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Fiduciary Responsibility - A Regulator's Viewpoint, by Professor E. Gillese

The following article is based on a speech given by Professor Eileen E. Gillese, Chair, Pension Commission of Ontario to the CCH Seminar held on Wednesday, May 17, 1995. Professor Gillese teaches pension and trust law at the Faculty of Law, University of Western Ontario and has also practised in these fields.

In a paper presented at a conference on October 13, 1994*, I explored the question of which members of the pension plan team could be found to be fiduciaries either at common law or under the *Pension Benefits Act***. Although that topic remains important and unresolved, I will not repeat these comments here except to the extent necessary to establish common usage of terminology. Rather, the thrust of this paper will be to explore areas which may expose the administrator to liability for breach of fiduciary obligation and to offer suggestions on how best to avoid such exposure.

Fiduciary Obligations - At Common Law and under the *Pension Benefits Act*

The Enfield case highlighted the potential liability that plan sponsors and all those that administer pension plans face. It heightened anxiety within the industry and propelled many into sessions like this. However, before any meaningful discussion of fiduciary responsibilities can take place, it is important that people understand the difference between fiduciary obligations which exist at common law and those created under the pension benefits legislation.

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* Gillese, E.E., "Pension Funds: Who is a Fiduciary?", (The Canadian Institute Conference, Toronto, 1994, ch. I, pp. 1-42).

** All references to the Act or pension benefits legislation are to the *Pension Benefits Act*, R.S.O. 1990, c. P.8

At common law, caselaw has established that a fiduciary relationship exists between two people whenever one person reasonably places trust or confidence in the other or is dependent upon the other in some significant way. The relationship often arises when one person undertakes, for compensation or gratuitously, to act on behalf of another person. Clearly, at common law, those responsible for the administration of pension plans and funds will be held to be in a fiduciary relationship with plan members.

The result of one person being held to be a fiduciary in respect of another is that the first person owes a duty of loyalty to the other. In the pension plan context, the duty of loyalty translates into an obligation on behalf of those administering the plan to act honestly, prudently, diligently, even-handedly, with strict candour and confidentiality and strictly in the best interests of the plan members. The duty of loyalty precludes those administering the plan from making unauthorized profits, from delegating their responsibilities and from placing themselves in a position of conflict of interest. The prohibition on delegation is ameliorated by subsection 22(5) of the Act which expressly authorises the use of agents:

> **22(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.

For statutory liability to exist for breach of fiduciary obligation, however, the legislation must create (or recognize) fiduciary obligations. Therefore, we must turn to the *Pension Benefits Act* to see what, if any, fiduciary obligations exist for those running pension plans and funds. Primary obligation for the administration of the plan lies with the registered administrator courtesy of subsection 19(1) of the Act which reads as follows:

> **19.-(1)** 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.

It is actually subsection 22(1) of the Act which creates fiduciary obligations as it is that subsection which establishes the standard of care owed by the administrator in fulfilling its obligations:

> **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.

In setting the standard of care as that to be exercised when dealing with the property of another, the legislature established that an administrator is to be held to a fiduciary standard. The standard of care owed by fiduciaries at common law varies with the importance and degree of dependency. The highest standard owed is that of a trustee; the trustee's standard of care is said to be the duty to take such care as an ordinary prudent person of business would take in managing similar affairs of his or her own.*** It will be apparent that the legislated standard in subsection 22(1) is higher yet. That fact coupled with the increased skill level set out in subsection 22(2) has led to the view that it will be easier to find an administrator guilty of breach of fiduciary obligation under the legislation than at common law.

Before the *Enfield* case, it was thought that the registered administrator alone was a fiduciary under the Act and that therefore only the registered administrator faced liability under the Act. *Enfield* established, however, that the statutory duties of the administrator created by sections 19 and 22 extend to those individuals who have been delegated to act as the de facto administrator of a pension plan. In the *Enfield* case, this resulted in the extension of liability to the Chief Executive Officer, the Vice President of Finance and an outside director.

*** Speight v. Gaunt (1883), 9 App. Cas. 1 adopted in Canada in Fales v. Canada Permanent Trust Co. (1976), 70 D.L.R. (3d) 257 (S.C.C.)

Because the *Enfield* case is familiar, we won't go through its facts. The question, of course, is how far the reasoning in *Enfield* will be extended to others involved in the running of a pension plan or fund as, arguably, its reasoning could extend to board directors, senior officers, members of pension committees and even, perhaps, senior members of plan departments.

As well, an argument can be made that the combination of subsections 22(5) and (8) of the Act extends fiduciary liability to agents of the administrator where an agent is any person performing an act required to be done in the administration of the pension plan or administration and investment of the pension fund. This view of agency is considerably larger in ambit than is the notion of agent at common law.

Differences in the Breach of Fiduciary Obligation at Common Law or under the Act

The Parties

The parties to a civil action for breach of fiduciary obligations are obvious. The plaintiff is either a plan member or the union, normally. The defendants are whomever they choose to name and it is usually all those with possible liability.

The parties in a quasi-criminal prosecution under the Act are similar to those in a criminal proceeding. Remember, breaches of the Act are offences. In an offence, the parties are the Crown acting as prosecutor, and those named in the information which began the proceeding.

The Process

Again, the differences are obvious so long as you appreciate that an action takes place in the civil courts whereas a prosecution under the legislation is quasi-criminal and takes place in provincial court.

Liability and Exposure

At common law, civil liability is limited to an award of damages.

In a quasi-criminal prosecution under the legislation, the court has a number of powers on sentencing as set out in sections 109 and 110 of the Act. The Superintendent, and the Commission, may decide to seek any of those penalties from the court and pursue the enforcement of them where a prosecution results in a conviction.

> **109.**- (1) Every person who contravenes this Act or the regulations is guilty of an offence.
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> (2) Every person who contravenes an order made under this Act is guilty of an offence. 1987, c. 35, s. 110.
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> **110.**- (1) Every person who is guilty of an offence under this Act is liable on conviction to a fine of not more than $25,000.
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> (2) Where a corporation is convicted of an offence under this Act, the maximum penalty that may be imposed is $100,000 and not as provided in subsection (1).
>
> (3) Where a corporation is guilty of an offence under this Act, an officer, official, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in, the commission of the offence is a party to and guilty of the offence and is liable on conviction to a fine of not more than $25,000.
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> (4) Where a person is convicted of an offence related to the failure to submit or make payment to a pension fund or to an insurance company, the court that convicts the person may, in addition to any fine imposed, assess the amount not submitted or not paid and order the person to pay the amount to the pension fund or to the insurance company. 1987, c. 35, s. 111(1-4).

(5) An order for payment under subsection (4), exclusive of the reasons therefor, may be filed in the Ontario Court (General Division) and is thereupon enforceable as an order of that court. 1987, c. 35, s. 111(5), *revised*.

(6) No proceeding under this Act shall be commenced after five years after the date when the subject-matter of the proceeding occurred or is alleged to have occurred. 1987, c.35, s. 111(6).

Types of Commonly Occurring Non-compliance

- Failure to file AIR and PBGF forms.

- Failure to pay AIR fees and PBGF assessments.

  Staff have started to systematically monitor both and will enforce the filings and the payment of the fees and assessments including penalties and interest.

- Failure to properly complete the AIR and PBGF forms. Examples of common problems are forms that are not properly certified and failure to complete the funding section (i.e. whether surplus is used to fund).

- Failure to file actuarial reports, financial statements and amendments to SIP&Gs.

  The Commission now has the ability to electronically monitor plans to identify delinquent filers and enforce the filings.

- Filing of wind-up reports, applications for transfers of assets, surplus applications, etc. that do not comply with the requirements.

This is a serious problem and has led to an express change in the way in which staff perform their function. Rather than go back and forth with actuaries and other agents, staff will list all the areas of non-compliance once and copy the administrator. If the defects are not corrected, the report/application will simply be submitted with a report setting out the defects to the Commission or the Superintendent for a decision. I should point out that enforcement action for non-filing, including prosecution, will be taken. This will include cases where a plan administrator has a long record of non-compliance with the filing requirements or there are other areas of non-compliance.

These changes in practice and policy may appear harsh. From the regulator's perspective, however, what we are doing is an express acknowledgement of the structure and intent of the legislation. These areas of non-compliance are squarely within the responsibilities placed upon the administrator. It is the fiduciary responsibility of the plan administrator to file on time and in accordance with the legislation. By re-aligning ourselves along these lines, we will be in the best position to discharge the full range of fiduciary obligations placed upon us as regulators.

Types of Non-compliance Most Likely to Trigger Prosecutions under sections 109 and 110 of the Act

- Failure to remit required employer contributions.

- Withholding employee contributions from payroll but not remitting these amounts to the pension fund.

- Failure to comply with the quantitative requirements for investments.

- Where administrators knowingly put themselves in a conflict of interest position in respect to their duties and/or investments.

- Abuse of expense charges to the pension fund.

- Failure of agents to report non-remittance of contributions.

Practical Suggestions for Avoiding Liability

The Act is very clear that it is the administrator's responsibility to comply. Take responsibility for governance. Use agents but don't rely on them unduly. Remember the principle of non-delegation. There is a role for advisors and agents; make sure that both sides of the arrangement understand who has what responsibilities.

Become familiar with the requirements, responsibilities and obligations of administrators. To assist, the PCO has aggressively pursued a strategy of communicating the information necessary to enable administrators to comply. Read the *PCO Bulletin* and policy releases, prepare a copy of the Policy and Decisions Manuals*, subscribe to the BBS, attend conferences and seminars.

Define the roles and responsibilities of all those directly involved in the administration of the plan and fund. Ensure that decision makers are aware of their legal and functional responsibilities.

Pro-actively monitor staff and agents to ensure they are complying. Ask for regular reports, read them, understand them and ask questions. Allow sufficient time and resources to supervise and monitor.

Good communication must exist among all the players. Hold regular meetings of the body responsible for administration, e.g. Pension Committee to review reports on plan administration, funding, investments, compliance with regulatory requirements. Communicate with plan members. Talk to the regulators too! We have made regulatory processes easier and better by assigning every plan to a specific officer. Get to know your pension officer.
Once a problem is identified or, if you think there might be a problem, talk to the regulator and take immediate steps to comply. If you're in breach make immediate restitution. If you cannot make immediate restitution in full, re-commence making the regular payments immediately.

Administrators - take responsibility for compliance with the Act. It's cheaper, faster and the only secure route to complete fulfilment of your fiduciary responsibilities.

PCO Staff Comment in Summer 1996. Prof. Gillese resigned from the position of Chair effective May 17, 1996. See “Announcements” in the Winter-Spring 1996 PCO Bulletin 6/3. The current Chair is Mr. Christopher (Kit) Moore.