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R. v. Christophe et al., 2009 ONCJ 586 (CanLII)

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B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

BERNARD CHRISTOPHE, GORDY K. CANNADY, MICHAEL FRASER,WAYNE HANLEY, LUCY PAGLIONE, TOM ZAKRZEWSKI, CLIFFORD EVANS, ANTONIO FILATO AND ALAIN PICARD

Before Justice Beverly A. Brown
Heard on: August 21; September 05, 15, 19, 24, 25, 26, 29;
October 10, 15, 16, 17, 27, 2008;
January 23, 26, 29; February 27; April 28;
June 3, July 15 and September 22, 2009
Reasons for Judgment released on: December 7, 2009

William J. Manuel, Mark Bailey and Alena Thouin……..for the prosecution
Mark Sandler and Scott Bergman…… for Bernard Christophe
Scott Fenton and Stephanie Wakefield……..……for Gordy K. Cannady
Mark Zigler and Anthony Guindon……..……for Michael Fraser
Mark Zigler and Anthony Guindon…… for Wayne Hanley
Paul Schabas and Erin Hoult……..…… for Lucy Paglione
Mark Zigler and Anthony Guindon……. for Tom Zakrzewski
David Humphrey and Seth Weinstein……..…… for Clifford Evans
Mark Zigler and Anthony Guindon…… for Antonio Filato
Mark Zigler and Anthony Guindon……..…… for Alain Picard

BROWN J.:

INTRODUCTION:

[1] The members of the Board of Trustees and the Investment Committee of this pension plan are charged with failure to comply with legislative provisions which govern the pension plan. The plan is the Canadian Commercial Workers Industry Pension Plan Trust Fund (hereinafter referred to as the Plan). This Plan was established in 1979 in the merger of the Alberta Retail Clerks Industry Pension Plan and the Manitoba Northwest Ontario Retail Stores Employees' Pension Plan. The members are employed by multiple separate employers in the grocery, food service and food production industry sectors. As of Dec. 31, 2002, the membership of the Plan included approximately 140,400 actively employed members and approximately 112,300 pensioner and other beneficiaries across Canada. At that date the Plan had assets of approximately $1.1 billion.

[2] The defendants Bernard Christophe, Gordy K. Cannady, Michael Fraser, Wayne Hanley, Lucy Paglione, Tom Zakrzewski, Clifford Evans, Antonio Filato and Alain Picard, are charged in their capacity as members of the Board of Trustees of the Plan. A smaller subset of this group, being Bernard Christophe, Gordy K. Cannady and Clifford Evans, are charged as members of the Investment Committee of the pension plan. This Plan is regulated by the *Pension Benefits Act* legislation in Ontario in relation to investments made by the Plan over the period from February 15, 2002 to December 31, 2003. The offence period for the charges commenced with the date upon which the Ontario legislation governed the plan, as it had previously been governed by Alberta legislation.

[3] There are two main groupings of charges in this trial. Firstly there are the counts related to the requirement that the pension plan administrator prudently invest and administer the pension plan funds. There are counts which charge the members of the Board of Trustees individually as breaching the prudent person standard. The Board of Trustees is defined as the administrator of the Plan. Parallel counts charge the members of the Investment Committee with similar offences, which become relevant if the court finds that the Board of Trustees delegated the function of making investments to those parties. In addition, if this delegation has taken place, the members of the Board of Trustees are charged with failure to properly supervise the members of the Investment Committee as it would relate to the prudence of investment decisions made by those members.

[4] The second grouping of charges relates to the obligation of the administrator to not advance or invest funds contrary to the quantitative limits rule. The charges target the advance of funds and investments to RHK Capital Inc. and/or PRK Holdings Ltd. Parallel counts, being counts 1 and 9, are before the court for consideration depending on whether the investment decisions were made by members of the Investment Committee, as delegated by the Board of Trustees, or whether the investment decisions were made by the members of the Board of Trustees.

[5] Concurrently, with respect to the quantitative limits requirement, if delegation had been made by the Board of Trustees to the members of the Investment Committee, there remains the consideration of whether the members of the Board of Trustees properly supervised those members regarding compliance with the quantitative limits requirement.

STATUTORY SCHEME:

[6] The legislation governing the Plan for the offence period is the *Pension Benefits Act*, R.S.O. 1990, c. P.8, Regulation 909, R.R.O. 1990 ("Regulation 909") to the *Pension Benefits Act* and the Federal Investment Regulations ("FIR") as defined in the regulation 909.

[7] This Act was considered by the Supreme Court of Canada in *Monsanto Canada Inc. v. Ontario (Superintendant of Financial Services)*, 2004 SCC 54 (CanLII), [2004] S.C.J. No. 51. The Court noted at para. 20 :

> "In the early days, pensions were commonly regarded as gratuitous rewards for long and faithful service, subject to the discretion and financial health of the employer (see Report of the Royal Commission on the Status of Pensions in Ontario, supra, at p. 2; Mercer Pension Manual (loose-leaf ed.), at p. 1-9). However, particularly as pensions became a more familiar sight at the collective bargaining table, a competing conception as an enforceable employee right developed (see E.E. Gillese, "Pension Plans and the Law of Trusts" (1996), 75 Can. Bar. Rev. 221, at pp. 226-27; Deaton, supra, at pp. 122-23). The enactment of minimum standards legislation in Ontario, first in 1963 and again in 1987, "considerably expanded the rights of plan members. It altered, again, the power balance between employers and employees in the matter of pensions" (Gillese, supra, at p. 228)."

[8] The Court affirmed the Court of Appeal for Ontario's statement of the purpose of the *Pension Benefits Act* in its judgment in *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 1998 CanLII 2947 (ON CA), 158 D.L.R. (4th) 497 (Ont.C.A.). In particular, the Court affirmed the principle that the Act establishes a "carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario" and is "intended to benefit and protect the interests of members and former members of pension plans". The Court noted that the legislation is a complex administrative scheme, which seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system. The Court also held that the purpose of this Act is to "establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans." The Court contrasted the scenario of defined contribution plans from defined benefit plans. Defined benefit plans provide guaranteed specific benefits at retirement based upon an amount fixed by formula and the benefits are not contingent on the level or return on contributions. In the case of defined benefit plans, employers can be called upon to make up a deficit through contributions for any unfunded liability. Moreover, if the defined benefit plan is underfunded on wind-up, the benefits will be reduced subject to the application in Ontario to the Pension Benefits Guarantee Fund.

[9] This Plan is a multi-employer pension plan, with defined or fixed contributions by employers. It is a defined contribution plan. The employer(s) are not required to "top-up" any unfunded liability in the Plan at any point.

[10] The Plan in this case would not be eligible for any shortfall contribution from the Pension Benefits Guarantee Fund. If there is a shortfall in the Plan arising from the Plan's failure to prudently deal with investments, it is much more likely that the shortfall would result in a reduction in the benefits to its members. As a result, members are more directly exposed to any funding shortfall in the Plan from imprudent investments. The members of a multi-employer pension plan do not have coverage through the Pension Benefits Guarantee Fund. As a result, any losses to this defined contribution Plan could result in more devastating consequences for members and former members than would have resulted if it was a defined benefit plan. This is an important consideration to bear in mind in the interpretation and purposive analysis of the *Pension Benefits Act*, the sections of the Act which govern, and the application of the provisions to the multi-employer pension plan in this trial. This situation is different from a single employer pension plan where an employer has an obligation to make up a funding shortfall. As a result, members of a multi-employer pension plan are potentially in a more vulnerable position than members of a single employer pension plan.

[11] In a purposive analysis of the *Pension Benefits Act*, this court considers the comments of the Supreme Court of Canada and Court of Appeal for Ontario, noted above. Further, as Justice W.P. Bassel noted in *R. v. Norton* , 2006 ONCJ 235 (CanLII), [2006] O.J. No. 2631, at para 44, the legislation strives "to ensure the integrity of pension plans" and endeavours to "put in safeguards for employees to reasonably expect that at the end of their work days, the pension plan will deliver what was expected."

EVIDENCE:

[12] This trial proceeded by way of an agreed statement of facts, which was filed at the outset. The facts are largely from the agreed statement of facts. No *viva voce* evidence was called either by the Crown or by the defence in the course of the trial. The agreed statement of facts was supplemented by the filing of numerous other volumes of material by the Crown, and additional volumes of material filed by the defence. Counsel

proceeded by way of written and oral submissions at the conclusion of the filing of evidence in this trial. Further submissions were sought by the court. The matter is now before the court for judgment.

[13] The Board of Trustees for this Plan is by definition the "administrator", pursuant to the *Pension Benefits Act*. The Plan is a "multi-employer pension plan", defined in s. 1(3) of the *Pension Benefits Act*. As a multi-employer pension plan, it is directed by an "administrator", which is defined as a Board of Trustees pursuant to s. 8(1)(e) of the *Pension Benefits Act*. The statute defines membership of the Board of Trustees for the administrator, and takes into account representation of plan members. In its role as the administrator, prior to the offence period, the Board of Trustees passed a resolution to establish the Investment Committee. Subsequently, in 1996, the Board of Trustees established a Statement of Investment Objectives, Policies, Goals and Guidelines. This was revised in 2001 and will hereinafter be referred to as the "SIP&P".

[14] The first grouping of charges relates to counts 3, 4, 6, 7, 10, 11, 13 and 14. These counts relate to s. 22(1) of the *Pension Benefits Act*, which requires that the administrator of a pension plan exercise the care, diligence and skill in the administration and investment of the pension fund for the Plan that a person or ordinary prudence would exercise in dealing with the property of another person. Counts 4 and 11 relate to the investments by the Plan in Case Financial, in California, which is a litigation funding company. Counts 7 and 14 relate to the investments by the Plan in British Colonial Property, in the Bahamas, which is a hotel and commercial complex. Counts 6 and 13 relate to the investments by the Plan in South Ocean Property, in the Bahamas, which is a golf and beach resort. Counts 3 and 10 relate to the investments by the Plan in Purely Supreme Foods, in Idaho, which is a food processing company.

[15] Advances by the pension plan were made to Case Financial Inc. Case Financial was established to provide cash advances to lawyers and plaintiffs involved in personal injury lawsuits in the United States. The advances were non-recourse loans, and a lien was given on the proceeds of litigation to be paid upon a favourable adjudication or settlement. During the offence period, the investment committee approved a $2 million loan to CFI. An additional advance, approved by the Investment Committee, in the amount of $750,000. was made for a specific class action suit, for a fixed rate of interest, with a provision for payment of a portion of any proceeds in excess of the principal to be shared with the Plan.

[16] Various loans were made to resort and hotel properties in the Caribbean prior to the offence period. Additional funds were advanced during the offence period for British Colonial Property, in the Bahamas, which is a hotel and commercial complex and for the South Ocean Property, in the Bahamas, which is a golf and beach resort. Initially the properties were held by RHK Capital Inc. (hereinafter referred to as RHK) for these loans. After the default on these loans, PRK Holdings Ltd. (hereinafter referred to as PRK) was involved as a result of a debt restructuring. The total outstanding loans at the time of the restructuring in December of 2000, which is prior to the offence period, was in excess of US $92 million. Subsequently various efforts were made to find purchasers or joint venture partners for the properties. Over the offence period, there was ongoing consideration of the options to continue to support the ongoing operations and provide ongoing funding, to sell the properties (and find purchasers to effect that goal) or alternatively to find joint venture partners for the properties. No such deals were consummated during the offence period. Further advances were made in April 2002 in the amount of US $4.7 million, January of 2003 for US $2 million, in March of 2003 for US $24,000., and a retainer for US $250,000. for Price Waterhouse Coopers Securities Inc. to act as brokers and investment bankers to facilitate the sale of the Caribbean properties. Additional funding was approved in April of 2003 for slightly above US $4 million. In September of 2003, the Investment Committee approved funding of US $3.45 million. Finally, in December of 2003, an additional loan in excess of US $5.06 million was approved.

[17] The first investment by the Plan in Purely Supreme Foods occurred in 1997 to a predecessor company of Purely Supreme Foods, in the amount of $2.1 million. This was a food processing company with a patent technology to process fresh foods, mainly potatoes, to extend the shelf life of potatoes. Additional advances were made by the pension plan from 1997 to just prior to the offence period, totaling in excess of $27 million. During the offence period, additional advances were made by the Plan in excess of $11.5 million. The Plan had a security interest. Interest payments were to have been made by Purely Supreme Foods. Additional loans were approved by the Investment Committee of the Board of Trustees to Purely Supreme Foods during the relevant period which totaled in excess of US $7.7 million.

[18] As will be discussed in greater detail below, under the consideration of the issue relating to expert evidence, the nature of the various business enterprises including their financial status and financial health, together with the financial arrangements in relation to the advances, are somewhat complicated. The advisability of the Plan making these advances is hotly contested. In essence, the Crown takes the position that if the administrator of the pension plan, being the members of the Board of Trustees, or the members of the Investment

Committee as delegated by the Board of Trustees, had acted in keeping with the standard of a fiduciary acting prudently, the advances over the offence period would not have been made. This forms the basis of the bulk of the counts in relation to the first group of charges regarding the failure to act prudently. The Crown takes the position that the members of the Investment Committee were delegated by the Board of Trustees the authority to make these decisions, and that accordingly the members of the Investment Committee are properly liable for breach of the prudent person standard in s. 22(1) of the *Pension Benefits Act*. The Crown argues that although the Board of Trustees delegated the power to make investment decisions, they retained the obligation to supervise the persons who were delegated the investment function. The Crown argues that the members of the Board of Trustees should be found guilty of count 2 in relation to failure to properly supervise the actions of the members of the Investment Committee in relation to the standard of making prudent investment decisions. In the alternative, the Crown submits that if the court does not find that the Board of Trustees delegated to the Investment Committee the power to make the decisions regarding loans and investments, and retained the authority to make those decisions, then the members of the Board of Trustees are properly liable for breach of the prudent person standard in s. 22(1) of the *Pension Benefits Act*. One issue that looms large in the consideration of all of the counts in this grouping of charges relates to the absence of expert evidence to consider the issues in the context of the evidence in this trial, which is discussed below.

[19] The second grouping of charges relates to the counts regarding holdings in excess of the quantitative limits as defined by the *Pension Benefits Act* and relevant regulations. The Crown takes the position, as related in the first grouping of charges, that the members of the Board of Trustees delegated authority to the members of the Investment Committee to make decisions related to investments and advances of funds of the Plan over the relevant period. On that basis, the Crown argues that the members of the Investment Committee are guilty in count 9 of taking on the delegated function of making investment decisions and in advancing funds which increased the holdings in RHK Capital Inc. and/or PRK Holdings Ltd above the maximum quantitative limits provisions of the *Pension Benefits Act*. If the court does not accept that this delegation has taken place, the Crown argues that guilt should be found on an alternative basis as set out in count 1. Count 1 charges the individual members of the Board of Trustees in the event that the court finds that they retained the function of making decisions regarding investments and advances and are thereby bound by the rule regarding quantitative limits. This issue will be discussed below under the heading related to quantitative limits.

[20] A third issue relates to a potential scenario of there having been delegation of the function to make investment decisions to the members of the Investment Committee, and whether the members of the Board of Trustees failed in their residual obligation to properly supervise those parties, either related to prudence in making decisions, or in failure to comply with the quantitative limits rules.

ANALYSIS:

(1) OVERVIEW OF ISSUES

[21] An important issue which has arisen in this case relates to the Crown failure to call evidence from a qualified expert as to the decisions made by the administrator and/or its agent in relation to advances of pension plan monies. This is an extremely important issue, as it touches upon Counts 3, 4, 6, 7, 10, 11, 13, 14 and as well potentially count 2 as it relates to the supervision of actions of any subcommittee of the Board of Trustees in making the financial advances. This issue does not relate to counts 1 and 9, which relate to what the court has referred to as the quantitative limits rules. The parties agree that expert evidence was not required for consideration of the evidence with respect to the quantitative limits offences, which are discussed below.

[22] The defence argues that there is no evidence before this court that can assist the court in reviewing various decisions that have been made, relevant to the standard in s. 22(1) of the *Pension Benefits* of exercising the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person. While it is clear that this is a fiduciary duty and it is a higher standard than the prudence one would use in investing one's own pension funds, the defence argues that the court cannot properly assess the decisions made by the administrator and/or agent of the pension plan without the assistance of expert evidence, which could for instance touch upon industry standards of investment relative to portfolio risk, including a portfolio valued in the range of $1 billion, where higher risk is tied to higher rates of return, and there is in effect a weighing of factors across the whole portfolio. The Crown responds that there is no need for expert evidence in this regard, as the standard in s. 22(1) of the *Pensions Benefits Act* is that or ordinary prudence which can be assessed in the circumstances and context of this case based upon the available information at the time. The Crown submits that this case is quite different from those where the administrator is held to a higher standard, such as pursuant to s. 22(2) of the *Pension Benefits Act*

by virtue of having special knowledge or skill arising from the administrator's profession, business or calling. In this respect, the Crown seeks to distinguish the American cases put before the court arising from the *Employment Retirement Income Security Act of 1974,* 29 U.S.C.S. § 1104 (hereinafter referred to as *ERISA*). The Crown argues that the *ERISA* legislation requires a higher standard. In the alternative, the Crown submits that the defendants had in effect special knowledge and opinion evidence available to it in making the decisions arising from the employment of consultants to assess various investments and to make decisions relating to those investments. In that regard, the Crown submits that the defendants had information available to them, which the court can use to assess the wisdom of the various decisions that were made, and ultimately whether the prudent person standard required by s. 22(1) of the *Pension Benefits Act* was met by the actions of the administrator. This particular issue and argument has permeated virtually all of the issues that have arisen in this case in relation to the prudent investment of the plan. It is clear that the Crown and defence are diametrically opposed in their views of whether this court has been put in a position where it can or cannot make the findings the Crown seeks the court to make in this case with respect to the various investments.

[23] The composition of the administrator of a multi-employer pension plan, being a Board of Trustees with defined representation of at least half from members of the plan is statutorily defined and constituted. While this democratic principle of representation is principled and would permit an impression of having a voice on the Board of Trustees. It may well result in a situation where representatives of the Plan membership may not have any particular expertise in areas of investment relative to decisions required to be made by the Board of Trustees. It might also result in a situation where different members of the Board of Trustees have different levels of expertise and knowledge regarding investments. By and large, s. 22(1) of the *Pension Benefits Act* would seem to require no special expertise or knowledge on the part of a fiduciary. The standard in s. 22(1) is distinct from the standard set out in s. 22(2) of the Act which provides an objective standard for an administrator with a particular profession, business or calling. This is elevated above what would be expected of a person with no particular profession, business or calling. It would seem that members of a Board of Trustees with special expertise would be held to a higher standard than those without special expertise. It is important to note that decisions of a Board of Trustees are made collectively. Some members may have special expertise, and other members may have no particular expertise. Members with special expertise might constitute a minority of the members. This could create difficulties where members of ordinary backgrounds with no special expertise would potentially either by greater membership decide issues or carry the majority vote, or conversely be unduly swayed by a minority of members with special expertise. It is clear that the legislation contemplated a board of membership to consider the various issues and make prudent investment decisions. If the administration of a Board of Trustees of a multi-employer pension plan is to work at an optimal level, it would seem that the knowledge of members with no special background should be supplemented by the expertise of consultants or experts, such that proper decisions could be made collectively to comply with the s. 22(1) *Pension Benefits Act* standard of a fiduciary and to generate the best overall rates of return.

[24] Counsel take the position that the standard of care mandated by s. 22(1) of the *Pension Benefits Act* is that of an ordinary person without special expertise or knowledge, held to a standard of a fiduciary. In order to perform at the level of a fiduciary, for the overall membership of the Board of Trustees, the retention of experts and consultants would only enhance the quality of the decision-making in relation to proposed loan or investment advances from the Plan. In that respect, the court finds that it would be advisable, to comply with the fiduciary duty in s. 22(1), for the administrator to retain consultants and experts to assist in decision-making to supplement the knowledge of ordinary persons and assist in providing information and advice regarding options for investments and loans under consideration. This would enhance the likelihood of the administrator in ultimately making prudent decisions, particularly where the issues are multi-faceted. The court has examined many decisions of the Board of Trustees of this plan. It is clear that the issues and considerations related to options and decisions are diverse and multidimensional. For instance, there is an expectation that funds in a pension plan be invested, or largely invested, to generate a rate of return. In situations like the case at bar, this means that funds in the range of $1 billion would need to be prudently invested. There is an expectation that the funds be invested prudently, and in complying with the fiduciary duty that the capital not be placed unduly at risk of loss. At the same time, there is an expectation that the funds be invested in a way to generate a suitable rate of return. Generally, greater risks generate greater risks of return. Obviously, plan members would prefer to have a pension plan which is financially healthy, that makes good investment decisions that generate a good rate of return across the portfolio. This rate of return is generated across the whole portfolio, with potentially different rates of return generated by different risks for components of the portfolio. There is the principle of diversification which is generally a good one to apply across a portfolio. As well, there may be real value and benefit in getting advice from a consultant or expert in a particular area of investments in a unique field, such as resort properties in the Caribbean. It would also be important to ensure that this information is from an objective source, and not for instance a representative of a party seeking funding, as happened in one of the investments

under consideration. Information of this nature could only assist and supplement the knowledge and experience of an ordinary person, and better assist such ordinary people in making appropriate decisions to comply with the duty of a fiduciary. The administrator could choose to follow or not follow suggestions or advice. With information to supplement the lack of expertise of an ordinary person, the administrator would be better informed and in a better position to make appropriate prudent decisions and comply with the fiduciary duty.

[25] In this case, the parties have not put before the court evidence that any members of the Board of Trustees had any special expertise or experience in the area of investments, apart from the fact that some members of the Board of Trustees had lengthy periods of service on the Board. Accordingly, the court is left with a factual record where the administrator has no special knowledge. In some instances, the administrator did in fact retain consultants or experts to assist in decision-making in relation to loans and investments under consideration. In some cases, the administrator appears to have relied upon biased or at least conflicted information that came from the party seeking the advances. In other cases, the court finds that there is no evidence before the court consisting of suitable consultants or experts retained to supplement the knowledge of an ordinary person to assist in the decision-making process, addressing the unique issues under consideration.

[26] For the purposes of the court's consideration of whether the Crown has proven the offences relating to the prudence of investments, it may be that the focus of analysis steers the court away from this approach. In other words, the court's determination must be directed towards the perspective of whether the Crown has proven that the administrator did not comply with the standard of prudence set out in s. 22(1) of the *Pension Benefits Act*. As set out below, the court requires appropriate evidence to consider the issues and whether there has been proof of this offence.

[27] Given the nature of the particular decisions to advance Plan funds to the various entities under contemplation and the monies involved, at first glance it would seem to this court that any prudent person would be required to hire a consultant or expert in the field to give advice as to options and recommended options regarding investments and loans. Failure to obtain such advice, for an administrator who is an ordinary person, would potentially leave an administrator at risk of criticism or potential liability for making imprudent decisions. The distinction for this court, however, is that the question is not whether the administrator can show prudent action, but rather whether the Crown has proven that the decisions were imprudent. For such an analysis, the court looks for assistance in terms of a standard of prudent investment of a pension plan portfolio. Given the factual context in this case, this is not a situation as to whether any one person should invest a small sum of money in a certain way. As set out above, the issues in this case are multi-dimensional and complicated.

[28] The administrator, at the Board of Trustees level, could in fact delegate its decision-making power in relation to investments and loans, pursuant to s. 22(5) of the *Pension Benefits Act*. A delegation could be made by the Board of Trustees as administrator to members of the Investment Committee, which was created by this Plan. If this took place, one would expect that parties selected for such a delegated function would have appropriate expertise and knowledge. Even if this has taken place, as discussed below, there is the related issue of the ongoing duty of a Board of Trustees to supervise persons to whom such a function is delegated. As set out above, the retention of consultants and experts for making the actual decisions, if done to assist the decision makers who are potentially delegated the function, would also be helpful to the membership of the Board of Trustees in its function to oversee and supervise the decisions of the people delegated the authority to make the investment decisions.

[29] This leads the court to consider the issue as to whether the Board of Trustees, as the administrator for the Plan, delegated its authority regarding decisions relating to investments to the members of the Investment Committee. The Crown has argued that the administrator Board of Trustees of this Plan did delegate this function to the members of the Investment Committee. The Crown argues that in light of the delegation of the investment decisions to the members of the Investment Committee, the court should consider the actions of the members of the Investment Committee as contravening the prudent person standard. The defence argues in relation to the prudent person standard that there was no such delegation by the Board of Trustees to the members of the Investment Committee. At the same time, the defence asks the court to consider the scenario of delegation of the investment decision function to the Investment Committee members in relation to the obligation to comply with the quantitative limits provision which is considered below in the reasons. The defence position is that the court should only consider the liability of members of the Board of Trustees for the quantitative limits offence in the event that the court does not accept its position regarding the delegation of the investment function to the investment Committee members in relation to quantitative limits obligations. This defence position is somewhat contradictory.

[30] A related issue arises if the court finds that the administrator has delegated the decision-making power regarding investments to the members of the Investment Committee, and the court finds that the party exercising the delegated power to invest has not acted prudently. This issue is whether the party who delegated the authority (being the members of the Board of Trustees) failed to properly supervise the party making the investment decisions (the members of the Investment Committee). If the administrator has delegated its authority, pursuant to s. 22(5) of the *Pension Benefits Act*, and if the court finds that the investment decisions were not made in accordance with the prudent person standard, the court must consider whether the members of the Board of Trustees properly supervised the delegated parties in making the prudent decisions as to Plan advances and investments. This relates to count 2 in the information, which charges the individual members of the Board of Trustees for in effect failing to properly supervise the decisions of the members of the Investment Committee. If there has been no delegation by the administrator to the members of the Investment Committee as its agent, then count 2 as it would arise from the prudent investment and administration of the pension plan is not relevant to the court's consideration of prudent investment decisions. On the other hand, if the court finds that the Board of Trustees has delegated this function to make investment decisions to those persons on the Investment Committee, and the court finds that the Crown has not met its burden of proving that the decisions that were made were contrary to the prudent person standard set out in s. 22(1) of the *Pension Benefits Act* , there is no need to go on and consider whether the Board of Trustees failed in their duty to supervise the members of the Investment Committee in relation to the standard of prudent investments set out in s. 22(1) of the Act. However, the need for expert evidence in relation to assessing the prudence of decisions is also required to assess the prudence of the acts of the supervisory Board of Trustees. The duty to supervise in relation to the duty to make prudent investment decisions pursuant to s. 22(1) of the *Pensions Benefits Act* is separate and apart from the additional duty to supervise in relation to compliance with the quantitative limits requirements for the pension plan. The overall duty to supervise pursuant to s. 22(7) of the *Pensions Benefits Act* encompasses both aspects which are before the court in terms of prudence of decision-making and compliance with quantitative limits requirements. This obligation is captured in count 2, the "duty to supervise" count.

[31] On the agreed and other facts before this court, there is no information regarding any particular expertise of the named persons who were placed on the Investment Committee by the Board of Trustees. To the extent that the Board of Trustees delegated its decision-making authority, and potentially responsibility for ensuring compliance with the respective *Pension Benefits Act* provisions and relevant regulations, there is no indication that the delegation was done on the basis of choosing a special group of people with special knowledge, training or expertise. Defence counsel made submissions to the effect that the functions of the pension plan administrator were diverse and the workload for the Board of Trustees voluminous, and that this would support the delegation of functions regarding decisions as to investments to a sub-group of the Board of Trustees. This justification is not however set out in the facts before this court. The court also questions the advisability of choosing a sub-group of the Board of Trustees with no greater expertise than the general membership of the Board of Trustees. If this is the case, one would expect that the Board of Trustees would not have any particular basis for confidence in the wisdom of the decisions, and that it would play an active role in supervising the decisions of the members of the Investment Committee. The situation would potentially be different if on the facts the persons delegated decision-making powers regarding investments for the plan had greater knowledge, training and expertise. In either case, however this would not relieve the members of the Board of Trustees from the residual and ongoing duty to supervise the members of the Investment Committee with respect to their actions.

[32] There are various other issues related to the specific investments under consideration. The parties have grouped the investments in terms of the subject matter and name of the company. Firstly, there are counts related to funds advanced to Purely Supreme Foods. In this regard, the individual members of the Board of Trustees are charged in count 3, and the individual members of the Investment Committee are charged in relation to the same advances in count 10. (As discussed above, the charges relate to the alternate positions of the Crown that firstly the Board of Trustees delegated to the Investment Committee as its agent the power to make various decisions related to the investments and therefore the Investment Committee members are properly charged in relation to these decisions. In the alternative, if the court does not accept the Crown argument that the Board of Trustees delegated these functions to the Investment Committee members, the Crown relies upon the count against the individual members of the Board of Trustees.) Secondly there are the counts related to funds advanced to Case Financial Inc. Individual members of the Board of Trustees are charged in relation to these advances in count 4, and the individual members of the Investment Committee are charged in relation to the same advances in count 11. The third subject of advances relates to what has been described as the Caribbean properties, which includes the South Ocean properties and the British Colonial properties. Individual members

of the Board of Trustees are charged in counts 6 (South Ocean) and 7 (British Colonial) and the individual members of the Investment Committee are charged in relation to the same advances in counts 13 (South Ocean) and 14 (British Colonial). The category of investments and loans to the Caribbean properties are also relevant to this court's consideration of compliance with the quantitative limits requirements set out by the *Pension Benefits Act* and regulations, as those counts relate to loans and investments by the plan directly to the respective Propcos (each of which related to a specific Caribbean property) then indirectly to RHK or PRK, and indirectly subsequently advanced to the particular Caribbean property.

[33] In the course of hearing submissions as to the various decisions made in relation to these subject investments, both the Crown and defence commonly turned to the minutes of the meetings of the Board of Trustees and the Investment Committee to show that the members had acted prudently or not acted prudently. The Crown argued that the minutes of the various meetings were wholly deficient in explaining the basis for any investment decisions. If the administrator is the Board of Trustees and it has not delegated its authority to make the investment decisions, the Crown argument is that the minutes of the relevant meetings should at the very least, in summary form, outline the basis for making the various decisions. As it stands now, it is apparent that the minutes by and large just recorded the fact that there had been a full and complete discussion of the issue, and the final decision made. The Crown argues that the minutes should be sufficient to at least outline in summary fashion the basis for the decision. The defence has argued that there is no need for any detail to be given in the minutes as the minutes are required purely to outline the decision that was made, and not why it was made.

[34] Overall, the minutes for most of the meetings were extremely brief and would not, even in summary form, set out the factors under consideration that supported various decisions or actions that were taken. Very often, the minutes stated that after a full discussion, or a full and complete discussion, the board or committee had chosen to make a particular decision and take a certain step or action. For any person reviewing the minutes, be that person a beneficiary of the pension plan or anyone trying to assess the prudence of the decision-making, the record was totally lacking in detail and of no assistance whatsoever. Again, the issue before this court is not whether the defence can show that the defendants acted prudently, as there is no reversal of the burden of proof, but whether the Crown has shown that the defendants failed to act prudently in relation to the s. 22(1) *Pension Benefits Act* standard. Given the legislative regime which governs pension plans, this court finds that the minutes which were put before the court over the course of the offence period were woefully inadequate in addressing various issues which arose during the course of this trial.

[35] Another issue which arises relates to the quantitative limits offence. Count 1 charges the members of the Board of Trustees individually, and count 9 charges the members of the Investment Committee individually in relation to failing to ensure that the assets of the plan were invested in accordance with the *Pension Benefits Act* and federal investment regulations, by directly or indirectly lending and/or investing moneys equal to more than 10 % of the book value in any one person, 2 or more associated persons, or 2 or more affiliated corporations.

[36] Another issue related to the quantitative counts is whether there was an indirect loan or investment in PRK for the purposes of this analysis. The Crown argues that the advances from the Plan went through the Propcos and all went indirectly to PRK. The Crown argues that PRK took certain actions and made certain decisions before subsequently making advances to particular Caribbean properties. The defence submits that there was a direct investment to the Propcos, which were investment corporations exempt from the quantitative limits requirements. Alternatively the defence argues that the analysis for an indirect advance should be done at the end point, which is at the point of the various Caribbean properties that ultimately received the respective funds, and not the PRK company which received the funds and at some later point advanced monies to the various properties.

[37] In terms of the actual offence the defence argues that the quantitative limits requirement only contemplates actual advances made during an offence period, without any consideration or regard to the current value of the holdings before or after the advances were made in relation to this offence. The Crown argues based upon a purposive analysis that the quantitative limits requirement involves an assessment of the advances in the context of the current holdings.

[38] If the Crown shows a *prima facie* case with respect to this offence, the defence argues alternatively a defence of due diligence, or an exemption under s. 192 of the *Canada Business Corporations Act.* The Crown responds that neither defence arises on the evidence and facts in this case.

[39] The court must determine whether the Crown has proven that the administrator committed an offence with respect to the quantitative limits requirements. Both the members of the Investment Committee (in count 9) and the members of the Board of Trustees (in count 1) have been charged with this offence. The court

must determine whether the offence was committed, and if it was committed by persons who were members of the Investment Committee delegated the authority to make the relevant investment decisions. This delegation would have entailed the obligation to comply with the quantitative limits requirements.

[40] If delegation to the Investment Committee occurred, there is also the remaining issue of whether the members of the Board of Trustees failed in their duty to supervise those persons regarding the obligation to comply with the quantitative limits for the pension plan set out in the legislation and regulations. If the quantitative limits offence was committed by Investment Committee members, the court needs to determine whether the members of the Board of Trustees are guilty of failure to properly supervise the members of the Investment Committee in relation to the duty to comply with the quantitative limits requirement.

(2) PRUDENT INVESTMENT AND ADMINISTRATION OF PENSION PLAN

Expert Evidence Issue:

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(a) Introduction

[41] Given the extent of the pervasiveness of the issue relating to expert evidence as it would relate to the prudent person standard, this issue will be considered first. It has a direct impact upon the majority of the counts in the information, being counts 3, 4, 6, 7, 10, 11, 13 and 14 as they relate to the prudence in making decisions to invest or advance funds of the Plan. As well the issue relates potentially to count 2 as it relates to the prudence of the supervision by members of the Board of Trustees of the actions of the members of the Investment Committee in making the financial advances. The defence concedes that the issue with respect to expert evidence does not arise in the context of the two remaining counts (1 and 9) which relate to quantitative limits and are discussed below.

[42] The issue of the necessity of expert evidence in this trial, as an argument advanced by the defence, cannot be considered in a vacuum. It is contextually based upon the evidence and facts in this case. In that respect, it is important to set out the context of the Crown's position regarding the majority of counts to which this would apply, relating to the standard of the fiduciary performing duties in accordance with a prudent person standard. It also provides necessary context to the defence argument that expert evidence was required in this case.

[43] The Crown's theory is that the consideration of the prudent person standard is focused on the process by which investment decisions are made. The Crown further argued that a key aspect of this duty requires undertaking a thorough, complete and independent investigation prior to making any particular investment decision. Failure to conduct appropriate investigation is a violation of the prudent person standard. In essence, the Crown argues that the failure to conduct what it characterizes as a proper investigation forms the basis of the breach of the prudent person standard. In addition, the Crown argues inherently that the onus is on the defence, in the context of this quasi-criminal trial, to show that it conducted appropriate investigation in light of its knowledge of what happened in this case.

[44] There are problems in this case arising from the evidence in this trial that arise from that approach. Firstly, there is no evidence as to what types of investments would be appropriate or inappropriate for a pension fund of this nature. The plan itself generated a policy, known as the SIP & P, which set out permitted categories of investment, and the Crown takes the position that some of the investments under consideration were not permitted. That is not entirely clear. If the pension plan generated a policy which suggested that certain types of investments were not to be pursued, the question is whether that in and of itself constituted a breach of the prudent person standard set out in this quasi-criminal legislation. Related to this issue is the need, as argued by the defence, for an expert to provide evidence regarding the standards of types of permissible investments in the pension industry. Further, if the categories of investment were permitted, the next question that arises is what appropriate steps should have been taken to ensure it was an appropriate investment? Are there enquiries that should have been made? Related to these issues is the ultimate issue as to whether the conduct of the defendants in managing and administering the pension fund assets fell short of the standard of prudence set out in s. 22(1) of the *Pensions Benefits Act*. While the statement of these issues seems rather simplistic, the evidentiary record in this case is anything but simple. There are various types of financing arrangements, which impact on the legality of the security given to the pension plan, and the value of the various investments. There are financial statements and reports regarding the financial health of the various business enterprises and projected revenues. There is no evidence before the court, whatsoever, to explain many of the terms used in the financing arrangements and business statements. Nor is there any explanation of the meanings of those terms as they would impact upon the security for the pension plan. Many of the concepts in the projections are without context or explanation. There is no evidence as to an evaluation of this material. There is no indication in the evidence as to a pension plan

industry standard, such that these types of investments are generally accepted or not accepted as proper for a pension plan, and whether there are particular enquiries that need to be put or limitations placed upon such investments. The court simply does not have evidence to assist in reviewing and analyzing this raw material which is put before the court in evidence. Without expert evidence on these issues, the court is unable to understand how to apply the prudent person standard to the various transactions. The Crown in effect argues that there were insufficient enquiries made, or that the information was sufficiently problematic that it should have dissuaded the prudent person from making any of the subject investments. Yet all of the contemplated advances were in the context of business enterprises where clearly there is an element of risk and nothing is certain.

[45] The defence strongly argues that expert evidence was required to assist the court in considering the evidence in this trial. In the absence of this requisite evidence, the defence submits that the court is unable to properly assess the complicated material in this case, in the context in which the various decisions were made. Accordingly, the defence argues that the Crown is unable to prove any of the relevant counts beyond a reasonable doubt as the court would not know the relevant standard of prudence for the various investments. The Crown argues, in a response that is attractive for its simplicity, that in effect one does not need an expert to assess the evidence. In essence, the Crown argues that the various businesses which obtained funds from the Plan for investment were in effect failing businesses, and that it is obvious that the Plan should not have advanced the funds during the period of the offence. In the alternative, the Crown argues that the court can use various opinions of consultants hired by the Plan in making its decisions, and that this evidence would meet the standard of expert evidence. Relying upon that evidence, the Crown argues that the advance of funds in light of those various reports which were before the decision makers of the plan was foolhardy and failed to meet the standard of a prudent person.

[46] There is no evidence before the court from a witness qualified by this court to provide opinion evidence relating to various issues which impact upon this court's review of the decisions made by the administrator and/or its agent in relation to the prudence of advancing pension plan monies. The defence argues that there is no evidence before this court whatsoever that can assist the court in reviewing various decisions that have been made, relevant to the standard in s. 22(1) of the *Pension Benefits Act* of exercising the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person. While it is clear that this is a fiduciary duty and it is a higher standard than the prudence one would use in investing one's own pension funds, the defence argues that the court cannot properly assess the decisions made by the administrator or agent of the pension plan without the assistance of expert evidence. For instance, the defence argues that expert evidence was required to enlighten the court as to industry standards of investment relative to portfolio risk, including a portfolio valued in the range of $1 billion, where higher risk is tied to higher rates of return, and there is in effect a weighing of all the factors across the whole portfolio. The Crown responds that there is no need for expert evidence in this regard, as the standard in s. 22(1) is that of ordinary prudence which can be assessed in the circumstances and context of this case based upon the available information at the time. The Crown submits that this case is quite different from those where the administrator is held to a higher standard, such as pursuant to s. 22(2) of the Act by virtue of having special knowledge or skill arising from the administrator's profession, business or calling. In this respect, the Crown seeks to distinguish the American cases put before the court arising from *Employment Retirement Income Security Act of 1974,* 29 U.S.C.S. § 1104 (*ERISA)*, as that legislation requires a higher standard for a fiduciary than the s. 22(1) *Pension Benefits Act* standard.

[47] This particular issue and argument has permeated virtually all of the issues that have arisen in this case in relation to the prudence of various advances and investments, and it is clear that the Crown and defence are diametrically opposed in their views of whether this court has been put in a position where it can or cannot make the findings the Crown seeks the court to make in this case based upon the evidence in relation to the various investments.

(b) Law:

[48] The development of the law regarding the admissibility of expert evidence has reflected a tension between a recognition that issues arise in litigation for which the trier of fact would need some assistance, and the reluctance to allow expert witnesses to usurp the function of the trier of fact.

[49] In the seminal case of *R.v. Abbey* (1982), 1982 CanLII 25 (SCC), 68 C.C.C. (2d) 394 (S.C.C.) the Court held:

> "With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary": (R. v. Turner (1974), 1974 CanLII 1825 (BC CA), 60 Cr. App. R. 80, at p. 83, per Lawton L.J.)
>
> at p. 409 per Dickson J.

[50] In 1994, when the Supreme Court again dealt with the issue of the admissibility of expert evidence in *R. v. Mohan* (1994), 1994 CanLII 80 (SCC), 89 C.C.C. (3d) 402, the Court set out a four part test. In particular, admissibility depends upon :

(a) relevance;
(b) necessity in assisting the trier of fact;
(c) the absence of any exclusionary rule; and
(d) a properly qualified expert

[51] In its consideration of this issue in *R.* v. *A.K.* (1999), 1999 CanLII 3793 (ON CA), 137 C.C.C. (3d) 225 (Ont.C.A.), the Court considered the requirement of necessity. In the majority judgment of the Court, Charron, J.A. further refined the meaning of the requirement of necessity as addressing the following questions:

"(a) Will the proposed expert opinion evidence enable the trier of fact to appreciate the technicalities of a matter in issue? Or
(b) Will it provide information which is likely to be outside the experience of the trier of fact? Or
(c) Is the trier of fact unlikely to form a correct judgment about a matter in issue if unassisted by the expert opinion evidence?"

at paras. 90-92

[52] Often, as in *R. v. A.K., supra,* and *R. v. Abbey*, *supra,* the issues arise in the context of an appeal consideration of a trial judge ruling that expert evidence was admissible at the trial level. In this case, it arises in potentially the opposite scenario. The Crown has chosen to not lead any expert evidence to assist the court, inferentially submitting that the trial judge can rely on knowledge and experience to consider the evidence in this case. The opposing position of defence counsel is that the consideration of the evidence in the context of the issues in this case requires expert opinion evidence as there is a need to understand technicalities beyond the knowledge and experience of an ordinary person. The defence also argues that the court should not take judicial notice of any matters in relation to these issues in its consideration of the evidence and facts in issue.

[53] In essence, the Crown argues that expert evidence was not required in this case. Extrapolating that position within the context of the law, if the Crown position is correct, this would mean that expert evidence would not have been admissible if led by a party in this case, as it would not pass the test for admissibility. The Crown takes the position that it was not necessary information for the trier of fact to interpret or consider the relevant issues and evidence in this case. For the evidence to be admissible as expert evidence, it must pass the necessity requirement as set out in *R. v. Mohan, supra*. In applying the refinement of the *Mohan* test in *R. v. A.K., supra*, the issue is whether expert evidence would enable the court to appreciate the technicalities of the investments, or provide the court with information likely to be outside the experience of the trier of fact. The categories in *A.K.* in (b) and (c) set out above are inter-related. Would expert evidence be likely to be outside the experience of a trier of fact sitting as a judge alone, and would the court be unlikely to form a correct judgment if unassisted by expert opinion evidence? If it is outside a judge's experience, how would the judge know whether the court might come to a correct judgment coincidentally, by applying the wrong analysis, or come to an incorrect judgment applying the same analysis? It is hard to know whether the court might come to a correct judgment if the court does not know whether personal experience, generating more or less knowledge in investing than a typical trier of fact, might lead the court in the right or wrong direction. This whole area is rather

convoluted. It is also bound up somewhat with the legal issue of judicial notice. Consideration of the evidence should not be done with any special knowledge or experience acquired in life on a personal level, outside a legal role. It would be an affront to the principles of judicial notice for the court to take any personal knowledge or experience into consideration in assessing the evidence in this case. The court cannot take judicial notice of the business sectors and the viability of any investment decisions in this case. Any assessment of the prudence of decisions should be based upon the evidence before the court in this trial, where the court performs the role of a trier of fact sitting as a judge alone. The court must consider evidence, not personal background and experience, which is something unknown to the parties and not properly in evidence.

[54] The parties agree that common sense can prevail and can be used in relatively straightforward situations. However, the Crown argues that the court can go much further. For instance, both parties agree that the court could without the benefit of an expert apply the prudent person test in considering the actions of a fiduciary handing the limited funds of an elderly client who had "invested" the funds by betting on a horse in a race. Everyone agrees that the court would not need an expert to apply the prudent person test in s. 22(1) of the *Pension Benefits Act*. Such an investment would be imprudent, regardless of whether it might have ultimately resulted in a huge win and financial gain.

[55] Likewise, if the court had a situation involving the fiduciary for an elderly person who wanted to conservatively invest the savings, and did so with a bank guaranteed investment certificate or government bond, the court would be well suited to apply the prudent person test in s. 22(1) of the *Pension Benefits Act*.

[56] Neither of those types of situations are before this court. In this case, there is a multi-employer pension plan, with assets valued at approximately $ 1 billion, with a fairly diversified portfolio. There are many types of investments in this portfolio. In the course of this trial, the court has reviewed and considered evidence in relation to advances to only four of those types of investments. For two of those investments, where substantial monies had already been invested by the plan prior to the offence period, and the defendants were charged with the responsibility of making decisions with a view to potentially gaining a return on the earlier and subsequent investments, the court is asked to review subsequent advances from the plan and the prudence of such advances. In that respect, the court should not assess the subsequent investments in isolation of the fact that earlier advances had been made and not recovered, which are prior to the offence period. It is also interesting to note that in large measure, the relevant investments in this case were made outside Canada. Again, the court has no evidence as to whether there is a unique standard of care in making pension fund investments outside Canada.

[57] For mainstream investment and financial decisions made in this day and age, by a large pension plan, the court must ask whether the assistance of an expert would have assisted the court in appreciating the technicalities of the investments or provided the court with information outside the experience of a trier of fact. The court is called upon to make this assessment as to whether there has been compliance with the prudent person standard in relation to advances by a pension fund charged with the obligation of properly investing $1 billion in assets, which chose for the subject period of time to invest millions of dollars in hotel, resort and commercial real estate properties, privately held commercial food businesses and publicly-traded litigation funding companies.

[58] The defence has argued that the evidence and factual context of such evidence is technical and specialized and requires the assistance of expert opinion evidence. The defence has argued that the court requires opinion evidence from qualified experts in the pension and investment industry to provide relevant information regarding the prevailing industry standards for prudent investing that is entirely outside the experience of the trier of fact. None of the consultant evidence before the defendants at the time of their decisions address that aspect of expert evidence. The defence also argues, relying upon the necessity criterion as considered in *R. v. A.K., supra*, that the trier of fact would be unlikely to form a correct judgment about the matters in issue if unassisted by such expert opinion evidence. Given the complexities in this case, the defence argues that the court must find that the expert evidence would have been admissible, and is in fact essential to the consideration of whether a prudent person would make the various investments. In the context of this case, which is not an appeal considering expert testimony being called at trial, but rather a trial level decision without the benefit of knowing the content of any expert evidence, the court cannot answer the third criteria in *R. v. A.K., supra* as to whether the court would be unlikely to form a correct judgment if unassisted by the expert opinion evidence as the court does not know the content or implications of such evidence. However in relation to the first two criteria in *R. v. A.K.*, *supra*, regarding necessity, expert evidence would have enabled the court to appreciate the technicalities of these investments in the respective business sectors, in the context of a large $ 1 billion multi-employer pension fund. The expert evidence would have provided the court with information relating to pension fund investments in the

relevant business sectors outside the experience of a typical trier of fact sitting as a judge alone. This evidence would have also educated the court in terms of the standard of care in the pension industry with respect to acceptable risk, ranges of return to go along with that category of risk, and potentially the portion of a portfolio that is accepted to be subject to that particular degree of risk. It would have also potentially assisted the court in terms of the standard of prudence to be applied for a pension fund investment where previous investments had already been made, the wisdom of investing additional monies to recover the earlier investment together with more recent advances and the acceptable period of time over which one should expect the return. The record before this court is entirely silent with respect to the prudent person standard for investment decisions of this kind. There is no evidence as to the balance of the pension plan portfolio and the extent to which any risk in the subject counts was potentially greater than the other portions, and the degree of risk taken by the defendants in relation to the balance of the portfolio. Apart from the absence of evidence from any expert commenting upon industry standards, there is an absence of evidence from a suitable expert as to the potential extent to which risk in relation to one portion of a portfolio might be justified to the extent there is less risk in the balance of the portfolio.

[59] Accordingly, the court must consider whether there can be a proper understanding of the evidence and an application of the prudent person standard without the assistance of expert evidence.

[60] Justice Bassel in *R. v. Norton,* [2007] O.J. No. 811(C.J.) found that expert evidence was required in that case. In that case, the court recognized that we now live in a complex world. Many matters are :

> " **…** beyond the knowledge of the trier of fact, be it a judge or jury. In those cases, the role of an expert in the truth finding process, and such a person who possesses that special knowledge and expertise, can be necessary, and of significant assistance to provide the court with assessments, diagnoses, and opinions in those complex areas, and issues which the trier is unable to determine without that expert assistance. Therefore, to be admissible, it must be relevant, must be necessary, must come from a properly qualified expert, and not be excluded by some rule."

[at para. 57]

[61] While the Court in *R. v. Norton, supra,* had the benefit of an expert witness who was proffered by the Crown, consideration can be given to numerous other cases from the United States where courts have considered similar issues arising from the *ERISA* legislation. In *R. v. Norton, supra.* the court considered the criteria regarding the admissibility of the expert evidence. There was a requirement for an assessment of actuarial methods in valuing a pension plan. The court, as the trier of fact, found that the necessity component for expert evidence was met arising from the court's inability without the assistance of an expert to draw the information and necessary inferences from the technical evidence put before the court. Expert evidence was required in that case.

[62] The Crown argues that the *R. v. Norton, supra,* case is distinguishable from the case at bar. The provision in the *Pension Benefits Act* under consideration in the *Norton* case required the court to consider the actions of the actuary in the context of accepted standards in the actuarial field, and for that reason alone the Crown was required to lead evidence of accepted standards in the actuarial field. In this case, the Crown submits that this court is required to consider the standard of care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person. The Crown argues that it is the standard, in this case of ordinary prudence for a fiduciary, that dictates whether expert evidence is required. The defence argues that it is not the standard that necessarily dictates the need for expert evidence, but rather the standard in the context of the evidence and facts under consideration by the court. For instance, the defence argues that the court needs the assistance of an expert to determine what a person of ordinary prudence would do, acting as a fiduciary, in the handling of relevant assets.

[63] While a properly qualified expert may have greatly assisted the court in this determination, there is a more fundamental question which arises in the application of the prudent person test. Would the prudent person be content with a relatively low rate of return on pension fund investments, where it would likely generate less growth and relatively lower pension benefits, or in the last few decades has the industry standard loosened to permit riskier investments in real estate and business sectors to potentially reap a higher reward, greater growth of the pension fund and greater pension benefits? Was there a standard rate of return in the pension industry either for each investment, or based upon the total portfolio ? More recently, has the standard in the pension industry perhaps changed, even after the date of the offence period in this case, and within the last year, to cause

the standard to become more conservative? These are all unanswered questions for the court in applying the prudent person standard for the subject investments in relation to actions taken in this case several years ago.

[64] The Crown has submitted that the defence could have called expert evidence if it wanted to rely upon expert evidence touching upon decisions that were made by the defendants in this case. Clearly, there is no expert evidence to assist the court in its consideration of these issues. The situation at bar is somewhat parallel to the ultimate situation in *Norton* where the court rejected the expert evidence on a number of bases. Clearly, the onus is on the Crown to prove the essential elements of the offences. It would be improper to shift the burden of proof by holding that the defence should have called expert evidence to assist the court in its consideration of the evidence in this case. This court does not shift that burden.

[65] The defence also argued that cases considered in the United States dealing with the *ERISA* legislation, which the Crown initially relied upon in its argument, clearly support its argument as to the necessity of calling expert evidence in cases such as the one at bar.

[66] The *ERISA* standard for a fiduciary investing in a pension plan is set out in *Employment Retirement Income Security Act of 1974,* 29 U.S.C.S. § 1104 (*ERISA*):

> "(a) Prudent man standard of care
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
> (A) for the exclusive purpose of :
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
> **(B)** with the **care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;**
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter."
>
> [emphasis added]

[67] The Crown originally made a submission that the *ERISA* legislation is similar to the *Pension Benefits Act*. The *ERISA* legislation formed the basis of the numerous civil litigation cases put before this court wherein the plaintiff sued the fiduciaries for breaching the relevant standard for investments.

[68] The Crown has resiled from this earlier position in its reply to the defence submissions regarding the parallels between the *ERISA* legislation in the United States and the *Pension Benefits Act* legislation in Ontario. This change of position arose following the defence reliance upon the prevalence of expert evidence in virtually every case dealing with the U.S. legislation, to support the defence position as to the necessity of an expert witness to assess the evidence in this trial relating to charges under the *Pension Benefits Act*.

[69] In its reply, the Crown submitted that the *ERISA* legislation is to be distinguished from the *Pension Benefits Act* legislation in one significant respect as it would relate to the calling of expert testimony. The Crown submits that the standard of prudence for a fiduciary of a pension plan under the U.S. legislation is for a "prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims". This requirement is tied to a person "familiar with such matters", which is akin to a requirement of special knowledge and experience in the conduct of the enterprise of like character and like aims. For that reason the cases put before the court relating to the *ERISA l*egislation by and large all consider expert evidence in each case. This Crown position is supported by the case of *Whitfield v. Cohen*, 682 F.Supp.188 (U.S.D.C. S.D.N.Y.), In *Whitfield*, the District Court for the Southern District of New York held that the ERISA standard is not of a prudent lay person but rather that of a prudent fiduciary with experience dealing with a similar enterprise. Similarly, the Court in *Chao v. Trust Fund Advisors*, 2004 U.S.

District LEXIS 4026 (U.S.D.C., D.C. 2004) held the fiduciary to the standard of a prudent real estate investment expert, not of a prudent lay person.

[70] In response, the defence submits that the need for calling expert evidence in the *ERISA* cases arises from the consideration of the specialized technical field of investing in pension plans, and not from the particular *ERISA* standard of a fiduciary investing pension funds.

[71] In the seminal case of *Donovan v. Mazzola*, 716 F.2d 1226, (9th Cir.1983), the Court considered an action for breach of the prudent person rule as set out above, in relation to the investment of plan assets. The United States Court of Appeals, Ninth Circuit, held that the trial court had properly applied the prudent person test in the employment of the appropriate methods to investigate the merits of the investment and the structure of the investment. In that trial the Secretary of Labor called an expert witness who provided evidence regarding the prevailing standards to be applied by competent real estate lenders in making, pricing, and managing real estate secured loans. This evidence was relevant and critical to the finding that the conduct of the fiduciaries fell below the industry standards.

[72] In the case of *Katsaros v. Cody*, 744 F.2d 270 (2nd Cir. 1984), cert. denied, 105 S. Ct. 565, the plaintiffs and Secretary of Labor called an expert witness to provide testimony regarding the financial advisability of making the subject loan, including the financial condition, performance and creditworthiness of the corporation which obtained the loan. The expert witness shed light on these important matters, including whether the advance was a prudent investment, which was critical to the issues in the case.

[73] In comparison, the standard in Ontario in the *Pension Benefits Act,* R.S.O. 1990, c. P.8, as amended, s. 22, provides :

> " 22 (1) The administrator of a pension plan shall exercise the **care, diligence and skill** in the administration and investment of the pension fund that a **person of ordinary prudence** would exercise in **dealing with the property of another person**.
>
> (2) The administrator of a pension plan **shall use** in the administration of the pension plan and in the administration and investment of the pension fund **all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess**."
>
> [emphasis added]

[74] When one considers the provisions in the *ERISA* legislation, setting out the standard of a fiduciary familiar with such matters, to be used in the conduct of an enterprise of a like character and with like aims, it seems clear that the standard is tied to a standard in the industry. Specialized knowledge is inferred. In the Ontario *Pension Benefits Act* legislation, s. 22(1) sets out the standard of a fiduciary, which reflects one of ordinary prudence. The Crown has specifically submitted that it does not rely upon s. 22(2) to make relevant any special profession, business or calling of any of the defendants, to make relevant a potentially higher standard for an administrator with special knowledge or experience. In this case, there is no evidence whatsoever as to whether any of the defendants have any special profession, business or calling that would otherwise touch upon the issues.

[75] The question that arises however, in a very real and practical sense, is whether the Ontario standard of ordinary prudence for a fiduciary is all that different from the *ERISA* standard. For instance, if the administrator is a lay person who sits as a member with other members acting as the administrator of the plan, it is clear that in Ontario that person must bring to bear his or her relevant knowledge and skill, whatever that may be. However, if a person in this capacity has no special knowledge or skill, does that mean that the standard for a fiduciary in Ontario is lowered to the level of that person's lack of background and experience in the area? Or, in a pragmatic sense, does this mean that for a lay person, perhaps sitting on a multi-employer pension plan as a representative of some group, that the administrator should retain advisors and consultants to elevate the knowledge of the administrator with respect to industry standards of investment in the particular sectors and enterprises which are under consideration by the administrator? It would seem to the court, from a purposive approach, that one must read in this higher standard as a fiduciary contemplating investments of millions of dollars in areas about which the person has no special knowledge or expertise. The administrator would be ill-advised to make the decisions without professional advice and consultation. Otherwise, such an administrator would potentially be in conflict with the s. 22 duties of a fiduciary acting prudently. In that respect, if people who perform the role of an administrator do not have special background or knowledge, one would expect that expert assistance would be required to act at the level of a fiduciary. That assessment is based upon a

consideration of the provisions of s. 22 of the *Pension Benefits Act*, and the purposive approach to the legislation and the role of a fiduciary.

[76] This court requires the assistance of expert evidence with respect to industry standards regarding investments of the pension funds, and in relation to particular types of investments and actual investments under contemplation. This type of evidence could have potentially been available to an administrator at the time of contemplating pension fund advances to various businesses. In this case, various consultants were actually hired with respect to some of the businesses. The act of retaining such consultants is relevant to the conduct of a fiduciary as it would relate to prudent conduct, and in fact would show some element of prudence in making investments.

[77] If one considers the Crown position and extrapolates from it, a strange result may arise. For instance, the Crown argument is that there is no need to have experts under the *Pension Benefits Act* to assess the prudent person standard as it would relate to investments of very large amounts of money in various types of enterprises. The Crown's position in effect is that it is a matter of common sense, and that the fiduciaries could have applied common sense and in that respect would have made different decisions in this case. In effect, the monies would not have been invested or advanced. This position, in effect, waters down the requirement of the standard of fiduciaries in Ontario. It would suggest that for lay people acting as fiduciaries, it would be sufficient to just use common sense and make the decisions. It would not require the advice of experts in the field either as to the industry standard for investing pension funds, or as it would relate to particular types of business enterprises, such as hotels, resorts and commercial real estate properties, privately held commercial food businesses and publicly traded litigation funding companies. This view would reflect a fairly simplistic view of the process of investing, which in the court's view is far removed from the reality of business of today. Matters have become much more complicated. Shades of grey prevail in everyday business investment decisions. The rules in the economy seem to change on a daily basis. It is hard to imagine how it could possibly be acceptable for Ontario to have fiduciaries that are lay people acting without professional or expert advice investing monies in multi-dimensional or complicated investments all over the world in different types of business enterprises. The court cannot accept that the Legislature in Ontario would have been content with this lower standard of conduct for a fiduciary in Ontario. From a purposive approach in interpreting the *Pension Benefits Act*, this court infers that the Legislature would have expected the actions of a fiduciary acting as an administrator of a pension plan to have professional or expert assistance, if the fiduciary did not have a background in the profession, business or calling to be able to make prudent decisions which comply with a fiduciary standard. The beneficiaries of a pension plan administered by lay people should be protected by the standard of a fiduciary. There should not be a lower standard for their administration, nor should there be a lower standard of protection for their pension plan than for plans administered by people with particular professional backgrounds acting in the capacity of administrator of their pension plan. In that respect, if a fiduciary acting as an administrator does not have special knowledge arising from one's profession, business or calling, then the fiduciary should get assistance in that regard. The beneficiaries, relying upon a fiduciary to properly administer their pension plan, should expect no less. They deserve no less. Beneficiaries deserve the benefits of a fiduciary with expertise or access to expert advice in making decisions which relate to loans and investments in multi-faceted investments.

[78] This means that the consideration of the standard of conduct for a fiduciary acting as an administrator would be fairly similar, whether the person has a specialized background or a lay background assisted by the retention of expert advice. In either case, a court considering the actions of the administrator under s. 22(1) of the *Pension Benefits Act,* regarding a person of ordinary prudence acting as a fiduciary, would require expert evidence to assist the court beyond the lay background and knowledge assumed to exist for a trier of fact or judge. This would mean that expert evidence is required in a case of this nature. There is no expert assistance to assist the court in this case.

(c) Evidence of consultants:

[79] As set out above, where an administrator retains a consultant or professional to obtain specialized advice in contemplating investment decisions for a pension plan, that action would be relevant to the standard of prudence. It is important to bear in mind that all parties agree that the s. 22(1) of the *Pension Benefits Act* standard of prudence is process-driven, rather than results-based. It is important for an administrator to go through a process of obtaining relevant information and potentially specialized assistance through a consultant or advisor if the administrator does not have that knowledge, before making a decision with respect to the assets of the pension plan. The court is required to examine the process that was followed in reviewing decisions and assessing the standard under s. 22(1) of the *Pension Benefits Act*. This is not an assessment which focuses upon the outcome of the decision, and an observation in hindsight that another decision would have generated a better result. Failure to do a proper investigation as to the merits or detriments, and the inherent advisability of a

potential decision, is required. Expertise is required to analyze the facts which arose in the course of an investigation. Both aspects are relevant to whether the administrator has complied with the s. 22(1) *Pension Benefits Act* standard of a prudent person acting as a fiduciary. This evidence would be relevant to compliance or breach of the prudent person standard of a fiduciary. A decision that was made and passed the process of a fiduciary acting prudently is a prudent decision. If unforeseen circumstances arise, that does not retroactively change the character of a previously prudent decision and render it imprudent.

[80] The Crown has made the alternate argument that if the court requires expert evidence to assist in considering the actions of the defendants in this case, resort can be made to the consultant reports which were given to the defendants during the offence period. The defence strenuously objects to such a suggestion, based on a number of rationales. Firstly the defence argues that none of the parties retained has ever been qualified as an expert in this regard. There is no dispute about this fact, as no *viva voce* evidence was tendered. The court made no determination as to whether any witness, or any party's evidence, met the test for an expert as set out in *R. v. Mohan*, *supra*, of being a properly qualified expert. Secondly, the defence argues that the nature of this evidence is not sufficient to address the needs for expert evidence in this trial. For instance, although the consultant did address potential options with respect to continued advances for various companies, it did not address any of the overarching issues such as a standard in the pension industry for investment, acceptable risk or ranges of risk which are permitted and criteria which should be considered for a pension fund for a class of undertakings, to name just a few. The nature of the evidence of the consultants in this trial is very limited, and addresses a very narrow component of professional advice that the court would like to consider in this case. Further, the defence argues that there is no evidence that the defendants in this case ignored the advice of the consultants. The defence submits that there is evidence that the administrator considered the advice of the consultants and chose an option canvassed by the consultant. The very fact that the defendant did not choose the option most preferred by the consultant does not necessarily mean that the option in and of itself was imprudent. There may well have been reasons beyond those known to the consultant to choose an option which was not recommended as the most preferred, but perhaps the second choice of various options. This scenario is very different from one where a consultant suggested that a particular option was absolutely foolhardy and too risky and the administrator went ahead and chose that particular option. That is not the situation in this trial.

d) Conclusion:

[81] In conclusion, expert evidence was required in this case to assist the court in providing information beyond the scope of an ordinary or lay person in these matters. In particular, this evidence was required to deal with the issue of current pension industry standards regarding the investment of pension funds in various types of business enterprises. Expert evidence was also required to explain many of the concepts and terms of art apparent in the documents and voluminous material filed in this trial. Further, expert evidence was required with respect to the standard of prudent conduct for a fiduciary making decisions to invest and advance monies of a pension fund in particular situations, including proper enquiries that should be made, considerations of various factors, and a decision-making paradigm for a fiduciary acting in compliance with the prudent person standard in this situation. Expert evidence could have commented upon the actual evidence in this trial, and decisions made in this case. Potentially this evidence could have also assisted the court as to how the actions, or omission(s), of the defendants fell short of the standard of a fiduciary performing functions prudently. None of this evidence is before the court. As noted above, any evidence of consultants hired by the defendants to assist in various narrow aspects of decision-making does not meet the test for expert evidence and does not address all of the requisite elements for expert evidence in this trial. There is a second issue which arises. The Crown relies upon a system of governance in terms of the Board of Trustees and Investment Committee which it strenuously argued was inadequate and in this case gave rise to the failure to properly supervise the prudence of actions or decisions of the Investment Committee. In that regard, the court should have had relevant expert evidence regarding the issue of supervising prudence in making investment decisions. In that respect, the failure of the Crown to call expert evidence on those points fell short on the failure to supervise as it related to prudent decisions of the members of the Investment Committee. Any analysis of the role of the Board of Trustees in the overview or supervision of investment decisions by the Investment Committee must be done in the vacuum arising from the absence of expert evidence. Where the court is unable to determine whether investment decisions of any member of the Investment Committee (if there was delegation of this authority to the Investment Committee) were imprudent, in a parallel way the court is ill-equipped and unable to find breach of the Board of Trustees' duty to prudently and reasonably supervise those parties as it related to making prudent decisions. In other words, if it is possible that the Investment Committee acted prudently, it is in this case not appropriate to find breach of the duty to prudently supervise the prudence of investment decisions made by the Investment Committee. The case of *R. v. Blair,* [1995] O.J. No. 3111 (Gen.Div.) is also helpful to this consideration.

[82] The onus does not shift to the defence in this case to call this type of expert evidence.

[83] Accordingly, this has left the court in the unenviable position where the court cannot properly assess the evidence in this case with respect to the burden on the Crown to prove the counts regarding the standard of prudence for investing. Even if the court tried to apply ordinary common sense as the Crown has submitted, in relation to the failure to supervise count regarding prudent investment decisions, the court would not know what the Board of Trustees should have done to properly supervise the Investment Committee in its role to make prudent investment decisions. There is no expert evidence to assist the court with respect to the type of governance which should be in place to properly supervise the delegated party(ies) in the carrying out of the function of making prudent investment decisions. As set out above, this is a complex case, with potentially $1 billion in pension fund assets and many types of investments administered and under consideration by the Plan. The court cannot properly assess this evidence purely on the basis of common sense. For example, if the court does not know how the decision-makers fell short of the prudent person standard of a fiduciary, how could the court possibly know how someone charged with prudent and reasonable supervision of that party fell short in overseeing that function? In other words, if it is possible that the Investment Committee members were acting prudently in keeping with the pension industry standards, how could this court find that the Board of Trustees fell short in their obligation to properly supervise that body regarding those decisions ? The court is unable to make that finding based upon the evidence or lack of evidence in this trial.

[84] As a result, the court is unable to make any requisite findings regarding the prudent person standard based upon a proper assessment of the evidence as it would relate to counts 3, 4, 6, 7, 10, 11, 13 and 14. Moreover, the court is similarly situated with respect to the inability to properly consider the evidence in this trial as it would relate to the duty to supervise offence in count 2 related to supervision of making prudent investment decisions.

[85] Although many other issues were raised in relation to all of the counts in the first grouping of charges, given the finding that expert evidence was necessary for the court to be able to make the requisite findings of fact for all of the counts relating to the prudent person standard, including the requirement to supervise prudent investment decisions, and the fact that this requisite evidence was not before the court, the Crown has failed to prove guilt with respect to any of these counts. The essential evidence the court required on the ultimate issue of prudence is not before this court. Given this problem, the court will not consider the many other issues that were raised in relation to these counts, as the result in this trial would be no different.

(3) *QUANTITATIVE LIMITS OFFENCE :*

(a) Introduction :

[86] The counts which relate to the quantitative limits are set out as counts 1 and 9 in the information. Counsel have made submissions in writing and orally in relation to these counts.

[87] The counts set out strict liability offences. The Crown must prove beyond a reasonable doubt that the defendants, named in counts 9 and alternatively in count 1, invested amounts in excess of the 10% limit specified in s. 9 of the *Federal Investment Regulations*. (The parties have taken the agreed position that this court should first consider liability under Count 9 as against the members of the Investment Committee, and that if the court finds proof of guilt in relation to these counts, then the court need not consider guilt under Count 1). This position arises from the analysis that if the members of the Investment Committee were in fact delegated the responsibility of the administrator to make and hold investments in compliance with the legislation and regulations, then the members of the Board of Trustees should not be found liable for the actions of the properly delegated function to the members of the Investment Committee. If the court finds guilt in relation to count 9 arising from the delegation of the administrator function to the members of the Investment Committee, there is a related issue with respect to the duty of the members of the Board of Trustees to properly supervise the Investment Committee members, related to count 2 in the information.

[88] Alternatively, if the court acquits the defendants on count 9, then the parties agree that the court should go on to consider the offence as against the members of the Board of Trustees in count 1. This position arises from the potential scenario where the court might find that the members of the Board of Trustees had not in fact delegated the function of the "administrator" of the plan, in terms of investments and compliance with the

law, to the Investment Committee, and had in fact retained the role and responsibilities of the administrator at the Board of Trustees level.

[89] In relation to the subject charges, a defence of due diligence is potentially available for this offence. on the balance of probabilities standard. The Crown takes the position that based upon the evidence in this case there could not be any defence of due diligence arising from the evidence in this trial. The defence differs from this position and argues that it may in fact rely upon a defence of due diligence. In addition, the defence relies upon a statutory exemption from liability as set out in the *Pension Benefits Act*, arising from an "arrangement" as contemplated by the *Canada Business Corporations Act*, which has created a statutory scheme for an arrangement.

[90] The consideration of these issues requires a consideration of the various legal requirements as set out in the relevant legislation and regulations, the statutory interpretation of those provisions, and the evidence touching upon the issues in this case.

b) Legislation and Regulations :

[91] Section 19 of the *Pension Benefits Act* states :

"19(1) The administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with this Act and the regulations. "

[92] Section 62 of the *Pension Benefits Act* states :
"62. Every person engaged in selecting an investment to be made with the assets of a pension fund shall ensure that the investment is selected in accordance with the criteria set out in this Act and prescribed by the regulations. R.S.O. 1990, c. P.8, s. 62."

[93] The general offence section is set out in s. 109 of the *Pensions Benefits Act* :

"109. (1) Every person who contravenes this Act or the regulations is guilty of an offence."

[94] The relevant regulations for these counts are in Regulation 909, s. 79, which provides as follows :

"79. Beginning on January 1, 2002, the assets of every pension plan shall be invested in accordance with the federal investment regulations, despite the provisions of the plan or an instrument governing the plan. O. Reg. 144/00, s. 31"

[95] Section 66(1) of this Regulation defines "federal investment regulations" as :

"sections 6, 7, 7.1 and 7.2 and Schedule III to the "Pension Benefits Standards Regulations, 1985" made under the *Pension Benefits Standards Act, 1985* (Canada) as it read on December 31, 1999".

[96] In particular, Schedule III of the Regulations (Section 6), sets out permitted investments. This Schedule provides :

"Quantitative Limits

9(1)The ***administrator*** of a plan shall not directly or indirectly lend moneys of the plan equal to more than 10 per cent of the total book value of the plan's assets to, or invest moneys equal to more than 10 per cent of the total book value of the plan's assets in,

(a) any one person;
(b) two or more associated persons; or
(c) two or more affiliated corporations."

[emphasis added]

[97] The Crown takes the position that the purpose of this rule is to ensure an adequate level of diversification of the pension plan. The defence concedes that the policy rationale for the rule may relate to limiting a pension fund's exposure to risk through its liability in relation to any one investment.

[98] In section 9 (3), there is a special provision for investments in an investment corporation. This provision states :

> "9(3) Subsection (1) does not apply in respect of investments in
>
> …
>
> (c) an investment corporation, real estate corporation or resource corporation; "

[99] In the same regulation, investment corporation is further defined:

> "s. 1 In this Schedule,
>
> …
>
> "investment corporation" in respect of a plan, means a corporation that
> (a) is limited in investments to those that are authorized for the plan under this Schedule,
> (b) holds at least 98 per cent of its assets in cash, investments and loans,
> (c) does not issue debt obligations,
> (d) obtains at least 98 per cent of its income from investments and loans, and
> (e) does not lend any of its assets to, or invest any of its moneys in, a related party of the plan; (*société de placement) …"*

[100] The parties in this case agree that the relevant Propcos, which were wholly owned by the Plan and held the respective properties, were investment corporations as defined by this regulation, and therefore are not subject to the quantitative limits rule set out in s. 9(1) of this Regulation.

[101] Accordingly, it is clear that if the pension plan advances money to an investment corporation, the pension plan is not bound by the 10% quantitative limits rule in relation to those advances. Although the advances which are the subject of counts 1 and 9 were advanced directly to the Propcos, which are exempt from the rule as investment corporations, there is the remaining issue as to whether the subject funds were "indirectly" advanced to the entity in receipt of the funds from the respective Propcos. The Crown takes the position that while the monies were directly and initially advanced to the respective Propcos, all of those monies were then advanced to PRK, and as such are "indirect" advances to PRK. In this respect the Crown takes the position that those advances are therefore subject to the quantitative limits rule at this level of holdings. PRK is not an investment corporation and therefore is potentially subject to the quantitative limits rule. This issue is discussed in further detail below.

(c) Administrator of the plan :

[102] This issue relates to the identity of the administrator of the pension plan for the purposes of the quantitative limits offence. The court finds that the administrator for the purposes of this provision is the same person in law as the administrator who made decisions with respect to loans and investments for the pension plan. As set out above in relation to the prudent decision-making function, the court finds that the administrator was effectively the persons who were delegated authority to make such decisions by the Board of Trustees, as members of the Investment Committee.

[103] The Crown takes the position that the administrator for these purposes is composed of the three people who serve as members of the Investment Committee. The defence also takes the position, as it relates to consideration of counts 1 and 9 of the information, that the Board of Trustees had in effect delegated this responsibility to these named persons, and therefore the administrator is the three parties named in count 9, being Bernard Christophe, Gordy K. Cannady and Clifford Evans. The court notes that the defence took a contrary position with respect to the prudent decisions made pursuant to s. 22 of the *Pension Benefits Act,* arguing that the Board of Trustees had not delegated to the Investment Committee the responsibility of making decisions for the pension plan relating to advances for loans and investments.

[104] Both parties agree that the individuals, who were members of the Investment Committee at the relevant time, being Bernard Christophe, Gordy K. Cannady and Clifford Evans, were potentially personally

liable in exercising this function as the "administrator" and therefore were properly charged as named people in count 9 of the information. As a result, they are potentially liable as the "administrator" if the court finds that they committed the offence outlined in count 9.

[105] The court's finding on this point triggers a separate consideration, which is discussed below under the heading (5), and which relates to the duty of the members of the Board of Trustees to properly supervise the actions of the delegated parties (the three individuals who were the members of the investment committee), as it related to decisions made by the three individuals which had an impact on compliance with the quantitative limits requirements. Where delegation is given, the members of the Board of Trustees nonetheless retain the responsibility to supervise the actions of the delegated parties, in particular with respect to compliance with the quantitative limits requirement.

(d) Indirect investment or loan of funds to PRK ?

[106] The Agreed Statement of Facts include portions related to the quantitative limits counts, as set out in paragraphs 25 through 26 inclusive. For ease of reference, the portion of the facts are as follows :

> "25. Counts 1 and 9 concern certain identified investments, all made through Propco-named "investment corporations" (as defined under the Federal Investment Regulations), wholly owned by the Plan, as follows:

Propco	Investment	Description of investment
34	British Colonial Property, Bahamas	Hotel & Commercial complex
39	South Ocean Property, Bahamas	Golf & Beach Resort
41	Kingston Hilton, Jamaica	Hotel
44	Ocean Bay Properties, Bahamas	Undeveloped oceanfront Land
46	Crane Ridge Resort, Jamaica	Resort and undeveloped land

> 26. In response to certain findings set out in the Draft Examination Report concerning compliance with certain quantitative limits prescribed in the Federal Investment Regulations, the Board of Trustees (through counsel) forwarded to FSCO a letter dated February 18, 2005 from Bryan Kogut, C.A., of BDO, the auditors for the Plan. Appendix B to the letter contains the calculations of BDO concerning the book value of certain investments in Caribbean properties which investments were made through RHK Capital Inc. and/or PRK Holdings Ltd. Though there are multiple ways to determine the book value of these investments, it is agreed that the BDO calculations represent the minimum book value of the subject investments."

[107] Starting in the late 1990's, the pension plan made loans in various resort and hotel properties in the Caribbean. The loans were made to several Propcos, specific to each property in the Caribbean. The Propcos made loans to RHK, which were secured against specific Caribbean Properties. In 2000, RHK defaulted on its loans and the Plan's debt was restructured through PRK Holdings Ltd. (PRK). Ownership of the various properties, with the exception of the property in Jamaica, was transferred to PRK. (The Jamaican property was not transferred as a result of potential tax implications that would have arisen in the event of the transfer of property in Jamaica.) The Propcos were given voting preferred shares in proportion to their outstanding debts. The Propcos also had authority over all purchase/sale/refinancing decisions with respect to the various Caribbean properties, and had the full right to vote the common shares until the Propcos were paid in full. As a result the Propcos collectively had full operating control of the relevant Caribbean properties through PRK. As of the date of the restructuring on December 31, 2000, the Plan's investments in the Caribbean properties were in excess of US $93 million, consisting of loan amounts from Propcos 34, 39, 41, 44 and 46.

[108] In this case, it is clear that the pension plan advanced monies to the various Propcos related to the particular properties. The Propcos were wholly owned by the Plan. The parties agree that the relevant Propcos in this case are "investment corporations" within the meaning of the regulations set out above. Accordingly, as provided in s. 1 of the *Federal Investment Regulations*, the 10% limit set out in s. 9(3)(c) of the *FIR* which sets out the s. 9(1) 10% quantitative limits does "not apply in respect of investments" in an investment corporation. The Propcos include Propco 34 (British Colonial Property, Bahamas), Propco 39 (South Ocean Property, Bahamas), Propco 41 (Kingston Hilton, Jamaica) Propco 44 (Ocean Bay Properties, Bahamas, which are undeveloped or vacant lands adjacent to the British Colonial) and Propco 46 (Crane Ridge Resort, Jamaica).

[109] In 2001, PRK engaged parties to advise PRK and the Plan to find purchasers or joint venture partners for the respective Caribbean properties. During that time the Propcos collectively had authority over all operational decisions of PRK. Over the offence period, the Investment Committee of the pension plan approved loans to each individual Propco for the respective Caribbean properties, totaling approximately US $12,578,006.70. These loans were in addition to the value already held in relation to previous advances made by the Plan through the Propcos and held by PRK for the respective Caribbean properties.

[110] It is the Crown's position that the relevant Propcos, wholly owned by the Plan, are "investment corporations" and as such are exempt from liability under this regulation for a reason. In particular, the Crown relies upon the *Pension Benefits Standards Regulations*, 1985 under Schedule III (s. 6), s. 2. The provision indicates that the holding of an investment by an investment corporation is not subject to the quantitative limits rules, as set out in s. 9(3)(c). The Crown argues that this exception for investment corporations arises from the context that an investment corporation may not alter the fundamental risk associated with the consolidation of investments in any one investment. The Crown argues that the court must go beyond the investment corporation to consider the actual investment risk substantively rather than on the formal structure of the investment. The Crown did not provide the court with any cases or authorities in support of this position.

[111] In particular, the Crown submits that the court should look at the PRK level to consider the application of the quantitative limits requirements. The Crown submits that the advances were indirectly made by the Plan to PRK, where decisions were made in relation to the security that would have impacted upon the associated risks with further advancing the funds to the respective Caribbean properties. At the relevant time, during the offence period, PRK held the total value of the investments in land and hotels in the Caribbean. It was "indirect" arising from the fact that the advance of the funds went from the Plan to the Propcos, then flowed through to PRK where it was held with other similar investments. The Crown argues that on this basis the court should consider the holdings of PRK in all of the Caribbean properties of the pension plan arising from the investment (Propco) corporations. The Crown also argues that PRK is in the context of section 6 of Schedule III of the Regulations and section 9, any "one person" being the legal definition of a person which would include a corporation such as PRK.

[112] It is important to note that the Plan utilized this structure for the advances which it chose to make with Plan assets. The pension plan made a decision to invest in many similar properties in the Caribbean, set it up through Propcos, each one of which advanced funds to PRK, which then in a sense held all the Propco investments of the plan together and then advanced funds to the individual Caribbean properties

[113] It is clear that the funds in each Propco, reflective of the investment in each Caribbean property, do not offend the 10% rule. The Crown relies not on that scenario, but as stated above the investments at the PRK level, which is the amalgamation of the Plan investments in all of the Propcos for all of the Caribbean properties.

[114] On the evidence in this case, the Crown argues that in fact the court should look beyond the investment corporations, which are the relevant Propcos, to the next level of holding. The Crown submits that the court should look to the historical context of these holdings by PRK. In this respect, the various relevant interests were held by RHK (which was the corporation holding the investments made by the Plan prior to the arrangement which inserted PRK as the holder of the assets rather than RHK). In particular, Richard Kelly was involved with the holdings of RHK. He was known to the Board of Trustees and he dealt directly with the Board of Trustees of the pension plan with respect to the various investments in the Caribbean properties. In particular, the pension plan appears to have been approached in the past by Richard Kelly in relation to these proposed investments.

[115] The Crown also relies upon the historical context of the prior warning or concern articulated by the Plan's auditor in 1999 in its review of the 1998 financial statements of the Plan. In particular, the auditor indicated its concern to the Investment Committee that the Plan (also referred to as the Fund) held:

> "a significant portion of its investments with a number of companies that appear to be either owned, controlled or managed by Mr. Ron Kelly. These investments represent approximately 20% of the cost and fair value of the Fund's investments. The following is a list that summarizes the book value of the investments in this "group" of companies, which includes capitalized interest…"

[116] In this list of investments noted of concern was the I.F. Propco (Ontario) 34, British Colonial Hotels, Bahamas, I.F. Propco (Ontario) 39, South Ocean Hotel, Bahamas, I.F. Propco (Ontario) 41, Hilton Hotel, Jamaica, and I.F. Propco (Ontario) 46, Comfort Suites Ocho Rios, Jamaica. This portion of the list refers to interests in properties in the Caribbean.

[117] This letter is clearly prior to the offence period in this case, but it is relevant to historical context for the period of the subject offence.

[118] Although the auditor did not specifically state a concern that the various investments were potentially contrary to the 10% quantitative limits rule which is the issue before this court, it is important to note that prior to 2002, the major authority for regulation for the Plan was outside Ontario. The Crown makes the point that the auditor was alerting the Investment Committee of its concern regarding the high concentration of the risk of these investments, as a high proportion of the Plan had been invested through the various I.F. Propcos controlled by Mr. Ron Kelly (which after a process of an arrangement / transfer of shares in 2000 was replaced by the PRK corporation). It is clear that in 1998 and 1999, the Plan was not governed by the *Pension Benefits Act* in Ontario, and was governed by the relevant Alberta legislation.

[119] In 2000, RHK defaulted on its loans and the debt to the Plan. This debt to the plan was then restructured through the new company PRK Holdings Ltd. Ownership of the various Caribbean properties, including British Colonial Development Company Limited, South Ocean Development Company Limited and Ocean Bay properties were transferred from RHK to PRK. The ownership of Crane Ridge Limited and Ocean Chimo Limited in Jamaica were not transferred to PRK arising from the fact that this transfer would have triggered significant land transfer taxes (also known as "stamp taxes") and other fees that would have been applicable to properties located in Jamaica. In this restructuring, the interests of the Propcos through RHK were reflected by giving the Propcos voting preferred shares, with cumulative dividends, in proportion to their outstanding debts. These shares were given priority in any distributions to the extent of the relevant holdings of the respective Propcos. The Propcos also were given authority over all purchase/sale/refinancing decisions with respect to underlying operating companies. The Propcos could vote the RHK shares until the Propcos were paid in full, giving the Propcos operating control. It is to be noted that this voting structure involved the Propcos voting collectively in terms of their overall interests, as distinct for example, from the Propco No. 34 having full rights and the exclusive right to vote on all decisions pertaining to the respective property of that Propco, to the exclusion of the other Propcos having an ability to make decisions in relation to that property. While the Propcos were all wholly owned by the Plan, one might be of the view that this is a distinction without a difference. Voting in relation to decisions affecting the various Caribbean properties was done collectively at the PRK level for all of the Propcos interests. This structure reflects a pooling of the votes, and control, at the PRK level for all decisions relating to all of the Caribbean properties held by the Plan. In that respect, a functional analysis would lead one to the inference that the PRK level is the one where the level of risk should properly be focused, and in that respect, the 10% quantitative limits rule should apply at that level, given the evidentiary and factual context in this case.

[120] After the restructuring of RHK and PRK in 2000, the Crown also relies upon the similarity of the pattern of the flow of funds for the relevant investments. For instance, the Plan directly forwarded its investment funds to the relevant Propco for the particular Caribbean property, which then forwarded the same funds to RHK or post 2000, to PRK. PRK then allocated the funds to be invested in the particular Caribbean properties which were the subject of the Plan approval for investments.

[121] It is also noteworthy that securities were given relative to the moneys advanced for the Caribbean properties by way of mortgages back to the relevant Propcos. These mortgages were often second mortgages, but on occasion were a third mortgage and first mortgage in the amounts of the various investments emanating from the Propcos. While one might take the view that this signified the relevance of the central consideration of risk to

be assessed at the Propco level rather than the PRK level of the flow of moneys, it is important to note that as more moneys were required to be invested, decisions had to be made and consent given, for instance to allow new money to be loaned for the properties by banks, who were put in the priority position of being first mortgagee for the property, relegating the security of the Propcos to the level of a second or third mortgagee. PRK retained a consultant to represent the interests of PRK, which included reference to the Caribbean properties during the offence period. Mr. Adamson was later made the President of the hotel division of PRK, and made recommendations regarding the operation of the various Caribbean properties with a view to maximizing their profits. It is also interesting to note that PRK retained Price Waterhouse Coopers to locate a purchaser or a joint venture partner for the Caribbean properties. As set out in the agreed facts, starting in 2001, PRK was the party which engaged various third parties to advise PRK and the Plan to find purchasers or joint venture partners for the properties that had been acquired prior to that time. No deals in that regard were ever consummated to and including the period of the offence. In these respects, PRK was the entity taking actions with respect to the Caribbean properties. All in all, steps were being taken by PRK in terms of operating the properties, protecting the security, and seeking to obtain a return on investments and advances in relation to the various Caribbean properties.

[122] The above-noted actions demonstrate that decision-making with respect to the various investments and properties was made at the PRK level.

[123] The defence puts forward the contrary argument that both before and after the 2000 restructuring of RHK and PRK, the securities were always held by the relevant Propcos that had advanced the funds to RHK or PRK. In that respect, the defence argues that the quantitative limits requirements should be assessed at the level of each Propco, rather than RHK or PRK. In the alternative the defence argues that the requirement should be assessed at the ultimate level of the investment, which is the particular property in receipt of the funds from the Plan, such as South *O*cean Beach, Bahamas. In that respect the defence argues that the funds were advanced by the Plan indirectly through the various Propcos and PRK to the ultimate properties. The defence submits that support for this position exists in relation to the Jamaican properties where investments continued to be held at that level and there was no transfer following the RHK to PRK restructuring. It is to be noted that the Jamaican properties' holdings remained the same following the restructuring simply because any transfer of these properties would have triggered adverse tax consequences to be paid to the Jamaican government for the relevant Jamaican properties.

[124] The defence argues that after the 2000 restructuring of RHK and PRK, there was a very significant change in terms of the role of RHK or PRK in the process of the funds going through to the respective Caribbean properties. The defence submits that the RHK company was controlled by Mr. Kelly. In this respect, the pension plan would have had far less control over the various investments made through the Propcos, which investment advances were distributed by RHK to the respective properties. The defence argues that the risk issues through RHK were more of a concern. This arises from the defence argument that the role and relationship between the plan and PRK was quite different than what had been in place with RHK. The defence submits that the court must consider the important difference when PRK was inserted in the process. The defence submits that the PRK corporation was entirely controlled by the preferred structure of the pension plan participation. In this sense, the defence argues that the pension plan had control over the process of PRK, whereas the pension plan would not have had control over RHK. The defence relies upon the fact that the Propcos related to the Caribbean investments were issued voting preferred shares, (with cumulative dividends) in proportion to the outstanding debts which were the monies advanced by the plan for the relevant investments. The preferred shares were given priority in any distribution to the extent of the total amounts owed to the Propcos plus accrued dividends. Moreover, in terms of effective control, the Propcos were given authority over all purchase / sale/ refinancing decisions with regard to the underlying operating companies, and the Propcos had the right to vote the PRK shares until the Propcos were paid in full. The Propcos had operating control of PRK.

[125] It is important however to keep in mind the pooling of the funds and resources at the PRK level, which was the level of control with respect to the various decisions impacting upon these advances. For instance, the interests of all of the Propcos were dealt with collectively, and not independently. In other words, a particular Propco did not have full voting rights to make a particular decision relating to the property for which the funds were advanced. Rather, all of the interests of the Propcos were effectively pooled at the PRK level, and decisions were made by PRK regarding all of the Caribbean properties which were the subject of the Propco holdings. Although the Propcos had full control of PRK, and PRK made the decisions, it is the pooling of the Propco interests and the pooling of decisions and steps taken at the PRK level which affected risk. In this sense, the risk for the various advances by the Plan for the respective Caribbean properties was pooled at the PRK level, and decisions were made together at the PRK level, even though PRK was controlled by the collective Propcos.

[126] There is other evidence which is noteworthy in consideration of this issue. For instance, minutes of the Plan meetings often considered the investments collectively as PRK investments. Within that category, the advances for the Caribbean properties, through PRK, were often discussed under that heading, thereby grouping the treatment of those investments for functional purposes. In this respect, the pension plan considered the advances to be advances to PRK and considered the Caribbean properties' investments through PRK together in their meetings.

[127] This, the Crown submits, is the rationale and functional basis upon which it relies for its argument that the Court should look at the PRK level of holdings, rather than the Propco investment corporation level of the respective holdings for the context of the quantitative limits provisions. Counts 1 and 9 specifically allege that the moneys were directly or indirectly loaned and/or invested in RHK Capital Inc and/or PRK Holdings Ltd. The question then for this court to consider is whether the Crown has proven that moneys loaned and/or invested in RHK (presumably before the offence period, that would have resulted in holdings of PRK to the benefit of the pension plan during the offence period), together with advances of loans and/or investments during the offence period would have run afoul of this quantitative limits provision.

[128] The Crown also argues that the court should consider the commonality of the investments in the Caribbean properties through the PRK company as providing support for its position that the court should look at the PRK corporate level of holding the investments for the purposes of the offence relating to the 10% quantitative limits rule. The Crown submits that the nature of the similar investments in the Caribbean properties would mean that all of these investments would be commonly affected by various economic factors that would impact upon tourism in the Caribbean. In that sense, the Crown argues that it makes sense from a pragmatic standpoint, in considering the focus of examination regarding application of the 10% quantitative limits rule to look at the PRK level rather than the Propcos.

[129] If there is a finding that the investments were made indirectly to PRK, then they are potentially subject to the 10% quantitative limits rule. All of the amounts were advanced through PRK, and promissory notes were executed by PRK in favour of the relevant Propco for each advance. In other words, PRK was the party promising to repay the money advanced by the Plan through the respective Propcos. The promise to pay back the money was not made by the respective Caribbean properties in receipt of the funds. This again shows that PRK was involved in setting the nature of the payback arrangements, and as such was administering and making decisions regarding the risk of the various advances, and the security for same.

[130] The defence argues that the indirect investments which were the subject of the relevant counts were to the particular property, and that the Crown is in effect arbitrarily targeting the level of PRK. The defence submits that targeting the level of PRK does not properly reflect the nature of the investments as they would relate to this rule. The defence position is that if the court is looking at an indirect advance, the court should not stop its analysis at an intermediate point. Rather the defence argues that for this analysis, the court should look further on down the chain to the ultimate organization in receipt of the funds, which is each Caribbean property.

[131] The Crown responds to this defence argument by taking the position that the subject investments are indirectly to both PRK and to the respective Caribbean properties. In the Crown's submission, the investments could potentially run afoul of the quantitative limits rule at either the indirect investment level, where the funds were pooled at the PRK level, where decisions were made affecting the risk and security of those advances, or at the indirect investment level which ultimately received advances from PRK at the level of the particular Caribbean properties. Either level, in the Crown's submission could potentially be the target of a charge relating to quantitative limits. In this trial, the Crown relies upon the indirect investment at the PRK level.

(e) Holdings and Advances in PRK for Caribbean properties :

[132] The parties agree that the investments in the Caribbean properties and the comparable book values are such that for the period of the offence in counts 1 and 9, the value of the investments in the Caribbean properties exceed the 10% threshold at all times during the offence period, and that this margin of excess increased as further advances were made during the offence period. The parties agree that during the offence period, a sum of US $19.554 million was approved as the subject of additional advances by the pension plan to the Propcos. All of the advances were made to PRK through the Propcos. However, the amount actually advanced during the offence period was the lesser amount of US $16.42 million, due to delays near the end of the offence period in paying approved advances.

[133] The defence argues that one must look only to the amounts of advances during the offence period in determining whether the actions of the administrator ran afoul of the 10% quantitative limits rule, and not consider the balance held by the pension plan at the beginning of the offence period nor the balance at the end of

the offence period. In other words, the defence argues that one must ignore the value of the holdings from contributions or advances prior to the start of the offence period. It is the defence position that in relation to this offence, the court must consider only contributions made during the offence period to see if those advances run afoul of the 10% quantitative limits rule. In other words, the defence argument is that one should only look to any increases during the offence period as running afoul of the 10% quantitative limits rule.

[134] It is important to consider the purposive approach for this provision. Clearly the requirement targets situations where greater than 10% of the pension plan assets are loaned or invested in any one person, two or more associated persons or two or more affiliated corporations. The purpose of this requirement is to ensure adequate diversification of the funds of the pension plan. The provision itself refers to the word "held" and not the word "contributed" and in that sense targets holdings which offend the 10% rule. In this case, as stated above, it is not just a case of coming into the start of the offence period holding an amount in excess of the limit and making no further contributions. Rather, the situation in this case is that the respective holding, in combination with the further contributions made by the administrator during the offence period, ran afoul of this requirement. This is in the nature of a continuing offence. Over the period of the offence the administrator continues to retain the existing holdings, and in this case made additional contributions during the offence period, which ran further afoul of the 10% quantitative limits requirements.

[135] The defence argues that the subject offences do not target the holding of investments in excess of the 10% quantitative limits rule, but rather the act of investing or loaning funds in that amount, as it would relate to the offence period.

[136] The Crown argues that the provision relating to the 10% quantitative limits rule requires the administrator to ensure that pension plan holdings do not run afoul of this rule. The Crown relies upon s. 79 of the *Regulation* which requires that the assets of the plan be "invested" in accordance with the regulations. In this respect, the Crown submits that the Regulation creates an ongoing requirement that the investments be held in a manner which meets the requirements of the regulations. In this respect, the Crown argues that s. 9(1) of Schedule III of the *Regulations* (s. 6) creates a continuing offence which continues to be committed for as long as the Plan's investments are not in compliance with the regulations. While the Crown argues that no additional funds need be advanced during the offence period to run afoul of this rule, the Crown submits that in this case additional funds were advanced which further exceeded the 10% quantitative limits. The Crown also makes reference to the Regulatory Impact Analysis Statement as shedding some light on the description of the provisions and proposed amendments, including the Quantitative Limits. In this comment, which was not included in the regulation but referred to in the *Canada Gazette*, Part II, Vol. 127, No. 13, SOR/DORS/93-299, reference is made to the quantitative limits provisions as being maintained to encourage administration of pension plans to diversity the nature of investments being held by the plan. In this respect, the provision targets the holdings of the plan and would thereby potentially capture any actions such as advances which resulted in exceeding the quantitative limits.

[137] It is also interesting to note that over a period slightly shorter than the offence period, the total proportion of pension plan advances to PRK relative to the total pension plan advances was just in excess of 40 %. In this respect, the pension plan administrator would have been aware of the very high proportion of its total advances to PRK over the offence period, which should have raised some concern in terms of the quantitative limits requirement.

[138] The court finds that the purpose of this provision, that the administrator of a plan not directly or indirectly lend or invest moneys of the plan equal to more than 10 per cent of the total book value of the plan's assets, is to ensure adequate diversification of the investments and loans of the pension plan. This provision captures any acts such as advances during the offence period which would result in the holdings of the plan being in excess of this quantitative limits. It would not make sense from a purposive or functional approach to interpret this provision as targeting only new loans or investments which are advances during the offence period in excess of 10%. The provision is in place to ensure the overall diversification of the plan and to minimize the dangers which would result if there is too great a concentration of risk in any one "person". Accordingly, the provision targets the overall amount held in any one place, such that there not be any new advances which would result in holdings beyond the quantitative limits.

[139] As a result, the court finds that based on the agreed facts in this case, that the pension plan advanced monies, as investments or loans, resulting in the holdings of the pension plan at the PRK level running afoul of the 10% quantitative limits rule.

(e) Defence of due diligence:

[140] A defence of due diligence relates to taking reasonable care in the circumstances. It consists of some conduct that relates to the commission of the prohibited act, not some broader notion of acting reasonably. Evidence of due diligence relates to reasonable steps taken to avoid committing the activity which is the subject of the offence. In other words, the evidence of due diligence must relate to the specific offence. In this case, the offence relates to monies advanced by way of loan or investment which went through the Propcos and flowed through to PRK for eventual distribution to the Caribbean properties. In this sense, due diligence would potentially relate to steps taken by the administrator to ensure that the sum of monies advanced had not exceeded the 10% quantitative limits.

[141] While the Crown concedes that a defence of due diligence might be available for this offence at law, the Crown takes the position that it cannot be available on the evidence in this trial. In particular, the Crown argues that at the outset of the offence period, the holdings were already contrary to the 10% quantitative limits for the Caribbean properties. The Crown argues that the defence cannot argue that the administrator acted with due diligence to bring the Plan into compliance with the 10% rule. In particular, the pension plan advanced significant additional funds to run further afoul of the 10% quantitative limits rule as the Plan made further investment decisions during the offence period. In that respect, the Crown argues that these additional advances are fatal to the success of any possible due diligence defence. The Crown also relies upon a letter to the members of the Investment Committee prior to the offence period, from the auditor for the pension plan for the year 1998, in a letter dated November 5, 1999, that stated the concern. The letter noted that there should be a report to the Investment Committee that approximately 20% of the cost and fair value of the investments of the plan were in companies owned, controlled or managed by Mr. Ron Kelly, including RHK. The various Propcos were referred to at that point in time. In that respect, the Crown argues that the administrator of the pension plan was explicitly told by the auditor a few years prior to the offence period that there was a problem with these investments being so highly concentrated at the RHK and Mr. Ron Kelly level. The Crown also points to the absence of any evidence to show that there were any measures or safeguards in place to ensure that the administrator complied or endeavoured to comply with the quantitative limits requirements for investments or loans of a pension plan.

[142] The Supreme Court of Canada, in its seminal judgment in *R. v. City of Sault Ste. Marie,* 1978 CanLII 11 (SCC), [1978] 2 S.C.R. 1299, considered the defence of due diligence and held that the defence of due diligence "proceeds on the assumption that the defendant could have avoided the prima facie offence through the exercise of reasonable care and he is given the opportunity of establishing, if he can, that he did in fact exercise such care", at p. 1314. If a defendant establishes a defence of due diligence on a balance of probabilities, the defendant would be entitled to an acquittal. The court relies upon the judgment of the Court of Appeal for Ontario in *R.* v. *Kurtzman*, 1991 CanLII 7059 (ON CA), [1991] O.J. No. 1285, which held that the due diligence defence must "relate to the commission of the prohibited act, not some broader notion of acting reasonably".
The court notes that the Court of Appeal for Ontario in its earlier judgment in *R.* v. *Rio Algom* , 1988 CanLII 4702 (ON CA), [1988] O.J. No. 1810, at para 31 noted that evidence of general conduct is relevant to keep in mind with respect to sentence. The court held that general conduct does not assist a defendant in avoiding responsibility for a lack of care with respect to an actual incident, as the defendant in that case was unable to show it was not negligent with respect to the circumstances which caused the actual incident. More recently, the Court of Appeal for British Columbia in *R. v. Imperial Oil Ltd.,* [2000] B.C.J. No. 2031, followed the Court of Appeal for Ontario's judgment in *R. v. Rio Algom, supra,* at para. 23. It considered this issue and held the "focus of the due diligence test is the conduct which was or was not exercised in relation to the "particular event" giving rise to the charge, and not a more general standard of care".

[143] In this case, the defence has relied upon evidence of retention of auditors to review the financial statements on a regular basis. The only information forthcoming in this regard consisted of the letter of engagement regarding the audit of the plan investments. This letter of engagement of the auditors, which is before the court in Exhibit 6 at tab 5, does not make any reference whatsoever to investigating or monitoring compliance with the quantitative limits requirement for the pension plan. There is no evidence before the court to suggest that the auditor(s) were ever asked by the administrator to monitor or alert the administrator to tracking advances of monies to the Propcos, to flow through PRK for eventual distribution to the Caribbean properties. Nor is there evidence that the auditor(s) were retained to do a calculation of those sums of money advanced for the subject properties through the Propcos and PRK relative to the total book value of the plan's assets. There is also no reference in the financial statements or other material before the court reporting back on this type of a calculation relative to the offence period. In addition, while the defence made submissions referring to the discussions and considerations of the administrator during the offence period ostensibly to sell the interests in the Caribbean properties, to find a joint venture party for those properties, or other steps which were

taken during the offence period, there is no evidence before the court that these steps were pursued in relation to any effort to comply with the 10% quantitative limits rule. The defence did not lead any evidence of specific efforts or steps taken to comply with the 10% quantitative limits rule. The defence relies generally on what it submits was a divestiture strategy over the subject period. It is interesting to note that there is nothing in the record to suggest that during the offence period the administrator was even aware that the balance of its holdings through PRK in the Caribbean properties exceeded the 10% quantitative limits amount. There is accordingly no evidence before the court to suggest that any general steps including advances with a view to divestiture, or retention of the properties with a view to acquiring a joint venture partner, were related to efforts to reduce the amounts loaned or invested in the subject properties to comply with the quantitative limits requirement. Throughout the offence period, further amounts were advanced for the subject properties. The defence concedes that there is no expert evidence which has been put before the court to support an inference it seeks to make, to the effect that such steps were related to the particular offence of the quantitative limits offence. Accordingly the court does not rely upon this evidence to support the advancement by the defence of a defence of due diligence as defined in the law.

[144] Taking into account all of the evidence before this court in this trial, and applying the law, the court finds that there is no defence of due diligence in this case.

(g) Exemption - s. 192, Canada Business Corporations Act :

[145] The defence argues that if the Plan had loaned or invested funds contrary to the quantitative limits rule, then those actions were exempt from liability for the quantitative limits rule. As a result, the defence submits that the administrator cannot be found guilty for contravening the quantitative limits rule. The Crown responds that there is no such exemption which can arise in this case for a few reasons which are outlined below.

[146] It is important to consider the legislative regime upon which the defence seeks to rely for this exemption.

[147] As set out above, the *Pensions Benefits Act* is governed by *Regulation* 909, s. 79, which provides that assets of the pension plan shall be invested in accordance with the federal investment regulations. S. 66(1) of the *Regulation* defines "federal investment regulations" as sections 6, 7, 7.1 and 7.2 and Schedule III to the *Pension Benefits Standards Regulations*, 1985. The offence relating to quantitative limits is set out in s. 9. In this Schedule III, s. 18 provides :

> "18. Sections 9 to 16 do not apply in respect of
>
> (a) investments in a corporation that are held by, or on behalf of, a plan as a result of an **arrangement**, within the meaning of subsection 192(1) of the *Canada Business Corporations Act*, for the **reorganization** or liquidation of the corporation or for the amalgamation of the corporation with another corporation, if the investments are to be exchanged for shares or debt obligations; "
>
> [emphasis added]

[148] In this sense, it is important to consider the provisions of s. 192(1) of the *Canada Business Corporations Act* , R.S.C., C-44, which provides as follows :

"Definition of "arrangement"

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192. (1) In this section, "arrangement" includes
(a) an amendment to the articles of a corporation;
(b) an amalgamation of two or more corporations;
(c) an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to this Act;
(d) a division of the business carried on by a corporation;
(e) a transfer of all or substantially all the property of a corporation to another body corporate in exchange for property, money or securities of the body corporate;

(f) an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate;
(f.1) a going-private transaction or a squeeze-out transaction in relation to a corporation;
(g) a liquidation and dissolution of a corporation; and
(h) any combination of the foregoing.

Where corporation insolvent

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(2) For the purposes of this section, a corporation is insolvent
(a) where it is unable to pay its liabilities as they become due; or
(b) where the realizable value of the assets of the corporation are less than the aggregate of its liabilities and stated capital of all classes.

Application to court for approval of arrangement

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(3) Where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.

Powers of court

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(4) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
(a) an order determining the notice to be given to any interested person or dispensing with notice to any person other than the Director;
(b) an order appointing counsel, at the expense of the corporation, to represent the interests of the shareholders;
(c) an order requiring a corporation to call, hold and conduct a meeting of holders of securities or options or rights to acquire securities in such manner as the court directs;
(d) an order permitting a shareholder to dissent under section 190; and
(e) an order approving an arrangement as proposed by the corporation or as amended in any manner the court may direct.

Notice to Director

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(5) An applicant for any interim or final order under this section shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

Articles of arrangement

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(6) After an order referred to in paragraph (4)(e) has been made, articles of arrangement in the form that the Director fixes shall be sent to the Director together with the documents required by sections 19 and 113, if applicable.

Certificate of arrangement

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(7) On receipt of articles of arrangement, the Director shall issue a certificate of arrangement in accordance with section 262.

Effect of certificate

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(8) An arrangement becomes effective on the date shown in the certificate of arrangement.
R.S., 1985, c. C-44, s. 192; 1994, c. 24, s. 24; 2001, c. 14, s. 96."

[149] It is also important to bear in mind s. 47(3) of the *Provincial Offences Act*, which provides :

> " 47(3) The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the

> defendant, whether or not it is set out in the information. R.S.O. 1990, c. P.33, s. 47(3)"

[150] The defence argues that the reorganization of RHK to PRK in 2000 was in the nature of a restructuring, wherein the original investments in RHK were exchanged for shares or debt obligations in PRK. The defence argues that this is covered by the s. 18(a) exemption of the *Federal Investment Regulation*, as an arrangement within the meaning of s. 192(1) of the *Canada Business Corporations Act*, for the reorganization or liquidation of the corporation or for the amalgamation of the corporation with another corporation.

[151] The Crown responds that this was not a restructuring of RHK. In other words there was no reorganization or liquidation of RHK or for its amalgamation with PRK. RHK was not reorganized.

[152] Secondly, the Crown argues that s. 192 of the *Canada Business Corporations Act* provides an exemption for an "arrangement". Pursuant to s. 192, the Crown submits that there cannot be an arrangement which falls within that section unless it is a court-approved arrangement. It is clear on the facts in this case that there was no court-approval of the transaction involving RHK and PRK in 2000. As such, the Crown argues that the defence cannot rely upon s. 192 of the *Canada Business Corporations Act* as providing a statutory exemption from liability for this offence.

[153] This court canvassed counsel on various occasions in 2009 for any cases interpreting s. 192 of the *Canada Business Corporations Act*. In particular, the court sought case law from the parties regarding any requirement that an arrangement under s. 192 of the *Canada Business Corporations Act* be court-approved. The court was advised by counsel for the parties that there were no cases interpreting this provision. Subsequent to many occasions upon which submissions were made by counsel on the issues in this case, and following "final" submissions made in writing, followed up with questions put to counsel for the parties by the court orally in court, in July of 2009, the court adjourned the case to consider judgment. In that period, shortly after engaging in independent research, the court became aware of the Supreme Court of Canada judgment in *B.C.E. Inc. v. 1976 Debentureholders* , 2008 SCC 69 (CanLII), [2008] S.C.J. No. 37. The court was quite surprised to find this case given that counsel had never referred to this Supreme Court of Canada judgment, after being questioned by the court on multiple occasions. The court had requested case law on the interpretation of s. 192 of the *Canada Business Corporations Act* and was advised that there were no cases which dealt with this issue. Counsel never mentioned this Supreme Court of Canada judgment.

[154] Given the importance of this issue, the court wrote to counsel for both parties again and sought further submissions, again, regarding this *B.C.E.* case which was never brought to the court's attention, but had been released in 2008, long before the relevant submissions in this case. Counsel were asked to submit further submissions in writing. The Crown made submissions that it had not come across this case, but upon the court bringing this case to the Crown's attention, the Crown relied upon it. The Crown submits that this case is directly on point and clearly holds that court approval is required for an "arrangement" under s. 192 of the *Canada Business Corporations Act*. The defence took the position that essentially this judgment did not deal with the issue of any requirement for court approval under s. 192 of the *Canada Business Corporations Act* . This is an exemption which the defence relies upon in this case.

[155] At this point the court reviews briefly the facts touching upon this issue. The following is an excerpt from the Agreed Statement of Facts:

> "51. In 2000, RHK defaulted on its loans and the Plan's debt in respect of the Caribbean properties was restructured through the creation of a new company called PRK holdings Ltd.("PRK"). At that time, ownership of the Bahamian Properties (common shares of British Colonial Development Company Limited, South Ocean Development Company Limited and Ocean Bay Properties I and II Ltd.) was transferred to PRK. Ownership of Crane Ridge Limited and Ocean Chimo Limited was not transferred to avoid significant land transfer taxes (known as "stamp taxes") and other fees applicable in the case of these two properties by virtue of their location in Jamaica.
>
> 52. Pursuant to the 2000 debt restructuring, RHK was issued all of the common shares of PRK. Propcos supporting the Caribbean investments were issued voting preferred shares, with 11% per annum cumulative dividends, in proportion to their outstanding debts. The preferred shares were given priority in any distributions to the extent of the total amount owed to the Propcos, plus accrued dividends. RHK was entitled to receive any excess above the total amount owed to the Propcos, plus accrued

dividends. The Propcos were also given authority over all purchase/sale/refinancing decisions with regard to the underlying operating companies. The Propcos had the right to vote the RHK shares until the Propcos were paid in full, giving the Propcos operating control."

[156] Given the state of the record in this case, the court will deal first with the second argument of the Crown. In effect, can the defence rely upon the exemption, defined as an "arrangement" as set out in s. 192 of the *Canada Business Corporations Act* if there is no court approval?

[157] As set out above, the defence has conceded and agreed that there was no court approval of any dealings between RHK and PRK. In that respect, there is no court approval as contemplated within the various subsections in s. 192 of the *Canada Business Corporations Act* . The applicability of the exemption upon which the defence seeks to rely then rises or falls depending on whether this provision requires court approval to qualify as a s. 192 *Canada Business Corporations Act* arrangement contemplated in s. 18(a) of the regulation.

[158] This court finds that the Supreme Court of Canada judgment in *BCE Inc. v. 1976 Debentureholders*, *supra,* which was released on December 19, 2008, is determinative of this issue. This case dealt with an arrangement which was questioned as not being "fair and reasonable" and had been opposed in an application for court approval of the arrangement under s. 192 of the *Canada Business Corporations Act* . In a unanimous judgment, the Court noted that the purpose of the approval process under s. 192 is to permit major changes in corporate structure while ensuring that individuals whose rights may be affected are treated fairly, to achieve a fair balance between conflicting interests. The process and purpose of a court approval for an arrangement oversees the consideration of those issues. The Court very clearly held that court approval is required for arrangements under s. 192 of the *Canada Business Corporations Act*. In particular, this court relies upon paragraphs 46, 47, and 115 through 143. The Supreme Court has clarified that a court approval is required for a s. 192 *Canada Business Corporations Act* arrangement. Accordingly, this court finds that the regulation set out in s. 18 (a), referencing an arrangement within the meaning of subsection 192(1) of the *Canada Business Corporations Act,* requires a s. 192 court approval. This requirement is consistent with a purposive approach in construing the relevant regulation that would have permitted an exemption in the case of a court-approved arrangement. In the situation of an investment in a corporation in financial distress, this process under the *Canada Business Corporations Act* , while potentially removing the requirement to comply with the quantitative limits provisions in the *Pensions Benefits Act*, would have at least provided a measure of protection to potential beneficiaries of the pension plan to the extent that a court considering approval of the arrangement could consider whether it was fair and reasonable to all parties that might be affected by the arrangement. In an application for court approval, the potential impact of the arrangement upon the security or value of pension plan assets could be raised and considered by the court. That did not happen in this case. There was no application for approval nor any approval in the case at bar. Accordingly, the defendants cannot rely upon this exemption to defend any contravention of the quantitative limits provisions rules.

[159] Given that there was no court approval pursuant to any s. 192 *Canada Business Corporations Act* arrangement in this case, the defence cannot succeed in its reliance upon the exemption set out in s. 18(a) of the regulation applicable to the provisions applicable to the quantitative limits offence.

(h) Transitional argument :

[160] The defence initially argued that there were transitional provisions which applied to any acts that might otherwise be captured by the quantitative limits offence alleged in this trial. The Crown took the position that the transitional provisions did not apply in this case. Subsequently, the defence abandoned that argument and for that reason this court does not consider this issue.

(i) Conclusion:

[161] In relation to the quantitative limits offence, as set out above, the members of the investment committee were the "administrator" for the pension plan. The loans and investments in PRK during the offence period added to the holdings in the PRK during the offence period. The acts of the administrator during the offence period resulted in a situation where during the offence period, additional funds invested in the pension plan exceeded the 10% rule and thereby contravened the quantitative limits provision.

[162] There is no defence of due diligence available to the defence in this case. There is no evidence of due diligence such as steps taken in an effort to comply with the quantitative limits. At best, for potential consideration on sentence, the administrator had retained an auditor who audited the statements, but was not retained to comment upon compliance with the quantitative limits requirements for the pension plan. The defence relied upon the advance of further monies to PRK in the hope that it would assist in the eventual sale or joint partnership options regarding the Caribbean properties. However, such general actions are not capable of being considered due diligence in relation to this particular offence.

[163] The defence has sought to rely upon an exemption pursuant to s. 192 of the *Canada Business Corporations Act*. In order to qualify as a s. 192 arrangement, there must be a court approval. There was no court approval of any arrangement and therefore the defence cannot rely upon this statutory exemption.

[164] In conclusion, the members of the Investment Committee, being Bernard Christophe, Gordy K. Cannady and Clifford Evans, are found guilty of the quantitative limits offence, as set out in count 9 in the information.

(4) ADMINISTRATOR OF PENSION PLAN

[165] The administrator of a pension plan shall, pursuant to s. 19(1) of the *Pension Benefits Act*, ensure that the pension plan and pension funds are administered in accordance with the *Pension Benefits Act* and the regulations. The common law has been clear that an administrator of a pension plan acts in the capacity of a fiduciary relationship with the plan members. This standard is greater than the standard of care of a trustee who would be required to take the level of care as an ordinary prudent person of business in managing his or her own affairs. This greater standard of care, which exceeds that of a trustee, is now codified in s. 22(1) of the Ontario *Pension Benefits Act*:

> "22(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person or ordinary prudence would exercise in dealing with the property of another person."

[166] This standard of care is one of a fiduciary relationship between the administrator and the plan members. The actions of the fiduciary must be driven by the need to pursue the best interests of the beneficiaries of the plan.

[167] The "administrator" of the pension plan is defined in s. 1(1) of the *Pension Benefits Act*. R.S.O. 1990, c. P.8, and provides as follows:

> "administrator" means the person or persons that administer the pension plan; ("administrateur")

[168] The term "person" is not defined in the *Pensions Benefits Act*.

[169] The *Interpretation Act*, R.S.O. 1990, c. I.11 was repealed on July 25, 2007 (See:2006, c. 21, Schedule F, ss 134, 143(1).) This legislation was the subject of statutory interpretation in *Ontario (Ministry of Labour) v. NMC Canada Inc*., 1995 CanLII 1641 (ON CA), [1995] O.J. 2545 (C.A.) The Court considered the definition of "person" in the *Interpretation Act*, R.S.O. 1990, c. I.11 and found that it included a corporation but not a partnership. In this judgment, the Court considered the common law and held that a partnership is not a legal person. Presumably, a Board of Trustees created at the instance of a provincial statute for the purposes of the pension plan would also not be a legal person pursuant to the common law. In *Ontario (Ministry of Labour) v. NMC Canada Inc., supra,* the Court agreed that it was proper to make the amendment of the information to change the name of the defendant from a partnership which could not be charged under the provincial quasi-criminal legislation to naming the two parties who were the partners, even though this amendment was not done until after the limitation period for charging the offence. In so doing the Court considered the s. 34 *Provincial Offences Act* powers of amendment and found that there was a lack of prejudice.

[170] Pursuant to the *Legislation Act*, 2006, S.O. 2006, chapter 21, schedule F, s. 87:

> "person" includes a corporation; ("personne")

[171] There is no definition for an "unincorporated association" in the *Pension Benefits Act* or the *Legislation Act*.

[172] The *Pension Benefits Act* defines "administrator" in terms unique to each type of pension plan. In this case, the relevant portions of the provision are :

> **"8.** (1) A pension plan is not eligible for registration unless it is administered by an administrator who is,
>
> (e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a **board of trustees** appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants; …"
>
> [emphasis added]

[173] The defence argues that "person" includes every entity as defined as "administrator" in s. 8 of the Act.

[174] The Board of Trustees of the Plan was the "administrator" of the Plan, as defined in the legislation over the relevant period. This is an agreed fact. The defendants Bernard Christophe, Gordy Cannady, Clifford Evans, Michael Fraser, Wayne Hanley, Lucy Paglione, Thomas Zakrzewski, Antonio Filato and Alain Picard were members of the Board of Trustees over the relevant period of time.

[175] The court must determine whether the members of the Board of Trustees delegated their authority to make decisions relating to investments to the members of the Investment Committee. The Crown takes the position that this delegation was permitted in law pursuant to s. 22(5) of the *Pension Benefits Act*, and that in fact the delegation took place. The *Pension Benefits Act,* s. 22(5) provides :

> " 22(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund."

[176] As noted above, the three members who comprise the Investment Committee are a subset of the members of the members of the Board of Trustees. The Crown has prosecuted these individually named members of the Investment Committee for the offence of failing to comply with s. 22(1) of the *Pension Benefits Act*. Consistent with this position, the Crown has also prosecuted all of the named members of the Board of Trustees for the offences of failing to properly supervise the agents (who are the individually named members of the Investment Committee), contrary to their obligation to supervise under s. 22(7) of the Act. The *Pension Benefits Act,* s. 22(7) provides:

> " 22(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable."

(5) DUTY TO SUPERVISE OFFENCE:

(a) Introduction

[177] A preliminary issue that needs to be raised relates to the charging of the named defendants in count 2 of the information. The defence challenged the potential liability of people named in count 2 as it related to the duty in s. 22(1) of the *Pension Benefits Act* to invest prudently. In essence, the defence argued that in law, the Crown could have only charged the full Board of Trustees as an entity for failure to comply with that standard. This argument was made by the defendants specifically in relation to the s. 22(1) *Pension Benefits Act* duties of the administrator to make prudent investment decisions. The defence has submitted in the context of the quantitative limits requirements, that the Board of Trustees did have authority and did in fact pursuant to s. 22(5) of the *Pension Benefits Act* delegate to the three members of the Investment Committee the responsibility to make decisions regarding advances in the forms of loans and investments. Notwithstanding the concurrent obligation of the Board of Trustees as administrator that comes with that delegation, pursuant to s 22(7) of the *Pension Benefits Act*, to supervise the delegated party, the defence argued that the individual named members of the Board of Trustees cannot bear any liability for the subject offence pursuant to s. 22(7) of the Act. In essence, the defence argument was that the *Pension Benefits Act* does not support charges against individual members of the Board of Trustees, but rather just the Board of Trustees as a named entity. The Crown strongly argues against this position.

[178] The defence has made an argument that the individual members of the Board of Trustees, notwithstanding the obligation on the Board of Trustees as administrator under s. 22 (7), cannot be personally liable as charged in count 2.

[179] The Crown argues that the Board of Trustees delegated to the members of the Investment Committee, as agent of the Board of Trustees, the management and decision-making functions for the investments which are the subject of count 2 in the information. S. 22(5) of the *Pension Benefits Act* permits the Board of Trustees to delegate to an agent these powers. On that basis, the Crown argues that the members of the Investment Committee, being Bernard Christophe, Gordy K. Cannady and Clifford Evan were bound by the quantitative limits requirements, as discussed above under that heading. As further set out above, both the Crown and the defence take the position that for the purpose of the quantitative limits offence requirements, this function was delegated to the three named members of the Investment Committee, and any liability which the court might find for failure to comply rests with those three members, and not the full membership of the Board of Trustees.

[180] In 1996 the Board of Trustees established a statement of Investment Objectives, Policies Goals and Guidelines. A Statement of Investment Policies and Procedures was revised in April 2001 and approved by the Board of Trustees on July 30, 2001, which is referred to as the "SIP & P".

[181] Pursuant to the Restated Agreement and Declaration of Trust which created the plan in 1986, and the last relevant Resolution regarding the Investment Committee in 1990, the Investment Committee had its role affirmed. The Investment Committee was established and reaffirmed, setting out the responsibilities and duties of the Investment Committee. This resolution was made pursuant to the powers of the trustees to establish and allocate certain responsibilities and administrative duties, including the right to make decisions on behalf of the trustees to committees or sub committees of the trustee. The trustees resolved that the Investment Committee would have 23 duties and responsibilities which were listed therein. In 1996, and subsequently in 2001, the Board of Trustees approved the Statement of Investment Policies and Procedures (the "SIP&P"). This provision permitted the Investment Committee to make "direct investments", which was defined as "investments approved and entered into by the Investment Committee directly" and not through a third party professional investment manager. Various investments made by the Investment Committee are direct investments and form the basis of various counts in the information. During the offence period, the three named defendants, Bernard Christophe, Gordy K. Cannady and Clifford Evans, were members of both the Investment Committee and the Board of Trustees.

[182] By way of legislative context, the legislative scheme of the *Pension Benefits Act*, permits such delegation. In s. 22(5), the *Pension Benefits Act* provides that an administrator may delegate to an agent "any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund". The Crown takes the position that the administrator, being the Board of Trustees in this case, delegated to the Investment Committee the decisions related to investments and advances of funds of the plan. The Crown relies upon the minutes of the meetings of the Board of Trustees and Investment Committee as indicative of this delegation. The Crown also refers to the statutory responsibilities of the administrator which cannot be assigned, which are set out in s. 22(7) of the *Pension Benefits Act*.

[183] In essence the administrator has a duty to personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed. It is notable that in this case there is no evidence before the court with respect to this function of selection of the members of the Investment Committee. However, this aspect of the responsibility of the administrator does not form the basis of count 2, which simply particularizes the function of failing to carry out proper supervision. The act of selection of the members of the Investment Committee is not an aspect which the Crown relies upon in its prosecution. The court notes that the selection of the members of the Investment Committee took place prior to the offence period, which was prior to the date upon which the Ontario *Pension Benefits Act* governed this pension plan.

[184] Both Crown and defence counsel made submissions regarding the lack of evidence relating to the selection of the members of the Investment Committee by the Board of Trustees. The Crown submitted that the lack of any evidence of properly determining the suitability of the agent, by the administrator Board of Trustees, may in and of itself be evidence of the failure to properly supervise the agent in an overall way. The defence argues that the failure to lead evidence on this point is suggestive of the fact that there was no agency relationship, and this is an argument which the court totally rejects. If the factual record indicates that the relevant functions were delegated and carried out by the members of the Investment Committee, the lack of evidence as to the Board of Trustees previously making a proper determination as to their suitability to make the investment decisions does not suggest there was no such delegation. The court notes that the selection of the

defendants was not particularized in count 2 in the information. The evidence need not have been led, particularly arising from the fact that the selection of the members of the Investment Committee occurred prior to the date of the offence.

[185] In any event, the Crown relies upon the second duty in s. 22(7) which cannot be delegated by the administrator, that duty being to supervise the agent as is prudent and reasonable. This duty is separate and apart from the duty to determine the suitability of the agent. In essence, the Crown argues that the administrator (being the individual members of the Board of Trustees) failed to carry out the requisite supervision of the members of the Investment Committee as was prudent and reasonable. In that respect, the Crown relies upon what it submits are minutes which reflect the degree of reporting, or information to support decision making, which is by and large inadequate, and after the fact. In this case, the court considers this offence with respect to compliance with the quantitative limits requirements set out in the Act and regulations, and the duty of the administrator to supervise the members of the Investment Committee with respect to compliance with those requirements.

(b) Members of Board of Trustees:

[186] In order to consider this issue, the court will review the arguments put forward by the parties. In essence, the defence submissions arise from the interpretation it submits be followed with respect to the relevant sections of the *Pension Benefits Act*. In summary, the defence position is that if the Legislature had intended to expose individual members of the Board of Trustees to potential personal liability for breach of this offence, the respective sections would have explicitly stated that any member of the Board of Trustees could be charged personally. The defence initially argued that this was not explicitly done, and for that reason individual members of the Board of Trustees cannot be found liable for this type of offence. Then the defence submitted that if Crown had charged the individual persons on the Board of Trustees in Count 2 with reference to s. 110 of the *Pension Benefits Act*, rather than by citing s. 109 of the *Pension Benefits Act,* then there could have been potential liability for individual members of the Board of Trustees.

(i) Potential Liability of individual members of the Board of Trustees :

[187] It is clear that the *Pension Benefits Act* has fixed responsibility for various duties upon the administrator, which in this case is the Board of Trustees. The defence has argued that the "Board of Trustees" could and perhaps should have been charged as the defendant, in relation to this offence, arising from the s. 22(7) duty of the Act. The defence has argued initially that statutory interpretation of s. 110(2) of the *Pension Benefits Act* contemplates charging an "unincorporated association" with an offence under this legislation. The defence submits that the wording of s. 110(3), and in particular the phrase "whether or not the corporation or unincorporated association has been prosecuted" would seem to suggest that an unincorporated association could be charged. The Crown responds that it is not clear that a Board of Trustees would be an "unincorporated association", and further that it is not clear that it would be an entity which could be charged for failure to comply with the duties of an administrator under the plan. There is some doubt as to whether pursuant to a provincial offence an unincorporated association could be found guilty of this offence according to the Crown's position, relying upon *Ontario (Ministry of Labour) v. NMC Canada Inc*., *supra*. Whether this entity, being the Board of Trustees, is an unincorporated association, and whether it could have been charged with a similar offence is not the issue before this court. There are no counts before the court in this trial which charge the "Board of Trustees" as the defendant in relation to the offence. The court needs to determine whether the named members of the Board of Trustees could be personally liable for the statutory obligation placed upon the Board of Trustees and secondly whether the Crown has properly charged the named people who comprise the Board of Trustees at the relevant time in light of the wording in count 2.

[188] It is important to note that if the court accepts the initial position put forward by the defence, which would exclude personal liability of members of the Board of Trustees for the acts or omissions of the Board of Trustees, this would mean that in many situations, such as individuals sitting on a Board of Trustees, whether as required by a multi-employer pension plan or otherwise, they would not be bound by this most important duty. It is also clear in reviewing the definition of "administrator" in s. 1, and s. 8 of the *Pension Benefits Act*, that the Act contemplated and set out the structure of an administrator that would be consistent with the structure in this case. There is nothing within s. 22(7) which excuses individuals sitting on the Board of Trustees from the

responsibility of an administrator. The defence initially argued that this section should be interpreted in a way, when one looks at other sub sections of that provision, that the Legislature must have intended that individuals would not bear responsibility for the obligations of the Board of Trustees, such as under s. 22(7). If this defence position is correct, this would mean that the Legislature intended to draft a provision that would not bind the individual members of the administrator Board of Trustees by this most important statutory duty, that being the fiduciary duty which is encompassed in s. 22(1) and 22(7) of the *Pension Benefits Act*. That simply could not have been the case.

[189] Adopting the language of Justice Iacobucci in *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 2 S.C.R. 27 and quoted by Justice Rosenberg in *R. v. Hamilton Health Sciences Corp*., 2000 CanLII 16901 (ON CA), [2000] O.J. No. 3929, if this court interpreted the provisions in s. 22(1) and (7) as initially suggested by the defence, it would lead to "absurd" and "ridiculous" consequences. It would make absolutely no sense if the members of a Board of Trustees could not be charged with breaching their fiduciary duties under s. 22(1) and (7). In making this finding, the court notes that there appears to be no provision for charging a Board of Trustees as a legal entity under this Act. Although the defence has argued that an unincorporated association could be charged with breach of the respective *Pension Benefits Act* requirements, there is no definition for an unincorporated association which relates to the creature of this statute, being the Board of Trustees. It would be even more absurd to read in this interpretation as initially submitted by the defence, when on the clear wording of the definition of administrator, it contemplates a situation of more than one person being the administrator. This definition of administrator could permit the members of a Board of Trustees being charged individually, and together, with the duty to act as the fiduciary for the plan.

[190] If the defence initial position is correct, this would mean that where an administrator of a pension plan is composed of two or more employers under (a), a pension committee under (b) or (c), and a Board of Trustees under (e) they would be exempt from potential prosecution for breach of the duties under s. 22(1) and (7). The logical extension of this initial argument by the defence is that the individual members of each of those groups could not be named and charged separately. This simply would be a ridiculous and absurd consequence which this court cannot accept as a proper interpretation of s. 22(1) and (7) of the Act.

[191] The Crown also makes an additional submission to support its position. If the initial position argued by the defence is correct, this would lead to an illogical and absurd result. A single employer acting as an administrator of the plan, pursuant to s. 22(1) and (7) would be bound to comply with the provisions and could be charged in that legal capacity, for instance as a corporation which is the single employer. In the case of a single employer pension plan, under s. 8(1)(a) of the Act, the single employer has the responsibility to make contributions to the plan to ensure there are sufficient assets to pay the promised benefits. A single employer cannot reduce the benefits of members, pursuant to s. 14(1) of the Act. Accordingly, if there are insufficient funds in place for the single employer to meet its s. 22(1) *Pension Benefits Act* obligations and there are investment losses, the single employer must make up the difference, as plan members do not have their benefits reduced as a result. On the other hand, in the case of a multi-employer pension plan, there is no such protection to the employees. There is clearly a greater need to protect the assets of a multi-employer pension plan, as the employer contributions are generally fixed, and the benefits to plan members can be reduced. If there is a breach of s. 22(1) or (7) of the Act which causes a loss, it is the pension plan members who are most at risk. Yet, for a multi-employer pension plan with a Board of Trustees composed of individual members, those members of the Board of Trustees would not be subject to a prosecution under this section for failure to properly supervise those individuals who made decisions in relation to the quantitative limits requirements, in light of their clear fiduciary duty, even though the plan members are subject to much greater risk than in the case of single employer pension plans. This simply would not make sense from a legislative purpose of protecting potential pension plan members at risk.

[192] In considering whether a Board of Trustees can be charged as a legal entity, resort to the definitions of the *Pension Benefits Act* does not assist. There is no definition of a "person" in this legislation. S. 87 of the *Legislation Act*, S.O. 2006, c. 21 defines "person" as including a corporation, but it makes no other reference of assistance to this interpretation. Given the definition of person in the *Legislation Act*, and the lack of inclusion of an entity such as a Board of Trustees, had the Legislature wanted to make the Board of Trustees a party which could be charged with the offence, particularly where the Act made specific reference to the entity, the court finds that it would have defined the Board of Trustees as a "person" for the purposes of the legislation. This was not done. Accordingly, one cannot find a provision that would permit charging a Board of Trustees as a legal entity. Further, the court notes that the Court of Appeal for Ontario declined to find in a parallel scenario that one can read into the definition of "person" a partnership, where the definition included a corporation but made no reference to a partnership. Following that reasoning, one cannot read into the definition of person a Board of

Trustees or an unincorporated association, whatever that may be. An unincorporated association is not defined and accordingly it is not clear whether it would include a Board of Trustees.

[193] It is clear that pursuant to s. 1 of the Act, more than one person can be the administrator. The administrator for a multi employer pension plan must be composed of more than one person pursuant to the provisions of s. 8(1)(e) of the Act.

[194] In subsequent submissions, the defence has conceded that individual members of the Board of Trustees may be charged personally in that capacity.

[195] Accordingly, the individual members of the Board of Trustees, can be charged personally and potentially found guilty for breach of the s. 22(7) *Pension Benefits Act* duty.

(ii) Liability of named defendants as set out in count 2:

[196] The defence then re-stated its position that there could not be liability as against the named people in count 2 as a result of the wording of the count.

[197] The specific issue under consideration is whether the Crown has properly charged the named people personally as count 2 has been worded. The Crown takes the position that the persons who are members of the Board of Trustees have been properly charged as particularized in count 2, under the general offence provision in the Act, being s. 109 of the Act. S. 109 defines an offence as including the situation of "every person who contravenes this Act", which the Crown argues would include s. 22(7) of the *Pension Benefits Act*. The Crown relies on the provisions of s. 110 as defining the means by which the offence has been committed by the individuals who are named and members of the Board of Trustees. Alternatively, the defence takes the position that the relevant counts should have expressly stated reliance upon s. 110 of the Act as the means by which the offence was committed by the individuals, and that the failure to state this section removes the possibility of the court finding any individuals guilty of an offence as having acted as members of the administrator Board of Trustees.

[198] The specific route for defining the fixing of liability upon individuals who are members acting in that role on the Board of Trustees is set out in s. 110 of the *Pension Benefits Act*.

[199] For ease of reference, the two sections in the *Pension Benefits Act* provide as follows :

"Offence

109. (1) Every person who contravenes this Act or the regulations is guilty of an offence.

idem

(2) Every person who contravenes an order made under this Act is guilty of an offence. R.O.O. 1990 c. P.8, s. 109.

Penalty

110 (1) Every person who is guilty of an offence under this Act is liable on conviction to a fine of not more than $100,000 for the first conviction and not more than $200,000 for each subsequent conviction. 1997, c. 28, s. 220(1).

Persons re corporation

(2) Every director, officer, official or agent of a corporation and every person acting in a similar capacity or performing similar functions in an unincorporated association is guilty of an offence if the person,

(a) causes, authorizes, permits, acquiesces or participates in the commission of an offence referred to in section 109 by the corporation or unincorporated association; or

(b) fails to take all reasonable care in the circumstances to prevent the corporation or unincorporated association from committing an offence referred to in section 109. 1997 c. 28, s. 220(1)

[200] The *Pension Benefits Act* further provides in s. 62 :

> "62. Every person engaged in selecting an investment to be made with the assets of a pension fund shall ensure that the investment is selected in accordance with the criteria set out in this Act and prescribed by the regulations. R.S.O. 1990, c. P.8, s. 62."

[201] As indicated "person" is not defined in the *Pension Benefits Act*. The Crown submits that it would include those people who are members of the Board of Trustees as the administrator of the plan.

[202] The count in the information which is relevant to this consideration states as follows :

> "(2) And further that Bernard Christophe, Gordy K. Cannady, Michael Fraser, Wayne Hanley, Lucy Paglione, Tom Zakrzewski, Clifford Evans, Antonio Filato and Alain Picard, all of 61 International Blvd., Suite 110, Rexdale, ON M9W 6K4 from on or about Feburuary 15, 2002 to on or about December 31, 2003 at the City of Toronto, in the Region of Toronto, in the Province of Ontario, as members of the Board of Trustees of the Canadian Commercial Workers Industry Pension Plan, Registration Number 050431 (the "Plan"), the administrator of the Plan, did commit the offence of failing to carry out such supervision of the Investment Committee of the Board of Trustees of the Plan, an agent employed by the administrator of the Plan under section 22(5) of the Pension Benefits Act, R.S.O. 1990, c. P.8, as is prudent and reasonable contrary to section 22(7) of the Pensions Benefits Act, R.S.O. 1990, c. P.8 and did thereby commit an offence pursuant to section 109 of the Pension Benefits Act regulation 909, and did thereby commit an offence pursuant to section 109 of the Pension Benefits Act."

[203] Accordingly, the count names the parties personally, referencing their role and membership in the Board of Trustees, which is the administrator of the plan.

[204] The relevant offence and penalty sections of the *Pension Benefits Act* clearly contemplate that a member of a Board of Trustees can be found guilty of the offence under consideration. The pension plan is not a corporation. The defence has argued that it is an unincorporated association and by virtue of that status, the Crown should have pled s. 110 of the *Pension Benefits Act* in count 2, in order to make the named defendants potentially liable in their personal capacities for their acts or omissions on the Board of Trustees. The legislation clearly contemplates charging individuals acting in such a capacity or performing such a function, even if an entity which is the unincorporated association has not been prosecuted arising from the same facts or circumstances. That is the situation in the case at bar. The Crown has chosen to prosecute the named people who are members of the Board of Trustees, and chosen not to prosecute the party being "Board of Trustees" with the offences. The wording of the relevant counts specifically notes that capacity as the basis for charging the named people. The defence takes issue with the wording of the counts in that it has not stated the penalty section which also reflects the scenario of charging people acting in a similar capacity or performing similar functions in s. 110. Instead, the Crown cited s. 109 as the offence-creating section in its relevant counts, rather than the penalty section.

[205] The defence has argued, in effect, that the Board of Trustees should have been charged if the Crown proceeded on the offence-creating provision of s. 109, and that if the Crown had sought to proceed against the named parties who were on the Board of Trustees, the Crown should have particularized "s. 110" in count 2. That is the defence argument in a nutshell.

[206] The defence concedes that a sensible and policy–driven interpretation of the *Pension Benefits Act*, where the administrator is an entity, would provide for quasi-criminal liability in accordance with the liability provisions set out in s. 110 of the Act.

[207] It is interesting to look in comparison at the provisions that relate to parties. In the *Provincial Offences Act*, *supra,* sections 77 and 78 provide as follows :

> "77. (1) Every person is a party to an offence who,
> (a) actually commits it;
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
> (c) abets any person in committing it.
>
> <u>Common purpose</u>

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to the offence. R.S.O. 1990, c. P.33, s. 77.

Counselling

78. (1) Where a person counsels or procures another person to be a party to an offence and that other person is afterwards a party to the offence, the person who counselled or procured is a party to the offence, even if the offence was committed in a way different from that which was counselled or procured.

Idem

(2) Every person who counsels or procures another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling or procuring that the person who counselled or procured knew or ought to have known was likely to be committed in consequence of the counselling or procuring. R.S.O. 1990, c. P.33, s. 78."

The statutory regime in the *Criminal Code*, R.S.C. 1985, C. C-34, in particular, the various sections underlying the offences set out the acts or omissions which comprise the elements of each offence. An accused can be charged by reference to the offence-creating section or the penalty provision. In addition, there is a general parties provision, set out in s. which provides :

"21(1) Every one is a party to an offence who
(a) actually commits it;
(b) does or omits to do anything for the purpose of aiding any person to commit it; or
(c) abets any person in committing it.
(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out h e common purpose is a party to that offence. R.S., c C-34, s. 21"

[208] Where the Crown relies upon a theory of liability for a criminal offence arising from a person abetting a person to do an act, the Crown is not required to specifically plead the parties offence in the count in the information which charges the offence. The parties provision setting out the modes of committing the potential offence is in a sense read into the interpretation of the count charging the offence. While this is federal and not provincial legislation, and it sets out criminal offences rather than provincial offences, this comparison is helpful to the analysis of the defence argument under consideration.

[209] The rules of statutory interpretation are also helpful to this analysis. In *Rizzo v. Rizzo Shoes Ltd. (Re)*, *supra*, the Court considered the rules of statutory interpretation. The Court adopted the approach that the words of an Act are "to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." The Court also applied s. 10 of the *Interpretation Act*, R.S.O. 1980, C. 219, which provides that every Act "shall be deemed to be remedial" and shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit". In that respect, the *Pension Benefits Act* constitutes a statutory codification of the common law as it had evolved to the point of setting out the very important nature of the fiduciary duty of an administrator of a pension plan in relation to the interests of the pension plan members. The wording of the s. 22(7) *Pension Benefits Act* provision permits an interpretation that the members of the Board of Trustees could each be responsible for that duty. The interpretation suggested initially by the defence, to the effect that individual members of the Board of Trustees could not be personally liable for their acts or omissions as members of the Board of Trustees, would be totally contrary to the intention of the Legislature to codify this important duty. It also would result in a clear gap where the individual members of a Board of Trustees administering multi-employer pension plans would not be subject to liability for failure to act pursuant to that fiduciary duty. It would mean that individual members of a Board of Trustees could not be prosecuted for offending this statutory provision. When one examines the evolution of the common law and the purpose of the statutory codification of the common law, this could not possibly have been the intention of the Legislature.

[210] There is some doubt in the case law, as provided by counsel, as to whether an unincorporated association, such as a named "Board of Trustees" could be liable for a quasi-criminal offence under this

provincial offence statute. The court considers the case of *Ontario (Ministry of Labour) v. NMC Canada Inc.*, *supra*.

[211] The judgment of the Supreme Court in *Rizzo v. Rizzo Shoes Ltd. (Re), supra,* is subsequent to the earlier line of authority relied upon by the defence, in the Superior Court of Ontario judgment in *R. v. Blair*, which the defence relies upon in their submissions. As held by the Court of Appeal Ontario in *R. v. Hamilton Health Sciences Corp.*, *supra,* which adopted *Rizzo v. Rizzo Shoes Ltd. (Re), supra*, and noted that s. 10 of the *Interpretation Act* applies to penal statutes. These cases are relevant to this court's statutory interpretation of the relevant provisions of the *Pension Benefits Act*.

[212] The Supreme Court in *Monsanto Canada Inc. v. Ontario (Supt of Financial Services),* 2004 SCC 54 (CanLII), [2004] 3 S.C.R. 152, considered this very piece of legislation. The Court held that the *Pension Benefits Act* has as its purpose the establishment of minimum standards and regulatory supervision to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans. Subsequently, as held by Justice Bassel in *R. v. Norton*, 2006 ONCJ 235 (CanLII), [2006] O.J. No. 2631 (C.J.), at para. 44, the *Pension Benefits Act* is a statute which is a public welfare statute "striving to ensure the integrity of pension plans and endeavouring to put in safeguards for employees to reasonably expect that at the end of their work days, the pension plan will deliver what was expected." Obligations are placed upon plan administrators to keep the plan at a point where it will be able to deliver at the relevant future date. In this case at bar, the court finds that the obligations on the administrator of the plan, charged with the duty to supervise the actions or omissions of the three members on the Investment Committee in relation to quantitative limits requirements, retained that duty in order to protect the interests of the plan members.

[213] On a purposive reading of the Act, which is the means of statutory interpretation that should be employed in this situation, the *Pension Benefits Act* is clearly intended to contemplate persons being charged personally. This includes their personal capacities as members of a Board of Trustees. The defence in effect concedes this point, but argues that the Crown should have specifically cited s. 110 in Count 2 as the means by which the individual people could be charged. S. 110 provides that for the individual people to be convicted, the offence is related to the role of the person who "causes, authorizes, permits, acquiesces or participates in the commission of an offence referred to in section 109 by the corporation or unincorporated association", or "fails to take all reasonable care in the circumstances to prevent the corporation or unincorporated association from committing an offence referred to in s. 109". The Crown has not cited s. 110, but has named the individuals and cited their role and membership in the Board of Trustees, the administrator of the plan. In that respect, this defence argument is straightforward. The individual members may be charged under the Act, but has the Crown properly charged them in the wording of count 2 ? Is it necessary to specifically state "s. 110" in count 2?

[214] It is also clear that one of the key codifications of the common law in the *Pension Benefits Act* is the explicit responsibility, as set out in s. 22(1) of the Act, that the administrator is bound by the duty of a fiduciary, as it would relate to the interests of the plan members, in its dealings with the pension plan. Section 22(7) is a related duty of the fiduciary. As stated above, this codification reflected the evolution of the common law in this area.

[215] The court also considers the overall approach of the *Provincial Offences Act* and as well the *Criminal Code* that the law has evolved over time. Technicalities in drafting the wording of counts in an information which do not cause prejudice are less important than in the past. There is no actual prejudice put before the court in relation to this argument.

[216] It is interesting to note that the penalty provisions that would apply, if the Crown charged the Board of Trustees as an unincorporated association, pursuant to s. 110(1) would be the same as the penalty for persons who were charged personally, pursuant to s. 110(3) of the Act. There is no difference in the potential penalty for the two types of defendants in potential charges. There is no penalty provision in s. 109, as s. 110 sets out the penalty provisions for offences under the *Pension Benefits Act.*

[217] The court finds that on the basis of statutory interpretation, the people named in count 2 are members of the Board of Trustees and can be potentially found guilty of an offence for breach of the s. 22(7) duty which applies to the plan administrator, by virtue of any role that named person had in actions set out in s. 110(2) of the *Pension Benefits Act*. It is not necessary for the Crown to also state the actions of omissions of the individuals upon which the Crown relies for count 2. The clear means for finding individuals potentially liable is through s. 110(2) of the Act. If there was any confusion with respect to the means by which the charged people were being prosecuted, a request for particulars could have been made, and thereby generated a response as to the

nature of the actions or omissions which the Crown relies upon in relation to the various named people in the counts. That was not done in this case.

[218] In conclusion, the individual members of the Board of Trustees can be charged with an offence under s. 22(7) of the *Pension Benefits Act*. Count 2 as currently worded permits a finding of guilt as against individuals who are named personally and at the time of the allegations were members of the Board of Trustees, under the general offence provision of s. 109 of the *Pension Benefits Act* and under the penalties provisions in s. 110. It is not necessary to plead in count 2 the wording relying upon "s. 110" of the *Pension Benefits Act* to ground this potential liability.

(c) Duty to supervise regarding quantitative limits:

[219] The next issue is whether in fact the Crown has proven guilt in relation to the duty to supervise the members of the investment committee in relation to the quantitative limits requirement.

[220] It is clear that the Board of Trustees has authority to delegate the authority to make decisions regarding investments, and as held by this court, did in fact delegate that authority to the three named defendants who were the members of the Investment Committee. While the Board of Trustees as the administrator of the pension plan clearly has a fiduciary duty to exercise care, diligence and skill in the administration and investment of the pension fund, the *Pension Benefits Act* clearly permits this function to be delegated. With this delegation however come concurrent obligations and duties. Firstly, s. 22 (7) provides :

> "An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator **shall carry out such supervision of the agent as is prudent and reasonable**."
>
> [emphasis added]

[221] As set out above, the Crown has not charged the defendants who are members of the Board of Trustees in relation to the selection of the three members of the Investment Committee and their suitability to perform the function of selecting investments, and making decisions to loan and invest funds of the pension plan. The selection of the members of the Investment Committee by the members of the Board of Trustees took place long before the commencement of the offence period when the Ontario legislation governed the pension plan. In this case, the Crown has charged the defendants in count 2 in relation to their duty to supervise the members of the Investment Committee in a prudent and reasonable way.

[222] In this case, given the court's findings on the other counts, the court considers this count only as it would relate to the actions of the members of the Investment Committee to comply with the quantitative limits requirement set out by the *Pension Benefits Act* and the relevant regulations. As set out above, the court has found that the members of the Investment Committee failed in their obligation to comply with those respective limits, and has in fact found them guilty in relation to count 9 in the information.

[223] The very fact that the delegated parties were found guilty of count 9 is not at all determinative of liability of the members of the Board of Trustees in relation to count 2 in the information. The issues in count 2 require the court to consider the actions or omissions of the members of the Board of Trustees in terms of overall supervision of the members of the Investment Committee as would have been prudent and reasonable regarding investments and loans touching upon the quantitative limits requirements. There is a related question as well given that three members named in count 2 are in fact the same people who carried out the function of being on the Investment Committee.

[224] The requirement for the supervision to be "prudent and reasonable" clearly imports a factual context for the court's consideration. Presumably, the degree of supervision could potentially vary with the knowledge of the members of the Board of Trustees as it would relate to the skill, education and experience of the persons who were members of the Investment Committee. For instance, to the extent that less experienced persons were delegated that authority, arguably more supervision would be required. In this case, the defence justified the delegation of this function on the basis of the workload of the Board of Trustees. No information was put before the court as to any particular knowledge, education or experience of the members of the Investment Committee. This court finds that at least a basic level of supervision is required, given the high fiduciary duty operating to protect the interests of the pension plan members. All that the court can glean from the evidence in this trial is the period of time over which the respective members served on the Investment Committee and also on the Board of Trustees. While that provides some information for the court to consider, it

would be speculation for the court to find that simply because a person serves on a committee or board for a long time that they were particularly knowledgeable or had special expertise for that function.

[225] The duty to supervise, as would have been prudent and reasonable, as it would relate to the quantitative limits requirements, would presumably be addressed by the provision of information which could be readily assembled for the Board of Trustees. In this case, oversight of advances by members of the Investment Committee is much more straightforward than the degree of oversight that would have related to making prudent decisions in relation to the advances. In other words, the quantitative limits requirements require a tracking of the proposed and actual advances of funds to various persons, both directly and indirectly. In this case, a system that would have reported the loans and investments on a direct and indirect basis, to any one "person", two or more associated persons or two or more affiliated corporations relative to the total book value of the plan's assets would have informed the members of the Board of Trustees of the percentages of advances going or about to go forward, and potential compliance or lack of compliance with the 10% quantitative limits requirement. In this case, such data could have been easily put in a financial statement in the form of a proposal or report of the members of the Investment Committee to the Board of Trustees. Likewise, the Board of Trustee members could have questioned the Investment Committee regarding the quantitative limits requirement. Steps should have been taken to comply with the duty to supervise as was prudent and reasonable regarding the quantitative limits requirement. Steps were not taken by the members of the Board of Trustees to comply with this duty to supervise, regarding ongoing compliance or lack thereof with respect to the quantitative limits requirement.

[226] Clearly this is not a status offence. Individual members of the Board of Trustees cannot be found guilty of this quasi-criminal offence simply because they were members of a collective, in this case the Board of Trustees as the administrator, which contravened its duty under s. 22(7) of the Act. It is important for the court to consider the aspects of s. 110(2)(a) and (b) as they would relate to this offence. For ease of reference, the provisions state :

> " 110
>
> (2) Every director, officer, official or agent of a corporation and every person acting in a similar capacity or performing similar functions in an unincorporated association is guilty of an offence if the person,
>
> (a) causes, authorizes, permits, acquiesces or participates in the commission of an offence referred to in section 109 by the corporation or unincorporated association; or
>
> (b) fails to take all reasonable care in the circumstances to prevent the corporation or unincorporated association from committing an offence referred to in section 109. 1997, c. 28, s. 220(1).

[227] In this case, the court finds that s. 110(2)(b) is more relevant to the situation of failure to properly supervise the actions of the members of the Investment Committee.

[228] Relative to the particular quantitative limits requirements which were the subject of count 9 in the information, proper records and presentation of information could have been easily prepared to show direct advances to each of the Propcos for the respective Caribbean properties, indirect advances to PRK from those Propcos, balances of holdings in the Propcos and in PRK, and the final indirect advances to the actual Caribbean properties. A percentage calculation relative to the net book value would have readily alerted the members of the Board of Trustees to the problem, had this information ever been sought or put before the Board of Trustees.

[229] In this case, it is clear from an examination of the minutes of the relevant Investment Committee minutes, the Board of Trustee minutes, the financial statements, and other documents before this court, that there was no such recording of information or presentation of calculations given to the members of the Board of Trustees. This court has carefully looked for such evidence. It is interesting to note that over the offence period, the minutes show that over a period slightly less than the offence period, almost half of the monies advanced by the whole pension plan went to PRK. The court finds that this should have at least raised some concern for the administrator, and the members of the Board of Trustees, in terms of the quantitative limits requirement. It is also notable that to the extent the minutes recorded the nature of any issues discussed or considered in the meetings, there was no notation of the quantitative limits requirement and the impact of particular advances in that regard. It appears as well that there is no record of calculations or information regarding compliance with the quantitative limits requirement, at the Investment Committee level, nor at the level of the Board of Trustees.

There is no record or evidence of any relevant enquiries by members of the Board of Trustees, nor of any relevant information regarding this requirement.

[230] While the defence has argued that the auditors were retained and would have had an overall obligation to advise the Board of Trustees and other representatives potentially of a problem in terms of compliance with the provisions of the *Pension Benefits Act,* there was no reference whatsoever to a request to the auditor for this type of information, nor any term in the retainer for the auditors requesting this type of information or a report in the event of non-compliance. It also appears that there is no reference one way or the other from the auditors in the financial statements regarding the quantitative requirements arising from the *Pension Benefits Act* and the regulations. The record, and it is all that speaks in this case as there was no *viva voce* evidence in this trial, is entirely silent in this regard. The uncontradicted evidence in this trial, therefore, is that there is no evidence that the members of the Board of Trustees, named as the defendants in count 2, did anything to ensure that the persons on the Investment Committee were complying with the quantitative limits requirements. The record would suggest that nothing was done and as a result, the only inference that can be drawn from the record, in the face of the clear duty of the members of the Board of Trustees to prudently and reasonably supervise the Investment Committee members in this regard, is that they totally failed in the duty to supervise with respect to the quantitative limits.

[231] The court notes that this is a fairly important duty. The onus on the members of the Board of Trustees is that of a fiduciary, and it is clear, as set out above, that the quantitative limits requirements had as their purpose the overall diversification of the pension plan, to reduce the risk of investment. The defendants totally failed in this respect to oversee this aspect in supervising the plan's investments.

[232] There is no defence relied upon by counsel representing the defendants nor is there any evidence of a defence to this offence.

(d) Conclusion:

[233] Given the evidentiary record before this court, and on the uncontradicted evidence on this point, the court finds that the members of the Board of Trustees failed in their duty to supervise the members of the Investment Committee as was prudent and reasonable, as it related to the quantitative limits requirements of the *Pension Benefits Act* and regulations. As set out above, there is no defence. The Crown has proven this offence beyond a reasonable doubt.

[234] Accordingly, the court finds the members of the Board of Trustees, being Bernard Christophe, Gordy K. Cannady, Michael Fraser, Wayne Hanley, Lucy Paglione, Tom Zakrzewski, Clifford Evans, Antonio Filato and Alain Picard, guilty on count 2.

[235] There is however an important issue which remains in terms of the three defendants who were members of the Board of Trustees and also were the members of the Investment Committee with the delegated function for making investments, including compliance with the quantitative limits requirement. The particular defendants to whom this issue relates are Bernard Christophe, Gordy K. Cannady and Clifford Evans. Given that the court has found those three defendants guilty of count 9, and given the similarity of the steps and elements that would be required to both ensure compliance with the quantitative limits requirement and to supervise to ensure compliance with the quantitative limits requirement, in the circumstances of this case, based upon the principle in *R. v. Kienapple (1975),* 1974 CanLII 14 (SCC), 15 C.C.C. (2d) 524 (S.C.C.), the court enters a stay as against those three defendants in count 2.

CONCLUSIONS

[236] As set out above, the court finds that the Crown has failed to lead sufficient evidence to prove guilt as against the named members of the Board of Trustees and the Investment Committee in relation to the offences of failure to exercise the care, diligence and skill of a person of ordinary prudence in dealing with the pension plan assets, contrary to s. 22(1) of the *Pension Benefits Act*, arising from the failure to call expert evidence addressing the relevant issues in this trial. Accordingly, the court enters a finding of not guilty in relation to counts 3, 4, 6, 7, 10, 11, 13 and 14 in the information.

[237] In relation to count 9, the Crown has proven guilt beyond a reasonable doubt as against the named members of the Investment Committee, being the defendants Bernard Christophe, Gordy K. Cannady and Clifford Evans, of the offence of failure to comply with the quantitative limits requirements as set out in the Act and regulations.

[238] The court enters a finding of not guilty as against the members of the Board of Trustees, in count 1, in light of the court's finding that the function had been delegated to the Investment Committee and in light of the

findings in relation to count 9.

[239] In relation to count 2, the named members of the Board of Trustees, being the defendants Bernard Christophe, Gordy K. Cannady, Michael Fraser, Wayne Hanley, Lucy Paglione, Tom Zakrzewski, Clifford Evans, Antonio Filato and Alain Picard, are found guilty of the offence of failure to supervise the Investment Committee as was prudent and reasonable, as it related to the quantitative limits requirement, contrary to section 22(7) of the *Pension Benefits Act*. In light of the finding of guilt made by the court as against the three members of the Investment Committee in relation to the actual function, in count 9, the court enters a stay of proceedings as against Bernard Christophe, Gordy K. Cannady and Clifford Evans in count 2 in the information.

Released: December 7, 2009

Signed: Justice Beverly A. Brown