1. Introduction

Pension governance is a field that continues to gain importance as members take more of an interest in the way their pensions are managed and as administrators become increasingly concerned about potential liability. Recent case law suggests that pension administrators could face severe consequences, either under the *Pension Benefits Act* (Ontario) and its corresponding regulations (PBA, collectively here) or at common law, for failing to practise good pension governance. Good pension governance requires an understanding of all the administrator's legal obligations and how to implement a system to ensure these obligations are met. Administrators who implement good pension governance generally avoid liability and have pension plans that perform better and more efficiently.

This paper is divided into five sections. The first section describes pension governance and the administrator's role in governing the plan. The second section describes the various legal duties imposed upon the administrator at common law, the consequences of breaching these duties and some safeguards that protect administrators. The third section is a discussion of some of the most common governance pitfalls that administrators face. The fourth section outlines the Canadian Association of Supervisory Authorities' (CAPSA) governance guidelines as they relate to these pitfalls. Finally, the fifth section provides a brief discussion of some recent case law pertaining to pension governance.

2. Pension Governance and the Administrator

CAPSA defines pension governance as “the structure and process for overseeing, managing and administering a plan to ensure that fiduciary and other obligations are met.” Good pension governance exists when the administrator is held accountable for administering the plan in accordance with the plan documents, common law, relevant statutes, governance guidelines and industry best practices. Beyond satisfying these obligations, good pension governance also leads to better performance of the pension fund, more efficient operation of the pension plan and higher satisfaction among plan members.

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The Growing Importance of Governance

Despite the importance of the concept of governance, only over the last decade have administrators started to evaluate their pension governance practices. Several factors have peaked administrators’ interest in pension governance.

First, the broader concept of corporate governance increased in popularity following the failure of corporations such as Enron and WorldCom in the early 2000s, and pension governance is often viewed as a subset of corporate governance. Second, there has been an increase in pension-related litigation in which administrators have allegedly breached their duties to plan members. Third, the growing body of pension plan assets and liabilities has increased the risk and potential magnitude of governance failures. The recent economic downturn has made these governance risks even more apparent, and members are increasingly scrutinizing the way their plans are governed. Unfortunately, this situation is unlikely to improve in the near future, according to the consulting firm Mercer, which has recently reported that pension funds are less well-funded overall, despite the recovery of the stock market. Fourth, Canadian regulatory authorities have published guidelines over the last decade, making various recommendations and underscoring the importance of good pension governance. Collectively, the above factors have created an environment that requires administrators to prioritize achieving good pension governance.

The Administrator

The PBA allows a corporate employer to be the administrator of a pension plan. In the private sector, this means that the corporation’s board of directors usually becomes the pension plan administrator for single-employer pension plans. The board often appoints a committee to take responsibility for the plan’s administration. The administrator must ensure that the pension plan and fund are administered according to the law and plan documents. The administrator’s specific tasks include registering the pension plan, defining roles and responsibilities for those involved in the plan’s operation, delegating responsibilities, making filings, paying fees, maintaining necessary documentation, communicating with members and monitoring the fund. Most important, the administrator is also the entity most responsible for achieving good pension governance.

The administrator is generally helped by other parties in administering the pension plan. A trustee is responsible for holding and ensuring the safekeeping of the pension assets; investment managers are responsible for investing the pension fund; actuaries prepare valuations in the case of defined benefit plans; and numerous other tasks are delegated to agents and third parties. The parties to whom responsibilities are delegated may have legal obligations similar to those of the administrator. The scope of this paper, however, is limited to the obligations of the administrator and employees who work directly for the administrator. The discussion here is also limited to single-employer pension plans in Ontario.

3. The Administrator’s Legal Duties

The core of pension governance is about ensuring that the administrator meets its legal duties and satisfies the terms of the plan. With respect to the administrator’s legal duties, pensions in Ontario are governed by both the PBA and common law. These two sources of law must be analyzed together to determine the administrator’s various legal duties.

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5 PBA, supra note 1 at s. 8(1).
6 Ibid. at 19(1) and 19(3).
7 This is reflected in PBA, supra note 1 at s. 19(1), which requires the administrator to follow the requirements of the plan and the PBA.
8 Ibid.
Duty and Standard of Care

A pension administrator is a fiduciary at common law, a relationship that creates a special duty of care toward the pension plan beneficiaries. This duty of care exists because the beneficiaries are dependent upon the administrator’s discretionary power to affect their interests. Chief Justice McLachlin has written that “the essence of a fiduciary relationship is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.” This duty of care extends to all aspects of the plan’s administration and is owed to any person who is entitled to benefits under the plan. At common law, the standard of care for a fiduciary is to do what a person of ordinary prudence would do in managing his or her own property.

Without using the term “fiduciary,” the PBA creates a fiduciary-like duty and creates an even higher standard of care, requiring that an administrator “exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would apply in dealing with the property of another person.” The term “prudence” in this context, refers to the caution, attentiveness and care that is utilized during the decision-making process. The prudence standard also requires that the administrator hire advisers or agents to carry out tasks for which the administrator is unsuited or unqualified.

The PBA also requires administrators to use “all of the relevant skill and knowledge in administering the pension plan and fund and in investing the pension fund that the administrator possesses, or by reason of its business, call or profession, ought to possess.” The standard of care therefore varies among administrators, and also among individual members of a particular board, depending on their background, experience and qualifications.

Duty to Avoid Conflicts of Interest

At common law, the administrator has a duty to avoid all actual and perceived conflicts of interest as a result of the fiduciary relationship the administrator has with beneficiaries. The PBA similarly prohibits an administrator from knowingly permitting its interests to conflict with its duties and powers or from receiving a benefit other than pension benefits, a refund of contributions or reasonable expenses relating to the plan’s administration.

The most notable exception to the conflicts of interest prohibition is the fact that an employer is permitted to be the administrator of a plan, an exception that has become known as the “two hats” principle. This means that employers must be able to separate the functions they serve in their role as an administrator from the functions they serve in their role as an employer because only the administrator’s functions are subject to the legal duties set out in the legislation and at common law. In its role as an employer, the board is free to act in its own interest without regard for the members’ interests, provided

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9 Imperial Oil Ltd. v. Ontario (Superintendent of Pensions) (1995), 18 C.C.P.B. 198 at 31 [Imperial Oil].
10 Guerin v. The Queen, [1984] 2 S.C.R. 335 at 98.
12 Ari Kaplan, Pension Law (Toronto: Irwin Law Inc., 2006) at 332 [Kaplan].
13 Ibid. at 333.
14 PBA, supra note 1 at s. 22(1).
15 Mercer, The Mercer Pension Manual (Toronto: Carswell, looseleaf) at 14.1(e) [Mercer].
16 Ibid.
17 PBA, supra note 1 at s. 22(2) and 22(3).
19 PBA, supra note 1 at s. 22(4) and 22(9).
20 See Imperial Oil, supra note 7.
that the employer’s actions are undertaken in good faith. Evidently, it is of the utmost importance that a board understand which “hat” it is wearing.

**Duty of Loyalty and Good Faith**

The administrator has a duty of loyalty and good faith that arises from the fiduciary relationship between an administrator and the members. This duty means that the administrator must act solely in the best interest of the beneficiaries and must not act in bad faith. The PBA makes no explicit reference to the duty of loyalty and good faith, though it is implicitly in the statutory standard of care.

**Duty of Impartiality and Even-handedness**

The duty of impartiality and even-handedness arises as a result of trust law. The principle requires that where competing interests or interpretations exist, the administrator should prefer the one that is most fair and even-handed to the employees as a whole. Where beneficiaries are competing for the same benefit, the administrator must act in good faith, honestly, prudently, impartially and reasonably, and act as fairly as possible with regard to only the factors it should take into account to resolve the conflict. Although this duty is not explicitly in the PBA, it is reflected in certain PBA sections, such as calculating proportional payouts if a pension plan is wound up.

**Duty to Inform and Disclose**

As a fiduciary, the administrator has a responsibility to disclose material information in order to allow beneficiaries to make informed decisions regarding their pension plan. All communications made to beneficiaries must also be entirely truthful and accurate. Disclosing inadequate, false or inaccurate information could lead to a civil claim of negligent misrepresentation. The PBA reinforces these obligations and specifically requires that certain information be disclosed to members, such as information regarding the plan, members’ rights and obligations, and proposed plan amendments.

**Consequences of a Breach**

**Liability under the PBA**

The Superintendent of the Financial Services Commission of Ontario (the Superintendent) has the authority to take any action or refrain from taking any action with respect to a pension plan. The Superintendent will take actions if there are reasonable and probable grounds to believe that the plan or fund is not being administered in accordance with the PBA. Any breach of the administrator’s duties under the PBA is an offence and could subject the administrator to a fine. Moreover, the Superintendent may fine individuals personally if they are employees or agents of the administrator. Fines under the Act are limited to a maximum of $100,000 for a first offence, and $200,000 for subsequent offences.

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21 Mercer, supra note 13 at 14–17.
22 See Cowan, supra note 16.
23 PBA, supra note 1 at s. 22(1) and 22(2).
24 Kaplan, supra note 10 at 342.
26 Kaplan, supra note 10 at 344, and PBA, supra note 1 at s. 77(1).
27 PBA, supra note 1, sections 24–28.
28 PBA, supra note 1 at 87(1).
29 Ibid. at s. 87 (2).
30 Ibid. at s. 110.
31 Ibid.
**Liability at Common Law**

At common law, an administrator that breaches its legal duties may be liable for numerous causes of action, including breach of fiduciary duty, negligent misrepresentation, breach of contract, or negligence. These actions could lead a court to order restitution, damages or other equitable remedies. While breaching an obligation under the PBA may be accepted by a court as evidence of negligence, it will not give rise to a separate cause of action. In other words, merely proving that an administrator has breached the PBA will not ground a cause of action in negligence.32

**Safeguards on Liability**

One way for administrators to proactively avoid liability is to apply to the court for advice and directions. The common law actually imposes a positive obligation on a trustee to seek direction from the court if there is uncertainty regarding obligations under a trust agreement.33 Therefore, administrators may seek direction from a court when there is a question regarding the interpretation of pension plan documents, when the validity of amendments or other issues regarding the pension plan are unclear and when the PBA does not alter the operation of this trust law doctrine.

Due to the many instances that could give rise to personal liability for employees, employers often attempt to limit employees' liability through some or all of the following mechanisms: exculpatory clauses, indemnification and D&O insurance. Although these measures may help shelter employees from liability, they will not be enforceable if individuals engage in willful misconduct.

**4. Common Pitfalls**

Certain issues commonly arise in pension plan administration that test an administrator’s pension governance practices. The common pitfalls that are discussed below are delegating, communicating with members, conflicts of interest and investing the pension fund assets. This is far from an exhaustive list of the governance challenges that administrators face. Nevertheless, these are common scenarios that could expose administrators to liability if they are not handled in accordance with sound governance practices.

**Delegating**

At common law, fiduciaries are permitted to delegate non-discretionary powers to an agent. The PBA further extends this power by allowing the administrator to delegate responsibility in any instance in which it is reasonable and prudent in the circumstances.34 Under the PBA, an agent is any person employed by the administrator to carry out an act relating to administration of the plan or investment of the fund and is paid for services provided in respect of the plan.35 Common agents employed by the administrator include the HR department, actuary, trustee, investment manager and legal counsel, to name a few.

Delegating is a governance pitfall because the administrator is not delegating its fiduciary obligations, but rather only responsibility for specific tasks. The administrator must therefore ensure that it properly selects and supervises the agent to whom it delegates responsibility. An administrator is breaching its duties if it does not have a reliable system in place to select properly qualified agents whenever it is unqualified for a task, and if it fails to continually monitor the agent to ensure compliance with all legal obligations.

An agent who is delegated responsibility steps into the shoes of the administrator and is held to the same statutory fiduciary standards. Agents often try to limit this exposure to liability through carefully

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33 Kaplan, *supra* note 10 at 349.
34 PBA, *supra* note 1 at s. 22(5).
35 Kaplan, *supra* note 10 at 354.
crafted service agreements. The administrator, however, is always liable for a breach of its legal duties, regardless of who is carrying out specific tasks. If the administrator does not have proper governance measures in place, it might delegate to agents who are inappropriately selected, unqualified, unsupervised or given inadequate direction. Any of these scenarios could expose the administrator to liability.

Communicating with Members

The type of communication that occurs between the administrator and the beneficiary differs between defined benefit (DB) and defined contribution (DC) plans. With DB plans, there is very little ongoing communication with members, aside from certain communications regarding termination statements, portability options, joint and survivor options and plan amendments. Conversely, members in DC plans receive ongoing communications about a range of issues, including significant information regarding the risk and return of investments in the pension fund.

An administrator is exposed to possible liability every time a communication is issued to beneficiaries. As a consequence, the regular ongoing communication that takes place regarding DC plans means that administrators in those plans are more often exposed to liability. Sound governance practices are paramount to ensuring that all communications are truthful and accurate and that they provide sufficient information to allow beneficiaries to make informed decisions.

Conflicts of Interest

Numerous scenarios could arise in which an administrator has an interest that conflicts with either its fiduciary or other legal duties. The most common, however, results from the employer’s dual role, or “two hats,” as both an employer and an administrator. This dual role means that the board of directors must decide whether each decision is made as part of its administrator or as part of its employer duties. For example, a corporation can make the decision to wind up a pension plan solely on the basis that it is in the best interest of the corporation. The employer is under no fiduciary duty to the members in making that decision. Subsequently, however, the board of directors would be under a fiduciary duty in carrying out the windup of the plan. These distinctions and the employer’s “two hats” are easier to navigate when good pension governance systems are in place.

Investing the Pension Fund Assets

The investment of the pension fund assets is a governance pitfall for the administrators of both defined contribution (DC) and defined benefit (DB) plans. For defined benefit plans, the administrator’s fiduciary responsibilities are to ensure that beneficiaries receive the promised benefit and that assets are invested in a reasonable and prudent manner. For administrators of DC plans, the duty is more about selecting investment managers and fund options. Administrators of DC plans must provide a range of investment options that give employees an appropriate and diversified choice of funds. The prudence standard requires that an investment portfolio be balanced in terms of investment categories and risk levels. This requirement has left some uncertainty in terms of the administrator’s liability for losses that result from members’ decisions regarding their own assets. A recent legislative development has provided some clarification and will be discussed in the next section of this paper.

The governance risks relating to investing the pension fund assets are also related to the risks of delegation because the pension fund itself must be governed by a trustee, which, in the case of corporate administrators, is normally a trust corporation or insurance company. Since it is the trustee that is responsible for governing the pension fund, the administrator is not permitted to provide investment advice because this advice may only be provided by the trustee. The administrator’s main responsibilities with regard to the pension fund are to provide investment education, use prudence in selecting and

36 This scenario is discussed in Mercer, supra note 13 at 14.1(f).
37 Ibid. at 14.4.
monitoring the fund trustee and enter a trust agreement with the trustee that ensures compliance with all legal requirements and the plan documents. If an administrator provides investment advice, a claim for damages could result if a member relies on this advice and is thereby detrimentally affected.

Good pension governance might be most important with matters relating to the investment of the pension fund assets. Indeed, a pension plan is a significant asset for both the corporation and the members. Accordingly, it is critical to both parties that it be managed effectively. Yet administrators face a tough dilemma in attempting to manage the pension fund in a prudent manner and meet the required standard of care. The prudence standard is normally based on industry practice and investing in funds that are deemed to be acceptable by other investors. This standard is contradictory to the way investors normally generate gains in the equity markets. To be sure, gains are usually made by investing in areas where most other people are not yet investing, a strategy that could lead to greater gains for members. Investing in these riskier areas also means, of course, a greater risk of loss and a possible breach in the administrator’s standard of care. In any case, administrators must have governance systems in place that prevent the administrator from providing investment advice, that establish a relationship whereby the trustee is accountable to the administrator and properly supervised and provide beneficiaries with appropriate information and options in the case of DC plans.

5. CAPSA’s Governance Solutions

The Development of Governance Guidelines

Since 1998, pension regulators have published governance guidelines to provide pension administrators with direction regarding their governance practices. That year, the Office of the Superintendent of Financial Institutions (OSFI) released a document titled “Guidelines for Governance of Federally Regulated Pension Plans.” An accompanying memorandum made it clear that the guidelines described best practices for the governance of federally regulated pension plans and reflected OSFI’s view on plan governance. The guidelines were not intended to provide a “safe harbour” for administrators. Indeed, the guidelines did nothing to change administrators’ legal obligations, but rather were considered a series of best practices.

In 2004, CAPSA built upon the work of OSFI and released “Guideline No. 4, Pension Plan Governance Guidelines and Self-Assessment Questionnaire.” These guidelines provided a series of governance principles for all pension administrators. The Joint Forum of Financial Regulators, of which CAPSA is a member, also released guidelines for capital accumulation plans (CAP) in that same year, and those guidelines apply to all pension plans with DC components that allow members to make decisions between two or more options. These guidelines operate together to provide guidance to administrators on how to govern their pension plans and minimize liability. As with the OSFI publication referenced above, the guidelines are voluntary and are merely representative of governance best practices; they are not law. Nevertheless, administrators would be well advised to follow the guidelines because liability could indirectly result from ignoring CAPSA’s recommendations.

CAPSA’s Approach to Governance

The guidelines provide a high-level vision of good pension governance. The guidelines make it clear that pension plan governance is about delivering on the pension promise consistently with the pension plan documents and pension legislation. CAPSA also espouse its belief that “good pension plan governance is

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38 The May 1, 1998 Memorandum was intended for all “Administrators of federally-regulated pension plans under the Pension Benefits Standards Act, 1985 (PBSA)” and was titled “Guideline for Governance of Federally Regulated Pension Plans.”

39 Ibid.

40 Guideline 4, supra note 2.

41 Guidelines 3, supra note 4.
essential if plan members are to both receive benefits and values that they are entitled to, and to understand their rights and responsibilities under the pension plan. 42 At a high level, CAPSA instructs administrators to create a framework for defining duties and responsibilities; establish governance objectives; set up an internal control framework for risk; implement a system to ensure ongoing compliance with legal requirements; monitor participants and conduct performance measurement; and regularly review the governance system against the administrator’s governance objectives. The administrator is also invited to increase its accountability by reporting the results of its governance review to members or other stakeholders.

In addition to providing high-level guidance on pension governance, the guidelines outline more specific suggestions for dealing with the governance pitfalls covered in this paper.

**Delegating**

The guidelines underscore the point that a plan administrator is expected to delegate responsibility for certain tasks while retaining ultimate responsibility for managing the pension plan. Whenever responsibilities are delegated, the administrator is told to clearly define roles and responsibilities and to document all aspects of the delegation process. 43 Moreover, the delegate should be given accurate and complete information to enable him or her to carry out responsibilities effectively. 44

The CAP guidelines provide DC plan administrators with more direction on engaging service providers as agents. These guidelines make it clear that an administrator should be using a service provider if it lacks the knowledge or skill to carry out the task, and that the administrator should ensure that the delegate fulfill these same requirements. The guidelines also suggest that the administrator create a set of criteria to be used when selecting service providers, with considerations such as training, experience, specialization in the type of service to be provided, cost of the service, understanding of pension law or rules, consistency of service offered in all geographic areas where members reside and the quality of service offered. 45

While there are no surprises within CAPSA’s suggestions with respect to managing delegation, the guidelines make clear that the administrator must take seriously any delegation of responsibility to an agent. The selection process should be clearly defined in advance and rigorously followed. After selection, the delegate and the administrator should define roles and responsibilities within a documented process. Following that process, the administrator must supervise the delegate and monitor his or her performance. These governance measures will prevent having a delegate who acts outside the limits imposed by the law and the plan documents, and, as a result, prevent liability for the administrator.

**Communicating with Members**

CAPSA guidelines suggest that administrators create a communications policy to outline their approach to communicating with members. In addition to the information that administrators are required to divulge by law, they are also encouraged to disclose information on their governance practices. The guidelines create a standard that seems higher than the legal standard; communications should be appropriate, timely, accurate, complete, consistent, cost effective and accessible. 46 Administrators are also told to carefully consider their legal obligations when deciding what to disclose and how to disclose it. Significantly, administrators are advised that they should respond quickly to members’ questions or concerns.

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42 Guideline 4, supra note 2 at 3.
43 Ibid. at 7.
44 Ibid.
45 Guideline 3, supra note 4 at 3.
46 Guideline 4, supra note 2 at 8.
As mentioned earlier, communications with members are more of a concern for the administrators of DC plans than those of DB plans. Most of the instruction in this area, therefore, comes from the CAP guidelines. These guidelines provide specific information on the type and content of disclosure that administrators should provide, including annual statements, information on investment activity and funds, summaries of transactions, and fund performance reports. Administrators are also told to provide communications when any changes to investment options occur.

Conflicts of Interest

The CAPSA guidelines suggest that the administrator establish a code of conduct and a policy to address conflicts of interest. The policy is intended to set out a procedure for identifying and disclosing conflicts of interest, whereas the code deals with the procedures and dispute resolution mechanisms to be employed in the case of a conflict.\(^{47}\)

The CAPSA guidelines respond to the fundamental conflict of interest that exists with corporate administrators: the “two hats” principle. CAPSA guidelines urge corporations that perform both pension administration and corporate functions to acknowledge these divergent roles and responsibilities. More specifically, all actions that are taken by the board of directors must be documented as being either within their administrative capacity and engaging their fiduciary and other legal obligations, or within their corporate capacity and not engaging any of these duties. This distinction is often fine, and CAPSA does not provide much concrete guidance. Nevertheless, it is imperative that administrators assess the relevant “hat” they are wearing before making decisions, since that is the only way to be aware of the relevant obligations and to avoid liability.

Investing the Pension Fund Assets

The CAP guidelines have provided guidance to administrators regarding the administration of DC plans. The guidelines suggest factors that an administrator should consider in creating investment options; they give examples of information that should be provided to members when the plan is created; and provide direction regarding the specific information to be given to members regarding their funds. Members are also to be provided with appropriate decision-making tools to help them make an informed decision regarding their investments. The guidelines require that members be given the opportunity to transfer between investment options on at least a quarterly basis, and also provide direction on how an administrator should select the default investment option to be chosen in the event that a member does not make a selection.\(^{48}\)

The most challenging pitfall in this area, however, is the uncertainty surrounding an administrator’s liability for losses that result from the member’s own decision making. The governance solution to this pitfall did not come from CAPSA, but rather from Bill C-47.\(^{49}\) On September 30, 2010, the federal government tabled Bill C-47, amending the federal PBSA. The bill received royal assent on December 15, 2010. Bill C-47 provides a safe harbour to administrators that operate capital accumulation plans, such as DC pension plans, as long as they offer investment options of varying degrees of risk and expected return that would allow a reasonable and prudent person to create a portfolio of investments. Bill C-47 is a significant development in clarifying DC plan administrators’ exposure to liability. These administrators must certainly follow the guidance provided by Bill C-47. Nevertheless, they are not immune from liability and must continue to take care and utilize good pension governance regarding the options they present to members and how they invest the pension fund.

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\(^{47}\) Ibid. at 9.

\(^{48}\) Guideline 3, supra note 4 at 4.

6. Recent Case Law on Pension Governance

A few significant cases have recently brought pension governance issues before the courts. Most of these cases relate to the investment of the pension fund, the governance pitfall that can have the most dire consequences.

**Participating Co-Operatives Case (2008)**

The Participating Co-Operatives\(^{50}\) case was a class proceeding initiated by plan members against the board of trustees for breaching their fiduciary duties on the basis that the plan was underfunded. The Financial Services Commission of Ontario investigated the plan’s governance and found there was a lack of investment policies, no internal monitoring to ensure that the administrator’s directions were being followed, inadequate supervision of agents and potential conflicts of interest between the board and agents. The plan was eventually wound up despite a provision in the plan documents prohibiting any amendment or discontinuance that would reduce the accrued benefits. Although the case ended in a settlement and does not provide much legal guidance, it still serves as a warning of the potential liability that can result from inadequate investment policies and procedures.

**Jeffrey Mines (2009)**

The issue of prudent investment also arose in the Superior Court of Quebec class action case of Jeffrey Mines.\(^{51}\) In that case, the investment manager, under the supervision of the pension committee (administrator), decided to change the portfolio asset mix from 43% to 73% equities. The members alleged that this constituted imprudent investment practice and that both the administrator and the investment manager who was delegated responsibility should be held liable. As with the case above, a settlement was reached in 2009, so there is still very little guidance regarding how the courts will apply the prudence standard to investments and what this means for investment managers who are delegated responsibilities. This continues to be an area of uncertainty regarding an administrator’s obligations.

**R v. Christophe (2009)**

In R. v. Christophe,\(^{52}\) the members of the board of trustees (administrator) were exposed to statutory liability in connection with their management of the investment fund. The members were charged with failing to comply with the statutory standard of care, duty to supervise agents and breaching the quantitative investment limits in Ontario’s PBA. The Crown argued that the members acted imprudently and were unqualified for the investment decisions they were making. Other investment decisions were being delegated to an investment committee that did not have much more specialized expertise than the administrator. While the Crown was unable to prove that the members failed to meet the prudence standard, it did find that the delegation to the unqualified investment committee was improper, that the committee was inadequately supervised and that the administrator was guilty of failing to comply with the prescribed quantitative investment limit. R v. Christophe illustrates (i) the personal liability that can result from a failure to create governance systems that ensure compliance with the PBA, and (ii) the need to delegate to qualified professionals if the administrator lacks expertise.

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\(^{52}\) R. v. Christophe, 2009 ONCJ 586.
7. Conclusion

It is clear that pension governance is not going to wane in importance any time soon. Administrators of pension plans face a multitude of obligations from a variety of sources, and a solid governance framework is necessary to ensure compliance with all these obligations. CAPSA guidelines provide some high-level guidance for administrators, though good pension governance also requires a constant assessment of industry best practices and the latest academic literature. Administrators must prioritize governance and continually evaluate whether their approach to governance is helping to achieve the administrator’s governance goals. Taking this approach to pension governance will go a long way to limiting the administrator’s exposure to liability and will also increase members’ satisfaction with the pension fund.