

Workshop 19

Avoiding Litigation Pitfalls in Pension Plan Administration

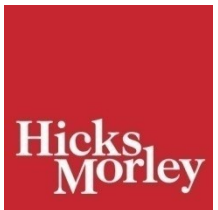
2010 CBA/IPEBLA Conference: Pension and Benefits in a Changing Global Environment

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Current Litigation Landscape

- **What are examples of the most common types of Court claims brought by or on behalf of Plan beneficiaries relating to the administration of a pension plan or retiree benefits plan?**
 - **Breach of fiduciary duty claims (eg. *Lomas v. Rio Algom Limited* (Ont. C.A. 2010))**
 - **Discrimination claims (eg. *Clarke v. Ontario Teachers' Pension Plan Board*, 2010 HRTO 1123)**
 - **“Stock drop” litigation (eg. *R. v. Cristophe* (2009, Ont. Ct.))**
 - **Post retirement benefits (eg. *Nadolny v. Peel (Region)* (Ont. S.C., 2009) and *Acreman v. Memorial University of Newfoundland* (Nfld. S.C. 2010))**



Current Litigation Landscape

- What deference do the Courts pay to decisions made by the Plan administrator?
 - *Conkright v. Frommert*, 2010 (U.S.)
 - *Dinney v. Great-West Life*, 2009 (Canada)



Risk Avoidance Strategies

- **As legal counsel for a large pension plan sponsor, what do you see as the greatest area of risk in Plan administration? In Canada and in the US?**
 - **Internal consistency and accuracy of member communications**
 - **Design changes compliant with multiple legislation**
 - **Complaints about past practices**
 - **Concerns raised by retired employees**
 - **Challenges to historical plan terms**



Risk Avoidance Strategies

- **What are some of the practical strategies you have adopted to minimize the risk of litigation?**
 - **Governance structure**
 - **Keeping governance committees informed about recent legal developments**
 - **Monitoring of changes in the law**
 - **Ongoing training of staff and committee members with respect to fiduciary obligations**
 - **Protocols for documentation and written communication review**



Risk Avoidance Strategies

- **What kinds of protocols are in place for responding to member inquiries?**
 - **Call Centre**
 - **Regular meetings of Call Centre employees to ensure consistency of approaches**
 - **Use of template responses and scripts**
 - **Established escalation protocols**



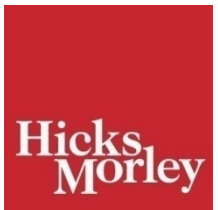
Risk Avoidance Strategies

- **When there is a law suit commenced against the Plan administrator, what are the key considerations from a strategic perspective?**
 - **Defences to be considered – procedural and substantive, right parties named, limitation periods, third party proceedings, etc.**
 - **Consideration of the merits and education of internal decision makers about weaknesses**
 - **Considerations related to settlement of pension plan claims that may differ from settling other kinds of “individual” claims against the sponsor**



Risk Avoidance Strategies

- **Class actions are prevalent in the US and appear to be an increasing phenomenon in Canada as well. How does a Plan administrator react to a threatened/actual class action and what is your tolerance for such claims?**
 - **Certification battles**
 - **Settlement strategies**
 - **Recent pension related class actions**



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