

Standards Required of Pension Plan and Pension Fund Trustees in Canada

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This article highlights two of the principle sources of standards imposed on trustees of pension plans and funds in Canada: (1) pension benefits legislation, and (2) general fiduciary duties. The scope of the legislative responsibilities and to whom they apply are examined, as is the scope of the general fiduciary obligation and when it arises in the context of pension plans. The standards of conduct required under a pension plan and trust agreement are not discussed as they are unique to each particular arrangement.

Bibliography

Legislation

Pension Benefits Act, R.S.O. 1990 c. P.8, as amended.

Jurisprudence

Cowan v. Scargill, [1984] 2 All E.R. 750 (Ch. D).

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Secondary Material: Articles and Books

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Introduction

In their administration of a pension plan or pension fund, administrators and trustees in Canada are governed by applicable pension legislation, general standards of fiduciary duty and provisions of a pension plan and trust agreement. Statutory law requires pension plans to be registered under either federal or provincial jurisdiction, each jurisdiction having its own pension legislation. The particular requirements flow from the legislation applicable to the jurisdiction of registration. This article focuses on the standards required of pension plan and pension fund administrators and trustees (“plan and fund administrators and trustees”) from the perspective of Ontario law. Consequently, our review of pension legislation will deal only with the *Pension Benefits Act* (Ontario).¹ The general principles of law and equity that apply to trustees also impose requirements on plan and fund administrators and trustees. The standards of conduct that pension plans and trust agreements impose on trustees will not be discussed since these documents are unique to each particular arrangement.

Statutory Standard of Care

The PBA establishes the fundamental regulatory regime for all private sector pension plans in Ontario. Under the PBA,

a pension plan administrator “shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would apply in dealing with the property of another person.”² This is a classic “fiduciary” standard. In addition, the pension plan administrator (or the member of a board or committee that acts as administrator) “shall use all relevant skill and knowledge in administering the pension plan and fund and in investing the pension fund that the administrator possesses, or by reason of its business, calling or profession, ought to possess.”³ Thus, although the board is a collective body responsible as a whole for its decisions, the PBA recognizes that individuals on the board are independently responsible and may be independently liable for the performance of their duties. So the standards an administrator or a trustee may be held to vary according to the individual’s knowledge and skill, including the knowledge and skill that each is presumed to have by virtue of a profession, business or calling. Consequently, a person with a background in professional investing may be held to a higher or different standard under the legislation than a person who has no relevant investment experience.

The PBA also permits administrators and trustees to delegate certain responsibilities

¹ R.S.O. 1990, c. P.8, as am. [PBA].

² *Supra* note 2 at 22(1).

³ *Ibid.* at 22(2), (3).

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where reasonable and prudent. And in certain cases trustees may be under a duty to delegate if they lack the knowledge and expertise to perform the services themselves. The PBA provides that a pension plan administrator may employ an agent or agents to carry out administrative functions in respect of the pension plan or fund or any investment functions in respect of the fund.⁴ If the administrator delegates responsibility, the PBA requires that he or she must personally select the agent and be satisfied with the agent's suitability to perform the assigned tasks, and must supervise the agent to a reasonable and prudent extent.⁵ Again, the standard imposed by the PBA is a classic fiduciary standard. An employee or agent of the administrator is subject to the same standard of care applicable to the administrator and to the same restrictions regarding conflict of interest.⁶ Furthermore, although the plan administrator or trustee can delegate to agents the responsibility to complete a particular task, they cannot delegate their ultimate responsibility to the plan and its members *vis-à-vis* the performance of a specific task. As a result, the failure to ensure that the agent is properly qualified may lead to the administrator or trustee being liable.

Finally, the PBA expressly imposes contribution monitoring obligations on the plan administrator and on the agent of

the administrator responsible for receiving contributions under the pension plan, if there is one, and they must ensure that all contributions are paid when due.⁷ If a contribution is not paid when due, the administrator or agent must notify the regulator of this failure.⁸ The administrator must give the trustees of the pension fund a summary of the contributions required to be made in respect of the pension plan.⁹ In addition, a person who is entitled to receive a summary must notify the regulator if he or she does not receive the summary¹⁰ or if a contribution is not paid when due.¹¹

The General Fiduciary Standard of Care

Centuries of case law have established general fiduciary standards. In particular, these standards require that a trustee take the same care in administering the trust as an ordinary prudent person of business would take in managing similar affairs of his or her own.¹² In addition, a fiduciary must not permit personal interests to conflict with the performance of his or her duties, nor may a fiduciary earn unauthorized profits from these duties. Finally, fiduciary responsibility can be delegated only in limited circumstances. Delegation must be reasonable and

⁴ *Ibid.* at 22(5).

⁵ *Ibid.* at 22(7).

⁶ *Ibid.* at 22(8).

⁷ *Ibid.* at 56(1).

⁸ *Ibid.* at 56(2).

⁹ *Ibid.* at 56.1(1).

¹⁰ *Ibid.* at 56.1(2).

¹¹ *Ibid.* at 56.1(3).

¹² William M. Mercer Limited, *The Mercer Pension Manual* (Toronto: Carswell, 2005) at 14-5.

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appropriate in the circumstances and the trustee must properly select and supervise the delegate.

The above standards apply to all trustees and fiduciaries, including pension plan trustees.¹³ However, jurisprudence has extended the concept of fiduciary to encompass an increasing array of persons. The Supreme Court of Canada has held that where “one party has an obligation to act for the benefit of another and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary’s strict standard of conduct.”¹⁴

Typically, plan administrators are considered to have a fiduciary relationship with plan members and therefore owe a fiduciary duty. Interestingly, the PBA does not explicitly describe the administrator’s role as that of either a trustee or a fiduciary. Nonetheless, the legislation imposes a standard of care that is similar to that applied generally to a trustee or fiduciary. Accordingly, despite the lack of specific reference in the legislation, the plan administrator is generally considered to be a fiduciary. A trust company that acts as a pension fund trustee under a trust

agreement is clearly a fiduciary under general law. Furthermore, even though an insurance company or a bank might not be operating under a trust agreement, it may nevertheless have fiduciary responsibilities.¹⁵

Some writers have suggested that depending on the situation, the scope of fiduciary responsibility can be different and thus liability limited. For example, when a financial institution acts as a trustee, sometimes its only responsibilities are to hold the plan assets. It may be required to take investment direction from an investment adviser and to take instructions from the employer regarding the payment of benefits. In this case, it is arguable that the trustee’s fiduciary responsibility applies only to the functions entrusted to it. If the trustee has no responsibility for the selection of investments or the calculation of benefits, it is reasonable to expect that it would not be subject to fiduciary responsibility for the investments chosen or benefits paid.¹⁶ However, the decision in *Froese v. Montreal Trust Co. of Canada*¹⁷ forced the reevaluation of this conclusion.

In *Froese*, the British Columbia Court of Appeal held that there was “an

¹³ *Cowan v. Scargill*, [1984] 2 All E.R. 750 (Ch. D).

¹⁴ *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 384 (Dickson J.).

¹⁵ N. Chaplick, “Retirement Plan Disclosure Obligations: Some Hidden Issues for Financial Institutions” (1999) 19 *Estates, Trusts and Pensions Journal* 51 at 62.

¹⁶ *Ibid.*

¹⁷ (1996), 137 D.L.R. (4th) 725, [1996] 8 W.W.R. 35, 20 B.C.L.R. (3d) 193 (C.A.) [*Froese* cited to D.L.R.].

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overarching obligation upon a custodial or administrative trustee to pay attention to the interests of the beneficiaries additional to its contractual duties provided in the trust indenture. This obligation is not unlimited: it arises only within the function assigned to or assumed by the trustee.”¹⁸ The Court found that there was an “obligation to recognize reasonably apparent danger signals” and to function as a “watchdog” to protect the beneficiaries’ interests.¹⁹ Neither the limited role of administrative custodian played by the defendant trust company nor the provisions of the trust agreement were sufficient to protect the custodian from this liability.

The Manitoba Court of Appeal considered the scope of a custodial trustee’s fiduciary responsibility under a registered pension plan and narrowed the interpretation of *Froese in Bohemier v. Centra Gas Manitoba Inc.*²⁰ This case concerned an action that retired members of a pension plan commenced against the pension plan sponsor, Centra Gas Manitoba Inc., the custodial trustee, Canada Trust, and the union representing the active plan members. The retired members brought the action on the basis of their exclusion from an agreement between the union and Centra for distribution of surplus pension funds. Canada Trust was included in the action as the trustee of the pension plan that distributed surplus

assets pursuant to the agreement. The lower court dismissed the claim against Canada Trust on a motion for summary judgment because Canada Trust was merely a stakeholder for the pension funds. It had no authority to make any payment out of the fund unless authorized by the proper party; it was obligated to pay out funds in accordance with company’s direction. On appeal, the Manitoba Court of Appeal upheld the decision and noted that Canada Trust’s usual fiduciary responsibilities had been specifically circumscribed by the terms of the trust agreement. On that basis, it held that Canada Trust should be considered a “stakeholder” that had no responsibilities or control over the matters in the case.

The *Froese* decision makes trustees potentially liable outside the “four corners of the trust agreement” and a trustee, custodial or classic, must act as a “watchdog” in obvious cases of concern. However, where a prudent and reasonable trustee would not suspect a problem in the situation, there should be no obligation to investigate the directions received.

Conclusion

Duties of care, prudence and loyalty arise from the PBA, general principles of fiduciary law and the individual pension plan and trust agreement. The PBA itself refers not only to plan administrators but also to their agents and delegates when assigning responsibility. Thus, in most

¹⁸ *Ibid.* at 736.

¹⁹ *Ibid.*

²⁰ (1999), 170 D.L.R.(4th) 310 (Man. C.A.).

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circumstances, the standards from all three sources will be imposed on any party to a pension arrangement who has discretionary power. ♦

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