

CITATION: MacKinnon v. Ontario Municipal Employees Retirement Board, 2012 ONSC 4450  
COURT FILE NO.: 05-CL-006035  
DATE: 20120803

SUPERIOR COURT OF JUSTICE – ONTARIO  
(COMMERCIAL LIST)

RE: WYMAN MACKINNON, Plaintiff

AND:

ONTARIO MUNICIPAL EMPLOYEES RETIREMENT BOARD,  
BOREALIS CAPITAL CORPORATION, BOREALIS REAL ESTATE  
MANAGEMENT INC., IAN COLLIER, R. MICHAEL LATIMER AND  
MICHAEL NOBREGA, Defendants

BEFORE: MORAWETZ J.

COUNSEL: Mark Zigler and Jonathan Bida, for the Plaintiff

Peter Griffin and Eli Lederman, for the Defendants, Ontario Municipal  
Employees Retirement Board, Borealis Capital Corporation, and Borealis  
Real Estate Management Inc.

R. Bruce Smith and Christopher Bardsley, for the Defendants, Ian Collier, R.  
Michael Latimer and Michael Nobrega

HEARD &  
ENDORSED: JUNE 28, 2012

ENDORSEMENT

[1] On June 28, 2012, the record was endorsed as follows:

The motion proceeded on an unopposed basis. I am satisfied that the requested relief is appropriate in the circumstances. The motion is granted and the order has been signed in the form submitted. Brief reasons will follow.

[2] These are the reasons.

[3] This was a motion to approve the settlement of a representative action under subrule 10.01 (3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[4] In 2005, this action was commenced against the defendants alleging breaches in the transactions whereby Ontario Municipal Employees Retirement System (“OMERS”) transferred

management of its real estate assets to Borealis Real Estate Management Inc. ("Borealis") in 2002 and subsequently reassumed asset management in 2004. The plaintiff alleged that the transactions were improper and at commercially unreasonable levels leading to increased costs for the pension plan.

[5] The plaintiff obtained a representation order to proceed on behalf of all persons who had a present, future, contingent or unascertained interest in the Ontario Municipal Employees Retirement System Fund or may be affected by this proceeding (collectively, the "representative persons").

[6] The parties spent years litigating pleadings motions, which were appealed to the Court of Appeal. Following the release of the Court of Appeal's decision permitting certain claims to proceed, the parties engaged in a mediation and fact-finding process chaired by Mr. Stanley Beck, Q.C.

[7] The defendants made extensive documentary production which had not previously been available to the plaintiff. These documents were reviewed by experts, counsel and Mr. Beck. In addition, Mr. Beck reviewed the governance practices of OMERS in the context of the disputed transactions.

[8] Mr. Beck released a lengthy report and letter of recommendation to the court (his "Report and Recommendations"). Mr. Beck found no wrongdoing by any defendant and concluded that the disputed transactions were carried out on commercially reasonable terms. He did, however, conclude that the plan sponsors and stakeholders were not informed of the essential underlying facts, which raised serious questions giving rise to these proceedings. Mr. Beck further concluded that more detailed disclosure by OMERS fully explaining transactions and events at the time, which had not previously been supplied, may have avoided this litigation. He observed that OMERS' processes today will help to ensure better communication and its new strong governance practices will avoid these types of issues in future.

[9] Mr. Beck indicated that, although there were not actual conflicts of interest in the transactions, and the defendants acted appropriately throughout, the OMERS Board ought to have taken greater care to have avoided the appearance of a conflict of interest.

[10] Mr. Beck concluded that the outsourcing of real estate asset management from OMERS to Borealis in June 2002 was done on commercially reasonable terms based on industry models. However, by November 2003, OMERS concluded that the management of real estate assets was more expensive when outsourced to Borealis than it was projected to be if OMERS took back the management "in house".

[11] Mr. Beck further concluded, that since the commencement of the litigation, there have been extensive governance changes at OMERS. The processes in place today will help to ensure better communication and governance, thereby avoiding perceived conflict of interest issues in the future.

[12] The plaintiff is satisfied that these governance changes address his and other CUPE members' concerns. Since the events giving rise to this litigation, OMERS and CUPE Ontario

have established improved working relationships and, further, they have confidence in, and fully support, the current leadership team at OMERS.

[13] A settlement agreement was signed by the parties to resolve this litigation. It recognizes the improved governance structure at OMERS and Mr. Beck's fact-finding report. The key terms of the settlement provide that this action shall be dismissed in a manner that shall be binding on all represented persons and that OMERS will reimburse the plaintiff for his costs and professional fees in the action and the mediation. It is noted that this is to be the sole monetary payment made by any defendant. Further, the parties release each other in relation to the facts and allegations pleaded in this action and Mr. Beck's Report and Recommendations are a matter of public record.

[14] The settlement agreement is recommended by Mr. Beck as being fair and in the best interests of all members and stakeholders of the OMERS pension plan and the parties accept the findings and conclusions expressed in the Report and Recommendations.

[15] Extensive notice of the settlement approval hearing was provided in accordance with the court's order as follows:

- (a) a joint press release was issued;
- (b) a newspaper notice was made in the Toronto Star on two occasions;
- (c) the notice was mailed, faxed and emailed to all the stakeholder groups representing employers and unions, who are in a position to keep the plan members informed; and
- (d) the notice, settlement agreement, press release and motion record were all published on class counsel's website.

[16] The due date for objections was June 8, 2012 and no objections were made.

[17] Rule 10.01 (3) provides that a judge may approve a settlement in a representative action where: (a) the representative plaintiff agrees to the settlement, (b) the settlement will be for the benefit of the represented persons and (c) requiring service on those represented persons would cause undue expense or delay.

[18] It seems to me that the assessment of a settlement in a Rule 10 representative action is analogous to the analysis of settlement approval under the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

[19] In approving the settlement of a representative action in *Ironworkers Ontario Pension Fund v. Research In Motion Ltd.*, (2007), 87 O.R. (3d) 721 at para. 20 (S.C.J.) [Ironworkers]. C. Campbell J. noted that Rule 10 has been described as the "simplified procedure" version of proceedings under the *Class Proceedings Act, 1992*, S.O. 1992, c.6 and that it is "designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 [*Class Proceedings Act, 1992*] order".

[20] In *Ironworkers*, C. Campbell J. affirmed the approach and factors to consider in the approval of settlements in class proceedings. These factors include:

- (i) likelihood of recovery or likelihood of success;
- (ii) amount and nature of discovery, evidence or investigation;
- (iii) settlement terms and conditions;
- (iv) recommendation and experience of counsel;
- (v) future expense and likely duration of the litigation;
- (vi) recommendation of neutral parties, if any;
- (vii) number of objectors and nature of objections; and
- (viii) the presence of arm's-length bargaining and the absence of collusion.

[21] Counsel to the plaintiff submitted that the overriding principle is whether the settlement is fair, reasonable and in the best interests of the class as a whole, and not whether it meets the demands of a particular member. Further, a settlement must fall within the range of reasonableness in order to obtain court approval; it need not be "perfect" in every respect. There is a "strong initial presumption of fairness" when the settlement is negotiated at arm's length. See *Martin v. Barrett*, [2008] O.J. No 2105 at paras. 20-21 (S.C.J.) and *Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128 at paras. 55-56 [Serhan].

[22] Counsel further submits that a focus on the interest of the representative persons as a whole is particularly appropriate in this action. This action relates to the administration of OMERS, rather than seeking payment to individual beneficiaries. As noted by the Court of Appeal, this action was brought "to ensure the due administration of the pension fund".

[23] Counsel to the plaintiff takes the position that this action was commenced as there were serious concerns regarding transparency, governance and administration of OMERS in respect of the disputed transactions.

[24] It is clear from the record that the parties in this action had the benefit of a lengthy mediation and fact finding process with Mr. Beck, an experienced law professor, corporate and securities lawyer and a former chair of the Ontario Securities Commission. Mr. Beck performed a thorough review of all of the evidence and expert reports. He concluded that there was no wrongdoing and no breach of duty by any of the defendants.

[25] Further, the parties have had the benefit of extensive documentary disclosure and review by a neutral third party. The parties have a thorough understanding of the liability issues raised and the likely conclusions by a court. This was recognized in *Serhan* as an important factor to be taken into account in approving a settlement.

[26] It is also clear that the transactions at issue in this action raised concerns about transparency and governance at OMERS. However, counsel to the plaintiff acknowledges that these concerns have been substantially addressed through the changes to OMERS' policies and practices that took place over the course of this litigation.

[27] Mr. Beck's report found that these policies and procedures have been implemented.

[28] Finally, the settlement provides for payment of Mr. MacKinnon's costs in pursuing this action and in implementing the settlement. This is consistent with the Court of Appeal's findings in this action that the plaintiff should be fully indemnified for his costs, which have been incurred on behalf of all the pension plan members. With respect to quantum, it is noted that OMERS has reviewed and approved these amounts which I consider to be fair and reasonable in the circumstances.

[29] In the result, an order shall be issued approving the settlement agreement in its entirety and dismissing the action against all defendants.

  
MORAWETZ J.

**Date:** August 3, 2012