

# Practical Issues In Pension Fund Investing – Execution Of Subscription Agreements



There is a famous phrase which is particularly apt in the area of pension fund investing – “the devil is in the details”. This is the first in a series on practical issues that arise in connection with investments by Canadian pension funds in alternative asset classes. The subject of this post is the execution of subscription agreements.

It is becoming common now for pension funds in Canada to invest in pooled funds. Such investments can take different forms. For example, a pooled fund may be structured as a limited partnership or a trust. Whatever the structure, the investor is typically required to complete and sign a “subscription agreement”. An issue that frequently comes up is: what entity should execute the subscription agreement?

You might ask: why does it matter who signs the subscription agreement? Isn’t this just a technicality? It is probably correct that nothing will turn on who signs – as long as everything is going well. But what happens if the investment fails and/or the plan becomes insolvent? In those scenarios the last thing anyone needs is a dispute over who is on the hook for payments under the agreement. Even if the dispute is ultimately resolved in favour of the party who is properly liable under the agreement, time and money will have been wasted over an issue which could have been addressed up front.

Many subscription agreements make the “pension plan” or “pension fund” the signatory. This assumes that the pension fund is a “person” capable of entering into a legal agreement. In some jurisdictions, a “pension plan” is deemed by law to be a separate legal person. In those jurisdictions, the pension plan or pension fund may be the proper person to enter into the subscription agreement. But this is not the law in Canada. In Canada, a pension plan or pension fund does not have the status of a separate legal person and therefore cannot legally enter into a subscription agreement.

So who is the proper person to enter into the agreement? The answer depends on a range of factors, including the nature of the plan, the terms of the plan’s funding documents, any internal delegations of authority and the form of subscription agreement. What is important to remember is that, under pension legislation, the investment of the plan assets is a “plan administrator” function, not an “employer” function. This means that if the employer is also the legal plan administrator (which is the norm for private sector plans in most Canadian common law jurisdictions), it

must be made clear that the employer is signing the subscription agreement in its capacity as the plan administrator, not in its personal capacity.

Another issue which needs to be kept in mind when completing a subscription agreement arises from the interaction between pension law and securities law. Generally, a subscription agreement requires the pension plan to confirm that it is an "accredited investor" under applicable securities legislation. It is important to review the documentation carefully to make sure it is clear that the "accredited investor" is the pension fund, since the person signing on behalf of the plan may not qualify as an "accredited investor". This may require modifications to the wording of the subscription agreement.

Next time we will consider how to deal with ERISA representations in a subscription agreement.

Article by Louise J.A. Greig

**Osler, Hoskin & Harcourt LLP**