

PENSIONS AND EMPLOYEE COMPENSATION BULLETIN

October 2004

TELL IT ALL: ONTARIO RULING CALLS ON PENSION ADMINISTRATORS TO COMMUNICATE PROPOSED PENSION CHANGES TO PLANS

Following a recent Ontario Superior Court decision, pension administrators contemplating modifications to their plans may be obligated to inform plan members of such possible changes before they are implemented. In *Hembruff v. Ontario Employees Retirement Board*, the Court decided that 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.

THE COURT DECISION

The *Hembruff* case arose from the complaints of a group of retired employees of the Toronto Police Services Board, who were former members of the Ontario Municipal Employees Retirement System (OMERS). Having retired in 1998, they found themselves unable to capitalize on benefit enhancements that came into effect on January 1, 1999. The retirees contended that they missed out on substantial increases in benefits owing to the failure of OMERS to inform them of imminent changes to their plan prior to their decision to retire. At the time the retirees were considering retirement, OMERS had received actuarial information confirming that the plan had a substantial surplus that was accumulating at such a significant rate that it 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 Court's decision centred on the issue of exactly when the duty to inform plan members arose. The Court held that OMERS was not obligated to inform members of any inclination towards increasing benefits occasioned by a preliminary actuarial report pertaining to the fund's surplus. However, a duty to communicate did arise 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. According to the Court, the final actuarial report made it "inevitable" that OMERS would take measures to enhance pension benefits. In this situation, OMERS had a duty to inform members of changes under consideration that were "almost certain" or "highly likely" to come to fruition.

Based on the statutory obligation in the Ontario *Pension Benefits Act* to communicate plan amendments within 60 days of the registration of an amendment, conventional wisdom would not have anticipated the Court's ruling. In fact, OMERS argued that a duty to notify members of the potential for changes could not have been triggered at a preliminary stage of decision making, when there had not been consideration of which benefits would be supplemented or the manner of implementing such changes. Further, any changes recommended by OMERS could only be implemented by way of provincial regulatory amendment. To support the early trigger of the communication duty, the Court noted that the Ontario government had consistently enacted recommendations put forward by OMERS.

REQUISITE STANDARD OF COMMUNICATION

The *Hembruff* judgement also touches upon the minimum requirements for acceptable communication relating to proposed changes to a plan. Information must be clear, direct and easily understood. In notifying members of a contribution holiday and of a consultation process that was to be undertaken to determine how to manage the surplus, OMERS advised that it was discussing "other options" with key plan stakeholders. The Court concluded that such a reference was too subtle to constitute communication of the potential improvement of plan benefits and thus did not fulfil OMERS' notification obligations.

The Court criticized OMERS for its failure to establish, implement and monitor an effective communications policy that targeted those most in need of information on impending changes.

IMPLICATIONS FOR PENSION PLAN ADMINISTRATION

The *Hembruff* case has significant ramifications for all pension plan administrators.

- Plan changes need to be communicated much earlier than previously thought. Administrators must now ensure that any material changes to pension plans that are "almost certain" or "highly likely" owing to the circumstances of the plan are promptly communicated to plan members.
- Early communication of possible changes may conflict with an employer's bona fide management of broader business issues such as reorganizations, acquisitions or mergers.
- When a duty to communicate is triggered, communication to plan members must be sufficiently explicit so as to allow members to make informed decisions.
- Special efforts must be made to target those plan members who have indicated that they are considering career decisions and so might be particularly impacted by plan changes.

Pension plan communications have always been fraught with risk for pension plan administrators. The good news is that OMERS has appealed the decision to the Ontario Court of Appeal. We can expect that the appellate court will provide guidance and clarification in this critical area of pension plan administration. The *Hembruff* case, combined with the recent Joint Forum Capital Accumulation Plan Guidelines and CAPSA's Governance Guidelines, make it clear that pension communications will be an area of ever increasing importance.

The members of our Pensions and Employee Compensation Group are available to assist you with all your pension communication needs.

Written by David Wentzell, Hilary E. Clarke and Lisa Brost

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.

WHO WE ARE



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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.



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Hilary is a corporate/commercial litigator whose practice focuses on pensions/trust, financial institutions and bankruptcy and insolvency litigation. She has acted for clients in pension litigation involving such issues as entitlement to pension surplus, interpretation of plan provisions, the power to amend the pension plan, issues arising on the transfer of pension plans and the liability of plan administrators for breach of fiduciary duty and misstatements on member benefit statements. Hilary recently defended a large mining company in the first pension class action in Ontario. This class action arose out of the wind-up of a pension plan and involved claims of surplus entitlement, undervaluation of member benefits and misrepresentation. Hilary has experience in obtaining variation of trust orders in the context of pension surplus sharing arrangements. She has appeared before all levels of court in Ontario, various administrative bodies, including the Financial Services Commission of Ontario, and has also participated in alternative methods for resolving disputes, like mediation and arbitration.



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Susan's practice is primarily focused on advising private sector employers and financial institutions on pension surplus and contribution holiday issues, on-going regulatory compliance as well as pension, trust and benefit issues arising in the context of business transactions and insolvencies. Before joining McMillan Binch, Susan spent a year and a half as a lawyer and consultant with Watson Wyatt Worldwide. She also gained experience in drafting trust agreements for pension and other registered plans during her time as a compliance officer at Royal Trust Corporation of Canada prior to being called to the Bar of Ontario in 1998.



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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.



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Lisa practises in all areas of corporate restructuring and insolvency. She advises and represents creditors, debtors and insolvency professionals in insolvency related matters including receiverships, bankruptcies, reorganizations, proceedings under the *Winding-Up and Restructuring Act*, proceedings under the *Companies Creditors' Arrangement Act* and informal loan restructurings. Lisa has a particular interest in legal research and in pension issues arising in insolvencies. Lisa also practises in the area of secured lending and has represented both lenders and borrowers in secured financing transactions. She is a member of the firm's research and opinions group and the firm's Pensions and Employee Compensation Group.



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Lisa is an associate in the firm's Litigation and Dispute Resolution Group. Her focus is in the areas of pension and bankruptcy and insolvency litigation.

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