



OBA 2009 INSTITUTE

Pension Law: So You Think You Know Pensions

February 3, 2009

The Pension Plan Administrator: the importance of
consciousness raising

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Agenda

- Who's who in running a pension plan?
- Who is liable for mistakes?
- The conflict of “two hats”
- Service providers attempt to limit their liability: agents and actuaries
- Current issues in service-provider contracts & a Quebec solution
- Governance best practices
- The CAPSA Pension Governance Guidelines
- The CAP Guidelines
- The role of insurance
- MEPP current issues

Who's who in running a pension plan?

- Plan Sponsor
- Administrator
- Board of Directors
- Board of Trustees
- Pension Committee



Who's who in running a pension plan?

- Advisory Committee
- Trustee/Custodian
- Actuary
- Auditor
- Legal Counsel
- Investment Manager/Asset Consultant
- Service Provider



● ● ● | And what about the pension
Czar?



The “Administrator” – what’s all the fuss about anyway??

- Every plan has an “administrator” - defined by pension standards legislation in each jurisdiction. Refer to Schedule B of paper
- In Ontario, an RPP is administered by: employer; pension committee; insurance company; board of trustees; corporation, board, agency or commission responsible for administering a pension plan under a legislative Act; or any person appointed by the Superintendent of Financial Services. Similar in other jurisdictions.
- Quebec mandates pension committees.
- Two hats issue: distinguish between acting as “administrator” or on behalf of “employer”.
- What’s the fuss? Fiduciary liability!





More importantly, who has the ultimate legal liability when things go wrong?





So who's liable for errors?



Ontario Pension Benefits Act – prosecution:

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



So who's liable for errors?



Ontario Pension Benefits Act – order by regulator:

s. 87 (1) The Superintendent, in the circumstances mentioned in subsection (2) and subject to section 89 (hearing and appeal), by a written order may require an administrator or any other person to take or to refrain from taking any action in respect of a pension plan or a pension fund.

s. 87 (2) The Superintendent may make an order under this section if the Superintendent is of the opinion, upon reasonable and probable grounds,

(a) that the pension plan or pension fund is not being administered in accordance with this Act, the regulations or the pension plan;

(b) that the pension plan does not comply with this Act and the regulations; or

(c) that the administrator of the pension plan, the employer or the other person is contravening a requirement of this Act or the regulations.



The conflict of “two hats”

Where the employer is the administrator of the pension plan, it is often said that the employer wears “two hats”:

- one hat as the administrator of the pension plan, obliged to act in the best interests of the members of the plan, and
- another hat as the corporation, obliged to act in the best interests of the corporation and its shareholders.





The conflict of “two hats”

Two recent court cases illustrate the “two hats” dilemma:

Slater Steel
Jeffrey Mines





Why do pension consultants ask plan sponsors to confirm that they are not “agents”?



Role of the Actuary

- The Actuary's basic task - to assist employers/unions/trustees in design, funding and administration of DB pension plans and other employee benefit plans.
- There are issues with the role the actuary plays (highlighted in Slater Steel).
- Are actuaries agents?
 - Actuaries generally take the position that they are not agents.
 - PBA isn't clear, but does give actuaries specific functions while not specifying that they are agents.
 - Case law is interpreting "agent" broadly - we are likely to see this issue addressed eventually.
 - It may depend on the function the actuary is performing at the time.





Role of the Actuary

- Extracted from the Ontario Expert Commission's recommendations:
 - 8-13 - The pension regulator and/or the proposed Pension Champion should initiate consultations with stakeholders and with representatives of the relevant professional governing bodies in order to clarify:
 - which participants in the governance of pension plans are bound by fiduciary duties;
 - the scope of such duties;
 - whether such duties can be assigned to professional advisors and agents
 - Whether advisors and agents are themselves bound by the same duties; and
 - Whether fiduciaries, their advisors and agents can enter into exculpatory contracts and indemnification agreements in order to limit their liability to the client or third persons.



Role of the Actuary



- Extracted from the Ontario Expert Commission's recommendations:
 - 8-14 – Following such consultations, the pension regulator should draw up codes of best practice for the guidance of all participants in the governance process. The regulator should urge the governing bodies of professions whose members are involved in the pension field to [adapt & implement the code, educate &, if necessary, discipline...]
 - 8-15 - All persons responsible for providing valuations, reports or other documents that are filed with the regulator, or provided to active and retired plan members, should be required to certify that all such documents have been prepared in accordance with the law and with relevant professional standards.

- ● ● | Current issues in negotiating contracts with service providers

- standard of care

- limit on liability

- release upon delivery of statements

- records retention



New & exciting limitation in Quebec pension legislation:

- Delegates, representatives and service providers may not exclude or limit their liability. Any clause to that effect is null.
- Any clause to that effect in a contract terminated or in effect on 13 December 2006 is null if it is abusive.



New & exciting limitation in Quebec pension legislation:

- The abusive nature of such a clause is assessed, with the necessary modifications, with reference to the articles of the Civil Code on consumer contracts and contracts of adhesion.
- The Quebec Civil Code says that a contract is abusive if it is “excessively and unreasonably detrimental to consumer or adhering and is therefore not in good faith”.



Governance Best Practices – 15 years ago we had no guidance...

Documents to consider when researching pension governance practices

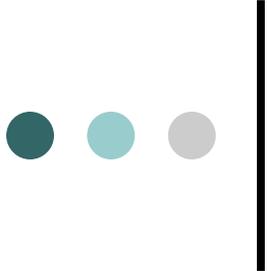


<i>Document</i>	<i>Date Published</i>
OSFI Guidelines for Governance of Federally Regulated Pension Plans (“OSFI Guidelines”)	May 1998
ACPM/PIAC/ OSFI Joint Recommendation on Pension Plan Governance and Self-Assessment	December 1999
Institutional Investment in the UK: A Review (the Myners Report)	Published 2001, reviewed 2007
CAPSA Pension Plan Governance Guidelines and Self-Assessment Questionnaire (“CAPSA Governance Guidelines”)	October 2004
CICA 20 Questions Directors Should Ask About Pension Governance plus supplemental documents	Published in 2003, 2005 & 2006
OECD Guidelines for Pension Fund Governance	Published 2005, revised and published for comment August 2008
The Regie series “Administering a Pension Plan Well”	Publication commencing in 2004
CFA Code of Conduct for Members of a Pension Scheme Governing Body	May 2008

CAPSA Governance Guidelines

- Eleven principles – what documentation is necessary/useful?
 1. Understand fiduciary and other responsibilities owed
 - Table of stakeholders and responsibilities owed
 2. Establish governance objectives
 - Governance objective
 3. Document roles and responsibilities
 - Governance job descriptions
 4. Establish and monitor performance
 - Performance measures for decision makers
 5. Apply the knowledge and skills needed
 - Governance job descriptions





CAPSA Governance Guidelines

- Eleven principles – documentation?
 6. Have access to relevant, timely and accurate information
 - Governance job descriptions
 7. Establish internal control framework to manage risks
 - Potential areas of risk and management process
 8. Establish mechanisms to oversee and ensure compliance with legislation etc
 - Tasks timetable
 9. Communicate the governance process to plan members
 - Communication policy
 10. Establish a code of conduct/conflict of interest policy
 - Code of conduct/conflict of interest policy
 11. Regularly review its plan governance
 - Governance procedures policy

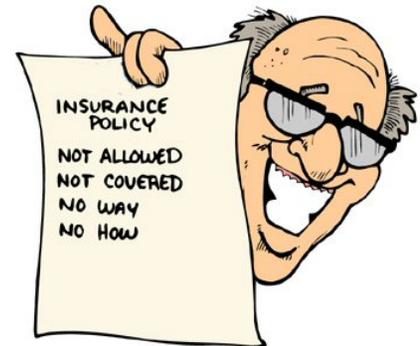


CAP Guidelines – a better take up rate than the Governance Guidelines!

- Designed to clarify rights and responsibilities of plan sponsors, service providers and plan members. Best practices, not legislative requirements.
- To comply with Guidelines, plan administrator should consider developing at least the following documents:
 - member responsibility notice
 - document retention policy
 - policy on selection and supervision of service providers
 - policy on selection and retention of investment options
 - communications policy

Protection for the Administrator and its delegates? Get some insurance

- Ensure adequate controls in place and monitored i.e., good governance
- But this isn't enough - get some insurance!
- Consider the following questions:
 - Cap on coverage? Does it apply to all fiduciary/benefit plan claims against all companies worldwide? If global policy exists, can you provide an estimate as to the total pension/benefit assets of all plans falling under this coverage?
 - Have any claims ever been made under this policy?
 - Is there any limit on the type of loss/claim covered? For example, would it apply to penalties under the prosecution provisions of provincial pension legislation (sometimes referred to as “quasi-criminal”, or “provincial offence” claims) that are prosecuted in provincial court by the Ministry of the Attorney General, rather than in civil court?





Get some insurance!

- Any distinction between the coverage of a penalty or judgement versus the cost of defending? Does the insurance cover the full costs of defending? Will defence costs be paid by insurance provider or will the individuals who are covered be required to pay up front and wait for reimbursement?
- Will reimbursement be dependent on a successful defence?
- Is there any deductible? If so, how much and who pays?
- Does coverage apply to the individuals after they cease to be employed, or serve as an officer or director?
- Is there a limit on the type of benefit plan covered, i.e. does it apply to Group RRSPs, as well as non-registered plans and pension plans?
- Can you give annual confirmation that the insurance is in place, and immediate notification if any significant changes are made?

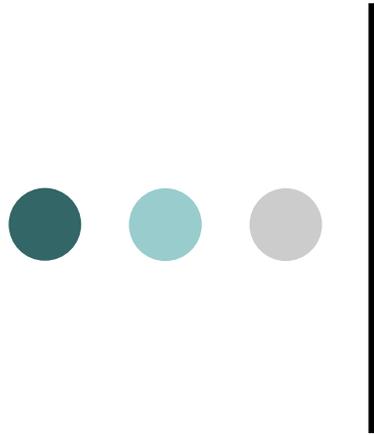




current issues regarding MEPPs

- Participating Co-ops litigation
- Canadian Commercial Workers Industry Pension Plan (“CCWIP”) litigation
- Neville v. Wynne





Questions?