

PENSIONS AND EMPLOYEE COMPENSATION GROUP

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APPEAL COURT SETS REASONABLE PLAN COMMUNICATION STANDARDS

In a decision this week that will bring welcome relief to pension plan administrators, the Ontario Court of Appeal overturned the Ontario Superior Court's ruling in *Hembruff v. Ontario Employees Retirement Board*. The Superior Court had decided that pension plan administrators have a duty to inform members of possible changes to plans when such modifications are highly likely or almost certain to be implemented, even if the changes have been neither considered in detail, nor authorized by regulatory authorities. In a unanimous decision, the Court of Appeal determined that OMERS did not make a negligent misrepresentation and did not breach its fiduciary duties to plan members by not informing members of possible plan changes.

BACKGROUND

The *Hembruff* case arose from the complaints of a group of retirees of the Toronto Police Services Board, who were former members of OMERS. Having retired in 1998, the plaintiffs found themselves ineligible for benefit enhancements that came into effect on January 1, 1999. At the time the retirees were considering retirement, OMERS had received actuarial information confirming a substantial surplus in the plan which could not adequately be managed solely by cutting contributions. The retirees argued that if OMERS had communicated to them that an increase in benefits was necessitated by the surplus, they would have postponed their retirement in order to take advantage of the impending changes. The Superior Court concurred with the retirees, ruling that a duty to communicate arose when a finalized version of the actuarial report confirmed the extent of the surplus and made it apparent that benefit enhancements would have to be considered in order to manage the surplus. The Superior Court determined that the final actuarial report made it "inevitable" that OMERS would take measures to enhance pension benefits. As a result, OMERS had a duty to inform members of changes under consideration that were "almost certain" or "highly certain" to come to fruition.

COURT OF APPEAL DECISION

Although OMERS owed the retirees a duty of care, the Court of Appeal nevertheless determined that OMERS did not make a representation that was untrue, inaccurate or misleading. The Court confirmed that failure to disclose accurate and complete information regarding a plan's *existing* terms and options can amount to an untrue, inaccurate or misleading representation. The Appeal Court noted that the Superior Court ruling placed the plan administrator in an unworkable, "invidious" position. Information regarding potential changes does not have to be revealed because such information is speculative and therefore, not information on which it would be reasonable to rely. Until the meeting at which the OMERS Board finally decided upon the recommended changes, benefit enhancements were speculative and subject to change and OMERS therefore did not have an obligation to reveal such information to members.

The Court of Appeal also examined whether OMERS breached its fiduciary obligations to the retirees. In examining this issue, the Court determined that OMERS did not have a duty to disclose plan changes which were under consideration. Only when such changes were finalized was there a duty to disclose. The Court also rejected the trial judge's determination that OMERS failed to treat all plan members fairly and failed to act in good faith.

OUTLOOK

Though the Court of Appeal's decision is good news for plan administrators, plan communications are still a source of potential risk in an increasingly litigious environment. While plan administrators are not responsible to reveal speculative information to members, they will be held to account as soon as potential changes are approved or otherwise no longer subject to change. This decision, together with the Capital Accumulation Plan Guidelines and CAPSA's Governance Guidelines, provides plan administrators with greater insight into how to prepare pension plan member communications.

The Pension and Employee Compensation Group at McMillan Binch Mendelsohn is available to assist you with all your pension communication needs.

Written by Ivan Luksic and David Wentzell

For further information, please contact your McMillan Binch Mendelsohn lawyer or one of the members of our Pensions and Employee Compensation Group featured below:



David Wentzell

Partner – Pension Practice Leader

Direct Line: 416.865.7036

E-mail: david.wentzell@mcmbm.com

For over 20 years, David's practice has concentrated on providing both Canadian and foreign clients with advice in pension and benefits matters. He is an expert in all aspects of provincial and federal law regulating pension plans. Of particular interest to David are the emerging issues of pension plan governance. He has assisted firm clients with comprehensive legal reviews of their pension governance structure.

David has advised numerous clients in the recovery and sharing of pension plan surpluses. His pension practice includes advising on pension aspects of business acquisitions and dispositions, pension governance and developing innovative retirement compensation and stock option arrangements for clients. David has served as a member of the Financial Services Commission Legal Advisory Committee, a policy advice resource for the pension regulator in Ontario.



Ivan A. Luksic

Associate – Pension Advisory Services

Direct Line: 416.865.7923

E-mail: ivan.luksic@mcmbm.com

Ivan's practice focuses on advising clients on a full range of pension, labour and employment issues. His pension practice is concentrated on advising clients on regulatory compliance, plan governance and pension and benefit issues relating to corporate transactions and reorganizations.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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MCMILLAN BINCH MENDELSON

TORONTO | TEL: 416.865.7000 | FAX: 416.865.7048
MONTRÉAL | TEL: 514.987.5000 | FAX: 514.987.1213
www.mcmbm.com