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No Surplus Distribution Required on Partial Termination of Federally-Regulated Pension Plans

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In its much anticipated decision in *Cousins* v. *Canada (Attorney General*) *and Marine Atlantic Inc.* ("*Marine Atlantic*"), the Federal Court of Appeal has concluded that the federal *Pension Benefits Standards Act, 1985* (the "PBSA") does not require a proportionate distribution of surplus on a partial termination of a defined benefit (DB) pension plan. The Federal Court of Appeal's decision, which was released on June 26, 2008, overturns the May 1, 2007 decision of the Federal Court.

In its May 2007 decision, the Federal Court had held that the relevant provisions of the Ontario *Pension Benefits Act* (the "Ontario PBA") and the federal PBSA were essentially analogous, and that, following the Supreme Court of Canada's July 2004 decision in *Monsanto Canada Inc.* v. *Ontario (Superintendent of Financial Services)* ("*Monsanto*"), the administrator of a federally-regulated DB pension plan must provide for a proportionate distribution of surplus on partial plan termination.[1]

FACTS

Marine Atlantic Inc. ("MAI") is a federal Crown corporation that operates ferry services between various points in the Atlantic provinces. MAI maintains a DB pension plan for certain of its employees (the "Plan"), which is governed by the PBSA.

In the late 1990s MAI discontinued routes between New Brunswick and Prince Edward Island ("PEI"), New Brunswick and Nova Scotia ("Fundy"), and Nova Scotia and Newfoundland and Labrador ("Labrador"). MAI also relocated its Moncton head office.

In 1997, MAI terminated the Plan in respect of the employees terminated in connection with discontinuation of the PEI route. The federal Superintendent of Financial Institutions (the "Federal Superintendent") approved the PEI partial termination report, which did not provide for the distribution of a proportionate amount of surplus. In April 1998, the Federal Superintendent approved the partial termination report submitted by MAI in connection with its sale of the Fundy route. Again, the Fundy partial termination report did not provide for a distribution of surplus. In 2004, MAI filed a partial termination report in connection with its termination of the Labrador route and relocation of its Moncton head office. The Labrador/Moncton partial termination report contemplated a refund of surplus to MAI on full wind-up of the Plan. The Federal Superintendent had not approved or rejected the Labrador/Moncton partial termination report at the time the *Marine Atlantic* proceedings were commenced in the Federal Court.

At some point, the *Monsanto* proceedings came to the attention of certain former Plan members, and in 2005 a formal request was made to the Federal Superintendent to reconsider his decision to approve the PEI and Fundy partial terminations, and to order a distribution of surplus to members of the Plan affected by the PEI, Fundy and Labrador/Moncton partial terminations.

The Federal Superintendent replied that he had no authority to re-open the PEI and Fundy matters unless new information was presented, and that the decision of the Supreme Court of Canada in *Monsanto* did not constitute new information.

In September 2005, the former Plan members applied for judicial review of the Federal Superintendent's decision to approve the PEI and Fundy partial termination reports without provision for a proportionate distribution of surplus. The former Plan members also sought an order that the Federal Superintendent not approve the Labrador/Moncton partial termination report unless it provides for a proportionate distribution of surplus within a reasonable time.

RELEVANT LEGISLATIVE PROVISIONS

Subsections 29(11) and 29(12) of the PBSA state:

(11) *Where the whole of a pension plan has been terminated and the Superintendent is of the opinion that no action or insufficient action has been taken to wind up the plan, the Superintendent may direct the administrator to distribute the assets of the plan in accordance with the regulations made under paragraph 39(j), and may direct that any expenses incurred in connection with that distribution be paid out of the pension fund of the plan, and the administrator shall forthwith comply with any such direction.*

(12) *Where a plan is terminated in part, the rights of members affected shall not be less than what they would have been if the whole of the plan had been terminated on the same date as the partial termination.* [emphasis added]

By way of comparison, the relevant provisions of the Ontario PBA, considered by the Supreme Court of Canada in *Monsanto*, are as follows:

70(6) *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.*

79(4) *A pension plan that does not provide for payment of surplus money on the wind up of the pension plan shall be construed to require that surplus money accrued after the 31st day of December, 1986 shall be distributed proportionately on the wind up of the pension plan among members, former members and any other persons entitled to payments under the pension plan on the date of the wind up.* [emphasis added]

THE FEDERAL COURT'S DECISION

The Federal Court considered the appropriate standard of review to be applied when it judicially reviews decisions of the Federal Superintendent. The Federal Court held that decisions of the Federal Superintendent are owed a low degree of deference (as the Supreme Court of Canada held in relation to the Ontario Financial Services Tribunal (the "Ontario FST") in *Monsanto*). In order to withstand scrutiny, the Federal Court held that a decision of the Federal Superintendent on a pure question of law must be correct, not merely reasonable.

On the substance of the *Marine Atlantic* matter, the Federal Court held that subsection 29(11) of the PBSA does not contemplate a situation where assets can remain in a plan indefinitely following full termination. The Federal Court reasoned that the Federal Superintendent's discretion in respect of a fully terminated plan is limited to *when*, not *if*, a full termination occurs. Since the assets of a fully-terminated plan must, in all cases, be distributed at some point, the Federal Court held that subsection 29(12) of the PBSA necessitates a proportionate distribution of surplus on, or shortly after, partial termination of a federally-regulated pension plan. As a result, the Federal Court directed that the Labrador/Moncton partial termination report not be approved by the Federal Superintendent unless it provides for the distribution of a proportionate amount of surplus.

However, the Federal Court dismissed the applications for judicial review of the Federal Superintendent's decision to approve the PEI and Fundy partial termination reports. Since the time limit for application for judicial review of a federal board or tribunal decision is 30 days, the PEI and Fundy judicial review applications were years out of time (assuming that the limitations period started running when the Federal Superintendent's decisions were made). The former Plan members did not apply for judicial review of those decisions until September 2005, even though the Federal Superintendent had approved the PEI and Fundy partial termination reports in 1997 and 1998, respectively.

DECISION OF THE FEDERAL COURT OF APPEAL

STANDARD OF REVIEW

The Federal Court of Appeal held that the decisions of the Federal Superintendent to approve the PEI and Fundy partial termination reports without requiring a partial distribution of surplus were owed a significant degree of deference. The Federal Court of Appeal observed that, in approving the partial termination reports:

[T]he Superintendent was required to exercise his discretionary powers in the face of a range of policy-laden remedial choices that involved the balancing of multiple sets of interests of competing constituencies. These are precisely the circumstances where the Supreme Court of Canada has urged a higher degree of deference.

The Federal Court of Appeal attempted to distinguish the roles of the Federal Superintendent and the Ontario FST, the source of the decision under consideration in *Monsanto*, noting among other things that: (1) the Ontario FST is not the pension regulatory body and therefore does not have the advantage of being closer to the dispute and the industry; (2) the Ontario FST has no policy function as part of its pensions mandate; and (3) the decisions of the Ontario FST are subject to a statutory right of appeal. In its final analysis, the Federal Court of Appeal held that the Federal Superintendent's decision to approve the PEI and Fundy partial termination reports were owed a significant degree of deference and only needed to be reasonable, not necessarily correct. It went on to hold that, even if "correctness" was the appropriate standard of review, the Federal Superintendent's decisions to approve the partial termination reports without a proportionate distribution of surplus had been correct.

INTERPRETATION OF THE RELEVANT PBSA PROVISIONS

The Federal Court of Appeal distinguished the relevant provisions of the federal PBSA and Ontario PBA and held that the reasoning in *Monsanto* could not be applied in the context of a federally-regulated DB pension plan.

The Federal Court of Appeal noted that the Ontario PBA defines "wind-up" to mean the termination of a pension plan and the distribution of the assets of the pension fund. Under the federal PBSA, "termination" is defined to mean the cessation of crediting of benefits to plan members, and "winding-up" is defined separately to mean the distribution of the assets of a pension plan that has been terminated.

In light of this distinction, the Federal Court of Appeal held that under the Ontario PBA there was a "strong and inextricable connection between the termination of a pension plan and the distribution of assets". Subsection 70(6) of the Ontario PBA – which entitles members to the same rights and benefits on partial wind-up that they would have on full wind-up – requires a proportionate distribution of surplus on partial wind-up.

By contrast, subsection 29(12) of the PBSA affords members of a federally-regulated pension plan the same rights on partial *termination that they would have on full termination. On this basis, the Federal Court of Appeal held:*

While the PBSA contemplates that winding-up is a step that follows the termination of a pension plan, there is no provision in the PBSA that compels the distribution of assets to be done on the termination of a pension plan.

Similarly, the Federal Court of Appeal held that subsection 29(11) of the PBSA does not require a distribution of surplus on partial termination of a pension plan. The Federal Court of Appeal held that, at most, that provision gives members the ability to ask the Federal Superintendent to direct the plan administrator to distribute the plan assets in accordance with regulations made under paragraph 39(j) of the PBSA. However, as was noted by the Federal Court of Appeal, no regulations have been made under subsection 39(j) of the PBSA to date.

The Federal Court of Appeal also distinguished *Monsanto* on the grounds that, in *Monsanto,* the parties had agreed that on full wind-up of the plan members were entitled to a distribution of surplus. In *Marine Atlantic* the distribution of the Plan surplus on wind-up was an unresolved issue between the parties.

In conclusion, the Federal Court of Appeal overturned the Federal Court's ruling that the PBSA requires a proportionate distribution of surplus on a partial termination of a federally-regulated DB pension plan.

Although the Federal Court of Appeal held that subsection 29(12) of the PBSA does not require a proportionate distribution of surplus in the event of a partial termination of a federally-regulated DB pension plan, there is an open question as to whether, based upon subsection 29(11) of the PBSA, affected plan members might persuade the Federal Superintendent to direct that a proportionate share of surplus be distributed from the plan in accordance with regulations made under paragraph 39(j) of the PBSA, on the grounds that no action or insufficient action has been taken by the plan administrator to wind up the plan. This will presumably remain an open question unless and until regulations are made under paragraph 39(j) of the PBSA.

IMPLICATIONS

This decision suggests that, since the distribution of plan assets is tied to "winding-up" rather than "termination" under the federal PBSA, subsection 29(12) of the PBSA does not require the administrator of a federally-regulated DB pension plan to distribute a proportionate share of surplus on partial plan termination. *Marine Atlantic* also suggests that, due to her expertise and policy-intensive mandate, decisions of the Federal Superintendent attract a significant degree of deference and, in many cases, need only be reasonable to withstand judicial scrutiny.

Unless it is successfully appealed to the Supreme Court of Canada, the Federal Court of Appeal's decision in *Marine Atlantic* represents a welcome relief to sponsors of federally-regulated DB pension plans. The former Plan members have until late September 2008 to seek the leave of the Supreme Court of Canada to appeal the Federal Court of Appeal's decision in *Marine Atlantic*.

In light of the Federal Court of Appeal's decision in *Marine Atlantic*, administrators of pension plans registered in a common law province other than Ontario should not assume that the *Monsanto* decision requires them to distribute a proportionate share of surplus when a plan is brought to an end in part. In order to determine whether a proportionate share of surplus must be distributed on partial termination or partial wind-up (depending on the terminology used in the applicable pension standards legislation), a plan administrator must carefully consider the requirements of the applicable provincial pension standards legislation and the plan documents.

[1] In *Monsanto*, the Supreme Court of Canada held that subsection 70(6) of the Ontario PBA requires a plan administrator to distribute a proportionate share of surplus on partial plan wind-up. Since *Monsanto*, sponsors of Ontario-registered pension plans have faced myriad challenges in calculating, administering and distributing surplus in the context of a partial wind-up.

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