



THE CANADIAN
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CAPSA Consultation on the % Revisions to the Pension % Plan Governance Guideline %

**CANADIAN BAR ASSOCIATION
PENSIONS AND BENEFITS LAW SECTION**

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Pensions and Benefits Law Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Pensions and Benefits Law Section.

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CAPSA Consultation on the Revisions to the Pension Plan Governance Guideline %

I. INTRODUCTION %

The Pensions and Benefits Law Section of the Canadian Bar Association (the CBA Section) is pleased to comment on CAPSA's drafts of the revised *CAPSA Guideline No. 4: Pension Plan Governance*, and the related *Self-Assessment Questionnaire* and *FAQ Document* (collectively, the Draft Guideline) released on March 11, 2016.

The CBA Section consists of members involved in pensions and benefits law across the country, including counsel who advise pension and benefits administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

The CBA Section commends CAPSA's continuing efforts in providing guidance on the important issue of pension plan governance and in seeking input on such guidance from pension industry stakeholders.

II. COMMENTS ON THE DRAFT GUIDELINE

The CBA Section largely agrees with the proposed changes in the Draft Guideline. Our specific comments on the general statements describe each principle (including the revised principles themselves), the self-assessment questionnaire and the frequently-asked questions (FAQ) for each principle.

A. Principle 1: Fiduciary Responsibility

General Statements Describing Principle 1

The CBA Section is in general agreement with CAPSA's discussion of fiduciary obligation as outlined in Principle 1 of the Draft Guideline. However, the CBA Section suggests that CAPSA revise the explanation in Principle 1 as to when fiduciary responsibilities may be owed, to reflect the most recent Supreme Court of Canada guidance.

In *Galambos v Perez*,¹ the Supreme Court specified that a fiduciary responsibility will only arise where there is "an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party, in accordance with the duty of loyalty reposed on him or her."² In *Alberta v. Elder Advocates of Alberta Society*,³ the Supreme Court restated the necessary elements for a fiduciary duty to arise as follows:

- (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
- (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and
- (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.⁴

Accordingly, the CBA Section suggests that the language in Principle 1 indicating when fiduciary obligations are owed be revised as follows:

- i. ! a plan administrator and/or any delegates have undertaken to act in the best interests of the members or beneficiaries;
- ii. ! the members and/or beneficiaries are in a position of vulnerability at the hands of the plan administrator and/or delegate; and
- iii. ! the plan administrator and/or delegate can exercise its discretion or control to adversely affect a legal or substantial practical interest of the members or beneficiaries.

Self-Assessment Questionnaire for Principle 1

For Principle 1, Question 1(c) of the Self-Assessment Questionnaire, the CBA Section suggests that this question also ask whether the delegates have identified to whom they owe fiduciary duties. In certain circumstances, the delegates may owe fiduciary duties to the members, beneficiary or plan administrator.

¹ 2009 SCC 48

² *Supra* note 1 at para. 66

³ 2011 SCC 24

⁴ *Supra* note 3 at para. 36.

FAQ for Principle 1

The CBA Section suggests that this concept of the undertaking by the administrator or delegate be discussed in the FAQ. For example, this language could be used in the answer to Question 1.1:

There is also a requirement that the fiduciary (the plan administrator) has undertaken to act in the best interests of the plan member or beneficiary. This undertaking can be explicit or implicit.

B. Principle 2: Governance Framework

The CBA Section supports the Governance Framework requirements and has no comments on the general statements, self-assessment questionnaire or FAQ for Principle 2.

C. Principle 3: Roles and Responsibilities

General Statements Describing Principle 3

The CBA Section largely supports the general statements describing the roles and responsibilities in Principle 3 of the Draft Guideline. However, we question whether the intent of the last sentence of these general statements is to require the employer to document each decision about the pension plan and confirm if the decision was a pension plan governance decision or a corporate decision. Given that the employer's pension plan governance functions and corporate functions for the pension plan will already have been determined as part of its governance framework (as per Principle 2), an additional requirement to document every decision further is unnecessary and overly burdensome. While we agree that documentation may be prudent for particularly significant decisions (i.e., plan windup, plan conversion, matters arising where the employer is insolvent or nearly insolvent, etc.), this should be in the discretion of the employer given the particular circumstances.

FAQ for Principle 3

The CBA Section believes that the sample self-assessment tool (the Sample Tool) in the answer to Question 3.1 of the FAQ is a helpful guideline for plan administrators. The Sample Tool appropriately reflects the advancement of the delineation of the roles and responsibilities of plan administrators since the release of CAPSA Guideline No. 4 in 2004. In footnote 2 to the Sample Tool, we think it would be helpful to include a statement advising which functions are typically corporate functions for single-employer plans (*e.g.*, establishment/termination of the plan, plan amendments, actuarial methods and assumptions and funding policy). This

statement would help avoid any ambiguity resulting from the interchangeable use of the terms plan sponsor and plan administrator in previous CAPSA guidelines.

The CBA Section also believes that information in Question 3.2 of the FAQ will be a useful tool for plan administrators. To allow the roles to be adaptable for different types of pension plans rather than a prescribed minimum standard, we recommend amending the second sentence of the answer as follows:

Recognizing that the number and type of roles will vary from pension plan to pension plan, the following are examples of "typical" roles in the governance process for a standard defined benefit, defined contribution and multi-employer pension plan.

We agree with the descriptions of the roles in Question 3.2. It is not clear why the statement "(various tasks may be performed by delegates)" was omitted from the *Role: High level duties in the administration of the pension plan* and *Role: Oversee the investment of the assets of the pension plan*, as many responsibilities listed there are frequently delegated to persons other than the plan administrator. We recommend that this statement be inserted after each role listed in the answer to Question 3.2.

D. Principle 4: Performance Monitoring

General Statements and Self-Assessment Questionnaire for Principle 4

The CBA Section agrees with the emphasis on documentation and expansion of Principle 4 to include participants in the governance and administration of the plan and has no comments on the general statements or Self-Assessment Questionnaire for Principle 4.

FAQ for Principle 4

In the chart in the answer to Question 4.1, the CBA Section questions the inclusion of the final performance measure for the Benefits Administrator or Record Keeper – "Are regulatory requirements for the operation of the plan being met?". We believe that the plan's overall compliance with regulatory requirements is more appropriately included under the performance measures for the Pension Committee or Board of Trustees and should be added there. We suggest that the final performance measure for the Benefits Administrator or Record Keeper be revised to read:

Are regulatory requirements applicable to record keeping and the administration of benefits being met?

E. Principles 5: Knowledge and Skill

General Statements Describing Principle 5

In the general statements describing Principle 5, the CBA Section recommends that the last sentence be revised so that the plan administrator (i) considers whether it and all delegates (not just all delegates) have the relevant qualifications, resources and experience to carry out their function, and (ii) ensures that all parties involved in the administration of the plan have access to appropriate education, as opposed to being responsible for providing access to that education.

Self-Assessment Questionnaire for Principle 5

In the Self-Assessment Questionnaire for Principle 5, the CBA Section recommends that the term “governance” be changed to “administration” in Question 5(a). The CBA Section also recommends that Question 5(b) be revised so that the plan administrator considers whether it and all delegates have and continue to have the necessary knowledge and skills to fulfill their responsibilities.

FAQ for Principle 5

In the FAQ for Principle 5, the CBA Section recommends replacing the term “adequate” with “appropriate” in the first sentence of the answer. The CBA Section also recommends that the last sentence be revised to state that external advice could be provided by the persons listed, instead of stating that external advice could include the persons listed.

F. Principle 6: Access to Information

General Statements Describing Principle 6

In the general statements describing Principle 6, the CBA Section recommends that the reference to “decision-making” be removed from the first sentence for consistency with the other parts of the Draft Guideline that refer only to “fiduciary and other responsibilities”. The CBA Section also recommends that the second sentence state that the plan administrator “should provide or cause to be provided” appropriate information to delegates.

FAQ for Principle 6

In the FAQ, the CBA Section recommends that the answer to Question 6.2 be revised to state that the plan administrator should have a process “for providing appropriate information to its delegates” instead of “to share important information with its delegates”.

G. Principle 7: Risk Management**General Statements Describing Principle 7**

The CBA Section supports the more general approach to risk management. In today’s rapidly changing financial, investment, technological and social environment, the risks faced by plans are also evolving and should not be defined or limited to a specific list. For example, data management and governance has become a significant risk for pension plans that has emerged only recently with the development of cloud technology and other IT developments.

The CBA Section also supports the recognition that the management of risks is an ongoing process and that some risks cannot necessarily be eliminated or fully mitigated. For example, an administrator can take steps to mitigate or reduce the impact of a severe market downturn but in most cases the risk itself cannot be completely eliminated.

To better reflect the recognition that some risks can only be mitigated, not eliminated, we recommend that the phrase “to the extent possible” in the Principle 7 be removed, and the following clause added to the end of Principle 7 “, recognizing that some risks can only be mitigated, not eliminated”.

We also understand the thinking behind clause (d) in the general statements describing Principle 7, “accepting the risk or designing and implementing an appropriate risk-mitigating response”. The word “or” after the phrase “accepting the risk” suggests that it may be appropriate simply to accept a risk without taking any mitigating action. Again, there are risks that may be beyond the control of the administrator but even those risks may be at least partially mitigated. We suggest rephrasing clause (d) as “recognizing that certain risks cannot be eliminated because they are beyond the control of the administrator and designing and implementing an appropriate risk-mitigating response”.

We also suggest adding the word “key” before the reference to “risks” in clause (a). There are many risks in a pension plan. Part of good governance is identifying and prioritizing key risks.

H. Principle 8: Oversight and Compliance

General Statements Describing Principle 8

The CBA Section agrees with the changes to Principle 8, including adding the requirement that processes be documented.

In the general statements describing Principle 8, the CBA Section recommends that the phrase “Every pension plan needs documented processes...” be revised to say “Every pension plan should have documented processes...” for consistency with other provisions in the Draft Guideline.

I. Principle 9: Transparency & Accountability

General Statements Describing Principle 9

The CBA Section largely agrees with the general statements describing Principle 9. However, Principle 9 suggests that members, beneficiaries and other stakeholders be given access to information about the plan that goes beyond that which is required to be provided under applicable legislation. We believe that the plan administrator should have the discretion to determine what, if any, additional information should be made available in the circumstances of the particular plan.

The answer to Question 9.3 of the FAQ (discussed in more detail below) provides guidance as to what may be considered “important decisions” about a plan and indicates that communicating those important decisions to plan members is optional (i.e., at the discretion of the administrator). To ensure consistency with that FAQ, we recommend revising the first paragraph of the general statement to Principle 9 to read as follows:

The plan administrator should establish a communication process, taking into account both fiduciary and other responsibilities, so that plan members, beneficiaries and other stakeholders have access to information about the plan as required by applicable legislation. In addition, the plan administrator should consider what, if any, other information regarding important decisions about the plan should be made available to members and beneficiaries.

Self-Assessment Questionnaire for Principle 9

Further to our comments above on the general statements, we recommend that Question 9(a) be revised to read:

- a) provides plan members, beneficiaries and other stakeholders with access to information about the plan as required by legislation and any other information regarding important decisions about the plan as determined by the administrator?

FAQ for Principle 9

The CBA Section recommends that the description of what constitutes “important decisions” be consistent with pension legislation, by referring to decisions that affect the pension benefits, rights or obligations of plan members or beneficiaries.⁵ In the FAQ, Question 9.3, the CBA Section suggests that the answer be revised to say:

Some decisions (for example, changes to the pension plan) must be communicated under applicable legislation. Other important decisions respecting the plan may not legally be required to be communicated to plan members, but may affect the pension benefits, rights or obligations of a plan member or beneficiaries or help plan members better understand the plan. Such optional communications might include, to the extent they affect the pension benefits, rights or obligations of a plan member or beneficiaries:

- Changes in how the pension plan’s investments are managed;
- Changes in delegates or service providers; and
- Changes in services provided to plan members and beneficiaries.

J. Principle 10: Code of Conduct and Conflict of Interest

General Statements Describing Principle 10

The CBA Section recommends that the general statements describing Principle 10 be clarified to indicate that the code of conduct is specific to the party to which it applies (e.g., a pension committee), since companies may have a general code of conduct that may not apply to members of the pension committee.

Self-Assessment Questionnaire for Principle 10

The CBA Section recommends that Questions 10(b) and 10(c) in the Self-Assessment Questionnaire for Principle 10 be revised to clarify that the conflict of interest policy and code of conduct may be separate documents.

⁵ See, for example, the Ontario Pension Benefits Act, s 26(4)(a) or the Nova Scotia Pension Benefits Regulations, s 30(4)(b).

FAQ for Principle 10

The CBA Section suggests that it may be beneficial to include examples of the difference between a plan sponsor decision (e.g., benefit design) and a plan administrator decision (e.g., administration of benefits). The CBA Section also recommends revising the FAQ for Principle 10 to indicate that the identification and resolution of issues relating to conflicts of interest should be documented.

K. Principle 11: Governance Review

General Statements Describing Principle 11

The CBA Section disagrees with the elimination of the detailed guidance currently in the description of Principle 11 of CAPSA Guideline No. 4, as plan administrators may find the detailed guidance useful. In particular, the CBA Section recommends that the general statements describing Principle 11 include that the plan administrator should regularly review governance procedures and practices. Finally, it is not clear why the recommendation that plan administrators may wish to seek independent professional advice to ensure impartiality for their self-assessment was removed.

Self-Assessment Questionnaire for Principle 11

It is not clear why Question 11(b) in the original Self-Assessment Questionnaire was removed. The question may be helpful and the CBA Section recommends that it be restored.

FAQ for Principle 11

The CBA Section recommends that the governance review include consideration of whether any changes or modifications to the governance policies and practices are appropriate.

III. CONCLUSION

The CBA Section acknowledges CAPSA's continuing efforts in providing guidance on various aspects of pension plan governance and we are in general agreement with the changes in the Draft Guideline. We trust that our specific comments are helpful and look forward to the opportunity for our continued participation in CAPSA initiatives.