

## Pension Law

August 10, 2004

### Surplus Distribution on the Partial Wind-Up of a Pension Plan:

#### The Supreme Court of Canada Decision in *Monsanto Canada Inc. v. Superintendent of Financial Services (Ontario)*

On July 29, 2004 the Supreme Court of Canada released its long-awaited decision in the matter of *Monsanto Canada Inc. v. Superintendent of Financial Services*. This decision has major funding implications for companies with defined benefit pension plans.

In the *Monsanto* case, the Court considered whether the Ontario legislation requires surplus to be distributed on a partial pension plan wind up which usually occurs when a company sells part of its business, or when it lays off a “significant number” of its employees. The decision does not deal with the full wind up of a pension plan because the law is clear that any surplus in such a plan must be distributed to its rightful owners.

In 1997 and 1998, Monsanto terminated 146 employees as part of a corporate reorganization. When it submitted its partial wind up report to the provincial regulator for approval, the Superintendent of Financial Services refused because Monsanto had not provided for the distribution of that portion of the surplus related to the terminated employees. At that time Monsanto’s pension plan had a surplus of \$19.1 million.

When the Superintendent’s decision was reviewed by the Financial Services Tribunal, it came to the conclusion that the terminated employees’ participation in any surplus distribution would only occur at the time the plan is fully wound up. Accordingly, the Tribunal held that the surplus assets relating to the terminated employees were to remain in the plan. Since employers are permitted to take contribution holidays when a pension plan is in surplus, the practical effect of the Tribunal’s decision would have been to lessen Monsanto’s immediate funding obligations.

The case was subsequently appealed to the Ontario Divisional Court, the Ontario Court of Appeal and then finally to the Supreme Court of Canada. None of the Courts appealed to agreed with the Tribunal’s holding. The Supreme Court of Canada unanimously held that Monsanto’s terminated employees were entitled to receive a pro rata share of the surplus (as calculated on the effective date of the partial wind up) but only if they have surplus ownership rights. In reaching their decision, the Court took the unusual step of discussing and rejecting the practical and policy issues raised by, amongst others, the Association of Canadian Pension Management.

The Court carefully pointed out that its decision does not address the issue of surplus ownership. Rather, this is generally a question of fact to be determined by reference to the relevant plan documents, funding agreements (i.e., trust agreement or insurance contract) and governing legislation. Nor did the Supreme Court of Canada indicate whether its finding should be applied retroactively. Plan sponsors are now looking to the Superintendent of Financial Services to clarify his position with respect to approximately 200 previously completed partial wind-ups.

Although the *Monsanto* case dealt with Ontario’s pension legislation, this decision may be important in the federal jurisdiction, and in Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia and Saskatchewan, as their relevant pension legislation contains similar provisions to the Ontario statute.

# Goodmans<sup>LLP</sup> Update

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The *Monsanto* decision is the second major pension decision to come out of the Supreme Court of Canada since pension legislation was overhauled in the late 1980s.

If you have any questions about the *Monsanto* case and its potential implications, please contact a member of our Pension Law Group:

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