
**SAINT-PAUL UNIVERSITY, FACULTY OF CANON LAW
LEGAL EDUCATION FOR LEADERSHIP OF
RELIGIOUS INSTITUTES**

August 21, 2010

Investment Policy

**By Terrance S. Carter, B.A., LL.B., Trade-mark Agent
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OVERVIEW OF TOPICS

- Introduction
- Application of Provincial Legislation
- Standard of Care
- Investment Advisors
- Delegation of Investment Powers
- Investment Policy
- Establishment of an Investment Committee
- Conclusion

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A. INTRODUCTION

- In deciding how and where to invest charities must be diligent in ensuring that they comply with the applicable provincial legislation
- All of the provinces have enacted legislation dealing with the investment powers of charities (e.g. Ontario's *Trustee Act* Nova Scotia's *Trustee Act*)
- For illustrative purposes this presentation will refer to the Ontario *Trustee Act*

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B. APPLICATION OF PROVINCIAL LEGISLATION

- There are differences among the provincial legislation, but all the statutes generally provide that the provisions of the trust instrument (e.g. Letters Patent) take precedence over the investment powers in the legislation
- If the governing documents are silent about investment powers, the provisions in the legislation prevails

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C. STANDARD OF CARE

- Every province except Quebec, has moved away from the legal list approach of acceptable investments and adopted a more flexible, discretion-based approach of prudence
- All of the provincial statutes, while using slightly different wording, provide generally for a “prudent investor” or “prudent person” standard of care
- This approach offers more flexibility and a wider range of investment choices

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- The Ontario *Trustee Act*, while not defining what is meant by “prudent investor”, states that in planning the investment of trust property, a trustee must consider the following criteria:
 - 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 overall trust portfolio

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- The expected total return from income and the appreciation of capital
- Need 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
- Ontario's *Trustee Act* also imposes a requirement on trustees to diversify the investments

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- D. INVESTMENT ADVISORS**
- The Ontario *Trustee Act* allows a trustee to obtain advice in relation to the investment of trust property
 - The advisor is independent from the board and the board remains responsible for making the decisions
 - The board, however, is not liable for losses if it relied on the advice if a prudent investor would have relied on the advice

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- E. DELEGATION OF INVESTMENT POWERS**
- The authority to invest trust property rests with the board of Directors
 - The Ontario *Trustee Act*, and most of the other provincial legislation permits directors to delegate the day to day investment decisions to an agent or investment manager

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- At common law directors could not delegate this investment authority – therefore, can not delegate unless authority is given in the *Trustee Act* and the corporation is under the *Trustee Act*
- The Ontario legislation goes further than the other provinces and requires an investment policy to be in place for there to be proper delegation

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F. INVESTMENT POLICY

1. Benefits of an Investment Policy

- Even if there is no delegation, or even if the particular provincial legislation does not require an investment policy, it is advisable to have an investment policy
- An investment policy can protect the board from personal liability if a loss results from the board relying on the policy and the policy would have been adopted by a prudent investor

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- The policy can assist in ensuring that any mandatory statutory criteria are met
- If the board decides to delegate investment decision making to a manager in the future, it would be helpful to have a policy in place to guide the manager

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2. Elements of an Investment Policy

- **Definitions and interpretations**
- **General**
 - **Purpose**
 - **To establish a policy for investment of funds that comprises reasonable assessments of risks and harms**
 - **To ensure that the investment of funds is in accordance with best interests of corporation’s charitable objects**

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- **Short statement of purpose of corporation**
- **Recognition of directors’ fiduciary responsibility to prudently invest funds**
- **General terms of investment**
 - **State the prudent investor standard of care**
 - **State statutory investment criteria**
 - **Responsibilities of board**
 - **Investment committee**
 - **Members – some directors and non-directors; report to board regularly**

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- **Specific investment plans**
 - **Prepared for each fund which requires a separate plan; must have at least one**
 - **Each plan to be deemed part of investment policy**
 - **Must be adopted by board**
 - **Contents of each specific investment plan**
 - **Objectives**
 - **Description of asset classes**

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- Description of ranges within which each asset class can be held
- Description of constraints
- Performance criteria

– State that any investment policies provided by investment managers to be incorporated as a specific investment plan and subject to investment policy

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- Investment manager
 - Prudent selection of qualified person
 - Requires board approval
 - In Ontario must sign agency agreement (investment management agreement)
 - Must comply with investment policy
 - Report to board regularly; board needs to be diligent in monitoring performance
 - Define conflicts of interest
- Review and amendment of agreement

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G. ESTABLISHMENT OF AN INVESTMENT COMMITTEE

- The establishment of an investment committee is not a statutory requirement, but is a prudent step to take if the full board does not have the time or expertise to oversee investments
- The appointment of an investment committee must be done in accordance with the terms of the general operating by-law for the religious institute

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- The composition of an investment committee should be made up of members of the board, but could also include non-board members, provided that the general operating by-law authorizes the establishment of an investment committee and appropriate investment expertise is sought for the committee
- Non-board members should generally constitute a minority of the composition of the committee
- The terms of reference for the investment committee needs to be clearly delineated, possibly as part of the investment policy
- The investment committee needs to report back to the board on a regular basis

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H. CONCLUSION

- While development of an investment policy may seem challenging, it would demonstrate that the board was acting prudently in its role as trustee of charitable property, as well as, providing the means by which the corporation could articulate its investment goals, provide guidance for decision making and permit delegation of decision making

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