assessment of the documentation provided to him.

[84] Professor Thornton concluded that there was no incremental claim on cash, as expense savings would have flowed through to the PAR accounts as a result of the expense allocation methods without a contribution. In contrast, Ms. O'Malley concluded that there was an incremental claim on the basis that the PAR accounts would not have received the expense savings had the PATs not proceeded.

[85] However, Professor Thornton agreed that had he accepted the same assumptions as Ms. O'Malley, he would have provided a report very much like hers. Likewise, Ms. O'Malley accepted that had her starting point been that the PAR accounts would have shared in the merger synergies without the PATs, then she would have reached the same conclusion as Professor Thornton, namely, that the PPEAs were not assets for GAAP purposes.

[86] Thus, the question for the trial judge was whether the merger synergies or expense savings would have flowed through to the PAR accounts. This was a question of fact.

[87] While the trial judge appreciated the business concept that there should be no benefit unless there was a contribution, she found, correctly in our view, that the PAR accounts would, in fact, have enjoyed the synergistic savings under the companies' existing expense allocation methods.

[88] After a review of the evidence, the trial judge found, at para. 152, that "the allocation method in place at the time of this transaction would have allowed the flow of expense savings to the PAR accounts" – a finding she repeated at para. 168. She also found, at para. 152, that if management wanted to prevent the expense savings from flowing through to the PAR accounts without paying for them, management would have had to change the companies' allocation methods. At para. 169, she stated that the "only way that this natural flow would not occur would be if the allocation method changed." However, at para. 160, she found that "[t]here was no intention of changing the expense allocation method at the time."

[89] On appeal, the appellants say that of course there was no intention to change the expense allocation methods, as they were an aspect of the PATs. Rather, they submit that had the PATs not occurred, other steps would have been taken to divert the flow of merger synergies to the PAR accounts.

[90] The trial judge addressed this argument and referred specifically to the fact that alternatives to the PATs were considered and to the appellants' "hypothetical other step" that would have been taken had the PATs not been implemented or accepted by OSFI at paras. 159 and 177 of her reasons. She found, at para. 178, that "there was no legally justifiable method to deprive the PAR accounts of the merger synergies, except by changing the allocation methods in a lawful and proper manner, which was not done in this case." And, at para. 179, she concludes that:

> … given there was no change in the allocation method, shareholders were not in a position to vend the synergies to PAR. In other words, shareholders did not have the right to exclusively own the merger synergies. PAR had a right to them as well, given the allocation method in place. *A prior transaction was necessary, in order to deprive the expense savings from PAR, giving the right to the shareholders to vend the merger synergies to PAR. That prior step did not occur and as a result the PPEA does not meet the criterions set out in sub-paragraph 120 herein.* [Emphasis added.]

[91] The reference to "sub-paragraph 120 herein" is a reference to the paragraph of the reasons in which the trial judge sets out the three requirements for a GAAP asset, which are set out above.

[92] As we point out later, however, the fact that alternative steps were not taken does not mean that alternative steps would not have been taken had the PATs not been implemented. Indeed, we should not be taken to agree with the trial judge that the only legally justifiable method to deprive the PAR accounts of the merger synergies was to change the existing allocation methods. As we point out in the remedy section below,

alternative measures were not pursued because the companies considered that the PATs were sufficient. We return to this point later in the remedy section because the trial judge's focus on the fact that alternative steps were not taken is sufficient for purposes of the GAAP analysis.

[93] It was the evidence of Professor Thornton upon which the trial judge relied in support of her conclusion that a transaction prior to the PATs was necessary. Timing, Professor Thornton testified, is significant in assessing whether the past transaction requirement has been met and there is a GAAP-compliant asset. His response to a question from the trial judge best illustrates his opinion:

> THE COURT: … I'm just going to ask you one question just on that very last point, that you've made with respect of the difference of the assumption that Ms. O'Malley has made. And you keep saying that there ought to have been before November 26, an event, a decision to take away these default - and to use your word, the default benefits. Are you suggesting it ought to have been an accounting entry or just basically a decision that would reflect the denial or the withdrawal of the default that you use? Do you understand my question?
>
> A. Well, of course – I do Your Honour, yes and certainly an accounting entry would be a clincher. I mean that would definitely do it. But um, if there were some firm resolution made and disclosed for everybody to see um, and was a formal declaration that basically unless you give me $220 million you don't get the merger benefits and everybody agrees that that's the default, then um, I think that my inference is reasonable in the circumstances.

[94] Ms. O'Malley also addressed the issue of timing. The difference between her opinion and that of Professor Thornton is best demonstrated by her answer in re-examination to a question about Professor Thornton's view that another transaction was required prior to November 26:

> … And that was in his mind something that needed to take place in order for the past transaction to be in place for the asset to exist at that time, the November 27th when the asset was actually, the cash was exchanged for the asset and the asset was recognized. But I think as I said, I think that rests on his inference or his, the premise underlying his opinion that they were entitled, the PAR accounts were entitled to share in those savings in any event so I would agree with him if that's the beginning of your argument that that second transaction may be necessary.

[95] Once again, the divergence in opinions between Professor Thornton and Ms. O'Malley stemmed from their different starting premises. Ms. O'Malley agreed that were she to accept Professor Thornton's assumption, then a second transaction may be necessary. Ultimately, it was open on the evidence before the trial judge for her to accept that a prior transaction was required and the fact that "hypothetical steps" were contemplated was not enough to meet the incremental claim requirement.

[96] In conclusion, the trial judge found, based on the evidence before her, that the synergistic benefits would have flowed through to the PAR accounts under the existing allocation methods. She also found that there was no intention to change the existing allocation methods at the time. There is no reason to interfere with those findings.

[97] Even if there were other hypothetical steps that could have been taken to divert the savings, no such steps were taken at the requisite time (i.e., prior to the implementation of the PATs). On the expert evidence before the trial judge, it was open to her to find that a prior transaction was required.

[98] Given these findings, it followed, based on the expert evidence of both Professor Thornton and Ms. O'Malley, that the incremental requirement was not met. Far from refusing to give Ms. O'Malley's expert opinion any weight because she used an assumption – as the appellants assert – the trial judge fairly considered it.

(b) Other Evidence

[99] Other evidence the trial judge considered included the discovery and trial evidence from William Lovatt, Great-West Life's CFO at the time of the transactions. While Mr. Lovatt tried to resile from his discovery evidence, the trial judge found, at para. 149, that it was clear that "Mr. Lovatt was of the view that the expense savings were to flow to [the PAR accounts] with or without a contribution". The other main body of evidence relating to the GAAP compliance issue came from the appellants' auditors at the time: Bruce Jack of Deloitte & Touche, and Doug McPhie of Ernst & Young. Mr. Jack was the audit partner at Deloitte's responsible for Great-West Life's 1997 audit. Mr. McPhie was the lead audit partner from Ernst & Young responsible for London Life's 1997 audit. The trial judge outlined their involvement in her timeline of events at para. 33 of her reasons.

[100] Ultimately, the trial judge preferred the expert accounting evidence – in particular, that of Professor Thornton – over the evidence of the auditors at the time. The trial judge deals with the accounting evidence from Mr. McPhie and Mr. Jack in the following context:

> 171 In essence, Mr. McFeetors [Great-West Life's and London Life's President and CEO and a director of both companies at the relevant time] relied on Mr. Morrison [Great-West Life's appointed actuary] to come up with the concept of the PATs. Then Mr. Lovatt relied on the [Great-West Life] controller, Mr. Len Anderson, to create the accounting for the PATs. The PPEA was created, and as a result, the PAR surplus appeared unchanged on the balance sheet. Mr. Anderson was not called as a witness at trial.
>
> 172 Mr. Edwards [appointed actuary of London Life] relied on [Great-West Life] to formulate the proper accounting for the PATs.
>
> 173 In its report on the PATs, Mercer relied on a verbal comment from someone at [Great-West Life] that someone at Deloitte, [Great-West Life's] external auditor, was "aware of and agreeable to" [Great-West Life's] intention to establish the PPEA as part of the transactions.
>
> 174 Mr. Jack, the audit partner from Deloitte, had no recollection of an analysis of the PATs being undertaken by him or his colleagues to determine if the PPEA would comply with GAAP. Unfortunately, his firm lost both the paper and electronic versions of their working papers for [Great-West Life's] 1997 audit and therefore he can only rely on the "clean" audit opinions.
>
> 175 Mr. McPhie, the audit partner with [Ernst & Young] ([London Life's] external auditors) relied on Deloitte's work in respect of the PATs.

[101] The important feature of the trial judge's finding is that Mr. Jack did not have a recollection of the PPEA/GAAP analysis undertaken and there was no paper record explaining what analysis was conducted. While there is a dispute as to what was or was not lost, the appellants have not pointed to any paper record explaining what PPEA/GAAP analysis was conducted by Deloitte at the time.

[102] It is not at all surprising that, without documentation detailing the PPEA/GAAP analysis that was undertaken to refresh his memory, Mr. Jack could not recall the details of what occurred some 12 years earlier. While Deloitte's ultimate opinion was clear – they provided a clean audit opinion – their reasoning for reaching it was not.

[103] As to the trial judge's finding that Ernst & Young relied on Deloitte's audit work, the appellants say that Ernst & Young only relied on Deloitte's calculations of the amounts involved in the PATs. This was not, stress the appellants, reliance with respect to GAAP compliance. Mr. McPhie testified that he still needed to satisfy himself on the appropriateness of the accounting for the PATs and that it was in accordance with GAAP, which he did.

[104] However, in spite of Mr. McPhie's testimony that the PATs were material for audit purposes and singled out for "specific audit procedures", Ernst & Young could not furnish any working papers explaining the work undertaken in respect of the accounting for the PATs and could not produce any documentary analysis to support that the PPEAs were compliant with GAAP.

[105] Whether Deloitte lost the working papers from the 1997 audit and whether Ernst & Young relied on Deloitte's work in respect of the PATs is ultimately of little consequence. Reading the trial judge's reasons set out above, her concern is that, while all manner of people considered the accounting issues, there was considerable inter-reliance rather than independent analysis.

[106] Also of note is that Mr. Jack and Mr. McPhie each testified that they understood, at the time, that the PAR accounts had to contribute to the acquisition to benefit from it and therefore the PPEAs were properly assets under GAAP. While the trial judge did not refer to this portion of their evidence in her reasons, it is clear from her reasons that she rejected the thrust of this reasoning based on the existing allocation methods.

[107] We see no reason to interfere with the trial judge's finding that she preferred the expert evidence, as set above, over that of the auditors at the time.

(c) Conclusion

[108] Whether the PATs were compliant with GAAP and, more specifically, whether the PPEAs were assets under GAAP are, as the trial judge correctly noted, questions of fact. The trial judge reviewed the relevant body of evidence in considerable detail, weighed the competing evidence and made specific findings of fact. We can find no reason for interfering with the trial judge's conclusion that the PPEAs did not qualify as GAAP assets. This ground of appeal must therefore be dismissed.

VI. SECTION 458

[109] As noted above, there was no question that Great-West Life and London Life had approved expense allocation methods in place as required by s. 458 of the *ICA*. The question before the trial judge was whether the expenses incurred as a result of the PATs, namely the annual amortization of the PPEAs, were proper expenses.

[110] We agree with the trial judge's conclusion that once it is established that the PPEAs were not assets for GAAP purposes, the amortized charges stemming from the unlawful assets would not be proper expenses within the meaning of s. 458 of the *ICA*.

VII. SECTION 462

[111] The trial judge found that the PATs breached s. 462 of the *ICA*, which provides:

> *Transfers from participating account*
>
> 462. The only transfers that may be made from a participating account maintained pursuant to section 456 are:
>
> (*a*) transfers made pursuant to sections 461 and 463;
>
> (*b*) transfers made in respect of transfers or reinsurance of all or any portion of the participating policies in respect of which the participating account is maintained; and
>
> (*c*) transfers, with the approval of the Superintendent, of amounts that can reasonably be attributed to sources not related to the participating policies in respect of which the account is maintained.

[112] It is common ground that the PATs do not fall within the enumerated exceptions in s. 462. The only issue is whether the payment of $220 million by the PAR accounts to the respective shareholders accounts on November 27, 1997 constituted a "transfer" prohibited by s. 462.

[113] The appellants argue that the PATs did not involve a "transfer" because there was an "exchange" of cash ($220 million) for assets (the PPEAs) of an equivalent value. They submit that s. 462 is aimed only at prohibiting the reduction of total assets in participating accounts. Section 462 is not a complete code prohibiting all but the limited exceptions.

[114] The appellants point out that pursuant to s. 15(1) of the *ICA*, insurance companies have the rights, powers and privileges of a natural person. Insurance companies routinely transfer assets to and from participating accounts when making investments. Moreover, other sections of the *ICA* permit payments from PAR accounts.

[115] The appellants also look to the French version of s. 462, submitting that the "shared meaning" rule should be applied. Under this interpretive rule, "[w]here the words of one version may raise an ambiguity, courts should first look to the other official language version to determine whether its meaning is plain and unequivocal": *R. v. Mac*, 2002 SCC 24, [2002] 1 S.C.R. 856, at para. 5. It is presumed that the Legislature intended the meaning that is found in both language versions, unless that meaning is

unacceptable in light of other evidence of legislative intent. Where one of the two versions is broader than the other, the common meaning would favour the more restricted meaning: *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269, at para. 56.

[116] In the appellants' submission, the interpretation of the word "transfers" in s. 462 is confirmed by the application of the shared meaning rule. The English word "transfers" arguably raises an ambiguity, whereas its French translation is plain and unequivocal.

[117] The heading "Transfers from participating account" is translated "*Prélèvements* sur les comptes de participation" (emphasis added). The phrase "[t]he only transfers that may be made" reads in French "[s]eules peuvent être *prélevées* sur des comptes de participation" (emphasis added). The term "prélevées" connotes a reduction.

[118] The trial judge did not accept the argument that "transfer" only meant net transfers. She expressed concern about protecting the interests of participating policyholders. She concluded that "[a]s a matter of common sense" a transfer involves a payment of money such as the $220 million paid from the PAR accounts in this case. Thus, she found a breach of s. 462.

[119] We agree with the trial judge that the PATs breached s. 462, but for a different reason. As set out above, we see no basis for interfering with the trial judge's conclusion that the PPEAs were not assets within the meaning of GAAP. That conclusion means

that the PPEAs cannot be shown as assets on the financial statements of Great-West Life and London Life. Thus, there would be no way of recording, from an accounting standpoint, the transactions that gave rise to the "exchange theory". Consequently, the transfer of $220 million in cash from the PAR accounts resulted in a reduction in the PAR accounts' surplus.

[120] In our view, the purpose of s. 462 is to protect the interests of participating policyholders. The interests of the participating policyholders include – and, indeed the *ICA* expressly requires – that the financial affairs of PAR accounts be properly recorded, thus providing transparency to participating policyholders and a measure of protection against unfair and inequitable treatment. Thus, transactions such as the PATs, which do not comply with GAAP, should not be considered to be an exchange so as to avoid the prohibition in s. 462.

[121] The final question that arises with respect to the s. 462 issue is whether an exchange that is compliant with GAAP falls within s. 462. Given our conclusion above, it is unnecessary to answer this question to decide this case. However, the issue was fully argued on appeal and it may be helpful for us to make some comments on it.

[122] It is apparent from insurance companies' practices generally, and from some of the sections in the *ICA*, that some transfers are permitted in circumstances other than in the exceptions set out in s. 462.

[123] For example, pursuant to s. 458, insurance companies are permitted to charge expenses against PAR accounts if the allocation of those expenses is fair and equitable to participating policyholders. In the case of expenses, the PAR account receives the benefit of the service and is debited for the corresponding expense. The debit of the account is a "transfer" of the amount debited.

[124] Another example involves investments. By their nature, PAR accounts are intended to realize returns on investments for the benefit of participating policyholders. In order to manage investments for a PAR account, a company will be required to buy and sell shares, bonds and other assets. In the course of investing, PAR accounts will be required to "transfer" or to "exchange" money or other assets from the PAR account. Such transfers or exchanges are not specifically authorized in the *ICA*, but no one suggests that PAR accounts should not be able to effect these types of transactions.

[125] As previously stated, the purpose of s. 462 is to protect the interests of participating policyholders from unfair or inequitable treatment by the company. That being the case, we see no reason why, in principle, s. 462 should not be interpreted in a way that allows the company to operate PAR accounts in a manner that permits transfers for value, in circumstances other than those enumerated in s. 462. This interpretation is consistent with the French version of s. 462, which prohibits "prélèvements" – or transfers resulting in a reduction in value - from PAR accounts.

[126] What is clear, in our view, is that s. 462 should be interpreted to permit insurance companies to operate PAR accounts in a manner that is fair and equitable and for the benefit of participating policyholders. Put another way, insurance companies should be permitted to operate PAR accounts in a manner that is consistent with the purposes of the participating policies themselves.

VIII. SECTION 166(2)

[127] Having found that Great-West Life and London Life breached ss. 331(4), 458 and 462, the trial judge concluded that they also breached s. 166(2) of the *ICA*, which requires that directors, officers and employees comply with the *ICA*.

[128] In this case, no directors, officers or employees were sued; actions were only brought against corporate entities. There is no issue of liability by directors, officers or employees. We therefore do not see how there was a breach of s. 166(2).

[129] We note that had directors, officers or employees been sued, it would have been open to them to seek to rely upon the safe harbour defence under s. 220 of the *ICA* – a defence not open to corporations.

[130] Accordingly, we would allow the appeal in respect of the trial judge's finding on s. 166(2).

IX. OSFI'S REVIEW

[131] Before turning to the appropriate remedy, we will address the appellants' submission that the trial judge erred in refusing to give weight to OSFI's review of the legality of the PATs and OSFI's determination that the PATs complied with the *ICA*.

[132] In our view, OSFI's approval does not determine the legality of the PATs, and the fact that there was regulatory approval does not alter our conclusion that s. 331(4), s. 462 and s. 458 of the *ICA* were breached. In the circumstances of this case, there are four reasons for not according any deference to that approval. First, the trial in this case was not a judicial review of OSFI's decision to approve the PATs. While OSFI's review may have considered many of the same issues as those before the trial judge, OSFI's decision was not being challenged in the civil case.

[133] Secondly, it is not clear on the record that OSFI considered the issue that we consider to be of critical importance, that is whether the PPEAs were assets within the meaning of GAAP. However, even if it did, this was an issue that was properly determined by the trial judge on the evidence before her. The parties called extensive evidence addressing the GAAP issue, much of it from experts. Ultimately, the trial judge concluded, as she was entitled to do on the evidence before her, that the PPEAs were not assets within the meaning of GAAP. While OSFI may have considered the question of GAAP compliance, it is not apparent that it had the benefit of evidence similar to the

evidence before the trial judge. In any event, in the end, it was up to the court to make this determination based on the evidence at trial.

[134] Thirdly, to the extent that the resolution of the s. 462 issue depended on an interpretation of the section, the court has jurisdiction to determine questions of statutory interpretation. A court is not bound by an interpretation by a regulatory body on a question of law. This is particularly the case when the court proceeding is not reviewing the regulatory decision.

[135] Finally, we observe that the trial judge and this court do not have the benefit of OSFI's reasons for approving the PATs. Both parties at trial summoned OSFI witnesses to give evidence. OSFI challenged the summonses on the ground of deliberative secrecy. The trial judge made a ruling about the availability of the OSFI evidence: (2009), 80 C.C.L.I. (4th) 202 (S.C.J.). That ruling was appealed to this court: 2009 ONCA 819, 78 C.P.C. (6th) 23. Pursuant to this court's decision, the parties were permitted to ask OSFI witnesses if, in approving the PATs, they considered that the PATs complied with various sections of the *ICA*. The witnesses, however, were restricted from testifying about how, why and by whom the PATs were reviewed. The limited nature of the OSFI evidence weighs against this court deferring to OSFI's approval of the PATs.

X. REMEDY

(1) Introduction

[136] Having found breaches of the *ICA*, the trial judge ordered a variety of remedies under the compliance provisions found in s. 1031 of the *ICA*. That section states:

> 1031. If a company, a society, a foreign company, a provincial company or an insurance holding company or any director, officer, employee or agent of one does not comply with any provision of this Act or the regulations other than a consumer provision, or, in the case of a company, a society or an insurance holding company, of the incorporating instrument or any by-law of the company, society or insurance holding company, the Superintendent, any complainant or any creditor of the company, society or insurance holding company may, in addition to any other right that person has, apply to a court for an order directing the company, society, foreign company, provincial company, insurance holding company, director, officer, employee or agent to comply with — or restraining the company, society, foreign company, provincial company, insurance holding company, director, officer, employee or agent from acting in breach of — the provision and, on the application, the court may so order and make any further order it thinks fit.

[137] Most notably – in addition to a declaration that the PATs were contrary to the *ICA* and unlawful – the trial judge granted monetary relief in what was, in effect, an award of general damages to the individual class plaintiffs. She accomplished this result by ordering London Life and Great-West Life to repay approximately $390 million to the PAR accounts (the original $220 million plus a return on investment plus a gross up for taxes) and creating a "litigation trust" in those amounts. The monies were to be distributed from these litigation trusts to the participating policyholders as dividends in

accordance with a distribution plan to be approved later. As well, she ordered the PPEAs and the annual amortization charges in the PAR accounts with respect to the PPEAs cancelled as of January 1, 2011, and she granted permanent injunctions prohibiting the companies from charging, debiting or expensing to the PAR accounts any amounts relating to "merger synergies" (a defined term).

[138] In granting this broad relief, the trial judge relied heavily on the "make any further order it thinks fit" language at the conclusion of s. 1031. She concluded that the purpose of clothing the court with that power was "consistent with the behaviour modification policy of the [*Class Proceedings Act, 1992*]." She then proceeded to assess the "damages" necessary "for the purpose of remedial compensation" in order to put the plaintiffs in the position they would have been in had the PATs not taken place.

(2) Interpretation of s. 1031 of the *ICA*

(a) Introduction

[139] The rule of statutory interpretation to be applied is not disputed. Iacobucci J. explained the rule in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21:

> Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the

> scheme of the Act, the object of the Act, and the intention of Parliament.

[140] Driedger's approach to statutory interpretation has been repeatedly followed since *Rizzo Shoes*: see *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, and the cases cited therein.

[141] Respectfully, the trial judge misread the purpose of s. 1031 and the scope of her discretion under it in granting such broad relief, in our view.

[142] As we will explain, we view the purpose of s. 1031 as remedial rather than compensatory or punitive. It is remedial in the sense that it provides a mechanism for those who at common law would have little recourse with respect to the internal affairs of a corporation, to compel corporations governed by the *ICA*, and their actors, to comply with the requirements of the *ICA*, the regulations and the internal governing documents of the corporation. The added power to "make any further order [the court] thinks fit" must be construed in that context. While this added power affords considerable discretion to the judge fashioning a remedy, that discretion is tempered by the principle of minimal interference in corporate affairs and should be exercised in a way that is tailored to the non-compliance in issue and that is proportional to the character of the breach. It is a complementary power, not a stand-alone power.

(b) Case Law

[143] Section 1031 of the *ICA* has not previously been interpreted by the courts. The federal and provincial business corporation statutes contain parallel provisions that have been, however: see the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, s. 247 and, for example, the *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 253(1); the *Business Corporations Act*, S.B.C. 2002, c. 57, s. 228; the *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 248.

[144] No appellate court has yet dealt with the interpretation of these provisions either, but trial courts and textbook writers have generally adopted an approach consistent with the view expressed in para. 142 above: see *Lei v. Noble China Inc.* (1996), 34 B.L.R. (2d) 172 (Ont. C.J.); *Polar Star Mining Corp. v. Willock*, (2009), 96 O.R. (3d) 688 (S.C.); *Davidson v. FinancialCAD Corp.*, 2008 BCSC 353, 44 B.L.R. (4th) 70, aff'd 2009 BCCA 7, 52 B.L.R. (4th) 84 (interpretation of the compliance provision was not undertaken); *D&G Developments Ltd. v. Crystal Cove Beach Resorts Inc.*, 2006 BCSC 1432, 274 D.L.R. (4th) 749. For a somewhat more expansive view of the role of the comparable provision in Alberta, see *Sumner v. PCL Constructors Inc.*, 2010 ABQB 536, 32 Alta. L.R. (5th) 239 . See also Markus Koehnen, *Oppression and Related Remedies*, (Toronto: Thomson Canada Ltd., 2004), at pp. 327-28; Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3d ed. (Mudgeeraba: Scribblers Publishing, 2006), at pp. 531-532.

[145] In *Davidson v. FinancialCAD Corp.*, at para. 32, Pitfield J. observed that "s. 247 [the comparable section to s. 1031] must be construed to permit the court to restrain action or order compliance with some aspect of corporate governance, ***and*** to make any *complementary order* that is reasonably required in relation to the restraining or compliance order" (bold in original; italics added). We think the same may be said for s. 1031 of the *ICA*. The authority to "make any order [the court] thinks fit" is complementary to the power to order compliance or restrain further non-compliance; as noted above, it is not a stand-alone power.

(c) Three Types of Statutory Procedural Remedies

[146] In the corporate law world, the common law was not kind to minority shareholders and others with legitimate complaints about the majority conduct of corporate affairs. A long line of jurisprudence anchored the view that only a corporation could sue for a wrong done to it and – save for limited exceptions not relevant here, such as fraud on the minority – the courts would not interfere in the internal affairs of the corporation unless the corporate conduct was not within the corporation's powers. This was known as the rule in *Foss v. Harbottle* (1843), 67 E.R. 189 (Eng. V.C.) and was cemented in place by the decision of the Privy Council in *Burland v. Earle*, [1902] A.C. 83, at p. 93, where Lord Davey stated:

> It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in

> order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself.

[147] In the latter part of the twentieth century, however, legislators in Canada (and elsewhere) implemented measures to address this corporate imbalance of power. They did so by introducing a number of procedural statutory measures providing access to the courts for minority shareholders and other "complainants" previously denied redress in such circumstances. These measures included three types of procedural remedies: statutory derivative actions, compliance provisions, and oppression remedies.

[148] The statutory derivative action (or, as Professor Welling would have it, the statutory representative action) enables disgruntled "claimants" to bring an action in the corporate name for a wrong done to the corporation that the corporation will not seek to redress (perhaps because the wrongdoers control the corporation): see Welling, at pp. 526-528. That is not this case. Corporations cannot sue themselves to force themselves to comply with their controlling statutes, regulations, articles of incorporation, or by-laws. Hence, the creation of a second type of remedy, the "compliance" provisions — enacted to bridge that gap and to enable "claimants" to obtain orders forcing corporations to comply with the statutory framework and constating documents governing them. Although the discretion involved in making a compliance order is broad, the object of this second type of remedy, it seems to us, is to ensure corporate compliance and not to provide an individual fix.

[149] The oppression remedy, on the other hand – the third, and by far the most wide-reaching of the statutory remedy trio – was developed to do just that, that is, to provide a broad-ranging authority and discretion in the court to remedy a wrong to individual complainants as a result of conduct by the corporation or its majority that is prejudicial to the individual.

[150] While there may be some overlap between these statutory remedies, in the sense that the oppression remedy is much broader and may lead to the type of orders made in statutory representative actions or compliance proceedings, the three remedies are different.

[151] Here, in spite of the protestations of the respondents to the contrary, the gravamen of the relief sought by them is the type of relief normally associated with an oppression remedy claim. They want to be "fully compensated," individually, for the wrong they say was done to them as a result of the PAR accounts being debited the $220 million in exchange for reputed "savings"; in substance, they want the money back as if it were theirs plus a return on investment (and this is what the trial judge gave them). In short, they want – and were granted – the relief contemplated by an oppression remedy action.

[152] The problem is that an oppression remedy claim is not available to them under the *ICA*.

[153] It is significant for two reasons that the *Canada Business Corporations Act* and its provincial counterparts all provide for *both* an oppression remedy *and* a compliance order similar to s. 1031 of the *ICA*, whereas the *ICA* contains only the latter remedy. First, the respective legislators clearly recognized the need for both types of remedies, thereby confirming that there is a difference between the two. This view is strengthened by the fact that s. 1031 and the comparable business corporation legislation all give to a complainant the right to apply for a compliance or restraining order "in addition to any other right that person has". Secondly, Parliament, equally clearly, has made a choice not to provide for an oppression remedy in the case of *ICA* corporations.

(d) The "Oppression Remedy" Analogy is Inapplicable

[154] As noted, counsel for the respondent class plaintiffs disavow any intent to invoke the oppression remedy as a basis for recovery. Instead, they say they are simply resorting to "[t]he foundational concepts underlying the oppression remedy" – namely, the oppression jurisprudence concentrating on the reasonable expectation of shareholders in business organizations (equated with policyholders in this case) – in order to "assist the court to find the right approach to remedy the wrongs by the appellants": respondents' factum, at para. 123. This is a distinction without a difference, in our view. The effect of accepting their submissions – and the conclusions of the trial judge in this respect – would be to introduce, through the back door, the oppression remedy that does not exist in the *ICA*, by importing it into the "any further order [the court] thinks fit" language of s. 1031, the compliance section.

[155] Whether an oppression remedy should exist in the context of *ICA* companies is a matter for Parliament to determine. At the moment, no such remedy exists in that context, and for the reasons expressed above, the purpose and object of the two types of remedies are different. In these circumstances, the analogy to oppression remedy jurisprudence is of little assistance.

[156] Even if we were to draw upon oppression remedy principles, however, they would be of little assistance to the respondents in these circumstances. The actuarial concept of "policyholder reasonable expectations" or "PRE" is not the functional equivalent of "reasonable shareholder expectations" in oppression remedy parlance.

[157] As the trial judge noted, PRE refers to the expectations imputed to policyholders as a group, based on company information such as the dividend policy, past practice, and company communications to shareholders. PRE relates to future dividends. It is an actuarial principle and is not a free-standing contractual or statutory right. The trial judge refused to grant the respondents' request for a declaration that PRE includes the receipt of expense savings from merger synergies. She was correct in this regard.

[158] In addition, the participating policyholders could have had no reasonable or realistic expectation that the PAR accounts would receive all the considerable expense savings that would flow to them over the next 25 years through the existing allocation methods without their part of the corporate operation bearing some of the price paid to

obtain those savings. Mr. Jeffrey was quite open in accepting the "no contribution/no benefit" notion and the trial judge found that concession quite reasonable.

[159] It is fantasy to think that, if the PATs had not been conceived, management would not have put in place some other mechanism to ensure that the costs of acquiring the benefits would be spread across the two corporate solitudes (participating policyholders and shareholders) if the benefits were to be as well. The evidence was that alternative steps would have been taken. In conclusion, the "reasonable expectation" principle underpinning oppression remedy jurisprudence would not help the respondents here.

(e) The Allocation Methods and Alternative Measures

[160] Raymond McFeetors, President and CEO of Great-West Life and London Life at the time of the events in question, and current chair of the board for both companies, was very clear on this point. In examination-in-chief, he said:

> Q. Now, if the par accounts were not contributing to the purchase price, what was your view about their ability to get their share of the synergies?
>
> A. *Well, it wouldn't have happened. I mean, you know, that's the fallacy of the free lunch* ... in investment parlance we talk ... about the free lunch and it's a fallacy, there is no free lunch. Without a contribution, there's no return. [Emphasis added.]

[161] Two alternatives that were considered by management, although not by the directors, were (i) that the appellants would establish a management company to supply the services to them, and (ii) that the appellants would "freeze unit costs" against the

PAR accounts. It is true that the directors did not discuss these options seriously and that no decision was taken to proceed with them. But that was because management preferred and recommended the PATs option; the directors accepted that recommendation, and the decision was made to proceed with the PATs.

[162] Contrary to the respondents' argument, the trial judge did not disbelieve Mr. McFeetor's testimony that alternative steps would have been taken if the PATs had not been pursued. In fact, she accepted the evidence, but simply concluded that the real question was whether, if a contribution to the acquisition were required by the PAR accounts, were the PATs the legal way to accomplish that goal? She stated at paras. 155-158 of her reasons:

> *The prospect of PAR benefiting from the merger synergies without them paying or contributing towards them, did not sit well with the GWL directing minds and they wanted to find a way to avert this "free lunch"* or "windfall" to PAR.
>
> As a result, the executives of GWL considered that in order to receive the expense savings, the PAR account should contribute or purchase those savings from shareholders. Put another way, PAR should contribute to the acquisition so as to benefit in the long run on the future expense savings. The PATs are best categorized as an "actuarial business decision" made in the context of the acquisition.
>
> No fault can be found in the business concept of a contribution for a benefit, as one of the plaintiffs' representatives, Mr. Jeffrey, said so well. He was candid to admit that it is necessary to make a contribution in order to receive a benefit. I agree with him.

> The question is if a contribution to the acquisition was required by PAR, were the PATs the legal way to attain this goal? [Emphasis added.]

[163] The trial judge accepted but gave short shrift to the appellants' evidence that alternative measures would have been implemented if the PATs had not been put in place because she fastened on the fact that management had no intention of changing the existing allocation methods at the time and, accordingly, that the savings would automatically flow to the PAR accounts in any event. This view was sufficient to support her conclusion that the PAR transactions did not comply with GAAP, but it cannot realistically found a reasonable expectation that things would have remained the same regardless.

[164] In our view, the trial judge misapprehended the evidence that "there was no intention to change the allocation method": she mistakenly took it to mean that "there was no intention to change the allocation method *even if the PATs had not been implemented*." These are quite different shades of meaning, and the latter nuance is not consistent with the uncontradicted evidence of the appellants that alternatives to the existing allocation methods would have been considered had the PATs not been adopted. That evidence is consistent with the "no contribution/no benefit" premise accepted by both Mr. Jeffrey and the trial judge.

[165] Clearly, management had no intention of changing the allocation methods at the time. But that was because they saw no need to do so; they thought – albeit mistakenly –

that they could accomplish their objective of sharing the price and the benefits between the two classes of stakeholders by the PATs.

(f) The "Behaviour Modification" Ethic of the *Class Proceedings Act ("CPA")*

[166] We do not accept the respondents' argument that, because these proceedings were commenced under the *CPA* and because "behaviour modification" is one of the underlying objectives of the *CPA*, s. 1031 must therefore be interpreted more expansively with a behaviour modification goal in mind. The interpretation of a statutory provision does not vary with the type of proceeding in which it is invoked.

[167] The *CPA* is procedural legislation that opens the door to classes of individuals who would otherwise be unable to sue, to do so. It is interpreted broadly with that purpose in mind, and the results that follow may have the salutary effect of modifying inappropriate corporate behaviour. However, the nature and scope of the relief granted in a class proceeding must flow from the statutory cause of action that is asserted. Here, the cause of action is the statutory right to seek an order compelling the appellants to comply with the *ICA*, its regulations, and the companies' governing documents. The relief goes no further than is permitted under s. 1031 and respondents' counsel candidly and correctly conceded in argument that the interpretation to be placed on the scope of the remedy under that provision does not change with the type of proceeding commenced.

(3) Appropriate Remedies

[168] For the reasons we have articulated above, the scope of the remedy under s. 1031, and the judicial discretion accompanying it, do not extend to the type of individual relief accorded by the trial judge. What, then, are the appropriate remedies?

[169] It follows most obviously from the foregoing that the trial judge's order setting up the litigation trusts, and the plan of distribution she put in place to give effect to them, must fall. But what of the other remedies she granted?

[170] Some preliminary observations, first.

[171] First, it bears repeating that in considering the issue of remedy, the dispute is, in effect, between shareholders and participating policyholders. Each group has rights, and management and directors have obligations to protect the rights and enhance the benefits of both groups. Any remedy that favours one will have an adverse impact on the other. The appropriate corrective disposition under s. 1031 must therefore reflect this balance.

[172] Secondly, while we have confirmed that London Life and Great-West Life have breached the provisions of the *ICA*, those breaches all flow from the trial judge's finding that the PATs failed to comply with GAAP. They were primarily of an accounting and somewhat technical nature, therefore, and it does not follow that they necessarily render the transactions unfair to the PAR accounts from an economic standpoint. Fairness, as mentioned, is a relevant factor in the debate about rectifying non-compliance.

[173] Thirdly, the following factors are of particular significance to these considerations: (i) Mr. Jeffrey's concession that the PAR accounts had to contribute in order to benefit; (ii) the trial judge's finding that no fault could be found with this business premise; (iii) the trial judge's dismissal of the respondents' claim for unjust enrichment; (iv) the trial judge's finding that there was no evidence that the PATs had had any negative impact on participating policyholder dividends; and (v) the trial judge's conclusion that the participating policyholders were neither better off nor worse off as a result of the PATs.

[174] The participating policyholders were "no better off" – for the first 25 years, at any rate – because the effect of the transactions was that the PAR accounts were to receive the equivalent of their $220 million contribution plus an investment return of 6.91 percent per annum (which the trial judge found to be reasonable). This is no "better" than what they would otherwise have been entitled to expect from the proper use of those funds. On the other hand, the participating policyholders were "no worse off" because the costs savings were virtually guaranteed; the shareholders' accounts were subject to a deferred revenue liability to make up any difference if the cost savings turned out to be less than anticipated. The PAR accounts were no worse off, as well, because we now know that the London Life acquisition turned out to be a good deal, a least in the sense of the cost-saving merger synergies it generated, and that the savings have turned out to be greater than anticipated when the PATs were implemented in 1997 – an estimated $68.2 million for the London Life PAR account over the 25-year period, according to the ERA conducted in 2002.

[175] The trial judge made a number of dispositions apart from those relating to the litigation trusts and their related mechanisms. Some of the more minor dispositions we will return to later. For now, we focus on the difficult larger question raised by the foregoing considerations: in order to rectify the non-compliance, do the PATs themselves need to be unwound, and, if so, on what terms and as of what date? The question is not an easy one to answer, as there are a number of potential alternatives to be addressed when responding to it.

(a) The Trial Judge's Solution

[176] We start with the alternative favoured by the trial judge. She ordered that the monies (plus interest and a tax gross up) be returned to the PAR accounts, the PPEAs be cancelled as of January 1, 2011, and the appellants be forbidden from making any changes to the expense allocation methods relating to the merger synergies on a going forward basis.

[177] If that order is to remain in effect, the PAR accounts will have received the benefit of the cost savings allocated to them annually during the 13 years since their inception, because of the PATs being in place. And – given the effect of the existing allocation methods – the PAR accounts will continue to receive those benefits in the future, including the $68.2 million of unpredicted savings reflected in the ERA and any additional savings. For those benefits, they will not have made, nor will they make, any contribution to the price paid to achieve the savings, and the appellants will be forbidden

from doing what they have every right to do – in the absence of the PATs – namely, to seek to change the allocation methods to affect the flow of merger synergy savings to the PAR accounts.

[178] Can it be said that such a result is fair to the shareholders, when the PAR accounts would get very significant benefits from the merger synergies without contributing anything to their acquisition, and while having no downside risk? We do not think so. The solution ignores the "no contribution/no benefit" business principle accepted by all, including the trial judge. It does not rectify the non-compliance. Rather, it provides the PAR accounts with a complete and considerable windfall.

[179] We would not give effect to the trial judge's solution for those reasons.

(b) Other Alternatives

[180] There are three other potential alternatives to consider:

> 1. that the PATs not be unwound at all, but allowed to continue and Great-West Life and London Life be forbidden from altering the allocation methods on a going forward basis in a way that would exclude the merger synergy savings from passing to the PAR accounts;
>
> 2. that the PATs be unwound as of the date of their implementation (November 27, 1997); and

3. that the PATs be unwound as of the present.

[181] There are things to be said in favour of all three alternatives, but all three raise complicating considerations as well.

(i) Leaving the PATs in Place

[182] For example, there may well be benefits to the PAR accounts if the PATs are left in place and further amendments to the allocation methods forbidden – particularly if the PAR accounts were to receive the benefit of the $27.1 million in further unanticipated additional expense savings reflected in the 2008 review conducted by Mr. Edwards and for which the evidence is that the PAR accounts would not be required to make a further contribution.

[183] In addition, whether the PAR accounts were to receive the full benefit of the $68.2 million ERA savings without having to make an additional contribution to them – and, if so, on what terms – are unsettled questions, and those questions appear to be the "ERA issue" over which the trial judge retained jurisdiction to determine.

[184] However, leaving the PATs in place does not rest comfortably with our affirmation of the trial judge's decision that the transactions breached the *ICA*, or with the need to provide rectification of that non-compliance. What's more, the respondents do not seek such a remedy. Indeed, they seek the contrary disposition; they ask that the

PATs be set aside. It is for them to choose what remedy they wish to pursue in their best interests.

[185] We therefore reject this alternative as well.

(ii) The Unwinding Options

[186] On the other hand, the unwinding options have their helpful and their complicating features, too. On the helpful side, they are more compatible with the notion of rectifying the non-compliance and with the relief sought by the respondents. They result in the monies being returned to the PAR accounts, which is consistent with the view that they ought not to have been paid out in the way they were, in the first place. And, they are consistent with the accepted "no contribution/no benefit" business principle because the appellants would be permitted to seek amendments to the allocation methods. At the same time, however, both unwinding options raise other hurdles that need to be confronted before the unwinding issue can be resolved. Some of these questions cannot be determined at this stage of the proceedings and will have to be referred back to the trial judge for further consideration.

[187] What we mean by this will emerge as we explore the different options.

(iii) Choice of Options

[188] We conclude that the best of the various alternatives is to unwind the PATs as of now. We say this for the following reasons.

[189] While unwinding the PATs from the beginning may appear, at first blush, to be the most logical result, given the decision that they failed to comply with the *ICA*, that option carries with it the problematic exercise of determining what to do with the allocation methods in place to this point in time – an improbable task at best. This problem is at the heart of why we choose not to unwind the PATs from the outset.

[190] The existence of the allocation methods during the period prior to trial was at the core of much of the trial judge's GAAP analysis. She determined that the expense savings would have flowed to the PAR accounts in any event – regardless of the PATs – given the existing allocation methods. Because of this, and because she found that there was no intention to alter the allocation methods at that time, the trial judge appears to have been of the view that, even though she was unwinding the PATs, the PAR accounts were nonetheless entitled to the merger synergy expense savings flowing to them.

[191] Although we have not interfered with the trial judge's disposition in terms of the breach, we do not see it quite the same way when it comes to the appropriate remedy to be applied. As explained earlier in the context of reasonable expectations, while we agree that the companies had no intention to change the allocation methods, or take some

other steps to divert the flow of savings, when they were under the misapprehension that the PATs were the legal way to do so, that does not mean that, absent the PATs, steps would not have been taken to divert the flow of savings in accordance with the no contribution/no benefit philosophy.

[192] We therefore approach the question of remedy from the premise that, if the PATs had not been implemented, management would have turned to alternative measures to ensure that the PAR accounts did not receive the benefits of the significant anticipated merger synergies without paying something for those benefits. However, this poses problems for the unwinding *ab initio* scenario.

[193] As long as the existing allocation methods remain in place and no other steps are taken to divert the flow of savings from the PAR accounts, the PAR accounts are entitled to receive the benefits of the merger synergy expense savings, including whatever flows from the ERA savings. On the other hand, if the premise is that the allocation methods would have been changed or some other steps taken, the nature of the changes to the allocation methods or other steps are not matters that can readily be determined retrospectively. For example, given the prevailing "no contribution/no benefit" mindset, would Great-West Life and London Life have sought to amend the allocation methods to preclude any of the anticipated savings from passing to the PAR accounts? Or just some? What would OSFI's position have been with respect to this? In view of the public nature of the London Life acquisition, would a move to change the allocation methods or to take

some other steps to divert the flow of savings have led to negotiations with the participating policyholders about those changes as a practical reality, even though the trial judge appears to have been mistaken in her view that such consultation was necessary as a matter of law?

[194] In the face of these questions, exactly what steps would have been taken and/or approved by OSFI are indeterminable determinants. They are questions that neither this Court nor the trial judge is in a position to sort out, looking backwards. Yet they would have to be resolved before the issues of the proper amount to be returned to the PAR accounts could be finalized.

[195] If the PATs are not unwound until the present, however, it is unnecessary to settle these issues looking backwards. In our view, it is less complicated to determine the amount of monies to be returned to the PAR accounts by unwinding the PATs on a going forward basis, as of the present. That said, we recognize that in choosing the option of unwinding the PATs as of now, other issues must also be addressed.

(iv) Payment for Expense Savings Benefits Received to the Present

[196] The PAR accounts have received a portion of the merger synergy expense savings over the years since the implementation of the PATs. Each year their share of the annual value of those savings has been credited to them and as a result the expenses in the PAR accounts have been reduced.

[197] What this means is that if the PATs are to be unwound as of now, the monies to be returned to the PAR accounts by the appellants must be adjusted to account for the merger expense savings received by the accounts. Put another way, the PAR accounts are not entitled get back all of their $220 million plus interest, but rather a discounted version of that amount to reflect the "purchase price" for the benefits already received prior to the date of unwinding. These benefits will include the additional expense savings identified by the ERA report that have flowed to the PAR accounts to date. Whether they also include the portion of the post-2002 $27.1 million associated with Mr. Edward's 2008 review that would be attributable to the PAR accounts up to the present is something that we will address below.

(v) The $68.2 Million ERA Expense Savings and the Additional $27.1 Million Expense Savings

[198] In accordance with the PATs, a review of the merger synergy savings was conducted looking back over the first five years (1997-2002). The ERA report revealed that the savings for the London Life PAR account amounted to $68.2 million more than originally estimated. This amount represented the present value, as at December 31, 1997, of those additional savings over the 25-year life of the PATs.

[199] The debate over "the ERA issue" – i.e., whether, and if so, to what extent, the PAR accounts were required to contribute in exchange for the additional benefits – was not litigated at trial. During her opening statement, counsel for the appellants advised the Court that the additional savings had not been dealt with by the board of directors, given

this litigation. The trial judge retained jurisdiction to hear submissions at a later date "with respect to how best to deal with this ERA."

[200] In view of the remedy we have selected, we do not think it matters that the directors had not dealt with the additional ERA savings received. The remedy we impose calls for the PAR accounts to receive:

a) Their original contributions of $220 million;

Plus:

b) Forgone investment income to the date of trial in the amount of $172.7 million as calculated by the trial judge;

Plus:

c) A further amount of foregone investment income to the present, calculated on the same basis;

Less:

d) An amount representing the merger expense savings received by the PAR accounts to date (including, in the case of the London Life PAR account, the additional expense savings to date flowing from the ERA report, but not including the $27.1 million associated with the 2008 review);

Plus:

e) An amount that represents a 6.91 percent return in relation to the merger expense savings received to date.

[201] The 6.91 percent factor referred to in (e) is reflective of the fact that the PAR accounts were not required to pay 100 cents on the dollar for the benefits received.

[202] As noted, on the foregoing scenario it does not matter that the directors had not "dealt with" the additional ERA savings received. Based on the foregoing formula, the amount returned to the PAR accounts is to be reduced by the *total* merger expense savings received in the PAR accounts and to which the PAR accounts would be called upon to contribute, in order to give effect to the "no contribution/no benefit" principle and to ensure that the PATs are effectively unwound. Had the directors gone ahead and taken additional amounts from the PAR accounts to off-set the $68.2 million in additional expense savings, the formula set out above would remain the same but the ultimate numbers would be different because the amount paid out of the PAR accounts would have been higher than the original $220 million and therefore the amount returned to them would have had to be increased by an equivalent amount. The amount returned to the PAR accounts would still be reduced by the total expense savings (less the 6.91 percent factor referred to above). Therefore the net result would be the same either way.

[203] We have excluded the $27.1 million associated with Mr. Edward's 2008 review from the foregoing calculations. We do this because under the PATs the PAR accounts were to be entitled to receive the benefit of further additional expense savings achieved after the first five years without making any further contribution (as well as any further additional savings after the 25-year life span of the PATs). Since the PAR accounts were

not to be called upon to contribute to those further additional expense savings in any event, we do not think it conflicts with the "no contribution/no benefit" rationale for the remedy we have put in place.

[204] The numbers generated by the foregoing formula are not something that this Court can readily determine. If the parties are unable to agree, we refer to the trial judge for determination, after further submissions, the amounts arising from the application of the foregoing formula. We have concluded that the PATs should be unwound as of the present. We leave it to the trial judge to select the most appropriate date to give effect to that conclusion (the "effective date").

(vi) The Tax Gross Up

[205] The trial judge included in the amount to be returned to the PAR accounts – and in her scheme of remedies, to be paid out to the participating policyholders – a tax gross up of $63 million. The inclusion of such an amount is not appropriate given our disposition, however.

[206] A tax gross may have been a relevant consideration in view of the trial judge's decision to establish the litigation trusts and to order what was, in effect, an award of individual damages to the class members in the form of a court-imposed dividend. No monies are to be paid out to individual class members as a result of our disposition, though. As noted above, whatever monies are to be returned to the PAR accounts are to

be dealt with in those accounts in accordance with the dividend policies of Great-West Life and London Life in the ordinary course of business. To the extent that some or all of those monies may be paid out as dividends, they should be treated for tax purposes as they would normally be treated for tax purposes, both from the companies' and from the participating policyholders' perspectives.

[207] No award of damages is made here. A tax gross up is not called for, in our view. That portion of the trial judge's order must also be set aside.

(vii) Other Relief

[208] The trial judge granted certain other relief that must be reconsidered as well.

[209] First, she included Lifeco – London Life's parent company – in the "defendants" against whom her orders were made. This relief cannot stand. Lifeco is a party only to the McKittrick action, and then only with respect to the claim for unjust enrichment. The trial judge dismissed the claim for unjust enrichment; therefore there is no basis for the granting of other relief against Lifeco.

[210] Secondly, we would not require the trial judge's reasons to be circulated to all members of the two classes in their entirety (or the reasons of this Court). We think it sufficient that a summary of the salient points be distributed to class members as part of the notification of the results of the proceedings and that such summary advise class members of the availability of these reasons on this Court's website. Finally, it follows

from the foregoing reasons that the injunctive relief granted by the trial judge restraining the appellants from charging, debiting or expensing any amount in respect of the merger synergies to the PAR accounts must fall.

XI. DISPOSITION

[211] For the foregoing reasons, the appeal is allowed in part and we order as follows:

a) That the trial judge's creation of the litigation trusts, and the mechanism she put in place to give effect to them, be set aside; paras. 30-32 of the judgment are therefore struck.

b) That the injunctive relief at para. 26 prohibiting the defendants (subject to para. 27 of the judgment) from charging, debiting or expensing to the PAR accounts any amount in respect of merger synergies, to the extent it relates to the period following the effective date, be set aside.

c) That para. 27 remain in effect, except that "January 1, 2011" is replaced by "the effective date"; and that as of the effective date, the defendants shall:

- Cancel the PPEAs in the PAR accounts; and,

- Cancel the annual amortization charges in the PAR accounts in respect of the PPEAs.

d) That the monetary relief provided for in paras. 28 and 29 be varied to provide for the payment into the PAR accounts of the sum of $220 million, plus foregone investment income to the effective date, *less* an amount agreed to by the parties or to be determined by the trial judge in accordance with the formula set out in para. 200 above.

e) That the monies returned to the PAR accounts be dealt with in the ordinary course in accordance with the dividend policies of Great-West Life and London Life.

f) That the monies returned not include the tax gross up of $63 million ordered by the trial judge.

g) That the words "or any other amounts except those arising in the ordinary course of business" in para. 33 of the judgment be deleted.

h) That Lifeco be deleted from the reference to "defendants" in the relief granted.

i) That the trial judge's finding that there was a breach of s. 166(2) of the *ICA* be set aside.

j) That para. 40 of the judgment requiring that the reasons for judgment be provided to the class members be deleted and replaced with an order directing that a summary of the trial judge's reasons and these reasons be provided to the class members by the defendants, and that such summary shall advise class members of the availability of these reasons on this Court's website.

k) That para. 41 of the judgment be deleted.

[212] If the parties are unable to agree on costs, they may file brief written submissions within 30 days of the release of these reasons.

RELEASED: "DOC" "NOV 03 2011"

"D. O'Connor A.C.J.O."
"R.A. Blair J.A."
"H.S. LaForme J.A."

Appendix "A"

Insurance Companies Act, S.C. 1991, c. 47

(Provisions as in force at the time in question, except for s. 1031 which is cited in its current form)

15.(1) A company or society has the capacity of a natural person and, subject to this Act, the rights, powers and privileges of a natural person.

15.(2) Neither a company nor a society shall carry on any business or exercise any power that it is restricted by this Act from carrying on or exercising, or exercise any of its powers in a manner contrary to this Act.

166. (1) Every director and officer of a company in exercising any of the powers of a director or an officer and discharging any of the duties of a director or an officer shall

(*a*) act honestly and in good faith with a view to the best interests of the company; and

(*b*) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

166. (2) Every director, officer and employee of a company shall comply with this Act, the regulations, the company's incorporating instrument and the by-laws of the company.

220. A director, an officer or an employee of a company is not liable under subsection 166(1) or (2), or section 216 or 219 if the director, officer or employee relies in good faith on

(*a*) financial statements of the company represented to the director, officer or employee by an officer of the company or in a written report of the auditor of the company fairly to reflect the financial condition of the company; or

(*b*) a report of an accountant, actuary, lawyer, notary or other professional person whose profession lends credibility to a statement made by the professional person.

331.(4) The financial statements referred to in subsection (1), paragraph (3)(*b*) and subsection 333(1) shall, except as otherwise specified by the Superintendent, be prepared in accordance with generally accepted accounting principles, the primary source of which is the Handbook of the Canadian Institute of Chartered Accountants. A reference in any

provision of this Act to the accounting principles referred to in this subsection shall be construed as a reference to those generally accepted accounting principles with any specifications so made.

456. A company shall maintain accounts, in the form and manner determined by the Superintendent, in respect of participating policies, separately from those maintained in respect of other policies.

457. There shall be credited to, or debited from, a participating account maintained pursuant to section 456 that portion of the investment income or losses of the company for a financial year, including accrued capital gains or losses, whether or not realized, that is determined in accordance with a method that is

(*a*) in the written opinion of the actuary of the company, fair and equitable to the participating policyholders;

(*b*) approved by resolution of the directors, after considering the written opinion of the actuary of the company; and

(*c*) not disallowed by the Superintendent, on the ground that it is not fair and equitable to the participating policyholders, within sixty days after receiving the resolution.

458. There shall be debited from a participating account maintained pursuant to section 456 that portion of the expenses, including taxes, of the company for a financial year that is determined in accordance with a method that is

(*a*) in the written opinion of the actuary of the company, fair and equitable to the participating policyholders;
(*b*) approved by resolution of the directors, after considering the written opinion of the actuary of the company; and
(*c*) not disallowed by the Superintendent, on the ground that it is not fair and equitable to the participating policyholders, within sixty days after receiving the resolution.

461. A company that has share capital may, from a participating account maintained pursuant to section 456, make a payment to its shareholders, or transfer an amount to an account (other than a participating shareholder account as defined in section 83.01) from which a payment can be made to its shareholders, if

…

(*b*) the company pays dividends or bonuses to its participating policyholders out of the profits of the participating account for that financial year in accordance with its dividend or bonus policy established pursuant to paragraph 165(2)(*e*); and

462. The only transfers that may be made from a participating account maintained pursuant to section 456 are:

(*a*) transfers made pursuant to sections 461 and 463;
(*b*) transfers made in respect of transfers or reinsurance of all or any portion of the participating policies in respect of which the participating account is maintained; and
(*c*) transfers, with the approval of the Superintendent, of amounts that can reasonably be attributed to sources not related to the participating policies in respect of which the account is maintained.

464. (1) Subject to this section, the directors of a company that issues participating policies may declare, and the company may pay or otherwise satisfy, a dividend, bonus or other benefit on those policies in accordance with its dividend or bonus policy established pursuant to paragraph 165(2)(*e*).

1031. If a company, a society, a foreign company, a provincial company or an insurance holding company or any director, officer, employee or agent of one does not comply with any provision of this Act or the regulations other than a consumer provision, or, in the case of a company, a society or an insurance holding company, of the incorporating instrument or any by-law of the company, society or insurance holding company, the Superintendent, any complainant or any creditor of the company, society or insurance holding company may, in addition to any other right that person has, apply to a court for an order directing the company, society, foreign company, provincial company, insurance holding company, director, officer, employee or agent to comply with — or restraining the company, society, foreign company, provincial company, insurance holding company, director, officer, employee or agent from acting in breach of — the provision and, on the application, the court may so order and make any further order it thinks fit.