

PENSIONS AND EMPLOYEE COMPENSATION BULLETIN

March 2004

GRAPPLING WITH GOVERNANCE: THE CAPSA PENSION PLAN GOVERNANCE GUIDELINES

Today it seems wherever you turn you find governance as a topical issue. A few short years ago, governance was a subject confined to the discussions of academics and theorists. Today, the headlines are crowded with stories based on governance, or more correctly, the failure of governance systems. The Enron spectacle and the avalanche of corporate scandals that followed have guaranteed that governance is not merely a “flavour of the month” fascination, destined to become a footnote in the history books.

Governance is a reality for all Canadian pension plans that must be comprehensively addressed. CAPSA, the Canadian Association of Pension Supervisory Authorities, is in the process of road testing new guidelines which will ultimately affect the governance of pension plans. The guidelines were unveiled last summer along with a self-assessment questionnaire designed to assess a plan’s compliance with the guidelines. Since then, CAPSA has invited pension plan administrators to review the guidelines, complete the questionnaire and provide feedback. Once CAPSA receives and reviews the feedback from administrators, it will finalize the guidelines. It is anticipated that the guidelines will be finalized by Fall 2004. The guidelines and questionnaire are available at www.capsa-acor.org.

The publication of the guidelines and questionnaire was the culmination of a lengthy process that began with industry consultations in 2001. Since July 2002, CAPSA has collaborated with an Industry Task Force in order to develop the draft guidelines and questionnaire. The guidelines build on the governance-related efforts of labour organizations, industry associations such as the Association of Canadian Pension Management (ACPM) and the Pension Investment Association of Canada (PIAC) and regulators such as the Office of the Superintendent of Financial Institutions (OSFI).

Eleven principles, covering diverse areas of governance, form the foundation for the guidelines. The guidelines address the plan administrator’s fiduciary duties set out under pension standards legislation and the common law, and outline the appropriate roles and responsibilities of the plan administrator. In particular, the principles of the draft guidelines confirm that the administrator should be responsible for, among other things, the following:

- establishing performance measures and monitoring the performance of anyone with decision-making authority in the governance process and evaluating actual performance against the established criteria;
- describing and documenting the roles, responsibilities, and accountability of all participants in the governance process;
- establishing a framework of internal controls for risk management of the pension plan;
- establishing appropriate procedures to oversee and ensure compliance with legislative requirements and plan documents;
- applying the skills and knowledge needed to meet governance responsibilities and providing for appropriate training as required;
- ensuring transparency by providing appropriate, timely and accurate information regarding the governance process to members and related parties;
- establishing a code of conduct and a policy to address conflicts of interest.

It is important to note the guidelines are not rigid “one size fits all” rules. Instead, the guidelines provide a broad, flexible outline of key pension plan governance principles. CAPSA recognizes that different types and sizes of plans may require different governance practices. At the same time, however, CAPSA urges all plan administrators to adopt a governance structure that is consistent with the guidelines’ principles.

The self-assessment questionnaire companion piece to the guidelines aims to assist plan administrators in determining the extent to which their plans follow effective governance principles. In particular, plan administrators are asked whether they have implemented or established policies, objectives, measures and reviews in a manner consistent with CAPSA’s guidelines. While the questionnaire need not be filed with CAPSA, CAPSA recommends that the plan administrator keep a copy on file.

CAPSA’s guidelines reflect the increased global attention to issues concerning corporate and plan governance. From the 1991 Maxwell scandal in England to the recent American Enron debacle, thousands of members have lost significant pension savings, triggering calls for improved governance standards. The Organization for Economic Co-Operation and Development (OECD) has developed fifteen principles for the regulation of private pension schemes, including principles focusing on corporate governance. In Australia, the *Superannuation Safety Amendment Bill 2003* is currently before parliament. Among the proposals in the Bill are plans to develop licensing requirements for all trustees and to establish risk management strategies setting out, among other things, the risks associated with governance and decision-making processes.

Clearly the trend is towards an increased focus on purposeful, applied governance rather than haphazard administration that is based on habit and past practice. CAPSA has emphasized that it does not intend to create additional regulations and that the guidelines are voluntary corporate best practices. This means that the guidelines also provide a diagnostic tool for potential litigation. Members and former members of a plan will enjoy increased likelihood of success in litigation if they can show the administrator failed to meet the criteria established by the guidelines. The natural desire to minimize the likelihood of lawsuits over pension plan practices and to increase the due diligence defences against such law suits will motivate the prudent pension plan administrator to conform with the guidelines. In short, compliance with CAPSA’s guidelines is a prudent course of action for plan administrators and will likely be taken into account by the courts in making a determination on whether a pension plan administrator adequately satisfied its fiduciary obligations under pension standards legislation and the common law.

The development of comprehensive, practical governance practices that satisfy the broad requirements of the draft CAPSA guidelines is a complex task. Professional plan consultants and legal advisors can assist plan administrators facing the challenge of developing or updating pension governance practices. In an increasingly regulated environment that is also increasingly litigious, it is in your best interest to reduce your legal exposure by assessing your current pension governance procedures and eliminating any potential weaknesses. The lawyers of the McMillan Binch Pensions and Employee Compensation Group are available to help you with a pension governance audit and to develop a governance model that best suits the needs of your plan.

Any of our lawyers featured below would welcome your call to discuss governance issues unique to your plan.

Written by David Wentzell and Ivan Luksic

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

© Copyright 2004 McMillan Binch LLP

McMILLAN BINCH LLP

TELEPHONE: 416.865.7000
FACSIMILE: 416.865.7048
WEB: WWW.MCMILLANBINCH.COM

WHO WE ARE



DAVID WENTZELL

PARTNER – PENSION PRACTICE LEADER

Direct Line: 416.865.7036

E-mail: david.wentzell@mcmillanbinch.com

For over 20 years, David's practice has concentrated on providing both Canadian and foreign clients with advice in pension and benefits matters. He is an expert in all aspects of provincial and federal law regulating pension plans. Of particular interest to David are the emerging issues of pension plan governance. He has assisted firm clients with comprehensive legal reviews of their pension governance structure.

David has advised numerous clients in the recovery and sharing of pension plan surpluses. His pension practice includes advising on pension aspects of business acquisitions and dispositions, pension governance and developing innovative retirement compensation and stock option arrangements for clients. David has served as a member of the Financial Services Commission Legal Advisory Committee, a policy advice resource for the pension regulator in Ontario.



HILARY E. CLARKE

PARTNER – PENSION LITIGATION

Direct Line: 416.865.7286

E-mail: hilary.clarke@mcmillanbinch.com

Hilary is a corporate/commercial litigator whose practice focuses on pensions/trust, financial institutions and bankruptcy and insolvency litigation. She has acted for clients in pension litigation involving such issues as entitlement to pension surplus, interpretation of plan provisions, the power to amend the pension plan, issues arising on the transfer of pension plans and the liability of plan administrators for breach of fiduciary duty and misstatements on member benefit statements. Hilary recently defended a large mining company in the first pension class action in Ontario. This class action arose out of the wind-up of a pension plan and involved claims of surplus entitlement, undervaluation of member benefits and misrepresentation. Hilary has experience in obtaining variation of trust orders in the context of pension surplus sharing arrangements. She has appeared before all levels of court in Ontario, various administrative bodies, including the Financial Services Commission of Ontario, and has also participated in alternative methods for resolving disputes, like mediation and arbitration.



SUSAN L. NICKERSON

PARTNER – PENSION ADVISORY SERVICES

Direct Line: 416.865.7239

E-mail: susan.nickerson@mcmillanbinch.com

Susan's practice is primarily focused on advising private sector employers and financial institutions on pension surplus and contribution holiday issues, on-going regulatory compliance as well as pension, trust and benefit issues arising in the context of business transactions and insolvencies. Before joining McMillan Binch, Susan spent a year and a half as a lawyer and consultant with Watson Wyatt Worldwide. She also gained experience in drafting trust agreements for pension and other registered plans during her time as a compliance officer at Royal Trust Corporation of Canada prior to being called to the Bar of Ontario in 1998.



IVAN A. LUKSIC

ASSOCIATE – PENSION ADVISORY SERVICES

Direct Line: 416.865.7923

E-mail: ivan.luksic@mcmillanbinch.com

Ivan's practice focuses on advising clients on a full range of pension, labour and employment issues. His pension practice is concentrated on advising clients on regulatory compliance, plan governance and pension and benefit issues relating to corporate transactions and reorganizations.