

**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 Plan 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 subsection 89(8) of the *Act*;

**BETWEEN:**

**MONSANTO CANADA INC.**

Applicant

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:**

Mr. Colin H.H. McNairn, Vice Chair of the Tribunal and  
Chair of the Panel  
Mr. Louis Erlichman, Member of the Tribunal  
Mr. C.S. (Kit) Moore, Member of the Tribunal

**APPEARANCES:**

For the Applicant:  
Ms. Freya Kristjanson  
Mr. Markus F. Kremer

For the Superintendent:  
Ms. Deborah McPhail

**HEARING DATE:**

June 2, 1999  
Toronto, Ontario

## REASONS FOR ORDERS

### The Background

On June 2, 1999 the Tribunal held an oral hearing on a preliminary motion in this matter, made by the Applicant, Monsanto Canada Inc. ("Monsanto"), for orders directing the Respondent, the Superintendent of Financial Services (the "Superintendent"), to disclose certain documents and to respond to certain interrogatories. At the conclusion of the hearing, after receiving submissions from both parties, the Tribunal made the orders set out in Appendix A and Appendix B (the "Orders") and undertook to provide written reasons for those Orders thereafter.

The matter to which the Orders relate is a request for a hearing, filed by Monsanto on December 31, 1998, pursuant to subsection 89(8) of the *Pension Benefits Act*, as amended by the *Financial Services Commission of Ontario Act, 1997* (the "Act"). That request concerns a Notice of Intent (the "Notice") to Refuse to Approve a Partial Wind Up Report (the "Report"), which Notice was served by the Superintendent on Monsanto on November 30, 1998. The Report was submitted by Monsanto to the Superintendent on August 11, 1997; it relates to the partial wind up of the Pension Plan for Employees of Monsanto Registration Number 341230 (the "Plan") as it affects certain employees who received notice of termination as a result of two separate corporate reorganizations (the "Affected Employees"). The Report proposes that the partial wind up be effective May 31, 1997 (the "Partial Wind Up Date").

The Notice recites a number of reasons for the Superintendent's decision to serve it. In essence, it states that the Report does not meet the requirements of the Act and the regulations under it and does not protect the interests of members and former members of the Plan because:

- It does not treat the benefit enhancements provided for certain of the Affected Members, by amendment to the Plan, as distributions from the surplus of the Plan subject, as such, to requirements of equitable allocation among members of the Plan and to the prior consent of the Superintendent and of a certain percentage of the members of the Plan, and
- It does not contemplate the distribution of the assets of the Plan, including surplus, as at the Partial Wind Up Date, that relate to the Affected Members and it allows Affected Members to leave their pensions and deferred pensions in the Plan.

## **The Basis for the Motion**

One of the issues in this matter that Monsanto identified, in its pre-hearing conference brief, is whether it can rely, to its benefit, on the doctrine of “legitimate expectation”, which has received acceptance in Canadian administrative law (see *Old St. Boniface Residents Association v. Winnipeg (City)* (1990), 75 D.L.R. (4<sup>th</sup>) 385, at p. 414 (Supreme Court of Canada)). Counsel for Monsanto maintained, on the motion, that this doctrine would apply in the present case if it could be established that Monsanto had a legitimate expectation that the Superintendent would follow the past practice of the office of the Superintendent, as to the treatment of benefit enhancements and the need (if any) for surplus distribution, on the partial wind up of a pension plan. Counsel alleged that the Superintendent had a duty, by virtue of the doctrine, to act fairly in changing any such practice, to the detriment of Monsanto and others similarly situated and, therefore, was required to engage in prior consultation with, or prior communication to, Monsanto and other affected persons. The disclosure orders against the Superintendent were requested in an effort to obtain information regarding any such past practice and the circumstances regarding any change thereto.

In its pre-hearing conference brief, Monsanto identified, as a further issue, whether the Superintendent is estopped, by any practice of the kind described above, from refusing to approve the Report. Counsel for Monsanto maintained, on the motion, that there was another relevant issue, namely whether the failure to consider past practice and the significance of any change thereto would constitute an improper fettering of a discretionary authority under the Act to approve partial wind up reports. These other issues were offered as further justification for ordering the Superintendent to provide the requested information about past practice.

## **The Authority of the Tribunal to Entertain the Motion**

The Interim Rules of Practice and Procedure of the Tribunal address the requirements of pre-hearing disclosure, by a party to a proceeding before the Tribunal, of information relating to the subject matter of the proceeding, including documentary information and information requested by way of response to specific interrogatories (i.e. written questions) posed by another party. Rule 31.01(d) imposes an obligation on all parties to “provide such ... information, particulars or documents as the Tribunal considers necessary to enable it to obtain a full and satisfactory understanding of an issue in the proceeding.” Rule 19.01 provides that the Tribunal,

may issue procedural directions providing for interrogatories that are necessary to;

- (a) clarify evidence filed by a party;
- (b) simplify the issues;

- (c) permit the full and satisfactory understanding of the matters to be considered; or
- (d) expedite the proceeding.

Monsanto initially put its interrogatories, relating to the practice of the Superintendent in dealing with partial wind up reports, to the Superintendent through its pre-hearing conference brief. The Superintendent indicated, in her pre-hearing conference brief, that she was unwilling or unable to provide the information called for by those interrogatories. Monsanto was dissatisfied with that response and, as entitled under Rule 20.03, filed a notice of motion to have the matter determined by the Tribunal.

It follows from Rule 20.03, and from the Tribunal's authority under Rule 13.01 to make procedural orders, that the Tribunal may entertain Monsanto's motion for the disclosure orders it requested against the Superintendent. Section 5.4 of the *Statutory Powers Procedure Act* provides that a tribunal, such as the Tribunal, that has made rules governing its practice and procedure, may at any stage of a proceeding before it, subject to any other Act or regulation that applies to the proceeding, make orders for;

- the exchange of documents,
- the oral or written examination of a party,
- the exchange of witness statements and reports of expert witnesses,
- the production of particulars,
- any other form of disclosure,

except that this authority does not authorize the making of an order requiring disclosure of privileged information.

### **A Test for Pre-Hearing Disclosure**

We believe that the Tribunal should, generally, be prepared to make a disclosure order against a party to a proceeding before it, requiring the production of documents or answers to interrogatories, in the following circumstances (if not also in other circumstances);

- the information sought is arguably relevant to an issue in the proceeding and that issue is not a frivolous one,
- the information sought is sufficiently particularized that the party from whom the information is requested should be able to respond efficiently and with a reasonable degree of precision, and
- the information is not privileged.

This test for ordering disclosure is consistent with Rules 13.01 and 20.03 of the Tribunal and section 5.4 of the *Statutory Powers Procedure Act*.

## Analysis

Counsel for the Superintendent maintained that the doctrine of “legitimate expectation” was irrelevant in this case because the proceeding before the Tribunal was by way of a hearing *de novo* with the result that the Tribunal was not inhibited or otherwise affected by the prior practice of the Superintendent in similar matters. We do not think that the function of the Tribunal can be divorced, to this extent, from the function of the Superintendent. The hearing before the Tribunal that the Act affords in this case is simply part of the over-all process of regulatory review of pension plan wind up reports (see ss. 70 and 89(4), (6) – (9) of the Act). Subsection 89(9) of the Act, which suggests that the Tribunal is to carry out a hearing *de novo* in performing its role in that process, allows the Tribunal, in effect, to step into the shoes of the Superintendent. Therefore, the Tribunal can properly take account of any factors pertaining to the matter that the Superintendent should have considered. One of those factors might well be whether the doctrine of “legitimate expectation” applies in the circumstances and to what effect.

Counsel for the Superintendent also maintained that the doctrine of “legitimate expectation” cannot possibly apply in this case as it does not operate where there would be a resulting interference with the requirements of law. In essence, the argument was that the position taken by the Superintendent in the Notice was dictated by the Act and, whatever the past practice may have been, the Superintendent had no latitude to do anything but to apply the requirements of the Act. In our view, it is at least arguable that the Superintendent had some discretion in the matter of whether to approve the Report given subsection 70(5) of the Act, which 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].

Subsection 70(6) may have the effect of narrowing any such discretion in that it suggests that the Superintendent would be obliged to refuse to approve a partial wind up report if the members and former members of the pension plan were given rights and benefits that fell short of those they would have on a full wind up of the plan. The precise effect of subsection 70(5), particularly as read with subsection 70(6), will no doubt be the subject of further submissions at the hearing on the merits of this case. At this stage of the proceeding, it would be inappropriate to make a definitive determination as to whether the Superintendent had any discretion on the question of whether to approve the Report.

Finally, counsel for the Superintendent maintained that the doctrine of “legitimate expectation” may only be raised on a judicial review application or a statutory appeal and, therefore, it has no place in this proceeding before the Tribunal. We agree with counsel

for Monsanto that the particular duty of fairness that is mandated by this doctrine is not an element of judicial review or statutory appeal but that those processes have simply provided the means for enforcing that duty. There is no reason, in principle, why the duty should not be recognized in the context of a proceeding before an administrative body such as this Tribunal.

For the purposes of Monsanto's motion for orders of disclosure against the Superintendent, we are not required to make, and we do not make, any decision as to whether the doctrine of "legitimate expectation" does, in fact, apply in this matter, whether it would entitle Monsanto to any relief and what any such relief might be. We have only to decide, at this stage, whether Monsanto's argument that the doctrine applies is a frivolous argument.

## **Conclusion**

We are persuaded that the information sought by Monsanto, as to any practice of the Superintendent in matters of this kind, is arguably relevant to the issue that Monsanto has raised of whether the doctrine of "legitimate expectation" applies in this case and that this is not a frivolous issue in the present context. The information has been sufficiently particularized by Monsanto and no claim has been made that disclosure would involve a violation of privilege. Therefore, applying the test for pre-hearing disclosure that we have adopted, we made the Orders set out in Appendices A and B. The Orders are in the form requested by Monsanto except that the time for compliance by the Superintendent is four, rather than three, weeks from the date of the Orders.

Dated the 21<sup>st</sup> day of June, 1999 at the City of Toronto, Province of Ontario.

"Colin H.H. McNair"  
Colin H. H. McNair, Chair

"C.S. (Kit) Moore"  
C. S. (Kit) Moore, Member

"Louis Erlichman"  
Louis Erlichman, Member

## **Appendix A**

The Superintendent of Financial Services (the "Superintendent") is hereby ordered to disclose the documents described below to Monsanto Canada Inc. within four weeks of the date of this order:

All records, documents and other materials in the possession of the Superintendent or the Financial Services Commission of Ontario in relation to the following:

1. Any memoranda, analysis, notes or reports identifying a change in position or administrative practice in the period November 1992 to November 1998 regarding matters raised in the Notice of Proposal to Refuse to Approve served by the Superintendent on Monsanto Canada Inc. on November 30, 1998 and the reasons for such change.
2. Any memoranda, analysis, notes, reports or other materials relating to matters raised in the interrogatories attached as Appendix B.

Dated this 2<sup>nd</sup> day of June, 1999.

## Appendix B

The Superintendent of Financial Services (the "Superintendent") is hereby ordered to answer the interrogatories of Monsanto Canada Inc. set out below within four weeks of the date of this order:

1. Have partial wind up reports been filed in which the plan which is the subject of the partial wind up has been in actuarial surplus as at the date of the partial wind up report, during the period November 1992 to November, 1998? If so, how many?
2. How many of those reports were approved, or not refused by the Superintendent, where there was no immediate distribution of surplus, or where the report indicated that any surplus distribution relating to the partial wind up group could be dealt with at the time of full wind up?
3. Has the Superintendent accepted partial wind up reports in the period November 1992 to November, 1998 for plans with actuarial surplus as at the partial wind up date, in which the report stated that if and when the plan is fully wound up, that any surplus attributable to the partial wind up group at the time the plan is fully wound up will be dealt with at the time of full wind up in accordance with the terms of the plan and applicable legislation? Has the Superintendent in this period granted his or her consent pursuant to section 70(3) of the Act even where no present distribution of such actuarial surplus was provided for? If so, on how many occasions?
4. See letter received from the Pension Commission, and attached hereto as Schedule 1 Is this the form of letter that, in the past, has been sent by the Superintendent in situations relating to item #3, above? How many letters in this form have been sent by the Commission in the period November, 1992 to November, 1998?
5. At any time prior to August, 1997, did the Superintendent indicate that he or she would be changing this practice regarding the treatment of surplus on partial wind up and, if so how was this communicated?
6. Has the Superintendent approved the provision of benefit enhancements coincident with partial wind up reports in the period November, 1992 to November, 1998? If so, how many? Were the benefit enhancements treated as a distribution of surplus in each case? If not, how many and in what proportion of cases were they treated as a distribution of surplus or indirect payment of surplus to the employer, and what were the reasons for such treatment? Where such benefit enhancements were not treated as a distribution of surplus or indirect payment of surplus to the employer, why were they not so treated?
7. Has the Superintendent required all partial wind up reports filed in the period November 1992 to November 1998 to provide for the distribution of all plan assets relating to the partial wind up to provide for the purchase of annuities such that members and former members were precluded, notwithstanding the deemed or actual election, from leaving their pensions or deferred pensions in the plan? If not, how many partial wind up reports have been approved by the Superintendent during such period which permitted the plan administrator to either choose to leave

benefits in the plan as is the administrator's right under ss. 43 and 72(2) of the Act, or permitted the member/former member to elect to leave benefits in the plan pursuant to the plan terms?

Dated this 2<sup>nd</sup> day of June, 1999.

## SCHEDULE 1

Dear

Re:

Based on the documents in our files and our review of the partial wind up report and other documents submitted by you as required under the *Pension Benefits Act*, R.S.O. 1990 (the "Act") and Regulation 909, R.R.O. 1990, as amended, the proposals set out in the partial wind up report for the distribution of pension benefit entitlements are acceptable for purposes of the Act. Pursuant to my authority under subsection 70(3) of the Act, I hereby authorize the distribution of the assets of the pension plan to the members, former members and other persons affected by the partial wind up effective September 30, 1993 in accordance with that report.

Please note that pursuant to subsection 70(6) of the Act, the members, former members and other persons affected by the partial wind up "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." The rights and benefits referred to in this subsection may include any entitlements to surplus that would exist on a full wind up. As a result, the surplus attributable to the members, former members and other persons affected by the partial wind up must be dealt with in accordance with the Act.

In the event you have any questions, please contact David Allan, Pension Officer, of this office at (416) 314-0612.

Yours very truly,

D. Ross Peebles  
Superintendent of Pensions