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Osgoode Professional Development: The Essential  
Course in Pensions

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“Could I be sued?”

*Potential personal liability of individuals  
who govern pension plans*

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Exactly who is legally responsible for administering a pension plan?

- registered administrator has *absolute liability* under pension legislation
- FSCO website identifies registered administrator and address – typically:
  - board of individual trustees (MEPPs)
  - corporate employer
  - pension committee of individuals

**but ... anyone** who's involved in pension governance, even if not the registered administrator, has potential personal liability:

**at common law or contract law**

+

**under pension legislation**

**Does potential legal liability apply to anyone other than the registered administrator?**

Ontario pension legislation imposes liability on individuals who aren't the "administrator":

- "an employee or agent of an administrator" is subject to the following statutory requirements:
  - exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person
  - use all relevant knowledge and skill that you possess, or, by reason of your profession, business or calling, ought to possess
  - don't knowingly permit your interests to conflict with your duties and powers in respect of the pension fund

[section 22 of Pension Benefits Act of Ontario]

Every director, officer, official or agent of a corporation is guilty of an offence under the legislation, and could be fined and/or required to pay \$\$ to the pension plan, if the person:

- (a) causes, authorizes, permits, acquiesces or participates in the commission of an offence, or
- (b) fails to take all reasonable care in the circumstances to prevent the corporation from committing an offence

[section 110(2)]

Prosecution under legislation against individuals who aren't the "administrator" are rare in Ontario for example, in 2006:

- charges laid against corporations (the employers who were the administrators) + officers of the corporation for non-filing of annual forms
- corporations plead guilty and fined \$6,500 in one case; \$3,000 in another
- charges withdrawn against officers of the corporations

### **Participating Co-Ops**

Martha Martin v. Michael Barrett et al., as trustees of the Participating Co-operatives of Ontario Trusteed Pension Plan, CIBC Mellon Trust Company and Ted Workman

- Ontario-registered multi-employer pension plan promises pension benefits to approximately 2,300 current and former employees of 26 Ontario farm co-ops
- registered administrator: board of trustees of a MEPP: "Pension Committee Trustees"
- the plan was fully funded prior to 1997
- by 2003 its assets were \$60 million but its liabilities were \$120 million
- Koskie Minsky obtained certification of a class action against the Pension Committee Trustees claiming restitution for the deficit
- allegations of aggressive, risky investments in derivatives

2002 FSCO staff “pension examination” commented:

*“There does not seem to have been adequate supervision of agents...we found a lack of operational policies and procedures.”*

Statement of Defence in Participating Co-ops case:

*“The Trustees are unpaid volunteers ... Their own pension entitlements will be affected in the same way as the Plaintiffs.”*

Other named defendants in the class action:

- past trustees
- investment advisor
- actuary
- custodians (Canada Trust, CIBC Mellon, CIBC)
- law firm

A separate FSCO regulatory procedure regarding the Participating Co-Ops plan may assist the individual trustees being sued for the deficit:

- to surprise of many, the specific wording of this MEPP doesn’t allow reduction of benefits (in FSCO’s opinion)
- therefore, says FSCO, the employers are obliged to fund the deficit (not typically the case with MEPPs, where the employer’s obligation is thought to end when it makes fixed contributions)

The Pension Committee Trustees launched a court action trying to resign; not successful so far

### **Jeffrey Mines**

*René Langlois v. Denis N. Roy et al. and Réjean Coutu v. Denis N. Roy et al.*

- Under Quebec pension legislation, a “pension committee” is the administrator
- When the employer in this case was having financial difficulties, commencing in 1999, the pension committee changed the asset mix and investments to be more weighted towards equities (from 44.7% in 1999 to 73% in 2003)
- Following the employer’s bankruptcy, the pension committee resigned, and the Quebec pension regulator became the administrator
- At date of plan termination in 2002 it was only 64% funded
- January 2006: Superior Court of Quebec authorized two class action suits against seven pension committee members + pension consultants (Buck) + investment manager (TAL)
- claiming \$7 million

Allegation is that the deficit was caused by imprudent investment policies Jeffrey Mines case highlights the “two hats” challenge that Quebec pension committee members face:

- Quebec pension legislation says pension committee must act in best interest of plan members
- Caselaw clearly says that interests of the employer can and do conflict with interests of plan members, and employers *are* entitled to consider their interests as employer, not as administrator
- How does an employer representative on a pension committee balance the competing interests?
- Quebec pension regulator doesn’t know – but points out the challenge

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