

# Fearful asymmetry

Monsanto case creates more uncertainty.

EDITORIAL



**A**t a time of heightened sensitivity to risk, the recent Monsanto decision of the Supreme Court of Canada introduced the potential for even more risks for sponsors of defined benefit (DB) pension plans to manage. Monsanto appealed to the Supreme Court to overturn the rulings of lower courts in Ontario which held that provincial law requires the proportional distribution of actuarial surplus upon the partial wind-up of a DB plan. The appeal was dismissed. But this provided only limited clarity for DB plan sponsors and their advisors. In many ways, the waters are muddier than ever.

A key part of the Monsanto story is the asymmetric treatment of pension fund surpluses and deficits. For many DB plans, the plan sponsor is responsible for funding the deficit but doesn't own the surplus. This has been a sore point for years, and the Monsanto decision added to the discomfort. The asymmetry seems to have become even more pronounced.

"Distribution of surplus on partial wind-up is unlikely to disrupt [the] balance or to compromise the continuing integrity of the pension fund," said the Supreme Court decision, delivered by Madam Justice Marie Deschamps. It is difficult to share this confidence, what with all the possibilities extending from the Monsanto case.

For instance, will Ontario plan sponsors who never

envisioned this treatment of surplus on a partial wind-up as being part of the pension deal look at the Monsanto decision as an alteration of that deal? Will employers change their funding policies and, in turn, their investment strategies so that they have better influence over the potential creation of surpluses? Do they have many options? Will the 'DB pension promise' undergo a profound change?

Indeed, many observers say they can envision DB plan sponsors altering their funding and investment policies toward the goal of ensuring there is a minimal chance of running a surplus, in order to avoid the attendant risks and costs, especially during any restructuring. Keeping funding levels at or below 100% is one way to manage the risk of surplus. Another is to convert a DB plan into a defined contribution plan, or wind it up entirely. Of course, the Ontario government could enact legislation to deal with surplus issues, but what are the chances of that happening, given the enormous issues competing for government attention?

The Supreme Court did its job. However, its decision was only the end of a chapter in the story. We're into a new chapter of legal, administrative and regulatory uncertainty. ■

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