
CONSIDERATIONS IN DRAFTING INVESTMENT POLICIES IN ONTARIO

*By Terrance S. Carter**

A. INTRODUCTION

Charity Law Bulletin No. 192,¹ which was posted on February 25, 2010, explained the various investment powers under the *Trustee Act*² that apply to charities and not-for-profit organizations operating in Ontario, where such organizations hold monies in trust for charitable purposes. This *Charity Law Bulletin* addresses issues that can arise when a charity or not-for-profit organization in Ontario is considering drafting an investment policy in order to comply with the provisions of the *Trustee Act*, as well as providing some practical tips about what to include in an investment policy. In this regard, an investment policy is generally described as a "document that articulates the investment objectives and constraints of the organization and is equally valuable whether investments are handled internally or by an external manager."³

B. THE BENEFITS OF IMPLEMENTING AN INVESTMENT POLICY

In Ontario, the *Trustee Act* requires that there be an investment policy if investment decision making is delegated.⁴ Although it is not a requirement that there be an investment policy where there is no delegation of investment decision making, it is still advisable to consider adopting an investment policy for the following reasons:

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¹ Terrance S. Carter, "Investment Powers of Charities and Not-for-profits Under Ontario's *Trustee Act*" in *Charity Law Bulletin* No. 192 (February 25, 2010), online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb192.htm>.

² R.S.O. 1990, c. T.23.

³ S. Kelly Rodgers, "Developing the Investment Policy Statement" (1995) 12:3 *Philanthrop.* 9 at 9

⁴ *Trustee Act*, *supra* note 2, s. 27.1(2).

- An investment policy can provide the board of the organization with protection from personal liability in the event that a loss occurs, if such a loss resulted from the board relying on the policy for the investment of trust property, and the policy was such that a prudent investor would adopt under similar circumstances. Section 28 of the *Trustee Act* enumerates this protection.⁵
- An investment policy can assist in ensuring that the board has addressed the statutory requirements to comply with the investment criteria set out in the *Trustee Act*, as well as the related statutory requirements under the *Trustee Act* regarding diversification of investments.
- If the trustees of a charity, either now or in the future, decide to delegate investment decision making to an investment manager, there must be an investment policy in place to guide the investment manager.⁶

Generally, the purpose of an investment policy is to ensure that the provisions of the *Trustee Act* and the applicable common law requirements are complied with, while also ensuring that the specific terms of investments for different funds of the organization are set out in separate investment policies often referred to as “specific investment plans.” These specific investment plans are then deemed to be incorporated by reference into and become part of the general investment policy. This approach will generally provide flexibility for the future while at the same time ensuring consistency when multiple specific investment plans are required for different funds.

As the forms of investment policies that are currently utilized by investment managers in the investment community do not necessarily comply with the terms of the *Trustee Act*, the investment policy should state that any investment policies that are provided by investment managers are to be incorporated by reference into the investment policy of the organization as a specific investment plan, but are to be read subject to the overriding terms of the investment policy of the organization. In the event there is a conflict between the terms of a specific investment plan and the investment policy of the organization, then the conflicting terms of the specific investment plan would be deemed to be amended in accordance with the applicable terms of the investment policy of the organization. This would help protect the board of directors from exposure to

⁵ *Ibid.*, s. 28.

⁶ *Ibid.*, s. 27.1(2). See also Terrance S. Carter, “Pro-active Protection of Charitable Assets: A Selective Discussion of Liability Risks and Pro-active Responses” (November 20, 2001), online: <http://www.carters.ca/pub/article/charity/2001/proactiv.pdf>.

personal liability for unintentionally failing to comply with the applicable terms of the *Trustee Act* because of an erroneous term of a specific investment plan prepared by an investment manager.

Although the majority of what is contained within an investment policy reflects the requirements of the *Trustee Act*, there is some flexibility in relation to the specific terms, such as whether an investment manager reports on a quarterly basis or at different time intervals. As such, it is important that the board of directors have an opportunity to discuss the terms of the draft investment policy and determine if amendments need to be made to it before it is implemented.

C. WHAT TO INCLUDE IN AN INVESTMENT POLICY

In general terms, an investment policy would normally include the following sections:

1. Definitions and Interpretations
2. General
3. General Terms of Investment
4. Specific Investment Plans
5. Delegation
6. Review and Amendment of Investment Policy

The “Definitions and Interpretations” section is self-explanatory. Words like “Board”, “Corporation”, “Fund”, “Investment”, “Investment Policy”, and “Specific Investment Plan” would be defined. Terms that are crucial to the policy would be defined to ensure that they are interpreted in the way the organization intends. The interpretations section would include statements regarding whether the use of the masculine gender includes the feminine gender, whether the singular includes the plural, and whether the headings form part of the policy or are to be used for convenience of reference only.⁷

The “General” section would provide an explanation of the purpose of the investment policy and its applicability (i.e. “This Investment Policy shall apply to all Investments of the Corporation invested within the Province of Ontario”). An organization might want to include an explanation of the organization’s reason

⁷ For sample interpretation provisions, see Cynthia L. Elderkin and Julia S. Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements* (Toronto: Thomson Carswell, 2005), c. 8.

for its existence and goals, and might also include a statement about the organization's source of capital. Such general information would assist those who are unfamiliar with the organization.⁸ As well, a provision could be included that recognizes the fiduciary duty of the board of directors to prudently invest the funds. In this regard, it might also be useful for the policy to incorporate the exact wording of the *Trustee Act*, i.e. "The purpose of this Investment Policy is to ... establish a policy for the Investment of Funds of the Corporation that comprises reasonable assessments of risk and return that a prudent investor would adopt under comparable circumstances... ." Other matters that could be included in the "General" section are statements affirming legislative compliance and statements about the effective date of the policy and any transition provisions.

The "General Terms of Investment" section would be used to outline and reaffirm the board's commitment to meeting the applicable statutory requirements. First, a statement about the statutory standard of care would be included, as well as a list of the statutory investment criteria that a trustee is required to consider when making investments. Since the *Trustee Act* includes requirements about diversification, authorized investments, and investment advice, those requirements would also need to be set out as well. This section might also list the responsibilities of the board with regard to investments and, if an investment committee was to be established, there would be a statement explaining the board's power to establish such a committee, and explaining the duties and responsibilities of the investment committee. This section could also include provisions dealing with conflict of interest situations (i.e. what a conflict of interest is, what the procedure is for a board member who discovers a conflict of interest, and any allowable situations where the board might be able to authorize a minor conflict of interest). Lastly, a provision could be included explaining how income and capital gains earned from the investment of funds would be utilized by the organization.

The "Specific Investment Plans" section would explain the board's power to implement specific investment plans, explain the relationship between the investment policy and any specific investment plans (i.e. which document prevails if there is a conflict), and would list the required contents of a specific investment plan. In this regard, the investment policy could include a provision stating "The board may adopt as many specific investment plans as necessary from time to time, but at least one specific investment plan for the general

⁸ S. Kelly Rodgers, *supra* note 3 at 10.

fund of the Corporation must be in place at all times.” This would ensure that the board would be left with flexibility concerning how many specific investment plans it may want to adopt in the future

The “Delegation” section would include provisions explaining when delegation of investment decision making would be permitted and would outline the steps that a board must take before delegating investment decision making to an investment manager (technically referred to as an agent under the *Trustee Act*). This section would also include provisions on the requirements for an agency agreement, as well as a requirement that an agency agreement would need to be entered into with every investment manager. Specifically, this section would outline the documents which the investment manager would need to comply with, including the agency agreement, the investment policy, and any specific investment plans in place, in addition to the general standard of care for investing contained in the *Trustee Act*. Although this information could also be contained within the agency agreement, it is generally recommended to have it repeated in the investment policy for reference purposes. Lastly, this section would explain how the board would monitor the actions of the investment manager to ensure compliance (e.g. reviewing reports at certain intervals, considering whether to provide directions to the investment manager, reviewing the agency agreement annually), and would reaffirm the board’s right to commence proceedings against an investment manager if the organization were to suffer a loss because of a breach of duty of the investment manager.

The last section, “Review and Amendment of Investment Policy” would only be a brief section dealing with how and when this review and amendment of the investment policy would be undertaken. In this regard, it is generally recommended that the board review the investment policy on an annual basis. Upon adoption of an investment policy, copies of the new policy would be forwarded to the auditor and the investment manager. This section of the policy could also require that an investment manager acknowledge and agree, in writing, to comply with the terms of a new investment policy within 60 days, failing which the appointment would be terminated and a new investment manager would need to be retained.

D. CONCLUSION

Developing an investment policy may at first glance seem to be a challenging task for a charity or not-for-profit organization, but the benefits of having a policy can be significant. At the very least, an investment policy would demonstrate that the board of directors was acting prudently in its role as trustee of charitable

property, as well as providing the means by which an organization could articulate its investment goals, provide guidance for investment decision making, and permit delegation of investment decision making.

Of course, while adopting an investment policy would be consistent with good governance and risk-avoidance procedures, simply having a policy on its own will not be sufficient. For board members to meet their standard of care of a prudent investor, each investment decision authorized by the board would need to be considered in relation to the enumerated criteria set out in the *Trustee Act*, subject to the charity's incorporating or other constitutional documents. In this regard, the board of directors of an organization that has adopted an investment policy would still need to record each individual investment decision made by the board with reference back to the investment policy.