CITATION: Jeffery and Rudd v. London Life Insurance et al, 2010 ONSC 4938
COURT FILE NO.: 46300CP
DATE: 2010/10/01

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
JAMES JEFFERY and D'ALTON S. RUDD	Paul Bates, David B. Williams, Jonathan J. Foreman, Jeremy A. Forrest, Robert L. Gain for the Plaintiffs
Plaintiffs	
- and -	
LONDON LIFE INSURANCE COMPANY and THE GREAT-WEST LIFE ASSURANCE COMPANY	Sheila Block, Wendy Matheson, Crawford Smith, Sandra Perri, Justin Necpal for the Defendant(s)/Respondent(s)
Defendants	

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

Court File No. 47959CP

ONTARIO
SUPERIOR COURT OF JUSTICE

A N D B E T W E E N:	
JOHN DOUGLAS McKITTRICK	Paul Bates, David B. Williams, Jonathan J. Foreman, Jeremy A. Forrest, Robert L. Gain for the Plaintiffs
Plaintiff	
- and -	
THE GREAT-WEST LIFE ASSURANCE COMPANY and GREAT-WEST LIFECO INC.	Sheila Block, Wendy Matheson, Crawford Smith, Sandra Perri, Justin Necpal for the Defendant(s)/Respondent(s)
Defendants	Heard: September 28th, 2009 to January 15th, 2010

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

Reasons for Judgment

<u>Morissette J.</u>

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Overview:

[1] This dispute arises from the acquisition of London Life in 1997 by Great-West Lifeco and The Great-West Life Assurance Company. At issue in these proceedings are transactions involving the PAR accounts of both London Life and Great-West Life (referred to as the "PAR account transactions") that occurred during the course of the acquisition.

[2] The issue to be determined is whether the PAR account transactions ("PATs") were compliant with the relevant statutory regime.

Issues to be determined at trial:

[3] This is a common issues trial under s. 11(1)(a) of the *Class Proceedings Act* ("*CPA*"). The common issues have been stated by Madam Justice Leitch (the certification justice) as follows:

> 1) Did the PATs constitute a breach of sections 331(4), 456, 458, 462, 492 or 521 of the *Insurance Companies Act*, S.C. 1991, c. 47 ("*ICA*")?
>
> 2) Did the Directors and Officers of the defendants breach sections 166(1), 166(2), 211 or 212 of the *ICA*?
>
> 3) Were The Great-West Life Assurance Company and Great-West Lifeco Inc. unjustly enriched by the PATs?
>
> 4) If the answer to any of (a) to (c) is yes, what remedies, if any, are just and appropriate under sections 215 and 1031 of the *ICA*, or otherwise at law?

[4] This case involves mainly a statutory complaint under the *ICA*, as well as a claim for unjust enrichment.

[5] The following is a glossary of terms to assist the reader with respect to the terminology and acronyms referred to in these reasons.

GLOSSARY OF TERMS:

TERM	ACRONYMS	DESCRIPTION
Appointed Actuary	A.A.	Pursuant to the *ICA*, ss. 49(1), 162(2)(i), an actuary appointed by a life insurance company as the actuary of the company; Pursuant to the *ICA*, ss. 457 and 458, the A.A. must opine on the Expense and Income Allocation Methods of the life insurance company.
Experience Rating Adjustment	ERA	A mechanism incorporated into the PAR account transactions to allow for an assessment of synergies after 5 years. An ERA was completed in 2004.
Generally Accepted Accounting Principles	GAAP	The accepted standards of accounting practice.
Independent Actuary	I.A.	Pursuant to OSFI Guideline E-14, an actuary engaged by a life insurance company that is seeking the approval of OSFI for certain transactions.
Great-West Life	GWL	Life insurance company
Lifeco	Lifeco	Parent company of GWL
London Life	LL	Life insurance company
London Life Group	LIG	Parent company of LL
Minimum Continuing Capital and Surplus Requirements	MCCSR	A regulatory metric which is applied in respect of an insurance company's accounts in order to regulate the ratio of capital to surplus in the accounts.
Mortality, Interest, Lapse, Expenses, Taxes	MILET	Actuarial assumptions which form the basis of the calculation of an insurance premium.
Office of the Superintendant of Financial Institutions	OSFI	The federal regulator of insurance companies.
PAR account	PAR	A PAR account is a separate account from the non-participating account as set out in s. 456 of the *ICA*. The surplus in the PAR account is the earnings that accumulate to ensure payment of benefits to participating policyholders.
PAR Account Transactions	PATs	The transactions in the participating accounts of LL and GWL which were made in 1997 in connection with the acquisition of LL and its parent LIG by GWL and Lifeco.
Policyholder Reasonable Expectations	PRE	Actuarial concept that refers to the expectations imputed to policyholders as a group, based on company information such as dividend policy, past practices and company communications to policyholders.
Prepaid Expense Asset	PPEA	The accounting entries recorded in the participating accounts of LL and GWL in November 1997 that corresponded to the $180 million and $40 million of cash removed from those PAR accounts.

The Parties:

The Plaintiffs:

[6] The plaintiff classes consist of current and former holders of participating life insurance policies from Great-West Life and London Life, from November 1997 to the date of judgment.

[7] The plaintiff, Mr. Rudd, is a participating policyholder of and an actuary formerly employed by London Life until 1982.

[8] The plaintiff, Mr. Jeffery, is also a participating policyholder of and an actuary formerly employed by London Life until 1987.

[9] Mr. McKittrick is a participating policyholder of Great-West Life. He never worked for either of the defendants.

The defendants:

[10] Great-West Life Assurance Company ("GWL") is a federal insurance company that carries on business as a life and health insurer in Canada and elsewhere, headquartered in Winnipeg, Manitoba. London Life ("LL") is also a federal insurance company that carries on business as a life and health insurer in Canada and elsewhere, headquartered in London, Ontario. Great-West Life Lifeco Inc. ("Lifeco") is the parent company of GWL. London Insurance Group ("LIG"), which is not a defendant, is the parent company of LL.

[11] GWL and LL are federal life insurance companies incorporated under and governed by the *ICA*. In contrast, the parent companies of GWL and LL, Lifeco and LIG, are not *ICA* companies but rather are business corporations incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (*CBCA*).

[12] Although not defendants, it is noteworthy that Power Corporation is and was the majority owner of Power Financial Corporation, which in turn has a majority interest in Lifeco.

[13] In 1997, after the acquisition, Power Financial Corporation held 79.6% in Lifeco, which in turn held 99.6% in GWL, which in turn held 100% in LIG, which in turn held 98.2% in LL.

Participating policies and the *ICA:*

[14] The *ICA* provides for the incorporation of *ICA* companies, establishment of their powers, corporate governance and many other matters. *ICA* companies, unlike ordinary companies, are governed under a specialized regulatory regime.

[15] The *ICA* contains provisions relevant to matters at issue in this case, including provisions regarding the constitution and duties of boards of directors of *ICA* companies, participating policies and the PAR account, the capital requirements of insurance companies and provisions regarding investments, accounting, expenses and dividends.

[16] Life insurance policies are either participating ("PAR") or non-participating ("non-PAR"). A participating policyholder is a holder of a participating policy. As set out in s. 2(1) of the *ICA*, a participating policy is "a policy issued by a company that entitles its holder to participate in the profits of the company." Section 461(b) of the *ICA* further provides that dividends are paid "out of the profits of the participating account" in accordance with the dividend policy established pursuant to s. 165(2) (e) of the *ICA*. The source of participating policyholder dividends is the earnings in the PAR account.

[17] PAR policyholders pay significantly higher premiums, typically at least two to three times that of non-PAR policyholders. The participating policy premium is calculated based on actuarial assumptions regarding certain profitability factors: mortality, interest, lapses, expenses and taxes (together referred to as "MILET"). Canadian life insurance companies maintain very conservative MILET pricing

assumptions in order to maximize policyholders' opportunity to benefit from the company's operations.

[18] Life insurance companies that issue participating policies are required pursuant to s. 456 of the *ICA* to maintain accounts for the participating policies separately from the accounts maintained in respect of non-participating policies. These accounts are maintained pursuant to statutorily mandated "allocation methods" for income and expenses. Income and expenses of the company are divided between the PAR accounts and the shareholder accounts, pursuant to the allocation methods, in a manner that ensures the fair and equitable treatment of PAR policyholders.

[19] The bookkeeping entries in the PAR account include entries for the assets and liabilities, such as credits reflecting the premiums from participating policies and the investment income earned on the assets accounted for in the PAR account; and debits such as the death benefits paid to beneficiaries, expenses of the business activity relating to participating policies, such as salaries, rents and the purchase of supplies allocated annually in accordance with the expense allocation method in place pursuant to s. 458 of the ICA and of course the dividends paid to participating policyholders in accordance with the dividend policy in place according to s. 64(1) of the *ICA*.

[20] The difference between the assets accounted for in the PAR account, and the PAR account liabilities, is the participating surplus. Participating surplus is the earning that accumulates to ensure the payment of benefits over the continuing life of the company.

[21] The surplus in a PAR account reflects the experience of both current and previous participating policyholders of the company. For instance, the surplus in the PAR account of LL reflects more than a century of participating life insurance business.

[22] The capital in the PAR account can only be invested according to the *ICA* and for the benefit of PAR policyholders. As conceded in the defendants' opening and closing argument, the PATs were not investments, nor were they permitted either by the investment policies or by s. 492 of the *ICA*.

[23] The participating policies are, in essence, a contract of life insurance and an investment contract. Prior to the death of an insured, the owner of the policy may terminate the insurance contract and receive its "cash surrender value," which is fixed in advance. The owner is also entitled, like a shareholder, to receive any dividends declared by the directors. This is the origin of the term "participating."

Participating policyholders' rights under the *ICA*:

[24] Section 456 states that insurance companies must maintain separate accounts for their shareholders and participating policyholders, resulting in the creation of a "participating account" and a "non-participating" or "shareholder account."

[25] Sections 457 and 458 state that income and expenses of the company must be allocated between these accounts pursuant to the statutorily mandated "Allocation Methods" and other protections (set out in ss. 459 and 460).

[26] Section 464 provides for the payment of an annual dividend to participating policyholders in the form of cash, bonus additions to coverage or credits against premiums. This section requires the dividend to be paid in accordance with the company's "dividend policy," which is established pursuant to s. 165(2)(e).

[27] Section 492 requires the company to establish prudent investment and lending policies and to adhere to them in the management of the participating account investment and loan portfolios.

[28] Section 462 prohibits all other "transfers" of monies from the participating account except in specifically delineated circumstances (none of which are applicable to this case).

Overview of the PAR account transactions (PATs):

[29] In brief, the impugned transactions involved a contribution by the PAR accounts of LL and GWL to the financing of the acquisition in exchange for a "prepaid expense

asset" ("PPEA"). The amount of the contribution was $180 million from the LL PAR account and $40 million from the GWL PAR account.

[30] As a result, $220 million was transferred from the respective PAR accounts to the respective shareholder accounts. LL's shareholder account loaned GWL the $180 million in order for GWL to acquire LL (i.e. a vendor takeback mortgage). That shareholder loan was repaid with interest by GWL to LL's shareholder account within a few months of the transaction. The $180 million was not repaid to the PAR account. The total of $220 million represented approximately 7.5% of the total financing of the acquisition price of $2.9 billion.

[31] In general, the structure of the PATs was that a cash transfer from the respective PAR accounts of each defendant was exchanged for a PPEA of an equal amount. The PPEA represented the expense savings ("merger synergies") estimated by the appointed actuary of GWL, namely Mr. David Morrison. In each of the shareholders' accounts, the cash was received and offset by a deferred revenue liability of an equal amount. The PPEAs were amortized annually, and the amortization was an expense of the PAR accounts. An Experience Rating Adjustment ("ERA") mechanism was established to adjust for any material deviations (in excess of +/- 10%) between the estimated and actual expense savings, based on five years of actual experience. Finally, the PATs incorporated a discount rate of 6.91% to represent the present day value in 1997 of the estimated expense savings.

Chronology of the acquisition:

[32] Attached as Schedule "A" to this decision is a list of the names of the individuals who will be referred to herein, describing their role and for whom they worked and if and by whom they were called as a witness.

[33] There is essentially very little dispute as to the chronology of the acquisition. These are this Court's findings of fact as to the chronology of the acquisition.

- On June 27th, 1997, the Royal Bank of Canada announces that it will make an offer to purchase all of the outstanding shares of LIG;

- Late June 1997, executive team members at GWL (William Lovatt (CFO), Raymond McFeetors (CEO), and David Morrison (Appointed Actuary)) and others begin formulating a plan for a potential competing bid.

- Early July, GWL retains Bain & Co. to assist in developing a model of acquisition.

- July 4th, 1997, a meeting takes place at Power Financial offices in Montreal to discuss the acquisition, including the proposed role of the PAR accounts.

- July 5th, 1997, Mr. McFeetors and Mr. Morrison analyse the allocation of synergies between shareholders and policyholders of GWL and LL and consider scenarios for the participation by policyholders in the transaction.

- July 10th, 1997, a draft financing plan document is generated, which describes $250,000,000.00 available cash/capital in the PAR accounts.

- July 11th, 1997, another meeting takes place at Power Financial offices in Montreal to discuss the acquisition, including the proposed role of the PAR accounts.

- July 14th, 1997, another meeting takes place at Power Financial offices in Montreal during which someone records a note that "PAR directors do not have a special role to play."

- July 16th, 1997, Bain delivers a PowerPoint presentation to GWL/Lifeco on its analysis of synergies.

- July 18th, 1997, RBC offers to purchase all outstanding common shares of LIG at $27.50/share. LIG distributes a Director's Circular that, in part, describes a support agreement between RBC and LIG and contains the director's unanimous recommendations that shareholders accept the RBC offer.

- July 24th, 1997, Mr. Morrison (A.A.), requests an opinion from Tillinghast, an actuarial firm, as to whether his proposed allocation of the financing costs of an acquisition/merger transaction to the PAR accounts is "fair and equitable" to participating policyholders.

- July 30th, 1997, Tillinghast provides its final report to Mr. Morrison, who, in turn, drafts a memorandum to the GWL board discussing the then PATs.

- July 31st, 1997, a meeting of the Canadian Executive Committee of the GWL board and the Executive Committee of the Lifeco board takes place to discuss the acquisition including the PATs. Management authorized to move forward with a potential bid.

- August 5th, 1997, Mr. McFeetors (CEO of GWL) and Orest Dackow (Director of Lifeco) meet with John Palmer of the Office of the Superintendent of Financial Institutions (OSFI) to advise it of the proposed acquisition.

- August 8th, 1997, Mr. Morrison writes to OSFI with some details of the proposed PATs, including a copy of the Tillinghast opinion.

- August 9th, 1997, GWL/Lifeco and LIG enter into a confidentiality agreement under which GWL/Lifeco may conduct due diligence for six days.

- August 11th, 1997, the LIG board meets to discuss the pending offer from GWL/Lifeco.

- August 11th to 17th, 1997, GWL/Lifeco conducts their due diligence.

- August 19th, 1997, GWL/Lifeco offer to purchase all outstanding common shares of LIG at $33.50/share is announced.

- August 21st, 1997, RBC announces it will not increase its offer to acquire the outstanding common shares of LIG.

- On August 22nd, 1997, OSFI advises GWL/Lifeco that it wishes to have an Independent Actuary (I.A.) appointed to review the PATs. Mr. Morrison faxes Stuart Wason of Mercer the same materials sent to OSFI on August 8th.

- August 26th, 1997, Mr. Wason of Mercer sends a draft mandate to GWL and advises that it is available to act as I.A. LIG distributes a Notice of Change to Director's Circular that withdraws the board's recommendation of the RBC offer and advocates support for agreements with GWL/Lifeco. Nesbitt Burns prepares for Mr. McFeetors models of the acquisition under different scenarios for GWL. GWL/Lifeco increases their offer to $34.00/share for a total of $2.9 billion.

- August 27th, 1997, Mr. Wason writes to Ken Stewart of LL requesting access to information needed to complete the I.A. Report.

- September 8th, 1997, the Boards of Lifeco and GWL meet and approve the making of the Offer to Purchase.

- September 11th, 1997, GWL/Lifeco makes a formal Offer to Purchase the outstanding common shares of LIG. Dr. Brender, an actuary at Mercer, sends a first draft of the I.A. report to Mr. Morrison, which expresses concerns about the legality of the transaction under s. 458 of the *ICA*.

- September 12th, 1997, Mr. Wason of Mercer travels to Winnipeg to meet with Mr. Morrison to discuss the PATs.

- September 15th, 1997, Allan Edwards, the A.A. of LL, discusses with Mr. Morrison the various aspects of the proposed PAR account contributions. Mr. Edwards is not given the Tillinghast opinion. Mr. Edwards also discusses the proposed PAR account contributions with Mr. Wason and Dr. Brender.

- September 17th, 1997, Dr. Brender sends a second draft of the I.A. report to Mr. Morrison and Ms. Heather Friesen of OSFI. The previously expressed concerns about the impact of s. 458 are absent from the draft.

- September 22nd, 1997, Dr. Brender faxes a then-final draft of the I.A. report to Mr. Morrison, with a signed copy to follow the next day. Mr. Morrison writes to Mr. McFeetors expressing his confidence in the Mercer report. Ms. Wagar (in-house legal counsel of GWL) writes to OSFI requesting regulatory approvals in connection with the acquisition.

- September 23rd, 1997, Dr. Brender sends a signed copy of the then-final Mercer report to Mr. Morrison and Ms. Friesen (OSFI).

- October 1st, 1997, Mr. Edwards and Mr. Morrison discuss elements of the proposed PAR account contribution including GWL's intention to create "an asset called prepaid expense asset."

- October 2nd, 1997, Mr. Edwards sends a memo to Frederic Tomczyk, President and CEO of LL that discusses the GWL plan for financing the acquisition of LIG. Paul Brisson, Senior Vice President of LL, emails Mr. Edwards discussing appropriate bond rates of return. Mr. Edwards notes several concerns he has with the proposed contribution including the amount of anticipated savings, the rate of return and amortization period.

- October 7th, 1997, Dr. Brender faxes a draft addendum to the Mercer report, which was included at OSFI's request, to Mr. Morrison and Mr. Jean-Guy Lapointe, actuary with OSFI.

- October 8th, 1997, Dr. Brender faxes another revision of the Mercer report to Mr. Morrison.

- October 9th, 1997, Ms. Wagar faxes to Ms. Burrows of OSFI charts showing the structure of the acquisition including the PATs.

- October 10th, 1997, Dr. Brender faxes further revisions of the Mercer report to Mr. Morrison and Mr. Lapointe.

- October 14th, 1997, Ms. Wagar faxes Ms. Burrows charts and other material showing the structure of the acquisition including the PATs.

- October 14th and 15th, 1997, Mr. Morrison advises Mercer that Len Anderson (GWL controller) has spoken with someone "unknown" at Deloitte & Touche regarding the proposed contribution by the PAR accounts and that Deloitte is "agreeable to GWL's intention to create the prepaid expense asset."

- October 16th, 1997, Mr. Lapointe sends a memo to Ms. Burrows and others setting out Mr. Lapointe's review of the Mercer report.

- October 17th, 1997, Dr. Brender faxes another revision of the Mercer report to Mr. Lapointe.

- October 24th, Dr. Brender faxes a then-final Mercer report to Mr. Morrison.

- October 27th, 1997, Mercer completes its I.A. report.

- October 28th, 1997, the final Mercer report is circulated.

- November 4th, 1997, statutory approval is obtained from OSFI.

- November 12th, 1997, Mr. Edwards notes his concerns about the Mercer report. He asks to see the Tillinghast opinion. A Globe and Mail article discusses the LL PAR account's role in the acquisition.

- November 13th, 1997, the acquisition closes. The Board of LL meets and is reconstituted to mirror the Board of GWL – Mr. McFeetors becomes President and CEO of LL. Both companies continue under their respective names.

- November 14th, 1997, Mr. Morrison sends Mr. Edwards copies of the material that was provided to OSFI in August 1997, including the Tillinghast report and copies of the experience rating notes.

- November 15th, 1997, Mr. Edwards faxes Mr. Morrison and expresses concerns about the conclusions in the Tillinghast report with respect to the test for equitable treatment of PAR policyholders.[1]

- November 21st, 1997, Mr. Edwards faxes Mr. Morrison a revised copy of Mr. Edward's draft memorandum to the LL Board. Mr. Edwards comments about the PowerPoint presentation to the boards. Mr. Edwards is concerned about the use of the term "transfer."

- November 25th, 1997, Mr. Edwards comments with respect to the Experience Rating Adjustment mechanism (ERA), which is a mechanism incorporated into the PATs to allow for an assessment of synergies after five years.

- November 26th, 1997, the executive committee meetings followed by the board meetings at which the PAR account transactions are authorized, following a joint presentation made by Mr. Morrison and Mr. Edwards.

- November 27th, 1997, implementation of the PATs. LL moves $180 million from its PAR account to its shareholder account and GWL moves $40 million from its PAR account to its shareholder account. Prepaid expense assets are recorded in the PAR accounts and deferred revenue liabilities are recorded in the shareholder accounts of both companies. LL shareholders account loans $180 million to GWL shareholder account.

[1] The fax is undated but the parties have agreed the date is November 15th, 1997.

- December 15th, 1997, Bruce Jack of Deloitte & Touche ("Deloitte") (auditors of GWL) writes to Douglas McPhie of Ernst & Young ("E & Y") (auditors of LL) confirming that Deloitte will include the consolidated financial statements of LIG in the consolidated financial statement for GWL for the year ending December 31st, 1997 and that Deloitte will rely on E & Y's opinion in respect of the LIG consolidated financial statements when Deloitte forms its opinion of the GWL consolidated financial statements.

- December 16th, 1997, OSFI writes to Mr. McPhie of E & Y, advising that it is not aware of any issue that should be brought to E & Y's attention prior to E & Y issuing an opinion on LL's financial statements.

- January 8th, 1998, Mr. McPhie writes to Mr. Jack of Deloitte advising that E & Y has no objection to Deloitte's reliance on the consolidated financial statement of LIG prepared by E & Y in Deloitte's preparation of its opinion in respect of the consolidated financial statements of GWL. The letter also states that E & Y will rely on Deloittte's work in respect of the LL PAR contribution when E & Y forms its opinion with respect to the consolidated financial statements of LIG.

- January 19th, 1998, Mr. Jack writes to E & Y advising that Deloitte has no objection to E & Y relying on Deloitte's work in E & Y's preparation of its opinion in respect of LIG's consolidated financial statements.

- January 22nd, 1998, E & Y delivers its unqualified opinion on LIG and LL's consolidated financial statements of 1997.

- January 28th, 1998, Deloitte delivers its unqualified opinion on GWL and Lifeco's consolidated financial statement of 1997. The audit committees of LL and GWL, including auditors' reports re: 1997 financial statements and presentation of E & Y and Deloitte referencing the PATs.

- January 30th, 1998, GWL's shareholder account repays the loan to LL's shareholder account ($180 million plus interest).[2]

- April 20th, 1998, Annual General Meeting of LL; Mr. Rudd and Mr. McFeetors publicly discuss the LL PATs.

[2] That repayment to the LL shareholders' account does not repay the LL PAR account.

- March 9th, 2004, ERA report is completed.
- April 2nd 2004, Tillinghast opines on the ERA.
- December 17th, 2004, Mercer opines on the ERA.
- November 17th, 2006, the results of the ERA are presented to the GWL and LL Boards.
- This action was commenced on January 25th, 2005 and certified as a class action on April 8th, 2008.

Class members' complaints:

[34] PAR policyholders became aware of the offer to purchase one day before closing, when on November 12th, 1997, a Globe & Mail article stated that GWL was transferring part of the purchase price "to the policyholders of LL by reducing their dividend pool… [In effect] charging part of the acquisition directly to the policyholders of LL." The article also mentioned that an Independent Actuary Report had been prepared by Mercer at the request of the federal regulator, the Office of the Superintendent of Financial Institutions (OSFI), but that this report would not be made available to PAR policyholders.

[35] In response to the article, LL released an information memorandum to its sales force claiming that PAR policyholders were making "an investment in future savings." Mr. Edwards (the A.A. of LL) was quoted in the article as saying that "it is not expected that the investment by the PAR fund will in any way reduce the dividend scale."

[36] LL's sale representatives were authorized to share this information with any policyholder who made inquiries of them.

[37] In early 1998, Mr. Rudd reviewed the 1997 LL Annual Report. He was concerned and had a number of questions about the fact that the PAR account had provided acquisition financing.

[38] On April 20th, 1998, Mr. Rudd attended the LL Annual and Special Meeting of Policyholders and Shareholders and spoke to Mr. Raymond McFeetors, CEO of LL and GWL, and James Burns, Chairman of the Board of GWL and LL and Deputy Chairman of Power Corporation. Mr. Rudd maintained that the funding provided to GWL by LL's PAR account was improper and illegal. Mr. McFeetors disagreed with Mr. Rudd's position and stated that the transaction was proper because it had been reviewed by an independent actuary, who Mr. Rudd later learned was Mercer.

[39] Not satisfied with that answer, Mr. Rudd corresponded with OSFI, which advised him that it would not take any action. Still unsatisfied, Mr. Rudd began a correspondence exchange with Mr. Edwards and Mr. Morrison, which was, from his standpoint, to no avail.

[40] In or about late 1998 or early 1999, Mr. Rudd discussed his concerns with Mr. Jeffery, who decided to independently review Mr. Rudd's concerns. Mr. Jeffery reviewed the LL 1997 Annual Report and other information provided by Mr. Rudd.

[41] In March 1999, Mr. Jeffery met with Mr. Edwards to discuss the LL PATs to try to understand them and to suggest ways in which the company could better respect and protect the interests of the PAR policyholders.

[42] On May 7th, 1999, Mr. Jeffery wrote to Mr. McFeetors to outline his concerns and thoughts in respect of the LL PAR account contribution and reiterated suggestions for protecting the interests of the PAR policyholders. Mr. McFeetors redirected Mr. Jeffery to meet with Mr. Edwards and Mr. Morrison, which he did in June of 1999. Once again, Mr. Jeffery felt that he received no substantive response nor was he permitted to receive a copy of the Mercer Report, though he was allowed to glance at it.

[43] Through 1998 and 1999, all of the executives of LL and GWL maintained that the contribution was lawful and reasonable.

[44] In October of 1999, Mr. Rudd retained counsel who wrote to Mr. McFeetors reiterating the serious concerns regarding the legality of the PATs. No response was received to counsel's letter and litigation ensued.

[45] Mr. Jeffery's real concern has been that the PATs resulted in PAR contributing towards a benefit that it would not receive for at least 25 years. He testified that he understands that PAR should contribute to the acquisition but PAR must receive a benefit in return and not wait 25 years.

[46] Mr. Jeffery met with Mr. Edwards to discuss the intergenerational equity, and specifically, the notion that the current generation of PAR policyholders were funding a transaction that would not generate results for 25 years.

[47] Finally, Mr. Jeffery is of the view that there ought to have been full disclosure of the transaction with proper legal, accounting and actuarial advice for the PAR policyholders which would have led to a better negotiated "legal" deal for PAR policyholders.

The test for interpretation of the *ICA*:

[48] There is no dispute between the parties that the proper approach to the interpretation of the *ICA* is for the Court to consider the words of the statute in their grammatical and ordinary sense, in harmony with the scheme of the Act and the intention of Parliament. This is the modern rule of statutory interpretation.[3]

[49] Pursuant to s. 13 of the *Official Languages Act*,[4] the English and French versions of the *ICA* are equally authoritative. According to the Supreme Court of Canada, "statutory interpretation of bilingual enactments begins with a search for the shared meaning between the two versions. Where the words of one version may raise an

[3] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: LexisNexis, 2008), p. 1.
[4] R.S.C. 1985, c. 31.

ambiguity, courts should first look to the other official language version to determine whether its meaning is plain and unequivocal."[5]

[50] In this case, the interpretation of ss. 331(4), 456, 458, 462, or 521 of the *ICA* is at issue.

Common Issue #1: Did the PATs constitute a breach of ss. 331(4), 456, 458, 462, 492 or 521 of the *Insurance Companies Act* ("*ICA*")?

[51] I will address each section individually and provide my analysis on each one.

Section 456: Maintaining separate accounts:

[52] Life insurance companies that issue participating policies are required to maintain accounts for the participating policies separately from the accounts maintained in respect to non-participating policies.

Participating account	**Compte de participation**
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.	456. La société tient des comptes séparés, en la forme déterminée par le surintendant, à l'égard des polices à participation.

[53] A PAR account is the accounting record that is established in respect of PAR policies of the company. It is a "bookkeeping account" in which the following bookkeeping entries are made:

a) credits (i.e. inflows) reflecting participating policyholder premiums, investment income and interest;

b) debits (i.e. outflows) reflecting death benefits paid to beneficiaries, expenses of the business activity relating to PAR policies, cash surrender values and dividends to participating policyholders.

[5] *R. v. Mac*, [2002] 1 S.C.R. 856 at para. 5, per Bastarache J., citing Pierre-André Côté, *Interpretation of Legislation in Canada*, 3rd ed. (Scarborough: Carswell, 2000) at 327.

[54] Both LL and GWL have maintained separate PAR accounts, as required, throughout the relevant period. In fact, the LL PAR account has been maintained separately from the non-PAR account since at least 1891 and GWL has had a separate PAR account since before 1997. There is no breach of this section.

Section 462: Transfer from participating account:

[55] Section 462 of the *ICA* prohibits "transfers" ("prélevées") from a participating account, except in certain defined circumstances.

Transfers from participating account	**Prélèvements sur les comptes de participation**
462. The only transfers that may be made from a participating account maintained pursuant to section 456 are:	462. Seules peuvent être prélevées sur des comptes de participation visés à l'article 456:
(a) transfers made pursuant to sections 461 and 463;	a) les sommes virées aux caisses séparées aux termes des articles 461 et 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	b) les sommes virées à l'égard des virements ou de la réassurance de tout ou partie des polices à participation à l'égard desquelles le compte de participation est tenu;
(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.	c) avec l'agrément du surintendant, les sommes virées qu'il est raisonnable d'attribuer à des sources non liées aux polices à participation à l'égard desquelles le compte de participation est tenu.

[56] The plaintiffs maintain that the term "transfer" means a payment from the PAR account to the shareholders account. The plain meaning is that "transfer" is a movement of money from one account to another. The plaintiffs claim that the payment of $220 million by PAR to the shareholders' accounts was a transfer of that amount.

[57] The defendants argue that s. 462 has no application to the PATs, since the PATs did not involve the taking away or removal of assets from the participating accounts. They claim that the PATs involved the exchange of cash from the participating accounts for a PPEA of the same amount.

[58] The defendants further argue that since 1992, life insurance companies have the capacity of a natural person, which means that the Act does not require that every act or transaction involving an insurance company be expressly authorized by the *ICA*.

[59] Section 15 of the *ICA* prescribes the following:

> 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.
>
> (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.

[60] Finally, the defendants submit that, in the event the Court concludes that the PATs were inconsistent with the language of the statute, the Court should, in any event, defer to OSFI which approved the transaction.

Analysis

[61] First, nothing in s. 15 of the *ICA* permits the directing minds of corporations to exercise a power that is contrary or restricted by the Act.

[62] Dictionary definitions of the term "transfer" indicate that the term includes a payment:

> [to] convey, remove, hand over, (thing etc. from person or place to another); make over possession of (property, ticket, rights, etc., to person).[6] To convey or take one place, person, etc. to another; to transmit, transport; to give or hand over from one to another.[7]

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[6] *The Concise Oxford Dictionary*, 7th ed. (Oxford University Press, 1985).
[7] *The Shorter Oxford English Dictionary*, 3rd ed. (Oxford University Press, 1973).

[63] The French text of s. 462 uses the word “prélevées” in the corresponding position to “transfer” in the English text. The verb “prélever” has a meaning in English synonymous with “debit”, “removal” or “deduction.”

[64] The French terms “prélever” and “virement” are defined as follows:

> prélever: Prendre (une partie d’un ensemble, d’un total). Syn.: enlever, extraire, ôter, retenir, retrancher.
>
> virement: Transfer de fonds du compte d’une personne au compte d'une autre personne.[8]

[65] Translated into English “prélever” means to deduct, set apart (portion) in advance; to levy, to remove, to take away, paying to another.

[66] Translated into English, “virement” means to transfer from one account to another account. If the funds are paid to a person, then it is a “versement.” For instance, s. 461 in French: “… verser à ses actionnaires, ou virer à un compte …” In English, this means to make a payment to its shareholders or “transfer” an amount to an account.

[67] The English text has a prohibition on “transfers” and the French text has a prohibition on “prélevées” from the participating account. In the French text, “seules” is the equivalent of “only” in the English text.

[68] Section 462 expressly states that it prohibits all transfers, except those that are expressly permitted: “the only transfers…”

[69] The plaintiffs argue that the effect of the section is that there must be a statutory justification for amounts paid by PAR to shareholders.

[70] The defendants state instead that a section of the *ICA* was not needed to justify the payment of $220 million from PAR to the shareholders’ accounts. They say that nothing in the term “transfer” connotes a specific form or type of payment, whether by accounting debits and credits, wire transfer, or any other means.

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[8] *Le nouveau petit Robert*, 2008 ed., s.v. “prélever”, “virement.”

[71] The plaintiffs contend that it is incorrect to argue that the *ICA* prohibits only transfers that cause a reduction in the surplus of the PAR accounts. Nothing in the *ICA* references to any terms regarding a "net" reduction in the PAR account. Section 462 does not make an exception for asset exchanges.

[72] Section 461 refers to "payment" to shareholders interchangeably with "transfer."

[73] As s. 462 uses the term "only," all transfers are prohibited except those that are expressly permitted.

[74] The PATs required a careful review for legal compliance. Counsel for the defendants maintained both in their opening and throughout the trial that the defendants did not plead nor did they rely on a legal due diligence defence. Notwithstanding, the defendants called Mr. Paul Bélanger of the Blakes law firm, who has had a legal relationship with the GWL and the Power Financial group of companies for many years prior to 1997. It appears that his evidence was directed at answering the plaintiffs' assertion that the defendants never had legal counsel review the PATs for statutory compliance.

[75] Mr. Bélanger's testimony was largely based on his recollection, which was not supported by documents or detailed dockets. Mr. Bélanger testified that he spent just under 300 hours working on the acquisition of which approximately 15 hours were spent on the PATs. He admitted that from August 11th, to early November 1997, he had no dockets reflecting any work done on the PATs. He testified that he would have been ready to write a legal opinion letter but none was requested. He confirmed that he was not at the board meeting of November 26th, 1997.

[76] I find that Mr. Bélanger's recollection was weak and his legal analysis was scant at best. As a result, his evidence supports at the very minimum what the plaintiffs' have asserted all along, and that is that the defendants did not see the wisdom of obtaining a legal opinion on the PATs.

OSFI as regulator:

[77] OSFI is the primary regulator of federally incorporated financial institutions, including not only insurance companies, but also other financial institutions such as banks and trust companies. Its mandate is to supervise financial institutions to ensure compliance with their governing statute.

[78] In performing its supervisory function over insurance companies, OSFI is statutorily required to protect the rights of PAR policyholders.[9]

[79] OSFI required GWL to obtain an independent actuarial opinion on the PATs even though such an opinion was not statutorily required for the acquisition.

[80] At the outset of the trial, OSFI, who is not a party to this action, took no position with respect to the issues raised in this class action. The plaintiffs took the position at the beginning of the trial that OSFI conducted no review of the PATs. The defendants maintained that OSFI accepted the PATs in its review for approval of the acquisition. Both sides summoned OSFI witnesses. OSFI challenged the summonses to witness on the grounds of "deliberative secrecy" and a ruling was made on October 13th, 2009. This ruling was appealed by OSFI and a decision was rendered by the OCA on November 20th, 2009. As part of the Court of Appeal's ruling, the following was noted:

> [4]…counsel for the plaintiffs shall be entitled to pursue a line of questioning with Mr. Le Pan focused on whether, in recommending the approval of the overall acquisition, he or his staff considered if the participating account transactions complied with ss. 458 to 464 of the *Insurance Companies Act*, R.S.C. 1991, c. 47. In our view, as properly acknowledged by counsel for the Attorney, the answers to questions of that nature are matters of fact not covered by deliberative secrecy.

[81] As a result of this decision, Mr. LePan was called to testify by the defendants. On the morning of his testimony, counsel for OSFI together with counsel for both parties

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9 *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18, s. 4(3)(a) (*OSFI Act*).

met with the Associate Chief Justice of the Court of Appeal by teleconference to obtain direction concerning the interpretation of the Court of Appeal's order.

[82] The Court of Appeal restricted Mr. LePan's evidence to whether, in recommending the approval of the overall acquisition, he or his staff considered if the PATs complied with ss. 458 to 464 of the *ICA*. He was not permitted to testify about how, why and by whom the PATs were reviewed, as that would be considered to be "deliberative secrecy."

[83] Mr. LePan testified that he and his staff did consider whether or not the PATs complied with the *ICA* as part of its review and approval of the acquisition, and concluded that they did.

[84] Mr. LePan did testify that his office relied on the Mercer analysis in coming to its conclusion.

Review of Mercer's analysis:

[85] Dr. Brender was called by the defendants as the drafter of the Mercer report.

[86] Dr. Brender has been a member of the Actuarial Science Faculty of the University of Waterloo since 1975 and has worked for Mercer since 1987 on a part-time basis and then full-time as of 1993. Dr. Brender also worked at Mutual Life and participated in the development of the MCCSR (discussed later). He also authored a paper in 1989 about the changes proposed to the *Canada and British Insurance Companies Act* (the predecessor legislation to the *ICA*) and some of his recommendations were implemented. Although Dr. Brender retired in 2006, he is still involved in the Actuarial Foundation of Canada as a director.

[87] Dr. Brender's first review of the PATs caused him some concern about their legality and he suggested in his first draft report of September 11th, 1997 that it would be appropriate to consult legal counsel with respect to this matter. No legal review was obtained, however.

[88] Dr. Brender testified that he had had the flu that day and was not feeling well when he drafted his concerns to Mr. Wason and Mr. Morrison.

[89] In the final independent actuarial report dated October 27th, 1997, Mercer found the legal justification for the PATs was in s. 458 of the *ICA*. In particular, it states under the heading "Legal Justification":

> The legal authority to withdraw these amounts from the companies' respective participating funds is based upon section 458 of the *Insurance Companies Act*…. The transfer will be considered, initially, to be a prepaid expense item, offset by creation of the prepaid expense asset (PPEA), 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.

[90] Dr. Brender attempted to explain that the legal justification was not meant to mean the payment over of the capital but rather the amortization of the PPEA.

[91] Dr. Brender testified that in drafting and reviewing the PATs he was following the I.A. guideline of OSFI, even though it did not apply to this specific transaction. That guideline is to determine whether policyholders would be adversely affected. He did consider the policyholders' reasonable expectations to be "critical" and found that the dividends would not likely be reduced as a result of the PATs.

[92] Dr. Brender also agreed in cross-examination that merger synergies are a type of expense saving that result from efficient management action. However, his testimony contradicts the following written passage he wrote in the Mercer Report: "It therefore seems reasonable and equitable that the benefit of expense savings over the first 25 years with respect to participating policies, as well as the values of reduced GWL shareholder transfers over 25 years should accrue to the GWL shareholders."

[93] So, in other words, Dr. Brender's fairness principle rested on the premise that it was fair so long as policyholders were no worse off. However, nothing in the *ICA* says that a transaction is fair so long as policyholders are no worse off.

[94] Dr. Brender initially thought that the withdrawal of the $220 million required justification under the Act. He then changed his mind, he says, and testified that when he wrote the final report he referred to s. 458 as the section allowing for the allocation of those estimated expense savings.

[95] The question then is what actions did he take between September 11th and September 17th to alleviate his concerns? The dockets show that he worked another 8.5 hours with no details of what happened to assuage those concerns.

[96] Dr. Brender does not remember what conversations took place and there are no documents to show what made him change his mind. He testified that it is likely that Mr. Wason returned from Winnipeg after meeting with Dave Morrison and he must have had the answer.

[97] Mr. McFeetors admitted that he made a change in the draft of the Mercer report, from "the legal justification … should be..." to "the legal justification…is…" and did so without any input from Mr. Morrison or Mr. Edwards. Dr. Brender was asked about the propriety of someone at GWL changing the wording of the I.A. report. He was of the view that no one at GWL would write part or change any words in the Mercer report because he was of the view that would be a compromise of his independence.

[98] Clearly Dr. Brender was unaware of the fact that Mr. McFeetors had changed a word in that section. There is an unmistakeable change in nuance in Mr. McFeetors' change.

[99] The Mercer report expresses a foundational premise that PAR policyholders play no part in generating the merger synergies. Although that statement is correct, how relevant is it to the Mercer analysis? Management generates expense savings and obtains a management fee under s. 461 of the *ICA*. Mercer opined that since GWL intended to reduce their annual management fee to that of LL, the shareholders ought to be allowed to obtain the expense savings for the first 25 years. Mercer opined that this was fair and equitable to PAR policyholders.

[100] Was that the right question? When dealing with the allocation of expenses under s. 458, actuaries must ask themselves if it is fair and equitable to PAR in so doing. However, with regards to the transferring of $220 million from PAR to the shareholders' accounts, the question cannot be whether it is fair and equitable, but rather is it in the best interest of PAR in doing so? The investment of $220 million to purchase an intangible asset cannot be viewed as an allocation of an expense. In other words, is it in the best interest of PAR to "invest" $220 million on the PPEA which will defer the expense savings from the merger for at least 25 years?

Conclusion:

[101] This Court does not have any evidence that OSFI conducted a critical analysis of the Mercer report. Rather, it merely accepted its conclusions.

[102] Given OSFI's reliance on Mercer's analysis, and given the issues raised by the Mercer report as outlined above, the legal concept of deference to a review by an expert regulator does not, in my opinion, apply where, as here, the regulator invites the Court to make its own determination. Further, no reasons were provided either orally or in writing by OSFI. OSFI's process was not an adjudicative one. Mr. LePan's evidence confirms that OSFI relied on the Mercer report on the issue of legal justification. I am not prepared to defer therefore to this regulator on the issue of legal justification as provided by Mercer.

[103] What was Parliament's intent? If the term "transfer" only meant "net" transfers as suggested by the defendants and did not apply to an exchange of assets, then the defendants could remove the entire surplus in the PAR account (over $2 billion) and replace it with a promissory note, an intangible asset or other accounting entry. That cannot be consistent with Parliament's intention in requiring the PAR accounts be separated from shareholders' accounts and prohibiting all transfers, except for those expressly permitted.

[104] Section 462 should be interpreted in light of s. 456, which mandates the separation of accounts. As a matter of common sense, the PATs involved transfers of capital from PAR to the shareholders' accounts.

[105] This Court, therefore, finds that the $220 million payment involved a transfer of cash in contravention of s. 462 of the *ICA*.

Section 458: Expense allocation method

[106] Section 458 sets out the process for debiting expenses from a PAR account:

Allocation of expenses:	**Répartition des frais :**
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.	458. Il est porté au débit du compte de participation la partie des frais, y compris les impositions fiscales, de la société pour l'exercice déterminée selon les mêmes modalités qu'à l'article 456. (a) selon l'avis écrit de l'actuaire de la société, sont équitables à l'égard des souscripteurs avec participation; (b) sont approuvées par résolution des administrateurs prise après étude de l'avis de l'actuaire de la société; (c) ne sont pas désavouées par le surintendant, dans les soixante jours qui suivent la réception de la résolution, pour des motifs d'iniquité à l'égard des souscripteurs avec participations.

[107] There is no issue that LL and GWL had in place a required expense allocation method, which was implemented using the process set out in s. 458.

[108] In this case, the expense that is incurred as a result of the PATs is the annual amortization of the PPEA. This intangible asset was designed to be amortized over 25 years. The defendants maintain that this annual amortization is being expensed in the PAR account under s. 458.

[109] In order to ascertain if the expense is properly allocated, one must look to the allocation method. The allocation methods are used to allocate expenses only. The question is whether future savings or profits can be allocated under this method.

[110] Mr. Edwards (the A.A. for LL) agreed in cross-examination that the LL allocation method applies to expenses incurred in a financial year and does not apply to future savings or profits. He further agreed that the withdrawal of the $220 million from the companies' PAR accounts "would not be dealt with" under s. 458. Finally, he agreed that the PATs do not constitute investments for either the Income Allocation Method or the Investment Policy of LL.

[111] Mr. Wason testified that he and Dr. Brender completed their report on the assumption that there was no need to justify the initial payment of $220 million under the *ICA* and that they gave no consideration to whether any other legal justification was necessary.

[112] Although the defendants' testimony, including that of Mr. Edwards, confirms that the quantum of the PATs was understood to represent the present value of expected future savings, the testimony of Messrs. Edwards, Wason, McFeetors, Morrison and Dr. Brender in cross-examination supports the fact that s. 458 does not provide the legal justification to transfer $220 million.

[113] The difficulty with all of the defendants' testimony is that the documentary evidence (contemporaneous to the development of the PATs and shortly thereafter), refers to s. 458 as the legal justification for the PATs. A proper review of that contemporaneous documentation supports a strong inference that the intended legal

justification for the PATs by the defendants at the time of the transaction was under s. 458.

[114] For example, the Mercer report states: "the legal authority to withdraw these amounts from the companies' respective participating funds is based upon section 458 of the *ICA*."

[115] Another example is Mr. Edwards' statement made in his May 27th, 1998 letter to Mr. Rudd responding to a request for the legal basis of the LL PATs:

> Section 458 of the *Insurance Companies Act* provides the legal authority for the participating account contribution towards the acquisition financing by pre-funding $180 million of net anticipated expense savings.[10]

[116] There are many other examples of the contemporaneous documentation that referred to s. 458 as the legal justification for the withdrawal. The contemporaneous documentation is much more reliable than the attempts by the various defendants to suggest otherwise during their testimony. Accordingly, the reliable evidence supports the conclusion that the intent of the defendants at the time of conception of the PATs was to justify it under s. 458. By the time the legality of the PATs got to trial, the defendants recognized that their earlier position could not be sustained legally and, therefore, the defendants offered a different interpretation of their contemporaneous documentation, which I do not accept.

[117] I find that the defendants believed that s. 458 was the legal justification for the transfer of the $220 million from PAR to the shareholders' accounts. I cannot accept that s. 458 of the *ICA* is the legal justification for this transfer of funds. However, in order to determine if there has been a breach of s. 458, this Court must first ascertain if the transaction complied with GAAP.

[10] JDB0879

Section 331(4) Accounting principles:

[118] Section 331(4) of the *ICA* requires that a company's annual financial statement be prepared in accordance with generally accepted accounting principles, otherwise known as GAAP:

Accounting principles 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.	Principes comptables 331(4) Sauf spécification contraire su surintendant, les rapports et états financiers visés au paragraphe (1), à l'alinéa (3)(b) et au paragraphe 333(1) sont établis selon les principes comptables généralement reconnus, principalement ceux qui sont énoncés dans le Manuel de l'Institut canadien des comptables agréés. La mention, dans les autres dispositions de la présente loi, des principes comptables visés au présent paragraphe vaut mention de ces principes, compte tenu de toute spécification faite par le surintendant.

[119] While 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.

[120] In order for the PPEA to be assets under GAAP, the economic substance of the PATs must meet all of the following three essential requirements:

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.

[121] The plaintiffs called Professor Gordon Richardson who was qualified as an expert in financial accounting. He is the KPMG Professor of Accounting at the Rotman School of Management at the University of Toronto. He received his PhD from Cornell in 1983.

[122] As Dr. Richardson said: "[t]he central question is whether GAAP would allow the $220 million in the PAR accounts to be called a 'prepaid expense asset.'"

[123] Dr. Richardson examined various sections of the Canadian Institute of Chartered Accountants' (CICA) Handbook to find guidance. CICA HB 1000.46 states that: "accrual accounting encompasses deferrals that occur when a payment occurs prior to the criteria for an expense being satisfied." HB 1000.50 states that: "the costs of assets that benefit more than one period is normally allocated over the periods benefited." HB 1000.51 states that: "expenses that are linked with revenue are normally matched with revenue in the period when the revenue is recognized."

[124] Dr. Richardson opined that the term deferral is a vague one that could apply to a PPEA, a deferred charge, an intangible other than goodwill or goodwill itself. He, therefore, considered that paragraph 1000.46 was not helpful in resolving the choice between these various asset candidates.

[125] Dr. Richardson went on to examine the PPEA and said that normally these have short benefit periods. He quoted Skinner[11] as an authoritative book on Canadian GAAP as it existed in 1997, in which a prepaid expense for GAAP purposes is defined as "payments made to suppliers of goods and services in the advance of the receipt of those items," and gives the examples of prepaid insurance and prepaid rent.

[126] Professor Dan Thornton was also qualified as an expert in financial accounting and financial transactions. Professor Thornton received his PhD in 1978 from York

[11] *Accounting Standards in Evolution* (Holt, Rinehart and Winston, 1987).

University (now the Schulich School of Business). Dr. Thornton was asked to examine the PATs and provide an opinion as to their GAAP compliance.

[127] He opined that “the $220 million PPEA cannot be a prepaid expense because it is not a current asset and does not pertain to the ordinary activities of the company.” Moreover, he opined that “it is unlikely that it even satisfies the definition of an asset under GAAP because it does not give rise to an incremental claim on cash that was under the control of the PAR accounts. If it is an asset, then the $220 million transferred in 1997 cannot be an expense of fiscal 1997.”

[128] Professor Thornton examined many documents and found that the PAR accounts would have shared in the merger benefits whether the PATs had occurred or not. For example, he referred to the minutes of a LL Board of Directors meeting on November 26th, 1997, which stated the following:

> As a result of the expected annual expense savings, the Company’s participating account will [emphasis added] realize an extraordinary long term benefit.

[129] So in order to assess whether the PPEA complied under GAAP, there is a fundamental question to be asked: did PAR have an “entitlement” to benefit from merger synergies even if the PATs would not have occurred?

[130] Merger synergies are expense savings that would result from the combination of these two large life insurance companies. The plaintiffs maintain that shareholders do not own merger synergies and they are not in a position to “vend” them to PAR policyholders via a capital transaction with the PAR account. Thus, the plaintiffs say this results in the violation of one of a policyholders’ reasonable expectations (“PRE”).

Policyholder reasonable expectations (PRE):

[131] PRE is an actuarial concept. It 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 policyholders.

[132] The relevant definition arises in the actuarial standards for the valuation of policy liabilities. PRE relates to matters arising under the policy contract that are in the discretion of the company, as in this case, policyholder dividends. In other words, to ascertain PRE, the actuary considers the company's dividend policy, past practice and representations and communications made to policyholders as a group or subgroup. Every witness testifying on this issue agreed that PRE is a complex matter, calling for the actuary to exercise judgment.

[133] The OSFI guideline for independent actuaries (F-6) in force in 1997 also referred to PRE. In particular, one of the questions to be addressed by an I.A. was whether policyholders would be adversely affected by the proposed transaction.

[134] PAR policyholders receive profits of the company through receipt of "dividends, bonuses or other benefits" on those policies in accordance with the company's dividend or bonus policy. In other words, if expenses decline, profits increase, surplus grows and more funds are made available for PAR policyholders. In effect, Mr. McFeetors testified that LL pays out more than 85-90 percent of earnings in the PAR account as dividends to PAR policyholders.

[135] GWL's dividend policy consistently embodies the following principle: "to the extent that emerging experience differs from the levels assumed in the premium, a contribution to net income or surplus will be made by that class of policies."[12]

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[12] JDB0068.002

[136] PRE relates to future dividends. Actuaries must consider PRE in the context that dividend expectations are not to be adversely affected. Expense management is also important to PRE.

[137] Even more important, as part of PRE, the surplus is to be managed in the best interest of PAR. This was confirmed on the cross-examination of Mr. Wason.

[138] Although I agree with the plaintiffs that PRE has a broader application to the PAR policyholder in general, including compliance with the law and compliance with GAAP, PRE is not a contractual right, nor is it has a statutory right.

[139] Accordingly, PRE is not a free-standing contractual or statutory right, but is accepted to be a matter of judgment, about which actuaries can reasonably disagree. PRE has a role with respect to dividends and given the lack of evidence that dividends were adversely affected, I am not prepared to grant the plaintiff's request for a declaration that PRE includes the receipt of expense savings from merger synergies. That question depends on the allocation method in place at the time.

[140] And so, do shareholders have a right to PAR surplus other than through the annual s. 461 transfers? In other words, can shareholders have access to PAR surplus in order to assist in the financing of an acquisition, as here?

Did PAR have an "entitlement" to benefit from merger synergies?

[141] The plaintiffs say that the PATs resulted from the position taken by the directing minds of GWL that policyholders were not entitled to benefit from "merger synergies" that may result from the management's efforts to control expenses following an acquisition.

[142] The defendants' position is that policyholders have no "legal entitlement" to benefit from merger synergies without paying for them. There is no "free lunch" for any one, as Mr. McFeetors said.

[143] The defendants also rely on the previous experience of LL with its purchase of a block of business of Prudential in 1996, wherein the PAR account of LL contributed to the purchase price.

[144] The plaintiffs submit that in the Prudential acquisition, the transaction had a substantially different structure. In that transaction, merger synergies were explicitly shared with PAR. In connection with the Prudential acquisition, policyholder communications indicated that dividend expectations would be enhanced.[13] Accordingly, the plaintiffs state that it was foreseeable that the reasonable expectations of PAR policyholders would benefit from merger synergies, as they had delivered those savings to PAR the previous year.

[145] The plaintiffs rely on the discovery evidence of Mr. Lovatt, the CFO of GWL, who on December 5th, 2006 responded to Mr. Bates' questions as follows:

> Q. 135 Would I be correct to suggest to you, from your knowledge of the business events and these documents in particular, that the PAR accounts would have realized the savings that are quantified in these studies whether or not the PAR account transactions were performing?
>
> A. These documents speak to what actually happened between 1997 and 2002.
>
> Q. 136 I agree but do you agree with my suggestion?
>
> A. I agree with your suggestion that the expense savings would have been realized by the participating account.
>
> Q. 137 Whether or not they funded an amount? That is my suggestion to you, sir.
>
> A. The experience rating was a subsequent report which measured the savings to the participating account.
>
> Q. 138 Agreed.
>
> A. And that was the intention of the report.

[13] Jun. 7, 1996, Letter – Prudential and LLIC to Prudential Canadian Policyholders, JDB0135, Compendium, Vol. 1, Tab 35, pp. 195-202.

Q. 139 Understood. I am of the understanding that the expenses allocated to the PAR accounts over the years 97 through 2002, which I think are the years studied, that that allocation of expenses was in accordance with the allocation method of the companies. Is that fair?

A. The expenses allocated were in accordance with the expense allocation methods of the companies.

Q. 140 Right. Nothing in the 2004 report from Mercer's says that the PAR accounts needed to contribute to the acquisition financing to realize those expense savings, right?

A. That is correct.

Later, the following questions were asked and answered:

Q. 491 After November 13th there was no doubt in your mind that expense savings were going to flow through the income statements of the PAR and shareholders side of GWL, right?

A. That was the intention, yes.

Q. 492 And it was your expectation of what would happen in future, whether or not you got a contribution from PAR, right?

A. Yes.

[146] At trial, Mr. Lovatt explained that he had not been as careful with his wording as he would have liked to have been, and that when he reviewed his discovery transcript, he thought he should clarify those answers. Counsel for the defendants did write to counsel prior to trial to provide plaintiffs' counsel with Mr. Lovatt's clarification.

[147] He said he used those words because the company has only one income statement. "I was saying that it was the intention of the company to integrate the businesses and reduce the expenses and that the expense gains or savings would flow through the income statement in the operating expense line. I wasn't commenting as to whether the savings would be attributable to the participating or shareholders' account."

[148] Mr. Lovatt was trying to explain that he did not mean that the PAR account would receive expense savings without making a contribution to the acquisition.

[149] Although the clarification by Mr. Lovatt appears to be somewhat disingenuous, it seems clear from my reading of the discovery transcript that indeed Mr. Lovatt was of the view that the expense savings were to flow to PAR with or without a contribution.

Analysis:

[150] In order to ascertain whether PAR would benefit from the merger synergies with or without a contribution, a review of the allocation method is required. The evidence is clear: there was no intention to change the allocation method, which essentially requires that expenses are to be allocated on an annual basis, in respect of expenses incurred in the immediately preceding year.

[151] The proposition that PAR policyholders must purchase merger synergies from the share account cannot be found in the *ICA*, dividend policies, investment policies or the allocation of expense methods.

[152] The power point presentation to the board on November 26th, 1997 made it clear that PAR would have received the merger synergies as a default. In order to divert that natural flow of expense savings to the PAR account, management would have had to change the allocation method in order to prevent these savings from flowing through to the PAR account without paying for them. In my opinion, the allocation method in place at the time of this transaction would have allowed the flow of expense savings to the PAR accounts.

[153] In the ordinary course of business, whenever management successfully decreases expenses, PAR benefits from those savings. It is reasonable to accept that there is an expectation under PRE that management always did their best to decrease expenses. As a return for management's hard work, shareholders are entitled to their management fee transfer from PAR to the shareholders' accounts, in accordance with s. 461 of the *ICA*.

[154] Clearly a merger of this magnitude is not everyday business. The significant merger synergies anticipated would have benefited the PAR policyholders greatly.

[155] The prospect of PAR benefiting from 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.

[156] 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.

[157] No 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. He was candid to admit that it is necessary to make a contribution in order to receive a benefit. I agree with him.

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

[159] Were there alternatives to the PATs? Mr. Morrison testified that he briefly thought of other means, but in his actuarial opinion, he preferred the PATs as the best method.

[160] There was no intention of changing the expense allocation method at the time. A change to the allocation method, to ensure that the PAR accounts did not realise expense savings unless they made a payment, suggests that the expense allocation methods would have been changed to shift the future expense savings to the shareholders. Such amendment would have required a revised method memorandum, including policyholder disclosure. It would also have required OSFI’s approval.

[161] In order to answer the question of whether the PAR account was entitled to benefit from merger synergies under the allocation method, Dr. Thorton and Dr. Richardson conducted an assessment of the economic substance of the PATs. Accountants are asked to assess the economic substance of any transaction in order to apply the proper accounting construct to it.

[162] In order to establish the economic substance of the PATs, Dr. Richardson testified that the PPEA do not comply with GAAP because no step was taken prior to November 27th, 1997 reversing the default position that merger synergies would naturally flow into PAR according to the allocation method in place at that time.

[163] Dr. Thornton opined that the Deferred Revenue Liability recorded in the shareholders' accounts cannot be revenue or deferred revenue under GAAP because it does not pertain to the ordinary activities of the company. He further opined that "it is unlikely that it even satisfies the definition of a liability under GAAP" because, given the opinion of Dr. Richardson above, it did not give rise to an incremental obligation to transfer resources to the PAR accounts.

[164] Ms. Patricia O'Malley was retained by the defendants and she was called to provide her opinion on the accounting of the transaction. Ms. O'Malley is the current Chair of the Canadian Accounting Standards Board. As admitted by the Plaintiffs, she is one of Canada's finest and most respected accountants. Prior to becoming Chair of the Canadian Accounting Standards Board, Ms. O'Malley was a partner at KPMG for 17 years.

[165] In coming to her conclusion, Ms. O'Malley was asked to assume that the merger synergies would not flow to PAR unless they contributed. I pause here to question why counsel felt that this assumption should be given to Ms. O'Malley rather than allowing her to independently assess the economic substance of the PATs.

[166] Both Dr. Thornton and Dr. Richardson expressed great respect for Ms. O'Malley's reputation as an accountant and both praised her work and opinion. However, both were of the view that her opinion was based on the faulty assumption that PAR was not entitled to the merger synergies.

[167] 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.

[168] The assumption that merger synergies were going to flow through naturally in accordance with the allocation method is the only reasonable inference and therefore the only conclusion that I can make.

[169] The only way that this natural flow would not occur would be if the allocation method changed. In that event, as already indicated, there would have been disclosure to the policyholders and presumably negotiations with the benefit of independent legal, actuarial and accounting advice to the participating policyholders. This would have been, in my opinion, the best course of action for such an important transaction.

[170] Had the PATs not occurred, the remaining 7.5% financing would have had to be obtained either by issuing further common shares or by another financing arrangement.

Accounting for the PATs:

[171] In essence, Mr. McFeetors relied on Mr. Morrison to come up with the concept of the PATs. Then Mr. Lovatt relied on the GWL 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 (A.A. of LL) relied on GWL to formulate the proper accounting for the PATs.

[173] In its report on the PATs, Mercer relied on a verbal comment from someone at GWL that someone at Deloitte, GWL's external auditor, was "aware of and agreeable to" GWL'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 GWL's 1997 audit and therefore he can only rely on the "clean" audit opinions.

[175] Mr. McPhie, the audit partner with E & Y (LL's external auditors) relied on Deloitte's work in respect of the PATs.

[176] As previously discussed, s. 458 of the *ICA* and expense allocation practice requires the defendant to allocate the expenses of the companies between PAR and non-PAR pursuant to the allocation method of the companies. The ordinary application of those methods would deliver the reduced expenses or merger synergies to the PAR accounts but for the PATs.

[177] The defendants have stated (but not pleaded) that "the hypothetical other step taken" would have been taken had the PATs not been implemented or accepted by OSFI.

Analysis:

[178] In my view, 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.

[179] This Court therefore finds 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.

[180] Ms. O'Malley conceded that if her underlying controlling assumption were incorrect, then the PPEA are not assets under GAAP.

[181] Given this Court's finding with respect to PPEA non-compliance with GAAP, s. 331(4) of the *ICA* has been breached.

[182] If the PPEA are not assets under GAAP, then it follows that the Deferred Revenue Liability Assets are also not assets compliant under GAAP.

[183] The amortization charges each year do not comply with s. 458 because the charges stemming from an unlawful asset ought to be set aside. Accordingly, s. 458 of the *ICA* has also been breached. I will deal with this issue further in the Remedy section.

Common Issue #2: Did the director and officers of the defendants breach ss. 166(1), 166 (2), 211 or 212 of the *ICA*?

Section 166 – Director's duties:

[184] Sections 166(1) and (2) create statutory fiduciary duties, duties of care and compliance obligations for directors and officers. Sections 211 and 212 impose disclosure requirements on directors and officers with respect to conflicts of interest.

[185] All directors have the same duties under the *ICA*, whether the director is elected by the shareholders or the PAR policyholders.

[186] Those duties are as follows:

Duty of Care 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 interest of the company; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. **Duty to Comply**(2) Every director, officer and employee of a company shall comply with this Act, the regulations, the	**Diligence** 166(1) Les administrateurs et les dirigeants doivent, dans l'exercice de leurs fonction, agir : (a) avec intégrité et de bonne foi au mieux des intérêts de la société; (b) avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente. **Observation** (2) Les administrateurs, les dirigeants et les employés sont tenus d'observer la présente loi, ses règlements, les dispositions de l'acte constitutif et les règlements

company's incorporating instrument and the by-laws of the company.	administratifs de la société.

Fiduciary duty:

[187] In *BCE Inc. v. 1976 Debentureholders*,[14] the Supreme Court of Canada discussed the responsibilities of directors in the context of the *CBCA*. The Court stated at para. 36:

> The directors are responsible for the governance of the corporation. In the performance of this role, the directors are subject to two duties: a fiduciary duty to the corporation under s.122 (1)(*a*) (the fiduciary duty); and a duty to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances under s. 122(1)(*b*) (the duty of care).

[188] Section 166 was modelled on the equivalent provision in the *CBCA*, which similarly provides as follows:

Duty of care of directors and officers 122(1) Every director and officer of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. **Duty to comply** (2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.	**Devoir des administrateurs et dirigeants** 122(1) Les administrateurs et les dirigeants doivent, dans l'exercice de leurs fonctions, agir : a) avec intégrité et de bonne foi au mieux des intérêts de la société; b) avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente. **Observation** (2) Les administrateurs et les dirigeants doivent observer la présente loi, ses règlements d'application, les statuts, les règlements administratifs ainsi que les conventions unanimes des actionnaires.

[14] 2008 SCC 69, [2008] 3 S.C.R. 560 (*BCE Inc.*).

[189] The Court in *BCE Inc*. went on to clarify to whom this duty is owed. At para. 66, the Court stated:

> [T]he directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

[190] Thus, while the directors of a company may have regard to the interests of stakeholders in the company, such as shareholders, creditors, policyholders, employees and so on, their fiduciary duties are owed only to the company. They must act in the best interests of the company.

[191] In fact, proposals to change the statutory duties of directors and establish a separate duty to participating policyholders were expressly rejected by Parliament when the *ICA* was amended in 2005 through Bill C-57.[15]

[192] The statutory fiduciary duty specifically contemplates that individual stakeholder interests might diverge from the company as well as one another. In fact, acting in the best interests of the company could, in some circumstances, require a director to act other than in the best interests of a particular stakeholder group. In *BCE Inc.*, the Supreme Court explained this at para. 99:

> the directors had a fiduciary duty to act in the best interests of the corporation and that the content of this duty was affected by the various interests at stake in the context of the auction process that BCE was undergoing. …the directors, faced with conflicting interests, might have no choice but to approve transactions that, while in the best interests of the corporation, would benefit some groups at the expense of others.

[15] Department of Finance, *Corporate Governance of Financial Institutions: Consultation Paper January 2003*.

[193] Similarly, in *Brant Investments Ltd. v. KeepRite Inc.*,[16] the Ontario Court of Appeal considered that a director's duty to act in the best interest of the corporation might diverge from the best interest of one of the stakeholder groups. At 301, the Court stated:

> Acting in the best interests of the corporation could, in some circumstances, require that a director or officer act other than in the best interests of one of the groups protected under s. 234. To impose upon directors and officers a fiduciary duty to the corporation as well as to individual groups of shareholders of the corporation could place directors in a position of irreconcilable conflict, particularly in situations where the corporation is faced with adverse economic conditions.

Review of the director's evidence:

[194] The defendants called Mr. Jerry Nickerson to testify because he was a director of GWL in 1997. He had served in that capacity since 1980. He was a member of the audit committee of GWL for 25 years, 15 years of which was as chairman. Mr. Nickerson was also a member of the executive committee of Lifeco since 1979 and joined the board of Power Corporation and Power Financial in 1999, two years after the GWL acquisition of LL.

[195] Mr. Nickerson saw his role as a director to act in the best interest of the companies at all times and to try to fulfill his responsibilities in a reasonable, fair and diligent manner.

[196] Mr. Nickerson testified that he relied on management generally for assurances on legal compliance and, therefore, assumed that management was satisfied that the PATs were legally compliant. He gave evidence that he could not imagine that Mr. Morrison would recommend something that he did not believe was entirely reasonable and fair.

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[16] (1991), 3 O.R. (3d) 289 at 301.

[197] Mr. Nickerson did state that he did not rely on the actuaries to make legal determinations. He also maintained that he did not believe that the board required a written legal opinion that the PATs were legally compliant.

[198] Mr. Nickerson further testified that he believed that merger synergies belonged to the company as a whole. Accordingly, he believed that it was the board and management's view that PAR should pay for merger benefits. He maintained repeatedly that the PAR accounts did not contribute to acquisition financing, stating rather that the purpose of the PATs was to purchase a PPEA. He did concede, albeit reluctantly, that the PATs represented an amount that GWL would not have to find from alternative sources of financing. His argumentative approach to his testimony damaged his credibility.

[199] Mr. Nickerson testified that the board works very closely with management over a long period of time, and many of the managers are long serving. Given OSFI's "tremendous power," Mr. Nickerson derived "a lot of comfort from the fact that OSFI was very much involved in the picture." As Mr. Nickerson said "OSFI was happy with Mercer's report" and no objections were raised *vis-à-vis* the PATs.

[200] Finally, Mr. Nickerson believed that the PATs were GAAP compliant on the basis that they would not have been brought to the board for approval otherwise.

[201] Mr. Paul Desmarais Jr., the son of the founder of Power Corporation, also testified that the directors rely on the management to bring forward only those proposals which comply legally and with GAAP. He is of the view that directors must rely on management who, in turn, deal with the specialists such as lawyers, accountants and actuaries. He disagreed with the proposition that it would have been more prudent to have the directors ask for written opinions both on the legality and on the GAAP compliance for the PATs. He was of the view that management had done a good job in creating the PATs.

Analysis on section 166(1):

[202] In discharging their statutory fiduciary duty, boards of directors may be entitled to the following:

(a) the safe harbour provision;[17] and

(b) the business judgment rule (BJR).

[203] Under s. 220 of the *ICA*, the "safe harbour provision," directors are entitled to rely in good faith on the reports and advice of their professional advisors. Section 220 provides as follows:

Reliance on statement	***Foi à des déclarations***
220. A director, an officer or an employee of a company is not liable under section 166(1) or (2) or sections 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.	220. N'est pas engagée, aux termes des paragraphes 166(1) ou (2) ou des articles 216 ou 219, la responsabilité de l'administrateur, du dirigeant ou de l'employé qui s'appuie de bonne foi sur : (a) des états financiers de la société reflétant fidèlement sa situation, d'après l'un de ses dirigeants ou d'après le rapport écrit du vérificateur; (b) les rapports des personnes dont la profession permet d'accorder foi à leurs déclarations, notamment les actuaires, avocats, notaires ou comptables.

[204] In *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, the Supreme Court of Canada explained the *raison d'être* of the safe harbour provisions in the context of the *CBCA*. At para. 77, the Court stated:

[17] S. 220 of the *ICA*.

> The reality that directors cannot be experts in all aspects of the corporations they manage or supervise shows the relevancy of a provision such as s. 123(4)(b).

[205] In *Dovey v. Cory*, [1901] A.C. 477, the House of Lords explained the importance of directors being able to rely upon opinions of management and appointed professionals. It explained, at 486 that "the business of life could not go on if the directors could not trust those who are put in a position of trust for the express purpose of attending to the details of management."

[206] In my opinion, the board members of the GWL and LL were entitled to rely on management. It was up to management to assure legal and GAAP compliance. Therefore, the board members have not breached s. 166(1) of the *ICA.*

Analysis of section 166(2):

[207] As stated in *BCE Inc.*, directors' fiduciary duty requires as a minimum that the corporation complies with its statutory obligations.[18] This is recognized by s. 166(2) of the *ICA*.

[208] The defendants take the position that the BJR applies.

[209] Interestingly, the plaintiffs have submitted the Ontario Securities Commission decision of *Re Standard Trustco*,[19] where directors were found to have breached their fiduciary duty by failing to take sufficient care to comply with Canadian financial institutions legislation. Directors could not excuse themselves on the basis of consultations with OSFI. As the commission noted, it is the directors who are responsible for the company, not OSFI. Inadvertence is no answer to a breach of the law.

[210] In *BCE Inc.*, the Supreme Court explained that courts should give deference to the business judgment of directors who take into account the ancillary interests of *inter*

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[18] *Supra* note 9 at para. 38.
[19] (1992), 6 B.L.R. (2d) 241 (Ont. Sec. Com.).

alia, shareholders, employees, creditors, consumers, government and the environment to inform their decisions. At para. 40, the Court stated:

> The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives: see *Maple Leaf Foods Inc. v. Schneider Corp*. (1998), 42 O.R. (3d) 177 (C.A.); *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331, 2007 SCC 44. It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

[211] In *Maple Leaf Foods Inc. v. Schneider Corp* (1998), 42 O.R. (3d) 177, the Court of Appeal explained that perfection is not required of a business decision. At 192, the Court stated:

> The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision: *Paramount*, *supra*, at p. 45; *Brant Investments*, *supra*, at p. 320; *Themadel Foundation v. Third Canadian General Investment Trust Ltd.* (1998), 38 O.R. (3d) 749 at p. 754 (C.A.). This formulation of deference to the decision of the Board is known as the "business judgment rule". (Cited with approval in *Kerr v. Danier Leather*, [2007] 3 S.C.R. 331 at para. 54).

[212] In *Main v. Delcan Group Inc.*, the Court held that the BJR is no response to a breach of statute:[20]

> It is difficult to imagine that any decision which runs contrary to both the *CBCA* and the Shareholders' Agreement could nevertheless be said to be honest, and in good faith. Accordingly, I must find that

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[20] [1999] O.J. No. 1961 at para. 36 (S.C.J.).

> the Respondent cannot rely on the Business Judgment Rule as support for its argument.

[213] Given my findings that the defendants breached ss. 462, 458 and 331(4) of the Act, the BJR does not apply to transactions that are contrary to a governing statute. Accordingly, s. 166(2) of the *ICA* is also breached.

Sections 211 and 212 – Conflict of interest

[214] The plaintiffs claim that certain directors of LL and GWL were in a conflict of interest in respect of the PATs by virtue of being directors or shareholders of Power Financial or Power Corporation.

[215] Section 211 of the *ICA* requires directors and officers of a company to disclose conflicts of interest, as follows:

Disclosure of interest	**Divulgation des intérêts**
211(1) A director or an officer of a company who (a) is a party to a material contract or proposed material contract with the company, (b) is a director or an officer of any entity that is a party to a material contract or proposed material contract with the company, or (c) has a material interest in any person who is a party to a material contract or proposed material contract with the company shall disclose in writing to the company or request to have entered in the minutes of the meetings of directors the nature and extent of that interest.	211(1) Doit faire connaître par écrit à la société la nature et l'étendue de son intérêt, ou demander qu'elles soient consignées au procès-verbal de al réunion du conseil en cause, l'administrateur ou le dirigeant qui : (a)soit est partie à un contrat ou projet de contrat important avec la société; (b) soit est également administrateur ou dirigeant d'une entité partie à un tel contrat ou projet; (c) soit possède un intérêt important dans une partie à un contrat ou projet de contrat important avec la société.

[216] Section 212 set out the circumstances in which a director of a company must abstain from attending or voting on a material contract on the basis of a conflict of interest:

Where director must abstain	**Abstention**
212(1) Where subsection 211(1) applies to a director in respect of a contract, the director shall not be present at any meeting of directors while the contract is being considered at the meeting or vote on any resolution to approve the contract unless the contract is (a) an arrangement by way of security for money lent to or obligations undertaken by the director for the benefit of the company or a subsidiary of the company; (b) a contract relating primarily to the director's remuneration as a director or an officer, employee or agent of the company or an subsidiary of the company or an entity controlled by the company or en entity in which the company has a substantial investment; (c) a contract for indemnity under section 221 or for insurance under section 222; or (d) a contract with an affiliate of the company.	212(1) L'administrateur visé au paragraphe 211(1) doit s'absenter de la réunion pendant que le contrat est étudié et ne peut participer au vote sur la résolution présentée pour le faire approuver, sauf s'il s'agit d'un contrat: (a) garantissant un emprunt ou des obligations qu'il a contractés pour le compte de la société ou d'une filiale de celle-ci; (b) portant essentiellement sur sa rémunération en qualité d'administrateur, de dirigeant, d'employé ou de mandataire de la société ou d'une filiale de celle-ci ou d'une entité contrôlée par la société ou dans laquelle elle détient un intérêt de groupe financier; (c) portant sur l'indemnité prévue à l'article 221 ou sur l'assurance prévue à l'article 222; (d) conclu avec une entité du groupe de la société.

[217] The analysis required under the *ICA* is for this Court to determine if there was a "contract" between GWL or Lifeco and one of the directors (or an entity in which the director had an interest).

[218] The decisions of the directors at issue are the resolutions authorizing the PATs made at the November 26th, 1997 board meetings of both LL and GWL. Were the PATs

a contract within the meaning of the Act? A contract is an agreement between two or more persons who have the capacity to contract. It follows that there must be two separate parties with legal capacity. The PAR account is not a legal entity.

[219] Interestingly, the conflict of interest provisions of the *ICA* in place in 1997, which applied only to contracts, were amended in 2005 to extend to "material contract or material transactions."

[220] The plaintiffs argue that the PATs were not arm's-length commercial transactions between parties of equal bargaining power. They further argue that the PATs were acquisition financing in which Power Financial was vitally interested.

[221] The acquisition was a $2.9 billion transaction that was financed from a variety of sources including GWL's own cash reserves, preferred shares and common shares.

[222] The acquisition financing was structured as follows:

> $1.209 billion from cash reserves of GWL;
>
> $569 million from preferred share issue to LIG shareholders;
>
> $548 million from common share issue to LIG shareholders;
>
> $267 million from common share issue to Investors Group;
>
> $220 million from the PATs; and
>
> $133 million from common share issue to Power Financial.

[223] The plaintiffs have suggested that the Desmarais family and the Power Financial directors who were also on the board of GWL had an interest in PAR financing the acquisition because it minimized the amount of money that Power was otherwise required to contribute.

[224] Mr. Paul Desmarais Jr. agreed that the contribution by PAR meant that less was required from the shareholders. He denied that he or any other member of the board of directors were in a conflict position. He agreed in cross-examination that if the

contribution by PAR would have been at 30% of the purchase price, then perhaps there could have been a conflict. But he felt that at 7.5% of acquisition financing, there was none. Mr. Desmarais was of the view that management had devised this concept in order to allow PAR to participate in the merger synergies. In fact, Mr. Desmarais testified that if the PATs had not been approved, the quantum at issue was not a significant part of the financing or "an insurmountable number."

[225] Power provided $133 million of acquisition financing to encourage the public, by example, to subscribe to it, a display of shareholder's confidence in the acquisition so that the public market would support the acquisition.

[226] There is no evidence to support the conclusion that the directors were influenced or forced to go along with the PATs. Neither is there evidence that any influence was exerted by any directors or by the Desmarais family in any way.

[227] Although this was a material internal company transaction, it was not a contract within the meaning of the conflict provisions of the Act.

[228] Section 212(1)(d) of the *ICA* provides an exception for contracts "with affiliates of the company." Section 2(1) of the *ICA* defines "affiliate" as follows:

"affiliate" means an entity that is affiliated with another entity within the meaning of section 6; **"affiliated entities"** 6(1) One entity is affiliated with another entity if one of them is controlled by the other or both are controlled by the same person.	**"groupe"** L'ensemble des entités visées à l'article 6; **Groupe** 6(1) Sont du même groupe les entités dont l'une est contrôlée par l'autre ou les entités qui sont contrôlées par la même personne.

[229] As part of the mechanics of the acquisition, GWL did receive funds from the LL PAR account, via the intercompany loan. The funds were repaid within two months with interest.

[230] LL and GWL are, and were at the relevant times, affiliates within the meaning of the *ICA*, because LL was "controlled" by GWL, and LL and GWL were "controlled" by the same person (Lifeco) within the meaning of s. 3 of the *ICA*.

[231] Accordingly, the intercompany loan constituted a contract within the meaning of the *ICA*. Furthermore, the directors of LL and GWL were permitted to attend the meetings at which the intercompany loan was considered and to vote on it, by virtue of the statutory exception in s. 212(1)(d) for contracts with affiliates.

[232] The conflict provisions in ss. 211 and 212 did not apply to the PATs and thus were not breached.

Section 521 - Related party transactions:

[233] As part of common issue #1, the Court is asked whether s. 521 has been breached. In the plaintiffs' opening brief, there was no mention of any complaint with respect to s. 521. In the plaintiffs' closing argument, they submitted that there is a related party transaction disclosure issue in the financial statements.

[234] Section 521 of the *ICA* prohibits certain transactions between a company and a related party of the company:

Prohibited transaction 521(1) Except as provided in this Part, a company shall not, directly or indirectly, enter into any transaction with a related party of the company. **Transaction of entity** (2) Without limiting the generality of subsection (a), a company is deemed to have indirectly entered into a transaction in respect of which this part applies where the transaction is entered into by an entity that is controlled by the company.	**Opérations interdites** 521(1) Sauf disposition contraire de la présente partie, il est interdit à la société d'effectuer une opération avec un apparenté, que ce soit directement ou indirectement. **Présomption** (2) Il est entendu que la société est réputée avoir indirectement effectué une opération régie par la présente partie si l'opération a été effectuée par une entité contrôlée par elle.

[235] Given that the plaintiffs' complaint does not arise from s. 521 of the *ICA*, but rather as a disclosure issue, I will only briefly deal with whether there is a s. 521 breach.

[236] A "company" is defined in the *ICA* as a body corporate that is incorporated or continued under the *ICA*.[21]

[237] Only GWL and LL fall within the definition of a "company." Neither Lifeco nor LIG are a "company" within the meaning of the *ICA* as they are incorporated under the *CBCA* and the related party rules do not apply to them.

[238] In essence, LL is not a related party of GWL because s. 518(2) provides an exception for subsidiaries. A subsidiary of a regulated insurance company is not a related party of the company if the person who controls the company does not control the subsidiary other than through its controlling interest in the company.

[239] LIG is not a related party of GWL. LIG is not a related party of LL. GWL is not a related party of LL.

[240] Lifeco is a related party of GWL and Lifeco is a related party of LL.

[241] The only transaction to which the rules apply is the intercompany loan between LL and GWL, which is expressly exempted under s. 518(2) (which provides that LL is not a related party of GWL) and s. 519(4) (which provides that GWL is not a related party of LL).

[242] The plaintiffs ask this Court to examine whether the PATs were properly disclosed in the financial statements. I accept the evidence of Ms. O'Malley in this regard when she says that if one found that the disclosure was substandard, that in and of itself does not invalidate the asset.

[243] The related party transaction provisions of the *ICA* have not been breached.

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[21] *ICA*, ss. 2(1) and 13(1).

Section 492 – Investment standards:

[244] Section 492 requires that a company establish and adhere to investment and lending policies, standards and procedures that a reasonable and prudent person would apply in respect of a portfolio of investments to avoid undue risk of loss and obtain a reasonable return:

Investment standards	**Normes en matière de placements**
492. The directors of a company shall establish and the company shall adhere to investment and lending policies, standards and procedures that a reasonable and prudent person would apply in respect of a portfolio of investments and loans to avoid undue risk of loss and obtain a reasonable return.	492. La société est tenue de se conformer aux principes, normes et procédures que son conseil d'administration a le devoir d'établir sur le modèle de ceux qu'une personne prudente mettrait en œuvre dans la gestion d'un portefeuille de placements et de prêts afin, d'une part, d'éviter des risques de perte indus et, d'autre part, d'assurer un juste rendement.

[245] In discharging their duties, directors are guided by OSFI Guideline B-1 regarding the Prudent Person Approach.

[246] As required by the *ICA*, both LL and GWL had investment policies that had been approved by their respective boards of directors. Both policies restricted investments in common stock.

[247] The defendants argue that the PATs were not an invested asset and therefore not in breach of s. 492.

[248] The plaintiffs claim that the directors breached s. 492 in two ways:

i) The PATs constituted unlawful investing of PAR assets; and

ii) The shift in asset mix was in contravention of the investment guidelines.

[249] The plaintiffs do not challenge the content of the defendants' investment and lending policies. Rather they contest the defendants' alleged failure to adhere to them *vis-à-vis* the PATs.

[250] At no time did the boards of either defendant engage in an analysis of whether the PATs were prudent investments consistent with the companies' investment policies. Mr. Edwards testified that the term "investment" was used in common parlance among the management not to mean "invested asset" under the investment and lending policies. The PPEA were not invested assets, according to both Mr. Edwards and Mr. Munro (the Chief Investment Officer at GWL). As Mr. Paul Batho, the plaintiffs' expert in institutional investing testified, the PPEA are illiquid and there is no market for them and they therefore are not an "invested asset." In essence, $220 million of PAR surplus was converted to cash, which was used to purchase an "asset" that could not be sold on the market or liquidated.

[251] The defendants stipulate that the PATs cannot be considered as non-compliant under s. 492 since the PPEA were not invested assets. As Mr. Munro testified, invested assets means bonds, real estate, mortgages, stocks and short-term money market securities.

[252] As indicated by Mr. Wason of Mercer, the surplus in the PAR account is to be invested in the best interest of PAR and in accordance with the investment policies. Accordingly, was the purchase of a PPEA in the best interest of PAR? In other words, was the purchase in the best interest of PAR when considering the effect to PAR being no worse but no better off? That question must be focused on an examination of the benefit to PAR at the time of the transaction.

[253] For the first 25 years, there is a projected increase in the PAR account's expense, which has been portrayed as representing the present value of the expense savings or merger synergies annually achieved as was estimated in 1997. Therefore, the intent of

the directing minds was to defer any savings from the PAR account for 25 years through the yearly amortization of the PPEA.

[254] Although the PPEA were not "invested assets," the PAR accounts have received no return on their "investment" of $220 million since the PATs were created. Had the $220 million not been paid to the shareholders' accounts, it would have been available to be "invested" on behalf and in the best interest of PAR. The test for investments is to earn a return on the basis of a prudent person.

[255] Even though there is no evidence that the dividends were negatively impacted, the fact remains that this generation of policyholders have had their benefits deferred for 25 years. If the PATs had not occurred, and the merger proceeded, the PAR account would have had a great windfall and perhaps dividends would have been greater than they were.

[256] GWL was a particularly risk averse investor. GWL's investment policy specified a range of 0 to 10% for common stocks.

[257] LL had made plans to increase their equity holdings prior to the acquisition. The plaintiffs submit that the segmented guideline for the participating business[22] was LL's investment policy instead of the Standing Investment Authorization.[23] That segmented guideline provided for a minimum of 5% in equity holdings. The Standing Investment Authorization provided for no such minimum.

[258] The plaintiffs submit that the liquidation of the equity portfolio in the PAR accounts and replacement with bonds was in contravention of the investment guidelines.

[259] Based on the evidence of Mr. Edwards and Mr. Munro, this Court finds that the Standing Investment Authorization was the investment policy of LL at the time of the acquisition. Accordingly, the sale of the common stocks was compliant with the companies' investment policies.

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[22] December 9th 1996 JDB0148
[23] JDB0552

[260] As noted, the second complaint is with respect to the shift in asset mix.

[261] In the period leading up to the acquisition, GWL and later LL, sold a substantial majority of their common stock portfolios. The stock was sold from both the PAR and non-PAR investment portfolios of the companies with the sales continuing through to the end of 1997. The common stocks were replaced by corporate and government bonds.

[262] The majority of the investment portfolios of the companies were then and remain now in bonds and mortgages. Approximately 5 to 6% of the PAR accounts were in common stocks.

[263] Mr. Munro testified that the purpose of selling the stocks was to reduce the overall risk to two large insurance companies heading into a merger, by reducing their exposure to the volatile stock market. Further, Mr. Munro was of the view that it was an opportune time to lock-in capital gains.

[264] The *ICA* requires that insurance companies maintain adequate capital which is measured using the "Minimum Continuing Capital and Surplus Requirements" (MCCSR) formula. That regulatory metric formula is applied in respect of an insurance company's accounts in order to regulate the ratio of capital to surplus in the accounts. Both LL and GWL had maintained MCCSR ratios in excess of 180% prior to the acquisition.

[265] In total, approximately $1 billion in stocks were sold from the PAR accounts. After several years, the companies began to increase their common stock portfolios by reinvesting in equities in the later part of 1998 and early 1999. By the end of 2004, the companies were re-invested in the stock market to the level they were prior to the acquisition.

[266] The plaintiffs maintain that the shift in asset mix was done for the benefit of the shareholders, in order to negate the impact on the MCCSR caused, they say, by the PATs and the acquisition financing.

[267] The defendants called Dr. David Babbel to opine on this issue. Dr. Babbel was qualified as an expert in asset liability management and insurance asset valuation. Dr. Babbel is a Professor of Insurance and Finance at the Wharton School of Business at the University of Pennsylvania. He holds a PhD in Financial Economics from the University of Florida which he obtained in 1978.

[268] Dr. Babbel summarized his opinions as follows:

- The sale of common equities from the investment portfolios of the PAR and non-PAR accounts of LL and GWL was appropriate, prudent and common in light of the circumstances faced by the companies;
- The sale of equities did not diminish the returns experienced by the PAR accounts of the companies; and
- The discount rate used in connection with PATs was reasonable and, when considered with the savings that will accrue to the PAR accounts, generous.

[269] I find that the evidence of Dr. Babbel, and that of Mr. Munro, supports the sale of common stock as being entirely reasonable and prudent in order to reduce their exposure to the stock market, including the advantage of realizing on capital gains all the while maintaining adequate capital. The evidence does not support the conclusion that the only reason the sale of equities occurred was due to the MCCSR requirements, affected by the PATs.

[270] Given those findings, I cannot find that the shift in asset mix was in contravention of s. 492 of the *ICA*.

Discount rate of 6.91%:

[271] The plaintiffs challenge the discount rate incorporated into the PATs. The defendants maintain that the rate of 6.91% was designed to reflect the minimum risk undertaken by the PAR accounts, given the expense rating adjustment (ERA) mechanism.

[272] Mr. Paul Batho, a CFA and investment specialist was called as an expert by the plaintiffs to opine on the discount rate. He was of the opinion that the discount rate that

should have been used should have reflected all of the investment risks inherent in the PATs. He explained that a lower discount rate would maximize the present value calculation of the capital paid by the PAR accounts. That evidence was accepted by all experts. However, Mr. Batho was of the view that a full risk rate of return would have been more appropriate, given what the PPEA represented. In other words, investors would demand a higher rate of return to reflect the risk embedded in the diminished liquidity of the PPEA. Further, he was of the opinion that the negative impact on the ability of the PAR accounts to generate investment returns caused by the sale of equities should also generate a full risk of return.

[273] The defendants' position is that in exchange for $220 million the PAR accounts would receive benefits beyond those amounts with no additional payment. Mr. Morrison agreed under cross-examination that the valuation analysis was such that PAR was paying for the intangible benefits in the first 25 years and that any merger synergies thereafter would benefit PAR without any further contribution required by PAR. This is consistent with the evidence of Dr. Babbel wherein he opines that savings in relation to the post 25 year period are relevant to any consideration of the appropriateness of the discount rate.

[274] Dr. Babbel testified that the rate used by the defendants was reasonable and appropriate. In hindsight, Dr. Babbel explains that the rate of return depends upon the use of funds, not where the funds originate or the rate that had previously been earned on those funds.

[275] Given my findings that the shift in the asset mix was appropriate and reasonable, and not solely related to the PATs, I prefer the evidence of Dr. Babbel when concluding the rate of return as being an appropriate rate given the circumstances of the PATs.

Conclusion:

[276] The defendants have not breached s. 492. The sale of common stock was conducted pursuant to and consistent with the defendants' investment policies and finally the discount rate utilized by the defendants was reasonable and appropriate.

Common Issue #3: Were The GWL and Lifeco unjustly enriched by the PATs?

[277] Were GWL and Lifeco unjustly enriched by the PATs?

[278] The unjust enrichment claim is non-statutory and is brought against GWL with respect to LL and against Lifeco with respect to GWL.

[279] The test for unjust enrichment has three elements:[24]

> i) The defendant was enriched;
>
> ii) There was a corresponding deprivation of the plaintiff; and
>
> iii) There was no juristic reason for the defendants to retain the enrichment, such as a contract, legal disposition, or other valid legal, equitable or statutory obligation.

[280] First, Lifeco did not receive any of the funds from the PATs and with respect

to GWL, it did receive funds from the LL PAR, via the intercompany loan, but the funds were repaid within two months to the shareholder account of LL.

[281] Clearly Power Corporation and/or GWL did not have to seek the $220 million towards the acquisition financing elsewhere. In that sense, the defendant GWL was enriched by PAR in the amount of $220 million.

[282] Although there was a deprivation of the $220 million from the PAR accounts' surplus, the plaintiffs have failed to prove that the shareholders' benefit was detrimental to the PAR accounts in that amount. There is no evidence that there was any impact on

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[24] *Pacific National Investments Ltd. v. Victoria* (*City*), [2004] 3 S.C.R. 575 at para. 14.

policyholder dividends, which is what the policyholders are entitled to under their contracts.

[283] Finally, there is no evidentiary basis to allow the alternative disgorgement remedy, because there is no basis to allow the unjust enrichment claim. Further, there is no evidence that the shareholders' dividends were positively affected by the taking of the synergies. Although there was some evidence that the value of the shares did rise considerably over the years, there is no reliable evidence to suggest that it was only due to the PATs.

[284] As will be discussed further, the *ICA* contains an extensive remedial regime for non-compliance with its provisions. In that context, compensation should place the PAR accounts in the position that they would have been in had the PATs not taken place.

[285] Given my findings with respect to the issue that the shift in asset mix was reasonable, and given no corresponding deprivation to the PAR with respect to the dividends paid, the claim for unjust enrichment fails and therefore the claim for disgorgement also fails.

Common Issue #4: If the answer to any of (a) to (c) is yes, what remedies, if any, are just and appropriate under sections 215 and 1031 of the ICA, or otherwise at law?

Remedies:

[286] Having found that the defendants breached the *ICA*, what is the proper remedy in this case? The *ICA* contains an extensive remedial regime for non-compliance with its provisions. Section 1031 provides that:

> Compliance or restraining order
>
> 1031(1) 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.

[287] Section 215 has a narrower application, being confined to contraventions of the disclosure requirements for conflicts of interest in s. 211. As already discussed, this Court has found that there was no conflict of interest and as such s. 215 is not applicable as a remedial provision.

[288] The purpose of granting the court the power to make any further order it thinks appropriate is also consistent with the behavior modification policy in the *CPA*.

[289] In this regard, the PATs were entered into without regard to due legal diligence. Mercer did not seek legal advice, even though Dr. Brender had initially recommended that they should.

[290] Mercer's failure to review this transaction from a legal perspective, and the failure by Deloitte to properly assess the economic substance of the PATs, had a domino effect from Deloitte to Mercer to OSFI and finally in the illegal transactions by the defendants.

What is the appropriate remedy in relation to the breaches herein?

[291] The defendants urge this Court to make no order beyond a declaration of a breach.

[292] The plaintiffs ask this Court to make a monetary award putting them in the position they would have been in had the PATs not taken place.

[293] In addition, the plaintiffs seek monetary compensation from the shift in asset mix in the PAR account. As discussed earlier, the sale of common equities was not caused by the PATs, but rather it complied with the defendants' investment policies and was reasonable in the circumstances and therefore no monetary claim is allowed in that regard.

[294] The claim of excessive integration costs is abandoned by the plaintiffs.

[295] The plaintiffs also advance an alternative remedy known as "disgorgement." They argue that as a result of the unlawful transactions, the shareholders derived improper benefits from receiving the $220 million. As already discussed, the disgorgement claim is not available to the plaintiffs.

[296] I wish to examine the expert evidence on the issue of damages and then I will deal with how to arrive at a reasonable award, taking into consideration the 13 years that have now passed since the PATs were created.

Damages experts:

[297] Mr. Cohen and Mr. Anson-Cartwright were the two experts tendered on behalf of the plaintiffs to support a claim for monetary remedy.

[298] Mr. Cohen was tendered as an expert in the life insurance industry, including the PATs, dividend policies and practices, and how experience can benefit participating policyholders. Mr. Cohen is an actuary who has worked in the insurance field for some time. He is not a qualified Certified Financial Analyst (CFA), nor is he an accountant. He has never held the position of A.A., nor has he been responsible for the management of a participating account portfolio.

[299] The evidence of Mr. Cohen was based on many errors and/or omissions and was fraught with opinions on matters without foundation and based on faulty assumptions. For example, Mr. Cohen purported to compare PAR account yields of LL, GWL and Manulife and Canada Life, but conceded that the figures used for Canada Life

were dividend interest rates and not PAR account yields. Also, Mr. Cohen inaccurately portrayed different time periods for different companies. These are just a few examples of errors in his work which render his evidence unreliable.

[300] Mr. Anson-Cartwright was proffered as an expert in damage calculation. He is a certified accountant and was a partner with Price Waterhouse since 1967. He has appeared as an expert witness relating to loss of profits and damages in all level of Courts in Canada and elsewhere. He has also acted as a Court appointed inspector.

[301] Mr. Anson-Cartwright calculated damages based on the assumption that the transfer of $220 million was not a permitted transfer under s. 462. The initial component of damages quantification, in his opinion, requires restoring $220 million to the PAR accounts of both companies effective November 1997.

[302] Replacing $220 million to the PAR accounts effective as of the end of November 1997 would result in a return on investment being earned thereon by the PAR accounts since that time.

[303] The foregone investment income thereon (or time value of money) was then calculated from that time through to September 30th, 2009. Mr. Anson-Cartwright produced two sets of ranges: the lower one, which reflects the yield earned on the PAR accounts of both companies and the higher one being the average yield earned on the PAR accounts of Manulife and Canada Life.

[304] Mr. Anson-Cartwright's first range concluded that pre-tax returns ranged from 5.01% to 8.48% from 1997 to 2007 and in 2008 from -.057% for GWL and -1.22% for LL.

[305] In cross-examination, Mr. Anson-Cartwright was shown a different set of percentages, for instance, instead of 5.09 actual returns for GWL, his calculations were at 5.01, which he acknowledged was slightly different. In the LL return, he was shown a figure of 5.09 and his calculations were based on returns of 5.11. His calculations were

slightly inferior in the GWL return and slightly higher in the LL returns and he was therefore of the view that the difference would not materially affect his calculations.

[306] Mr. Anson-Cartwright's second range was as a result of looking at those other companies which had maintained asset mixes more comparable to what GWL and LL had in the years prior to the acquisition. In cross-examination, Mr. Anson-Cartwright agreed that if those figures which he took from Mr. Cohen's report were incorrect, then his calculations would be wrong.

[307] As indicated earlier, Mr. Cohen's calculations were shown on numerous occasions to be incorrect by the cross-examiner. Accordingly, the evidence does not support the second range or the higher parameter of damages.

[308] Finally, Mr. Anson-Cartwright has factored in an incremental tax gross up, as participating dividends paid on PAR accounts are tax deductible in the year to the extent of accumulated participating income, effectively making them payments of pre-tax earnings.

[309] Participating dividends are tax deductible by the company and accordingly the yield that is actually paid out to participating policyholders is a pre-tax yield. Mr. Anson Cartwright's quantification of damages needed to be grossed up to a pre-tax basis so that the participating policyholders are awarded damages on the basis to which they would have been entitled.

[310] The gross up was initially calculated assuming the return on investment was retained as additional surplus throughout the period and paid out as a dividend at the end of the period (September 30th, 2009). An incremental gross up was then calculated as an alternative to reflect the benefits of paying out the yield as participating dividends in each year that such yield was earned.

[311] As already indicated, the plaintiff did not call any reliable evidence about the actual impact of the PATs on dividends. Accordingly, there is no basis for Mr. Anson-

Cartwright's assumption that any foregone income earned over the period would have been paid out annually.

[312] However, I accept that the tax gross up on the foregone investment income should be calculated as if the investment was retained as additional surplus throughout the period and paid out as a dividend at the end of the period (or after this judgment is released).

[313] Mr. Anson-Cartwright also testified that when earnings are retained as additional surplus in the PAR accounts, tax is paid on such earnings. When this surplus is eventually paid out to the participating policyholders by way of dividends, the dividends are deductible and taxes are recovered. Thus, the grossing up of damages to a pre-tax amount is consistent with the tax treatment of the PAR accounts.

[314] The defendants argue that the gross up assumes that all foregone investment income accruing to the PAR accounts should be paid out to the plaintiffs. For the purpose of remedial compensation, this Court finds that the plaintiffs are entitled to a reasonable award compensating for all foregone investment income accrued to the PAR accounts as indicated earlier, together with the corresponding gross up for taxes.

[315] The defendants finally argue that the gross-up should not be paid by the non-PAR accounts because they argue that as Mr. Anson-Cartwright testified: "dividends are tax deductible to the accounts and, once paid, the taxes are recouped." This issue shall be dealt with by the "litigation trustees."[25]

[316] This Court accepts Mr. Anson-Cartwright's calculations as set out in Schedule "A" to his report. His evidence was forthright and reliable, especially given his rectification as of September 11th, 2009.

[317] The investment return on the $220 million from November 1997 to September 2009 was between $172.7 million and $216.4 million.

[25] As set out in paras. 30 and 31 of Schedule "B" herein.

[318] The portion of the claim represented by the gross up for taxes was calculated as between $63 and $79 million of the $172.7 and $216.4 million.

[319] The difference in the amount results from calculating two ways, the lowest representing the returns experienced by the defendants' PAR accounts; and the highest representing the average of the returns experienced by the PAR accounts of Manulife and Canada Life.

[320] There is no evidence to support the latter method of calculation as being the proper comparable. Mr. Anson-Cartwright admitted that the differing returns for the companies can result from differing asset mixes unrelated to the actual PATs in addition to the fact that his figures may be erroneous.

[321] This Court accepts the calculation of Mr. Anson-Cartwright in Schedule "2a" of his report dated November 20th, 2007 and updated September 11th, 2009 based on the returns experienced by the defendants' respective PAR accounts, as of September 30th, 2009.

Conclusion:

[322] By creating the PATs, the defendants have done indirectly what was prohibited from being done directly.

[323] The PPEA could be characterized as "creative accounting", however, they are not assets recognized by GAAP. If PPEA are not assets then it follows that the Deferred Revenue Liability assets are also not assets recognized by GAAP. In addition, there is no market for them. They are not considered assets for the purposes of MCCSR.

[324] The annual amortization of the PPEA does not comply with s. 458 because the charges stemming from an unlawful asset ought to be set aside.

[325] The plaintiffs asked that the defendants prepare revised financial statement retroactive to 1997, in accordance with section 355 of the *ICA* and GAAP.

[326] Even though I have found that the PPEA are not compliant with GAAP, I am of the view that the amortization of the PPEA for the last 13 years is a form of contribution by PAR to the merger synergies by not having received them through that expense.

[327] Of course counsels have not made any submissions on this point given their opposite positions. I am therefore prepared to entertain submissions on this suggested remedy.

[328] To retroactively revise the financial statements could have the effect that PAR could obtain that "windfall" in addition to the foregone investment income granted herein. In order to prevent this unjust result, I hereby order that the amortization of the PPEA shall terminate as of January 1st, 2011. This would allow the future merger synergies to flow through naturally in accordance with the allocation method that has not been changed.

[329] On March 9th, 2004, the ERA report was completed. The results of the ERA were presented to the GWL and LL board of directors on November 17, 2006. The review was conducted in 2002 (five years after the PATs were created). Ms. Block for the defendants advised the Court in her opening that the additional savings in the amount of $68.5 million have not been dealt with by the Board of Directors of the Defendants, given this litigation.

[330] Accordingly, I am prepared to hear submissions with respect to how best to deal with this ERA.

[331] Finally, the defendants shall pay to the PAR accounts the sum of $220 million plus the foregone investment income of $172.7 million plus $63 million of gross up for taxes for a total of $455.7 million.

[332] Each PAR account shall receive the following:

For LL: $372.2 million and for GWL: $83.5 million.

Litigation trusts and plan of distribution

[333] In order that the amounts awarded by this Court are available for distribution pursuant to a plan to be furnished to this Court, a litigation trust shall be formed for each defendant who will be charged with the task of retaining the award of the class members pursuant to the *CPA*, ss. 24 and 26 as outlined in paras. 30 and 31 of Schedule “B”.

[334] The amounts awarded to the PAR accounts will increase the surplus and be available for distribution to class members as dividends. The litigation trustees shall be charged with distributing the trust assets to and for the benefit of the class members in the most tax-efficient method pursuant to plans of distribution to be approved by this Court, having regard to the defendants’ dividend policies and inter-generational equity.

[335] The parties shall be required to return to court within 120 days from the date of these reasons for judgment with a plan of distribution of the amounts ordered paid to the litigation trusts for approval by this Court.

Draft Judgment:

[336] Judgment shall be issued as set out in the draft judgment attached as Schedule “B” of these reasons.

“*Justice J. N. Morissette*”

Justice J. N. Morissette

Released: October “1st”, 2010

SCHEDULE "A"

LIST OF INDIVDUALS REFERRED TO IN THESE REASONS:

NAME:	FOR WHICH COMPANY THE PERSON WORKS FOR:	OCCUPATION:	CALLED AS A WITNESS OR NOT BY WHOM?
Anderson, Len	GWL	Vice-President and Controller	Not called to testify
Anson-Cartwright, Ronald	Anson-Cartwright & Associates	Business valuator and FCA & damage calculation expert	Plaintiffs' expert witness
Babbel, Dr. David	Professor of Insurance and Finance at Wharton School of Business	Qualified as an expert in asset liability management and insurance asset valuation	Defendants' expert witness
Batho, Paul	PRB Financial Consultants	Institutional investor	Plaintiffs' expert witness
Bélanger, Paul	Blake, Cassels & Graydon	External counsel to GWL and Lifeco	Defendants
Blake, Ian	GWL	Director, valuation	Not called to testify
Brender, Allan	Mercer	Actuary and author of Mercer Report	Defendants
Brisson, Paul	LL	Senior Vice-President, Asset Liability Management	Not called to testify
Burns, James	GWL, LL and Lifeco Power Corporation	Chairman of the Board Deputy chairman	Not called to testify
Burrows, Monica	OSFI	Manger, Corporate Analysis, Life Insurance Division	Not called to testify
Cohen, Harry Hy	Miral Consulting Inc.	Life insurance industry expert	Plaintiffs' expert witness
Dackow, Orest	GWL and Lifeco Lifeco LL	Director President and Co-CEO Director	Not called to testify
Desmarais, André	GWL and Lifeco	Director	Not called to

	Power Corporation Power Financial Corporation LL	President and Co-CEO Deputy Chairman Director	testify
Desmarais, Paul Jr.	GWL and Lifeco Power Corporation Power Financial Corporation, LL	Director Chairman and Co-CEO Chairman Director	Defendants
Desmarais Paul Sr.	GWL, Lifeco, Power Corporation, Power Financial Power Corporation LL	Director Chairman of the Executive committee Director	Not called to testify
Edwards, Allan	LL	Appointed Actuary	Plaintiffs
Friesen, Heather	OSFI	Director, Analysis Life Insurance division	Not called to testify
Jack, Bruce	Deloitte	Partner, Chartered Accountant	Defendants
Lapointe, Jean-Guy	OSFI	Actuary	Not called to testify
LePan, Nick	OSFI	Deputy Superintendent of Financial Institutions in 1997	Defendants
Lovatt, William	GWL and Lifeco LL	CFO of GWL in 1997 CFO	Defendants
Martin, Paul	Government of Canada	Minister of Finance in 1997	Not called to testify
McFeetors, Raymond	GWL Lifeco LL	President Director CEO	Defendants
Morrison, David	GWL	Appointed Actuary	Defendants
Nickerson, Jerry	GWL, Lifeco, Power Financial Corporation and Power Corporation GWL and LL	Director Chair of the Audit Committees in January 1998	Defendants
O'Malley, Patricia	Chair of the Canadian Accounting	Accounting and GAAP expert	Defendants' expert witness

	Standards Board		
Palmer, John	OSFI	Superintendent of Financial Institutions	Not called to testify
Richardson, Gordon	GAAP & Financial accounting expert	Plaintiffs' expert witness	Not called to testify
Stewart, Ken	LL	Vice-President, Strategic initiatives	Not called to testify
Thornton, Dr. Daniel	Professor of Chartered accounting at Queen's University	GAAP & Financial accounting expert	Plaintiffs' expert witness
Wagar, Sheila	GWL and Lifeco LL	Senior Vice-President and Corporate Secretary and General Counsel General Counsel	Not called to testify
Wason, Stewart	Mercer	Actuary, and co-author of Mercer Report	Defendants
Winokur, Paul	Winokur Consulting Inc.	Actuarial expert	Plaintiffs' expert witness

SCHEDULE "B"

DRAFT JUDGMENT:

DEFINITIONS

[1] **THIS COURT ORDERS AND DECLARES** that for purposes of this Judgment the following definitions shall apply:

[2] "acquisition" means the acquisition in 1997 of LL and its parent London Insurance Group Inc. ("LIG") by GWL and its parent Great-West Lifeco Inc. ("Lifeco");

[3] "class representatives" means the representative plaintiffs in this action;

[4] "experience rating adjustment" means the review of the PAR account transactions conducted in 2002 and includes the work undertaken by the defendants, Tillinghast-Towers Perrin and Mercer Oliver Wyman;

[5] "fully cooperate" means to forthwith provide access to documents as that term is defined in Rule 30 of the *Rules of Civil Procedure,* and forthwith respond to written and oral questions;

[6] "GAAP" means generally accepted accounting principles, which in turn means the accounting principles encoded in the Canadian Institute of Chartered Accountants' Handbook;

[7] "Great-West Life Class Members" means all persons who held a participating life insurance policy of The Great-West Life Assurance Company between 1997 and the date of judgment;

[8] "GWL PAR account" means the account maintained by The Great-West Life Assurance Company ("GWL") in respect of participating policies pursuant to s. 456 of the *Insurance Companies Act*, S.C. 1991, c. 47 ("*ICA*");

[9] "inter-generational equity" means the fair treatment of different generations of policyholders with respect to dividend distribution;

[10] "litigation trusts" means trusts established by the parties, the subject matter of which shall be all amounts ordered herein to be paid by the defendants and the beneficiaries of which shall be the class members;

[11] "LL PAR account" means the account maintained by London Life Insurance Company ("LL") in respect of participating policies pursuant to s. 456 of the *ICA*;

[12] “London Life Class Members” means all persons who held a participating life insurance policy of the London Life Insurance Company between November 1997 and the date of judgment;

[13] “Mercer report” means the Independent Actuary Report prepared by William M. Mercer Limited, dated October 27, 1997;

[14] “merger synergies” means the expense savings considered in these actions or in any way related to the acquisition as described in the experience rating adjustment;

[15] “non-participating accounts” means the accounts of the defendants other than those referred to in [8] and [11] above;

[16] “PAR account transactions” means the transactions made in the participating accounts in connection with the acquisition, which include the following:

1) the transactions approved by the Boards of Directors of LL and GWL on November 26, 1997 that resulted in the transfer of $180,000,000 and $40,000,000 from the respective companies’ participating accounts to the non-participating accounts; and

2) the transaction approved by the Board of Directors of LL on November 26, 1997 that resulted in the movement of $180,000,000 from the LL non-participating account to the GWL non-participating account.

[17] “participating accounts” means the collective accounts referred to in [8] and [11] above.

[18] “participating policyholder” means the holder of a participating policy;

[19] “participating policyholders’ reasonable expectations” means the expectations that can reasonably be imputed to participating policyholders in respect of their policies and includes both expectations codified in actuarial standards and expectations that the companies’ shall at all times in their dealings with the participating policyholders and the participating accounts comply with the *ICA* and GAAP;

[20] “prepaid expense assets” means the accounting entries recorded in the participating accounts contemporaneous with the transfers of $180,000,000 and $40,000,000 from the LL PAR account and GWL PAR account respectively.

COMMON ISSUES

[21] **WHEREAS** the following are common issues raised on behalf of the classes:

> (a) Did the PAR account transactions constitute a breach of sections 331(4), 456, 458, 462, 492, or 521 of the *Insurance Companies Act*?
>
> (b) Did the Directors and Officers of the defendants breach sections 166(1), 166(2), 211, or 212 of the *Insurance Companies Act*?
>
> (c) Were The Great-West Life Assurance Company and Great-West Lifeco Inc. unjustly enriched by the PAR account transactions?
>
> (d) If the answer to any of (a) to (c) is yes, what remedies, if any, are just and appropriate under sections 215 and 1031 of the *Insurance Companies Act* or otherwise at law?

CLASS DEFINITION

[22] **WHEREAS** the class in the Jeffery-Rudd action is defined as follows:

> All persons who held a participating life insurance policy of the London Life Insurance Company between 1997 and the date of judgment.

[23] **WHEREAS** the class in the McKittrick Action is defined as follows:

> All persons who held a participating life insurance policy of The Great-West Life Assurance Company between November 1997 and the date of judgment.

NATURE OF THE CLAIMS

[24] **WHEREAS** the claims asserted by the class in the Jeffery-Rudd Action and by the class in the McKittrick Action (together "the classes") are as follows:

- that the events and actions referred to as the "PAR account transactions" by the parties in this litigation constituted a breach by the defendants of sections 331(4), 456, 458, 462, 492 and/or 521 of the *Insurance Companies Act*;

- that, through their conduct respecting the PAR account transactions, the Directors and Officers of the defendants breached sections 166(1), 166(2), 211 and/or 212 of the *Insurance Companies Act* and certain common law duties;

- that, as a result of the PAR account transactions, The Great-West Life Assurance Company and Great-West Lifeco Inc. were unjustly enriched; and
- that the class members are entitled to relief under sections 215 and 1031 of the *Insurance Companies Act*, and otherwise at law.

DECLARATIONS AND ORDERS

[25] **THIS COURT ORDERS AND DECLARES** that the PAR account transactions were contrary to the *ICA* and unlawful.

[26] **THIS COURT ORDERS AND DECLARES** that, subject to [27] herein, the defendants shall be prohibited from charging, debiting or expensing to the participating accounts any amount in respect of merger synergies.

[27] **THIS COURT ORDERS AND DECLARES** that as of January 1, 2011, the defendants shall:

- cancel the prepaid expense assets in the participating accounts; and,
- cancel the annual amortization charges in the participating accounts in respect of the prepaid expense assets.

MONETARY RELIEF - PAR ACCOUNT TRANSACTIONS

[28] **THIS COURT ORDERS AND DECLARES** that the defendants shall pay to the LL PAR account the sum of $372,200,000 as of September 30th, 2009.

[29] **THIS COURT ORDERS AND DECLARES** that the defendants shall pay to the GWL PAR account the sum of $83,500,000 as of September 30th, 2009.

LITIGATION TRUSTS

[30] **THIS COURT ORDERS AND DECLARES** that there shall be created a litigation trust pursuant to the *Class Proceedings Act*, sections 24 and 26 for the benefit LL class members with the purpose of holding all monetary relief ordered to be paid herein pursuant to [28] above and having as trustees three persons to be approved by the parties.

[31] **THIS COURT ORDERS AND DECLARES** that there shall be created a litigation trust pursuant to the *Class Proceedings Act*, sections 24 and 26 for the benefit of GWL class members with the purpose of holding all monetary relief ordered to be paid

herein pursuant to [29] above and having as trustees three persons to be approved by the parties.

PLAN OF DISTRIBUTION

[32] **THIS COURT ORDERS AND DECLARES** that the parties shall make further submissions within 120 days of the date of this judgment for approval by and further order of this Court of a plan of distribution in the most tax-efficient method, having regard to the defendants' dividend policies and inter-generational equity, of all or any portion of the amounts ordered paid to or for the benefit of the participating accounts and participating policyholders into the litigation trusts.

PROHIBITION ORDER

[33] **THIS COURT ORDERS AND DECLARES** that the defendants shall be enjoined from debiting, expensing or otherwise deducting from the participating accounts any costs or expenses incurred by the defendants in defence of these actions or any other amounts except those arising in the ordinary course of business, except by leave of the court on notice to the class representatives.

DUTY OF COOPERATION AND ASSISTANCE OF THE DEFENDANTS

[34] **THIS COURT ORDERS AND DECLARES** that the defendants shall take all reasonably necessary steps and to do all things reasonably appropriate to fully cooperate in carrying into effect this judgment.

OSFI

[35] **THIS COURT ORDERS AND DECLARES** that the judgment of this Court shall be provided to OSFI for its assistance in carrying out its statutory responsibilities pursuant to section 4(2) of the *OSFI Act.*

PREJUDGMENT INTEREST AND OTHER ADJUSTMENTS

[36] **THIS COURT ORDERS AND DECLARES** that the sums awarded under [28] and [29] above shall be adjusted to the date of this judgment in respect of prejudgment interest or other time value of money adjustments by agreement of the parties or upon further attendance before this court by no later than 120 days from this judgment.

REPRESENTATION OF CLASS MEMBERS

[37] **THIS COURT ORDERS** that James Jeffery and D'Alton Rudd are appointed as class representatives of the LL Class members.

[38] **THIS COURT ORDERS** that John McKittrick is appointed as class representative of the GWL Class members.

[39] **THIS COURT ORDERS** that the class representatives may be replaced by such other class member(s) as may be further ordered by the Court pursuant to the *Class Proceedings Act.*

[40] **THIS COURT ORDERS AND DECLARES** that the reasons for judgment and judgment of this Court shall be provided to class members by the defendants.

ADDITIONAL ORDERS AND STEPS

[41] **THIS COURT ORDERS AND DECLARES** that this Court shall retain jurisdiction to make further orders and hear submissions and give directions as necessary to carry out the relief granted to class members, including but not limited to:

a) Cancellation of the PPEA as of January 1, 2011;

b) The ERA issue;

c) Creation of litigation trust;

d) Plan of distribution.

COSTS

[42] **THIS COURT ORDERS AND DECLARES** that the Court shall retain jurisdiction to make orders respecting costs.

Justice J. N. Morissette

Dated: October 1st , 2010