



September 9, 2010

Christian Nordin
Policy Manager
CAPSA Secretariat
c/o Financial Services Commission of Ontario
5160 Yonge Street, Box 85
Toronto, ON M2N 6L9

Dear Mr. Nordin,

Re: CAPSA Consultation on Guideline on Fund Holder Arrangements

I am writing as outgoing Chair of the National Pension and Benefits Law Section of the Canadian Bar Association (CBA Section) in response to the request for comments about the Guideline on Fund Holder Arrangements (the Guideline) issued by the Canadian Association of Pension Supervisory Authorities (CAPSA) on May 4, 2010. We thank you for the opportunity to comment.

The CBA is a national association representing 37,000 jurists, including lawyers, notaries, law students and teachers across Canada. The Association's primary objectives include improvements in the law and in the administration of justice. The CBA Section represents lawyers who practice pensions and benefits law in various capacities from across Canada.

We appreciate the efforts of CAPSA and the industry working group that collaborated with CAPSA to clarify the roles and responsibilities of parties involved in safekeeping pension fund assets. In particular, there has been some uncertainty about the responsibilities of financial institutions that "hold funds", either as a custodian or a fund holder of the pension fund.

Preliminary Comments

The manner of presenting the applicable pension legislation in the Guideline was helpful, but we believe that it did not thoroughly examine the actual legislation and practices across the country. Significant reliance may be placed upon the Guideline by interested parties. Also, as some issues are quite complex and must be considered in the context of the applicable legislation and common law principles, they might better be addressed through actual legislative amendments.

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 i.e. usually the pension committee.¹ The pension committee enters into a custody agreement

¹ This is true unless the pension plan has less than 26 members and beneficiaries, in which case the pension plan may be administered by the employer.

with a custodian for the actual holding of the funds. 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.

Provisions of the Guideline

A. 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.

B. Fund holder

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

- a) The Guideline does not squarely address the issue of whether the fund holder is an agent of the administrator. This is important, as in British Columbia, Ontario, New Brunswick and Nova Scotia, agents of the administrator are subject to the same statutory standard of care as the administrator. A similar issue arises in Quebec, depending on the extent to which the fundholder assumes delegated powers from the pension committee under the applicable agreement.
- b) As to a common law fiduciary duty, there should be some clarification particularly in its application to insurance companies as fund holders. It is unclear which functions of the fund holder are contemplated and which are not in the sentence on page 9, which reads "if the administrator has delegated fund holder functions that involve his/her own fiduciary duties, the fund holder is obligated to conduct itself as a fiduciary".
- c) 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.
- d) 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.

C. 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

Section 2.4 of the Guideline indicates that the fund holder is required to report late or missing contributions to the pension plan. However, under pension legislation, the statutory duty to report missing or late contributions to the Superintendent 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, and in the federal jurisdiction, the requirement is that of the "holder or custodian of the pension fund". Ontario, Nova Scotia 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.

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. Quebec legislation places the duty to warn when the fund is in jeopardy upon all parties involved in pension fund administration.

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*², it is difficult to see how the responsibility of contribution monitoring is, or should be, placed on anyone other than the custodian. An exception would be in multi-employer plans, where the employer contributions typically flow through the third party administrator.

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

² [Froese v. Montreal Trust Co. of Canada](#), 1996 CanLII 1643 (BC C.A.).

- 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.

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. A similar issue arises as to the custodian as delegate of the fund holder. If the fund holder is the agent of the administrator, is the custodian then a sub-agent of the administrator?

As to the common law fiduciary duty, the Guideline as referred to above 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.

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:

- both the legislation of a jurisdiction and contractual obligations of the parties override any statement in the Guideline;
- until the multi-jurisdiction agreement has been adopted by all jurisdictions, the legislation of all jurisdictions where there are plan members may apply to an employer, administrator, fund holder or custodian, as the case may be; and
- 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.

Yours truly,

(original signed by Gaylene Schellenberg for Hugh Wright)

Hugh Wright
Past Chair, National Pensions and Benefits Law Section