ACPM/ACARR
The Association of Canadian Pension Management
L'Association canadienne des administrateurs de régimes de retraite

June 20, 2005

CONFIDENTIAL

The Honourable Greg Sorbara
Minister of Finance
Government of Ontario
Frost Building South, 7th Floor
7 Queen's Park Crescent
Toronto, ON M7A 1Y7

Re: Resolving Workplace Pension Issues Related to the *Monsanto* Decision

Dear Minister:

The Association of Canadian Pension Management (ACPM) represents private and public sector pension plan sponsors, administrators and stakeholders. The Association's 700 members across Canada represent plans with assets of $300 billion and over three million plan members.

The ACPM's mission is to promote the health and growth of Canada's retirement income system by championing the following principles:

- Clarity in pension legislation, regulation and arrangements;
- Good governance and administration; and
- Balanced consideration of stakeholder interests.

We are deeply concerned about the impact the Supreme Court of Canada's decision in the *Monsanto*[1] case has had upon many of our members and upon workplace pension plans in Canada. Our greatest concern is the impact of the decision on the future viability of defined benefit (DB) plans, which we consider an option valued highly by plan sponsors, labour unions and plan members alike. Large numbers of DB plans have been closed or frozen for future hires in both the U.S. and U.K., and Canada has not been immune to this trend in recent years.

The purpose of this letter is to propose changes to the *Pension Benefits Act* (the "Act") which we believe would mitigate the most serious implications of the *Monsanto* decision. We also believe these changes would provide greater clarity in the future for all pension stakeholders and encourage sponsors to maintain existing DB workplace plans.

As you know, in its *Monsanto* judgment, the Supreme Court interpreted the *PBA* to require distribution of the surplus related to the partial wind up when a DB plan is partially wound up. In a March 10, 2005 letter addressed to the Superintendent of the Financial Services Commission (copy attached), the ACPM outlined numerous issues the decision raises for plan sponsors and their advisors who must apply this decision to individual cases.

[1] Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), 2004 SCC 54

These implementation issues include applying the *Monsanto* decision retroactively to plans that have had multiple events in their history which have a bearing on funding, including plan mergers and other asset transfers, as well as partial wind ups. Some of these events occurred many years ago. Because accurate data and institutional memory are not always available, simply tracing the history of a plan becomes extremely difficult in some cases. In multi-jurisdictional plans, these problems are exacerbated.

The ACPM met with the Superintendent of Financial Services on May 5, 2005, to discuss practical implementation measures which, if taken, could alleviate some of the concerns raised in our March letter. Although the meeting was constructive, it became obvious to both parties that many of the most serious problems of the retrospective application of the *Monsanto* decision cannot be resolved through regulatory action alone, but remain to be resolved through litigation.

Notwithstanding the implementation issues related to dealing with past cases, our greatest concern is the threat the *Monsanto* decision poses to Ontario's DB pension system going forward. In our opinion, the judgment has increased the existing asymmetry between the employer's obligation to fund DB plan deficits and the increasing restrictions placed on the employer's ability to manage plan surplus in a predictable way. Left uncorrected, the requirement for mandatory distribution of surplus on partial wind up sends a signal to plan sponsors to fund their plans at the bare minimum.

As stated above, the purpose of this letter is to present the ACPM's recommendations regarding legislative measures which would address the most serious problems. This requires immediate action. The recommended changes are described in the attached document titled, "Resolving Workplace Pension Issues Related to the *Monsanto* Decision: Recommended Legislative Measures". The document states the Association's preferred option as well as alternative measures which would address some, if not all, of our members' concerns. We look forward to discussing these issues with you and your staff at your earliest convenience.

Yours truly,

Stephen Bigsby
Executive Director, ACPM

Encl: (1)

cc: Bryan Davies, Superintendent of Financial Services
David Gordon, Deputy Superintendent, Pensions
Scott Perkin, President, ACPM
Becky West, Chair, ACPM Advocacy & Government Relations Committee
Peter Shena, Chair, ACPM Strategic Communications Committee
Bethune Whiston, Chair, ACPM Ontario Regional Council

RESOLVING WORKPLACE PENSION ISSUES RELATED TO THE *MONSANTO* DECISION: RECOMMENDED LEGISLATIVE MEASURES

(June, 2005)

I. A SUMMARY OF RECOMMENDED LEGISLATIVE CHANGES

The Association of Canadian Pension Management's recommendations are set out below:

1) Remove the concept of a partial wind up in the *Pension Benefits Act* (the "Act") on a go forward basis.

2) As a less desirable alternative, specifically indicate that surplus does not have to be distributed on partial wind up unless the plan text requires it, and

    a) Clarify the circumstances that will justify the Superintendent declaring a partial wind up; and

    b) Clarify that the distribution of basic benefits and surplus does not require the purchase of annuities for affected members.

3) Impose a limitation period on the Superintendent's authority to declare that a partial wind up has occurred related to events which pre-date the *Monsanto* SCC decision. If the concept of partial wind up remains in the Act, this limitation should also apply to future declarations of partial wind up by the Superintendent.

4) Address surplus issues on wind up. Preferably, this would be done by amending the legislation to provide for employer ability to withdraw surplus for its benefit if it can show entitlement or can obtain the consent of two thirds (2/3) of plan beneficiaries. If this cannot be done, an option would be to let the current surplus regulations expire and allow the Act to stand as it is.

5) Encourage the courts to give more deference to Financial Services Tribunal (FST) decisions by clarifying the *Financial Services Commission of Ontario Act* to specify that only pension experts will participate in FST hearings on pension issues; and/or amending the Act to add a privative clause limiting the ability of a claimant to obtain a review of FST decisions.

6) Address the above and other important issues in the context of a full review of the *Pension Benefits Act*. It has been over two decades since the Act was subject to a full-scale review. The ACPM believes such a review would be the most effective way to deal with the many important issues which have arisen in that time.

II) SPECIFIC RECOMMENDATIONS

A) Primary Recommendation: Remove the Concept of a Partial Wind Up

Recommendation:

The ACPM strongly recommends removing the concept of partial wind ups in the *Pension Benefits Act* on a go forward basis. This is consistent both with changes made to Quebec's *Supplemental Pension Plans Act* in 2000 and with the *Proposed Principles for a Model Pension Law* released January 19, 2004, by the Canadian Association of Pension Supervisory Authorities (CAPSA).

This recommendation has already been implemented successfully in another province, appears to be the way of the future, and is, we believe, the best solution to a number of issues raised in this submission. The ACPM recognizes that elimination of partial wind ups could have an impact on access to grow-in benefits under the Ontario legislation and would likely require other policy responses. The issue should, therefore, be debated separately.

B) If the Concept of a Partial Wind Up is Retained

If, for some compelling reason, the government is not in a position to remove the concept of a partial wind up, some legislative measures will need to be taken to address the difficulties surrounding partial wind ups generally. We would suggest the Act be amended as follows:

- **Indicate that surplus does not have to be distributed on partial wind up unless the plan text requires it.** This is consistent with successful changes to pension legislation made by both Alberta and British Columbia in recent years.

- **Clarify the circumstances that will justify a partial wind up declaration by the Superintendent.** For example, it is difficult under current rules to determine when a "significant number of employees... ceases to be employed by an employer...as a result of the reorganization of the business of the employer". At one point a "significant" number of members was understood to be 20%; since that time, the Superintendent has invoked the provision in cases where the percentage of terminated employees was less than 5%.

- **Clarify that the distribution of basic benefits and surplus does not require the purchase of annuities for members affected by the partial wind up.** Although the Financial Services Tribunal decision in *Monsanto* indicated that the purchase of annuities was not required, and that decision was not appealed to the courts, the Superintendent has since issued written *Questions & Answers* on the FSCO Website that indicate annuities must be purchased.

C) Recommendations to Contain the Impact of *Monsanto* Implementation Issues

A strict application of the *Monsanto* decision could cause a re-opening of any partial wind up that has occurred since 1969. This problem is exacerbated by the lack of any statutory limitation on the Superintendent's ability to take regulatory action related to past events.

It is self-evident that employers must be able to manage their businesses with some assurance that any regulatory decisions affecting their financial situation be brought to their attention within a reasonable time limit after the regulated event occurred. The longer the delay, the greater the practical difficulties in reconstructing past events for reasons such as incomplete or lost records and the departure of knowledgeable personnel.

In addition, many plan sponsors with current funding deficits are concerned that a mandatory distribution from a plan today, of "surplus" related to a past partial wind up, risks placing the plan in an even more serious funding deficit. Accordingly, the ACPM urges the legislature to act to contain such problems.

Recommendation:

Impose a limitation period on the Superintendent's authority to declare that a partial wind up has occurred related to events which pre-date the *Monsanto* SCC decision. If the concept of partial wind up remains in the Act, this limitation should also apply to future declarations of partial wind up by the Superintendent.

There should be a reasonable time period following the occurrence of an event after which the Superintendent should no longer be able to commence regulatory proceedings, at his/her own instance or at the instance of members. We believe this period should be two years (the general limit under the recently revised *Limitations Act*). We think this gives the Superintendent ample time to learn of events and consider regulatory action.

D) Legal Entitlement to Surplus

There are serious problems in Ontario regarding the use of and entitlement to surplus in DB pension plans. These problems have been exacerbated by the debate over partial wind up issues.

Existing legislative provisions combined with recent court decisions have introduced a significant risk-reward asymmetry into the funding calculations of most DB pension plans. The employer is generally responsible for funding any deficits. However, the same employer is restricted in managing plan surpluses in a predictable way, even if the plan documents have always clearly given the employer entitlement to surplus.[1]

[1] The issue of asymmetry is addressed in a letter sent to the Minister's office dated September 28, 2004, from Dean Connor, Chairman and CEO of Mercer HR Consulting.

A significant threat facing Ontario's DB pension system is the inclination for plan sponsors to fund at the barest minimum, due to this asymmetry. There is evidence that this predictable response is now occurring. As we have seen, when an employer becomes insolvent or enters restructuring with underfunded pension plans, this can have severe financial repercussions for member benefit security, the Pension Benefits Guarantee Fund, and, ultimately, Ontario taxpayers, who backstop the PBGF.

Recommendation:

The surplus issue could be addressed in one of two ways:

a) Preferably, the Act would be amended to provide for employer ability to withdraw surplus if it can show entitlement or it obtains the consent of two thirds (2/3) of plan beneficiaries.

This recommendation is consistent with the January 2004 CAPSA *Model Law Principles* (as currently proposed) and with the Federal *Pension Benefits Standards Act.* It is appropriate to offer plan sponsors a level playing field. The legislation must clearly override trust law (where necessary) if plan members approve of the withdrawal of surplus by the employer.

b) Alternatively, the Government could let the current surplus regulations expire and allow the *Pension Benefits Act* to stand as is.

The Minister will recall that the Liberal government passed legislation in the late 1980s to completely overhaul the *Pension Benefits Act.* At the time, it developed provisions which were aimed at addressing the uncertainty around entitlement to surplus, but unfortunately failed to do so. The member consent requirements added to the regulations by the succeeding NDP government in the early 1990s were intended as a temporary measure, to reduce the cost of surplus litigation, yet have been extended numerous times. These consent requirements were initially unwieldy within the context of the existing Act and have become more and more problematic with case law decisions (most recently with an Ontario lower court decision in *Kent v. TecSyn*[2]).

We note, however, that this alternative is very unsatisfactory because it will not, in most cases, avoid the requirement to negotiate a settlement in a court context. Court proceedings are very costly, in terms of both time and money.

E) The Financial Services Tribunal (FST)

The *Monsanto* decision also calls into question the continuing legitimacy of the Financial Services Tribunal (FST). If no changes are made to the FST's current structure then an appeal to the FST in the future would appear to be a costly exercise of little use to parties seeking a final resolution of a dispute.

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[2] Kent v. TecSyn International Inc., Court File No.483/99 (Ontario Superior Court of Justice), May 26, 2000

Recommendation:

The ACPM suggests taking one or both of the following actions, either of which would encourage the courts to give more deference to FST decisions:

a) **Clarify the *Financial Services Commission of Ontario Act* to specify that only pension experts will participate in FST hearings related to pension issues; and/or**
b) **Amend the *Pension Benefits Act* to add a privative clause limiting the ability of a claimant to have FST decisions reviewed.**

F) Conclusion: The Need for a Full Review of the Ontario *Pension Benefits Act*

Left unaddressed, the fallout from the *Monsanto* decision will result in a further move away from DB workplace pension plans in Canada. We have suggested a number of actions that the Ministry of Finance could take to address this threat and other concerns noted above. This paper proposes piecemeal solutions to very specific issues. However, a more integrated approach would be more logical.

Recommendation:

The ACPM believes that the most effective way to address the numerous issues which have surfaced respecting the *Pension Benefits Act* over the past two decades would be in the context of a full review of the present Act. This action is long overdue.

The ACPM believes that working Ontarians, and those who depend on workplace pensions to finance a portion of their retirement income, now or in the future, would applaud a government which proposed a full-fledged review of the province's *Pension Benefits Act.* We believe such a proposal would rally almost unanimous support, both in the Legislature and across the province.

A full review may, by definition, prove to be a more complex and challenging exercise than specific remedial legislation. However, the process offers the opportunity to draft a renewed *PBA* based on developments in the pension industry, on judicial decisions, and on the pension funding concerns facing all stakeholders in 2005. As well, Ontario could take a leadership role in developing legislation that would assist in achieving uniformity of pension legislation in Canada. The current legislative environment is perceived by employers as unreasonably restrictive of their legitimate interests and imposing excessive administrative costs on sponsors which wish to offer DB pension plans. Unless this environment is improved, DB coverage levels will decline in both relative and absolute terms.

A wide review of the Act may also provide government and the Legislature with greater flexibility to propose specific policy measures which ensure that the final recommendations represent a balanced approach to the problems addressed.

The government may consider various methods to achieve this worthwhile objective, including a legislative committee, consultative task force or an external Commission. We would urge that such a review not take place in isolation from developments in other jurisdictions. Whatever the chosen process, the ACPM would be willing to work with other stakeholder representatives to bring Ontario's *PBA* into step with the 21st Century.

As stated in the covering letter to this submission, the ACPM would appreciate an opportunity to meet with the Minister, staff and officials, to discuss the above recommendations and action proposals.