

NEW INVESTMENT AND DELEGATION POWERS FOR CHARITIES IN ONTARIO

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A. INTRODUCTION

As the result of an initiative taken by the Ontario Bar Association, recent amendments to the *Trustee Act* (Ontario) have been enacted, which will now permit the delegation of investment decision making by charities in Ontario. Bill 57 (Chapter 9, Statutes of Ontario, 2001), known inelegantly as *An Act to Promote Government Efficiency and to Improve Services to Tax-payers by Amending or Repealing Certain Acts*, was given third reading on June 28, 2001, and received Royal Assent on June 29, 2001 (“Bill 57”). Bill 57 amends certain portions of the *Trustee Act* (Ontario) and the *Charities Accounting Act* (Ontario), as well as adding new provisions to the *Trustee Act*, that collectively mean that charities that are either incorporated in Ontario, have their offices in Ontario or invest in Ontario, will now have the ability to delegate investment decision making to qualified investment managers.

This important amendment to the *Trustee Act* follows on the new investment powers given under amendments to the *Trustee Act* as of July 1, 1999, which earlier established a prudent investor standard to replace the more archaic statutory list of investment powers. What was missing from the July 1999 amendment to the *Trustee Act* was the ability to delegate investment decision making to qualified investment managers. This anomaly resulted in the unsatisfactory situation that charities had to satisfy the prudent investor standard in investment decision making but not were not able to delegate day to day investment decision making to qualified professionals. This was contrary to what one would expect of a prudent investor who did not have the sophistication necessary to make daily investment decisions, often involving large sums of money.

Given that most large charities with surplus funds or endowment funds have for many years utilized the services of investment managers to make day-to-day investment decisions on behalf of the board of directors of a charity, the lack of legal authority to continue with such arrangements was clearly a major impediment for charities. If the board of a charity continued to delegate investment decision making, it ran the risk of being found in breach of trust for having permitted unauthorized delegation of investment decision making. On the other hand, if the board did not use the services of a qualified investment manager, it ran the risk of being found in breach of the new statutory requirement to exercise the standard of care expected of a prudent investor.

With the amendments provided under Bill 57, directors of charities will now be able to delegate investment decision making to qualified investment managers in accordance with investment community standards and in accordance with the practice of most large charities. However, the statutory requirements that apply to the authority granted to delegated investment decision making must be carefully reviewed and complied with. The failure of directors to do so could result in possible personal liability to them for non-compliance with statutory requirements for the investment of charitable funds.

B. OVERVIEW OF APPLICABLE PROVISIONS UNDER THE TRUSTEE ACT

The following is a brief overview of the applicable provisions of the *Trustee Act* as amended by Bill 57. A copy of the applicable provisions of Bill 57 amending the *Trustee Act* (Schedule “A”), as well as a copy of the *Trustee Act* including the applicable amendments from Bill 57 (Schedule “B”) are attached to this Bulletin. (Please note that Schedule “B” to this article is not an official consolidation of the *Trustee Act*. Reference to the official statutes of Ontario is required in this regard.).

1. When Do the Investment Powers of the Trustee Act Apply?

Whether or not the *Trustee Act* applies to the trustees of a charity (i.e. its Board of Directors) has always been a matter of some debate, particularly as a result of the Ontario Court of Appeal decision in the *Christian Brothers* case (see *Charity and the Law Update* No. 6, June 1st, 2001 found at www.charitylaw.ca). However, Bill 57 has amended the *Charities Accounting Act* (Ontario) to state that Sections 27 to 30 of the *Trustee Act* apply to trustees and corporations that are deemed to be trustees under the *Charities Accounting Act*, i.e. all charities that deal with charitable property in the Province of Ontario, whether organized as corporations, charitable trusts, or unincorporated charitable associations.

One exception to this rule is if the terms of the trust dealing with charitable property provide for a different investment power. For instance, if an endowment agreement or testamentary trust imposes a specific investment power on the gift being made. The other exception is found in subsection 27(9) of the *Trustee Act*, as amended by Bill 57, which states that the investment powers set out in the *Trustee Act* do not require a trustee to act in a manner that is inconsistent with the terms of the trust. Subsection 27(10) provides that the constating documents of a charitable corporation under the *Charities Accounting Act* are deemed to form part of the terms of the trust. This means that if the letters patent of the charitable corporation provide for investment powers different from the investment powers contained under the *Trustee Act*, then the investment powers of the letters patent of the charitable corporation will take precedence, regardless of whether the charitable corporation is incorporated in Ontario, federally, or in another province.

From a practical standpoint, in the event that the charity wishes to adopt investment powers that are different from the investment powers set out under the *Trustee Act*, it is unlikely that the Public Guardian and Trustee of Ontario will permit the charity to do so when applying for supplementary letters patent. This means that only charities incorporated federally or in another province other than Ontario will be able to obtain investment powers which are different from those within the *Trustee Act*, and only then if its letters patent specifically provide for different investment powers than those provided for under the *Trustee Act*. Whether or not a charity would want to have different investment powers than those provided for in the *Trustee Act* is a matter which the charity and its legal advisor will need to carefully review.

2. What Investment Powers Apply?

Subsection 27(1) of the *Trustee Act* states that a trustee “*must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments*”. Based upon the standard of care of a prudent investor, subsection 27(2) of the *Trustee Act* states that a trustee “*may invest trust property in any form of property in which a prudent investor might invest*”.

Subsection 27(3), which is amended by Bill 57, states that “*any rule of law that prohibits a trustee from delegating powers or duties does not prevent the trustee from investing in mutual funds, pooled funds or segregated funds under variable insurance contracts*”. This authority to invest in mutual funds or other funds is not now subject to the statutory requirements concerning the delegation of investment decision making which are contained in the balance of Bill 57.

Although the *Trustee Act* does not define what is meant by a “*prudent investor*”, subsection 27(5) states that a trustee must consider the following criteria in the planning of investment of trust property, in addition to any others that are relevant in the circumstances:

- General economic conditions.

- The possible effect of inflation or deflation.
- The expected tax consequences of investment decisions or strategies.
- The role that each investment or course of action plays within the overall trust portfolio.
- The expected total return from income and the appreciation of capital.
- Needs for liquidity, regularity of income and preservation or appreciation of capital.
- An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

In addition to the said mandatory investment criteria, subsection 27(6) of the *Trustee Act* states that a trustee must diversify the investment of trust property to an extent that is appropriate to:

- the requirements of the trust; and
- general economic and investment market conditions.

Subsection 27(7) and (8) state that a trustee may obtain advice in relation to the investment of trust property and will not be held liable for losses to the trust where he or she relied upon such advice, provided that a prudent investor would rely upon the advice under comparable circumstances. Unfortunately, these two subsections are of little practical assistance, since they do not identify the criteria by which a prudent investor would rely upon such advice. The ability to rely upon investment advice does not constitute statutory authority for delegation of investment decision making. Such authority has only now been given by Bill 57, as discussed below.

3. Is an Investment Plan Required?

It is not a statutory requirement that trustees must develop and utilize an investment plan or strategy ("Investment Plan") unless the trustee is delegating investment decision making. However, it is recommended that a charity and its board of directors should do so in any event. The following are reasons for doing so:

- In accordance with Section 28, an Investment Plan will provide trustees of the charity with protection from personal liability in the event that a loss occurs if such a loss resulted from the trustees relying upon an Investment Plan for the investment of trust property that constituted a reasonable assessments of risk and return which a prudent investor would have adopted under comparable circumstances.
- An Investment Plan will assist in ensuring that the trustees have addressed the statutory requirements to comply with the mandatory investment criteria of Section 27(5) of the *Trustee Act*, as well as the mandatory requirements regarding diversification under Section 27(6) of the *Trustee Act*.
- If the trustees of a charity, either now or in the future, delegate investment decision making to an investment manager, as discussed below, then the trustees can only do so if there is an Investment Plan in place.

4. What Are The Requirements In Order To Delegate Investment Decision Making?

Subsection 27.1(1) of the *Trustee Act*, as amended by Bill 57, states that "*a trustee may authorize*

an agent to exercise any of the trustee's functions relating to investment of trust property to the same extent that a prudent investor, acting in accordance with ordinary investment practice, would authorize an agent to exercise any investment function". However, there are certain statutory conditions that must be complied with before the authority to delegate investment decision making will apply. Those requirements are summarized as follows:

a) Investment Plan

Subsection 27.1(2)(a) requires that a trustee must comply with section 28, which is the requirement that a trustee conform to a written plan or strategy (i.e. "Investment Plan") for "*the investment of trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances*". The Investment Plan must be in writing and need to take into account the mandatory investment criteria referred to above.

b) Best Interest of Beneficiaries

Subsection 27.1(2)(b) requires that a trustee must be satisfied that the Investment Plan is "*intended to ensure that the functions will be exercised in the best interests of the beneficiaries of the trust*", i.e. in the best interests of the charitable purpose for which the charitable property is to be applied.

c) Agency Agreement

Subsection 27.1(3) requires that a trustee must have a written agreement ("Agency Agreement") between the trustee and the agent. An Agency Agreement is to include;

- a requirement that the agent comply with the Investment Plan in place from time to time; and
- a requirement that the agent report to the trustee at regular stated intervals.

Although not a statutory requirement, in the event that a charity has a Delegation Plan in place, as described below, then the Agency Agreement would also require the agent to comply with the terms of a Delegation Plan in place from time to time.

d) Prudent Selection of Agent

Subsections 27.1(4) and (5) require that a trustee exercise prudence in selecting an agent, which includes compliance with the regulations made under section 30 of the *Trustee Act*, as amended by Bill 57. Section 30, states that:

The Attorney General may make regulations governing or restricting the classes of persons or the qualifications of persons who are eligible to be agents under section 27.1 in establishing conditions for eligibility.

From a practical standpoint, the Attorney General, through the Office of the Public Guardian and Trustee of Ontario, will be able to determine the categories of who qualifies to be investment managers for purposes of receiving delegated investment decision making under the *Trustee Act*. The criteria that is eventually established will likely reflect the current industry standards for qualified investment managers. This means that individuals who are not professional investment managers would not be appropriate individuals to whom investment decision making should be delegated to. However, at the date of this Bulletin, no regulations have been adopted under section 30 of the *Trustee Act*. Pending the adoption of such regulations, it would be prudent for directors of a charity in choosing an agent to limit their selection to

individuals who have appropriate professional credentials as investment managers.

e) Prudence in Monitoring Agents

Subsection 27.1(4) states that a trustee must exercise prudence in monitoring the agent's performance to ensure compliance with the terms of the Agency Agreement. Subsection 27.1(5)(b) states that prudence in monitoring an agent's performance includes:

- reviewing the agent's reports;
- regularly reviewing the Agency Agreement and how it is being put into effect, including considering whether the Investment Plan should be revised or replaced, replacing the Investment Plan if the trustee considers it appropriate to do so, and assessing whether the Investment Plan has been complied with;
- considering whether directions should be provided to the agent or whether the agent's appointment should be revoked; and
- providing directions to the agent or revoking the appointment if the trustee considers it appropriate to do so.

f) Delegation Plan

Although not a statutory requirement, it would be prudent for the board of directors of a charity to adopt a plan to summarize all that is required for the board to be able to delegate investment decision making in accordance with the statutory requirements of the *Trustee Act* as described above ("Delegation Plan"). A Delegation Plan could then be incorporated by reference into the mandatory Agency Agreement that must be in place between the charity and the agent.

5. Duties of Agent

Subsection 27.2(1) of the *Trustee Act*, as amended by Bill 57, states that an agent who is authorized to exercise a trustee's functions relating to the investment of trust property has a duty to do so:

- with the standard of care expected of a person carrying on the business of investing the money of others;
- in accordance with the agreement between the trustee and the agent; and
- in accordance with the Investment Plan.

Subsection 27.2(2) states that an agent who has been authorized to exercise a trustee's functions relating to the investment of trust property may not further delegate that authority to another person.

6. Action Against Agent

Subsection 27.2(3) of the *Trustee Act*, as amended by Bill 57, states that when an agent has been authorized to exercise a trustee's functions relating to the investment of trust property and the trust then suffers a loss because of the agent's breach of the duty owed under subsection 27.2(1) or (2), then legal action may be commenced against the agent by:

- the trustees (i.e. the board of directors of a charity); or
- a beneficiary (which would include the charity itself, and possibly even its members, such as the members of a church) if the trustee does not commence a proceeding within a

reasonable time after acquiring knowledge of the breach.

This means that members of a charity, or individuals who receive a benefit from the charity in question, can themselves initiate legal proceedings against the agent who has received delegated investment decision making power.

C. CONCLUSION

The amendments to the *Trustee Act* arising from Bill 57 are a welcome solution to the problems which had resulted from the 1999 amendments to the *Trustee Act* omitting to permit delegation of investment decision making. However, before the statutory authority to delegate investment decision making can be utilized, it will be necessary for the board of directors of a charity to develop, implement, regulate and review two and possibly three separate documents; i.e. an Investment Plan to evidence compliance with the mandatory investment criteria, an Agency Agreement between the charity and the agent who is retained to make investment decision making, and possibly a Delegation Plan to summarize the statutory as well as any additional requirements that need to be complied with before investment decision making can be delegated to an agent.

For those charities that have not yet developed these documents, legal advice should be obtained to determine whether it is necessary or appropriate for a charity to do so, and whether such documentation should be deemed in effect retroactive to the date that delegation decision making commenced, notwithstanding the fact that such commencement date may have been prior to the enactment of Bill 57 on June 29th, 2001.

Even if an Investment Plan, an Agency Agreement and a Delegation Plan have been developed and implemented, it will still be necessary for the board of directors of the charity to review such documentation on a regular basis, preferably annually. Bill 57 is clearly good news for charities in Ontario, but will require careful study, implementation and monitoring by directors of charities and their legal counsel.

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Same

(3.3) A reduction or waiver under subsection (3.2) may be in respect of a person or a class of persons.

(2) Section 14 of the Act, as amended by the Statutes of Ontario, 1992, chapter 32, section 25, 1996, chapter 2, section 75 and 2000, chapter 26, Schedule A, section 14, is further amended by adding the following clause:

- (k) establishing criteria for determining hardship for the purposes of subsection 8 (3.2).

TRUSTEE ACT

13. (1) The *Trustee Act* is amended by adding the following section:

Expenses of trustees

23.1 (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,

- (a) pay the expense directly from the trust property; or
(b) pay the expense personally and recover a corresponding amount from the trust property.

Later disallowance by court

(2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust.

(2) Subsection 27 (3) of the Act, as re-enacted by the Statutes of Ontario, 1998, chapter 18, Schedule B, section 16, is repealed and the following substituted:

Mutual, pooled and segregated funds

(3) Any rule of law that prohibits a trustee from delegating powers or duties does not prevent the trustee from investing in mutual funds, pooled funds or segregated funds under variable insurance contracts, and sections 27.1 and 27.2 do not apply to the purchase of such funds.

(3) Subsection 27 (4) of the Act, as re-enacted by the Statutes of Ontario, 1998, chapter 18, Schedule B, section 16, is amended by adding at the end “and sections 27.1 and 27.2 do not apply”.

(4) Subsection 27 (9) of the Act, as enacted by the Statutes of Ontario, 1998, chapter 18, Schedule B, section 16, is repealed and the following substituted:

Terms of trust

(9) This section and section 27.1 do not authorize or **Idem**

(3.3) Une réduction ou une renonciation prévue au paragraphe (3.2) peut être faite à l'égard d'une personne ou d'une catégorie de personnes.

(2) **L'article 14 de la Loi, tel qu'il est modifié par l'article 25 du chapitre 32 des Lois de l'Ontario de 1992, par l'article 75 du chapitre 2 des Lois de l'Ontario de 1996 et par l'article 14 de l'annexe A du chapitre 26 des Lois de l'Ontario de 2000, est modifié de nouveau par adjonction de l'alinéa suivant:**

- k) établir des critères pour déterminer s'il existe des difficultés pour l'application du paragraphe 8 (3.2).

LOI SUR LES FIDUCIAIRES

13. (1) La *Loi sur les fiduciaires* est modifiée par adjonction de l'article suivant:

Dépenses des fiduciaires

23.1 (1) Le fiduciaire qui est d'avis qu'une dépense serait légitimement engagée dans l'exécution de la fiducie peut, selon le cas:

- a) en prélever le paiement directement sur les biens en fiducie;
b) la payer personnellement et recouvrer une somme correspondante prélevée sur les biens en fiducie.

Rejet ultérieur d'ii tribunal

(2) La Cour supérieure de justice peut, par la suite, rejeter le paiement ou le recouvrement si elle est d'avis que la dépense n'a pas été légitimement engagée dans l'exécution de la fiducie.

(2) **Le paragraphe 27 (3) de la Loi, tel qu'il est réédité par l'article 16 de l'annexe B du chapitre 18 des Lois de l'Ontario de 1998, est abrogé et remplacé par ce qui suit:**

Fonds mutuels, mis en commun et distincts

(3) Toute règle de droit qui interdit au fiduciaire de déléguer ses pouvoirs ou ses fonctions n'a pas pour effet de l'empêcher de faire des placements dans des fonds mutuels, des fonds mis en commun ou des fonds distincts prévus dans des contrats à prestations variables. Les articles 27.1 et 27.2 ne s'appliquent pas à l'achat de tels fonds.

(3) **Le paragraphe 27 (4) de la Loi, tel qu'il est réédité par l'article 16 de l'annexe B du chapitre 18 des Lois de l'Ontario de 1998, est modifié par adjonction de « et les articles 27.1 et 27.2 ne s'appliquent pas ».**

(4) Le paragraphe 27 (9) de la Loi, tel qu'il est édicté par l'article 16 de l'annexe B du chapitre 18 des Lois de l'Ontario de 1998, est abrogé et remplacé par ce qui suit:

Conditions de la fiducie

(9) Le présent article et l'article 27.1 n'ont pas pour

require a trustee to act in a manner that is inconsistent with the terms of the trust.

Same

(10) For the purposes of subsection (9), the constating documents of a corporation that is deemed to be a trustee under subsection 1 (2) of the *Charities Accounting Act* form part of the terms of the trust.

(5) The Act is amended by adding the following sections:

Trustee may delegate functions to agent

27.1 (1) Subject to subsections (2) to (5), a trustee may authorize an agent to exercise any of the trustee's functions relating to investment of trust property to the same extent that a prudent investor, acting in accordance with ordinary investment practice, would authorize an agent to exercise any investment function.

Investment plan or strategy

(2) A trustee may not authorize an agent to exercise functions on the trustee's behalf unless the trustee has prepared a written plan or strategy that,

- (a) complies with section 28; and
- (b) is intended to ensure that the functions will be exercised in the best interests of the beneficiaries of the trust.

Agreement

(3) A trustee may not authorize an agent to exercise functions on the trustee's behalf unless a written agreement between the trustee and the agent is in effect and includes,

- (a) a requirement that the agent comply with the plan or strategy in place from time to time; and
- (b) a requirement that the agent report to the trustee at regular stated intervals.

Trustee's duty

(4) A trustee is required to exercise prudence in selecting an agent, in establishing the terms of the agent's authority and in monitoring the agent's performance to ensure compliance with those terms.

Same

- (5) For the purpose of subsection (4),
 - (a) prudence in selecting an agent includes compliance with any regulation made under section 30; and
 - (b) prudence in monitoring an agent's performance includes,
 - (i) reviewing the agent's reports,

- (ii) regularly reviewing the agreement between

effet d'autoriser ou d'obliger le fiduciaire à agir d'une manière qui est incompatible avec les conditions de la fiducie.

Idem

(10) Pour l'application du paragraphe (9), les documents constitutifs d'une personne morale réputée un fiduciaire en application du paragraphe 1 (2) de la *Loi sur la comptabilité des oeuvres de bienfaisance* font partie des conditions de la fiducie.

(5) La Loi est modifiée par adjonction des articles suivants:

Délégation de fonctions à un mandataire par le fiduciaire

27.1 (1) Sous réserve des paragraphes (2) à (5), le fiduciaire peut autoriser un mandataire à exercer l'une ou l'autre de ses fonctions en matière de placement de biens en fiducie dans la même mesure qu'un investisseur prudent, qui agit conformément aux pratiques habituelles en matière de placement, autoriserait un mandataire à exercer une fonction en matière de placement.

Plan ou stratégie de placement

(2) Le fiduciaire ne peut autoriser un mandataire à exercer des fonctions pour son compte à moins qu'il n'ait préparé, par écrit, un plan ou une stratégie qui satisfait aux conditions suivantes:

- a) le plan ou la stratégie est conforme à l'article 28;
- b) le plan ou la stratégie a pour but d'assurer que les fonctions seront exercées dans l'intérêt véritable des bénéficiaires de la fiducie.

Conventions

(3) Le fiduciaire ne peut autoriser un mandataire à exercer des fonctions pour son compte à moins qu'une convention écrite conclue entre eux soit en vigueur et qu'elle comprenne ce qui suit:

- a) l'obligation pour le mandataire de respecter le plan ou la stratégie en vigueur;
- b) l'obligation pour le mandataire de présenter un rapport au fiduciaire à des intervalles réguliers qui sont précisés.

Obligation du fiduciaire

(4) Le fiduciaire est tenu de faire preuve de prudence lorsqu'il choisit un mandataire, fixe les conditions du pouvoir du mandataire et surveille la prestation de celui-ci pour assurer le respect de ces conditions.

Idem

- (5) Pour l'application du paragraphe (4):
 - a) faire preuve de prudence dans le choix d'un mandataire comprend le fait de se conformer aux règlements pris en application de l'article 30;
 - b) faire preuve de prudence dans la surveillance de la prestation d'un mandataire comprend ce qui suit:

- (i) examiner les rapports du mandataire,

Attorney General

the trustee and the agent and how it is being put into effect, including considering whether the plan or strategy of investment should be revised or replaced, replacing the plan or strategy if the trustee considers it appropriate to do so, and assessing whether the plan or strategy is being complied with,

- (iii) considering whether directions should be provided to the agent or whether the agent's appointment should be revoked, and
- (iv) providing directions to the agent or revoking the appointment if the trustee considers it appropriate to do so.

Duty of agent

27.2 (1) An agent who is authorized to exercise a trustee's functions relating to investment of trust property has a duty to do so,

- (a) with the standard of care expected of a person carrying on the business of investing the money of others;
- (b) in accordance with the agreement between the trustee and the agent; and
- (c) in accordance with the plan or strategy of investment.

No further delegation

(2) An agent who is authorized to exercise a trustee's functions relating to investment of trust property shall not delegate that authority to another person.

Proceeding against agent

(3) If an agent is authorized to exercise a trustee's functions relating to investment of trust property and the trust suffers a loss because of the agent's breach of the duty owed under subsection (1) or (2), a proceeding against the agent may be commenced by,

- (a) the trustee; or
- (b) a beneficiary, if the trustee does not commence a proceeding within a reasonable time after acquiring knowledge of the breach.

(6) Section 30 of the Act, as **re-enacted by the Statutes of Ontario, 1998, chapter 18, Schedule B, section 16, is revoked and the following substituted:**

Regulations

30. The Attorney General may make regulations governing or restricting the classes of persons or the qualifications of persons who are eligible to be agents under section 27.1 and establishing conditions for eligibility.

- (ii) examiner régulièrement la convention con-

Procureur général

Application

31. Sections 27 to 30 apply to a trust whether it is created before or after the date section 13 of Schedule B conclue entre le fiduciaire et le mandataire et son application, y compris examiner s'il y a lieu de reviser ou de remplacer le plan ou la stratégie de placement, remplacer le plan ou la stratégie si le fiduciaire estime son rem-placement indiqué et évaluer le respect du plan ou de la stratégie,

- (iii) examiner s'il y a lieu de donner des directives au mandataire ou de révoquer sa nomination,
- (iv) donner des directives au mandataire ou révoquer sa nomination si le fiduciaire estime que cela est indiqué.

Obligation du mandataire

27.2(1) Le mandataire qui est autorisé à exercer les fonctions d'un fiduciaire en matière de placement de biens en fiducie a l'obligation de le faire comme suit:

- a) en observant les normes de diligence attendues d'une personne qui exploite l'entreprise de faire des placements de sommes d'argent pour des tiers;
- b) en agissant conformément à la convention conclue entre le fiduciaire et le mandataire;
- c) en agissant conformément au plan ou à la stratégie de placement.

Subdélégation interdite

(2) Le mandataire qui est autorisé à exercer les fonctions d'un fiduciaire en matière de placement de biens en fiducie ne doit pas déléguer ce pouvoir à une autre personne.

Instance contre le mandataire

(3) Si un mandataire est autorisé à exercer les fonctions d'un fiduciaire en matière de placement de biens en fiducie et que la fiducie subit une perte parce que le mandataire manqué à son obligation prévue au paragraphe (1) ou (2), une instance contre le mandataire peut être introduite par l'une des personnes suivantes:

- a) le fiduciaire;
- b) un bénéficiaire, si le fiduciaire n'introduit pas d'instance dans un délai raisonnable après avoir pris connaissance du manquement.

(6) L'article 30 de la Loi, tel qu'il est réédité par l'article 16 de l'annexe B du chapitre 18 des Lois de l'Ontario de 1998, est abrogé et remplacé par ce qui suit:

Règlements

30. Le procureur général peut, par règlement, régir ou limiter les catégories de personnes ou les qualités requises

des personnes qui sont admissibles comme mandataires aux termes de l'article 27.1 et établir les conditions d'admissibilité.

Application

31. Les articles 27 à 30 s'appliquent aux fiducies, qu'elles soient créées avant ou après la date de l'entrée

Sched./annexe B

Attorney General
EFFICIENCE DU GOUVERNEMENT
Projet 57

25

Procureur général

to the *Government Efficiency Act, 2001* comes into force.

en vigueur de l'article 13 de l'annexe B de la *Loi de 2001 sur l'efficacité du gouvernement*.

COMMENCEMENT

Commencement

14. (1) Subject to subsection (2), this Schedule comes into force on the day the *Government Efficiency Act, 2001* receives Royal Assent.

Same

(2) Subsections 1 (1) and (3) to (8), sections 5 and 6, subsections 10 (1) and (3) to (10) and 11 (1) to (65) come into force on a day to be named by proclamation of the Lieutenant Governor.

ENTRÉE EN VIGUEUR

Entrée en vigueur

14. (1) Sous réserve du paragraphe (2), la présente annexe entre en vigueur le jour où la *Loi de 2001 sur l'efficacité du gouvernement* reçoit la sanction royale.

Idem

(2) Les paragraphes 1 (1) et (3) à (8), les articles 5 et 6 et les paragraphes 10 (1) et (3) à (10) et 11 (1) à (65) entrent en vigueur le jour que le lieutenant-gouverneur fixe par proclamation.

SCHEDULE "B"

INVESTMENTS

Other Acts

26. If a provision of another Act or the regulations under another Act authorizes money or other property to be invested in property in which a trustee is authorized to invest and the provision came into force before section 16 of Schedule B of the *Red Tape Reduction Act, 1998*, the provision shall be deemed to authorize investment in the property in which a trustee could invest immediately before the coming into force of section 16 of Schedule B of the *Red Tape Reduction Act, 1998*. 1998, c. 18, Sched. B, s. 16 (1).

Standard of care

27. (1) In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments. 1998, c. 18, Sched. B, s. 16 (1).

Authorized investments

(2) A trustee may invest trust property in any form of property in which a prudent investor might invest. 1998, c. 18, Sched. B, s. 16(1).
Mutual, pooled and segregated funds

(3) Any rule of law that prohibits a trustee from delegating powers or duties does not prevent the trustee from investing in mutual funds, pooled funds or segregated funds under variable insurance contracts, and sections 27.1 and 27.2 do not apply to the purchase of such funds. 2001, c. 9, Sched. B, s. 13 (2).

Common trust funds

(4) If trust property is held by co-trustees and one of the co-trustees is a trust corporation as defined in the *Loan and Trust Corporations Act*, any rule of law that prohibits a trustee from delegating powers or duties does not prevent the co-trustees from investing in a common trust fund, as defined in that Act, that is maintained by the trust corporation and sections 27.1 and 27.2 do not apply. 1998, c. 18, Sched. B, s. 16(1); 2001, c. 9, Sched. B, s. 13(3).

Criteria

(5) A trustee must consider the following criteria in planning the investment of trust property, in addition to any others that are relevant to the circumstances:

1. General economic conditions.
2. The possible effect of inflation or deflation.
3. The expected tax consequences of investment decisions or strategies.
4. The role that each investment or course of action plays within the overall trust portfolio.
5. The expected total return from income and the appreciation of capital.
6. Needs for liquidity, regularity of income and preservation or appreciation of capital.
7. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries. 1998, c. 18, Sched. B, s. 16 (1).

Diversification

- (6) A trustee must diversify the investment of trust property to an extent that is appropriate to,
 - (a) the requirements of the trust; and
 - (b) general economic and investment market conditions. 1998, c. 18, Sched. B, s. 16 (1).

Investment advice

- (7) A trustee may obtain advice in relation to the investment of trust property. 1998, c. 18, Sched. B, s. 16 (1).

Reliance on advice

(8) It is not a breach of trust for a trustee to rely on advice obtained under subsection (7) if a prudent investor would rely on the advice under comparable circumstances. 1998, c. 18, Sched. B, s. 16 (1).

Terms of trust

(9) This section and section 27.1 do not authorize or require a trustee to act in a manner that is inconsistent with the terms of the trust. 2001, c. 9, Sched. B, s. 13 (4).

Same

(10) For the purposes of subsection (9), the constating documents of a corporation that is deemed to be a trustee under subsection 1(2) of the *Charities Accounting Act* form part of the terms of the trust. 2001, c. 9, Sched. B, s. 13 (4).

Trustee may delegate functions to agent

27.1 (1) Subject to subsections (2) to (5), a trustee may authorize an agent to exercise any of the trustee's functions relating to investment of trust property to the same extent that a prudent investor, acting in accordance with ordinary investment practice, would authorize an agent to exercise any investment function. 2001, c. 9, Sched. B, s. 13 (5).

Investment plan or strategy

- (2) A trustee may not authorize an agent to exercise functions on the trustee's behalf unless the trustee has prepared a written plan or strategy that,
 - (a) complies with section 28; and
 - (b) is intended to ensure that the functions will be exercised in the best interests of the beneficiaries of the trust. 2001, c. 9, Sched. B, s. 13 (5).

Agreement

(3) A trustee may not authorize an agent to exercise functions on the trustee's behalf unless a written agreement between the trustee and the agent is in effect and includes,

- (a) a requirement that the agent comply with the plan or strategy in place from time to time; and
- (b) a requirement that the agent report to the trustee at regular stated intervals. 2001, c. 9, Sched. B, s. 13 (5).

Trustee's duty

(4) A trustee is required to exercise prudence in selecting an agent, in establishing the terms of the agent's authority and in monitoring the agent's performance to ensure compliance with those terms. 2001, c. 9, Sched. B, s. 13 (5).

Same

- (5) For the purpose of subsection (4),
- (a) prudence in selecting an agent includes compliance with any regulation made under section 3-0;-and
 - (b) prudence in monitoring an agent's performance includes,
 - (i) reviewing the agent's reports,
 - (ii) regularly reviewing the agreement between the trustee and the agent and how it is being put into effect, including considering whether the plan or strategy of investment should be revised or replaced, replacing the plan or strategy if the trustee considers it appropriate to do so, and assessing whether the plan or strategy is being complied with,
 - (iii) considering whether directions should be provided to the agent or whether the agent's appointment should be revoked, and
 - (iv) providing directions to the agent or revoking the appointment if the trustee considers it appropriate to do so. 2001, c. 9, Sched. B, s. 13 (5).

Duty of agent

- 27.2 (1) An agent who is authorized to exercise a trustee's functions relating to investment of trust property has a duty to do so,
- (a) with the standard of care expected of a person carrying on the business of investing the money of others;
 - (b) in accordance with the agreement between the trustee and the agent; and
 - (c) in accordance with the plan or strategy of investment. 2001, c. 9, Sched. B, s. 13 (5).

No further delegation

(2) An agent who is authorized to exercise a trustee's functions relating to investment of trust property shall not delegate that authority to another person. 2001, c. 9, Sched. B, s. 13 (5).

Proceeding against agent

- (3) If an agent is authorized to exercise a trustee's functions relating to investment of trust property and the trust suffers a loss because of the agent's breach of the duty owed under subsection (1) or (2), a proceeding against the agent may be commenced by,
- (a) the trustee; or
 - (b) a beneficiary, if the trustee does not commence a proceeding within a reasonable time after acquiring knowledge of the breach. 2001, c. 9, Sched. B, s. 13 (5).

Protection from liability

28. A trustee is not liable for a loss to the trust arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances. 1998, c. 18, Sched. B, s. 16 (1).

Assessment of damages

29. If a trustee is liable for a loss to the trust arising from the investment of trust property, a court assessing the damages payable by the trustee may take into account the overall performance of the investments. 1998, c. 18, Sched. B, s. 16 (1).

Regulations

30. The Attorney General may make regulations governing or restricting the classes of persons or the qualifications of persons who are eligible to be agents under section 27.1 and establishing conditions for eligibility. 2001, c. 9, Sched. B, s. 13 (6).

Application

31. Sections 27 to 30 apply to a trust whether it is created before or after the date section 13 of Schedule B to the *Government Efficiency Act, 2001* comes into force. 2001, c. 9, Sched. B, s. 13 (6).

32. REPEALED: 1998, c. 18, Sched. B, s. 16 (1).

33. REPEALED: 1998, c. 18, Sched. B, s. 16 (1).

34. REPEALED: 1998, c. 18, Sched. B, s. 16 (1).

TECHNICAL BREACHES OF TRUST

Relief of trustees committing technical breach of trust

35. (1) If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, the court may relieve the trustee either wholly or partly from personal liability for the same. R.S.O. 1990, c. T.23, s. 35.

Application

(2) Subsection (1) does not apply to liability for a loss to the trust arising from the investment of trust property. 1998, c. 18, Sched. B, s. 16(2).

PAYMENT INTO COURT

Payment into court by trustees of trust funds or securities by order of court

36. (1) Where any money belonging to a trust is in the hands or under the control of or is vested in a sole trustee or several trustees and it is the desire of the trustee, or of the majority of the trustees, to pay the money into court, the Superior Court of Justice may order the payment into court to be made by the sole trustee, or by the majority of the trustees, without the concurrence of the other or others if the concurrence cannot be obtained. R.S.O. 1990, c. T.23, s. 36 (1); 2000, c. 26, Sched. A, s. 15 (2).

Payment or delivery to Accountant of court

(2) Where any such money is deposited with a banker or broker or other depository, the court may order payment thereof to the Accountant of the Superior Court of Justice, and payment made under the order is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the money paid. R.S.O. 1990, c. T.23, s. 36 (2); 2000, c. 26, Sched. A, s. 15 (3).

Payment into court by persons holding trust money for trustee