



JUSTICE MATTERS

# Pension Plan Service Providers CUPE National

May 17, 2022

---

Lesa MacDonald, Counsel  
E-mail: [Imacdonald@kmlaw.ca](mailto:Imacdonald@kmlaw.ca)

# Contents

---

1. Typical pension plan service providers and their roles
2. Issues around delegation to service providers
3. Best practices for selecting, monitoring, and terminating service providers
4. Service provider conflicts of interest

# Appointing Service Providers

---

- Pension plan administrator may appoint service providers for advice and assistance in administering the pension plan.
  - Service providers are required for certain tasks. For example:
    - An actuarial valuation report or certificate must be prepared by a Fellow of the Canadian Institute of Actuaries.
    - Auditor's report on financial statements must be prepared by a licensed accountant.
  - It may be imprudent not to obtain professional advice in certain circumstances.

# Typical Service Providers

---

- Typical pension plan service providers include:
  - Administrative Agent (includes internal plan executives and plan staff and external providers)
  - Actuary
  - Investment Consultant/Advisor
  - Investment Manager(s)
  - Auditor
  - Legal Counsel
  - Custodian
  - Consultant

# Typical Service Providers and their Roles

---

- “Legal” pension plan administrator must be an entity authorized under legislation.
  - Examples of “legal” pension plan administrators:
    - Per Ontario’s *Pension Benefits Act* (“PBA”): employer; pension committee or board of trustees, each composed in accordance with applicable law; and a corporation authorized by legislation.
- “Legal” pension plan administrator is responsible for administering the pension plan.
  - May appoint service providers for assistance.
  - In some cases, service providers are required under legislation or to satisfy fiduciary obligations.

# Typical Service Providers and their Roles

---

## ■ Administrative Agent

- Role of the administrative agent is to perform day-to-day functions such as:
  - Responding to inquiries;
  - Maintaining records and calculating benefits;
  - Monitoring and reconciling contribution remittances; and
  - Preparing annual and other pension statements.
- Specific functions vary from plan to plan.
- May be internal, including plan executives and other internal staff, or external.
  - Consider plan rules regarding division of responsibilities.

# Typical Service Providers and their Roles

---

- Actuary
  - Roles of the actuary include:
    - Preparing actuarial valuation reports and certificates when required by law or the administrator;
    - Providing advice on actuarial questions such as discount rates and required contributions;
    - Providing advice on pension plan design questions; and
    - Calculating commuted values and benefits.

# Typical Service Providers and their Roles

---

- Investment Consultant/Advisor
  - Roles of the investment consultant/advisor include:
    - Providing advice on investment issues;
    - Conducting investment manager due diligence;
    - Assisting with the identification, and selection, of potential investment managers; and
    - Plan and investment manager monitoring and reporting, including plan and investment manager performance and benchmarking.



# Typical Service Providers and their Roles

---

- Investment Manager(s)
  - Roles of investment manager(s) include:
    - Investing pension plan assets in accordance with applicable investment policies; and
    - Determining the asset mix for applicable investment fund.

# Typical Service Providers and their Roles

---

- Auditor
  - Roles of the auditor include:
    - Auditing the pension fund's financial statements and providing an audit opinion and report;
    - Providing a report on the pension fund's financial controls; and
    - Reporting on issues identified during the audit in accordance with the engagement terms.

# Typical Service Providers and their Roles

---

- Legal Counsel
  - Roles of legal counsel include:
    - Providing opinions and advice on issues such as governance and fiduciary obligations, regulatory compliance, and tax;
    - Negotiating contracts with service providers; and
    - Representing the pension plan administrator in proceedings before regulators, tribunals, and the courts.

# Typical Service Providers and their Roles

---

- Custodian
  - Roles of the custodian include:
    - Maintaining accurate records of the pension fund's holdings;
    - Safe-keeping of pension fund's holdings and executing instructions regarding investments; and
    - Receiving contributions and making payments to pensioners and others entitled to benefits.

# Typical Service Providers and their Roles

---

- Consultant
  - Roles of consultant include:
    - Advising the pension plan administrator on specific projects or tasks such as:
      - Pension plan design questions; and
      - Searches for service providers.

# Delegation and Supervision

---

- Pension legislation in Canada generally expressly permits a pension plan administrator to delegate functions to an agent.
  - Specific legislative wording varies by jurisdiction.
  - In some cases, legislation does not expressly reference agents.
  - CAPSA guidelines say administrators may use delegates.
- For example, Section 22(5) of Ontario's PBA says:

*Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.*

# Delegation and Supervision

---

- If a pension plan administrator delegates a function to an agent, they must personally select the agent, be satisfied the agent is suitable, and perform reasonable and prudent supervision of the agent.
  - In most jurisdictions, agents are addressed in pension legislation.
  - There are also common law fiduciary obligations for selecting and supervising agents.
- Personal selection of the agent and supervision of the agent are separate duties.

# Delegation and Supervision

---

- For example, Section 22(7) of Ontario's PBA says:  
*An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's "suitability" to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.*
- Alberta's *Employment Pension Plans Act* and British Columbia's *Pension Benefits Standards Act* require that an administrator be satisfied that the agent is "qualified" for the applicable powers or duties and carry out reasonable and prudent supervision of the agent.



# Delegation to Service Providers

---

- Clear documentation of delegation to service providers is required:
  - CAPSA: Plan administrator should clearly describe and document the roles, responsibilities, and accountabilities of all participants in the plan governance process, including:
    - Plan administrator should ensure governance structure, roles and responsibilities, accountabilities and reporting relationships (chain of delegation) are clearly documented and communicated to all participants in the governance process.
  - Delegation should be documented in writing. For example, in governance and related policies and contracts and they should be consistent with each other.

# Supervision of Agents

---

- *R. v. Christophe* 2009 ONCJ 586 (CanLII)
  - Prosecution involving the board (administrator) of a multi-employer pension plan for alleged offences under Ontario's PBA.
  - Board had delegated certain investment functions to a subset of the board, the investment committee.
  - One alleged offence was that the board had failed to reasonably and prudently supervise the investment committee with respect to the 10% rule contrary to Ontario's PBA.
  - 10% rule was breached; rule prohibits lending or investing more than 10% of the pension plan assets in any one entity.

# Supervision of Agents

---

- Court noted that the requirement for “prudent and reasonable” supervision requires considering the facts and suggested that the required level of supervision might vary depending on the skill, education, and experience of the agent; here, the investment committee.
- Information about the skill, education, or experience of the members of the investment committee was not provided.
- Court concluded that at least a basic level of supervision was required to satisfy the test, noting that:
  - Information could have been assembled for the board to supervise the investment committee in regards to the 10% rule.
  - Board could have questioned the investment committee about the 10% rule.

# Supervision of Agents

---

- Court found that the steps that should have been taken by the board to supervise the investment committee in regards to the 10% rule were not taken.
- The members of the board were found guilty of failing to carry out reasonable and prudent supervision of the investment committee contrary to Ontario's PBA.
  - Penalties for this offence and breaching the 10% rule were approximately \$22,000 per trustee in total; not payable from pension fund.

# Supervision of Agents

---

- Federal *Pension Benefits Standards Act* limits an administrator's liability for breach of its statutory fiduciary obligations **if it relied in good faith** on:
  - Certain financial statements and reports prepared by an accountant or auditor; or
  - Report of an accountant, actuary, lawyer, notary, or other professional person “whose profession lends credibility to the report”.
- Similar rules are not in other Canadian pension legislation.
- Impact on administrator's duty to supervise and service provider's obligations?
- Similar provisions sometimes in plan documents. Enforceable?

# Standard of Care

---

- Service providers must perform the contracted service to the applicable standard of care.
- What is the standard of care?
  - Standard of care may be imposed by statute.
    - Under pension legislation, agents are generally subject to a fiduciary standard of care.
    - Not all pension legislation expressly subjects agents to a fiduciary standard of care.
  - Contract terms may specify the standard of care.
    - For example, in their contract, service provider may agree to, or resist, a fiduciary standard of care.

# Standard of Care

---

- Common law fiduciary standard of care may arise based on the facts.
  - Courts have concluded that some advisors are in a fiduciary relationship with those they advise because of the circumstances of their retention.
  - Fiduciary relationship may arise where there is evidence that the client was dependent on the advisor and reasonably placed trust and confidence that the advisor would act in the client's best interests.
  - Common law fiduciary standard is different than the fiduciary standard under most pension legislation.
    - Ordinary prudence in managing own vs. another's property

# Standard of Care

---

- Most pension legislation refers to the possibility of pension plan administrators retaining agents.
  - Some pension legislation is silent on agents; silence does not mean an administrator cannot retain agents.
  - At law, “agency” is a specific legal relationship in which one party (agent) is given power by another (principal) to perform certain acts.
- Pension legislation that refers to agents says that the pension plan administrator:
  - Is entitled to retain agents where it is reasonable prudent.
  - Must personally select the agent and be satisfied of their suitability (or that they are qualified) and carry out reasonable and prudent supervision of the agent.



# Standard of Care - Agents

---

- Generally, pension legislation that refers to agents says that an “agent” or employee of the pension plan administrator owes statutory fiduciary obligations:
  - To exercise the care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person.
  - To use all relevant knowledge and skill that they possess or ought to by reason of their profession, business or calling.
  - To not knowingly permit their interest to conflict with their duties and powers in respect of the pension fund.
- These are in addition to a service provider’s contractual obligations.

# Standard of Care

---

- Some exceptions:
  - Some pension legislation does not:
    - expressly refer to a pension plan administrator retaining agents
    - expressly provide for agents to be subject to the same statutory fiduciary standard of care as the pension plan administrator
  - Silence in pension legislation does not mean:
    - pension plan administrator cannot retain agents/service providers
    - agents/service providers are not subject to a fiduciary standard of care

# “Agent” vs. “Advisor”

---

- A service provider may take the position that it is not an “agent” but is instead an “advisor”.
  - Possible purposes:
    - To avoid being characterized as a fiduciary and potentially permit a lower standard of care.
    - Support liability limits in contractual arrangements.
  - Quebec’s pension legislation prohibits service provider liability limits and generally provides that any provision to that effect is null.

# “Agent” vs. “Advisor”

---

- Financial Services Regulatory Authority of Ontario (“FSRA”) Guidance entitled “Pension Plan Administrator Roles and Responsibilities” comments on the role of service providers for pension plans as follows:

*Service providers, that are employed by administrators to carry out any act required for the administration and/or investment of the plan, are subject under the PBA to the same standard of care as administrators. Such service providers cannot contract out of the legislated standard of care.*

# “Advisors” vs. “Agents”

---

- Example: Are actuaries “agents” or “advisors”?
  - Debated question.
  - Many actuarial firms take the position that they are not agents, but are advisors.
  - Some court decisions support classifying actuaries as agents.
  - Even if the individual actuary is an agent, the actuarial firm they work for will not necessarily be an agent.

# “Advisors” vs. “Agents”

---

- *Ontario (Superintendent of Financial Services) v. Norton and Aon Consulting Inc.* 2006 ONCJ 235 (QL)

*“It appears from the broad language of Section 22(5) of the Act that what was intended was that anyone hired by the administrator to perform a function that the administrator was responsible for performing would be treated as an agent. On this view, the actuary preparing a valuation report is performing the function of the administrator and is an agent.”*

# Liability of Service Providers

---

- Even if service providers are not “agents” and subject to the fiduciary standard of care under pension legislation, they may be liable for their conduct through other causes of action such as negligence or breach of contract.
- Contracts with service providers must be carefully reviewed to determine, among other things:
  - What services are to be provided and what is the standard of care?
  - Are there any limits on their liability?
  - Do they maintain adequate insurance?

# Liability of Service Providers

---

- *Chapman v. Benefit Plan Administrators*, 2013 ONSC 3318 (CanLII) and 2016 ONSC 6991 (CanLII)
  - Class action against pension plan administrator, administrative agent, and actuaries.
  - Pension plan provided unreduced early retirement benefits with the administrator's consent.
  - Over a period, administrator consented to unreduced early retirement benefits; plan had funding issues in that period.



# Liability of Service Providers

---

- Pension plan administrator then reduced benefits to address the plan's funding issues.
- Plaintiff sued pension plan administrator, administrative agent, and actuaries alleging negligence and breach of trust related to the granting of consent to unreduced early retirement benefits.
  - Claimed benefit reductions would have been lower but for the granting of consent to unreduced early retirement benefits.

# Liability of Service Providers

---

- Court certified the negligence claims against the administrative agent and one of its principals and actuaries as well as the claims against them for breach of trust.
  - Test for class action certification includes whether plain and obvious that particular claim could not succeed.
  - Court noted that, “an administrative agent or custodial trustee may be found to have a common law duty to pension plan beneficiaries beyond the terms of the contract in certain circumstances”.
    - Depends on the facts.

# Liability of Service Providers

---

- After certification of the action -
  - Administrative agent and its principal settled for \$1.1 million.
  - One set of actuarial firm defendants settled for \$100,000.
    - To the limit of their insurance.
  - Action discontinued against second set of actuarial firm defendants.
    - No funds
    - No insurance

# Selecting Service Providers

---

- Pension plan administrator must:
  - Take appropriate steps to select service providers, including:
    - Identify potential candidates;
    - Establish criteria for evaluating candidates;
    - Issue request for proposal to candidates;
    - Request sample contract and/or ask about proposed contractual terms;
    - Review proposals;
    - Interview potential candidates;
    - Check references; and
    - Negotiate contract.

# Selecting Service Providers

---

- Process for selecting investment managers is typically different than that for other service providers:
  - Investment consultant/advisor identifies investment managers for asset class;
  - Criteria for evaluating candidates is developed;
  - Candidates or a short-list of candidates are interviewed; and
  - Due diligence of selected manager's investment documentation is conducted.

# Selecting Service Providers

---

- Pension plan administrator must select service provider and be satisfied of their suitability.
- Some questions to consider in selecting pension plan service providers (different for different providers)
  - Do they have the required professional designations for the service?
  - What is their experience with similar pension plans?
  - What is their reputation like and what do their references say?
  - Do they have any conflicts?
  - Will they accept the proposed contract terms?

# Selecting Service Providers

---

- What are the terms of their proposed contract?
- Do they have sufficient professional liability insurance?
- Do they have sufficient resources to provide the services?
- What are their fees and are they competitive?
- For investment managers, does the investment consultant have any comments/advice?

# Monitoring and Supervising Service Providers

---

- Pension plan administrator is required to monitor service providers.
- If service provider is an agent, required to carry out reasonable and prudent supervision.
- Schedule for monitoring service providers and results of monitoring should be documented in writing.
  - For example, in governance and related policies and/or in meeting minutes.



# Monitoring and Supervising Service Providers

---

- Some questions to consider:
  - What are the evaluation criteria?
  - How frequently should service provider be evaluated or monitored?
  - What is the process or procedure for evaluating or monitoring service providers?
  - How will the evaluation/monitoring be documented?
  - Is there a process for allowing service providers to respond to concerns and questions?
  - Can contractual terms address performance?
    - For example, performance fees for beating targets/penalties for not meeting targets.

# Frequency of Marketing for Providers

---

- Some plans have a set schedule for marketing for certain service providers.
  - No established pension industry standard for minimum or maximum interval for marketing for service providers.
  - Consider purpose of marketing for service providers.
  - Schedule for marketing for providers does not replace the pension plan administrator's duty to monitor service providers.
  - Consider various issues: costs, concerns with service provider's performance, transitional issues, etc. . . .
  - Different considerations for investment managers, including benchmarks and value add and changes in asset mix.

# Terminating Service Providers

---

- Different practices for terminating service providers are appropriate depending on the circumstances.
- Important to review contract and other documents, including term, required notice, and procedure on termination.
- Consider timing and transition issues
  - How long will it take retain a new provider? See the steps on pp. 36 and 37.
  - Are there upcoming deadlines for which the service provider's services are required?
  - Would there be any transition issues in moving to new service provider?

# Service Provider Conflicts of Interest

---

- *City of Fredericton v. Fredericton Police Association, et. al.* 2021 NBCA 30 (CanLII) (“City of Fredericton”)
  - This case involves a number of issues.
  - Given the subject matter of this session, this presentation only discusses the conclusions in City of Fredericton on the allegation that the actuary was in a conflict of interest.

# City of Fredericton

---

- In 2013, the City attempted to convert the defined benefit plan (the “Original Plan”) it maintained for its employees to a shared risk plan.
- Police and fire unions successfully challenged the conversion before the labour board.
- City then split the Original Plan effective March 31, 2013:
  - Police and Fire Plan for City police and firefighters.
  - Original Plan for other City employees and converted Original Plan to a shared risk plan.

# City of Fredericton

---

- City directed Mercer (Canada) Ltd. (the “Actuary”), who was the actuary for the Original Plan, to determine the amount to be transferred from the Original Plan to the Police and Fire Plan.
- Regulator accepted the transfer amount.
- Police and fire unions successfully appealed that decision seeking a higher transfer amount.
- City appealed the Tribunal’s decision, but then abandoned the appeal.

# City of Fredericton

---

- As a result, the amount to be transferred to the Police and Fire Plan from the Original Plan and the initial value of the Police and Fire Plan would increase.
- The City, with the Actuary's assistance, tried to use the increase in the value of the Police and Fire Plan to further a proposal to:
  - retroactively reduce contributions to the Police and Fire Plan (since April 2013) and refund the excess; and
  - prospectively reduce contributions.

# City of Fredericton

---

- The administrator of the Police and Fire Plan was a joint union and management board (the “Board”).
- Evidence indicates that the Actuary worked with and took instructions from the City and City staff rather than the Board.
  - Actuary prepared and filed reports for the Police and Fire Plan, but was never formally appointed by the Board.



# City of Fredericton

---

- In December 2016, the Actuary advised the regulator that given the increase in the initial funding of the Police and Fire Plan, contributions to that plan had been higher than necessary and requested preliminary approval of a proposed contribution reduction and refund.
  - Also advised that revised actuarial reports for 2013 to 2015 would be required and certain amendments.
- Proposal to reduce future contributions and refund the excess was not presented to the Board until March 2017 – after Actuary wrote to the regulator.

# City of Fredericton

---

- Board initially accepted the Actuary's recommendation, but soon overturned their decision and decided to obtain independent actuarial and legal advice.
- The Actuary then presented the 2016 report to City Council. City Council approved the Actuary's recommendations, including a 6.2% discount rate, and directed Actuary to file the 2016 report.
- Actuary filed the 2016 report as well as revised reports for prior years with the regulator without Board approval.

# City of Fredericton

---

- Police and fire unions filed complaints with the regulator.
- Regulator advised that the 6.2% discount rate in the 2016 report was too high.
- Actuary sought the City's instructions on preparing a revised 2016 report.
- At the City's direction, Actuary advised the Board that if the discount rate or margin resulted in a funding deficiency, benefits would be reduced because contributions were capped.

# City of Fredericton

---

- Board terminates the Actuary.
- City then amends the by-law for the Police and Fire Plan to abolish the Board and make itself the administrator of the Police and Fire Plan.
- City directs the Actuary to file the revised 2016 report.
- The police and fire unions expand their complaints to the regulator.
  - Included complaints that the actuary was in a conflict of interest.

# City of Fredericton

---

- The regulator dismissed the police and fire unions' complaints.
- The police and fire unions successfully appealed to the Tribunal.
- The Tribunal made the following finding about the Actuary's involvement:
  - The Actuary was taking instructions from the City not the Board.
  - The Actuary knew the discount rate had to be approved by the Board.
  - Actuary knew that they did not have the Board's approval to submit the revised reports for 2013 to 2015 or the report for 2016, but did so anyway.
- Tribunal's decision was appealed, but not these findings.

# City of Fredericton

---

- Tribunal concluded that the evidence indicated that the Actuary preferred the City's interests over the members of the Police and Fire Plan and that this supported a conclusion that the Actuary had violated the conflict of interest prohibition under New Brunswick's *Pension Benefits Act* ("NB PBA") and their fiduciary obligations under the NB PBA.

# City of Fredericton

---

- The City and the regulator appealed the Tribunal's decision.
- With respect to the Actuary, the City and regulator argued that the Actuary did not have a statutory obligation to avoid a conflict of interest with the Board and that the Actuary did not have fiduciary obligations because they were not an agent.

# City of Fredericton

---

- Court of Appeal upheld the Tribunal's decision that:
  - actuaries are “agents” who are precluded from having conflicts under the NB PBA; and
  - the Actuary's conduct was inconsistent with their conflict of interest obligations.
- Tribunal noted many of the issues in this case arose from a poor delineation of the respective authorities and roles of the Board as the administrator and the City as the sponsor.
  - Could steps have assisted in avoiding these issues?