

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 Proposal of the Superintendent of Financial Services to Make Orders under sections 87 and 88 of the *Pension Benefits Act* relating to the Imperial Oil Limited Retirement Plan, Registration Number 0347054 (the “IOL Plan”);

AND IN THE MATTER OF A Proposal of the Superintendent of Financial Services to Make Orders under sections 87 and 88 of the *Pension Benefits Act* relating to the Imperial Oil Limited Retirement Plan for Former Employees of McColl-Frontenac Inc., Registration Number 0344002 (the “MFI Plan”)

AND IN THE MATTER OF a Hearing in accordance with subsection 89(8) of the Act.

IMPERIAL OIL LIMITED

Applicant

and

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

and

**WILLIAM DYER, NAOMI ROSE, LODEWYK VAN KAMP, TONY EICHHORN,
PETER KOZAK, YVON BISSONNETTE, WILLIAM ORR, ROSS FRASER,
GORDON BLACKWELL, DONALD DIQUE AND LESLIE ODOR**

Intervenors

BEFORE:

Elizabeth Shilton
Member of the Tribunal and Chair of the Panel

Ralph Scane
Member of the Tribunal and of the Panel

David Short
Member of the Tribunal and of the Panel

APPEARANCES

For the Applicant: Mahmud Jamal and Catherine Weiler

For the Superintendent: Deborah McPhail

For the Intervenor: Donald Dique (Spokesperson) William Dyer, Peter Kozak, Yvon Bissonnette, William Orr, Ross Fraser

Date of Hearing:

October 30, 2009

DECISION

A. INTRODUCTION

This case deals with the rights of pension plan members¹ affected by a partial wind up of their pension plans. Specifically, it addresses the question of what options are available on partial wind up for protecting the pension entitlements of those affected members who do not elect to transfer the commuted value of their pensions out of the plan. According to the Superintendent of Financial Services (the “Superintendent”), the *Pension Benefits Act* (“PBA”) requires that in all such cases, the pension entitlements of those members must be annuitized. Imperial Oil Ltd. (“IOL”), the employer, plan sponsor and administrator of the plans involved in this case, argues that the pensions of such members may be provided through the on-going plan. The intervenors side with IOL.

The Superintendent’s position is reflected in a policy of the Financial Services Commission of Ontario (“FSCO”), FSCO Policy W100-231. This policy, effective March 30, 2007 and entitled “Distribution of Benefits on Partial Wind Up”, provides that:

If a member who is entitled to make an election does not do so within the prescribed time, or such longer period as the administrator may allow, the member shall be deemed to have elected a deferred or immediate pension.

All immediate and deferred pensions in the wound up portion of the pension plan must be provided through the purchase of life annuities from an insurance company licensed in Canada to provide such annuities. [emph. added]

This is the first case to test the appropriateness of this aspect of the FSCO policy. We have determined that in the circumstances of this case, the PBA permits a plan administrator to meet its obligation to provide pensions for members affected by a partial wind up by providing those pensions through the on-going plan.

¹Technically, most of those whose pension entitlements are at issue in this case are “former members” under the PBA, since they have all terminated their employment and some are already retired on pension. Some may be surviving spouses of former members. We use the shorthand ‘members’ or ‘plan members’ throughout these reasons to refer to all persons whose rights are at issue here, unless the context otherwise requires.

We set out below the reasons for our decision.

B. FACTUAL BACKGROUND

Most of the evidence in this case was agreed among the parties, and filed by way of an Agreed Statement of Facts and Book of Documents. In addition to the agreed-upon evidence, IOL filed an affidavit including an expert report from Fred Vettese, Chief Actuary, Morneau Sobeco. Mr. Vettese was cross-examined, and the transcript of the cross-examination was also filed as evidence. While IOL and the Superintendent took the lead in the preparation of the evidence, the Intervenors were also involved in the evidence-gathering process to the extent they chose to participate.

This case arises out of three Notices of Proposal (“NOPs”) issued by the Superintendent on December 19, 2008. All three NOPs raise identical issues. They relate to three partial wind ups ordered by the Superintendent between September 4, 1997 and March 21, 2003 in respect of two pension plans administered by IOL, the IOL Plan and the MFI Plan (collectively, “the Plans”). The employee terminations which triggered these partial wind ups took place over a period of years from February 4, 1992 to July 7, 2000, and involved a total of 2,603 employees of IOL across Canada. Partial wind up reports for the plans were filed between August 18, 2003 and July 29, 2005. Following interim approval of these reports under subsection 70(3) of the *PBA*, and settlement of all member portability elections under s.42(1) of the *PBA*, FSCO advised IOL to “proceed with the distribution of the remaining assets related to the wound-up portion” of the Plans, noting that “there are liabilities that will need to be settled via an annuity purchase”. IOL then advised FSCO that “where members have elected to leave their pension in the Plan as opposed to electing a commuted value transfer or annuitized pension, it is Imperial Oil’s intention to honour such elections”. The Superintendent responded by issuing the NOPs at issue in this case.

The NOPs propose to require IOL, as the administrator of the Plans, to distribute the assets by purchasing annuities for all former members of the Plans or their spouses affected by the partial wind ups who did not elect to transfer their respective pension entitlements out of the plans pursuant to section 42 of the *PBA*, and continue to have pension entitlements under the Plans. The NOPs also propose to make orders pursuant to section 88(2)(c) of the *PBA* requiring IOL, as administrator of the Plans, to amend and resubmit the Partial Wind Up Reports submitted in respect of the three partial wind ups, to provide that all former members affected by the partial wind ups who have not selected any of the options provided in the Partial Wind Up Reports have their pension entitlements as described in the respective Partial Wind Up Report distributed by way of a purchase of annuities. The NOPs explicitly rely on *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152.

At the time of their initial termination of employment, plan members below the age of 55 were given the choice either of staying in the pension plan to receive a deferred pension (if eligible) or transferring the commuted value of their pension benefits out of the relevant plan pursuant to one of the portability options (also called “transfer options”) provided by s.42(1) of the *PBA*. These members were advised that if they failed to return their election forms to the benefit centre within a specified time period, they would be deemed to remain in the Plan and receive a

pension. In addition, eligible members were advised that if they elected to transfer their commuted value out of the plan, they would lose their eligibility for certain discretionary (“*ad hoc*”) pensions benefit increases and post-retirement benefits to which they would be entitled if they stayed in the plan. Many terminated employees elected to remain with the Plans.

Once the partial wind up had been declared and benefits had been calculated, the affected members, 2,603 in number, were sent additional election forms and were given a variety of options depending on their initial election, their age and service. In general, eligible members who had previously elected to remain in the Plans were offered a choice either to take a transfer option under s.42(1) or to remain in the Plans. In all cases, members were advised that if they failed to elect, the default option was that they would remain in the Plans. Members who were currently eligible for post retirement benefits or for *ad hoc* benefit increases were advised that if they took a s.42(1) option to transfer their benefit entitlements out of the plan, they would no longer be eligible for those additional benefits. They were also advised that any calculation of commuted value did not include the value of any *ad hoc* increases. As a result of this wind up election process, 718 of the total of 2,603 affected members across Canada elected or were deemed to have elected to remain in the Plans. 409 of those affected members are residents of Ontario.

In their evidence, the parties made a distinction between two different kinds of annuity options. The option the parties have described as the “voluntary annuitization option” is the transfer option provided under s.42(1)(c) of the *PBA*. Under this provision, affected members have the right to transfer the commuted value of their pension benefits into an annuity. Depending on the prevailing interest rates and other market forces affecting the annuity pricing market at that time, an annuity purchased under this option is unlikely to yield an amount equal to the value of the pension benefit to which a member is entitled under the plan. There is an inherent cost to purchase an annuity not present in providing a pension from a pension plan because the annuity provider must be compensated both for its services and for the risk it bears. A member who elects annuitization under s.42(1)(c) assumes the risk that an annuity might yield less than the pension benefit. Members who received election forms pursuant to the partial wind up were advised on the face of that form that the amount of the annuity purchases under the transfer options would be different than the pension to which they would be entitled under the plans. By contrast, under the annuitization option which the Superintendent proposes to order (dubbed, perhaps unfortunately, the “forced annuitization option”) the risk that an annuity equal to the pension benefits might cost more than the commuted value of the benefit would fall on the Plans, since the Plans would be required to purchase an annuity which reproduced the pension benefit. The evidence of Fred Vettese was that under current market conditions, the additional cost of annuitizing the pensions of the affected members who did not elect one of the portability options (over and above the Plan’s going concern liability in respect of those pensions) would be \$16.5 million, an amount which he characterized as a capital loss to the Plans.

As noted above, a significant number of affected plan members chose to remain with the Plans. The evidence suggested a number of factors which might explain this high rate of loyalty to the Plans. First, IOL has a credit rating which is superior to most annuity providers. Second, in addition to the pension benefit, membership in the IOL Plans comes with two features to which plan members quite properly attach significant value. The Plans have an established pattern of providing *ad hoc* increases to pension benefits, a practice estimated by Morneau Sobeco to be

worth \$7.9 million. Because these increases are discretionary and not built into the benefit formulae, this value is not reflected in the valuation of the benefit entitlements, and would be available in future only to continuing members of the Plans. In addition, IOL provides to qualifying retired employees a package of post-retirement medical and dental benefits. Although these benefits are not provided by the Plans, we were advised that IOL has historically paid them only to retirees collecting pensions from the Plans. IOL has taken the position that plan members who transfer their entitlements out of the Plan will lose their eligibility for these benefits, and clearly advised plan members of this position at the time of their elections. While no dollar figure has been placed on the value of these post-retirement benefits, it would no doubt be considerable. (We note that IOL has since made the commitment that this particular group of affected members will continue to be eligible to receive post-retirement benefits regardless of the outcome of this case, although it has made no such commitment with respect to future situations.)

While neither party emphasized this point in argument, we have no doubt that there was an additional reason for the plan members' loyalty. Under the set of wind up options offered by IOL, members had a choice between continued plan membership and the s.42(1) "commuted value" options. The 'forced annuitization' option proposed by the Superintendent, which would have guaranteed the pension benefit (although not the *ad hoc* increases or post retirement benefits) was not on offer. The 'voluntary annuitization' option offered pursuant to s.42(1)(c) explicitly did not guarantee the pension benefit. Accordingly, the only way members could be sure that they would get their full pension entitlement was to stay in the Plans. It would appear, however, that the members would likely have chosen to remain in the Plans in any event. At the request of the Intervenors, IOL conducted a survey canvassing the views of the affected members on whether they supported the IOL position or the Superintendent's position in this case. The survey results were filed by agreement of the parties; they demonstrate that approximately 97% of those who responded support the position of IOL.

C. THE POSITIONS OF THE PARTIES

IOL's position before us is quite simple. IOL argues that the governing provision of the *PBA* is s.70(6), which provides that members affected by a partial wind up must be given "rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan". The *PBA* provides that on a wind up, members must be offered the transfer options under s.42(1). In this case, the affected members were offered those options and therefore their right to parallel treatment has been respected. The Act is silent, argues IOL, on what happens if members do not chose to transfer their entitlements. IOL's decision to continue to provide pensions through the on-going Plans respects the right of members to a continuing pension benefit, and there is no legal requirement to annuitize.

In support of its position, IOL relies on the decision of this Tribunal in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2000), 23 C.C.P.B. 148, pointing out that in that case, all members of the Tribunal held that there was no requirement to annuitize pension entitlements in a partial wind up situation. IOL argues that we are bound by that decision. Furthermore, it accuses the Superintendent of inconsistency in his interpretation of the Supreme

Court's *Monsanto* decision. It points to FSCO Policy S900-910, entitled "Distribution of Surplus to Employer on Partial Wind Up", in which FSCO takes the position that:

To distribute the employer surplus, the employer may choose:

- (a) to receive the employer surplus as a cash payment;
- (b) to allocate the employer surplus to the ongoing portion of the pension plan; or
- (c) a combination of (a) and (b).

IOL argues that this policy, which permits employers to "distribute" their share of a plan surplus in the wound up portion of the plan by "allocating" it back to the on-going portion of the plan, is completely at odds with the Superintendent's current position, which is that "distribution" requires that funds be removed from the plan altogether. It characterizes the interpretation of "distribution" reflected in FSCO Policy S900-910 as an "administrative interpretation" by a regulator, and argues that "in cases of statutory ambiguity, where a regulator departs from its prior administrative interpretation of the statute and adopts an inconsistent interpretation, the regulator's administrative interpretation may be used to resolve the ambiguity in favour of a party challenging the regulator's late interpretation" (IOL Supplementary Written Submissions, November 12, 2009).

In addition, submits IOL, there are strong policy reasons not to force continuing plans to annuitize pensions. IOL points to the fact that annuitization creates a significant cost over and above the cost of providing pension benefits from the Plans. If IOL's position is accepted, these costs are entirely avoidable. IOL also points out that under the circumstances in this case, plan members forced out of the plan through annuitization will lose valuable rights: the right to *ad hoc* increases to their pension benefits, the right to post-retirement medical and dental benefits, the right to participate in any future surplus accumulation, and the protection that comes from having their defined benefits backstopped by a company with one of the best credit ratings in Canada. IOL argues that plan members should be free to make informed decisions in their own best interests about how to realize their pension entitlements. IOL argues that the option of having their pensions provided by the Plans is a rational choice selected by numerous plan members in this case, and that this choice is not precluded by the *PBA*.

We note that IOL also made a number of policy arguments premised on the assumption that 'forced annuitization' is the functional equivalent of 'voluntary annuitization', requiring plan members to bear the cost of their own annuity purchases out of commuted values, and thus requiring them to bear the risk that annuities purchased would produce benefits less than those that would be provided by the plan. This assumption was fostered by the Superintendent's ill-advised and subsequently retracted concession in the Agreed Statement of Facts that 'forced annuitization' would have the same impact as 'voluntary annuitization' on plan members. In fact, it is now clear that under the Superintendent's position, the cost of 'forced annuitization' would fall on the Plans, not on the members. Accordingly, we have not reviewed or weighed those aspects of IOL's argument which are based on the contrary assumption.

In response, the Superintendent argues that IOL's focus on s.70(6) is a red herring. The Superintendent expressly abstains from grounding his case on s.70(6). He does not argue that annuitization is a 'right' or 'benefit' to which plan members are entitled on wind up. Instead, he simply argues that leaving the pension entitlements of affected plan members in the Plan is

inconsistent with the concept of a wind up or partial wind up under the *PBA*. In the Superintendent's view, the option of allowing members to remain in the plans does fundamental violence to the nature of a partial wind up. He supports this argument by pointing to statutory language which requires that in both wind up and partial wind up situations, the assets of a plan attributable to the affected members must be not just "allocated" but also "distributed". He then argues that "the only possible correct interpretation of 'distribution' is that there be an actual transfer from the pension plan" (Superintendent's Written Submissions, para. 30(a).) The Superintendent's position is summed up in written submissions as follows:

If the *Act* is to be interpreted in its ordinary and grammatical meaning, the following points are clear:

- a) the assets related to a partial wind up must be allocated and distributed on partial wind up;
- b) the assets related to a partial wind up are not limited to surplus assets;
- c) the act of distributing has to mean something other than simply allocating the assets within the plan; otherwise, the language in clause 70(1)(c) would not use the words "allocated and distributed";
- d) based on dictionary definitions, a distribution involves a payment out or dispersal and not simply a segregation from within;
- e) the *Act* gives an additional right to a transfer on partial wind up that is not available to a member who is terminated and entitled to an immediate pension in circumstances that do not constitute a partial wind up.
(Superintendents' Written Submissions, Para. 44)

The Superintendent acknowledges the force of some of IOL's policy arguments. He points out, however, that policy concerns cannot prevail over legal requirements. Furthermore, in view of the broad implications of our decision, we are cautioned not to place too great reliance on factors unique to this situation, such as IOL's superior credit rating or the fact that IOL offers ancillary benefits to retirees that it is not prepared to offer to plan members who transfer their entitlements out of the Plans. He argues, quite properly, that "law cannot be applied on a selective basis" (Superintendent's Written Submissions, para. 72).

In support of his interpretation of the *PBA*, the Superintendent relies on the decision of the Supreme Court of Canada in *Monsanto*; indeed, he argues that we are bound by that decision to decide this case in his favour. In the NOP the Superintendent points directly to the Supreme Court's decision in *Monsanto* as the justification for FSCO Policy W100-231. The Superintendent directs us to numerous passages from the Supreme Court's *Monsanto* decision which, he argues, make it clear that the Court sees a partial wind up as a situation in which "accounts will be settled" with affected members, requiring that their entitlements and the assets which back those entitlements be removed from the plan. After *Monsanto*, the Superintendent argues, it is no longer possible to take any position other than the one it now takes: that members affected by a partial wind up must sever all ties with the plan, and all assets relating to them must be wholly removed from the plan.

In response to the Superintendent's reliance on the Supreme Court's decision in the *Monsanto* case, IOL points out a fact which the Superintendent fully acknowledges: while the issue that is before us was addressed by the Tribunal in its *Monsanto* decision, no appeal was taken from that

aspect of the decision, and accordingly that issue was not before the Supreme Court. IOL argues that judicial comments made in the course of the Supreme Court's *Monsanto* decision must be understood in their context, and are of very little assistance in resolving the problem posed by this case.

D. THE STATUTORY FRAMEWORK

The *PBA* defines "wind up" as follows:

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund.

It also contains a closely parallel definition of "partial wind up":

"partial wind up" means 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.

In addition, s.70(1) of the *PBA* imposes certain procedural requirements on plan administrators in both full and partial wind up situations:

The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

- (a) the assets and liabilities of the pension plan;
- (b) the benefits to be provided under the pension plan to members, former members and other persons;
- (c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and
- (d) such other information as is prescribed.

In a partial wind up situation, these provisions appear to contemplate a division between the assets and liabilities relating to the partial wind up group, and those relating to the other members of the plan. FSCO Policy W100-102 requires that "[a]s at the effective date of a partial wind up, the liabilities and assets related to the members, former members and other persons affected by the partial wind up must be identified. The split of the pension plan assets between the wound up portion and the on-going portion of the plan must be determined as if the total pension plan were wound up on the partial wind up date". As we understand their submissions, the parties agree that the plan must be split into two portions: the "wound up portion of the plan", and "on-going portion of the plan". We do not, however, understand any party to be arguing that the split must be actual, as opposed to notional, at this point. IOL filed with us a FSCO document entitled "Partial Wind Ups Post Monsanto", dated March 22, 2005 and available on FSCO's website, in which FSCO notes that the split of assets between wound up and on-going portions of the plan may be either notional or actual, "depending on the circumstance". Indeed, no assets may be removed from the integrated fund until the partial wind up report is approved, without the consent of the Superintendent.

For purposes of calculating the value of the relevant pension entitlements, it is necessary to take into account the additional rights the *PBA* accords to plan members affected by wind ups. Sections 73 and 74 spell out these rights in some detail. Section 73 provides that:

- (1) For the purpose of determining the amounts of pension benefits and any other benefits and entitlements on the winding up of a pension plan, in whole or in part,
 - (a) the employment of each member of the pension plan affected by the winding up shall be deemed to have been terminated on the effective date of the wind up;
 - (b) each member's pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and
 - (c) provision shall be made for the rights under section 74.
- (2) A person entitled to a pension benefit on the wind up of a pension plan, other than a person who is receiving a pension, is entitled to the rights under subsection 42 (1) (transfer) of a member who terminates employment and, for the purpose, subsection 42 (3) does not apply.

Under s.74, a wind up triggers additional rights known as “grow-in rights”:

- (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,
 - (a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;
 - (b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,
 - (i) the normal retirement date under the pension plan, or
 - (ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or
 - (c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

As noted above, s.73(2) makes available to members affected by a wind up the rights provided by s.42(1). These rights, normally applicable to members who leave pension plans on termination of employment, provide for certain options for transferring the commuted value of pension entitlements out of the plan. These options, often referred to as “portability” or “transfer” options, are as follows:

A former member of a pension plan who, on or after the 1st day of January, 1988, terminates employment or ceases to be a member of the pension plan and who is entitled

to a deferred pension is entitled to require the administrator to pay an amount equal to the commuted value of the deferred pension,

- (a) to the pension fund related to another pension plan, if the administrator of the other pension plan agrees to accept the payment;
- (b) into a prescribed retirement savings arrangement; or
- (c) for the purchase for the former member of a life annuity that will not commence before the earliest date on which the former member would have been entitled to receive payment of pension benefits under the pension plan.

All of these rights are relevant to the valuing of pension entitlements of members affected by a plan wind up. They are equally applicable to members affected by *partial* wind ups, by virtue of s.70(6), which provides as follows:

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.

There is no disagreement in this case that the affected members are entitled to have their pension entitlements valued taking into account all the rights provided by ss.73 and 74, including the transfer options provided in s.42(1). We are assured that the value of those rights is fully reflected in the portion of the pension fund which has been allocated to the partial wind up groups in this case, and dealt with in the partial wind up reports filed with FSCO.

Once these values have been determined, what is the next step in the wind up or partial wind up process? Section 72 of the Act provides important guidance on that issue. It requires that:

- (1) Within the prescribed period of time, the administrator of a pension plan that is to be wound up, in whole or in part, shall give to each person entitled to a pension, deferred pension or other benefit or to a refund in respect of the pension plan a statement setting out the person's entitlement under the plan, the options available to the person and such other information as may be prescribed.
- (2) If a person to whom notice is given under subsection (1) is required to make an election, the person shall make the election within the prescribed period of time or shall be deemed to have elected to receive immediate payment of a pension benefit, if eligible therefor, or, if not eligible to receive immediate payment of a pension benefit, to receive a pension commencing at the earliest date mentioned in clause 74 (1) (b).

While s.72 itself is primarily a procedural provision, it underlines what is implicit in ss.73 and 74; *in addition to* other rights provided under these sections, members in the position of those involved in this case are entitled to either *an immediate or deferred pension benefit*. While they must be offered the transfer options provided by s.42(1), they are not required to take them. Section 72(2) clearly spells out the 'default option' in the event they do not choose a transfer: they are deemed to have elected to receive either an immediate or a deferred pension benefit.

What does this mean? “Pension benefit” is a defined term under the Act:

“pension benefit” means the aggregate monthly, annual or other periodic amounts payable to a member or former member during the lifetime of the member or former member, to which the member or former member will become entitled under the pension plan or to which any other person is entitled upon the death of a member or former member (s.1(1))

The *PBA* is clear, then, that members affected by a wind up or partial wind up remain entitled to the pension they have been promised under their pension plan. The *PBA* is not so clear, however, on *how* that pension is to be provided in a wind up situation. There is no dispute that it is the practice in Ontario in a full wind up situation for plans to deliver on the pension promise through the purchase of annuities for those who do not choose transfer options. There is no specific provision of the *PBA* that mandates annuity purchases in wind up situations; it is simply, as the Superintendent argues, a “practical necessity” for achieving the results mandated by statute – the distribution of the plan’s assets in a manner that protects pension benefits – in the circumstances of a full wind up. The question before us is whether the same “practical necessity” compels the same result in a partial wind up situation, or whether, in view of the fact that the original pension plan continues to exist as an on-going plan, there is another equally practical (and considerably less expensive) mechanism: the transfer of both the assets and the liabilities to provide pension benefits back to the on-going plan.

Both parties submit that this question must be answered on the basis not only of the statutory provisions, but also on the basis of the interpretation placed by the Tribunal and the courts on these provisions in the *Monsanto* case. We turn now to the *Monsanto* decisions.

E. THE MONSANTO CASE

As both IOL and the Superintendent have pointed out in their submissions, the issue before us – the issue of whether or not pension plans are required to annuitize members affected by partial wind ups – was raised and argued before the Tribunal in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2000), 23 C.C.P.B. 148, prior to the development of FSCO Policy W100-231. The *Monsanto* case involved a NOP proposing to refuse to approve a partial wind up report filed by Monsanto on a number of grounds, including that it did not provide for the distribution to affected members of surplus assets, and that it proposed that pensions and deferred pensions payable to affected members would “remain in the Plan” (FST Decision, pp. 116) if not transferred out pursuant to s.42(1). Monsanto’s challenge to the NOP raised a number of issues. Although the Tribunal was divided on some of the issues in that complex case, including the issue of whether or not Monsanto was required to make an immediate distribution of surplus, both majority and minority were united in rejecting the Superintendent’s argument that the *PBA* required pension plans to annuitize all members affected by a partial wind up who did not elect s.42(1) portability options. It was unanimous in holding that the members’ right to a pension benefit could be delivered by leaving their entitlements in the continuing plan.

In *Monsanto*, the Superintendent advanced before the Tribunal arguments very similar to those it has advanced in this case. The Superintendent argued that the *PBA* contemplates not just the

allocation but also the distribution of the assets relating to the portion of a pension plan that is to be partially wound up. The Superintendent relied on the definition of “partial wind up” found in s.1 requiring “distribution” of the assets, the requirement in s. 70(1)(c) that the wind up report set out “the methods of allocating and distributing the assets of the pension plan”, and the requirement in s.10(1)¶13 that the pension plan documents set out “the method of allocation of the assets of the pension plan on wind up”.

The majority of the FST panel rejected the Superintendent’s arguments on this issue, concluding:

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 Members 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. [para.50]

Dissenting FST member Erlichman also rejected the Superintendent’s arguments on this issue. He held:

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. [para.109-110]

Member Erlichman conceptualized the process somewhat differently than the majority; while the majority used the language of “leaving ... pension entitlements in the plan”, member Erlichman referred to “segregation” of the partial wind up assets, and “transferring accrued benefits to the ongoing plan”. The practical result, however, was the same: the Superintendent’s argument that the benefits must be annuitized was rejected, and the affected members who did not elect a transfer option continued to receive their pension benefits from the on-going plan.

The Superintendent appealed the Tribunal’s Decision to the Divisional Court, but not on this issue. The appeal challenged the Tribunal’s decision on two other issues: whether the former members affected by the partial wind up were entitled to an immediate distribution of their *pro rata* share of plan surplus, and whether Monsanto’s conduct in failing to make any provision for surplus distribution in its partial wind up report, based on prior FSCO policy, was protected by the doctrine of legitimate expectations. The majority decision in *Monsanto* did not survive the appeal process. It was reversed by the Divisional Court, which adopted the decision of dissenting

Member Erlichman determining that plan members affected by a partial wind up were entitled to have their *pro rata* share of any plan surplus distributed to them at the time of the partial wind up. This decision was subsequently affirmed by both the Court of Appeal and the Supreme Court of Canada.

The case reached the Supreme Court of Canada on only one issue: the issue of Monsanto's failure to provide in its partial wind up report for the distribution of surplus to affected plan members. The unanimous judgment of the court was delivered by Deschamps J. As she spells out clearly in her decision, the case focused on the interpretation of s.70(6) of the Act. In particular she notes that the "main area of contention between the parties is the import of the last phrase: 'on the effective date of the partial wind up'. Monsanto argued that the provision merely gave the affected members "a vested right, as of the effective date of partial wind-up, to participate in surplus distribution when, if ever, the Plan fully winds up". The Superintendent argued "that the distribution of the surplus actually occurs on the effective date of the partial wind-up." [para.18]. The direct focus, therefore, was not on the meaning of the term distribution, but on the *timing* of distribution of any entitlement to surplus.

In the context of that dispute, Deschamps J. makes it clear that under s.70(6), "rights and benefits are not only measured but also realized as of the effective date of partial wind up" (168). She notes that:

... s. 70(6) acts as a residual deeming provision rather than being an independent delineation of substantive rights. As a matter of logic, if it equalizes the position of the full and partial wind-up groups, and it is clear that there is surplus distribution on full wind-up, then there should also be surplus distribution on partial wind-up.

She sums up the court's holding on this interpretative issue as follows:

[T]he provision indicates that the assessment of rights and benefits is to be conducted as if the Plan was winding up in full on the effective date of partial wind up. The realization of rights and benefits, including the distribution of surplus assets, then occurs for the part of the Plan actually being wound up. Therefore, the Affected Members, if entitled, may receive their pro rata share of the surplus existing in the fund on a partial wind-up, as if the Plan was being fully wound up on that day. [para. 31]

As to the mechanics of that exercise, she notes: "a partial wind up requires a full wind up to notionally occur for the purposes of evaluating the pro rata share of the assets and liabilities related to the partial wind-up, followed by the continuation of the remainder of the Plan" [para. 33].

The Superintendent draws our attention to two additional passages in the court's decision. He points out that the court showed concern for the equities of the situation in light of the "increasingly mobile nature of labour". The Court observes that "[i]t makes sense for the Affected Members to be subject to the risks of the Plan while they are part of it, but not after they have been terminated from it". Furthermore, the Court clearly sees a partial wind up, like a wind up, as a point at which "accounts are settled":

When a group of employees is terminated and that part of the Plan is wound up, those accounts should generally be settled concurrently. The Affected Members should be able to know their status at the time of their termination so as to arrange their affairs accordingly and not be indefinitely tied to an employer that laid them off.[para. 42-43]

It is important, however, to place these comments in context. They are clearly directed to the issue of plan surplus. As Deschamps J makes clear in para. 42 of the decision, the Court is concerned with the fair allocation and distribution of market windfalls:

There are also policy and practical reasons supporting an interpretation requiring distribution upon partial wind-up. A surplus is, in effect, a windfall because it was not within the expectations of either the employer or the employees when the regime was implemented. The employer contributes to the fund as much as is necessary to match the funding target of the Plan on a going concern basis, taking into consideration actuarial estimates and assumptions. The basic expectation of the employees when joining the Plan is to receive periodic pension benefits on retirement. The fluctuation in the value of the assets is essentially the result of unforeseen market performance or plan experience. *As discussed earlier, the most equitable solution is to distribute the fortunes of favourable markets at the time Affected Members are terminated. In this way, the windfall is related to their actual time and participation in the plan rather than being subject to the experience of a plan of which they are no longer a part.* [emph. added]

On Monsanto's approach, employees affected by a partial wind up would be entitled to share in plan surplus at the time of wind up *only if the plan was still in surplus at that time*, regardless of whether or not it was in surplus at the time of the partial wind up. The Court clearly finds it more equitable to allow employees to share in the surplus generated while they were members of the plan, and not to place them at risk of losing this entitlement altogether as a result of events which take place after they have left the plan.

Additionally, and this is clearly relevant to the issue in this case, the Court does not provide clear direction as to the meaning of the word "distribution" in the broader context of pension benefit entitlements. Surplus entitlements are clearly to be distributed, whether on full or partial wind up, to the owners of the surplus, which may include the employer, the plan members, or some combination of the two. The only practicable way to 'realize' a surplus distribution to plan members is to pay it out to them. Pension benefit entitlements, on the other hand, cannot legally be paid out to plan members. They must be dealt with in accordance with the over-riding policy of the *PBA* that pension entitlements are to be used to provide pension benefits, and with the requirements of the *Income Tax Act*. In a partial wind up situation, they must certainly be distributed out of the wound up portion of the plan. The question remains, however, what options are available to effect that distribution. We turn now to that question.

F. ANALYSIS

We commence our analysis, as we must, with the requirements of the *PBA*. As noted above, the Act defines a partial wind up as follows:

“partial wind up” means 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.

While the definition appears to distinguish between the ‘plan’ and the ‘fund’, the parties did not focus in their submissions on the first part of the definition. Instead, they focussed on the meaning of the term “distribution”. In our view, this focus appropriately reflects the reality that in a funded defined benefit plan, the purpose of the fund is to provide the assets required to meet the liabilities established under the plan documents. The requirement on partial wind up is to deal with the ‘package’ consisting of both assets and liabilities relating to the partial wind up group. An appropriate ‘distribution’ of the segregated assets will terminate the segregated liabilities (i.e. terminate the “part of the plan”). The key issue, therefore, is the meaning of the distribution requirement.

We turn, then, to the issue of “distribution”. As discussed in Part D, above, the parties appear to be in agreement that in order to meet the requirements for the preparation of a partial wind up report, the plan administrator is required to calculate the actuarial value of the pension benefits of all plan members as though the plan were totally wound up, including in the calculation the value of any additional benefits triggered under the *PBA* by a wind up. The fund’s assets are then segregated into two portions: the on-going portion of the plan and the wound up portion of the plan, in proportion to the related liabilities. Affected plan members must then be offered the transfer options required by the *PBA*, and their elections and deemed elections valued. Once these steps are completed, the plan actuary can then compare the assets of the wound up portion of the plan with its liabilities, a process which may trigger the requirement to make additional contributions under s.75 (as clarified by Regulation 35(2)) of the *PBA*). The segregation, although notional, is nevertheless meaningful, since it requires and permits a clear identification of the value of the plan assets which have been allocated to the partial wind up group to meet the plan’s liabilities to that group.

Once this segregation has taken place, it is then clear from the definition that a partial wind up requires the ‘distribution’ of the assets in the wound up portion of the fund. The crux of the issue between the parties is the meaning of this term ‘distribution’. With respect to those members who have selected a transfer option, ‘distribution’ clearly involves carrying out the specific transfer option the member has chosen. In the case of these Plans, that step has already been carried out, pursuant to the interim approval granted by the Superintendent under s.70(3). The remaining assets in the wound up portion of the plan are those referable to the entitlements of plan members who did not select a transfer option. What are the administrator’s obligations with respect to ‘distributing’ those assets?

As discussed above, pursuant to s.72(2) of the *PBA*, affected plan members who have not elected a transfer option are deemed to have elected to receive an immediate or deferred pension:

If a person to whom notice is given under subsection (1) is required to make an election, the person shall make the election within the prescribed period of time or shall be deemed to have elected to receive immediate payment of a pension benefit, if eligible therefor, or, if not eligible to receive immediate payment of a pension benefit, to receive a pension commencing at the earliest date mentioned in clause 74 (1) (b).

Their entitlement, then, is to an immediate or deferred pension. Obviously the assets of the wound up portion of the plan must be distributed in a manner that ‘realizes’ this right: in other words, in a way that provides for the payment of an immediate or deferred pension benefit. The default option offered by IOL, to continue to provide benefits from the on-going plan, clearly does this.

The Superintendent argues, however, that it does not do so in a manner consistent with the requirements of a partial wind up because it does not constitute a ‘distribution’. In the absence of a statutory definition of the term ‘distribution’, the Superintendent put before us a series of dictionary definitions from such impeccable sources as the Concise Oxford Dictionary and Black’s Law Dictionary. As with most dictionary definitions of troublesomely vague terms, however, most of the sources provide a range of definitions, from which the Superintendent urged us to select the one most supportive to his case. (Indeed, IOL also selectively relied on some of the same definitions). We found the definitions unhelpful, since they served only to focus on the point on which the parties do agree: “distribution” undoubtedly requires the funds allocated to the wound up portion of the Plans to be removed from that portion of the Plans in order to effect the partial wind up. The definitions do not help us to determine how that distribution takes place.

The Superintendent relied most heavily, of course, on the decision of the Supreme Court of Canada in *Monsanto*; indeed, as we have noted above, he argued that we were bound by it. Since the issue that is before us was not before the Court, we are not persuaded that we are so bound. In the course of addressing the issue before it, however, the Court was required to consider the provisions of the *PBA* dealing with the wind ups and partial wind ups, and to address the meaning of the word “distribution” in the context of plan surplus. Accordingly, regardless of whether or not we are bound by that decision, it is incumbent upon us to examine with great care what the Supreme Court had to say about the meaning of the *PBA* in the context of a partial wind up, and to consider what implications that decision may have for the issue before us.

It should be clear from our review of the *Monsanto* decision in Part E, above, however, that we do not share the Superintendent’s view that the Supreme Court’s decision compels annuitization of all uncommuted benefit entitlements in a partial wind up situation. The Supreme Court’s decision certainly supports the proposition that on a partial wind up, there must be a notional segregation of the wound up portion of the plan from the on-going portion of the plan, that all entitlements must be identified and valued at the point of partial wind up, and that “accounts must be settled” at that time. It supports the proposition, although it does not directly address the issue, that the wound up portion of the plan must be eliminated – liquidated, if you like – before the partial wind up is complete. What it does not do is address in any way the question of what options a plan administrator has for distributing the assets which underwrite the pension entitlements of the affected plan members. After *Monsanto*, that question still remains open.

In our view, the focus of the distribution requirement in a partial wind up situation is on the wound up portion of the plan. As long as the wound up portion of the plan is fully depleted in a manner which provides full pension entitlements, the distribution requirement is met. In a full wind up situation, it is obvious that the entire plan must be liquidated before the wind up is complete; the plan will cease to be. Accordingly, as the Superintendent points out in his

argument, it is a ‘practical necessity’ in a full wind up situation that pension entitlements for those who do not choose a transfer option must be provided by some third party. In the case of a partial wind up, however, the ‘practical necessities’ are very different. It would be completely unrealistic not to recognize that in a partial wind up situation, there is an on-going plan. If that plan is capable of providing pension entitlements for the members affected by the partial wind up, a decision by a plan administrator to provide those entitlements through the on-going plan would seem prudent, practical and fully consistent with the administrator’s fiduciary duties both to the partial wind up group and to the other members of the continuing plan.

IOL argues that a transfer of assets back to the on-going plan is a “distribution” just as surely as any of the transfers of commuted value contemplated by s.42(1), or a transfer to an insurance company. We are persuaded that IOL’s argument is correct. In both cases, the assets disappear from the wound up portion of the plan. Accordingly, we agree with our Tribunal colleagues in the *Monsanto* case that the option chosen by the plan administrator here, the option of providing the pension benefits through the continuing plan, is not precluded by the *PBA*. While we are certainly not bound by that decision, we find it fully consistent both with the statutory requirements and the decision of the Supreme Court of Canada in the *Monsanto* case.

This view is also consistent with FSCO’s own approach to the “distribution” of an employer-owned portion of any surplus triggered by a partial wind up. As noted above, FSCO Policy S90-910, entitled “Distribution of Surplus to Employer on Partial Wind Up”, permits employers to “distribute” their share of any plan surplus in the wound up portion of the plan by transferring it, in whole or in part, to the on-going portion of the plan. The Superintendent attempted to distinguish between this situation and the result sought by IOL by pointing to the fate of the surplus once it is distributed back to the ongoing plan, noting that Policy S900-910 provides that “[o]nce the employer surplus has been distributed in accordance with the Superintendent’s approval, any portion allocated to the ongoing pension plan becomes simply an asset of the ongoing pension plan”. We fail to see how the fact that the transferred funds simply become part of the on-going fund again assists the Superintendent’s argument. The key focus here is on the meaning of the word “distribution”, and not on what happens after distribution. While we are not persuaded by IOL’s argument that the inconsistency here rises to the level of an “administrative interpretation” by which FSCO is bound, we do find in Policy S900-910 clear evidence of a common sense approach to the term “distribution” that is fully in accord with the decision we have made in this case.

We are also persuaded that this result best effects the policies underlying the *PBA*. In its decision in *Monsanto*, the court reiterated the observation first made by the Ontario Court of Appeal in *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 at p. 503 concerning the purpose of the Act:

[T]he *Pension Benefits Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and “evinces a special solicitude for employees affected by plant closures” [para. 13, emphasis added]

If plan members are forced to cut all ties with the Plans, they stand to lose valuable rights to which they would be entitled had the partial wind up not taken place: *ad hoc* indexing of their pension benefits, and post-retirement benefits. These are real and important losses, which could be avoided if they are permitted to retain their connection with the Plans. We note, of course, that such losses do not flow inevitably from exit from the plan. IOL could obviously continue to pay these benefits, and indeed has committed to continue the post retirement benefits for the plan members involved in this case.² Nevertheless, in future cases, members in partial wind up cases who are “expelled” from on-going pension plans may well stand to lose discretionary benefits that cannot be quantified and reflected in annuitized pension entitlements. Under a statute which “evinces a special solicitude for employees affected by plant closures”, we would not be quick to adopt an interpretation of the *PBA* that imposed such losses unless it was necessary to do so to protect the pension benefits of plan members. We believe that the pension benefits of the members are fully protected by the option IOL has chosen in this case.

IOL points to the overwhelming support for its position among plan members. In response, the Superintendent argues that the system is ‘paternalistic’, and is designed in part to protect members from the consequences of poor decisions about their pension benefits. He argues that members affected by partial wind ups should be protected from the risk of plan insolvency. Annuitization, he argues, is a safer choice. He points to the fact that while annuities in Ontario are not absolutely guaranteed, they have a more generous backstop than pension benefits, since the insurance industry guarantees 85% of the monthly annuity pension benefit up to \$2,000 per month, whereas pensions paid from a single-employer defined benefit plan are guaranteed only up to a maximum of \$1,000 per month by Pension Benefits Guarantee Fund under the *PBA*.

This argument would be more compelling if the Superintendent had chosen to ground his argument on s.70(6). It appears to be common ground between the parties that annuitization is the default option in full wind up situations. If it were so clearly superior to continued plan membership in all cases, it would have been open to the Superintendent to argue that it is a “right or benefit” available to plan members on full wind up, and must therefore be made available to affected plan members on partial wind up under s.70(6). However, the Superintendent has expressly declined to make that argument in this case, and has instead chosen to ground his argument on the meaning of the term “distribution”. As we have indicated above, we do not agree that “distribution” precluded distribution back to the on-going plan.

We recognize that the result of our decision is that the plan membership of the affected members and the portion of the pension fund assets necessary to support their pension benefits never really leave the plan; from a practical perspective, the result is a continuation of plan membership for

² In his written submissions, the Superintendent pointed out that the issue of whether employees can legally withdraw post-retirement benefits from retired employees is far from settled under Canadian law, and drew our attention to the decision of the Supreme Court of Canada in *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada* (CAW-Canada) [1993] S.C.J. 53; [1993] 2 S.C.R. 230. As we understand it, the Superintendent has not directly assailed IOL’s conduct with respect to post-retirement benefits in this case, and we certainly do not purport to adjudicate or even to comment upon it. We do believe it important to flag this general issue, however, since it has recently, but far from conclusively, been addressed by the courts in a number of cases: see, for example, *Kranjcec v. Ontario*, [2004] O.J. No. 19; *Bennett v. British Columbia*, [2007] B.C.J. No. 4 (C.A.) [leave to appeal to the SCC dismissed, June 21, 2007]

the affected members. The Superintendent argues that this result cannot be what the *PBA* contemplates. We disagree. It is true that the mechanics of partial wind up sit somewhat awkwardly within the *PBA*. Both the FSCO Policies we have examined and the *Monsanto* decision contemplate that the process of carrying out a partial wind up involves to at least some degree a set of book-keeping, or ‘notional’, transactions. What is *not* ‘notional’, however, is the requirement to ‘realize’ for affected members the rights accorded to them by ss. 70-75 of the *PBA*, and to preserve and protect the pension entitlements flowing from those rights. We are satisfied that the appropriate steps have been taken to do that in this case.

We have found that membership in the on-going Plans is an option that IOL was entitled to offer as an alternative to s.42(1) transfers. Accordingly, we will order the Superintendent not to proceed with his proposal to deny approval to the partial wind up reports in this case. There is one qualification on that order, however. The central issue raised by the NOPs is whether the transfer of pension entitlements back to the on-going plan is an acceptable method of distribution under the *PBA*; we have found that it is. In the NOP, however, the Superintendent notes that the partial wind up reports filed in this case do not specify the method of distribution of the assets in the wound up portion of the Plans. Under s.70(1)(c). of the *PBA*, they are required to do so. In order to meet that requirement, IOL must amend the Partial Wind Up Reports to specify its method of distribution and refile those Reports. Our order reflects that requirement.

In making this decision, we think it important to underscore the obvious point: while our decision may have broader implications in the context of the *PBA* and FSCO Policy W100-231, we have addressed only the facts and arguments raised in this case. In particular, we note that no issues were raised here about the capacity of the continuing Plans to accept the liabilities with respect to the affected plan members, and to continue to provide their benefits; in fact, the parties have explicitly assured us that if we find in favour of IOL’s interpretation of “distribution”, the continuing Plans will be able to provide benefits to the affected members, and accordingly, we need not concern ourselves with the plan documents. Additional issues which we do not now foresee may also arise in other cases, which would make annuitization the only prudent course of action. We leave those issues to future cases.

G. ORDER

In accordance with the above reasons, we order the Superintendent:

- a. Not to proceed with the proposed orders outlined in the three Notices of Proposal at issue in this case;
- b. To permit IOL a reasonable time to amend the Partial Wind Up Reports to specify the method of distribution of the assets of the wound up portion of the Plans, in accordance with this decision;
- c. Once the Partial Wind Up Reports have been amended in accordance with this decision, to approve the Partial Wind Up Reports.

We will remain seized of this matter in the event that there may be continuing issues arising out of this order with which the parties may require our assistance.

DATED at Toronto, Ontario, this 2nd day of December, 2009

“Elizabeth Shilton”

Elizabeth Shilton, Chair of the Panel
and Member of the Tribunal

“Ralph Scane”

Ralph Scane, Member of the Tribunal
and of the Panel

“David Short”

David Short, Member of the Tribunal
and of the Panel