Legal

FOUNDATIONS OF TRUST
MANAGEMENT STANDARDS

Please Note: Participant booklets exclude some slides.

International Foundation
OF EMPLOYEE BENEFIT PLANS
CANADA

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Key Knowledge Area: Legal

The objective of FTMS is to increase awareness and understanding of the basics of the four key knowledge areas related to the effective management of trusts, highlight why they are important and identify sources of additional information.

Legal: Learning Objectives

- **Define** basic terms
- **Explain** the key elements and purpose of Trust Agreements
- **Identify** key legislation and their implications for operation of trusts
- **Understand** Trustees’ fiduciary obligations
- **Explain** Trustee’s basic duties

Legal: Learning Objectives

- **Explain** Trustee's basic duties
- **Consider** examples of difficult situations Trustees have found themselves in (court cases and arbitration decisions)
- **Identify** strategies to protect Trustees, beneficiaries, settlors and participating employers
- **Explain** fiduciary liability insurance policies and common exemptions clauses

How We Will Cover It

Lesson 1: The Nature of Trusts

Lesson 2: Trustee Duties

Lesson 3: Trustee Duties, Breach of Trust and Trustee Expenses

How We Will Cover It

Lesson 1: The Nature of Trusts

a) Elements of a Trust
b) Purpose and Importance of the Trust Agreement
c) Purpose and Importance of Participation Agreements
d) Role of a Trustee

Nature of a Trust

- A trust is a legal relationship where the ownership of assets is divided into two parts:
  - Legal ownership (Trustee)
    - Right to deal with the assets—Sell, trade, use
  - Beneficial ownership
    - Right to benefit from the asset
- Trustee(s) has the legal authority to control the asset, but must do so for the benefit of the trust's beneficiaries and according to the terms of the trust

Fiduciary Duties

- Where the law sees power (trustee) and vulnerability (beneficiary), it imposes strict, *i.e.* fiduciary obligations from the trustee towards the beneficiaries
- Key principles:
  - Trustees must act in the best interests of beneficiaries (duty of loyalty)
  - High standard of care (duty of care)
  - Treat beneficiaries fairly and equally (duty of evenhandedness)

Primary Sources of Law

- Common Law
  (*e.g.* court cases, arbitration decisions)
- Contracts
  (*e.g.* Trust Agreement, Collective Agreements)
- Legislation

Legislation

- Trust legislation, *e.g.* Trustee Act (Alberta)
- Pension legislation, *e.g.* Pension Benefits Standards Act (British Columbia)
- Income Tax Act
- Human rights legislation, *e.g.* Human Rights Code (Ontario)
- Canadian Charter of Rights and Freedoms

Employee Benefit Trusts

- Trusts established for the benefit of employees
- Usually require contributions for each hour worked
- May be established to provide pension, welfare, training, supplementary unemployment benefits, etc.

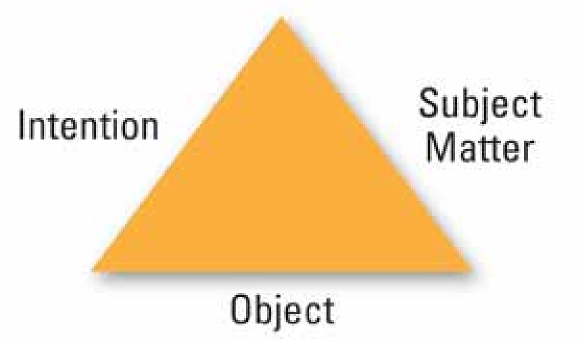
Trusts for Union Members

- Generally settled based on negotiated collective agreements
- Parties to the collective agreement prepare a "Trust Agreement" to establish the trust
- Collective agreement will commonly require contributions to the trust
- Trusts may be "jointly trusteed" by union and management
- May be multi-employer and/or "sector wide"

Elements of a Trust: Three Certainties

The law requires "three certainties" to establish a valid trust

1) **Certainty of intent:** It must be clear that the party that transferred the initial trust property to Trustees (the settlor) intended that the property be held in trust
2) **Certainty of subject matter:** It must be possible to identify the property that is to be held in trust
3) **Certainty of object:** It must be possible to identify the trust's beneficiaries*



* In some cases, a trust may lack identifiable beneficiaries but be valid if it is established for the benefit of a precise, identifiable purpose; see *Dionisio v. Mancinelli*

Difficult Scenario No. 1

Dionisio v. Mancinelli, 2004 CanLII 34626 (ON SC)

- Issue—Validity of the Trust
- LiUNA Ontario Provincial District Council ("OPDC") set-up a committee to establish an organizing fund
- Draft trust agreement says the purpose of the trust was to pay:
    1. For promoting the organizing fund,
    2. For the administration of the fund, and
    3. All legal and related costs incurred in organizing campaigns and related proceedings.

Dionisio v. Mancinelli *(continued)*

- OPDC delegates approved the draft trust agreement and funding recommendations
- LIUNA, Local 183's Exec challenged the trust in Court
- The Court declared that the trust was invalid because:
  - There were no identifiable beneficiaries
  - The identified "purpose" was imprecise and indefinite

Dionisio v. Mancinelli *(continued)*

- Recall: Trusts generally have to be for identifiable beneficiaries
- There are exceptions for "purpose trusts", either charitable or non-charitable
- Non-charitable purpose trusts require a "*specific* non-charitable purpose"
- Local 183's challenged the trust on the basis that the purpose of the Trust was not specific

Dionisio v. Mancinelli *(continued)*

- The Trust was allowed to take the contributions and use them for too wide a range of purposes
  - *ex.* one "purpose" was to pay for "all legal and related costs incurred in organizing campaigns and **related proceedings.**"
- The term "related proceedings" was not defined—Trust funds could be used to pay for costs not directly related to organizing campaigns

Trust Agreement vs. Trust Legislation

- Trust Agreement provisions regarding Trustees’ powers and duties takes precedence over provincial legislation (see Ontario’s *Trustee Act*, section 68)
- Trustees’ powers, rights and immunities per provincial legislation are in addition to those set out in the Trust Agreement (see Ontario’s *Trustee Act*, section 68)

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FTMS

Legal

Trust Agreement

A Trust Agreement:

- Sets out purpose and conditions for operation of fund
- Sets out duties and responsibilities of Trustees
- Identifies the parties who established the trust (*i.e.*, parties to Trust Agreement)

Sample Trust Agreement

Elements of a Trust Agreement (See Reading 1C—Sample Trust Agreement):

- Section 1: Definitions
- Section 2: Existence and Purpose of Trust Fund
- Section 3: Contributions
- Section 4: Trustees
- Section 5: Powers, Duties and Responsibilities of Trustees
- Section 6: Miscellaneous Provisions
- Section 7: Participation Agreements
- Section 8: Amendments
- Section 9: Termination of Trust Fund

Trust Agreement—Effective Date

- THIS AGREEMENT AND DECLARATION OF TRUST made as of the ● day of ●
- THIS AGREEMENT AND DECLARATION OF TRUST made effective as of the ● day of ●

Trust Agreement—Parties

BETWEEN:

- Employer Association

(hereinafter referred to collectively as the "Employers" or individually as an "Employer")

OF THE FIRST PART

AND:

- Union Association(s)

(hereinafter referred to collectively as the "Unions" or individually as the "Union").

OF THE SECOND PART

Trust Agreement—Recitals

WHEREAS the Employers and the Unions are parties to Collective Bargaining Agreements which require payments to be made to a Trust Fund in stated amounts in respect of each hour worked by the employees of the Employers, to provide pension benefits for the employees of the Employers; and

WHEREAS to give effect to that purpose, the Employers and the Unions desire to **create a trust and established a fund known as • the Pension Trust Fund (the "Fund"),** to establish a fund for receiving contributions and providing benefits for eligible Employees; and

Trust Agreement—Definitions

- Definitions are usually set out in the first section
- May include a lot of detail setting key terms of the trust
- Defined terms typically begin with a capital letter—Definition does not apply to the same term if not capitalized
- In some agreements, terms may be defined in the body of the trust agreement—Ex. All the students in the FTMS class (the “Students”)

Trust Agreement—Definitions

Example—

- **"Member"** means a person who meets the **E**ligibility **R**equirements of the **P**ension **P**lan as adopted by the **T**rustees, and for whom an individual account has been established, notwithstanding that said person is not an **E**mployee.

Trust Agreement—Title and Purpose

2.01 **Title.** The title to all assets of the Trust Fund shall be **jointly vested** in and remain exclusively in the Trustees. The Trustees shall jointly hold the property of the Fund and shall deal with it in accordance with the terms of the Trust Agreement.

2.02 **Purpose.** The Trustees agree to receive, hold and administer the Fund for the purpose of providing Benefits for the Members and their beneficiaries in accordance with the Pension Plan.

Trust Agreement—Contributions

- 3.01 Members' Contributions
- 3.02 Employer Contributions
- 3.03 Employer Information Requirements
- 3.04 Non-Payment By One Contributor
- 3.05 Employer Contributions Held in Trust
- 3.06 Member Contributions Held in Trust
- 3.07 Audits
- 3.08 Employer Failure to Comply
- 3.09 Grace Period
- 3.10 Collection Costs

Trust Agreement—Board of Trustees

4.01 **Board of Trustees.**

There shall be eight (8) Trustees to administer the Pension Plan in accordance with the terms of this Trust Agreement and the Pension Plan. Four (4) Trustees shall be appointed by the Unions (hereinafter referred to as "Union Trustees"), and four (4) Trustees shall be appointed by the Association (hereinafter referred to as "Employer Trustees"). The appointment of a Trustee shall be in the discretion of the appointing party, provided that the appointing party at all times complies with applicable federal and provincial legislation.

Board of Trustees *(continued)*

- 4.02 Acceptance of Trusts
- 4.03 Resignation, Removal, Incapacity or Death
- 4.04 Fees and Expenses
- 4.05 Chair
- 4.06 Secretary
- 4.07 Execution of Documents and Cheques
- 4.08 Annual Meeting
- 4.09 Meetings at the Request of the Unions and the Association
- 4.10 Other Meetings
- 4.11 Meetings by Conference Call or Consent in Writing
- 4.12 Quorum
- 4.13 Trustees' Deadlock

Trust Agreement—Powers, Duties and Responsibilities of the Trustees

- 5.01 Administration of the Trust Fund
- 5.02 Collection of Contributions
- 5.03 Liability of Trustees
- 5.04 Authority of Trustees
- 5.05 Liability and Indemnity
- 5.06 Liability of Unions, Employers and Members
- 5.07 Powers

Trust Agreement—Trustee Liability

5.05 **Liability and Indemnity**. No Trustee shall be liable for the act or omission of any other Trustee. The Fund shall indemnify and save harmless the Trustees and each of them, of, from and against any loss, expense, claim, demand, action or thing of any nature whatsoever, arising out of the performance or purported performance of their duties or responsibilities hereunder **except that this indemnity shall not, in any way, extend so as to protect any Trustee with respect to any matter or thing arising out of his own dishonesty, wilful misconduct or gross negligence**.

Trust Agreement—Amendments

8.01 Amendment. This Trust Agreement may be amended at any time, in whole or in part by the Board of Trustees by a resolution of the Board. No amendment shall authorize or permit;

(a) Any part of the corpus or income of the Fund to be used for or diverted to purposes other than for the exclusive benefit of the Members of the Pension Plan or their beneficiaries or estates;

(b) The elimination of the requirement of an annual audit or its availability for inspection by interested parties;

(c) The Trust Fund to be administered other than by an equal number of Employer Trustees and Union Trustees with equal voting privileges.

Termination of Trust Fund

9.01 This Trust Agreement may be terminated only by mutual agreement of the Unions and the Association . . . in which case the Trustees shall wind up and terminate the Fund . . . as follows:

(a) Provide for a final audit and accounting for the purpose of the termination of the Fund;

(b) Make payment or provision for payment out of the Fund of all expenses, claims and obligations of the Fund including the expenses incidental to such termination;

Termination of Trust Fund

(c) Distribute the balance or surplus, if any, in any one or a combination of the following forms:

(i) Improvements to Benefits to Members, their spouses, beneficiaries or estates including the purchase of annuities;

(ii) Cash payments to Members, their spouses, beneficiaries or estates;

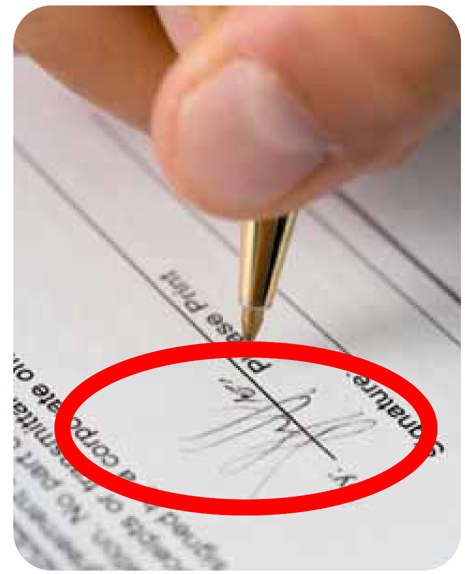
(iii) Transfers to a Registered Retirement Savings Plan, or other similar vehicle, in such manner as the Trustees deem equitable and in keeping with the requirements of applicable legislation.

Participation Agreement

7.01 Participation Agreements. Each Employer shall enter into a Participation Agreement with the Trustees in the form set out at Appendix "B" hereto.

Participation Agreements

- Generally, when a trust is established, participating employers are parties to a (1) **Trust Agreement** or (2) **collective agreement** that requires them to make contributions
- The terms generally provide that later employers who sign (1) the **collective agreement** or a (2) **participation agreement** may also contribute



Importance of Participation Agreements

- Employers' obligation to make contributions generally cannot be enforced unless the employer is ***legally bound*** by some document
- If an Employer is not party to a Collective Agreement requiring contributions—Either directly or through representation by an Employer Association—Then Trustees should require the employer to enter into a Participation Agreement

See sample Participation Agreement in Participant Guide
See Reading 1C—Sample Trust Agreement, page 1C-40

Difficult Scenario No. 2

Boe v. Alexander, 1987 CanLII 2596 (BC CA)

- U.A. Local 170 pension plan (established in 1966) required at least five years of service before entitlement to benefits were "vested"
- Under the terms of the Plan, only employer contributions were permitted
- U.A. Local 170 Business Manager began working for the U.A. International in 1967—his entitlement was not vested at that time
- From 1967 to 1973, he made his own contributions to the Plan and U.A. International reimbursed him for the cost

Difficult Scenario No. 2

- Some Plan members filed a claim challenging the Trustees' decision to accept the self-contributions
- The Trustees argued that the Trust Agreement gave them very broad discretion and that, on that basis, it was not open to the Court to challenge their decision
- The Judge ruled against the Trustees. He ruled that:
  1. Self-contributions were not expressly permitted under the terms of trust, and
  2. In accepting the "self-contributions" the Trustees failed to treat all beneficiaries even handedly

Boe v Alexander *(continued)*

- The Judge set out some general principles for when a Court can review Trustees' decisions:
  - Trustees failed to exercise discretion
  - Trustees acted dishonestly,
  - Trustees failed to exercise "the level of prudence expected from a reasonable businessman", or
  - Trustees failed to "hold the balance evenly between beneficiaries" or acted in a manner "prejudicial to the interests of a beneficiary"

The "More Than One Hat" Theory

The Board of Trustees of an employee benefit trust may be appointed by Unions, Participating Employers and/or other stakeholders

The "Multiple Hat" theory says . . .

Multiple Hats

"The Trustee may indeed have multiple hats, including that of a Trustee, that of a union or employer representative and that of a beneficiary, <u>but he is bound to wear only the hat of the Trustee when he carries out any duty of the Trustee</u> . . . He must act only in the best interest of all beneficiaries and he will be held to account if his conduct falls short of the standard."

Multiple Hats—Difficult Scenario 3

Cowan v Scargill [1984] All ER 6750

- Jointly-governed pension fund for coal miners in UK
- Union Trustees sought to limit overseas investments and investments in industries competing with coal
- Employer Trustees brought court claim alleging improper use of investment power

Cowan v Scargill *(continued)*

Court ruled:

- Trustees must act in plan member's best *financial* interest, as measured by *return on investments*
- Must not put working members' interest over retired members

"The starting point is the duty of Trustees to exercise their powers in the **best interests** of the **present** and **future** beneficiaries of the trust . . . When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are **normally their best financial interests**."

Multiple Hats—
Supreme Court Doubts

Indalex Limited Supreme Court of Canada [2013] 1 SCR 271

- Indalex filed for creditor protection under *Companies' Creditors Arrangement Act*
- Retirees faced losses to their pension benefits due to underfunding
- Indalex got approval for "debtor-in-possession" financing allowing them to borrow capital for restructuring, giving new lenders a "super-priority" over beneficiary claims
- The Supreme Court of Canada determined that breached its fiduciary duty to Plan members
- Court found "two-hats" doctrine inappropriate for managing competing and conflicting roles for employer-administrators

Multiple Hats—
Supreme Court Doubts

"Where interests do conflict, **I do not find the two hats metaphor helpful.** The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan**. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations** to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". **What is important is to consider the consequences** of the decision, not its nature."

–Deschamps J.
Re Indalex Ltd.

Multiple Hats— Supreme Court Doubts *(continued)*

"As I see it, the only breach of fiduciary duty committed by Indalex occurred when, upon insolvency, Indalex's corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict—The conflict itself was unavoidable. **Its breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the CCAA proceedings as if there were independent plan administrators**."

–Cromwell J.
Re Indalex Ltd.

Initial Duties of a Trustee

Upon acceptance of your position as a Trustee,
you are obligated to:

- Ensure you have been **properly appointed** (*e.g.*, if you are replacing a former Trustee, ensure you are satisfied as to the sufficiency of the other Trustee's resignation)
- Ensure you have signed all necessary documents of appointment as have other Trustees—Acceptance of Trust

See Reading 1C—Sample Trust Agreement—Appendix "A", Acceptance of Trust, page 1C-39

Initial Duties of a Trustee *(continued)*

- **Review** all necessary documentation, including:
  1. Trust agreement
  2. Benefit plan
  3. Collective agreement
  4. Trust policies
  5. Actuarial reports
  6. Audit reports
  7. Meeting minutes from last two years
  8. Agreements with agents and professionals
  9. Errors and Omissions (E&O)—Liability Insurance
- Ensure you have **ready access** to all documents necessary for proper administration of the trust (in hard copy or electronic form)

Initial Duties of a Trustee *(continued)*

- Familiarize yourself with the **agents** and **professionals** who act on behalf of the trust
- Familiarize yourself with the different **trust committees** and their responsibilities

In summary, you are well acquainted with the operations of the trust!

Standard of the "Prudent Person"

- In exercising their role, a Trustee must meet the "standard" of "prudent person"
- This concept comes from the common law
- It imposes a duty on the Trustee to act honestly and "with the same degree, care, skill, and prudence as a reasonable person would exercise in the management of their own affairs"

Pension Legislation Imposes a Higher Standard

Example from Nova Scotia's *Pension Benefits Act*:

Care, diligence, knowledge and skill

Section 29 (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Section (2) The administrator or, if the administrator is a committee or a board of Trustees, a member of the committee or board shall use in the administration of the pension plan, and in the administration and investment of the pension fund, all relevant knowledge and skill that the administrator or member possesses or, by reason of profession, business or calling, ought to possess. (Emphasis added)

Québec *Supplemental Pension Plans Act*

Section 151. The pension committee shall exercise the prudence, diligence and skill that a reasonable person would exercise in similar circumstances; it must also act with honesty and loyalty in the best interest of the members or beneficiaries.

The members of the pension committee shall use in the administration of the pension plan all relevant knowledge or skill that they possess or, by reason of their profession or business, ought to possess.

Section 151.1. The pension committee is presumed to have acted with prudence where it acted in good faith on the basis of an expert's opinion.

Standards Under ERISA (United States)

- The standard in the *Employee Retirement Income Security Act* (ERISA) "the prudent person acting in a like capacity and familiar with such matters one would use in the conduct of an enterprise of like character and with like aims"
- Requires that Trustees have a more meaningful degree of familiarity with the subject matter with which they deal than is the case in Canada

What We Have Learned

- Basic terms and elements related to trusts
- Key legislation and their implications for operation of trusts
- The purpose and key elements of Trust Agreements and participation agreements
- Fiduciary duty and initial obligations of Trustees

Getting Connected

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How We Will Cover It

Lesson 1: The Nature of Trusts

Lesson 2: Trustee Duties

Lesson 3: Trustee Duties, Breach of Trust and Trustee Expenses

Specific Duties of Trustees: Six Principal Duties to Discharge

1. **To administer the trust**
2. To possess and protect the property of the trust
3. To provide for beneficiaries
4. To make the trust property productive
5. To collect amounts due the trust
6. To account for handling of the funds

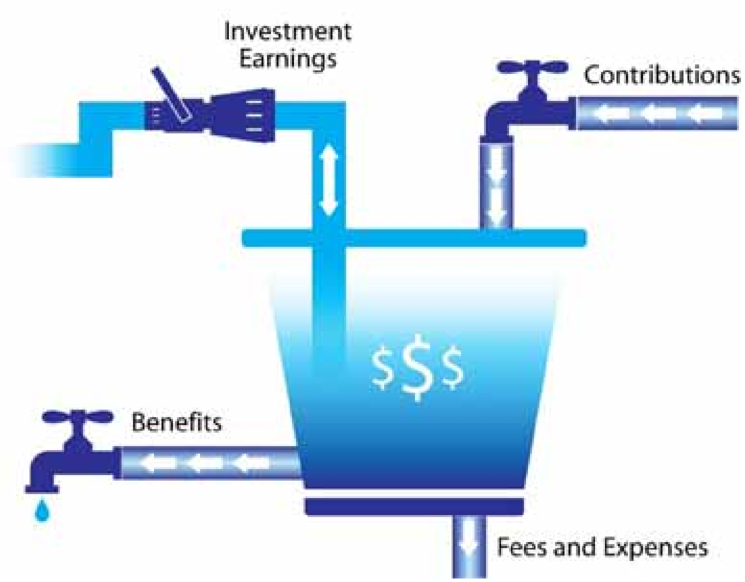
1. To Administer the Trust

- The Board of Trustees is the legal "Administrator"
- Trustees are responsible for overall **operation** and **administration** of the trust fund
- Administration encompasses **all activities** required to make the trust "work" to **achieve its purpose**

Overview of Administration

This includes:

- Receiving, holding, having charge of assets
- Managing disbursements
- Accounts for all receipts and disbursement



Consider Nova Scotia PBA's Standard of Care

Care, diligence, knowledge and skill

Section 29 (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that **a person of ordinary prudence would exercise in dealing with the property of another person.**

Nova Scotia PBA's Standard of Care *(continued)*

Section 29 (2) The administrator or, if the administrator is a committee or a board of **Trustees**, a member of the committee or board **shall use** in the administration of the pension plan, and **in the administration and investment** of the pension fund, **all relevant knowledge and skill that the administrator or member possesses or, by reason of profession, business or calling, ought to possess.**

"Conflict of Interest" Provision in Alberta's EPPA

Section 35 (4) The administrator of a pension plan or, if the administrator is a board of Trustees, a member of that board, <u>must not, while acting in the capacity of administrator, knowingly allow their interests to conflict with the administrator's powers and duties</u> in respect of the pension plan.

(5) For the purpose of subsection (4), an administrator does not knowingly allow the interests of the administrator to conflict with the administrator's powers and duties in respect of the pension plan <u>merely because the administrator is or may become entitled to a pension or other benefit under the plan</u>.

Delegation of Administration to Agents

- Trustees have right to hire agents . . .
- Depending on nature and size of trust, aspects of administration may be delegated to an **administrative agent**, **custodian**, **auditor**, **actuary**, **legal counsel**, **investment manager(s),** etc.
- But . . . Trustees are still ultimately responsible for proper selection and supervision

Manitoba's *The Pension Benefits Act*

Section 28.1 (6) **Employment of agent**
Where it is **reasonable and prudent** in the circumstances so to do, the administrator of a pension plan **may** employ or appoint one or more agents to carry out any act required to be done in the administration of the plan and in the administration and investment of the pension fund.

Manitoba's *The Pension Benefits Act* *(continued)*

Section 28.1 (7) **Responsibility for agent**
An administrator of a pension plan who employs or appoints an agent **shall personally select** the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed or appointed, and the administrator <u>shall carry out such **supervision** of the agent as is prudent and reasonable</u>.

See Reading 1B—Pension Benefits Acts (Excerpts)

Ontario *Pension Benefits Act*

Section 22(8) **Employee or agent**
An **employee** or **agent** of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

Difficult Scenario No. 4

McCann v McColl, 2004 CanLII 21954 (ON LRB)

- The Board of Trustees of the Canadian Elevator Industry Pension Trust Fund were deadlocked on the appointment of the Fund actuary (Union and Employer Association appointees could not agree)
- Trust Agreement provided that a neutral arbitrator would resolve deadlocks

See Reading 1C—Sample Trust Agreement—page 22

McCann v McColl *(continued)*

REFERENCE MATERIAL

- Arbitrator selected the actuary with no insured cap on liability for damages, which had only slightly higher fees
- Arbitrator's decision states that Trustees "should choose the most economical manner of performing any task"
- Therefore, if service providers are equally qualified, the least expensive is the appropriate choice
- In this case, bids were very similar, but one distinction was the lack of an insured liability cap

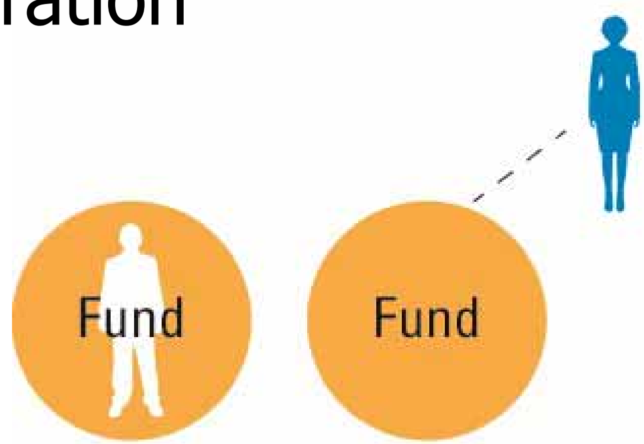
See Reading 1D—*McCann v McColl* 2004 CanLII 21954 (ON LRB)

Importance of Meetings

- At Trustees' meetings:
  - Day-to-day trust operations are discussed and reviewed
  - Trustees make decisions and give instructions
- Absence or abstaining from voting does not excuse liability for decisions
- Importance of **proper minute taking** and **review for accuracy** cannot be overstated

Types of Administration

1. Self-administration—
   Permanent employee(s) of the fund
2. Third-party administrator—
   Firm specializing in administration
3. Addressed in session
   on Administration
   and Governance



Specific Duties of Trustees: Six Principal Duties to Discharge

1. To administer the trust
2. **To possess and protect the property of the trust**
3. To provide for beneficiaries
4. To make the trust property productive
5. To collect amounts due the trust
6. To account for handling of the funds

2. To Possess and Protect the Property of the Trust

- The **ultimate responsibility** of Trustees is to **safeguard** trust funds
- This includes:
  - Accounting for receipt and deposit of employer contributions
  - Satisfying themselves that any agent responsible for receipt and deposit is following procedures for receipt and disbursement

2. To Possess and Protect the Property of the Trust *(continued)*

- Trust property ***must be kept separate*** from Trustees' own property
- There must be complete separation of interest and relationship between the ***administrator*** and ***auditor***

Specific Duties of Trustees: Six Principal Duties to Discharge

1. To administer the trust
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3. To Provide for Beneficiaries

- Trustees are ultimately responsible for achieving the **purpose** of trust
- To **provide benefits** for fund **beneficiaries**
- To do so **strictly** in accordance with the eligibility requirements and other terms and conditions of the **Trust Agreement** and/or the **benefit plan document**

Difficult Scenario No. 5

Garcia v. Labourers' International Union of North America, Local 1059, 2015 ONCA 230 (CanLII)

- Following expulsion from LIUNA, Local 1059, Garcia sought:
  - Ongoing benefits from the Local 1059 Benefit Plan so long as he had an adequate balance in his dollar bank account, *or*
  - A cash payment for the balance of his account
- Trustees denied Garcia's claim on the basis that he was ineligible under the terms of the Benefit Plan

Garcia v. Local 1059 *(continued)*

- Garcia challenged the Trustees' authority to deny him entitlement
- He made a technical argument:
  - The Trust Agreement granted Trustees the authority to adopt and administer the Benefit Plan, including setting and amending eligibility requirements
  - If this was allowed, the trust would be invalid because the Trust Agreement would be insufficient to identify the beneficiaries of the trust—The Benefit Plan text had to be consulted

Garcia v. Local 1059 *(continued)*

- The Ontario Superior Court of Justice and the Ontario Court of Appeal found against Garcia
- It was proper to read the Trust Agreement and the Benefit Plan text together to determine the beneficiaries of the trust
- On this basis, individuals who cease to be members of Local 1059 are no longer beneficiaries and, in that case, the notional balance in their dollar bank account becomes part of the general funds of the plan

Even Handedness

- Trustees (fiduciaries) are required to be even-handed or impartial in their treatment of the trust's beneficiaries
- In simple terms, the duty of even-handedness or impartiality means that a fiduciary must treat different trust beneficiaries and classes of trust beneficiaries equitably and is not permitted to favour certain trust beneficiaries or certain classes of trust beneficiaries

Even Handedness

Boe v. Alexander, 1987 CanLII 2596 (BC CA)

- Recall—*Boe* was about the UA. Local 170 Business Manager who continued to make contributions after he left Local 170
- Under the terms of the Plan, only employer contributions were permitted
- The Trustees argued that they have very broad discretion and that they could decide to extend coverage to a former member and accept self-contribution
- The B.C. Court of Appeal rejected the argument

Even Handedness—
Boe v. Alexander *(continued)*

The following description of the even-handedness requirement was described by the Court of Appeal:

> "It is I think a primary principle, which need not be laboured by me, that **one of the trustees' first duties was to hold the balance evenly between the beneficiaries and various groups of beneficiaries** and to try to interpret the document and carry out its provisions in the spirit and the letter in which it was expressed. **They were not, nor are they now, entitled to favour one group of beneficiaries in any way as against another. They were obliged to treat all beneficiaries with fairness and impartiality, always attempting to carry out the expressed intention of the settlor**."

Specific Duties of Trustees: Six Principal Duties to Discharge

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5. To collect amounts due the trust
6. To account for handling of the funds

4. To Make the Trust Property Productive

- In addition to safeguarding funds, Trustees are ultimately responsible, to the greatest extent possible, to earn income on funds for the benefit of beneficiaries
- Extent of Trustees' power of investment is determined by (1) the **Trust Agreement**, (2) **legislation** that limits the power of investment for pension funds and type and size of fund

Provincial Trust Legislation

- *Trustee Act* in Nova Scotia requires consideration of eight factors:
  1. General economic conditions
  2. Possible effects of inflation or deflation
  3. Expected tax consequences of investment decisions
  4. Role that each investment or course of action plays within the overall trust portfolio

Provincial Trust Legislation *(continued)*

- *Trustee Act* in Nova Scotia requires consideration of eight factors:
  5. Expected total return from income and appreciation of capital
  6. Other resources of the beneficiaries
  7. Needs for liquidity, regularity of income and preservation or appreciation of capital
  8. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more beneficiaries

Federal Pension Legislation

- Federal **Pension Benefits Standards Act, 1985** (PBSA)
  - Applies to federally-regulated pension plans
  - Also incorporated into provincial pension legislation
  - Quantitative rules: 10% rule and 30% rule
  - "Related Party" rule
- **Income Tax Act** (ITA)
  - Borrowing restrictions
  - Prohibited investment rules

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Federal Pension Legislation *(continued)*

- **10% Rule**—A Pension Plan cannot invest more than 10% of the total market value of its assets in a single business/group of affiliated corporations/etc.
- **30% Rule**—A Pension Plan cannot own, directly or indirectly, more than 30% of the voting shares of a corporation
- **Related Party Rule**—A Pension Plan cannot invest in, or lend money to a "related party" (including participating employers)

Photo source: Marco Verch Professional Photographer under CC 2.0

Responsible Investment

- Developing view that Environmental, Social, and Governance ("ESG") factors are linked to **profitability** (and even viability) of a corporation as well as the **health of the economy** more broadly
- May include issues such as climate change, human rights and governance best practices
- This view gains support of the UN, with the launch of the UN "Principles for Responsible Investment" (UN PRI) at the New York Stock Exchange in 2006

Responsible Investment

- CAPSA Guideline for Risk Management for Plan Administrators—September 2024
- ESG factors can be relevant to assessing a pension fund's risk-return profile

"Using ESG information to provide financial insight is consistent with an administrator's fiduciary duty. Conversely, ignoring or failing to consider ESG information that might materially affect the fund's financial risk-return profile could be a breach of fiduciary duty."

Regulatory Requirements

- Ontario's *PBA* has adopted ESG reporting requirements for Plans' Statement of Investment Policies and Procedures (SIPPs)
  - If ESG factors are incorporated into the investment strategy, then plan administrators must disclose how
  - The terms "environmental, social or governance" are not defined in the *PBA* or its Regulations

Responsible Investment *(continued)*

Spence v American Airlines, USDC (Northern District of Texas) (2025)

- Spence, a pilot employed by AA, sued AA and its Employee Benefits Committee (EBC), in a class action on behalf of DC(401(k)) plan members
- EBC selected a range of investment options for members
  - In addition to alternative fund options, members can open their own brokerage accounts and purchase a wide variety of instruments, including individual stocks
  - Blackrock index funds were among the funds available to members
- Spence alleged that Blackrock engaged in ESG investing for non-financial reasons, and that AA and its EBC breached their duties of prudence and loyalty in accepting rather than challenging Blackrock's ESG proxy-voting practices

Spence v American Airlines *(continued)*

- Court assesses duty of prudence vis-à-vis prevalent standard in the industry and concludes that
  - AA and EBC conducted standard or above-standard evaluation and monitoring of the Plan's investment managers on both quantitative and qualitative metrics
  - Proxy-voting generally delegated to investment managers, monitored (if at all) by investment consultants, and often considered non-material to financial performance
  - No evidence that a prudent plan fiduciary would have replaced Blackrock based on its proxy-voting record
  - No violation of the duty of prudence

Spence v American Airlines (continued)

- **But,** Court holds that the duty of loyalty requires a fiduciary to make decisions exclusively in the best financial interests of plan members—
  - ESG investing "is aimed at, in whole or in part, bringing about certain types of societal change" and is focussed on "non-pecuniary interests"
  - AA had business interests with Blackrock—their funds owned AA securities and lent significant moneys to AA—and so, AA was unwilling to challenge Blackrock
  - AA's business was sensitive to the climate change and renewable fuels debate and AA aspired to be a climate leader and so did not want to challenge Blackrock
  - AA did not act solely and exclusively in the best financial interests of Plan members, had a conflict between its business and fiduciary obligations and breached its duty of loyalty

Responsible Investment *(continued)*

- The legal issues are complex
- There are no clear answers regarding the extent to which ESG factors may be taken into account in the context of the administrator’s primary objective to achieve an optimal rate of return with an acceptable level of risk

See Reading 1E—FSCO* IGN-004 Environmental, Social and Governance (ESG) Factors

What We Have Learned

- Basic terms and elements related to trusts
- Key legislation and their implications for operation of trusts
- The purpose and key elements of Trust Agreements and participation agreements
- Fiduciary duty and initial obligations of Trustees
- Board of Trustees is the trust's legal administrator
- Responsibility for agents and employees
- Assets must be kept separate
- Even Handedness
- Investment Rules
- Emerging Issue—ESG factors

How We Will Cover It

Lesson 1: The Nature of Trusts

Lesson 2: Trustee Duties

Lesson 3: Trustee Duties, Breach of Trust and Trustee Expenses

How We Will Cover It

Lesson 3: Trustee Duties, Breach of Trust and Trustee Expenses

a) Trustee Duties *(continued)*

b) Protecting Against "Breach of Trust"

c) Trustee Expenses

Specific Duties of Trustees: Six Principal Duties to Discharge

1. To administer the trust
2. To possess and protect the property of the trust
3. To provide for beneficiaries
4. To make the trust property productive
5. **To collect amounts due the trust**
6. To account for handling of the funds

5. To Collect Amounts Due the Trust

- The continued viability of the trust depends on collection of amounts due
- Trustees are ultimately responsible for due **enforcement** and **collection** of employer contributions

Delinquency

- Delinquency occurs when an employer fails or refuses to remit contributions in the amount or by the date required by the applicable collective agreement

Delinquency Control

- Trustees' obligation to collect and enforce may be shared with:
  - Trade union
  - Administrator (if appointed)
- This depends on (1) the Trust Agreement and (2) applicable collective agreements

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Legal

Consequences of Delinquency

- Loss of revenue to the fund and/or weakening of the fund's financial position
- Potential for loss of an employee's entitlement to benefits
- Creation of an uneven playing field, (*e.g.*, a construction contractor who delays or doesn't pay contributions may gain competitive advantage over contractors who do pay)

Causes of Delinquency

- Delinquency can stem from:
  - An employer's avoidance/evasion in making payments
  - Administrative problems such as bookkeeping or clerical errors in an employer's office
  - An employer's inability to pay
  - Miscommunication between the employer and the administrator on the obligation to make contributions

Delinquency Control

- Trustees must:
  – Be vigilant in ensuring the union files grievance/arbitration proceedings
  – Ensure creation of a Delinquency Control Program
  – Review delinquency lists and steps being taken by the administrative agent for collections at Trustee meetings

Specific Duties of Trustees: Six Principal Duties to Discharge

1. To administer the trust
2. To possess and protect the property of the trust
3. To provide for beneficiaries
4. To make the trust property productive
5. To collect amounts due the trust
6. **To account for handling of the funds**

6. To Account for Handling of the Funds

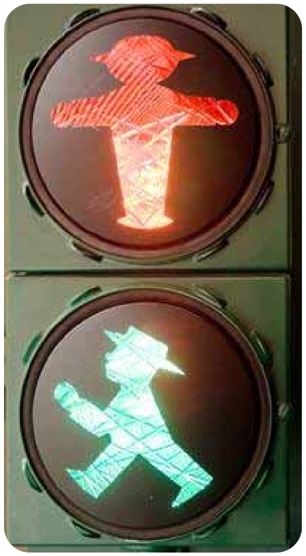
- Ultimate responsibility for proper books and records rests with the Trustee
- Includes audited financial statements, mid-year reports, operating expense budgets, etc.
- Addressed in session on Funding/Investment/Finance

Breach of Trust

1. Meaning of "Breach of Trust"
2. Consequences of a breach
3. What about a breach by a co-Trustee?
4. Exculpatory clauses
5. Fiduciary liability insurance

Breach of Trust

- "Breach of Trust" occurs when a Trustee:
  - Acts contrary to the Trust Agreement
  - Fails to do something required by the Trust Agreement
  - Acts contrary to common law or statutory duties



Consequences of Breach

- Clearly intentional or dishonest conduct such as misappropriation of trust funds or embezzlement or gross negligence will result in **criminal sanctions** and/or **personal liability** if sued by beneficiaries

Consequences of Breach *(continued)*

"Gross negligence involves the reckless indifference to the existing or foreseeable risks and thus, involves something greater than a mere error in judgment."

See Reading 1A—Introduction to Employee Benefit Trusts—page 1A-22

Consequences of Breach *(continued)*

- Honest errors in judgment may, in most cases, be excused by the court as "technical breaches of trust"

Consequences of Breach *(continued)*

Section 96 of British Columbia's *Trustee Act* provides:

Jurisdiction of court to relieve Trustee of breach of trust

Section 96 If it appears to the court that a Trustee, however appointed, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, **but** <u>has acted honestly and reasonably, and ought fairly to be excused for the breach of trust</u> and for omitting to obtain the directions of the court in the matter in which the Trustee committed the breach, then <u>the court **may** relieve the Trustee</u> either wholly or partly from that personal liability.

What About a Co-Trustee Breach?

"A question often arises to the **extent of liability** to which a Trustee may be exposed for the **breach of duty** by one of their **co-Trustees**.

Clearly liability will attach where a Trustee either **participates in** or **knowingly agrees** to **conceal** the improper act or omission of another Trustee.

However, a Trustee's inactivity or passivity may also constitute a breach of trust."

See Reading 1A—Introduction to Employee Benefit Trusts—page 1A-23

What About a Co-Trustee Breach? *(continued)*

- If a co-Trustee has committed a breach of trust:
  - Resignation or other passive activity is not adequate
  - Impropriety must be disclosed to the full Board of Trustees
  - Obtain legal advice regarding whether to commence an action against the Trustee who has acted improperly

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Trust Agreement: Exculpatory Clauses

- Excuse Trustees from liability (*e.g.*, in event of honest errors of judgment)
- Will not hold up in Court in cases of:
  - Wilful or dishonest conduct
  - Gross negligence

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Fiduciary Liability Insurance

- Available for the **fund**, its **Trustees, officers** and **agents**
- Protects in cases of "technical" breaches of trust and, in some cases, even gross negligence
- Generally, policies allow insured parties to recover amounts that they are obligated to pay as a result of a claim (*e.g.*, damages, judgments, settlements, interest and legal costs)
- Policies are also a benefit to beneficiaries, because there is some guarantee that funds will be available as compensation

Understanding the Policy

1. Ask for a copy of the liability insurance document!
2. Review to assess
   - Common areas of coverage
   - Exclusions/exemptions
     (average policy has between 9 and 19 exclusions)
   - Conditions that must be fulfilled before, during and after a claim is made so losses can be recovered
   - Most importantly, know your limit
     (What is your ceiling and is that realistic given your industry?)
3. Review at least once every three years—Times change!
   (*e.g.*, inflation, cybersecurity risks)

Common Exemptions

- Existing/pending claims
  - Discourages purchase of insurance as reaction to rumours of an impending claim
  - Disclosure before signing policy doesn't guarantee coverage of a claim
- Criminal or fraudulent acts or omissions or illegal remuneration or advantage
  - Policies not designed to shield Trustees from illicit activities

Common Exemptions *(continued)*

- Claims requesting only nonmonetary relief (*e.g.*, a claim asking for an order to prevent a Board of Trustees from investing the plan assets with a particular company)
- Claims arising from allegations of libel, slander and defamation of a particular person
- Claims relating to allegations of bodily damage to a person or property

Notice/Reporting Requirements

- Must give written notice of claim together with full particulars "as soon as practicable" in order to recoup any losses under the policy
  - When claim is made
  - When claim in pending
- "As soon as practicable" subject to judicial interpretation if coverage denied on basis that notice was not soon enough
- Any delay in disclosing pertinent information could hinder recovery of losses such as damages and legal costs
- Early disclosure is key. The most often cited reason for denying a claim is delay

Determining Coverage

- Flows from risk assessment
- Litigation unpredictable and costly; a claim can last for years in judicial system
- In most policies, legal fees incurred defending a claim are part of, not in addition to, the limit of coverage under the policy
- Desire to tailor coverage
  – Addition of clauses (*e.g.*, third-party administrator coverage)
  – Amendment or removal of common exclusions

See Reading 1I—Chapter 10—"Trustee Fiduciary Liability Insurance" from *Employee Benefits in Canada*

Trustee Expenses

- Trustees can reimburse themselves from the trust property from all expenses properly incurred in the execution of their trust powers
- Expenses are taxable to the extent Trustees receive a non-accountable allowance, (*e.g.*, a non-accountable per *diem* allowance given while attending a conference may be considered taxable income)
- Trustee compensation?

See Reading 1H—Chapter 8—"Legal Aspects of Trustee Expenses and Attendance at Educational Programs", Trustee Dos and Don'ts, page 1H-9, from *Employee Benefits in Canada*

Trustee Expenses *(continued)*

- Trustees are personally liable for breach of trust in civil suits
- Various *Criminal Code* offences for criminal conduct involving theft, misappropriation or embezzlement of trust funds
  - See s. 336 of the *Code* for criminal breach of trust; s. 322 of the *Code* for the offence of theft; s. 330 of the *Code* for the separate offence of theft by a person required to account and s. 380 of the *Code* for the offence of fraud

Single Most Important Message

- ***Importance of Trust Agreement***

  "It may be safely said that the Trust Agreement is the most important document which must be read and understood by Trustees and for that matter, observed to the letter"

What We Have Learned

- Basic terms and elements related to trusts
- Key legislation and their implications for operation of trusts
- The purpose and key elements of Trust Agreements and participation agreements
- Fiduciary duty and initial obligations of Trustees
- Board of Trustees is the trust's legal administrator
- Responsibility for agents and employees
- Assets must be kept separate
- Even handedness
- Investment Rules
- Emerging Issue—ESG factors

What We Have Learned

- Basic Trustee duties
- Strategies for protecting yourself, other Trustees, beneficiaries, settlors and subsequent participating employers
- Trustee expense reimbursement considerations

Your Feedback Is Important.
Please Scan This QR Code.

Session Evaluation

Note to Participants Regarding Readings

The focus of this module is on the law governing trusts and Trustees, how trusts are created as well as the responsibilities, duties, standards of care and competence required of Trustees under the law.

Please note that while the focus and/or examples provided in some of the readings are on pension plans and Ontario legislation, generally, the basic intent and requirements of the law and duties of Trustees apply to any type of trust or plan. Participants are encouraged to understand the basic intent and requirements as well as how they apply to any type of employee benefit trust across Canada.

THE READINGS FOR THIS MODULE INCLUDE:

1A Introduction to Employee Benefit Trusts
Roberto Tomassini and Padraigin Murphy, Koskie Minsky LLP, Toronto, Ontario.

1B Pension Benefits Acts (Excerpts)

- Federal Pension Benefits Act, 1985, RSC 1985, c. 32 (2nd Supp.)
- British Columbia Pension Benefits Act, Part 6, Section 35
- Alberta Pension Benefits Act, Chapter E-8.1, Part 6, Div. 2 and 3 Administrator
- Manitoba Pension Benefits Act, CCSM, c. P32
- Ontario Pension Benefits Act, R.S.O., 1990, c. P.8, s. 22-22.1
- Québec Pension Benefits Act, CQLR, c. R-15.1
- New Brunswick Pension Benefits Act, SNB 1987, c P-5.1
- Nova Scotia Pension Benefits Act, SNS 2011, c. 41
- Newfoundland and Labrador Pension Benefits Act, 1997, SNL 1996, c. P-4.01

These excerpts illustrate the higher standards of care codified for administrators of pension plans, including Trustees.

1C Sample Trust Agreement (including Appendix A, Acceptance of Trust and Appendix B) and Participation Agreement
While written for a pension trust, the types of provisions addressed are relevant to most trusts.

1D *McCann v McColl* 2004 CanLII 21954 (ON LRB)

(continued)

1E Financial Services Commission of Ontario IGN-004, Environmental, Social and Governance (ESG) Factors
Note: Effective June 8, 2019, the Financial Services Regulatory Authority of Ontario (FSRA) took over regulatory duties from both the Financial Services Commission of Ontario (FSCO) and the Deposit Insurance Corporation of Ontario (DICO).

1F Fiduciary Responsibility
Roberto Tomassini and Mark Zigler, Chapter 5, *Employee Benefits in Canada*, Fourth Edition Revised, Zigler, Hunter, Mazzuca, Tomassini (eds.).

1G Trustees and Their Professional Advisors
Mark Zigler, Chapter 6, *Employee Benefits in Canada*, Fourth Edition Revised, Zigler, Hunter, Mazzuca, Tomassini (eds.).

1H Legal Aspects of Trustee Expenses and Attendance at Educational Programs
Michael Mazzuca and Mark Zigler, Chapter 8, *Employee Benefits in Canada*, Fourth Edition Revised, Zigler, Hunter, Mazzuca, Tomassini (eds.).

1I Trustee Fiduciary Liability Insurance
Lillo DiPasquale, Chapter 10, *Employee Benefits in Canada*, Fourth Edition Revised, Zigler, Hunter, Mazzuca, Tomassini (eds.).

1J Responsible Investment: The Legal Perspective
Brittany Greenberg and Apollonia Mastrogiacomo, Chapter 44, Fourth Edition Revised, Zigler, Hunter, Mazzuca, Tomassini (eds.).

INTRODUCTION TO EMPLOYEE BENEFIT TRUSTS

BY

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Toronto, Ontario

(Revised April 2024)

***originally authored by Alan Minsky, KC**

Introduction to Employee Benefit Trusts

By

Roberto Tomassini and Padraigin Murphy

INTRODUCTION

An employee benefit trust fund which has been created to receive contributions from employers for pension, welfare, vacation pay, training, supplementary employment benefit or such other purposes is, as its name implies, a “trust”. As a matter of law, a trust is a legal relationship under which a trustee holds legal title to property for the exclusive benefit of beneficiaries of the trust. Therefore, when a trustee is appointed to an employee benefit trust fund, they enter into a legal relationship with the employee-members of the fund. In this paper, I will review and describe the legal nature of such trusts and the duties and obligations of the trustees to the fund's beneficiaries. These duties and obligations are the same as those owed by the trustees of any other type of trust, such as an estate trust established under a will. It is important that new on an employee benefit trust understand the nature of their duties trustees when they enter this important office.

1. DEFINITION OF TRUSTEE

Simply put, a trustee is a person who holds the legal title to property (called the “trust property”) on behalf of another person (called the “beneficiary”) for certain specific terms and conditions. Technically speaking, there is a dual ownership of the trust property: the trustee holds legal title in the property, but the beneficiary holds “equitable title” to the property. As a result, although the trustee legally holds the trust property, they must exercise their powers over the property for the exclusive benefit of the beneficiaries, and not for their own personal gain or advantage. In fact, the sole purpose of creating a trust is to enable a trustee to administer trust property for the benefit of a beneficiary.

As a result of this structure, the essential legal characteristic of a trust is the “fiduciary” relationship created between the trustee and the beneficiary. Simply put, this means that the trustee owes a duty of "loyalty" to his/her beneficiary. The word "fiduciary" is from the Latin "fiducia" which means trust or confidence. The law imposes “fiduciary” responsibility in relationships where the highest legal standard of care is owed by one party to another. For example, the relationship between a doctor and patient is also a fiduciary relationship.

As discussed in more detail below, although trustees were historically required to perform their duties personally, today, in some cases, a trustee may discharge their duties through employees or agents, though they generally retain ultimate responsibility for selecting and overseeing their employees’ or agents’ conduct. A trustee also has a duty to account for all their conduct in connection with the administration of the trust, as well as the conduct of any employees and agents.

2. THE LAW GOVERNING TRUSTS AND TRUSTEES

The trust concept has its root in the Middle Ages and was the subject of extensive litigation before the courts in England for centuries. Many of the most important rules and standards governing the affairs of trusts and trustees were created and developed by the English courts. In modern times, trust law continues to develop in case law from courts in Canada, the United States, England, and other common law countries.

Additional, trusts and trustees in Canada are also subject to provincial legislation specifically governing trusts, such as British Columbia's *Trustee Act*.[i]

Finally, and most importantly, a trust relationship is governed by the written trust agreement, which generally expresses the purposes and functions of the trust as well as the rights, duties and obligations of the trustees. The paramount importance of the trust agreement is reflected in provincial trust legislation. For example, section 67 of the *Trustee Act* (Ontario) provides that "the powers, rights and immunities" conferred by the legislation are "in addition to" those conferred by the trust agreement and are "subject to" the terms of the trust agreement. Further, section 68 provides that if there is a conflict between the powers and duties of the trustees under the terms of the trust agreement and the powers and duties of trustees under the *Trustee Act* (Ontario), then the provisions of the trust agreement take precedence over the legislation.

For these reasons, ideally, a trust agreement will clearly and carefully set forth the terms and conditions governing the trust and the trustees, creating a complete code of conduct for the operation of the trust. This will help to avoid later difficulties and disputes concerning the rights of the beneficiaries and the powers of the trustees. In summary, it may be safely said that the trust agreement is the most important document, which must be read and understood by the trustees and observed to the letter.

3. THE CREATION OF THE EMPLOYEE BENEFIT TRUST

As their name implies, employee benefit trusts are created to provide benefits to employees and, often, their dependents.

In the unionized context, employee benefit trusts are often established as a result of collective bargaining. Generally speaking, in such cases, collective agreements will stipulate that employers are required to contribute certain amounts for each hour worked by each employee covered by the collective agreement to the applicable welfare, pension, etc. benefit funds, on behalf of their employees.

To the extent that the parties have agreed to establish a trusteed fund, the parties will then arrange for the preparation and execution of a suitable trust agreement which sets forth the purposes and conditions for the operation of the fund and the duties and responsibilities of the trustees. The trust may be trusteed jointly by trustees appointed by the union and management, or otherwise, often depending on the industry. (Note: the requirement to establish a trust may or may not be included in the collective agreement between the parties).

In most cases, the initial parties to the trust agreement are the parties who bargained to establish the trust, sometimes along with the initial trustees. It is worth noting that the requirement to establish a trust may or may not be incorporated into the collective agreement entered into by bargaining parties. It is important that trustees understand the connection between the trust agreement governing a particular fund and any collective agreement that may require contributions to the fund. As a legal/practical matter, it is not possible to enforce the requirements for making contributions required by the collective agreement unless the employer is legally bound by the collective agreement. In some cases, it may be appropriate to require an employer to sign a participation agreement, under which they agree to be bound by the trust agreement and make contributions accordingly.

4. <u>THE LAW GOVERNING EMPLOYEE BENEFIT TRUSTS</u>

In Canada, most pension funds are regulated under provincial pension legislation, such as Alberta's *Employment Pension Plans Act*.[ii] Pension funds established for employees working in federally regulated industries—such as the airline industry—are regulated under the *PBSA* (Federal). This legislation sets certain "minimum standards", such as vesting requirements and spousal rights. Additionally, in order to maintain their tax-exempt status, pension funds are subject to rules imposed under the *Income Tax Act*.[iii] Other employee benefit trusts are subject to comparatively fewer rules.

In the case of employee life and health trusts ("ELHTs"), certain *Income Tax Act* rules must be followed in order for the trusts to maintain their preferential tax treatment.

Supplementary unemployment benefit plans ("SUB Plans") must meet certain rules imposed under the *Employment Insurance Act*[iv] in order not to trigger employment insurance ("EI") benefit claw backs. SUB Plans may also qualify for preferential tax treatment if they comply with additional rules imposed under the *Income Tax Act*.

All employee benefit trusts are subject to human rights legislation, such as Manitoba's *The Human Rights Code*.[v] Rules imposed under human rights legislation must be considered in the context of Plan design as well as Plan administration. Each jurisdiction also has specific human rights carveouts that apply in the context of employee benefit plans. For example, discrimination on the basis of family status is generally prohibited. However, exemptions in the context of employee benefit plans allow benefit plans to set the terms of eligibility for dependents, such as allowing coverage for spouses and dependent children.

In assessing the law governing employee benefit trusts, it is worth noting that while the *Income Tax Act* generally taxes all employee remuneration, an exception under section 6(1)(a) excludes benefits derived from employers' contributions to registered pension funds, employee life and health trusts, private health service plans, group term life, and group sickness or accident insurance from taxable income. In some cases benefits provided under such funds and plans are taxable, such as periodic wage replacement benefits and pension payments.

The administration of employee benefit trusts may also have GST/HST, insurance, and premium tax implications, which are beyond the scope of this paper.

5. RESPONSIBILITIES AND DUTIES OF TRUSTEES

A. GENERAL STANDARD OF THE "PRUDENT PERSON"

(a) Common law

The standard of care owed by trustees to beneficiaries has its origin in the common law: the trustee has a duty to act honestly and with "the same degree of care, skill and prudence as a reasonable person would exercise in the management of his/her own affairs."

Further a trustee must act at all times in good faith and in the exclusive interests of the beneficiaries as a group and impartially amongst the members of the group and not for their own profit or gain. A trustee must thus avoid a conflict of interest between their own personal interest and the duty or obligation owed to the beneficiaries.

Finally, a trustee may not "delegate" or shift the duties of their office to third parties: they may employ agents but they are responsible for the choice of proper agents and must exercise adequate supervision over them.

(b) <u>Trust legislation</u>

The common law principles above have, to a certain extent, been codified in some provincial trust legislation. For example, subsection 27(1) of the *Trustee Act* (Ontario) provides that when investing trust property, “a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments”. Further, subsection 27(2) provides that a trustee may invest trust property “in any form of property in which a prudent investor might invest.”

With respect to delegating the trustee's functions, section 27.1 of the *Trustee Act* (Ontario) confirms that a trustee may authorize an agent to “exercise any of the trustee’s functions relating to the investment of trust property to the same extent that a prudent investor, acting in accordance with ordinary investment practice, would authorize an agent to exercise any investment function”. However, this is subject to certain conditions:

- Subsection 27.1(2) provides that the trustee must first prepare a written plan or strategy comprising reasonable assessments of risk and return that a prudent investor could adopt under comparable circumstances and that is intended to ensure that the functions will be exercised in the best interests of the beneficiaries of the trust;
- Subsection 27.1(3) provides that there must be a written agreement between the trustee and the agent;
- Subsection 27.1(4) provides that a trustee is required to exercise prudence in selecting an agent, in establishing the terms of the agent's authority, and in monitoring the agent's performance to ensure compliance with those terms; and
- Subsection 27.1(5) provides that “prudence in monitoring an agent's performance” includes:

    (i) reviewing the agent's reports,

    (ii) regularly reviewing the agreement between the trustee and the agent and how it is being put into effect, including considering whether the plan or strategy of investment should be revised or replaced, replacing the plan or strategy if the trustee considers it appropriate to do so and assessing whether the plan or strategy is being complied with,

(iii) considering whether directions should be provided to the agent or whether the agent's appointment should be revoked, and

(iv) providing directions to the agent or revoking the appointment if the trustee considers it appropriate to do so.

(c) Pension legislation

It should be noted that pension legislation has codified higher standards of care and competence for pension plan administrators, including Boards of Trustees. For example, subsections 29(1) and (2) of the *PBA* (Nova Scotia) provides as follows:

Care, diligence, knowledge and skill

> 29 (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> (2) The administrator or, if the administrator is a committee or a board of trustees, a member of the committee or board shall use in the administration of the pension plan, and in the administration and investment of the pension fund, all relevant knowledge and skill that the administrator or member possesses or, by reason of profession, business or calling, ought to possess. (Emphasis added).

B. DUTIES OF A NEW TRUSTEE

Not surprisingly, a new trustee's first duty to the trust is to satisfy themselves that they have been properly and effectively appointed as a trustee and have taken their office in the manner prescribed by the trust agreement. For example, if the new trustee is replacing a former trustee who has resigned, the new trustee ought to be satisfied as well as to the sufficiency of the other trustee's resignation. In addition, the trustee should make it their responsibility to obtain and review the following documents:

- The trust agreement
- The plan documents
- The collective agreement
- The minutes of the trustees' meetings over the last 2 years
- The written agreements with the trust's administrator, lawyers, and any other employees or agents.

Also, in the context of employee benefit trusts, it always bears re-stating that in addition to ensuring that they do not act in their own self-interest, , in order to avoid any conflict of interest, trustees must also divest themselves of their "union" or "management" roles when discharging their trust responsibilities. They must not adopt “union” or “management” points of view and must not understand their role as “representing” union or management. Instead, in their role as trustees, they must share the same community of interest, namely, to properly represent the employee-member beneficiaries of the fund. Consequently, there is no place for trustees to play the traditional adversarial roles of union vs. management. Finally, trustees' decisions must be made by themselves, personally, and not by the unions or employers who appointed them.

C. SPECIFIC DUTIES OF TRUSTEES OF EMPLOYEE BENEFIT TRUST FUNDS

Trustees of employee benefit trusts have 6 principal duties or responsibilities to discharge, namely:

1. To administer the trust;
2. To possess and protect the trust property;
3. To provide for the beneficiaries;
4. To make trust property productive;
5. To collect the amounts due the trust fund;
6. To account for the handling of the funds.

Pension plan governance includes setting out the proper roles or requirements for the various persons who manage the trust, ensuring that these requirements have been complied with and measuring the performance of these individuals.

(a) Administering the Trust Fund

At the outset, it must be again emphasized that the administration of the trust fund must be solely and exclusively for the benefit of its employee-member beneficiaries and not for the personal advantage or gain of the trustees.

The trustees are responsible for the overall operation and administration of the trust fund. While, the trustees have the right to hire agents to perform certain trust duties, such as an investment manager, the trustees are ultimately responsible for the proper selection of their agents. Further, just as individuals must evaluate and assess the advice they receive from their professional advisors in the management of their personal affairs, such as their lawyer or accountant, trustees are required to exercise independent judgment to assess the advice their agents provide. This is not to say that trustees will be personally liable for errors of judgment or dishonesty on the part of agents, in most cases. Rather, the point is that trustees cannot avoid their duties by delegating them to such third persons.

The importance of attending trustees' meetings cannot be overstated. At these meetings, the day-to-day decision making is discussed and reviewed and the trustees make necessary decisions and give necessary instructions regarding the operation of the fund. Attendance is import not least because a trustee is just as responsible for—and liable for the consequences of—the decisions made at meetings when they are absent as when they are present. This also highlights the importance of taking proper minutes of meetings and carefully reviewing the accuracy of draft minutes before approving them.

Depending on the size and complexity of the fund in question, trustees hire an administrator as an employee of the fund (i.e., self-administration) or, alternatively, may retain a firm that specializes in trust fund administration. Given the trustees' ultimate responsibility for the administration of the fund, it is of utmost importance that the trustees exercise prudence in selecting an administrator and that they properly supervise the performance of the administrator’s duties.

Similarly, depending on the size of the fund, the trustees may engage an investment counsellor, an investment manager, or retain an insurance company to manage the fund's investments. However, again, their performance must be properly supervised by the trustees.

If necessary, trustees may also apply to courts in their jurisdiction to seek the "opinion, advice or direction" of the court on questions concerning the management or administration of the trust property or the assets of the fund. To the extent that a trustee acts upon the court's direction, provincial trustee legislation deems the trustees to have discharged their duties as trustee, except to the extent they are guilty of fraud, wilful concealment, or misrepresentation in obtaining such opinion, advice or direction (see for example section 47 of the *The Trustee Act* (Sask)).

(b) Possessing and Protecting the Trust Property

One of the hallmarks of trusteeship is that the trustees must possess and protect the trust property. This includes a requirement to keep that property separate from their own property.

Trustees bear the ultimate liability to account for the receipt and deposit of employer contributions remitted to the fund. As such, trustees must satisfy themselves that the administrator or other agent who is charged with the physical receipt and deposit of these funds has properly followed the necessary and proper procedures for receiving, depositing and recording such funds and of course any necessary expenditures. The fund's auditor is charged with scrutinizing the pertinent financial books and records on an annual basis on behalf of the trustees and, for obvious reasons, there must be a complete separation of interest and relationship between the administrator and the auditor.

(c) Providing for Beneficiaries

The ultimate purpose of the employee benefit trust is to provide benefits for the employee-member beneficiaries of the trust fund. Benefits, of course, may only be made or paid in accordance with the eligibility requirements of a particular trust agreement and/or benefit plan document or text which normally sets out the rules and regulations concerning the amount and timing of benefits and, most importantly, the criteria for eligibility.

(d) Making the Trust Fund Productive

In addition to safeguarding the contributions received, trustees must, in general, and to the greatest extent possible, earn income on the trust’s assets for the benefit of the beneficiaries. As discussed in the previous section, trustees often appoint an investment counsellor or manager to make investment decisions, but trustees are ultimately responsible for the investment policy of the fund.

A number of factors may impact the extent of the trustees' power of investment and how they may exercise that power, including:

1. Type or size of the trust,
2. Provincial trust legislation,
3. Common law principles,

4. Provincial pension legislation,
5. Federal Investment Rules ("FIRs") applicable to pension plans,
6. "Responsible investment" principles.

i. <u>Type or Size of the Trust</u>

One important factor is the type of trust. For example, a vacation pay fund pays out the bulk of the proceeds of the fund on an annual basis and cannot, therefore, make long-term investments.

The size of the trust is another important factor. For example, a small fund will generally be incapable of establishing a robust diversified investment portfolio and/or making direct investments in alternative asset classes, such as real estate or infrastructure.

ii. <u>Provincial Trust Legislation</u>

Provincial trust legislation incorporates certain investment rules. For example, subsection 27(5) of the *Trustee Act* (Ontario) requires a trustee to consider the following specific criteria in planning the investment of trust property:

1. General economic conditions
2. The possible effect of inflation or deflation
3. The expected tax consequences of investment decisions or strategies
4. The role that each investment or course of action plays within the overall trust portfolio
5. The expected total return from income and the appreciation of capital
6. Needs for liquidity, regularity of income and preservation or appreciation of capital
7. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

iii. Common Law Principles: The Prudent Person Standard - Investments

The common law imposes on all trustees a prudent person standard with respect to investments. In the context of employee benefit trusts, this is reflected in the landmark 1985 decision in the United Kingdom, *Cowan v. Scargill*.[vi] In the decision, Sir Robert Megarry summarized the common law investment duties of pension fund trustees as follows:

> [T]he standard required of the trustee in exercising his powers of investment is that he must take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide.

That duty includes the duty to seek advice on matters which the trustee does not understand, such as the making of investments, and on receiving that advice to act with the same degree of prudence. The requirement is not discharged merely by showing that the trustee has acted in good faith and with sincerity. Honesty and sincerity are not the same as prudence and reasonableness. Some of the most sincere people are the most unreasonable.

Accordingly, although the trustee who takes advice on investments is not bound to accept and act on that advice, he is not entitled to reject it merely because he sincerely disagrees with it unless in addition to being sincere he is acting as an ordinary prudent man would act."

iv. Provincial Pension Legislation

Prudent person standard

As noted above, most provinces have incorporated a statutory "prudent person" standard for pension fund investments in their pension legislation, similar to the common law principles set out above. The legislation generally requires the trustees to exercise the care, diligence and skill in the investment of pension fund assets that a person of ordinary prudence would exercise in dealing with the property of another person. For example, subsection 17(1) of the *PBA* (New Brunswick) states:

> The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that

> a person of ordinary prudence would exercise in dealing with the property of another person.

Statement of Investment Policies and Procedures

Most provinces pension legislation also provides that trustees and other administrators of pension plans must establish a Statement of Investment Policies and Procedures (SIP&P). This statement must include the policies and procedures in respect to the plan's portfolio of investments and loans, more specifically:

- Categories of investments and loans (including derivatives, options and futures)
- Diversification of the investment portfolio
- Asset mix and rate-of-return expectations
- Liquidity of investments
- The lending of cash or securities
- The retention or delegation of voting rights acquired through plan investments
- The method of, and the basis for, the valuation of investments that are not regularly traded at a public exchange
- Related party transactions and the criteria used to establish whether a transaction is nominal or material.

The policy must consider all factors that may affect a plan's funding and solvency and its ability to meet its financial obligations. Trustees must conduct an annual review of the policy.

Provincial pension legislation may impose different review and filing requirements. For example, effective January 1, 2016, Ontario registered plans must file the SIP&P with the Financial Services Commission of Ontario and disclose whether the investment policy addresses environmental, social or governance factors ("ESG Factors").

v. <u>Federal Regulation—Federal Investment Rules</u>

The *PBSA* (Federal) imposes certain investment rules on federally regulated pension plans, set out in Schedule III of the federal *Pension Benefits Standards Regulations*.[vii] These rules, which include certain quantitative and qualitative restrictions, also apply to most provincially regulated pension plans, as they are incorporated into provincial legislation by reference. The rules are commonly referred to as the federal investment rules (“FIRS”).

Quantity Restrictions

Generally, a pension fund cannot invest more than 10% of the total market value of plan assets in any one company, including associated companies and affiliated corporations. There are specific exemptions to this limitation. For example, fully insured funds held by a bank, trust company or other financial institutions are not subject to the limit. In addition, the following funds are exempt from the rule:

- Mutual or pooled funds that comply with the FIRs,
- Unallocated general funds of life insurers,
- An investment corporation, real estate corporation or resource corporation,
- Securities issued or fully guaranteed by the government of Canada, a province or territory,
- A fund composed of fully government-guaranteed and mortgage-backed securities,
- A fund that replicates the composition of a widely recognized index for a broad class of securities traded at a public exchange.

Generally, a pension plan cannot own, directly or indirectly, more than 30% of the voting shares of a corporation. (Note: in its 2023 Fall Economic Statement, the Federal Government announced an intention to “explore” removing the 30% rule from the FIRs.[viii] This intention was confirmed in Budget 2024[ix]).

Related Party Transactions

Trustees are prohibited from—directly or indirectly—lending monies to a related party, investing in securities of a related party or entering into transactions with a related party on behalf of the plan. For the federal investment rules, related party means a person who is:

- A trustee or pension committee member
- An officer, director or employee of the trustees if they employ staff
- A person holding or investing plan assets (including officers, directors and employees of the holder or investor)

- An association or union representing plan members (including association or union officers or employees)
- A participating employer (including its officers, directors and employees);
- A plan member
- A person who owns, together with a spouse or child, more than 10% of the voting shares of the sponsoring corporate employer.

vi. Responsible Investing

Consideration of ESG Factors or "Responsible Investing ("RI") has become an important theme in pension investing over the course of the last 30 years.

The United Nations-supported Principles for Responsible Investing (U.N. PRI), define responsible investments as considering environmental, social and governance (ESG) issues when making investment decisions and influencing companies or assets (known as active ownership or stewardship).[x] The UN PRI provides the following definitions of ESG criteria:

- **Environmental.** Issues relating to the quality and functioning of the natural environment and natural systems. These include biodiversity loss; greenhouse gas (GHG) emissions, climate change, renewable energy, energy efficiency, air, water or resource depletion or pollution, waste management, stratospheric ozone depletion, changes in land use, ocean acidification and changes to the nitrogen and phosphorus cycles.
- **Social.** Issues relating to the rights, well-being and interests of people and communities. These include: human rights, labour standards in the supply chain, child, slave and bonded labour, workplace health and safety, freedom of association and freedom of expression, human capital management and employee relations, diversity, relations with local communities, activities in conflict zones; health and access to medicine, HIV/AIDS, consumer protection and controversial weapons.
- **Governance.** Issues relating to the governance of companies and other investee entities. In the listed equity context these include: board structure, size, diversity, skills and independence; executive pay; shareholder rights; stakeholder interaction; disclosure of information; business ethics; bribery and corruption; internal controls and risk management, and, in general, issues

dealing with the relationship between a company's management, its board, its shareholders and its other stakeholders. This category may also include matters of business strategy encompassing both the implications of business strategy for environmental and social issues, and how the strategy is to be implemented. In the unlisted asset classes governance issues also include matters of fund governance, such as the powers of Advisory Committees, valuation issues, fee structures, etc.[xi]

By becoming a signatory, signatories commit to apply the 6 principles and acknowledge their belief that considering ESG issues can affect the performance of their investment portfolios.[xii] The 6 principles developed for investors are:

- **Principle 1**: We will incorporate ESG issues into investment analysis and decision-making processes.
- **Principle 2**: We will be active owners and incorporate ESG issues into our ownership policies and practices.
- **Principle 3**: We will seek appropriate disclosure on ESG issues by the entities in which we invest.
- **Principle 4**: We will promote acceptance and implementation of the Principles within the investment industry.
- **Principle 5**: We will work together to enhance our effectiveness in implementing the Principles.
- **Principle 6**: We will each report on our activities and progress towards implementing the Principles.[xiii]

Key issues targeted by RI include climate change, water scarcity, women in leadership, executive compensation, community relations, and supply chain issues.[xiv] Further, there are different investment strategies to achieve the desired result. Key approaches to RI include:

- **Screening**: a process for defining criteria for determining which investments are permitted in a portfolio.
- **ESG Integration**: the incorporation of ESG factors into an investment process. It involved an ongoing consideration of ESG factors within an investment analysis and decision-making process with the aim to improve risk-adjusted returns.

- **Thematic Investing**: the construction of a portfolio of assets that are expected to benefit from specific medium- to long-term trends.
- **Stewardship**: the deliberate deployment of rights and influence (beyond capital allocation) to protect and advance the interests of those clients and beneficiaries.
- **Impact Investing**: investing with the intention to generate a positive, measurable social and/or environmental impact alongside a financial return.[xv]

As of 2020/2021, there were 3826 total signatories to the UN PRI and in 2023, Canadian RI assets under management increased to 49%.[xvi]

Federal and provincial pension benefits legislation in Canada imposes fiduciary standards of conduct on pension fund trustees with respect to fund investments. These standards have a bearing on the application of ESG principles to pension investments. Such is not the case for benefit funds that are not pension funds.

Despite the silence of Canadian legislation, the Canadian Association of Pension Supervisory Authorities ("CAPSA") has issued guidelines in regard to 'capital accumulation plans' ("CAP"), including defined contribution pension plans (the "CAP Guidelines") which set out the expectations of Canadian pension regulators in regard to CAPs.[xvii] In addition, on June 9, 2022, CAPSA published an additional Guideline titled "Environmental, Social and Governance Considerations in Pension Fund Management", for consultation.[xviii] CAPSA's ESG Guideline applies to all pension plans. It recognizes that that there is a "potential for ESG factors to provide valuable insight on investment risks and opportunities", and that these may "have a material effect on investment returns over varying time horizons.[xix] The guidelines set out general expectations with respect to plan governance, risk management, investment decision-making, and disclosure to relevant stakeholders including members, plan sponsors/employees and unions.

In the absence of specific Canadian statutory or regulatory standards, it is useful to consider the decisions of courts in other jurisdictions with respect to trust and fiduciary law and the legal implication of SRI policies in the pension context.

A consideration of case law concerning employee benefit trust investments often begins with *Cowan v. Scargill*, mentioned above. This U.K. case concerned investment proposals under consideration by a jointly trusteed pension fund established for the employees of the National Coal Board. The union-appointed trustees refused to approve an annual investment plan for the pension fund unless it incorporated screens prohibiting all foreign investments as well as any investments in companies operating in sectors competing with the coal industry (e.g., oil companies). The Judge, Vice-Chancellor Robert Megarry, concluded that the union trustees had breached their fiduciary duty to plan beneficiaries by refusing to approve the investment plan because it did not include the restrictive screens.

In his judgment, Megarry considered a number of issues relating to the trustees' fiduciary obligations to plan members. The salient points are as follows:

- The same legal principles that courts have applied to investment of trust funds in general are equally applicable to pension funds, subject to any differences in the provisions of the pension plans themselves.
- This is significant because traditional trust principles are historically conservative, placing primary emphasis for trust fund investments on the preservation of capital and only latterly adopting the prudent person rule.
- Pension fund trustees have a duty to exercise their investment powers in the best interests of present and future beneficiaries, holding the scales impartially between different classes of beneficiaries.

While the court recognized the investment restrictions advocated by the union trustees might benefit active union members engaged in the coal industry, a significant class of beneficiaries— including deferred pensioners, retirees and member beneficiaries— would have gained little or no advantage from the union's policies.

In considering investments, trustees are required to put aside their personal interests and views, including social or political opinions when investments that conflict with these views would be more favourable to the beneficiaries than other investments. The court went so far as to say that trustees may even have to act dishonourably if the interests of their beneficiaries required it.

The court held that, in most cases, the best interest of plan beneficiaries means their best financial interest. This was qualified, however, by adding that in certain trusts with adult beneficiaries holding strict views of certain social or moral issues, financial considerations need not be paramount provided the beneficiaries agree. For that group, the nonfinancial rewards might be preferable to financial benefits that result from an unacceptable activity. Pension fund trustees, however, have a heavy burden of proof. They must show that nonfinancial considerations and policies will lead to direct benefit for the plan beneficiaries and not just the general public.

While the principles advanced by the court in the Cowan decision appear to prohibit any type of RI policies for pension fund trusts, some factors should be remembered when assessing the implications of this decision. The union trustees in this case were attempting to impose a blanket policy that would have significantly limited the potential for investment diversification by screening out all foreign investments and investments in entire industries. More importantly, the union trustees sought to enact the policy without any regard or consideration of its impact on the fund's financial wellbeing. The court's decision may have been very different if the trustees had proposed an investment screening policy that they could demonstrate would not negatively affect the fund's investment performance, given the availability of comparable competitive investments.

In a subsequent discussion of the case, Megarry suggested the result might have been different if the union trustees had not expressed their policy as an absolute prohibition on foreign investments or investments in competing industries, but had rather formulated it as a preference for domestic and non-oil investments where other factors were equal between competing investment choices.

The decision also may have been different if the trustees had proposed social or ethical screens that did not confer any special advantage on one class of beneficiaries—those who were active employees in the coal industry. For instance, if the trustees had proposed favouring investments in coal industry companies where investment risks and rates of return were comparable to oil industry investments, the impact of the economically targeted investment would have been neutral to the non-union beneficiaries of the pension trust. In these circumstances, it is not likely a court would have concluded the trustees' fiduciary duties had been compromised by the investment policy.

There has been more recent foreign litigation dealing with ESG considerations in investing. For example, in 2023, four New York City employees and a non-profit organization filed a lawsuit against three pension funds for divesting in companies involved in the extraction of fossil fuel, alleging that they breached their fiduciary duty in doing so.[xx] Similarly, a decision of the U.S. District Court in Northern Texas, denied a motion to dismiss a claim against a 401(k) fund for their management of the plan by investing pursuant to ESG initiatives. Although the outcome has not yet been determined, the court found that there were sufficient facts to support plausible claims.[xxi] In the UK, the Court of Appeal dismissed an appeal of a decision of the high court for a derivative claim on behalf of a pension trustee company against its directors for failing to divest in fossil fuels. The Court denied on the claim, noting that there had been no financial loss suffered. The Court stated:

> They may disagree with the Directors' approach to investments in fossil fuel companies on ethical grounds and, in particular, with their view that divestment is not the appropriate way to reach net zero. But they have not put their case on the basis of those objections but rather that the Company has suffered a financial loss (or will suffer a loss) by holding these investments.[xxii]

(e) <u>Collecting Employer Contributions</u>

The continued viability of any trust fund depends on the appropriate procedures taken for the due enforcement and collection of employers' contributions. Delinquency occurs when there is a failure/refusal by an employer to remit contributions to a benefit plan in the amount of or by the date required.

There are various causes for such delinquency including an employer's avoidance/evasion in making the payments, administrative problems, for example, bookkeeping or clerical errors in the employer's office, the employer's inability to pay and/or miscommunication by the administrator or trade union to the employer of its obligations to remit the requisite contributions.

There are serious consequences in the event of the delinquency of the employer to make contributions to the trust fund, including the potential for loss of an employee's entitlement to benefits, loss of revenue to the fund and/or weakening of the fund's financial position and/or for example for contractors in the construction industry, create an uneven playing field for contractors who might gain a competitive advantage by either not paying the contributions at all or even by delaying such payments.

In some cases, the obligation to enforce/collect employers' contributions may be jointly and severally shared with the trade union. In particular, this may be the case where a trade union is party to a collective agreement providing for contributions. Even in such cases, trustees must be vigilant in ensuring that collection procedures are promptly and properly taken against delinquent employers by, for example, ensuring that the union files grievance-arbitration proceedings. Put another way, the trustees do not have the right to delegate or shift this function to the administrator or to the union but must take the appropriate steps on their own to ensure the proper collection of contributions.

Trustees should establish a "delinquency control programme" and should review delinquency lists at their meetings. In cases of delinquency, Trustees should ask their administrator what steps they have taken to collect to ensure they are following proper collection procedures. Administrators must verify the hours, contributions and calculations on monthly contribution forms and compare them with previous forms to ensure regularity.

(f) Accounting for Handling of the Funds

Trustees must ensure that proper books and records are kept in respect of the trust fund. While the trustees may employ an administrator or other agent to keep the books and records and ensure an annual audit of same, the prime accountability for proper books and records is ultimately on the trustees and not the administrator.

6. BREACH OF TRUST BY THE TRUSTEE

A. GENERAL

As a general matter, a trustee breaches their duty when they act contrary to the trust agreement or fail to do something required by such agreement or, of course, act contrary to the common law or statutory duties imposed upon them. It should, however, be understood that not every breach of trust will expose a trustee to personal liability for their default. Clearly, intentional or dishonest breaches of the trust, such as misappropriation of the trust's funds or embezzlement, or gross negligence in the conduct of their duties, will result in personal liability on the part of the trustee. Gross negligence involves reckless indifference to existing or foreseeable risks and thus involves something greater than mere error in judgment. Examples of gross negligence by trustees include: (i) making payments to a person who is not covered by the trust agreement without first checking the trust agreement, (ii) making payments to the wrong person in a careless way, or (iii) making payments for a greater amount than was proper under the Trust Agreement.

In these examples, and even aside from criminal sanctions, the trustee will be personally liable in a suit for damages by the beneficiaries which may include a court order to repay the fund for any profits received in the form of secret or improper commission. On the other hand, honest errors in judgment may, in most cases, be excused or relieved by the court as "technical breaches of trust". For example, section 96 of the *Trustee Act* (BC) provides:

> **Jurisdiction of court to relieve trustee of breach of trust**
>
> 96 If it appears to the court that a trustee, however appointed, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, then the court may relieve the trustee either wholly or partly from that personal liability.

With respect to liability for a loss to the trust arising from the investment of trust property, section 15.3 of the *Trustee Act* (BC) provides that a trustee is protected from liability if their conduct that led to the loss conformed to a plan or strategy for the investment of the trust property comprising reasonable assessments of risk and return that a prudent investor could adopt under comparable circumstances.

Whether or not the incompetence or negligence of the trustee could give rise to a viable action or claim by beneficiaries always depends on an examination of the particular facts and circumstances. In general, the question of a trustee's personal liability will depend on the degree of seriousness of any negligent or reckless conduct.

B. BREACHES BY CO-TRUSTEES

A question often arises as to the extent of liability to which a trustee may be exposed for the breach of duty by one of their co-trustees. Clearly liability will attach where a trustee either participates in or knowingly agrees to conceal the improper act or omission of another trustee. However, a trustee's inactivity or passivity may also constitute a breach of trust. For example, as Waters *et al.* point out in *Waters' Law of Trusts in Canada* 4th ed., if a trustee:

> . . . permits investments to be held solely in the co-trustee's name or he/she allows cash belonging to the trust to be in his co-trustee's hands for an unnecessary or lengthy period of time, any loss through the co-trustee's fraud or neglect is indirectly the responsibility of the trustee under discussion whose inactivity facilitated the breach.[xxiii]

More generally, Waters *et al* write:

> [a trustee] is not entitled to shrug off the wrongful actions of a co-trustee on the basis that he knew nothing of what the other was doing; as a fiduciary he is responsible for all acts of trusteeship, and he therefore carries a several, as well as a joint, liability for all that is done in the name of the trust or through the exercise of the office of trustee.[xxiv]

A more difficult question to answer is what steps a trustee must take to remedy a breach of trust on the part of their co-trustee when they become aware of same. It is worth noting that under the United States' *Employee Retirement Income Security Act of 1974*[xxv], neither a trustee's recorded dissent to an improper decision made at a meeting, nor their resignation, nor any other passive activity is enough to shield liability. This may be true under Canadian common law as well. At the very least, a trustee in such circumstances must disclose the impropriety to the board of trustees and recommend that legal advice be obtained with a view to taking proceedings against the trustee who has engaged in misconduct.

C. EXCULPATORY CLAUSES

Trust agreements usually contain a form of exculpatory clause, which excuses trustees from liability in the event of, for example, honest errors of judgment. These clauses may purport to apply even in cases of wilful or dishonest conduct or gross negligence but would generally not be upheld in court in such cases. In some cases, trust agreements may provide for reimbursement for trustees' who have incurred legal costs successfully defending an action. It is always an open question as to how far such clauses will be upheld by the courts in excusing different types of trustees' wrongdoing.

D. TRUSTEE LIABILITY INSURANCE AND BONDING

In the same way as exculpatory clauses will not relieve against a trustee's wilful or dishonest conduct, it is similarly against public policy to try to insure a trustee in cases of his/her own criminal or dishonest conduct. Liability insurance however can be obtained for the trust fund, its trustees and its officers and agents to insure against "technical breaches of trust" and even gross negligence. As a general matter, liability insurance ought to be considered by the trustees as a protection for them as well as the beneficiaries. The beneficiaries benefit from liability insurance because if a successful suit is brought against the trustees for breach of trust such insurance provides some guarantee that the judgment against the trustees will be satisfied.

As a further protection, some trust agreements historically included a requirement that trustees be bonded in order to protect the trust fund in case of a trustee's gross negligence, fraud or other misconduct. Generally, these clauses for surety bonds provided that the amount of the bond was to be determined by the employer and the union and that the cost of the premiums for these bonds was to be paid out of the trust fund.

E. TRUSTEES' EXPENSES

As noted earlier, a trustee must exercise their powers over trust property for the exclusive benefit of the beneficiaries and not for their own personal gain or advantage. However, provincial trustee legislation clearly permits trustees to reimburse themselves from trust property for all expenses properly incurred in the execution of their trust powers. As Waters *et al*. points out:

> It would be an extraordinary system of law which did not permit trustees to recover their out-of-pocket expenses incurred in the discharge of their duties and powers under the trust, and in fact, Courts of Chancery were never in any doubt that the trustee was entitled to such indemnification.[xxvi]

However, trustees who use trust property improperly for their own benefit may face liability for breach of trust, criminal charges, and/or tax liability. In the context of a civil claim for breach of trust based on improper expenditures, trustees are personally liable. Additionally, there are various offenses under the *Criminal Code*[xxvii] applicable to theft, misappropriation or embezzlement of trust funds.

7. CONCLUSION

Unquestionably, the role or office of trustee to an employee trust fund is at the same time a rewarding and challenging experience. As with any other office, there are duties and obligations imposed on trustees and the law requires that they understand those duties and obligations and perform their duties in accordance with their obligations under the law.

[i] *Trustee Act*, RSBC 1996, ch 464 [*Trustee Act* (BC)]; see also *Trustee Act*, SA 2022, c T-8.1 [*Trustee Act* (Alberta)], *The Trustee Act*, 2009, SS 2009, c T-23.01 [*Trustee Act* (Sask)], *The Trustee Act*, CCSM c T160 [*Trustee Act* (Manitoba)], *Trustee Act*, RSO 1990, c T.23 [*Trustee Act* (Ontario)], *Civil Code of Québec*, CQLR c CCQ-1991 (see especially Ch. II: The Trust), *Trustees Act*, SNB 2015, c 21 [*Trustees Act* (New Brunswick)], *Trustee Act*, RSNS 1989, c 479 [*Trustee Act* (Nova Scotia)], *Trustee Act*, RSNL 1990, c T-10 [*Trustee Act* (Nfld)], *Trustee Act*, RSPEI 1988, c T-8 [*Trustee Act* (PEI)], *Trustee Act*, RSY 2002, c 223 [*Trustee Act* (Yukon)], *Trustee Act*, RSNWT 1988, c T-8 [*Trustee Act* (Northwest Territories)], *Trustee Act*, RSNWT (Nu) 1988, c T-8 [*Trustee Act* (Nunavut)].

[ii] *Employment Pension Plans Act*, SA 2012, c E-8.1SA 2012, c E-8.1 [*EPPA* (Alberta)]; see also *Pension Benefits Standards Act*, 1985, RSC 1985, c 32 (2nd Supp) [*PBSA* (Federal)] (Note: the *PBSA* (Federal) applies to federally-regulated pension plans, as well as pension plans regulated in PEI and the Territories), *Pension Benefits Standards Act*, SBC 2012, c 30 [*PBSA* (BC)], *Pension Benefits Act, 1992*, SS 1992, c P-6.001 [*PBA* (Sask)], *The Pension Benefits Act*, CCSM c P32 [*PBA* (Manitoba)], *Pension Benefits Act*, RSO 1990, c P.8 [*PBA* (Ontario)], *Supplemental Pension Plans Act*, CQLR c R-15.1 [*SPPA* (Quebec)], *Pension Benefits Act*, SNB 1987, c P-5.1 [*PBA* (New Brunswick)], *Pension Benefits Act*, SNS 2011, c 41 [*PBA* (Nova Scotia)], *Pension Benefits Act*, 1997, SNL 1996, c P-4.01 [*PBA* (Nfld)].

[iii] *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*Income Tax Act*].

[iv] *Employment Insurance Act*, SC 1996, c 23.

[v] *The Human Rights Code*, CCSM c H175 [*Human Rights Code* (Manitoba)]; see also *Human Rights Code*, RSBC 1996, c 210 [*Human Rights Code* (BC)], *Alberta Human Rights Act*, RSA 2000, c A-25.5 [*Human Rights Act* (Alberta)], *The Saskatchewan Human Rights Code*, 2018, SS 2018, c S-24.2 [*Human Rights Code* (Sask)], *Human Rights Code*, RSO 1990, c H.19 [the *Code* (Ontario)], *Charter of Human Rights and Freedoms*, CQLR c C-12 [the *Quebec Charter*], *Human Rights Act*, RSNB 2011, c 171 [*Human Rights Act* (New Brunswick)], *Human Rights Act*, RSNS 1989, c 214 [*Human Rights Act* (Nova Scotia)], *Human Rights Act*, 2010, SNL 2010, c H-13.1 [*Human Rights Act* (Nfld)], *Human Rights Act*, RSPEI 1988, c H-12 [*Human Rights Act* (PEI)], *Human Rights Act*, RSY 2002, c 116 [*Human Rights Act* (Yukon)], *Human Rights Act*, SNWT 2002, c 18 [*Human Rights Act* (Northwest Territories)], *Human Rights Act*, SNu 2003, c 12 [*Human Rights Act* (Nunavut)].

[vi] *Cowan v Scargill* [1985] Ch 270, Chancery Division [*Cowan v Scargill*].

[vii] *Pension Benefits Standards Regulations, 1985*, SOR/87-19.

[viii] Government of Canada, *Fall Economic Statement* (21 Nov 2023), available online: https://www.budget.canada.ca/fes-eea/2023/home-accueil-en.html.

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[xiii] The PRI, *About the PRI*, online: https://www.unpri.org/about-us/about-the-pri.

[xiv] RIA Canada, *Intro to Responsible Investment*, online: https://www.riacanada.ca/responsible-investment/.

[xv] The PRI, *Definitions for responsible investment approaches* (1 Nov 2023), online: https://www.unpri.org/investment-tools/definitions-for-responsible-investment-approaches/11874.article.

[xvi] RIA Canada, *Conviction Behind Responsible Investing Grew Stronger Despite Polarization and Economic Disruption* (26 Oct 2023), online: https://www.riacanada.ca/news/conviction-behind-responsible-investing-grew-stronger-despite-polarization-and-economic-disruption/.

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[xviii] Canadian Association of Pension Supervisor Authority, "CAPSA Guideline Environmental, Social and Governance Considerations in Pensions Plan Management" (9 Jun 2022), online: https://www.capsa-acor.org/Documents/View/1914.

[xix] *Ibid* at page 4.

[xx] *Wong v New York City Employees' Retirement System* (complaint) (May, 22, 2023), online: https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230511_docket-6522972023_complaint.pdf.

[xxi] *Spence v. Am. Airlines, Inc.*, F Supp (3d) (ND Tex, 2024).

[xxii] *McGaughey and another v Universities Superannuation Scheme Ltd and others*, [2024] 1 All ER (Comm) 319 at para 190.

[xxiii] D.W.M. Waters, Mark R. Gillen, Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at page 1276.

[xxiv] *Ibid* at page 43.

[xxv] 29 U.S.C. Chapt. 18 *Employee Retirement Income Security Act* (ERISA).

[xxvi] D.W.M. Waters, Mark R. Gillen, Lionel D. Smith, *supra* note xxi at page 1207.

[xxvii] *Criminal Code*, RSC 1985, c C-46.

Pension Benefits Acts (Excerpts)

FEDERAL

PENSION BENEFITS STANDARDS ACT

1985, RSC 1985, c 32 (2nd Supp)

Standard of care

(4) In the administration of the pension plan and pension fund, the administrator shall exercise the degree of care that a person of ordinary prudence would exercise in dealing with the property of another person.

Manner of investing assets

(4.1) The administrator shall invest the assets of a pension fund in accordance with the regulations and in a manner that a reasonable and prudent person would apply in respect of a portfolio of investments of a pension fund.

Investment choices

(4.2) A pension plan may permit a member, former member, survivor or former spouse or former common law partner of a member or former member to make investment choices with respect to their account maintained in respect of a defined contribution provision or with respect to their account maintained for additional voluntary contributions.

Administrator's duty

(4.3) If a pension plan permits a member, former member, survivor or former spouse or former common law partner of a member or former member to make investment choices, the administrator must offer investment options of varying degrees of risk and expected return that would allow a reasonable and prudent person to create a portfolio of investments that is well adapted to their retirement needs.

Deemed compliance with subsection (4.1)

(4.4) With respect to the account for which an investment choice is made by a member, former member, survivor or former spouse or former common law partner of a member or former member, if an administrator offers investment options in accordance with subsection (4.3) and the regulations, that administrator is deemed to comply with subsection (4.1).

Special knowledge or skill

(5) Without limiting the generality of subsection (4), an administrator who in fact possesses, or by reason of profession or business ought to possess, a particular level of knowledge or skill relevant to the administration of a pension plan or pension fund shall employ that particular level of knowledge or skill in the administration of the pension plan or pension fund.

Administrator not liable

(5.1) An administrator is not liable for contravening subsection (4), (4.1) or (5) if the contravention occurred because the administrator relied in good faith on

(a) financial statements of the pension plan prepared by an accountant, or a written report of the auditor or auditors of the plan, that have been represented to the administrator as fairly reflecting the financial condition of the plan; or

(b) a report of an accountant, an actuary, a lawyer, a notary or another professional person whose profession lends credibility to the report.

Conflict of interest

(6) A person shall not accept an appointment to a body referred to in paragraph 7(1)(a) or (b) or subparagraph 7(1)(c)(ii) if there would be a material conflict of interest between that person's role as a member of that body and that person's role in any other capacity.

Not a conflict of interest

(6.1) For the purposes of subsection (6), merely being entitled to a pension benefit or having an interest in a pension benefit credit does not constitute a conflict of interest.

Eliminating conflict of interest

(7) A person described in subsection (6) shall, within ninety days after becoming aware that a material conflict of interest exists,

(a) eliminate that conflict of interest; or

(b) resign as a member of that body.

Validity of documents

(8) A document issued by a board of trustees or other similar body or a pension committee is valid notwithstanding a material conflict of interest of a member thereof.

Removal of member

(9) If a person contravenes subsection (6) or (7), the Superintendent or any other interested person may apply to a court of competent jurisdiction for an order that that person be replaced, and the court may make an order on such terms as it considers appropriate.

Other conflicts of interest

(10) If there is a material conflict of interest between the role of an employer who is an administrator and their role in any other capacity, the administrator

> (a) shall, within thirty days after becoming aware that a material conflict of interest exists, declare that conflict of interest to the pension council or to the members of the pension plan; and
>
> (b) shall act in the best interests of the members of the pension plan.

Court order

(11) If an administrator contravenes subsection (10), a court of competent jurisdiction may, on application by the Superintendent or any other interested person, make any order on such terms as the court considers appropriate.

R.S., 1985, c. 32 (2nd Supp.), s. 81998, c. 12, s. 62010, c. 12, s. 1791, c. 25, s. 1832012, c. 16, s. 86

BRITISH COLUMBIA

PENSION BENEFITS STANDARDS ACT

SBC 2012, c 30

PART 6, SECTION 351

Responsibilities of administrator

35 (1) The administrator of a pension plan must ensure that the plan and the pension fund are administered in accordance with this Act, the regulations and the plan documents.

(2) While acting in the capacity of administrator of a pension plan, the administrator stands in a fiduciary capacity in relation to

(a) the members, and

(b) others entitled to benefits.

(3) Without limiting subsection (2), the administrator, while acting in the capacity of administrator of a pension plan, must

(a) act honestly, in good faith and in the best interests of

(i) the members, and

(ii) others entitled to benefits, and

(b) exercise the care, diligence and skill that a person of ordinary prudence would exercise when dealing with the property of another person.

(4) The administrator of a pension plan, or, if the administrator is a board of trustees, a member of that board, must not, while acting in the capacity of administrator, knowingly allow the administrator's or member's interests to conflict with the administrator's powers and duties in respect of the plan.

(5) For the purpose of subsection (4), an administrator does not knowingly allow the interests of the administrator to conflict with the administrator's powers and duties in respect of the pension plan merely because the administrator is or may become entitled to a pension or other benefit under the plan.

(6) In addition to any other responsibilities under this Act, the administrator of a pension plan must

(a) ensure that the plan documents comply with this Act and the regulations,

(b) if the plan is terminated, ensure that the plan is wound up in accordance with this Act and the regulations,

(c) ensure that any agreement respecting the transfer of money or benefits between the plan and any other pension plan does not contain any provision, relating to a benefit, that a pension plan is prohibited by this Act from containing, and

(d) perform any other duties the administrator is obligated under the regulations to perform.

(7) If an administrator employs an agent to exercise one or more of the powers or perform one or more of the duties of the administrator, the administrator must

(a) be satisfied that the agent is qualified to exercise the powers or perform the duties for which the agent is employed, and

(b) carry out reasonable and prudent supervision of the agent.

ALBERTA

EMPLOYMENT PENSION BENEFITS ACT

SA 2012, c E-8.1SA 2012, c E-8.1

Administration of Pension Plan

Chapter E-8.1, Part 6, Division 2 and 3 Administrator1

Responsibilities of administrator

35 (1) The administrator of a pension plan must ensure that the plan and the pension fund are administered in accordance with this Act, the regulations and the plan documents.

(2) While acting in the capacity of administrator of a pension plan, the administrator stands in a fiduciary capacity in relation to

(a) the members, and

(b) others entitled to benefits.

(3) Without limiting subsection (2), the administrator, while acting in the capacity of administrator of a pension plan, must

(a) act honestly, in good faith and in the best interests of

(i) the members, and

(ii) others entitled to benefits,

and

(b) exercise the care, diligence and skill that a person of ordinary prudence would exercise when dealing with the property of another person.

(4) The administrator of a pension plan or, if the administrator is a board of trustees, a member of that board, must not, while acting in the capacity of administrator, knowingly allow his or her interests to conflict with the administrator's powers and duties in respect of the pension plan.

(5) For the purpose of subsection (4), an administrator does not knowingly allow the interests of the administrator to conflict with the administrator's powers and duties in respect of the pension plan merely because the administrator is or may become entitled to a pension or other benefit under the plan.

(6) In addition to any other responsibilities under this Act, an administrator of a pension plan must

(a) ensure that the plan documents comply with this Act and the regulations,

(b) if the plan is terminated, ensure that the plan is wound up in accordance with this Act and the regulations,

(c) ensure that any agreement respecting the transfer of money or benefits between the plan and any other pension plan does not contain any provision, relating to a benefit, that a pension plan is prohibited by this Act from containing, and

(d) perform any other duties the administrator is obligated under the regulations to perform.

(7) If an administrator employs an agent to exercise one or more of the powers or to perform one or more of the duties of the administrator, the administrator must

(a) be satisfied that the agent is qualified to exercise the powers or to perform the duties for which the agent is employed, and

(b) carry out reasonable and prudent supervision of the agent

Division 3

Administrator must ensure governance policy established

42(1) The administrator of a pension plan must ensure that a written governance policy that meets the prescribed criteria is established in respect of the structures and processes for overseeing, managing and administering the plan.

(2) The administrator of a pension plan must ensure that the plan is administered in accordance with the governance policy established under subsection (1).

Administrator must ensure statement of investment policies and procedures established

43(1) The administrator of a pension plan must ensure that a written statement of investment policies and procedures that meets the prescribed criteria is established in respect of the plan's portfolio of investments.

(2) The administrator of a pension plan must ensure that the pension fund is invested in accordance with the statement of investment policies and procedures established under subsection (1).

(3) If the plan text document of a pension plan contains a benefit formula provision, the administrator of the plan must provide to the actuary engaged to prepare the actuarial valuation report for the plan under section 38 a copy of the statement of investment policies and procedures on or before the later of

(a) the date that is 60 days after the establishment of or amendment to the statement, and

(b) the effective date of the actuary's engagement

MANITOBA

PENSIONS BENEFIT ACT

CCSM c P32

Care, diligence and skill

28.1(2) The administrator of a pension plan shall exercise the care, diligence and skill in the administration of the plan and the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Investing pension assets

28.1(2.1) The administrator of a pension plan shall invest the assets of the pension fund, and manage those investments, in accordance with the regulations and in a manner that a reasonable and prudent person would apply in investing and managing a portfolio of investments of a pension fund.

Non-financial considerations

28.1(2.2) Unless a pension plan otherwise provides, an administrator who uses a non-financial criterion to formulate an investment policy or to make an investment decision does not thereby commit a breach of trust or contravene this Act if, in formulating the policy or making the decision, he or she has complied with subsections (2) and (2.1).

Special knowledge and skill

28.1(3) The administrator of a pension plan shall use in the administration of the plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Application of subsection (3)

28.1(4) Subsection (3) applies with necessary modifications to a member of a board, agency or commission made responsible by an Act of the legislature for the administration of a pension plan.

Conflict of interest

28.1(5) An administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the plan and the pension fund.

Employment of agent

28.1(6) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ or appoint one or more agents to carry out any act required to be done in the administration of the plan and in the administration and investment of the pension fund.

Responsibility for agent

28.1(7) An administrator of a pension plan who employs or appoints an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed or appointed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

28.1(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (2), (2.1), (3) and (5).

Benefit by administrator

28.1(9) The administrator of a pension plan is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits, a refund of contributions, and fees and expenses related to the administration of the pension plan and permitted by the common law or provided for in the pension plan.

Member of board or committee

28.1(10) If the administrator is a board, committee or other body of persons, subsection (9) applies with necessary modifications to each member of that body.

Payment to agent

28.1(11) An agent of the administrator of a pension plan is not entitled to payment from the pension fund other than the usual and reasonable fees and expenses for the services provided by the agent in respect of the pension plan.

ONTARIO

PENSION BENEFITS ACT

RSO 1990, c P.8

Care, diligence and skill

22. (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6) No person other than a prescribed person shall be a trustee of a pension fund.

Responsibility for agent

(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4). R.S.O. 1990, c. P.8, s. 22 (8).

Benefits of administrator

(9) The administrator of a pension plan is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits and a refund of contributions.

Benefits of members of pension committee, etc.

(10) Subsection (9) applies, with necessary modifications, to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act for the administration of a pension plan.

(11) Repealed: 2010, C. 24, S. 7.

Payment of administrative fees and expenses

22.1(1) The administrator of a pension plan is entitled to be paid from the pension fund the administrator's reasonable fees and expenses relating to the administration of the pension plan and the administration and investment of the pension fund.

Exception

(2) However, the administrator is not entitled to be paid from the pension fund any fees and expenses relating to the administration of the pension plan or the administration and investment of the pension fund,

(a) if payment to the administrator is prohibited, or payment of the fees and expenses is otherwise provided for, under the documents that create and support the pension plan or the pension fund; or

(b) if payment to the administrator is prohibited, or payment of those fees and expenses is otherwise provided for, under the Act or regulations.

Same, members of pension committee, etc.

(3) Subsections (1) and (2) apply, with necessary modifications, to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act for the administration of a pension plan.

Fees and expenses of agent, etc.

(4) The administrator of a pension plan may pay from the pension fund to an agent of the administrator, to the employer or to any other person who provides services relating to the administration of the pension plan or the administration and investment of the pension fund the reasonable fees and expenses of the agent, employer or other person.

Exception

(5) However, the administrator is not permitted to pay from the pension fund to an agent, employer or other person described in subsection (4) the fees and expenses relating to the administration of the pension plan or the administration and investment of the pension fund,

(a) if payment to the agent, employer or other person is prohibited, or payment of the fees and expenses is otherwise provided for, under the documents that create and support the pension plan or the pension fund; or

(b) if payment to the agent, employer or other person is prohibited, or payment of those fees and expenses is otherwise provided for, under the Act or regulations. 2010, c. 24, s. 8 (1).

Fees and expenses of appointed administrator

(6) If the Chief Executive Officer appoints an administrator under subsection 8 (1.1), the appointed administrator is entitled to be paid, from the pension fund, the appointed administrator's reasonable fees and expenses relating to the administration of the pension plan and the administration and investment of the pension fund.

Expenses of Chief Executive Officer

(7) If the Chief Executive Officer acts as administrator under subsection 8 (1.2), the Chief Executive Officer is entitled to be paid, from the pension fund, his or her reasonable expenses relating to the administration of the pension plan and the administration and investment of the pension fund. 2010, c. 24, s. 8 (2); 2016, c. 5, Sched. 22, s. 1; 2018, c. 8, Sched. 23, s. 23

QUÉBEC

SUPPLEMENTAL PENSION PLANS ACT

CQLR c R-15.1

151. The pension committee shall exercise the prudence, diligence and skill that a reasonable person would exercise in similar circumstances; it must also act with honesty and loyalty in the best interest of the members or beneficiaries.

The members of the pension committee shall use in the administration of the pension plan all relevant knowledge or skill that they possess or, by reason of their profession or business, ought to possess.

151.1. The pension committee is presumed to have acted with prudence where it acted in good faith on the basis of an expert's opinion.

151.2. The pension committee shall adopt internal by-laws establishing its rules of operation and governance. The committee ensures that they are complied with and reviews them regularly.

The internal by-laws determine, in particular,

(1) the duties and obligations of the committee members;

(2) the rules of ethics to which those persons are subject;

(3) the rules governing the appointment of the chair, vice-chair and secretary;

(4) the procedure for meetings and the frequency of meetings;

(5) the measures to be taken to provide professional development to committee members;

(6) the measures to be taken to manage risks;

(7) internal controls;

(8) the books and registers to be kept;

(9) the rules to be followed when selecting, remunerating, supervising or evaluating delegatees, representatives or service providers; and

(10) the standards that apply to the services rendered by the committee, namely the standards on communicating with plan members and beneficiaries.

In the event of a discrepancy between the text of the pension plan and the text of the internal by-laws as regards the operation and governance of the committee, the latter prevails. However, in the case of the following subjects, the internal by-laws prevail only if the text of the pension plan expressly so provides:

(1) the rules governing the appointment of the chair, vice-chair and secretary of the pension committee as well as their duties and obligations;

(2) quorum and the granting of a casting vote at committee meetings; and

(3) the proportion of committee members who must participate in a decision in order for it to be valid.

151.3. The secretary of the pension committee or any other person appointed by the committee provides the committee members with the documents and information needed to administer the pension plan.

Committee members have access to all information on the plan and may obtain a copy of any document. However, they may not have access to personal information unless it is required in the performance of their duties.

152. Subject to such limitations or prohibitions as may be set out in the pension plan, the pension committee may delegate all or part of its powers or be represented by a third person for a specific act.

To such extent as is permitted by the instrument of delegation, the person or body to whom or which the pension committee has delegated powers may subdelegate all or part of such powers.

153. The person or body exercising delegated powers shall assume the same obligations and incur the same liability as those the pension committee or one of its members would have had to assume or have incurred if the powers had been exercised by the pension committee. The same applies to service providers and representatives who exercise a discretionary power belonging to the committee.

154. The pension committee is accountable for the person to whom it has delegated powers if, among other things, it was not authorized to do so; if it was so authorized, it is accountable only for the care with which it selected the delegatee and gave him instructions.

Service providers and representatives who exercise a discretionary power belonging to the pension committee are considered to be delegatees.

154.1. The pension committee selects and hires the delegatees, representatives and service providers.

154.2. Delegatees, representatives and service providers must submit reports on their work to the pension committee.

Delegatees, representatives and service providers must report to the pension committee in writing any situation noted in the normal course of their duties that might adversely affect the financial interests of the pension fund and that requires correction.

If the pension committee fails to take immediate corrective measures, the delegatee, representative or service provider must send a copy of the report to Retraite Québec.

A person who, acting in good faith, sends a report to the committee or Retraite Québec under the second or third paragraph may not be held liable.

NEW BRUNSWICK

PENSION BENEFITS ACT

SNB 1987, c P-5.1

17(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

17(2) The administrator or, if the administrator is a committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall use in the administration of the pension plan, and in the administration and investment of the pension fund, all relevant knowledge and skill that the administrator or member possesses or, by reason of that person's profession, business or calling, ought to possess.

17(3) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit that person's interest to conflict with the person's duties and powers in respect of the pension fund.

18(1) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

18(2) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

18(3) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections 17(1), (2) and (3).

19(1) The administrator of a pension plan or, if the administrator is a pension committee or a board of trustees, a member of the committee or board is not entitled to any benefit

from the pension plan as administrator or member of a committee or board other than fees and expenses related to the administration of the pension plan and permitted by law or provided for in the pension plan.

19(2) An agent of the administrator of a pension plan is not entitled as an agent to payment from the pension fund other than the usual and reasonable fees and expenses for the services provided by the agent in respect of the pension plan.

20 An employer shall provide to the administrator any information required by the administrator for the purpose of complying with the terms of the pension plan and the requirements of this Act and the regulations.

NOVA SCOTIA

PENSION BENEFITS ACT

SNS 2011, c 41

33(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

(2) The administrator of a pension plan shall use in the administration of the pension plan, and in the administration and investment of the pension fund, all relevant knowledge and skill that the administrator possesses or, by reason of profession, business or calling, ought to possess.

(3) The administrator or, where the administrator is a pension committee or a board of trustees, a member of the committee or board shall not knowingly permit the administrator's or member's interest to conflict with the administrator's or member's duties and powers in respect of the pension fund.

(4) Where it is reasonable and prudent in the circumstances to do so, an administrator may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

(5) No person other than a prescribed person may be a trustee of a pension fund.

(6) An administrator who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

(7) An employee or agent of an administrator is also subject to the standards that apply to the administrator pursuant to subsections (1) to (3).

(8) The administrator is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits and a refund of contributions.

(9) Subsections (2) and (8) apply mutatis mutandis to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act for the administration of a pension plan.

1997, SNL 1996, c P-4.01

Duties of administrator

14(1) An administrator shall administer a pension plan and pension fund as a trustee for the employer, the members and former members of the plan, and other persons with an entitlement under the plan.

(2) An administrator of a pension plan is responsible for administering the plan and the pension fund and for filing the required documents in accordance with this Act.

(3) An employer, who is not the administrator of a pension plan, shall provide the administrator with the information required by that administrator in order to comply with the terms of the plan and discharge the responsibilities under subsection (2).

(4) An administrator of a pension plan shall, within 30 days of becoming the administrator, inform the superintendent of

(a) the administrator's name and address;

(b) the names and addresses of the persons who constitute the body that is the administrator; and

(c) a change in the membership of the body that is the administrator.

17(1) A person shall not be appointed to a body referred to in paragraph 12(1)(b), (c) or (e) or subsections 13(1) and (2) if there is a conflict of interest between the person's role as a member of the body and the person's role in any other capacity.

(2) Where a person described in subsection (1) has a conflict of interest the person shall, within 30 days after becoming aware of the conflict, declare the conflict to the body and, as the body directs,

(a) abstain from the matter of the conflict;

(b) eliminate the conflict; or

(c) resign as a member of the body.

(3) Where the employer is the administrator of a pension plan under paragraph 12(1)(a), if there is a conflict of interest between the employer's role as administrator and the employer's role in any other capacity, the employer shall

(a) within 30 days after becoming aware of the conflict, declare the conflict to the pension committee or to the members of the plan; and

(b) act in the best interests of the members of the plan.

LINKS TO PENSION LEGISLATION IN ALL JURISDICTIONS

FEDERAL: *Pension Benefits Standards Act*, 1985, RSC 1985, c 32 (2nd Supp)

> *Note: the PBSA (Federal) applies to federally regulated pension plans, as well as pension plans regulated in Prince Edward Island and the Territories*

BRITISH COLUMBIA: *Pension Benefits Standards Act*, SBC 2012, c 30

ALBERTA: *Employment Pension Plans Act*, SA 2012, c E-8.1SA 2012, c E-8.1

MANITOBA: *The Pension Benefits Act*, CCSM c P32

ONTARIO: *Pension Benefits Act*, RSO 1990, c P.8

QUÉBEC: *Supplemental Pension Plans Act*, CQLR c R-15.1

NEW BRUNSWICK: *Pension Benefits Act*, SNB 1987, c P-5.1

NOVA SCOTIA: *Pension Benefits Act*, SNS 2011, c 41

NEWFOUNDLAND AND LABRADOR: *Pension Benefits Act*, 1997, SNL 1996, c P-4.01

SAMPLE TRUST AGREEMENT

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THIS AGREEMENT AND DECLARATION OF TRUST made as of

the day of , 20XX.

B E T W E E N:

(hereinafter referred to collectively as the "Employers" or individually as an "Employer")

OF THE FIRST PART

AND:

(hereinafter referred to collectively as the "Unions" or individually as the "Union").

OF THE SECOND PART

WHEREAS the Employers and the Unions are parties to Collective Bargaining Agreements which require payments to be made to a Trust Fund in stated amounts in respect of each hour worked by the employees of the Employers, to provide pension benefits for the employees of the Employers; and

WHEREAS to give effect to that purpose, the Employers and the Unions desire to create a trust and established a fund known as the __________________ Pension Trust Fund (the "Fund"), to establish a fund for receiving contributions and providing benefits for eligible Employees; and

WHEREAS it is desired to set forth the terms and conditions under which the said Fund is to be established and administered; and

WHEREAS it has been mutually agreed that the Fund shall be administered by Trustees and it is desired to define the power and duties of the Trustees and the nature of benefits to be provided; and

WHEREAS the parties contemplate that future Collective Agreements have, and will continue to contain similar provisions and that the Trust Fund will continue and that the Agreement will enure for the benefit of subsequent Collective Agreements; and

WHEREAS the parties hereto acknowledge and agree that there may be periods of time when no Collective Bargaining Agreement exists and there may be no obligation upon the Employers to pay funds to the said Trust Fund and that shall not be deemed to vitiate the continuance of the Trust Fund;

NOW, THEREFORE, in consideration of these premises and of the promises and mutual covenants contained herein, the parties do hereby agree as follows:

SECTION 1
DEFINITIONS

(a) "**Actuary**" means the person, corporation or firm appointed by the Trustees to be the actuary of the Plan, who shall be, or in the case of a firm or corporation, a member of the staff shall be, a fellow of the Canadian Institute of Actuaries.

(b) "**Administrative Agent**" means such person, firm or corporation as may be from time to time appointed by the Trustees as their agent for the purpose of administration of the Fund and the Plan established hereunder.

(c) **"Association"** means the Employer Association of __________________, or its successor.

(d) "**Auditor"** means such person or firm as the Trustees may appoint from time to time to audit the financial statements of the Trust Fund.

(e) "**Bank**" means a bank which may lawfully carry on business in Canada.

(f) "**Benefits**" means the pension and ancillary benefits to which the Members are entitled pursuant to the Pension Plan.

(g) "**Collective Agreement**" means any written collective bargaining agreement, Project Agreement, memorandum of agreement or understanding, entered into between a Union, or Local thereof, on the one hand, and an Employer, the Association or any other employers' organization, on the other, which provides, among other things, for Contributions to this Trust Fund, with any and all amendments, supplements, modifications and renewals thereof and successor agreements thereto.

(h) "**Consultant**" means such person, firm or corporation as may be from time to time appointed by the Trustees for the purpose of consulting with and advising the Trustees with respect to the Plan.

(i) "**Contributions**" means payments required or permitted by the Pension Plan the PBA and paid or payable to the Trust Fund:

(i) by an Employer in accordance with:

(1) the terms of a Collective Agreement;

(2) the terms of a Participation Agreement;

(3) any decision of the Trustees as may be permitted by this Agreement; or

(4) any other document, action or oral agreement, by which an Employer is required to make Contributions to the Fund as may be permitted by this Trust Agreement;

(ii) by an Employee who is entitled to pay directly to the Fund, in accordance with:

(1) the terms of a Collective Agreement;

(2) the terms of a Participation Agreement;

(3) any decision of the Trustees as may be permitted by this agreement; or

(4) any other document, action or oral agreement, by which an Employee

is entitled to make Contributions to the Fund as may be permitted by this Trust Agreement;

(iii) by any other person, trade union, employers' organization, corporation, as the Trustees may decide to accept from time to time in such amounts and in such manner as they may deem appropriate; and

(iv) pursuant to any reciprocal agreement.

(j) "**Eligibility Requirements**" means the rules, regulations and procedures established, from time to time, by the Trustees for determining the eligibility, or the discontinuance of eligibility, for Benefits.

(k) "**Employee**" shall mean any of the following persons:

(i) any person covered by a Collective Agreement, or any other document or oral agreement as may be permitted by this Trust Agreement, who is engaged in employment with respect to which the Employer is obligated by the Collective Agreement, other document or oral agreement, to make Contributions to the Trust Fund and is making such Contributions to the Trust Fund; or

(ii) any person employed by an Employer who is a party to, or bound by, a memorandum of agreement, or a memorandum of understanding, or other similar instrument, with a Union, or a Local thereof, incorporating by reference the provisions of any applicable Collective Agreement or the provisions of this Agreement, where such person is covered by such agreement and the Employer is making the required Contributions to the Trust Fund.

(l) "**Employer**" as used herein shall mean any employer who:

(i) now or hereafter is a party to, or is bound by, a Collective Agreement;

(ii) in writing adopts and agrees to be bound by the terms and provisions of this Agreement as the same may be amended or modified from time to time by executing a Participation Agreement in the form annexed hereto as Appendix "B"; or

(iii) by any course of conduct, including but not limited to, oral representations to representatives of a Union, or a Local thereof or the Trustees, agrees to make Contributions to this Trust Fund, and such agreement may, but need not be limited to, conduct where such Employer ratifies or accepts the provisions of:

(1) any Collective Agreement;

(2) the Trust Agreement; or

(3) any other written instrument which binds such Employer to make Contributions to the Trust Fund;

provided that the person entering into any such agreement with any such Employer as aforesaid, advises the Trustees in writing of the terms thereof, which agreement must be approved by the Trustees prior to their receiving any Contributions from any such Employer and extending credit for Benefits to any Employees of the Employer.

(m) "**Insurance Company**" means an insurance company licensed to carry on business in Canada.

(n) "**Investment Counsel**" means a person, firm or corporation to be appointed by the Trustees, to act in the capacity of financial advisor regarding the investment of the assets of the Trust Fund.

(o) "**Legal Counsel**" means a person or firm lawfully to be appointed by the Trustees, for the purpose of consulting with and advising the Trustees with respect to the legal aspects of the Trust Fund.

(p) **"Member"** means a person who meets the Eligibility Requirements of the Pension Plan as adopted by the Trustees, and for whom an individual account has been established, notwithstanding that said person is not an Employee.

(q) **"PBA"** means the *Pension Benefits Act*, ________________________, as amended from time to time.

(r) **"Pension Plan"** or **"Plan"** means the pension plan established as of the ___ day of _____, 20XX, to provide pension and ancillary benefits from the Fund to Members, as the same may be amended from time to time.

(s) **"Project Agreements"** means amendments to the Collective Agreements, mutually agreed to by the parties to said Collective Agreements altering the provision of the Collective Agreements for certain projects because of project location, type, size or other specifications. Said Project Agreements may be added as appendices to the Collective Agreement.

(t) "**Trust Agreement**" or **this "Agreement"** means this instrument, including any amendments or modifications thereto.

(u) "**Trust Company**" means a trust company which is licensed to carry on business in Canada.

(v) "**Trust Fund**" or "**Fund**" as used herein shall mean all of the assets of the ________________, Pension Trust Fund consolidated with all funds received by way of Contributions with all increments, earnings and benefits accruing from the administration of the Fund.

(w) "**Trustees**" as used herein shall mean all persons designated from time to time as trustees pursuant to provisions of the Trust Agreement and the "**Board of Trustees**" shall comprise all the Trustees and shall be the administrator of the Plan for the purposes of the PBA.

(x) **"Unions"** as used herein shall mean the ________________________, collectively and "**Union**" shall mean each of them individually.

SECTION 2
EXISTENCE AND PURPOSE OF TRUST FUND

2.01 **Title**. The title to all assets of the Trust Fund shall be jointly vested in and remain exclusively in the Trustees. The Trustees shall jointly hold the property of the Fund and shall deal with it in accordance with the terms of the Trust Agreement.

2.02 **Purpose**. The Trustees agree to receive, hold and administer the Fund for the purpose of providing Benefits for the Members and their beneficiaries in accordance with the Pension Plan.

2.03 **Binding Effect**. It is hereby agreed that the Trust Agreement is binding on the Employers, the Association, any other employers' organization, the Unions, or a Local thereof, and all Members and their respective heirs, executors, administrators, successors and assigns.

2.04 **Trust Fund**. The corpus of the Fund and all payments into the Fund from time to time together with the income therefrom shall constitute on receipt by the Trustees, a trust fund to be administered by the Trustees in accordance with the Trust Agreement, the Pension Plan and the Collective Agreement.

2.05 **Manner of Payment**. All payments and Contributions shall be made payable to the "Board of Trustees of the Pension Trust Fund".

2.06 **Rights or Interest**. Neither the parties hereto, nor any other person, association, firm or corporation shall have any right, title or interest in or to the assets of the Fund, except as specifically provided by a Collective Agreement, the Trust Agreement and the Pension Plan; provided however that nothing in the Trust Agreement shall prevent a Contribution, made by an Employer or a Member by mistake of fact, from being returned by the Trustees to such Employer or Member within one (l) year after the payment of such contribution.

2.07 **Seizure or Attachment**. Subject to the Pension Plan and the laws of the province of Saskatchewan, no monies, property or equity of any nature whatsoever, in the Fund, or policies or benefits or monies payable therefrom, shall be subject in any manner by any Member or person claiming through such Member, or otherwise, to anticipation, alienation, seizure, sale, transfer, assignment, pledge, encumbrance, attachment, garnishment, execution, mortgage, lien or charge. If by reason of any seizure or sale or any attempted sale under any legal, equitable or other process or by way of any suit or proceedings, any Benefit becomes payable to any person other than the beneficiary from whom the same is intended, as provided in the Plan, the Trustees shall have the power to withhold payment of such Benefit to such beneficiary until such anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, attachment, garnishment, mortgage, lien, charge or seizure or other legal process is cancelled or withdrawn, and the Trustees shall have the right to use and apply the amount of such Benefit during such period, as the Trustees may deem best for the support and maintenance of such beneficiary.

SECTION 3
CONTRIBUTIONS

3.01 **Members' Contributions**. Members shall make Contributions to the Fund in the amounts, manner and form, and by the dates, prescribed pursuant to the Collective Agreement and the Pension Plan. In the event of conflict between the requirements of the Collective Agreement on the one hand, and the Pension Plan on the other, the Collective Agreement shall prevail.

3.02 **Employer Contributions**. Employers shall make Contributions to the Fund in the amounts, manner and form, and by the dates, prescribed pursuant to the Collective Agreement and the Pension Plan. In the event of conflict between the requirements of the Collective Agreement on the one hand, and the Pension Plan on the other, the Collective Agreement shall prevail. The Employers agree that their absolute obligation to make Contributions to the Fund shall not be subject to any set-off or counter-claim which an Employer may have for any liability of the Unions, a Member or Employee.

3.03 **Employer Information Requirements**. The Employers shall:

(a) provide the Trustees with all documentation required by law; and

(b) complete and remit to the Trustees an information form as prescribed by the Trustees.

3.04 **Non-Payment By One Contributor**. Non-payment by anyone required to make Contributions to the Fund shall not relieve any other person of his or her obligations to make such payments.

3.05 **Employer Contributions Held in Trust**. Contributions to the Fund payable by an Employer are deemed to be held in trust by the Employer for the Trustees of the Fund until remitted to the Fund. For the purposes of enabling the Trustees to recover unpaid Contributions, Contributions payable to the Fund by an Employer shall be deemed to be payments of wages due to Employees, which have been irrevocably assigned by the Employees to the Fund.

3.06 **Member Contributions Held in Trust**. Contributions by a Member that are, or ought to be, deducted and withheld by an Employer are deemed to be held in trust by the Employer for the Trustees of the Fund until remitted to the Fund.

3.07 **Audits**. Each Employer agrees that upon the written demand of the Trustees, it shall permit a chartered accountant acting on their behalf, or in accordance with their instructions, to:

(a) enter upon that Employer's premises at any reasonable time or times, upon giving one (1) days' written notice, for the purpose of carrying out an inspection, audit or examination of all books of account, documents, payrolls, records, or any other material which may be relevant to the said inspection, audit or examination; and,

(b) make inquiries of an Employer or any persons employed or otherwise engaged by an Employer, which persons shall produce all books of account, documents, payrolls, records, or any other material which may be relevant to the said inspection, audit or examination, in order to ensure that the Employer has been complying with the terms and conditions of the Collective Agreement, the Trust Agreement and the Pension Plan, including and without limiting the generality of the foregoing, complying with its obligations to make Contributions to the Fund. It is agreed that the chartered accountant shall not reveal any of the information or documents obtained herein, unless such inspection, audit or examination reveals that an Employer has failed to carry out his or her obligations under the Collective Agreement, the Pension Plan or the Trust Agreement.

3.08 **Employer Failure to Comply**. In the event that an Employer has failed to carry out its obligations under the Collective Agreement, the Trust Agreement or the Pension Plan, the Employer shall forthwith, upon written demand from the Trustees:

(a) pay to the Fund all sums which may have been determined by the said inspection, audit or examination or otherwise, to be due and owing by the Employer, as well as interest at such rate as may be determined by the Trustees, from time to time, from the due date until such sums are totally satisfied;

(b) complete and remit any information forms or other related and supporting documents which may be required of the Employer;

(c) pay to the Fund all costs, expenses, or losses, incurred by it in connection with or arising out of any inspection, audit or examination or other proceedings or steps taken in respect to any such failure;

(d) pay to the Fund on account of liquidated damages, an amount equal to ten (10%) percent of the total of all amounts found to be due and owing to the Fund as aforesaid. Such Employer acknowledges that the liquidated damages will be used to defray administrative costs resulting from the said delinquency and acknowledges the costs to have been actually incurred, waiving the necessity of any additional proof thereof. Without limiting the generality of the foregoing, the said sum is on account of damages resulting from:

  (i) inconvenience and burden imposed upon the Trustees;

  (ii) loss of any Benefits, monetary or otherwise, to any Members; and,

  (iii) loss of benefit of the use of any funds, in connection with an Employer's failure to comply with the terms and conditions of the Collective Agreement, the Trust Agreement, or the Pension Plan.

(e) subject to any contrary terms in the Pension Plan, furnish the Trustees with cash deposits of Contributions in such amounts and at such times as are determined by the Trustees, provided that the Trustees have given such Employer reasonable notice of such requirement for deposits, the amount to be deposited, the dates such deposits are due and the basis on which the deposit is determined and required; and,

(f) furnish the Trustees in lieu of cash deposits, a bond with reputable surety,

  (i) with the Trustees as obligees thereunder;

  (ii) in an amount, determined by the Trustees, consistent with the anticipated future obligations of such Employer to the Fund; and,

  (iii) with notice provisions acceptable to the Trustees, consistent with the purposes of such bond.

3.09 **Grace Period**. The Trustees are authorized to establish a reasonable and lawful grace period by which Contributions must be received.

3.10 **Collection Costs**. If an Employer becomes delinquent in its Contributions and the Trustees place the account in the hands of Legal Counsel for collection, the said delinquent Employer shall be liable for reasonable counsel fees and for all reasonable costs incurred in the collection process, including court fees.

SECTION 4
TRUSTEES

4.01 **Board of Trustees**. There shall be eight (8) Trustees to administer the Pension Plan in accordance with the terms of this Trust Agreement and the Pension Plan. Four (4) Trustees shall be appointed by the Unions (hereinafter referred to as "Union Trustees"), and four (4) Trustees shall be appointed by the Association (hereinafter referred to as "Employer Trustees"). The appointment of a Trustee shall be in the discretion of the appointing party, provided that the appointing party at all times complies with applicable federal and provincial legislation.

4.02 **Acceptance of Trusts**. Each Trustee after signing an Acceptance of Trust in the form set forth in Appendix "A" attached hereto, shall be deemed to accept the trusts created and established by the Trust Agreement and the Pension Plan and to consent to act as a Trustee.

4.03 **Resignation, Removal, Incapacity or Death**.

(a) **Resignation**. A Trustee may resign by giving notice in writing to the remaining Trustees, the Unions and the Association. Such notice shall state the date on which such resignation shall take effect and shall be effective as of that date and such Trustee shall be fully discharged from any duty, responsibility or liability herein arising after such date.

(b) **Removal**. Any Union Trustee may be removed at any time by the Unions and any Employer Trustee may be removed at any time by the Association, upon giving written notice to the said Trustee and to the other parties hereto and to the remaining Trustees. Such removed Trustee and his or her heirs, executors, administrators and assigns shall be fully discharged from all duties, responsibilities and liabilities in respect of this Trust Agreement arising after the date of this notice given to him or her.

(c) **Automatic Removal.** A Trustee shall be automatically removed if a receiving order is made against him or her or if he or she makes an assignment under the *Bankruptcy and Insolvency Act*.

(d) **Incapacity**. In the case of a Trustee becoming incapable of acting as a Trustee, the appointment of the Trustee may be terminated by notice from the Trustee, or his or her personal representatives, or the party which appointed the Trustees to the remaining Trustees and the other parties hereto.

(e) **Death**. In the event of the death of a Trustee, his or her heirs, administrators, executors and assigns shall be fully discharged from all duties, responsibilities and liabilities in respect of the Trust Agreement arising after the date of death.

(f) **Remaining Trustees**. In the event of the death, resignation, incapacity or removal of any one or more of the Trustees, the remaining Trustees shall have jointly all the powers, rights, estates and interests of the Trustees as provided hereunder and shall be charged with all duties of the Trustees hereunder.

(g) **Status**. Any Trustee resigning or being removed and the personal representatives of any deceased Trustee shall forthwith turn over to his or her successor Trustee, or if no successor is immediately appointed, to the other Trustees, any and all records, books, documents, monies, shares, securities and other property and assets in the possession of the Trustee forming part of the Trust Fund or incidental to his or her duties as a Trustee under this Trust Agreement or relating to the administration of the Fund.

(h) **Appointment of Replacement Trustees**. In the event any Trustee shall die, become incapacitated, resign or be removed, the party which appointed such Trustee shall immediately appoint a successor Trustee and give the other Trustees and the other parties hereto notice thereof. Any successor Trustee so designated or elected to serve as Trustee shall immediately, upon an Acceptance of Trust being filed in writing with the Trustees, become vested with all the powers, rights, estates and interests of the other Trustees under the Trust Agreement with the like effect as if he or she had been originally named as Trustee.

4.04 **Fees and Expenses**. Trustees shall not be entitled to any fee or payment on account of their holding office, but may be reimbursed by the Fund for all expenses which have been incurred by them in the performance of their duties; provided however, that the Trustees determine that such expenses are reasonable and necessary in the performance of such duties. This includes, but is not limited to, the reasonable expenses incurred for Trustees to attend conferences for educational purposes relevant to the administration of the Fund and its assets.

4.05 **Chair**. The Trustees shall elect a joint-Chair for the Board (hereinafter referred to as the "Chairs"). The Chairs shall consist of one Union Trustee and one Employer Trustee. The Chairs so elected shall serve as such until such time as new Chairs are elected.

4.06 **Secretary**. The Trustees shall appoint a Secretary who shall keep minutes or records of all meetings, proceedings and acts of the Trustees. Such minutes need not be verbatim. The Secretary does not necessarily need to be a Trustee of the Fund.

4.07 **Execution of Documents and Cheques**. All documents to be executed by the Trustees and all cheques payable out of the Fund shall be signed by at least one Union Trustee and one Employer Trustee or by such other persons as the Trustees may by resolution appoint, but nothing contained herein shall be construed so as to regard any Trustee as an agent of the Unions, the Association, or the Employers.

4.08 **Annual Meeting**.

(a) The Trustees shall hold at least two (2) meetings each year, one of which will be designated as the Annual Meeting of the Trustees. The Chairs shall be responsible for setting the dates of each such meeting, provided that the Annual Meeting must be held within six (6) months of the end of the fiscal year of the Fund.

(b) At each Annual Meeting of the Trustees, among other things:

(i) a financial statement from the Auditors of the fund shall be presented covering the immediately preceding fiscal period of the Fund;

(ii) the Administrative Agent shall submit a report relating to the period since the inception of the Fund or from the date of the last preceding Annual Meeting as the case may be.

(iii) Auditors shall be appointed; and

(iv) the interest rate to be credited to Members' accounts for the preceeding calendar year ending December 31, shall be declared.

4.09 **Meetings at the Request of the Unions and the Association.** The Unions and the Association may, jointly and by notice in writing to the Chairs, Secretary or to each Trustee personally, require a meeting of the Trustees to discuss issues raised in the said written notice, whereupon the Chairs or Trustees, as the case may be, shall convene a meeting of the Trustees with the Unions and the Association within five (5) days of receipt of notice to discuss the issues raised in the notice.

4.10 **Other Meetings**. The Chairs or any two (2) or more Trustees may call a meeting of the Trustees at any time by giving at least seven (7) days' written notice of the time and place thereof to each Trustee. Meetings of the Trustees may be held at any time without notice if all Trustees consent thereto.

4.11 **Meetings by Conference Call or Consent in Writing**. Any meeting of the Trustees may be held by means of a conference telephone call, if all Trustees consent thereto. Any decision is effective without a meeting of the Trustees if evidenced by instrument in writing signed by all the Trustees.

4.12 **Quorum.**

(a) A quorum shall consist of four (4) Trustees provided that at least two (2) Union Trustees and two (2) Employer Trustees are present. The decisions of the Trustees shall be determined by a majority vote unless otherwise provided for herein. Where all of the Union Trustees or all of the Employer Trustees are not present at a meeting, or in the event that there is a vacancy on the Board of Trustees, but a quorum exists, the Union Trustees or Employer Trustees present shall be entitled to cast an equal portion of the votes allocated to his/her respective class of Trustees on all matters coming before the meeting.

(b) The Chairs at any meeting of Trustees shall not be entitled to a second or casting vote.

4.13 **Trustees' Deadlock**

(a) **Deadlock**. A deadlock shall be deemed to exist wherever a proposal, motion or resolution made by any Trustee is neither adopted nor rejected by a majority vote, or where a proposal, motion, or resolution is unable to be made at a meeting due to lack of a quorum at two (2) consecutively called meetings. In the event of a deadlock, a meeting of the Trustees shall be held at least ten (10) days after the deadlock has arisen for the purpose of either resolving the matter in dispute or agreeing upon the designation of an arbitrator to resolve the matter in dispute.

(b) **Dispute Resolution Procedures**. If, within thirty (30) days after such deadlock no arbitrator has been designated, or the matter in dispute has not been resolved, then either the Employer Trustees or the Union Trustees may request the Minister of Labour for the Province of (insert Province here) to appoint a neutral arbitrator. An arbitrator so appointed shall have all the powers of an arbitrator under the *Arbitration Act*.

(c) **Arbitration Procedure.** An Arbitrator selected or appointed in accordance with this provision shall attend the next meeting of the Board of Trustees which shall be held as soon as practical thereafter. At such time the Arbitrator shall hear any evidence or arguments presented by any Trustee or any interested parties. The Arbitrator shall cast the deciding vote by providing written reasons for his or her decision. Copies of his or her reasons for decision shall be delivered to the Chairs and the Secretary of the Board of Trustees.

(d) **Final and Binding Decisions**. Any decision of an arbitrator, reached through the arbitration steps of the dispute resolution procedure, in accordance with paragraph (b) and (c) above, shall be final and binding upon the Trustees.

SECTION 5

POWERS, DUTIES AND RESPONSIBILITIES OF THE TRUSTEES

5.01 **Administration of the Trust Fund**. The administration of the Fund shall be the responsibility of the Trustees, and they shall administer the Fund in accordance with the express powers given them pursuant to the Trust Agreement and the Pension Plan.

5.02 **Collection of Contributions**. The Trustees may use all reasonable means to collect and receive all Contributions due to the Fund, and shall, promptly after receipt, deposit such Contributions in a Trust Fund account, established in a Bank, or Trust Company, or other financial institution.

5.03 **Liability of Trustees**. The Trustees shall incur no liability, either collectively or individually, in acting upon any documents, data or information believed by them to be genuine and accurate and to have been made, executed, delivered or assembled by the proper parties.

5.04 **Authority of Trustees**. All persons dealing with the Trustees are released from inquiry into any decision or authority of the Trustees and from seeing to the application of any monies, securities or other property paid or delivered to the Trustees and may rely upon any document required to be executed by the Trustees which has been executed as provided herein, as having been duly authorized.

5.05 **Liability and Indemnity**. No Trustee shall be liable for the act or omission of any other Trustee. The Fund shall indemnify and save harmless the Trustees and each of them, of, from and against any loss, expense, claim, demand, action or thing of any nature whatsoever, arising out of the performance or purported performance of their duties or responsibilities hereunder except that this indemnity shall not, in any way, extend so as to protect any Trustee with respect to any matter or thing arising out of his own dishonesty, wilful misconduct or gross negligence.

5.06 **Liability of Unions, the Association, Employers and Members**. Neither the Unions, the Association, the Employers, nor any Member shall be responsible or liable for:

(a) the validity of the Trust Agreement;

(b) any delay occasioned by any restriction or provision in this Trust Agreement, the rules and regulations of the Trustees issued hereunder, or any contract procured in the course of the proper administration of the Fund; provided, however, that this clause shall not excuse any violation of the Collective Agreement as it may affect the Fund;

(c) the making or retention of any deposit or investment of the Fund, or any portion thereof, or the disposition of any such investment, or the failure to make any investment of the Fund, or any portion thereof, or any loss or diminution of the Fund, except as to the particular person involved, such loss as may be due to the dishonesty, gross negligence or wilful misconduct of such person;

(d) any of the obligations or acts of the Trustees because such Trustees are in any way associated with the Unions, the Association or the Employers;

(e) any Contributions required to be paid to the Fund, other than their own Contributions as may be required by the Pension Plan, a Collective Agreement or a Participation Agreement.

5.07 **Powers**. The Trustees are hereby empowered as follows:

(a) to administer the Pension Plan for the exclusive benefit of Members, their beneficiaries or dependents, as the case may be;

(b) to adopt such policies, procedures, by-laws, rules or regulations, as they deem necessary for the carrying out of their trusts, consistent with the provisions of the Collective Agreement, the Trust Agreement and the Pension Plan and with the requirements of applicable provincial and federal legislation;

(c) to enter into agreements with a Bank, Trust Company, Insurance Company or Investment Counsel, selected by the Trustees, for the purpose of providing investment management or advice, or for the purpose of acting as a depository for safekeeping of assets of the Trust Fund, or for any other purpose as the Trustees shall deem necessary and to authorize any such Bank, Trust Company, Insurance Company, or Investment Counsel to commingle any monies deposited with them in any pooled fund administered or managed by any of them;

(d) to pay or provide for the payment of Benefits to those persons eligible to receive the same;

(e) to pay from the Fund all reasonable expenses for collecting Contributions and administering the Fund including, but not limited to, all compensation and all reasonable and necessary costs and fees which may be incurred in connection with the employment of such actuarial, legal, accounting, and clerical assistance as the Trustees may find necessary in the performance of their duties. The Trustees shall be held completely and fully protected in acting and relying upon the opinions or advice of the aforementioned persons;

(f) to enter into any and all contracts and agreements for carrying out the terms of this Trust Agreement;

(g) to compromise, settle, arbitrate and release claims or demands in favour of, or against the Fund, or the Trustees, on such terms and conditions as the Trustees may deem advisable;

(h) to establish procedures to be followed in filing applications for Benefits and for the furnishing and certification of evidence necessary to establish a right to such Benefits.

(i) to pay out of the Fund, all real and personal property taxes, income taxes and other taxes of any and all kinds, levied or assessed under existing or future laws, upon or in respect to the Fund or any money, property or securities forming a part thereof;

(j) to receive payments from any source whatsoever, to the extent permitted by law and by the Collective Agreement, the Trust Agreement and the Pension Plan;

(k) to invest and re-invest such portion of the Fund as is not required for current expenditures, in any type of investments that are permitted by the applicable federal and provincial laws and regulations, provided that the Trustee shall make investment decisions with consideration given to the overall context of the investment portfolio without undue risk of loss or impairment and with a reasonable expectation of fair return or appreciation given the nature of the investment.

(l) to take any actions with respect to holding, buying, selling or exchanging investments as they, in their sole discretion, may deem appropriate or necessary and, in particular, without limiting the generality of the foregoing:

(i) to exercise any of the powers of an owner with respect to stocks, bonds, debentures, mortgages, or other investments and property held in the Trust Fund and, in particular, but without limiting the generality of the foregoing, to exercise any right there may be to vote in connection therewith; to give general or special proxies or powers of attorney with or without powers of substitution; to exercise any conversion privilege, subscription rights or other options, and to make any payments incidental thereto; to consent to or otherwise participate in corporate reorganizations or other changes affecting shares and other securities; to delegate discretionary powers and pay any assessments and other charges in connection therewith; and to accept and hold any shares or securities which may be issued as a result of corporate reorganizations or changes affecting corporate shares or securities;

(ii) to renew or extend or participate in the renewal or extension of any mortgage, upon such terms as may be deemed advisable, and to agree to a reduction in the rate of interest on any mortgage, or to any other modification or change in the terms of any mortgage, or of any guarantee pertaining thereto, in any manner and to any extent that may be deemed advisable for the protection of the Trust Fund or the preservation of the value of an investment; to waive any default, whether in the performance of a covenant or condition in any mortgage, or in the performance of any guarantee, or to enforce in such manner and to such extent as may be deemed advisable; to exercise and enforce any and all rights of foreclosure; to bid on property in a judicial sale; to take a deed in lieu of foreclosure, with or without paying a consideration therefor, and in connection therewith to release any person or persons from their covenant or guarantee given in connection with such mortgage, and to exercise and enforce by any action, suit or proceeding at law or in equity, any rights or obligations or to take appropriate measures by way of proceedings at law or otherwise for the enforcement or realization of any investment;

(m) to hold in uninvested cash, without any liability for interest thereon, such sums as they deem necessary or advisable for the reasonably current cash requirements of the Fund;

(n) in their discretion and to the extent they deem it wise, beneficial or necessary, to appoint a Bank, Trust Company or Insurance Company to be designated as "Corporate Trustee", and to enter into and execute an agreement or agreements with such Bank, Trust Company or Insurance Company, to provide for the investment and re-investment of assets of the Fund, subject always to the terms of the Collective Agreement, the Trust Agreement and the Pension Plan and applicable laws; and upon such execution, to convey and transfer to such Corporate Trustee, any assets of the Fund, together with as full or lesser power, to administer, invest and re-invest such assets as the Trustees themselves enjoy under the terms hereof. The Trustees shall be released and discharged from any responsibility or liability with respect to any assets which they may convey to such Corporate Trustee, unless and until such assets and any additions thereto are returned by the Corporate Trustee to the Trustees;

(o) to exercise all rights or privileges granted by the provisions of any contract entered into by the Trustees with any Insurance Company, Bank, Trust Company or Investment Counsel, and to agree with such Insurance Company, Bank, Trust Company or Investment Counsel to any alternative, modification, amendment or cancellation of such contract subject always to the terms of the Collective Agreement, the Trust Agreement, the Pension Plan and applicable law, or to take any other action respecting such contracts which they, in their discretion, may deem necessary or advisable;

(p) to delegate any of their administrative powers or duties to any committee of the Trustees or to any of their agents, where it is reasonable and prudent to the circumstances so to do; provided that such agent is personally selected by the Trustees and is supervised in a reasonable and prudent manner by them;

(q) to lease or purchase such lands, premises, materials, supplies and equipment as the Trustees deem necessary or appropriate in the performance of their duties;

(r) to construe the provisions of the Trust Agreement, and any construction adopted by the Trustees, in good faith, shall be binding upon the Union, the Association, the Employers, Members, and the family, dependents, beneficiaries and/or legal representatives of such Members;

(s) to use the monies available in the Fund to pay all reasonable expenses and to provide for the payment of Benefits;

(t) to enter into written agreements with the Unions, the Association, the Employers or any other trust funds covering Employees, to permit the Trustees to share certain expenses pertaining to the administration of the Fund with respect to such matters as:

(i) costs of collection and disbursement of funds pursuant to the provisions of this Agreement, the Pension Plan or any other agreement;

(ii) salaries of office and supervisory staff;

(iii) cost of office equipment, supplies and incidental material;

(iv) costs of computer equipment and facilities and computer maintenance;

(v) rent of office space, furnishings, fixtures and office equipment;

(vi) cost of producing Member and Employer lists and addresses;

(vii) cost of services of the Unions, the Association, or the Employers required in connection with delinquent Contributions;

(viii) legal, consulting, actuarial and audit fees; and

(ix) such other costs that in the opinion of the Trustees may be shared with the Unions, the Association, the Employers, or any other trust funds;

provided that the Fund is fairly compensated for any expenses it incurs in connection with such an agreement, or alternatively, provided that any amounts paid by the Fund to the Unions, the Association, the Employers or any other trust fund, in respect of the above costs and expenses, shall be in accordance with a cost sharing report prepared by an independent auditor providing a time and expense audit for work performed and expenses incurred by the Union, or any other trust fund, in connection with the expenses pertaining to the administration of the Trust Fund; and provided further, that such cost sharing agreement provide that the Trustees may terminate such agreement at any time, with no more than thirty (30) days' notice to all other parties.

5.08 **Fidelity Bonds**. The Trustees may procure fidelity bonds for the persons authorized to receive, handle, deal with, or draw upon the monies in the Fund for any purpose whatsoever. Such persons may be bonded in such amounts and in such manner as the Trustees may determine. The cost of such bond may be paid out of the Fund.

5.09 **Errors and Omissions Insurance**. The Trustees may purchase such fiduciary and errors and omissions insurance as they deem necessary. The cost of such insurance may be paid out of the Fund.

5.10 **Appointment of Actuary, Auditor and Legal Counsel**. The Trustees may appoint an Actuary, Auditor and Legal Counsel for the Fund, who shall serve until their respective successors are appointed.

5.11 **Requirement for Information**. The Trustees may require any Employer, Employee or Member to submit to them, any information, data, report or documents, reasonably relevant to, and suitable for the purposes of administration of the Fund.

5.12 **Records**. The Trustees shall maintain suitable and adequate records of and for the administration of the Fund.

5.13 **Annual Audits**. The books of account and records of the Trustees, including the books of account and records pertaining to the Fund, shall be audited at least once every year by the Auditor of the Fund, as of the fiscal year end of the Fund. A statement of the results of the annual audit shall be available for inspection by interested persons at the principal office of the Fund and at such other suitable place as the Board of Trustees may designate from time to time. Copies of such statement shall be delivered to each Trustee within sixty (60) days after that statement is prepared.

5.14 **Administrative Agent**. The Board of Trustees may, in their discretion, appoint or hire an Administrative Agent and may, at any time, but subject to any agreement reached between the Trustees and the Administrative Agent, remove the Administrative Agent and appoint or hire a successor. The Administrative Agent shall assume the responsibility of accounting for payments and such duties and responsibilities, as may be delegated to him or her, or from time to time, by the Board of Trustees. Without limiting the generality of the foregoing, the following duties and obligations may be delegated to the Administrative Agent:

(a) submit a report to the Board of Trustees as soon as possible after the end of each fiscal year and on such interim basis as the Trustees may order, of the status of the Fund, financial or otherwise;

(b) attend such meetings of the Board of Trustees, or committees thereof, as required by order of the Board of Trustees, and to execute such instructions, as may be given to him, and to attend such meetings in connection with the Fund, as required by order of the Board of Trustees;

(c) keep such records as are necessary to determine each Member's rights to Benefits under the Plan and to determine the amount of such Benefits as they become due;

(d) deal with all communications from Members and others, with respect to the Fund and the terms of the Trust Agreement and the Pension Plan;

(e) validate all claims against the Fund and obtain all necessary declarations, certificates and other evidence required for the proper administration of the Fund;

(f) advise the Trustees if an Employer or Member is not contributing to the Fund as may be required;

(g) manage the Fund's building at which the Fund's offices are located; and

(h) hire or discharge employees required for the administration of the Fund.

5.15 **Designation of Trustees**. The name of the Fund may be used to designate the Trustees collectively, and all instruments may be executed by or for the Trustees in such names.

5.16 **Legal Proceedings**. The Trustees may commence such legal proceedings as they deem necessary and appropriate in connection with the interpretation or enforcement of the Trust Agreement and Pension Plan and the administration of the Fund as well as defending any legal proceedings which may be brought against them, the reasonable expenses for which shall be paid by the Fund, except with respect to any proceedings brought against any Trustee in relation to any matter or thing arising out of his dishonesty, wilful misconduct or gross negligence.

5.17 **Trust Fund Borrowing**. The Trustees may from time to time, borrow money on a short term basis from any Bank or Trust Company,

(a) on such terms and conditions as may be necessary and appropriate in the circumstances; provided that such borrowing shall only be for the purpose of:

(i) providing for the payment of any Benefit authorized by the Trustees; or

(ii) permitting the orderly disposition of investments and the acquisition of new investments during the planned conversion of any investments, in order to avoid a distress sale of investments of the Fund that would otherwise be necessary to pay such Benefits or acquire new investments.

(b) where such borrowing is other than for the purpose of acquiring income producing real property pursuant to (a),

(i) the borrowing term shall not exceed 90 days, and

(ii) the borrowing shall not form part of the series of loans or other transactions and repayments.

(c) where such borrowing is for the purpose of acquiring income producing real property pursuant to (a)(ii),

(i) the aggregate of all amounts borrowed for the purpose of acquiring the property and any indebtedness incurred as a consequence of the acquisition of the property shall not exceed the cost to the person of the property, and

(ii) none of the property that is held in connection with the Fund, other than real property, shall be used as security for the borrowed money.

5.18 **Advice of the Court**. The Trustees may seek the advice, opinion or direction of an appropriate court on any matter pertaining to the Trust Agreement or the administration of the Fund or Pension Plan.

SECTION 6

MISCELLANEOUS PROVISIONS

6.01 **Notices**

(a) Any notice provided for herein to be given shall be in writing and shall be effectively given if delivered personally by courier, by telegram, facsimile or other electronic transmission, or prepaid registered mail addressed to the Trustees, the Unions, the Association, or to any Employer, at their last address known to the Trustees or the Administrative Agent.

(b) Any notice so given shall be deemed to have been given if delivered personally by courier, by telegram, facsimile or other electronic transmission, on the day of delivery or if given by prepaid registered mail five (5) business days following the date of mailing of such notice.

6.02 **Illegality**. If any provision of the Trust Agreement or the rules and regulations made pursuant hereto, or any steps in the administration of the Fund, are held to be illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining portions of the Trust Agreement, the Pension Plan, or the said rules and regulations, unless such illegality or invalidity prevents accomplishment of the objectives and purposes of the Collective Agreement, this Trust Agreement or the Pension Plan.

6.03 **Interpretation**. Wherever the singular and/or masculine and/or neuter is used throughout the Trust Agreement the same shall be construed as meaning the plural and/or feminine or a body corporate where the context or the parties hereto so requires.

6.04 **Headings**. The headings used herein are for ease of reference only and shall not be deemed to form part of the Trust Agreement.

6.05 **Fiscal Year**. The fiscal year of the Fund shall end on the 31st day of December, in each year.

6.06 **Further Co-operation**. Each of the parties hereto shall, from time to time and at any time hereafter upon each reasonable written request to do so, make, do, execute and deliver, or cause to be made, done, executed and delivered, all such further acts, deeds, assurances, things and written instruments as may be necessary in the opinion of the Association, the Employers and the Unions, for more effectively implementing and carrying out the intent of the Trust Agreement.

6.07 **Situs**. The Province of Saskatchewan shall be deemed to be the situs of the Fund and all questions pertaining to the validity, construction and administration of the Trust Agreement, the Pension Plan and the Fund shall be determined in accordance with the laws of the Province of Saskatchewan, or where applicable, in accordance with the laws of any other province.

6.08 **Execution in Counterpart**. The Trust Agreement may be executed in counterpart.

SECTION 7
PARTICIPATION AGREEMENTS

7.01 **Participation Agreements**. Each Employer shall enter into a Participation Agreement with the Trustees in the form set out at Appendix "B" hereto.

SECTION 8
AMENDMENTS

8.01 **Amendment**. This Trust Agreement may be amended at any time, in whole or in part by the Board of Trustees by a resolution of the Board. No amendment shall authorize or permit;

(a) any part of the corpus or income of the Fund to be used for or diverted to purposes other than for the exclusive benefit of the Members of the Pension Plan or their beneficiaries or estates;

(b) the elimination of the requirement of an annual audit or its availability for inspection by interested parties;

(c) the Trust Fund to be administered other than by an equal number of Employer Trustees and Union Trustees with equal voting privileges.

SECTION 9
TERMINATION OF TRUST FUND

9.01 **Termination by Mutual Agreement of the Unions and the Association.** This Trust Agreement may be terminated only by mutual agreement of the Unions and the Association, evidenced in writing and written notice thereof indicating the date of termination being forwarded to the Trustees, in which case the Trustees shall wind up and terminate the Fund within one hundred and twenty (120) days of such date of termination as follows:

(a) provide for a final audit and accounting for the purpose of the termination of the Fund;

(b) make payment or provision for payment out of the Fund of all expenses, claims and obligations of the Fund including the expenses incidental to such termination; and

(c) distribute the balance or surplus, if any, in any one or a combination of the following forms:

(i) improvements to Benefits to Members, their spouses, beneficiaries or estates including the purchase of annuities;

(ii) cash payments to Members, their spouses, beneficiaries or estates;

(iii) transfers to a Registered Retirement Savings Plan, or other similar vehicle, in such manner as the Trustees deem equitable and in keeping with the requirements of applicable legislation.

9.02 **Notification of Termination**. Upon termination of the Fund in accordance with this Section, the Trustees shall forthwith notify the Unions, the Association, the Employers, and any other necessary parties and the Trustees shall continue as Trustees for the purpose of winding up the affairs of the Trust.

9.03 **Merger.** In lieu of termination, the Trustees can elect to effect a merger of the Trust Fund within a reasonable period with an existing fund with similar objects, to provide similar Benefits for some or all of the Members under this Agreement and to do all such acts and things and execute such documents as may be necessary for this purpose.

IN WITNESS WHEREOF the parties hereto, in consideration of the mutual premises and undertakings herein set forth, and intending to be legally bound hereby, have caused this Trust Agreement to be executed as of the date and year first above written.

SIGNED, SEALED AND DELIVERED	)	
______________________	)	Per:______________________________
Witness	)	
______________________	)	Per:______________________________
Witness	)	
______________________	)	Per:______________________________
Witness	)	

APPENDIX "A"

ACCEPTANCE OF TRUST

THE UNDERSIGNED, having been designated to serve as a (Union Trustee) (Employer Trustee) in accordance with the Agreement and Declaration of Trust effective as of the day of ________________, 20XX, relating to the ___________________________ Pension Trust Fund does hereby accept the trusts created and established by the aforesaid Fund, consents to act as a Trustee thereunder and agrees to administer the Fund in accordance with the terms thereof.

DATED at the day of , 20XX.

________________________ ________________________

Witness Trustee

APPENDIX "B"

(PARTICIPATION AGREEMENT)

THIS PARTICIPATION AGREEMENT made as of the day of , 20XX

B E T W E E N:

(the "Participating Employer")

OF THE FIRST PART

AND:

THE TRUSTEES OF THE PENSION PLAN

(the "Trustees")

OF THE SECOND PART

WHEREAS the Pension Trust Fund (the "Trust Fund") was established by an Agreement and Declaration of Trust made and entered into __________, 20XX (the "Trust Agreement");

AND WHEREAS the Trustees, in accordance with the Trust Agreement, have agreed to permit the Participating Employer to participate in the Trust Fund and remit Contributions on certain terms and conditions;

AND WHEREAS the parties hereto have agreed to enter into this Participation Agreement for the purpose of confirming the Participating Employer's participation in the Trust Fund and the terms and conditions thereof;

AND WHEREAS the parties represent and warrant that each is empowered to enter into this Participation Agreement.

NOW THEREFORE FOR GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which is acknowledged, the parties hereto agree as follows:

1. The parties acknowledge that the recitals contained herein are true in substance and in fact.

2. Where capitalized terms are used herein, but are not otherwise defined, such terms shall have the meaning provided for in the Trust Agreement. Wherever the singular and/or masculine and/or neuter is used throughout this Participation Agreement, the same shall be construed as meaning the plural and/or feminine or a body corporate or other entity, where the context or the parties hereto so require.

3. The Participating Employer acknowledges and agrees that it is in possession of, and familiar with, the Pension Plan and the Trust Agreement.

4. The Participating Employer covenants and agrees to be bound as a "Employer" by the terms of the Trust Agreement and the Pension Plan, as they may be amended from time to time, as if an original party thereto.

5. The Participating Employer agrees to comply with all of its obligations and responsibilities as a Participating Employer as provided for in the Trust Agreement and the Pension Plan, as they may be amended from time to time, and to provide to the Trustees, without limitation, such relevant reports and data as the Trustees may from time to time require.

6. The Participating Employer covenants and agrees to pay Contributions to the Trustees of the Trust Fund, or as the Trustees may direct:

(a) at the rate and in accordance with the provisions of the Collective Agreement which may from time to time be binding upon the Participating Employer and its respective Employees; or

(b) if the Participating Employer is not bound by a Collective Agreement, or, if bound by a Collective Agreement, such agreement does not specifically refer to particular contributions to the Trust Fund, at the rate and in accordance with the Schedule attached hereto.

7. The Trust Fund shall provide Benefits to any eligible Member on whose behalf Contributions have been made to the Trust Fund, directly or indirectly, by the Participating Employer or its Employees, subject to the Trust Agreement, including without limitation, the Eligibility Requirements.

8. This Participation Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns. This Participation Agreement may be amended at any time, in writing, with the consent of the parties hereto.

9. Any dispute in relation to the interpretation, application or administration of this Participation Agreement, including without limitation, the failure of the Participating Employer to remit Contributions as required herein, shall be resolved by an impartial arbitrator, selected by the parties, or, if no agreement is reached on such impartial arbitrator within twenty (20) days of the first nomination of the arbitrator by either party, then by an impartial arbitrator appointed by the Minister of Labour for the Province of Ontario at the request of either party. All fees, costs and expenses of such impartial arbitrator shall be shall be shared equally by both parties. The decision of the arbitrator shall be final and binding on the parties and shall be enforceable against all parties hereto in accordance with such decision.

10. Any notice required or permitted to given pursuant to this Participation Agreement or the Trust Agreement shall be in writing, and shall be sufficiently given if personally delivered to the

party to whom it is given, or faxed to such party, or mailed by prepaid registered mail, delivered or addressed as follows:

(a) if to the Trustees then at:

(b) to the Participating Employer, then at:

or, at such other address that the party to whom such notice is to be given shall have last notified the party giving the notice, in the manner provided for in this paragraph. Any notice so given shall be deemed to have been given if delivered personally, or delivered by facsimile transmission on the day of such delivery, or the sending of such facsimile, or if by registered mail, on the fifth business day following the date of mailing such notice.

11. This Participation Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein, and the parties hereto attorn to the non-exclusive jurisdiction of the courts of the Province of Ontario.

12. This Participation Agreement shall terminate and be of no further force or effect upon the earlier of the happening of the following:

(a) the dissolution or liquidation of the Trust Fund; or

(b) the termination of the Trust Agreement; or

(c) if the requirement to remit Contributions ends, either as a result in an amendment or change to a Collective Agreement, if applicable, or as contemplated in the Schedule attached hereto.

13. For so long as the Participating Employer is making Contributions to the Trust Fund in accordance with the provisions of the Trust Agreement the Participating Employer shall not be entitled to appoint any Trustees.

SIGNED, SEALED AND DELIVERED	)	EMPLOYERS
	)	
	)	
______________________________	)	Per: ______________________________
Witness	)	(Authorized Signing Officer)
	)	
	)	
	)	
______________________________	)	Per: ______________________________
Witness	)	(Authorized Signing Officer)
	)	
	)	

	)	THE TRUSTEES OF THE PENSION PLAN
	)	
	)	
	)	
	)	
______________________________	)	Per: ______________________________
Witness	)	(Authorized Signing Trustee)
	)	
	)	
	)	
______________________________	)	Per: ______________________________
Witness	)	(Authorized Signing Trustee)

SCHEDULE "A"

CONTRIBUTION SCHEDULE

[to be inserted, if applicable and initialled by the parties]

ONTARIO LABOUR RELATIONS BOARD

1125-04-G Tom McCann, Rick Baxter and Glen Jones, Applicants v. **David McColl, Andrew Reistetter and Ray Stinson**, Responding Parties.

BEFORE: David A. McKee, Vice-Chair.

DECISION OF THE BOARD; August 12, 2004

1. This is a referral of a grievance to arbitration pursuant to section 133 of the *Labour Relations Act, 1995*, S.O. 1995 ch. 1 (the "Act"). The dispute arises under the terms of the Canadian Elevator Industry Pension Trust Fund (the "Fund"). For the purposes of this referral, the parties agree that the provision of the Declaration of Trust that created the Fund (the "Trust Declaration") that brings them to the Board is incorporated into the Ontario Provincial Collective Agreement between the National Elevator & Escalator Association ("NEEA") and the International Union of Elevator Constructors on behalf of its Locals 50, 90, and 96 (the "Union").

2. The applicants are the three Trustees appointed by the International Union under the terms of the Trust Declaration. The responding parties are the three Trustees appointed by NEEA. There are two issues on which the Trustees disagree. The first, which is the issue with which this decision deals, is which company should be appointed as the Fund actuary. The parties agree that they are deadlocked on this issue, and that an arbitrator must "decide the dispute" (to use the words of the Trust Declaration).

3. The second issue relates to whether or not an actuarial valuation ought to be redone for the years 2000, 2001 and 2002. The parties are not in agreement about whether they are deadlocked on this issue. The applicants allege that the Trustees are deadlocked and that an arbitrator must decide that issue. The responding parties do not agree that the Trustees are deadlocked at this time, although it is possible they will be at some point. The parties agreed that I should remain seized of this second issue, and decide the first one as soon as possible. The pension plan provided for in the Trust Declaration is registered in Ontario and a triennial actuarial valuation must be filed in 2004.

4. In 2003, for reasons not relevant to this decision, the Trustees decided to terminate the services of the actuary who had provided actuarial services for the past several years. They began a search for a new actuary. In doing so they engaged the services of a lawyer who has considerable expertise in trust fund matters to assist them in choosing a new actuary. He advised the Trustees on the process of developing a Request for Proposal for the actuarial services, reviewed and analyzed the responses, and assisted the Trustees in their discussions about how to make the choice.

5. Neither party had any criticism to offer about the procedure adopted. They agreed that the process was one that was fairly conducted; it enabled the Trustees to fairly and appropriately assess the relative merits of the respective proposals; and it elicited the necessary and relevant information about all of the respective bids. The disagreement concerns the final choice among the three firms who remained on the "short list" at the end of this process: Mercer

Human Resources Consulting Limited ("Mercer"), The Segal Company, Ltd. ("Segal"), and Watson Wyatt & Company ("Wyatt").

6. The Trustees were unable to come to a decision about which of them to choose. They did agree that it should be one of these three. They also agreed that all three of the firms were competent to perform and capable of performing the work of providing actuarial services required by the Fund. All the Trustees acknowledge that any of the three would be an acceptable and prudent choice to make. The question was simply which one to choose, and the Trustees could not agree.

7. There is no dispute that the Trustees are in a fiduciary relationship to the beneficiaries of the pension plan in all of their actions as trustees. As fiduciaries, they must "put the interests of the trust and the beneficiaries first in [their] thinking whenever [they] are exercising the powers or performing the duties of [their] office. … Nothing may be done which is not directed solely towards the best interests of the trust beneficiaries" (D. M. Waters, *Law of Trusts in Canada*, Carswell, 1984, pp. 31-2.) No one disputed the proposition that the Trustees must have regard only to the best interests of the beneficiaries of the Pension Plan, and should not base any decision on the interests of the Union or of one or more employers or of NEEA. However, agreement on that general principle did not lead to an agreement about how to apply it in this case.

8. The responding parties wished to call evidence about the process of decision making, and would have asked me to draw conclusions about what they said was the true motivation of the Union Trustees. I concluded that such evidence would not assist me in making a decision in this case. While it is important to hear from counsel what the concerns or stated concerns of the various trustees are, it is not relevant to my decision to make any finding about how the Trustees came to the conclusions they did, or what may or may not have motivated them.

9. The duty of a third party adjudicator in making a decision on behalf of a deadlocked Board of Trustees is to make a decision most closely in keeping with the terms and objects of the trust having regard to the nature of the decision to be made. That is, the adjudicator must make what she or he concludes would have been the correct decision for the Trustees to have made: see *Re Haasz* (1959) 21 D.L.R. (12d) 12 (O.C.A.), *Re Billes* (1983) 148 D.L.R. (3d) 512 (OHC per Holland J.) and *Montreal Trust Co. v. Sproule* [1979] 6 W.W.R. 372 (Alta QB). In this case I am making the decision for the Trustees and must apply the same principles of fiduciary responsibility that the trustees were obliged to exercise in the course of making my decision. It does not assist to know in detail how the deadlock arose. It arose and I must make the decision.

10. In this case, I have been given the facts that were before the Board of Trustees when they attempted to make a decision. No one asserts that there are other relevant facts that need to be established or considered. I am therefore making a decision about which firm is to be selected as actuary in the place of the Trustees. In doing so, I must be guided by the same fiduciary principles that did or should have guided the Trustees in the first instance. I am not conducting a review of the Trustees' actions or determining the propriety of anyone's choice. I am simply making the decision that the Trustees were unable to make on their own.

11. The first, and perhaps easiest principle to apply is that the trustees should choose the most economical manner of performing any task. Absent any other considerations, as among equally qualified professional service providers, the least expensive one is *prima facie* the appropriate choice. As in any situation, there is no guarantee that "the lowest or any bidder will

be successful". There may be other considerations. However, any significant cost saving must be of considerable importance in any decision.

12. The Union trustees felt a greater comfort level in Segal. I accept that the "comfort level" comes from valid, if not overwhelming considerations. This is a very limited factor. Trust is an important component of any professional relationship where parties must rely on the expertise of professionals whose work can be judged only by the results, which may not be evident of years. In this case, there is no lack of trust toward any of the three firms.

13. I accept that a fourth firm, which dropped out of the bidding at the last minute, would not have been acceptable to the Union Trustees because of a lack of trust. The reasons for that lack of trust arose from legitimate issues, although those concerns may have been entirely unfounded. It would not, however, be a prudent course of action to appoint an actuary whom half of the Trustees did not trust, whose advice would always be treated with suspicion, and whose actions would always be subject of second-guessing by half of the Board of Trustees. No such difficulty arises with any of the three firms under consideration. Therefore the slightly greater "comfort level" with a firm that is known to some of the Trustees is not of much significance.

14. The criteria used by the Trustees after receiving the advice of the lawyer retained to advise them are, in my view, all appropriate criteria and there are no criteria that the Trustees ought to have considered and did not. While there are slight differences among the three firms in respect of most of the criteria, most of those differences are so slight as to be negligible factors in making a decision. The significant differences in my view are those set out below. Given the level of confidentiality involved in each of the bids, I have referred to the specific issues only in general terms

15. Segal was the most expensive of the three bids to a significance degree. However, it was not so far out of the range that it was eliminated on that basis alone (as one other firm was). It does not have an office in Quebec, which is an important service consideration. I do not know how many members of the Plan reside in Quebec, but given the language laws of that province, the presence of an office in Quebec is an important consideration.

16. Wyatt was the lowest bid. However, its insurance provisions provide a limitation on liability that sets a cap on the amount of damages "with respect to the particular engagement pursuant to which such liability arises". While Wyatt may well be able to self-insure for amounts greater than the amount specified, the Trustees quite properly required a greater level of insurance from a third party insurer than is provided for in Wyatt's proposal.

17. Mercer's bid was slightly higher than Wyatt's, however all of the difference is attributable to the fees for the first year of three years of the proposed contract. Otherwise its bid was as good as any of the other two and did not have the limitations that the other two contain. The Union Trustees expressed a concern that Mercer had lost a bid in 1995 to another firm as administrator of the Fund. There is not necessarily any criticism to be inferred from the fact that Mercer came second in that bid; the reasons for that decision were not in evidence; and in any event the contract was for a different type of services. Therefore, this is not a relevant consideration.

18. On that basis, I determine that the contract for actuarial services should be awarded to Mercer.

19. I remain seized of any other issues that may arise in dealing with the matter the parties have referred to the Board.

"David A. McKee"
for the Board

SECTION:	Investment Guidance Notes
INDEX NO.:	IGN-004
TITLE:	Environmental, Social and Governance (ESG) Factors
APPROVED BY:	Superintendent of Financial Services
PUBLISHED:	FSCO website (October 2015)
EFFECTIVE DATE:	January 1, 2016

Note: Where this guidance note conflicts with the Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28 (FSCO Act), Pension Benefits Act, R.S.O. 1990, c. P.8 (PBA) or Regulation 909, R.R.O. 1990 (Regulation), the FSCO Act, PBA or Regulation govern.

Note: The electronic version of this guidance note, including direct access to all linked references, is available on FSCO's website at www.fsco.gov.on.ca. *All pension policies and guidance notes can be accessed from the* **Pensions** *section of the website through the* **Pension Policies** *link.*

1. Purpose

This guidance note provides background information and guidelines on **environmental, social and governance (ESG) factors**, to assist pension plan administrators in meeting the requirement of section 78(3) of Regulation 909 (the Regulation) under the Pension Benefits Act (PBA), which comes into force on January 1, 2016. Under section 78(3), a plan's statement of investment policies and procedures (SIPP) is required to include information as to whether environmental, social, and governance (ESG) factors are incorporated into the plan's investment policies and procedures and, if so, how those factors are incorporated.

2. Background on Relevant Legislation

a. PBA Requirements for Prudent Investing (Section 22)

A pension plan administrator (administrator) is responsible for investing the pension fund in accordance with the administrator's standard of care, in a prudent manner, and in the best interests of the pension plan's beneficiaries. Prudent investing entails understanding, monitoring and mitigating risk. It is the responsibility of the administrator to determine what prudence requires in the context of the plan and fund that it administers.

Accordingly, all investment decisions that are made by the administrator (or its delegates), including the decision whether to incorporate ESG factors, must be made in accordance with the administrator's fiduciary duties.

b. PBA Regulations

Under section 78(1) of the Regulation, the administrator is required to establish a SIPP for the plan. A SIPP is a document that contains investment policies and procedures in respect of a plan's portfolio of investments and loans. The content requirements of the SIPP reflect the federal investment regulations[1] as modified in sections 47.8 and 79 of the Regulation.

Section 78 of the Regulation has been amended, effective January 1, 2016, to add the following requirements:

- Administrators will be required to file their SIPPs, and subsequent amendments to their SIPPs, with FSCO; and
- SIPPs must include information as to whether ESG factors are incorporated into the plan's investment policies and procedures, and if so, how those factors are incorporated.

Under sections 40, 40.1, and 40.2 of the Regulation, effective July 1, 2016, administrators must include prescribed statements about the SIPP in annual statements to members, and in biennial statements to former and retired members.

The disclosure requirements set out in the Regulation are applicable to both defined benefit and defined contribution plans.

3. ESG Factors

The term "ESG factors" is not defined in the PBA or the Regulation. While there is no standard definition of ESG factors that has been accepted among the investment community, "ESG factors" can be described as a broad term that encompasses a wide range of environmental, social, and governance factors. Environmental factors relate to a company or industry's interactions with the physical environment, social factors concern the social impact of a company and/or industry on a community or society, and governance factors typically relate to how companies and/or countries are governed.

Approaches to incorporating ESG factors into investment policies and procedures differ among investors. The two approaches below could be considered opposite ends of the spectrum and are outlined for general guidance. A consideration of every possible and evolving approach is beyond the scope of this guidance note.

[1] The federal investment regulations (FIR) are defined by section 66 of the Regulation as sections 6, 7, 7.1 and 7.2 and Schedule III to the *Pension Benefits Standards Regulations, 1985* (PBSR) made under the *Pension Benefits Standards Act, 1985* (Canada) as they may be amended from time to time. The FIR are incorporated by reference in sections 78 and 79 of the Regulation. The Regulation also modifies the application of the FIR with respect to Ontario plans.

One approach involves integrating ESG factors into fundamental investment analysis to the extent that they are relevant to investment performance. This approach is driven by the belief that effective research, analysis and management of ESG factors can play a part in assessing the valuation and future performance of an investment over the short, medium and long term. It involves the assessment of a wider range of risks and opportunities that may influence the investment performance of the pension fund, by looking at factors beyond those included in traditional financial analysis. It also recognizes the long-term nature of ESG factors, and the impact they may have on the sustainability and profitability of individual entities, or of an industry sector, in which the pension fund may invest. This approach sees ESG factors as among the many factors that may impact the investment performance of an asset, asset class, or the entire portfolio. While all such factors should be taken into account as part of an administrator's duty to invest prudently, it is up to the administrator as fiduciary to evaluate which factors are relevant and how to take them into account.

Another approach is to incorporate ESG factors into the investment process from an ethical or moral perspective, instead of from a financial perspective. For example, an investor may screen investments on social and environmental factors, such as employing ethical screens targeting certain industries. An administrator should be cautious to ensure that its approach to incorporating ESG factors does not conflict with its fiduciary duties, as may be the case with the use of ethical screens. The best interests of plan beneficiaries has traditionally been defined by the courts in terms of the beneficiaries' financial interests, with the result that there is a potential conflict with investing with other goals in mind, such as ethical or moral considerations. If the administrator is considering such an approach, the administrator is encouraged to consult with its legal counsel on this issue.

4. ESG Disclosure in the SIPP

In order to comply with the Regulation's ESG disclosure requirement, FSCO expects that by January 1, 2016, the administrator will have made a decision on whether or not to incorporate ESG factors into its investment policies and procedures, and will have documented its position in the plan's SIPP. Like all decisions of the administrator, this decision should be made with regard to its fiduciary duties. In making this decision, FSCO expects that the administrator will, after consultation that is appropriate in the context of the plan (such as with the plan's trustees, investment committee, and/or investment advisors):

- establish and document its own view or understanding on what is meant by ESG factors; and,
- consider whether it will incorporate ESG factors and document the basis for its decision.

An appropriate place for such documentation would be the minutes of the meeting(s) where the issue was discussed, or in an internal memorandum.

<u>ESG Factors Not Incorporated</u>

Where the administrator has decided not to incorporate ESG factors into its investment policies and procedures, a statement to that effect must be made in the SIPP. Administrators may also wish to include a brief explanation of their rationale in the SIPP itself, in the interest of transparency to members and beneficiaries.

ESG Factors Incorporated

Where the administrator has decided to incorporate ESG factors into its investment policies and procedures, then a statement to that effect must be made in the SIPP, as well as information on how those factors have been incorporated. The Regulation does not provide further details, however, FSCO expects the following information to be disclosed:

- Either a broad statement that the administrator incorporates all ESG factors, or an enumeration of ESG factors that are incorporated, such as a particular ESG category or categories (i.e., environmental, social, or governance) and/or specific factors within those categories (e.g., labour relations, shareholder rights) which form the focus of the administrator's approach to incorporating ESG factors. Since the SIPP is an important plan document and the administrator is responsible for ensuring compliance with the SIPP, the policies and procedures, including those pertaining to ESG, must be clearly drafted. A general reference to incorporating ESG factors will be interpreted by FSCO as including the broadest range of ESG factors.
- A brief explanation of the approach taken by the plan to incorporate ESG factors.
- A description of the scope of the application of ESG factors. The disclosure should indicate if ESG factors are considered across the entire pension fund, or only certain portions of the pension fund (e.g., such as certain asset classes, or internally managed assets rather than externally managed assets).

The administrator is responsible for ensuring compliance with the SIPP, not only by itself, but by its delegates.[2] Accordingly, the language concerning the incorporation of ESG factors to be included in the SIPP should be drafted in such a way that it can be complied with by the administrator and, where applicable, external investment managers. In this regard, the administrator may want to engage with its external managers in preparing its ESG disclosure language for the SIPP.

5. Member Statements

Effective July 1, 2016, the annual statements to members will be required to include specific *statements* concerning SIPPs, as prescribed in section 40 of the Regulation. Among these prescribed statements is the following:

> (v) a statement that the administrator of the pension plan must establish a statement of investment policies and procedures for the plan that contains,
>
> > (i) the investment policies and procedures in respect of the plan's portfolio of investments and loans, and
> >
> > (ii) information about whether environmental, social and governance factors are incorporated into the plan's investment policies and procedures and, if so, how those factors are incorporated.

[2] See section 22(7) of the PBA, and section 79(1) of the Regulation (as of January 1, 2016). In addition, agents of the administrator have a fiduciary standard of care (PBA, s. 22(8)) and every person engaged in selecting an investment must ensure that the investment is selected in accordance with the criteria set out in the PBA and the Regulation (PBA, s.62).

Similar requirements have also been prescribed for biennial statements to former and retired members (see sections 40.1 and 40.2 of the Regulation).

As can be seen from the language above, the administrator is not required to make the same ESG disclosure as in the SIPP, but is only required to indicate that such disclosures can be found in the SIPP. Administrators are required to provide the SIPP to plan members, former members, retired members, and other stakeholders upon request.[3]

6. Expert Advice

Where the administrator does not believe it has sufficient knowledge on the topic of ESG factors, it would be prudent for it to seek advice from an external advisor. As in the selection of all advisors, the administrator is responsible for selecting a suitable advisor, i.e. one with relevant knowledge and expertise.

[3] See PBA, s. 29 and Regulation, s. 45(1)13 and s. 45(2)7.

Fiduciary Responsibility

Roberto Tomassini and Mark Zigler

What Is a Fiduciary?

The term *fiduciary* comes from the Latin *fiducia,* meaning trust or confidence.[1] In law, a person in whom trust or confidence is reposed is termed a fiduciary when the relationship is such that the fiduciary is impressed with a duty of loyalty to those placing their trust in him or her.[2] The classic example of a fiduciary relationship is that of a trustee vis-à-vis a trust. When a trust deed or agreement vests legal title to property to a trustee, the trustee is required to use the property for a certain purpose that serves the best interest of the trust beneficiary.

The fiduciary concept has been substantially expanded beyond the traditional doctrine rooted in trust law and has been applied by Canadian courts in the pension and benefit plan context. The scope of the fiduciary principle was most recently articulated by the Ontario Court of Appeal in the pension context when it confirmed that an employer/administrator[3] of a single employer plan owed a fiduciary duty to pension plan beneficiaries when it granted priority claim to its assets to lenders over its obligation to fund its employees' pension plans—where these corporate interests conflicted with the interests of the pension plan beneficiaries. Madam Justice Gillese of the Ontario Court of Appeal summarized the fiduciary concept as follows:

> *"A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests. The key factual characteristics of a fiduciary relationship are: the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and, a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power."*[4]

From this expanded definition, it becomes clear that anyone who has the authority to act with respect to an employee benefit plan in a way that can affect the interests of a plan beneficiary, where the beneficiary reposes their trust and confidence in that person (e.g., by making investment or benefit entitlement decisions or through a power to amend the plan), is likely to be labelled a fiduciary. Accordingly, Canadian courts have held employers, corporate trustees and boards of trustees affiliated with benefit plans as fiduciaries accountable to benefit plan beneficiaries. In *Indalex,* the Ontario Court of Appeal stated the characteristics of a fiduciary relationship are "readily apparent" in the relationship a pension plan administrator has with plan members and beneficiaries:

> *"The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. They are peculiarly vulnerable to the administrator's exercise of its powers."*[5]

Source of Fiduciaries' Duties and Responsibilities

In the administration of a trust, benefit plan trustees and professional advisors are governed primarily by the common law standards of fiduciary conduct. However, legislation, plan provisions and trust agreements can also have an influence on the administration of a trust.

The federal government and each of the ten provinces have pension benefits legislation,[6] although Prince Edward Island's legislation has yet to be proclaimed. When the Supreme Court of Canada upheld the Court of Appeal decision in *Indalex,* it made clear that trustees and other administrators of a pension plan have fiduciary obligations to plan members and beneficiaries. These duties and responsibilities arise both from common law and by virtue of the pension benefits statutes, which impose "fiduciary-like" standards of care on plan administrators and the administrator's agents.[7]

There is no legislative parallel to that for pension benefits for health and welfare benefits, vacation pay trust funds, training trust funds or supplementary unemployment insurance benefits. There is, however, legislation respecting trustees in general that may apply. Because this general legislation is also concerned with the trustees of estates for minors, executors appointed under a will, etc., it does not deal with employee benefit plan administration in the same detailed way pension benefits legislation does.

In some jurisdictions, the administration of employee benefit plans is affected by provisions in labour relations legislation. For example, the Alberta *Labour Relations Code*[8] limits the personal liability of trustees and the joint board of trustees of an employee benefits plan, except where the trustees failed to act honestly or in accordance with the intent and purpose of the trust instrument.[9] This provision is expressly stated to be paramount over any provision in the *Trustee Act*.

Finally, all employee benefit plans in Canada are affected by the provisions of the *Income Tax Act*. For example, this legislation places a ceiling on the amount of pension benefit payable to a retiree annually without tax consequences to the sponsor. Trustees of any pension plan need to consider compliance with the tax regulations and tax consequences when making fiduciary decisions with respect to a pension plan.

The Common Law Duty of Care

When explaining a trustee's fiduciary duty under common law, it is often said a trustee owes a duty of care to the beneficiaries of the trust. Generally speaking, this duty is one of utmost good faith, requiring a "heightened sense of loyalty and fidelity" on the part of the trustee.[10] The fiduciary duty of care encompasses at least four distinct, specific duties:

1. The ***conflict-of-interest rule***—to act scrupulously for the benefit of the trust or the beneficiaries and never for themselves while carrying out fiduciary duties
2. The ***standard-of-care rule***—to be active in carrying out duties and performing them with complete integrity
3. The ***no-delegation rule***—to carry out duties personally as a result of the trust and confidence reposed in them
4. The ***even-handed rule***—to act impartially between the beneficiaries unless the trust instrument authorizes favouritism.

These duties apply to all trustees—including employee benefit plan trustees—and extend to other aspects of plan administration where the trustees have discretionary powers of decision.[11]

Conflict-of-Interest Rule

A leading case on trustees and conflicts of interest remains an English court decision made almost 300 years ago. In *Keech v. Sandford,*[12] a trustee (Sandford) held a lease as trust property. When the lease expired, the owner (Keech) refused to renew it with Sandford in his capacity as trustee. When Keech offered the lease to Sandford in his personal capacity, Sandford accepted it. In so doing, Sandford was found to have placed himself in a conflict-of-interest position—despite the fact the lease was no longer available to the trust. Essentially what this means is that a trustee breaches (violates) the conflict-of-interest rule if they secure a benefit as a result of their status as trustee. It makes no difference whether the benefit is secured at the expense of the trust or it is a benefit that the trust is incapable of obtaining.

The fiduciary duty of pension plan trustees and other administrators to avoid conflicts of interest is also imposed by pension legislation in most jurisdictions, reflecting the common law duty.[13] For example, section 8(10) of the Federal *Pension Benefits Standards Act,*[14] prohibits an employer/administrator from putting itself in a material conflict of interest. As noted by the Supreme Court of Canada (SCC) in *Buschau v. Rogers Communications Inc.*,[15] this prohibition precludes an employer from withdrawing pension plan assets for its own purpose in conflict with the beneficiaries' interest in maintaining a sufficiently funded pension plan.[16]

As part of the *Indalex* case, the Court of Appeal for Ontario considered the actions of the administrator for an employer-sponsored pension plan while under insolvency protection. The court added that the prohibition against conflict of interest "is not confined to situations where the fiduciary's personal interest conflicts with those of the beneficiaries. It may also apply where the fiduciary acts for two parties who are adverse in interest."[17] While a majority of the Supreme Court of Canada agreed that Indalex's corporate interests were in conflict with its obligation as plan administrator, the mere existence of such a conflict does not automatically prohibit the employer from acting in its corporate interest, particularly where the conflict is specifically authorized by pension benefits legislation that contemplates employer sponsors acting as pension plan fiduciaries.[18] In the Supreme Court's view, the fiduciary obligation only required Indalex to address its conflict as both employer and plan administrator. Justice Cromwell reasoned:

> *"In my view, the Court of Appeal took much too expansive a view of the fiduciary duties owed by Indalex as plan administrator and found breaches where there were none. As I see it, the only breach of fiduciary duty committed by Indalex occurred when, upon insolvency, Indalex's corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict—the conflict itself was unavoidable. Its breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the CCAA proceedings as if there were independent plan administrators."*[19]

In *Cowan v. Scargill,* the United Kingdom High Court considered the actions of union trustees for a pension plan benefiting members employed in the coal mining industry. The trustees approved certain restrictions on plan investments including prohibitions on 1) investments in any company engaged in energy industries that were in direct competition with coal and 2) increases in foreign investments. While the union trustees took the position that these restrictions were in the best interest of the beneficiaries, the court disagreed and held that the trustees were advancing the political or policy interests of the union or the interests of the coal industry generally. The court concluded that:

> *". . . in considering what investments to make trustees must put on one side their own personal interests and views. Trustees may have strongly held social or political views. They may be firmly opposed to any investment in South Africa or other countries, or they may object to any form of investment in companies concerned with alcohol, tobacco, armaments or many other things. In the conduct of their own affairs, of course, they are free to abstain from making any such investments. Yet under a trust, if investments of this type would be more beneficial to the beneficiaries than other investments, the trustees must not refrain from making the investments by reasons of the views that they hold."*[20]

In reaching this conclusion, the court noted that many of the beneficiaries who were retired or never worked in the coal industry would not benefit from the union's attempt to protect the coal industry. Such investment policies would only benefit active employees.

Generally, trustees and other fiduciaries are required to avoid not only actual conflicts of interest but also potential conflicts of interest. However, in *Indalex*, the SCC noted that not all conflicts of interest require a fiduciary or trustee to refrain from acting in a manner conflicting with their duty to the beneficiaries, provided the conflict is adequately addressed in the particular circumstances.

Common Law Standard of Care

The classic formulation of the standard of care owed by a trustee to trust beneficiaries is more than 100 years old:

> *". . . the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own affairs."*[21]

The standard of care and diligence for trustees and those acting in an equivalent fiduciary capacity is the highest legal standard known.[22] The standard required when administering a trust is that of a person of ordinary prudence in managing his or her own affairs.[23] At a minimum, the standard of care requires the fiduciary to acquaint himself or herself with the terms of the trust, with the state of the trust property and with the contents of all documents affecting trust property.[24]

In *Ford v. Laidlaw Carriers Inc.*, the Ontario Court of Justice also noted the standard of care requires that:

> *"New trustees should further ascertain that the trust fund is properly invested, and that their predecessors have not committed breaches of trust which ought to be set right."*[25]

The court, in its decision, held that:

> *"There can be no relief available to [the trustee] for its failure to be intimately familiar with the terms of the plans. Accordingly, [the trustee] cannot be excused from liability as a result of its failure to read the terms of the plans. In addition, [the trustee] cannot*

and should not be excused from all of the consequences which were the direct result of its failure to read and understand the terms of the plans and trust documents."[26]

Fiduciaries are required to act strictly in accordance with the terms of the trust. If fiduciaries do so, they will not be liable if a loss subsequently occurs to some beneficiaries.[27] This standard of care also requires fiduciaries to take legal action to protect trust property and to defend against such proceedings when there is a reasonable prospect of success.[28] A failure to perform any one of these duties could amount to a breach of the standard of care owed to the beneficiaries.

The standard is not one of absolute correctness but one that excuses mistakes or errors of judgment when such errors arise honestly and in good faith.[29] This leeway is exemplified by the case of trustees who sold trust property for its appraised value and were not found to have breached the standard of care even though the market value of the property was much higher.[30]

Although the common law in Canada has traditionally established the same standard of care for all trustees, regardless of whether they are lay or professional trustees, courts have been holding professional trustees to a higher standard of care.[31] The British Columbia Court of Appeal (BCCA) has noted the trend toward increased responsibility for professional trustees to exercise reasonable care in protecting the beneficiaries' interests:

"[P]ension beneficiaries are usually dependent upon decisions or choices made by others such as administrators, investment managers, or actuaries. There is also concern that the party establishing the plan, usually an employer, appoints the other players. There are opportunities for conflicts of interest unless care is taken at all levels to protect the vulnerable and necessarily passive beneficiaries, who literally "trust" others to protect their pensions."[32]

In many instances, statutes have been used to elevate the standard of care for professional trustees or advisors with special skills, including benefit plan trustees. An example is the Ontario *Pension Benefits Act*, which requires trustees to bring to bear all of the relevant knowledge and skill they possess or ought to possess as a result of their professional business or calling.[33] In *R. v. Christophe*,[34] the court questioned whether the "knowledge and skill" requirement meant the standard is lowered if a trustee lacked background and experience in performing the duties of a benefit plan trustee. The court ultimately determined that an administrator without special background or knowledge "would be ill-advised to make the decisions without professional advice and consultation."[35]

A higher standard is expected for an agent paid for services than an agent acting without reward. The care, skill or diligence required is not merely that which the agent possesses, but rather that which is reasonably necessary for the due performance of the undertaking. Agents who serve a particular trade or profession and hold themselves out to the world for employment as such represent themselves as reasonably competent to carry out the business they undertake in such trade or profession. The agent must show the care and diligence exercised as is usual and requisite in the business for which payment is received.[36]

No-Delegation Rule

The no-delegation rule requires fiduciaries to oversee all aspects of trust administration personally and prohibits trustees from delegating any tasks requiring the exercise of discretion to others. However, as an exception to this rule, fiduciaries may select agents to perform certain tasks when it is prudent in the ordinary course of business to delegate such duties.[37] Administrators who do not obtain advice in areas where they do not possess the necessary knowledge and skill are at risk of criticism or liability for imprudent decisions.[38] Likewise, trustees without special background or knowledge are "ill-advised to make the decisions without professional advice and consultation."[39]

Unlike the conflict-of-interest rule and the standard-of-care rule, it is possible for a trust instrument to override the no-delegation rule. Most employee benefit plans and the trust agreements that establish these plans empower trustees to retain professional advisors to assist in trust administration. These trustees have a duty to personally select the agent and be satisfied with the agent's suitability to perform the act for which the agent is employed.[40] Even when a trustee is permitted to employ agents or otherwise delegate functions, the trustee is obligated to:

- Select and supervise the agent or employee personally.
- Employ the agent only so far as the matter lies within the agent's professional competence.

If these prerequisites are satisfied, the trustee is not liable for any trust loss due to the agent's dishonesty, unless the trustee assists the agent in perfidy by failing to supervise them properly.[41] In a case dealing with the administrator of an estate, it was noted that:

"An administrator who puts the assets of an estate in the hands of an agent and takes no steps to ensure that the assets are properly dealt with has breached the duty to supervise."[42]

In addition to the documents of the specific plan, the pension legislation in several Canadian jurisdictions also expressly authorizes the delegation of tasks to employees or agents or permits the administrator to rely in good faith on the reports of professionals.

Certain tasks are so central to the administration of a trust that they cannot be delegated to advisors or plan beneficiaries.[43] What tasks are non-delegable depends on the nature of the fiduciary duty and the *settlor's* (the person who establishes the trust) intent as revealed in the trust instrument.

The rule that emerges from the authorities seems to be this: Whenever the power, discretion or duty assigned to a fiduciary requires a policy decision to be made, the fiduciary must make it himself or herself. A *dispositive policy decision* determines how much and at what time a beneficiary receives the benefit. An *administrative policy decision* directly affects the likelihood of achieving a trust's object or purpose.[44] For example, if the purpose of a trust fund is to provide academic scholarships, determining who receives the scholarships is a decision that must be made by the trustee personally.[45] If a trust consists of real estate property and the trustee is expressly empowered to retain the property, the trustee is required to personally make the decision whether to retain the property.[46]

It must be emphasized that the common law requirement that fiduciaries act personally does not preclude them from seeking professional advice; it merely precludes fiduciaries from divorcing themselves completely from the decision-making process.[47]

The Ontario Provincial Court dealt with delegating of responsibilities for a pension plan in a criminal law context. In *R. v. Blair,*[48] the committee administering the plan claimed it had delegated the supervisory function to an investment manager from a trust company. The investment manager used half of the trust funds to purchase the sponsoring employer's shares to stave off a hostile takeover. The subsequent devaluation of the shares caused a major loss to the trust. The committee was charged criminally under the Ontario *Pension Benefits Act* (PBA) for, *inter alia*, breaching the regulation that restricts a pension plan's investment in the sponsoring employer's corporation to 10% of the total book value of a pension fund's assets. The court held:

> *"[T]he P.B.A. requires, obligates, or mandates an administrator who by virtue of s. 23(1) of the P.B.A. is a fiduciary, to perform certain responsibilities pursuant to the wording of s. 23(1); (2); and (7). The purpose or scheme of the Act requires a . . . pro-active approach as opposed to the approach engaged in and relied upon by the accused who urge me to find that by contractual agreement with Montreal Trust, the supervisory function over [the investment manager] in effect has been transferred to and assumed by Montreal Trust. This amounts to the administrator delegating its statutory supervision responsibility in s. 23(7) of the P.B.A. I find that the statutory duty of the administrator to supervise under s. 23(7) of the P.B.A. in relation to the facts of this charge, is one that the administrator is obliged to discharge and is unable to delegate to another person or body."*[49]

On appeal to the Ontario Court General Division, however, the Provincial Court's decision was overturned. The primary reason for the reversal of the conviction was that the pension committee was not held to be the plan administrator within the meaning of PBA, and, therefore, committee members could not be convicted for breaching legal obligations imposed on the administrator by the statute. Moreover, the general division emphasized the lower court's failure to consider the role of the custodial trustee in monitoring fund investments when it determined the committee had not prudently delegated and supervised the investment manager.

The General Division decision in the *R. v. Blair* appeal did not alter the fundamental principles of the no-delegation rule relied on by the lower court. Where trustees delegate certain responsibilities, the trustees must prudently select and supervise the agents or advisors selected.[50] In fact, the New Brunswick Court of Appeal recently affirmed in *Fredericton Police Association v. Superintendent of Pensions* that a plan's agent, an actuary, was subject to the same duty of care, diligence and skill required of a plan administrator—including the obligation to avoid conflicts of interest.[51]

In more recent cases, trustees have been charged with and convicted for failing to adequately supervise their agents. The Ontario Provincial Court decision *R. v. Christophe*[52] found trustees of a multiemployer pension plan guilty of violating the Federal Investment Rules and the Ontario *Pension Benefits Act*. The Ontario court convicted the trustees and agreed with the Crown that agents could have been required to keep records and make presentations to ensure that the trustees were more frequently advised and kept informed. The duty to supervise requires trustees to monitor and question their agents.

Even-Handed Rule

The even-handed rule generally requires fiduciaries to treat different beneficiaries and classes of beneficiaries equitably.

However, as with the no-delegation rule, this rule is subject to modification in the trust agreement. For example, a wealthy person dies and leaves a will distributing their money among their children in unequal proportions. In this scenario, the executor of the will is a trustee and the children are the beneficiaries of the trust. Contrary to what the name of the rule implies, the executor is not required to give each child an "even" share of the money. Instead, the executor must distribute the money unequally as stated in the will.

In a similar fashion, many employee benefit plans provide for the unequal allocation of benefits. Consider a pension plan. Participants who retire before a certain date may be entitled to benefits at one rate, while those who retire later have a different rate. To the extent that the plan provisions permit the trustees to favour one group of beneficiaries, the even-handed rule is not breached.

There are occasions when trustees are required to make discretionary decisions not contemplated by a plan or trust agreement. Perhaps money in excess of that required to fund the promised benefits has accumulated. Plan trustees might want to use this money to increase benefits. In doing so, they must determine who will receive the increased benefits. Will the increase be retrospective so that those who have already retired will profit or will only future retirees enjoy the additional dollars? On the other hand, a fund's solvency might be threatened and reducing benefits is being considered. Trustees must assess the burden that different classes of beneficiaries must bear.

In *Neville v. Wynne*, the BC Court of Appeal considered the actions of trustees facing a choice between reducing benefits and a wind-up of their plan.[53] The trustees decided to cut the benefits for all participants, both active and retired, but the reductions had a greater impact on active members than retired members. The trustees reasoned that this disproportionate impact of the reductions on active members was appropriate as they continued to work and accumulate pensions and their benefits were indexed for inflation. In contrast, the pensions of those already retired were not indexed. The BCCA agreed with the BC Supreme Court's reasoning on the following principles:

> *"[T]he environment in which pension plans derive the income that is essential to their purpose creates circumstances that require benefits to be increased or decreased. Whenever this occurs, some of the members of the plan—sometimes all—will be disadvantaged by the change. In other cases, the changes will be beneficial to some and detrimental to others. This creates a particular problem for trustees of pension plans. The impact of the trustees' decisions will never be equally distributed among the beneficiaries of the plan. Accordingly, it is impossible to enforce equity by demanding equality of treatment. It must be left to the trustees to navigate these shoals and determine the nature of the change that will achieve a fair result."*[54]

The BCCA affirmed the trial judge's approach and stated that while "[r]educing everyone by the same numerical figure may achieve formal equality […] it may also ignore the past and future considerations taken into account by the Trustees in striving to achieve a balanced outcome."[55] Thus, the BCCA held the trustees' decision was arrived at "impartially" and "maintained an even balance amongst the beneficiaries."[56]

In *Larkin v. Johnson*, another BCCA decision involving plan amendments, plan members alleged that the trustees breached their fiduciary duties by increasing the normal retirement age from 62 to 65 in March 2016.[57] More specifically, the members argued the trustees failed to "assess decisions on an ongoing basis and act in the best interest of the beneficiaries where the underlying assumptions have materially changed."[58] The BCCA found the trustees adequately justified the increase in normal retirement age in June 2016 when it provided to members that "[p]ensioners are living longer and collecting pension payments over a longer period of time."[59] In dismissing the appeal, the Court of Appeal found:

> *"After all, the Trustees' duties in relation to reserving the solvency of the Plan included the going concern approach, that is, attempting to preserve the financial viability of the Plan not just for the present and immediate future, but also beyond."*[60]

To Whom Do Common Law Duties Apply?

Until now, reference has been made to common law fiduciary standards as if they apply only to trustees. Certainly, trustees are the preeminent example of fiduciaries but, increasingly, common law has extended the concept of fiduciary to impress these duties on all manner of persons. Almost anyone who is given discretionary power and is required to exercise this power in the best interests of another may be considered a fiduciary.[61] As the SCC has stated:

> *"It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard of categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the*

relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed." [62]

When the court is dealing with one of the relationships traditionally considered to be fiduciary in nature, such as trustees, agents and partners, the characteristics or criteria for a fiduciary duty are assumed to exist. Conversely, when confronted with a relationship that does not fall within one of the traditional categories, it is essential the court consider what the essential ingredients of a fiduciary relationship are and whether these characteristics are present.[63] While no "ironclad" formula has been formulated by the courts, the Supreme Court of Canada has confirmed that the key ingredients of a fiduciary relationship are:[64]

- The fiduciary has discretionary power.
- The fiduciary can unilaterally exercise this power so as to affect the beneficiaries' interests.
- The beneficiary is vulnerable to the fiduciary's discretionary power.
- The beneficiary reasonably relies on the fiduciary to exercise this power in his or her best interest.[65]

Although the jurisprudence is not extensive, Canadian courts have imposed the fiduciary label on benefit plan administrators, advisors and agents based on the common law principle. *Collins v. Ontario (Pension Commission)*[66] was a case in which a regulatory agency, the Pension Commission of Ontario, was held to owe a fiduciary duty to the members of a pension plan. While there has been considerably less litigation in Canada than in the United States on the issue, the courts have also held that financial advisors[67] may be fiduciaries and, in at least one decision, a pension fund manager was accountable for losses suffered by the Metropolitan Toronto Pension Plan based on a breach of fiduciary duty.[68]

Actuaries

In the British Columbia case of *Wynne v. William M. Mercer Ltd.,*[69] the actuarial firm was found liable for damages suffered by the plan when the actuaries prepared an erroneous valuation. The court held that the actuaries were not acting in a fiduciary capacity. Instead, the liability was based on the actuary's negligence.

In the subsequent case of *McLaughlin v. Falconbridge*,[70] members of a pension plan alleged they elected a certain option because of the actuary's aggressive actuarial and economic assumptions. This led to a serious understatement of plan liabilities that artificially increased the plan surplus. These surplus assets were then withdrawn. The claim against the actuary in breach of fiduciary duty was found to be a novel claim—Canadian courts had not previously held that plan actuaries owe a fiduciary duty to plan beneficiaries—but was not a bar to an action and was allowed to proceed.[71]

In a criminal prosecution of an actuary pertaining to the preparation of actuarial reports, the Crown looked to both common law and Ontario legislation to find that the meaning of "agent" in the legislation can and does embrace the actions and role of an actuary, vis-à-vis the administrator or trustees, as principal.[72] As an agent, the actuary is subject to the same fiduciary duty as the trustees.

As noted above, the New Brunswick Court of Appeal in the *Fredericton Police Association* case found that a plan actuary was subject to the same fiduciary obligations as the plan administrator and was found to have a conflict of interest in giving advice to the employer.[73]

Custodial Trustees

In *Froese v. Montreal Trust Co. of Canada,*[74] the British Columbia Court of Appeal imposed liability on the custodial trustee of a pension plan when the trustee failed to recognize and disclose to participants the fact that the fund was in financial trouble. The court reached this conclusion even though the trust agreement excluded any duty for pension fund investments as part of the trustee's responsibility. The court stated the custodial trustee had a common law duty to inform participants that an employer had failed to make contributions when they were due. Where danger signals exist, the trustee has a duty to make adequate inquiries concerning the health of the plan fund.

Employer-Sponsors

In *Anova Inc. Employee Retirement Pension Plan (Administrator of) v. Manufacturers Life Insurance Co.,*[75] the court imposed the fiduciary label on the employer-sponsor of the pension plan with respect to the sponsor's power to make plan amendments regarding surplus fund usage. The court held that the employer, as an administrator of the plan, owed a fiduciary duty to plan beneficiaries when making amendments regarding a plan surplus. The court concluded that amendments introducing early retirement incentives for some plan members using surplus funds is consistent with the administrator's fiduciary duty. The rationale of the court is that these early retirement inducements benefit the company and are, therefore, of benefit to the employees. This rationale is clearly questionable in light of the voluminous litigation regarding the issue of surplus ownership where the company's interest and employee interests are plainly in conflict. The court did hold, however, that Anova's amendment, to the extent that it was a covert attempt to divert surplus to employees who were shareholders of the company, was a violation of Anova's fiduciary duties.

Pension Legislation and the Duty of Care

Since 1985, new pension benefits legislation has been introduced in the following Canadian jurisdictions: Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island (not yet proclaimed) and the federal jurisdiction. The legislators in each of these jurisdictions consciously attempted to achieve a degree of uniformity in the statutes.

There has been considerable uniformity in the articulation of the duties of care imposed on plan administrators (i.e., trustees) in legislation. All these jurisdictions provide the standard of care imposed on a trustee is that of "a person of ordinary prudence dealing with the property of another."

Additionally, legislation in Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and the federal jurisdiction, as well as the as yet unproclaimed legislation in Prince Edward Island, imposes on trustees with special professional or business skills—the obligation to utilize these skills when managing a fund. This standard coincides with the higher standard of care that courts are beginning to impose on professional trustees. The legislation in these provinces also contains an express prohibition on trustees placing themselves in conflict-of-interest positions.

Although Newfoundland and Saskatchewan also have pension benefits legislation in effect, these statutes do not articulate the standard of care imposed on the plan administrator (i.e., trustees) in the administration of the trust. The Saskatchewan legislation does stipulate a fiduciary relationship exists between the plan administrator and the beneficiaries and that a trustee relationship exists in relation to the fund.[76] These statutory provisions, therefore, incorporate common law fiduciary duties. Where the fiduciary duties imposed on trustees are not specified in legislation, it is presumed common law standards apply—the one exception is Quebec.

The standard for New Brunswick is identical for all employee benefit plans, at least with respect to investments. The *Trustees Act* in New Brunswick specifies that in investing trust property, a trustee shall exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person.[77]

The Duty of Care in the United States

Some assistance respecting the application of the standard of care may also be derived from U.S. jurisprudence under the *Employee Retirement Income Security Act of 1974* (ERISA). ERISA is helpful in Canada as it is based largely on common law. The following examples illustrate situations in which benefit plan trustees were found to have violated the prudence standard:

- Trustees entered into a real estate deal they had not properly investigated by obtaining evaluation reports, survey, etc. [78]
- Trustees purchased whole life insurance rather than group term insurance without knowledge of the differences between the two plans, without the advice of professionals and without securing a competitive bid—the cost of the whole life insurance was three times that of term life insurance.[79]
- Trustees failed to seek outside advice concerning the soundness of a loan.[80]
- Trustees failed to create a system to ascertain the amounts owed to the plan under a reciprocal agreement with another fund and to verify that these amounts were actually remitted.[81]
- A plan administrator failed to notify plan members of financial problems arising from insufficient employer contributions when such information would have enabled participants to arrange for other health and welfare coverage.[82]

These examples suggest trustees are most likely to violate the prudence standard when they fail to adequately investigate and assess the risks associated with a proposed investment or transaction.

There are occasions when trustees investigate before making a decision, yet still make a choice that is disadvantageous to their fund. When this happens, it cannot be assumed the trustees have violated the prudence standard. For instance, trustees of a fund consulted with lawyers, actuaries and other professional advisors before deciding to charge plan participants an interest rate below the prevailing market rate for mortgages. The trustees did not violate the prudence standard since the expert advice revealed this sort of rate would have to be offered by a noninstitutional lender in order to attract borrowers.[83]

Although plan trustees can act imprudently even while acting honestly,[84] the question of whether they have observed the prudence standard frequently arises in cases involving self-dealing. The following cases illustrate how closely connected are violations of prudence standards and self-dealing:

- Trustees violated the prudence standard by hiring a consultant at an exorbitant price without checking his qualifications or following accepted standards for hiring. The trustees also violated the conflict-of-interest rule by loaning plan dollars from one plan to another at below-market interest rates.[85]
- Trustees invested all of a plan's assets in loans to companies affiliated with the plan sponsor in exchange for unsecured promissory notes. This activity violated the prudence standards and the prohibition on self-dealing because the high interest rates paid on the loans did not adequately compensate the fund for the magnitude of risk involved.[86]
- Trustees who loaned trust assets to a former trustee based on inadequate security also violated the fiduciary duty and duty of loyalty owed to the beneficiaries.[87]
- Trustees who purchased an enormous amount of employer stock at an inflated price in order to thwart a corporate takeover also violated both duties.[88]

In the situations just listed, it is sometimes difficult to tell whether the fact that the trustees entered into a transaction with the employer or someone closely identified with the employer would, in itself, have constituted a violation of ERISA, or if it is the combination of an imprudent investment benefiting the party in interest that grounded the finding that ERISA had been violated. There is evidence, however, that a fund and constituting parties to the trust can enter into a transaction where the transaction is beneficial to the participants and is otherwise prudent. In *Donovan v. Walton*,[89] it was held to be permissible for the fund to lease a building to the union as a tenant since both the fund, and the union benefited from the transaction—a reasonable rent was charged and it was prudent for the fund to enter into the transaction. This is an important case for multi-employer plan trustees since they often enter into cost-sharing agreements with a union or an employer association.

Endnotes

1. J. C. Traupman, *The Bantam New College Latin and English Dictionary* (Toronto: Bantam Books, 1995), p. 180.
2. Waters, Gillen and Smith, *Waters' Law of Trusts in Canada*, Fourth Edition (Toronto: Carswell, 2021) [*Waters*], pp. 42-47.
3. The term "administrator" as used in this article is a reference to the defined term used in pension legislation that refers to the entity with the ultimate responsibility for the administration management of a pension fund. For multi-employer pension plans, the administrator is typically a board of trustees and, for single employer plans, the administrator is typically the employer who sponsors the plan. The terms administrator and trustee are used interchangeably as both are subject to fiduciary obligations with respect to the governance of a pension plan.
4. *Indalex Ltd. (Re)*, 2011 ONCA 265, para. 118 [*Indalex* (ONCA)], rev'd 2013 SCC 6 [*Indalex* (SCC)] (reversed on other grounds, but the Supreme Court of Canada confirmed that Indalex in its capacity as the pension plan administrator owes a fiduciary obligation to plan members.)
5. Supra note 4, *Indalex* (ONCA), para. 119.
6. *Employment Pension Plans Act*, R.S.A. 2012, c.E.-8.1; *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352; *Pension Benefits Standards Act*, 1985, R.S.C. 1985, c. 32; *Pension Benefits Act*, C.C.S.M. 1987, c. P.32; *Pension Benefits Act*, S.N.B. 1987, c. P-5.1; *Pension Benefits Act*, 1997, S.N.L. 1996, c. P-4.01; *Pension Benefits Act*, R.S.N.S. 1989, c. 340; *Pension Benefits Act*, R.S.O. 1990, c. P. 8; *Pension Benefits Act*, S.P.E.I. 1990, c. 41, not proclaimed; *Supplemental Pension Plans Act*, C.Q.L.R., c. R-15.1; *Pension Benefits Act*, 1992, S.S. 1992, c. P-6.001.
7. Supra note 4, *Indalex* (ONCA), para. 117 and *Indalex* (SCC) paras. 62 and 184.
8. Alberta *Labour Relations Code*, R.S.A. 2000, c. L-1.
9. Ibid., s. 24.
10. Mark Vincent Ellis, *Fiduciary Duties in Canada* (Toronto: Carswell, 2023), § 1:4.
11. *Cowan v. Scargill*, [1984] 2 All E.R. 750 (Ch. D.) [*Cowan*]; *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 at 407 (Ont. Gen. Div.), aff'd (1994), 110 D.L.R. (4th) 609 (Ont. C.A.).
12. *Keech v. Sandford* (1726), [1558-1774] All E.R. Rep. 230.
13. Alberta *Employment Pension Plans Act*, 2012, s. 35(s); B.C. *Pension Benefits Standards Act*, 1996, ss. 8(9), (10); Federal *Pension Benefits Standards Act*, 1985, s. 8; New Brunswick *Pension Benefits Act*, 1985, ss. 17(3) and 18(3); Newfoundland and Labrador *Pension Benefits Act*, 1996, s. 17; Nova Scotia *Pension Benefits Act*, s. 29(3); Ontario *Pension Benefits Act*, 1990, s. 22(4); Quebec *Supplemental Pension Plans Act*, s. 158.
14. *Pension Benefits Standards Act*, 1985, R.S.C. 1985, c. 32, s. 8(10).
15. *Buschau v. Rogers Communications Inc.* (2006), 1 S.C.R. 973.
16. Ibid., para. 38.
17. Supra note 4, *Indalex* (ONCA), para. 141.
18. Supra note 4, *Indalex* (SCC), paras. 65-68, 73 and 182-222.
19. Ibid., para. 182.
20. Supra note 11, *Cowan*, p. 763.
21. *Learoyd v. Whiteley* (1887), 12 App. Case. 727 (H. L.), p. 733. This standard was explicitly adopted by the Supreme Court of Canada in *Fales v. Canada Permanent Trust Co.* (1977), 2 S.C.R. 302 at 315.
22. *Collins v. Ontario (Pension Commission)* (1986), 31 D.L.R. (4th) 86 (Ont. Div. Ct.), para. 40.
23. *Fales v. Canada Permanent Trust Co.* (1977), 2 S.C.R. 302 at 315.
24. 48 Hals. 4th, para. 817; *Hallows v. Lloyd* (1988), 39 Ch. D. 686; *Harvey v. Olliver* (1887), 567 L.T. 239; *Ford v. Laidlaw Carriers Inc.* (1993), 1 C.C.P.B. 97 (O.C. (G.D.)) rev'd in part (1994), 12 C.C.P.B. 179 (Ont. C.A.), leave to appeal to the S.C.C. ref'd (1995), 191 N.R. 400 (note) [*Ford v. Laidlaw Carriers Inc.*].
25. Supra note 24, *Ford v. Laidlaw Carriers Inc.*, p. 168, citing Underhill's *Law of Trusts and Trustees*, 13th ed., p. 48.
26. Supra note 24, *Ford v. Laidlaw Carriers Inc.*, p. 169.
27. 48 Hals. 4th, para. 818; supra note 24, *Ford v. Laidlaw Carriers Inc.*
28. 48 Hals. 4th, para. 820; Re *Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546 (C.A.).
29. *Davies v. Nelson* (1928), 1 D.L.R. 254 (Ont. C.A.); *Michipicoten First Nation v. Michipicoten First Nation Community Trust*, 2014 ONSC 594.
30. *Davies v. Nelson* (1928), 1 D.L.R. 254 (Ont. C.A.).
31. *Bartlett v. Barclays Bank Trust Co. Ltd.*, [1980] 1 All E.R. 139; supra note 24, *Ford v. Laidlaw Carriers Inc.*; *Metropolitan Toronto Pension Plan v. Aetna Life Assurance Co.* (1992), 98 D.L.R. (4th) 582 (Ont. Gen. Div.) [*Metropolitan Toronto Pension Plan v. Aetna Life Assurance Co.*].
32. *Froese v. Montreal Trust Co. of Canada* (1996), B.C.J. No. 1091 (C.A.), para. 43 [*Froese v. Montreal Trust Co. of Canada*].
33. Supra note 6, Ontario *Pension Benefits Act*, 1990, s. 22(2).
34. *R. v. Christophe* (2009), O.J. No. 5296 (C.J.), para. 75 [*Christophe*].
35. Ibid.
36. Supra note 31, *Metropolitan Toronto Pension Plan v. Aetna Life Assurance Co.*, p. 597.
37. *Wagner v. Van Cleeff* (1991), 5 O.R. (3d) 477 (Div. Ct.) at 484 [*Wagner v. Van Cleeff*].
38. Supra note 34, *Christophe*, para. 27.

39. Ibid., para. 75.
40. Ibid., para. 183.
41. Supra note 2, *Waters*, p. 973.
42. Supra note 37, *Wagner v. Van Cleeff*, p. 485.
43. *Metropolitan Toronto Police Services Board v. Ontario Municipal Employees Retirement Board* (1994), 20 O.R. (3d) 210 (Div. Ct.)
44. Supra note 2, *Waters*, p. 969.
45. Re *Partanen* (1944), O.J. No. 527 (C.A.).
46. Re *Wilson* (1937), O.J. No. 314 (C.A.).
47. See, for example, supra note 37, *Wagner v. Van Cleeff*.
48. *R. v. Blair* (1993), 106 D.L.R. (4th) 1 (Ont. Prov. Div.), rev'd on appeal (1995), 129 D.L.R. (4th) (Ont. Gen. Div.).
49. Ibid., paras. 106-107.
50. Eileen E. Gillese, *The Law of Trusts*, Third Edition (Toronto: Irwin, 2014), p. 160.
51. *Fredericton Police Association v. Superintendent of Pensions*, 2021 NBCA 30, para. 168 [*Fredericton Police Association*].
52. Supra note 34, *Christophe*.
53. *Neville v. Wynne* (2006), B.C.J. No. 2778 (C.A.).
54. *Neville v. Wynne* (2005), B.C J. No. 712 (S.C.), para. 43.
55. *Neville v. Wynne* (2006), B.C.J. No. 2778 (C.A.), para. 9.
56. Ibid., para. 14.
57. *Larkin v. Johnson*, 2023 BCCA 116, para. 31.
58. Ibid., para. 94.
59. Ibid., para. 123.
60. Ibid., para. 124.
61. J. C. Shepherd, *The Law of Fiduciaries*, (Toronto: Carswell, 1981), p. 35.
62. *Guerin v. The Queen* (1984) 2 S.C.R. 335 at 341 (C.J.C.); *Hodgkinson v. Simms* (1994), 3 S.C.R. 377 at 462 [*Hodgkinson v. Simms*].
63. *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 2 S.C.R. 574 at 598.
64. Ibid., at 599.
65. Supra note 62, *Hodgkinson v. Simms* at 409.
66. Supra note 22, *Collins v. Ontario (Pension Commission)*.
67. Supra note 62, *Hodgkinson v. Simms*.
68. Supra note 31, *Metropolitan Toronto Pension Plan v. Aetna Life Assurance Co*. Also, see Chapter 7, which discusses fiduciary obligations and professional advisors.
69. *Wynne v. William M. Mercer Ltd.* (1993), 1 C.C.P.B. 301 (B.C.S.C.), aff'd (1995), 11 C.C.P.B. 1 (B.C.C.A.).
70. *McLaughlin v. Falconbridge* (1999), O.J. No. 2403 (S.C.).
71. Ibid., paras. 25-27.
72. *Ontario (Superintendent of Financial Services) v. Norton* (2006), O.J. No. 2631 (C.J.), para. 44.
73. Supra note 51, *Fredericton Police Association*.
74. Supra note 32, *Froese v. Montreal Trust Co. of Canada*.
75. *Anova Inc. Employee Retirement Pension Plan (Administrator of) v. Manufacturers Life Insurance Co*. (1994), O.J. No. 2938 (Gen. Div.).
76. Saskatchewan *Pension Benefits Act*, 1992, supra note 6, s. 11(2).
77. *Trustees Act*, S.N.B 2015, c. 21, ss. 30, 37.
78. *Brock v. Wells Fargo Bank* (1986), N.A., 7 EBC 1221 (N. D. Cal.).
79. *Donovan v. Tricario* (1984), 5 EBC 2057 (S. D. Fla.).
80. *Katsaros v. Cody* (1984), 5 EBC 1777 (2d Cir.).
81. *Nichols v. Trustees of Asbestos Workers Pension Plan* (1982), 3 EBC 1726 (D. C. Cir.).
82. *McNeese v. Health Plan Marketing Inc.* (1986), 8 EBC 1154 (N. D. Ala.).
83. *Brock v. Walton* (1986), 7 EBC 1769 (11th Cir.).
84. *Brock v. Robbins* (1987), 8 EBC 2489 (7th Cir.).
85. *Donovan v. Mazzola* (1983), 4 EBC 1865 (9th Cir.).
86. *Freund v. Marshall & Ilsley Bank* (1979), 1 EBC 1898 (W. D. Wis.).
87. *Dooley Associates Employees Retirement Plan v. Reynolds* (1987), 8 EBC 1785 (E. D. Mo.).
88. *Donovan v. Bierwirth* (1982), 3 EBC 1417 (2d Cir.).
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Trustees and Their Professional Advisors

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Who Are the Advisors?

Generally, employee benefit trust funds, and pension funds in particular, permit trustees to seek the opinion and advice of professional advisors. Such an ability is often specifically provided for in the trust agreement creating the fund, as trustees at common law cannot delegate any of their responsibilities. Given the complexity of modern-day trust funds, the large number of beneficiaries involved, and the legal framework under which trustees and trust funds must operate, professional advice becomes critical.

Specifically, we will be turning our attention to the role of the actuary, the auditor, consultants, legal counsel, investment counsel and custodians.

In particular, many plans now involve thousands of plan members and administration and investment of sizable assets. This has increased the dependence on professional advice.

The most common benefit plan advisors are actuaries, accountants or auditors, benefit consultants, legal counsel, investment counsel and custodians. As a group, these advisors have significant influence over benefit plan design and administration. This article provides a brief overview of the role of these advisors and the standards of conduct expected of them when providing services. Many third-party administrators, mentioned briefly in this article, also provide consulting advice and contractual arrangements with them and are subject to the same considerations.

Engaging With Professional Advisors

While every advisor and task is different, trustees are usually interested in whether an advisor has the proper experience, competencies and reputation; meets the appropriate standards of conduct; has professional insurance; and is cost-competitive. Of course, the advisor must also be willing to be engaged on reasonable terms acceptable to the plan, its trustees and, ultimately, plan beneficiaries. The key document setting out these expectations, terms and conditions is the contractual agreement between the plan and the advisor. Trustees must carefully consider this agreement before they sign it and periodically review it to ensure it remains appropriate. Many agreements are also for fixed terms but renew automatically if no further action is taken. Trustees should be vigilant in reviewing these agreements when a fixed term is about to expire to ensure that it is only renewed if the trustees find it in the fund's best interest to do so.

The Legal Basis for Delegation

The trust agreements of trusteed benefit plans should include express terms that empower trustees to seek the advice of professional advisors. While it may seem obvious that trustees would seek help administering a benefit plan or investing plan assets, trust agreements contain this language because traditional trust law obligates trustees to perform duties personally—subject to limited exceptions. Without such terms in a trust agreement, trustee power to delegate may be questioned in the absence of statutory powers to retain agents and advisors.

Modern pension regulation recognizes the need to empower pension plan trustees and administrators to seek advice or delegate functions when appropriate. For example, Ontario's Pension Benefits Act[1] expressly provides that all administrators (whether or not they are trustees) may delegate to an agent:

> *"Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund."*[2]

Pension legislation in other jurisdictions typically contains similar provisions.

If a plan administrator does delegate a duty to an agent, the administrator must personally select the agent and supervise their performance. Again, this rule has been codified in Ontario's pension legislation:

> *"An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable."*[3]

Be aware that the statutory provisions permitting delegation noted above only apply to pension plans and not to employee life and health trusts (ELHTs) and other benefit plans. When the latter plans are trusteed, the trust agreement should enumerate the powers of the trustees and permit the delegation of certain trustee functions to professional advisors and other "agents."

Trustees generally do not have the same skills and abilities as their advisors—This is often the reason for retaining an advisor. Fees and expenses charged to the plan must also be reasonable. However, trustees must (1) satisfy themselves that the advisors they select are suitable and (2) supervise the advisor to the extent it is prudent and reasonable to do so.

While trustees should and do have the power to seek advice from professionals, it is important to note a limitation on their ability to take advice; trustees cannot delegate most decision-making. However, trustees may often rely on the advice of professionals to mitigate potential liability in carrying out their duties as trustees, if such advice is reasonable. Ultimately, trustees must make the decisions required to administer a plan and are responsible for the actions of the trust—even when they are relying on professional advice in the decision-making process.

Agents or Advisors?

Though this article explores the appointment of advisors by benefit plan trustees and administrators, the Ontario Pension Benefits Act refers to advisors as "agents." What is the importance of this distinction?

An *agency relationship* is a legal relationship in which one party (the *agent)* is given power by a second party (the *principal)* to perform certain acts on behalf of the principal such as enter contracts or purchase property. Agents owe a duty of loyalty—a fiduciary duty—to their principals.

Legislation like Ontario's Pension Benefits Act imposes fiduciary duties on administrators of pension plans regardless of whether they are trustees. The same duty is imposed on agents. Under pension legislation, the duty is not only owed to the trustee-as-principal, but also owed to plan beneficiaries. This gives beneficiaries the right to enforce the fiduciary duty against advisors personally.

In contrast, if an advisor is not an agent, the advisor may not owe a duty to plan beneficiaries. Similarly, an advisor may resist recognizing a fiduciary relationship to trustees, which may permit a different (and lower) standard of conduct in the advisors' agreement.

This is the reason advisors sometimes take the position that they are not agents and are merely advisors. We will return to this issue after considering the different types of advisors and the functions they perform for benefit plans.

Selection

The trustees' first duty when engaging an advisor is to select the appropriate firm or individual to provide the desired service. It is most common for trustees to request and review proposals from a number of service providers in a competitive bidding process. Where appropriate, the trustees should, of course, interview candidates personally before making a selection.

It is also common practice to request references and require candidates to provide names of representative clients or examples of their services. Depending on the scope of services required, it may also be useful to request bidders to address problems or specific situations in their responses. Such scenarios may be hypothetical or actual.

There is no fail-safe method for selecting the best candidate for any position, but inquiries of other clients and the use of experienced consultants—particularly for large funds—are useful strategies.

Finally, if a potential advisor uses a standard form contract or engagement letter, it is important to review it upon interviewing them to ensure that the terms and conditions are acceptable. If not, it is necessary to confirm that there is room for negotiated changes.

Supervision

In addition to taking appropriate steps when selecting an advisor, it is important for trustees to monitor the performance of advisors that have been hired. Periodic review of an advisor's performance and terms of engagement are essential.

Trustees should establish performance standards for professionals, then conduct performance reviews at regularly scheduled intervals. It is incumbent on trustees to question any area of performance where they have a concern or unanswered question. It is not always sufficient for trustees to follow advice and not challenge an advisor, particularly when a trustee has identified or is aware of a concern. In these situations, a trustee must be satisfied performance is being monitored and any necessary steps have been taken to ensure the continuing engagement of the advisor are prudent.

Standard of Conduct

All advisors must perform the services for which they are engaged to an adequate standard of care. There are three considerations in characterizing the standard of conduct expected of an advisor.

1. The first is any standard imposed by statute—such as the fiduciary standard imposed on agents under Ontario's Pension Benefits Act in respect of advisors to pension funds. If such a standard applies, it is the required standard of conduct.
2. A second consideration is the terms of the service agreement with the advisor. If the contract stipulates a fiduciary standard of conduct, then this is the agreed-upon standard of conduct for the advisor.
3. The third consideration is the circumstances surrounding the engagement of the advisor. Even if the advisor does not contract for a fiduciary standard of conduct or have it imposed by statute, advisors may still owe fiduciary duties to the trustees in performing their services. For example, the Supreme Court of Canada has ruled that some types of advisors are in a fiduciary relationship with those whom they advise and, thus, are required to meet the standards of a fiduciary. [4] The Supreme Court has stated:

   "[t]he relationship of the broker and client is elevated to a fiduciary level when the client reposes trust and confidence in the broker and relies on the broker's advice in making business decisions. When the broker seeks or accepts the client's trust and confidence to advise, the broker must do so fully, honestly and in good faith . . . It is the trust and reliance placed by the client that gives to the broker the power and in some cases, discretion, to make a business decision for the client. Because the client has reposed that trust and confidence and has given over that power to the broker, the law imposes a duty on the broker to honour that trust and respond accordingly."[5]

That courts may enforce fiduciary duties in professional advisory relationships is not surprising. The very nature of professional advisory relationships—particularly in specialized areas such as actuarial science, law, accounting, taxation and investments—is based upon an imbalance of information that often makes the client reliant upon or vulnerable to the advisor. These conditions justify imposing a high standard of conduct.[6]

As noted earlier, not all advisors agree that they are or should be either agents or fiduciaries. In taking this position, they may be trying to limit their liability or exposure to litigation brought against trustees or themselves. Even if advisors acknowledge an agency relationship or fiduciary duty, they may attempt to limit their liability through other contractual terms. Trustees should resist such limitations to the extent possible.

Investment Advisors

Perhaps the clearest case of trustee reliance on advisors is assistance with the investment of plan assets. A primary trustee function is to secure and properly maintain trust property for the benefit of plan beneficiaries. This typically means investing trust property, which requires the advice and assistance of investment advisors.

Pension funds are particularly dependent on investment counsel not only to preserve property but also to produce investment returns to increase fund assets and pay benefits. Given the broad discretion trustees have in making investments, it is important that trustees carefully choose investment advisors.

Pension legislation in Canada requires pension funds to adopt a statement of investment policies and procedures, sometimes abbreviated as SIP&P.[7] Developing such a policy typically requires the advice of investment advisors as well as actuarial advisors.

There are two basic roles for investment advisors in most benefit plans: investment consultant and investment manager. *Investment consultants* advise trustees on trust fund investment policy and make recommendations regarding mandates. It is typically the role of *investment managers* to execute investment policy and mandates. Investment consultants assist in the selection and monitoring of investment managers. They may have access to large internal and proprietary databases of managers that can be used during the selection process. In addition, investment consultants assist trustees in monitoring investment manager performance. When necessary, investment consultants can assist with the termination and replacement of managers.

Selection

The market for investment managers in North America is large and mature. Trustees have access to advisors with expertise in most asset categories and investment products, at relatively competitive costs. The size and scale of a fund are important factors when accessing these markets on competitive terms, and these considerations have led large pension plans to internalize some of these functions.[8] Management also may vary with respect to the asset classes in which the trustees have chosen to invest, there often being specialized managers for specific types of investments, both on a geographical and scope scale.

Public policy reform efforts have examined ways to make low-cost investment services available to all plans—large and small. For example, in 2012, the Ontario government commissioned a report on the desirability and procedures for consolidating public sector pension plan investment activities.[9] This led to a major consolidation in the public pension plan sphere in Ontario.

Investment advisors are usually chosen through a formal bidding process. There is no single process or procedure for selecting investment counsel, but the Canadian Association of Pension Supervisory Authorities has published *Guideline No. 6* and an accompanying self-assessment questionnaire to help pension trustees develop investment policy.[10] In addition, the U.S. Department of Labor has identified several factors for trustees to consider when selecting investment advisors.[11] These factors have been highlighted in a number of consent judgments and include:

- The business structure and affiliations of the advisor
- The financial condition and capitalization of the advisor
- The investment style of the advisor and the advisor's relation to the investment policy of the fund
- The investment process to be followed by the advisor
- The identity, experience and qualifications of the professionals who will be handling the fund's portfolio
- Whether any relevant litigation or enforcement actions have been initiated within a reasonably relevant time against the advisor, the advisor's officers or directors or the advisor's investment professionals who have responsibility for the fund portfolio
- Over an appropriate time period, the experience and performance record of the advisor and the advisor's investment professionals—including experience managing other tax-exempt and employee benefit plan assets
- Whether the advisor uses the services of an affiliated broker or dealer and, if so, the types of transactions for which these affiliates are used and the financial arrangement with the broker or dealer.

Engagement and Conduct

Investment counsel and managers are typically engaged through an investment management agreement. The terms of this contract govern the investment advisor's relationship with the trustees. Key terms of an agreement usually include the fees charged, warranties and representations of the advisor, standards of care and limits on liability, if any.

A key requirement of an investment advisor is compliance with securities regulations. To provide investment advice or manage fund investments, most advisors must register with a self-regulatory organization under the authority of provincial securities regulation, such as the Canadian Investment Regulatory Organization. Such organizations include the Mutual Fund Dealers Association, the Investment Dealers Association and the Investment Industry Regulatory Organization of Canada.[12] All of these organizations are mandated to set standards of conduct for members and to enforce these standards. Courts have held that such registrations are required for those who advise the administrators of pension and benefit funds. For example, the Ontario court has stated investment counsel selected by an administrator must fulfill the qualifications established under provincial securities legislation.[13]

Many investment management agreements require the personal services of named officers of the management company, as it is the investment skill and expertise of these individuals that leads a fund to retain the services of the firm. Other common terms of investment management agreements include:

- A confirmation that the advisor carries sufficient professional insurance
- Bonding where an advisor has control over money receipts
- The fiduciary standard of care and conduct expected of the advisor.

Most investment advisors acknowledge a fiduciary standard of care in their agreements. A fiduciary standard is appropriate given the significant influence or actual control an advisor has over plan investments. This influence was recognized in *Hodgkinson v. Simms* concerning the duty an investment advisor owes a client. The court stated that "the standards for choosing the people who invest the funds . . . are quite high."[14] Typically, investment management agreements provide for a short period of notice to terminate the agreement. In the event the trustees lose confidence in a particular investment manager, it would be inappropriate to have a lengthy period of time where the manager continues to invest while not having the confidence of the trustees. Typically, agreements provide for termination on thirty (30) or sixty (60) days' notice, which would provide sufficient time for the trustees to at least engage a transition manager, if not a new manager, to manage the assets in question.

Actuaries

Actuaries are key advisors to pension plan trustees and are frequently consulted by health and welfare plan administrators—particularly when there is a group risk arrangement in areas such as life insurance and long-term disability.

Pension plan administrators usually seek the advice of an actuary when determining plan design, funding, and efficient reporting and administration. Pension legislation recognizes this role by requiring plans to file reports prepared by an actuary in compliance with professional standards. Such reports for defined benefit and target plans typically include triennial actuarial valuations, the calculation of commuted values for purposes of portability, marriage breakdown, pre- and postretirement death benefits, intervaluation cost certificates and various reports on plan wind-up. In the case of multi-employer pension plans, it can be argued the actuary is more important because actuarial input is key to ensuring the "pension promise" is kept.

Selection

At present, there are several large actuarial consulting firms in Canada—Many are subsidiaries of global firms. There are many other smaller and medium-sized firms providing actuarial services. Insurance providers, regulators and other industry stakeholders also employ actuaries.

When choosing an actuary, it is important to check that the individual is a member of the self-regulating Canadian Institute of Actuaries (CIA). Beyond this basic requirement, trustees should also consider:

- What services will the actuary provide the plan?
- What is the capability of the actuary and actuarial firm?
- What experience does the actuary and the firm have in serving similar funds?
- What is the reputation of the actuary and the firm?
- Does the firm have the resources to provide the services needed by the plan?
- Is there adequate professional insurance? Is the actuarial firm seeking to limit its liability in cases of errors or negligence?
- Is the actuary or firm willing to acknowledge a fiduciary standard of care?
- What are the fees? Are they competitive?

Engagement and Conduct

Actuaries are typically engaged using long-term service agreements. These contracts set out the scope of the services to be provided—usually dividing services between standard or included services and special or project-based services. Common agreement terms include fee schedules, a description of basic and extra services, the roles and responsibilities of the trustees and actuary, warranties and representations, and limits on liability, if any.

The standard of conduct for actuaries—particularly those advising pension funds—has been the subject of some debate. The issue is the distinction between advisors and agents discussed previously. The functions of the actuary are integral to pension funds, but many actuarial firms take the position that they are only advisors, not agents of the trustees, despite numerous court decisions to the contrary.

This is not to suggest actuaries are not subject to codes of conduct. The CIA—the professional regulatory body governing actuaries—is charged with ensuring members have the appropriate level of education, skill and expertise. To be recognized and practice as a member of the CIA, an actuary must comply with the organization's qualification criteria and rules of professional conduct. CIA rules require actuaries to perform their duties with "integrity, skill and care" and prohibit these professionals from accepting work when they have a conflict of interest.

The role of the CIA has been formally recognized in pension benefits legislation that defines *actuary* in reference to the CIA.[15] That CIA guidelines and rules of professional conduct are a primary source of the standards to be met by actuarial advisors has been recognized by Canadian courts:

“the rules set by the relevant professional body are of guiding importance in determining the nature of the duties flowing from a particular professional relationship. [I]t would be surprising indeed if the courts held the professional advisor to a lower standard of responsibility than that deemed necessary by the self-regulating body of the profession itself.”[16]

Courts typically hold actuaries who are providing advice to a high standard. An Ontario court has held that an actuary advising a client is an agent (but not, it seems, the firm employing the actuary).[17] A British Columbia court has held actuaries responsible for all losses incurred by the trustees of a pension plan where the actuaries made an error in the valuation of the plan on which the trustees relied.[18]

In a 2021 decision, the New Brunswick Court of Appeal found that actuaries are agents under the applicable pension legislation. The court further upheld a tribunal finding in New Brunswick that the actuary and his firm were in a conflict of interest in a situation where they were advising both the employer (the city of Fredericton) and the pension plan board responsible for the plan, in a manner contrary to the interest of the pension plan board and its beneficiaries. The board had retained the services of the actuary.[21,22]

There is still, however, no consistent treatment of the duties and standard of care of actuaries across Canada, although most court decisions are leaning toward a fiduciary standard. As a result, trustees must carefully review the terms of engagement with an actuary to ensure they understand whether the actuary acknowledges an agency and fiduciary relationship or, in some manner, seeks to limit liability.

The limitation of liability provisions is also a matter of great concern in contracts with actuarial advisors. Often, actuaries seek to limit their liability for negligence to small amounts, such as one or two years of fees, while the nature of the error that they can make may be much more substantial. Given the size of potential losses for actuarial negligence and errors, trustees should avoid limitation of liability clauses with actuaries or at least ensure that the actuarial consulting firm and the actuary have sufficient errors and omissions insurance to cover any sizable loss.

Legal Counsel

Trustees engage legal counsel in a variety of circumstances. Legal counsel has two basic roles: solicitors and litigators. Among other services, *solicitors* typically provide advice to trustees on regulatory compliance, employment and service provider contracts, tax matters, corporate governance, and the drafting of various documents and policies. It is common for legal counsel to attend trustee meetings and provide ongoing advice regarding matters before the trustees. *Litigators* prosecute or defend claims on behalf of plans and plan trustees, or deal with litigation before courts or regulatory tribunals.

Selection

A diversity of firms provide legal counsel to benefit plans in Canada. These firms vary by region, industry segment and client group. Plans sometimes engage more than one firm, depending on the services required. Legal counsel must be qualified to practice in the appropriate jurisdiction. In other words, they must (1) be a member of a provincial law society in good standing and (2) if working outside their home jurisdiction, comply with the rules of the applicable law society. In selecting counsel, trustees should also consider the following criteria:

- What is the lawyer and legal firm’s depth of experience with trusts and benefit plans?
- Do the lawyer and firm have experience with similar funds?
- What is the reputation of the firm and lawyer?
- Does the counsel have sufficient professional liability insurance?
- Does the firm have the required resources, and is it large enough to provide the depth of services needed by the plan?
- What are the fees, and are they competitive?

Like investment advisors and actuaries, legal counsel should be engaged through a formal bidding process.

Retainers and Conduct

Rules of practice require legal counsel to meet certain “know your client” standards and have a retainer agreement with clients that sets out the terms and conditions of engagement. Agreements vary but typically contain terms governing fees, the scope of services, the identity of the person who provides directions on behalf of the client, and the scope of work or litigation.

Because of the nature of their work, courts have long recognized that lawyers owe their clients a fiduciary duty and standard of care. In addition to this standard of conduct, lawyers must meet professional rules of conduct, which govern matters such as handling conflicts or potential conflicts of interest, confidentiality, responsibilities to courts, and administration of justice and conduct toward clients and other lawyers. Like other professionals, lawyers are self-regulated professionals governed by bodies such as the Law Society of Ontario or other similar provincial law societies or regulatory bodies. Law societies set rules of professional conduct and are responsible for enforcing disciplinary matters against lawyers.

There is one issue common to the contracting and conduct of both lawyers and actuaries—the identity of the client. Trustees typically engage lawyers and actuaries in their capacity as plan trustees or administrators. However, the same legal counsel or actuarial firm may also be engaged to provide advice to a contributing employer or union stakeholder in the plan. While not necessarily legal conflicts of interest, such situations should be carefully monitored by counsel in the event of any potential conflicts arising. If an actual conflict arises, it must be disclosed. Where appropriate, counsel may have to recuse themselves if there is a conflict.

Accountants and Auditors

Accountants play a more limited role in the administration of employee benefit plans, but they play an important role in reporting to trustees, plan members, employers, shareholders and regulatory authorities. Auditors conduct the annual review of a fund's financial statements and provide a report on financial controls. Financial statements are a primary source of information concerning plan funding and are often required by law.

Traditional trust law entitles trust beneficiaries to an accounting of how trust fund property is administered. When the terms of a trust require audited financial statements or otherwise require the services of an auditor, trustees are obligated to engage one.

In addition, both pension and labour relations regulations require benefit funds to file audited financial statements. Section 76 of the regulations under Ontario's Pension Benefits Act requires any trust fund with $10 million or more in assets to annually file an auditor's report on the fund's financial statements. This report must be prepared by an accountant licensed under the Public Accounting Act and must be filed within six months of the fiscal year-end. The regulations provide a detailed checklist with which the audit report must comply.

Labour relations legislation typically requires funds maintained by unions to file audited financial statements and make them available to union members. For example, the Labour Relations Act (Ontario)[23] requires the administrator of any vacation pay fund, welfare fund or pension fund for members of a trade union to file an annual audited financial statement with the Minister of Labour.

Finally, auditors typically handle applicable tax return filings with the Canada Revenue Agency for benefit trusts, including tax returns for ELHTs and other benefit trusts that are not pension plans. They also often advise pension plans and other plans with respect to necessary tax filings or the issuing of tax reporting forms to plan members.

Selection

Presently, there are four very large global accounting and consulting firms with Canadian operations, and a larger number of small and medium-sized accounting firms across Canada. Accountants and their firms are typically engaged through a formal bidding process.

When selecting these service providers, trustees should consider:

- Does the accountant have the required professional designations?
- What depth of experience does the accountant and the accounting firm have with trusts and benefit plans?
- Does the firm have sufficient professional liability insurance? Are there any limitations on such liability?
- Does the accounting firm have the resources to provide the services needed by the plan?
- What are the fees, and are they competitive?

Engagement and Conduct

The employment of an accountant is typically through an "engagement letter" to which standard service terms are appended. The agreements of the "big four" global accounting firms are much the same including the scope of the audit, the roles and responsibilities of plan trustees (often termed *management*) and the auditor, and a description of the final audit report content. Other terms include a fee schedule, privacy and confidentiality terms, and limits on liability.

Much like the standards of actuarial practice, the rules established by the professional bodies for accountants are expressly approved and adopted by legislation. The self-governance of accountants is enabled by legislation in each province, which permits professional organizations such as the Chartered Professional Accountants of Canada (CPA Canada) to set standards, license and discipline members. For example, Subsection 76(8) of the regulations under the Ontario Pension Benefits Act requires the performance of pension fund audits according to the principles and standards set out in the *Handbook of the CPA Canada*, sometimes known as the *CPA Handbook*.

Subsection 76(15) of the regulations under Ontario's Act requires an accountant to report to the plan administrator any irregularity that may indicate a violation of the audit requirements set out in the regulation. If the irregularity is significant and not corrected within 30 days of when first reported, the auditor has an obligation to notify the regulator.

As stated earlier, trust beneficiaries may compel a trustee to provide an accounting of the trust property. Hence, trustees are advised to maintain accurate and detailed financial statements and, where justified (e.g., when a trust is large or complex), to have financial statements audited on a regular basis.

Like other advisors, accountants may take the position that they are not agents, but the case law pertaining to other professionals does indicate otherwise in most cases. Further, accountants recognize that third parties rely on the financial statements they have audited.

Trustees must carefully review the terms of engaging an accountant to ensure they understand the roles and responsibilities specified and that the accountant acknowledges the appropriate standard of care or seeks to limit liability.

Benefit Consultants and Third-Party Administrators

Benefit consultants are industry professionals with diverse competencies, depending on the industry they serve. They may be group insurance consultants, third-party administrative service consultants, multi-employer plan consultants or another type of consultant. What they have in common is their role of advising plan trustees on a specific project or administrative task. Tasks for which benefit consultants are often employed include establishing a new plan or reviewing an existing plan, searching for advisors, and evaluating the performance of a plan or plan advisors. Consultants also often advise on various administrative procedures, processes and technology-related issues. As fund administration moves from a paper-based to a digital model, this has become an increasing area of concern. Benefit consultants may work with large firms, such as large actuarial or human resources firms, or be independent.

Selection

Benefit consultants are engaged in a variety of ways and increasingly through formal bidding processes. Unlike the other professionals discussed, benefit consultants are not required to maintain any professional designations—although many do have professional qualifications and designations.

In selecting consultants, trustees should consider:

- What is the consultant's experience in the field for which the consultant is being engaged?
- Does the consultant understand the specific project or activity for which the consultant is being employed?
- Does the consultant have the ability to communicate clearly and concisely?
- What depth of support or resources does the consultant bring to the endeavor?
- What references does the consultant have?
- What is the reputation of the consultant among previous clients?
- Does the consultant have knowledge of the benefit marketplace?
- If applicable, does the consultant have the leverage/ability to negotiate with service providers on behalf of the plan?
- What is the cost of service?
- Is the consultant willing to be held accountable for results?
- Are the fees reasonable?
- Does the consultant have adequate errors and omissions insurance?

Engagement and Conduct of a Benefit Consultant

Consultants are typically engaged using a project-based service agreement. These agreements set out the scope of the project or services to be provided, associated timelines, milestones, deliverables and a fee schedule. In addition, there are standard contractual terms, including representations and warranties, standards of conduct, professional liability insurance (where applicable) and conditions for termination of the contract.

There is no statutory recognition of a "benefit plan consultant." Under pension legislation, these consultants are likely considered agents of plan trustees or, depending on the terms of engagement and surrounding facts, fiduciaries. In the United States, benefit consultants have been found liable and in breach of fiduciary obligations where they advised trustees to enter into prohibited lease transactions. Liability was also found in a case where trustees had relied heavily upon the consultant to answer any and all questions regarding plan administration and management.[24]

Many benefit consultants also provide third-party administrative services to trustees, particularly for smaller plans, who lack the internal administrative infrastructure to administer their own plans. In many cases, a third-party administrator (TPA) represents the face of the plan to the members, as they are the frontline contact between the member and the plan. They also interact directly with the trustees. Accordingly, trustees of such plans must exercise particular diligence in the engagement and oversight of TPAs who also act as consultants.

Trustees should refer to duties generally covered by such third-party agreements. From a fiduciary point of view, trustees must protect themselves by contractual provisions to ensure adequate oversight of TPAs and be able to take appropriate action in the event of issues. If it is necessary to change administrators, the trustees must protect their assets and data and ensure that any data held by a TPA belongs to the trustees. In addition, other concerns with respect to limitations of liability, termination provisions and other standard contractual provisions outlined above apply to any contract with a TPA.

Custodians or Bare Trustees

Custodial services are provided by large financial institutions—usually banks. Custodians are not advisors in the same sense that actuaries, accountants, lawyers and benefit consultants are advisors. Custodians are generally used as service providers—They do not provide trustees with advice. The engagement of custodians and the terms governing their conduct, however, deserve a brief discussion here as they have similarities to advisors and perform a crucial function for many plans.

A custodian's role is to:

- Hold a fund's financial assets (e.g., fund stock, bonds and other securities)
- Execute any instructions of investment consultants or managers
- Provide a regular accounting of the value of these assets
- Furnish basic transactional services such as repatriating profits, remitting taxes and maintaining the account for cash flows in and out of the fund.

Since they hold trust fund assets for beneficiaries, custodians are considered trustees. They are often referred to as *bare trustees* because they hold fund assets and conduct certain transactions for the fund, but they are not generally empowered to provide advice or make decisions.

Selection

There are four or five financial institutions in Canada willing to act as custodians of benefit funds. There are more banks in the United States. Large funds usually require a custodian with international capacity and affiliates. Small and medium-sized funds may only require a Canadian-based custodian. Custodians are typically engaged through a competitive bidding process.

Engagement

Custodians are engaged through a custodial trust agreement. Because of the limited number of custodians and the standard suite of services provided, these agreements have become highly standardized over time. The agreements contain many terms typically seen in other trust agreements, including the role and responsibilities of the custodian, the powers and duties of the custodian, the fee schedule, the list of services provided and termination provisions. Trustees should regularly review their custodial arrangements to satisfy themselves that the terms are appropriate.

Three standard terms bear further discussion. The first is the fee schedule. Fees for the suite of custodial services provided can be significant. For example, in large funds, fees paid on foreign exchange transactions may be millions of dollars or more per year. Litigation in the United States has alleged misconduct by custodians that were charging higher prices to clients than the actual cost of the foreign exchange transactions.[25]

Many custodial agreements have been in place for lengthy periods. In these older agreements, fee schedules were often brief and did not specify service fees. Some agreements contained terms stating "all other services" would be subject to fees as disclosed by the custodian from time to time. Over time, both the services provided and the fees changed. As a matter of prudent governance, custodial agreement terms should be reviewed periodically to ensure they are consistent with current industry standards.

Another issue is that of reducing taxation in other jurisdictions or obtaining tax refunds where possible.

Additionally, there are limits on liability that custodians typically seek. Trust law permits a trust to limit the liability of trustees for trustee negligence. A trustee, however, may not excuse intentional wrongful conduct. Despite this restriction, most custodial trust agreements seek to include broad limits on liability. Some of these limits are reasonable; for example, a custodian is normally not liable for the poor performance of an investment. Arguably, however, a custodian should be liable for the failure to make a transaction in a timely manner when proper instructions were delivered and for other acts that were within their mandate and competence. Blanket liability limits and indemnities in custodial agreements should be avoided as much as possible. In recent years, the internationalization of the custodial trustee business has spurred custodians to introduce clauses that are more complex, which leads to a discussion of another set of terms now common in custodial engagement agreements. Many of these terms are not common in other trust agreements and seem to stretch the limit of trust law. For example, it is now common to find terms in agreements that acknowledge the custodial trustee has many different client groups and that this may result unintentionally in transactions that conflict with the interests of the benefit plan and plan trustees. The duty not to conflict is a core duty placed upon a trustee. Clauses excusing such behaviour should be regarded with suspicion.[26]

Other ancillary matters, such as securities lending arrangements and foreign tax refund services, are often provided by custodial trustees. Where these types of arrangements are entered into, they are often covered by separate agreements that should be scrutinized by fund legal counsel and the trustees in the same manner as custodial agreements and other service agreements.

Endnotes

1. R.S.O. 1990, C. p. 8.
2. Ontario Pension Benefits Act, s. 22(5).
3. Ibid., s. 22(7).
4. *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.) [*Hodgkinson*].
5. Ibid., p. 184.
6. Ibid., p. 188.
7. Pension Benefits Standards Regulation, R.B.C. 1993, Reg. 443/93, amended as Reg. 337/94, s. 38(3); General Regulations; Pension Benefits Act, R.N.B. 1991, Reg. 91-195, as amended by N.B. Reg. 93-144 and N.B. Reg. 94-78; Pension Benefits Standards Regulations, R.R.C. 1985, SOR/87-19, as amended; Employment Pension Plans Regulation, Alta Reg. 35/2000, s. 51(1); Pension Benefits Regulation, Man Reg. 39/2010, s. 3.23(1); Supplemental Pension Plans Act, RSQ cR-15.1, s. 169, 170; Pension Benefits Regulations, NS Reg. 164/2002, Schedule I (3); Pension Benefits Act Regulations, NLR 114/96, s. 39(6). SIP&Ps must include certain information required by legislation, including objectives of the investment policy, the relationship to the requirements of the plan, the permitted categories of investment, minimum quantitative and qualitative criteria for investments, certain prohibited investments and criteria for the evaluation of investments, among other requirements.
8. For example, some of the largest pension funds have developed internal investment groups for nontraditional asset categories such as infrastructure and private equity.
9. William Morneau, *Facilitating Pooled Asset Management for Ontario's Public- Sector Institutions: A Report from the Pension Investment Advisor to the Deputy Premier and Minister of Finance* (October, 2012) at www.fin.gov.on.ca/en /consultations/pension/recommendations-report.html.
10. Canadian Association of Pension Supervisory Authorities, *Guideline No. 6: Pension Plan Prudent Investment Practices Guideline* (November 15, 2011) at www.capsa-acor.org/en/init/prudence/Pension_Plan_Prudent_Investment _Practices_Guideline.pdf.
11. Eugene Burroughs, *Trustees and Their Professional Advisors* (Brookfield, Wisconsin: International Foundation of Employee Benefit Plans, 1996).
12. See, for example, the Securities Act, R.S.O. 1990, c. 5, Part VIII.
13. *R. v. Blair* (1993), 106 D.L.R. (4th) 1 at p. 64 (Ont. Prov. Ct.), rev'd on appeal (1995), 9 C.C.P.B. 1 (G.D.).
14. See *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204 (G.D.) p. 234 as quoted in supra note 6, *Hodgkinson*.
15. See, for example, Regulation to the Ontario Act, S.1, which defines actuary as "a Fellow of the Canadian Institute of Actuaries."
16. *Wynne v. William M. Mercer Ltd.* (1993), 1 C.C.P.B. 301 (B.C.S.C.) aff'd (1995), 11 C.C.P.B. 1 (B.C.C.A.). See also *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* (2008), 65 CCPB 293 (Ont. CA) [*Morneau*]; and *McLaughlin v. Falconbridge Ltd.* (1999), 21 C.C.P.B. 133 (O.S.C.J.), leave to appeal denied (unreported decision of MacFarland J., September 13, 1999).
17. *R. v. Norton* (2006), O.J. No. 2631 [*Norton*].
18. Supra note 20, *Norton* and Supra note *19, Morneau*. See also *Dawson v. Tolko Industries Ltd.* (2010), B.C.S.C. 346, para. 15.
19. Labour Relations Act, 1995, S.O. 1995, c. 1, s. 93.
20. *Brock v. Self* (1986), 632 F.Supp. 1509 (U.S.D.C.L.A.).
21. City of Fredericton v. Fredericton Police Association, et al., 2021 NBCA 30 (CanLii), at paras. 153-169.
22. *Ibid*, at paras. 168 & 169.
23. See *Arkansas Teacher Retirement System v. State Street Corporation et al.*, Court File No 11-CV-10230 (MLW) (U.S.D.C.) and *People of the State of California ex rel Brown v. State Street Corp.* Case No.34-2008-0008457-CA-MC-GDS (Cal. Sup. Ct., October 20, 2009).
24. In fact, these duties grew out of the classic trust in which one person administers property on behalf of and for the benefit of another. Custodians and investment managers have this very relationship.

Section I—General Principles

Legal Aspects of Trustee Expenses and Attendance at Educational Programs

Michael Mazzuca and Mark Zigler[1]

Trustees of multi-employer pension and benefit plans have a fiduciary responsibility to exercise their powers in the best interests of both present and future trust beneficiaries. This duty toward beneficiaries is paramount.[1] Like any other class of trustees, plan trustees are subject to close scrutiny by trust beneficiaries, the general public, regulators and the courts when it comes to spending and accounting for trust fund money.

As the law develops in Canada and the United States on the subject of trustee expenses for educational conferences, the control of such expenditures becomes increasingly important. Educating trustees in all aspects of fund administration is essential to the prudent and efficient performance of trustee duties. On the other hand, the substantial discretion given to trustees when expending trust fund money for educational programs creates the potential for abuse. Trustees who abuse their power with respect to spending for educational opportunities may be subject to civil, criminal and tax penalties.

In Canada's common law, province issues concerning trustee expenses and attendance at educational programs may be dealt with by the Courts. This is similar to the United States, which has much more developed case law. It is therefore helpful to briefly examine U.S. case law concerning such issues. The U.S. Department of Labor (DOL) has the authority to conduct investigations and to take enforcement actions when it deems there have been improper trustee expenses.[2]

Potential Abuses by Trustees

More than four decades ago, Noel Arnold Levin noted a number of concerns with respect to trustee conference expenditures in his article "Trustee Expenses and Attendance at Educational Programs."[3] Levin's concerns continue to be relevant today. Levin proposed "six measures of prudence" to which trustees should address themselves, as follows.

1. **The reasonableness of expenses**. One must examine the amount spent by the trustee in light of the conference locale and the amount a trustee might reasonably be expected to spend. Moreover, there is a need to itemize all expenses so that individuals receive the lesser of the per diem rate or the actual expenses incurred.

2. **The number of meetings attended per year and who attends**. The position of a trustee should not be used as a means to visit widespread locations. More importantly, lay trustees should not attend conferences from which they cannot reasonably derive knowledge they will use. For example, it is inappropriate for trustees to attend a conference on a specific

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[1] This is an update of the chapter written by Raymond Koskie for *Employee Benefits in Canada*, **Third Edition Revised, published by the International Foundation of Employee Benefit Plans**.

issue for which they have no responsibility. While there are cases where exceptions should be made, some advisors recommend limiting trustees to one conference per year.

3. **The location of the meeting**. A trustee should attend the meeting nearest to their home when similar meetings are held in different locations.

4. **The number of persons from the particular board of trustees attending**. Sending a large number of trustees to any one conference is not a prudent use of fund resources. Trustees who attend conferences are expected to report back to their respective boards, and little can be gained by having all or most trustees attend.

5. **Attendance at all sessions of the conference**. Trustees should not engage in recreational activities or other diversions during the hours when sessions are in progress. Failure to adhere to this rule may result in a conviction for fraud or embezzlement.

6. **Charging more than actual expenses incurred**. Overcharging raises difficult questions with respect to the personal, civil, criminal and tax liabilities of trustees.

All of the concerns listed by Levin are as applicable to trustees in Canada as they are to those in the United States. The major difference is that the Employee Retirement Income Security Act of 1974 (ERISA) and its associated regulations provide clear guidelines for the conduct of trustees in the United States—including the incurring of expenses by trustees.

While there is no Canadian counterpart to ERISA in this respect, Canada does not lack statutory guidance regarding trustee conduct. Most direction is in the trustee acts of the various provinces.[4] Drafted with a view to regulate testamentary or family trusts rather than major employee benefit plans, these statutes are, nevertheless, applicable. Basic common law concerning trusts also provides some assistance. In addition, there are provisions of the Criminal Code where fraud or criminal breach of trust might be involved.

When a pension plan is involved, pension legislation and the policies of the various pension regulators across Canada, including the Canadian Association of Pension Supervisory Authorities, provide further assistance.

With respect to trustee compensation, a guideline published by the Office of the Superintendent of Financial Services (OSFI) in 1998 advises:

> *"If, for example, the plan wishes to update the knowledge of its administrator and staff by sending them to conferences, documented guidelines could specify for instance what conferences are considered appropriate, what is to be gained from the attendance, what reporting of findings is expected of the attendees, who should attend, what accounting of expenses is expected, and what are reasonable expenses."*[5]

The OSFI Guidelines remind trustees that the standard of prudence requires trustees to establish "clear written rules and guidelines regarding the use of plan assets for purposes other than benefit payments." These rules should set out the issues to be considered before an expense payment is authorized and guidelines regarding what expenses are appropriate. As an example, the OSFI guidelines address attendance at educational conferences:

"The board of trustees should establish a policy for compensating its members for their time and earnings lost while they work as trustees. In doing so, they should seek the opinion of independent advisors with expertise in compensation. The policy should be reviewed by legal counsel to ensure that it is consistent with trust law and the specifics of the plan. The board should consider disclosing to members the actual compensation and any honoria or repayment of expenses to trustees as well as the plan's policy in this regard."[6]

Even though OSFI only regulates federally registered pension plans, the expectations set out in the excerpts from its guidelines apply to the obligations of all benefit fund trustees.

Is It Appropriate for Trustees to Attend Conferences?

In the absence of an express provision in a trust agreement permitting reimbursement for trustee expenses, there is some question as to whether such expenses are proper. For example, Section 23.1 of the Ontario Trustee Act states a trustee:

"…who is of the opinion that an expense would be properly incurred in carrying out the trust may, pay the expense directly from the trust property; or pay the expense personally and recover a corresponding amount from the trust property."[7]

As Donovan Waters notes in the Law of Trusts in Canada:

"It would be an extraordinary system of law which did not permit trustees to recover their out-of-pocket expenses incurred in the discharge of their duties and powers under the trust, and in fact, Courts of Chancery were never in any doubt that the trustee was entitled to such indemnification."[8]

More specific is the question of whether trustee conference expenses are properly "incurred in the discharge of their duties and powers under the trust." Given the complexity of modern-day employee benefit plans and trusts, the importance of educating trustees cannot be overstated. At conferences, trustees learn how to properly discharge their trust obligations. Canadian regulators recognize that adequate knowledge and skills on the part of pension plan administrators is an underlying principle of good governance.[9]

Since it is often difficult to establish a direct connection between conference expenses and benefits to a trust, it is crucial these expenses be reasonable in amount and incurred with an honest belief that the trust will benefit. Obviously, this places constraints on the extent to which these expenditures may be made.

A new factor that has emerged, particularly after the COVID-19 pandemic, is the availability of less expensive "online" conferences. Prudent trustees must weigh the advantages of "in-person learning" and the personal interaction gained by such learning with fellow trustees and instructors present against the economics and efficiencies of the online alternatives. Where trustees lack the availability or budget to travel, online options are often preferable when they are available.

Regulation of Expenses Incurred at Educational Conferences

The common law of trusts is the primary source of general guidelines and principles from which a code of behaviour might be developed for trustees attending such conferences. There are three guiding common law principles with respect to trustee expenses.

1. Trustee expenses must be properly incurred.

2. Trustees are under an obligation to account for all expenses.

3. Trustees must meet the standard of care that a person of ordinary prudence would exercise in the management of his or her own affairs.

Properly Incurred Expenses

A basic principle of common law is that trustees are entitled to reimbursement for expenses "properly incurred." While this criterion can be vague and nebulous, the courts and legal scholars have offered a more precise definition of what constitutes a "properly incurred" expense. Waters provides a threefold test as follows:

> *". . . in allowing or refusing claims made by trustees, the test is whether the expense incurred arose out of an act within the scope of the trusteeship duties and powers, whether in the circumstances it was reasonable, and whether it was something that his duty as a trustee required him to do."*[10]

Is the Act Within the Scope of Trustee Duties and Powers? This question has been dealt with above with respect to the issue of whether expenditures on educational conferences can be made in the first place. Such expenditures are readily justifiable when there is an express provision in the trust agreement permitting them, although the importance of educating the trustees of an employee benefit trust can be viewed as a matter within the scope of the trusteeship duties in most circumstances.

Is the Expenditure Reasonable? The courts provide little guidance on when expenditures are reasonable. The facts of each case often dictate what is reasonable. Consider a conference on a specialized topic, such as protecting the privacy of personal information. It may be reasonable for one trustee to attend the event, but it may not be reasonable for several trustees of the same fund to attend.

The reasonableness test often manifests itself when trustees choose the more reasonably priced of various alternative expenditures. Such is the case when economy air travel is chosen over a first-class ticket, and a less expensive hotel room is selected instead of luxury accommodations. It is impossible to compile an exhaustive list of reasonable expenditures, but the list of "Trustee Dos and Don'ts" included in Appendix A outlines some trustee conference expenditures generally viewed as reasonable.

In any event, it is clear that a trustee may not recover expenses that arise from their own misconduct.[11] This includes situations where a trustee falsifies accounts or unjustifiably runs up expenses.[12] Examples of such activities are cashing first-class airline tickets provided by the trust fund and traveling economy class, payments for travel and meals of spouses at the expense of the trust fund, and not attending part or all of the conference.

Do the Duties of the Trustee Require This Activity? A crucial aspect of conference expenditures is the practicable relevance to the trustee's duties. Accordingly, a trustee not involved in fund delinquencies should not attend a conference on this topic. Expenditures may be justified for trustees with considerable time commitments to trust fund work who exercise a degree of skill and ability and have had some success in trust administration. Justifying such expenditures for trustees with few or no commitments and responsibilities may be extremely difficult.

Duty of Trustees to Account

The second key area for consideration with respect to the law of trusts is the duty of trustees to account and disclose information. By law, trustees are required to keep clear and distinct accounts. In the old English case of *Chisholm v. Barnard*,[13] this obligation was held to mean trustees must give full explanations of all their dealings and the reasons why outstanding assets were not collected or property of the estate has disappeared. More recently, the Ontario Superior Court has clearly held that a trustee *"has an obligation to keep proper accounts"* and *"must keep a complete record of his/her activities."*[14] Beneficiaries of a trust fund are entitled to an accounting for all expenditures as a matter of common law and may bring legal proceedings for such accounting at any time.

Accordingly, it is crucial for trustees to account fully for conference expenditures. Even trustees receiving a per diem allowance for a conference must account for amounts actually spent to avoid suspicion they profited from the allowance by, for example, "doubling up" in hotel rooms and having meals paid for by others. Trustees are legally obliged to return the unused balance of any allowance. On the other hand, trustees may be reimbursed for any reasonable additional expenses that were incurred if plan policies permit doing so.

Standard of Care of Trustees

A final matter is the general standard of care expected of trustees when conducting trust affairs. Apart from maintaining the highest standards of honesty and good faith, the law requires a trustee to exercise the same degree of diligence in their office as a person of ordinary prudence would exercise in the management of their own affairs.[15] In the case of pension fund trustees, pension legislation often holds trustees to the highest possible standard where they must act as if managing the affairs of another person.[16] Paid trustees are held to an even higher standard. If a trust fund is in a precarious financial position or has a large number of trustees, attendance at conferences by any or all of the trustees should be carefully considered in light of the circumstances. Charging illegitimate expenses to pension funds is also a breach of this standard.[17]

Liability of Trustees

Trustees who abuse their trust position and transgress the guidelines noted above or actually fall prey to the temptations of improperly benefiting from trust monies may be subject to serious liability in civil courts, criminal courts and under the Income Tax Act.

Civil Liability

Trustees need not be found to have acted fraudulently, negligently, incompetently or in an otherwise blameworthy manner in order to incur civil liability. The operating principle is:

> *"If the letter of the trustee's obligation has not been adhered to for whatever reason, he is liable to the beneficiaries for any loss which has occurred as a result."*[18]

Trustees are jointly and severally liable to the trust beneficiaries for a loss arising out of a breach of trust—in other words, each trustee is personally liable for their own part in losses and also for losses caused by the other trustees. Take note that this common law position has been modified by trustee legislation in some, but not all, provinces. For example, the Trustee Act of British Columbia does not hold a trustee accountable for the acts of another trustee unless the loss "happens through trustee's own wilful default."[19] Hence, a trustee who condones abuses by other trustees with respect to attendance at educational conferences and is fully aware of such abuses may share liability.

The specific remedies available to fund beneficiaries and trustees are twofold. The first remedy is for situations where expenses are improperly incurred regardless of any dishonesty on the part of the trustee—It consists of reinstatement of the funds improperly advanced and possibly payment of any damages arising from the trust losing the use of the funds. In the case of *Zimmerman v. McMichael Estate*[20], the Ontario Superior Court found that a trustee had made improper and unauthorized payments to himself or for his benefit out of the trust and ordered the trustee of an *inter vivos* trust to reimburse the trust more than $400,000 plus interest.

A more stringent civil remedy is available when it can be proven a trustee was dishonest, which is the gravest breach of trust.[21] Furthermore, most trustee acts permit the nomination of a new trustee to replace a trustee found unfit to act or convicted of an indictable offence.[22] In a recent Alberta case, the court held that a trustee's expenses were not reasonably and properly incurred. As a result, the trustee was ordered to reimburse the fund, and the fund was directed to remove the trustee.[23]

Criminal Liability

There are various criminal charges to which a trustee suspected of abuses of trust may be subject, including criminal breach of trust, theft, theft by a person required to account and fraud. All of these offences relate to the misappropriation of money or property that does not belong to the trustee, and all can result in prison terms on conviction.

The offence of criminal breach of trust is set out in Section 336 of the Criminal Code:

> "*Everyone who, being a trustee of anything for the use or benefit, whether in whole or in part, of another person, or for a public or charitable purpose, converts, with intent to defraud and in contravention of his trust, that thing or any part of it to a use that is not authorized by the trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."*[24]

With respect to criminal breach of trust, the courts have determined that even if the trustee is given unfettered discretion to look after the trust property, they are not entitled to use the property for personal gain. If the trustee does so, they are guilty under Section 336.[25]

In most criminal proceedings, the Crown must prove that the accused actually intended to engage in criminal conduct. However, in cases of criminal breach of trust, the necessary fraudulent intent may be deduced from the accused's conduct. Where the natural consequences of the accused's acts are to defraud trust beneficiaries, the onus is on the accused to rebut the presumption they intended these consequences.[26] Finally, the courts have determined it is not at all inconsistent to charge a trustee with criminal breach of trust and theft for the same offence, as it is possible to be convicted of one and not the other.[27]

Under Section 322 of the Criminal Code, an individual commits theft when, among other things, the person:

> *". . . fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent to deprive temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it. . . ."*[28]

In addition, Section 330 of the Criminal Code creates an offence of theft by a person required to account, as follows:

> *"Everyone commits theft who, having received anything from any person on terms that require him to account for or pay it or the proceeds of it or a part of the proceeds to that person or another person, fraudulently fails to account for or pay it or the proceeds of it or the part of the proceeds of it accordingly."*[29]

Under Section 330, it is possible for a trustee to be convicted for refusing to account for expenditures while attending an educational conference, or simply for not being able to account for how the money was spent. Conviction for theft under Section 322 or Section 330 may result in a jail term of up to ten years where the stolen property exceeds $5,000 in value. Theft under $5,000 may result in a jail term of up to two years or a fine.

Section 380 of the Criminal Code sets out the offence of fraud that is committed by:

> *". . . one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security. . . ."*[30]

The penalties for fraud may result in a jail term of up to 15 years and depend on whether the amount in question exceeds $5,000.

In recent years, there has been an upsurge in theft and fraud cases against politicians and civil servants who misappropriate public funds. For example, there is the case of a British Columbia cabinet minister who cashed in first-class airline tickets and traveled economy, then pocketed the difference. The result was a conviction under the Criminal Code's fraud provisions. In another case, a member of Parliament in Newfoundland claimed the mileage allowance available to members of Parliament for trips to his constituency that he did not make. He was convicted of fraud in excess of $200 under the then-Section 338 of the Criminal Code despite evidence that many members of Parliament believe the mileage expenses were an allowance to be used regardless of whether a trip was taken. Similarly, trustees may fall victim to the same types of charges where they seek reimbursement for expenses not actually incurred.

Income Tax Liability

A final matter to be considered is the income tax consequences that might result from attending educational conferences and conventions. Generally, trustees are not subject to tax for conference expenses reimbursed by their trust fund—just as employees are not taxable for such expenses reimbursed by employers as part of the duties of employment. However, Canada Revenue Agency Folio S2-F3-C2 provides that:

> *". . . if the employer gives an employee a non-accountable allowance to cover the cost of attendance at such a convention, the employee will, as a rule, be taxable on that allowance. . ."*[31]

From this it can be argued trustees receiving a non-accountable allowance to attend a conference are receiving remuneration for their work as trustees and, accordingly, are taxed on such an allowance.

Finally, if a trustee is convicted of a criminal offence or illegally misappropriates trust funds, such illegally obtained income is taxable to the trustee under the Income Tax Act.[32]

Conclusions

It is generally possible under the terms of most employee benefit plans, and pursuant to the relevant provisions of the trustee acts of Canada's provinces, for trustees to incur expenses for attending educational conferences—provided such expenditures are closely controlled and are reasonable. It is prudent for a trust to establish controls to ensure the expenses charged are reasonable and adhere to the standards set out in legislation and common law.

Trustees should be required to account for all expenses and the reasonableness thereof. The trustees must fully account for their expenditures and observe the standard of care expected of trustees. Failure to operate within these controls may result in adverse civil, criminal and tax liability to the trustee.

APPENDIX A
TRUSTEE DO'S AND DON'TS

DO'S

1. Keep all travel, meal and accommodation expenses at reasonable levels, taking less expensive options when possible and practical. For example, attend educational events closest to home when the same opportunity is offered at more than one location. Select economy over first-class transportation when it is available and appropriate.

2. Attend all educational sessions relevant to your duties as a trustee while at an event.

3. Substantiate all expenditures associated with attending the educational event even when you have a per diem allowance. Keep receipts whenever possible and provide a full accounting of all trust fund monies spent.

4. Report to the board of trustees your attendance at the educational events, including the subject matter of the sessions and what you learned.

DON'TS

1. Attend educational events that do not have content relevant to your responsibilities as a trustee.

2. Permit an unreasonable number of trustees of the same fund to attend the same conference.

3. Attend programs when the financial position of the trust fund would not reasonably justify such attendance.

4. Charge expenses for days other than those actually spent in attendance at conferences or traveling to or from a conference.

5. Charge to the trust fund expenses incurred by friends, spouses or children attending a conference.

6. Receive payment from two sources (e.g., two different trust funds) for the same expenses.

[1] *Cowan v. Scargill*, (1984) 2 All E.R. 750 (Ch.D.) at p. 760.

[2] See J. Mader, "Trustee and Plan Expense Issues," NCCMP Resources (Updated November 2006).

[3] N.A. Levin, "Trustees Expenses and Attendance at Educational Programs," Employee Benefits Digest, June 1979.

[4] S.A. 2022, c. T-8.1, ss. 15, 58, 86; R.S.B.C. 1996, c. 464, ss. 27, 31and 95; C.C.S.M., c. T-160, ss. 8, 9, 78; S.N.B. 2015, c. 21, ss. 9, 52; R.S. N.L. 1990, c. T-10, ss. 3, 11, 29, 31, 32; R.S.N.S. 1989, c. 479, ss. 16, 29, 31; R.S.O. 1990, c. T-23, ss. 3, 27-28; R.S.P.E.I. 1988, c. T-8, s. 4; R.S.N.W.T. 1988, c. T-8, ss. 5, 6, 7; R.S.Y. 2002, c. 223, ss. 8, 9, 10; S.S. 2009, c. T-23.01, ss. 43, 15, 16; R.S.C. 1985, c. P-6.

[5] Memorandum of Administrators of Federally Regulated Pension Plans Under the Pension Benefits Standards Act, 1985, Guidelines for Governance of Federally Regulated Pension Plans (May 1, 1998), p. 13.

[6] Ibid., p. 21.

[7] R.S.O. 1990, c. T-23 s. 23.1; R.S.B.C. 1996, c 464, s. 95; S.A. 2022, c. T-8.1, s. 58,; C.C.S.M., c. T-160, s. 78;S.N.B. 2015, c. 21, s. 52; R.S.N.L. 1990, c. T-10, s. 29; R.S.N.S. 1989, c. 479, s. 29; R.S.N.W.T. 1988, c. T-8, s. 5; R.S.N.W.T. (Nu) 1988, c. T-8, s. 5; R.S.Y. 2002, c. 223, s. 8; S.S. 2009, c. T-23.01, s. 43.

[8] Waters, *Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), p. 1207.

[9] Standing Senate Committee on Banking, Trade and Commerce, *Report on the Governance Practices of Institutional Investors*, November 1998; and supra note 5.

[10] Waters, supra note 8, p. 1209.

[11] Ibid., p. 1210.

[12] Ibid., p. 1210.

[13] *Chisholm v. Barnard* (1864), 10 Fr. 479 (Ch.).

[14] *Zimmerman v. McMichael Estate*, 2010 ONSC 2947, para 31.

[15] *Learoyd v. Whitely* (1887), 12 Cas. 727 (H.L.).

[16] See *Ontario Pension Benefits Act* s. 22(1) and (2).

[17] OSFI, *"Guidelines for Federally Regulated Pension Plans"* supra note 5 p. 13.

[18] Waters, supra note 8, p. 1270.

[19] R.S.B.C. 1996, c 464, s. 95; S.A. 2022, c. T-8.1, s. 58; C.C.S.M., c. T-160, s. 78; S.N.B. 2015, c. 21, s. 52; R.S.NL. 1990, c. T-10, s. 29; R.S.N.S. 1989, c. 479, s. 29; R.S.O. 1990, c. T-23; R.S.N.W.T. 1988, c. T-8, s. 5; R.S.N.W.T. (Nu) 1988, c. T-8, s. 5; R.S.Y. 2002, c. 223, s. 8; S.S. 2009, c. T-23.01, s. 43.

[20] *Zimmerman v. McMichael Estate* (2010) ONSC 2947, para 31.

[21] Waters, supra note 8, p. 898.

[22] S.A. 2022, c. T-8.1, s. 15; R.S.B.C. 1996, c 464, s. 27, 31; C.C.S.M., c. T-160, s. 8, 9; S.N.B. 2015, c. 21, s. 52; R.S.NL. 1990, c. T-10, s. 11; R.S.N.S. 1989, c. 479, s. 16, 31; R.S.O. 1990, c. T-23, s. 3; R.S.N.W.T. 1988, c. T-8, ss. 6, 7; R.S.N.W.T. (Nu) 1988, c T-8, 6, 7; R.S.Y. 2002, c. 223, s. 9, 10; S.S. 2009, c T-23.01, s. 15, 16.

[23] McDonald Estate (2012), 14 ABQB 704, paras. 38-47, 105.

[24] Criminal Code, R.S.C., 1985, c. C-46, s. 336.

[25] *R. v. Belanger* (1925), 44 C.C.C. 129 (Que. K.B.).

[26] Ibid.

[27] *R. v. Petricia* (1974), 17 C.C.C. (2d) 27 (B.C.C.A.); *R. v. Nakonechny* (1980), 3 Sask. R. 209 (Sask. C.A.); *R. v. Lowden* (1981), 59 C.C.C. (2d) 1 (Alta. C.A.), aff'd (1982), 68 C.C.C. (2d) 531 (S.C.C.).

[28] Criminal Code, supra note 23, s. 322(1).

[29] Ibid., s. 330(1).

[30] Ibid., s. 380(1).

[31] Canada Revenue Agency, Folio S2-F3-C2, "Convention Expenses" (November 24, 1989), para. 7.

[32] *R. v. Poynton* (1972), 72 D.T.C. 6329 (Ont. C.A.); and *Lennox Industries Ltd. v. The Queen* (1987), 87 D.T.C. 5041 (F.C.T.D.).

Trustee Fiduciary Liability Insurance

*Lillo DiPasquale**

When trustees act in a fiduciary capacity, they have a moral obligation to do what is in the best interests of plan participants and beneficiaries. They must act prudently and according to plan documents. Trustees are also subject to common law (except for Québec) and the statutory duties imposed on trustees by the provinces (e.g., Québec Supplemental Pension Plans Act).[1] Despite even the best of intentions, an allegation of a wrongful act or breach of fiduciary responsibility can place significant liability on trustees. Purchase of adequate fiduciary liability insurance is a wise course to take.

A fiduciary liability insurance policy protects plan assets as well as the personal assets of plan trustees when there is mismanagement, negligence or simply a mistake that leads to a breach of fiduciary duty, wrongful acts, and errors or omissions in plan administration. Such policies also provide protection for actual misconduct as well as allegations that wrongful acts have occurred.

Fiduciary Liability Insurance Versus Other Types of Coverage

It is important to keep in mind that fiduciary liability is not the only potential loss faced by trustees and funds—There are many others. Administrators and trustees should discuss the broader issue of risk and insurance with the fund attorney and insurance broker. Exhibit 1.1 offers an exposure checklist as food for thought.

Tip for Trustees

The old saying that "an ounce of prevention is worth a pound of cure" is good advice. Fund administrators and trustees should know what steps to take to prevent intentional and unintentional wrongdoing with respect to fund management. There are many excellent articles on risk management.[2] A discussion with fund advisors, including the fund attorney and insurance broker, on this topic is essential.

The Right to Purchase Fiduciary Liability Insurance

The Employee Retirement Income Security Act of 1974 (ERISA) in the United States is very specific about the ability of trustees to buy insurance with plan assets. Canadian legislation is mainly silent on the subject. The primary issue is whether it is proper for trustees to use plan assets to purchase insurance to protect the trustees from liabilities associated with their personal responsibilities. To date, there are no known circumstances where this has been a problem in Canada. Legal advice should be sought on this topic. If there is still a concern after discussion with legal counsel, the fund insurance broker should approach the insurer(s) to arrange a premium split between the fund and the trustees with each trustee paying their own premium allocation. It is expected the cost for each trustee will be nominal.

*This is an update of the chapter written by Brian Jeffrey for *Employee Benefits in Canada*, Third Edition Revised, published by the International Foundation of Employee Benefit Plans.

Fiduciary Liability Insurance Versus Indemnity Agreements

Some trustees may question why there is a need to purchase fiduciary liability insurance when a trust agreement has indemnity provisions in place for trustee protection. Fiduciary liability insurance offers three areas of protection:

1. Coverage for the fund in cases where the fund itself is found liable for an insured claim
2. Coverage for amounts paid by the fund to trustees for claims covered under the indemnity provisions of a trust agreement
3. Coverage for the trustees in cases where the trust agreement indemnity provisions don't offer protection while the broader coverage provided by a fiduciary liability policy does.

From a trustee standpoint, the third item is especially important. The indemnity provisions of a trust agreement frequently do not indemnify trustees for claims or losses arising from the individual fraud or negligence of that trustee. Even if a trustee thought he or she was acting in good faith, the courts may rule the trustee negligent. In this case, costs for the legal defence of the trustee, judgment against the trustee and other costs would be borne solely by the trustee. Coverage provided by a fiduciary insurance policy is far broader, and the risk that a trustee would be personally liable is greatly reduced.

The Canadian Insurance Market

Initially, fiduciary liability coverage was provided either by Lloyd's of London or Canadian subsidiaries of U.S. companies. Because demand for such protection was not substantial, policies tended to be either U.K. or U.S. policies nominally amended to reflect the Canadian context. In the late 1970s, Canadian wording was developed after discussion with, and input from, Canadian trustees, lawyers and administrators. In terms of policy coverage today, the policy forms offered are relatively unchanged.

There are four insurers underwriting meaningful amounts of trustee fiduciary insurance and about four or five others offering some coverage.[3] Having a meaningful amount of similar business indicates an insurer has a com-

Exhibit 1.1

Potential Exposure to Loss and Insurance Needs

Coverage	Comments
I. **Fiduciary/general errors and omission** protects the trust fund and trustees when there are errors and omissions on the part of trustees in carrying out their duties and responsibilities as trustees.	• The definition of *insured* should include the fund, all trustees and any person acting on behalf of the fund within the organization of the fund, including employees. • Coverage should apply even if an exculpatory clause waives trust liability for a particular error or omission. • Independent administrators, actuaries, auditors, investment managers, investment management services, consultants, lawyers and accountants acting in their capacities as such are excluded. • If the fund uses the services of an independent administrator, consider adding the administrator as an additional insured. • Verify that all professionals utilized and not covered under the fund's insurance policy carry professional liability insurance of sufficient limits. • Coverage limits usually start at $500,000 for a small fund while a limit of more than $25 million is not uncommon for very large funds. The average limit purchased is $5 million.

Exhibit 1.1 continued on next page

Coverage	Comments
II. Dishonesty protects a fund from the dishonest acts of trustees and employees—acting alone or in collusion with others—that cause a loss to the fund.	• Limits range from $500,000 to more than $25 million depending on the size of the fund.
III. General legal liability provides protection for bodily injury and property damage claims arising on fund premises and as the result of fund operations and products. It may be extended to include: A. Premises and operations B. Products and completed operations C. Personal injury D. Nonowned automobile E. Nonowned watercraft F. Owners and contractors protective G. Contractual liability H. Contingent employers liability I. Employers liability J. Employee benefits errors and omissions K. Advertising liability L. Liquor liability M. Incidental medical malpractice N. Medical expenses O. Elevator collision P. Employees as insureds Q. Trustees as insureds R. Occurrence property damage S. Broad form property damage T. Hostile fire extension U. Intentional injury amendment V. Tenant legal liability	• General liability policies exclude owned aviation, owned automobile, owned watercraft, environmental, nuclear, professional and employment practices liability. • Most, if not all, possible extensions should be included. A number of these extensions can be included at little or no cost. • Limits range from $1 million to more than $25 million. A $5 million limit can usually be purchased at a reasonable price. • A combination of commercial general liability coverage and umbrella liability coverage may be desired to achieve appropriate limits of liability.
IV. Automobile (owned or operated) A. Direct damage B. All perils or collision and comprehensive C. Loss of use D. Third-party liability	• This coverage is required if any motor vehicles are owned by, leased to or registered in the name of the fund.
V. Watercraft (owned or operated) A. Direct damage B. Loss of use C. Third-party liability	• This coverage is only required if a fund owns, leases, operates or has assumed responsibility for any watercraft.
VI. Aircraft (owned or operated) A. Direct damage B. Loss of use C. Third-party liability	• This coverage is only required if a fund owns, leases, operates or has assumed responsibility for any aircraft.

Exhibit 1.1

Exhibit 1.1 continued on next page

Exhibit 1.1	
Coverage	Comments
VII. Property (owned, leased or for which the insured has agreed to be responsible) A. Direct damage 1. Building(s) 2. Boiler and machinery 3. Exterior glass 4. Signs 5. Growing trees, plants and shrubs 6. Office/plant equipment and stock 7. Computers (e.g., hardware, software, extra expense) 8. Fine arts 9. Customer goods 10. Employee property 11. Tenant improvements 12. Property in storage (off-premises) 13. Property in transit 14. Property in custody of sales reps 15. Accounts receivable records 16. Valuable papers records B. Loss of use 1. Loss of income 2. Increased expenses a. Auditors/professional fees b. Other	• Coverage should be written on a "blanket, all risks" basis. • Property policies exclude money and securities. • Coverage should also include: – Replacement cost and stated amount clauses with extensions for earthquake, flood, sewer backup and full by-laws – Interruption by civil authority protection for 30 days with 60 days' notice of cancellation – Separate coverage for computers, as well as general extra expense. – Mechanical breakdown and transit on computers – Boiler and machinery insurance written in a comprehensive form to pay for financial loss incurred when equipment breaks down suddenly and accidentally • Additional coverage available includes business interruption and consequential damage. • Appropriate limits are needed for extensions (e.g., extra expense, expediting expense, ammonia contamination). • Sufficient limits should be established for extra expense coverage with 100% of limit available the first month. • Sufficient sublimits should be established for valuable papers, accounts receivables records, professional fees and other extensions as appropriate. • Leases should be reviewed to determine any special insurance requirements or obligations.
VIII. Money and securities A. Loss inside the premises B. Loss outside the premises C. Depositor forgery D. Computer theft and funds transfer E. Employee dishonesty	• Employee dishonesty is addressed under Section II in this Exhibit. • Other coverage may be appropriate depending on fund handling of money and securities, etc.
IX. Environmental liability	• Coverage may be required if a fund owns properties from which there is the possibility of environmental damage.
X. Professional liability A. Trustees/directors' and officers' liability B. Errors and omissions liability C. Employment practices liability D. Outside directors' liability	• Some larger funds set up an owned corporation to handle specific needs such as real estate. If this is the case, Items A and B are addressed under directors' and officers' liability (Section I of this Exhibit). • Employment practices liability relates to sexual harassment, wrongful dismissal, etc. • Outside directors' liability applies if a trustee is asked to sit on the board of a company in which the fund has substantial investments.

Exhibit 1.1 continued on next page

Exhibit 1.1

Coverage	Comments
XI. Accidental death and dismemberment (AD&D)	• Coverage can be purchased to provide AD&D for trustees and employees.
XII. Key person insurance	• Coverage can be purchased on the lives of key persons to the fund whose death would result in possible financial loss to the fund.
XIII. Ransom/kidnap	• Coverage can be purchased against the possibility of trustees or key employees being kidnapped and held for ransom.
XIV. Credit insurance	• Not likely to be appropriate for a fund
XV. Ocean marine	• Not likely to be appropriate for a fund
XVI. Employee benefits insurance	• Coverage can be arranged to provide a package of employee benefits (e.g., group life, dental).
XVII. Package of insurance products for sale to members (e.g., AD&D, medical, home, auto insurance and legal expense).	• Trustees may want to consider offering a package of insurance products that members can purchase.
XVIII.	**Cyber liability insurance** • Coverage is broken down into coverage for first- and third-party costs. Examples of first-party costs covered by a policy include: – *Notification costs*—letting all those affected by a breach know the breach has occurred (i.e., mail campaign, credit monitoring, call centre to handle questions) – *Forensic investigative costs*—hiring a professional third party to determine where, when and how the breach occurred, including data system preventive processes – *Data restoration costs*—restoring the network and data to the point it was at before the breach occurred – *Cyberextortion*—an attack or threat against a plan when there is a demand for compensation to stop the attack. • Examples of third-party liability costs covered by a policy are: – *Network security liability*—damages and claims expenses associated with the unauthorized access to, degradation of or disruption to the plan's network through use of malware, denial of service attack, phishing, etc., causing loss – *Privacy liability*—liability for unauthorized collection, disclosure, use, access, destruction or modification of personal protected information – *Electronic Media Liability*—liability resulting from allegations concerning infringement of privacy, defamation, – disparagement, piracy, copyright infringement, etc., related to content displayed electronically (i.e., website).

Source: HUB International (Ontario) Ltd. Insurance Brokers.

mitment to providing this coverage on a long-term basis.[4] Avoid companies trying to "buy" premiums in a soft market.

Unfortunately, there are few insurers with a sufficient portfolio of Canadian fiduciary insurance premiums to produce standalone viable loss results. This means insurer portfolios may be subject to shock (large) losses or lumped in with other similar insurance that may not benefit Canadian trustees and trust funds.

Coverage Analysis Highlights

There is no clear-cut best wording for a policy in the Canadian insurance market nor a clear-cut best insurance carrier for all situations. Consider the pros and cons of policy wording when addressing a specific risk or circumstance. Typically, an insurance carrier provides additional endorsements to address any concerns.

- **The insuring agreement should pay on behalf of and not reimburse.** *Pay on behalf of* means the insurer pays first and, thus, trust funds are not spent. Policies usually cover all sums the insured becomes legally obligated to pay for a wrongful act.
- **All policies include defence costs.** It is important to know whether defence costs are included in or an addition to policy limits. Obviously, it is better to have defence costs in addition to the limits. Today, however, it is common for insurers to include defence costs in policy limits as opposed to an addition to the limits. If defence costs are included within the limit, consider higher limits. With the added threat of class action lawsuits, defence costs can quickly add up and could potentially exhaust a sizable portion of the total limit secured.
- **Most, if not all, fiduciary liability policies are on a claims-made basis.** With *claims-made poli- cies,* claims that arise during the life of the policy are covered. Typically, claims anticipated or known prior to the policy effective date are excluded. Claims on prior events not expected as of the policy effective date should be covered. The insurance carrier whose policy is in effect on the date a fund becomes aware and gives notice to the insurer is the carrier that must defend and settle the claim. With most claims-made insurance, the application becomes part of the policy and acts as a warranty. It is therefore imperative the application be an accurate representation of overall plan operations.
- **An insurer may offer a retroactive effective date.** This simply means any unknown claims that arise out of circumstances that occurred prior to the retroactive effective date are not covered. This is an important area that requires discussion with your insurance broker and legal advisors.
- **It is important to know the extension rights under a claims-made policy.** Once a policy is cancelled or lapsed, there is no further coverage. There is the chance that sometime in the future—perhaps years later—a claim will be made on a situation that occurred while the policy was in force. Most policies offer an extension commonly known as an *extended reporting period* if the insured pays an additional premium when the extension is exercised. Since a claim against a plan/board of trustees or individual fiduciary can take many years before it manifests itself, coverage for the longest possible extension period is best. An extended reporting period endorsement allows additional years of insurance protection for the reporting of claims committed and not reported before the cancellation of the policy.

Again, it is important to emphasize that coverage be fully understood. Consultation with an insurance broker and legal counsel is essential.

Who Can and Should Be an Insured?

A fiduciary liability insurance policy should cover all trustees—past, present and future—regardless of any hold-harmless or exculpatory clauses contained within the trust document to protect the trust fund. The fund itself should also be covered by the policy so it is protected against loss arising from trustee actions. When allowed by law, it is common for trustees to be held harmless for their inadvertent actions. While this protects trustees, there may still be financial loss to the fund. It is essential that any insurance purchased picks up this type of loss. If a fund has employees, the employees should also be named insureds. Outside administrators can be added in certain circumstances; however, this affects liability limits.

How Much Coverage Should Be Purchased?

The answer to this question is subjective and must be made by the trustees, taking into consideration the advice of professionals including accountants, attorneys, insurance brokers, insurers and insurance consultants. Professional opinions should be weighed based on the particular professional's expertise. The decision ultimately must be based on a review of as many factors as possible. At minimum, the following factors (in no particular order of importance) require consideration:

- ***What coverage is being purchased by others?***
  - Limits, deductibles and premiums by asset size
  - Average coverage limits by asset size
- ***Are defence costs included in the limit?***
  - If they are, consider higher limits than for a policy that has defence costs in addition to the limit.
  - Most policies contain an annual aggregate limit for all claims arising in a policy year. Consider the possibility of having more than one claim in a policy year.
- ***What is the prior claims history?*** Consider the history of:
  - The fund (if any)
  - Similar Canadian insureds
  - Similar U.S. insureds.
- ***What limits are available in the marketplace?*** Very low limits are available for some coverage. In these cases, the limit issue may be moot. Consider alternative risk financing vehicles (e.g., reciprocals, spread loss). At present, limits of $25 million or more are available for well-managed Canadian trust funds.
- ***What are the anticipated future trends?***
  - There seems to be a swing toward having professionals and others in a fiduciary capacity be increasingly accountable for their actions.
  - Legislation continues to change, which is making pension plan management increasingly complicated. In addition, the laws governing plan management place a higher duty of care on trustees—dictating that trustees assume more and more responsibility for plan administration and investment.
  - Although not to the level of our neighbours to the south, Canada is becoming more litigious. At the extreme, some parties are unwilling to suffer the least inconvenience or injury without seeking compensation from someone—anyone! The original object of the tort system was to allow redress against others who, through carelessness, cause harm to others. In a number of cases, the need to show negligence is being replaced by simply showing involvement. The "deep pocket" syndrome looks for anyone who can pay.
- ***What are the financial reporting requirements for a fund?*** If a suit exceeds the coverage limits purchased, this can have a detrimental impact on the annual financial statements. The potential impact of such a claim should be discussed with the fund auditor and legal counsel. Keep in mind that it is not uncommon for a liability claim to take up to ten years to settle.
- ***How many insureds are involved and what is the loss exposure?*** In deciding upon adequate limits, trustees must, as best as possible, assess their exposure—particularly if more than one insured is involved. It is not uncommon for multiple insureds to be the case. The annual aggregate limit normally applies to all insureds. Consider the implication of having not only one large claim but multiple claims in a policy period. The failure to secure a higher limit of protection could result in one or more claims exhausting most, if not all, of the aggregate limit with little left for the remaining policy period.
- ***How much is the deductible?*** Most policies are subject to a deductible. It may be *two-layered*, with a higher deductible for the fund and a lower deductible for the trustees. In most cases, the deductible is negotiable. A higher deductible often yields a premium reduction. Check whether the deductible applies to legal costs.
- ***What is a reasonable premium?*** Historically, the insurance industry has been cyclical with periods of soft and hard underwriting positions. *Soft* means most premiums are negotiable. After a decade of low interest rates and increasing competitive intensity that left the insurance industry performing at an unsustainable level, in 2019 the insurance marketplace began to "harden." *Hard markets* are characterized by a lack of capacity where limits or even complete lines of business are removed from carrier portfolios. Hard markets also see deductibles increase, coverage terms and conditions restricted, and premiums rise. Starting in 2020, the COVID-19 pandemic also contributed to the challenges of the insurance market. It created further financial strain and uncertainty across the Canadian economy.

With pandemic restrictions wound down, economic activity returning to mostly prepandemic levels and several years of insurance premium rate increases, the insurance industry's financial performance and sustainability has improved significantly. There are signs that the "hardened" market is moderating, at least in well-performing product lines and for good risks. As a result, the rate of increase of premium including for trusteed plan fiduciary liability risk has slowed.

Despite improved financial positions, insurance companies are likely to remain cautious. That uncertainty will cause many insurers to continue to be cautious with respect to both the risks they are prepared to underwrite and the cost for the assumption of these risks. Under these current conditions, it would not be a surprise for modest rate increases to continue for the foreseeable future even as insurer margins return closer to historical levels.

What Is Excluded From a Fiduciary Policy?

Standard exclusions on all fiduciary liability insurance policies typically include:

- Criminal or deliberate fraudulent acts/dishonesty, which can be insured separately
- Illegal personal profiting
- Bodily injury/property damage, which can be insured separately
- Discrimination, libel, slander and defamation of character, which should be insured separately
- Failure to collect contributions
- Pending and prior acts—Prior to its inception, a fiduciary insurance policy is not intended to provide coverage for "known" litigation or circumstances that could give rise to a claim.
- Pollution
- Cyber and data privacy breach (but see below).

Protecting Member Data

Safeguarding data is a significant concern for many organizations today in all business sectors. As the purveyors and protectors of plan data, a trusteed board is certainly no different. From network intrusions and data extortions to the compromise of sensitive personal and plan information either by criminal network hackers or an innocent error by a plan employee or representative, the impact of a data breach can be enormous.

While a board of trustees may be able to hold outsourced third-party providers liable for any privacy or network security breaches, it is possible that the board also be held liable and responsible for securing the personally identifiable information of its members.

What Protections Can a Cyber Insurance Policy Provide a Board of Trustees?

The potential costs involved in managing a data breach incident covered in a cyber insurance policy can be divided into first-party and third-party costs.

First-Party Costs:

If a board and its administration office were to become involved in a breach incident then a cyber insurance policy is designed to manage and pay for costs associated with required "triage" services, including:

- Legal fees for the "breach coach" lawyer who would advise the board and oversee a breach response strategy
- Costs for any forensic IT investigation to determine the extent and severity of any network intrusion, (i.e., the source of the network security or privacy breach came from a network system that a trustee or plan representative was using)
- Notification costs in the event that plan members must be advised of the breach
- Costs for retaining public relations experts who can assist in crafting the proper messaging around the breach incident
- Credit monitoring/credit restoration costs in the event that financial information has been stolen/compromised and affected plan members need such a service.

Third-Party Costs

Includes the payment for costs associated with responding to and defending a claim brought by a third party. If the board of trustees fails to safeguard plan member information and a plan member brings a suit against the board for its negligence, then the third-party liability coverage from a cyber liability insurance policy can respond.

In addition to first-party and third-party costs, breach incidents can result in certain ancillary costs.

- Ransomware attacks including forensic IT support to investigate
- Legal costs to negotiate with the extortionist and the payment of the actual ransom itself, whether in cryptocurrency or otherwise

Working Remotely

In the post-COVID-19 environment, a board could face a "wrongful act" claim from plan members alleging that plan trustees failed to plan and respond adequately. Allegations of plan management failings could include:

- A failure to have adequate systems in place to allow access to servers and systems so that "business as usual" can be maintained while administrative staff/plan employees "work from home"

- Lack of planning on how to monitor systems and controls at the required level with increased remote working
- Lack of cyber resilience capabilities to ensure the security of data when there is a very high level of remote access.

Any of these failings and more could potentially expose a board to investigations and claims arising from its contingency planning and decision-making.

Your fiduciary liability policy does not sufficiently cover data privacy breaches and cyber liability claims. Cyber insurance fills the gap left by policy wording exclusions. Pairing cyber insurance with a fiduciary liability policy ensures adequate protection for the breach, potential class action actions and claims arising from a breach.

What Precisely Is a Claim Under a Fiduciary Policy?

The definition of *claim* varies widely from policy to policy, and some do not define it at all. Generally, a claim includes any written demand alleging a wrongful act by an insured in their capacity as a plan fiduciary or in the administration of a plan seeking monetary or nonmonetary damages. This includes lawsuits and may be expanded to include formal investigations.

When Should a Claim Be Reported?

Typically, a claim must be first asserted or made against a plan or board of trustees and reported to the insurance carrier during the policy period. If the claim is not reported in a timely fashion or other reporting provisions of a policy are not followed, the insurance carrier may refuse a claim that otherwise would have been covered. It is important to be familiar with the reporting requirements of a fiduciary policy, including the terms of any post-policy-reporting period that may exist or any extended reporting requirements.

Final Thoughts

Accepting the principle that purchasing fiduciary liability insurance is prudent, trustees should recognize that not all insurance providers are equal. In addition, while the cost of protection is important, it is not the only factor to consider. The insurer's reputation, financial strength and claims payment record should also be examined. The breadth of coverage, limits available and insurer's track record providing fiduciary liability insurance should also have a bearing.

The selection and role of an insurance broker is equally critical. Trustees have a fiduciary responsibility to carefully select and monitor their plan's insurance broker as well as other fund advisors. At a minimum, the broker selected should be able to demonstrate expert knowledge regarding fiduciary risk, leverage insurance market relationships and provide support in the event of a claim or service request. Questions to ask when evaluating a broker include:

- How long have you been involved in multi-employer fiduciary insurance?
- How many multi-employer clients do you handle?
- What staff is dedicated to this coverage?
- What in-house resources do you have access to?

In the event of a claim, the broker should be the plan's advocate with the insurer and serve as a resource for fund counsel.

Endnotes

1. Supplemental Pension Plans Act, R.S.Q. 1990, R-15.1, s. 151.
2. D. Bailey, *ERISA Fiduciary Liability Loss Prevention* (New Jersey: Chubb & Sons. Inc., 1989), applicable to Canadian Trustees; *Nonprofit Governance: The Executive's Guide,* an American-oriented publication of the American Bar Association and the American Society of Corporate Secretaries (Chicago, 1997).
3. Commercial Union Assurance Company (now CGU Canada Ltd.), Axa Insurance Canada, Chubb Insurance Company of Canada, American Home Assurance Company, London Guarantee Insurance Company.
4. M. Larsen and P. Sinott, "Our Latest D&O Survey Shows . . . , " Watson Wyatt's *D&O Newsletter* (Winter 1989), pp. 1-2. Although related to directors and officers, the comments contained in Watson Wyatt's *D&O Newsletter* (Winter 1998) are appropriate to this circumstance: *"Current premium, loss, and coverage trends suggest that we could be only a few years away from some fairly adverse loss ratios and shrinking profit margins. Corporate insurance purchasers should, therefore, take a longer term during 1998 or 1999 D&O policy renewal negotiations. While looking to identify the best D&O insurance value for their particular circumstances, they should also be prepared to:*
   - *Negotiate a fair price*
   - *Establish a long-term strategy to maintain appropriate coverage*
   - *Assess the strength and reputation of the D&O liability insurers with whom they negotiate.*

   In addition, multiyear policies may merit consideration for many companies, particularly if the organization is comfortable with its current insurer.

Responsible Investment: The Legal Perspective

Brittany Greenberg and Apollonia Mastrogiacomo[1]

Responsible investment (RI) has become an important theme in pension investing over the last 30 years. This article reviews some of the legal issues that arise in the context of RI, particularly as they relate to the fiduciary obligations of pension fund administrators in Canada.

For this purpose, the definition of RI provided under the United Nations Principles for Responsible Investment (PRI) is useful:

> *"Responsible investment is an approach to investment that explicitly acknowledges the relevance to the investor of environmental, social and governance factors, and of the long-term health and stability of the market as a whole. It recognises that the generation of long-term sustainable returns is dependent on stable, well-functioning and well-governed social, environmental and economic systems."*[2]

As of March 2023, UN PRI had over 5,391 signatories, and as of 2021, signatories managed over US$121.3 trillion in assets.[3] When viewed as a percentage of all Canadian professionally managed assets, RI assets accounted for 49% of all assets under management in Canada in 2023.[4]

1) Responsible Investment Strategies

RI strategies come in different forms. However, RI involves considering environmental, social and governance (ESG) issues when making investment decisions and influencing companies or assets. RI strategies complement traditional financial analysis and portfolio construction techniques.[5]

RI investment can be categorized by the following ESG criteria:

- **Environmental**. Issues relating to the quality and functioning of the natural environment and natural systems. These include biodiversity loss; greenhouse gas (GHG) emissions; climate change; renewable energy; energy efficiency; air, water or resource depletion or pollution; waste management; stratospheric ozone depletion; changes in land use; ocean acidification; and changes to the nitrogen and phosphorus cycles.
- **Social**. Issues relating to the rights, well-being and interests of people and communities. These include human rights; labour standards in the supply chain; child, slave and bonded labour; workplace health and safety; freedom of association and freedom of expression; human capital management and employee relations; diversity; relations with local communities; activities in conflict zones; health and access to medicine; HIV/AIDS; consumer protection; and controversial weapons.
- **Governance**. Issues relating to the governance of companies and other investee entities. In the listed equity context, these include board structure, size, diversity, skills and independence, executive pay, shareholder rights, stakeholder interaction, disclosure of

information, business ethics, bribery and corruption, internal controls and risk management and, in general, issues dealing with the relationship between a company's management, board, shareholders and other stakeholders. This category may also include matters of business strategy, encompassing both the implications of business strategy for environmental and social issues as well as how the strategy is to be implemented. In the unlisted asset classes, governance issues also include matters of fund governance, such as the powers of advisory committees, valuation issues, fee structures, etc.[6]

ESG criteria may be reflected in one of several ways in RI strategies. Generally, they concern security selection versus asset allocation decisions. But there is some scope for ESG considerations in asset allocation decisions as well. The following are the broad categories of RI strategies, each of which reviews and uses ESG information in the investment decision-making process in one way or another.

Thematic Investing

Thematic investing involves the construction of a portfolio of assets that are expected to benefit from specific medium- to long-term trends. It includes investing in assets focused on ESG considerations and trends.[7]

Screening of Investments

Screening is a process for defining criteria for determining which investments are permitted in a portfolio. The U.N. PRI defines three types of investment screening:

1. **Negative/exclusionary screening**—Excluding from a fund or portfolio certain sectors, companies or practices based on specific ESG criteria
2. **Positive/best-in-class screening—**Investing in sectors, companies or projects based on positive ESG performance relative to industry peers
3. **Norms-based screening**—Vetting against minimum standards of business practice based on international norms.[8]

Integration of ESG Issues

In principle, integrating ESG issues into investment decision making simply means considering ESG criteria in the analysis of a security on an ongoing basis. ESG factors should not be treated as more or less important than, say, financial factors in the decision-making process. Instead, integrating ESG factors should provide the investment decision maker with a more comprehensive assessment of all of a security's risk and return characteristics.

Stewardship

Stewardship refers to the use of investor rights and influence to advance the interests of beneficiaries. In doing so, stewards may use their power to enhance the long-term value of the common environmental, natural, intellectual, social and institutional assets.[9]

Impact Investing

Impact investing refers to the practice of investing with the intention to generate a positive, measurable social and/or environmental impact alongside a financial return.[10]

RI strategies may be active or passive. An example of a passive strategy is investing in an index fund that integrates ESG issues into the selection of securities comprising the index. Active ownership includes proxy voting and the introduction of shareholder resolutions. Active ownership also may take the form of "engagement" with the companies in which the fund holds securities. Regardless of whether a pension fund's investment strategy is active or passive, it may use its rights as a security holder and its position of ownership to engage in stewardship.[11]

Approaches to RI are constantly changing. Investment managers regularly offer new forms of RI, pension funds generally assess and reassess their level of RI, and investee companies often seek different ways of responding to ESG initiatives.

2) Legislation and Regulation in Canada

Canadian pension standards legislation is silent on the use of ESG criteria in investment decision making, and there are few statutory or regulatory requirements or prohibitions.

Federal and provincial pension benefits legislation in Canada imposes fiduciary standards of conduct on pension fund trustees with respect to fund investments. These standards have a bearing on the application of ESG principles to pension investments. Such is not the case for benefit funds that are not pension funds. The following examples of the formulation of the fiduciary obligation and related ESG provisions from Ontario, British Columbia and Manitoba are typical.

Ontario Pension Benefits Act (PBA)

Care, Diligence and Skill

PBA Section 22 (1). "The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person."

Special Knowledge and Skill

PBA Section (2). "The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess."

British Columbia Pension Benefits Standards Act (PBSA)

Investment requirements

PBSA 60 (1). "Investments, including loans, and financial decisions respecting a pension plan must be made (a) in accordance with this Act and the regulations, and (b) in the best financial interests of plan members and other persons entitled to benefits under the plan."

(2) "Pension plan assets must be invested in a manner that a reasonable and prudent person would adopt if investing the assets on behalf of a person to whom the investing person owed a fiduciary duty to make investments (a) without undue risk of loss, and (b) with a reasonable expectation of a return on the investments commensurate with the risk, having regard to the plan's liabilities."

While the language is different, both the Ontario and British Columbia statutes illustrate the fiduciary standard rests on a fundamental "duty of loyalty" that requires investment decisions to be made in the interest of the plan's beneficiaries rather than those of the plan administrator.

The British Columbia provisions add the requirement that investment decisions be made in the best "financial interests" of the current and former plan members and beneficiaries. While the emphasis on best financial interests is clear in the British Columbia statute, case law suggests that in the case of any trust providing financial benefits, the best interests of the beneficiaries generally include their best financial interests.[12] In some cases, particularly in regard to trusts with charitable or social objectives, nonfinancial objectives such as ESG criteria may also be expressed in the applicable trust agreement and form part of a trustee mandate.

Manitoba Pension Benefits Act

The Pension Benefits Act (PBA) of Manitoba adopts a modified approach to the fiduciary obligations of pension administrators in regard to investments. It expressly addresses the use of nonfinancial criteria in investment decision making:

Care, diligence and skill

PBA 28.1(2). "The administrator of a pension plan shall exercise the care, diligence and skill in the administration of the plan and the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person."

Investing pension assets

PBA 28.1(2.1). "The administrator of a pension plan shall invest the assets of the pension fund, and manage those investments, in accordance with the regulations and in a manner that a reasonable and prudent person would apply in investing and managing a portfolio of investments of a pension fund."

Nonfinancial considerations

PBA 28.1(2.2). "Unless a pension plan otherwise provides, an administrator who uses a non-financial criterion to formulate an investment policy or to make an investment decision does not thereby commit a breach of trust or contravene this Act if, in formulating the policy or making the decision, he or she has complied with subsections (2) and (2.1)."

By adding Section 28.1(2.2) to its PBA, Manitoba has stipulated that compliance with statutory fiduciary decision-making requirements does not need to preclude consideration of nonfinancial criteria. Under the Manitoba PBA, an administrator must act in a fiduciary capacity, subject to a duty of loyalty and a duty of care (the administrator must invest pension assets "in a manner that a reasonable and prudent person would apply in investing and managing a portfolio of investments of a pension fund."). But, so long as these requirements are complied with, the administrator may consider nonfinancial criteria in its decision making.

All pension standards statutes in Canada codify the fiduciary "duty of care." This duty is separate from the duty of loyalty. While the duty of loyalty defines the interests that the fiduciary must protect, the duty of care addresses the manner in which the fiduciary is obligated to protect those interests. Some of the statutes contain a requirement that plan administrators utilize all the skills and knowledge they have, or ought to have, in making decisions in regard to the pension fund (Ontario PBA, S.22(2)). More generally, however, the references in Canadian pension legislation to the prudent person are intended to import the prudent person rule into pension investing. The federal Pension Benefits Standards Regulations, for example, stipulate that pension administrators must formulate a prudent statement of investment policies and procedures "having regard for all factors that may affect the funding and solvency of the plan and the ability of the plan to meet its financial obligations."[13] Among other things, the prudent person rule is considered to include a duty of diversification within an investment portfolio and a duty to construct a portfolio with regard to how the assets within the portfolio are likely to perform not only in an absolute sense, but in relation to other assets in the portfolio and in regard to the plan's liabilities.

While not specifically directed at RI, Canadian and provincial pension standards legislation requires that pension funds establish a written Statement of Investment Policies and Procedures (SIPP) in accordance with the federal investment regulations (FIR).[14] However, in Ontario only, since 2016, the Ontario Pension Benefit Act Regulation requires pension plans to include, in the SIPP, information about whether ESG factors are incorporated and if so, how they are incorporated.[15] The Financial Services Regulatory Authority of Ontario provides that where ESG factors have not been incorporated, the SIPP must include a statement to that effect. Where the ESG factors are incorporated into investment policies and procedures, however, the SIPP could include a broad statement explaining that ESG factors, including the particular categories and specific factors that are incorporated, a brief explanation of the approach taken to incorporate the factors, and/or a description of the scope of application of the factors.[16]

The Canadian Association of Pension Supervisory Authorities (CAPSA) has also issued guidelines in regard to capital accumulation plans (CAP), including defined contribution pension plans (the CAP Guidelines). The CAP Guidelines set out the expectations of Canadian pension regulators in regard to CAPs, including with respect to the selection by CAP Sponsors of investment options to be offered to CAP participants and the disclosure required in respect of investment options by CAP Sponsors to CAP participants. The CAP Guidelines were originally issued in 2004, but CAPSA began the process of revising the guidelines in 2022.[17]

In addition, on June 9, 2022, CAPSA published an additional Guideline for consultation titled "Environmental, Social and Governance Considerations in Pension Fund Management" (the ESG Guideline).[18] CAPSA's ESG Guideline applies to all pension plans. It recognizes the "potential for ESG factors to provide valuable insight on investment risks and opportunities," and that these may "have a material effect on investment returns over varying time horizons."[19] The guidelines set out general expectations with respect to plan governance, risk management, investment decision-making, and disclosure to relevant stakeholders including members, plan sponsors/employees and unions.

Legislation and Regulation Outside Canada

In contrast to the regulatory silence on SRI in Canada, the U.S. Department of Labor (DOL) has formally adopted a regulatory policy with respect to "economically targeted investments" by pension funds under the Employment Retirement Income Security Act (ERISA). However, ESG policy and legislation have recently become a contentious topic in the U.S. In 2020, the Trump administration issued a rule that attempted to restrain the ability of ERISA fiduciaries to consider ESG factors when investing. The rule amended ERISA to require plan fiduciaries to select investments solely on financial considerations and "never sacrifice investment returns."[20]

In 2022, the Biden administration published another rule that walked back the proposed 2020 amendments. The rule acknowledges and agrees with the DOP's longstanding position that ERISA fiduciaries may not sacrifice investment returns for social goals but clarifies that the duty of prudence may require a consideration of ESG factors in investments.[21] Since ERISA imposes similar fiduciary standards on plan administrators as Canadian pension legislation, these regulatory policies can be instructive for Canadian pension fund administrators—even though they are not legally binding.

Since the adoption of the 2022 rule, it has been under considerable attack. On September 21, 2023, Judge Matthew J. Kacsmaryk of the U.S. District Court in Northern Texas rejected a challenge to the legislation by 26 states finding that the law does not violate ERISA and is not contrary to the Administrative Procedure Act.[22]

Further, the Safeguarding Investment Options for Retirement Act was recently introduced into Congress, which seeks to prohibit tax-advantaged retirement plan trustees from considering factors other than financial risk and return.[23] Similar legislation has also been introduced on the state level. As of February 2024, there were 61 anti-ESG bills pending at state legislatures.[24]

As of July 3, 2000, regulations in the United Kingdom required pension fund administrators to disclose their RI policies.[25]

In 2018, the regulations were amended to require SIPPs to include in policies the extent to which "nonfinancial matters" are taking into account in the selection, retention and realization of investments.[26] Pension plan trustees are also required to publish an implementation statement to demonstrate how principles are being applied in their investment strategies.[27] In 2023, the U.K. Pension Regulator launched a campaign to ensure trustees are complying with ESG reporting requirements.[28] The ExxonMobil Pension Plan was the first pension scheme to be fined by the Pension Regulator in September 2023 for failure to disclose.[29]

U.K.-style disclosure requirements have now been adopted in many other countries. The EU has also enacted the Sustainable Finance Disclosure Regulation (SFDR), which requires disclosure of policies on the integration of sustainability risks by financial market participants,[30] including by "manufacturers of pension products."[31] As discussed above, similar reporting requirements were adopted in Ontario in 2016.

Further, legislation in the U.K. recently saw a shift from voluntary to mandatory standards. As of 2021, certain pension plan trustees are required to publish the financial risks of climate change within their portfolios, and as of 2022, they must publish whether their investments align with net-zero emissions goals.[32]

Jurisprudence on Responsible Investing

In the absence of specific Canadian statutory or regulatory standards, it is useful to consider the decisions of courts in other jurisdictions regarding trust and fiduciary law and the legal implications of RI policies in the pension context—especially as seen in the U.K. and the U.S.

Cowan v. Scargill.[33] The English case of *Cowan v. Scargill* concerned investment proposals under consideration by a jointly trusteed pension fund established for the employees of the National Coal Board. The union-appointed trustees refused to approve an annual investment plan for the pension fund unless it incorporated screens prohibiting all foreign investments as well as any investments in companies operating in sectors competing with the coal industry (e.g., oil companies). The judge, Vice-Chancellor Robert Megarry, concluded that the union trustees had breached their fiduciary duty to plan beneficiaries by refusing to approve the investment plan because it did not include the restrictive screens.

In his judgment, Megarry considered a number of issues relating to the trustees' fiduciary obligations to plan members. The salient points are as follows:

- The same legal principles that courts have applied to the investment of trust funds in general are equally applicable to pension funds, subject to any differences in the provisions of the pension plans themselves
- This is significant because traditional trust principles are historically conservative, placing primary emphasis for trust fund investments on the preservation of capital and only latterly adopting the prudent person rule

- Pension fund trustees have a duty to exercise their investment powers in the best interests of present and future beneficiaries, holding the scales impartially between different classes of beneficiaries.

While the court recognized that the investment restrictions advocated by the union trustees might benefit active union members engaged in the coal industry, a significant class of beneficiaries—including deferred pensioners, retirees and member beneficiaries—would have gained little or no advantage from the union's policies.

In considering investments, trustees are required to put aside their personal interests and views, including social or political opinions, when investments that conflict with these views would be more favourable to the beneficiaries than other investments. The court went so far as to say that trustees may even have to act dishonourably if the interests of their beneficiaries required it.

The court held that, in most cases, the best interests of plan beneficiaries means their best financial interests. This was qualified, however, by adding that in certain trusts with adult beneficiaries holding strict views of certain social or moral issues, financial considerations need not be paramount provided the beneficiaries agree. For that group, the nonfinancial rewards might be preferable to financial benefits that result from an unacceptable activity. Pension fund trustees, however, have a heavy burden of proof. They must show that nonfinancial considerations and policies will lead to direct benefit for the plan beneficiaries and not just the general public.

While the principles advanced by the court in the *Cowan* decision appear to prohibit any type of RI policies for pension fund trusts, some factors should be remembered when assessing the implications of this decision. The union trustees, in this case, were attempting to impose a blanket policy that would have significantly limited the potential for investment diversification by screening out all foreign investments and investments in entire industries. More importantly, the union trustees sought to enact the policy without any regard or consideration of its impact on the fund's financial well-being. The court's decision may have been very different if the trustees had proposed an investment screening policy that they could demonstrate would not negatively affect the fund's investment performance, given the availability of comparable competitive investments.

In a subsequent discussion of the case,[34] Megarry suggested the result might have been different if the union trustees had not expressed their policy as an absolute prohibition on foreign investments or investments in competing industries, but had rather formulated it as a preference for domestic and non-oil investments where other factors were equal between competing investment choices.

The decision also may have been different if the trustees had proposed social or ethical screens that did not confer any special advantage on one class of beneficiaries—those who were active employees in the coal industry. For instance, if the trustees had proposed favouring investments in coal industry companies where investment risks and rates of return were comparable to oil industry investments, the impact of the economically targeted investment would have been neutral to the nonunion beneficiaries of the pension trust. In these circumstances, it is not likely a court would have concluded the trustees' fiduciary duties had been compromised by the investment policy.

Withers v. Teachers' Retirement System of the City of New York.[35] In contrast to the *Cowan* decision, at least one U.S. court has upheld a decision by pension fund trustees to make economically targeted investments where the policy could be justified on the basis it was needed to ensure the viability of the plan as a whole. In *Withers v. Teachers' Retirement System of the City of New York*, the court upheld the purchase of nearly $1 billion of New York City bonds by the New York Teachers' Pension Plan when the city was in the midst of a financial crisis. The bonds were very risky due to the city's pending bankruptcy, but the city was also the pension plan's major contributor. Preserving the city as an ongoing contributor was understood to be critical to the plan. This was a principal factor in the decision to purchase the high-risk bonds.

The trustees defended their decision based on their belief that their obligation was to safeguard the interests of all members. The court held that this otherwise imprudent investment was consistent with the trustees' fiduciary responsibilities given the need to preserve a stream of contributions to the fund.

The *Teachers* case is a good example of a court endorsing an investment decision by fiduciaries not motivated strictly by considerations of investment return and risk. However, the decision is not likely to be widely applied because of the unique circumstances. The decision in this case may have been different if the investment had not been made to save the city from bankruptcy but rather to, for example, encourage the hiring of more teachers.

Both the *Cowan* and *Teachers* cases are primarily directed at "economically targeted investments" by pension funds rather than RI in the broad sense.

The Board of Trustees v. City of Baltimore.[36] The *City of Baltimore* case involved a number of challenges to ordinances passed by the city requiring three Baltimore city employee pension plans to divest holdings in companies doing business in South Africa. The ordinances required divestiture within a two-year period. The trustees, however, retained the discretion to suspend the divestiture during the two-year period if they concluded that continued divestiture under the ordinance would be inconsistent with generally accepted investment standards for pension fund fiduciaries or would cause financial losses to the fund.

The trustees of the plans challenged the ordinances on a number of grounds. They argued that the ordinances were unconstitutional because they altered the trustees' contractual obligations to their beneficiaries, which incorporated the common law duties of prudence and loyalty.

Based on the rather inconclusive financial evidence presented during the trial, the court found that the ordinances would not impair the pension funds' performance. The court made a number of evidentiary observations on the impact the ordinances might have on fund performance. The court recognized that the ordinances prohibited investment in 120 of the 500 companies on the Standard and Poor's 500 Index (S&P 500), representing approximately 40% of the index's market capitalization. Thus, the ordinances would have required the pension fund portfolios to have more investments in relatively smaller companies whose stock prices tended to be more volatile. The court nevertheless found the trusts were not necessarily disadvantaged—reasoning that such stocks perform as well or better than large company stocks in the long term.

The trustees also argued that the proposed investment restrictions would adversely affect their investment managers' active styles, which had proven to be very successful. The court acknowledged the ordinances would affect the managers' options by eliminating potential investments in certain sectors, but the court nonetheless concluded that any interference would be insignificant because replacement stocks could be found for each sector—even though the South Africa–free investments would replace larger companies.

The trustees also argued that the restrictions would diminish the quality of the pension plan portfolios by requiring their investment managers to forego their first choice of investments. The court, while acknowledging that this may be the case, stated it was not certain a manager's second choice would be inferior to the first. The court reasoned that all money managers ordinarily invest in a limited number of companies with which they are familiar, so the restrictions would merely require money managers to do additional research to locate adequate replacement stocks.

The court recognized that the ordinances would require divestiture of 47% of the pension funds' equity portfolios and 10% of the fixed income portfolios, creating a one-time cost of approximately $750,000. Because the South Africa–free companies were smaller, there would also be a larger volume of trading in the smaller securities that would add brokerage costs of approximately $300,000. The divestiture costs represented about one-sixteenth of 1% of the funds' total value. The court calculated the ongoing costs of divestiture would be $1.2 million per year or one-tenth of 1% of the fund's total value. The court concluded imposing these costs on the funds to implement ethical screens was not inconsistent with the trustees' duties of prudence and loyalty, as the costs were *de minimis*.

The court recognized that the ordinances would exclude a not insignificant segment of the investment universe but accepted the city's evidence demonstrating that economically competitive substitute investments remained available under the divestiture program.

The court concluded the ordinances did not alter or impair the trustees' duties of prudence, noting in particular that the divestiture program would occur gradually over a two-year period and that the ordinances expressly empowered the trustees to suspend the program at any time for up to 90 days if they found that the divestiture became imprudent.

Finally, the trustees contended that the ordinances altered their duty of prudence by mandating considerations of social factors unrelated to investment performance. The Court of Appeal disagreed with this assertion. The court recited from a highly respected authority on the law of trusts, Professor Austin Scott, who rejected the proposition that trustees are only bound to attempt to secure the maximum return on fund investments. Scott stated:

> *"Trustees in deciding whether to invest in, or to retain, the securities of a corporation may properly consider the social performance of the corporation. They may decline to invest in, or to retain, the securities of corporations whose activities, or some of them, are contrary to*

> *fundamental and generally accepted ethical principles. They may consider such matters as pollution, race discrimination, fair employment, and consumer responsibility."*[37]

Scott analogized the trustees' situation to that of a corporation's board of directors, which often concludes that charitable contributions are in the corporation's best interests. This is based on the belief that a corporation with a proper sense of social obligation is more likely to be successful in the long run than those solely driven by obtaining maximum profits.

The Court of Appeal concluded these views are consistent with the position that a trustee's duty is not necessarily to maximize the return on investments but rather to "secure a *just* or *reasonable"* return while avoiding undue risk:

> *"Thus, the investment should not be deemed imprudent if, as in this case, social investment yields economically competitive returns at a comparable level of risk. Moreover, given the vast power that pension trust funds exert in American society, it would be unwise to bar trustees from considering the social consequences of investment decisions in any case in which it would cost even a penny more to do so.* ***Consequently we conclude that if, as in this case, the cost of investing in accordance with social consideration is* de minimis, *the duty of prudence is not violated.***[38] *(emphasis added)*

In summary, the *City of Baltimore's* decision advances several important principles on the issue of RI, which are reformulated as follows.

- It is perhaps critical that pension plan administrators retain the discretion to withdraw from an RI policy if it appears a continuation is clearly imprudent. The policy should not bind the administrator to one irreversible course of action.
- Eliminating otherwise prudent investments through screens is not necessarily inconsistent with a plan administrator's duties to fund beneficiaries, provided prudent alternative investments are available with comparable risk-and-return profiles.
- Considering nonfinancial factors is not, in and of itself, inconsistent with a plan administrator's duty of prudence and loyalty. This statement is in direct conflict with the central principle espoused by the English Court in the *Cowan* decision.
- Bearing a cost to implement an SRI policy is not imprudent where the cost is insignificant relative to the size of the fund.

Martin v. The City of Edinburgh District Council.[39] The *City of Baltimore* case should be contrasted with the Scottish decision in *Martin v. The City of Edinburgh District Council,* which also considered the legal implications of a South Africa–free investment policy. This case was concerned with the investment of public and charitable funds held in trust by the City of Edinburgh District Council. The City Council had decided to express its abhorrence of apartheid in South Africa by instructing the council's investment advisors to report on any council trust fund holdings in South African companies and to propose substitute investments. The court was asked to determine whether this investment policy breached trustee fiduciary duties.

The court did not reach a decision as to whether the policy itself violated trustee fiduciary obligations. Rather, the court focused on the process the trustees used to develop and adopt the divestment policy. The court found that the trustees did not seek the advice of professional advisors as to whether it was in the interests of the trust and their beneficiaries to divest in South Africa. This, in the court's view, constituted a breach of the trust principle that a trustee is required to apply their mind to the best interests of the beneficiaries before any exercise of discretion. The court concluded:

> *"Accordingly I conclude that the pursuer has proved a breach of trust by the Council in pursuing a policy of disinvesting in South Africa without considering expressly whether it was in the best interests of the beneficiaries and without obtaining professional advice on this matter."*

The City of Edinburgh case illustrates that the standard of prudence against which trustee action is measured is more concerned with the processes utilized by fiduciaries in arriving at their decisions than with the substantive outcomes of any particular decision. The predecessor pension regulator to Ontario's Financial Services Regulatory Authority, the Pension Commission of Ontario explicitly stated that the standard of prudence should be measured primarily by the process through which investment strategies and tactics are developed, adopted, implemented and monitored.[40] *The City of Edinburgh* case is a good example of this principle.

In assessing whether pension fund administrators have satisfied the procedural prudence requirements that apply to all investment decisions (including RI policies), a court will likely consider whether the administrator:

- Employed proper methods to investigate, evaluate and structure the investment
- Exercised independent judgment when making investment decisions
- Conducted an impartial study of the advantages and disadvantages of the investment policies and/or the particular transaction under consideration
- Exercised due diligence in researching all aspects of the investment policy or transaction
- Retained qualified experts and consultants as appropriate in the circumstances
- Relied on complete and up-to-date information in reaching the decision.

Harries v. Church Commissioners.[41] The English case of *Harries v. Church Commissioners* considered the duties of the trustees of a charitable trust and, in particular, whether trustees would be in breach of their fiduciary duties by taking into account nonfinancial considerations when making investment decisions. The case involved an application brought by the Bishop of Oxford and other clergy members against the Church Commissioners Board of Governors responsible for investing Church of England assets for religious/charitable purposes. The applicants alleged the Commissioners breached their duty by taking into account only financial considerations when investing trust property. They argued that the Commissioners also were required to give weight to the underlying purpose for which they held the assets—the promotion of the Christian faith through the Church of England. The applicants claimed that the Commissioners should not exercise their investment functions in a manner that would be incompatible with this purpose, even if it involved the risk of financial loss.

The court began its analysis with the basic principle that trustees should be primarily concerned with furthering the purposes of the trust. All the powers vested in the trustees must be exercised for these purposes.

The second primary principle enunciated by the court was that where property is held in trust for investment purposes, prima facie, the purposes of the trust are best served by the trustees seeking to obtain the highest return—whether by way of income or capital growth, which is consistent with commercial prudence.

"In most cases this prima facie position will govern the trustees' conduct. In most cases the best interests of the charity require that the trustees' choice of investments should be made solely on the basis of well-established investment criteria, having taken expert advice where appropriate and having due regard to such matters as the need to diversify, the need to balance income against capital growth, and the need to balance risk against return."[42]

The court recognized there may be some exceptions to this general principle but commented that these are likely to be rare. The court noted that if an investment clearly conflicts with the aim or purpose for which a trust was established, then, even though the investment may be the most prudent investment financially, it may be contrary to the trust's terms to proceed with it. The court cited the example of a cancer research charity holding tobacco shares or trustees of temperance charities owning brewery and distillery shares. In those circumstances where trustees are satisfied that investing in a company engaged in a particular type of business would conflict with the very objects their trust is seeking to achieve, they are duty-bound not to make these investments.

Another instance that may entitle trustees to take into account nonfinancial factors is where the trust document requires trustees to do so. In such a case, a plan administrator would be required to take the stated factors into account as part of the investment decision-making process. It should be noted, however, that pension trust agreement provisions cannot be contrary to a plan administrator's fiduciary obligations as codified in the applicable pension standards legislation.

The court in *Harries* noted that the general rule is that trustees cannot properly use assets held as investments for noninvestment purposes. On the other hand, trustees are not prohibited from accommodating the views of those who consider a particular investment conflict with the purposes of the charity on moral grounds as long as the trustees are satisfied the accommodation does not involve a risk of significant financial detriment.

The court's review of the Commissioners' existing investment policy also is of interest. What follows are some relevant passages from the policy:

"The primary aim in the management of our assets is to produce the best total return, that is capital and income growth combined. While financial responsibilities must remain of primary importance (given our position as trustees), as responsible investors we also continue to take

proper account of social, ethical and environmental issues. . . . As regards our stock exchange holdings this means that we do not invest in companies whose main business is armaments, gambling, alcohol, tobacco and newspapers.

. . .

We do not invest in any South African company nor in any other company where more than a small part of their business is in South Africa. Where we do invest in a company with a small stake in South Africa we try to ensure that it follows enlightened social and employment policies, so far as possible within the system of apartheid of which we have repeatedly expressed our abhorrence.

. . .

On the property side, although we shall continue to seek out development possibilities so as to discharge our duties as trustees, we are conscious of the effect of our actions upon local communities and their perceptions of the Church as a whole. We shall, therefore, continue to ensure that environmental considerations are properly taken into account when development schemes arise . . . "[43]

In reviewing the investment policy, the court noted the Commissioners did, in fact, have "an ethical investment policy" and stated that nothing in the statement was inconsistent with the general principles enunciated in the case. In this regard, the court noted the Commissioners had demonstrated that they had felt able to exclude certain items from their investments for ethical purposes because there had remained open to the Commissioners an adequate width of alternative investments.

Butler-Sloss and others v. The Charity Commission for England and Wales and another.[44] The *Butler-Sloss* decision interprets *Harries v. Church Commissioners* exactly ten years later. In this U.K. decision, the court considered whether charities, whose primary purpose is environmental protection and the relief of poverty, should be able to adopt an investment policy that excludes investments not in line with the charity's purpose. The question before the court was whether a charity can prioritize investment pursuant to the purpose of the organization over maximizing financial returns. The two charities were part of a family charitable trust network and managed over 60 million pounds in assets. The claimants, who are trustees of the trust, sought the court's approval for their new investment policy, which selects investments based on their alignment with the Paris Climate Agreement under the UN Convention on Climate Change. In permitting the claimants to adopt the policies, the court noted that there is no "absolute prohibition" against investments conflicting with the purpose of the charity but rather that trustees must still perform a discretionary balancing exercise weighing the risk of financial detriment from the policy against the conflicting investment.[45] Nevertheless, the court found that the claimants had exercised their powers properly, considered all relevant factors in their policy and paid mind to the potential financial effect of the policy.[46]

McGaughey and another v. Universities Superannuation Scheme Ltd. and others.[47] Here, the claimants brought a derivative action on behalf of a pension scheme offered to university staff against the directors of the scheme. The claimants alleged that the directors breached their statutory and fiduciary duties for, among other actions, failing to divest from fossil fuels contrary to the scheme's long-term interests.[48] The court dismissed the appeal of the decision that denied the claim, noting that there had been no financial loss suffered. The court states:

> They may disagree with the Directors' approach to investments in fossil fuel companies on ethical grounds and, in particular, with their view that divestment is not the appropriate way to reach net zero. But they have not put their case on the basis of those objections but rather that the Company has suffered a financial loss (or will suffer a loss) by holding these investments.[49]

The court's suggestion implies that the claimants may have been successful if they had based their claim in ethical beliefs and duties. This case may, therefore, represent an increasing appetite for the consideration of nonfinancial factors in investment decisions the U.K.

Spence v. Am. Airlines, Inc.[50] In the *Spence* case, the plaintiff was an American Airlines pilot. He brought an action against American Airlines and the American Airlines Employee Benefit Committee (the defendants), who manage the American Airlines 401(k) plan and are therefore fiduciaries under ERISA. The action centres around the defendants' investment of the 401(k) plan assets in ESG initiatives. The plaintiff put forth two causes of action under ERISA. First, he asserted that the defendants breached their duty of loyalty and prudence, and second, that they breached their duty to monitor. The court refused the motion to dismiss the claim and found that there were sufficient facts to support plausible claims. The court notes that various sources have reported underperformance of ESG funds, thereby supporting the inference that the defendants should have known about these facts and circumstances. The court noted:

> *Plaintiff has adequately alleged that Defendants breached their duty of prudence by selecting, including, and retaining investment managers who pursue ESG objectives rather than focusing exclusively on maximizing financial benefits. These specific actions—selecting, including, and retaining ESG-oriented investment managers—allow the Court to reasonably infer that Defendants' process is flawed because it allowed Plan assets to be used to support ESG strategies.*[51]

While this decision does not represent the court's ultimate view on the suitability of the consideration ESG factors, it does demonstrate the resistance in the U.S. toward RI and the recent tensions between supporters and critics discussed above.

Legal Commentary

The law and practice with respect to RI have changed considerably over the past 20 years. Initially, RI was driven by a number of social and political concerns that focused on the so-called "sin industries" of tobacco, alcohol and armaments. In the 1980s, university students and social reformers protested against South African apartheid and demanded that the endowment and investment funds of universities, as well as other institutions, divest themselves of shares in companies that did business in South Africa. At the same time, there were significant instances of *economically targeted investments*—investments whose principal purpose was to create or maintain employment for pension plan members. Many characterized these issues as being outside of the investment paradigm and rejected consideration of them because they were inconsistent with a fiduciary's primary obligation to invest a portfolio prudently.

Court cases in the 1970s and 1980s reflected the prevailing view of RI as outside of the investment mainstream. In each case, the court began its analysis by considering whether the proposed RI strategy was in the best financial interests of a plan's active and retired membership. In some instances, emerging social norms also influenced the court—most particularly, in the *City of Baltimore* case. The 1978 decision in the *Withers* case also illustrates that a strict emphasis on the risk-and-return characteristics of a portfolio could be broadened to include reference to the plan sponsor's solvency. The court permitted the New York teachers' plan trustees to make significant investments in junk bonds issued by the City of New York that would ordinarily have been viewed as imprudent but nevertheless were justified given the financial benefit to the pension fund.

The approach to emerging social issues had begun to change by the early 2000s. Financial scandals at Enron, WorldCom and a number of other public corporations brought home to institutional investors the financial significance of corporate governance, especially in regard to the composition of corporate boards and their accounting committees as well as the relationships between the management of public corporations and their independent auditors. At the same time, concerns regarding the potential impact of climate change on the broader economy and firms operating in economic sectors as diverse as agriculture, insurance, transportation, fossil fuels and real estate began to mount among institutional investors.[52]

The dichotomy between the traditional fiduciary concerns of risk and return on the one hand and ESG factors on the other hand began to dissolve as ESG issues received more attention among mainstream institutional investors. By 2004, it became plain that prudent investors were not only permitted to consider the impact of ESG issues on risk and return, but they were also arguably required to do so. In a report prepared for the U.N. PRI, the London-based law firm of Freshfields opined as follows:

> *"Conventional investment analysis focuses on value, in the sense of financial performance. As we note above, the links between ESG factors and financial performance are increasingly being recognized. On that basis, integrating ESG considerations into an investment analysis so as to more reliably predict financial performance is clearly permissible and is arguably required in all jurisdictions."*[53]

Two different approaches—the concepts of the *universal owner* and of the *public fiduciary*—supporting a broader view of fiduciary obligations, especially for large, institutional investors, have emerged in recent years. Neither has been tested in the courts nor has any government legislated changes to reflect these emerging views. Nevertheless, these concepts have gained some traction among commentators in the debate over IR.

The Universal Owner Hypothesis

The *universal owner hypothesis* assumes large, institutional investors inevitably own shares in many firms across the entire economy. Because of their size and diversified portfolios, these funds are inevitably exposed not simply to individual companies but to the economy as a whole. Based on this assumption, institutional investors' interest in corporate behaviour is somewhat different from that of the investee corporation.

This is especially the case with regard to *externalities*—costs created by a corporation's activities that are not borne by the corporation itself. An example of an externality is the emission of pollutants into the atmosphere or a water system. The cost of the emission may be borne by individuals (or their families) who become ill, the corporations that employ those individuals and provide them with health insurance, and/or governments that sponsor health care systems and pay for pollution cleanup. Externalities are a classic problem in economics, as they represent potentially significant costs shifted from polluters—in this example, a shift to the general community.

The universal owner hypothesis suggests that large institutional investors inevitably bear some of a firm's externalities, because institutional investors own shares in other firms that suffer the consequences of the externalities. If, for example, Firm A emits pollution that imposes costs on Firms B, C and D, then Firm A has an economic advantage because it has shifted costs to Firms B, C and D. But the universal owner, with ownership interests in Firms A, B, C and D, has to pay the cost one way or the other. Thus, the universal investor hypothesis urges institutional investors to take steps to control externalities at the corporate level to protect the interests of their portfolios as a whole.[54]

One difficulty with the universal owner hypothesis is that decision making at the corporate level is controlled by fiduciary obligations owed by the corporation's board of directors and its senior officers to the corporation itself. From Firm A's perspective, there is generally little reason for it to absorb the cost of an externality if it can shift that cost to others. Large institutional owners may indeed have portfolio-driven interests that are separate and distinct from the interests of any one of their investee companies, but the structure of governance at the corporate level reflects the corporation's own interests, not the institutional owners' portfolio interests. For this reason, among others, the universal owner hypothesis has not translated into modified behaviour at the corporate level.

The Public Fiduciary Hypothesis

A second emerging approach to fiduciary obligations is reflected in the concept of the *public fiduciary*.[55] The public fiduciary hypothesis, like the universal investor hypothesis, presumes that the overall financial returns generated by financial markets are the most important determinant of a pension fund's financial success. In other words, ". . . most funds' returns come from general exposure to the market (beta) rather than seeking market benchmark outperformance strategies (alpha)."[56]

In the public fiduciary hypothesis, institutional investors are part of a network of fiduciaries. Each investor performs specialized and complex functions in an interdependent marketplace. Because of their scale and structure, it is argued that courts should impose obligations of trust on institutional fiduciaries toward not only their beneficiaries but also the public at large.[57] Pension fiduciaries are obliged, according to the public fiduciary hypothesis, to pay "close attention to reputational and sustainability concerns, concerns which strike at the heart of investee companies' ability to generate wealth in the long run, and which often have an intergenerational dimension."[58]

In summary, because the public fiduciary occupies a position of social trust and is institutionally concerned with overall market performance, the concept holds that the public fiduciary is obligated to engage in collective and collaborative actions with other public fiduciaries to address broader environmental, social and governance issues. As Waitzer and Sarro, leading academic lawyers, conclude:

> *"Current imbalances in our economy, if unaddressed, are likely to exacerbate a range of health, educational and social problems in what could easily give rise to a vicious cycle.[59] Ultimately, investing is a means for pension fund trustees to ensure the future well-being of beneficiaries. Financial returns are a necessary element but, in considering the interests of beneficiaries, so, too, are other concerns. It is in this context that pension trustees become "public" fiduciaries. Given the mission, size, and systemic significance of pension funds, this suggests a 'duty to collaborate' (and consequential behavioural shifts). This goes beyond seeking cost advantages to the heart of effecting systemic reform."*[60]

Criticisms of RI

While RI has gained significant prominence and is now front of mind in investing decisions, the priority of ESG issues in investing still attracts many criticisms. One common concern of investment focused on achieving ESG goals is greenwashing. *Greenwashing* is the practice of issuers misleading investors with regard to sustainability or falsely portraying themselves as adhering to ESG goals to attract investors.[61] Along the same lines, critics note the lack of uniformity in ESG-focused investing. There is no universal rating system to measure ESG scores and additionally environmental, social and governance considerations may actually conflict within one investment decision.[62] There are also financial concerns associated with RI, some of which have been addressed in this article already. First, ESG mutual funds may charge higher fees.[63] Second, critics worry that financial performance may be compromised. ESG initiatives may not improve long-term value and, regardless, such long-term value is difficult to value and may be contrary to short-term benefits.[64]

3) Summary and Conclusions

RI has become an increasingly significant aspect of the pension and institutional investment landscape. Total assets under management invested under RI mandates have increased significantly over the last decade, reaching trillions of dollars worldwide. As this trend continues, many of the above concerns may be nullified.

RI strategies vary widely. At their most elementary level, they mandate the exercise of proxy voting rights in an informed manner directed to governance improvements, if not to social and environmental issues as well. Increasingly, however, ESG criteria are recognized as relevant to the long-term risk-and-return characteristics of securities and the underlying enterprises. ESG criteria are incorporated directly into investment decision making. In its strongest form, RI strategies entail direct engagement with corporations in which institutional investors hold securities, with a view to exercising influence in the boardroom for the benefit of long-term shareholders.

Overall, RI strategies must conform to fiduciary requirements. Fiduciary obligations direct pension fund administrators to seek the best investment returns available at a level of risk acceptable to the institutional investor considering its liability profile. Increasingly, however, there is an increased social expectation that pension plans will behave as responsible investors and play a constructive role in the general economy as they grow in size and potential influence while benefiting from generous tax incentives. The important and difficult balance between economic and pension funding objectives, on the one hand, and social responsibility, on the other hand, will continue to challenge pension administrators and stakeholders.

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