

**FINANCIAL SERVICES TRIBUNAL**

**IN THE MATTER OF** the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended by the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 (the "Act")

**AND IN THE MATTER OF** a Partial Wind Up Report submitted by Monsanto Canada Inc. to the Superintendent of Financial Services respecting the Pension Plan for Employees of Monsanto Canada Inc., Registration Number 341230 (the "Plan"),

**AND IN THE MATTER OF** a Hearing in accordance with section 89(8) of the Act;

BETWEEN:

**MONSANTO CANADA INC.**

("Monsanto")

Applicant

-and-

**SUPERINTENDENT OF FINANCIAL SERVICES**

(the "Superintendent")

Respondent

-and-

**A GROUP OF CERTAIN TERMINATED MONSANTO EMPLOYEES**  
**and the ASSOCIATION OF CANADIAN PENSION MANAGEMENT**

Additional Parties

**BEFORE:** Colin H. H. McNairn  
Vice Chair of the Tribunal and Chair of the Panel

Louis Erlichman  
Member of the Tribunal and of the Panel

C. S. (Kit) Moore  
Member of the Tribunal and of the Panel

**APPEARANCES:** Freya J. Kristjanson and  
Markus F. Kremer,  
for Monsanto

Deborah McPhail,  
for the Superintendent

Ronald B. Davis and  
Mark Zigler,  
for A Group of Certain Terminated Monsanto Employees

Jeff W. Galway and  
Randy V. Bauslaugh,  
for The Association of Canadian Pension Management

**HEARING DATES:** January 10-12 and February 7-11, 2000

## **REASONS FOR MAJORITY DECISION**

### **A. The Background**

Monsanto Canada Inc. ("Monsanto") maintained three separate pension plans in respect of its various operations. These plans were consolidated, with effect from January 1, 1996, to form the Pension Plan for Employees of Monsanto Canada Inc. (the "Plan").

As a result of a reorganization of Monsanto, involving a staff reduction program and a plant closure, 146 active members of the Plan (the "Affected Members") received notice that their employment with

Monsanto would terminate with their last days of work falling on various dates between December 31, 1996 and December 31, 1998.

Monsanto offered the Affected Members a package of benefits on the termination of their employment, including cash severance and pension improvements for the more senior employees, allowing for early entitlement to enhanced pension benefits. Two separate amendments to the Plan ("Amendment No. 1" and "Amendment No. 2") were filed with the pension regulator to provide the enhanced benefits (the "Benefit Enhancements"). Amendment No. 1, relating to certain members of the Plan affected by the staff reduction, was filed by Monsanto on March 31, 1997 and registered by the pension regulator on August 7, 1997 and, in revised form, on March 18, 1998. Amendment No. 2, relating to certain members of the Plan affected by the plant closure, was filed by Monsanto on June 30, 1997 and ultimately registered by the pension regulator on March 23, 1999. In all, 45 of the 146 Affected Members were eligible for the Benefit Enhancements provided by these Amendments.

At all times before July 1, 1998, the pension regulator was the Pension Commission of Ontario (the "PCO") and on and after that date it was the Superintendent of Financial Services appointed under the *Financial Services Commission of Ontario Act, 1997* (the "Superintendent").

On August 11, 1997, following the initial registration of Amendment No. 1 and the filing of Amendment No. 2, Monsanto submitted a report (the "Partial Wind Up Report") to the pension regulator in respect of the partial wind up of the Plan as it related to the Affected Members (the "Partial Wind Up"). The Partial Wind Up Report provided that the Partial Wind Up was to be effective May 31, 1997. At the time, the Plan had an actuarial surplus of \$14.3 million after the cost of the Benefit Enhancements, estimated at approximately \$4.82 million, was taken into account. In a letter to the pension regulator dated April 20, 1998, Towers Perrin, the actuary for the Plan, portrayed the cost of the Benefit Enhancements as funded first from the excess of the pro-rata share of market value of assets over liabilities for the Affected Members and, as to the remaining \$1.76 million, "by the use of excess assets under the Plan".

On December 1, 1998, the Superintendent served Monsanto with a notice of proposal to refuse to approve the Partial Wind Up Report (the "Notice of Proposal"). The reasons for the proposed refusal, as set out in the Notice of Proposal, were that the Partial Wind Up Report did not meet the requirements of the *Pension Benefits Act* (the "Act") and the regulations under the Act and did not protect the interests of the members of the Plan in the following respects;

- it did not provide for the distribution to the Affected Members of surplus assets relating to that part of the Plan being wound up,
- it contemplated the application of surplus to pay for the Benefit Enhancements without going through the process of a surplus withdrawal application although it was effectively paying itself surplus and then redirecting that surplus to certain of the Affected Members, all in order to avoid having to pay them more cash severance,
- in contemplating the use of surplus, in the manner proposed, in order to provide Benefit Enhancements to only 45 of the 146 Affected Members, it disregarded the principles of trust law, which require an equitable and proportionate distribution of surplus,
- it was preceded by a notice of the Partial Wind Up given to the Affected Members that was deficient for failure to include a statement of the method of distribution of surplus assets and the formula for allocation of any surplus, and
- it proposed that pensions and deferred pensions payable to Affected Members could remain in the Plan, which is inconsistent with a distribution of those assets in the pension fund relating to the part of the Plan that is being wound up.

On December 31, 1998, Monsanto filed a request for a hearing (the "Request for a Hearing") by this Tribunal in respect of the Notice of Proposal. At a pre-hearing conference convened by the Tribunal, the Association of Canadian Pension Management (the "ACPM") and A Group of Certain Terminated Monsanto Employees, comprising some of the Affected Members (the "Group of Employees"), were added as parties to this proceeding, along with Monsanto and the Superintendent.

## **B. The Surplus Distribution Issue**

The first issue is whether Monsanto is required, in its Partial Wind Up Report, to allocate a portion of the actuarial surplus in the Plan existing at the Partial Wind Up Date to the Affected Members and to provide for the distribution of that portion in connection with the Partial Wind Up. The Report does not contemplate such a distribution, but says that the benefits to which the Affected Members are entitled under the Plan, as at the Partial Wind Up Date, will be recognized and taken into account for the purpose of determining entitlement, if any, to surplus at the time of full wind up of the Plan.

The Superintendent's position was that an allocation and distribution of surplus are required on a partial wind up on the basis of section 70(6) of the Act, as read with certain other provisions of the Act and Regulation 909 (the "Regulation"). The Superintendent was supported in this by the Group of Employees.

Section 70(6) of the Act provides that:

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.

In these reasons, we use the word "members" to refer collectively to the members, former members and other persons entitled to benefits under a pension plan.

The first question about section 70(6) that needs to be addressed is whether it ensures minimum rights and benefits on a partial wind up simply to the members of the plan who are in the partial wind up group or to all the members. While a literal reading of the provision would suggest the latter, that is not a sensible interpretation as it would give ongoing members rights that are inconsistent with their continuing membership in the plan, such as an immediate right to transfer their pension entitlements out of the plan without regard to the terms of the plan. Section 70(6) should, therefore, be taken to ensure minimum rights and benefits to those affected by a partial wind up, and not to others, despite its lack of clarity in this respect.

Monsanto maintained that those members affected by a partial wind up of a pension plan are afforded a right that is not less than the right they would have in respect of surplus on a full wind up, as of the partial wind up date, if they are given the right to participate in any surplus in the event of a full wind up of the plan. That is what the Partial Wind Up Report contemplated. The ACPM maintained that section 70(6) cannot be taken to confer any rights at all in respect of surplus for a number of reasons, including the fact that it appears in the part of the Act headed "WINDING UP" rather than the part of the Act headed "SURPLUS".

The term "partial wind up", which is used in section 70(6), is defined for the purposes of the Act to mean;

the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of the pension plan.

It was argued by the Superintendent and the Group of Employees that the term "assets" must include those assets that can be said to represent surplus since the term "surplus" is defined for the purposes of the Act to mean;

the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan...

However, the definition of "partial wind up" does not answer the question of whether any of the assets of a pension fund that might be said to represent surplus are "related to that part of the pension plan" that is being partially wound up. That question is something we have to resolve in deciding this case. The definition does not assist in that decision. In any case, the definition of "partial wind up" in the Act must be read in light of the purpose of a statutory definition, which is to give meaning to the defined term when it is used in the body of the statute rather than to establish independent obligations.

A number of procedural provisions of the Act and Regulation were referred to in argument as relevant to a proper understanding of the scope and effect of section 70(6). Given their procedural nature, these provisions cannot control the meaning of the substantive requirements of section 70(6), although they may shed some light on the appropriate scope and effect of that provision. With that possibility in mind, we will now consider those procedural provisions.

Section 70(1) requires the administrator of a pension plan that is to be wound up, in whole or in part, to file a wind up report that sets out, among other things:

- (c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits.

In the context of a full wind up of a pension plan, this provision clearly relates to the methods of allocating and distributing all the assets of a pension plan. In the context of a partial wind up, it cannot be taken to relate to the methods of allocating and distributing all such assets as that would be inconsistent with the continuation of the plan, which a partial wind up assumes. We interpret the term "assets", as used in this provision, to mean those assets that are in fact proposed, or in law required, to be distributed, whether on a partial or full wind up of a pension plan. Therefore, the provision does not assist in determining when the law requires a distribution.

Section 72(1) of the Act directs the administrator of a pension plan, on a partial or full wind up, to give members a statement setting out their benefit entitlements, options available and other prescribed information. Section 28(2) of the Regulation, in turn, prescribes the information that is to form part of any such statement, as including:

- (q) if there are surplus assets, a statement of the method of distribution and, if applicable, the formula for allocation of any surplus among the plan beneficiaries.

By comparison, the statement that the administrator of a pension plan must give a member of the plan whose membership ceases outside the context of a partial or full wind up need not say anything about surplus or surplus assets (see s. 28(1) of the Act and s. 41(1) of the Regulation).

The requirement of section 28(2)(q) of the Regulation is not determinative of the scope and effect of section 70(6) of the Act because it is in a regulation, a form of "subordinate legislation" with limited value in interpreting the parent legislation (see R. Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994), at p. 246).

We were also referred to section 29.1(4) of the Regulation, which directs the administrator of a pension plan to give written notice to the Superintendent, within 30 days after final distribution of the assets of a pension plan under section 70 of the Act, to the effect that all the assets of the plan have been distributed. Once again, this provision is in a regulation and should, therefore, be given limited weight in the interpretation of the Act. Moreover, as in the case of section 70(1)(c), it should logically be interpreted to refer to those assets that are in fact proposed, or in law required, to be distributed, whether on a partial or a full wind up of a pension plan.

As this discussion demonstrates, the provisions of the Act and Regulation relating to full wind ups of pension plans have been extended to cover partial wind ups but do not appear to deal with the inherent differences between the two processes. As a result, there is a lack of precision in the way partial wind ups are dealt with in the Act and Regulation.

In the leading case of *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 211, Mr. Justice Cory, giving the majority judgment of the Supreme Court of Canada, described pension plan surpluses and entitlement to them in the following way:

An ongoing pension fund is said to have an "existing" or "actuarial" surplus when the estimated value of the assets in the fund exceeds the estimated value of all the liabilities (i.e. pension benefits owed employees) of the fund. When the calculated fund liabilities exceed the calculated fund assets, the plan is said to be in a state of "unfunded liability". Once the plan is wound up, assets and liabilities can be precisely determined. The fund will then be in a state of "actual" or "real" surplus or liability. [At p. 624]

Once funds are contributed to the pension plan they are "accrued benefits" of the employees. However, the benefits are of two distinct types. Employees are first entitled to the defined benefits provided under the plan... The other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from actuarial calculations and is a function of the assumptions used by the actuary. Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday [by the employer does not represent] a reduction of accrued benefits. [At p. 654]

We interpret the second paragraph to mean that a member's interest in the surplus of a pension plan is simply a form of benefit that remains contingent while the plan is ongoing. That benefit consists of an entitlement to participate in a distribution of any actual surplus remaining upon final wind up of the plan. Upon such wind up, the benefit crystallizes into a right to participate in a distribution of any such surplus.

The Superintendent argued that the rights of those affected by a partial wind up are equivalent to the rights they would have on a full wind up, as at the partial wind up date, only if there is a crystallization of their right to surplus, in the sense of the *Air Products* decision, by virtue of the partial wind up.

However, the right that crystallizes on the full wind up of a pension plan is a right to participate in any surplus remaining upon the final distribution of all the assets of the plan. Therefore, if section 70(6) of the Act gives those affected by a partial wind up that right, it does not follow that they would be entitled to participate in a distribution of the surplus in the plan at the partial wind up date. In our view, the most they would have is a right to participate in a distribution of actual surplus on a full wind up on the basis of their membership in the plan at the partial wind up date without disqualification because they have ceased to be members of the plan before the full wind up. If they have that right, they are better off than they would otherwise be. But for section 70(6), they would stand to lose their entitlement to participate in a distribution of actual surplus on a full wind up at such time as they ceased to be members of the plan.

If the Act were to be read as requiring a distribution of surplus on the partial wind up of a pension plan to members of the partial wind up group, the result could be unfair to the ongoing members of the plan. They would only have a potential right to participate in the distribution of any remaining part of the undistributed surplus if and when the plan were to be ultimately wound up in full (or, as to them, in part) while they were still members of the plan. By comparison, those affected by the partial wind up would have an immediate right to participate in the distribution of a determinate amount of surplus. If the Act were to require, in clear terms, that such a distinction is to be made between the surplus rights of the two groups of members, that distinction would have to be respected. But that is not the case.

Consequently, the potential unfairness to the ongoing members of requiring a distribution of some of the surplus on a partial wind up provides an additional reason for avoiding an interpretation of section 70(6) that would produce that result.

Given the very general language of section 70(6) of the Act, which does not refer to surplus rights specifically, we do not think that the Act can be taken to require an allocation and distribution of some portion of the surplus of a pension plan on a partial wind up.

If the effect of a partial wind up were to divide a pension plan and the assets in the related pension fund into two parts - one part in respect of liabilities for members of the partial wind up group and the other part in respect of the liabilities for the remaining members of the plan - then an accompanying division of surplus between those parts would be a logical consequence. On such a division of assets, liabilities and surplus, each part would, effectively, represent a separate plan. The surplus in the first plan (that for the members of the partial wind up group) would then be subject to distribution as that plan would terminate and the members would have a crystallized right, in the sense of the *Air Products* decision, to the surplus in the plan. This is so because the plan would be subject to liquidation, in which event its assets and liabilities could be precisely determined and the actual surplus ascertained. The Group of Employees argued that this was the result of a partial wind up under the Act. There is nothing in the Act, however, that suggests that a pension plan and the related pension fund are divided into two on a partial wind up. Various provisions of the Act that appear under the heading "WINDING UP" (ss. 68-77) use the expression "the pension plan" or "the pension fund" (emphasis added) to refer to a plan that is being wound up in whole or in part or to the related pension fund. There is no indication that, from the effective date of a partial wind up, there is more than one plan or fund.

The Group of Employees also maintained, in the alternative, that a partial wind up causes a termination of any trust for the members of the partial wind up group, in which case they are entitled to call for a distribution of those assets that are held in trust for them, including surplus assets. This argument also presupposes a division and termination on a partial wind up - specifically, a division of any trust for the members of the plan and a termination of one of the successor trusts, namely that for the members of the partial wind up group. But, once again, the Act does not contemplate such a result on a partial wind up. And under trust law principles, a trust generally continues until its terms or objects have been carried out or until all the beneficiaries have agreed to modify or terminate the trust; the beneficiaries may require the trustee to transfer the trust property to them only in the event of unanimous agreement to termination (see D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1994), at

pp. 961-964). In a pension plan context, the beneficiaries would include all the members of the plan and may include the employer with respect to some or all of the surplus assets.

In conclusion, the Partial Wind Up Report filed by Monsanto was not deficient for failing to provide for an allocation and distribution of some portion of the surplus in the Plan. Whether it would have been deficient had it made no provision for the participation of the Affected Members in any actual surplus on a full wind up is not a question that is before us since the Partial Wind Up Report did make such provision. If such provision is necessary, which we think is the better view, there may be some practical difficulties in contacting those affected by a previous partial wind up on a full wind up and in determining their precise entitlements in that event, as noted in Mr. Erlichman's dissenting reasons. Those difficulties could be addressed by amendments to the Act or Regulation.

Monsanto argued that there would be serious negative consequences for the pension system if this Tribunal were to support the position adopted by the Superintendent on the surplus distribution issue. Monsanto's actuarial expert testified as to these consequences. The Superintendent's actuarial expert offered a different opinion about the consequences for the pension system. In light of the conclusion we have arrived at, we do not find it necessary to decide between any conflicting aspects of the actuarial experts' evidence.

The Superintendent, in her Notice of Proposal, also put her proposed refusal to approve the Partial Wind Up Report on the basis of a failure by Monsanto to comply with section 28(2)(q) of the Regulation (set out above) in giving its notice of partial wind up. We are of the opinion that any deficiency in that respect was effectively remedied by the notice of this hearing, which referred specifically to the surplus distribution issue.

### **C. The Benefit Enhancements Issue**

The benefit enhancements issue can be broken down into two sub-issues. The first is whether the Benefit Enhancements amount to a payment out of the surplus of the Plan to Monsanto subject to the preconditions of the Act and Regulation to the making of any such payment to an employer. The second is whether the Benefit Enhancements failed to meet the requirements of the Act or the common law for lack of a proportionate and equitable basis of entitlement.

**1. Do the Benefit Enhancements Involve a Payment of Surplus to Monsanto subject to Preconditions under the Act and Regulation that were not Satisfied in this Case?**

The Superintendent argued that the Benefit Enhancements provided "as part of the partial wind up package" were funded in part by surplus to which the Affected Members had a crystallized right by virtue of the partial wind up. She then maintained that Monsanto was the real beneficiary of the Benefit Enhancements because they enabled it to avoid paying a substantial portion of the severance that would otherwise have been payable to the older Affected Members, who qualified to receive the Benefit Enhancements. In her view, the Benefit Enhancements, therefore, amounted to a payment of surplus to Monsanto, which was not permitted by the Act unless Monsanto satisfied certain preconditions. In particular, it would have had to go through the surplus withdrawal procedures under the Act and Regulation (see s. 79(3) of the Act and s. 8 of the Regulation), which it had not done. The position of the Superintendent on this issue was built on her position on the surplus distribution issue - that the Affected Members had a right to participate in a distribution of surplus on the Partial Wind Up - which is a proposition that we have rejected in Part B of these Reasons.

The Superintendent's position also turned on an underlying distinction between an enhancement of benefits under a pension plan in association with a partial wind up and a similar enhancement of benefits at any other time. The Superintendent conceded that Monsanto would be free to provide benefit enhancements from an ongoing plan at other times so long as there was an actuarial surplus in the Plan

sufficient to cover the actuarial costs of those benefits or so long as any resulting actuarial deficiency in the Plan were to be made up.

What makes the situation any different when the benefit enhancements are associated with a partial wind up? The Superintendent's response to this question was that the members of a partial wind up group have an immediate crystallized right to surplus on a partial wind up and that benefit enhancements provided shortly before a partial or full wind up, if funded out of plan surplus, are normally considered by the Superintendent to be part of any surplus distribution proposal, if that is in the best interests of the members, in accordance with FSCO Policy No. S900-900. That policy does not apply here in a direct way, however, because there was no surplus distribution proposal, although the Superintendent argued that there should have been one. In any case, as an administrative policy, it does not have the binding force of law but would simply be persuasive in the event of any doubt about the meaning of the Act (see R. Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994), at p. 471).

There is no apparent basis in the Act or Regulation to support the alleged difference in the treatment of benefit enhancements on a partial wind up and at other times. While the Act regulates plan amendments (see ss. 12-14 & 17-18), it imposes no requirements with respect to the funding of benefit enhancements effected by such an amendment where the plan assets are sufficient to cover the additional liabilities created by the amendment. In the present case, the amendments to the Plan introducing the Benefit Enhancements were duly filed by Monsanto and registered by the Superintendent. Such registration would normally result in an immediate increase of the liabilities of the Plan, to cover the actuarial cost of the Benefit Enhancements (see para 2.05 of the Standard of Practice for Valuation of Pension Plans of the Canadian Institute of Actuaries (January, 1994)) and a corresponding reduction in the actuarial surplus of the Plan.

If the Benefit Enhancements did not lead to an automatic reduction in surplus, but instead were to be treated as a *de facto* payment of surplus to Monsanto, Monsanto would be unable to fund those Benefit Enhancements without first making a successful surplus withdrawal application or contributing a

sufficient amount to the Plan to cover the actuarial cost of the Benefit Enhancements. The former course of action would be problematic for Monsanto because of the requirement of consent from at least two-thirds of the members (see s. 8 of the Regulation). The latter course of action would not be feasible as the Plan was in an "excess surplus" position. The term "excess surplus" is commonly used to refer to the level of funding of a pension plan, in relation to plan liabilities, that would preclude the employer from making an "eligible contribution" to the plan under the *Income Tax Act* (Canada) (see s. 147.2 of the *Income Tax Act* and ss. 8501 & 8502 of the *Income Tax Regulations*). If an employer were to make a contribution to a pension plan that was not an "eligible contribution", the registration of the plan under the *Income Tax Act* would be put in jeopardy. Therefore, there are practical reasons, as demonstrated by this case, for resisting the conclusion that benefit enhancements are to be treated differently when they are introduced in association with a partial wind up of a pension plan.

Recognizing the practical dilemma, the Superintendent modified or clarified her position in oral argument, suggesting that Monsanto could have funded the Benefit Enhancements from the "excess surplus" in the Plan without the need for a surplus withdrawal application, although the Notice of Proposal that led to Monsanto's Request for a Hearing by this Tribunal is not consistent with that solution. However, the concept of "excess surplus" does not have any particular significance under the Act. While we received evidence of the existence of "excess surplus" in the Plan, we received no evidence as to the actual amount of that surplus. The "excess surplus" to which the Superintendent said Monsanto could resort was, apparently, the amount of such surplus remaining in the Plan after the distribution of a portion of surplus to the members of the Partial Wind Up Group, in accordance with the Superintendent's position on the surplus distribution issue (for which, see Part B above).

While the Superintendent's ultimate position may remove any substantive objection to the introduction of the Benefit Enhancements, we are of the opinion that, in any event, those Enhancements did not involve a payment of surplus to Monsanto that would have required a surplus withdrawal application should the Enhancements have been incapable of being funded from "excess surplus". Monsanto did not actually receive any payment out of surplus and any indirect benefit that it gained from the Benefit Enhancements is speculative at best. The utilization of surplus as a source of funding for benefit

enhancements does not normally require a surplus withdrawal application. The only compelling basis for departing from that norm in this case would be if the surplus that was utilized was set aside, or was shortly to be set aside, for distribution to the Affected Members on the Partial Wind Up, which we do not accept as being the consequence of a partial wind up under the Act (see Part B above).

**2. Did the Benefit Enhancements Fail to meet the Requirements of the Act or the Common Law for Lack of a Proportionate and Equitable Basis of Entitlement?**

The Superintendent argued that as the Benefit Enhancements were funded from surplus on the occasion of a partial wind up, they should have been provided proportionately and equitably. They were not provided in that fashion, it was said, first, because only a limited number of the Affected Members received the Benefit Enhancements and, second, because the surplus that funded those Enhancements included some of the actuarial surplus in which the members of the ongoing Plan had an interest. The second reason falls away if all of the funding can be said to come from a single source - the undifferentiated actuarial surplus of the Plan. We have already concluded that the Act does not contemplate a division of surplus on a partial wind up between the partial wind up group and the remaining plan members. Therefore, we consider the Benefit Enhancements to have been funded from a single source, namely the undifferentiated surplus of the Plan.

The Superintendent relied, once again, on FSCO Policy No. S900-900, which provides that benefit enhancements introduced shortly before a partial wind up and funded from plan surplus will normally be considered a distribution of surplus when that is in the best interests of the members of the plan. She then argued that there is a clear intention in the Act that surplus be distributed proportionately, as evidenced by section 79(4), which says that a pension plan that is silent as to the payment of surplus shall be construed as requiring that surplus accrued after December 31, 1986 be distributed proportionately to plan members on a wind up. Neither of these provisions is directly applicable in this case, the first because it relates to a surplus distribution proposal, which is not in issue here, and the

second because there was no evidence as to what the Plan provides, if anything, with respect to the payment of surplus on a wind up. At most, these provisions might be taken to establish principles that could have some relevance by analogy to the facts of this case.

When benefit enhancements are provided outside the context of a wind up, there is no requirement in the Act or at common law that they be proportionate as among the members of the plan. This proposition is supported by the decisions of the Ontario Court General Division in *Anova Inc. Employee Retirement Pension Plan (Administrator of) v. Manufacturers Life Insurance Co.* (1994), 121 D.L.R. (4<sup>th</sup>) 162 (see p. 180), and *Mair v. Stelco Inc.* (1995), 9 C.C.P.B. 140 (see p. 148). Indeed, the Superintendent acknowledged, in oral argument, that if the Benefit Enhancements in this case had been funded from "excess surplus" in the ongoing Plan, they would not have to be proportionate. In our view, the Benefit Enhancements are funded from the undifferentiated surplus of the Plan and, therefore, do not attract any special requirement of proportionality simply because they are associated with a partial wind up. It was not seriously argued that the Benefit Enhancements were inequitable apart from their lack of proportionality.

#### **D. Transfer of Pensions Issue**

The third issue is whether Monsanto is required to transfer out of the Plan, whether by annuity or otherwise, the assets necessary to fund pensions and deferred pensions payable to the Affected Members. In fact, Monsanto gave those members the option of leaving their pension entitlements in the Plan, as well as the various options of transferring the commuted values of their deferred pensions out of the Plan that are set out in section 42(1) of the Act (see also ss. 73(2) & 74(8) of the Act). Two-thirds of those members took up the first option. None of the other members has apparently objected to that option being made available.

The Superintendent argued that the option to leave pension entitlements in the Plan was inconsistent with the Act since the Act contemplates the distribution of the assets relating to that part of a pension plan that is to be partially wound up. Support for this was found in the definition of "partial wind up" (in s. 1 of the Act), the requirement that a wind up report set out "the methods of allocating and distributing the assets of the pension plan" (in s. 70(1)(c) of the Act), and the requirement that pension plan documents set out "the method of allocation of the assets of the pension plan on wind up" (in para 13 of s.10(1) of the Act),.

We have already dealt with the significance of the first two of these provisions in Part B above. We indicated that the Act's definition of "partial wind up" should not, by itself, determine the effect of the operative requirements of the Act. We also concluded that the "methods of allocating and distributing the assets of a pension plan" should be taken to refer to the assets that are in fact proposed, or in law required, to be distributed on a partial or a full wind up. We note that "the method of allocation of the assets" that must be included in plan documents is in relation to a "wind up" of a pension plan, and not in relation to a wind up "in whole or in part" of a pension plan. The latter expression is used elsewhere in the Act in reference to a wind up to indicate that both forms of wind up are meant to be covered (see ss. 68(1), 69(1), 70(1), 71(1), 72(1), 73(1), 74(1), (5) & (8), 75(1) & 77).

Monsanto argued that since the Act requires the administrator of a pension plan to give a member of a plan affected by a partial wind up certain transfer options on the partial wind up (in accordance with ss. 42(1), 73(2) & 74(8) of the Act), but is silent on leaving pension entitlements in the plan, the latter option can be made available to the members of the partial wind up group. Monsanto also maintained that if that option were not open to such a member, there would be potential adverse consequences for both the employer and the members of the partial wind up group. The employer could be faced with higher costs for providing the promised benefits because it would have to go into the market and purchase annuities on a "retail basis" and any additional costs would reduce the surplus in the ongoing plan. The members of the partial wind up group, for their part, would forego the opportunity to participate in any future *ad hoc* increases in benefits under the pension plan. The Superintendent responded to these concerns by saying that they were, at best, arguments for a change in the law, which

was not for the Tribunal to make, and that they could be addressed by an employer setting up a new pension plan for those members of a partial wind up group who wanted to leave their pension entitlements in a comparable plan.

There is no provision in the Act dealing specifically with the question of whether the members of a partial wind up group can be given the option of leaving their pension entitlements in the plan, as they clearly could if they had terminated their employment outside the context of a wind up. We do not think that the Act implicitly precludes this option. Accordingly, we conclude that Monsanto was free to give the Affected Employees the option of leaving their pension entitlements in the Plan. We take some comfort in the fact that this is a practical result for all concerned.

#### **E. The Legitimate Expectations Issue**

The final issue is whether Monsanto had a legitimate expectation that the Superintendent would approve the Partial Wind Up Report in light of the past practice or policy of the pension regulator in respect of similar reports with the result that the Tribunal should direct the Superintendent to approve the Partial Wind Up Report. Put another way, the issue is whether the Superintendent was estopped from disapproving the Partial Wind Up Report on the grounds that Monsanto had relied on the past practice or policy of the pension regulator, with the result that the Tribunal should direct the Superintendent to approve the Partial Wind Up Report.

## **1. The Relevant Practice and Policy of the Superintendent**

### **(a) On the Distribution of Surplus**

During the period from November 1992 to November 1998, 156 partial wind up reports were filed with the pension regulator (the Superintendent or her predecessor, the PCO) in respect of plans that were in a surplus position, but where there was no proposal for the distribution of such surplus. The pension regulator neither approved nor refused to approve these reports. Section 70(2) of the Act provides that no payment shall be made out of a pension fund where notice of proposal to wind up the related plan has been given, until the Superintendent has approved the wind up report. However, this does not prevent the making of any payment out of the fund where such payment is approved by the Superintendent pursuant to section 70(3) of the Act. Prior to the present case, the pension regulator had never issued a notice of proposal to refuse to approve a partial wind report on the basis that surplus was not being distributed.

In a published guideline that was subsequently adopted by the Superintendent and in published clarifications of that guideline, the PCO disclosed its policy with respect to proposals for the treatment of surplus in wind up reports. Compliance Assistance Guideline No. 4 (FSCO Policy No. W100-100) states that in a wind up report the administrator of a pension plan "shall disclose intentions with respect to the proposed handling of surplus" (at p. 4). In a question and answer section in the PCO Bulletin of July, 1991 (vol. 2, issue 2), the latter statement, as it appeared in the version of the Guideline then in force, was clarified by the PCO as meaning that administrators are not required to state how surplus will be allocated and dealt with at the time of the report if they do not wish to deal with the issue at that time, adding that "a statement to this effect in the wind up report is sufficient to consider the question 'handled' " (at p. 11). This position was further clarified in the PCO Bulletin of November, 1991 (vol. 2, issue 3) by reiterating that the administrator could simply state in a wind up report that surplus was not

being dealt with at that time, but adding that the PCO does expect the administrator to identify the existence of the surplus and to state what its intention is. These two clarifications are reproduced in FSCO Policy No. W100-125. Monsanto's Partial Wind Up Report appears to comply with the policy set out in this Guideline, as clarified by the PCO.

The PCO published a further policy on "Partial Wind Up - Identification and Administration of Surplus - Compliance with PBA section 70(6)", which was subsequently adopted by the Superintendent (FSCO Policy No. S900-400). This policy directs the actuary on the partial wind up of a pension plan to identify assets related to a partial wind up in the same manner as the Act would require on a full wind up. It also affirms that where surplus is identified as a portion of the assets related to the partial wind up, as contemplated by various referenced provisions of the Act and Regulation, it is the administrator's responsibility to administer the surplus as required by the Act and Regulation. However, another policy on " Filing Requirements and Priorities" on the wind up, in whole or in part, of a pension plan says that "if a decision has been made to distribute all surplus on wind up among members..., the formula for distribution should be included in the wind up documentation" (FSCO Policy No. W100-101, at para 1.1). This suggests that a decision to distribute surplus on a wind up does not have to be made. The same policy also contains the following statement:

If the plan is in a surplus position on wind up, the administrator should indicate how the surplus will be dealt with. Generally, distribution of assets must conform with the proposals set out in the wind up report approved by the Superintendent. If the wind up report does not indicate how the surplus will be dealt with, a supplement to the initial report dealing with the surplus assets will be required (at para 3.1).

We understand this policy as simply intended to impose certain requirements in respect of a distribution of surplus assets when a decision is, in fact, made to effect such a distribution.

In our view, there was a clear and unambiguous practice and policy of the pension regulator of not insisting that the distribution of surplus be provided for, or even dealt with on a current basis, in a partial

wind up report. Other policies on the wind up process can be reasonably understood to provide direction only when there is an actual proposal to distribute surplus on a partial wind up, rather than indicating that there must be such a distribution on that occasion.

**(b) On Benefit Enhancements**

Prior to the date of the Notice of Proposal in this case, the pension regulator had never issued a notice of proposal to refuse to approve a partial wind up report on the grounds that enhancements paid on partial wind up were funded from surplus and, therefore, constituted a surplus distribution.

The published PCO policy on the "Allocation of Surplus Distributed to Members and Former Members on Wind Up", which was subsequently adopted by the Superintendent, states, in its current wording, that "the Superintendent may refuse to approve any allocation of surplus contained in a wind up report, whether by cash or benefit enhancements, that does not protect the interests of members" pursuant to section 70(5) of the Act (FSCO Policy No. S900-900, at para 3). The policy further states that "where it is in the best interests of the members..., benefit enhancements provided shortly before a wind up, if funded out of plan surplus, will normally be considered to be part of the surplus distribution proposal" (at para 6). In the present case, of course, there was no surplus distribution proposal.

Another policy that relates to "Amendments for Benefit Improvements - Notice and Funding" says that the Superintendent may treat an amendment that provides benefit improvements only for specified persons or a class of members as an "adverse amendment" under section 26(1) of the Act, in which case notice of the amendment would usually be required to be given to all members (FSCO Policy No. B100-251, paras. 1 & 2). Monsanto, in fact, notified all the active members of the Plan in respect of the amendments introducing the Benefit Enhancements. The policy also addresses the funding of benefit improvements, stating that such improvements can be provided to "specified persons" if they are funded by a contribution from the employer unless such a contribution would not be an "eligible contribution" in

the sense of the *Income Tax Act* (Canada), which was the situation in the present case (see Part C1 above).

In short, the practice of the pension regulator with respect to benefit enhancements on a partial wind up was consistent with the practice on the distribution of surplus in that event. Such enhancements were not treated as justifying a refusal to approve a partial wind up report because they effected a distribution of surplus or, apparently, because they might otherwise be inconsistent with a distribution of surplus called for on a partial wind up. None of the published policies of the pension regulator were inconsistent with this practice. Indeed, the action of the Superintendent in this particular case, in registering the Plan amendments introducing the Benefit Enhancements (see Part C above), conformed to, and did not signal any change in, the practice. Once again, in our view, the relevant practice was clear and unambiguous.

## **2. The Scope and Application of the Doctrines of Legitimate Expectations and Estoppel**

### **(a) The Doctrine of Legitimate Expectations**

The doctrine of legitimate expectations was described by Taylor, J. in the English decision in *R. v. Secretary of State for the Home Department, ex parte Ruddock and others*, [1987] 2 All E.R. 518 (Q.B.D.) in the following terms:

...I conclude that the doctrine of legitimate expectation in essence imposes a duty to act fairly. While most of the cases are concerned ... with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where ex hypothesi there is a right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course, such a promise or undertaking must not conflict with his statutory duty...I accept the submission of counsel for the Secretary of State that the

respondent [the Secretary of State] cannot fetter his discretion. By declaring a policy he does not preclude any possible need to change it. But then if the practice has been to publish the current policy, it would be incumbent on him in dealing fairly to publish the new policy, unless again that would conflict with his duties.

In the earlier case of *Council of Civil Service Union v. Minister for the Civil Service*, [1985] A.C. 374 (H.L.), Lord Fraser said that a "legitimate, or reasonable, expectation may arise from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue" (at p. 401). In *Ruddock*, the court found that there was a legitimate expectation arising from both such sources - an express promise in a published policy and a regular practice - although the conduct of the public authority, the Secretary of State, that was challenged in that case was found to be justified on a reasonable or rational interpretation of the policy and practice that gave rise to the legitimate expectation.

A person who invokes the doctrine of legitimate expectations must have relied to his or her detriment on a clear and unequivocal practice, policy or other promise giving rise to the expectation (see *R. v. Inland Revenue Commissioners Ex Parte Unilever Plc*, (1996), 68 T.C. 205, at p. 231 (C.A.)).

In the present case, the pension regulator had a clear and unequivocal practice and, to some extent, published policies that would reasonably lead Monsanto to believe that its Partial Wind Up Report would not be disapproved for failure to provide for a distribution of surplus or to take account of the Benefit Enhancements as part of a distribution of surplus. Ray Mowling, the chairman and president of Monsanto, testified that Monsanto would probably have structured the severance programs for the Affected Members differently from a financial perspective if it had known the position that the pension regulator would take on the Partial Wind Up Report. While he claimed no personal knowledge of the policies and practices of the regulator in respect of partial wind ups and benefit enhancements in connection with such wind ups, he indicated that Monsanto essentially relied on its pension actuary, Towers Perrin, in that regard. Michael Millns of Towers Perrin, in turn, testified that his firm had used language in respect of surplus distribution in the Partial Wind Up Report that was similar to that used in

other partial wind up reports filed with the pension regulator, which had never led to a notice of proposal to refuse to approve the partial wind up report.

Should Monsanto now be required to distribute some portion of the surplus that was in the Plan at the effective date of the Partial Wind Up, it appears that it would be in no position to unwind the Benefit Enhancements and to reinstate the surplus applied to fund those Enhancements. Monsanto contended that once the amendments introducing the Benefit Enhancements were registered by the pension regulator, the Benefit Enhancements constituted legal obligations that could not be unilaterally withdrawn. This contention was not disputed by any of the other parties.

We conclude that Monsanto relied, directly or indirectly, to its detriment on the relevant practice of the pension regulator in structuring the Partial Wind Up and in providing the Benefit Enhancements, which reliance was reflected in the Partial Wind Up Report.

**(b) The Doctrine of Estoppel**

The decision of the Federal Court Trial Division in *Aurchem Explorations Ltd. v. Canada* (1992), 7 Admin. L. R. (2d) 168, is particularly instructive for present purposes. In that case, a mining recorder had refused to record a mining claim because it was not in accordance with the requirements of the *Yukon Quartz Mining Act* (Canada) (the "Mining Act"). However, the recorder had a past practice of recording claims that had the same deficiencies, under the Mining Act, as this particular claim. The principals of the prospector whose claim was refused for recording made a judicial review application to the Federal Court to quash that refusal. In fact, the recorder had considerable discretion under section 43(1) of the Mining Act to waive the strict requirements of the Act in circumstances such as those of this case and to proceed to record a claim. Mr. Justice Strayer of the Federal Court made an order quashing the decision of the recorder to refuse the claim on the basis of the following reasoning;

... in these circumstances the [mining recorder] should be estopped from relying on the strict technical requirements of the Act when those requirements had been commonly and lawfully waived by the mining recorder in the past in the exercise of his discretion. The conditions for promissory estoppel are well established. First there must be a promise which is clear and unequivocal. I believe that the mining recorder by accepting, in a routine fashion, [claims staked in a particular way] has in effect promised to the prospecting community that if they stake and claim in this way their claims will not be rejected but will be the subject of a favourable exercise of discretion under subs. 43(1). There was reliance on that representation [by the prospector when he staked the rejected claim, on behalf of his principals, in the way he did]. As a result he and his principals suffered a detriment when the ... mining recorder suddenly applied the strict letter of the Act without the benefit of the discretion typically exercised under subs. 43(1)... This is not a matter of using promissory estoppel as a "sword" rather than as a "shield". It is a matter of disallowing the mining recorder from raising objections based on technical requirements of the Act when he has through past conduct represented that such requirements would not be invoked, such representations leading prospectors to stake and file claims as they have done in the past. Estoppel could not, of course, preclude the [mining recorder] from enforcing the strict terms of the law simply because they had not been enforced in the past. But here the law leaves a discretion in the mining recorder to waive certain requirements which he has lawfully done on many occasions. This is not to say that the mining recorder was precluded from changing practice and not exercising in the same way the discretionary power provided under subs. 43(1). But, given the wide-spread practice which, according to the evidence, had been going on at least six years, it was incumbent on the mining recorder to make reasonable efforts to bring to the attention of prospectors his intention to require strict and literal compliance with the Act and not to waive those requirements in future. If he had done this, then prospectors could be expected to govern themselves accordingly and not to go into the field locating claims in accordance with past practice. [At pp. 176-178.]

The Superintendent in the present case also has a discretion as to whether to approve a partial wind up report that is not in strict compliance with the Act. Section 70(5) of the Act provides that:

The Superintendent may refuse to approve a wind up report that does not meet the requirements of this Act and the regulations or that does not protect the interests of the members and former members of the pension plan (emphasis added).

Therefore, even though a partial wind up report does not satisfy the requirements of the Act, the Superintendent is not obliged to refuse her approval. If the Superintendent were to approve such a report, she would be acting lawfully as well as in accordance with a representation to the pension community evidenced by her past practice and that of the PCO in dealing with partial wind up reports that had the same deficiencies, in respect of its handling of surplus distribution and benefit enhancements, as were alleged in respect of Monsanto's Partial Wind Up Report.

**(b) Potential Limitations on the Doctrines of Legitimate Expectations and Estoppel**

While the doctrines of legitimate expectations and estoppel cannot preclude a public official from exercising a statutory duty (see *Lidder v. Canada (Minister of Employment and Immigration)* (1992), 6 Admin. L.R. (2d) 62, at p. 71 (Fed. C.A.)), that would not be the result of applying either doctrine in this case. The Superintendent is simply given the discretion under the Act to refuse to approve a partial wind up report that fails to comply with the requirements of the Act.

In *Aurchem*, the Federal Court declined an invitation to make a second order directing the mining recorder to record the rejected claim, even though the effect of the court's decision was that the recorder "cannot without some warning reverse the practice of the office and insist on strict compliance with certain provisions of the Act" (at p. 178). The court said that, in the final analysis, the decision of whether or not to record the claim was that of the mining recorder within the scope of his discretionary powers. It should be remembered that this case came to the court by way of a judicial review application and not by way of an appeal. This explains the reluctance of the court to order the recording of the claim. Judicial review, unlike a typical appeal process, is not designed to allow a court to

substitute its view of the right decision or the right exercise of discretion by the original decision-maker (see D.P. Jones & A. de Villars, *Principles of Administrative Law*, 3d ed. (Toronto: Carswell, 1999), at p. 684). This Tribunal, by comparison, has the express power, under section 89(9) of the Act, at or after a hearing in respect of a proposal to refuse to approve a partial wind up report:

to direct the Superintendent to carry out or refrain from carrying out the proposal and to take such action as the Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

Therefore, the Tribunal is entitled to impose its opinion as to the proper exercise of a discretionary power of the Superintendent in association with a direction to the Superintendent to refrain from carrying out a particular proposal.

The Superintendent argued that since the doctrine of legitimate expectations gives rise to procedural rather than substantive rights, it would not permit this Tribunal to find in favour of Monsanto as that would involve a conclusion that the doctrine gives Monsanto a substantive right. In *Reference re Canada Assistance Plan (Canada)* (1991), 1 Admin. L. R. (2d) 1, the Supreme Court of Canada had this to say (at p. 32) about the effect of the doctrine of legitimate expectations:

If the doctrine of legitimate expectations required consent, and not merely consultation, then it would be the source of substantive rights...

There is no support in Canadian and English cases for the position that the doctrine of legitimate expectations can create substantive rights. It is part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can create a right to make representations or to be consulted. It does not fetter the decision following the representations or consultations.

Monsanto did not suggest, in this case, that its consent would be required to a change in the practice of the pension regulator or that the regulator would be precluded from implementing a change in that practice in respect of future cases, following representations or consultations on the practice. Therefore, it did not need to rely on the doctrine of legitimate expectations as the source of a substantive right. Although the rights arising from the doctrine are procedural, this does not mean that a public authority, such as the Superintendent, could remedy a failure to entertain representations or consult on a change in practice by doing so currently and applying a new policy retroactively to the prejudice of a person, such as Monsanto, who had ordered its affairs in reliance on the old practice. That would afford little respect for the reliance interest of that person and would give little meaning to the procedural right.

While prejudice to the interests of third parties may provide a reason for declining to apply the doctrine of legitimate expectations (see *Libbey Canada Inc. v. Ontario (Minister of Labour)* (1999), 42 O.R. (3d) 417, at p. 435 (Ont. C.A.)), in this case the practice of the pension regulator on which Monsanto relied was well known to others besides Monsanto. The third parties who would, arguably, be prejudiced if the doctrine were to be applied, namely the Affected Employees, cannot reasonably have expected that the pension regulator would do anything in this case but follow that practice and not disapprove the Partial Wind Up Report. The representation from the pension regulator on which Monsanto relied to its detriment was not made exclusively to it but was made to a broader community, as in *Aurchem* (referred to above). That community was, in effect, the whole pension community, including pension members; consequently, it included the Affected Members. Some of the Affected Members, namely those who were entitled to the Benefit Enhancements, are likely to have benefited from Monsanto's reliance on the established practice of the pension regulator. We heard evidence, which was not disputed, that Monsanto would probably not have introduced the Benefit Enhancements had it known that the Superintendent would change the practice in the way she did in this case.

In conclusion, this is a proper case for applying the doctrine of legitimate expectations or, as it sometimes put, the doctrine of estoppel as it applies against a public authority.

## **F. Disposition**

In light of our conclusions, we would order the Superintendent to refrain from carrying out the proposal contained in the Notice of Proposal and to approve the Partial Wind Up Report. We make no order as to the costs of this proceeding but the panel will entertain written representations on that matter from any of the parties who wish to make them.

DATED at Toronto, this 14<sup>th</sup> day of April, 2000.

“Colin H.H. McNairn”

Colin H. H. McNairn, Vice Chair of the Tribunal and  
Chair of the Panel

“C.S. (Kit) Moore”

C.S. (Kit) Moore, Member of the Tribunal and  
of the Panel

## **MINORITY REASONS**

The facts in this proceeding are adequately summarized in the Majority Reasons and I adopt that summary for the purposes of these Reasons.

### **The Surplus Distribution Issue**

The key issue to be decided in this proceeding is whether it is necessary to distribute pension surplus on a partial wind up in order to meet the requirements of section 70(6) of the *Pension Benefits Act* (Ontario) (the "Act").

Section 70(6) of the Act says:

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.

Can those persons affected by a partial windup “have rights and benefits that are not less than the rights and benefits they would have on a full wind up” without a distribution of surplus at the time of the partial wind up?

In order to answer this question, it is necessary to look at the rights and benefits provided on a full wind up. The Act confers special rights and benefits (not available on an individual termination) to plan members on a full wind up, including immediate vesting, portability options and “grow-in” rights. A wind up also “crystallizes” surplus rights, as clarified by the Supreme Court of Canada in *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 211.

The Act creates the concept of a partial wind up to extend these rights and protections to those affected by certain events involving the termination of the active membership of a significant group of a plan’s members. There are at least two reasons for this legislative concept. First, it is presumed that members of a partial wind up group are in a similar vulnerable position to those in a full wind up, and deserve the same protections. Second, a partial wind up prevents an employer from maintaining the ongoing status of a plan simply to avoid the extra obligations that would result from a full wind up, including the requirement to provide the special wind up rights noted above, and possibly having to deal with surplus.

It is clear, when a plan is fully wound up, that the issue of surplus ownership and distribution must be dealt with. Section 8(1) of Regulation 909 (the “Regulation”) lays out two acceptable methods of dealing with surplus on full or partial wind up. The surplus can be distributed to, or for the benefit of, members, former members and others with entitlements (excluding the employer). The Pension Commission of Ontario (the “PCO”) and the Superintendent have taken the position, in Policy S900-900, that, in this case, surplus must be distributed to each of the three groups, in a way which protects the interests of each of these groups.

Alternatively, there can be an agreement between the employer, the members’ collective bargaining agent (or two-thirds of the active plan members) and former members and others with entitlements, to share and distribute surplus in some other way.

Section 70(6) contains a very broad statement extending all of the rights and benefits of a full wind up to members affected by a partial wind up. It says that, in effect, members affected by a partial wind up are to be dealt with as if there had been a full wind up at the partial wind up date. Conceptually, this requires the division of the pension fund into two parts - assets and liabilities relating to the partial wind up group, and assets and liabilities relating to the ongoing group. The assets and liabilities relating to the partial wind up group must then be dealt with as if it were a plan undergoing a full wind up.

The assets which exceed the liabilities for the partial wind up group constitute a surplus to which the partial wind up group potentially have rights. The employer cannot unilaterally use that surplus to take contribution holidays or make benefit improvements, other than on the basis set out on section 8(1) of the Regulation.

There is no reason to exclude surplus rights from the rights referred to in section 70(6) of the Act. There is no other way in which those rights can be extended to the partial wind up group without a resolution of the rights to surplus at the time of partial wind up.

Monsanto proposes to maintain the rights to surplus of members affected by the partial wind up, by allowing them to share in a future surplus distribution, if a surplus exists at the time of a future full wind up of the plan. While such a result could conceivably be agreed to by members of the partial wind up group following the procedures of section 8(1) of the Regulation, Monsanto cannot unilaterally dispose of the surplus rights of the partial wind up group in this manner, and proceed to use the surplus attributable to this group arbitrarily for benefit enhancements related to a subset of the partial wind up group.

Monsanto's proposal does not offer to members of the partial wind up group protection of their surplus rights. A possible share of a surplus that may arise many years in the future is not the equivalent of an immediate resolution of surplus issues, and a distribution of surplus at the time of the partial wind up.

Furthermore, postponing the issue of surplus ownership and distribution to a future full wind up creates serious practical and legal difficulties.

On a practical level, a full wind up of the pension plan may not happen for decades, and, as time passes, it will become increasingly difficult to locate the members of the partial wind up group (or the beneficiaries of those who have died), many of whom would have long since severed all connections with the employer and the pension plan.

There may also be more than one partial wind up over the course of the plan's history, and it is not at all clear how the rights to a future surplus can be equitably shared among members of different partial wind up groups and plan members at the final wind up. For example, if a plan has two partial wind ups prior to a full wind up, with a surplus at one of the partial wind ups and at the full wind up, how is surplus at the full wind up to be shared among the members at the full wind up and the two partial wind up groups? Would those members affected by a partial wind up without a surplus have any rights with respect to the surplus at full wind up?

An even more difficult problem is the lack of a clear legal basis for this proposal. Section 8(1) of the Regulation says:

No payment may be made from surplus out of a pension plan that is being wound up in whole or in part unless,

(a) the payment is to be made to or for the benefit of members, former members and other persons, other than an employer, who are entitled to payments under the pension plan on the date of wind up; or

(b) the payment is made to an employer with the written agreement of

(i) the employer

(ii) the collective bargaining agent of the members of the plan or, if there is no collective bargaining agent, at least two-thirds of the members of the plan, and

(iii) such number of former members and other persons who are entitled to payments under the pension plan on the date of the wind up as the Superintendent considers appropriate in the circumstances.

At a future full wind up of the plan, members of the partial wind up group who exercise their transfer options under section 42 of the Act are no longer members, former members, or those entitled to payments. The disposition of surplus on full wind up would be in the hands of the future employer, active members and others with entitlements at full wind up. There is no clear basis in the Act for members of the partial wind up group to pursue their rights to surplus at a future full wind up of the plan. How can Monsanto commit to guarantee to this group potential rights to future surplus, if its own rights are not established, and could not be until a future full wind up?

Monsanto contends that the Superintendent's proposal is unfair to ongoing members of the pension plan. In general, there is no reason to see the removal of a proportional share of assets and liabilities related to the partial wind up group, which leaves in the plan for the ongoing group a proportional share of the assets, including surplus, as disadvantageous to the members of the ongoing group.

In this particular case, it is difficult to understand how the removal of \$3.1 million in surplus from the pension, satisfying all future claims from the partial wind up group, is less advantageous to ongoing plan

members than the Monsanto proposal, which would remove \$4.8 million from the pension surplus for pension enhancements to some of the partial wind up group, and still maintain some future rights to surplus for the partial wind up group as a potential future liability in the ongoing plan.

Monsanto and the Association of Canadian Pension Management presented arguments about the negative consequences for the future of the pension system if the Superintendent's position were upheld. It is an unfortunate consequence of legislative and regulatory requirements in the pension field that, in providing protections and more equitable treatment for plan members, they may make plans less attractive to employers. While this is obviously a matter of general concern for legislators, the role of the Tribunal is to interpret the legislation as it is written, having regard for the goals of the legislation. Requiring that surplus rights be dealt with on partial wind up, though it may make defined benefit pension plans less attractive to employers, is clearly compatible with a central goal of the Act, namely the protection of the interests of plan members.

As for the argument that requiring surplus distribution on partial wind up would be detrimental to future pension plan funding, it was not demonstrated that this would lead to a significant future underfunding of pension plans, negatively affecting the security of pension benefits in the future, given the constraints of actuarial and legislative standards.

### **The Benefit Enhancements Issue**

Section 70(5) of the Act gives the Superintendent authority to refuse to approve a wind up report which "does not protect the members and former members of the pension plan". FSCO Policy S900-900, dated February 24, 1994, says, in part,

Where it is in the best interests of the members and former members, benefit enhancements provided shortly before a wind up, if funded out of plan surplus, will normally be considered to be part of the surplus distribution proposal.

This policy prevents an employer from arbitrarily using all of the pension surplus to meet some or all of its severance or other obligations to its terminating employees - in effect, spending the surplus for its own purposes, without having established ownership rights with respect to that surplus.

In the absence of an approved surplus sharing agreement, as provided for under section 8(1) of the Regulation, the Superintendent has the authority, under section 70(5) of the Act, to refuse to approve a wind up report that proposes a disproportionate or inequitable distribution of surplus on the basis that it does not protect the interests of the members and former members of the plan.

In this case, Monsanto proposed to use the entire surplus related to the partial wind up group (as well as some of the surplus related to the ongoing plan) to fund benefit enhancements to only 45 of the 146 members of the partial wind up group. The Superintendent is justified in viewing this as a disproportionate and inequitable distribution of surplus and contrary to section 70(5) of the Act.

Monsanto argued that the members of the partial wind up group were not disadvantaged as their total package of severance and pension benefits was in excess of the sum of minimum statutory severance requirements and their proportional share of surplus. While there is no doubt that the Superintendent's proposal would require a restructuring of Monsanto's severance and retirement packages, it is not clear what the final outcome would have been for all affected members if a surplus distribution arrangement had been agreed to as provided for under section 8(1) of the Regulation, and statutory and common law severance requirements were met. In any case, it is not the role of this Tribunal to assess the overall fairness of potential alternative severance packages, but rather to deal with the pension plan and the requirements of the Act.

If the rights with respect to surplus of the partial wind up group are to be protected, the requirement that benefit enhancements at full wind up are to be fair and equitable must be extended to a partial wind up situation. Monsanto must either distribute the surplus related to the partial wind up group equitably among that group or reach an agreement for surplus distribution in accordance with section 8(1) of the Regulation.

### **The Notice Issue**

Section 28(2)(q) of the Regulation requires that each member, former member and others with entitlements be provided with the following:

if there are surplus assets, a statement of the method of distribution and, if applicable, the formula for allocation of surplus among the plan beneficiaries;

Monsanto did not provide such notice to members of the partial wind up group, arguing that, as there was no actual surplus at the partial wind up, such notice was not required. In my view, as surplus rights exist, and must be dealt with, at the time of partial wind up, Monsanto failed to meet this notice requirement.

### **The Transfer of Pensions Issue**

The Superintendent argued that all benefits from the partial wind up group must be transferred out of the plan, either for the purchase of an annuity or one of the options (as required by section 42 of the

Act) for transfer of commuted value, relying on the references to “distribution” of assets at various places in the Act. This interpretation has the virtue of consistency: the assets, including surplus, attributable to the partial wind up group, and the plan’s obligations to that group, would be totally removed from the plan. This interpretation would lead to a duplication of the requirements on a full wind up.

Monsanto argued that reading such a requirement into the Act would disadvantage both the plan and the members. The plan would be required to purchase annuities at a higher cost on the market than provided for in the plan valuation, and members would lose the option of keeping their benefits in the plan, either for the sake of convenience or the possibility of future benefit enhancements. Apparently, in light of the options presented to them, two-thirds of the Monsanto partial wind up group have elected to keep their benefits in the plan.

I see no reason for a strict interpretation of the meaning of the word “distribution” in this instance. There is no need for a partial wind up to duplicate in every detail a full wind up, where there is no disadvantage to the affected members. “Distribution” on partial wind up need only require that assets, including surplus, related to the partial wind up group, must be segregated from the assets related to the ongoing plan group. Individual terminating members within the partial wind up group would retain their section 42 transfer rights, but the option of transferring accrued deferred benefits to the ongoing plan need not be precluded.

While it may turn out in many partial wind ups that all assets would indeed be removed from the plan, I see no reason to limit these options for a partial wind up, if the rights of the affected plan members are not impaired.

### **The Legitimate Expectations Issue**

Monsanto argued that the failure of the Superintendent and the predecessor PCO to clearly inform employers of the requirement for surplus distribution on partial wind up created the legitimate expectation that their partial wind up proposals would be accepted by the Superintendent even though they made no provision for such a distribution. A failure to accept Monsanto's proposal would therefore cause Monsanto financial harm, as it had made commitments with respect to pension enhancements and severance which could not be withdrawn, and could now be required to make further payments out of plan surplus to members of the partial wind up group. Monsanto also argued that it would be unable to fund the promised pension enhancements without using the surplus as it had proposed since the plan has "excess surplus", which precluded Monsanto from making any additional payment into the plan that would qualify as an "eligible contribution" in the sense of the *Income Tax Act* (Canada).

The policies of the Superintendent and the predecessor PCO have been ambiguous at best, and it had not been the practice, prior to this case, to refuse to approve a partial wind up report on the basis that surplus issues had not been dealt with. In such circumstances, a notification to the pension community of the intent to change (or clarify) policy and practice on these matters would certainly be the preferred course of action.

While an earlier and clearer statement of the Superintendent's reading of the legislative requirements and intentions with respect to the treatment of surplus on partial wind up would certainly have been desirable, and Monsanto may be facing higher costs than it had earlier expected, accepting Monsanto's proposal would deny members of the partial wind up group rights conferred on them by the Act. The Act gives members of the partial wind up group rights with respect to surplus, and these rights cannot be dispensed with to compensate Monsanto for

the lack of clarity in the past pronouncements of the Superintendent and the PCO or inconsistencies in their past practices.

Section 70(5) of the Act says:

The Superintendent **may** refuse to approve a wind up report that does not meet the requirements of the Act and the regulations or that does not protect the interests of the members and former members of the pension plan.(emphasis added)

While there would seem to be leeway for the Superintendent to approve a report which fails in a minor or technical way, the Superintendent has a clear duty to protect the interests of plan members and former members. The disposition of surplus, in this case, involves more than a minor or technical breach. It could have a significant financial impact on affected members. Approving the Monsanto wind up report and waiving their right to an immediate disposition of the surplus issue would stretch beyond reasonable bounds the discretion of the Superintendent.

Section 79(3)(b) of the Act prevents the Superintendent from consenting to payment of surplus to an employer unless “the pension plan provides for payment of surplus to the employer on the wind up of the pension plan”. As Monsanto’s rights with respect to the surplus relating to the partial wind up group have not been established, the Superintendent cannot approve a distribution of surplus to Monsanto.

I would therefore uphold the Superintendent’s refusal to accept Monsanto’s partial wind up report.

DATED at Toronto, this 14<sup>th</sup> day of April, 2000

‘Louis Erlichman’

Louis Erlichman

Member of the Tribunal and the Panel