

TRIBUNAL RULES THAT DISTRIBUTION OF SURPLUS NOT REQUIRED ON PARTIAL WIND-UP OF PENSION PLAN

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services,
An Unreported Decision of the Ontario Financial Services Tribunal Dated April 14, 2000 (F.S.T.
File No. P0013)

Facts

Monsanto Canada Inc. ("Monsanto") laid off 146 employees. This mass lay-off necessitated a partial wind-up of Monsanto's Pension Plan (the "Plan"). As part of the partial wind-up, Monsanto offered 45 of the affected Plan members an entitlement to early and enhanced benefits by way of amendments to the Plan.

Monsanto submitted a report in respect of the partial wind-up of the Plan (the "Report") to the pension regulator, the Superintendent of Financial Services (the "Superintendent").

Superintendent's Decision

The Superintendent concluded that the Report did not meet the requirements of the *Pension Benefits Act* (the "Act") and did not protect the interests of the Plan members affected by the partial wind-up (the "Affected Members").

Ontario Financial Services Tribunal

The Tribunal ordered the Superintendent to approve a partial wind-up of the Plan.

Tribunal Responses to the Superintendent's Reasons for Refusing to Approve the Report.

The Tribunal addressed the following arguments that the Superintendent had raised in rejecting the Report.

1. *The Report did not provide for the distribution to the Affected Members of surplus assets relating to that part of the Plan being wound up.*

The Tribunal found that the Report was not required to provide for the distribution of the surplus at the time of the partial wind-up. The Report provided that if any Affected Members were entitled to a portion of the surplus, this would be determined at the time of the full wind-up of the Plan. This is consistent with section 70(6) of the *Act*, which only requires that employees affected by a partial wind-up be provided with no less than the benefits that they would have on full wind-up.

Furthermore, the Supreme Court of Canada has held that a member's interest in the surplus of a plan is a benefit that remains contingent while the plan is ongoing. The benefit only crystallizes

when the plan is finally wound up. Accordingly, the Affected Members hold a contingent interest in the surplus until the Plan's final wind-up. On partial wind-up this benefit has not yet crystallized. Section 70(6) of the *Act* requires that the Affected Members retain their contingent interest until final wind-up, not that they obtain an immediate right to a distribution of the surplus at partial wind-up.

2(a) The Report contemplated using the surplus from the Plan to pay for benefit enhancements without formally applying to withdraw the surplus.

Under the *Act*, an employer is entitled to provide benefit enhancements from an ongoing plan at any time as long as there is a surplus in the plan sufficient to cover the cost of those benefits. The Superintendent's objection to the Report in this respect rested on the Superintendent's position that the Affected Members have an immediate crystallized right to the surplus. By using this surplus, Monsanto partially avoided its obligation to pay severance to the Affected Members. Accordingly, Monsanto was the effective recipient of the surplus. Ordinarily, Monsanto would not be entitled to receive a surplus without following the surplus withdrawal procedures of the *Act*.

The Tribunal found that Monsanto did not directly receive any payment out of surplus, and that any indirect benefit it received was speculative at best.

Accordingly, Monsanto was entitled to provide the benefit enhancements at the time of partial wind-up, just as it could have provided benefit enhancements at any other time while the Plan was ongoing. There was no requirement for Monsanto to formally withdraw the surplus.

2(b) The Report failed to equitably distribute the surplus because it used the surplus to provide benefit enhancements to only 45 of the Affected Members.

The Tribunal found no requirement in the *Act* or at common law that benefit enhancements provided outside the context of a final wind-up be proportionate.

3 The Report proposed that pensions and deferred pensions payable to Affected Members could remain in the Plan, which is inconsistent with distributing the assets that related to the part of the Plan being wound up.

The Tribunal found that the *Act* did not preclude an employer from allowing the affected members of a partial wind-up to leave their pension entitlements in the plan. Accordingly, the Tribunal found that Monsanto was entitled to give its employees this option.

Legitimate Expectations and Estoppel

The Tribunal found that the doctrine of legitimate expectation (or estoppel against a public authority) applied to prevent the Superintendent from rejecting the Monsanto Report.

1. *Legitimate Expectation*

Monsanto had a legitimate expectation that the Superintendent would approve the Report. This expectation arose out of published Pension Commission of Ontario ("PCO") policies and past PCO practice. These policies and practice clearly demonstrated that the pension regulator did not insist that the distribution of surplus be provided for in a partial wind-up report, and that a partial wind-up report would not be refused for effecting a distribution of surplus.

Monsanto's reliance upon its legitimate expectation was to its detriment. Monsanto's representative testified that it would have structured its severance programs differently if it had known the position the pension regulator would take on the Report.

2. *Estoppel*

The Superintendent has discretion to approve a Report that does not satisfy the requirements of the *Act*. By its past practice of approving Reports that had the same flaws as the Monsanto Report, the Superintendent was estopped from rejecting the Monsanto Report.

Notice of Appeal

The Superintendent has given notice of appeal of this decision.