



**ACPM
Submission
to
Canadian Association of Pension
Supervisory Authorities
CAPSA**

**Consultation Paper:
Guideline on Fund Holder Arrangements**

Wednesday, September 15, 2010

**Prepared by:
ACPM Advocacy and
Government Relations Committee**

ACPM CONTACT INFORMATION

Mr. Bryan Hocking
Chief Executive Officer
Association of Canadian Pension Management
1255 Bay Street, Suite 304
Toronto ON M5R 2A9
Tel: 416-964-1260 ext. 225
Fax: 416-964-0567
Email: bryan.hocking@acpm.com
Web: www.acpm-acarr.com

TABLE OF CONTENTS

Foreword	3
General Comments	4
Specific Provisions of the Guideline	5
Additional Comments	8
Conclusion	8

FOREWORD

The Association of Canadian Pension Management (ACPM)

The ACPM is the informed voice of Canadian pension plan sponsors, administrators and their allied service providers. Established in 1976, the ACPM advocates for an effective and sustainable Canadian retirement income system through a non-profit organization supported by a growing membership and a team of volunteer experts. Our members are drawn from all aspects of the industry from one side of this country to the other. We represent over 300 pension plans consisting of more than 3 million plan members, with total assets under management in excess of \$300 billion.

The ACPM promotes its vision for the development of a world-leading retirement income system in Canada by championing the following Guiding Principles:

- Clarity in legislation, regulations and retirement income arrangements;
- Balanced consideration of other stakeholders' interests; and
- Excellence in governance and administration.

Introduction

The ACPM appreciates the opportunity to provide our input to the CAPSA consultation paper entitled Guideline on Fund Holder Arrangements (the Guideline). In this brief you will find our perspective on the key points raised for discussion in this paper. Following review of our comments, should you have any questions or wish to carry on further dialogue about its content, we would welcome the opportunity to do so.

GENERAL COMMENTS

The ACPM believes that the consultation paper represents a good initiative in furthering the description of governance best practices, particularly as they relate to fund holder arrangements.

The initiative could be a useful clarification of the roles and responsibilities of the employer, administrator, fund holder, and where applicable, the custodian.

Generally, the Guideline contains some good information, and it is particularly helpful to have produced a spreadsheet showing the applicable legislation. However, in certain instances there is insufficient attention paid to the actual words of the legislation (for example, see our comments on contribution monitoring). Although the Guideline is intended to clarify, it may add to the difficulty in negotiating contracts and ongoing relationships with financial institutions.

The Guideline makes clear and helpful distinctions between the role of the employer and that of the plan administrator.

The application of the Guideline to multi-employer plans needs clarification. Given the frequent dual roles of the boards of trustees of such plans as administrator and fund holder, and the central role played by third party administrators of such plans on behalf of their boards of trustees, it would be helpful for the Guideline to acknowledge the roles of those parties in multi-employer plans, in contrast to the operation of single-employer plans.

SPECIFIC PROVISIONS OF THE GUIDELINE

Employer and Administrator

The Guideline distinguishes between the roles of the employer and the plan administrator. To preserve this distinction, it would be helpful for the parties' capacity to be specified in all contracts between and among the employer, administrator, fund holder and custodian. For example, in practice the employer usually contracts with the fund holder, and it is often unclear whether the employer is acting in the capacity of employer or administrator or both.

Fund Holder

We have some concerns about the role of the fund holder as outlined:

- We question the last bulleted point on page 8 as to the responsibilities of the fund holder to "provide direction on the investment of the pension fund's assets, unless this duty is delegated under the agreement in accordance with the plan's SIP&P, applicable legislation and the ITA". It is our understanding that responsibility for the investments of the pension fund lies with the administrator. When the fund holder is a trust company, direction as to the investment of fund assets is given by the administrator or an investment manager or managers, who are appointed by the administrator. When the fund holder is an insurance company, the contract with the insurance company constitutes the investment of the pension fund assets.
- When pension fund assets are held by a trust company, either as fund holder or as custodian, legal title is in the name of a depository or other nominee. When pension fund assets are held by an insurance company, the asset of the pension fund is the contract with the insurance company. Accordingly, the particular investments made by the insurance company are not the property of the pension fund, and may be held in the name of the insurance company or otherwise as it sees fit. Other investments, such as direct holdings in real estate, may be held by the administrator for the pension fund, but will not involve financial institutions acting as fund holders or custodians.

Custodian

The Guideline in section 2.5 on page 9 describes the custodian as holding the fund's assets "pursuant to a contract between (a) the custodian and the fund holder, or (b) the custodian and a trustee, board of trustees or pension committee acting as fund holder". The distinction between (a) and (b) is unclear. The contract of the custodian is with the fund holder, whoever that fund holder may be.

Section 2.5.1 of the Guideline provides as follows:

The custodian's responsibilities are generally solely related to the safekeeping and servicing of the pension fund's assets. The custodian is responsible for holding these assets in accordance with the terms of the custodial agreement, and must be capable of segregating the pension plan's assets and meeting the reporting and record keeping requirements of the custodial agreement. The custodian does not have legal title to assets and does not have the same tax reporting obligations. In addition, the custodian is retained through a contract and only owes duties to the party that retained its services.

This language insufficiently takes into account either the precise language in the various pension statutes, or actual practice.

a) Contribution Monitoring and Reporting

We recommend including a disclaimer at the beginning of Section 2.4 of the Guideline providing that "notwithstanding statutory requirements or best practice guidelines for certain parties to report missing, late, or incorrect contributions...".

Section 2.4 of the Guideline also indicates that the fund holder is required to report late or missing contributions to the pension plan. However, under the pension legislation of certain jurisdictions, the statutory duty to report missing or late contributions to the supervisory authorities may be construed to be that of the custodian. In Alberta, the statutory duty lies with the "ultimate recipient" of the contributions to the plans (for example, the board of trustees of a multi-employer plan is the fund holder, while the custodian is the "ultimate recipient" and has the obligation to report late contributions), and in the federal jurisdiction, the requirement is that of the "holder or custodian of the pension fund". Ontario and New Brunswick laws place the contribution monitoring responsibility upon the "agent of the administrator who is responsible for receiving contributions under the plan". British Columbia, Saskatchewan, Manitoba and Newfoundland law place the contribution monitoring responsibility more specifically on the fund holder responsible for receiving the contributions. Quebec legislation places the duty upon all parties involved in pension fund administration to warn when there is a situation noted in the normal course of their duties that might adversely affect the fund.

We understand that, where the fund holder is a board of trustees or individual trustees, the contributions flow to the custodian (financial institution) directly from the employer (except in the case of multi-employer plans in some jurisdictions, where they flow first to the board of trustees).

Accordingly, in view of the language of the legislation, and also bearing in mind the decision of the British Columbia Court of Appeal in *Froese*¹, it is difficult to see how the responsibility of contribution monitoring is, or should be, placed on anyone other than the custodian in most cases. An exception would be in multi-employer plans, where the employer contributions typically flow through the third party administrator on behalf of the board of trustees. In that case, the Guideline should clarify whether the board of trustees and/or its third party administrator maintains only responsibility for contribution monitoring, to reflect the reality of how such plans operate.

b) Legal Title

Please see our comments as to legal title, above.

c) Standard of Care

The Guideline suggests (see the listing of Fund Holder Principles on page 3 of the Guideline) that:

- i. The fund holder acts in a fiduciary role in relation to the pension fund; and
- ii. If a function is delegated to a third party, that party also needs to act in the fiduciary role as required by the appropriate legislation in respect to the delegated function.

¹ [Froese v. Montreal Trust Co. of Canada](#), 1996 CanLII 1643 (BC C.A.).

Issues as to the statutory standard of care and common law fiduciary duty of the custodian are not clearly addressed.

As to the statutory standard of care, again, the Guideline does not address the issue of whether the fund holder is considered to be an agent of the administrator and so caught by the pension legislation that imposes the administrator's standard of care upon the agent of the administrator. This question also arises for multi-employer plans, where the board of trustees acts as both administrator and fund holder, and the custodian is a direct delegate of the administrator. A similar issue arises as to the custodian as delegate of the fund holder.

As to the common law fiduciary duty, the Guideline suggests that the custodian has such a duty with respect to the functions it agrees to perform. In our experience, this duty is more readily accepted by trust company custodians than insurance company custodians.

ADDITIONAL COMMENTS

Application of the Guideline to Quebec

We believe that it would be helpful to more clearly distinguish the application of the Guideline to Quebec pension plans.

Note that the French translation of “fund holder” as “responsable des caisses de retraite” is somewhat misleading. In Quebec, the “responsable de la caisse de retraite” is the administrator of the pension plan - the pension committee (unless the plan has less than 26 members and beneficiaries, in which case the pension plan may be administered by the employer).

Also, the person or body exercising delegated powers assume the same obligations and incur the same liability as those the pension committee would have had to assume or have incurred if the powers had been exercised by the pension committee. The same applies to service providers and representatives who exercise a discretionary power belonging to the committee. Consequently, the responsibilities and level of liability of a fund holder, and more specifically to which extent it has the statutory standard of care of the pension committee, will depend on the nature of the agreement between the pension committee and the fund holder.

Although there are comments to that effect in the Guideline, it may be appropriate to more clearly distinguish the application of the Guideline to Quebec pension plans. For instance, only the pension committee or the person or body to whom or which that power has been delegated may decide how the assets of the plan are to be invested. Also, all deposits and investments of the assets of the pension plan must be made in the name of the pension fund or for its account. Finally, every pension plan, with the exception of insured plans, must have a pension fund into which contributions and the income derived therefrom are paid. The pension fund constitutes a trust patrimony appropriated mainly to the payment of the refunds and pension benefits to which the members and beneficiaries are entitled.

CONCLUSION

Some of the issues we have addressed can be complex. We suggest that the Guideline provide as much clarification as possible to recognize that:

- i. both the legislation of a jurisdiction and contractual obligations of the parties override any statement in the Guideline;
- ii. there are differences in the structure and operation of the fund holder and custodian arrangements between single-employer and multi-employer pension plans; and
- iii. care should be taken in drafting contracts among and between employers, administrators, fund holders and custodians to ensure that the obligations under and consequences flowing from the contract or agreement are consistent with the intentions of the parties.

We hope that our comments are helpful, and would be pleased to respond to any questions.