

Duties, Responsibilities and Liabilities of Retirement Fund Trustees

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Declaration

I hereby declare that this is my own unaided work, the substance of or any part of which has not been submitted in the past or will be submitted in the future for a degree in to any university and that the information contained herein has not been obtained during my employment or working under the aegis of, any other person or organization other than this university.

(Name of candidate)

Signed

Signed this day of 2011 at Johannesburg.

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TABLE OF CONTENTS

1. Introduction

2. Australia
 - 2.1 Statutory Provisions
 - 2.2 Superannuation Plan Structure
 - 2.3 Duties, responsibilities and liabilities of Trustees

3. Botswana
 - 3.1 Statutory Provisions
 - 3.2 Pension Plan Structure
 - 3.3 Duties, responsibilities and liabilities of Trustees

4. Canada
 - 4.1 Statutory Provisions
 - 4.2 Pension Plan Structure
 - 4.3 Duties, responsibilities and liabilities of Trustees
 - 4.3.1 Alberta
 - 4.3.2 British Columbia
 - 4.3.3 Manitoba
 - 4.3.4 New Brunswick
 - 4.3.5 Newfoundland and Labrador
 - 4.3.6 Nova Scotia
 - 4.3.7 Ontario
 - 4.3.8 Prince Edward Island
 - 4.3.9 Quebec
 - 4.3.10 Saskatchewan

5. Mauritius
 - 5.1 Statutory Provisions
 - 5.2 Pension Fund Structure
 - 5.3 Duties, responsibilities and liabilities of Trustees

6. Namibia

6.1 Statutory Provisions

6.2 Pension Plan Structure

6.3 Duties, responsibilities and liabilities of Trustees

7. South Africa

7.1 Statutory Provisions

7.2 Retirement Fund Structure

7.3 Duties, responsibilities and liabilities of Trustees

8. United Kingdom

8.1 Statutory Provisions

8.2 Pension Fund Structure

8.3 Duties, responsibilities and liabilities of Trustees

9. United States of America

9.1 Statutory Provisions

9.2 Pension Trust Structure

9.3 Duties, responsibilities and liabilities of Trustees

10. Conclusion

11. Electronic Annexures

Australia

Electronic annexure 1- Superannuation Industry (Supervision) Act of 1993

Electronic annexure 2- Trusts Act of 1973

Electronic annexure 3- Superannuation Guarantee Act 1992

Electronic annexure 4- Criminal Code 2002

Botswana

Electronic annexure 5- Pension and Provident Funds Act 1987

Canada

Electronic annexure 6- Public Trustee Act

Electronic annexure 7- Alberta Employment Pension Plans Act, Revised 2000

Electronic annexure 8- British Columbia Pension Benefits Standards Act 1996

Electronic annexure 9- Manitoba Pension Benefit Act 1987

Electronic annexure 10- New Brunswick Pension Benefits Act 1987

Electronic annexure 11- Newfoundland and Labrador Pension Benefits Act 1997

Electronic annexure 12- Nova Scotia Pension Benefits Act 1989

Electronic annexure 13- Ontario Pension Benefit Act 1990

Electronic annexure 14- Prince Edward Island Pension Benefit Act 1990

Electronic annexure 15- Quebec Pension Benefit Act

Electronic annexure 16- Saskatchewan Pension Benefit Act 1992

Mauritius

Electronic annexure 17- Employment Superannuation Fund Act 1954

Namibia

Electronic annexure 18- Pension Fund Act 1956

Electronic annexure 19- National Pensions Act 1992

Electronic annexure 20- Social Security Act 1994

Electronic annexure 21- NAMFISA Act 2001

South Africa

Electronic annexure 22- Pension Fund Act 1956

United Kingdom

Electronic annexure 23- Pension Act 1993

Electronic annexure 24- Pension Schemes Act 1995

United States of America

Electronic annexure 25- Uniform trust code, Revised 2003

Electronic annexure 26- Employment Retirement Income Security Act of 1974

12. Tables

Australia

Table 1: Superannuation structure in Australia

Table 2: Duties and Responsibilities of Trustees

Table 3: Covenant Duties and Responsibilities of Trustees

Botswana

Table 4: Structure of Pension Plans

Canada

Table 5: Duties and Responsibilities

Table 6: Duties and Responsibilities

Table 7: Duties and Responsibilities

Table 8: Duties and Responsibilities

Table 9: Offenses and penalties

Table 10: Duties and Responsibilities

Table 11: Offenses and penalties

Table 12: Duties and Responsibilities

Table 13: Duties and Responsibilities

Table 14: Duties and Responsibilities

Table 15: Duties and Responsibilities

Table 16: Offenses and penalties

Table 17: Duties and Responsibilities

Table 18: Offenses and penalties

Table 19: Common Duties in 10 Canadian Provinces

Mauritius

Table 20: Structure of Pension Plans

Namibia

Table 21: Objectives of the Basic State Grant Act

Table 22: Structure of Pension Plans

South Africa

Table 23: Structure of retirement funds

Table 24: Duties and responsibilities

United Kingdom

Table 25: Objectives of the TPR

Table 26: Elements of the public pension programme

Table 27: Duties and Responsibilities

United States of America

Table 28: Duties and Responsibilities

Table 29: Civil action and liabilities

Table 30: Investment assessment facts

13. Reference

Abstract

This research examines the duties, responsibilities and liabilities of retirement fund trustees in various countries including South Africa. Duties, responsibilities and liabilities are always of great interest to insurance underwriters and trustees themselves, it has been found that trustees are often unaware of their duties, responsibilities and liabilities.

1. Introduction

The background of pension funds can be traced to the industrial revolution, where the need for business productivity and efficiency arose. The economic hardships faced by business did not always make it possible for companies to support retired employees out of company profits. Coupled with “improvements in medical science, which increased life-spans and the demand for better standards of living” (Downie, 2010, 3) a separate provision for retirement had to be made.

Pension funds are the single largest institutional investors globally with an equity ownership of up to 77% in the world’s largest 1000 companies (Davis, 2004, 2). ‘Pension funds are central to the health of the financial system and are a primary source of capital’, it is for this reason amongst many that pension fund management practises attract global interest (Johnson and De Graff, 2009, 45).

Other researchers, such as Davenport (2005), George (2006), Ikard (1996) and the well cited work undertaken by Myners in his report 2001; have contributed greatly to the understanding of pension trustee’s duties. Their findings have made regulators, boards of trustees as well as fund beneficiaries aware firstly of the duties and responsibilities entrusted to trustees; secondly, the possible liabilities faced by trustees as a result of lack of knowledge and/or breaching of these duties, and lastly, the correlation between fund governance and performance directly influenced by oversights in the management of funds.

The structure of the report will be in three parts per country, firstly focusing on the statutory provisions, secondly looking at the various retirement systems per country, thirdly investigating the duties, responsibilities and finally focusing on the liabilities of the trustees.

2. Australia

2.1 Statutory

The primary federal legislation regulating the operations and investment of monies in superannuation funds is the Superannuation Industry (Supervision) Act of 1993 (SIS Act) (Electronic annexure 1). The SIS Act describes retirement funds in Australia as long term savings funds that function as post retirement income.

“The law governing superannuation is comprised of Federal statute and common law (case law) with an overlay of taxation legislation enacted by the Federal government” (Hoser, Henzell and Waldron, 2002, 1). They also mention that trustees have to adhere to the provisions of the trust deed constituting the trust as well as Australian trust law, in the form of the Trusts Act of 1973 (Electronic annexure 2).

Superannuation funds in Australia are operated under a trust model as a requirement of the ‘SIS’ Act. Trustees have “legal ownership” of the contributed funds with the “economic or beneficial interest” belonging to the fund participants (Hoser, et al, 2002, 1).

Hu and Stewart report that the funds are also subject to directives and management by three main authorities, firstly the Australian Prudential Regulation Authority (APRA) - prudential regulator, mainly covering issues which affect the financial health of supervised financial services institutions. Secondly the Australian Securities and Investments Commission (ASIC) the conduct and disclosure regulator, is mainly concerned with market integrity and business conduct issues. Lastly the Australian Taxation Office (ATO) - main regulator of the self-managed superannuation funds (SMSF)”

2.2 Superannuation Plan Structure

Prior to the 1992 Superannuation Guarantee Act (SGA, Electronic annexure 3), superannuation funds in Australia were viewed as an industrial award negotiated by the unions. The SGA was initiated as part of a major reform package focusing on Australia's retirement income policies (Mitchell and Piggott, 2000, 4).

The system takes the form of a three pillar approach with the first pillar being the means-tested government age pension system (i.e. means test refers to an investigation process undertaken to determine whether or not an individual or family is eligible to qualify for help from the government), considered in a lot of countries as “safety nets”, which offers a “minimum guarantee” of income. The second pillar is private savings generated through compulsory contributions to private superannuation funds, and the third pillar voluntary savings through superannuation funds and other investments (Mitchell and Piggott, 2000, 3)

The table below shows that the private savings are made up of five main types of remuneration related superannuation schemes namely:

Table 1: Superannuation plan structure

1.	Public Sector Funds	provided to public sector employees, such as government employees, teachers and nurses to name a few.
2.	Industry Funds	occupational pension plan created “by enterprises within a single industry, or related industries”
3.	Corporate Funds	occupational pension fund founded by a distinct “enterprise or companies within the same group”
4.	Retail Funds	Individual pension funds that normally originate from financial organisations
5.	Small superannuation funds or self managed superannuation fund (SMSF)	which has less than five members including small Australian Prudential Regulation Authority (APRA) funds.

Source: Hu and Stewart, 2009, 30

2.3 Duties, responsibilities and liabilities

As mentioned in section 2.2, specific duties and responsibilities are codified in the SIS Act whilst others are the subject of common trust law. Part 12 of the SIS Act regulates the duties and responsibilities of trustees.

SIS Act part 1, division 2, section 10, defines trustees as “..... in relation to a fund, scheme or trust, means:

(a) If there is a trustee (within the ordinary meaning of that expression) of the fund, scheme or trust—the trustee; or

(b) In any other case—the person who manages the fund, scheme or trust”.

Table 2: Duties and Responsibilities of Trustees

Duties	Section of SIS Act, Part 12	Responsibilities
To establish arrangements for dealing with inquiries or complaints	101	Each trustee of a regulated superannuation fund other than a self-managed superannuation fund, or of an approved deposit fund, must take all reasonable steps to ensure that there are at all times in force arrangements under which: a) a person referred to in subsection has the right to make an inquiry or a complaint of the kind specified in that subsection in relation to that person and b) an inquiry or complaint so made will be properly considered and dealt with within 90 days after it was made.
to seek information from investment manager	102	If an agreement has been entered into with an investment manager to invest the funds of the superannuation, the trustee must request the following information: a) returns on investment b) assess the capability of the investment manager to manage the investments of the entity. The trustees can terminate an agreement that was made prior to this section, if the agreement does not incorporate the above
to keep minutes and records	103	trustees must keep, and retain for at least 10 years, minutes of all meetings of the trustees at which matters affecting the entity were considered.
to keep records of changes of trustees	104	Each trustee of a superannuation entity must ensure that up-to-date records of: a) all changes of trustees of the entity; and b) all changes of directors of any corporate trustees of the entity; and c) all consents given under section 118 (consent to appointments)
to keep reports	105	Each trustee of a regulated superannuation fund or of an approved deposit fund must ensure that: (a) copies of all member or beneficiary reports are kept, and retained so long as they are relevant and in any event for at least 10 years; and (b) those copies are made available for inspection by a member of the staff of the Regulator if requested to do so by a member of that staff.

Duties	Section of SIS Act, Part 12	Responsibilities
to notify the Regulator of significant adverse events	106	If a trustee of a superannuation entity becomes aware of the occurrence of an event having a significant adverse effect on the financial position of the entity, the trustee must ensure that a trustee of the entity immediately notifies the Regulator in writing of the event.
to notify Commissioner of Taxation of change in status of entity	106A	If a trustee of a superannuation entity: (a) has knowledge that the superannuation entity has ceased to be a self managed superannuation fund; or (b) has knowledge that the superannuation entity has become a self managed superannuation fund since first becoming a superannuation entity; the trustee must ensure that a written notice is given to the Commissioner of Taxation.
of trustee of employer-sponsored fund to establish procedure for appointing member representatives	107	This section applies if the trustee, or the trustees, of a standard employer-sponsored fund (other than a superannuation fund with fewer than 5 members) are required by law: (a) if the trustee is a single corporate trustee—to have member representatives on the board of directors of the trustee; or (b) if there is a group of individual trustees—to have member representatives included in the group; or (c) in any other case—to have member representatives on a policy committee of the fund.
of trustee of employer-sponsored fund to establish procedure for appointing independent trustee	108	This section applies if a standard employer-sponsored fund (other than a self managed superannuation fund) relies on subsection 89(2) in order to comply with the basic equal representation rules. (That subsection deals with an additional independent trustee or an additional independent director of a corporate trustee.)
Investments of superannuation entity to be made and maintained on arm's length basis	109	A trustee or investment manager of a superannuation entity must not invest in that capacity unless: (a) the trustee or investment manager, as the case may be, and the other party to the relevant transaction are dealing with each other at arm's length in respect of the transaction; or (b) both: (i) the trustee or investment manager, as the case may be, and the other party to the relevant transaction are not dealing with each other at arm's length in respect of the transaction; and (ii) the terms and conditions of the transaction are no more favourable to the other party than those which it is reasonable to expect would apply if the trustee or investment manager, as the case may be, were dealing with the other party at arm's length in the same circumstances.

The following duties fall under covenants, part 6, section 52(2) of the SIS Act, these duties must go together with the “governing rules” of superannuation funds:

Table 3: Covenant Duties and Responsibilities of Trustees

Duties	Section of SIS Act, Part 6	Responsibilities
To act honestly, in good faith and in the best interests of the beneficiaries	section 52(2a)	to act honestly in all matters concerning the entity;
to exercise the care, diligence and skill	section 52(2b and c)	in relation to all matters affecting the entity, as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide and to ensure that the trustee’s duties and powers are performed and exercised in the best interests of the beneficiaries;
to segregate and not commingle	section 52(2d)	To keep the money and other assets of the entity separate from any other money or assets , respectively: i) that are held by the trustee personally or ii) that are money or assets, as the case maybe, of a standard employer-sponsor or an associate of the standard employer-sponsor of the entity
Loyalty and Conflict of Interest	section 52(2e)	not to enter into any contract, or do anything else, that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee’s functions and powers
Diversify investments	section 52(2f)	to formulate and give effect to an investment strategy that has regard to the whole of the circumstances of the entity including, but limited to the, to the following: a) the risk involved in making , holding and realising, and the likely return from, the entity’s investments having regards to the its objective and its expected cash flow requirements b) the composition of the entity’s investments as a whole including the extent to which the investments are diverse or involve the entity in being exposed to risk in an inadequate diversification; c) the liquidity of the entity’s investment having regard to its expected cash flow requirements; d) the ability of an entity to discharge its existing and prospective liabilities

Duties	Section of SIS Act, Part 6	Responsibilities
To manage Reserves	section 52(2g)	if there are any reserves of the entity—to formulate and to give effect to a strategy for their prudential management, consistent with the entity’s investment strategy and its capacity to discharge its liabilities (whether actual or contingent) as and when they fall due
Access to Information	section 52(2h)	To allow a beneficiary access to any prescribed information or any prescribed documents.

Liabilities

Contravention of the SIS Act could result in civil liability, which invokes a civil penalty or criminal liability. According to the SIS Act, “Chapter 2 of the *Criminal Code* (Electronic annexure 4) sets out the general principles of criminal responsibility.” A contravention can be ignored unless it is an “offence, a contravention of a civil penalty provision or a contravention of the *Taxation Administration Act 1953*.”

Trustees become liable if they fail to satisfy the “culpability test” which tests the following elements amongst others; the gravity of the contravention and how many trustees were directly or indirectly involved in the contravention (SIS Act, section 42 (1A) (a), 118).

The following case is an example of a contravention of a duty as well as a covenant:

In *Finch v Telstra Super Pty Ltd*, Mr Finch had undergone numerous surgical operations in an attempt to change his gender and as a result he stated becoming ‘severely depressed, suffered from an adjustment disorder and was sensitive about his appearance’ (Supreme Court of Victoria 2008). Mr Finch then made an ‘application for the payment of a total and permanent invalidity (TPI) benefit under the Trust Deed’ which was declined by the trustees.

According to judge Byrne J of the High Court, the trustees has failed in their duty of inquiry as the trustees has failed to make sufficient inquiries and had not given enough consideration to Mr Finch circumstances, (Supreme Court of Victoria 2008).

3. Botswana

3.1 Statutory Provisions

Pension funds in Botswana are governed by the Pension and Provident Funds Act 1987 (Electronic annexure 5) and the pension fund rules. “Since 2008, all pension and provident funds, trustees and administrators are under the regulatory control of Non-Banking Financial Institutions Regulatory Authority (NBFIRA)” (Oxford Policy Management, 2010, 17)

3.2 Pension Plan Structure

Botswana operates a universal pension system similar to that of Namibia; the pension plan structure is divided into two sections namely, public and private pensions. The table below provides a summary view of the current structure:

Table 4: Structure of Pension Plans

TYPE OF PENSION	COVERAGE	CONTRIBUTION RATES	BENEFITS
Public: Universal old age pension	Aimed at Botswana citizens over the age of 60 years, qualification requirement is citizenship	Nil	P220 as of 2009
Public: Botswana Public Officers Pension Fund (BPOPF)	Aimed at public sector employees		Defined contribution arrangement
Private: Voluntary occupational pension	Aimed at private sector employees	Varies between 10% and 15%, with employee contributing 5% and employer between 5%-10%	Include both defined benefit and defined contribution
Private: provident funds	Aimed at self-employed individuals and those who can contribute over and above their occupational pensions	Varies	Defined contribution that pays out lump sum, which can be used to purchase a annuity

It can be seen from the above table that within the public funds there are two types of pension, specifically the universal old age pension and the Botswana Public officers Pension Fund (BPOPF) and voluntary occupational pension and provident pensions under private pensions.

The universal old age pension provides a monthly income of P220 to citizens of Botswana over the age of 65 years; this pension is on a non-contributory basis and is funded through government revenue (Stewart and Yermo, 15, 2009). Under the universal pension the government also caters for orphans, people with disabilities, the destitute, and the chronically ill (Devereux, 554, 2007).

The BPOPF is a government scheme aimed at public sector employees; it is previously a defined benefit arrangement but has since been converted to defined contributions (Stewart and Yermo, 15, 2009).

Within the private sector, there are voluntary occupational pensions which are usually established by medium to large companies for their employees. The employer and employee contribute towards the plan at a rate of 10% to 5% and 5% respectively and these plans can either be defined benefit or defined contribution, however defined contribution dominate plan (Hassan, Hendrie, Okurut, 2008, 21-22).

The last pension option is the provident fund, which is aimed at self-employed individuals and those who can afford to contribute to the fund over and above their occupational pension. This option pays out a lump sum which can be used to purchase an annuity from an insurance company, (OECD Global Pension Statics, 2011).

3.3 Duties, responsibilities and liabilities of Trustees

According to the Pension and Provident Funds Act 1987, part III, section 7, “the rules of a fund shall make provision for the functions, powers, duties and areas of responsibility of every director, manager, controller, principal officer and, where the fund is a trust fund, the trustees”.

4. Canada

4.1 Statutory Provisions

Pension plans in Canada are governed by common law, the Federal statute (The Public Trustee Act, Electronic annexure 6) and provincial governments through regulatory laws commonly known as Pension Benefit Acts (PBA) or Employment Pension Plan Act (EPPA).

The Federal government regulates private pensions in “nationally regulated industries such as banking, communications, international and inter-provincial transportation and international and inter-provincial trade” (Baldwin; 2007, 5).

Other industries outside of this scope are regulated by provincial governments. This regulation according to Baldwin (2007) is ‘derived from the right to regulate the industry in which plan members work’.

Baldwin (2007) observes that the regulatory laws were adopted in the late 1980’s as a consequence of the decision not to inflate the government employee pension plan benefits, i.e. the Canadian and Quebec Pension Plans (C/QPP). Therefore a need arose to tighten the regulation on the “workplace pension plans and the expanded tax support for individual retirement savings arrangement” as an alternative, hence the prescriptive nature of the regulation (Baldwin, 2007, 11).

Brown and Liu (1999) however contend that the first provincial legislation can be traced back to 1965 in Ontario. The legislation sought to set ‘standards for employment pension plans. According to Baldwin (2007) the province of Ontario ‘is the largest regulation jurisdiction’ with approximately 40% of Canadian plans registered in the province.

According to Brown and Lui (1999) pension benefit laws apply only to private sector pension plans and not to Federal and provincial government plans and Registered Retirement Savings (RRSPs). Pension benefit laws were designed to protect the procedural rights of plan members.

There is a lack of consensus amongst scholars regarding the uniformity of pension benefit laws in the Canadian provinces.

Baldwin (2007) states that “the federal and provincial regulation is usually uniform” in the following areas, Investment Policy, Benefit Provisions, financing and plan governance, including the rights of plan members.

Davis (1993) and Brown and Liu (1999) differ with the uniformity theory; they believe that provincial regulation varies between provinces with the leading provincial regulation being in Ontario.

Lastly, regulation in Canada covers the following topics: Vesting and locking in of pension benefits, “sets rules regarding funding, investment of pension funds and disclosure of benefit provisions” as well as prescribes the powers and duties of administrators/pension trustees (Maxwell, 1999, 6). It also requires “pension plans to have an administrator, the sponsoring employer to select fund trustees, the creation of a pension advisory committee and approval from plan members for certain uses of pension surpluses” (Baldwin, 2007, 6)

4.2 Pension Plan Structure

Canada’s pension income system, as identified by Maxwell (1999), consists of three levels, firstly the government administered pension programme made up of Old Age Security (OAS), Guaranteed Income Supplement (GIS) benefits and the Canada/Quebec pension plan (C/QPP). Secondly employer-sponsored retirement income plans such as Registered Pension Plans (RPPs) and finally individual retirement savings accounts specifically Registered Retirement Savings Plans (RRSPs).

The OAS provides to 65 year old Canadians, (who meet certain residency requirements), a flat monthly pension, amounting to ‘14% of average wages and salaries’ (Baldwin, 2007, 3). Maxwell (1999) describes the GIS is an income-tested benefit that is intended for ‘pensioners, their spouses and surviving spouses with a low annual income’. It provides a monthly subsidy that is decreased ‘by one dollar for every two dollars of other income received, either than the OAS, to maintain the needs based approach to the benefit’ (Maxwell, 1999, 3).

The last of the government administered pension plans is the Canada/Quebec Pension Plan (C/QPP) which was effected in 1966; it provides ‘25% of the workers average annual lifetime earnings’ (Baldwin, 2007, 11). The aim of the programme is to offer ‘retirement income, disability, and death and survivor benefits’ (Maxwell, 1999, 3).

The most common private pension plan is the Registered Retirement Savings Plan (RRSPs), which forms the layer of the Canadian pension programme (Maxwell, 1999, 3). RRs are initiated by employers and are open to most Canadian employees with ‘the exception of plans set up exclusively for unionized employees and executive personnel’ (Baldwin, 2007, 4).

Other examples of private pension plans in the state of Ontario, according to the OMERS administration corporation 2010 annual report, the Ontario’s Teachers pension plan (union-controlled) is “responsible for administering pensions for public school teachers”. The plan is a multi-employer pension plan, jointly sponsored by the government of Ontario and the Ontario teacher federation.

Finally, the last tier is the tax-assisted individual retirement savings accounts known as the Registered Retirement Savings Plans (RRSPs). These accounts are not subject to provincial benefit Acts, the ‘contributions are tax deductible and the investment income accrues tax free until’ benefits are paid out to beneficiaries (Brown and Liu, 1999, 65).

A large fraction of RRSPs are in defined benefit plans but this is slowly changing to defined contribution. In “1997 RRs assets accounted for approximately 61% of total registered plan assets” (Brown and Liu, 1999, 66).

4.3 Duties and Responsibilities of Trustees

The duties and responsibilities of trustees under Canadian law are defined by the common law, the Pension Benefit Acts (PBA) that apply in the different provinces as well as trust deeds (Maxwell, 1999, 34).

4.3.1 Alberta

The duties and responsibilities of private pension administrators/trustees in Alberta are governed by Section 13 (General responsibilities of Administrators) of the Employment Pension Plans Act, (Electronic annexure 7):

Table 5: Duties and Responsibilities

DUTIES	SECTION OF THE ALBERTA EPPA	RESPONSIBILITIES
To administer the plan	Section 13(1)	The administrator of a pension plan is responsible for administering and shall administer the plan in accordance with this Act.
To ensure that plan complies with the Alberta PBA.	Section 13(2)	The administrator shall ensure that the plan, including its contractual provisions and the other plan documents, complies with this Act.
To ensure that plan is wound up in accordance with the Alberta PBA.	Section 13(3)	Where a plan has been terminated, the administrator shall ensure that it is wound up in accordance with this Act.
To ensure an actuarial valuation report and a cost certificate are undertaken in the case of a defined benefit plan.	Section 13(4)	The administrator shall, if the plan contains a defined benefit provision, have the defined benefit provisions of the plan reviewed in accordance with the regulations and have the results of the review set out in the form of an actuarial valuation report and a cost certificate.
Fiduciary Duty	Section 13(5)	While acting in the capacity of administrator, the administrator stands in a fiduciary capacity in relation to members, former members and others entitled to benefits.
To ensure that no prohibited provision is contained in the plan document	Section 13(6)	The administrator shall ensure that none of the other plan documents contain any provision that a pension plan is prohibited by this Act from containing.

4.3.2 British Columbia

The Pension Benefits Standards Act (PBSA) regulates private pension plans in British Columbia, with section 8 of the Act regulating duties and responsibilities of administrators/trustees, (Electronic annexure 8):

Table 6: Duties and Responsibilities

DUTIES	SECTION OF THE BRITISH COLUMBIA PBSA	RESPONSIBILITIES
To administer the plan	Section 8(1)	An administrator of a pension plan is responsible for the administration of the plan and must administer the plan in accordance with this Act and the regulations
To ensure that plan complies with the British Columbia PBA	Section 8(2)	The administrator must ensure that the pension plan, including the plan's contractual provisions, complies with this Act and the regulations.
To ensure that plan is wound up in accordance with the British Columbia PBA.	Section 8(3)	If a plan is terminated, the administrator must ensure that the plan is wound up in accordance with this Act and the regulations.
To ensure an actuarial valuation of the plan is undertaken	Section 8(4)	If the plan contains a defined benefit provision, the administrator must (a) have the plan reviewed in accordance with the regulations, and (b) have the results of the review set out in the form of an actuarial valuation report.
To act in good faith	Section 8(5a)	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,
Of care, diligence and skill	Section 8(5b) Section 8(6)	Exercise the care, diligence and skill that a person of ordinary prudence would exercise when dealing with the property of another person. The provisions of subsection (5) are in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of a trustee
To verify qualification of agent employed to carry out administrators duties	Section 8(7)	If and administrator employs and 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 the prudent and reasonable.
To avoid conflict of interest	Section 8 (9)	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.

DUTIES	SECTION OF THE BRITISH COLUMBIA PBSA	RESPONSIBILITIES
To inform the superintendent	<p>Section 9(1)</p> <p>Section 9 (2)</p>	<p>Within 30 days after becoming the administrator of a pension plan, the administrator must ensure that the superintendent is informed, in writing, of the administrator's name and address.</p> <p>The administrator must inform the superintendent, in writing, of any change in the administrator's name and address within 60 days after that change.</p>
To file reports	Section 9(3)	<p>Subject to this section, the administrator must file with the superintendent,</p> <p>(a) at the times prescribed and in the form required by the superintendent, returns containing information respecting the following:</p> <p>(i) the administration of the plan;</p> <p>(ii) contributions to the plan;</p> <p>(iii) membership in the plan;</p> <p>(iv) any other information necessary to permit the fulfilment of the superintendent's duties under this Act,</p> <p>(b) in the case of a plan that contains a defined benefit provision, refer to Section 9(3B) of the PBSA</p>
To file Financial Statements	Section 9 (7)	<p>(7) A plan must file audited financial statements, prepared in accordance with the accounting standards prescribed by regulation,</p> <p>(a) annually if the plan has assets exceeding the prescribed amount, and</p> <p>(b) at any time that the superintendent may require.</p>
Disclosure of information	<p>Section 10(1)</p> <p>Section 10(2)</p>	<p>An administrator must, in writing, and in the prescribed manner and at the prescribed times, provide information to specified persons.</p> <p>The administrator must provide all information under subsection (1) without charge</p>
To provide information to plan members	Section 10(4)	<p>Within 10 working days after receipt of a written request and without charge, the administrator must permit a person entitled to a benefit, or the spouse or a designated beneficiary or agent of the person entitled to a benefit,</p>

DUTIES	SECTION OF THE BRITISH COLUMBIA PBSA	RESPONSIBILITIES
To retain records	Section 11	An administrator, or any other person responsible for the administration of a pension plan, who has possession or custody of any record respecting the plan must retain the record

In the *Froese v Montreal Trust Company of Canada 1996*, the plan members’ brought an action against the plan trustees claiming the trustees had breached their fiduciary duty to warn them when the employer had discontinued making contributions to the plan [Froese v. Montreal Trust Co. of Canada (1996)].

The British Columbia Appeal court held that the “trustees has (sic) a duty to ensure that the plan was properly wound up, a duty it had breached by ignoring certain deficiencies in the actuary’s wind-up report”.

4.3.3 Manitoba

Under sections 28, 29 and 30 of the Pension Benefit Act of Manitoba, (Electronic annexure 9), the following duties and responsibilities apply to Manitoba pension trustees:

Table 7: Duties and Responsibilities

DUTIES	SECTION OF THE MANITOBA PBA	RESPONSIBILITIES
Care, diligence and skill	Section 28.1(2)	The administrator of a pension plan shall exercise the care, diligence and skill in the administration of the plan and the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
Investing Pension Assets	Section 28.1(2.1)	The administrator of a pension plan shall invest the assets of the pension fund, and manage those investments, in accordance with the regulations and in a manner that a reasonable and prudent person would apply in investing and managing a portfolio of investments of a pension fund.

DUTIES	SECTION OF THE MANITOBA PBA	RESPONSIBILITIES
Special Knowledge and Skill	Section 28.1(3)	The administrator of a pension plan shall use in the administration of the plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
Conflict of Interest	Section 28.1(5)	An administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the plan and the pension fund.
Responsibility for Agent	Section 28.1(7)	An administrator of a pension plan who employs or appoints an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed or appointed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.
Administrator to provide information	Section 29	The administrator of a pension plan must provide information about the plan and benefits under the plan in accordance with the regulations to such persons and in such circumstances as are prescribed.
Administrator to make documents available	Section 30	The administrator of a pension plan must make plan documents and related documents available in accordance with the regulations to such persons and in such circumstances as are prescribed.

4.3.4 New Brunswick

The following duties and responsibilities are prescribed under the New Brunswick Pension Benefits Act sections 15 to 18, 23 to 25 and 58, Electronic annexure 10:

Table 8: Duties and Responsibilities

DUTIES	SECTION OF THE NEW BRUNSWICK PBA	RESPONSIBILITIES
To file annual information return	Section 15(1)	The administrator of a pension plan shall file each year an annual information return in respect of the pension plan in the prescribed form and shall pay the prescribed filing fee.
To file additional reports	Section 15(2)	The administrator of a pension plan shall file additional reports at the prescribed times and containing the prescribed information.
To file additional a certified copy of a reciprocal transfer agreement	Section 16	An administrator of a pension plan shall file a certified copy of a reciprocal transfer agreement entered into in respect of the pension plan.
Care, diligence and skill	Section 17(1)	The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
To use the knowledge and skill possessed	Section 17(2)	The administrator or, if the administrator is a committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall use in the administration of the pension plan, and in the administration and investment of the pension fund, all relevant knowledge and skill that the administrator or member possesses or, by reason of that person's profession, business or calling, ought to possess.
Conflict of interest	Section 17(3)	An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit that person's interest to conflict with the person's duties and powers in respect of the pension fund.
To delegate	Section 18(1)	where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

DUTIES	SECTION OF THE NEW BRUNSWICK PBA	RESPONSIBILITIES
To ensure suitability of agent	Section 18(2)	an administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such of the agent as is prudent and reasonable.
Disclosure of information	Section 23(1)	<p>The administrator of a pension plan shall provide in writing to each person who will be eligible or is required to become a member of the pension plan</p> <p>(a) an explanation of the provisions of the plan that apply to the person,</p> <p>(b) an explanation of the person's rights and obligations in respect of the pension plan, and</p> <p>(c) any other prescribed information.</p> <p>This duty also applies to written requests for "prescribed documents and information, by members, former members and spouses, section 27(1). Sections 27(2) (a-c), 27(3) and 27(4) prescribe the place for the inspection of the documents as well as the form in which members/spouses can extract the documents and information.</p>
To inform pension fund members of amendments made to the pension plan	Section 24(1)	If the administrator of a pension plan applies for registration of an amendment to the pension plan that may adversely affect the pension benefits, rights or obligations of a member or former member or a person entitled to payments under the pension plan, the administrator shall transmit to each such member, former member or other person a written notice containing an explanation of the amendment and inviting comments to be submitted to the administrator and the Superintendent, and the administrator shall provide to the Superintendent a copy of the notice and shall certify to the Superintendent the date on which the last such notice was transmitted.

DUTIES	SECTION OF THE NEW BRUNSWICK PBA	RESPONSIBILITIES
To keep members informed	Section 25	The administrator of a pension plan shall transmit to each member a written statement at the prescribed intervals and containing the prescribed information in respect of the pension plan, the member's pension benefits and any ancillary benefits. 2002, c.12, s.9.
To invest	Section 58	Every person engaged in the investment of money of a pension fund shall ensure that the money is invested in accordance with this Act and the regulations.

Liability:

Table 9: Offences and penalties

OFFENCES	PENALTIES
88(1) a person who violates or fails to comply with any provision of the regulations commits an offence.	88(1.2) where an offence under this Act continues for more than one day, <p>(a) the minimum fine that may be imposed is the minimum fine set by the <i>Provincial Offences Procedure Act</i> multiplied by the number of days during which the offence continues, and</p> <p>(b) the maximum fine that may be imposed is the maximum fine set by the <i>Provincial Offences Procedure Act</i> multiplied by the number of days during which the offence continues.</p>

4.3.5 Newfoundland and Labrador

The duties and responsibilities of Newfoundland and Labrador pension trustees/administrators are governed by, the same provisions, parts of section 14, 16 and 17 of the Newfoundland and Labrador Pension Benefits Act, 1997, S.N.L. 1996, c. P-4.01, Electronic annexure 11, and are stated as follows:

Table 10: Duties and Responsibilities

DUTIES	SECTION OF THE NEWFOUNDLAND AND LABRADOR PBA	RESPONSIBILITIES
Duties of administrator	Section 14(1)(2)(4)	<p>(1) An administrator shall administer a pension plan and pension fund as a trustee for the employer, the members and former members of the plan, and other persons with an entitlement under the plan.</p> <p>(2) An administrator of a pension plan is responsible for administering the plan and the pension fund and for filing the required documents in accordance with this Act.</p> <p>(4) An administrator of a pension plan shall, within 30 days of becoming the administrator, inform the superintendent of</p> <ul style="list-style-type: none"> (a) The administrator's name and address; (b) The names and addresses of the persons who constitute the body that is the administrator; and (c) A change in the membership of the body that is the administrator
Filing requirements	Section 16(1)(2)(3)	<p>(1) An administrator of a pension plan shall file with the superintendent an information return for the plan in the form and containing the information required by the superintendent and as prescribed by the regulations.</p> <p>(2) An administrator of a pension plan shall file other information required by the superintendent and as prescribed by the regulations.</p> <p>(3) The contents and the method of preparation of the reports and qualifications of the persons or classes of persons by whom the report must be prepared shall be as required by the superintendent and as prescribed by the regulations.</p>

DUTIES	SECTION OF THE NEWFOUNDLAND AND LABRADOR PBA	RESPONSIBILITIES
Conflict of interest	Section 17(1)(2)(3)	<p>A person shall not be appointed to a body referred to in paragraph 12(1)(b), (c) or (e) or subsections 13(1) and (2) if there is a conflict of interest between the person's role as a member of the body and the person's role in any other capacity.</p> <p>(1) Where a person described in subsection (1) has a conflict of interest he or she shall, within 30 days after becoming aware of the conflict, declare the conflict to the body and, as the body directs,</p> <p>(a) Abstain from the matter of the conflict;</p> <p>(b) Eliminate the conflict; or</p> <p>(c) Resign as a member of the body.</p> <p>(3). Where the employer is the administrator of a pension plan under paragraph 12(1)(a), if there is a conflict of interest between the employer's role as administrator and the employer's role in any other capacity, the employer shall</p> <p>(a) Within 30 days after becoming aware of the conflict, declare the conflict to the pension committee or to the members of the plan; and</p> <p>(b) Act in the best interests of the members of the plan.</p>
Registration Requirements	Section (1)(3)	<p>(1) An administrator of a pension plan applying for registration of the plan, or an amendment to the plan, shall do so as required by the superintendent and shall provide the information required by the superintendent.</p> <p>(3) An administrator of a pension plan shall not administer the plan unless it is file for registration under this Act.</p>

DUTIES	SECTION OF THE NEWFOUNDLAND AND LABRADOR PBA	RESPONSIBILITIES
Disclosure of Information	Section 25(1)	<p>(1) an administrator of a pension plan shall provide in writing to a person eligible or required to become a member of the plan</p> <p>(a)An explanation of the terms and conditions and any subsequent amendments of the plan applicable to the person;</p> <p>(b)An explanation of that person's rights and obligations in respect of the plan; and</p> <p>(c)Other information that the superintendent requires to be provided</p>
To provide information to plan members	Section 25 (3)(4)	<p>(3) Where an amendment to a pension plan which affects the member's or former member's rights and obligations in respect of the plan is registered under this Act, the administrator of the plan shall, within 60 days after registration, provide a written notice and an explanation of the amendment to each member, former member or other person who is or will be affected by the amendment.</p> <p>(4)An administrator of a pension plan shall, at least once every 3 years or at the written request of a member or former member, provide each member, or that member or former member, with a written statement as required by the superintendent.</p> <p>(5) Where a member of a pension plan retires, ceases membership in the plan or dies, the administrator of the plan shall provide a written statement as required by the superintendent</p>
To make information available as requested by plan members	Section 25(7)	Each member or former member or principal beneficiary of a member or former member of a pension plan, once in each fiscal year of the plan may, personally or by an agent authorized in writing for that purpose, request in writing to examine documents filed with the superintendent under section 16, subsection 18(1) or a regulation or requirement of the superintendent under this Act, at the office of the administrator of the plan or at another place as agreed, and may request a photocopy of those documents.
Investments	Section 37	Assets of a pension plan shall be invested as prescribed by the regulations.

DUTIES	SECTION OF THE NEWFOUNDLAND AND LABRADOR PBA	RESPONSIBILITIES
Portability	Section 40	The administrator of a pension plan shall transfer money out of the pension fund under this section except where the transfer is not permitted under this Act.

Liability: Section 76 of the act provides remedies available for breach of the provisions of the act:

Table 11: Offenses and penalties

OFFENCES	PENALTIES
76. (1) Every person who contravenes this Act or the regulations is guilty of an offence.	76.(2)Every person who is guilty of an offence contrary to this Act or the regulations is liable on summary conviction to a fine not exceeding \$10,000 or to imprisonment for 6 months or to both.

4.3.6 Nova Scotia

There are a limited number of duties and responsibilities under the Nova Scotia Pension Benefits Regulations made under Section 13, 16 to 18, 21, 25, 51, 58, 67, 72 and 82 of the Pension Benefits Act R.S.N.S. 1989, c. 340, (Electronic annexure 12).

Table 12: Duties and Responsibilities

DUTIES	SECTION OF THE NOVA SCOTIA PBA	RESPONSIBILITIES
To administer actuarial valuations	Section 13(1) (5)	<p>The administrator of a pension plan must cause the plan to be reviewed and an actuarial valuation report and a cost certificate prepared by a person authorized by Section 14 not more than 3 years after the date of the establishment of the plan and at intervals of not more than 3 years thereafter.</p> <p>(5) The administrator shall file the actuarial valuation report and cost certificate with the Superintendent within 1 year of the review date established for the report referred to in subsection (1).</p>
Administrator's duties respecting transfer to a LIF ("LIF" means a life income fund)	Section 16	An administrator must not effect a transfer to a LIF issued by a financial institution unless the administrator has ascertained that the financial institution's name and LIF are currently on the list maintained in accordance with subsection (13).
Administrator's duties respecting transfer to a LIF ("LIF" means a life income fund)	Section 17	An administrator must advise the financial institution as to whether the commuted value of a pension benefit transferred to the financial institution was determined in a manner that differentiated on the basis of sex.
Administrator's duties respecting transfer to a LIF ("LIF" means a life income fund)	Section 18	An administrator must advise the financial institution of the earliest date on which a former member would have been entitled to receive payment of a pension under the pension plan from which the funds have been transferred
To transfer commuted value of a pension as agreed	Section 21(3)	The administrator must not transfer the commuted value or portion thereof of a pension or deferred pension unless the transferee agrees to administer the amount transferred as a pension or deferred pension in accordance with the Act and these regulations.

DUTIES	SECTION OF THE NOVA SCOTIA PBA	RESPONSIBILITIES
To comply with the cost of an attachment	Section 25(2) (3)	<p>(2) The administrator must calculate the cost of complying with the attachment of a defined benefit as the amount, not to exceed \$500 that reasonably represents the cost to the pension plan of complying with the attachment.</p> <p>(3) The administrator must calculate the cost of complying with the attachment of a defined contribution benefit as the amount, not to exceed \$250 that reasonably represents the cost to the pension plan of complying with the attachment.</p>
Conflict of interest—multi-employer pension plan	Section 51	<p>Subsection 29(3) of the Act (conflict of interest) does not apply to an administrator of a multi-employer pension plan or, if the administrator is a pension committee or board of trustees, a member of the committee or board, who enters into an arrangement related to the administration of the pension plan or pension fund that</p> <p>(a) is in the interest of the members and former members of the pension plan;</p> <p>(c) is protective of the rights of the members and former members of the pension plan;</p> <p>(d) is expressly provided for in the documents that create and support the pension plan; and</p> <p>(e) is disclosed to members and former members of the plan prior to entering into the arrangement.</p>
Filing of reciprocal transfer agreements	Section 58(1)	The administrator of a pension plan must submit for filing a certified copy of any reciprocal transfer agreement entered into prior to these regulations coming into force within 6 months following the date these regulations come into force.
Investment regulations	Section 67(3)	The administrator or fund holder must maintain a current record clearly identifying each of the plan's investments and the name in which each investment is registered. Schedule I of the act- Investments, elaborates on the requirements, schedule III elaborates on permitted investments.
Information from pension plan	Section 72 (2)(4)	<p>2) The administrator must provide the information requested pursuant to subsection (1) within 60 days after receipt of Form 5.</p> <p>(4) Once the information has been provided in accordance with subsection (2), the administrator is required to provide updates to that information only once in each calendar year upon request from the spouse or common-law partner who submitted the Form 5.</p>

DUTIES	SECTION OF THE NOVA SCOTIA PBA	RESPONSIBILITIES
To give notice	Section 82	Administrator must give notice to spouse or common-law partner if member's interest may be affected

4.3.7 Ontario

The Ontario Pension Benefit Act (PBA), (Electronic annexure 13), provides a list of prescribed persons who can be appointed as a trustee; amongst this list are trusts and insurance companies (Ontario PBA, section 54).

Pension funds operated as trusts are governed by a ‘written trust agreement’ under which: The trustee is a trust corporation registered under the Loan and Trust Act or three or more individuals, two of whom reside in Canada and at least one who is “independent of any employer contributing to the pension fund, or a corporate pension society” (Maxwell, 1999, 28).

The PBA the trustees and plan administrator are separate, but only qualified entities can perform the role of trustees. In spite of this where multi-employer pension plans are concerned a trust company can act as both administrator and trustee (Ontario PBA, section 8).

Table 13: Duties and Responsibilities

DUTIES	SECTION OF THE ONTARIO PBA	RESPONSIBILITIES
To provide annual information return	Section 20(1)	(1)The administrator of a pension plan shall file each year an annual information return in respect of the pension plan in the form approved by the Superintendent and shall pay the filing fee established by the Minister.
To provide additional reports	Section 20(2)	(1)The administrator of a pension plan shall file each year an annual information return in respect of the pension plan in the form approved by the Superintendent and shall pay the filing fee established by the Minister.

DUTIES	SECTION OF THE ONTARIO PBA	RESPONSIBILITIES
To keep records of reciprocal transfer agreements	Section 21	An administrator of a pension plan shall file a certified copy of a reciprocal transfer agreement entered into in respect of the pension plan.
To act with care, skill and diligence	Section 22(1)	The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
To apply special knowledge and skill	Section 22(2)	The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
To avoid conflict of interest	Section 22(4)	An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.
To delegate where necessary	Section 22(5)(7)	<p>Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.</p> <p>(7) Responsibility for agent</p> <p>An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.</p>
To provide information	Section 24(7)	The administrator of a pension plan shall provide to the advisory committee or its representative such information as is under the control of the administrator and is required by the advisory committee or its representative for the purposes of the committee.

DUTIES	SECTION OF THE ONTARIO PBA	RESPONSIBILITIES
To retain records	Section 24.1	The administrator of pension plan shall retain the prescribed records about the pension plan and the pension fund for the prescribed period of time.
To provide pension fund members with information	Section 25(1)	<p>The administrator of a pension plan shall provide in writing to each person who will be eligible or is required to become a member of the pension plan,</p> <ul style="list-style-type: none"> (a) an explanation of the provisions of the plan that apply to the person (b) an explanation of the person's rights and obligations in respect of the pension plan and (c) Any other information prescribed by the regulation
To provide annual statements to pension fund members	Section 27	The administrator of a pension plan shall transmit annually to each member a written statement containing the prescribed information in respect of the pension plan, the member's pension benefits and any ancillary benefits.
To make records available to pension plan members	Section 29(1)	<p>On written request, the administrator of a pension plan shall make available the prescribed records about the pension plan and the pension fund for inspection without charge by,</p> <ul style="list-style-type: none"> (a) a member (b) a former member (c) the spouse of a member of a former member

4.3.8 Prince Edward Island

The legislature that governs pension fund activity in the Prince Edward Island is referred to as Act No. 30 Pension Benefits Act (Electronic Annexure 14). The sections relating to duties and responsibilities are:

Table 14: Duties and Responsibilities

DUTIES	SECTION OF THE PRINCE EDWARD ISLAND PBA	RESPONSIBILITIES
To administrator	Section 26	<p>The administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with this Act and the regulations.</p> <p>(3) The administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with</p> <p>(a) the filed documents in respect of which the Superintendent has issued an acknowledgment of application for registration or a certificate of registration, whichever is issued later; and</p> <p>(b) the filed documents in respect of an application for registration of an amendment to the pension plan, if the application complies with this Act and the regulations and the amendment is not void under this Act.</p>
To file annual reports	Section 27	<p>(1)The administrator of a pension plan shall file each year an annual information return in respect of the pension plan in the prescribed form and shall pay the prescribed filing fee.</p> <p>(2) The administrator shall file additional reports at the times and containing the information prescribed.</p>
To file a reciprocal agreement	Section 28	An administrator of a pension plan shall file with the Superintendent a certified copy of a reciprocal transfer agreement entered into in respect of the pension plan within 90 days after entering into the agreement.

DUTIES	SECTION OF THE PRINCE EDWARD ISLAND PBA	RESPONSIBILITIES
Exercise care, diligence and skill	Section 29	<p>The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.</p> <p>(2) The administrator or, if the administrator is a committee or a board of trustees, a member of the committee or board shall use in the administration of the pension plan, and in the administration and investment of the pension fund, all relevant knowledge and skill that the administrator or member possesses or, by reason of profession, business or calling, ought to possess.</p> <p>(3) The administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board shall not knowingly permit the administrator's or member's interest to conflict with the administrator's or member's duties and powers in respect of the pension fund.</p> <p>(4) Where it is reasonable and prudent in the circumstances to do so, an administrator may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.</p> <p>(6) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.</p>

DUTIES	SECTION OF THE PRINCE EDWARD ISLAND PBA	RESPONSIBILITIES
Disclosure of information	Section 32	<p>(1) The administrator of a pension plan shall provide in writing to each person who will be eligible or is required to become a member</p> <ul style="list-style-type: none"> (a) an explanation of the provisions of the plan that apply to that person; (b) an explanation of that person's rights and obligations in respect of the pension plan; and (c) any other prescribed information. <p>(2) The administrator shall provide the information mentioned in subsection (1) to</p> <ul style="list-style-type: none"> (a) each person who becomes a member within the prescribed period of time after the date on which the pension plan is established; (b) a person who is likely to become eligible to become a member of the pension plan, within the prescribed period of time before the date on which that person is likely to become eligible; and (c) each person who becomes eligible to become a member of the pension plan upon becoming employed by the employer, within the prescribed period of time after the date on which that person becomes so employed.
To provide information to pension members	Section 34	The administrator of a pension plan shall transmit annually to each member a written statement containing the prescribed information in respect of the pension plan, the member's pension benefits and any ancillary benefits.

Liability:

100. (1) Every person who is guilty of an offence contrary to this Act is liable on summary conviction to a fine not exceeding \$25,000.

4.3.9 Quebec

Quebec pension plan trustee's duties and responsibilities are regulated by the Pension Benefits Act, (Electronic annexure 15)

Table 15: Duties and Responsibilities

DUTIES	SECTION OF THE QUEBEC PBA	RESPONSIBILITIES
Administration of plan and fund	Section 26	<p>26 (1) the administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with this Act and the regulations.</p> <p>(1A) Subsection (1) applies whether or not the pension plan is amended to comply with this Act and the regulations.</p> <p>(2) The administrator shall ensure that the pension plan and the pension fund are administered in accordance with</p> <p>(a) the filed documents in respect of which the Superintendent has issued an acknowledgment of application for registration or a certificate of registration, whichever is issued later; and</p> <p>(b) the filed documents in respect of an application for registration of an amendment to the pension plan, if the application complies with this Act and the regulations and the amendment is not void pursuant to this Act.</p> <p>(3) The administrator may administer or permit administration of the pension plan and the pension fund in accordance with an amendment pending registration or refusal of registration of the amendment.</p> <p>(4) Subsection (2) does not apply to enable the administrator to administer the pension plan contrary to this Act and the regulations. <i>R.S., c. 340, s. 26; 2002, c. 21, s. 11.</i></p>
Annual returns	Section 27	<p>27 (1) The administrator of a pension plan shall file each year an annual information return in respect of the pension plan in the prescribed form and shall pay the prescribed filing fee.</p> <p>(2) The administrator shall file additional reports at the times and containing the information prescribed. <i>R.S., c. 340, s. 27.</i></p>
Filing of reciprocal transfer agreement	Section 28	<p>28 An administrator of a pension plan shall file a certified copy of a reciprocal transfer agreement entered into in respect of the pension plan. <i>R.S., c. 340, s. 28.</i></p>

DUTIES	SECTION OF THE QUEBEC PBA	RESPONSIBILITIES
Care, diligence, knowledge and skill	Section 29	<p>29 (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.</p> <p>(2) The administrator or, if the administrator is a committee or a board of trustees, a member of the committee or board shall use in the administration of the pension plan, and in the administration and investment of the pension fund, all relevant knowledge and skill that the administrator or member possesses or, by reason of profession, business or calling, ought to possess.</p> <p>(3) The administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board shall not knowingly permit the administrator's or member's interest to conflict with the administrator's or member's duties and powers in respect of the pension fund.</p> <p>(4) Where it is reasonable and prudent in the circumstances to do so, an administrator may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.</p> <p>(4A) No person other than a prescribed person shall be a trustee of a pension fund.</p> <p>(5) An administrator who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.</p> <p>(6) An employee or agent of an administrator is also subject to the standards that apply to the administrator pursuant to subsections (1), (2) and (3).</p> <p>(7) The administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board is not entitled to any benefit from the pension plan other than pension benefits and fees and expenses related to the administration of the pension plan and</p>

		<p>permitted by law or provided for in the pension plan.</p> <p>(8) An agent of the administrator is not entitled to payment from the pension fund other than the usual and reasonable fees and expenses for the services provided by the agent in respect of the pension plan. <i>R.S., c. 340, s. 29; 2002, c. 21, s. 12.</i></p>
<p>DISCLOSURE OF INFORMATION- <i>information for members</i></p>	<p>Section 31</p>	<p>31 (1) The administrator of a pension plan shall provide in writing to each person who will be eligible or is required to become a member</p> <p>(a) an explanation of the provisions of the plan that apply to that person;</p> <p>(b) an explanation of that person's rights and obligations in respect of the pension plan; and</p> <p>(c) any information prescribed.</p> <p>(2) The administrator shall provide the information mentioned in subsection (1) to</p> <p>(a) each person who becomes a member within the prescribed period of time after the date on which the pension plan is established;</p> <p>(b) a person who is likely to become eligible to become a member of the pension plan, within the prescribed period of time before the date on which that person is likely to become eligible;</p> <p>(c) each person who becomes eligible to become a member of the pension plan upon becoming employed by the employer, within the prescribed period of time after the date on which that person becomes so employed.</p> <p>(3) The employer shall transmit to the administrator the information necessary to enable the administrator to comply with subsection (2) and shall transmit the information in sufficient time to enable the administrator to comply with the time limits set out in that subsection. <i>R.S., c. 340, s. 31.</i></p>
<p><i>Annual statement</i></p>	<p>Section 33</p>	<p>33 The administrator of a pension plan shall transmit annually to each member a written statement containing the prescribed information in respect of the pension plan, the member's pension benefits and any ancillary benefits. <i>R.S., c. 340, s. 33.</i></p>

DUTIES	SECTION OF THE QUEBEC PBA	RESPONSIBILITIES
<i>Notice of overdue contribution</i>	Section 45	<p>45 (1) The administrator of a pension plan or, if there is an agent of the administrator responsible for receiving contributions under the pension plan, the administrator and the agent shall give written notice to the Superintendent of a contribution that is not paid when due.</p> <p>(2) The administrator and the agent shall give the notice to the Superintendent within sixty days after the date on which the administrator or the agent first became aware of the failure to pay the contribution. <i>R.S., c. 340, s. 45</i></p>
<i>Transfers</i>	Section 66	<p>(6) The administrator shall not make payment</p> <p>(a) pursuant to clause (b) of subsection (1) unless the retirement savings arrangement meets the requirements prescribed by the regulations; or</p> <p>(b) pursuant to clause (c) of subsection (1) unless the contract to purchase the deferred life annuity meets the prescribed requirements</p>
<i>Duty respecting investment</i>	Section 67	<p>Every person engaged in the investment of money of a pension fund shall ensure that the money is invested in accordance with this Act and the regulations. <i>R.S., c. 340, s. 67</i></p>

Liability:

Table 16: Offences and penalties

OFFENCES	PENALTIES
<p>99 (1) Every person who contravenes this Act or the regulations is guilty of an offence.</p> <p>(2) Every person who contravenes an order made pursuant to this Act is guilty of an offence. <i>R.S., c. 340, s. 99.</i></p>	<p>100 (1) Every person who is guilty of an offence contrary to this Act is liable on summary conviction to a fine not exceeding twenty-five thousand dollars.</p>

4.3.10 Saskatchewan

Part III, section 11 of the Pension Benefit Act 1992, sets out the tasks and obligations of pension plan trustees in the province of Saskatchewan, (Electronic annexure 16).

Table 17: Duties and Responsibilities

DUTIES	SECTION OF THE SASKATCHEWAN PBA	RESPONSIBILITIES
To administer	Section 11(1)	The administrator of a plan is responsible for administering and shall administer the plan in accordance with this Act, the regulations and the terms and conditions of the plan
Of Trust	Section 11 (2b)	holds in trust for the benefit of members, former members and other persons entitled to benefits pursuant to the plan, any fund established or contract arising pursuant to the plan;
To act in good faith and in the best interest of plan members	Section 11 (2c)	shall act in good faith and in the best interests of members, former members and other persons entitled to benefits pursuant to the plan;
To avoid conflict of interest	Section 11 (2d)	shall not prefer the interests of one person entitled to benefits pursuant to the plan over the interests of any other person so entitled.
To notify	Section 11 (3a,b)	(3) The administrator of a plan shall notify the superintendent in writing of: (a) the administrator's name and address within 30 days after becoming the administrator; and (b) any change in the administrator's name or address within 60 days after that change.
To file	Section 11 (4a,b)	(4) The administrator shall file with the superintendent: (a) at the times prescribed and in the form required by the superintendent, returns containing information respecting: (i) the administration of the plan; (iii) membership in it; and (iv) any other information that is necessary to enable the superintendent to carry out the duties of superintendent pursuant to this Act; (b) in the case of a plan that contains a defined benefit provision, at the times prescribed or on the request of the superintendent: (i) actuarial valuation reports that: (a) contain the prescribed information; (b) are prepared by a Fellow of the Canadian Institute of

DUTIES	SECTION OF THE SASKATCHEWAN PBA	RESPONSIBILITIES
To provide contributions that are sufficient to meet the solvency tests	Section 11 (4c)	provide for contributions that are sufficient to meet the solvency tests; and (ii) cost certificates that: (a) are signed by a person mentioned in paragraph (i)(B); (b) are in the form required by the superintendent; and (c) contain the information required by the superintendent for the purpose of determining whether the plan will meet the solvency tests; and (d) at the times prescribed, where contributions to or benefits from a plan are determined by the provisions of a collective bargaining agreement or arbitration award, a copy of those provisions and of any amendments to them.

Liability:

Table 18: Offenses and penalties

OFFENCES	PENALTIES
70(1) A person who: (a) contravenes this Act or the regulations or a direction of the superintendent given pursuant to this Act or the regulations; (b) to avoid compliance with this Act: (i) destroys, alters, mutilates, secretes or otherwise disposes of any record; (ii) makes a false or misleading statement or entry in any record; or (iii) fails to state anything in any record;	(2) prevents or obstructs, or attempts to prevent or obstruct, the superintendent or the superintendent’s authorized representative doing anything that the superintendent or representative is authorized to do pursuant to this Act; is guilty of an offence and liable on summary conviction to a fine not exceeding \$100,000.

4.3.11 Canadian Common PBA Duties

The following duties are the main PBA duties that apply, across the provinces, to administrators as well as trustees, in the case of multiple-employer pension plans.

4.3.12 Duty of care, diligence and skill

Section 22 (1) of the PBA of Ontario states that the administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another. This means that trustees should be honest at all times, be attentive when performing their role and apply their expertise where necessary.

Trustee must show ordinary care, skill and prudence; it must act as the prudent man of discretion and intelligence would act in his own affairs” (Maxwell, 1999, 34).

Case law is not very clear as whether the “standard of care requires the trustee to act as a prudent man in managing his own affairs or those of another or others” (Maxwell, 1999, 37). The duty of prudence applies as well to the decisions taken with regards to investments of the fund property. According to Maxwell (1999) it is also important to note that this duty of prudence imposed on plan administrators would apply to multi-employer pension plan trustees.

4.3.13 Duty of delegation

Once again, if the plan administrator and the plan trustees are the same, section 22(5) of the Ontario PBA applies, which states that “where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund”.

The trustee also needs to carefully select and monitor the agent chosen to perform the delegated task, in that way avoiding liability of the agent’s omissions and defaults (Maxwell,1999, 43).

Liability: Although the above statement is true, trustees will however be liable for the actions of agents if regular follow ups were not conducted, in an effort to check whether or not the agents are still adhering to the plan strategies (Maxwell, 1999, 38).

4.3.14 Duty to avoid conflict

This is a common law principle which requires the trustees to separate their interest from that of the business of the trust. According to Section 22 (4) of the Ontario PBA “An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator’s interest to conflict with the administrator’s duties and powers in respect of the pension fund”.

Baldwin (2007) adds to this duty by stating the following, “judicial interpretations of trust law allow some scope for an employer to act as an employer in administering a pension plan”, hence the added need for employers to avoid the two interests.

Liability: The trustee is liable to the trust for breach of duty to avoid conflict in that any profit made as a result of the breach has to be returned to the trust and any loss incurred a by the trust has to be accounted for (Maxwell, 1999, 114).

4.3.15 Duty to administer the plan

Section 19 (1) of the Ontario PBA states “The administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with this Act and the regulations”.

Subsection 19(3) gives a comprehensive list of the administrative requirements, “The administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with,

- (a) the filed documents in respect of which the Superintendent has issued an acknowledgment of application for registration or a certificate of registration, whichever is issued later; and
- (b) the filed documents in respect of an application for registration of an amendment to the pension plan, if the application complies with this Act and the regulations and the amendment is not void under this Act”.

However as mentioned previously the different provinces are governed by their own pension legislature. The duties and responsibilities shown below, in table 20, are some of those that appear in the respective provinces PBA’s and are not an exhaustive list.

Table 20: Common Duties in 10 Canadian Provinces

COMMON DUTIES
To administer the plan
To act in good faith
To act with care, diligence and skill
To avoid conflict of interest
To disclose information
To provide information to plan members
To retain records
To file
To invest

5. Mauritius

5.1 Statutory Provisions

Pension schemes in Mauritius are governed by three major Acts namely the Employment Superannuation Fund Act 1954 (Electronic annexure 17) which regulates the ‘creation of pension funds for employees’, the Insurance Act 1987 regulating long term insurance and the Income Tax 1995 which grants tax exemption status to Pension funds. Regulation is supervised by the staff at the Registrar of Associations and the Controller of Insurance. (World Bank Report No 29558-MU, pg 34) (World Bank).

5.2 Pension Fund Structure

Mauritius has a well-developed pension system, which is a hybrid of defined benefit and defined contribution. “It provides basic universal pensions to all elderly, mandates participation in an earnings-related system for private and public sector workers in separate schemes, and has a voluntary and privately managed scheme”(World Bank).

Mauritius has a three tier pension system which consists of the firstly a universal non-contributory Basic Retirement Pension (BRP); the pension is intended to provide a minimum guaranteed income to Mauritian citizens over the age of 60 years, in 1999/2000 the monthly benefit came up to Rs 1500. It is funded through taxes and the only requirement to receive the pension is citizenship". The BRP dates back to 1950 but was only made universal in 1958 (Becceea, 2010, 4).

Secondly two private sector mandatory income-related pension schemes namely, the National Pension Fund (NPF) and the National Savings Fund (NSF) which are both administered by the public sector (World Bank).

The NPF was introduced in 1978; it is a defined benefit scheme which covers private sector employees (Becceea, 2010, 4). The mandatory contribution towards this scheme is 9%, (13.5% for the sugar sector), it does not cover workers on low wages as well as some workers in the sugar industry.

The scheme is partially funded and compensates '33% of average lifetime earnings for 40 years of employment' (World Bank).

According to Becceea (2010), the NSF is a defined contribution scheme which 'requires all employees to participate, including civil servants and employees of statutory bodies'. The compulsory contribution is 2.5% and the scheme is partially funded.

There are also separate schemes that cover public sector employees (civil servants and parastatal employees) and thirdly the voluntary savings schemes and their main function is to supplement pension income. These schemes are voluntary, non-contributory and are defined contributions (Becceea, 2010, 5). Vittas (2003) further states that the schemes provide 66.7% of final salary on the last month of employment after 40 years of service.

Table 19: Structure of Pension Plans

TIER		COVERAGE	FUNDING	BENEFIT	STRUCTURE
1	Basic Retirement Pension	0%	Government	20 %	DB
2	National Pension Fund	44%	9% of wages (non sugar); 13.5% of wages (sugar)	33.3 %	DB
	National Savings Fund	44%	2.5% of wages	N/A	DC
	Civil Servants' Scheme	11 %	Government	66.7%	DB
	Parastatals Schemes	2.5%	Parastatal	66.7%	DB
3	Private Schemes	5 %	Individual	N/A	DC
	Tier Occupational Schemes	12-19%	Individual	N/A	DB/DC

DB- Defined Benefit DC- Defined Contribution

5.3 Duties, responsibilities and liabilities of Trustees

According to Stewart and Yermo (2009) the current regulatory environment in Mauritius is weak and virtually non-existent; the government is aware of this and has embarked on a debate to reform the pension system, including a comprehensive World Bank (2004) review of, improved transparency in pension management through introduction of regulation and a supervisory agency.

6. Namibia

6.1 Statutory Provisions

Pension funds in Namibia are governed and regulated by the South African Pension Funds Act 1956 (Pens Act, Electronic annexure 18) (inherited by Namibia from the South African colonial regime), National Pensions Act 1992 (Natl Pens Act, Electronic annexure 19),

Basic State Grants Act 2000 (State Grants Act) and Namibia Financial Institutions Supervisory Authority (NAMFISA) Act 2001. Schleberger (2002) notes that social security, in particular, is regulated by the Social Security Act 1994 (Electronic annexure 20).

NAMFISA is a supervisory agent responsible for “registering and regulation non-banking financial institutions” (NAMFISA Act, 2001 Electronic annexure 21).

The objective of the Basic State Grant was to provide a standardized system that would consolidate “all state grants into one scheme” (Schleberger, 2002, 5) :

Table 21: Objectives of the Basic Sate Grant Act

Objectives	
1.	Non-contributory old-aged pensions
2.	Child maintenance of protection grants
3.	All disability grants
4.	Foster parent grants
5.	Pensions for war veterans
6.	As well as cater for the “suspension, cancellation and administration of basic state grants”

Source: Schleberger, 2002, 1

6.2 Pension Plan Structure

In 1943 social pensions were introduced for “Non-African Namibians” but they were included in 1973 (Devereux, 2001, 1).

The Namibian pension system is made up of both “public and voluntary contributory private pensions”, the public pension system is a universal scheme called the National Pension Scheme (NPS), (Stewart & Yermo, 2009, 24). The NPS is a non-taxable, non contributory government funded scheme (Payet, 2009, 4).

The National Pension Scheme (NPS) and other ‘grant based transfer programmes’ are regulated by the Basic State Grant Act. The Basic State Grant Act replaces the National Pensions Act of 1992 which established the NPS (Schleberger, 2002, 5).

The government has also established the Agricultural Retirement Fund which is a defined benefit fund that covers workers in the agricultural sector (Stewart & Yermo, 2009, 22).

Private occupational voluntary pension funds take the form of either pension or provident; they are set up as trusts, they allow the fund members to elect at least 50% of the board of trustees and only permanent employees are covered with retirement age set at 65 years, however providing option to extend to 70 years (Payet, 2009, 4).

A provident fund can a 100% lump sum or may be used to purchase an annuity from a life insurance company, which introduces the second element of public pension funds known as personal voluntary pension, this option offers retirement annuity funds (Open pension plans/umbrella funds), (Payet, 2009, 3).

There are approximately 500 private funds in Namibia, these funds are usually administered by external fund administrators and the majority of them are small. The services provided by the external administrators include “recordkeeping” or even “specialised legal and actuarial services” when necessary (Stewart & Yermo, 2009, 22).

In summary the Namibian pension structure takes the following format:

Table 22: Structure of Pension Plans

PUBLIC PENSIONS	
Name	Structure
1. Universal Social Pension also called the NPS	Payable to Namibia citizens over the age of 60 years
	Provides a flat-rate benefit of N\$ 450 as of 2005
	Non-contributory and Non-taxable
	Payable to all Namibian citizens in Namibia regardless of other income
	Funded from government taxation
2. Government Institutions Pension fund (GIPF)	A Define Benefit plan covering government employees
	Fully funded
	Largest pension fund in Namibia

3. Agricultural Retirement Fund	Established by government to cover agriculture associated employees
	Employees and employers contribute 10%
	Employer contributes and additional 1% for administrative fees
PRIVATE PENSIONS	
Name	Structure
1. Occupational (voluntary)	Pension and Provident funds are set up on a trust basis
	Can be either Defined Benefit or Defined Contribution
	Provident Funds are Defined Contribution
	Established by employer for employees on a voluntary basis
	Membership is required for employees of the sponsoring employer
	Fund Members can elect 50% of board
2. Personal (Voluntary)	Retirement Annuities/Umbrella funds
	Can be purchased with lump sum from Provident fund
	Purchased from life insurance company

Source: Payet (2009) and Schleberger (2002).

6.3 Duties, responsibilities and liabilities of Trustees

The duties, responsibilities and liabilities of trustees in Namibia are adapted from the South Africa Pension Funds Act 1956 under chapter III (Manner of administration and powers of registered funds) sections 7C (2), 7D and 13B, Electronic annexure. As stated above in section 6.1 Namibia inherited the Pension Fund Act from the South African colonial regime.

7. South Africa

7.1 Statutory Provisions

Pension funds in South Africa are governed by common law, legislation, namely the Pension Fund Act 1956 (PFA, Electronic annexure 22) and the pension fund rules. The PFA was enacted to govern the “establishment and operation of pension funds” (Cheadle Thompson and Haysom Inc, 2004, 8).

The regulation and supervision of the retirement fund system in South Africa meets international standards, as supported by the International Network of Pension Regulators and supervisors.

7.2 Retirement Fund Structure

It can be observed from National Treasury retirement fund reform discussion paper (December 2004), that the retirement fund environment in South Africa is characterised by a diverse structure which includes defined contributions, defined benefits, multi-employer funds and hybrid funds. The structure of retirement funds in South Africa follows the World Bank model recommendations and is given by the table below:

Table 23: Structure of retirement funds

PILLAR	COVERAGE	BENEFITS
Public benefit programme	Aimed at South Africa citizens over the ages of 60 years for women and 65 years for men, qualification is done through a income based means-test	A monthly stipend of R1,080 (currently)
Occupational Funds	Private and Public sector employees	Usually defined contribution which pays a lump sum upon retirement
Voluntary Savings	All	Lumps sum or living annuity

It can be seen from Table 23 above that the retirement fund structure in South Africa is divided into three pillars, namely pillar I which the public benefit programme which is aimed at assisting South Africa's senior citizens that are below a certain income threshold.

According to the Policy brief 1 February issue on Social Grants in South Africa, the public benefit programme is further sub-divided into five subsections namely the Foster Child Grant and the Care Dependency Grant, the Disability Grant, the State Old Age Pension and the Child Support Grant. The programme provides a pension of R1, 080, as of 2011, at a zero contribution rate. These grants are managed by a national government agent called the South African Social Security Agency (SASSA) and are funded through revenue tax.

The second pillar caters for both private and public sector employees and usually takes the form of defined benefits fund. This occupational pension is paid out as a lump sum upon retirement, which a member can use to purchase an annuity (Devereux, 541, 2007).

The final pillar is aimed at self-employed individuals or employees that can afford to contribute over and above their occupational pensions (National Treasury Discussion Paper)

7.3 Duties, responsibilities and liabilities of Trustees

The following duties and responsibilities are prescribed under the PFA chapter III (Manner of administration and powers of registered funds) sections 7C (2), 7D and 13B, Electronic annexure 22:

Table 24: Duties and responsibilities

DUTIES	SECTION OF THE PFA	RESPONSIBILITIES
To protect the interest of fund members	Section 7C (2a)	take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;
Care, diligence and good faith	Section 7C (2b)	To act with due care, diligence and good faith
Conflict of interest	Section 7C (2c)	Avoid conflict of interest
Of Impartiality	Section 7C (2d)	To act with impartiality in respect of all members and beneficiaries.
To keep books and records	Section 7D (a)	To ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;
To implement proper control systems	Section 7D (b)	To ensure that proper control systems are employed by or on behalf of the board;
To keep beneficiaries informed and to account to them	Section 7D (c)	To ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund;
To pay contributions timeously	Section 7D (d)	To take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act;
To obtain advice from experts	Section 7D (e)	To obtain expert advice on matters where board members may lack sufficient expertise

DUTIES	SECTION OF THE PFA	RESPONSIBILITIES
To administer	Section 7D (f)	To ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act, 2001 (Act 28 of 2001), and all other applicable laws.

7.3 Liabilities

Pension fund members have two avenues of remedy against trustees who breach their duties in the form of access to the courts and/or complaints that can be made to the Pension Fund Adjudicator. According to Chapter V A (Consideration and Adjudication of Complaints), section 30 O the pension adjudicator’s decision has the same effect as a court decision.

Chapter V A (Consideration and Adjudication of Complaints), Section 37 of the PFA sets out the penalties trustees may face as a result of a breach of their duties. A breach of fiduciary duty is a criminal act that could result in imprisonment or a fine up to R10, 000.

Breach of duty to administer

The Registrar may impose an administrative penalty in the case of any failure by a pension fund, administrator or third party to submit to the registrar or any other person within a period specified in terms of this Act or in a directive or condition imposed by the registrar in terms of the Act, any scheme, statement, report, return or other document or information required in terms of this Act to be submitted, not exceeding R1 000 or such other amount prescribed by the registrar for every day during which the failure continues.

In the *Emma and Others v Orion Money Purchase Provident Fund (2004)*, the complainant Emma and others alleged that there were funds maladministered by its board of management, particularly, with regard to its failure to timeously collect contributions due to the fund.

The Pension Funds Adjudicator held that the ‘board of management were in breach of their fiduciary duty as they had failed to “take all reasonable steps to ensure that the interests of members are protected at all times.

The board must also take all reasonable steps to ensure that contributions are paid timeously to the fund” [Emma and Others v Orion Money Purchase Provident Fund (2004)].

8. United Kingdom

8.1 Statutory Provisions

Private pension funds, particularly the occupational schemes, are regulated by a trust deed, general trust law and specific pension legislation such as the Pension Act 1993 (Electronic annexure 23), the Pension Schemes Act 1995 (Electronic annexure 24) and the Financial Services and Markets Act of 2000 (FSMA), which has a bearing on the investment decisions of the pension fund (Myner, 2001, 41).

According to Hu and Stewart (2009) the Department of Work and Pensions (DWP) is responsible for laying down pension legislation in the UK with The Pension Regulator (TPR) supervising ‘work-based pension schemes’ and enforcing the legislation.

The main objectives of the TPR are to:

Table 25: Objectives of the TPR

OBJECTIVES	
1.	encourage high-quality administration of the ‘work-based schemes’
2.	protect the benefits under the occupational pension schemes, in the interest of scheme members.
3.	To protect the benefits under the personal pension schemes, in the interest of scheme members.
4.	mitigate the risk of the amounts of compensations that end up being payable from the Pension Protection Fund (PPF)

Source: Hu and Stewart (2009).

The second regulatory authority is the Financial Services Authority (FSA), which according to Myner (2001), is responsible for regulating the financial services industry. “The FSA has four objectives under the Financial Services and Markets Act 2000 (FSMA) and that is to:

- a) Maintain market confidence;
- b) Promote public understanding of the financial system;
- c) Consumer protection
- d) and fighting financial crime”

(Myner, 2001, 94).

However, with regards to private pensions the FSA is aimed at supervising the ‘financial service providers related to both occupational and personal pensions’ (Hu and Stewart, 2009, 38). Therefore, in summary “the FSA supervises the market with the focus on service providers, while the TPR focuses on employers” (Hu and Stewart, 2009, 42).

8.2 Pension Fund Structure

The United Kingdom pension programme consists of public, private and personal pensions (Komatsubara, 2000, 24).

8.2.1 Public Pensions

The public pension arm of the programme is made up of:

Table 26: Elements of the public pension programme

ELEMENTS	
1.	The basic state pension (BSP) is a pay-as-you-go system which did not initially require workers to contribute and only paid out benefits to disadvantaged retirees However the BSP was remodelled in 1925, to mandate contributions and provide cover to individuals.
2.	Subsequently coverage has been extended to individuals caring for children and the old using the “home responsibilities protection credit”
3.	The State Second Pension (S2P) provides pension to individuals “without a private pension and it offers 19% of average earnings compared to those making a full set of contributions”
4.	The Minimum Income Guarantee (MIG) seeks to provide “means tested benefits” in an effort to maintain pensioners above the poverty margin; it is currently being replaced by the ‘pension credit’ and guarantees 20% earnings

Source: Komatsubara (2000) and Davis (2000)

Individuals can ‘contract-out’ of the ‘earnings related social security (SERPS)’ (also known as occupational plans) to “individual retirement accounts called Appropriate Personal Pensions (APPs)” (Komatsubara, 2000, 2).

8.2.2 Private Pensions

There are two types of private pensions namely the occupational and personal pensions:

Occupational Pensions - these schemes are offered by employers to the employees in both the private and public sectors. The schemes normally take the form of defined benefits, defined contributions or a hybrid of the two, with both employer and employee contributing (Komatsubara, 2000, 24). They are set up as trusts, with the “administration and financial management of assets provided by the employer being in the hands of trustees, who are in turn responsible to the beneficiaries, i.e. scheme members (Davis, 2000, 6).

As of 2006, 87% of occupational scheme members were still part of defined benefit schemes however the trend is changing towards defined contributions (Hu and Stewart, 2009, 38)

Personal Pensions – personal pension schemes are further divided into two types namely the group schemes organised by companies on behalf of their employees basis and arrangements organised by individuals with life insurance companies (Davis, 2000, 7).

According to Komatsubara (2000) these personal savings take the form of defined contributions with coverage being higher amongst self-employed individuals and are ‘based on individual or a group contract with an insurance company’.

8.4 Duties, responsibilities and liabilities of Trustees

Trustees have to adhere to both the common law and fiduciary duties, the common law duties are embodied in common law principles, and Table 27 illustrates such:

Table 27: Duties and Responsibilities

Duties	Section of the PFA	Responsibilities
Take care or exercise skill	Part I, Section 33(1)	Trustees have the responsibility to take care or exercise skill in the performance of any investment function.
Of Investment	Part I, Section 34 (1)	(1) The trustees of a trust scheme have, subject to any restriction imposed by the scheme, the same power to make an investment of any kind as if they were absolutely entitled to the assets of the scheme.
Of delegation	Part I, Section 34 (2)	(2) Any discretion of the trustees of a trust scheme to make any decision about investments– (a) may be delegated by or on behalf of the trustees to a fund manager to whom subsection (3) applies to be exercised in accordance with section 36, but (b) may not otherwise be delegated except under section 25 of the [1925 c. 19.] Trustee Act 1925 (delegation of trusts during absence abroad) or subsection (5) below”. (4)“The trustees are not responsible for the act or default of any fund manager in the exercise of any discretion delegated to him under subsection (2)(a) if they have taken all such steps as are reasonable to satisfy themselves or the person who made the delegation on their behalf has taken all such steps as are reasonable to satisfy himself– (a) that the fund manager has the appropriate knowledge and experience for managing the investments of the scheme, and (b) that he is carrying out his work competently and complying with section 36”.
To maintain Investment principles	Part I, Section 35 (1) (2)	(1) The trustees of a trust scheme must secure that there is prepared, maintained and from time to time revised a written statement of the principles governing decisions about investments for the purposes of the scheme. (2) “The statement must cover, among other things– (a) the trustees’ policy for securing compliance with sections 36 and 56, and (b) their policy about the following matters”. (3) Those matters are– (a) the kinds of investments to be held, (b) the balance between different kinds of investments, (c) risk, (d) the expected return on investments, (e) the realisation of investments, and (f) such other matters as may be prescribed.

Duties	Section of the PFA	Responsibilities
To defer winding up	Part I, Section 38 (1-3)	(1) If, apart from this section, the rules of a trust scheme would require the scheme to be wound up, the trustees may determine that the scheme is not for the time being to be wound up but that no new members are to be admitted to the scheme. (2) Where the trustees make a determination under subsection (1), they may also determine— (a) that no further contributions are to be paid towards the scheme, or (b) that no new benefits are to accrue to, or in respect of, members of the scheme;
To restrict employer-related investments	Part I, Section 40 (1-5)	The trustees or managers of an occupational pension scheme must secure that the scheme complies with any prescribed restrictions with respect to the proportion of its resources that may at any time be invested in, or in any description of, employer-related investments.
Provision of documents to members	Part I, Section 41 (1-6)	(1) Regulations may require the trustees or managers of an occupational pension scheme— (a) to obtain at prescribed times the documents mentioned in subsection (2), and (b) to make copies of them, and of the documents mentioned in subsection (3), available to the persons mentioned in subsection (4).
Segregate Trust Assets and not to Commingle	Part I, Section 49 (1)	The trustees of any trust scheme must, except in any prescribed circumstances, keep any money received by them in a separate account kept by them at an institution authorized under the [1987 c. 22.] Banking Act 1987
To keep books and records	Part I, Section 49 (2)	(2) Regulations may require the trustees of any trust scheme to keep— (a) records of their meetings (including meetings of any of their number), and (b) books and records relating to any prescribed transaction.

8.4 Liabilities

Part I, section 33 deals with liabilities faced by trustees due to a breach of duty

Investment powers: duty of care

(1) Liability for breach of an obligation under any rule of law to take care or exercise skill in the performance of any investment functions, where the function is exercisable—

(a) by a trustee of a trust scheme, or

(b) by a person to whom the function has been delegated under section 34, cannot be excluded or restricted by any instrument or agreement.

9 United States of America

9.1 Statutory Provisions

Retirement funds in the USA are usually operated in terms of and their regulation is governed by The Uniform trust code, (Electronic annexure 25) (Davenport: 2005, 1). However this varies from state to state.

The Uniform Trust Code (UTC) article 8 codifies the fundamental common law duties and powers of a trustee. It applies as a general law to all States but has only been officially enacted in nine States. However, each State has adopted the law and added elements to it that best reflect both its legal and commercial environments for instance the Texas Trust Code as applicable in the State of Texas (Davenport: 2005, 2).

The Employment Retirement Income Security Act of 1974, (ERISA) (electronic annexure 26) is the key legislation in the USA dealing with the monitoring of the duties of trustees, their responsibilities and liabilities.

ERISA is a federal statute as supported by section 514 of the Act, pre-empting ‘all state laws "insofar as they relate to" such employee benefit plans, with the exception of state laws regulating banking, securities or insurance’.

ERISA consists of three titles (i.e. sections) namely; Title 1: Employee Benefits Protection, Title 2: The Internal Revenue Service (IRS) Code, Title 3: Jurisdiction and Title 4: Termination Insurance

ERISA Section 404 “protects the interests of participants and beneficiaries in private-sector employee benefit plans” by setting fiduciary standards.

This requires beneficiaries to be informed of their rights and the financial status of their plans. It also empowers beneficiaries by giving them the right to remedy for breach of fiduciary duties as well as recovery of benefits through legal actions in the federal courts.

The Department of Labour controls the requirements for reporting, disclosure of financial information and fiduciary standards (Purcell and Staman; 2003:49).

Over time there have been amendments made to ERISA as well as new laws implemented to enhance the governance and protection of pension plans. These laws would include the Social Security Amendments Act (1983), the Retirement Equity Act (1984) and the Pension Protection Act (1987) to name a few. Electronic annexure 25 and 26 show UTC provisions as well as ERISA. Electronic annexure 27 provides a comprehensive list of Benefits Legislation before and after ERISA.

The last section of governing instruments is the trust deed; which is the founding document creating trust.

9.2 Pension Trust Structure

Pre 1900's the pension plans mainly took the form of service-connected disability pensions, then adding disability and eventually adding age/retirement. By the 1900's pension plans were established in the steel, railroad, utility, banking and oil industries (Hannah, 2002:938).

In the USA pension benefits are normally presented in the form of employee benefit plans (private pension plans) and the Social Security programme (Mitchell and Piggott: 2000, 5).

“The national retirement program known as the Social Security or OASI (Old-Age and Survivors Insurance), is financed by a mandatory 12.4% payroll tax used to pay benefits to current retirees” (Mitchell and Piggott: 2000, 5). The employee benefit plans comprise of a pension benefit and welfare benefits e.g. health and disability benefits (Purcell and Staman; 2003:48).

Labadie and Kleiner (2002), define a pension plan as one that gives an income to employees upon retirement or cause employees to defer income for periods after employment has concluded.

According to Papke (1999), plans are commonly categorised into two type's namely defined benefit (DB) and defined contribution (DC).

Defined benefit plans define the benefits to be received upon retirement and the investment risk is carried by the employer, as they have guaranteed a specific pension amount to the employee.

In defined contribution plans [e.g. 401(k)] the employee has an individual account and makes a defined contribution together with their employer towards the account, this contribution is usually a fixed portion of employee's wages/salary (Papke: 1999, 346). In DC plans unlike DB plans, the investment risk is carried by the employee, as the employer does not guarantee the specific pension amount.

In DB plans there is a large element of investment risk which is carried by the employer. When the plans assets are not adequate in providing security for the promised benefits, this results in a deficit. When the funds in the plan, due to investment returns being lower than expected, do not meet the future liabilities of the plan, it is said to be under funded. The employer then has to make up that deficit by, for instance, higher contributions, as they guarantee the benefit amount (Ferris: 2007, 202).

Illustrations of large pension plans that have been underfunded and in some instances terminated include United Airlines in the U.S.A. The airline had liabilities amounting to \$16.8 billion and assets of only \$7 billion in May 2005, consequently the plan was terminated (Ferris: 2007, 203).

On the 13 April 2006 Bloomberg reported that in the UK, "Rolls Royce plans to pay 500 million pounds (\$876 million) toward closing a deficit in three pension plans provided they are closed to new members". In Canada, Air Canada reported a deficit of roughly \$1.2 billion in 2003 (Ferris: 2007, 204).

For employers to avoid exposure of the investment risk there has been a move towards DC plans, however retirees and current employees who had initially started on DB plans are being kept there. But fewer and fewer employers are offering this type of scheme because of the risk attached to it (Papke, 1999, 347).

In 1974 the United States introduced a retirement account for ‘workers without company pensions’ known as Individual Retirement Accounts (IRAs). IRAs grew in the 1980’s as workers and their spouses qualified and they extended ‘the same tax benefits as pension funds, 15 million plans opened in 1985’ (E.P Davis; 1993, 11).

9.4 Duties and Responsibilities of Trustees

Table 28: Duties and Responsibilities

Duties	Common Law as related in	Statutory Law as related in	Responsibilities
Good Faith and Fair Play	Ikard: 1996, 9		Trustees should display at all times good faith and fair play in all transactions
Confidentiality		Davenport: 2005, 11	The trustee is privy to crucial information pertaining to the trust such as the nature of trust assets and should not divulge any information
Take possession of trust property		UTC, S 809	to take reasonable steps to take and keep possession of and keep control of trust property.
Segregate Trust Assets and not to Commingle		UTC, S 810(b)	not to commingle personal funds or other non-trust assets with trust assets
Preserve & Protect Trust Assets	Ikard: 1996, 13		take reasonable care and skill to preserve trust property
Not to Delegate Trust Responsibilities	Ikard: 1996, 13		not to delegate acts or responsibilities that he/she can reasonably be expected to perform, included is the duty not to delegate administrative tasks that he/she can perform to a co-trustee if there are several trustees
Keep Accurate Books and Records		UTC, S 810(a)	keep accounts showing in detail the assets, liabilities, receipts and disbursements of the trust

Duties	Common Law as related in	Statutory Law as related in	Responsibilities
Uphold & Defend the trust		UTC, S 811	The trustee has a responsibility to actively defend any trust on the validity of the trust or any of its provisions e.g. such as enforcing claims on behalf of the trust as well defending the trust against adverse claims
Pay the Income Beneficiaries	Ikard: 1996, 18		The trustee has a responsibility to pay income to a beneficiary for a particular period , as instructed by the trust deed, at reasonable intervals the net income from the trust property
Exercise Ordinary Skill & Prudence (the "Prudent Man Rule)		ERISA, S 404(a)(1)(B), UTC, S 804	with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
Loyalty and to Avoid Conflict of interest		ERSIA, S 404(a) (1) (A), UTC S 802 (a)	A trustee must not engage in any act which puts his personal interest in conflict with those of any of the beneficiaries and must exclude all considerations of the interest of third parties
Impartiality		UTC, Section 803	Unless otherwise specifically provided in the trust instrument, the trustee must show impartiality in balancing the interests of life beneficiaries and remainder men and in balancing the interests of members of the same class. The duty of impartiality must be kept in mind when making investment decisions and discretionary distribution decisions.
Administer the trust	Davenport, 2005, 11	ERISA, S 404(a) (1) (D)	Once the trustees has accepted the role they are under a duty to study and understand the terms of the trust and to strictly adhere to the terms and provisions of the instruments creating the fiduciary relationship
Keep Beneficiaries Informed and to account to them		UTC, S 813	The trustee has a responsibility to inform the beneficiaries of important matters such as investment performance regarding the trust and the beneficiary is entitled to demand such information. The trustees may also be compelled by a beneficiary to furnish an accounting.
Make the Trust Property Productive	Ikard: 1996, 16 Davenport: 2005, 9		"A trustee is under a duty to use reasonable care and skill to make the trust property productive, a responsibility to "invest assets in a manner that is appropriate for the trust"

Duties	Common Law as related in	Statutory Law as related in	Responsibilities
Review Trust Investments Periodically	Ikard:1996, 17		A trustee has a responsibility to examine and check the trust investments periodically throughout their role
Invest	Davenport: 2005, 9		To invest assets in a manner that is appropriate for the trust. The prudent investor rule is used under this duty, over and above the duty to invest a "trustee has a duty to diversify investments and construct an appropriate asset allocation plan". The trustee is also under an obligation to "understand the investment direction provided in the trust instrument and also the investment requirements under applicable state law."
Diversify Investments		ERISA, section 404(a)(1)(C)	(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
Prohibited Transactions		ERISA, section 406 (a)	A trustee has a responsibility not to engage in transactions "deemed likely to injure a pension plan".

Section 3 (21) (A) of ERISA defines a fiduciary as “any person who:

- 1) exercises any discretionary authority or control with respect to the management of the plan or exercises any authority with respect to the management or disposition of plan assets;
- 2) Renders investment advice for a fee or other compensation with respect to any plan asset or has any authority or responsibility to do so or
- 3) Has any discretionary responsibility in the administration of the plan.”

Liabilities

Certain remedies, sanctions and other equitable relief as well as easy access to federal courts in the event of a breach or violation are provided for in ERISA section 502(a) (2).

Such remedies include profits made “through use of assets of the plan by the fiduciary” and the removal of the trustee (Purcell and Staman, 2003; 84).

However, as mentioned in paragraph 9.1 above, because ERISA is federal in nature the remedies offered in the statute pre-empt any state law remedies (Purcell and Staman; 2003, 82).

In other words a plaintiff/beneficiary may not recover remedies under state law if the civil action is a breach or violation of an ERISA provision. ERISA seeks to provide remedies to the plan as whole rather than compensatory or punitive damages to individuals (ERISA, section 514)

Civil actions authorised by section 502(a) and liabilities normally arise as a direct result of the following actions:

Table 29: Civil action and liabilities

Section of the Act	Civil action and liabilities
S 502 (a)	Breach of fiduciary duties, responsibilities or obligations
S 502 (a)	Failure of a plan administrator to furnish information compulsory to ERISA’s reporting and disclosure requirements
S 502 (a)	Failure to pay beneficiaries benefits due to them under the terms of their plan
S 502 (a)	Acts that violate provisions of ERISA or the terms of the plan

Source: Purcell and Staman (2003)

Section 409 of ERISA states that a trustee “may be personally liable to a plan for any losses resulting from a fiduciary duty breach and may be responsible for forfeiting to the plan any profits that have been made through the improper use of plan assets”.

9.3.1 Duty of prudence

Failure to apply the necessary care, skill, prudence and diligence will result in the courts finding trustees in breach of the duty of prudence. The trustee must assess the following facts about the investment before a decision is taken:

Table 30: Investment assessment facts

FACTS TO ASSESS ABOUT INVESTEMENTS	
1.	The risk-return,
2.	Diversification, liquidity and current return of the investment given the cash flow needs of the plan.
3.	As well as the if the investment under consideration forms part of the plans portfolio composition

Once the court can clearly ascertain whether the above procedural steps were taken, a ruling will be made. The success or failure of an investment then becomes immaterial, given that the trustee in question followed appropriate protocol (Purcell and Staman, 2003; 74).

In the *Tittle v. Enron(2006)* the plan provisions required that the trustees to accept contributions made by the employer in the form of Enron stock. When this matter was brought in to court, the judge decided “that the plan fiduciaries has (sic) a duty to ignore this provision if it would be imprudent to follow it” (Tittle v. Enron Corp., 2006).

The common ruling by the courts is to require the trustee to return to the plan the loss exposure caused by the investment (Purcell and Staman, 2003; 80).

9.3.2 Duty of loyalty

Liability under this duty arises when the trustees fail to act in the sole interest of the plan participants, for the exclusive purpose of affording benefits to the plan and settling reasonable expenses of administering the plan (Purcell and Staman, 2003; 72). In the *Donovan v. Bierman*, pension fund trustees, “who were also corporate officers, were responsible for deciding whether they should tender shares of company stock in order to thwart a hostile takeover attempt” (*Donovan v. Bierman*. 1982).

The court however reasoned in the following manner; “it is not a breach of fiduciary duty if a trustee, after careful and impartial investigation, makes a decision that while benefiting the plan, also incidentally benefits the corporation, or the fiduciaries themselves. However, fiduciary decisions must be made with an “eye single to the interests of the participants and beneficiaries” (*Donovan v. Bierman*. 1982).

9.3.3 Duty to diversify investments

To avoid liability the fiduciary is required to ‘minimise the risk of large losses; unless it is absolutely prudent not to do so. In the *GIW Industries, Inc v. Trevor Stewart* the court found that “the defendant investment manager breached its duty to diversify investments by investing too heavily in long-term government bonds. By investing 70 percent of the plan’s assets in long-term bonds rather than short-term bonds, the firm exposed the fund to a greater degree of risk” [*GIW Industries, Inc v. Trevor Stewart*. 895F. 1990).

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