TRUSTS: THE MULTI-FACETED ESTATE PLANNING TOOL
PAPER 2.1

What It Means to Be a Trustee: A Guide for Clients Acting as Fiduciaries

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WHAT IT MEANS TO BE A TRUSTEE: A GUIDE FOR CLIENTS ACTING AS FIDUCIARIES

I. Introduction

Trustee duties are numerous and complex, and explaining what is often an abstract and academic topic to clients can be difficult. The purpose of this paper is to provide an overview of the duties all prospective and existing trustees should be aware of regarding the exercise of the office of trustee, in a format for practitioners to use as a guide when advising clients. This will include a discussion of some of the less commonly explored duties, such as the duty to invest, restrictions on delegation, and the duty to provide trust information.

II. Duties on Acceptance of a Trusteeship

Acting as a trustee can be an onerous task with significant exposure to liability. Before accepting an appointment as a trustee, clients should take time to consider the nature and scope of the fiduciary obligations they are being asked to assume, and the potential for difficulties to arise in the circumstances. This should involve considerations such as:

(i) whether accepting the trusteeship is likely to put the client in situations whether their personal interests conflict with their fiduciary duties;

(ii) how difficult the task is likely to be, taking into account:

- the value and nature of the trust property;
- the duration of the trust;
- the range of beneficiaries and the potential for disagreement among them;
- the scope of the trustees' powers (e.g., how much discretion is the trustee required to exercise?);
- the existence of provisions in the trust deed offering protection from liability;

(iii) whether the trust instrument provides for remuneration of trustees and enables them to pre-take remuneration without approval of the beneficiaries or the court;

(iv) the possibility of retiring from the trusteeship without requiring others' consent;

(v) whether the validity of the transfer of the trust property to the trustee could be challenged; and

(vi) whether the trustee could be criminally liable under money-laundering legislation.[1]

If the client agrees to accept the appointment of trustee, they are well advised to take the following steps on the assumption of the office:

(i) ensure their appointment was validly made;

(ii) review the trust documents to ascertain the nature and current circumstances of the trust property, the terms of the trust, and the contents of the documents relating to the trust;

(iii) take control of the trust property;

(iv) disclose to the settlor, or the person having the power of appointment of new trustees, any facts that would affect the trusteeship;

(v) realize debts owing to the trust as soon as reasonably possible and pursue court action to enforce payment if debts are not paid in a reasonable amount of time;

(vi) determine whether there are encumbrances on the trust property;

(vii) inquire into any losses of the trust property;

(viii) inquire into the acts of predecessors, including ensuring that the fund is invested properly, and into any suspicious circumstances regarding the current and former trustees;

(ix) ascertain the beneficiaries and their circumstances; and

(x) apply to the court for advice and directions if they have any doubts regarding the above.[2]

III. General Duties in the Administration of the Trust

Once trustees have taken office, they are obliged to conduct themselves in the administration of the trust in accordance with the following duties:

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1 David J Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton Law of Trusts and Trustees*, 18th ed (London: Butterworths, 2010) at 42.1.

2 John Mowbray et al., ed, *Lewin on Trusts*, 18th ed (London: Sweet & Maxwell, 2008) at 12-28 to 12-41; *Underhill and Hayton*, *supra*, note 1 at 42.1 to 42.31.

A. Duty to Obey the Trust Instrument

The first of these duties is to obey the trust instrument.[3] They should strictly observe any conditions attached to the powers described in the instrument and must not act beyond the limits of the powers conferred.[4] Trustees should be reminded that if they act beyond the limits of their powers, they will be liable for any losses to the trust property, however unexpected the result or proper their motives.[5]

Trustees are only exempt from their duty to obey the trust instrument if:

- the directions of the instrument are illegal;
- the directions are impracticable (for example, if the instrument requires a sale of trust property, but no buyer can be found);
- the instrument is made impossible by statute; or
- the instrument is so uncertain in its terms that no valid trust is created.[6]

B. Duty of Impartiality

Trustees have a duty to maintain a position of neutrality as among the beneficiaries when they administer the trust. Should the trust become involved in litigation, trustees may not take a position that favours one party over another.[7] For example, in cases involving *Wills Variation Act* claims or the proper interpretation of a trust deed, the trustee should not take sides. Rather, the trustee's role is limited to providing the court with the relevant documents and the particulars of the trust. Where a trustee is also a beneficiary, legal counsel should delineate between advice being provided to the client in their capacity as trustee from advice provided to them as beneficiary, and separate the billing accordingly so that the trustee does not face challenges when seeking indemnity from the trust for their legal fees.

When managing the trust property, trustees must ensure that no beneficiary is given an advantage that would burden another beneficiary.[8] This does not mean that trustees must treat every beneficiary equally. If trustees act honestly and objectively and the trust instrument expressly or impliedly permits it, trustees are entitled to favour one beneficiary over another.[9] Generally, the rule is not inflexible, and fairness as between beneficiaries can give trustees wide discretion to consider different consequences when making investment decisions.[10] When deciding how to satisfy the duty of impartiality, the trustee should consider if there is evidence the settlor intended the benefits under the trust to be enjoyed unequally, and if there is no evidence that the settlor intended inequality, how can equality under the law be achieved.[11]

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3 *Underhill and Hayton*, *supra*, at 43.2.

4 See, for example, *Bateman v. Davis* (1818), 3 Madd 98 at 99, in which a subsequent ratification of the conduct by the beneficiary was not sufficient to excuse the trustees from a finding of breach of trust.

5 *Clough v. Bond* (1838), 3 My & Cr 490 at 496.

6 *Underhill and Hayton*, *supra*, at 43.3.

7 *Re Patton* (1971), 19 D.L.R. (3d) 497 (Ont. H.C.) at paras. 3 and 15.

8 *Howe v. Earl of Dartmouth* (1802), 7 Ves 137; see also discussion below on the duty to convert and apportion.

9 Donovan Waters, Mark Gillen and Lionel Smith, *Waters' Law of trusts in Canada*, 3d ed (Toronto: Carswell, 2005) at 967.

10 *Nestle v. National Westminster Bank Plc* (1992), [1993] 1 W.L.R. 1260 (Eng. C.A.).

11 *Waters, supra*, at 972.

The requirement of neutrality can pose challenges in practice when the trustee or a close family member is a beneficiary of the trust and may benefit from the decisions being made. In these situations, it is often helpful for the trustee to consider what an independent trustee with no interest in the outcome would do in the circumstances, and use this as a guide for their actions.

C. Duty to Act in the Best Interests of the Beneficiaries

When dealing with the trust property, trustees have an overarching duty to exercise their powers so as to protect and further the beneficiaries' interests as a whole. For the majority of trusts, which are established for the provision of financial benefits, this usually refers to "financial" interests. For trusts with this purpose, trustees are required to set aside their own personal interests and views when making investment decisions in order to provide the greatest financial benefits for the beneficiaries.[12] For example, in *Cowan v. Scargill*, the Court found that it was improper for union-appointed trustees of a coal mining employees' pension fund to refuse to approve an investment policy with overseas investments and investments in oil and gas on the basis that it was contrary to union policy, if those investments would provide greater financial benefit for the beneficiaries.

The general duty to act in the best interests of the beneficiaries is closely associated with other duties owed by trustees, such as the duty of loyalty, discussed below, and the duty to protect and preserve the trust property, which includes the requirement to insure the trust's assets.[13]

D. Duties Regarding the Exercise of Discretion

Trustees are required to put their minds to their distributive discretions (e.g., power to encroach on capital) and managerial discretions (e.g., power to convert trust assets) granted to them in the trust deed. While a trustee may ultimately elect not to exercise a particular discretionary power, he or she must still consider from time to time whether the discretion should be exercised. Also, trustees may not fetter their discretion by pre-determining or restricting their future decisions.[14]

When exercising their discretionary powers, trustees owe a duty of good faith which requires them to exercise the discretion with honesty, integrity, objectivity, care and impartiality. A trustee must consciously consider whether the exercise of discretion is appropriate in the circumstances, rather than simply follow the instructions of the settlor or the co-trustee. Exercises of discretion which are motivated by caprice, spite or a bribe will be invalid. The trustee has an obligation to inform him or herself, before making a decision, of all matters relevant to the decision, and a corresponding duty to refrain from considering factors which are irrelevant or extraneous to the exercise of the discretionary power. The settlor's intent, as gathered from the trust instrument, will assist in determining which factors are relevant to consider.[15]

E. Duty to Convert and Apportion

The duties to convert and apportion certain trust property correlate to the duty to act impartially. These duties essentially require a trustee to sell residuary personalty devised in a testamentary trust if the assets are of a wasting or hazardous character (to protect the interests of the remainder beneficiaries), or if they are not likely to fall in until sometime after the testator's death (to ensure income for the life tenant). If assets are of a wasting character, the trustees must apportion between the

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12 *Cowan v. Scargill*, [1985] Ch 270 at para. 5.

13 *Pateman v. Heyen* (1993), 33 N.S.W.L.R. 188.

14 *Waters, supra*, at 929-35.

15 *Underhill and Hayton*, *supra.*

income and capital beneficiaries the income earned on the assets prior to the sale of the trust property; if assets are non-productive and conversion is delayed, the trustees must apportion the proceeds of sale among the income and capital beneficiaries.[16]

These duties are largely intended to protect residuary beneficiaries by ensuring that they receive a fair portion of the trust capital, and therefore do not apply to specific devises (where it was intended for the beneficiary to enjoy the asset in its present form), *inter vivos* trusts (where it is presumed that the settlor intended the beneficiaries to enjoy the asset itself), realty,[17] or where the trust instrument expressly or impliedly indicates that the assets are not to be converted.[18] The rules have been criticized for their rigidity and specificity. For example, per *Re Earl of Chesterfield's Trusts*,[19] the amount to apportion to a remainderman on conversion is determined by ascertaining the sum at which,

> put out at 4 per cent. per annum … and accumulating at *compound interest* calculated at that rate with yearly rests, and deducting income tax, would, with accumulations of interest, have produced, at the respective dates of receipt, the amounts actually received;

Due to their complexity, and the seemingly increased willingness of the courts to find exceptions to these duties, their application is often expressly excluded in wills and trust deeds, and practitioners are best to treat them on a case-by-case basis. Numerous texts exist on the subject. For the Canadian position, see, for example, *Waters* at 972 to 1004.

F. Duty of Care

Trustees owe the beneficiaries a duty of care when managing the trust property. The common law requires trustees to take care of the trust property as someone of ordinary prudence would take, not as if they had themselves alone to consider, but as if they were required to make an investment for the benefit of other people for whom they felt a moral obligation to provide.[20] This is an objective standard for which trustees must show "vigilance, prudence and sagacity."[21] At least ostensibly, there is no distinction between the level of care required by lay or professional trustees, or active and passive trustees.[22]

Trustees are generally bound to repair trust property and see that the condition of the property does not deteriorate.[23] Trustees should apply to the court if they are uncertain how to raise the money for repair.[24]

G. Duty of Loyalty

Trustees owe a general duty of loyalty to their beneficiaries. This requires trustees not to place themselves in a position where their personal interests conflict, or may conflict, with their fiduciary duties.[25] The duty of loyalty is strict. It does not depend on fraud or good faith, or whether the

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16 *Earl of Chesterfield's Trusts, Re* (1883), 24 Ch D 643.

17 *Lottman et al. v. Stanford et al.*, [1980] 1 S.C.R. 1065.

18 *Howe v. Earl of Dartmouth* (1802), 7 Ves 137.

19 *Earl of Chesterfield's Trusts, Re* (1883), 24 Ch D 643.

20 *Learoyd v. Whiteley* (1887), LR 12 App Cas 727 (UK HL).

21 *Fales v. Canada Permanent Trust Co* (1976), [1977] 2 S.C.R. 302 at 318.

22 *Ibid.* at 316.

23 *Re Hotchkys* (1886), 32 Ch D 408.

24 *Re Fowler* (1881), 16 Ch D 723.

25 *Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Company*, [1917] 2 Ch 71 at 81.

beneficiary suffered any loss.[26] It may, however, be overridden by the trust instrument or by the informed consent of the beneficiaries.[27]

The duty of loyalty prevents trustees from profiting from the trust unless otherwise authorized. New trustees should be advised that they may not retain a profit if it is obtained directly or indirectly from the trust property or his or her fiduciary relationship.[28] The general rule is that trustees may not purchase from, sell to, or loan to the trust.[29] The rationale for the rule is that trustees cannot fulfill their obligation to determine whether the sale and its terms were in the trust's best interests when they operate at both sides of a transaction.[30]

Nevertheless, provisions in trust instruments which permit this kind of purchase have been upheld as valid,[31] and it does not appear that the common law completely removes the right for trustees to purchase from their beneficiaries.[32] Trustees are able to purchase from the trust property where the instrument authorizes them to do so. After a purchase, a beneficiary cannot set a sale aside if it was consented to by all the beneficiaries, being of full capacity and having full and proper disclosure of the sale.[33] If a trustee has any concerns that a beneficiary may mount a challenge to the sale, her or she should seek court approval before purchasing property from the trust.[34]

As incident to the duty of loyalty, a trustee must not assist a third party to claim adverse title against the beneficiary,[35] even if the trustee believes the property belongs to a third party in right. The trustee may, however, refuse to execute the trust or transfer the trust property if (i) they receive notice that they will be subject to a claim if they deal with the trust property, or (ii) cannot safely do so by reason of notice of title. In such cases, trustees are entitled to refuse to execute the trust until they have applied to the court for direction.[36]

IV. Duties in Relation to the Office of Trustee: Delegation and Acting Jointly

Trustees are not permitted to delegate, to either agents or co-trustees, the powers, discretion, or duties assigned to them, unless:

- the trust instrument authorizes the delegation;
- it is impossible for the trustee to do the act themselves;

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26 *Canadian Aero Service Ltd v. O'Malley* (1973), [1974] S.C.R. 592.

27 *Phipps v. Boardman*, [1966] 3 All ER 721, [1967] 2 AC 46 at 104 (UK HL).

28 *Keech v. Sanford* (1726), Sel Cas *t* King 61 at 62; *Regal (Hastings) Ltd v. Gulliver* (1942), [1967] 2 AC 134n HL.

29 *Ex parte James* (1803), 8 Ves Jun 337, 32 ER 385 (Eng Ch Div); *Re Mitchell* (1970), 1 N.S.R. (2d) 922, 12 D.LR. (3d) 66 (NSCA) at 941.

30 *Alexandra Oil & Development Co v. Cook* (1908), 11 OWR 1054 (Ont. C.A.).

31 *Ballard Estate v. Ballard Estate* (1991), 79 D.L.R. (4th) 142 (Ont. C.A.), leave to appeal to the SCC refused (1991) 5 O.R. (3d) xii (S.C.C.).

32 *Campbell v. Walker* (1800), 5 Ves Jun 678 at 681-682 (Eng Ch Div).

33 *Holder v. Holder*, [1968] Ch 353.

34 *Campbell v. Walker* (1800), 5 Ves Jun 678 at 681-682 (Eng Ch Div).

35 *Newsome v. Flowers* (1861), 30 Beav 461.

36 *Neale v. Davies* (1854), 5 De GM & G 258 at 263-64.

- the act does not involve an exercise of the trustees' discretion and the employment of an agent would seem necessary or appropriate to an ordinary person of business[37];
- the delegation is authorized by statute.

The policy behind the rule is that once trustees take on the role of managing property for others' benefit, they have no right to shift that duty onto someone else.[38]

There are some exceptions to the rule. Donovan Waters et al. suggest that the case law has shifted in Canada to permit delegation except where trustees make policy decisions.[39] These would include decisions involving:

- selection of recipients and determination of amounts and timing of distributions to beneficiaries[40];
- allocation of expenses to income or capital[41]; and
- retention or conversion of trust property.[42]

Certain provisions of the *Trustee Act* also permit delegation by trustees. For example, s. 7 permits a trustee to appoint a solicitor as agent to receive and give a discharge for money or other valuable consideration. Section 15.5 permits trustees to delegate the authority to invest the trust property, so long as the trustee exercises prudence with respect to the selection and oversight of the delegate. This power will be discussed further below.

In the case of multiple trustees, the courts have clearly stated that "where there are several trustees all must act."[43] The settlor places confidence in his or her trustees and each is under a duty to exercise personal judgment and discretion on every matter, and not blindly leave any questions to co-trustees. This is so even where the trust instrument speaks of an "acting trustee,"[44] or where the settlor has left a letter of wishes to guide the administration of the trust. All trustees must therefore act jointly in the receipt of money, unless the trust instrument authorizes one to receive funds,[45] or the trustees have appointed a solicitor to act as agent. The trustees should ensure that the bank does not pay cheques signed by only one of them, unless delegation to one trustee has been authorized by the trust agreement.[46]

Executors are exempt from this rule insofar as it applies to personal property. Where the trust property is realty, however, executors are required to act jointly.[47]

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37 *Underhill and Hayton*, *supra*, at 51.2; *Speight v. Gaunt* (1883) 9 App Cas 1.

38 *Turner v. Corney* (1841), 5 Beav 515 at 517, 49 ER 677.

39 *Waters*, *supra*, at 861.

40 *Re Partanen*, [1944] 2 D.L.R. 473 (Ont. C.A.).

41 *Underhill and Hayton*, *supra*, at 51.1.

42 *Re Wilson*, [1937] 3 D.L.R. 178 (Ont. C.A.).

43 *Gibb v. McMahon* (1905), 9 O.L.R. 522 at para. 12 (Ont. C.A.), aff'd (1906), 37 S.C.R. 362.

44 *Mickleburgh v. Parker*, 17 Gr. 503.

45 *Re Flower and Metropolitan Board of Works* (1884), 27 Ch D 592 at 596-97.

46 *Clough v. Bond* (1838), 3 My & Cr 490.

47 *Estate Administration Act*, s. 78(4); *Graham v. Moore Estate*, 2002 BCSC 691.

In some cases, it would be impracticable to require all the trustees to transact business on the trust bank account, so a clause may be inserted in the trust instrument which permits the trustees to delegate sole signing authority to one or more trustees, such as the following:

> The Trustees may open and operate bank accounts. For this purpose, they may designate in writing any one or more of them as authorized signatories on any account. The signature of the authorized signatories are binding on this Trust.

If signing authority is delegated to one or more trustees, all trustees must still participate in decisions involving the exercise of their discretion. Accordingly, trustees are advised to support any payments arising from an exercise of discretion with a trustees' resolution signed by all trustees, or minutes of a trustees' meeting evidencing the decision that was made.

V. Duties in Relation to Trust Information

There are at least four duties a trustee may have in relation to trust information.

The first is to keep the affairs of the trust, and any personal information relating to the beneficiaries, confidential.[48]

Second, trustees may not use information acquired as trustee to act against the interests of the trust.[49]

Third, trustees must be ready with the trust accounts. The rule was framed as follows in *Sanford v Porter*[50]:

> … the duty of the trustee or other accounting party is to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required.

This rule is not unqualified. Trustees are only required to have accounts ready in a "reasonable time" after being asked to account, having regard to the complexity of the trust's affairs, and the length of time it has been in existence.[51] Nor are trustees required to pay any fees necessary to provide copies of the trust documents. Such fees fall to the beneficiaries.[52]

The duty to account goes to the irreducible core of the trust obligation. It cannot be eliminated or amended by the trust instrument.[53] The accounts should contain full and accurate information as to the investment of the trust funds, and the amount and state of the trust property.[54]

Trustees are required to keep supporting vouchers and other documentation with their account information.[55] It would not be sufficient, for example, for trustees merely to state that the trust property was invested in a particular type of investment. Documentation relating to particular investments must be kept with the accounts.

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48 *Underhill and Hayton*, *supra*, at 56.31; *Argyll (Duchess of) v. Duke of Argyll*, [1967] Ch 302, [1965] 1 All ER 611.

49 *Phipps*, *supra*, at 91-92.

50 *Sanford v. Porter* (1889), 16 OAR 565 (Ont. C.A.) at 571.

51 *Waters*, *supra*, at 1064.

52 *Ottley v. Gilby* (1845), 8 Beav 602 at 604.

53 *Armitage v. Nurse*, [1998] Ch 241; *Jones v. Shipping Federation of British Columbia* (1963), 37 D.L.R. (2d) 273 (B.C.S.C.).

54 *Re Tillott*, [1892] 1 Ch 86 at 89.

55 *Pearse v. Green* (1819), 1 Jac & W 135.

In this vein, we typically advise new trustees to keep a Trust Record Book that retains:

(i) copies of the trust's banking statements, cancelled cheques and deposit slips;

(ii) the trust's accounting records detailing expenditures made to or on behalf of the beneficiaries and deposits received by the trust, and receipts for expenses;

(iii) copies of all T5 and other tax information slips received in respect of income earned by the trust during the year, including any dividends received;

(iv) details of any unusual transactions made or incurred by the trust;

(v) details of any changes in the trust agreement (such as the replacement of a trustee); and

(vi) documentation for any decision with respect to the administration of the trust, preferably by a written resolution by a trustee or, if there is more than one trustee, then by minutes of a meeting of the trustees or by a confirmatory letter from one trustee to the others.

The fourth duty discussed in relation to trust information is the duty of disclosure.

The duty of disclosure has traditionally been premised on the beneficiary having an equitable interest in the trust documents. The Ontario General Divisional Court's decision in *Ontario (Attorney General) v. Ballard Estate*[56] has departed from this rationale by holding that the purpose of the duty is for persons with actual or potential interests in the trust to be able to hold the trustees to account. This links Canadian jurisprudence with developments in other common law jurisdictions which ground the duty of disclosure in the irreducible core of the trust obligation.[57]

The distinction is theoretical—but it is an important one. Canadian law already recognizes that the duty of disclosure is owed to beneficiaries with vested, contingent, and remainder interests.[58] But if the duty of disclosure does not depend on a proprietary right in the trust documents, trustees may also be required to disclose trust information to objects of a discretionary power. This was the Privy Council's holding in *Schmidt v. Rosewood Trust Ltd*,[59] which grounded the obligation to disclose in the court's inherent jurisdiction to oversee the administration of trusts and suggested that disclosure may be granted to any party with more than a theoretical possibility of a benefit under the trust.[60] As jurisprudence continues to develop around *Schmidt*, trustees should be advised that their disclosure obligations could extend to discretionary objects, so long as there is more than a theoretical chance that these objects will receive a benefit under the trust.

The duty of disclosure imposes two primary obligations on trustees.

The first is to seek out each beneficiary of full age and capacity and inform them of their interests under the trust.[61] While the same duty does not apply to executors as wills are open to public inspection,[62] executors are nonetheless required under s. 112 of the *Estate Administration Act* to provide notice of their intention to apply for probate and a copy of the will to each beneficiary named in the will.

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56 *Ontario (Attorney General) v. Ballard Estate* (1994), 20 O.R. (3d) 350, 119 D.L.R. (4th) 750 (Ont. Gen. Div.).

57 See *Schmidt v. Rosewood Trust Ltd*, [2003] UKPC 26, [2003] 2 AC 709; *Armitage*, *supra*, at 253; and *Foreman v. Kingstone*, [2005] W.TL.R. 823 NZ HC.

58 In *Ballard Estate*, for example, the Court found that the duty of disclosure was owed to a contingent remainder interest.

59 *Schmidt*, *supra*.

60 *Ibid.* at 735.

61 *Burrows v. Walls* (1855), 5 De GM & G 233 at 253.

62 *Re Lewis*, [1904] 2 Ch 656 at 661.

The second duty is to provide the beneficiaries with the trust accounts when requested.[63]

There is no absolute right to the disclosure of trust documents and the right is not unqualified.[64] The information that needs to be provided may well depend on the nature of the beneficiary. For example, an income beneficiary cannot compel disclosure of information relating to matters solely relating to capital.[65] Nor does a beneficiary have an absolute right to documents that record the trustee's decision-making process,[66] or documents obtained by the trustees in their capacity as corporate directors.[67]

The duty of disclosure is a nebulous area and not easily navigated. Trustees should be advised of the potential scope of the duty and to seek legal advice or court direction where matters are unclear.

VI. Investing Trust Assets

A. General Rules

Section 15.1 of the *Trustee Act*[68] has modified the duty in respect to investing. That section states:

> 15.1(1) A trustee may invest property in any form of property or security in which a prudent investor might invest, including a security issued by an investment fund as defined in the *Securities Act*.

An "investment fund" is defined in the *Securities Act* as a mutual fund or non-redeemable investment fund.

The trustee has an equitable duty to take reasonable and proper care when investing trust assets. Trustees must act prudently in their selection of investments, having regard to the terms of the trust and the interests of the beneficiaries.[69] Section 15.2 of the *Trustee Act* requires that:

> In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

Section 21 of the *Trustee Act* provides that the powers of investment conferred by the *Trustee Act* are in addition to any powers contained in the trust instrument, and nothing in the Act authorizes the trustee to do what they are expressly forbidden to by the trust instrument. The trust instrument could therefore broaden or narrow the standard of care required when investing and the types of investments in which trustees could place the trust funds.

B. History

Prior to the Second World War, it was common for the trust instrument to specify the types of investments in which the trustee could place the trust funds. In the absence of such specifications, a "legal list" was provided by legislation that largely approved government guaranteed instruments and investments in certain "blue chip" companies. The principle behind the list was secured loans at fixed rates of interest - codifying equitable jurisprudence of the 19th century that favoured assets that

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63 *Armitage* at 253 and 261.

64 *Schmidt*, *supra*.

65 *Nestle v. National Westminster Bank plc* (1988), 10 Tru LI 112 at 124, aff'd, [1993] W.L.R. 1260 (C.A.).

66 *Re Londonderry's Settlement*, [1965] Ch 918, [1964] 3 All ER 855.

67 *Butt v. Kelson* (1951), [1952] 1 Ch 197, [1952] 1 All ER 167 Eng (CA); *Kordyban v. Kordyban* (2003), 50 E.T.R. (2d) 116 (B.C.C.A.).

68 *Trustee Act*, R.S.B.C. 1996, c. 464.

69 *Waters*, *supra*, at 940-41.

avoided the risks of speculation. Following the war and high inflation, trustees needed to compensate for the declining purchasing power of currency by hedging their investments and placing them in industrial and commercial stocks. Government stocks were no longer providing steady rates of return that could match the growth felt in funds.[70]

In 1970, the Uniform Law Conference adopted a new model Act that abandoned the "legal list" approach and adopted the prudent investor rule. In part a response to developments in modern portfolio theory, the "prudent investor" considers risk across the portfolio as a whole, and not in relation to a particular investment.[71] The "prudent investor" found in s. 15.2 of the BC *Trustee Act* embodies a theory that controls risk through diversification. He or she selects a desired risk level before choosing investments and then maximizes return within that risk level.[72]

C. Satisfying the Rule

Due to the complexity of modern portfolio theory, the *Trustee Act* permits trustees to delegate investment decisions and seek specialized advice. The initial decision to delegate must be in accordance with the prudent investor standard - and includes prudence in selecting, instructing, and monitoring their agent. If this standard is followed, trustees are not held liable for loss. If the agent is careless in their investment decisions, they may be held liable to the trustees.[73] Note, too, that despite the general ability under the Act to delegate investment decisions, s. 15.5(6) provides that trustees cannot delegate authority under circumstances in which the trust requires trustees to act personally.

Trustees must keep the portfolio reasonably balanced in order to increase the capital value of the trust property.[74] In most cases, this will require diversification of the trust property. In order to determine whether diversification is necessary, trustees should consider factors similar to those suggested by s. 01(3) of the *Uniform Trustee Investor Act, 1997* of the Uniform Law Conference of Canada. These are:

- (i) general economic conditions;
- (ii) the possible impact of inflation or deflation;
- (iii) the expected tax consequences of investment decisions or strategies;
- (iv) the role that each investment or course of action plays within the overall portfolio;
- (v) the expected total return from income and the appreciation of capital;
- (vi) other resources of the beneficiaries;
- (vii) needs for liquidity, regularity of income, and preservation or appreciation of capital; and
- (viii) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

Investment powers must be exercised so as to yield the best return for the beneficiaries.[75] This means that trustees are under a duty to determine the extent of their powers of investment and diversify

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70 *Waters*, *supra*, at 941-47.

71 *Waters*, *supra*, at 950-51.

72 *Waters*, *supra*, at 962.

73 *Waters*, *supra*, at 952-53.

74 *Waters*, *supra*, at 960.

75 *Cowan v. Scargill*, [1985] Ch 270, [1984] 2 All ER 750.

accordingly. Failure to identify the full scope of their powers (especially if it results in minimal returns) is likely to be considered a breach of trust and a form of recklessness or dishonesty.[76]

A trustee might be advised to proceed as follows:

(i) establish the trust instrument's objectives in writing, and review and change these objectives as the beneficiaries' circumstances change;

(ii) match these objectives and circumstances with an investment risk appetite;

(iii) develop and implement an investment policy that satisfies the trust instrument in terms of capital preservation and growth, adequacy of income, and portfolio risk;

(iv) set appropriate performance measures; and

(v) evaluate the investment portfolio's performance regularly and its compliance with the investment policy.[77]

Canadian and UK jurisprudence have not been consistent as to whether trustees will be shielded from liability by relying on the trust instrument.[78] Whether trustees act as a prudent investor will ultimately depend on the circumstances. If there has been a significant decline in circumstances since the creation of the trust instrument, for example, the prudent trustee should seek directions from the court, or at least the consent of the beneficiaries, before making an investment required by the instrument.[79]

VII. Seeking Directions

If trustees have any doubts as to how to carry out their duties, they have a general obligation to seek the court's advice.[80] Applications for directions from the court should be brought by petition pursuant to s. 86 of the *Trustee Act*[81] and served on all interested parties. Trustees should be advised, though, that this prerogative should not be abused; trustees could be required to pay court costs from their own pocket for frivolous applications. A good rule of thumb is that the court will not give advice or direction if it would abrogate the discretion of the trustee.[82] Examples of where it is proper to seek the court's direction are situations where:

(i) the trustee seeks to confirm the scope of his or her discretion under the trust[83];

(ii) there is a deadlock among the trustees (NB: the court will intervene only if necessary to carry out the terms of the trust and the relief sought is in the interests of the beneficiaries)[84];

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76 *Armitage*.

77 Mander & Co Ltd, *Trustee Investment Guide* at pages 1-2; Asset Risk Consultants, *Investment Overview & Control: a guide for trustees*, Guernsey, 2009.

78 Compare *Toronto General Trusts Corp v. Cobham*, [1944] 2 D.L.R. 207 (Ont. H.C.) and *Cowan v. Scargill*, [1985] Ch 270, [1984] 2 All ER 750.

79 *Waters*, *supra*, at 957.

80 John McGhee, ed, *Snell's Equity* (London: Sweet & Maxwell, 2010) at 29-003.

81 R.S.B.C. 1996, c. 464.

82 *Re Fulford* (1913), 29 O.L.R. 375, 14 D.LR. 844 (Ont. H.C.) at para. 24, in which the court refused to approve a scheme whereby the Trustees would seek court approval of proposed sales of stock.

83 *Re Floyd*, [1961] O.R. 50, 26 D.L.R. (2d) 66; *Nestle*, *supra*, at 1265.

84 *Kordyban v. Kordyban*, 2003 BCCA 216.

(iii) one of the trustees refuses to exercise their discretionary power[85]; or

(iv) the beneficiary is incorrectly named or never existed.[86]

85 *Sayers v. Philip* (1973), 38 D.LR. (3d) 602 (Sask. C.A.).

86 *Re MacGregor Estate* (1986), 22 E.T.R. 192 (Ont. H.C.).