

The Canadian
Experience

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**New Developments in
Pension Practice**



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Administrator of Pension Plan

- Employer
- Pension committee
- Body appointed by statute
- Quebec and Manitoba
 - Must be a pension committee
 - Attempt to separate function of employer/sponsor and administrator



Fiduciary Standard

- Administrator is fiduciary
 - Obligation to act in the best interests of members of the plan
 - Standard of “care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person”
 - Use all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess
 - Avoid conflict of interest
 - Liability for damages if fail to meet standard
- Agent of administrator subject to same standard
- No explicit test for moral character





Sponsor vs. Administrator

- Sponsor:
 - Control plan terms
 - Amend or terminate
 - Not subject to fiduciary obligation but some statutory limitations on amendments
- Administrator:
 - Operate the plan in compliance with legislation to deliver benefits
 - Fiduciary standard



Trustees

- Largely a custodial role in Canada
 - Recordkeeper and issuer of cheques
 - Ensure that assets held by third party
 - Limited role to police actions of administrator or employer
 - Subject to fiduciary obligations as trustee
 - Trust companies attempt to tightly limit such obligations in trust agreement
 - Administrator interprets plan terms and directs trustee
 - Administrator ensures minimum funding met



Trends in Disputes

- Common law of trusts prevailing over statutory and contract law
- based on “exclusive benefit” language and irrevocable trust
 - Surplus
 - Contribution holidays
 - Expenses paid from pension fund
 - Asset transfers



Trends in Disputes

- Class actions
- Allocating surplus – who decides and whether a fiduciary decision



Current Issues

- Partial windups
 - Uncertainty over when might be triggered
 - Dispose of all assets
- Monsanto
 - Allocate portion of surplus to PWU
 - Difficulties in retroactive application
 - Court viewed surplus as “windfall”
- Asymmetry
 - Share surplus with members, employer fully responsible for funding shortfall
 - Employer reluctance to fund more than bare minimum



Current Issues

- Volatility in contributions
 - Low discount rate & low asset values
 - Solvency standards driving contributions



Possible Changes/ Discussion Papers

- Solvency revisited
 - Longer amortization period
 - Letter of credit
 - Special account
 - Limitations on improvements when there is a solvency deficiency
 - Priorities on windup
- Nova Scotia changes to grow-in on windups



Possible Changes/ Discussion Papers

- National Pension Benefits Guarantee Fund?
 - Experience with Ontario PBGF
 - Federal discussion paper
 - Difficulty in properly assessing and charging for risk
 - Moral hazard objection