

The evolution of governance

Plan sponsors have paid more attention to good pension governance in recent years—and with good reason. We’ve witnessed a greater focus on corporate governance, the growth of class actions as a pension litigation vehicle, and the increasing attention paid to governance issues by some regulatory and non-regulatory pension bodies.

The difficulty many Canadian administrators face today is the lack of knowledge about what exactly is required of them in terms of pension governance. This problem has arisen largely because the legal framework is not clear and there has been a recent flurry of activity related to pension governance by several bodies, such as the Canadian Association of Pension Supervisory Authorities (CAPSA), attempting to fill this void. Now that the framework for pension governance has evolved, there is potential for change.

With the numerous pension governance guidelines that exist in Canada, it’s often difficult for plan administrators to decipher their duties. But sponsor adherence to CAPSA’s guidelines along with a more holistic approach on the part of regulators could effectively map out the process.

By Jana Steele

LEGAL FRAMEWORK

The concept of pension governance is generally understood: it is the need to have in place processes to ensure both the compliance with laws, and the effective administration and investment of the pension plan and fund. The potential benefits to all stakeholders of sound pension governance are also generally recognized. Good pension governance processes may help to reduce potential legal risks, maximize performance of the pension fund, utilize human resources most efficiently, ensure the delivery on

the pension promise and achieve employee satisfaction.

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fiduciary. However, there are likely other participants in the pension governance process who may also be fiduciaries and therefore subject to certain duties. Depending on the relationship, these persons may include service

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imposed upon the administrator and the other participants involved in the administration of the pension plan. While not the only component, compliance with any applicable laws is fundamental to good governance. As pension legislation varies across the country, it is important to be aware of the obligations and duties set out under the laws of the jurisdiction of registration of the plan and the applicable legislation in any other province where plan members reside.

Under the relevant pension legislation, the administrator—usually an employer—is generally responsible for the administration of the pension plan and fund in accordance with the plan terms and applicable laws. Where the employer is a corporation, the ultimate responsibility for the administration of the pension plan lies with the board of directors of the corporation.

Under the applicable pension legislation, the administrator may be permitted to delegate certain functions where it is reasonable and prudent to do so. Where an administrator chooses to delegate, they must comply with any requirements set out in the applicable pension legislation. For example, in Ontario, an administrator must select the agent personally, be satisfied that the agent is qualified to perform the tasks delegated and supervise the agent in a reasonable manner. However, legally it cannot delegate its decision-making functions.

The administrator is generally a fiduciary under applicable pension benefits legislation and under trust law. To determine this, the relationship between the parties is examined. In general, there are certain characteristics that may indicate that a relationship is fiduciary in nature. Firstly, one person is vested with discretion or power. Secondly, that power can be exerted so that the interests of another person are affected. Finally, that other person is particularly vulnerable to the exercise of the power or discretion by the fiduciary.

If the test for whether a person is a fiduciary under trust law is applied in the pension context, it would appear that there are various persons who may be fiduciaries at law vis-à-vis plan members and beneficiaries. For example, it is clear that the administrator is generally a

providers, members of a pension committee and actuaries.

The applicable provincial or federal pension benefits standards legislation generally sets out certain duties of the administrator and, in some cases, the standard of care required. In addition, as a fiduciary at law, the administrator and any other participants in the governance process who are fiduciaries have certain duties imposed on them, including:

- duty of loyalty;
- duty to act honestly and prudently;
- duty not to delegate decision-making power;
- duty not to let personal interests conflict with fiduciary duties; and
- duty to maintain an even hand with competing interests.

The administrator has several defined functions set out under the applicable laws. These may include applying for registration of the plan and any amendments, filing annual information returns and other reports, providing annual written statements to members, ensuring that contributions are paid when due and notifying the regulator of any default, making documents available to certain interested parties for inspection, and providing written explanations of plan provisions, rights, and obligations to eligible members.

In addition to any requirements set out in the applicable pension legislation, over the past several years there have been several significant cases in the pension law area that also shape the legal requirements related to pension administration. These court cases provide some guidance as to what is expected in terms of governance from a legal compliance perspective.

For example, in the area of employee communication, there have been several cases that have considered what is expected when communications are made to plan members. Specifically, jurisprudence has established that employee communications must be accurate, clear and understandable.

COMPLY WITH CAPSA

Unfortunately, without legislation that deals specifically with pension governance, pension administrators may be confused about what is required of them. And the answer

to this question is by no means clear, despite the fact that there has been significant attention paid to governance issues. This has spilled over into the pensions world where boards of directors are becoming increasingly aware of the potential liabilities related to poor pension governance and are seeking answers as to what is required in order to minimize legal risk.

To ease the confusion, the federal pensions regulator, Office of the Superintendent of Financial Institutions (OSFI), previously released certain principles of governance for federally registered plans. Non-regulatory bodies such as the Association of Canadian Pension Fund Management (ACPM) and the Pension Investment Association of Canada (PIAC) also had input on governance issues and released jointly with OSFI a governance self-assessment tool for the administration of pension plans.

Most recently, CAPSA introduced its governance guidelines and voluntary self-assessment questionnaire, which built upon the governance work previously done by OSFI, ACPM and PIAC. While the CAPSA governance guidelines do not have the force of law, administrators should pay careful attention to them and make every effort to comply, as they were developed over time with extensive industry input and have been frequently cited as being a “best practices” model. OSFI has indicated that it expects administrators of federally registered pension plans to follow the CAPSA guidelines.

Also, without any laws that specifically provide the precise requirements of good pension governance, these guidelines fill this void. In the event that a governance issue were to come before a court, there is a very strong probability that these guidelines would be referenced as the industry standard that is expected. Although meeting the standard set out in the guidelines will not necessarily provide a “safe harbour,” it is likely that failure to meet the standard could result in liability to the administrator.

MAKING CHANGES

The CAPSA governance guidelines set out detailed and extensive governance requirements. As a result, smaller employers may have difficulty bringing their pension administration into compliance. In addition, the fact that these guidelines are currently not law and the self-assessment questionnaire is voluntary may lead some employers to simply choose not to comply. As well, the mere fact that an administrator does comply with the CAPSA governance guidelines does not guarantee there will be no legal risk associated with the pension administration.

Why then should administrators voluntarily strive to meet the standards set out in the CAPSA guidelines? Because a lack of compliance with them will likely result in legal liability if a pension governance issue comes before a court. Furthermore, if attention is not paid on a voluntary basis to pension governance, regulators may become more involved in legislating this area. Detailed regulation with respect to pension governance is not a productive solution.

In addition, it would be useful if the various provincial regulators each specifically adopted the CAPSA governance guidelines and the CAPSA self-assessment questionnaire to apply to plans registered in their jurisdiction (or agreed upon another set of acceptable governance standards). If all the provincial regulators adopt a standard set of guidelines, this will avoid a proliferation of different governance standards and confusion for administrators of pension plans with members across the country. It would give administrators much needed direction in meeting regulators’ pension governance expectations. **BC**

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