

August 2004 - Pensions and Benefits Group News Bulletin

Serious Implications Arising from Supreme Court of Canada Pension Ruling in *Monsanto* Case

You may have seen reports in the media regarding the significant Supreme Court of Canada ("S.C.C.") *Monsanto* decision issued on July 29th, concerning the interpretation of the Ontario *Pension Benefits Act* (the "PBA"). This decision impacts employers with defined benefit pension plans that have been partially wound up (terminated), including plans resulting from a merger of one or more plans that were subject to a partial wind up. It may also affect employers who had defined benefit plans which have been converted into defined contribution plans if the defined benefit plan (or a predecessor to it) was subject to a partial wind up.

The *Monsanto* decision affects both past and future partial wind ups.

The S.C.C. said in *Monsanto* that when a pension plan is partially wound up, if there is any surplus in the pension plan, it must be determined and distributed if it is established that members are entitled to surplus. It's important to note that the *Monsanto* decision doesn't require that surplus be given to former employees automatically; it only requires that surplus be calculated and distributed to members affected by the partial wind up **if they are entitled to surplus** under the plan documentation.

Historically, many plan sponsors have not distributed surplus when pension plans were partially wound up. Pension laws vary across the country as to whether surplus can be distributed from pension plans that have been partially wound up and unique rules apply in Alberta, British Columbia and Quebec.

The Ontario pension regulator has declared that it will be issuing hundreds of letters to pension plan sponsors by the end of August, asking them about the treatment of surplus where partial wind ups of pension plans have been declared by employers or ordered by the regulator. If employers have partial wind ups that have not been approved, they should address the surplus issue even if they do not receive a letter. Although the *Monsanto* decision

is based on the PBA, other jurisdictions with similar pension legislation may also send out letters to plan sponsors. Employers will need legal advice to respond to those letters. Depending upon how the regulators decide to apply the *Monsanto* decision, employers may be required to make additional contributions where surpluses have become deficits (typical in recent experience). Additional financial disclosure due to potential surplus distribution liabilities related to past partial wind ups will also likely be required.

In addition, the *Monsanto* decision has significant cost and liability implications in the context of a purchase and sale of a business. Extreme care will be required in terms of due diligence, representations and warranties and accurate financial disclosure.

Please contact any of the pension lawyers listed below if your organization may be affected by *Monsanto*, particularly if there are partial wind up submissions that are on hold pending the outcome of *Monsanto*. We would be pleased to assist your organization in addressing the implications of this important decision and keeping you informed on future developments. We have successfully advised many employers on pension surplus issues, including sharing arrangements.

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