

# **PENSION PLANS AND UNION RESPONSIBILITIES**

by

**Jeffrey Sack, Q.C., Dona L. Campbell  
and Vanessa Payne**

**© Sack Goldblatt Mitchell**

For Delivery at  
Canadian Institute Conference  
Pension Funds: Who is a Fudiciary?  
Toronto, Ontario  
October 13, 1994

## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION</b> .....	<b>1</b>
<b>II.</b>	<b>THE UNION AS ADMINISTRATOR</b> .....	<b>2</b>
	a) The Duty of Care .....	4
	b) The Duty To Act Personally .....	5
	c) The Duty to Avoid Conflicts of Interest .....	7
	i) Can Social and Ethical Concerns be Considered? .....	7
	ii) Balancing the Interests of Active and Retired Workers .....	11
<b>III.</b>	<b>THE UNION AS NEGOTIATOR</b> .....	<b>12</b>
	a) Representing the Interests of Retirees .....	13
	b) Surplus Issues .....	18
	i) For Whose Benefit Can Surplus be Used? .....	18
	ii) Negotiating Surplus .....	21
<b>IV.</b>	<b>THE UNION AS PLAN SUPERVISOR AND/OR PENSION ADVISORY COMMITTEE MEMBER</b> .....	<b>24</b>
	a) Supervisory Role .....	25
	b) Pension Advisory Committee .....	27
	c) Effect of Assumption of Watchdog Status .....	28
<b>V.</b>	<b>SPECIAL PROBLEMS WITH MULTI-EMPLOYER PLANS</b> .....	<b>31</b>
	a) Entry and Withdrawal of Participating Employers .....	33
	b) Withdrawal of Group Members .....	34
	c) Delinquencies .....	35
	d) Costs of Administration .....	36
<b>VI.</b>	<b>CONCLUSION</b> .....	<b>39</b>

## I. INTRODUCTION

This paper addresses the obligations of unions, their lawyers and representatives in the interpretation and administration of pension plans. The issues dealt with will be of considerable interest to union representatives and lawyers representing unions in pension matters. But they should also be of interest to those who represent employers since similar considerations apply in meeting employer obligations with respect to the provision of pension benefits and plan administration. Indeed, employers and unions are often partners in decisions impacting pension plans. Moreover, it is helpful to both parties to understand the obligations a union must satisfy, and the conflicts it must confront.

The importance of pension plans to an aging population cannot be overstated. In 1992, over 2,000,000 Ontario workers belonged to registered pension plans.<sup>1</sup> Of these, 60% were in the private sector.<sup>2</sup> At the end of 1993, almost 200,000 Ontario workers were members in over one hundred multi-employer plans across the province.<sup>3</sup>

The role that unions play in the area of pensions is of growing significance. Unions have for many years been active in negotiating benefit levels, but increasingly unions are seeking a more active role in the development and governance of the plans which deliver benefits to their members and retired former members, a role matching that mandated

---

<sup>1</sup> K. Masur, Pension Plan Membership in Ontario, PCO Bulletin, Vol. 4, Issue 2, page 3, December 1993.

<sup>2</sup> *ibid.*

<sup>3</sup> Basic Facts about Ontario Pension Plans: Pension Plan Registration and Windup Statistics, PCO Bulletin, Vol.5, Issue 1, page 7, Spring 1994.

by legislation for administrators of multi-employer plans. As the workforce ages, and the concern for funded security grows, the demand by unions for an increased voice in plan administration will become more insistent. Indeed, how could it be otherwise? After all, it is the employment relationship which gives rise to pensions, and pensions form a crucial part of the employment contract.

A union's role is important, but it is also varied, because the union may function as administrator, negotiator, supervisor and advisory committee member. And depending on which hat the union wears, different duties and obligations may arise. What are these obligations? When do they come into play? And do they conflict with traditional collective bargaining imperatives?

## **II. THE UNION AS ADMINISTRATOR**

The summit of a union's involvement in a pension plan is as an administrator of the plan (or as "co-administrator" together with employer representatives).

A union may be involved in the administration of a plan in two ways: as representative of employees on a board of trustees and administering a multi-employer pension plan; or, much less commonly, as representative of employees where a plan is administered by a pension committee. In this regard, Ontario's Pension Benefits Act ("PBA"), which sets out who may act as an administrator of a plan registered in this province, stipulates,

in section 8(1)(e), that a multi-employer plan established under a collective agreement or a trust agreement must be administered by a board of trustees, at least 50% of which must be comprised of representatives of plan members.<sup>4</sup> This is a minimum standard for representation; in some instances, a board of trustees may be comprised completely of member representatives. In all cases, a majority of the member representatives must be Canadian citizens or landed immigrants.

Where a plan is administered by a board of trustees, section 8(2) of the PBA permits but does not require the appointment of a retired member to the board. In practice, it is unusual for a retired member to be appointed to a board of trustees. There is no mechanism in the PBA by which member representatives of a board of trustees are chosen. In practice, where there is a union, the union nominates the member representatives.

---

<sup>4</sup> The application of section 8(1)(e) was interpreted in CUPE v Ontario Hospital Association, (1992) 91 D.L.R.(4th) 436. In this case, the Ontario Divisional Court upheld a decision by the Pension Commission of Ontario that the OHA plan fell within the ambit of the provision, thereby requiring it to be administered by a board of trustees, at least one-half of whom represented plan members. The case raised interesting governance issues where plan members are represented by more than one union. Numerous different unions represent OHA plan members. The largest of those representatives initiated the proceedings to have the plan declared a multi-employer plan. Following the decision of the Ontario Court, a settlement was reached between the employers participating in the plan and those unions which were parties to the proceedings as to appropriate administration of the plan. Pursuant to the settlement, the plan is administered by ten trustees: five representatives appointed by the employers and five union representatives. Each of the four unions who had been party to the court proceedings are entitled to elect one of the union representatives on the board, regardless of the size differential between them. In addition, each of these unions takes turns appointing the fifth union representative. None of the other bargaining agents representing plan members has the right to appoint a representative to the board. It should be noted, however, that these bargaining representatives are significantly smaller in size than the smallest of the four unions represented on the board of trustees.

The PBA also permits union involvement where the plan is administered by a pension committee. However, this is far less common. Section 8(1)(b) or (c) of the PBA addresses the situation where the plan administrator is a pension committee, and provides that the committee may be comprised of both employer and member representatives, or of member representatives alone. Where a committee is comprised of both employer and member representatives, equal representation is not mandated; it is only necessary for there to be one member representative.

There is no question that union representatives act as fiduciaries if they sit on either a pension committee which administers a plan, or on a board of trustees. In either case, the fiduciary obligations of union representatives are precisely the same as those of employer representatives. These fiduciary obligations arise at common law and by virtue of section 22 of the PBA, which codifies, and in some respects increases, the common law standards. Broadly stated, these duties include: a duty of care; a duty to act personally (i.e. limited delegation); and a duty to avoid conflicts of interest.

**a) The Duty of Care**

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

person.<sup>5</sup> In addition, section 22(2) and (3) of the PBA envisage a higher standard of care where an administrator (including a member of a pension committee or board of trustees) possesses or ought to possess special knowledge or skills as a result of his or her profession or business.

Apart from the duty to supervise prudent investment (which duty is dealt with at this Conference by other speakers), two important aspects of the duty of care involve monitoring contributions to the pension fund to ensure that delinquencies are promptly addressed, and ensuring that the costs and expenses of operating the plan are "reasonable". These issues are dealt with in Part V below.

**b) The Duty To Act Personally**

The PBA modifies the common law duty to act personally by giving a wide power of delegation to plan administrators. Section 22(5) empowers an administrator to employ 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, where it is reasonable and prudent in the circumstances to do so. However, by virtue of section 22(7) of the PBA, an administrator has an obligation to (a) personally select the agent(s), (b) satisfy him or

---

<sup>5</sup> It should be noted that the standard imposed by section 22(1) of the PBA is higher than that imposed by common law, in that the common law standard of care is that which an ordinary prudent person of business would display in managing *his own* interests. Presumably, one would take less risk with the property of another than one would take with one's own property.

herself that the agent has the necessary skills and qualifications to perform the task to be delegated, and (c) carry out prudent and reasonable supervision of the agent. It is this last requirement that may cause difficulties to a plan trustee/administrator. What constitutes "reasonable supervision"?<sup>6</sup>

The usual reason for delegating the tasks associated with the administration of a pension plan is to take advantage of an agent's expertise in a particular area. Nevertheless, trustees are not allowed to take a "hands off" approach when it comes to supervision. Indeed, since all trustees are equally responsible for the supervision of agents, it would not be prudent for union trustees to leave this aspect of the job to employer trustees, on the assumption that the employer trustees may have more business or investment expertise. All trustees must maintain an ongoing "hands-on" approach to supervision of pension administration. Although some trustees may be more active than others in this regard, no trustee can afford to be inactive.

In this regard, it should also be noted that, where an agent's fees are to be paid out of the pension fund, it is the duty of the trustees to monitor the appropriateness of the fees

---

<sup>6</sup> In his judgment rendered against the prosecutions of the members of the pension committee in the Enfield case (R. v. Blair et al (1992) 7 O.R.(3d) 693), Provincial Court Judge Harris addressed at length the issue of reasonable supervision in the context of monitoring the activities of a plan's investment manager. For a discussion of this case, See Lancaster Labour Law Reports, Vol. 10, No. 10, October 1993.

charged. Because the monitoring of costs is of particular concern to a union in the context of a multi-employer plan, this is discussed more fully in Part V below.

**c) The Duty to Avoid Conflicts of Interest**

Section 22(4) of the PBA provides that an administrator of a pension plan, (which, in appropriate circumstances, may be a pension committee or board of trustees), shall not knowingly permit his or her interests to conflict with his or her duties and powers in respect of the pension fund.<sup>7</sup>

The issue of conflict of interest raises a number of potentially thorny problems from the perspective of a union-nominated trustee. For example, can the political or social policy perspectives of the union be taken into account in developing the investment policies of the pension committee or board of trustees? Further, where a union sees itself as acting primarily for active members, what obligations do the union trustees have toward retired members? What if the retired members outnumber the active members?

**i) Can Social and Ethical Concerns be Considered?**

The relationship between the political and social policy perspectives of a union and the investment policies of its pension plan trustees was raised in the English case

---

<sup>7</sup> But see R.R.O., 1990, Reg. 909, s.69(2) of the PBA, which specifically excuses conflict of interest relating to certain investments of pension assets, provided there has been full disclosure and the investment policy adopted for the plan in question permits the investment. See also section 75 of the Regulation.

Cowan v. Scargill.<sup>8</sup> In that case, the National Union of Mineworkers and the British National Coal Board were jointly administering the pension scheme through a board of trustees. The union's policy was to limit investments to Britain and to industries not in competition with the coal industry. This policy was aimed at maintaining the prosperity of the British coal industry and benefiting the British economy generally. A controversy arose between the union and employer trustees when the union trustees refused to approve an investment scheme on the basis that it conflicted with this policy. The employer trustees took the position that the suitability of investments should be determined solely by reference to financial criteria, and they sought a declaration by the court that the union trustees were in breach of their fiduciary duties to manage the pension fund.

Sir Robert Megarry, the Chancery Division judge hearing the case, granted the declaration, holding that trustees cannot refuse to invest simply for political or social reasons, because the primary duty of a trustee is to obtain the best benefit for the beneficiaries. Accordingly, he said, trustees must put aside their own personal interests and make those investments which are most beneficial to the beneficiaries:

"The assertion that trustees could not be criticised for failing to make a particular investment for social or political reasons is one that I

---

8

[1984] 2 All E.R. 750 (Ch D).

would not accept in its full width. If the investment in fact is equally beneficial to the beneficiaries, then the criticism would be difficult to sustain in practice, whatever the position in theory. But if the investment in fact is less beneficial, then both in theory and in practice the trustees would normally be open to criticism... Trustees may have strongly held social and 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 investment by reason of the views they hold."

Megarry did not rule out the possibility that a benefit might be construed to mean something more than simply a financial benefit. In certain narrowly defined circumstances, he held, the term "benefit" might be construed more broadly:

"Thus if the only actual or potential beneficiaries of a trust are all adults with very strict views on moral and social matters, condemning all forms of alcohol, tobacco and popular entertainment, as well as armaments, I can well understand that it might not be for the 'benefit' of such beneficiaries to know that they are obtaining rather large financial returns under the trust by reason of investments in those activities that they would have received if the trustees had invested the trust funds in other investments. The beneficiaries might well consider that it was far better to receive less than to receive more money from what they considered to be evil and tainted sources. 'Benefit' is a word with a very wide meaning, and there are circumstances in which arrangements which work to the financial disadvantage of a beneficiary may yet be for his benefit ..."

However, Megarry stressed that such cases are likely to be rare, and that a heavy burden would rest on the party asserting that it is to the benefit of beneficiaries as a whole to reject more profitable investments in favour of investments with a lower financial return.

Megarry concluded that the union trustees had breached their fiduciary obligations because they had attempted to impose investment prohibitions "in order to carry out union policy" rather than to benefit the beneficiaries, many of whom would not be directly affected by the prosperity of the mining industry or the union.

The key factor in the decision in Cowan v. Scargill seemed to be the broad investment power provided to the trustees in the trust agreement. Had the trust document itself specifically prohibited certain kinds of investment, the result might have been different.

In Ontario there have been various initiatives to legitimize the role of political or social policy in the investment of benefits funds. For example, in the late 1980's, the Ontario legislature enacted the South African Trust Investments Act<sup>9</sup> which

---

<sup>9</sup> South African Trust Investment Act, RSO 1990 c.S-16. Under the terms of the Act, before a trustee can dispose of, or refuse to acquire, a South African investment, the trustee is required to give written notice to all identifiable beneficiaries. If a majority of beneficiaries do not file a Notice of Opposition to the transaction within 60 days, the trustee can dispose of, or refuse to acquire, the South African investment as it sees fit. Where the trust or pension fund includes more than 100 identifiable beneficiaries, written notice is not

permits trustees, including trustees of pension funds, to refuse to acquire a South African investment, and to divest themselves of South African investments without being found in violation of a fiduciary duty. More generally, the Ontario Pension Commission takes the position that the restriction of pension fund investment to "ethical investments" will not be considered imprudent and therefore will not constitute a breach of section 22 of the PBA.<sup>10</sup> However, in such circumstances, it would be necessary to give notice to plan members of the investment restrictions, to set out the restrictions clearly in the pension fund's Statement of Investment Policies and Goals, and to include criteria for investment in the Statement.

**ii) Balancing the Interests of Active and Retired Workers**

Union trustees must also pay particular attention to the potential conflict of interest that arises by virtue of representing both active and retired workers. Indeed, the dichotomy of interest between active workers and retirees underlay the conflict in Cowan v. Scargill.

---

required. The trustee is simply obliged to make inquiries to determine that reasonable grounds exist to believe that a majority of the beneficiaries consent to the intended transaction and that the majority's combined beneficial interest in the trust or pension fund comprises more than 50% of its assets. Although this Act is still in effect, one might expect that it will be repealed, given the political changes in South Africa.

<sup>10</sup>

See PCO Bulletin February 1992, Vol.2, Issue 4, Page 11.

As previously indicated, a union may see itself as acting primarily on behalf of its active members. However, any trustee, whether acting as union representative or as employer representative, has an obligation to "hold the balance evenly" between various groups of beneficiaries, and they are not entitled to favour one group of beneficiaries over another.<sup>11</sup>

Whether trustees are using surplus to improve benefits or, in the case of a plan deficit, are reducing<sup>12</sup> benefits, they must keep in mind that they have a fiduciary obligation to all plan members, including retirees. A potential conflict will arise whenever trustees are considering changes to benefits. It is common, for example, for the plan documentation of a multi-employer plan to give the board of trustees a broad power to amend the plan. Whenever the trustees exercise this power, they must do so in an equitable fashion.

### **III. THE UNION AS NEGOTIATOR**

Aside from being directly involved in the administration of a pension plan, a union may also exert significant influence over the provision of pension plan benefits in its capacity as bargaining agent.

---

<sup>11</sup> See Boe v. Alexander (1987) 15 B.C.L.R.(2d) 106 (B.C.C.A.)

<sup>12</sup> Section 14(2) of the Pension Benefits Act specifically recognizes the right of the trustees of multi-employer plans to reduce benefits if a plan is in deficit. Trustees of plans in which the employer's contribution level is fixed by a collective agreement have the same power under section 14(3).

**a) Representing the Interests of Retirees**

One question that frequently arises during negotiation between a union and an employer over pension issues is whether the union has a duty to represent the interests of retirees in the negotiations, or indeed the extent to which the union has the authority to bargain on behalf of retirees, given that retirees are not active members of the union and do not participate in strike or ratification votes.

Contrary to what some employers believe, it is a well settled principle of labour law that unions can bargain on behalf of retired members and can seek to enforce the rights of retirees through the grievance and arbitration provisions of a collective agreement.<sup>13</sup> Indeed, untold numbers of unions across North America have negotiated pension benefits for retired workers and many negotiate increases to those benefits on a regular basis.

What interest does a union have in negotiating benefits for retirees or in pursuing the rights of retirees through arbitration? After all, retirees are no longer active members of

---

<sup>13</sup> See Re Liquor Control Board of Ontario and Ontario Liquor Board Employees Union (1980), 114 D.L.R.(3d) 715 (Ont.Div.Ct.), appeal dismissed, (1981), 125 D.L.R.(3d) 467 (Ont.C.A.); Canadian Paperworkers Union v. Pulp and Paper Industrial Relations Bureau (1977), 77 CLLC 675; Cominco Pensioners Union and Cominco [1979] 2 Can LRBR 322; Re Coulter Manufacturing Ltd. and United Automobile Workers, Local 222 (1972) 1 LAC 426. See also Justice LaForest's review of this jurisprudence in Dayco (Canada Ltd. v. CAW-Canada (1993). Note, however, that Dayco dealt with the negotiation of welfare benefits, which do not have statutory protection as do pension benefits. Therefore, while Dayco is relevant to the provision of benefits which are not statutorily protected, it is only partially relevant to pension benefits.

the bargaining unit and, consequently, they neither pay union dues nor participate in the election of local officers, or in strike or ratification votes.

As the British Columbia Labour Relations Board said in *Canadian Paperworkers*,<sup>14</sup> there may be several reasons why a union and its current membership would share the compensation package with retired workers. One reason may be altruism. Active workers may share a community of interest with retired workers, particularly in smaller "union towns", where they may live as neighbours.

A more important factor may be self-interest. Due to inflation and other factors, the income that employees forgo today to provide for their retirement may not have the same purchasing power in the future. However, employers may be unwilling to agree to index pensions to the rate of inflation or to the rate of increase of real earnings in the economy. Consequently, it may be that the periodic negotiation of improved benefits for retired workers is the best way for active workers to ensure their own retirement security and for employers to ensure that the obligations they undertake can continue to be met. The B.C. Labour Relations Board concluded:<sup>15</sup>

---

<sup>14</sup> *supra*, at note 13.

<sup>15</sup> *Supra*, at note 13. See also *Re Liquor Control Board of Ontario*, *supra*, at note 13, and *Leopold Morin*, [1988] O.L.R.B. Rep. May 506, where the Ontario Labour Relations Board dismissed an employee's complaint that the union had violated the duty of fair representation when it agreed to lower the mandatory retirement age in the collective agreement from age 70 to 65 in return for increased benefits and inflation protection in pensions. However, note that human rights legislation prohibits mandatory retirement before age

"How can a union walk that fine line between the concern of its active members about the adequacy of their retirement income and the concern of employers about the actuarial soundness of their pension funds and commitments? By periodically negotiating an increase in the level of pension benefits and passing that increase on in whole or in part to those who have already retired... From the point of view of the lawyer that may not appear to be a tight and enforceable guarantee for the period of retirement. But for those experienced in the dynamics of collective bargaining that is the safest kind of assurance one can have in the situation. It is exceedingly rare that any principle of that kind, especially one with the moral claim that is embedded in this one, can be eliminated once it is embedded in a collective bargaining relationship."

Notwithstanding the level of union involvement in Canada in the negotiation of retirement benefits, as Supreme Court Justice LaForest pointed out in Dayco,<sup>16</sup> the status of retired workers under collective bargaining regimes has received almost no attention from Canadian courts or labour tribunals. Consequently, it is unclear whether unions have a duty to bargain on behalf of retired workers<sup>17</sup> and what remedies may be available to retired workers when their benefits have been reduced or withdrawn.

If there was any lingering doubt, the majority judgment in Dayco made clear that a union **can** initiate a grievance objecting to a reduction in retirees' benefits. However, whether a union **must** do so was left an open question. On the one hand, the majority judgment

---

65 in some jurisdictions and in other jurisdictions, such as Quebec, prohibits it altogether.

<sup>16</sup> *supra*, at note 13.

<sup>17</sup> For American jurisprudence on this point, see Chemical and Alkali Workers v. Pittsburgh Plate Glass Company 404 U.S. 157 (1971).

speaks of grievances brought "at the instance of the union", implying that the union has a discretion in this regard. However, Justice LaForest recognized that, in some circumstances, a union may not want to carry a grievance forward because a successful outcome might affect the level of benefits the union would be able to negotiate for active workers. In this connection, Justice LaForest noted that retirees probably would be precluded from bringing a complaint of unfair representation against the union because they are no longer part of the bargaining unit.<sup>18</sup>

On the other hand, Justice LaForest raised the possibility that the relationship between retired workers and their former union may give rise to some type of fiduciary duty which

---

<sup>18</sup> For example, section 69 of the Ontario Labour Relations Act, which sets out the statutory basis of an unfair representation complaint, provides that a trade union "... shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit ...". [emphasis added]. This duty of fair representation has been described by the Ontario Labour Relations Board as quasi-fiduciary in nature: Leopold Morin, *supra*, at note 15.

There is also a common law duty of fair representation Canadian Merchant Service Guild v. Gagnon (1984), 9 D.L.R.(4th) 641 (S.C.C.), but the Supreme Court of Canada has said that the common law and the statutory codifications of the duty have the same effect and that where a labour statute applies, an employee may not base a claim on the common law but must have recourse to the statute: Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057 (1990), 109 N.R. 321 (S.C.C.). However, the Court also indicated that where a labour statute is silent or by its terms cannot apply, the common law duty may be operative. It may also apply when the alleged breach may not properly be characterized exclusively as a labour relations matter: Gendron, supra. Accordingly, in Knight v. C.B.R.T. & G.W. (1988), 95 N.B.R.(2d) 342, the New Brunswick Court of Appeal allowed a group of casual employees to sue their trade union and its negotiating committee for failing to adequately represent their interests in negotiations leading up to their termination and for excluding them for sharing in termination benefits given by the employer. The employees could not sue with respect to their rights under the collective agreement, the court said, but could maintain an action for alleged tortious acts including fraud, deceit, misrepresentation and breach of fiduciary duty. See also Comeau v. Canadian Union of Postal Workers (1991), 112 N.B.R.(2d) 432 (N.B.C.A.).

would compel the union to consider the interests of retirees during negotiations or in deciding whether to file a grievance.<sup>19</sup>

In approaching any negotiations which may affect the rights or benefits of retired members, a union should be clear and explicit as to whom it purports to represent. There may be instances where the rights of retirees will figure prominently in negotiations. In other negotiations, the rights of active members may be paramount. In any event, a union should not assume that the employer will be looking out for the interests of retirees or that the employer knows whom the union purports to represent.

A union would be wise to consider whether the rights or benefits of retirees may be affected by the negotiations, and should evaluate its negotiating position accordingly. Courts have recently shown an increasing willingness to hold unions liable for their part in failing to recognize the rights of employees in the human rights context.<sup>20</sup> While

---

<sup>19</sup> Dayco, supra at note 13. Justice LaForest did not explore this issue, but simply stated, in the context of discussing the means by which retirees may be able to overcome the "remedial roadblocks" facing them in labour law regimes:

"Finally, there is a possibility that the relationship between retired members of a bargaining unit and the bargaining agent for that unit is fiduciary in nature. If a union failed to consider the interests of retirees during collective bargaining, or refused to process a grievance on behalf of those retirees, such conduct might form the basis of a claim for breach of fiduciary duty."

<sup>20</sup> See for example, Central Okanagan School District No. 23 v. Renaud (1992), 95 D.L.R. (4th) 577 (S.C.C.); Gohm v. Domtar Inc. (1992), 89 D.L.R. (4th) 305 (Ont. Div. Ct.).

liability in this context arises from a statutory obligation,<sup>21</sup> given the comments of Justice LaForest in Dayco<sup>22</sup> it is not difficult to imagine a union being held liable for breach of a fiduciary duty where it enters into an agreement with an employer which harms the rights of retirees in some significant way.

**b) Surplus Issues**

**i) For Whose Benefit Can Surplus be Used?**

For over a decade, pension litigation has focused on the "surplus issue". If the plan is ongoing, the question generally has been whether an employer can use plan surplus to meet its contribution obligations, i.e. to take a contribution holiday. Where the plan at issue has been terminated, the question is generally who "owns" the surplus.

Those representing the interests of plan members, whether in respect of ongoing surplus or surplus remaining after plan windup, have taken the position that surplus should be used for the benefit of members of the plan and should not be used by or paid to the employer.

---

<sup>21</sup> Human rights legislation typically enjoins any "person" from discriminating on prohibited grounds and unions are considered persons for these purposes. See for example the Ontario Human Rights Code, R.S.O., 1990 ch. 19, s. 9.

<sup>22</sup> Supra, at note 13.

Much has been written about the numerous surplus cases, and detailed comment on the arguments made in the cases is outside the scope of this paper.<sup>23</sup> In brief, arguments generally focus on the language of the plan documentation or promises made by the employer. However, the argument that surplus belongs to plan members or should be used for their benefit has also been supported on the basis that promised benefits, and the funds securing those benefits, are key components of the compensation package and as such, represent "deferred" wages. This position is even more compelling where the plan in question is collectively bargained.

The validity of what is known as the "deferred wage theory" was recognized by Justice Adams in the recent litigation concerning the NHL pension plan. In finding in Bathgate<sup>24</sup> that the Players were entitled to plan surplus, Justice Adams made it clear that his conclusion was motivated not only by the plan documentation, but also by the conduct and representations made by the parties, as well as by the fact the pensions constitute a part of employment compensation:

---

<sup>23</sup> The most recent case is the decision of the Supreme Court of Canada in Schmidt v. Air Products Ltd., an as yet unreported decision of the Supreme Court of Canada, released June 9, 1994. This case addressed both the issue of validity of contribution holidays and entitlement to surplus on plan termination. While settling some questions relating to pension surplus, the case raises yet more interesting ones.

<sup>24</sup> Bathgate v. National Hockey League Pension Society, (1992), 11 O.R.(3d) 449 at 498. See Lancaster Labour Law Reports, Pension and Benefit Law Bulletin, Vol. 19, No. 11, November, 1992 for a summary of the case.

"I have been guided foremost by the language of the formal documents and the parties conduct, statements and representations to each other. I have also kept in mind that the context in which pension promises are made is one of employment ... not only are pension promises long-term in nature, but consideration for them is furnished every day by work. This can result as a matter of employment or contract law, in the earning of pension rights independent of the law of trusts."

Justice Adams referred specifically to the deferred wage theory in summarizing his conclusions with respect to the early Plan documentation:

"In summary, both the language of the Regulations and the cumulative effect of all the intrinsic evidence clearly establishes an exclusive and irrevocable entitlement in the Players to all 'excess' funds in the original Plan regardless of source. I have to this conclusion essentially by reference to the 'plain meaning' of the Regulations and alternatively, through a contractual analysis based on the various representations to the Players. The Players provided their services up to 1966 on the basis of their represented entitlement to all such monies, with the contractual result that this entitlement was irrevocably earned upon the expenditure of their efforts. This latter conclusion is reinforced by the defined employer contributions which, in the circumstances, are reasonably characterized as deferred wages."<sup>25</sup>

The Court of Appeal upheld the judgment rendered by Justice Adams and specifically endorsed the deferred wage aspect of his decision. As support for the

view that pension rights vest by virtue of service, the Court of Appeal quoted with approval the following from Hoefel v. Atlas Tack Corporation<sup>26</sup>

"... public policy long has required that pension plans be construed, where possible, to avoid the forfeiture of rights which an employee, through years of service, has earned ..."<sup>27</sup>

Indeed, the Supreme Court of Canada appears to have endorsed the concept that pensions constitute deferred wages. In Schmidt v. Air Products Canada Ltd.<sup>28</sup>, Justice Cory, for the majority, stated:

"In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour ..."

This remark by Justice Cory appears to open the door to future claims to surplus made on behalf of employees, based on the deferred wage theory.

## ii) **Negotiating Surplus**

In an ongoing plan, it is common for a union to negotiate benefits in the normal course of the bargaining process. Where the plan is in surplus, bargaining will

---

<sup>26</sup> 581 F.2d (1978) (U.S.C.A., First Circuit):

<sup>27</sup> Bathgate v. National Hockey League Pension Society, (1994) 16 O.R.(3d) 761 at 769 (C.A.). See Lancaster Labour Law Reports, Pension and Benefit Law Bulletin, Vol. 11, No. 4, April 1994 for a summary of the case.

<sup>28</sup> Air Products, *Supra*, note 23.

focus on the appropriate use of the surplus, i.e. whether the employer can access the surplus to take a contribution holiday, or whether the surplus should be used to improve benefits.

A union will also have a major role to play where the employer terminates its plan and seeks to withdraw surplus. Section 78 (2) of the PBA requires that where an employer applies to the Ontario Pension Commission for consent to payment to the employer of surplus out of a pension fund, the employer must give notice to each trade union that represents members of the pension fund of the employer's application.<sup>29</sup> Furthermore, Section 8(1) of the PBA Regulations<sup>30</sup> currently requires that the consent of the bargaining agent be obtained before the consent of the Pension Commission will be given to payment of any surplus to the employer.<sup>31</sup> In addition, the Pension Commission may require the written consent of such number of former members and other persons who are entitled to payments under the plan on the date of wind up as it considers appropriate. As a

---

<sup>29</sup> Notice must also be given to each member and each former member of the pension plan to which the pension fund relates, any individual who is receiving payments out of the pension fund, and the advisory committee established in respect of the pension fund: s. 78(2)(a)-(d).

<sup>30</sup> R.R.O., 1990, Reg.909, s.8, as amended by O.Reg 743/91. The application of this section of Regulation 909 was recently extended by O.Reg 409/94 and will now remain in force until at least December 31, 1997.

<sup>31</sup> Where no trade union exists, the written consent of two thirds of the members of the plan is required: R.R.O., 1990, Reg. 909, as amended by O.Reg. 743/91, s. 8(1)(b)(ii).

result of the introduction of section 8(1), which came into effect December 18, 1991, employers must now negotiate with unions or plan members (or both) if the employer wishes any part of surplus remaining on termination of its pension plan to be paid to itself.<sup>32</sup>

Based on the language of section 8 of the PBA Regulation, it would be possible for a union to block an employer's application to access surplus for its own use on wind-up of the pension plan, regardless of whether the union had previously participated in the administration of the plan or even in the negotiation of pension benefits. Although it would be prudent for a union to consult with its members when consenting to (or rejecting) a surplus sharing arrangement, it is unclear to what degree it must do so before its gives or withholds consent to an employer's application for surplus withdrawal.<sup>33</sup> Nevertheless, because a union may be seen

---

<sup>32</sup> Prior to the introduction of section 8(1), it was generally necessary to obtain a court declaration as to entitlement to surplus before the Pension Commission would permit any part of surplus remaining in a terminated pension plan to be paid to an employer. Plans that were effectively terminated prior to December 18, 1991 are called "grandfathered plans". Where a plan is "grandfathered", the employer can either seek to withdraw surplus under Section 8(1) (i.e. negotiate a surplus sharing agreement with the union or members, as applicable) or seek a court declaration as to surplus ownership prior to making its application to the Pension Commission. For a discussion of the PCO's policy as to the mechanics of surplus distribution on windup and the documentation requirements see PCO Policy S900-501, published in the PCO Bulletin, Vol. 5, Issue 2, p. 32.

<sup>33</sup> In the absence of statutory or collective agreement provisions to the contrary, a union may take whatever action it considers to be in the best interests of the bargaining unit as a whole, notwithstanding that a majority of bargaining unit members may disagree. The union must simply ensure that it has taken the views of the members into account, along with other relevant factors: See for example, John Daniell, [1987] O.L.R.B. Rep. July 990, where the union bargained a pension plan against the wishes of a majority of employees. Note that, in Leopold Morin, *supra* at note 15, the union held a convention to formulate collective bargaining proposals, including those pertaining to improved pension benefits for retired workers.

as acting in a fiduciary capacity in providing any consent to an agreement to share surplus for the benefit of its members, or in blocking an application by withholding consent, the union must exercise this discretion in an equitable fashion. Further, the union should ensure that it stipulates on whose behalf it is purporting to give consent. It would be prudent for a union to specifically limit its consent to active members and to advise the employer that it must seek such separate consent as is deemed necessary from former members of the pension plan and retirees.<sup>34</sup> In this regard, the obiter comments of the lower court in the Bathgate case give clear warning to unions that there may be real limits to their ability to negotiate away any entitlements of plan beneficiaries.

#### **IV. THE UNION AS PLAN SUPERVISOR AND/OR PENSION ADVISORY COMMITTEE MEMBER**

Where the union is not directly involved in plan administration, the PBA nonetheless envisions that the union will play some role in the monitoring of pension plans. Indeed, in these recessionary times, it may be particularly important for unions to assume some form of supervisory role to ensure that plans are not in deficit or that deficits are not allowed to grow. A union's supervision of the adequacy of contributions and solvency of the fund is even more critical in relation to plans whose deficits are not protected on wind-

---

<sup>34</sup> For guidelines regarding the allocation of surplus on windup between members and former members, see PCO Policy S900-900 published in PCO effective February 24, 1994, Bulletin, Vol. 5, Issue 1, p.28.

up by the province's guarantee fund, i.e. multi-employer plans and plans where the employer's contribution level is collectively bargained. Because the monitoring of plan funding and administrative costs is particularly important in the case of a multi-employer plan, these are dealt with in Part V below.

**a) Supervisory Role**

The disclosure provisions set out in the PBA permit the union to undertake a supervisory or watchdog role over the pension plan. For instance, sections 25 to 30 of the PBA set out the rights of members and others to obtain information about the plan and to gain access to plan documents, statements of benefits and the like.<sup>35</sup> These provisions specifically provide unions with the right to inspect documents and to obtain information relating to the pension plan and pension fund, and stipulate that a union is entitled to notice of a proposed reduction in plan benefits where the Plan is collectively bargained.<sup>36</sup> In addition, Pension Commission policies stipulating appropriate procedures with respect to merger of pension plans<sup>37</sup> require that notice be given to any trade union representing plan members affected by the employer's action.

---

<sup>35</sup> Section 45 of Regulation 909 under the PBA specifies what information must be made available.

<sup>36</sup> Section 26(5) of the PBA.

<sup>37</sup> The Pension Commission's policy with respect to plan merger is published in PCO Bulletin Vol. 4, Issue 2 at pp. 8-11. That policy makes it clear that all members of each plan to be merged, each trade union representing members of the plans, and any advisory committee established in respect of any of the plans must be provided with individual written notice of the proposed merger.

The ability to obtain information about a pension plan raises the question as to how much of a supervisory role a union should play and how effective it can be in protecting the interests of its members. Prudent management would require a union to play a quasi-supervisory role with respect to its members pension plan, even where the union has no involvement in the administration of the plan.

Prudent monitoring of a pension plan by a union will involve scrutinizing funding documentation to ensure the plan is being properly funded by the employer, and monitoring the costs of plan administration charged to the fund to ensure that these costs are "reasonable"<sup>38</sup>. In this regard, a union could monitor, on an ongoing basis, the plan's actuarial valuations and financial statements. This would provide the union with considerable detail regarding the payment of expenses out of the fund and would permit the union to understand the funded status of the plan. The union could determine whether contributions to the plan are being made as required, or whether the employer is taking a contribution holiday.

This type of watchdog role would enable a union to identify potential problems early on and take appropriate action, i.e. by filing a grievance under the collective agreement, or

---

38

See discussion of PBA requirement that costs be "reasonable" at p.36 and following.

by making an application to court or to the Pension Commission requiring the terms of the plan to be changed.

**b) Pension Advisory Committee**

A union may wish to "formalize" its supervisory role through the establishment of a pension advisory committee.<sup>39</sup>

Section 24 of the PBA provides that the members and "former members" of a pension plan may, upon a majority vote, establish an advisory committee to monitor the administration of the plan, make recommendations to the plan's administrator and promote members' awareness and understanding of the plan. However, the committee will not be involved in administering the plan.

Each class of employees represented in the pension plan is entitled to appoint at least one representative to the advisory committee. In contrast to the PBA's provisions regarding the composition of a board of trustees, section 24 also entitles "former members" of the pension plan to appoint one representative to the advisory committee. This means that both retired members and deferred members, (i.e. former employees who have terminated employment with a vested entitlement to pension benefits but who

---

<sup>39</sup> However, the Act does not permit the establishment of an advisory committee where the plan is administered by way of a board of trustees or pension committee.

have not yet retired), may participate in the vote establishing an advisory committee and may be represented on that committee.

A pension advisory committee will perform supervisory functions similar to those described above. Indeed, it should be noted that an advisory committee has no greater powers or rights than are provided to members of a union under sections 25 to 30 of the PBA with one notable exception. It could be argued that there must be greater disclosure by an administrator where there is an advisory committee. Section 24(5) permits an advisory committee to examine the administrator's "records" maintained in respect of the plan and the fund. Further, section 24(7) requires an administrator to provide the committee with "such information as is under the control of the administrator". Given the broad language used, sections 24(5) and (7) arguably provide an advisory committee greater access to plan and fund information than might otherwise be available to a union, pursuant to sections 29 and 30 of the PBA.

**c) Effect of Assumption of Watchdog Status**

Although prudent union management would dictate careful supervision of a pension plan, it is suggested that it cannot be maintained that a union is acting in a fiduciary capacity simply by assuming a supervisory role. A clear distinction can be drawn between circumstances in which a union is acting in a "watchdog" role over the employer's administration of the pension fund and circumstances in which the actions of the union

may directly impact on benefit entitlements, i.e. where the union is negotiating surplus-sharing agreements, or participating directly in plan administration.

The "watchdog" role should not be characterized as fiduciary in nature because, among other factors, the critical element of power is lacking. In her dissenting judgment in Frame v. Smith<sup>40</sup>, Justice Bertha Wilson set out the key features of a fiduciary relationship:

- i) the fiduciary will have some scope for exercise of discretion or power;
- ii) the fiduciary will have the opportunity to unilaterally exercise that power in such a way that will affect the interests of a beneficiary;
- iii) the beneficiary is especially "vulnerable" to the person holding the power.

Essential to a finding that a fiduciary relationship, and hence a fiduciary obligation, exists is **power**. The power element is missing in the "watchdog" role and that would distinguish this role from other situations<sup>41</sup> where a union might indeed wield considerable power to affect the benefit interests of members of a pension fund.

---

<sup>40</sup> (1987) 42 D.L.R.(4th) 81 at pp. 98-99.

<sup>41</sup> As to the importance of the power element, see for example Roman Corporation Ltd. v. Peat Marwick Thorne, (1992) 11 O.R.(3d) 248, where the Ontario Court (General Division) granted a motion to strike a statement of claim. The plaintiffs in the proceedings, who had had significant holdings in Standard Trustco Limited, sued the corporation's auditors for losses suffered in Standard's failure on the basis, inter alia, of breach of fiduciary duty. However, it did not appear that the defendants had any power over the plaintiff's interests and therefore, the court found that the statement of claim did not establish a basis for the existence of a fiduciary duty. See also Plaza Fibreglas Manufacturing Limited v. Cardinal Insurance et al., (1994) 18 O.R.(3d) 663, (C.A.), where the Court of Appeal found that the defendants owed no fiduciary obligation, since there was no scope for the unilateral exercise of a power or discretion that could have affected the plaintiffs.

In concluding that a union is not a fiduciary simply as a result of asserting a "watchdog" role, no distinction is made between situations in which the designation of "watchdog" arises because of the union's representative position as bargaining agent for its members, and situations in which the "watchdog" role arises because the union's position has become more formalized due to participation on an advisory committee. While it may be that the expectations of the union members themselves might differ where the union assumes a more "official" watchdog status, the element of power is still missing. That members might "rely" on the union to exercise a power to alter benefits is irrelevant where it should be clear that the union has no authority to affect entitlement. In any event, there is some difference of opinion in the judgment rendered by the Supreme Court of Canada in the Lac Minerals<sup>42</sup> case as to whether or not reliance constitutes an essential ingredient to the existence of a fiduciary relationship.<sup>43</sup>

---

<sup>42</sup> Lac Minerals Ltd. v. International Corona Resources Ltd. (1986) 25 D.L.R.(4th) 504, Ont. H.C. affirmed (1987) 44 D.L.R.(4th) 592 (Ont. C.A.), reversed as to application of fiduciary relationship to a mining company trying to negotiate a joint venture (1989) 61 D.L.R.(4th) 14 (S.C.R.) Note that in both the trial judgment and the minority decision of the Supreme Court of Canada it was found that a fiduciary relationship did exist. However, the existence of a fiduciary relationship was rejected by the majority of the Supreme Court of Canada. The majority found no basis for concluding that the company was acting in any way except in its own self interest. Instead, the majority found liability based on the breach of confidence rule.

<sup>43</sup> Mr. Justice Sopinka of the Supreme Court of Canada found reliance to be a key element to the existence of a fiduciary relationship while Mr. Justice LaForest noted that the application of the fiduciary principle is broader than that. They both agreed, however, that if reliance is present this would go a long way to establish that the relationship in question had a fiduciary component.

Despite the fact that Justice Wilson's articulation in Frame v. Smith of the hallmarks of a fiduciary relationship was made in a dissenting judgment, her views, with various modifications, have been adopted on numerous occasions.<sup>44</sup>

More recently, the "vulnerability" factor of those to whom a fiduciary obligation is owed has been particularly stressed.<sup>45</sup> This is another distinction between the pure "watchdog" role and other situations where a union acts on behalf of its members. The "vulnerability" element is not present in the "watchdog" relationship. However, the same might not be said where, for example, a union exercises power to "bargain away" rights.

## V. SPECIAL PROBLEMS WITH MULTI-EMPLOYER PLANS

The PBA defines a multi-employer plan as:

"...a pension plan established and maintained for employees of two or more employers who contribute or on whose behalf contributions are made to a pension fund by reason of agreement, statute or municipal by-law to provide a pension benefit that is determined by service with one or more of the employers, but does not include a pension plan where all the employers are affiliates within the meaning of the *Business Corporations Act*."

---

<sup>44</sup> See, for example, Lac Minerals Ltd., *supra* at note 42.

<sup>45</sup> In the Enfield decision (*supra*, note 6). Judge Harris emphasized the particular vulnerability of pension members who depend upon the plan sponsor to ensure that investment decisions related to the plan do not jeopardize the security of the pension fund.

A multi-employer plan carries with it a number of advantages for the members of the plan, including built-in portability and certain security from an employer's bankruptcy or insolvency.<sup>46</sup> Employers also benefit from multi-employer plans in that the risks of investment and funding are spread among several employers, as are administrative costs.<sup>47</sup>

As noted previously, participation of members in plan administration most frequently occurs in connection with multi-employer plans since the PBA requires that a multi-employer plan be administered by a board of trustees, at least half of whom are representatives of plan members.<sup>48</sup> Like other plan administrators, the board of trustees of a multi-employer plan is subject to the statutory fiduciary duties found in section 22 of the PBA. However, the trustees of a multi-employer plan should consider what their fiduciary obligations are in relation to certain problems which are unique to multi-employer plans.

---

<sup>46</sup> Note, however, that the protection available through the province's Pension Benefits Guarantee Fund to members of a plan which is in deficit on windup is not available to members of a multi-employer plan.

<sup>47</sup> For a discussion of the pros and cons of multi-employer plans, see M. Zigler, "Unions and Pension Plans - The Impact of Collective Bargaining on Pension Plan Administration", Pension Fund Governance, Insight Press, 1993.

<sup>48</sup> As noted earlier, while the PBA does not mandate trade union involvement, in practice it is almost invariably the trade union which appoints the member representatives to the board of trustees.

**a) Entry and Withdrawal of Participating Employers**

A board of trustees of a multi-employer plan may, from time to time, find itself in a dilemma with respect to past service recognition of employees whose employer has recently joined the pension plan. Difficulties may arise for a board of trustees which chooses to recognize the past service of these employees, given that any such recognition will create a liability of the plan and therefore have an effect on all plan members. The concern may be that, if the new employer subsequently withdraws from the plan, a significant liability relating to the past service of that employer's employees may remain in the plan. In effect, the continuing plan members may be left paying for the benefits granted to those employees in respect of service prior to their entry into the pension plan.

The board of trustees of a multi-employer plan may therefore want to give serious consideration to creating special provisions which will take effect in the event of withdrawal by any participating employer. For example, trustees of a multi-employer plan could consider incorporating in the plan text provisions similar to those used in the United States which would require a pro rata reduction of the benefits of withdrawing members, calculated in accordance with contributions actually made to the plan. All participating employers could be required to agree to such provisions upon commencing participation in the plan.

**b) Withdrawal of Group Members**

In addition to the movement of employers in and out of multi-employer plans, it is also possible for a group of members themselves to trigger withdrawal from a multi-employer plan and transfer to a new plan.<sup>49</sup> This will generally occur when the bargaining rights of the trade union representing a group of employees are terminated and another trade union, whose members are covered by a different plan, is certified as bargaining agent in its place. In these circumstances, the PBA requires a transfer of assets from the old plan to the new plan.

Sections 80(8) and (9) of the PBA provide that the administrator of the first pension plan must transfer to the administrator of the second pension plan all the assets and liabilities relating to the transferring members. The administrator of the new plan must accept the transfer as assets and liabilities of the new plan. The obvious difficulty from the perspective of the trustees of the first plan is in quantifying the value of the assets and liabilities to be transferred.

---

<sup>49</sup> Section 38(5) provides that, where a member of a multi-employer plan is represented by a trade union whose bargaining rights are terminated in accordance with the Labour Relations Act, and the member joins a different pension plan, he or she is entitled to terminate his or her membership in the first plan. However, this does not apply in situations where there is a reciprocal agreement respecting the two pension plans.

**c) Delinquencies**

It would be prudent for any union to monitor the funding of the pension plan of its members, regardless of the extent to which the union bargains pension benefits, and no matter what type of pension plan is provided to its members. It should be obvious that, wherever an employer is repeatedly overdue in making contributions or fails to make it contributions at all, the adequate funding of a plan is seriously undermined. If the employer becomes insolvent and the plan is wound up and found to be in deficit, plan members could lose a portion of the value of accrued benefits, since the provincial Pension Benefits Guarantee Fund does not guarantee funding of all pension benefits.

Although the possibility of delinquencies dogs all pension plans, it is of particular concern for unions involved in a multi-employer plan, because the Guarantee Fund does not protect the benefits in multi-employer plans.<sup>50</sup> Furthermore, the trustees of a multi-employer plan, whether union-appointed or employer-appointed, have fiduciary responsibilities to plan members imposed by pension legislation. A critical responsibility relates to the obligation, as administrator, to notify the Ontario Superintendent of Pensions within 120 days of the date the board first becomes aware that an employer has failed to make a contribution<sup>51</sup>. Furthermore, as plan administrator, the trustees can

---

<sup>50</sup> See section 85(4) of the PBA. It should also be noted that the Guarantee Fund does not protect benefits in plans where the employer's contribution level is fixed in a collective agreement: s.85(5).

<sup>51</sup> See section 56(3) of the PBA and section 60 of Regulation 909.

commence proceedings in a court of competent jurisdiction to obtain payment of the outstanding contributions.<sup>52</sup>

It is not uncommon for the trustees of multi-employer plans to establish delinquency control programs. Indeed, establishment of such a program would be a prudent course of action.<sup>53</sup> Such programs are aimed at identifying delinquencies as quickly as possible so that collection proceedings or other appropriate action may be commenced immediately. A control system may be particularly helpful where a delinquency might otherwise go unnoticed for a period of time, due to the large number of participating employers in the plan.

**d) Costs of Administration**

Adequate monitoring of the costs of plan administration forms an important part of the administrator's statutory duty of care imposed by sections 22(1) and (2) of the Ontario PBA. Some guidance as to the views of the regulatory authorities regarding the scope of this duty was recently provided by the federal Office of the Superintendent of Financial

---

<sup>52</sup> Section 59 of the PBA. Pursuant to ss.57(3) and (5), employers are deemed to hold in trust for the beneficiaries of the plan an amount of money equal to the contributions the employer owes but has not paid, and a plan administrator has a lien and charge on the assets of the employer equal to that amount.

<sup>53</sup> See L. Richmond, "Delinquency Control in a Recession", in Canadian Employee Benefit Plans - 1991, M. Brennan (ed), International Foundation of Employee Benefit Plans, Wisconsin, 1992.

Institutions. In a recent Bulletin<sup>54</sup> to members of the pension industry and sponsors of federally registered pension plans, the Office of the federal Superintendent made it clear that, in its view, the charging of "unreasonable" expenses to a pension fund would be a breach of a plan administrator's duty of care. The Office cautioned that all plan administrators should put in place adequate controls to ensure that any costs and expenses charged to a pension fund are reasonable and in accordance with the standards of care set out in the federal legislation. The language of the provisions of the federal pension statute setting out a plan administrator's duty of care is similar to that in the Ontario statute.<sup>55</sup> Therefore, the federal Superintendent's views provide useful guidance, not only for federally registered plans, but also for plans registered in Ontario.

The following are examples of expenses the federal Office of the Superintendent stated it would consider "unreasonable" if charged to a pension fund:

- unjustified travel expenses, including attendance at "distant" conferences by individuals who have no responsibility for pension administration;
- the purchase of capital equipment not used primarily for plan administration;
- donations; and

---

<sup>54</sup> The federal Office of the Superintendent of Financial Institutions set out its views in PBSA Update, Issue No. 11, dated August 1994.

<sup>55</sup> Compare the language of section 8(3) and (4) of the federal Pension Benefits Standards Act to section 22(1) and (2) of the PBA. Note, however, that section 8(3) of the federal statute makes it clear that a plan administrator acts as "trustee" for plan beneficiaries.

- the use of pension funds for union business.

The reference to attendance at conferences is especially noteworthy since it is common practice for pension plan trustees to attend educational seminars, many of which are located outside Canada.

The federal Office noted that on at least one occasion it had required pension plan trustees to reimburse to the pension funds charges the Office found to be excessive. The Office made it clear that plan administrators should be prepared to justify any expenses charged to a pension fund, and that proper disclosure of expenses would require that all expenses of plan operation be discussed in the plan's actuarial valuations. Furthermore, investment expenses should be set out separately from other plan expenses, and an indication should be given as to how the expenses will be paid, i.e. by way of employer contribution or use of surplus.

The Ontario PBA includes further provisions related to an administrator's monitoring of costs not found in the federal statute. The Ontario legislation requires an administrator to carry out "prudent and reasonable" supervision of its agents<sup>56</sup>, and specifically limits the expenses of an agent to "the usual and reasonable fees and expenses for the service

---

<sup>56</sup>

See Section 22(7) and (11) of Ontario PBA.

provided". Based on these two provisions, it would be prudent for the administrator of a provincially regulated plan to carefully monitor the expenses of its agents to ensure that any charges of the agents made to the pension fund are in accordance with reasonable industry standards.

Close monitoring of the costs of plan administration is of special concern to trustees of multi-employer plans because these costs cannot be recovered directly from employers participating in the plan. Normally, the obligations of participating employers are limited to a contribution rate specified in the collective agreement. Therefore, the board of trustees of a multi-employer plan must ensure that a pension fund is adequate, to meet not only the cost of benefit accruals, but also the cost of operating the plan.

## **VI. CONCLUSION**

As unions play a more active role in the negotiating, monitoring and administration of pension plans, they will have to carefully consider what their obligations may be to different groups of plan members, including those who may no longer be active members of the union.

Based on current law, a fiduciary obligation will exist only if it is established that the individual has the scope to unilaterally exercise a power of discretion (the "power element"). Clearly, individuals involved in plan administration have such a power.

Therefore, where union representatives put on a trustee's hat, they will be characterized as fiduciaries. However, it could also be said that those controlling the appointment of trustees to the board may have fiduciary obligations to the extent they are able to exercise influence over the conduct of the appointed trustee. If this "extended" fiduciary obligation exists, it would apply equally to employers nominating employer representatives, and the union nominating member representatives to the board of trustees.

Where a union wears any of its other hats, and particularly its negotiating hat, fiduciary obligations could arise. However, in each case it would be necessary to establish that the union had the power to affect an entitlement. So, while such a power might be present when negotiating surplus use, for example, it would not exist in other situations, such as when participating on an advisory committee.

Even where a fiduciary obligation is established, liability will not necessarily follow, unless a causal connection is established between the conduct of the fiduciary and the "loss" suffered by the beneficiary. Therefore, even if a union is acting in a fiduciary capacity, liability will not be imposed on the union unless it can be shown that, "but for" the union's actions, no loss would have been suffered.<sup>57</sup>

---

<sup>57</sup> The "but for" test was established by the Supreme Court of Canada in Lac Minerals, supra footnote 42. The lack of causal connection between the conduct and the loss was noted by the Ontario Court of Appeal in Plaza Fibreglas, supra, footnote 41, in its decision to overturn the trial judge's finding of liability.