

# LEGAL ALERT

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Current Legal Developments Critical to Corporate Management

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*It is not wisdom but Authority that makes a law.*

~ Thomas Hobbes  
(1588 – 1679)

## INTERNATIONAL TRADE

### NAFTA: “Re-set” or “Up-set”?

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**Canada can no longer take its access to the U.S. market for granted.**

During the 2016 U.S. election campaign, (now) President Trump often targeted NAFTA as “the worst deal ever” and promised to either renegotiate it or tear it up. He blamed it for taking jobs from U.S. workers and generally working to the disadvantage of U.S. economic interests.

President Trump vowed to take an “America First” approach to international trade negotiations moving forward. The first meeting of the U.S.,

Canadian and Mexican negotiators took place mid-August 2017 and clearly establishes that we have entered a “roller-coaster” of tough negotiations.

The problem is that the Trump Administration’s attacks on current free trade deals are driven by its supporters’ concerns that such deals are costing American jobs. However, in reality, free trade is about open access and free competition; a “balance” focus moves the needle toward “managed” — rather than free — trade.

#### Canadian impact

What does this approach by the Trump administration mean for Canadian businesses and those that advise them? At risk is access to our largest market.

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## PENSIONS AND BENEFITS

### Monitoring employer-sponsored capital accumulation savings plans

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**SIPPs for DCPPs filed with the Ontario pension regulator in 2016 indicate at least annual monitoring of investment performance.**

The Ontario pension regulator recently released information about

statements of investment policies and procedures that will be of interest to employers who are responsible for the administration of employee group capital accumulation plans.

Such plans include group registered retirement savings plans (“Group RRSPs”), defined contribution registered pension plans (“DCPPs”), tax-free savings accounts (“TFsas”) and non-registered savings plans.

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is to work for the best outcome but plan for the worst. For any firm, when it looks like a key commercial partner, customer/client or supplier wants to re-write the deal, it's time to take the perhaps painful but necessary step of considering new arrangements with new partners so as to lessen dependency, mitigate damages and create much-needed leverage.

In the long term, we need to look for ways to lessen our dependence upon what may become an increasingly aggressive and unpredictable trade partner.

In September 2017, Canada and the European Union will implement most of the *Comprehensive Economic and Trade Agreement* ("CETA") that took seven years to negotiate. And, discussions are ongoing about possibly forging ahead with an eleven-member TPP *sans* the United States.

Canada and China ratified a *Foreign Investment Protection Agreement* in 2013, and Canada has begun exploring free trade with China, Japan, India and other G20 countries.

Canada's trade objective of growing its global market first and foremost has the added benefit of decreasing our country's dependence on the U.S. market. Corporate Canada would be well advised to follow suit.

### Outcome

Many are predicting lengthy multi-year negotiations in spite of the fact that the U.S. negotiators want things wrapped up before the end of the year. We will be in a better position to gauge how things will go this fall, after the first couple of rounds of negotiations.

For those looking for a "do no harm" outcome, perhaps the best signal so far would be an early move by the three countries' negotiators to

address the "low hanging fruit" and steps such as:

- (1) the modernization of NAFTA;
- (2) improved transparency;
- (3) streamlined border services; and
- (4) addressing free digital trade and data flow.

REFERENCES: U.S.T.R. summary published July 17, 2017, online: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-releases-nafta-negotiating>; <https://www.fraserinstitute.org/sites/default/files/the-importance-of-international-trade-to-the-canadian-economy-an-overview-post.pdf>; Canadian firms may contact officials at Global Affairs Canada, online: NAFTA Consultations | Consultations ALÉNA-NAFTA-Consultations-ALENA@international.gc.ca or the North America Policy & Relations Division to learn more about participating in the process.

## Pensions and Benefits *continued from page 41*

### Service providers

Employers may believe that if they have established such plans with a respected and large service provider — such as Sun Life, Manulife or Great West Life — they have little or no responsibility for monitoring the investments. Service providers provide plan members with impressive tools and information about plan investments, and members have broad discretion to select, change and closely monitor their investments.

### Monitoring investments

Employers who believe that they are not at risk are probably wrong. They do have a legal obligation to prudently monitor the investments, due to pension benefits legislation, regulatory and industry guidelines and common law.

There are a few, limited exceptions to this legal obligation; for example, where the employer is a participating employer in a multi-employer DCP.

### Legal obligations

The legal sources of employers' obligations to prudently monitor investments in such plans include:

- pension benefits legislation which requires administrators of DCPs to act prudently in all respects;
- Investment Guidance Notes issued by the Ontario pension regulator; and
- guidelines issued by the Canadian Association of Pension Supervisory Authorities ("CAPSA") and the Joint Forum of Financial Market Regulators.

### Common law

Group RRSPs, TFSA's and non-registered savings plans are not regulated under pension legislation. Nevertheless, they will be subject to employer obligations under common law to act reasonably in the provision of employee benefits.

Employers are at risk of being held liable to the standard of a fiduciary with respect to the provision of Group RRSPs, TFSA's and non-registered savings plans, in the context of claims by their employees that they failed to act prudently in monitoring investments in those plans.

Prudent employers will establish and comply with some sort of process to monitor their employee group capital accumulation plans.

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## SIPPs

An important part of a prudent investment monitoring process is the adoption of a statement of investment policies and procedures ("SIPP"). Regulatory guidelines applicable to DCPPs state that SIPPs should include a description of *the processes and criteria for monitoring and terminating investment managers and investment funds*.

A SIPP should answer the following questions: how often will the employer consider reports from its service providers or consultants as to how the investments are performing? What are the benchmarks for measuring performance? How long will underperformance of managers be tolerated before funds are removed from the plan?

Employers should review those issues regularly, in accordance with their SIPPs, and keep records of doing so. Failure to do so puts them at risk of being held liable for damages; individuals may claim that their investment losses could have been avoided if their employer had properly monitored their investments.

## Employer reviews

Is there a consistent approach of employers regarding how frequently investments in these plans should be reviewed? We now have an Ontario

answer to that question, with respect to DCPPs.

The Ontario pension regulator published a report at the end of July 2017 that summarizes information about more than 3,000 SIPPs for DCPPs that were filed with the regulator in 2016.

The following notable findings are included in the report:

- The vast majority of SIPPs for DCPPs indicated that investment performance will be monitored "on at least an annual basis." Only 10 percent of such SIPPs stated that investments would be monitored quarterly or at more frequent intervals;
- On average, the SIPPs of larger DCPPs allow an offering of 13 investment options. The SIPPs of small DCPPs allow a much higher number of investment options, with an average of 34 options;
- Almost 40 percent of DCPPs have a life cycle (or target date) fund as the default (where plan members do not make a selection regarding their investment funds); and
- Most administrators of DCPPs do not incorporate environmental, social and governance factors into their SIPPs.

## Significance

There is much comfort in knowing what most employers do in their SIPPs. We now can say with confidence that *annual* investment monitoring appears to be the norm among Ontario employers who administer DCPPs.

That information is helpful for employers who have established all types of employee group capital accumulation plans, and strive to be prudent with their investment monitoring procedures.

REFERENCES: *Pension Benefits Act*, R.S.O. 1990, c. P.8, section 22. Investment Guidance Notes (IGN-003) effective January 1, 2016, published by the Financial Services Commission of Ontario in October 2015; Guidelines published by the Canadian Association of Pension Supervisory Authorities and the Joint Forum of Financial Market Regulators, online: <https://www.capsa-acor.org/en/pubs/>; 2017 Report of the Financial Services Commission of Ontario entitled, "Ontario Pension Plan Filings of Statement of Investment Policies and Procedures Information Summaries."

## INTERNATIONAL TAXATION

# Canada signs on to BEPS Multilateral Convention

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**Canada is a signatory to the BEPS Multilateral Convention that would superimpose anti-BEPS measures on its signatories' bilateral income tax treaties.**

On November 24, 2016, the OECD announced that over 100 countries (including Canada) had come to an agreement on a "Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion and Profit Shifting" ("MC").

## MC defined

The MC is a technique by which all agreeing countries could superimpose anti-BEPS measures on their

(collectively over 3,000) bilateral income tax treaties by way of a single signature to a document that would bind all the signatories, as long as they make matching choices and avoid the necessity of bilaterally renegotiating thousands of treaties.

This measure has successfully carried out Action 15 of the G20/OECD (anti) base erosion and profit shifting (BEPS) initiative that commenced in February 2013 and, in the

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