

## PENSIONS AND EMPLOYEE COMPENSATION BULLETIN

September 2004

### **MONSANTO: SUPREME COURT RULING PRESENTS ANOTHER CHALLENGE FOR PENSION PLAN ADMINISTRATORS**

On July 29, 2004, the Supreme Court of Canada released its decision in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Service)*. The decision creates an obligation for employers who have partially wound-up their defined benefit pension plans to distribute a proportional share of actuarial surplus in the plan as at the partial wind up date. This represents a significant shift in the timing of surplus distribution in Canada. Before the Monsanto case, no court or tribunal had determined that a distribution of surplus is required when there is a partial plan wind up.

#### **THE MONSANTO DECISION**

In *Monsanto*, the key issue was whether an employer has a legal obligation to distribute part of the actuarial surplus in a defined benefit pension plan when it implements a partial plan wind up. By answering in the affirmative, the Supreme Court upheld the lower courts' strict interpretation of subsection 70(6) of the Ontario *Pension Benefits Act* ("PBA"). Subsection 70(6) reads:

On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

The court determined that this subsection imposes a legal obligation on an employer to distribute the actuarial surplus that is related to that part of the pension plan being wound up. It should be emphasized that the Supreme Court's ruling does not deal with the issue of surplus ownership; surplus ownership will continue to be a separate legal issue determined by the historical terms of the plan and related funding documents.

#### **BACKGROUND TO THE CASE**

In December 1996, Mississauga-based Monsanto Canada announced that it would be letting go 146 employees as part of an internal restructuring. At the same time, Monsanto served notice that it would partially wind up its defined benefit pension plan as of May 31, 1997. Monsanto filed a partial wind-up report for approval with Ontario's Superintendent of Financial Services. At the time of filing, the plan's actuarial surplus was estimated at approximately \$14 million. In the report, Monsanto proposed to distribute their share of surplus to the terminated members, if and when the plan was ever fully wound up.

The Superintendent refused to approve the wind-up report, claiming that the interests of the terminated plan members were not protected. Monsanto appealed this decision to the Financial Services Tribunal, which ruled 2-1 in Monsanto's favour in April 2000, ordering the Superintendent to approve the Monsanto report. In subsequent appeals to the Ontario Divisional Court and the Ontario Court of Appeal, the Tribunal's decision was overturned. The Supreme Court of Canada decision ends the Court appeal process and pronounces the final word: a partial wind up requires the administrator to deal with any wind up surplus.

## IMPLICATIONS OF THE *MONSANTO* DECISION

As Ontario has had legislation similar to subsection 70(6) since 1969, the risk of exposure to a claim for distribution of plan surplus could extend to any partial plan wind up occurring at any time in the past 35 years. This means that if a partial wind up report has been filed on behalf of a plan, a distribution of surplus may be required, regardless if whether or not the report has been approved.

Even if a partial plan wind up report has not been filed, the potential for a surplus distribution still exists if the circumstances under which a partial plan wind up may be declared have existed at any point since 1969. If an event such as a plant closure, corporate restructuring, or a sale of a division has occurred in the past, a partial wind up may be required under pension benefits standards legislation.

Not only does this decision potentially allow the revisiting of partial plan wind ups occurring up to 35 years ago, thereby opening up uncertainties for defined benefit plans, it could also force plans to distribute surpluses from yesteryear which no longer exist. In many cases this will not be a positive result for current plan members who will see plan assets diminish, producing a corresponding reduction in the security of their future pensions. Regrettably, the Supreme Court did not address this issue in its decision.

Unfortunately for plan administrators, it does not appear likely that the impact of the *Monsanto* decision will be cushioned by the provincial government. In 2002, the former Progressive Conservative government introduced surplus provisions in Bill 198 to qualify and limit the application of PBA subsection 70(6). Strong opposition to these provisions, led by former Opposition Leader and current Ontario Premier Dalton McGuinty, forced the government to scuttle its plans. Given Premier McGuinty's opposition to the surplus provisions in Bill 198, it is doubtful that the current Liberal government will introduce legislation limiting *Monsanto*.

*Monsanto's* effect could ripple across Canada as many Canadian jurisdictions have legislation similar to subsection 70(6). In addition, even if the province in which the plan is registered does not have legislation similar to subsection 70(6), plans with members across Canada may be affected if they have members employed in other provinces in which such legislative provisions exist.

## IMMEDIATE NEXT STEPS

FSCO has announced that it will be sending letters requesting current compliance information from each plan administrator who filed a partial wind up report but who has not yet dealt with the related surplus.

Reviewing and understanding your obligations in the wake of *Monsanto* is critical. It is recommended that pension plan sponsors consult with their legal advisors, actuaries and consultants to determine whether their particular pension plans have been partially wound up in the past or whether the circumstances for a partial wind up have ever existed. If so, the implications of the *Monsanto* decision must be considered. The lawyers of the McMillan Binch Pensions and Employee Compensation Group are available to assist.

*Written by David Wentzell, Susan Nickerson and Ivan Luksic*

---

*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

---

© Copyright 2004 McMillan Binch LLP

## WHO WE ARE



### **DAVID WENTZELL**

PARTNER – PENSION PRACTICE LEADER

*Direct Line:* 416.865.7036

*E-mail:* david.wentzell@mcmillanbinch.com

For over 20 years, David's practice has concentrated on providing both Canadian and foreign clients with advice in pension and benefits matters. He is an expert in all aspects of provincial and federal law regulating pension plans. Of particular interest to David are the emerging issues of pension plan governance. He has assisted firm clients with comprehensive legal reviews of their pension governance structure.

David has advised numerous clients in the recovery and sharing of pension plan surpluses. His pension practice includes advising on pension aspects of business acquisitions and dispositions, pension governance and developing innovative retirement compensation and stock option arrangements for clients. David has served as a member of the Financial Services Commission Legal Advisory Committee, a policy advice resource for the pension regulator in Ontario.



### **HILARY E. CLARKE**

PARTNER – PENSION LITIGATION

*Direct Line:* 416.865.7286

*E-mail:* hilary.clarke@mcmillanbinch.com

Hilary is a corporate/commercial litigator whose practice focuses on pensions/trust, financial institutions and bankruptcy and insolvency litigation. She has acted for clients in pension litigation involving such issues as entitlement to pension surplus, interpretation of plan provisions, the power to amend the pension plan, issues arising on the transfer of pension plans and the liability of plan administrators for breach of fiduciary duty and misstatements on member benefit statements. Hilary recently defended a large mining company in the first pension class action in Ontario. This class action arose out of the wind-up of a pension plan and involved claims of surplus entitlement, undervaluation of member benefits and misrepresentation. Hilary has experience in obtaining variation of trust orders in the context of pension surplus sharing arrangements. She has appeared before all levels of court in Ontario, various administrative bodies, including the Financial Services Commission of Ontario, and has also participated in alternative methods for resolving disputes, like mediation and arbitration.



### **SUSAN L. NICKERSON**

PARTNER – PENSION ADVISORY SERVICES

*Direct Line:* 416.865.7239

*E-mail:* susan.nickerson@mcmillanbinch.com

Susan's practice is primarily focused on advising private sector employers and financial institutions on pension surplus and contribution holiday issues, on-going regulatory compliance as well as pension, trust and benefit issues arising in the context of business transactions and insolvencies. Before joining McMillan Binch, Susan spent a year and a half as a lawyer and consultant with Watson Wyatt Worldwide. She also gained experience in drafting trust agreements for pension and other registered plans during her time as a compliance officer at Royal Trust Corporation of Canada prior to being called to the Bar of Ontario in 1998.



### **IVAN A. LUKSIC**

ASSOCIATE – PENSION ADVISORY SERVICES

*Direct Line:* 416.865.7923

*E-mail:* ivan.luksic@mcmillanbinch.com

Ivan's practice focuses on advising clients on a full range of pension, labour and employment issues. His pension practice is concentrated on advising clients on regulatory compliance, plan governance and pension and benefit issues relating to corporate transactions and reorganizations.