Date: 20080626

Docket: A-266-07
A-267-07
A-269-07
A-270-07
A-271-07

Citation: 2008 FCA 226

CORAM: **NOËL J.A.**
BLAIS J.A.
RYER J.A.

BETWEEN:

DANA P. COUSINS and CHARLES McNALLY

Appellants
(A-270-07 and A-271-07)

and

DANA P. COUSINS, DONNA M. KEITH and CHARLES McNALLY

Appellants (A-269-07)
Respondents
(A-266-07 and A-267-07)

and

ATTORNEY GENERAL OF CANADA

Respondent
(A-270-07, A-271-07,
A-269-07 and A-267-07)
Appellant (A-266-07)

and

MARINE ATLANTIC INC.

Respondent
(A-270-07, A-271-07,
A-269-07 and A-266-07)
Appellant (A-267-07)

Heard at Toronto, Ontario, on May 20, 2008.

Judgment delivered at Ottawa, Ontario, on June 26, 2008

REASONS FOR JUDGMENT BY:	**BLAIS J.A.**
CONCURRED IN BY:	**NOËL J.A.** **RYER J.A.**

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REASONS FOR JUDGMENT

BLAIS J.A.

INTRODUCTION

[1] This is a consolidated appeal from the decision of the Applications Judge (2007 FC 469) dated May 1, 2007, in respect of three applications for judicial review that sought to raise, as the principal issue, whether subsection 29(12) of the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) (the "PBSA"), requires that the proportional amount of surplus in a federally regulated pension plan existing at the time of a partial termination of the plan be paid out. The Applications Judge dismissed two of the applications (T-1519-05 and T-1520-05) as being out of time, and allowed the third application (T-1518-05) in part having found that subsection 29(12) of the PBSA requires the payment out of the surplus attributable to the partial termination of a pension plan.

[2] In conformity with the order consolidating these appeals, these reasons will be filed in file A-266-07, being the lead file, and copies thereof will be filed in files A-267-07, A-269-07, A-270-07 and A-271-07.

[3] With respect, it is submitted that the Applications Judge erred in his interpretation of subsection 29(12) of the PBSA with the result that the appeals relating to this portion of his decision in respect of the application in T-1518-05 should be allowed.

[4] Given my conclusion on the principal issue of the interpretation of subsection 29(12) of the PBSA, it will not be necessary to address the appeals relating to the decision of the Applications Judge in respect of the applications in T-1519-05 and T-1520-05 or the balance of the application in T-1518-05, such determinations being now academic.

ISSUES

[5] The appeals raise the following four issues:

1. Did the Applications Judge err in determining that two of the three applications for judicial review are out of time and in refusing to exercise his discretion to extend the time for filing these applications?

2. Did the Applications Judge err in determining that the Superintendent of Financial Institutions properly declined to reconsider past approvals of partial termination reports that did not provide for payment out of surplus in the pension plan at the time of those partial terminations?

3. Did the Applications Judge err in his determination of the standard of review to be applied in respect of the decision of the Superintendent of Financial Institutions interpreting subsection 29(12) of the PBSA?

4. Did the Applications Judge err in his determination that subsection 29(12) of the PBSA requires the distribution of a proportional share of an existing surplus when a federally regulated pension plan is partially terminated?

The appeals will be disposed of by addressing issues 3 and 4 only.

BACKGROUND

[6] Dana P. Cousins, Charles McNally and Donna M. Keith (collectively, the "applicants"), are former employees of Marine Atlantic Inc. ("MAI") and former members of the Pension Plan for Employees of Marine Atlantic Inc. (the "Plan"). The Plan is registered under the PBSA, and is

regulated by the Office of the Superintendent of Financial Institutions ("OSFI"). It is not disputed that the Plan is a "defined benefit plan" within the meaning of subsection 2(1) of the PBSA. For the purposes of the PBSA, MAI is the administrator of the Plan. The pension fund in respect of the Plan is held by Guarantee Trust Company of Canada pursuant to a trust agreement (the "Trust Agreement").

[7] In the years between 1997 and 2000, MAI implemented changes to its operations that resulted in the appellants and other employees being terminated from their employment with MAI. MAI implemented partial terminations of the Plan relating to certain employment cutbacks resulting from the closure of the Bay of Fundy ferry service (the "Bay of Fundy Termination"), the P.E.I. ferry service (the "PEI Termination") and the Labrador ferry service and the Moncton office (the "Labrador and Moncton Termination"). Cousins, McNally and Keith were affected by the Bay of Fundy Termination, the PEI Termination and the Labrador and Moncton Termination, respectively.

[8] In respect of each of the Bay of Fundy Termination and the PEI Termination, and pursuant to the requirements of the PBSA, MAI filed partial termination reports with OSFI setting out the accrued benefits of affected members as determined by MAI. The partial termination reports in respect of the Bay of Fundy Termination and the PEI Termination were approved by OSFI in 1997 and 1998, respectively, and pension benefits were distributed in accordance with these reports.

[9] In 1997, OSFI permitted MAI to distribute accrued benefits, as determined by MAI, to members affected by the Labrador and Moncton Termination without having filed a partial

termination report on the understanding that such report was forthcoming. In May 2004, MAI filed this partial termination report which has not yet been approved by OSFI.

[10] The Bay of Fundy Termination, the PEI Termination and the Labrador and Moncton Termination all proceeded on the basis that there was no requirement to pay out a proportional share of the surplus existing in the Plan at the time of the partial terminations of the Plan to the affected members. Additionally, OSFI did not require MAI to distribute any surplus relating to any of these partial terminations of the Plan.

[11] In July 2004, the Supreme Court of Canada released its decision in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, [*Monsanto*], in which it determined that subsection 70(6) of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA"), requires the distribution of a proportional share of any surplus when a defined benefit plan is partially terminated.

[12] In letters dated March 8, 2005 and May 11, 2005, counsel for the appellants, relying on the decision in *Monsanto*, wrote to OSFI seeking an order from the Superintendent of Financial Institutions (the "Superintendent") for an accounting of the surplus in the Plan at the time of the partial terminations of the Plan and a distribution, pursuant to subsection 29(12) of the PBSA, of that surplus among the applicants and the other employees affected by the partial terminations of the Plan.

[13] In a letter dated August 8, 2005, the Superintendent refused to direct a distribution of surplus in relation to the partial terminations of the Plan. In particular, in respect of the Bay of Fundy Termination and the PEI Termination, the Superintendent stated that OSFI does not have the legal authority to reconsider the past approval of a partial termination report unless new information is presented that is material to the case. The Superintendent went on to note that the *Monsanto* decision does not constitute new information in this context. The Superintendent also pointed to the fact that there is no legislative authority to reconsider the past approval of a partial termination report regardless of whether or not surplus currently exists in a pension plan. In respect of the Labrador and Moncton Termination currently under consideration by OSFI, the Superintendent disclosed the general position of OSFI whereby if a plan is in a surplus position at the time of a partial termination but no longer has surplus assets, there can be no right to a distribution of surplus assets which no longer exist. Moreover, in light of a recently released public consultation paper by the federal Department of Finance, the Superintendent was of the view that it would be inappropriate for OSFI to require that a pension plan registered under the PBSA distribute all or a portion of any surplus assets on the partial termination of the plan.

[14] In his letter, the Superintendent also addressed the implications of the *Monsanto* decision. According to the Superintendent, the reasoning of the Supreme Court of Canada in *Monsanto* does not apply to subsection 29(12) of the PBSA; and even if it did, he was of the view that, unlike the Ontario legislation, there is no general requirement in the PBSA that all assets be distributed on the full termination of a pension plan with the result that entitlement to a distribution of surplus depends on the terms of the particular pension plan. The Superintendent noted that this determination of

entitlement on full termination also applies to a partial termination. Based on his reading of the Plan, the Superintendent determined that there was no clear obligation on the part of MAI as administrator of the Plan, or right on the part of members of the Plan, regarding the distribution of the assets of the Plan on either a full or partial termination of the Plan.

[15] On September 6, 2005, the applicants brought an application for judicial review (T-1518-05) challenging the August 8, 2005 decision of the Superintendent. Applications for judicial review were also brought on the same date challenging the approvals of the partial termination reports in respect of the Bay of Fundy Termination and the PEI Termination in 1997 and 1998, respectively (T-1520-05 and T-1519-05). The three applications for judicial review raised the common issue of whether subsection 29(12) of the PBSA requires the payment out of a proportional share of surplus that exists at the time of a partial termination of a federally regulated defined benefit plan.

[16] The Applications Judge dismissed the applications in T-1520-05 and T-1519-05 as being instituted too late as well as the portion of the application in T-1518-05 concerning the Superintendent’s refusal to reconsider the decisions in T-1520-05 and T-1519-05. Accordingly, the only issue remaining to be determined by the Applications Judge, which this Court will address, is the portion of the application in T-1518-05 concerning whether, for the purposes of the Labrador and Moncton Termination, subsection 29(12) of the PBSA requires the distribution of a proportional share of the surplus attributable to the partial termination of a federally regulated defined benefit plan.

ANALYSIS

Subsection 29(12) of the PBSA

Standard of Review

[17] The Applications Judge addressed the issue of the standard to be applied in reviewing the Superintendent's interpretation of subsection 29(12) of the PBSA. The Applications Judge observed that the Supreme Court of Canada in *Monsanto* had conducted a thorough pragmatic and functional review in respect of the decision of the Ontario Financial Services Tribunal on an issue virtually identical to the one before him. Following the decision in *Monsanto*, he determined that the standard of correctness should be adopted noting that there were no persuasive grounds for granting the Superintendent any deference on the pure question of law before him. He did not find it material that in *Monsanto* the body under review was not the Ontario Superintendent but rather the Financial Services Tribunal.

[18] In *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 (QL), 2008 SCC 9 [*Dunsmuir*], the Supreme Court of Canada stated that a two-step process is to be followed in determining the standard to be applied in reviewing the decision of a tribunal. At paragraph 62, Bastarache and LeBel JJ. stated:

> 62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[19] The Applications Judge was of the view that the decision of the Supreme Court of Canada in *Monsanto* satisfactorily determined that the interpretation of subsection 29(12) of the PBSA is a question of law in respect of which the appropriate standard of review is correctness.

[20] With respect, I am of the view that the Applications Judge erred in summarily relying on the conclusion reached in *Monsanto* without further analysis. In fact, he failed to consider or give sufficient weight to the following facts:

(a) In *Monsanto*, the body under review was not the Ontario Superintendent but the Financial Services Tribunal. This body is entirely distinguishable from the Superintendent and is, instead, a purely adjudicative tribunal (for which there is no equivalent in the federal scheme) that reviews decisions of the Superintendent;

(b) Unlike the Superintendent's office, the Financial Services Tribunal is not the regulatory body that has the advantage of being closer to the dispute and the industry;

(c) The Financial Services Tribunal has no policy function as part of its pensions mandate, which finding was crucial to the determination by the Supreme Court of Canada that the Financial Services Tribunal does not have any greater expertise relative to the courts in statutory interpretation that warrants deference;

(d) The decisions of the Financial Services Tribunal are subject to a statutory right of appeal; and

(e) The sole issue before the Financial Services Tribunal was a specific legal question as to the interpretation of one provision of the relevant legislation.

[21] The standard of review analysis, left unconsidered by the Applications Judge, involves the following four factors:

1. The presence or absence of a privative clause or statutory right of appeal;

2. The relative expertise of the decision-maker;

3. The purpose of the decision-maker as determined by the interpretation of the enabling legislation; and

4. The nature of the question at issue, in particular whether it relates to a determination of law or fact.

[22] Even if this Court concludes that the Superintendent was engaged in deciding a pure question of law, the standard of reasonableness ought to apply. The Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46 (QL), and more recently in *Dunsmuir*, has noted that even a pure question of law may be decided on the basis of reasonableness where the tribunal is interpreting its own statute and/or other factors of the standard of review analysis suggest that such deference is the legislative intention.

[23] Moreover, the decisions of the Superintendent were discretionary. While the decisions approving the partial termination reports in respect of the Bay of Fundy Termination and the PEI Termination were obviously subject to the discretion of the Superintendent, the decision on August 8, 2005 as to whether the Superintendent could revisit such approvals 7 or 8 years later and as to whether to order an accounting of the surplus in the Plan at the time of the partial terminations of the Plan was similarly discretionary.

[24] In the circumstances of this case, the 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. In *Baker v. Canada (Min. of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39,

(QL) at paragraph 56, the Supreme Court of Canada acknowledged the particular deference to be accorded by the courts when reviewing discretionary administrative decisions:

> 56 … The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options.

[25] The Applications Judge failed to undertake any meaningful analysis of the appropriate standard of review and, instead, applied a standard applicable to a disparate body under a different legislative regime. All of the factors under the standard of review analysis point to the August 8, 2005 decision of the Superintendent being given a high degree of deference. For the foregoing reasons, the Applications Judge's conclusion concerning the appropriate standard of review was in error and the standard of reasonableness should apply.

[26] In any event, even applying a standard of correctness, the Superintendent's decision should stand for the reasons provided below.

Interpretation of subsection 29(12) of the PBSA

[27] In addressing the interpretation that should be given to subsection 29(12) of the PBSA, the Applications Judge began his analysis with the decision in *Monsanto*. He agreed with the Supreme Court of Canada that the starting point was the principle of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". The examination of the grammatical and ordinary sense of subsection 29(12) and the scheme of the PBSA constituted the crux of his analysis.

[28] The Applications Judge determined that "the ordinary and grammatical sense of subsection 29(12) is that members affected by a partial termination are to be put in the same position in respect of distribution of surplus as those affected by a final termination, but as of the date of the partial termination".

[29] In considering the rights that a plan member has in respect of a terminated plan under the scheme of the PBSA, the Applications Judge observed the following:

> (a) Paragraph 28(1)(d) of the PBSA provides that upon termination of the whole or part of a plan, the administrator is required to provide to the affected member a written statement of the member's pension benefits *and other benefits* payable under the plan;
>
> (b) Subsection 29(6) of the PBSA requires that, on termination of the whole of a pension plan, the employer shall top-up any shortfall in the assets of the plan;
>
> (c) Subsections 29(7) and (8) of the PBSA preserve the assets of the plan for the benefit of members;
>
> (d) Subsection 29(11) of the PBSA provides that where a plan has been terminated, the Superintendent "may" direct a plan administrator to distribute the assets of the plan if insufficient activity has been undertaken to wind up the plan;
>
> (e) The Superintendent's discretion under subsection 29(11) of the PBSA is limited to that of ascertaining when it is reasonable to delay the winding-up for a reasonable period of time. The PBSA does not contemplate a situation where the assets will remain in a plan forever;
>
> (f) In light of subsection 29(12) of the PBSA, subsection 29(11) cannot be limited to a final termination and applies on a partial termination with the result that if the Superintendent is of the view that the plan administrator has not taken reasonable steps to wind up the relevant portion of the plan on a partial termination, the Superintendent must step in and see that such steps are taken in a reasonable fashion.

[30] Based on these observations, the Applications Judge found that the scheme of the PBSA is consistent with requiring that there be a proportional distribution of surplus on or shortly after partial termination. The Applications Judge went on to reach the following conclusion at paragraph 83 of his reasons:

> 83 Having regard to all the relevant considerations, I find that section 29(12) of the federal *Pension Benefits Standards Act*, *supra*, requires proportional distribution of the surplus attributable to the wound up part of the plan. Wind-up must occur within a reasonable time from termination and, if winding-up does not occur within a reasonable time after termination, the Superintendent shall step in and require that it be done.

[31] Accordingly, the Applications Judge allowed the application in T-1518-05 to the extent that a *mandamus* should be issued directing that the Superintendent not approve a partial termination report in respect of the Labrador and Moncton Termination that does not provide for wind-up of the affected part of the Plan and the proportional distribution of surplus within a reasonable time.

[32] For the reasons that follow, I am of the view that the Applications Judge erred his interpretation of subsection 29(12) of the PBSA.

[33] In my view, the essence of this case is the degree to which the decision of the Supreme Court of Canada in *Monsanto* applies, and by extension, the degree to which the Ontario PBA and the federal PBSA overlap.

[34] The decision in *Monsanto* addressed the interpretation of subsection 70(6) of the PBA which is similar to subsection 29(12) of the PBSA. These provisions are reproduced below:

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.	**70.** … (6) À la liquidation partielle d'un régime de retraite, les participants, les anciens participants et les autres personnes qui ont droit à des prestations en vertu du régime de retraite ont des droits et prestations qui ne sont pas inférieurs aux droits et prestations qu'ils auraient à la liquidation totale du régime de retraite à la date de prise d'effet de la liquidation partielle.
29. (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.	**29.** (12) Les droits des participants en cas de cessation partielle d'un régime doivent être au moins égaux à ceux qu'ils auraient eus si la cessation avait été totale

[35] In *Monsanto*, the Supreme Court of Canada recognized that subsection 70(6) of the PBA requires that the rights and benefits of members affected by the partial wind-up of a pension plan are not to be less than those rights and benefits that would be available to these members if there was a full wind-up of the plan on the date of the partial wind-up. The Supreme Court of Canada went on at paragraph 34 of its reasons to describe the role of subsection 70(6) of the PBA:

> 34 ... in this statutory scheme, the role of s. 70(6) appears to be as a residual deeming provision reflecting the legislature's intent of assuring that rights on partial wind-up are not less than those available on full wind-up, whether granted under the Act or under the terms of the Pension Plan.

As a matter of logic, the Supreme Court of Canada found it clear that if there is a surplus distribution on a full wind-up of a pension plan, then subsection 70(6) of the PBA requires that there should also be a surplus distribution on a partial wind-up of the pension plan.

[36] At paragraph 26 of the reasons in *Monsanto*, it was recognized that there was no dispute in that case that on the full wind-up of the pension plan, all members had the right to a surplus distribution:

> 26 Where the disagreement lies is with regard to the timing of distribution following a partial wind-up of a plan in which there is an actuarial surplus. The respondent reasons that, since (i) s. 70(6) requires the rights and benefits on a partial wind-up to not be less than those available on full wind-up, and (ii) all parties agree that surplus distribution would occur on a full wind-up (Court of Appeal judgment, at para. 43; see also s. 79(4)), then (iii) s. 70(6) must require surplus distribution on a partial wind-up. In contrast, the appellants argue that, at most, s. 70(6) requires the vesting of the right to participate in surplus distribution in a potential future full wind-up because it is only on final wind-up that an actual, rather than actuarial, surplus can exist. In my opinion, the former interpretation accords better with the ordinary and grammatical meaning of the section. [Emphasis added.]

[37] Subsection 79(4) of the PBA, referred to in the passage from *Monsanto*, provides that where a pension plan is silent as to the distribution of surplus on a wind-up, the pension plan will be construed to require the distribution of a proportional share of any surplus among affected members on the date of the wind-up:

79.	**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.	(4) Un régime de retraite qui ne prévoit pas le paiement de sommes excédentaires à la liquidation du régime de retraite s'interprète comme exigeant que les sommes excédentaires accumulées après le 31 décembre 1986 soient réparties proportionnellement, à la liquidation du régime de retraite, entre les participants, les anciens participants et les autres personnes qui ont droit à des paiements aux termes du régime de retraite à la date de la liquidation.

[38] In *Monsanto*, the members' entitlement to a surplus distribution on the full wind-up of the pension plan was key to the determination at paragraph 31 of the reasons that the members were equally entitled to such a distribution on the partial wind-up of the plan pursuant to subsection 70(6) of the PBA:

> 31 In sum, [subsection 70(6)] 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, <u>if entitled</u>, 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. [Original emphasis removed and my emphasis added.]

[39] It is important to recognize that, for the purposes of the PBA, the termination of a pension plan coincides with the distribution of assets. The Ontario statute defines "wind-up" to mean the termination of a pension plan *and* the distribution of the assets of the pension fund. This strong and inextricable connection between the termination of a pension plan and the distribution of assets in the Ontario scheme underpinned the Supreme Court of Canada's reasoning in *Monsanto*. In contrast, such a connection is absent in the PBSA. Under the federal scheme, "termination" is defined to mean the cessation of crediting of benefits to plan members generally and "winding-up" is defined separately to mean the distribution of the assets of a pension plan that has been terminated. 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.

[40] Subsection 29(11) of the PBSA, on which the Applications Judge relied, does not grant a right to any member to force a distribution of assets on the termination of a pension plan. At most,

that provision gives members the ability to ask the Superintendent to (a) form an opinion that no action or insufficient action has been taken to wind-up a pension plan that has been terminated; and, b) if such an opinion has been formed, to exercise a discretion to direct the administrator of the plan to distribute the assets of the plan in accordance with the regulations made under paragraph 39(*j*) of the PBSA.

[41] While paragraph 39(*j*) of the PBSA enables the Governor in Council to make regulations respecting the distribution of the assets of a pension plan that is being wound-up, the Crown submits that no such regulations exist. Arguably, the Superintendent could be powerless to direct a distribution of assets on winding-up in the absence of any regulation under paragraph 39(*j*) of the PBSA.

[42] I have no hesitation in concluding that subsection 29(11) of the PBSA simply grants a discretionary power to the Superintendent to order a distribution of assets in a limited set of circumstances. That provision certainly gives no right to members to a distribution of a proportional share of any surplus existing at the time of the partial termination of a pension plan. The Applications Judge was incorrect to hold otherwise.

[43] The fact that, unlike the PBA, the PBSA treats “termination” and “winding-up” as separate and distinct terms that occur at two different periods of time is relevant to the interpretation of subsection 29(12) of the PBSA. Whereas subsection 70(6) of the PBA equalizes the rights of members on a partial and full *wind-up*, subsection 29(12) of the PBSA equalizes the rights of

members on a partial and full *termination*. The PBSA defines a “surplus” to mean the amount by which the assets of a pension plan exceed its liabilities (i.e. the pension benefits owed to members). Assets and liabilities cannot be precisely determined until a plan is wound-up. As such, the existence of any actual or real surplus is determined at some point *after* the termination of a plan, and the distribution thereof would be the final step in the wind-up process. Accordingly, the federal scheme itself appears to preclude a right to a distribution of surplus from being a right on termination subject to subsection 29(12) of the PBSA. The suggestion by counsel for the applicants that while a right to a distribution of surplus crystallizes after the time of termination, such right is somehow retroactive to the time of termination is without any merit.

[44] The significant differences between the PBA and the PBSA are not limited to the definition of wind-up. For example, contrary to the Applications Judge’s view, subsection 29(6) of PBSA is in fact different from subsection 75(1) of the PBA in that only the latter ensures that the employer is responsible for any deficit in the pension plan on wind-up, whereas, the former limits the obligation of the employer, essentially, to the payment of any accrued contribution obligations that are outstanding at the time of the termination of the particular plan.

[45] In addition to the fact that *Monsanto* concerned a materially different legislative scheme, it is significant that all parties in *Monsanto* agreed that all members were entitled to a surplus distribution on the full wind-up of the plan. In *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973, [*Buschau*], the Supreme Court of Canada identified the sources of entitlement to surplus at paragraph 17 of its reasons:

> 17 … As the Court said in *Schmidt*, "[t]he right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan" (p. 654). Entitlement is determined by consulting the Plan, the Trust agreement (*Schmidt*, at para. 48) and the relevant legislation (*Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54, at para. 39).

[46] Applying *Buschau*, to support his conclusion that subsection 29(12) of the PBSA provides for the distribution of surplus to affected members on a partial termination, it was incumbent on the Applications Judge to ground the members' right in either the PBSA, the Plan or the Trust Agreement. Subsection 10(6) of the PBSA, which requires that every pension plan that is filed for registration must provide for the use of surplus during the continuation of the plan and on its termination, establishes that surplus entitlement must be determined by the wording of the relevant pension plan. While the Plan was registered prior to the enactment of subsection 10(6) of the PBSA, the Plan explicitly states that "when all liabilities of the Plan have been legally discharged, any balance of the Fund then remaining shall be returned to the Company, subject to the consent of the Superintendent". The Trust Agreement merely provides that in the event of the termination of the Plan, the trustee will, subject to the satisfaction of all liabilities with respect to the members under the Plan, dispose of the pension fund in accordance with the written direction of MAI that must be consistent with the terms of the Plan.

[47] As discussed at paragraph 66 of the reasons of the Applications Judge, all parties agree that entitlement, if any, to a distribution of the surplus in the Plan is an unresolved issue to be left for another time. While I recognize that negotiations may be underway to establish the proper recipient(s) of a distribution of surplus following the full termination of the Plan, for the purposes of

these appeals the applicants have not established such an entitlement so as to trigger the application of subsection 29(12) of the PBSA on a partial termination.

[48] Given this admission by all parties that it takes negotiations to determine an entitlement to surplus and that those negotiations occur after there has been a termination, it is hard to conclude that a member has any right to surplus at the time of the termination.

[49] In summary, the distinctions between the Ontario legislation considered in *Monsanto* and the federal legislation at issue in this case are material and justify distinguishing *Monsanto* and not treating it as a binding authority for the suggestion that members of a federally regulated pension plan have a right to a distribution of surplus at the time of a partial termination under the PBSA. Such legislative distinctions must be respected by the Court and given meaning.

[50] Additionally, I conclude that the applicants have failed to convince me that members of the Plan, or more specifically members affected by the Labrador and Moncton Termination, have a right to a distribution of surplus on a full termination of the Plan; therefore, such a right cannot be said to exist on a partial termination of the Plan pursuant to subsection 29(12) of the PBSA as suggested.

[51] As mentioned in paragraphs 25 and 26 herein, the conclusion of the Superintendent on the question of the statutory interpretation of subsection 29(12) of the PBSA is supportable on either the standard of reasonableness or correctness.

[52] For the foregoing reasons, I would allow the appeals of MAI and the Crown.

CONCLUSION

[53] Given my conclusion that the applicants have failed to establish that, for the purposes of the Labrador and Moncton Termination, subsection 29(12) of the PBSA requires the distribution of a proportional share of the surplus attributable to the partial termination of a federally regulated defined benefit plan, the two remaining issues regarding the timeliness of the applications in T-1520-05 and T-1519-05 and the Superintendent's refusal to reconsider the decisions in T-1520-05 and T-1519-05 need not be considered.

[54] Therefore, I would allow the appeals in files A-266-07 and A-267-07 with one set of costs in file A-266-07; and dismiss the appeals in files A-269-07, A-270-07 and A-271-07 with one set of costs in favour of Marine Atlantic Inc. in file A-269-07.

"Pierre Blais"
J.A.

"I agree.
Marc Noël J.A."

"I agree.
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-266-07, A-267-07, A-269-07, A-270-07, A-271-07

STYLE OF CAUSE:

BETWEEN:

DANA P. COUSINS and CHARLES McNALLY

Appellants
(A-270-07 and A-271-07)

and

DANA P. COUSINS, DONNA M. KEITH and CHARLES McNALLY

Appellants (A-269-07)
Respondents
(A-266-07 and A-267-07)

and

ATTORNEY GENERAL OF CANADA

Respondent
(A-270-07, A-271-07,
A-269-07 and A-267-07)
Appellant (A-266-07)

and

MARINE ATLANTIC INC.

Respondent
(A-270-07, A-271-07,
A-269-07 and A-266-07)
Appellant (A-267-07)

PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 20, 2008
REASONS FOR JUDGMENT BY:	BLAIS J.A.

CONCURRED IN BY:	NOËL J.A. RYER J.A.
DATED:	June 26, 2008

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