



Liability and the Trustee

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I. DUTIES OF TRUSTEES GENERALLY

Trustees must have a thorough understanding of their duties, as well as the sources of those duties, in order to avoid liability. If trustees are clear in their obligations they will be able to adopt procedures that afford them the greatest amount of protection possible.

The duties of trustees are derived from three distinct sources. Firstly, trust documents such as the trust agreement, plan rules and statement of investment policies and procedures, as well as custodial, administration and investment management agreements; secondly, the common law; and, last, legislation such as the Pension Benefits Standards Act (“PBSA”) and Regulations, the Income Tax Act, the Trustee Act, the Personal Information Protection Act and the Law and Equity Act. The particular legislation that applies to a trust will depend on the type of trust. For example, health and welfare plans are not subject to the Pension Benefits Standards Act.

Trustees are personally liable for breaches of their duties that result in loss or damage suffered by the beneficiaries. Trustees can also be liable for improperly obtained benefits. However, liability will not be imposed for the purpose of punishing a trustee.

The most common duties of trustees are the duty to comply with the terms of the trust, the duty to act personally, the duty of loyalty, the duty of care, the duty to act with an even hand, and the duty to communicate to the beneficiaries.

While the array of duties may sound daunting, they are generally common sense duties that one would expect to apply to an individual holding property on behalf of another.

II. SOURCES OF CLAIMS

The following have been the source of claims by beneficiaries against trustees:

- (i) denial of benefits;
- (ii) failure to adequately fund a benefit program;
- (iii) imprudent choice of agent/delegate;
- (iv) incorrect benefit calculation;
- (v) conflict of interest;
- (vi) improper amendments to trust documents;
- (vii) investment losses; and
- (viii) surplus ownership.

III. THE DUTY TO COMPLY WITH THE TERMS OF THE TRUST

A trustee can be liable for breach of trust where the trustee has not adhered to the terms of the letter of obligation in the trust documents. Accordingly, the trustee is expected to be aware of and to comply with all of the trust documentation. Ignorance of the documentation's wording is not a defence.

To protect oneself, a trustee should have read and possess copies of all trust documentation including, the trust agreement and all amendments, the plan rules and all amendments, the statement of investment policy and procedures, any other policies adopted, agreements such as the custodial agreement, investment management agreement(s) and administration agreement, and the fiduciary liability insurance policy.

A trustee should also be familiar with who is providing advice and consultation services to the trust.

IV. DUTY OF LOYALTY

The duty of loyalty is the cornerstone of a fiduciary relationship: the trustee must act with a view to the best interests of the beneficiaries.

Subsection 8(5) of the PBSA codifies the general duty of loyalty. This section reads as follows:

In the administration of a pension plan, the administrator must

(a) act honestly, in good faith and in the best interests of the members and former members and any other persons to whom a fiduciary duty is owed

...

Subsection 44(1) of the PBSA further sets out the duty of loyalty in respect of investments as follows:

Pension plan investments, loans and other pension plan financial decisions must be made in accordance with this Act and the regulations and in the best financial interests of plan members, former members and other plan beneficiaries.

Note, however, that this is a general common law rule that exists regardless of whether or not trustees are bound by the PBSA. The duty of loyalty often comes up in the context of conflict of interest, there being a prohibition against unauthorized profit or compensation.

The trustee must avoid any conflict of interest between his or her personal interests and the interests of the beneficiaries. In particular, the trustee must not be allowed to profit or benefit personally by reason of his or her status as trustee. The trustee will be in breach of the conflict of interest rule if he or she secures a benefit as a result of his or her status as trustee, even if the benefit was not secured at the expense of the trust or if it was a benefit that the trust was incapable of obtaining.

Section 8(9) of the PBSA states that:

An administrator or, if the administrator is a Board of Trustees, a member of the board who is the administrator, must not knowingly permit the administrator's interests to conflict with the administrator's duties and powers in respect of the pension plan.

Section 8(10) of the PBSA also specifies that entitlement to a pension or benefit under the plan does not constitute a conflict of interest. This is important as trustees would otherwise often be forced into a position of apparent conflict.

The administrator's duty to act solely in the best interests of the trust and the beneficiaries when carrying out duties with respect to the Plan is also known as the "one hat rule" or the "two hat rule". This rule will be particularly important where members of the pension committee also have executive roles in the organization administering the plan. Certain cases illustrate this rule:

1. MacKinnon v. Ontario (Municipal Employees Retirement Board) (2007 ONCA 874)

Plaintiffs alleged that the Board was negligent in the negotiation of contracts with former OMERS employees, ultimately profiting from the contracts.

The Court refused to strike claims for breach of fiduciary duties and unjust enrichment.

2. Re Slater Steel Inc. (2008 ONCA 196)

This case deals with the circumstances in which directors and officers may not act as directors and officers (one-hat/two-hat rule). Slater was put into receivership. Subsequently, Morneau Sobeco became the successor sponsor of the unfunded pension plan.

Morneau Sobeco brought an action against Norton, the former actuary of the Plan, and Norton's employer Aon Consulting inc. Aon and Norton then each sought to initiate third party proceedings against the former directors, officers or employees who served on Slater's Audit Committee. Slater had given its personnel on the Audit Committee responsibility for management and administration of the plans, and the Audit Committee had performed Slater's duties at the relevant times.

Allegations included that the members of the Audit Committee followed a deliberate strategy to minimize the contributions that Slater would be required to make to the Plan when they knew, or ought to have known, that Slater was insolvent or on the brink of insolvency.

Such a strategy allegedly involved, among other things, instructing Norton to prepare the solvency valuation using an asset smoothing method and deliberately delaying proceedings in order to avoid having Slater make pension plan contributions prior to seeking protection from its creditors.

The Court of Appeal allowed the third party claims to proceed. The claims were not barred under orders made under the Company Creditors Arrangement Act as the claims related to Slater personnel not in their roles as directors and officers, but rather as individuals who were agents and employees of Slater, the plan's administrator.

3. Sutherland v. Hudson's Bay Company (2007 CanLII 30293 (Ont. S.C.))

This case deals with the “one hat/ two hat rule”.

In 1994 HBC amended its pension plan such that the Plan, formerly closed, could be re-opened to 8000 new Zellers employees who became members of a DC section added to the Plan on a going forward basis. In 1998, HBC further amended the Plan to introduce 7000 employees of K-Mart to the Plan on the same basis. HBC used surplus in a pension plan to fund contribution holidays in respect of employer obligations under both DC and DB sections of the Plan.

Among other things, the plaintiffs, who were beneficiaries under the original DB section of the Plan, claimed that HBC's power to amend the Plan is subject to the restriction that any amendment that affects the trust must be for the exclusive benefit of Members of the Plan at the time of the amendment.

The plaintiffs grounded the argument in contract based partly on the general fiduciary duty imposed on HBC by virtue of its position as the administrator of the Plan. The Court determined that the Plan was properly amended. The Plan sponsor exercising a power of amendment in respect of pension plan documentation (i.e. a role undertaken as administrator not trustee) is not subject to a fiduciary obligation in favour of pension plan members.

The Administrator may, however, still have a duty to act in good faith.

4. Preventative Actions

To prevent liability issues, trustees should maintain a disclosure policy for trustees, take conflicts that arise very seriously, and take appropriate and immediate action if they find themselves in conflict of interest situation.

A trustee that has a relationship with an organization that is the subject of a vote at a trustee meeting must abstain from voting. Note that in this circumstance, a trustee's actions will be considered more closely if the decision of the board mirrors the best interests of the conflicted trustee.

V. DUTY OF CARE

To satisfy the standard of care imposed on trustees, a trustee must exercise the care, diligence and skill that a person of ordinary prudence would exercise when dealing with the property of another person. This is an objective standard: all trustees are held to the same standard regardless of training, experience or knowledge. This does not mean that a trustee cannot make mistakes. A trustee is not a guarantor or insurer; however, trustees must exercise prudence in decision-making.

The common law is codified in the PBSA. Subsection 8(5) states:

In the administration of a pension plan, the administrator must

...

(b) exercise the care, diligence and skill that a person of ordinary prudence would exercise when dealing with the property of another person.

Subsection 44(1) of the PBSA further sets out the duty of care in respect of investments. This is a more specific standard:

(2) Pension plan assets must be invested in a manner that a reasonable and prudent person would apply in respect of a portfolio of investments made on behalf of another person to whom there is owed a fiduciary duty to make investments without undue risk of loss and with a reasonable expectation of a return on the investments commensurate with the risk.

These principles are illustrated by the following cases:

1. *Fales v. Canada Permanent Trust Co.* ([1977] 2 S.C.R. 302)

The defendants failed to sell shares forming part of an estate in a timely fashion, with disastrous results. The Court held the trustees liable, noting that they had failed to exhibit prudence and sagacity in carrying out the trustee functions.

This case discussed how a higher standard of care may be expected of a professional trustee or advisor with special skills, but did not go so far as to impose such a higher standard of care.

2. *Deans v. Thachuk* (2005 ABCA 368)

The provincial superintendent found significant breaches of compliance and unsound administrative practice. Accordingly, plan members brought suit alleging breach of fiduciary duty and negligence.

This decision allowed the member plaintiffs to have their interim costs paid from the pension fund.

3. *Froese v. Montreal Trust Co. of Canada* ((1996), (137 D.L.R. (4th) 725 (B.C.C.A))

A plan suffered a shortfall and was wound up, resulting in greatly reduced pensions for the beneficiaries.

Montreal Trust, the custodial trustee of the funds, had not notified plan members of the employer's failure to make contributions, and had continued to allow funds to be withdrawn from the plan regardless of the irregular contributions. The Court held that as a trustee, Montreal Trust was obliged to respond to the danger faced by beneficiaries and should have known of the danger to the pensions.

This is a difficult case as many custodial trustees take the view that their role is limited in that they simply follow instructions provided by the employer. However, the BCCA arguably holds custodial trustees to a higher standard.

4. *Ermineskin Indian Band and Nation v. Canada* (2009 SCC 9)

At common law, trustees have a general duty to invest the trust monies. However, the Supreme Court confirmed in this case that there is no duty of a trustee at common law to "guarantee against risk of loss" to the trust as a result of investment, or to guarantee an increase in the trust due to investment. The Court concluded that it was possible for a trustee to satisfy the appropriate

standard and duties of care, with the result of a loss to the trust. The trustee cannot be liable for this loss.

VI. DUTY OF IMPARTIALITY OR EVEN HANDEDNESS

A trustee cannot prefer one beneficiary or one group of beneficiaries over another without a proper reason.

There must be procedural fairness in the trustee's decision-making; the trustee cannot be an advocate or a judge. Though it is permissible to bring different perspectives to the table, the trustee should not act in a matter where he or she has personal ties, and where trustees are making a group decision, each trustee must base his or her decision on the same information.

A trustee cannot prefer one group to another without a valid reason. This can be a difficult for trustees of trusts with many beneficiaries. However, while trustees must be impartial, they do have the discretion to differentiate. Impartiality means that the trustees must give equal consideration, not necessarily equal treatment.

1. *Boe v. Alexander* ((1987), 15 B.C.L.R. (2d) 106 (B.C.C.A.))

This is an older case, but it illustrates well the general duty of even-handedness.

The plan was set up such that benefits were earned for hours worked with a "participating employer" if contributions were made. The trustees accepted contributions from a non-participating employer for a senior union member. Accordingly, trustees gave one member credited service where no other member would have received it.

The Court found that the trustees had breached their duty of even-handedness and set aside their decision.

2. *Neville v. Wynne* (2006 BCCA 460)

A multi-employer negotiated cost plan was facing financial difficulties. The trustees made a decision to reduce benefits across the board, then further reduced benefits for active members.

The active members sued, arguing that the trustees had breached their duty of impartiality. The trustees had considered all relevant factors, including previous increases for active members, the vulnerable position of retirees etc. They had not considered any irrelevant factors.

The Court upheld the trustees' decision accordingly, noting that formal equality is not required.

3. Preventative Action

When making a decision, trustees should consider a range of options. Trustees should articulate their considerations and record the decision-making process to the extent practicable.

VII. DUTY TO ACT PERSONALLY

Historically, trustees were responsible for discharging every aspect of a trust's administration, and delegation was prohibited. Now, delegation is seen as necessary in light of the modern uses of trusts, such as large and complex pension plans. In fact, the trustee may have to delegate some powers in order to properly satisfy the duty of care. Some provisions of the Trustee Act specifically provide for delegation. For example, section 7 permits a trustee to delegate the receipt and discharge of money in certain circumstances to solicitors and bankers, subject to the provisions of the trust agreement, and section 14 permits the delegation of all trustee duties where a trustee is engaged in war service and is or intends to be outside of British Columbia for more than one month.

Further, section 15.5 of the Trustee Act permits the delegation of investment authority, subject to certain conditions including the following:

- (1) In this section, "agent" means any person to whom a trustee delegates investment responsibility.
- (2) A trustee may delegate to an agent the degree of authority with respect to the investment of trust property that a prudent investor might delegate in accordance with ordinary business practice.
- (3) A trustee who delegates authority under subsection (2) must determine the investment objectives for the trust and exercise prudence in
 - (a) selecting an agent,
 - (b) establishing the terms and limits of the authority delegated,
 - (c) acquainting the agent with the investment objectives, and
 - (d) monitoring the performance of the agent to ensure compliance with the terms of the delegation.
- (4) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
- (5) A trustee who complies with the requirements of subsection (3) is not liable to the beneficiaries or to the trust for the decisions or actions of the agents to whom the function was delegated.
- (6) This section does not authorize a trustee to delegate authority under circumstances in which the trust requires the trustee to act personally.
- (7) Investment in a mutual fund referred to in section 15.1(1) or a common trust fund referred to in section 15.1(3) is not a delegation of authority with respect to the investment of trust property. Note, however, that the Trust Agreement may specifically prohibit the delegation of some tasks.

Despite the guidelines noted above, it is not always clear what responsibilities can be delegated.

The general rule from the authorities seems to be that whenever the power, discretion or duty assigned to the trustee requires that a policy decision be made, the trustee must make the decision himself or herself. A policy decision is one which either determines how much and at what time a beneficiary takes, or directly affects the likelihood of the trust's object or purpose being achieved.

Advocates for trust law reform in BC have identified a need for clarity in the law regarding responsibility of a trustee for the agents he/she employs.

VIII. CONTINUING OBLIGATIONS ON DELEGATION

A trustee's obligations do not end by delegating a task. Where a trustee has established that he or she is permitted to delegate a task, the trustee must prudently select and supervise the agent.

This is expressly set out in subsection 8(7) of the PBSA, which states:

If an administrator employs an agent to carry out some of the duties of the administrator, the administrator must be satisfied of the agent's qualifications to perform the duties for which the agent is employed, and must carry out such supervision of the agent as is prudent and reasonable.

Accordingly, the trustee must personally select the agent, ensure that the agent has the necessary skill and training to carry out the delegated task, and supervise the agent in order to ensure the agent is carrying out his/her duties appropriately. Ensuring that delegates are properly selected and supervised is a key aspect of good governance, though what constitutes fulfillment of these criteria will differ on a case by case basis, depending on the circumstances at hand.

Interestingly, subsection 8(8) of the PBSA requires that the same duties of loyalty and care that apply to administrators in section 8 of the PBSA apply also to agents or employees of an administrator.

IX. LIABILITY FOR CO-TRUSTEES

Generally, a trustee is liable for his or her personal acts and omissions and not for those of co-trustees; a trustee does not ensure his/her co-trustee's honesty, attentiveness or competence.

However, where there is liability and loss in the circumstance where the trustees are acting together, the trustees are equally responsible for compensating beneficiaries, and are jointly and severally liable.

X. DELEGATION TO CO-TRUSTEES

A trustee may only delegate to his/her co-trustee where a third party agent could have been employed. A trustee cannot just leave the trust duties to co-trustees, merely rubber stamping their decisions. Accordingly, a trustee will remain liable where his/her personal participation as a trustee is called for and loss results from the wrongful or negligent act or omission of his/her co-trustees.

It can be said that a passive trustee proceeds at his or her peril, as it is no defence for a trustee to say that an action was carried out by the other trustees.

Similarly, voting against a matter at a meeting will not relieve a trustee of liability if the trustee could have taken further steps to prevent the loss, such as applying to the court for injunctive relief. The Court will assist the trustee where, though he or she has acted properly and prudently, the breach and consequent loss has occurred in the discharge of a task that could properly be left to the co-trustee to perform. An example of this principle is set out below:

1. *Bellai v. Forest Industry Pension Plan (Trustees of IWA) (2003 BCSC 1077)*

One issue in this case was whether the trustees had properly considered the plaintiff's application for past service credit.

The matter was referred to the audit committee who then provided recommendations at a full meeting of the trustees. The trustees accepted the audit committee's recommendations and rejected the application. The audit committee appeared to have considered the plaintiff's application. The question, however, was whether the trustees themselves gave the matter any consideration, and whether the consideration by the committee met their obligation to consider the application.

Evidence suggested that the audit committee's recommendations were accepted without review. The plaintiff also argued that the audit committee was not strictly speaking a subcommittee of the Board of Trustees as not all of its members were trustees.

The Court agreed with the plaintiff that the trustees had improperly delegated their authority and referred the matter back to the Board of Trustees.

2. *Preventative Actions*

A trustee must ensure the procedures for the selection and monitoring of delegates have been documented and that appropriate records are kept which demonstrate the procedures have been followed.

For example, the procedure by which an investment manager is selected should be documented and records should be kept of the reports and other processes by which the trustees have monitored and supervised the delegate. Delegates should make regular and thorough reports to trustees.

The trustee should be very familiar with the agreements entered into with delegates. They should know exactly what the delegates have agreed to do, including in respect of time frames, service delivery standards, etc.

It is important to invite delegates to report to board meetings and for the trustees to ask difficult questions of the delegates. Mistakes in this area can have serious consequences for the trustees themselves as well as for the plan.

In some circumstances, complete delegation by a trustee may be appropriate where the delegate is an expert in a particular field. Even in this situation, a trustee should ensure that there is still some reporting and some ability to determine if the delegate is behaving appropriately.

XI. DUTY TO INFORM BENEFICIARIES

Trustees have traditionally been required to advise beneficiaries of their rights. Clearly, this is a much more difficult task when dealing with large, complex trusts with multiple beneficiaries, such as pension trusts.

Section 10 of the PBSA specifies particular information to which plan members are entitled.

Under the PBSA, the benefits a member is entitled to obtain depend upon that member's circumstances, such as whether the member is a current or former member. Section 10 also prescribes information that is to be provided to an employee who is eligible or about to be eligible to join a plan.

Generally, the trustees should ask themselves the following questions:

- (i) Was the content of the notice to the beneficiary accurate and sufficient?
- (ii) Were all affected parties given notice?

Trustees who provide erroneous or incomplete information can be liable for negligent misrepresentation if the beneficiaries are able to show that they relied on the information to their detriment.

The subsequent inquiry is into how far the duty to inform beneficiaries extends. A trustee should consider the following cases:

1. *Lancot v. Civil Service Superannuation Board* (2007 MBQB 125)

The injured plaintiff applied for a disability pension. His application was not rejected by the Board, but by virtue of the communications that had occurred, he thought it was. Fourteen years later, the issue was re-visited.

The Board had made misleading representations and had failed to follow up with the beneficiary in order to clarify the plaintiff's rights. Further, the Plaintiff had relied on the Board's information to his detriment.

The Court granted an order extending the limitation period and granted leave to begin the action.

2. *Hembruff v. Ontario Municipal Employees Retirement Board* (2005 CanLII 39859 (Ont. C.A.))

The Board of Trustees made recommendations to the province of Ontario in respect of a surplus within the plan. These recommendations were implemented by the province, retroactive to January of 1999. Certain members who retired in 1998 proceeded to allege breach of fiduciary duty for not advising them of the contemplated changes.

The Court of Appeal decided that the failure to advise of potential changes does not constitute negligent misrepresentation, and that there was no duty to inform beneficiaries of potential changes to the plan. Information about potential changes is speculative and not highly relevant. Further, the duty sought by plaintiffs would impose an unmanageable burden on the trustees. However, if an

administrator does decide to advise members of changes to plan, the communications must be accurate and meaningful.

3. *Caponi v. Canada Life Assurance Co.* (2009 CarswellOnt 113 (Sup. Ct.))

A supplemental pension plan was partially wound up, resulting in lump sum payouts to deferred vested participants in the plan. Other members of the plan were not affected by the winding-up. The representative plaintiff in the resulting class action claims that the trustees of the plan were not entitled to effect the partial wind-up without prior notice to the affected beneficiaries.

Although the class action was certified, the Court expressed some doubt as to whether the trustees would ultimately be held liable for breach of contract or breach of fiduciary duty. The Court noted that the obligations of the Trustees are grounded in the Trust Deed, which did not impose any obligation on the Trustees to monitor the conduct and decisions of the company. Instead, the Trust Deed limited the Trustees' liability to "wilful or individual fraud or wrongdoing" in the administration of the pension plan.

XII. DEFENCES TO A TRUSTEE'S BREACH

The following arguments may be used by a trustee to defend against breach:

- (a) The beneficiary approved, instigated, or acquiesced to the breach

Note, however, that the beneficiary must be a capable adult, and not unduly influenced. Further, while a beneficiary might be barred from making a claim, it may still be open to other beneficiaries to make a claim. There is no requirement for the trustee to show that the beneficiary personally benefitted from the informed consent or acquiescence.

- (b) The limitation period has expired

Section 3(3) of the Limitation Act, R.S.B.C. 1996, c.266 sets out the following:

After the expiration of 10 years after the date on which the right to do so arose a person may not bring any of the following actions:

...

- (b) against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy;
- (c) against a trustee for the conversion of trust property to the trustee's own use;
- (d) to recover trust property or property into which trust property can be traced against a trustee or any other person;
- (e) to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor;

However, the limitation period may be postponed. Section 6 of the Limitation Act provides that:

(1) The running of time with respect to the limitation period set by this Act for an action

(a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy, or

(b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee or previously received by the trustee and converted to the trustee's own use, is postponed and does not begin to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.

...

(3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):

...

(h) for breach of trust not within subsection (1).

(c) Laches

This is a question of fact in each case. It may still have considerable scope where the limitation legislation does not expressly lay down a maximum period.

(d) Statutory power of the court to excuse the trustee

Section 96 of the Trustee Act allows the court to relieve a trustee from liability where the trustee has acted honestly and fairly and ought reasonably to be excused. The section reads as follows:

If it appears to the court that a trustee, however appointed, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, then the court may relieve the trustee either wholly or partly from that personal liability.

In *Langley v. Brownjohn* (2007 BCSC 156), the Court outlined some of the factors which will be considered when determining whether a trustee should be excused. These include:

- (i) whether the trustee sought out and/or relied on professional advice in relation to the impugned decision;
- (ii) whether the opinion relied on was correct;
- (iii) the relationship and communication between the trustee and the beneficiaries leading up to the breach;

- (iv) whether the breach was a technical or minor error;
- (v) whether the trustee is a lay person or professional;
- (vi) whether the trustee has received remuneration; and
- (vii) the quantum of loss.

XIII. PROTECTING TRUSTEES FROM LIABILITY: DILIGENCE

A trustee's first line of defence is prevention. Good governance guidelines and practices are a cost effective way to manage risk, and go a long way toward preventing future liability.

- (a) Trustees should carefully consider and document their governance practices, and regularly assess them against accepted standards. This includes:
 - (i) outlining the roles and responsibilities of individuals who help administer the plan;
 - (ii) outlining the steps taken to ensure that those responsibilities are met;
 - (iii) ensuring that the plan is administered in accordance with governing statutes and standards;
 - (iv) ensuring that the governance documents authorize the trustees to take the actions needed to protect the beneficiaries' interests;
 - (v) reviewing policies regularly and revising them as appropriate;
 - (vi) ensuring consistency among policies; and
 - (vii) filling in any gaps found within policies.

Compliance checklists are often an effective way to ensure that governance requirements are met and are up to par with current accepted standards.

- (b) Trustees should be very familiar with trust documentation. They should be aware of:
 - (i) any agreements the trustees have entered into;
 - (ii) any powers have been delegated;
 - (iii) the trustees' powers and duties under the terms of the trust agreement;
 - (iv) what the trustees are prohibited from doing; and
 - (v) any amendments made to trust documentation.
- (c) Generally, it is good advice for a trustee to just be careful and pay attention:

- (i) ask questions;
- (ii) thoroughly review all options in any decision making process; and
- (iii) carefully consider the appropriateness of practices such as how often trustees receive reports from agents/delegates, whether there are written policies and how often these policies are reviewed.

An example to keep in mind is *Alberta Society for Pension Reform v. Alberta* (2008 ABQB 74).

In this case, Alberta public sector plans were integrated with CPP in 1966. The plaintiffs claimed for \$3.75 billion based on alleged error in integrating CPP.

The Court held that the government was not liable for changes made by legislation, but this case still shows that there is no immunity from litigation and that historical documents may be a key to defending a claim.

XIV. PROTECTING TRUSTEES FROM LIABILITY: INDEMNIFICATION

At common law, trustees may recover reasonable expenses from the trust fund.

This right has been codified in s. 95 of the Trustee Act, which states as follows:

A trustee, without prejudice to the provisions of any instrument creating the trust... may reimburse himself or herself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his or her trust powers.

Litigation expenses are like other expenses. They will be paid from the trust provided they are reasonable.

The notion of “reasonable” is somewhat abstract and may not be comforting to a trustee, particularly when considering costs relating to lawsuits brought against the trustee. Accordingly, an extension of the common law principle of indemnification is often attempted in the trust instrument.

The following case applied the reasonableness analysis to legal costs:

1. *Burke v. Hudson’s Bay Company* (2008 ONCA 690)

The Court confirmed that legal costs are payable from a pension fund where the proceedings are brought to ensure the due administration of the pension fund, or for the benefit of all beneficiaries.

In this case, part of a business was sold, and a significant number of employees were terminated and transferred to a new employer, raising issues of surplus entitlement in the employees’ pension fund. There were ambiguities in the plan documentation that required the resolution of a number of novel legal questions at both the trial and appellate courts.

The Court noted that pension funds do not allow members the same level of scrutiny as beneficiaries in other trusts, such as estate trusts. As such, courts must take a closer look at the reasonableness of legal costs.

At the appeal level, the Court allowed payment out of the fund for the plaintiff's costs of \$43,000 for the appeal and cross-appeal. The Court denied HBC's request for \$280,000 for the appeal, and instead awarded \$140,000. The Court reasoned that the appeal was a one-day hearing, and the same counsel appeared as at trial. HBC also claimed indemnification for approximately \$2.23 million for the balance of the proceedings, which was referred back to the trial judge for determination.

The trust instrument will typically contain an indemnity or exculpation clause, which attempts to indemnify the trustee against all actions except those that can be characterized as grossly negligent or arising as a result of the trustee's wilful default.

Indemnity clauses are generally well accepted in Canadian courts; however it is not clear that they will be completely effective. They will be read narrowly by the Courts.

It is not acceptable, however, to exonerate a trustee from liability for any loss or damage however occurring (i.e., including liability for fraud or bad faith). Such a clause would be held invalid. It is also unacceptable to exclude compliance with legislation.

A detailed and specific clause is more likely to be enforced, presumably because a court would consider it evidence that the contracting parties put their mind to the clause.

In considering these matters, the following is a useful checklist:

- (a) Trustees should carefully consider the reasonableness of general expenses:
 - (i) Does the trustee need to fly business class to perform his/her obligations?
 - (ii) Do the trustee's expenses relate to an action outside the trustee's scope of authority?
- (b) Trustees should carefully consider the reasonableness of legal expenses:
 - (i) What is the purpose of the litigation?
 - (ii) Does the litigation further the administration of the trust? For example, there could be questions as to the appropriateness of appealing a decision if the trustee takes the question too far such that the litigation's purpose is no longer to resolve a question regarding the administration of the trust.

XV. PROTECTING TRUSTEES FROM LIABILITY: INSURANCE

Obtaining fiduciary liability insurance is now standard practice. This insurance will apply when a trustee is found to be liable. It ensures that:

- (i) any judgment against the trustees will be meaningful;
- (ii) trustees will not be liable for defence costs incurred in defending trust related claims; and
- (iii) the trust and its beneficiaries will be protected.

The trust agreement may even give express authority to pay liability insurance premiums out of the fund. It may be possible to fund liability premiums from the fund if the agreement is silent on the matter; however, the trustees must show that the expense benefits the beneficiaries.

Trustees should make thoroughly consider the scope and exceptions to coverage. For example, there may be requirements to report all claims or possible claims for continuing coverage, or limitation in respect of liability for others assumed under another agreement. Accordingly, each trustee should be canvassed thoroughly before policy renewal.

XVI. PROTECTING TRUSTEES FROM LIABILITY: LEGAL AND JUDICIAL ADVICE

(a) Judicial Advice

The Trustee Act permits trustees to obtain a judicial ruling on the construction of the trust instrument or a proposed course of action. Subsection 86(1) states:

A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge in chambers, for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a testator or intestate.

This process may be time consuming but is not necessarily so. It may be wisely used where trustees are wrestling with particularly difficult questions. It can also be useful where the trustees are comfortable with the action they decide to take, but where beneficiaries are likely to be disappointed and may accordingly start an action. The Court may, however, decline to advise the trustees.

Provided the trustees have given the Court all the relevant information and have not engaged in misrepresentation, fraud or wilful concealment, they will be deemed by acting on the Court's opinion to have carried out their duties as trustees. Section 87 reads:

- 1) The trustee, executor or administrator, acting on the opinion, advice or direction given by the court, is deemed, so far as regards his or her own responsibility, to have discharged his or her duty as trustee, executor or administrator in the subject matter of the application.

(2) This Act does not extend to indemnify a trustee, executor or administrator in respect of an act done in accordance with the opinion, advice or direction referred to in subsection (1) if the trustee, executor or administrator has been guilty of fraud, wilful concealment or misrepresentation in obtaining the opinion, advice or direction.

(b) Legal Advice

Judicial advice serves to provide the Trustees with legal certainty, and may present better optics when difficult decisions must be made. While legal advice is very useful, it doesn't provide the same protections as sections 86 and 87 of the Trustee Act. Acting on incorrect legal advice does not cure breach of trust. However, trustees who properly obtained advice may be able to claim under section 96 of the Trustee Act (acted honestly and reasonably and ought fairly to be excused).

Note that in order to have acted honestly and reasonably, the trustees must select, instruct and supervise the lawyer appropriately.

(c) Privilege Issues in Respect of Legal Advice

Issues may arise in respect of privilege depending on who pays for the legal advice sought.

Generally, legal advice is subject to solicitor-client privilege; however, the distinctive nature of the trust relationship can change this general rule. Because the trustee holds legal title to the trust property on behalf of the beneficiaries, all actions taken in relation to administering the trust, including obtaining legal advice, are done on behalf of beneficiaries. Accordingly, trustees may not be able to claim privilege over any legal advice obtained by them in their trustee capacity since that advice would also be property of the beneficiaries.

The trustees may want to obtain legal advice in their own capacity if a matter in issue is or might become the subject of a dispute with beneficiaries. In this circumstance, the trustees could not be reimbursed from the trust fund.

To be clear, in order for any protection to be afforded the trustees should be sure to obtain legal and/or judicial advice before acting.

XVII. OTHER CASES OF INTEREST TO TRUSTEES

(a) IWA- Forest Industry Pension Plan (Trustees of) v. Aspen Planers Ltd. (2006 BCCA 336)

A participating employer prohibited the trustees' auditor from reviewing employment records, arguing that it alone had the power to decide which of its employees should be in the plan.

The Court, however, decided that the trustees needed to review such records in order to do their job. This was a broad interpretation of audit and other enforcement powers of trustees as set out in the Trust Agreement.

The question remains open as to whether trustees would be liable if they do not exercise that power.

(b) *Ruddell v. BC Rail Ltd.* (2007 BCCA 269)

BC Rail instituted contribution holidays for itself and active members where a plan was in surplus. Retired members alleged breach of duty of impartiality and commenced a class proceeding.

Section 62 of the PBSA requires plans to contain an arbitration clause for the resolution of listed disputes, including disputes in respect of contribution holidays. Accordingly, the drafters of the PBSA clearly preferred arbitration for these kinds of disputes.

Note, however, that section 62 only concerns disputes between members and administrators, not disputes among trustees or between trustees and appointing parties.

XVIII. CONCLUSION

The task of a trustee can be daunting and there are many potential legal pitfalls for those who proceed without caution. However, those who act prudently with appropriate caution should negotiate these issues without liability.

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