

## Day 1 as a Committee Member – Are You Ready?

aka: “The Diary of a Wimpy Pension Committee Member”

Deron Waldock, Partner, McCarthy Tétrault



***Dear Diary:***



*I have just received a promotion to be the new VP of Communications! Yippee for me. Sadly, I am forced to become a member of the company's pension committee. I hate thinking about my own retirement. How can I sit on the committee???!!! I hear their meetings last for hours. ☹ I don't know if I can stay awake.*

## Governance Starts With the Selection of Committee Members

- **Yikes!!!** -- our diary-writer is concerned that they may not be the right person for the pension committee → How do we know if someone is the right person for the job?
- ▭ **We don't** – unless a list of the core competencies and skills has been articulated that collectively can help guide the Plan and the Fund to long-term success
  - ▭ A good governance structure will not be effective unless it involves the right people with the right skills, tools and attitude
    - ▭ Proper governance includes a formal selection process for committee members
    - ▭ With a defined process in place, committees can ensure that they not only consider all possible candidates, but that the candidates are evaluated on consistent and relevant criteria.
    - ▭ While a grounding in finance, pensions and investments would undoubtedly be helpful, the focus should ultimately be on establishing a diverse committee
  - ▭ Research has established that a congruent group, where most or all members are of the same age, gender and beliefs, are less effective
  - ▭ **With a properly diverse group, there is less likelihood of decisions being made through a “follow the leader” mindset**



## Governance Starts With the Selection of Committee Members

- ▮ The adoption and use of a “skills and experience matrix” is a good way to assemble an effective pension committee
- ▮ No individual is going to have all the skills listed in the matrix
  - ▮ Allows participants in the Plan’s governance structure to readily see where there may be gaps
  - ▮ The governing board is a team, and the purpose of the matrix is to ensure that each skill is covered by at least one of the members around the table
  - ▮ Assist s nominating entities in making their appointments
- ▮ A skills audit should be part of the Committee’s year-end self-assessment

# Skills and Experience Matrix: A Sneak Peak

Integrity and Accountability	Demonstrated integrity and high ethical standards both in personal and professional dealings. Willing to act on, and remain accountable for, decisions made in the boardroom.
Conflict of Interest	No real or perceived conflicts that are not easily satisfied through disclosure or exclusion from particular issues. This is verified annually.
Time Availability	Ability to devote the required time for preparation before, and participation at, board and committee meetings.
Financial Literacy	Competent in understanding financial matters and statements. Familiar with current accounting processes used to evaluate the Plan/Fund's financial performance.
Strategic Insight	Capable of contributing to board/committee work on identifying key trends, assessing risks and opportunities. Skilled in providing insight and suggestions in making strategic decisions, including encouraging innovation.
Pension Experience	Service on a pension committee before. Experience with other types of boards or pension committees → can help identify best practices.
Leadership	Ability, shown by prior actions, of taking into consideration all stakeholders as part of making sound business decisions. An understanding of current best practices in corporate management in complex, rapidly evolving business environments.
Informed Judgment	Ability to communicate wise, thoughtful counsel on a broad range of issues helpfully.
Mature Confidence	Ability to facilitate superior board/committee and team performance by demonstrating respect for others. Places a premium value on collective achievement over individual performance.
High Performance Standards	High standards for self and others reflected in a record of achievement.
Diversity	The board/committee should be reflective of the community it serves.

## *Dear Diary:*

*Well, the Senior Manager of Pensions sent me a huge black binder full of documents. This was bad, but not too long after receiving the binder, I found myself staring at another stack of meeting documents from the secretary of the Pension Committee. What do I do with them? I know I should read them all but really, I don't have the time. I have my own new job to keep up with and I need to drive my son to hockey tonight. I am already working all the time now*



# Document the Foundation

- ↪ **Our diary-writer is concerned about the volume of paper that has been dropped on their desk – is the concern justified?**
- ↪ **Maybe not** -- Effective governance requires that all participants are pulling in the same direction
  - ↪ Creating alignment is typically achieved through the creation of a strategic plan and various policies that produce a vision
  - ↪ Those documents need to be organized and easily accessible to committee members
- ↪ Good governance requires the Administrator to create and maintain a pension plan policy and procedure binder
  - ↪ This can be your standard three ring binder, or for the tech-savvy, there are several wonderful software programs like Board Books that allow easy access to these documents from your Ipad

# Document the Foundation

- ↪ If the binder has been well prepared and our dairy-writer is lucky, the binder will contain the following documents, as they relate to the pension plan:
  - the pension plan text, and any revision to the plan text;
  - any documents that create the pension plan;
  - any trust deed or agreement, insurance contract, by-law or resolution;
  - any investment agreement;
  - the written statement of investment policies and procedures, and any revision to that document;
  - any other document that relates to pension plan administration;
  - the plan member booklet, and any revision to the booklet;
  - the Certificate of Registration and the corresponding registration letter;
  - copies of joint annual information returns, as filed with the Regulator, for each plan year;
  - the pension fund's financial statements; and
  - copies of all amendments (i.e. to the plan text, to the life insurance contract, etc.) and the corresponding registration letters for each of those amendments.
- ↪ Don't forget the various new types of policies and procedures that Regulators are beginning to mandate or are becoming best practices : a governance policy, a funding policy, a risk policy/risk registry etc.
- ↪ **Do you have a binder containing all of these policies and plan documents?**



# Organize the Foundation

- ▮ How should the binder be organized?
- ▮ No one size fits all approach → consider, organizing governance manuals on a comprehensive and thematic basis – e.g., risk management
  - ▮ Combining policies into a binder with a cover note summarizing the policies and explaining the interplay between them creates a single, harmonized voice that had the following beneficial effects:
    - ▮ Efficiency
    - ▮ Consistency
    - ▮ Transition / Changes
    - ▮ Specificity
    - ▮ Context – helps to clarify the interplay between multiple policies

# An Agenda Sets the Tone for an Effective Meeting

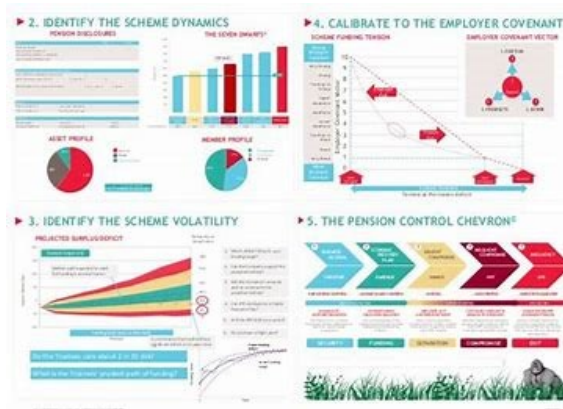
- ▮ An effective governance structure requires effective and well-organized meetings to be able to deliver best in class performance and results
- ▮ **A stack of miscellaneous papers and documents is not the answer. Agendas are an absolute must and pre-reading packages are critical, but they must be done right!**
- ▮ **Agendas**
  - ▮ Should focus on strategic issues, key governance responsibilities, and oversight
  - ▮ The most important items requiring the highest degree of dialogue and consideration should be scheduled at the beginning of each meeting
  - ▮ Time should be allocated for each topic to match the degree of importance and amount of discussion expected



# Effective Meetings Start with an Advance Mailing

## Pre-reading Packages

- ▶ Comprehensive pre-reading packages should set up the topic at a strategic level, including: thought starter questions, draft resolutions, and a cover note/executive summary for each major item
- ▶ The chair should be responsible to “vet” all materials to ensure they are at the right level and have appropriate layers of analysis
- ▶ A picture is worth 1000 words → much of this information can be contained within a summary dashboard indicating at a high level any areas that are not meeting the requirements (but equally allowing committee members to easily identify how well the Plan/Fund are also doing)



## Dear Diary:



Well, tomorrow is the first pension committee meeting. I feel slightly more prepared given that I have read the materials they gave me, but there are still some **big issues** to be discussed at this meeting. It is making me a bit nervous. We are suppose to approve the actuarial valuation of the corporate plan. I can't balance my own cheque book, there's no way I am going to understand all this. I think I will just refrain from voicing my assumptions in front of the CFO. If I don't

$$\ddot{a}_{60.25}^{(12)} = \frac{N_{60}^{(12)} * (.75) + N_{61}^{(12)} * (.25)}{D_{60} * (.75) + D_{61} * (.25)}$$

# Governance Includes Proper Training

- **Our diary-writer lacks certain skills and training to effectively perform his/her job as a committee member → Taking a pass is never an option → it's back to school for you!**
- Important to provide a wide range of training opportunities to those involved with the governance of the Plan and the Fund via a range of different approaches
  - As a new member, the diary-writer will want to know he or she will receive proper training
  - The Committee should receive initial (orientation) and annual training which includes key legal changes and upcoming events for the Plan
  - Broad-based education is important -- it is important that Committee members have the opportunity to learn about areas that the Plan may not currently be focused or future trend impacting the pension industry in general in addition to Plan-specific internal training sessions
  - All training attended should be clearly documented in a training log
  - Information in relation to attendance at training and upcoming sessions should be included in Committee updates and reports



## *Dear Diary:*

*I don't really have any luck! I attend my first meeting and the lawyer for the company tells us that we may get sued. Something about there being not enough money being put into the plan. But I wasn't even there for this. What ever happened, happened 10 years ago. How are we ever going to find all the relevant documents? God, I hope there is some type of insurance policy to cover me.*



## Do You Know Where All Your Plan Documents Are?

- ▮ **Our diary-writer is concerned about finding all of the relevant historical documents? Would this be an issue in your plan?**
- ▮ In order to manage your plan records, FSCO recommends that you develop a formal records management and retention policy
- ▮ The Canadian Association of Pension Supervisory Authorities
- ▮ (CAPSA), also recommends that you develop a formal policy under Guidelines Number 3 and 4

# Why Do We Need to Keep Records?

- ▮ Several ways that a formal records management and retention policy can help manage your record keeping practices:
  - ▮ Minimizes or prevents the loss of important records
  - ▮ Promotes the efficient management and control of plan records
  - ▮ Promotes accountability
  - ▮ Encourages the plan to have consistent standards





# Document Retention Considerations

- ▢ A documents retention policy should address the following:
  - ▢ Document types and retention periods
  - ▢ How and where documents will be stored
  - ▢ How documents can be accessed and by whom
  - ▢ How private and confidential documents should be treated
  - ▢ Details of any delegations
  - ▢ Training requirements
  - ▢ Who is responsible for managing records
  - ▢ Contractual Arrangements with Service Providers
  - ▢ How often record keeping processes will be audited
  - ▢ Whether you need or have a process for:
    - ▢ maintaining a backup of records,
    - ▢ monitoring documents,
    - ▢ communicating with plan beneficiaries, and
    - ▢ disposing of records

# Retention of Plan Records

## Sample Retention Schedule for Pension Plan Records

**Note to plan administrators:** This sample retention schedule does not provide a listing of all plan records that should be retained or show all information that should be documented for each record. Terminologies and retention periods for the listed records may vary from plan to plan. Please refer to FSCO policy A300-200 (Management and Retention of Pension Plan Records by the Administrator) for information about the plan administrator's record keeping responsibilities.

Retention schedules should also be developed for all predecessor plan(s), if applicable. Predecessor plans include pension plans that have been consolidated with the current pension plan as a result of a plan merger, asset transfer, etc.

Plan Name	Registration Number

Record	Record Date	Record Format (paper, imaged, electronic, etc.)	Minimum Retention Period	Storage Location	Final Disposition (archive or destroy)	Date of Final Disposition
Category (a): Plan Records that Pertain to Legislated Requirements						
Initial plan text						
Restated plan texts						
Amendments to plan texts						
Trust agreements						

# Do We Have Insurance for That?

- Finally, our diary-writer is worried about the costs of litigation and personal exposure. Is there insurance for this?
- **YES** -- Fiduciary liability insurance provides liability protection to Plan sponsors and fiduciaries against both personal liability and the sometimes significant costs associated with the defense of lawsuits
- In general a fiduciary liability policy provides coverage for breaches of fiduciary duties and errors and omissions in the administration of an employee benefit plan

# Fiduciary Liability Insurance

- ▢ What is covered?
  - ▢ Coverage is triggered upon presentation of a **Claim** – including a written demand for monetary damages
  - ▢ Insurance will provide coverage for any **Loss** including defence costs, settlements and judgements
  - ▢ Claim has to include an allegation of a **Wrongful Act** including any actions in the capacity of a fiduciary or settlor actions
  - ▢ Claims made policy

# Fiduciary Liability Insurance

## ▮ **What is Excluded?**

### 1. Uninsurable:

- ▮ Fraud (final non-appealable adjudication)
- ▮ Illegal Profit or remuneration (final non-appealable adjudication)

### 2. Insurable Elsewhere:

- ▮ Bodily Injury/Property Damage
- ▮ Pending or Prior Litigation
- ▮ Prior Notice (notice and accepted language)

### 3. Outside the Intent of the Policy:

- ▮ Pension benefits due
- ▮ Failure to collect employers contributions owed
- ▮ Breach of Contract

# Fiduciary Liability Insurance

- Plan sponsor should seek assistance from legal counsel and specialized advisors:
  - when determining what indemnities and insurance coverage is required for adequate protection whether:
    - (i) acting on own behalf,
    - (ii) acting on behalf of others,
    - (iii) subject to a standard of care
  - to understand what policy(ies) require in order to receive protection (e.g., what constitutes a claim)
  - to establish internal claim management procedures and provide timely claim notices

# Questions

¬ Are there other questions?

## Legislative & Caselaw Update

Kelleher Lynch, Associate, McCarthy Tétrault





# Overview

## I. Legislative & Regulatory Update

- ▮ Provincial/Federal changes and updates from the past year

## II. Pension Caselaw Update

- ▮ Decisions released in 2018 and implications for Administrators

# I. Legislative Update: British Columbia

↪ B.C. released:

- Bulletin-001 on Termination Expense Assumption (January 2018)
- Bulletin 18-002 on Calculating Commuted Values for multijurisdictional formula based pension plans (February 2018)
- Bulletin 18-003 on Audited Financial Statements (April 2018)
- Solvency Funding Consultation Paper (October 2018)



## I. Legislative Update: Alberta

- ↪ In Alberta, the *Employment Pension Plans Regulation* , Alta Reg. 154/2014, was amended to give certain collectively bargained multi-employer plans under a solvency moratorium the option to pay commuted values of defined benefit pension on a solvency basis or a going concern basis, subject to approval (November 2017)
- ↪ The Superintendent of Pensions released:
  - EPPA Update 18-01: Defined Benefit Funding Relief Provisions (March 2018)
  - Draft Interpretive Guideline IG-21 – Life Income Type Benefit (May 2018)
  - EPPA Update 18-03: Eligibility for Pension Credit Splitting on Relationship Breakdown Extended to Common-Law Spouses (May 2018)
- ↪ The Alberta Employment Pensions Tribunal was appointed (June 2018)
- ↪ New Superintendent of Pensions / Acting Deputy Superintendent of Pensions appointed (October 2018)



# I. Legislative Update: Saskatchewan & Manitoba

## ▮ Saskatchewan:

- Made housekeeping revisions to Policy Bulletin: Unlocking Pension Money (December 2017)
- Made housekeeping amendments to *The Pension Benefits Regulations, 1993* (July 2018)



## ▮ Manitoba:

- Updated Policy Bulletin #1 – Locked-In Retirement Account (LIRA) (November 2017)
- Updated Policy Bulletin #2 – Life Income Fund (November 2017)
- Updated Policy Bulletin #4 – Withdrawal or Unlocking LIRAs and LIFS updated (January 2018)
- Released a consultation paper as part of the public review of the *Pension Benefits Act* (January 2018)



# I. Legislative Update: Ontario



- ↪ Ontario introduced a number of statutes impacting the administration and regulation of pension plans, including:
  - Bill 177, *Stronger, Fairer Ontario Act (Budget Measures)*, 2017 (December 2017)
  - Bill 31, *Plan for Care and Opportunities Act, (Budget Measures)*, 2018 (May 2018)
  - O. Reg. 193/18 pertaining to the provision of a discharge for purchase of annuities (April 2018)
  - O. Reg. 250/18 setting out the new funding framework for defined benefit single employer pension plans (May 2018)
  
- ↪ The Ministry of Finance engaged in:
  - Consultations on Funding Rules for DB Plans (December 2017)
  - Consultation on proposed amendments to Pension Benefits Guarantee Fund assessments (January 2018)
  - Consultations on proposed regulations for Variable Benefits (March 2018)
  - Consultations on Target Benefit MEPP Funding rules (April 2018)
  
- ↪ FSCO:
  - Conducted targeted reviews of member option statements on termination and retirement (February 2018)
  - Posted two surplus policies for consultation (October 2018)
  - Released Guideline on Administrative Penalties (November 2018)

# I. Legislative Update: Québec

## ▸ In Québec:

- The *Regulation to amend the Regulation respecting supplemental pension plans* came into force on (January 2018)
- Bill 149, an *Act to enhance the Québec Pension Plan and amend various retirement-related provisions*, was adopted (February 2018)
- Bill 176, an *Act to amend the Act respecting labour standards and other legislative provisions mainly to facilitate family-work balance* was enacted, adding a new restriction against so-called “orphan clauses” in pension and other employee benefit plans to Québec’s labour standards act (June 2018)



# I. Legislative Update: New Brunswick & Nova Scotia

## ▮ **New Brunswick** passed:

- The *Pooled Registered Pension Plans Act*, SNB 2017, c 56 (assented to in December 2017, but not yet in force)
- Minor amendments to the *Pension Benefits Act*, SNB 1987, c P-5.1



## ▮ **Nova Scotia** passed:

- *N.S. Reg. 173/2017*, amending the *Pension Benefits Regulations* to provide criteria for asset transfers between plans (December 2017)
- Amendments to the *Pension Benefits Act*, SNS 2011, C. 41, to address entitlement to pre-retirement death benefits (April 2018)



# I. Legislative Update: Newfoundland



## ▮ In Newfoundland:

- Bill 5 – *An Act to Amend the Pension Benefits Act, 1997* was passed, introducing the definition of “individual pension plans” (May 2018) and relieving these plans from terminal funding requirements
- Directive No. 1 – Requirements for Registration was amended to clarify additional disclosure requirements for individual pension plans (effective December 2018)
- Directive No. 5 – Life Income Fund Requirements was amended to remove the maximum age for the owner of a LIF to purchase an annuity (effective January 2018)



# I. Legislative Update: Federal & CAPSA

## ➤ OSFI published:

- Guideline on Derivatives Sound Practice for Federally Regulated Private Pension Plans (February 2018)
- Guidance Note on Default Investment Options In Federally-regulated, Member Choice DC Plans (March 2018).
- Revised Guide to Intervention for Federally Regulated Private Pension Plans (March 2018)
- Revised Guidance Note for Asset Transfers related to Defined Contribution Provisions of Pension Plans (March 2018)
- Guides for Members in Multijurisdictional PRPPs (June 2018)



## ➤ CAPSA released:

- Draft “Guideline No. 9 – Searching for Un-locatable Members of a Pension Plan (Guideline)” for consultation (June 2018)
- Draft “Guideline No. 8 – Defined Contribution Pension Plans Guideline (Guideline)” for consultation (July 2018)
- Draft “Guidance: Solvency or hypothetical wind-up liabilities based on actual life insurance company annuity quotation (Guidance)” for consultation (November 2018)
- Draft “Guideline No. 2 – Electronic Communication in the Pension Industry” for consultation (November 2018)

## **II. Pension Caselaw Update – Implications for Administrators**

## II. Caselaw Update: Implications for Administrators

- 1) *Beccarea v. Canadian National Railway Company*, 2018 ONSC 63
- 2) *Lubianesky v. Gazdag*, 2018 ABQB 290
- 3) *Denluck v. The Board of Trustees for the Boilermakers' Lodge 359 Pension Plan*, 2018 BCSC 1109

## II. Caselaw Update: Implications for Administrators

### ▮ ***Beccarea v. Canadian National Railway Company*, 2018 ONSC 63**

- Ms. Beccarea's ex-husband had been employed by the Canadian National Railway Company (CNR) for thirty-five years, during which time he had been member of the CNR Pension Plan (Plan).
- He retired in 1980 and began to receive his benefits under the Plan. Ms. Beccarea and her ex-husband separated in 1985.
  - A judgment was issued dividing certain property, but it made no mention of the pension benefit entitlements, which continued to be paid to Ms. Beccarea's ex-husband until his death in 2003.

## II. Caselaw Update: Implications for Administrators

- ▮ ***Beccarea v. Canadian National Railway Company*, 2018 ONSC 63 (cont'd)**
  - Shortly after his death, Ms. Beccarea contacted CNR and requested survivor benefits to which she believed she was entitled.
    - The claim was denied by CNR on the basis that the Plan rules stipulated that survivor benefits were payable only to the “widow of a pensioner”, or the pensioner’s estate. Ms. Beccarea eventually filed suit in the Ontario Superior Court of Justice, seeking judgment totalling \$206,411.70 for the unpaid survivor benefits.

## II. Caselaw Update: Implications for Administrators

- ▮ ***Beccarea v. Canadian National Railway Company*, 2018 ONSC 63 (cont'd)**
  - The Court found in favour of CNR and dismissed Ms. Beccarea's claim. It was ultimately determined by the Court that the proceeding brought by Ms. Beccarea was not commenced within the statutorily prescribed limitation period.
  - Notwithstanding this finding, it was further held that the survivor benefits provided under the Plan did not extend to Ms. Beccarea, who as a divorcée, did not qualify as a "widow" under the terms of the Plan.

## II. Caselaw Update: Implications for Administrators

### ▮ ***Lubianesky v. Gazdag*, 2018 ABQB 290**

- The Applicant, Lubianesky, and the Respondent, Gazdag, had lived together in a common law spousal relationship for 15 years, but were not married.
- When they separated, the parties entered into an agreement to settle all aspects of their prior relationship, including support and property division.
  - Under the settlement, it was agreed that Gazdag would pay Lubianesky, lump-sum spousal support, in part from his pension.
- When Gazdag approached his pension administrator to effect the lump-sum transfer, the administrator refused, indicating that the agreement between the parties did not meet the requirements of sections 81 and 78 of Alberta's *Employment Pension Plans Act* (EPPA).

## II. Caselaw Update: Implications for Administrators

### ▮ ***Lubianesky v. Gazdag*, 2018 ABQB 290 (cont'd)**

- Section 78 of Alberta's EPPA specifically requires that marital property agreements meet the requirements of Alberta's *Matrimonial Property Act*.
  - The *Matrimonial Property Act*, by definition, applies only to married (or formerly married) spouses or parties to a void or voidable marriage.
- As a result, Lubianesky sought a declaration that section 78 of the EPPA contravened the equality rights enshrined in section 15(1) of the *Canadian Charter of Rights and Freedoms* (Charter).
  - The argument put forward centred on the effect that section 78 of the EPPA had on denying unmarried spouses the benefit of dividing their pension benefits by agreement, while otherwise allowing married spouses to do so.



## II. Caselaw Update: Implications for Administrators

### ▮ ***Lubianesky v. Gazdag*, 2018 ABQB 290 (cont'd)**

- The Court agreed and section 78 of Alberta's Employment Pension Plans Act was ruled unconstitutional.
  - The Court determined that the appropriate remedy would be to read in the underlined wording into section 78, so that the provision applies equally to both married and unmarried spouses:

“agreement” means a written agreement between pension partners that provides for the division and distribution of a benefit and that meets the requirements of sections 37 and 38 of the *Matrimonial Property Act*, *mutatis mutandis*, whether or not that Act is applicable as between the pension partners.

## II. Caselaw Update: Implications for Administrators

- ▮ ***Denluck v. The Board of Trustees for the Boilermakers' Lodge 359 Pension Plan*, 2018 BCSC 1109**
  - The Plaintiff, Denluck, was a member of the Boilermakers' Lodge 359 Pension Plan (Boilermaker Plan), administered by the defendants, The Board of Trustees for the Boilermakers' Lodge 359 Pension Plan (Trustees).
  - In 2008, Denluck decided to transfer the full commuted value of his pension out of the Plan into another pension plan.
    - Because the Boilermaker Plan was not fully solvent at that time, Denluck was advised that the transfer would be made in two installments with the second transfer payment made no more than five years after the first.

## II. Caselaw Update: Implications for Administrators

- ▮ ***Denluck v. The Board of Trustees for the Boilermakers' Lodge 359 Pension Plan*, 2018 BCSC 1109 (cont'd)**
  - Denluck received the first transfer payment in 2008.
    - However, in 2013, he was informed that the second transfer payment would be suspended due to on-going solvency issues.
  - In 2014, the solvency issues had not been resolved and the Trustees decided to cancel all deferred transfer payments.
    - Denluck was one of 76 retired or former members of the Plan who were affected by the Trustees' decision. The cancellation of the deferred transfer payments as proposed by the Trustees was approved by B.C.'s Superintendent and an amendment was made to the Plan.

## II. Caselaw Update: Implications for Administrators

- ▮ ***Denluck v. The Board of Trustees for the Boilermakers' Lodge 359 Pension Plan*, 2018 BCSC 1109 (cont'd)**
  - Denluck subsequently applied to the Court for certification of a class action against the Trustees, claiming, amongst other grounds, breach of trust by the Trustees in cancelling payment of the deferred transfers.
  - In response, the Trustees argued that the class action should not be certified because it was plain and obvious the breach of trust claim would fail.
    - Amongst other defences, the Trustees argued they could never be in breach of trust for complying with requirements of B.C.'s pension legislation at the relevant time. Further, the Trustees argued that the breach of trust claim was an impermissible collateral attack on the Superintendent's decision to approve the 2014 Plan amendment.

## II. Case Law Update: Implications for Administrators

- ▮ ***Denluck v. The Board of Trustees for the Boilermakers' Lodge 359 Pension Plan*, 2018 BCSC 1109 (cont'd)**
  - The Court rejected both arguments and found that it was not plain and obvious the breach of trust claim would fail. In agreeing to certify the class action application, the Court found that the alleged breach of trust claim raised common issues.
  - Considering the benefits of a class action, and applying the statutory factors with respect to the breach of trust claims, the Court determined that a class action was the preferable procedure and Denluck was an appropriate representative plaintiff.

## II. Caselaw Update: Other Cases of Note

- ▮ ***Kraft v. Kraft*, 2018 BCSC 496**
  - Reapportionment of pension benefits
- ▮ ***Ward v. Lucis*, 2018 NSSC 131**
  - Division of marital property and calculation of net offsetting pension entitlements
- ▮ ***Dussault v Imperial Oil Limited*, 2018 ONSC 4345**
  - Pension benefits and calculation of damages for wrongful dismissal
- ▮ ***Cotnam v. Rousseau*, 2018 ONSC 216**
  - Pre-retirement death benefit and order for dependent support
- ▮ ***Rehel Estate v. Methot*, 2017 ONSC 7529**
  - Entitlement to pre-retirement death benefit

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# Questions? Comments?



# Contacts

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## Mid-Morning Break





Financial Services Regulatory  
Authority of Ontario

# **FSRA Update McCarthy Tétrault**

Bryan Davies  
November 15, 2018



# FSRA, what is it?

### June 2017:

FSRA  
begins  
operations,  
3 founding  
Board  
members  
appointed

### May 2018:

Mark White  
appointed as  
CEO

### Oct 2018:

Public  
consultations  
on proposed  
FSRA fee rules  
begin (until  
Jan 4 2019)

### Spring 2019:

Target  
date for  
launch

### Jan - Apr 2018:

4 Board  
members  
appointed

**Sept 2018:**  
Recruitment  
for executive  
team begins

### Nov 2018 - Mar 2019

Consultations on  
2019-20 priorities  
and budget



# Why was it set up – purpose?

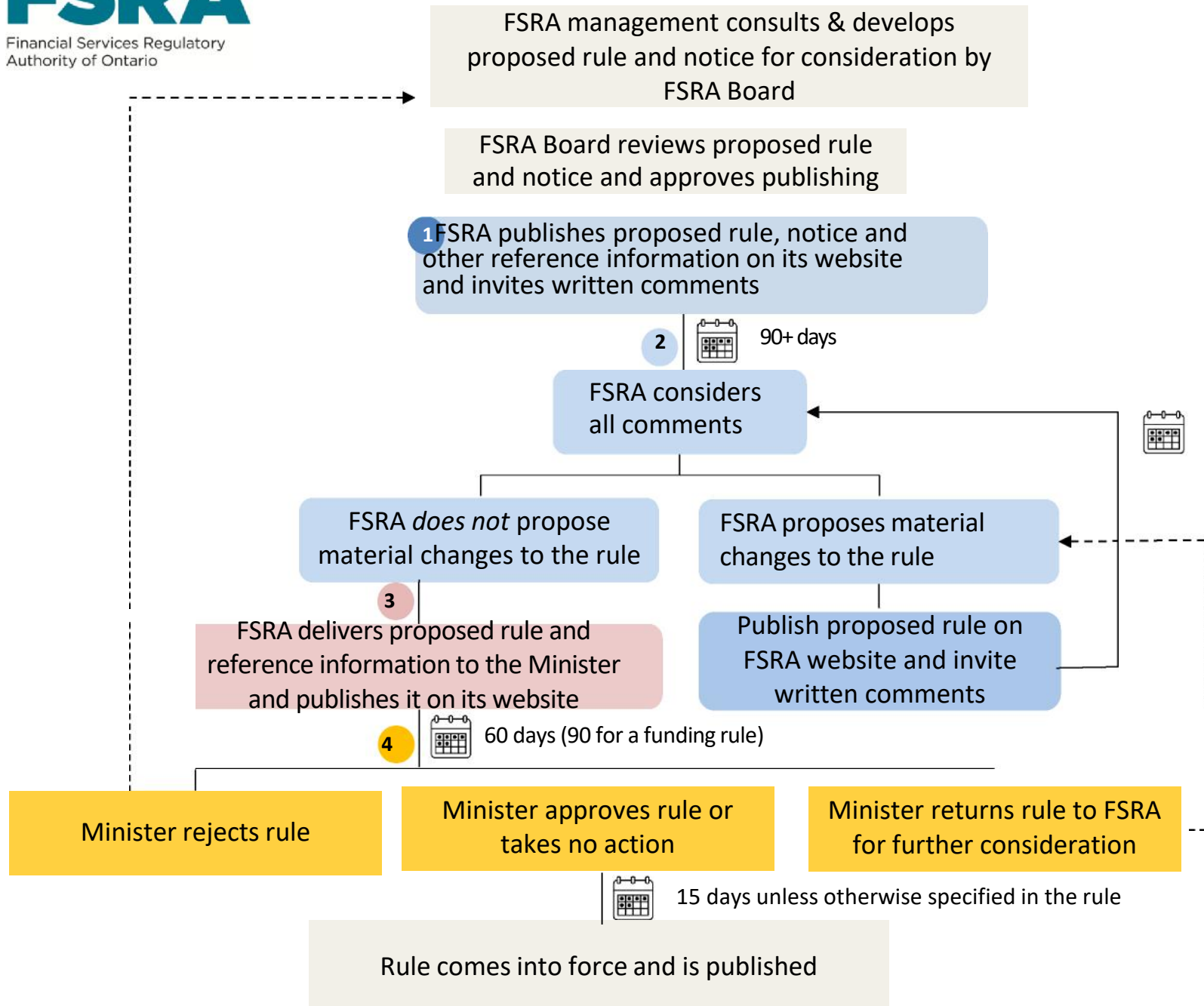
# FSRA to Replace FSCO?

Will FSRA be more flexible than  
FSCO?

What rule making powers will  
FSRA have?



# Rule-making process



How will it deal with other  
regulators?

How will FSRA discharge its obligation to promote public education or knowledge of pensions?

# How is FSRA to be funded?

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# Questions? Comments?



# Money Matters: The Investment Committee Invitation

Greg Winfield, Counsel, McCarthy Tétrault LLP



## Scene 1 – “The Invitation”

- ▢ Dale works in HR at Mega Corporation
- ▢ Her boss “suggested” that she accept a role as member of the Investment Committee (the “**IC**”) overseeing Mega’s portfolio of retirement plans
  - ▢ An RPP with (a) a closed DB feature that is not frozen, and (b) an open DC feature
  - ▢ A separate DC RPP from a new acquisition
- ▢ Dale is no investment whiz, but is known to be hard working, a quick learner and having an immense capacity for detail

## Scene 2 – “The Package”

- 10 Days before the first meeting of the IC, Dale received an Agenda and a package of materials, including a bunch of graphs allegedly providing rate of return and relative performance information as well as a memo from a consulting firm recommending new managers or funds for both the DB and DC programs and other information



## Scene 2 – “The Package” (cont’d)

- ▮ Dale read the information over a weekend, saw a mention somewhere of a SIPP and asked the IC chair for a copy of same
- ▮ Dale was sent two SIPP’s – one for the Mega programs and one for the newly acquired DC program

## Scene 3 – Calling In the Cavalry

- ▢ Dale found the materials daunting and in some cases meaningless to her
- ▢ Fortunately, her twin sister is an investment rock star and works in the private markets group at one of the biggest public sector pension plans
  - ▢ She invited her sister for coffee, used a magic marker to hide some of the names and details and asked for a tutorial
  - ▢ Two coffee klatches later, Dale feels much more prepared

## Scene 4 – At the Meeting: Reviewing Returns

- ↪ One of the other IC members was an employee in Mega's finance group and, together with an external consultant reviewed performance of the DB assets, the DC portion of the same plan as well as the new DC RPP
- ↪ Dale asked questions about the SIPP and how none of the managers were meeting the benchmarks and the Chair said the benchmarks were tough to attain, so she questioned the Mega plan's SIPP terms

## Scene 4 – At the Meeting: Reviewing Returns (cont'd)

- ▮ She also asked about the fact that the SIPP was dated 2014 and was told by the Chair that it has not been amended since then but is reviewed and affirmed (if not amended) at the second of the two meetings of the IC in each calendar year

## First Intermission: **Assessment # 1**

- ▢ Considering all events in Scenes 1 to 4, what actions or questions do you think Dale undertook that were positive?
  - ▢ Any negative?
- ▢ What about the Chair?

## First Intermission: **Assessment # 1** (cont'd)

### ↪ *My thoughts:*

#### ↪ Dale:

- ↪ +ve: Undertook position seriously, reviewed the materials and undertook self-help to improve her understanding
- ↪ -ve: Perhaps sharing information with Sister could be problematic but seems to have been done OK

#### ↪ Chair:

- ↪ Had good response on SIPP review but may have paused to respond more thoughtfully to comment on stringency of benchmarks that managers are not meeting

## Scene 5 – At the Meeting: Looking at Some of the Funds

- The agenda included a presentation by outside consultants as requested at the previous meeting on options to replace an actively managed balanced fund as an available option for the DC component of the RPP that had been put on the insurer's "watch list"
- Dale asked the consultant to explain the implications of being on the watch list, when this had occurred and what communication of that had or had not been made to the plan members – she received an explanation but was informed by the Chair of the IC no communications had been made

## Scene 5 – At the Meeting: Looking at Some of the Funds (cont'd)

- ↪ Dale observed that of the two recommended funds that were described, while one had 15% better performance, it's MER was 25% greater than the other; she also noted that the fund slated for replacement on the legacy Mega plan was also on the newly acquired plan's menu and was, seemingly, not up for consideration today
- ↪ The Chair apologised for the oversight and said that the IC wanted to review the entire platform of investments for the new plan but at a special meeting to be scheduled later



## Scene 6 – New DB Managers & New DC Funds

- The Chair asked investment consultants to provide their report on a new investment manager for bonds as the old manager had lost key staff and was therefore being replaced
  - The managers who had responded to an RFP/search and their style and performance were reported on and a recommendation made

## Scene 6 – New DB Managers & New DC Funds (cont'd)

- The committee debated the recommendation briefly, noting that they had moved from the recommended manager 10 years ago for performance issues but accepted the recommendation after explanation by the consultants
- The selected manager's form of agreement was noted

## Scene 6 – New DB Managers & New DC Funds (cont'd)

- Dale asked whether the committee had adopted its own form of standard investment management agreement as her sister had mentioned this is a good idea – the Chair said “no”

## Second Intermission: **Assessment # 2**

- ▢ Again, considering Scenes 5 and 6, what actions or questions do you think Dale undertook that were positive? Any negative?
- ▢ What about the Chair?
- ▢ What about the Investment Consultants?

## Second Intermission: **Assessment # 2** (cont'd)

- My “two cents”
- Dale continues to shine with good questions
- The Chair
  - Seemed to have a reasonable agenda and stuck with it
  - Had good answers for the most part, but
    - Needed to address not communicating “watch list” status
    - Address the fee vs. return point on the DC fund options
    - Address use of standard form IMAs

## Second Intermission: **Assessment # 2** (cont'd)

- ¬ My “two cents” (cont'd)
- ¬ The Investment Consultants
  - ¬ Seemed to have good answers for issues they were asked to address
  - ¬ Could have helped the Chair on some of the questions (e.g. meaning of watch list) and on the issue of using standard form IMAs

## Second Intermission: **Assessment # 2** (cont'd)

- A sidebar comment on the use of standard IMAs
  - At McCarthy we see little reason why pension fund investment manager searches are not conducted to some extent like any other procurement exercise and in this case it would seem sensible to send the consultants out with a standard form of agreement proposed by the pension plan administrator to (a) seek to have common terms amongst agreements and (b) hopefully speed up the papering of the arrangement at a lower cost

## Scene 7 – At the Meeting: A Bold New Step

- ▢ The next agenda item was a presentation by the consultants of 3 different funds, taking the form of limited partnerships, each with an investment mandate for infrastructure investments
  - ▢ An analysis of the geographical scope and, for two of the funds, existing investments was first made in addition to a description of each GP/manager and its track record; one fund was yet to be formed but the consultants explained its manager manages other similar funds



## Scene 7 – At the Meeting: A Bold New Step (cont'd)

- In front of the presenters were three stacks of documents they pointed to, the smallest measuring 10 cm high, which they said represented the documents provided by each of the managers and included the LP Agreement, offering memorandum etc. which had been emailed to each member but not provided in hard copy due to the size

## Scene 7 – At the Meeting: A Bold New Step (cont'd)

- The presenters described that while the DB SIPP had permitted investing in infrastructure since the 2014 SIPP revisions, it was only at the prior meeting that the IC had requested work be done to select a first investment representing 2% of the total fund assets
- A brief discussion highlighting fees, the difference between the time horizons of two of the funds versus the single evergreen and open ended fund and the anticipated timing for call of the “commitments” followed

## Scene 7 – At the Meeting: A Bold New Step (cont'd)

- Dale asked the chair if any of the other investments of the pension fund were made in limited partnerships and how that differed from other mandates
- The Chair indicated that this was the first investment in this type of structure

## Scene 7 – At the Meeting: A Bold New Step (cont'd)

- ↪ Dale asked what information the IC had about legal risks for these investments, compliance with pension standards, tax treatment and the scope of the representations she had noted from taking a glance at the 50 page “subscription booklet”
- ↪ The Chair said that they were relying on the investment consultant to provide insights into these issues and the fact that other plans routinely sign up such booklets

## Scene 7 – At the Meeting: A Bold New Step (cont'd)

- The consultants said that while they felt comfortable describing the investment approaches, goals and returns, they were not able to advise in detail on legal risks, compliance etc. and recommended going to pension/commercial lawyers for that

## Scene 7 – At the Meeting: A Bold New Step (cont'd)

- ▮ The Chair paused for a moment and then said that he was at a pension education session recently and spoke with another attendee who was telling him about these “side-letter things” that her pension fund negotiated in an investment of similar purpose and had used a law firm to help with that, provide them with a legal “due diligence memo” and with the completion of the booklet; he would call her and ask who she used for that work

## Scene 7 – At the Meeting: A Bold New Step (cont'd)

- The investment consultants mentioned that sometimes their clients relied on lawyers and sometimes they did not, but in the latter case there were always lots of questions on completing the subscription forms

## Scene 8 – Near the End of the Meeting

- When the Agenda item “Other Business” was reached, the Chair asked if there was anything else that needed to be discussed before calling an end to the meeting
- Dale asked what type of continuous training Mega provided to members of the IC to enable them to better perform their roles
- The Chair said that he attended regular seminars but that other members typically expressed no interest in doing so; he invited Dale to attend with him or to select different programs if she was inclined to do so



## Third Intermission: **Assessment # 3**

- ▮ Considering scenes 7 and 8, what actions or questions do you think Dale undertook that were positive? Any negative?
- ▮ What about the Chair?
- ▮ What about the Investment Consultants?

## Third Intermission: **Assessment # 3** (cont'd)

- ▢ My final two cents:
- ▢ Dale
  - ▢ Continued to ask generally sound and good questions
    - ▢ I don't think she did anything "bad"
- ▢ The Chair
  - ▢ Could have applied more rigour to thinking about the infrastructure fund matter
  - ▢ However, was generally open to discussion of points
  - ▢ Might have advanced notions of training for members generally as it appears a little lax

## Third Intermission: **Assessment # 3** (cont'd)

- ▢ My final two cents (cont'd)
  - ▢ The Investment Consultants
    - ▢ Here and in the prior scenes in which they appear, my fact pattern is pretty bare bones so it is difficult to provide detailed comments on them
    - ▢ They could have assisted the committee as a whole by recommending a legal review of the legal risks of the infrastructure fund, its structure generally and helping more on the subscription forms

# Questions

¬ Are there other questions?

# Acknowledgments

- I would like to thank Deron and Kell for their assistance in preparing these materials.



## Trends: The View from Our Offices

Randy Bauslaugh, Partner, McCarthy Tétrault LLP



# Overview

## 1. ESG Factor Integration

- Cut through the confusion: collateral benefits vs. risk-reward

## 2. Ancillary Benefits

- When are they pension benefits?

## 3. Cyber-security

- Prepare and test an incident response plan

## 4. Surplus strategies

- What's Mine is mine and what's yours we share?

## 5. Industry-wide Pension Projects

- What we are working on

## 6. Service Provider Agreements

- Tips for Negotiating

# ESG Factor Integration

## 1. Motive governs

- **Focus on financial risk and rewards** 😊
  - Consistent with duty of pension fiduciaries
  - ESG investing can provide superior risk-adjusted returns
- **Focus on collateral benefits** 😞
  - Inconsistent with duty of pension fiduciaries
    - Subject to some limited exceptions
      - Tie-breaker, directed by trust instrument ... etc

## 2. Proper Description in SIPP

- Direct and indirect investments
- Never say never



# Ancillary Benefits

- When is an ancillary benefit a pension benefit?
- Amendments to change or terminate ancillary benefits?
- Using ancillaries as a buffer in targeted benefit plans.

# Cyber-security Issues

- Plan member data collection and storage triggers privacy laws and fiduciary duty
- Data breach incidents are increasing in both numbers and sophistication
- Organizations subject to PIPEDA have reporting, notice and record retention obligations and are exposed to material fines
- Misuse of personal information can result in law suits for damages as well as violations of statutory fiduciary standards
- What should an administrator do? 🤔

# Cyber-security Preparedness

1. Prepare a data map
  - How personal information flows to and through the plan
2. Prepare and test an incident response plan that includes:
  - Contact information for internal and external resources
  - Framework for assessing real risk of significant harm
  - Identify reporting obligations
  - Step-by-step plan for addressing a suspected breach
  - Regular testing, review and update procedures
  - A security breach log
  - Template notices (to meet statutory privacy requirements and any fiduciary obligations)
  - Review of vendor contracts, including their obligation to report

# Surplus Strategies

Avoid trapped surplus and do not expose surplus to confiscation or sharing:

1. Fix “ownership” language ... if possible
2. Merge surplus plan with another plan
3. Convert plan to DC (rather than setting up new plan)
4. Convert plan to less volatile plan design
  - Consider CAE or flat benefit design
  - Consider target benefit or similar shared risk design
5. Consider new trust or funding structure for future contributions
6. Consider withdrawal from ongoing plan
7. Consider wind up to obtain access (without a successor plan defeating the wind up).

# Association & Industry-wide plans

- ❑ Consider MEPPs
  - Targeted benefit
  - Smart DC
  - Individual Choice DC

# Service Provider Agreements

## **Purpose:**

Create an enforceable contract that:

- achieves clarity about who is doing what, when, where, and how;
- sets out rights to own or access work product;
- allocates liability and indemnity roles.

# Service Provider Agreements

## Negotiating Tips:

1. Define scope, specs and service levels
2. Set out an objective and timely acceptance mechanism for work completed
3. Protect plan assets and other interests
  - IP Ownership
  - Confidential information
4. Build in timelines and penalties for delay
5. Obtain appropriate representations and warranties

# Service Provider Agreements

6. Obtain performance warranties
7. Clarify payment terms
8. Consider all risk and liability allocation provisions carefully
  - Sales and RFP material not disclaimed or limited
  - Indemnification provisions
  - Reasonable limitations of liability
9. “Boilerplate” is negotiable too
10. Consider termination provisions
  - Notices, timing and who can initiate



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# Questions? Comments?



***This program has been approved for 3.5 CPD hours under Section A of the Continuing Professional Development (CPD) Log of the Human Resource Professionals Association (HRPA).***

***This program qualifies for up to 3.5 hours of eligible educational activity or CPD/MCE credit under the mandatory education regimes in British Columbia, Ontario and Québec.***

