

¶43-600 FIDUCIARY LIABILITY INSURANCE

*Prepared by Murn Meyrick, CEO
Grey Swan Advisory Professional Corporation*

¶43-601 OVERVIEW

This chapter is intended to provide an overview of fiduciary liability insurance for general and illustrative purposes only. The material presented is not a complete or exhaustive analysis of legal liability exposures or risks, or of fiduciary liability insurance coverage. The terms and conditions of fiduciary liability insurance are not standardized. The availability of insurance coverage to respond to any particular claim will depend on the specific facts and circumstances of the claim and the language of the policy as issued. Advice with respect to particular insurance needs or actual or potential legal liability must be obtained from an insurance broker or lawyer, respectively.

¶43-601a Navigating this Chapter

Quick Solutions

- Use comparative charts and checklists
 - Chart: Maximizing protections for fiduciaries (¶43-642a)
 - Checklist: Conducting a review of risk exposures (¶43-644a)
 - Checklist: Reviewing the fiduciary liability policy (¶43-644b)
- Review sample documents
 - Sample fiduciary liability policy (¶43-646a)
 - Sample fiduciary liability insurance application (¶43-646b)
 - Sample labour management trust policy (¶43-646c)
- Check key current trends and topics relating to fiduciary liability insurance (¶43-601e)
 - Conflicting duties in plan administration and implications for insurance coverage
 - Voluntary settlement coverage
 - Expansion of the term “claim”

Essential Preliminary Information and Organizational Context

- Pension plan fiduciaries (¶43-601b)
 - Identity; the pension and benefit environment (litigation, reforms); conflicting duties in plan management; fiduciary exposures (breach of duty, wrongful administration, damages, class actions)
- Overview of fiduciary liability insurance (¶43-601c)
 - Purpose of the insurance; who needs it and why; who is not covered by fiduciary insurance; triggering the policy and key definitions (“claims made” coverage, “claim”, “all risks” coverage, “third-party liability” coverage)

- Maximizing fiduciary protections: insurance and indemnification (§43-601d)
 - Fiduciary insurance
 - Indemnification: Limitations on ability of corporations to indemnify fiduciaries; limitations on ability to provide indemnification from plan assets; indemnification agreements should provide the broadest protection; “presumptive indemnification”
 - Maximizing insurance coverage where indemnification fails: Include a priority of payments provision; purchase dedicated Side A coverage; purchase Side A DIC coverage

Manage Legal Risk and Provide Advice

- Understanding the role of in-house counsel in relation to fiduciary liability insurance (§43-604)
 - Review insurance policy terms; work with internal colleagues; work with external experts; review indemnification options
- Identifying and responding to exposures in pension plans and “red flag” situations (§43-606)
 - Fiduciary liability exposures in DB claims and DC claims; “red flag” situations to watch for; responding to exposures and red flags
- Key tips for reviewing fiduciary insurance policies and understanding policy terms and conditions (§43-608)
 - Work with key internal colleagues; consult with specialized external counsel/consultants; conduct insurance coverage audit and review; obtain insurance
 - What is covered by fiduciary policies
 - Terms and conditions
 - Extension where fiduciary compliance audit taken
- Selecting appropriate insurance for fiduciaries conditions (§43-610)
 - Employee benefits liability insurance; fiduciary liability insurance; labour management trust
- Purchasing fiduciary liability insurance (§43-612)
 - How it may be purchased; key considerations affecting limits and capacity; considerations affecting pricing; tips for securing the best terms and conditions through risk differentiation

Conduct Further Research

- Link to key cases impacting fiduciary liability (§43-672)

¶43-601b Pension Plan Fiduciaries

- **Who is a fiduciary?** A fiduciary includes those having a fiduciary relationship to the beneficiaries of any retirement plan or other employee benefit program (such as medical, accident, or group life plans) — referred to in this chapter as “plans” — and includes any person or entity that exercises discretionary authority or control over the plan or its assets and any person or entity that makes decisions regarding the administration and the investment or management of the plan’s assets. Persons to whom discretionary authority is delegated, such as members of administration committees and investment committees, are included.

A fiduciary may be any of the following:

- Employer/plan sponsor;
- Plan administrator;
- Officers and directors;
- Pension committee;
- Trustee or custodian;
- An investment manager; or
- Other consultants or advisors, including actuaries and lawyers.

- **The pension and benefit environment:**

- **Return of the Surplus and De-Risking:** Developments in 2013 and 2014, including strong stock markets and rising long-term interest rates, have led to many Canadian defined benefit plans seeing an improvement in their significant funding deficits. However, many employers continue to look for strategies to de-risk their plans given earlier poor investment returns combined with longer life expectancies and a wave of retiring baby boomers. Such strategies have included conversions of defined benefit to defined contribution plans, amendments to plan benefits, and mergers and acquisitions activity. Such activities carry a significant risk of litigation by plan beneficiaries against plan fiduciaries.

– **Fiduciary litigation:** Since 2000, Canada has been fertile ground for fiduciary litigation. Recent court decisions throughout Canada have broadly interpreted the obligations and duties (common law and statutory) imposed on fiduciaries, creating an escalating liability environment.

It is predicted that the decade from 2010 to 2020 could be very litigious for pension plans as today’s employers try to develop well-thought-out strategies to reconcile their long-term need to have a cost-efficient plan with their short-term volatility issues. Given the difficulty in reconciling these competing strategies, the anticipated failure may well result in litigation. Furthermore, increased merger and acquisition activity, particularly cross-border, combined with a lack of clarity in the case law, minimal legislation, and restrictive regulatory policies has created a risky legal environment for companies acquiring or disposing of pension plans and their associated liabilities.

These predictions have proven true in the early part of the decade, with a spate of cases following employers’ attempts to unilaterally change employee benefits, with varying results.¹ In addition, several high-profile insolvency proceedings have been complicated by issues of priority of secured creditors over pension obligations. This was the case in *Sun Indalex Finance, LLC v. United Steelworkers et al.*² where the Supreme Court of Canada (“SCC”) held that a super priority for debtor-in-possession lenders will trump the deemed trust under the Ontario *Pension Benefits Act*. The SCC’s decision in *Indalex* was endorsed by the Quebec Superior Court in *Aveos Fleet Performance Inc. (Re)*³ in the context of federal pension legislation. However some uncertainty over how the priorities will be set between secured creditors and a statutory deemed trust remains, as evidenced by the recent decision of the Quebec Superior Court in *Timminco Ltée*⁴, which found that a statutory deemed trust had priority over a secured creditor.

¹ For example, see (1) *ONeil v. General Motors of Canada*, 2013 ONSC 4654; (2) *Royal Ontario Museum Curatorial Association v. Ontario (Superintendent Financial Services)*, 2013 ONFST 9; and (3) *Halliburton Group Canada Inc. v. Alberta*, 2010 ABCA 254.

² 2013 SCC 6.

³ 2013 QCCS 5762.

⁴ (24 January 2014) Montreal 500-11-043844-121 (QCCS) 9 (decision is currently under appeal).

– **Pension reforms:** The last few years have brought substantial pension reform measures both at the provincial and federal levels and no abatement appears in sight.⁵ In response to the federal government's refusal to enhance the current Canada Pension Plan, the Ontario government unveiled a new Ontario pension plan in its spring 2014 Budget. As many plans have faced funding difficulties, some Canadian jurisdictions have enacted solvency funding relief measures.

Federally, the first proposed pooled registered pension plans ("PRPPs") came into force in 2012 as a new type of large scale and low-cost defined contribution plans offered by a single entity, and participated in by multiple employers, employees, and the self-employed. PRPPs have been fully introduced in federally regulated industries as well as for all employees in the Yukon, Northwest Territories, and Nunavut. Additionally, the federal government has launched consultations on potential frameworks for target benefit plans for federally regulated private sector and Crown corporation pension plans. Provincially, other jurisdictions have introduced draft legislation to establish PRPPs. These changes are arising in the context of "uncertain" financial times and in an environment when employees are far more aware of and engaged in concerns regarding their health benefits and retirement funds than ever before.

- **Conflicting duties in plan administration — the Indalex decision:** The SCC's decision on February 1, 2013 in *Indalex*⁶ considered the scope of the deemed trust provisions of Ontario pension legislation, the priority of a debtor-in-possession charge over pension trust assets, and conflicting duties of the company as its interests as a corporation conflicted with its fiduciary duties as a plan adminis-

trator during certain stages of its insolvency proceedings.

With respect to this last issue, the SCC held that Indalex was in breach of its fiduciary duty when, upon insolvency, it failed to address the conflict of its corporate interests with its duty as plan administrator to ensure all contributions were made to the plan. Recognition of the dual duties and potential conflict has arisen in previous cases.⁷ The implications of acting in dual capacities is a key consideration in determining insurance coverage, as discussed at ¶43-601c.

- **Exposures for fiduciaries:** Fiduciaries have potentially devastating exposures and face genuine risks arising out of their actions in connection with plans. Details of fiduciary risks are discussed at ¶43-606. In general, fiduciary risks arise from:

- **Breach of fiduciary duty (either statutory or common law standard of care):** As "fiduciaries", these individuals must comply with detailed, complex, and stringent legal requirements; must act with the utmost care; and must avoid even the appearance of certain conflicts of interest. Day-to-day decisions will be scrutinized in hindsight, even if they appeared prudent at the time.
- **Wrongful administration:** Wrongful administration includes negligent errors or omissions in the administration of any plan including denial, miscommunication, or miscalculation of benefits.
- **Significant damages:** If a wrongdoing occurs, potential damages can be enormous in light of the large amount of money controlled by or owing under such plans. Furthermore, defence costs are often substantial as legal teams may involve pension solicitors working with defence litigators and oftentimes historic, complicated plan documents must be reviewed.

⁵ For example, see (1) the proposed Ontario Retirement Pension Plan (proposed in spring 2014); (2) the amendments to the Ontario *Pension Benefits Act* enacted in 2012; (3) the Alberta *Employment Pension Plans Act*, SA 2012 c. E-8.1 (in effect September 1, 2014); (4) the British Columbia *Pension Benefits Standards Act*, RSBC 2012, c. 30 (formerly Bill 38, which received Royal Assent on May 31, 2012 but which has not yet been proclaimed in force); (5) the Quebec *Voluntary Retirement Savings Plan Act*, CQLR c. R-17.0.1 (formerly Bill 39, came into force July 1, 2014); and (6) the Nova Scotia *Pension Benefits Act*, SNS 2011, c. 41 (formerly Bill 96, which received Royal Assent on December 15, 2011 but which has not yet been proclaimed in force).

⁶ 2013 SCC 6.

⁷ See, for example, *Slater Steel (Re)*, 2008 ONCA 196, where the Ontario Court of Appeal held that audit committee members were not acting in the capacity of officers and directors when reviewing/approving actuarial reports, but rather as agents and employees *qua* administrator and thus were not protected by bankruptcy protection orders. See also *Association provinciale des retraités d'Hydro Québec v. Hydro-Québec*, 2005 QCCA 304, leave to appeal to the Supreme Court of Canada denied, where the Quebec Court of Appeal held that, in making a decision to change the benefit structure, the employer was acting in its capacity as corporate sponsor, and not as a fiduciary of plan.

- **Class action litigation:** Pension trusts have been said to be “the quintessential class action”, the advantages of which are “incontrovertible”.⁸ With class actions available across the country, increasing financial benefits of contingency fees or third-party funding, and a trend towards lower cost awards against unsuccessful plaintiffs, it appears that the judiciary is making class actions easier, more profitable, and less risky for plaintiffs. It is no wonder that plaintiff law firms have become more organized, experienced, and specialized in this area of litigation.

¶43-601c Overview of Fiduciary Liability Insurance

- **Purpose of the insurance:** Fiduciary liability insurance is designed to provide protection to the organization, subsidiaries, directors, officers, and employees — and the plans themselves against losses that result from actions under two types of alleged wrongdoing — a breach of fiduciary duty or wrongful administration of the plan.
- **Who needs to be insured:** Regardless of the size or the number of plan participants, every company needs fiduciary insurance if it sponsors a plan.
 - **Multi-employer plans:** The unique structure of and risks faced by multi-employer plans dictate that their insurance coverage should be underwritten and based on a specific policy form with features that address their individual needs. These policies are sometimes referred to as labour management trust policies. This often requires a custom, as opposed to “off the shelf”, solution.
 - **Persons acting in multiple capacities:** Persons or entities that have one type of professional liability insurance policy may not be covered for all potential risks under that one policy. Directors, officers, employees, and the employer/plan sponsor may serve in more than one capacity in an organization (see the discussion relating to the *Indalex* case above at ¶43-601b). The fiduciary responsibilities owed to the beneficiaries of a plan are separate and distinct from those respon-

sibilities that are owed to corporate stakeholders in other areas of corporate governance. This dual role as corporate employer/director/officer and plan administrator/fiduciary may give rise to situations where the interests of the corporate employer conflict with those of the plan beneficiaries.

It is not always clear in which capacity the person/entity may be acting. Such persons/entities may be insured under several different insurance policies, and a consideration of an insured's role and duties and the capacity in which it is alleged a wrongful act occurred is crucial to determine which type of insurance should respond to a particular loss.⁹

- **No contracting out of obligations:** Although a fiduciary can delegate some of its responsibilities, it cannot legally contract out of its fiduciary obligations. While there is no statutory liability of directors in the event of bankruptcy for pension obligations, directors have the ultimate responsibility for all functions involved in the operation of the plan and the fund.

It is thus necessary for companies with plans to obtain fiduciary liability insurance regardless of the nature of the plan and regardless of whether or not they have contracted out some of their fiduciary responsibilities, including delegation of administration of the plan to a third party.

- **Who is not covered by fiduciary insurance:** A typical fiduciary policy is not intended to provide coverage to persons or entities outside the insured corporation, even though they may be performing fiduciary duties in respect of the plan.
 - **Third parties not covered:** External lawyers, actuaries, investment advisors, third-party administrators, and so forth are not typically covered under fiduciary insurance.
 - **Hold harmless and indemnification agreements:** It is increasingly common for plan sponsors to be required to assume contractual liability for third-party service providers, in the form of hold harmless and indemnification agreements, as well as contractual limitations of liability. Such

⁸ *Ormrod v. Etobicoke (Hydro-Electric Commission)* (2001), 53 OR (3d) 285 (ONSC). See also *Lloyd v. Imperial Oil Limited*, 2008 ABQB 379.

⁹ See 2013 SCC 6. See also *Slater Steel (Re)*, 2008 ONCA 196, and *Association provincial des retraités d'Hydro Québec v. Hydro-Québec*, 2005 QCCA 304.

assumptions of liability will not typically be covered under fiduciary insurance. Rather, such exposures are more appropriately covered under a professional errors and omissions insurance policy, obtained by the third party itself.

• **Triggering the policy and key definitions:**

- **The claim as trigger — “claims made” coverage:** Fiduciary insurance policies are “claims made” coverage, meaning that the policy that is in place at the time the claim is made is the one that responds to the loss, regardless of when the wrongful act occurred.
- **Types of risks covered — “all risks”:** The policy is written on an “all risks” basis, meaning that the policy does not provide a list of covered risks, one of which must occur for coverage to be triggered, but rather covers all breaches of fiduciary duty and errors in the administration of a plan. The policy is triggered when a “claim” that seeks the recovery of “loss” is first made during the policy period for a “wrongful act”.
- **What is not covered:** This insurance is *not* intended to cover wrongful acts clearly known prior to the inception of the policy. Upon the purchase of new insurance, the insurance underwriter will require that an application¹⁰ be completed that asks if the insured is aware of any existing claims, or anything that could reasonably lead to a covered claim during the policy period (if there is, whether disclosed or not, there will be no coverage afforded for a subsequent claim). Prior claims and previous litigation are excluded from the future policy.
- **Notice of circumstances (where claim not yet made):** Most policies allow the insured to provide a notice of circumstances that may give rise to a claim where a claim has not yet been made. This type of notice provision can be very useful (1) where a policy is being terminated; (2) where policy terms have changed significantly; or (3) where limits have been depleted from one policy period to the next.

When the notice is accepted by the insurer, the insurer is obliged to treat a subsequent claim as if it had been made in the policy period in which the notice was given. Careful attention must be paid to the exclusion section; many policies exclude claims arising out of circumstances that have been previously noticed in a prior policy period. Thus, if a circumstance is noticed, but not accepted by the insurer, a gap in coverage may arise.

- **Types of claim:** The definition of “claim” within a policy may vary substantially, but typically includes: (1) a written demand for monetary damages; (2) a civil proceeding commenced by the service of a statement of claim or similar pleading; (3) a criminal proceeding commenced by the return of an indictment; and (4) formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigation order, or similar document.

The more broadly the term “claim” is defined, the easier it is to trigger coverage. However, a broader trigger can have undesirable consequences, such as onerous implications when coupled with a stringent reporting requirement.¹¹ Furthermore, increased coverage also increases access to and thus depletion of policy limits, thereby necessitating a consideration of the appropriateness of the limits purchased.

With the recent rise in activism of regulatory agencies, coverage to respond to the early stages of regulatory investigations, as opposed to only the later “formal” stage, has become important.

- **Third parties must seek compensation — “third-party liability” coverage:** The coverage provided is “third-party liability” coverage, meaning that a party separate from the insured must seek compensation for harm they have suffered, as opposed to the insured itself seeking recovery for the cost of correcting an error that it has discovered.

¹⁰ A sample fiduciary liability insurance application is provided at ¶43-646b.

¹¹ For example, where a claim includes a verbal demand, and the policy requires reporting within the policy period.

¶43-601d Maximizing Fiduciary Protections: Insurance and Indemnification

Benefit administrators and the individuals who act as fiduciaries of plans need protection against their legal risks. For individuals with personal exposure, indemnification is typically the first line of defence; however, given that indemnification may be an ineffective source of protection, fiduciary insurance and its particular terms must be given close attention.

- **Fiduciary insurance:** Fiduciary insurance is discussed at ¶43-601c.
- **Indemnification:** Key considerations relating to indemnification of fiduciaries are as follows:

- **Limited ability of corporation to indemnify fiduciaries:** Corporate business statutes make specific provisions to allow the corporation to indemnify officers and directors against costs, charges, and expenses, including amounts paid to settle or satisfy a judgment in a civil, criminal, administrative, investigative, or other proceeding in which the individual is involved because of their position with the company.

The ability of a corporation to indemnify its fiduciaries with regard to their actions in connection with a plan is more limited than the rights of indemnity that a corporation may extend to its executives. The fiduciary is typically required to be acting in good faith and without gross negligence in order to qualify for an indemnity. In today's environment of flagrant corporate malfeasance, there are more situations where the company is unable, or indeed unwilling, to indemnify costs incurred in defending claims.

- **Ability to provide indemnification from plan assets may be limited:** In some cases, the corporation or plan administrator may want to indemnify the fiduciaries out of the plan funds. This might be the case, for example, when an officer is appointed by his or her employer company to the board of trustees of a multi-employer plan.

Generally, directors and officers who act as administrators will have a right to indemnification from plan assets; however, this right can be

impaired by the plan terms, or by actions taken by the administrator that fall outside the scope of duties the administrator has set out in the plan. It is important to carefully review the plan to ensure it allows for such coverage, and that the coverage provided is adequate.

- **Indemnification agreements should provide the broadest protection:** To ensure the broadest indemnification protection, many corporations provide their directors and officers with indemnification agreements. Such agreements can be very beneficial as they are typically broader in scope and clarity than the plan or corporate constating documents.

It would be wise for plan sponsors to consider indemnity agreements for all their fiduciaries.

- **“Presumptive indemnification”:** As important as it is to provide well-crafted indemnification agreements, it is necessary to note that many, if not all, North American-based fiduciary policies contain a “presumptive indemnification” provision. Essentially, this provision provides that, if a company is legally permitted to indemnify, the insurance carrier will presume that the company has provided indemnification to the fullest extent allowable by law. In fact, the carrier will usually make this presumption whether or not the company has actually elected to do so. This becomes important in determining whether an insurance policy's retention/deductible must be paid before the insurer starts paying.

- **Maximizing insurance coverage where indemnification fails:** Maximizing coverage for non-indemnifiable loss (i.e., where the corporation or plan is incapable of indemnifying the individuals) can be done in the following ways, all of which are recommended:

- **Include a priority of payments provision:** Under certain circumstances, there may be competing claims for policy proceeds and insufficient limits of liability under the policy to cover all losses. This may occur, for example, where multiple requests are made of an insurer to pay losses under a policy (e.g., where a pension committee is sued in a class action in the United States and the plan sponsor is being investigated by a regulator in Canada, and a fraudulent CFO/trustee is

being prosecuted for fraud). The general principle governing which loss is paid first is the “first past the post” theory — that is, the first to make a claim is paid.

It is possible, however, to draft the insurance policy such that payments to individuals where no indemnity is available are given first priority over payments to the organization/plan itself. This is referred to as a “priority of payments” provision. This kind of a provision is an attempt to ensure that individuals need not resort to their personal assets to pay losses.

– **Purchase dedicated Side A coverage:** This type of coverage provides protection for loss paid by the insured persons which is not indemnified by the insured organization or plan. It does not cover exposures of the insured organization or plan, nor does it cover amounts the insured organization or plan may have paid to the insured persons as indemnification.

– **Purchase Side A difference in conditions (“DIC”) coverage:** A DIC policy is a separate policy which sits in excess of the underlying directors’ and officer’s (“D&O”) liability policies and provides both excess and, in many cases, broadened coverage. A DIC policy is intended only for individuals and is triggered only in circumstances of non-indemnifiable loss. A DIC policy may respond to the following types of situations: financial impairment of the insured entity or plan, indemnification prohibited by law, the underlying policy wrongfully refuses to pay or is unable to pay as a result of its own insolvency, and exhaustion of underlying policy limits. Furthermore, it is typical to have the DIC policy contain broader coverage (thus the title “difference in conditions”), which is uniquely important to the insured individuals. Thus, while a typical D&O policy would likely contain an exclusion to coverage for allegations relating to breach of fiduciary duties in connection with an employee benefit plan, a DIC policy may well provide coverage for such allegations.

As a result, the DIC policy acts in two very important ways (excess and difference in conditions) to protect the insured individuals. Thus, in

considering fiduciary coverage available to directors and officers, it is always important to review any available D&O and DIC policies.

¶43-601e Key Current Trends and Topics Relating to Fiduciary Liability Insurance

- **Conflicting duties in plan administration and implications for insurance coverage:** It is very important to determine in which capacity an insured is acting in order to determine whether a fiduciary or D&O policy should respond to a loss. This is because most, if not all, North American fiduciary insurance policies require that the wrongful act be committed in a fiduciary capacity, and most D&O policies contain an exclusion precluding coverage where the insured is acting in a fiduciary capacity with respect to a plan. The case of *Indalex* (see discussion at ¶43-601b and case digest at ¶43-672) showed that determining the capacity in which the insured was acting can sometimes be difficult.

There has been some innovation in the fiduciary insurance market in the United States to address this conundrum, such as new “settlor” coverage (where policies may cover some aspects of claims based on business decisions made about a plan such as termination of benefits or amendment of terms of a plan). To date, however, there has not been much, if any, innovation in Canada.

- **Voluntary settlement coverage:** Voluntary settlement coverage provides additional coverage where the insured resolves a potential claim before it meets the policy definition of “claim”. This allows an insured to make a correction to an error, before it turns into a full-blown claim, and still recover indemnification under the policy.
- **Expansion of the definition of “claim”:** The definition of the term “claim” has been expanded to trigger at an earlier stage of investigations. This innovation has firmly taken hold in the D&O insurance market, and is currently slowly gaining traction in the fiduciary insurance market.

¶43-602 PRACTICAL APPLICATION

¶43-604 Role of In-House Counsel in Relation to Fiduciary Liability Insurance

Insurance policies are significant commercial contracts and should be given the same due diligence attention that in-house counsel affords to all commercial contracts:

- **Carefully review insurance policy terms:** Fiduciary insurance policies and indemnities are not well-known or understood. The language is not standardized and a careful analysis of their terms is essential to ensure a full understanding of what coverage is (and is not) being provided.

– **Ensuring flexibility to respond to diverse risks:** Flexibility in coverage to respond to the diversity of risks is essential, and thus working with an insurer through an insurance broker, and with the assistance of a knowledgeable external adviser to craft unique and customized coverage that will be responsive to a company and/or plan's specific risks is important.

- **Work with internal colleagues to identify risks and ensure insurance protection:** In-house counsel should work together with the internal risk manager and financial officer responsible for the company/plan's insurance program to identify risks and ensure that adequate indemnity and insurance protection is in place.

Part of this process should include an audit of all the company/plan's insurance programs to determine any overlaps or gaps.

- **Work with external insurance experts/advisors:** Where necessary, in-house counsel should look to outside legal and/or insurance expert advisors to conduct an audit of proposed insurance coverage and indemnities, and to recommend and prepare language for specific protections.

- **Review indemnification options:** In-house counsel should review whether indemnification can be paid out of the plan assets or not, and should review limitations on liability agreements with third-party service providers together with insurance maintained by such providers.

¶43-606 Identifying and Responding to Exposures in Pension Plans and “Red Flag” Situations

- **Defined benefit vs. defined contribution pension plan exposures:** Fiduciary liability exposures exist in both defined benefit (“DB”) pension plans and defined contribution pension (“DC”) plans. Although fiduciary risk relating to DC plans has been noted as a potential growth area for some time, with the United States experiencing an explosion in these types of claims over the past several years, claims relating to DC plans remain quite rare in Canada. In Canada, there is a growing trend for companies to convert from a DB to a DC plan under the mistaken assumption that a DC plan, having removed the contractual promise to deliver a specified benefit, will remove most, if not all, fiduciary risk.

- **Fiduciary liability exposures:** The following are examples of the type of risks experienced by plans in today's environment that have led to regulatory or legal action, some of which may be covered by fiduciary insurance:

- Plan/benefit changes, relating, for example, to: (1) the right of the employer to change the earnings component of a benefit formula in a DB plan,¹² (2) the elimination/reduction¹³ of retiree health care, and (3) mergers and acquisitions;¹⁴
- Communications and disclosure/misrepresentation;¹⁵

¹² *Halliburton Group Canada Inc. v. Alberta*, 2010 ABCA 254; *Royal Ontario Museum v. Service Employees International Union (Brewery, General & Professional Workers' Union), Local 2 (Policy Grievance)*, [2001] 92 OLAA No. 292.

¹³ *O'Neill v. General Motors of Canada*, 2013 ONSC 4654.

¹⁴ *Kerfoot v. Weyerhaeuser Company*, 2012 BCSC 640, where employees who transferred employment as part of a corporate transaction were awarded monetary damages on account of lost pension benefits.

¹⁵ *NCR Canada Ltd. v. IBEW, Local 2013 (Pension Amendment Grievance)*, [2014] BCCAAA No. 34.

- Conversion from a DB to a DC plan;¹⁶
 - Investments and fees: there are few Canadian cases; however, guidance can be gleaned from the United States;¹⁷
 - Expenses: for example, what can be charged to the fund;¹⁸
 - Third-party service providers and indemnities, for example, improper selection and/or delegation;
 - Successor employers;¹⁹
 - Contribution holidays and surplus entitlements;²⁰
 - Family law and estate issues, for example, spousal and other competing claims to benefits after death²¹ and assignment of pension;²²
 - Priorities in bankruptcy or restructuring;²³
 - Employment issues, such as wrongful termination;²⁴
 - Human rights issues, for example, employee challenges to age-based distinctions in pension and benefit plans;²⁵
 - DC plans: “passive” plan members and default options (i.e., members who are not engaged in managing their accounts); and
 - US litigation (such as under the *Employee Retirement Income Security Act* (“ERISA”) “tag along” claims where the plan has investments in company stock and the stock price drops as a result of financial misrepresentation).²⁶
- **“Red flag” situations:** Underwriters of fiduciary insurance will consider certain situations to be “red flags” of concern and may be less inclined to provide insurance coverage at all or, if provided, may charge higher rates with more limited coverage. The following scenarios will result in underwriters asking more questions and taking a more cautious approach to their coverage offering:
 - **Reorganizations:** The company is undergoing a downsizing/restructuring, is experiencing high merger and acquisition activity, or is being sold.
 - **Plan changes, conversion, and status:** Changes in plan terms resulting in reduced benefits are being considered or have been made, the company has made or is considering a conversion of any of its plans, or the company’s pension plan is underfunded.
 - **Litigation:** The company has had claims.
 - **Reputational issues:** The company has had negative press.
 - **Company has employer securities:** This includes both larger public companies and private companies with employee stock option plans.
 - **Pension plan stock price changes:** The company has stock in any company pension plan where the stock price has recently dropped.
 - **Responding to exposures and red flags:** Where any of the above red flag scenarios exist, in-house counsel should work with the company’s risk manager, CFO, and relevant others to understand the situation and be prepared to answer the underwriters’ questions.

¹⁶ *Weldon v. Teck Metals Ltd.*, 2012 BCSC 1386.

¹⁷ *Plasterers’ Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210 (4th Cir. 2011); *Tussey v. ABB Inc.*, 2012 US Dist. LEXIS 45240 (W.D. No. March 31, 2012).

¹⁸ See, for example, *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39; and *Burke v. Hudson’s Bay Co.*, 2010 SCC 34.

¹⁹ *Ratasani et al. v. Superintendent of Financial Services and Ontario Pension Board*, FST File No. P0473-2011.

²⁰ *Telecommunication Employees Association of Manitoba Inc. v. Manitoba Telecom Services Inc.*, 2012 MBCA 13.

²¹ *Carrigan v. Carrigan Estate*, 2012 ONCA 736; *Lacey v. Weyerhaeuser Company Limited*, 2013 BCCA 252.

²² *Vladescu v. CTV Globe Media Inc.*, 2013 ONCA 448 (SCC denied leave to appeal January 16, 2014), where the Court dealt with whether a separation agreement effectively assigned pre-retirement benefits to former spouse.

²³ *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6; *Aveos Fleet Performance Inc. (Re)*, 2013 QCCS 5762.

²⁴ *IBM Canada Limited v. Waterman*, 2013 SCC 70.

²⁵ *Ying v. Canadian Commercial Workers Industry Pension Plan*, 2012 HRTO 1274; and *Kartna v. Toronto (City)*, 2014 HRTO 395, where an application brought before the Human Rights Tribunal alleging that long-term disability plan provision terminating benefits at age 65 was age discrimination was denied.

²⁶ The fiduciary claim follows the securities action.

The underwriter may, for example, ask specific questions regarding details of the situation, what risks of litigation or regulatory exposure may arise therefrom, what protections may be in place to mitigate any exposure (such as third-party indemnity agreements and hold harmless agreements) and, if possible, to provide an explanation that differentiates the risk from other risks where litigation has arisen.

¶43-608 **Key Tips for Reviewing Fiduciary Insurance Policies and Understanding Policy Terms and Conditions**

Fiduciary policy wordings are not standardized and thus differ significantly between insurance companies. A thorough review of the policy with attention to detail in the negotiation of terms and conditions is key to obtaining appropriate coverage.

- **Work with key internal colleagues:** Because insurance policies of this nature are significant commercial contracts with complex non-standardized terms, in-house counsel should work with the company's risk manager, CFO, or other representative charged with responsibility for purchasing and maintaining the company's insurance in determining an appropriate insurance solution.
- **Consult with specialized external counsel or other consultants:** In-house counsel may also wish to consult with external legal counsel or other consultants specialized in fiduciary insurance law (which is not a common area of expertise).
- **Conduct insurance coverage audit and review:** A prudent process should include an audit of the company's existing insurance coverage; an analysis of any gaps in insurance coverage; and a comprehensive review of the insurance market to ensure that appropriate up-to-date protection is in place.
- **Obtain insurance:** Insurance must be placed by a licensed insurance broker, and appropriate due diligence should be carried out to ensure that the broker has specific expertise in this area of insurance.

A sample fiduciary liability insurance policy is provided at ¶43-646a.

- **What is covered:** The most common misconception about fiduciary insurance revolves around the issue of what is actually covered under the standard fiduciary policy, stemming from the fact that benefits due under the plan are excluded from the definition of "loss" in virtually all fiduciary policies.

- **Definition of "loss":** A typical definition of "loss" in a fiduciary policy includes damages, judgments, settlements, and defence costs in connection with a claim. Carved out of the definition of loss, however, are benefits, or that portion of any settlement or award in an amount equal to benefits, due under a plan.²⁷ This is industry standard and should not cause concern. Even though the benefit itself may not be covered under the policy, the expenses associated with defending the claim may be covered.
- **Plan assets:** Many claims made against plans and their fiduciaries involve plan assets, as distinct from plan benefits.²⁸ Although benefits may be paid out of plan assets, the plan assets are not themselves benefits.
- **Surplus withdrawals and contribution holidays:** Claims that seek entitlement to surplus withdrawals or for failure to make contribution holidays are not seeking benefits as loss. It is important to note that most standard fiduciary policies also have exclusions that preclude coverage for loss, other than defence costs, associated with plan asset reversion or contribution holidays. Thus, a claim that alleges that a company has wrongfully reverted plan surplus to its own use or has wrongfully failed to make a plan contribution would have defence costs covered under the fiduciary policy, but would not have coverage for the amount of surplus that had been wrongfully taken, or the contribution amount owing.

²⁷ The rationale for this is that paying benefits is the reason why the plan was set up — what it contractually obligates its fiduciaries and administrators to do. Paying benefits, therefore, does not involve harm to the plan, the plan sponsor, or its fiduciaries.

²⁸ For example, claims that allege a breach of fiduciary duty in managing, investing, or allocating the assets of the plan are not claims for benefits but for assets.

- **Terms and conditions:** The terms and conditions that come up for discussion with underwriters generally fall into one of two categories:

- **Migration from other lines of coverage:** This includes terms and conditions that have migrated from other executive risks lines of coverage (most notably D&O), including a priority of payments provision, non-rescindable coverage, severability, conduct exclusions, and others.
- **Tailoring coverage to particular risk(s):** This includes terms and conditions necessary to tailor the coverage to a particular risk, including items such as the basis for the insuring agreement and claims notification requirements.

A common provision in fiduciary policies is the so-called “hammer clause”. Many standard fiduciary policies have a provision that requires the insured to obtain the insurer’s consent to settle a claim. Concerned that some insureds may view their policies as assets to spend, many fiduciary policy providers have a provision that allows the insurer, in circumstances where it wishes to accept an offer to settle but the insured refuses, to limit the insurer’s liability (i.e., bring down the hammer) to the amount for which it could have settled the claim plus costs (or some agreed percentage thereof) as of the date the written settlement was proposed.

- **Extension where fiduciary compliance audit taken:** In respect of companies subject to liability under the US Internal Revenue Service rules requiring administration of plans in accordance with plan documents and legal requirements, additional coverage by an extension is offered by a few major carriers, for plans that have undertaken a fiduciary compliance audit. At its most basic, a simple audit can result in coverage extension at no cost (and can help prepare a company for an enforcement audit). A more thorough operational audit can yield more meaningful coverage enhancements in exchange for additional premiums. In Canada, although such a compliance audit is not mandatory, it is certainly powerful evidence of good governance and a strong underwriting consideration.

¶43-610 Selecting Appropriate Insurance for Fiduciaries

A plan fiduciary has various insurance options available, some of which can result in overlapping coverage.

Note that a common misconception is that directors or officers who have coverage under a D&O policy are covered for all types of actions that might arise (see ¶43-606). To the extent that an executive is acting in a fiduciary capacity (as opposed to a corporate capacity) with respect to a plan, the D&O policy will *not* cover this exposure; in fact, it typically expressly *excludes* plan risks. (A further discussion on D&O insurance is provided at ¶43-300.)

- **Employee benefits liability insurance (“EBL”) (under a commercial general liability policy):**

This coverage can be purchased as an extension to a company’s general liability policy.

- **Cons:** This type of policy provides coverage for errors in administration of the plan, such as handling records, enrolling and terminating employees, and interpreting benefits, but not the broader risk of breach of a fiduciary duty.²⁹
- **Pros:** This type of policy may provide broader coverage for loss, including benefits due under the plan (which would not typically be covered under a fiduciary policy, as noted above).

- **Fiduciary liability insurance:** This coverage overlaps with EBL coverage to some extent, but extends beyond and is capable of far greater customization. Fiduciary insurance protects some of the same individuals and entities as D&O insurance, but from claims arising from a different breach of duty — namely the duty towards plan members as opposed to obligations towards the company.

- **Cons:** This type of policy typically requires a claim or demand by a third party to trigger coverage, not just the making of a mistake and realization by the company. This coverage does not protect against all losses — that is, contractual obligations of the plan to pay benefits is not a covered loss.

²⁹ See *Michelin North America (Canada) Inc. v. ACE INA Insurance*, [2008] OJ No. 2328, where it was held that claims requiring an interpretation of the plan to determine entitlement to take contribution holidays were not covered under a CGL policy.

- **Pros:** This type of policy covers a broad range of “fiduciaries” for legal costs and judgments or settlements arising out of breaches of fiduciary duty or errors in administration of a plan.
- **Labour Management Trust (Multi-Employer Pension Plan) Policies:** This coverage is similar to a fiduciary liability insurance policy, but is designed to respond to the unique structure of multi-employer pension plans.
 - **Cons:** There is little uniformity or innovation in policy design amongst insurers so a careful review of the policy and a good understanding of the necessary coverage is essential to ensuring appropriate coverage.
 - **Pros:** On larger risks, insurers may be willing to customize a policy designed to cover the unique structure of the particular insured.

A sample labour management trust policy is provided at ¶43-646c.

¶43-612 Purchasing Fiduciary Liability Insurance

- **How it may be purchased:** Fiduciary liability insurance may be purchased in the following ways:
 - **On a stand-alone basis (or a mono-line form):** In this case, it is the only coverage provided under the policy, with the result that the entire limit of liability is dedicated to fiduciary exposure. This is the preferred method to ensure dedicated, focused coverage.
 - **As a bundled product under a “multiple-line form”:** In this case, the limit of liability would be shared by all insureds under more than one insuring agreement, for example, combined D&O, employment practices liability, and fiduciary agreements. This is typically the type of coverage offered to private and not-for-profit companies. Although it is handy to have only one policy to negotiate and purchase, a

concern is that limits for each of the insuring agreements may be eroded or depleted by exposures under other insuring agreements.

- **As an extension to a D&O policy:** This means that the limit of liability of the D&O coverage would be shared with the fiduciary coverage. Again, this may cause concern with a depletion/erosion of limits shared with the D&O coverage; however, for companies with less exposure this may be a convenient way to purchase some level of fiduciary coverage.
- **Key considerations affecting limits and capacity:**³⁰ Factors to be considered in the determination of what limit of liability to purchase include:
 - Peer/industry benchmarking;
 - Plan asset size;
 - Insured’s capacity to retain risk;
 - Level of protection desired by fiduciaries;
 - Merger and acquisition exposure; and
 - Liability environment.
- **Considerations affecting pricing:** Pricing on larger, more volatile accounts is rising to some extent; however, the Canadian market continues to be quite “soft”, meaning quite broad coverage can be purchased for a relatively low premium. While still measurable and more economical than D&O insurance (on a price-per-million basis), it is expected that, given the growing exposures, fiduciary insurance rates will increase at some point as more insurers enter the market to offer competitive products and greater capacity. Fiduciary underwriters largely define a company’s fiduciary risk by considering:
 - Whether the company is public or private;
 - Plan funding levels and assumptions (need to provide financial/actuarial statements);
 - Planned reductions in benefits;

³⁰ The fiduciary marketplace is unusual, in that rising demand (and rising prices, particularly in the United States) is not necessarily prompting increased supply. One reason is that a number of underwriters do not believe that they fully understand fiduciary exposures, particularly US-based liabilities. Even as rates rise on many larger, global risks, some carriers appear reluctant to enter the marketplace or to offer capacity on lower layers in a fiduciary program. Another factor is the limits management programs of many carriers, which limit themselves to an aggregate amount of coverage on larger risks. If their available \$10–\$20 million has already been utilized on a D&O policy, then this market may simply not be available on the fiduciary program. Efficient coordination of the available markets among the executive risks lines of coverage (especially D&O, fiduciary liability, and employment practices liability, to a more limited extent) is therefore critical for larger placements.

- Mergers and acquisitions;
 - Claims history;
 - Investment choices whether employer securities are in a DB plan, or whether the default options are in a DC plan;
 - Third-party service providers and contracts;
 - Indemnification provided to fiduciaries; and
 - Global operations.
- ***Tips for securing the best terms and conditions through risk differentiation:*** In order to secure the best terms and conditions, risk differentiation is crucial. A good marketing strategy would include:
 - Meeting with the underwriting community well in advance of policy renewal or inception;
 - Emphasizing operational, financial, and plan governance procedures and strengths, including any governance audits;
 - Addressing any claims history;
 - Addressing any significant mergers and acquisitions plans; and
 - Outlining and prioritizing reasonable expectations.

¶43-640 PRECEDENTS/PRACTICAL TOOLS

¶43-642 Charts

¶43-642a Chart: Maximizing Protections for Fiduciaries

A combination of all of the following types of protections are recommended:

Type of Fiduciary Protection	Pros	Cons
Indemnification	<ul style="list-style-type: none"> Typically first line of defence for fiduciaries NB. Insurance policies typically “presume indemnification” — i.e., that the company has provided indemnification to the fullest extent allowable by law, whether or not the company actually indemnifies or not. Impacts payment of the retention/deductible Indemnification agreements: Company may set clearer and broader indemnification terms in indemnification agreements than is contained in plan or corporate constating documents Possible indemnification out of plan assets: This depends on the terms of the plan and whether actions by the administrator fall within the proper scope of duties outlined in the plan 	<ul style="list-style-type: none"> Limited indemnification: Ability of corporation to indemnify fiduciaries in connection with a plan is more limited than indemnification rights extended to corporate executives Standard of conduct: Fiduciary typically must act in good faith without gross negligence Limited indemnification from plan assets: The ability of the plan administrator to provide indemnification from plan assets depends entirely on the terms of the plan
Fiduciary Liability Coverage	<ul style="list-style-type: none"> Best fiduciary line of defence: Every company that sponsors a plan should have fiduciary liability insurance — covers a broad range of fiduciaries for legal costs and judgments or settlements arising out of breaches of fiduciary duty or errors in plan administration Fiduciaries may not contract out of their obligations: Just because certain functions are delegated to a third party does not mean the fiduciary is absolved of responsibility, and thus not in need of insurance Persons acting in multiple capacities: Fiduciary insurance may be called upon where D&O or other insurance does not cover liability All risks coverage: Policy covers all breaches of fiduciary duty and errors in plan administration Ability to protect individuals where no indemnity is available and there are competing claims: A “priority of payments provision” may be included in the policy, so that, where there are competing claims, payments to individuals for whom no indemnity is available are given first priority to payments to the organization/plan itself 	<ul style="list-style-type: none"> Policy triggers: A claim or demand by a third party is required to trigger coverage — not enough just to realize there was a mistake Persons acting in multiple capacities: May not be clear in which capacity the person/entity is acting, and which policy is relevant No coverage for third parties: Third parties, including external lawyers, actuaries, investment advisors, third-party administrators, etc., are NOT typically covered What is not covered: <ul style="list-style-type: none"> Does not cover wrongful acts clearly known prior to inception of the policy — prior claims and previous litigation are excluded Does not cover all losses — such as contractual obligations of the plan to pay benefits Hold harmless and indemnification agreements, contractual limitations of liability: Plan sponsors typically are required to assume contractual liability for third-party service providers — these exposures are more appropriately covered under a professional errors and omissions insurance policy obtained by a third party
Labour Management Trust Policies	<ul style="list-style-type: none"> Specialized, often customized coverage covering risks faced by multi-employer plans 	<ul style="list-style-type: none"> There is little uniformity or innovation in policy design amongst insurers — a careful review of the policy and good understanding of the necessary coverage is essential

Employee Benefits Liability Insurance	<ul style="list-style-type: none"> • Extension to a company's general liability policy • Provides coverage for errors in plan administration (e.g., handling records, enrolling and terminating employees, interpreting benefits, etc.) • May provide broader coverage for loss, including benefits due under the plan (not typically covered under a fiduciary policy) 	<ul style="list-style-type: none"> • Does not cover broader risk of breach of a fiduciary duty
Dedicated Side A Coverage	<ul style="list-style-type: none"> • Dedicated limits: Dedicated limits for non-indemnifiable loss that will not be eroded for amounts indemnified by the insured 	<ul style="list-style-type: none"> • Narrow trigger (i.e., loss must be non-indemnifiable)
Side A Difference in Conditions Coverage	<ul style="list-style-type: none"> • Broadened and excess coverage: Coverage is in excess of underlying policies and provides excess and usually broadened coverage <ul style="list-style-type: none"> – NB. Intended only for individuals – NB. Triggered only in circumstances of non-indemnifiable loss 	<ul style="list-style-type: none"> • Narrow trigger (i.e., loss must be non-indemnifiable)

¶43-644 Checklists

¶43-644a Checklist: Conducting a Review of Risk Exposures

1. Identifying risk exposures

- ☐ **Pension plan:** Does your organization sponsor a pension or other employee benefit plan?
 - ☐ Is your organization part of a multi-employer plan?
 - ☐ Is the plan a defined benefit plan or a defined contribution plan?
 - ☐ Does the company provide medical, accident, group life, or employee stock option plans?
- ☐ **Reorganization:** Is the organization undergoing a downsizing or restructuring, experiencing high merger and acquisition activity, or being sold?
- ☐ **Plan changes:** Have there been any changes made to the pension plan or benefits under the plan?
 - ☐ Has the plan converted from a defined benefit to a defined contribution plan?
 - ☐ Have any benefits been reduced?
 - ☐ In the case of a defined benefit plan, has the earnings component of the benefit formula been changed?
- ☐ **Plan expenses, investments, fees:**
 - ☐ Have there been any potentially problematic plan expenses?
 - ☐ Have there been any potentially problematic plan investments?
 - ☐ Have there been any potentially problematic plan fees?
 - ☐ Have there been any contested contribution holidays or disputes regarding surplus entitlement?
- ☐ **Plan complaints/litigation and miscommunications:** Have there been any confusing, contradictory or misleading communications to plan participants? Any human rights/alleged discriminatory issues associated with the plan?

☐ **Reputational issues:**

- ☐ Has the organization experienced any litigation or is aware of any circumstances which is likely to lead to litigation?
- ☐ Has the organization experienced any negative press or otherwise had reputational issues?

☐ **Securities:**

- ☐ Does the organization have any employer securities?
- ☐ Does the organization have stock in any company pension plan where the stock price has lately dropped?

2. Reviewing protections in place

- ☐ Identify any indemnity agreements in place that would cover fiduciaries
- ☐ Determine which insurance policies are in place that would cover fiduciaries
- ☐ Determine if indemnification arrangements and insurance policies are sufficient to cover all key fiduciary risks for the organization, the plan, and individuals

3. Closing gaps in protections and coverage

- ☐ Work with key internal colleagues such as the risk manager, CFO, or others with responsibility for purchasing and maintaining insurance
- ☐ Consult with specialized external counsel or insurance consultants specialized in fiduciary insurance law
- ☐ Ensure that indemnification agreements contain broad coverage terms
- ☐ Conduct due diligence on insurance broker to determine that it has specific expertise with fiduciary liability insurance
- ☐ Ensure that insurance is in place to cover off (as necessary):
 - ☐ Persons/entities acting in multiple capacities
 - ☐ Multi-employer plan scenarios
 - ☐ Specific risks

¶43-644b Checklist: Reviewing the Fiduciary Liability Policy

While it is impossible to provide an exhaustive checklist for what to look out for in a policy review, the following is a general overview only. Each policy must be read as a whole — all base language as well as the “endorsements” which modify the base language.

Review the application and representations made in the application, together with the “severability of the application” provisions of the policy which deal with how statements or representations by one insured impact coverage to other insureds.

1. Who is covered?

- ☐ Pay special attention to the “plan” definition — are all covered plans to be listed in the application? In the policy? What about newly created or acquired plans? What about coverage for past wrongful acts where a plan is sold?

- ☐ Review indemnification agreements given to third parties to determine if assumptions of liability are covered. Assuming they are not, ensure that third parties have their own coverage

2. What is covered?

- ☐ Review the definition of “wrongful act” to ensure broad coverage for errors in administration of the plan as well as breach of fiduciary duty
- ☐ Ensure broad coverage for appropriate capacity — i.e., corporate capacity versus fiduciary capacity is available under combined executive liability policies
- ☐ Review exclusions and definitions and particularly the “carve outs” which modify them

3. When does policy trigger?

- ☐ Review the definition of “claim”
- ☐ Be aware of the policy “prior and pending date” — i.e., the date before which all pending or commenced litigation will not be covered
- ☐ Voluntary settlements — can a discovered error which has not yet met the “claim” definition be reported and covered?

4. What types of loss are covered?

- ☐ Review the definition of “loss”
- ☐ Review the definition of “defence cost”
- ☐ Review exclusions, as sometimes they limit what losses are covered

5. Reporting a claim:

- ☐ Understand who has the obligation and right to report a claim and in what time frame — consider who should be given “authority” to act for all insureds
- ☐ Review the deductible and any reporting threshold
- ☐ Review the “prior noticed exclusion” in conjunction with the right to report a circumstance that is likely to turn into a claim
- ☐ Understand the concept of “interrelatedness” and when two or more claims are deemed to be treated as one claim
- ☐ Understand the implications of late notice

6. Defence, settlement, and co-operation

- ☐ Review duties and obligations
- ☐ Understand who chooses and directs counsel to defend the action
- ☐ Is there a “hammer clause” — i.e., does insurer have the ability to limit its liability if the insured refuses to accept a settlement offer?

7. Allocation

- ☐ Review provisions and understand whether there is a predetermined allocation or whether a negotiation must take place if there are covered and uncovered matters in a claim

8. Exclusions

- ☐ Read and understand what is not covered
- ☐ Get expert advice as to what is “market” typical language and how exclusions may be softened

9. Is the policy non-rescindable?

- ☐ Does the policy prohibit the insurer from rescinding coverage for individual insureds, or even all insureds, in all situations?

10. Excess policies

- ☐ Review language carefully
- ☐ Do not assume “follow form” policies necessarily follow the underlying policy — if there are any additional definitions, exclusions, or other terms are contained in the excess policy that differ from the underlying policy, watch out for gaps in coverage

¶43-646 Policies and Other Sample Documents

¶43-646a Sample Fiduciary Liability Policy

Executive Protection Policy

DECLARATIONS

FIDUCIARY LIABILITY COVERAGE SECTION

Item 1. **Parent Organization:**

[Account Name]
[Account Address including address1 and address2]
[Account City Name], [Account Domicile State] [Account Zip Code]

Item 2. Limits of Liability:

- (A) Each **Loss** [Each Loss]
(B) Each **Policy Period** [Fiduciary Agg Limit]

Note that the limits of liability and any deductible or retention are reduced or exhausted by **Defense Costs**.

Item 3. Deductible Amounts:

- (A) Non-Indemnifiable **Loss** None
(B) Indemnifiable **Loss** [Deductible Amount: Indemnifiable Loss]

Item 4. **Sponsor Organization:**

[list sponsor organizations]

Item 5. **Benefit Programs** included as **Insureds** and any other additional **Insureds**:

[benefit program(s)]

Item 6. Extended Reporting Period:

- (A) Additional Premium: [First Discovery percent] % of the Annual Premium
(B) Additional Period: [Enter additional period]

Item 7. Pending or Prior Date: [Pending or Prior Date]

Item 8. Continuity Date: [Continuity Date]

[CURRENCYTYPE]



Executive Protection Policy

Fiduciary Liability Coverage Section

In consideration of payment of the premium and subject to the Declarations, General Terms and Conditions, and the limitations, conditions, provisions and other terms of this coverage section, the Company agrees as follows:

Insuring Clause

1. The Company shall pay on behalf of each of the **Insureds** all **Loss** for which the **Insured** becomes legally obligated to pay on account of any **Claim** first made against the **Insured** during the **Policy Period** or, if exercised, the Extended Reporting Period for a **Wrongful Act** committed, attempted, or allegedly committed or attempted, before or during the **Policy Period** by an **Insured** or by any person for whose **Wrongful Acts** the **Insured** is legally responsible.

Estates and Legal Representatives

2. Subject otherwise to the General Terms and Conditions and the limitations, conditions, provisions and other terms of this coverage section, coverage shall extend to **Claims** for the **Wrongful Acts** of **Insured Persons** made against the estates, heirs, legal representatives or assigns of **Insured Persons** who are deceased or against the legal representatives or assigns of **Insured Persons** who are incompetent, insolvent or bankrupt.

Defense Provisions

3. The Company shall have the right and duty to defend any **Claim** covered by this coverage section. Coverage shall apply even if any of the allegations are groundless, false or fraudulent. The Company's duty to defend shall cease upon exhaustion of the Company's applicable Limit of Liability set forth in Item 2 of the Declarations for this coverage section.

Defense Costs incurred by the Company, or by the **Insured** with the written consent of the Company, are part of and not in addition to the Company's applicable Limit of Liability set forth in Item 2 of the Declarations for this coverage section, and the payment by the Company of **Defense Costs** reduces such applicable Limit of Liability.

The **Insureds** agree to provide the Company with all information, assistance and cooperation which the Company reasonably requests and agree that in the event of a **Claim** the **Insureds** will do nothing that may prejudice the Company's position or its potential or actual rights of recovery.

The **Insureds** agree not to settle any **Claim**, incur any **Defense Costs** or otherwise assume any contractual obligation or admit any liability with respect to any **Claim**, without the Company's written consent, which shall not be unreasonably withheld. The Company shall not be liable for any settlement, **Defense Costs**, assumed obligation or admission to which it has not consented.

Extended Reporting Period

4. If the Company terminates or refuses to renew this coverage section other than for nonpayment of premium, the **Insureds** shall have the right, upon payment of the additional premium in Item 6(A) of the Declarations for this coverage section, to an extension of the coverage granted by this coverage section for the period in Item 6(B) of the Declarations for this coverage section (Extended Reporting Period) following the effective date of termination or nonrenewal, but only for any

Executive Protection Policy

Extended Reporting Period (continued)

Wrongful Act committed, attempted, or allegedly committed or attempted, prior to the effective date of termination or nonrenewal. This right of extension shall lapse unless written notice of such election, together with payment of the additional premium due, is received by the Company within 30 days following the effective date of termination or nonrenewal.

Any **Claim** made during the Extended Reporting Period shall be deemed to have been made during the immediately preceding **Policy Period**.

If the **Insured** terminates or declines to accept renewal, the Company may, if requested, at its sole option, grant an Extended Reporting Period. The offer of renewal terms and conditions or premiums different from those in effect prior to renewal shall not constitute refusal to renew.

Exclusions

5. The Company shall not be liable for **Loss** on account of any **Claim** made against any **Insured**:
 - (a) based upon, arising from, or in consequence of any circumstance if written notice of such circumstance has been given under any policy or coverage section of which this coverage section is a renewal or replacement and if such prior policy or coverage section affords coverage (or would afford coverage except for the exhaustion of its limit of liability) for such **Loss**, in whole or in part, as a result of such notice;
 - (b) based upon, arising from, or in consequence of any deliberately fraudulent act or omission or any willful violation of any statute or regulation by such **Insured**, if a judgment or other final adjudication adverse to the **Insured** establishes such a deliberately fraudulent act or omission or willful violation;
 - (c) for libel or slander;
 - (d) for bodily injury, mental or emotional distress, sickness, disease or death of any person or damage to or destruction of any tangible property including loss of use thereof;
 - (e) based upon, arising from, or in consequence of liability of others assumed by the **Insured** under any contract or agreement, either oral or written, except to the extent that the **Insured** would have been liable in the absence of the agreement or contract or unless the liability was assumed in accordance with or under the agreement or declaration of trust pursuant to which the **Benefit Program** was established;
 - (f) based upon, arising from, or in consequence of the intentional failure of the **Insured** to comply with any law with respect to any **Government Benefit Program**, except the Consolidated Omnibus Budget Reconciliation Act of 1985 of the United States of America and amendments thereto;
 - (g) based upon, arising from, or in consequence of any demand, suit or other proceeding pending, or order, decree or judgment entered against any **Insured**, on or prior to the Pending or Prior Date set forth in Item 7 of the Declarations for this coverage section, or the same or substantially the same facts underlying or alleged therein;



Executive Protection Policy

Exclusions (continued)

- (h) based upon, arising from, or in consequence of such **Insured** having gained in fact any personal profit, remuneration or advantage to which such **Insured** was not legally entitled; or
- (i) based upon, arising from, or in consequence of (i) the actual, alleged or threatened discharge, release, escape or disposal of **Pollutants** into or on real or personal property, water or the atmosphere; or (ii) any direction or request that the **Insured** test for, monitor, clean up, remove, contain, treat, detoxify or neutralize **Pollutants**, or any voluntary decision to do so; including but not limited to any **Claim** for financial loss to the **Sponsor Organization**, its security holders or creditors or any **Benefit Program** based upon, arising from, or in consequence of the matters described in (i) or (ii) of this exclusion.

6. The Company shall not be liable for that part of **Loss**, other than **Defense Costs**:

- (a) which constitutes fines or penalties or the multiple portion of any multiplied damage award, other than the five percent or less, or the twenty percent or less, civil penalties imposed upon an **Insured** as a fiduciary under Section 502 (i) or (l), respectively, of the Employee Retirement Income Security Act of 1974, of the United States of America, as amended;
- (b) which is based upon, arising from, or in consequence of the failure to collect from employers contributions owed to or in respect of a **Benefit Program**, unless the failure is because of the negligence of an **Insured**;
- (c) which constitutes benefits due or to become due under the terms of a **Benefit Program** unless, and to the extent that, (i) the **Insured** is a natural person and the benefits are payable by such **Insured** as a personal obligation, and (ii) recovery for the benefits is based upon a covered **Wrongful Act**.

Severability of Exclusions

- 7. With respect to the Exclusions in subsections 5 and 6 of this coverage section, no act pertaining to or knowledge possessed by any **Insured** shall be imputed to any other **Insured** to determine if coverage is available.

Limit of Liability and Deductible

- 8. For purposes of this coverage section, all **Loss** arising out of the same **Wrongful Act** and all **Interrelated Wrongful Acts** of any **Insured** shall be deemed one **Loss**, and such **Loss** shall be deemed to have originated in the earliest **Policy Period** in which a **Claim** is first made against any **Insured** alleging any such **Wrongful Act** or **Interrelated Wrongful Acts**.

The Company's maximum liability for each **Loss** shall be the Limit of Liability for each **Loss** set forth in Item 2(A) of the Declarations for this coverage section. The Company's maximum aggregate liability for all **Loss** on account of all **Claims** first made during the same **Policy Period** shall be the Limit of Liability for each **Policy Period** set forth in Item 2(B) of the Declarations for this coverage section.

The Company's liability hereunder shall apply only to that part of each **Loss** which is excess of the Deductible Amounts set forth in Item 3 of the Declarations for this coverage section and such Deductible Amounts shall be borne by the

Executive Protection Policy

Limit of Liability and Deductible (continued)

Insureds uninsured and at their own risk. The Deductible Amount for Non-Indemnifiable **Loss** set forth in Item 3(A) of the Declarations for this coverage section shall apply to **Loss** incurred by any **Insured** other than the **Sponsor Organization** or any **Benefit Program** for which the **Sponsor Organization** is not permitted or required to indemnify or is permitted or required to indemnify but does not do so by reason of **Financial Impairment**. The Deductible Amount for Indemnifiable Loss set forth in Item 3(B) of the Declarations for this coverage section shall apply to all other **Loss**.

If a part of a single **Loss** is subject to the Deductible Amount for Non-Indemnifiable Loss and part of the same **Loss** is subject to the Deductible Amount for Indemnifiable **Loss**, the maximum Deductible Amount applicable to such **Loss** shall be the Deductible Amount for Indemnifiable **Loss**.

The **Sponsor Organization** shall be deemed permitted or required to indemnify an **Insured**, and the shareholder and board of director resolutions of the **Sponsor Organization** shall be deemed to provide indemnification to an **Insured**, to the fullest extent authorized by the **Sponsor Organization's** by-laws or certificate of incorporation in effect at the inception of this coverage section, or any subsequently amended or superseding by-laws or certificate of incorporation of the **Sponsor Organization** to the extent such subsequent document expands or broadens and does not limit or restrict such indemnification authorization.

Any **Loss** covered in whole or in part by this coverage section and the Employment Practices Liability coverage section of this Policy (if purchased) shall be subject to the limits of liability, deductible and coinsurance percent applicable to such other coverage section; provided, however, if any limit of liability applicable to such other coverage section is exhausted with respect to such **Loss**, any remaining portion of such **Loss** otherwise covered by this coverage section shall be subject to the Limit of Liability applicable to this coverage section, as reduced by the amount of such **Loss** otherwise covered by this coverage section which is paid by the Company pursuant to such other coverage section.

For purposes of this subsection 8 only, the Extended Reporting Period, if exercised, shall be part of and not in addition to the immediately preceding **Policy Period**.

Other Insurance

9. If any **Loss** arising from any **Claim** made against any **Insured** is insured under any other valid policy(ies), prior or current, then this coverage section shall cover such **Loss**, subject to its limitations, conditions, provisions and other terms, only to the extent that the amount of such **Loss** is in excess of the amount of payment from such other insurance whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written only as specific excess insurance over the Limit of Liability provided in this coverage section.



Executive Protection Policy

Changes in Exposure

Acquisition or Creation of Another Entity or Benefit Program

10. If during the **Policy Period** the **Sponsor Organization** creates or acquires a **Subsidiary** or **Benefit Program** or otherwise becomes a fiduciary of or responsible for the **Administration** of any **Benefit Program** ("Inception Event"), coverage shall be afforded, subject to the terms and conditions of this coverage section, from the date of the Inception Event for such **Subsidiary**, **Benefit Program**, and any **Insured Persons** of such **Benefit Program**, but only for **Wrongful Acts** committed, attempted, or allegedly committed or attempted, after the date of the Inception Event, unless the Company agrees by endorsement to provide coverage for **Wrongful Acts** committed, attempted, or allegedly committed or attempted, prior to such date. Any such coverage shall be specifically excess of the amount of payment from any other insurance available to such **Benefit Program**, **Insured Persons** or **Sponsor Organization**. The **Sponsor Organization** shall give written notice to the Company of the Inception Event as soon as practicable together with such information as the Company may require and shall pay any reasonable additional premium required by the Company.

Notwithstanding the foregoing, no coverage shall be afforded pursuant to this subsection 10 with respect to any employee stock ownership plan or any **Insured Persons** or **Sponsor Organization** thereof unless the Company, by specific endorsement hereto, agrees to afford such coverage. Any such coverage shall be at the terms and conditions and for the premium set forth in such endorsement.

Acquisition by another entity

11. If (i) the **Sponsor Organization** merges into or consolidates with another organization, (ii) another organization or person or group of organizations and/or persons acting in concert acquires securities or voting rights which result in ownership or voting control by the other organization(s) or person(s) of more than 50% of the outstanding securities representing the present right to vote for election of directors of the **Sponsor Organization**, or (iii) the responsibilities of the **Sponsor Organization** for the **Administration** of, or as a fiduciary of, any **Benefit Program** is fully assumed by any other person and/or entity, coverage under this coverage section for such **Sponsor Organization**, **Benefit Program** and the **Insured Persons** thereof who were **Insureds** prior to such acquisition, merger, consolidation or assumption of responsibilities shall continue until termination of this coverage section subject to the following:
- (a) for the merged, consolidated or acquired **Sponsor Organization** and any **Benefit Program** thereof, and for any **Benefit Program** described in subparagraph (iii) above, coverage shall continue only with respect to **Claims** for **Wrongful Acts** committed, attempted, or allegedly committed or attempted prior to such merger, consolidation, acquisition, or assumption of responsibilities;

SPENDING

Executive Protection Policy

Changes in Exposure

Acquisition by Another Entity (continued)

- (b) for **Insured Persons** of the merged, consolidated, or acquired **Sponsor Organization** or any **Benefit Program** thereof, and for **Insured Persons** described in subparagraph (iii) above, coverage shall continue with respect to **Claims** for **Wrongful Acts** committed, attempted or allegedly committed or attempted prior to the date the **Insured Person** ceases to be a trustee, director, officer and/or employee of any **Sponsor Organization** not so merged, consolidated or acquired.

The **Sponsor Organization** shall give written notice to the Company of such merger, consolidation, acquisition or assumption of responsibilities as soon as practicable together with such information as the Company may require. Any such continuing coverage shall be specifically excess of the amount of payment from any other insurance available to such **Sponsor Organization**, **Benefit Program** or **Insured Persons**.

Termination of Benefit Program

12. If the **Sponsor Organization** terminates any **Benefit Program** before or after the Inception Date of this coverage section, coverage under this coverage section with respect to such terminated **Benefit Program** shall continue until termination of this coverage section for those who were **Insureds** at the time of such **Benefit Program** termination, or who would have been **Insureds** at the time of such termination if this coverage section had been in effect with respect to **Wrongful Acts** committed, attempted or allegedly committed or attempted by such **Insureds** prior to or after the date of such **Benefit Program** termination. The **Insureds** shall give written notice to the Company of such **Benefit Program** termination as soon as is practicable together with such information as the Company may require.

Reporting and Notice

13. The **Insureds** shall, as a condition precedent to exercising their rights under this coverage section, give to the Company written notice as soon as practicable of any **Claim** made against any of them for a **Wrongful Act**.
- If during the **Policy Period** or Extended Reporting Period (if exercised) an **Insured** becomes aware of circumstances which could give rise to a **Claim** and gives written notice of such circumstance(s) to the Company, then any **Claims** subsequently arising from such circumstances shall be considered to have been made during the **Policy Period** or the Extended Reporting Period in which the circumstances were first reported to the Company.
- The **Insureds** shall, as a condition precedent to exercising their rights under this coverage section, give to the Company such information and cooperation as it may reasonably require, including but not limited to a description of the **Claim** or circumstances, the nature of the alleged **Wrongful Act**, the nature of the alleged or potential damage, the names of actual or potential claimants, and the manner in which the **Insured** first became aware of the **Claim** or circumstances.



Executive Protection Policy

Representations and Severability

14. In granting coverage to any one of the **Insureds**, the Company has relied upon the declarations and statements in the written application for this coverage section and upon any declarations and statements in the original written application submitted to another insurer in respect of the prior coverage incepting as of the Continuity Date set forth in Item 8 of the Declarations for this coverage section. All such declarations and statements are the basis of such coverage and shall be considered as incorporated in and constituting part of this coverage section.

Such written application(s) for coverage shall be construed as a separate application for coverage by each **Insured**. With respect to the declarations and statements contained in such written application(s) for coverage, no statement in the application or knowledge possessed by any **Insured** shall be imputed to any other **Insured** for the purpose of determining if coverage is available.

Definitions

15. When used in this coverage section:

Administration means giving advice to employees or effecting enrollment, termination or cancellation of employees under a **Benefit Program**.

Benefit Program means:

- (a) any **Employee Benefit Plan**; or
- (b) any **Government Benefit Program**.

Claim means:

- (a) a written demand for monetary damages,
- (b) a civil proceeding commenced by the service of a complaint or similar pleading,
- (c) a criminal proceeding commenced by a return of an indictment, or
- (d) a formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document, against any **Insured** for a **Wrongful Act**, including any appeal therefrom.

Defense Costs means that part of **Loss** consisting of reasonable costs, charges, fees (including but not limited to attorneys' fees and experts' fees) and expenses (other than regular or overtime wages, salaries or fees of the directors, officers or employees of the **Insured**) incurred in defending or investigating **Claims** and the premium for appeal, attachment or similar bonds.

Employee Benefit Plan means any plan so defined in the Income Tax Act or any plans or funds listed in the attached Endorsement, as defined in the Income Tax Act, or any plan, including any Welfare Benefit Plan, so defined in the Employee Retirement Income Security Act of 1974, of the United States of America, as amended.

Financial Impairment means the financial position of the **Sponsor Organization** as a debtor as that term is defined and used in Canada within the provisions of the Bankruptcy Act, R.S., c.B-3 and without limiting the generality of the foregoing shall occur when (i) any receiver, conservator, liquidator, trustee, sequestrator or similar official has been appointed by a provincial, state, or federal court, agency or official or by a creditor to take control of, supervise,

Executive Protection Policy

Definitions

(continued)

manage or liquidate the **Sponsor Organization**, (ii) a reorganization proceeding relating to the **Sponsor Organization** has been brought in Canada under the Companies' Creditors Arrangement Act, R.S., c.C-36, or (iii) the **Sponsor Organization** becomes a debtor in possession under Title 11 of the United States Code, Bankruptcy.

Government Benefit Program means any **Benefit Program** created by statute, of which the capital is administered and the contingent liabilities assumed by a government or governments or any agency thereof, including without limitation workers compensation, unemployment, social security and disability benefit programs.

Insureds, either in the singular or plural, means any one or more:

- (a) **Sponsor Organization**;
- (b) **Benefit Program**;
- (c) **Insured Person**, or
- (d) any other person or organization designated as an additional **Insured** by endorsement to this coverage section.

Insureds Persons, either in the singular or plural, means any one or more:

- (a) natural persons serving as a past, present or future trustee, director, officer or employee of the **Sponsor Organization** or of any **Sponsored Plan**, and
- (b) any other natural person acting as a past, present or future fiduciary of a **Sponsored Plan**.

Insured Plan means any **Employee Benefit Plan** pursuant to which risk or contingent liabilities are transferred to an insurer in return for a premium or other monetary consideration.

Interrelated Wrongful Acts means all casually connected **Wrongful Acts**.

Loss means the total amount which any **Insured** becomes legally obligated to pay on account of each **Claim** and for all **Claims** in each **Policy Period** and the Extended Reporting Period, if exercised, made against them for **Wrongful Acts** for which coverage applies, including, but not limited to, damages, judgments, settlements, costs and **Defense Costs**. **Loss** does not include matters uninsurable under the law pursuant to which this coverage section is construed.

Pension Benefit Plan means any plan defined as a pension plan in the Pension Benefit Standards Act, 1985, or any similar Federal or Provincial law or any plan defined as a Pension Benefit Plan in the Employee Retirement Income Security Act of 1974, of the United States of America, as amended.

Pollutants means any substance located anywhere in the world exhibiting any hazardous characteristics as defined by, or identified on a list of hazardous substances issued by, the Canadian Environmental Protection Act, the United States Environmental Protection Agency or a provincial, state, county, municipality or locality counterpart thereof. Such substances shall include, without limitation, solids, liquids, gaseous or thermal irritants, contaminants or smoke, vapor, soot, fumes, acids, alkalis, chemicals or waste materials.

Pollutants shall also mean any other air emissions, odor, waste water, oil and oil products, infectious or medical waste, asbestos and asbestos products and any noise.



Executive Protection Policy

Definitions (continued)

Sponsor Organization means any organization designated in Item 4 of the Declarations for this coverage section.

Sponsored Plan means an **Employee Benefit Plan**:

- (a) which is not an **Insured Plan**;
- (b) which is operated solely by the **Sponsor Organization** or jointly by the **Sponsor Organization** and a labor organization for the benefit of the employees of the **Sponsor Organization** located anywhere in the world and which existed at the Inception Date of this coverage section or of any policy or coverage section of which this coverage section is a renewal, or which is created or acquired after the inception of this coverage section, subject to the provisions outlined in this coverage section;
- (c) any other plan, fund, or program specifically included as a **Sponsored Plan** and named in Item 5 of the Declarations of this coverage section; provided however, **Sponsored Plan** shall not include any multiemployer plan, as defined in the Employee Retirement Income Security Act of 1974, of the United States of America, as amended, or, in Canada, as defined in relation to pension plans by the Pension Benefit Standards Act of 1985, mutatis mutandis;
- (d) any other **Employee Benefit Plan** or program not subject to Title 1 of the Employee Retirement Income Security Act of 1974, of the United States of America, as amended, operated solely by the **Sponsor Organization** for the benefit of the employees of the **Sponsor Organization**.

Subsidiary, either in the singular or plural, means any organization in which more than 50% of the outstanding securities or voting rights representing the present right to vote for election of directors is owned or controlled, directly or indirectly, in any combination, by one or more **Sponsor Organization**.

Wrongful Act means:

- (a) with respect to a **Sponsored Plan** or **Insured Plan**,
 - (i) any breach of the responsibilities, obligations or duties imposed upon an **Insured Person** in respect of a plan by the Pension Benefit Standards Act, 1985 or the Employee Retirement Income Security Act of 1974, of the United States of America, as amended, or by the common or statutory law of the United States of America, of Canada or any state, province, or other jurisdiction anywhere in the world; or
 - (ii) any other matter claimed against the **Sponsor Organization** or an **Insured Person** solely because of the **Insured Person's** service in connection with any **Sponsored Plan** or **Insured Plan**; or
 - (iii) any negligent act, error or omission by the **Insured** in the **Administration** of any **Sponsored Plan** or **Insured Plan**; and
- (b) with respect to a **Government Benefit Program**
 - (i) any negligent act, error or omission in the **Administration** of any **Government Benefit Program**.

SPENDING

¶43-646b Sample Fiduciary Liability Insurance Application



Chubb Insurance Company of Canada

APPLICATION

Labor Management Trust
Fiduciary Liability Coverage

By completing this APPLICATION you are applying for coverage with
Chubb Insurance Company of Canada (the "Company")

Underwritten in Chubb Insurance Company of Canada

THIS IS A CLAIMS MADE POLICY WHICH APPLIES ONLY TO "CLAIMS" FIRST MADE DURING THE "POLICY PERIOD" OR ANY EXTENDED REPORTING PERIOD. THE LIMIT OF LIABILITY AVAILABLE TO PAY DAMAGES OR SETTLEMENTS WILL BE REDUCED, AND MAY BE COMPLETELY EXHAUSTED, BY THE PAYMENT OF "DEFENSE COSTS" AND "DEFENSE COSTS" WILL BE APPLIED AGAINST THE DEDUCTIBLE AMOUNT. THE COMPANY SHALL NOT BE LIABLE FOR "DEFENSE COSTS" OR FOR THE AMOUNT OF ANY JUDGMENT OR SETTLEMENT IN EXCESS OF THE LIMIT OF LIABILITY. PLEASE READ THE POLICY CAREFULLY.

1. GENERAL INFORMATION

Name of trust or plan _____
Insurance Representative _____
Address of Insurance Representative _____
Industries or Trades Represented _____

2. MATERIAL CHANGE

Signing of this application does not bind the applicant or the Company. If there is any material change in the answers to the questions prior to the policy inception date the applicant will notify the Company in writing and any outstanding quotation may be modified or withdrawn.

3. UNDERWRITING INFORMATION

As part of this application, please attach the following (where applicable):

- * Copy of the plan or trust agreement
- * Copy of third party administration agreement(s) and investment management agreement(s)
- * Audited financial statements for the trust or plan.
- * List of all current Trustees and their Employers Name or Local.

4. LIMIT REQUESTED

Coverage	Limit Requested
Labor Management Trust Fiduciary Liability	\$ _____

5. POLICY PERIOD REQUESTED

From _____ to _____ both days at 12:01 a.m. at the principal address of the Insurance Representative.



Chubb Insurance Company of Canada

APPLICATION

Labor Management Trust
Fiduciary Liability Coverage

6. PLAN ADMINISTRATION

	Name	Years Employed
Fund Manager or Contract Administrator (Firm Name)	<input type="text"/>	<input type="text"/>
Consultant/Actuary	<input type="text"/>	<input type="text"/>
CA	<input type="text"/>	<input type="text"/>
Legal Counsel	<input type="text"/>	<input type="text"/>
Investment Manager	<input type="text"/>	<input type="text"/>
Custodian of Assets	<input type="text"/>	<input type="text"/>

How are plan benefits provided? by insurance (e.g. annuity, medical, etc.) , self-insured , combination ?

If insured, give the name of the insurance company.

If the trust or plan does not retain an independent investment manager, who makes the investment decisions?

Who administers the daily operations of the trust or plan? Please give the name of the firm.

How often are formal trustee meetings held?

7. SIZE OF PLAN

Year	Total Assets	Annual Contributions	Number of Participants
20 <input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>
20 <input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>
20 <input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>

8. RECENT PLAN CHANGES

Has the name of the trust or plan been changed? Yes No. If yes, when? and attach details.

Has any other trust or plan been added or merged into the trust or plan? Yes No

Have there been any trust or plan terminations in the past 3 years? Yes No. If yes, attach details.

Were benefits from terminated plans secured by the purchase of annuities? Yes No. If yes, attach details.

Please list annuity carrier.



Chubb Insurance Company of Canada

APPLICATION

Labor Management Trust
Fiduciary Liability Coverage

9. COMPLIANCE

Do the plans conform to the standards of eligibility, participation, vesting, funding and other provisions of, in Canada, the Pension Benefits Standards Act, 1985 and any similar provincial statute, or, in the U.S., ERISA?

☐ Yes ☐ No.

If no, please explain: _____

Have the plans been reviewed to assure that there are no violations of prohibited transactions and party-in-interest rules?

☐ Yes ☐ No.

If no, please explain: _____

If yes, by whom and when? _____

Has an actuary certified that the plans are adequately funded? ☐ Yes ☐ No.

If no, please explain: _____

Are there any outstanding delinquent contributions? ☐ Yes ☐ No. If yes, attach details.

Have any plans in the U.S. experienced any event reportable to the PBGC? ☐ Yes ☐ No. If yes, attach details.

Were any plan loans or obligations due the plan in default or classified as uncollectible during the plan year?

☐ Yes ☐ No. If yes attach details.

10. PAST ACTIVITIES

Has any fiduciary been:

a. accused, found guilty or held liable for a breach of trust? ☐ Yes ☐ No. If yes, attach details.

b. convicted of criminal conduct? ☐ Yes ☐ No. If yes, attach details.

c. refused coverage under a fidelity bond? ☐ Yes ☐ No. If yes, attach details.

Have any claims (other than for benefits) been made during the past 5 years against any trust or plan or any current or past fiduciaries? ☐ Yes ☐ No. If yes, attach details.

11. PRIOR INSURANCE

Does the applicant currently have fiduciary liability insurance? ☐ Yes ☐ No. If no, skip to Section 13 and answer the prior knowledge statement. If yes, please provide the following:

Insurer	Limits	Deductible	Policy Period
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Has the applicant given written notice under the provisions of any prior or current fiduciary liability policy of specific facts or circumstances which might give rise to a claim being made against any applicant? ☐ Yes ☐ No. If yes, attach details.

Have any loss payments been made on behalf of any Insured under any fiduciary liability policy or similar insurance?

☐ Yes ☐ No. If yes, attach details.



Chubb Insurance Company of Canada

APPLICATION

Labor Management Trust
Fiduciary Liability Coverage

12. CONTINUITY WITH PRIOR COVERAGE

Note: This section applies only if you currently have coverage and request continuity of coverage.

Continuity date requested: _____

If continuity of coverage is requested:

- a. attach a copy of the prior application with which continuity of coverage is to be maintained.
- b. the Company will be relying upon the declarations and statements contained in such prior application and those declarations and statements shall be considered to be incorporated in and form a part of the policy of the Company.

13. PRIOR KNOWLEDGE

Note: This section applies if you have requested continuity of coverage and your request has not been accepted or granted or if there is no prior coverage.

It is important that you fill in the blank in this paragraph. No person proposed for coverage is aware of any facts or circumstances which he or she has reason to suppose might give rise to a future claim that would fall within the scope of the proposed coverage, except: **(if no exceptions, please state.)** _____

It is agreed that if such facts or circumstance exist, whether or not disclosed, any claim arising from them is excluded from this proposed coverage.

14. FALSE INFORMATION

Any person who, knowingly and with the intent to defraud any insurance company or other person, files an application for insurance containing any false information, or conceals, for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime.

15. DECLARATION AND SIGNATURE

The undersigned declares that to the best of his or her knowledge and belief the statements set forth herein are true. Although the signing of this application does not bind the undersigned on behalf of the applicants to the effect insurance, the undersigned agrees that this application and its attachments shall be the basis of the contract should a policy be issued and shall be deemed attached to and shall form a part of the policy. The Company is hereby authorized to make any investigation and inquiry in connection with this application that it deems necessary.

This section of the application must be signed by a current fiduciary.

Date

Signature

Title

¶43-646c Sample Labour Management Trust Policy

Labour Management Trust Fiduciary Liability Policy

In consideration of the payment of the premium and subject to the Declarations, limitations, conditions, provisions and other terms of this policy, the Company agrees as follows:

-
- Fiduciary Liability Coverage** 1. The Company shall pay on behalf of each of the **Insureds** all **Loss** for which the **Insured** becomes legally obligated to pay on account of any **Claim** first made against the **Insured** during the **Policy Period** or, if exercised, the Extended Reporting Period, for a **Wrongful Act** committed, attempted, or allegedly committed or attempted, before or during the **Policy Period** by an **Insured** or by any person whose **Wrongful Acts** the **Insured** is legally responsible.
-

- Defence Provisions** 2. The Company shall have the right and duty to defend any **Claim** covered by this policy. Coverage shall apply even if any of the allegations are groundless, false or fraudulent. The Company's duty to defend shall cease upon exhaustion of the Company's applicable Limit of Liability as set forth in Item 3 of the Declarations.
- Defence Costs** incurred by the Company, or by the **Insured** with the written consent of the Company, are part of and not in addition to the Company's applicable Limit of Liability set forth in Item 3 of the Declarations, and the payment by the Company of **Defence Costs** reduces such applicable Limit of Liability.
- The **Insureds** agree to provide the Company with all information, assistance and cooperation which the Company reasonably requests and agree that in the event of a **Claim** the **Insureds** will do nothing that may prejudice the Company's position or its potential or actual rights of recovery.
- The **Insureds** agree to not to settle any **Claim**, incur any **Defence Costs** or otherwise assume any contractual obligation or admit any liability with respect to any **Claim** without the Company's written consent, which shall not be unreasonably withheld. The Company shall not be liable for any settlement, **Defence Costs**, assumed obligation or admission to which it has not consented.
-

- Estates and Legal Representatives, Spousal Liability** 3. Subject to the limitations, conditions, provisions and other terms of this policy.
- (a) Coverage shall extend to **Claims** for the **Wrongful Acts** of **Insureds** made against the estates, heirs, legal representatives or assigns of **Insureds** who are deceased or against the legal representatives or assigns of **Insureds** who are incompetent, insolvent or bankrupt.
- (b) If a **Claim** against an **Insured** includes a claim against the lawful uninsured **Spouse** or **Common Law Partner** of such **Insured** solely by reason of such person's status as a **Spouse** or **Common Law Partner** or such **Spouse's** or **Common Law Partner's** ownership interest in property which the claimant seeks as recovery for an alleged **Wrongful Act** of such **Insured**, all loss which such **Spouse** or **Common Law Partner** becomes legally obligated to pay on account of such **Claim** shall be treated for purposes of this policy as **Loss** which such **Insured** becomes legally obligated to pay on account of a **Claim** made against such **Insured**. All limitations, conditions, provisions and other terms of coverage applicable to such **Insured's Loss** shall also be applicable to such **Spousal** or **Common Law Partner** loss. However, coverage shall not apply to the extent any **Claim** alleges any act or omission by such **Insured's Spouse** or **Common Law Partner**.
-

Extended Reporting Period 4. If the Company terminates or does not renew this policy, other than termination by the Company for nonpayment of premium, the **Insureds** shall have the right, upon payment of the additional premium in Item 7(A) of the Declarations, to an extension of the coverage granted by this policy for the period in Item 7(B) of the Declarations following the effective date of termination or nonrenewal, but only for any **Wrongful Act** committed, attempted or allegedly committed or attempted, prior to the effective date of the termination or nonrenewal. This right of extension shall lapse unless written notice of such election, together with payment of additional premium due, is received by the Company within 30 days following the effective date of termination or nonrenewal. Any **Claim** made during the Extended Reporting Period shall be deemed to have been made during the immediately preceding **Policy Period**. The entire additional premium for the Extended Reporting Period shall be deemed fully earned at the inception date of such Extended Reporting Period.

The offer of renewal terms and conditions or premiums different from those in effect prior to renewal shall not constitute refusal to renew.

Exclusions

5. The Company shall not be liable for **Loss** on account of any **Claim** made against any **Insured**:
- (a) based upon, arising from, or in consequence of any circumstance if written notice of such circumstance has been given under any policy of which this policy is a renewal or replacement and if such prior policy affords coverage (or would afford such coverage except for the exhaustion of its limits of liability) for such **Loss**, in whole or in part, as a result of such notice;
 - (b) based upon, arising from, or in consequence of any deliberately fraudulent act or omission or any willful violation of any statute or regulation by such **Insured**, if a judgment or other final adjudication adverse to the **Insured** establishes such a deliberately fraudulent act or omission or willful violation;
 - (c) for libel or slander;
 - (d) for bodily injury, mental or emotional distress, sickness, disease or death of any person or damage to or destruction of any tangible property including loss of use thereof;
 - (e) based upon, arising from, or in consequence of liability of others assumed by the **Insured** under any contract or agreement, either oral or written, except to the extent that the **Insured** would have been liable in the absence of the contract or agreement or unless the liability was assumed in accordance with or under the agreement or declaration of trust pursuant to which the **Trust** or **Plan** were established;
 - (f) based upon, arising from, or in consequence of the failure of the **Insured** to comply with any law with respect to any **Government Benefit Program**;
 - (g) based upon, arising from, or in consequence of any demand, suit or other proceeding pending, or order, decree or judgment rendered against any **Insured** on or prior to the Pending or Prior Date set forth in Item 8 of the Declarations, or the same or any substantially similar fact, circumstance or situation underlying or alleged therein;
 - (h) based upon, arising from, or in consequence of such **Insured** having gained in fact any personal profit, remuneration or advantage to which such **Insured** was not legally entitled; or

Labour Management Trust Fiduciary Liability Policy

Exclusions

(continued)

- (i) based upon, arising from, or in consequence of (i) the actual, alleged or threatened discharge, release, escape or disposal of **Pollutants** into or on real or personal property, water or the atmosphere; or (ii) any direction or request that the **Insured** test for, monitor, clean up, remove, contain, treat, detoxify or neutralize **Pollutants**, or any voluntary decision to do so; including but not limited to any financial loss to any **Insured**, its beneficiaries, security holders or creditors based upon, arising from, or in consequence of the matters described in (i) or (ii) of this exclusion.

-
- 6. The Company shall not be liable for that part of **Loss**, other than **Defence Costs**:
 - (a) which constitutes fines or penalties or the multiple portion of any multiplied damage award, other than the five percent or less, or the twenty percent or less, civil penalties imposed upon an **Insured** as a fiduciary under Section 502 (i) or (l), respectively, of the Employee Retirement Income Security Act of 1974 of the United States of America, as amended;
 - (b) for the return of any contributions to any employer if such amounts are or could be chargeable to the **Trust** or **Plan**;
 - (c) which constitutes benefits due or to become due under the terms of a **Plan** or **Trust** unless, and to the extent that, (i) the **Insured** is a natural person and the benefits are payable by such **Insured** as a personal obligation, and (ii) recovery for the benefits is based upon a covered **Wrongful Act**.
-

Severability of Exclusions

- 7. With respect to the Exclusions in subsection 5 and 6 of this policy, no fact pertaining to or knowledge possessed by any **Insured** shall be imputed to any other **Insured** to determine if coverage is available.
-

Territory

- 8. Coverage shall extend anywhere in the world.
-

Limit of Liability and Deductible

- 9. For purposes of this policy, all **Loss** arising out of the same **Wrongful Act** and all **Interrelated Wrongful Acts** of any **Insured** shall be deemed one **Loss**, and such **Loss** shall be deemed to have originated in the earliest **Policy Period** in which a **Claim** is first made against any **Insured** alleging any such **Wrongful Act** or **Interrelated Wrongful Acts**.

The Company's maximum liability for each **Loss** shall be the Limit of Liability for each **Loss** set forth in Item 3(A) of the Declarations. The Company's maximum aggregate liability for all **Loss** on account of all **Claims** first made during the same **Policy Period** shall be the Limit of Liability for each **Policy Period** set forth in Item 3(B) of the Declarations.

The Company's liability hereunder shall apply to that part of **Loss** which is excess of the Deductible Amounts set forth in Item 4 of the Declarations and such Deductible Amount shall be borne by the **Insureds** uninsured and at their own risk.

For purposes of this section 9 only, the Extended Reporting Period, if exercised, shall be part of and not in addition to the immediately preceding **Policy Period**.

Other Insurance

10. If any **Loss** arising from any **Claim** made against any **Insured** is insured under any other valid policy(ies), prior or current, then this policy shall cover such **Loss**, subject to its limitations, conditions, provisions and other terms, only to the extent that the amount of such **Loss** is in excess of the amount of payment from such other insurance whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written only as specific excess insurance over the Limit of Liability provided in this policy.

Changes in Exposure

11. If a **Trust** or **Plan** merges into or consolidates with another trust or plan not enumerated in Item 5 of the Declarations, coverage under this policy for such **Insureds** thereof who were **Insureds** prior to such merger or consolidation shall continue until termination of this policy.

If the responsibilities for the administration or as a fiduciary of a **Trust** or **Plan** is fully assumed by another person or entity, coverage under this policy for **Insureds** who were **Insureds** prior to such assumption of responsibilities shall continue until termination of this policy but only with respect to **Claims** for **Wrongful Acts** committed, attempted, or allegedly committed or attempted prior to such assumption of responsibilities.

The **Insured** shall give written notice to the Company of such merger, consolidation or assumption of responsibilities as soon as practicable together with such information as the Company may require.

Termination of Trust or Plan

12. If a **Trust** or **Plan** terminates before or after the inception date of this policy, coverage with respect to such terminated **Trust** or **Plan** shall continue until termination of this policy for those who were **Insureds** at the time of such **Trust** or **Plan** termination, or who would have been **Insureds** at the time of such termination if this policy had been in effect, with respect to **Wrongful Acts** committed, attempted or allegedly committed or attempted by such **Insureds** prior to or after the date of such **Trust** or **Plan** termination.

Reporting Notice

13. The **Insureds** shall, as a condition precedent to exercising their rights under this policy, give to the Company written notice as soon as practicable of any **Claim** made against any of them for a **Wrongful Act**.

If during the **Policy Period** or Extended Reporting Period (if exercised) an **Insured** becomes aware of circumstances which could give rise to a **Claim** and gives written notice of such circumstance(s) to the Company, then any **Claims** subsequently arising from such circumstances shall be considered to have been made during the **Policy Period** or the Extended Reporting Period in which the circumstances were first reported to the Company.

The **Insureds** shall, as a condition precedent to exercising their rights under this policy, give to the Company such information and cooperation as it may reasonably require, including but not limited to a description of the **Claim** or circumstances, the nature of the alleged **Wrongful Act**, the nature of the alleged or potential damage, the names of actual or potential claimants, and the manner in which the **Insured** first became aware of the **Claim** or circumstances.

Labour Management Trust Fiduciary Liability Policy

Notice to the Company under this policy shall be given in writing addressed to:

- a. for notice of any **Claim** or circumstances which could give rise to any **Claim**:

Chubb Insurance Company of Canada
1 Adelaide Street East
Toronto, Ontario

M5C 2V9 Attention: Claims Department

- b. for all other notices:

Chubb Insurance Company of Canada
1 Adelaide Street East
Toronto, Ontario

M5C 2V9 Attention: Executive Protection Department

Such notice shall be effective on the date of receipt by the Company at the appropriate address, or with respect to notices in (b), at any branch office of the Company.

Arbitration and Allocation

14. Any dispute, including but not limited to claims sounding in contract or, tort between the **Insureds** and the Company arising in connection with or relating to this policy shall be submitted to binding arbitration.

Except with respect to the selection of the arbitration panel, any arbitration shall be governed by the provisions of the Ontario *Arbitration Act*, rules, orders, orders in council or regulations promulgated thereunder and amendments thereto or, upon the agreement of both the Company and the **Insureds**, by the provisions of any similar statute enacted by a provincial or territorial legislature other than Ontario. The arbitration panel shall consist of one (1) arbitrator selected by the **Insureds**, one (1) arbitrator selected by the Company, and a third independent arbitrator selected by the first two (2) arbitrators. In any arbitration, each party will bear his, her, or its own legal fees and expenses.

If both **Loss** covered by this policy and loss not covered by this policy are incurred, either because a **Claim** against any **Insured** includes both covered and uncovered matters or because a **Claim** is made against both an **Insured** and others, the **Insureds** and the Company shall allocate such amount between covered **Loss** and uncovered loss based upon the relative legal exposures of such parties to such matters.

Representations and Severability

15. In granting coverage to any one of the **Insureds**, the Company has relied upon the declarations and statements in the written application for this policy and upon any declarations and statements in the original written application submitted to another insurer with respect to the prior coverage incepting as of the Continuity Date set forth in Item 9 of the Declarations. All such declarations and statements are the basis of such coverage and shall be considered as incorporated in and constituting part of this policy.

Such written applications for coverage shall be construed as a separate application for coverage by each **Insured**. With respect to the declarations and statements contained in such written applications for coverage, no statement in the application or knowledge possessed by any **Insured** shall be imputed to any other **Insured** for the purpose of determining if coverage is available.

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- Investigation and Settlement** 16. The Company may make any investigation it deems necessary and may, with the written consent of the **Insured**, make any settlement of a claim it deems expedient. If the **Insured** withholds consent to such settlement, the Company's liability for all **Loss** on account of such **Claim** shall not exceed the amount for which the Company could have settled such **Claim** plus costs, charges and expenses accrued as of the date such settlement was proposed in writing by the Company to the **Insured**.
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- Subrogation** 17. In the event of any payment under this policy, the Company shall be subrogated to the extent of such payment to all the **Insureds'** rights of recovery, and the **Insureds** shall execute all papers required and shall do everything necessary to secure and preserve such rights, including the execution of such documents necessary to enable the Company effectively to bring suit in the name of the **Insured**.
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- Valuation and Foreign Currency** 18. All premiums, limits, retentions, **Loss** and other amounts under this policy are expressed and payable in the currency of Canada. If judgment is rendered, settlement is denominated or any element of **Loss** under this policy is stated in a currency other than Canadian dollars, payment under this policy shall be made in Canadian dollars at the rate of exchange published in The Globe and Mail on the date the final judgment is reached, the amount of the settlement is agreed upon or any element of **Loss** is due, respectively.
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- Action Against the Company** 19. No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy. No person or organization shall have any right under this policy to join the Company as a party to any action against the **Insured** to determine the **Insured's** liability nor shall the Company be impleaded by the **Insured** or the **Insured's** legal representatives.
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- Bankruptcy or Insolvency** 20. Bankruptcy or insolvency of an **Insured** shall not relieve the Company of its obligations nor deprive the Company of its rights under this policy.
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- Authorization Clause** 21. By acceptance of this policy, the **Insurance Representative** agrees to act on behalf of all **Insureds** with respect to the giving and receiving of notice of **Claim** or termination, the payment of premiums and the receiving of any return premiums that may become due under this policy, the negotiation, agreement to and acceptance of endorsements, and the giving or receiving of any notice provided for in this policy (except notice to apply for the Extended Reporting Period), and the **Insureds** agree that the **Insurance Representative** shall act on their behalf.
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- Alteration and Assignment** 22. No change in, modification of, or assignment of interest under this policy shall be effective except when made by a written endorsement to this policy which is signed by an authorized representative of the Company or designated affiliate.
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Labour Management Trust Fiduciary Liability Policy

Termination of Policy

23. This policy shall terminate at the earliest of the following times:
- (a) sixty days after the **Insurance Representative** receives written notice of termination from the Company,
 - (b) upon receipt by the Company of written notice of termination from the **Insurance Representative**,
 - (c) upon expiration of the **Policy Period** as set forth in Item 6 of the Declarations, or
 - (d) at such other time as may be agreed upon by the Company and the **Insurance Representative**.

The Company shall refund the unearned premium computed at customary short rates if the policy is terminated by the **Insurance Representative**. Under any other circumstances the refund shall be computed pro rata.

Termination of Prior Policies

24. Any policies issued by the Company or its affiliates and specified in Item 10 of the Declarations of this policy shall terminate, if not already terminated, as of the inception date of this policy.
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Definitions

25. When used in this policy:

Administration means giving advice to participants and beneficiaries with respect to a **Trust** or **Plan**, interpreting a **Trust** or **Plan**, and handling the records, effecting enrollment, and termination or cancellation of participants under a **Trust** or **Plan**.

Claim means:

- (i) a written demand for monetary damages or injunctive relief,
- (ii) a civil proceeding commenced by the service of a complaint or similar pleading,
- (iii) a criminal proceeding commenced by a laying of an information or return of an indictment.
- (iv) a formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document, or
- (v) a written notice of commencement in the United States of America by the Department of Labour or the Pension Benefit Guaranty Corporation of an investigation,

against any **Insured** for a **Wrongful Act**, including any appeal therefrom.

Common Law Partner with respect to an **Insured**, means a person who at any time:

- (a) has cohabited continuously in a conjugal relationship with an **Insured** person outside marriage for a period of at least one (1) year; or
- (b) has cohabited continuously in a conjugal relationship of some permanence with an **Insured** person outside marriage provided that both are the natural or adoptive parents of a child.

Defence Costs means that part of **Loss** consisting of reasonable costs, charges, fees (including but not limited to attorneys' fees and experts' fees) and expenses (other than regular or overtime wages, salaries or fees of the directors, officers, trustees or employees of the **Insured**) incurred in defending or investigating **Claims** and the premium for appeal, attachment or similar bonds.

Government Benefit Program means any benefit program created by statute, of which the capital is administered and the contingent liabilities assumed by a government or governments or any agency thereof, including without limitation workers' compensation, unemployment, social security and disability benefit programs.

Insured, either in the singular or plural, means any one or more:

- (a) **Trust or Plans**;
- (b) natural person serving as a past, present or future trustee or employee of a **Trust or Plan**; and
- (c) other natural person or organization designated as an additional insured by endorsement to this policy.

Definitions

(continued)

Insurance Representative means the person or organization authorized to represent the **Insureds** and designated in Item 1 of the Declarations.

Interrelated Wrongful Acts means all causally connected **Wrongful Acts**.

Loss means the total amount which any **Insured** becomes legally obligated to pay on account of each **Claim** and for all **Claims** in each **Policy Period** and the Extended Reporting Period, if exercised, made against them for **Wrongful Acts** for which coverage applies, including, but not limited to, damages, judgments, settlements, costs and **Defence Costs**. **Loss** does not include matters uninsurable under the law pursuant to which this policy is construed.

Plan means those plans enumerated in Item 5 of the Declarations.

Policy Period means the period of time specified in Item 6 of the Declarations, subject to prior termination in accordance with section 23. If this period is less than or greater than one year, then the Limits of Liability specified in the Declarations shall be the Company's maximum limit of liability under such coverage for the entire period.

Pollutants means any substance located anywhere in the world exhibiting any hazardous characteristics as defined by, or identified on a list of hazardous substances issued under or by the Canadian Environmental Protection Act, the United States Environmental Protection Agency or any federal, provincial, territorial, state, county, municipality or locality counterpart thereof. Such substances shall include, without limitation, solids, liquids, gaseous or thermal irritants, contaminants, or smoke, vapor, soot, fumes, acids, alkalis, chemicals or waste materials. **Pollutants** shall also mean any other air emission, odor, waste water, oil or oil products, infectious or medical waste, asbestos, or asbestos products and any noise.

Labour Management Trust Fiduciary Liability Policy

Spouse means either of a man or woman who:

- (a) is married to an **Insured** person, or
- (b) has together with an **Insured** person entered into a marriage that is voidable or void, in good faith on the part of the person asserting the relationship.

Trust means those trusts enumerated in Item 5 of the Declarations.

Wrongful Act means:

- (a) with respect to any **Trust** or **Plan**, any breach of the responsibilities, obligations or duties imposed upon fiduciaries of the **Trust** or **Plan** by the Pension Benefits Standards Act of Canada, or the Employee Retirement Income Security Act of 1974 of the United States of America, as amended or by the common, civil or statutory law of Canada, the United States of America, or any province, territory, state or other jurisdiction anywhere in the world; or
- (b) any negligent act, error or omission in the **Administration** of any **Trust** or **Plan**.

¶43-670 CASE LAW/LEGISLATION

¶43-672 Cases

Sun Indalex Finance, LLC v. United Steelworkers et al.³¹

Indalex Limited (“Indalex”) administered two pension plans, one for salaried employees and one for executive employees. Indalex became insolvent and obtained protection from its creditors under the *Companies’ Creditors Arrangement Act* (the “CCAA”). At the time the CCAA proceedings began, the salaried employees’ pension plan was being wound up and the executives’ pension plan was closed but not wound up. Both plans had funding deficiencies.

The CCAA court authorized Indalex to enter into debtor-in-possession (“DIP”) financing, which took priority over the claims of all other creditors. Ultimately, with the CCAA court’s approval, Indalex sold its business, but the purchaser did not assume Indalex’s pension liabilities. The proceeds of sale were insufficient to pay the DIP lenders in full. Indalex’s parent company, which guaranteed the DIP lenders, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority. The CCAA court ordered a partial payment in accordance with the priority, but ordered an amount held in reserve pending the determination of the priority to be ascribed to the pension plan members’ claims. These members (the “Plan Members”) moved for orders declaring that they had priority in the amount of the wind-up deficiency based upon a statutory deemed trust (s. 57(4) of the *Pension Benefits Act* (the “PBA”)) and a constructive trust arising out of Indalex’s alleged breach of fiduciary duty as the administrator of the pension plans.

In dismissing the motion, the motions judge held that the Plan Members were unsecured creditors.

In allowing the Plan Members’ appeal, the Court of Appeal accepted the Plan Members’ deemed statutory trust and constructive trust arguments. The Court of Appeal also refused the claim by the union (“USW”) which represented seven of the 169 beneficiaries of the salaried employees’ pension plan, for costs paid out of the salaried employees’ pension plan, on the

basis that the USW should not be able to impose the risks of litigation on all plan members when the vast majority of plan members were not union members. The court-appointed monitor of Indalex under the CCAA (the “Monitor”), the USW, and others appealed.

The Monitor’s and others’ appeals were allowed; the USW’s appeal was dismissed. The majority of the Supreme Court of Canada held that the language of the deemed statutory trust provision of the PBA (s. 57(4)) was broad enough to extend to pension plan wind-up deficiencies. However, the entire Court agreed that any statutory deemed trust under the provincial PBA, which applied to federally regulated CCAA proceedings, was subject to the doctrine of federal paramountcy. The CCAA order that granted the DIP lenders priority had the same effect as a statutory priority, which created an inconsistency with the priority set out in provincial law. Thus, due to the doctrine of federal paramountcy, even if there was a deemed statutory trust, it was superseded by the priority granted to the DIP lenders. The entire Court also found that Indalex encountered a conflict of interest because of its role as both administrator of the pension plans and as a corporate employer making management decisions in its own best interests; however, a majority of the Court held that there should be no remedial constructive trust, which was only appropriate where the wrongdoer’s acts gave rise to an identifiable asset that it would be unjust for the wrongdoer (or sometimes a third party) to retain. On the USW’s appeal, the entire Court agreed with the reasons given by the Court of Appeal for dismissing the USW’s claim for costs.

Slater Steel (Re)³²

This case related to the duties of directors and officers of a company charged with administering a pension plan sponsored by the company.

Slater Stainless Corp. (“Slater”) was the sponsor and administrator of certain pension plans (the “Plans”), and certain officers and directors of Slater (“Slater Personnel”) were delegated responsibility for adminis-

³¹ 2013 SCC 6.

³² 2008 ONCA 196.

tering the Plans. J. Melvin Norton (“Norton”) was the Plans’ actuary and was employed by Aon Consulting Inc. (“Aon”) (Norton and Aon are together referred to as the “Actuaries”). The Superintendent of Financial Services alleged improprieties in the Plan’s actuarial reports prepared by Norton.

In 2003, Slater was granted protection under the *Companies’ Creditors Arrangement Act* (the “CCAA”), a charge was made for up to \$17.5 million against Slater property to indemnify Slater directors and officers for claims that might be asserted against them, and a process to resolve such claims was instituted. A subsequent order provided that Slater directors and officers would be released from all claims for which the directors and officers were liable in their capacity as such and for which no claims notices had been filed by the deadline. At the time of the protection order, there was some \$18 million of unremitted contributions to the Plans. The CCAA proceedings subsequently terminated in 2004 but the claims bar process was allowed to continue for claims already underway. Later in 2004, the Superintendent of Financial Services appointed Morneau Sobeco Limited Partnership (“Morneau”) as the successor administrator of the Plans. Morneau brought an action against the Actuaries in 2005 claiming \$20 million in damages being the amount by which the Plans were underfunded as a result of the allegedly improper actuarial reports prepared by Norton (the “Morneau Action”). The Actuaries then sought, by instituting third-party proceedings against the Slater Personnel as the governing mind of Slater *qua* administrators, to seek contribution and indemnity from the Slater Personnel for any liability they were found to have in the Morneau Action. The Actuaries alleged that the Slater Personnel followed a deliberate strategy to minimize the contributions that Slater would be required to make to the Plans when they knew or should have known that Slater was insolvent or on the brink of insolvency; the strategy allegedly included instructing Norton to prepare the solvency valuation using an asset “smoothing” method to adjust the value of the Plans’ assets, without disclosing to the Actuaries whether Slater would remain a going concern. The Ontario Superior Court of Justice subsequently ruled, in April 2007, that

the Actuaries did not disclose a proper cause of action against the Slater Personnel. The Actuaries appealed.

The appeal was allowed. The issues before the Court were (1) whether the claims made by the Actuaries against the Slater Personnel disclosed a reasonable cause of action; and (2) if so, were the claims precluded by the CCAA orders. With regard to the first issue, the Court found that the lower court had erred in determining that the claims did not disclose a proper cause of action, and had failed to distinguish between Morneau’s role as a successor administrator (and right to bring suit on behalf of the Plans’ beneficiaries) and Slater’s role as the Plans’ administrator (and the directors and officers in their capacity as employees and agents of the Plans’ administrator). When Slater’s audit committee made decisions on the amount of Slater’s contribution to the Plans, it did so on behalf of Slater as administrator and therefore owed a fiduciary duty to the Plans’ members. Further, the fiduciary duty owed was raised given Slater’s financial predicament and the probable need for solvency funding.

Nolan v. Kerry (Canada) Inc.³³

This case related to the ability of a plan sponsor to charge pension plan administrative expenses to the fund, and the ability to use an actuarial surplus in the defined benefit (“DB”) portion of a pension plan to fund a contribution holiday in respect of the defined contribution (“DC”) portion of the plan.

Kerry (Canada) Inc. (“Kerry”) administered a pension plan (“Plan”) for its employees, requiring contributions from both employees and Kerry. A trust agreement provided that the contributions were to be paid into a trust (“Trust”) held in a trust fund (“Fund”). By 2001, the Fund had been in an actuarially determined surplus position for a number of years. Until 1984, Kerry paid the Plan expenses directly; however, following amendments to the Plan documents in 1985, third-party Plan expenses for actuarial, investment management, and audit services were paid by the Fund. As of 1985, Kerry also started taking contribution holidays from its funding obligations. Until 2000, the Plan existed as a DB pension plan; however, the Plan documents were amended again in 2000 to

³³ 2009 SCC 39.

introduce a DC component. The Fund was constituted in two separate funding vehicles with two separate trustees: (1) existing employees were deemed to be “Part 1 Members” and had the option of converting to the DC component; and (2) any new employees were deemed to be “Part 2 Members” and participated solely in the DC part of the Plan.

After Kerry introduced the amendments to the Plan in 2000, certain former employees and members of the Plan (the “Committee”) asked the Superintendent of Financial Services (the “Superintendent”) to make orders under the *Pension Benefits Act* relating to payment of Plan expenses from the Fund and Kerry’s contribution holidays. The Superintendent issued two Notices of Proposal: (1) proposing that Kerry reimburse the Fund for expenses that had not been incurred for the exclusive benefit of Plan members; and (2) proposing to refuse, amongst other things, to order Kerry to reimburse the Fund for the contribution holidays taken. Upon request by both Kerry and the Committee, a hearing before the Financial Services Tribunal (“Tribunal”) was held, which generally ruled in favour of Kerry. The Tribunal held that (1) all of the Plan expenses at issue could be paid for the Fund except for certain consulting fees; (2) Kerry was entitled to take contribution holidays while the Fund was in a surplus position and that Kerry could retroactively amend the Plan provisions to designate DC members as beneficiaries of the Fund, thereby allowing Kerry to fund its DC contributions from the DB surplus; and (3) no costs should be awarded.

The Committee appealed to the Divisional Court, which (1) ruled that the expenses at issue could not be paid out of the Fund, this constituted a partial revocation of the Trust and the expenses were not for the

exclusive benefit of the employees; (2) upheld the decision of the Tribunal that DB contribution holidays were permitted as nothing in the Plan documents precluded them; (3) ruled that the surplus in the Fund accumulated under the DB arrangement could not be used to fund the employer’s contribution obligations to the DC arrangement — there were “in law” two plans and two pension funds, which could not be joined; and (4) awarded costs out of Fund (having jurisdiction to do so, unlike the Tribunal), ordering Kerry to pay the Committee’s costs on a partial indemnity basis. The Court of Appeal allowed Kerry’s appeal, dismissed the Committee’s cross-appeal, and upheld the Tribunal’s rulings.

The appeal was dismissed. The Supreme Court of Canada confirmed the Court of Appeal’s decision that paying administrative expenses from the Fund did not constitute a revocation of the Trust unless the Plan expressly required that Kerry pay the funds, which it did not. Further, and importantly, a majority of the Supreme Court of Canada (two of the judges dissenting) held that DB and DC arrangements were two components of a single plan, and that retroactive amendments could be made to create a trust — there was no statute or regulation prohibiting the combining of DB and DC components into a single plan, nor prohibiting the taking of contribution holidays in respect of either component of the Plan. Kerry could therefore use the actuarial surplus accumulated in the DB component of the Plan to meet its funding obligations with respect to the DC component. Lastly, the Supreme Court of Canada upheld the Court of Appeal’s decision that costs were not payable from the Fund.

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