Original Article

Canadian pension plan administrators and legal liability

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This article does not provide legal advice, but rather aims to highlight some best practices in Canadian pension plan administration. Plan administrators should consult with legal counsel to determine their particular duties and obligations in the administration of their respective pension plan.

ABSTRACT Legal issues concerning Canadian private pension plans have grown in prominence, paralleling mounting concern over the adequacy of such pension plans to pay for benefits accrued by an ageing population nearing retirement. These concerns have become even more acute as a result of the global economic downturn and corresponding poor performance of pension plan investments. This article surveys the sources of legal obligations relating to pension plan administration, and provides a case study of a recent court decision in which the plan administrator was convicted of breaching certain quantitative investment regulations under Canadian law. Finally, it concludes by setting out a number of best practices to assist pension plan administrators in avoiding and limiting their exposure to legal liability.

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INTRODUCTION

Legal issues concerning private pension plans have grown in prominence, paralleling mounting concern over the adequacy of such pension plans to pay for benefits accrued by an ageing population nearing retirement. These concerns have become even more acute as a result of the

global economic downturn and the corresponding poor performance of pension plan investments. Recent Canadian newspaper headlines in the past year illustrate this concern: ‘Bankrupt Companies, Pension Promises Destroyed’, ‘Retirement Lost’, ‘Why So Many Pension Funds Are in Trouble’, ‘Will Your Employer Be Able to Pay Your Pension?’ and ‘Pension Plan Loses \$19 Billion in 2008’.

In an economically uncertain environment, pension plan administrators must be sure to

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exercise the necessary care and skill when navigating complex legal rules that affect plan members, retirees and their dependents. Plan members are now monitoring their pension plans more closely than ever before, and a single misstep by the administrator could lead to a costly adverse claim or even quasi-criminal charges. To complicate matters further, legal duties of pension plan administrators continue to evolve in a complex web of intersecting statutory and common law legal principles, with the courts playing a significant role in setting the standards of behaviour applicable to the investment of pension plan assets. For example, as the recent decision of the Ontario Superior Court of Justice in *R. v. Christophe*¹ has confirmed, persons charged with the responsibility of investing pension plan assets may be found liable for breaching investment rules, even when such persons merely supervise or oversee others. In the event the plan administrator fails to meet its legal obligations, in addition to possible prosecution, fines and restitution under applicable pension legislation, the administrator may face liability at common law, and a member, beneficiary or other stakeholder (or groups thereof) may commence a civil action against the administrator seeking damages.

Given the rising tide of employee class actions and the growing dependence of employees on their pension income, the need for reducing exposure to liability has never been greater. In order to defend themselves from liability claims, pension plan administrators must develop effective risk management strategies. Pension plan administrators must build around themselves layers of protection to help them defeat potential liability claims, or, at a minimum, minimize their effects. This article considers ways in which plan administrators can limit exposure to liability by highlighting sources of legal obligations, providing an example of how the legal rules are applied in practice and providing a review of best practices.

SOURCES OF LEGAL OBLIGATIONS

Statutory

Pension plan administrators are responsible for the overall administration of a pension plan and the

investment of the pension fund. The administrator's primary obligation is to ensure that the pension plan and fund are administered in accordance with the relevant pension legislation (typically the jurisdiction of registration), which establishes minimum standards for pension plans. In Canada, the pension plan administrator must also comply with the laws of each provincial or territorial jurisdiction in which plan members are employed, adding to the complexity of plan administration. Contravening pension legislation is an offence, punishable by fine.² Pension legislation also requires the administrator to ensure that the pension plan and the pension fund are administered in accordance with the plan documents filed with the applicable pension regulator.

In addition, pension statutes impose legal obligations relating to the investment of pension plan assets. For Ontario-registered pension plans, that legislation is the *Pension Benefits Act* (PBA),³ which establishes that pension plan administrators are legally responsible for the proper investment of the pension fund.⁴ In 2000, Ontario adopted the federal investment regulations for pension funds (a number of other provinces have also adopted the federal investment regulations, including British Columbia, Alberta, Saskatchewan and Manitoba). These rules regulate plan-related transactions and the investment of plan assets through quantitative restrictions in order to diversify and balance investment risk.⁵ Examples of the federal investment regulations include:

- *10 per cent single investment rule.* This rule prohibits a plan from investing or lending more than 10 per cent of the plan's book value directly or indirectly in any one person, two or more associated persons, or two or more affiliated corporations. Certain exemptions apply. For example, an investment by a plan in an index fund is not caught by the 10 per cent limit, but note that the index fund's underlying investments may constitute an indirect investment of the pension fund in certain cases. In addition, the 10 per cent limit does not apply to investments in real estate corporations, resource corporations and investment

corporations (however, these corporations are themselves subject to the investment rules). On 27 October 2009, the federal government announced plans to change the 10 per cent limit from the plan's book value to the plan's market value.⁶

- *5, 15, 25 per cent rules.* These rules prohibit a plan from investing, directly or indirectly, more than 5 per cent of the plan's book value in any one parcel of real property or Canadian resource property, the total of Canadian resource properties must be no more than 15 per cent of the plan's book value, and the total of all real property and Canadian resource properties must be no more than 25 per cent of the plan's book value. On 27 October 2009, the federal government announced plans to repeal the 5 and 15 per cent limits.⁶
- *30 per cent passive investor rule.* This rule prohibits a plan from investing, directly or indirectly, in more than 30 per cent of the voting shares of any one corporation. 'Voting shares' are defined as shares that carry votes for the election of directors. The rule also expressly requires indirect holdings to be included in the calculation. Certain exemptions apply. For example, there are special rules that prescribe the circumstances in which the administrator may directly or indirectly exceed the 30 per cent rule by investing in the securities of certain subsidiaries, namely real estate corporations, resource corporations and investment corporations. In each case, before exceeding the 30 per cent limit, the plan administrator must first obtain and deposit with the Superintendent an undertaking by the corporation that, while such securities are held, the corporation will file certain documents, permit the Superintendent access to its books and records, limit its activities to those prescribed and meet certain other prescribed obligations. These undertakings should be carefully examined as they constrain the activities of the subsidiary corporation. For example, these corporations may be precluded from carrying on activities for entities other than the plan and related parties. They are also subject to restrictions on their ability

to borrow and/or to issue debt obligations, and are prohibited from lending assets to, or investing in, a related party of the plan (see discussion below on related party transactions). The undertakings may also result in limits on the tiers of subsidiary corporations that may be used.

- *Related party transactions.* These rules relate to the 'no conflict' rule in Section 22 of the PBA by identifying certain situations considered to give rise to an automatic conflict of interest in the investment context. The administrator is prohibited from, directly or indirectly, lending plan assets to a related party, investing plan assets in the securities of a related party, or entering into a transaction with a related party on behalf of the plan. Certain exemptions apply. The administrator of a plan may enter into a transaction with a related party on behalf of the plan if the transaction is required for the operation or administration of the plan and the terms and conditions of the transaction are not less favourable to the plan than market terms and conditions. In addition, the administrator of a plan may invest the plan assets in the securities of a related party, if those securities are acquired at a public exchange. Finally, the administrator of a plan may enter into a transaction with a related party on behalf of the plan, if the transaction is nominal or immaterial to the plan.

In addition, pension plan administrators are required to establish a Statement of Investment Policies and Procedures (SIPP) for the pension plan, which provides objectives, policies and procedures for the investment management of pension assets. The administrator is required to review and confirm or amend the SIPP annually.

In the event the plan administrator fails to comply with these legislative requirements, it may face prosecution for breach of the applicable legislation. For example, in Ontario, the plan administrator is liable to punishment by a fine of not more than US\$100 000 for the first conviction and not more than \$200 000 for each subsequent conviction.⁷

Standard of prudence

In addition to the legal rules imposed on plan administrators by pension benefits legislation, pension plan administrators are required to administer the pension plan and invest plan assets in the context of an overarching statutory standard of prudence. In Ontario, the PBA sets out the standard of care applicable to the pension plan administrator in relation to the plan, provides, in part, as follows:

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.

(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.

...

(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.

(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.

...

(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).

Section 22(5) of the PBA specifically permits the plan administrator to retain one or more agents to carry out duties with respect to the plan's administration, but only 'where it is reasonable and prudent in the circumstances to do so'.⁸ To that end, Section 22(8) of the PBA provides that the standards applicable to the plan administrator

pursuant to Sections 22(1), 22(2) and 22(4) also apply to agents of the plan administrator. In addition, administrators, agents and employees are also subject to a 'no conflict' rule set out in Sections 22(4) and (8) of the PBA, and note that Section 62 of the PBA provides that '[e]very person engaged in selecting an investment to be made with the assets of a pension fund shall ensure that the investment is selected in accordance with the criteria set out in this Act and prescribed by the regulations'.

Given the above provisions, it is clear that the plan administrator and any agents of the administrator must ensure that pension plan assets are invested prudently, and satisfy the appropriate standard of care, diligence and education in making investment decisions. Although the statutory standard of prudence is a very high standard that requires pension plan administrators and their agents to act in the best interest of the plan and its members, it is also important to note that prudence is a process-driven as opposed to results-oriented standard. Not every investment is required to be successful. As noted in the 2003 OECD Report entitled, 'Prudent Person Rule Standard for the Investment of Pension Fund Assets'⁹ ('OECD Report'), when reviewing the prudence of any particular investment, courts are likely to do so in the context of the entire fund portfolio ('Prudent Portfolio Approach').¹⁰ The Prudent Portfolio Approach has been endorsed by the federal pension regulator, the Office of the Superintendent of Financial Institutions, which notes that 'the prudent person portfolio approach recognizes that risks that would be unsupportable for an individual investment may be sustainable for a well-diversified portfolio'.¹¹

However, it may be difficult to interpret what is prudent in some cases, particularly in rapidly changing economic circumstances. The OECD Report notes that the prudence person standard:

... presents challenges for pension trustees and fiduciaries, as well as for regulators and supervisors. Simply put, it may not be easy to determine when the rule is violated. As economic circumstances and a pension fund's demographic profile change and as new products, techniques and methods of investment become available,

trustees and fiduciaries, under the prudent person rule, must consider whether their current investment practices and investment portfolio remain prudent and whether that which is newly available may be appropriately and prudently utilised in their particular pension fund. This process of on-going monitoring, review and assessment is, of course, the very heart of the prudent person rule. Similarly, pension regulators and supervisors, themselves may need to decide whether certain of these new products, investment techniques and practices are more or less likely to be prudently used by plan trustees and offer guidance to the fiduciary community.¹²

This uncertainty in the prudence standard makes it all the more important for pension plan administrators to regularly consult with legal counsel in order to ensure that pension plan assets are invested in accordance with evolving legal standards and requirements.

In all cases, pension plan administrators will be evaluated by whether they have followed a reasonable and prudent process in making their decisions in the circumstances. Failure to comply with the prudence standard could result in a civil claim being brought against the plan administrator for negligence. In addition, such a failure by the plan administrator may be prosecuted by the authorities as a breach of the applicable pension legislation.

Fiduciary

A fiduciary relationship arises between two parties at common law when one party reasonably places his or her trust or confidence in the other, or is dependent on the other in a significant way. There is no doubt that pension plan administrators stand in a fiduciary relationship with the pension plan members, and it is prudent to assume that the duties that plan administrators would be held to owe are very similar as, if not identical to, those owed by trustees.¹³ As a fiduciary, the pension plan administrator owes the following obligations to plan members:

- duty of loyalty and utmost good faith;
- duty to act reasonably and prudently;

- duty not to profit from its fiduciary position (certain exemptions may apply if conflicts are appropriately disclosed);
- duty not to let personal interests conflict with those of plan members;
- duty to treat all plan members fairly and even-handedly;
- duty to interpret the pension plan's terms fairly, impartially and in good faith;
- duty to provide information; and
- within the scope of its authority, a duty to ensure that plan members and beneficiaries received promised benefits.¹⁴

These duties apply to all actions taken by the plan administrator in its administrative role (as opposed to the sponsor/employer role), which would typically include investment decisions relating to plan assets. Failure to comply with the applicable fiduciary duties could result in a claim being brought against the plan administrator by plan members for breach of fiduciary duty.

Other sources

In addition to the investment rules imposed by pension benefits legislation, the overarching standard of prudence, and the fiduciary duties owed by pension plan administrators, other documents and communications may impose binding legal obligations on pension plan administrators (sometimes even unintentionally). According to the Supreme Court of Canada, '[d]ocuments not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined'.¹⁵ Potential additional sources of legal obligations relating to pension plan investments include primary plan documents such as a plan text, trust agreement and insurance contract. In addition, secondary plan documents could be relevant including communications to plan members such as pamphlets and brochures, and written policies and procedures. Pension plan administrators should engage legal counsel to conduct a careful review of such documents in order to determine whether there are any additional legal obligations relating to the

investment of pension plan assets. Failure to comply with these sources of legal obligations could result in a claim being brought against the plan administrator by plan members for breach of contract or negligent misrepresentation.

LIABILITY CASE STUDY: CANADIAN COMMERCIAL WORKERS INDUSTRY PENSION PLAN (CCWIPP)

As mentioned, the investment of pension plan assets has come under increasing scrutiny in an uncertain economic environment. The recent judgment of the Ontario Court of Justice in *R. v. Christophe*, a trustee prosecution case brought against CCWIPP, is a case on point. The case centred on whether members of the CCWIPP's Board of Trustees, as administrator, and the Investment Committee (a subset of the Board of Trustees) breached their statutory obligations in relation to the investment and administration of the CCWIPP funds. The decision of the Court was a mixed bag for the defendants: members of the Investment Committee were convicted of breaching the federal investment regulations, whereas the Board of Trustees was convicted of failing to supervise the Committee in this regard. Nine pension plan trustees were each fined \$18 000 plus victim surcharges of \$4500. However, all defendants were found not guilty in relation to the offences of failure to exercise the necessary standard of prudence.

By way of background, CCWIPP is a multi-employer, defined contribution (DC) pension plan for grocery, food service and production sector employees. At the time of the alleged offences, CCWIPP had assets of approximately \$1.1 billion. In 2006, after an investigation, a variety of charges were laid against the pension plan's Board of Trustees and Investment Committee members in connection with certain investments made with the CCWIPP funds between 2002 and 2003. These investments were made in Caribbean real estate and other business ventures that the prosecution alleged should not have been made given their substantial risk.

At the outset of her 124-page decision, Madam Justice Beverly Brown provided an overview of CCWIPP, noting that it was a multi-employer DC plan, which did not require employers to 'top-up' any unfunded liability. Furthermore, as a multi-employer plan, CCWIPP was not eligible for protection by the Pension Benefits Guarantee Fund, and any losses could result in devastating consequences for members and former members. Justice Brown held that this increased vulnerability of the CCWIPP members should be taken into consideration when interpreting and applying pension standards legislation.

In terms of the prudence standard, the prosecution alleged that the defendants did not make thorough, complete and independent investigations before making these investments. The Court noted that pension plan funds should be invested prudently, and that capital should not be placed unduly at a risk of loss. However, the Court also found that pension funds should be invested so that they are capable of generating a suitable rate of return and an element of risk may be appropriate in the circumstances. The Court noted that, although the standard of care for this Board of Trustees and Investment Committee was ordinary prudence (as there was no evidence they had any special skills), it is incumbent on a board of trustees or investment committee with only ordinary prudence to obtain advice from consultants or experts to supplement their knowledge.

The Court held that expert evidence was required to provide necessary context to the facts of the case. Such evidence would help it understand pension industry standards on the investment of pension funds in various businesses, and assess what kinds of investments and risk would be appropriate or inappropriate for this pension fund. However, at trial, the prosecution failed to adduce any expert evidence. The Court held that it 'simply did not have evidence to assist in reviewing and analyzing this raw material which is put before the court in evidence ... [and was] unable to understand how to apply the prudent person standard to the various transactions'. As such, the defendants were found

not guilty in relation to the offences of failure to exercise the standard of prudence.

The Court also rejected the prosecution's argument that the defendants were responsible for demonstrating that they had conducted an appropriate investigation and acted prudently in making their decisions, as such an approach would amount to a reversal of the prosecution's onus to prove the charges. The judge stated, 'the question is not whether the administrator can show prudent action, but rather whether the [prosecution] has proven that the decisions were imprudent'.

Turning to the federal investment regulations, the Court noted that they did not permit more than 10 per cent of the book value of the pension plan assets to be invested in any one person (among other requirements as discussed above) in order to limit a pension fund's exposure to risk. In considering the CCWIPP investments in a holding company that invested in Caribbean properties, the Court found that the total exceeded the 10 per cent threshold, and therefore violated the quantitative limit rule. The Court held that the Investment Committee acted as the 'administrator' of CCWIPP in making investment decisions, and as such, its members were found guilty of breaching the rule. According to the Court, the purpose of the rule is to ensure adequate diversification of the investments of the pension plan, and, as such, it captures any acts by the administrator, which result in the holdings of the plan being in excess of the limitations. The Court also rejected a defence of due diligence, given that there was no evidence that the members of the Investment Committee had even turned their minds to the federal investment regulations.

Finally, in terms of delegation by the Board of Trustees to the Investment Committee, the Court held that while delegation of investment of the pension fund is permitted under pension legislation, the administrator is obligated to supervise the agent investing the funds in a prudent and reasonable manner. On the facts, the Court found that the CCWIPP Board of Trustees failed to prudently and reasonably supervise the members of the Investment

Committee relating to the 10 per cent rule limits, and convicted the members of the Board of Trustees of prudent supervision.

AVOIDING AND LIMITING LIABILITY

Compliance with legal obligations

Although it may come across as trite, the first step pension plan administrators should take in order to limit their liability relating to the investment of plan assets is to comply with their legal obligations. As mentioned above, these legal obligations may come from a variety of sources, including legislative rules, the standard of prudence, fiduciary obligations and other sources of obligations, including primary and secondary plan documents and communications. In order to ensure compliance with all of these legal obligations, pension plan administrators may find it helpful to adopt a number of compliance monitoring tools such as compliance checklists, expert advice, risk assessments, due diligence reports and legal opinions. It is also prudent for administrators to review their compliance monitoring tools on a regular basis, and update them as required.

In many cases, it will be prudent for pension plan administrators to engage service providers and experts where the administrator does not personally possess all of the skills, information and knowledge necessary to properly carry out its duties. Administrators should take special precautions with service providers, as the administrator can be held liable for the actions of its agents if it fails to supervise them adequately. In order to minimize this risk of liability, administrators should take several steps. First, plan administrators should document all decisions made relating to the decision to engage any service providers. Second, plan administrators should establish a list of criteria that will be used to select and review the actions of service providers. Third, the administrator should clearly define the role of all service providers and set out the scope of their delegated authority. In this regard, it is helpful to have legal counsel draft a service agreement. Finally, the administrator

should conduct periodic reviews of its service providers in order to evaluate their performance.

And finally, it is imperative for the plan administrator to produce adequate documentation. Complex investment liability cases can be won or lost on the evidentiary record. It is to the plan administrator's benefit to create a comprehensive record of its actions and decisions in order to defend itself against civil claims that may be brought against it. Documentation will illustrate the plan administrator's prudence and will serve to highlight decision making in compliance with the administrator's established policies and procedures. In this regard, it may be helpful to establish a formal records retention policy to ensure that employees and service providers create and retain adequate documentation.

Good governance and industry guidelines

Effective governance can reduce the risk of liability and shield administrators from possible lawsuits by demonstrating due diligence on the part of the plan administrator. Although the standard of conduct for pension plan administrators is not perfect, the administrator cannot act imprudently in breach of its legal duties. The administrator can help demonstrate its prudence by pointing to a governance structure that complies with the best practices in pension governance. In complex pension liability cases, courts are likely to turn to industry guidelines as a yardstick by which to measure the prudence of actions taken (or not taken) by the pension plan administrator. As such, it is to the administrator's benefit to follow applicable industry guidelines relating to pension plan governance, and document all such compliance.

The Canadian Association of Pension Supervisory Authorities (CAPSA) released the 'Pension Plan Governance Guidelines' ('CAPSA Guidelines')¹⁶ in 2004. The CAPSA Guidelines are designed to assist plan administrators of all types and sizes in achieving and maintaining good governance and are intended to apply to all registered pension plans, including both defined benefit and DC plans. In addition, CAPSA

released, as part of the Appendix to the CAPSA Guidelines, the 'Pension Plan Governance Self-Assessment Questionnaire'. This Questionnaire helps plan administrators assess whether their plans are following effective governance principles. CAPSA recommends that plan administrators complete this questionnaire annually. Although these principles do not have the force of law, they provide a best practices yardstick by which pension plan administrators can measure the adequacy of their governance structure and practice, and manage the risks associated with pension plan governance.

In addition, CAPSA released a consultation paper, entitled 'The Prudence Standard and the Roles of the Plan Sponsor and Plan Administrator in Pension Plan Funding and Investment'¹⁷ on 30 November 2009. This paper highlights a number of principles contained in the CAPSA Guidelines relating to the investment of pension plan assets:

- *Principle 3: Roles and Responsibilities.* Have clear documentation for funding and investment processes.
- *Principle 4: Performance Measures.* Regularly monitor the performance of all key decision-makers and evaluate them against set performance measures. Conduct a regular review of performance measures.
- *Principle 5: Knowledge and Skills.* Fulfil funding and investment functions by having plan administrators and delegates apply their knowledge and skills. Investment options should be investigated and evaluated in order to make informed decisions.
- *Principle 6: Access to Information:* Ensure plan administrators and delegates have access to timely, relevant and accurate information.
- *Principle 7: Risk Management:* Have written policies on documentation, record keeping, costing, funding and investment. Monitor and assess fees to make sure they are reasonable and competitive. Funding policies should cover funding objectives, key risks faced by the plan, funding volatility factors and management of risk, funding target ranges, cost sharing mechanisms, utilization of excess funds, actuarial methods and assumptions, frequency

of valuations, monitoring, and communication. Monitor risks facing the plan and map out strategies to manage the risks.

- *Principle 8: Oversight and Compliance.* Ensure that all funding and investment activities meet the plan's terms, administrative policies and legislative requirements.
- *Principle 9: Transparency and Accountability.* Facilitate transparency and accountability by communicating funding and investment processes to plan members, beneficiaries and other stakeholders. Report results to appropriate stakeholders.
- *Principle 10: Code of Conduct and Conflict of Interest.* Develop a code of conduct that sets out required behaviour, a control procedure for conflicts of interest, and provisions for due process.
- *Principle 11: Governance Review.* Periodically review funding and investment procedures and practices to assess their effectiveness in comparison to the stated objectives. Modify the policies and procedures after each review (as required), to enhance their effectiveness.

Finally, the Joint Forum of Financial Market Regulators published its Guidelines for Capital Accumulation Plans (CAP Guidelines)¹⁸ in 2004. The CAP Guidelines are intended to apply only to capital accumulation plans, which are tax-assisted investments or savings plans that permit plan members to make investment decisions among two or more options offered within the plan. As the investment decisions for these plans are made by the plan members themselves, the CAP Guidelines focus on the communication provided by the plan administrator to the plan members in order to ensure that members are well informed of their investment options and risks.

Focus on communications

Canadian courts have held that plan administrators owe communication and disclosure obligations that extend beyond basic statutory requirements. Specifically, the courts have required that pension plan administrators assess, on an ongoing basis, whether certain information

is important to members and whether such information should be communicated. In general, if material information is 'highly relevant' to plan members,¹⁹ the administrator may have a positive obligation under the common law to disclose that information, even in the absence of an enquiry by a member. This duty can be breached not only by providing inaccurate pension information but also by negligently failing to communicate information.

Given that the applicable pension standards legislation and the common law impose legal obligations on the pension plan administrator to properly explain the pension plan's terms to plan members and to make disclosure with respect to the plan, certain steps should be taken in relation to plan governance to provide accurate and adequate pension plan information:

- *Ensure that communications are accurate:* It can happen that communications are made about a member's benefits and the communications are not consistent with the plan text. Periodically assess or audit the content of communications, in particular employee booklets and member statements, against plan terms to ensure consistency. Recognize that employee communications will be binding. Do not simply rely on the plan text to resolve any ambiguities.
- *Know your audience:* Plan administrators may need to tailor the form and content of member communications depending on the literacy, education, background and language of the audience. The courts have placed a high burden on the plan administrator to ensure that plan members understand the implications of any choices they are given with respect to their benefits. For example, if a member is given a choice between a higher life-only pension and a joint and survivor pension in a lower monthly amount, explain that the life only pension stops when the member dies.
- *Limit the number of people who give advice and answer questions:* In addition, ensure that these employees are adequately trained. Employees giving advice and answering questions should not give 'off the cuff' information or advice, and they should obtain the full factual background

before responding to an enquiry. Pay attention to communications at key decision points for members (such as when to retire, what form of pension to take, what level of contributions to put in and so on).

- *Avoid providing only verbal information to plan members:* In most of the pension communication cases, the plaintiff and defendant usually have a different memory of what was said during a meeting or telephone conversation, and the judge must decide whom to believe. Such litigation often arises many years after a communication was made, by which time the employee involved in the discussion may have left the employer, leaving the employer with no evidence to defend its case. When a telephone enquiry is received, instruct staff to tell the person that their question will be answered in writing in a day or two. This approach will provide human resources staff with time to verify the information and create a written record of the advice given.
- *Create a written record and ensure proper document retention policies are in place:* Have human resources staff send follow-up letters or e-mails after meetings with pension plan members, or at the very minimum, prepare a 'note to file' as to what was discussed at the meeting. Contractually require the same of your service providers.
- *Archive effectively:* Keep copies of historical booklets and other information, as well as details regarding the distribution of such information (such as to whom the document was distributed and when). When using electronic communications, ensure that e-mail and website information is archived and that you have a record of what information was provided to, or accessible by, employees at any point in time.
- *Do not assume that duties of communication end with providing only the information required by pension benefits legislation:* Case law is quite clear that the plan administrator's duty of care in communications goes beyond providing the information required under the applicable pension benefits legislation.
- *Establish a written communication policy:* An effective written communication policy should identify and document the responsibilities of

each participant in the administration of the plan in relation to communications. The policy should outline all of the permitted delegations and sub-delegations of such responsibilities.

- *Ensure that contracts with service providers set out the service provider's authority to provide communication directly to employees (as well as the service provider's responsibilities in that regard):* These responsibilities should cover all modes of communication, written, oral and electronic (for example, will the service provider be permitted to answer phone inquiries, and, if so, will such conversations be recorded? How frequently will any applicable websites be updated?). Your service providers should also have processes and procedures in place to limit errors and misstatements, and these should be included in your contracts with service providers.
- *Monitor any communications provided by service providers:* Periodically monitor communications provided by your service providers and their document retention practices to ensure that the level of service is adequate.
- *Correct any communication errors as soon as possible:* Do not delay delivering bad news. Even if an error in communication is made, it is not necessarily actionable: In order for the administrator to be liable for a communication, the member must have relied on the error to his or her detriment. The sooner the error is corrected, the less opportunity there is for reasonable reliance.

If all else fails ...

In the event the plan administrator is found liable for damages in an action, an indemnity can provide compensation to the plan administrator for the damage award and expenses related to the associated litigation. Indemnities are often included in agreements between related companies. For example, parent companies will frequently indemnify the actions of their subsidiary companies. An indemnity may also be provided by a company to its directors, officers and employees who are participating in pension plan administration in order to reduce their personal exposure under statutory, fiduciary and the common law to plan members, beneficiaries and other stakeholders.

However, if the plan administrator finds itself liable for damages and is unable to rely on a full indemnity, it may resort to fiduciary insurance to satisfy any adverse claim. Although many directors and officers rely on insurance to protect them from personal exposure to liability, many such policies expressly exclude risks relating to directors and officers acting in a fiduciary capacity, such as pension plan administration. Instead, fiduciary insurance policies are expressly designed to cover risks associated with breaches of fiduciary obligations. Fiduciary insurance policies are constantly evolving in the pension plan context, and although they may be expensive or difficult to obtain, insurance can provide peace of mind that damages flowing from breaches of fiduciary duties by the plan administrator are recoverable.

CONCLUSION

Responsibility for good pension governance rests with the pension plan administrator. The prospect of legal liability in the complex and uncertain legal environment related to pension plans looms large, particularly in an environment of economic uncertainty. Plan administrators are constantly battling potential sources of liability in an ever-changing pension law landscape. However, by developing an effective risk management strategy, pension plan administrators can ensure compliance with legal obligations and greatly reduce exposure to liability.

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REFERENCES AND NOTES

- (2009) 78 C.C.P.B. 34 (Ont. Ct. J.).
- For example, Section 109 of the *Pension Benefits Act* (Ontario) creates an offence for contravening the Act, the regulations, or an order made under the Act, while s. 110 sets out a fine on conviction of up to \$100,000 for the first conviction, and not more than \$200,000 for each subsequent conviction.
- R.S.O. 1990, c. P.8, as amended.
- Section 19(1) of the PBA states: 'The administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with this Act and the regulations'. Section 62 of the PBA states: 'Every person engaged in selecting an investment to be made with the assets of a pension fund shall ensure that the investment is selected in accordance with the criteria set out in this Act and prescribed by the regulations'.
- The investment rules are set out in sections 6, 7, 7.1, 7.2 and Schedule III to the *Pension Benefits Standards Regulations*, 1985, SOR/87-19. Note that in Ontario, these rules are incorporated as they read at 31 December 1999.
- See Department of Finance Canada, 'Minister of Finance modernizes federal pension framework', http://www.fin.gc.ca/n08/data/09-103_1-eng.asp, however, note that as Ontario currently reads the federal investment regulations into its pension legislation as they read on 31 December 1999, and therefore any changes to the federal investment regulations would not automatically be incorporated into Ontario law.
- See Section 109 of the PBA.
- Note that only persons prescribed under Section 54 of the PBA General Regulations, R.R.O. 1990, Regulation 909 are permitted to administer a pension fund.
- See OECD, 'Prudent person rule standard for the investment of pension fund assets' (2002) <http://www.oecd.org/dataoecd/4/19/12543171.pdf>.
- See OECD, note 9, p. 54.
- See OSFI, 'Guideline for the development of investment policies and procedures for federally regulated pension plans', (April 2002), http://www.osfi-bsif.gc.ca/app/DocRepository/1/end/pension/guidance/penivst_e.pdf.
- See OECD, note 9, p. 56.
- See, for example, *Imperial Oil Ltd. v. Ontario (Superintendent of Pension)* (1995), 18 C.C.P.B. 198 (PCO), pp. 205–206, where the plan administrator is referred to a standing in a 'special fiduciary relationship' with the members courtesy of the fiduciary standard of care set out in s. 22(1) of the PBA. See also Kaplan, A. (2006) *Pension Law*. Toronto: Irwin Law.
- Some of these points were adapted from the Canadian Association of Pension Supervisory Authorities, 'The prudence standard and the roles of the plan sponsor and plan administrator in pension plan funding and investment: A consultation paper' 30 November 2009, p. 6, <http://tinyurl.com/ybblez3>.
- Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611.
- See <http://tinyurl.com/ye2pafc>.
- Canadian Association of Pension Supervisory Authorities. (2009) The prudence standard and the roles of the plan sponsor and plan administrator in pension plan funding and investment: A consultation paper, 30 November, <http://tinyurl.com/ybblez3>.
- See <http://tinyurl.com/y3d8zt7>.
- See the decision of the Ontario Court of Appeal in *Hembruff v. Ontario Municipal Employees Retirement Board* (2005), 78 O.R. (3d) 561 (C.A.).

APPENDIX

CAPSA and CAP guidelines

The CAPSA Guidelines, briefly stated, are as follows:

- Fiduciary responsibility*: The plan administrator has fiduciary and other responsibilities to

plan members and beneficiaries. The plan administrator may also have fiduciary and other responsibilities to other stakeholders. The administrator should be aware of its fiduciary role to members (and others) and distinguish its role as sponsor and administrator.

In its fiduciary role, the plan administrator's responsibilities include the following aspects:

- treating members and beneficiaries impartially;
 - acting with the care, skill and diligence of a prudent person;
 - interpreting the pension plan's terms fairly, impartially and in good faith;
 - preventing personal interests from conflicting with those of the plan; and
 - within the scope of its authority, ensuring that members and beneficiaries received promised benefits.
- (b) *Governance objectives*: The plan administrator should establish governance objectives for the oversight, management and administration of the pension plan.
- (c) *Roles and responsibilities*: The plan administrator should clearly describe and document the roles, responsibilities and accountability of all participants in the pension plan governance process.
- (d) *Performance measures*: The plan administrator should provide for the establishment of performance measures and for the periodic review of the performance of participants and service providers in the governance process.
- (e) *Knowledge and skills*: The plan administrator, directly or with delegates, has a duty to apply the knowledge and skills needed to meet governance responsibilities. The administrator should employ the expertise of others if necessary.
- (f) *Access to information*: The plan administrator, and any delegates as necessary, should have access to relevant, timely and accurate information.
- (g) *Risk management*: The plan administrator should provide for the establishment of an internal control framework, commensurate with the plan's circumstances, which address the pension plan's risks. Established internal controls should include, among others:
- policies regarding record-keeping, costing, funding, investment, expenses, benefit administration, outsourcing, compliance and communication;
 - a system for monitoring fees; and
 - a delinquency control system.
- (h) *Oversight and compliance*: The plan administrator should provide for the establishment of appropriate mechanisms to oversee and ensure compliance with the legislative requirements, pension plan documents and administrative policies.
- (i) *Transparency and accountability*: The plan administrator should provide for the communication of the governance process to plan members, beneficiaries and other stakeholders to facilitate transparency and accountability.
- (j) *Code of conduct and conflict of interest*: The plan administrator should provide for the establishment of a code of conduct and a policy to address conflicts of interest.
- (k) *Governance review*: The plan administrator should conduct a regular review of its plan governance. Structures should be modified, if necessary following a review, to increase the plan's effectiveness.

In addition, the CAP Guidelines tend to focus on member protection. Administrators of defined contribution plans, in which investment decisions are made by plan members, should ensure that a range of investment options is made available taking into consideration the purpose of the plan.