THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
The Voice of the Legal Profession
La voix de la profession juridique

April 10, 2006

Rob Finlayson
President, Uniform Law Conference of Canada
c/o Prosecution Division
Manitoba Justice
510 - 405 Broadway
Winnipeg, Manitoba
R3C 3L6

Dear Mr. Finlayson:

Re: Proposal for Investment Power Securities

I write on behalf of the Charities and Not-For-Profit Law Section of the Canadian Bar Association (CBA Section). The Canadian Bar Association is a national association representing approximately 35,000 jurists, including lawyers, notaries, law teachers and students across Canada. The primary objectives of the CBA include improving the law and the administration of justice. The CBA Section deals with law and practice relating to the regulation and administration of charities and not-for-profit organizations in Canada.

In August 2005, the Uniform Law Conference of Canada adopted the *Uniform Charitable Fundraising Act*, of which the CBA Section is very supportive. We would like to suggest another project which we believe the Uniform Law Conference of Canada should consider for possible formulation of draft uniform legislation: investment powers for charities across Canada.

Presently, different investment powers apply to charitable funds in different jurisdictions, making it extremely difficult for charities to operate on either a national or inter-provincial basis. A 2004 report prepared by Linda Godel, a member of the CBA Section, compares the different investment powers that apply to charitable funds across Canada. This report evidences the confusion that the lack of uniformity can cause for charities. A copy of the report is attached for your information.

We would urge the Uniform Law Conference of Canada to consider undertaking a study to determine the need for uniform legislation for the investment of charitable funds, and if such legislation is found to be required, to proceed with developing appropriate draft uniform legislation.

Should you wish to discuss this proposal with the CBA Section or any member of the executive, please do not hesitate to contact me. In addition, if it would be of assistance, members of the executive would be more than willing to assist in this process.

Thank you for your consideration in this matter.

Yours truly,

(Original signed by James M. Parks)

James M. Parks
Chair, National Charities and Not-For-Profit Law Section

Attachment (32 pgs.)

c.c. Russell Getz, Chairperson, Civil Section
Uniform Law Conference of Canada

Investment Powers for Charities across Canada

GOWLINGS

Linda J. Godel,
with the assistance of Gilles Séguin (Gowlings' Montreal Office), Peter Schneider and Ian Strulovitch (articling students)

March 2004

I. INTRODUCTION

Charities are an integral part of any modern society. Charities act as a conduit through which resources are passed from those more fortunate members of society to those who are less fortunate. In order to maximize the capital that they have to distribute, charities invest the contributions they receive. However, questions often arise regarding what constitutes a proper investment of charitable funds.

In order to answer these questions, charities have turned, rightly or wrongly, to the Trustee Acts of Canada's provinces and territories. Recent amendments to these Acts have moved the law of investments for Canadian trustees closer towards reaching the objectives proposed by the 1997 *Uniform Trustee Investment Act* presented by the Uniform Law Conference of Canada ("**ULCC**")[1].

The preamble to the 1997 *Uniform Trustee Investment Act* states that its objectives are to:

> * *enhance the statutory powers of investment and delegation of trustees in order to enable trustees who are not acting under a sophisticated trust instrument to invest efficiently under modern market conditions, and*
>
> * *allow the standard of performance required of trustees and other principles governing the administration of trusts to better reflect accepted elements of modern portfolio theory, including diversification, covariance, and risk and return analysis.*[2]

This paper presents a comparative analysis of Canada's statutory investment powers for trustees and addresses various investment issues facing charities across the country. Part II of this paper addresses the issue of whether and when trust law applies to Canadian charities and part III discusses the issue of trustee investment powers in the context of charities. The paper concludes in part IV by providing options to charities that operate in more than one province or territory.

II. APPLICABILITY TO CHARITIES

The applicability of trustee investment powers to Canadian charities is the subject of considerable debate. Regrettably, it is difficult to provide a definitive link between trust law and all types of charities.

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1 *Uniform Trustee Investment Act*, Uniform Law Conference of Canada, 1997.

2 ibid. p. 1.

In his paper entitled *Investment by Charities*[3], Timothy G. Youdan outlines the following three ways in which trust law can be applicable to charities:

> *(1) the charity may be organized as a charitable trust; (2) the charity, even though organized as a corporation, may hold some funds subject to a trust separate from its general property; and (3) the position may be taken that the general property even of an incorporated charity is held subject to the requirements of trust law.*

Whereas Youdan's first two points provide a clear link between trust law and charities, the last point is particular to Ontario where "[t]he Office of the Public Guardian and Trustee has taken the position that a charitable corporation is effectively subject to trust law and that the position of its directors and officers are effectively assimilated to the position of trustees"[4].

1. The Ontario Position

Ontario's *Charities Accounting Act*[5] deems corporations "incorporated for a religious, educational, charitable or public purpose" to be trustees for purposes of such Act[6] and states that Ontario's rules for investment as set out in the Ontario *Trustee Act* apply to such corporations[7]. (Note that the *Charities Accounting Act* does not limit its application to corporations that are registered charities under the *Income Tax Act* (Canada)). However, the *Charities Accounting Act* does not provide that the directors of the identified corporations are themselves trustees. In his paper entitled *Liability of Directors and Officers of Charitable and Non-Profit Corporations*[8], William I. Innes provides the following commentary regarding the *Charities Accounting Act* (at p. 6):

> *The statute imposes liabilities upon the corporation, which it deems to be a trustee for the purposes of the statute. It is silent on the question of directors and officers of such corporations and it does not create any specific statutory jurisdiction to impose liability upon, or otherwise regulate the conduct of, directors. . . . one must look to the common law for such powers.*

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3 Investment by Charities, presented Thursday February 18, 1999, Canadian Bar Association - Ontario, Charity and Not-for-Profit Law Section, "New Investment Powers for Charities", p. 1.

4 ibid. p. 4.

5 R.S.O. 1990, c. C.10.

6 ibid. s. 1(2).

7 ibid. s. 1.1(b).

8 Liability of Directors and Officers of Charitable and Non-Profit Corporations, Estates and Trusts Journal, Volume 13, No. 1, September 1993.

2. The Case Law

There is a line of cases dealing with the remuneration of directors of charities that has been cited for the proposition that directors of charities are trustees but the law is far from clear. For example, in *French Protestant Hospital* v. *Attorney General*[9], the court provided (at page 940) as follows:

> *It is said by counsel for the applicants that it is the corporation which is trustee of the property of the charity in question, and that the applicants, the governor and directors, are not trustees. Technically that may be so. . . . It is obvious that the corporation is completely controlled by the governor, deputy governor, and directors, and it is, therefore, those persons who, in fact, control the corporation and decide what shall be done. Those persons are as much in a fiduciary position as trustees in regard to any acts which are done in regard to the corporation and its property. . . . Therefore, it seems plain that they are, to all intents and purposes, and for the purposes of this case, bound by the rules which affect trustees.*

The court in *David Feldman Charitable Foundation (Re)*[10] stated that the charitable corporation in question was deemed to be a trustee by subsection 1(2) of the *Charities Accounting Act* and, following the same logic as was followed in *French Protestant Hospital*, that the directors of the charitable corporation were also trustees. However, the court in *French Protestant Hospital* specifically said that directors of charitable corporations are not technically trustees but rather that the directors of charitable corporations are bound by the rules which affect trustees.

In addition, the court in *Public Trustee* v. *Toronto Humane Society*[11] declined to address the issue of whether the directors of charities are trustees and also declined to say definitively that charitable corporations are trustees in all respects but rather provided as follows:

> *It is clear, therefore, that for certain purposes the Society is a trustee and its property is trust property. . . .*
>
> *Without going the length of holding that the Society is in all respects and for all purposes a trustee, I have concluded that it is answerable in certain respects for its activities and the disposition of its property as though it were a trustee; . . .*

As such, the cases that have been cited as authority for the proposition that directors of charities are trustees do not satisfactorily determine the issue. Innes summarizes this position succinctly:

> *The better view seems to be that directors of charitable corporations are not themselves trustees of the general assets of the corporation; they appear to be*

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9 (1951), 1 All E.R. 938 (Ch. D.).

10 (1987), 58 O.R. (2d) 626, 26 E.T.R. 86 (Surr. Ct.).

11 (1987), 60 O.R. (2d) 236 (H.C.J.).

> *subject to the same types of fiduciary obligations as are directors of other forms of corporations. Those duties may, however, require greater diligence because of the trustee-like obligations of the corporation with respect to its general assets. It would seem that the lack of clarity in the case-law stems from early cases that confused the concepts of trusteeship and directorship at a time when the law relating to the rights and obligations of directors was itself undeveloped. It may have also stemmed, in part, from a tendency of boards of directors of charitable corporations to style themselves a "Board of Trustees". Nevertheless, there is little support in the jurisprudence for the suggestion that the directors of a charitable corporation are, as such, trustees of the assets of the corporation.*[12]

3. The Ontario Office of the Public Guardian and Trustee

According to submissions made by the Public Trustee for Ontario (as it was then known) to the Ontario Law Reform Commission, the Public Guardian and Trustee claimed jurisdiction over charitable corporations that carry on their activities in Ontario whether or not they are incorporated in Ontario.[13] It is the author's understanding that the current position of the Public Guardian and Trustee limits its authority to those extra-provincial charitable corporations that have their head office or principal place of operations in Ontario. As such, the Public Guardian and Trustee's position is that the Ontario *Trustee Act* would apply to such corporations.

Whether or not the Public Guardian and Trustee has such authority is subject to debate. According to Innes:

> *While it seems reasonably clear that a province has the constitutional authority to regulate the activities of charitable corporations that carry on activities within the province, in the view of the author there are serious unresolved constitutional questions whether provincial legislation could regulate the corporate governance of federal (or extra-provincial) corporations on such issues as the standard of care applicable to directors, remuneration, indemnification, conflicts of interest, etc., particularly where the statutes under which those corporations were incorporated contain inconsistent provisions.*[14]

4. Views from Alberta

In a paper entitled, *Investment by Nonprofit Entities*[15], the Alberta Law Reform Institute (the "**ALRI"**) adds to the debate. The ALRI seeks to explain why an independent organization not subject to a specific legal trust should be treated as a trust. It states that "[h]istorically [t]he law

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[12] Innes, ibid. p. 12.

[13] Public Trustee for Ontario, Submissions to the Ontario Law Reform Commission: Project on the Law of Charities (1990-91), 10 E. & T. J. 272.

[14] Innes, opcit., p. 13, citing Peter W. Hogg, Constitutional Law of Canada, 3rd ed. (Toronto: Carswell, 1992), chapter 23, "Companies", p. 603 at pp. 610-12.

[15] Investment by Nonprofit Entities, Alberta Law Reform Institute, April 2002, p. 10.

of trusts was adapted to the purpose of charitable activity in order to give effect to the intentions of donors"[16]. The ALRI further provides that non-profit entities (incorporated or not) are a response against the narrow scope of "purposes" recognized as charitable and the inflexibility of the courts in their use of the "purpose test" to expand charitable benefits to organizations that operate beyond the historically limited charitable scope[17].

As we know, non-profit entities may be incorporated or unincorporated and may receive tax and other benefits similar to those enjoyed by charities. However, it is the ALRI's position that in order to determine the applicable investment standards for incorporated non-profit (including charitable) entities, "corporate (not trustee) rules and safeguards apply"[18].

5. Summary

In summary, the only certainty that exists in Canada in the application of Trustee Act investment powers for trustees arises in the following circumstances:

1. if a charity is incorporated in Ontario (by virtue of subsection 1.1(b) of the *Charities Accounting Act*); or

2. if the incorporating documents of a charity incorporated outside Ontario grant the charity Trustee Act investment powers; or

3. if an unincorporated charity's constitution grants it Trustee Act investment powers; or

4. if a charity is specifically set up as a trust.

Uncertainty still exists regarding the application of Trustee Act investment powers for charities incorporated outside of Ontario. Nevertheless, the link between charities and trustee investment powers provides a background for a discussion of the investment powers of charities.

III. TRUSTEE INVESTMENT POWERS

Proceeding on the basis that all charities may be trusts regardless of where or how established, directors and trustees of charities need to be cognizant of their investment powers across Canada. A number of measurable issues have been identified and compared across the Canadian Trustee Acts and a summary of this comparison is attached (see Appendix "A"). The following issues will be addressed in more detail:

1. Does the trust instrument prevail over the statutory requirements?

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[16] ibid. p. 10, citing Ontario Law Reform Commission, Report on the Law of Charities (1996, 2 vols) at p. 388.

[17] ibid. p. 12 – 13.

[18] ibid. p. 14.

2. Is there a restrictive list of allowable investments or investment selection requirements?

3. Is a standard of care statutorily imposed?

4. Can trustees delegate investment authority or rely on investment advice?

5. Does the statute provide an "anti-netting" clause?

1. Supremacy of Trust Instrument

It is a general legal principle that a trust instrument can override the law[19] and thus, the provisions of a trust instrument will prevail over any statutory requirements. The Trustee Act of each province and territory of Canada upholds this principle specifically in relation to their respective rules on trustee investment powers.[20] For example, the Ontario *Trustee Act* provides as follows in subsection 27(9) and section 68:

> *27(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.*[21]
>
> *68. Nothing in this Act authorizes a trustee to do anything that the trustee is in express terms forbidden to do, or to omit to do anything that the trustee is in express terms directed to do by the instrument creating the trust.*

Such position is also recognized by Ontario's Office of the Public Guardian and Trustee in its Charities Bulletin #7[22] which states that charities usually have one of the following investment powers set out in their constating documents:

1. investment powers in accordance with the *Trustee Act*, either by express provision in the document that created the charity or by default if such document is silent on the charity's power to invest;

2. investment powers not limited to trustee law; and

3. limited powers of investment as outlined in the document that created the charity.

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[19] *Merrill Petroleums Ltd.* v. *Seaboard Oil Co.* (1957), 22 W.W.R. 529 at 527.

[20] See the first row of Appendix "A" for the specific section of each provincial and territorial Trustee Act that addresses the issue of whether the trust instrument prevails over the statute.

[21] Subsection 27(10) of the Ontario *Trustee Act* deems the constating documents of a corporation that is deemed to be a trustee under subsection 1(2) of the *Charities Accounting Act* to form part of the terms of the trust.

[22] See the Office of the Public Guardian and Trustee website: www.attorneygeneral.jus.gov.on.ca for a copy of this Bulletin.

2. Allowable Investments

(a) Historically

Until very recently, Canadian Trustee Acts all had a restrictive list of allowable investments, often referred to as the "legal list" approach.[23] The legal list approach was mirrored by Canadian common law provinces from the British. These list originated from the British principle of *consols*[24]. In 1859, England codified the consols principle by enacting a statutory list of authorized investments, which went marginally beyond the consolidated annuities. Historically, the list contained only debt securities with fixed incomes. The absence of equity securities was of significant concern to beneficiaries who sought to maximize their potential return. Despite this concern of beneficiaries, courts generally supported the absence of equity securities by stating that equity securities were subject to both gains and losses. However, in the last fifty years, government regulation of the equity marketplace has improved the risks associated with equity investment. Furthermore, a prudently organized portfolio of equity investments that, over time, would far surpass the returns provided by debt, would still be generally safe. This reality of prudent portfolio investment and the desire for larger returns came to be commonly reflected in trust instruments, which would state that the trustees were not restricted to investments authorized by law, but rather were able to invest widely. As a result, few trusts were actually confined to the statutory list.[25]

However, not all trusts specified trustee investment powers and there grew a consensus supported by a number of Canadian law reform commissions that the restrictive list needed to be replaced.

(b) The U.S. Experience

In the U.S., the concept of a restrictive list of investments was never as fully embraced as in Canada. Massachusetts was the first state to adopt what has come to be known as the "Prudent Person Test" in relation to investment power when in 1830 it held that the only restriction on a trustee's investment power was:

> *. . . that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own*

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[23] Eileen E. Gillese, *The Law of Trusts*, (Concord: Irwin Law, 1997) at 148.

[24] According to The Columbia Encyclopedia, Sixth Edition, 2001, "consols" is a "*contraction of consolidated annuities, a bond issue designed to consolidate two or more outstanding issues, used in reference to British government stock. Public borrowing began in England with the establishment of the Bank of England and the national debt (1693-94), and the growth of the debt produced a confusing variety of stocks. Prime Minister Henry Pelham began to consolidate existing stocks in 1751. The consolidated stocks had a fixed rate of interest, or annuity, payable by the Bank of England, with premiums to be paid if the market conditions justified such payments. Consols bore no maturity date and were redeemable on call by the government. During the late 19th and early 20th cent., consols constituted the major part of the national debt and were thus a reliable index to the state of national credit.*"

[25] D.W.M. Waters, *Law of Trusts in Canada,* 2nd ed., (Toronto: Carswell, 1984) at 766.

affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested: Harvard College v. Amory (1830) 9 Pick. 446, 461.[26]

(c) Prudent Person Test

Following numerous political lobbying efforts, the Prudent Person Test has replaced the restrictive list across Canada. While the summary of the Quebec legislation in Appendix "A" does contain a codified list of investments, readers must note that it is not restrictive. Despite claims to the contrary[27], the Quebec Civil Code charges its administrators (trustees) to "act with prudence and diligence … honestly and faithfully in the best interest of the beneficiary"[28], and to perform any necessary or useful act, including "any form of investment"[29]. The Quebec Civil Code presents a list of presumed sound investments. If a trustee invests within this legal list, the trustee will be presumed to be acting with prudence and diligence. A trustee may invest outside of the list, but may then need to prove soundness and prudence.

(d) Mutual Funds

Before reform, mutual fund investments were never an option for trustees. Traditionally, there were two reasons why trustees were not allowed to invest in mutual funds. Firstly, mutual funds were never contained within the various permitted investment lists. Secondly, it was argued that a trustee investing in a mutual fund would be improperly delegating decision-making authority to the fund manager. The common law was strict in terms of a trustee's obligation to act with a personal fiduciary duty. Allowing trustees to access mutual fund investments has been a significant part of trustee investment reform. In keeping with the earlier mentioned goals of the ULCC when it presented the *Uniform Trustee Investment Act*, permission to invest in mutual funds recognizes "modern market conditions" and "modern portfolio theory, including diversification, covariance and risk and return analysis"[30]. Prudent investing in mutual funds allows a trustee to capitalize on the knowledge and experience of fund managers and minimize the trust's exposure to the risk of the equity market.

Permission for mutual fund investment is specifically included in the Trustee Acts of Alberta, British Columbia, Ontario, Prince Edward Island, Quebec and Saskatchewan. Although Nova Scotia does permit a trustee to adhere to prudent investment standards in respect of a portfolio of investments, there is no allowance for delegation of authority or receipt of third-party investment advice, which closes the possibility of mutual fund investment. Furthermore, although Manitoba and Newfoundland permit a trustee to invest in any kind of property subject to the exercise of

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[26] ibid. p. 136.

[27] See Trustee Investment Powers, Alberta Law Reform Institute, February 2000, p. xiv.

[28] Quebec Civil Code, Title Seven, Chapter III, Division I, 1309.

[29] ibid. 1304.

[30] Uniform Law Conference of Canada, General Preamble to the *Uniform Trustee Investment Act, 1997*: online http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u8>.

prudence and care, there is again no allowance for delegation of investment authority. Manitoba does allow a trustee to employ an agent[31] to transact business, but this allowance does not clearly state that this employment can include a delegation of trustee authority. Without an express allowance for mutual fund investment, trustees in Manitoba, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia and the Yukon Territories would be acting outside of their default common law duties and would be subjecting themselves to potential liability if they invested trust monies in mutual funds.

The statutes of the provinces that specifically allow trustee investment in mutual funds either state that mutual funds are permitted investments or state that the investment in mutual funds does not constitute a delegation of investment authority. Such language upholds the common law position that a trustee has a fiduciary duty to the trust and its beneficiaries.

(e) Criteria for Investments

The general standard of prudent behaviour receives further refining in five of Canada's Trustee Acts. The Trustee Acts of Alberta, Newfoundland, Ontario, Prince Edward Island and Saskatchewan each provide a specific list of criteria for a trustee's investment consideration. For example, some of the Trustee Acts direct a trustee making investments to consider inflation, total return, commission fees and maintenance of real value. Of the five provinces that specify such criteria (see Appendix "B" for a detailed listing), only the *Trustee Act* of Prince Edward Island states that a trustee "may have regard" to the criteria, thereby making the criteria permissive rather than mandatory. The remaining four Trustee Acts with investment criteria state either that a trustee "must consider" the criteria or "shall have regard" for the criteria.

3. Statutorily Imposed Standard of Care

It is imperative for trustees to understand the statutorily imposed standard of care to which they are subject. Some of the Canadian Trustee Acts oblige a trustee to review the trust's investments and some specifically require a trustee to review the performance of an agent to whom a trustee has delegated authority as permitted within the Trustee Act. Ontario's *Trustee Act* specifies exactly what is meant by the obligation to "review" an agent's performance. Paragraph 27.1 (5)(b) of the Ontario *Trustee Act* provides that prudent monitoring 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,*

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[31] S. 35(1) of *The Trustee Act* of Manitoba, R.S.M. 1987, c. T160 provides that an agent can be a stockbroker.

(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.

No other Canadian Trustee Act imposes such a defined standard of review on a trustee. The common law does not make specific mention of review standards but rather the common law's review obligation is encompassed in a trustee's general duties to the trust, such as the duty of loyalty to the beneficiary.

The specific inclusion of a review standard of care in the Ontario legislation narrowly defines the general standards of prudent behaviour expected of a trustee and imposes the potential for heightened liability.

4. Delegation of Investment Authority and Related Trustee Liability

Delegation of investment authority acts against the traditional duty of a trustee to accept sole responsibility for the trust. However, many charities are managed by boards or committees which are often unable to assemble quickly enough to take full advantage of a dynamic investment marketplace. These boards or committees collectively form a single trustee with singular duties and obligations. It is not always possible for a collective trustee to join together for a collective decision. As with the arguments in favour of mutual fund investments which seek to permit delegation to a fund manager, delegation of investment authority to professional investment managers allows a trustee to capitalize on the expertise of others and to make investment decisions in a timely fashion. Recent amendments to a number of Canada's Trustee Acts have been made to permit delegation of investment authority and now only the *Trustee Acts* of Nova Scotia and the Territories make no allowance for delegation.

The issue of whether or not a trustee can rely on investment advice and thereby be absolved from personal liability is obviously key to a trustee's decision to delegate his or her investment authority. Acting on investment advice, investing in mutual funds or delegating investment authority are all part of modernizing trustee investment powers to recognize changing investment opportunities and changing investment processes. The restrictive legal lists of the past have been fully abandoned across Canada to permit a prudent trustee to make investment decisions that more closely reflect the needs of the trust's objectives, beneficiaries and growth potential. In light of this more liberal investment strategy, recent amendments to some of Canada's Trustee Acts have made corresponding changes to trustee liability. To date, the Trustee Acts of New Brunswick, Ontario, Prince Edward Island and Saskatchewan specifically permit a trustee to rely on investment advice and avoid liability when a trustee prudently relies on such advice.

5. Anti-Netting

In investment terms, "netting" is the process whereby a portfolio's total losses are deducted from a portfolio's total gains to give an overall picture of the portfolio's performance, rather than focusing in on the specific loss or gain realized on an individual investment. Netting clauses have been incorporated into Trustee Acts as a result of modern portfolio investing and trustee liability reform. A portfolio of investments is prudently assembled to collectively maximize

investment return. As such, a portfolio will generally hold a balance between debt and equity investments and within the collection of equity investments, there will be stock that ideally increases highly in value and/or stock that produces a more modest increase and/or stock that may even decrease in value. However, over all, it is the total portfolio that is measured. In other words, loses are netted against gains.

The common law prohibits netting of investments and would allow a beneficiary to target a specific loss within a trustee's investment portfolio and claim a remedy against the trustee even if the trust's overall investment return was positive.

The traditional rules of trust law with regards to netting are expressed (and nullified) in subsections 15.4(1) and 15.4(2) of British Columbia's *Trustee Investment Statutes Amendment Act, 2002*, as follows:

> *15.4(1) The rule of general trust law that requires the assessment of the decisions of a trustee on an investment by investment basis if the decisions are called into question is abrogated.*
>
> *15.4(2) The rule for the assessment of damages for breach of trust that prohibits losses from being off set by gains is abrogated ....*

Allowing the netting of investment losses and gains recognizes modern investment practice. With the exception of four jurisdictions (Alberta, British Columbia, Ontario and Prince Edward Island), the Canadian Trustee Acts are deficient in regards to the concept of netting when evaluating a trustee's investment performance.

IV. OPTIONS

In a perfect world, all of the Canadian Trustee Acts would be more closely aligned with each other to fully recognize the modern investment marketplace and deliver the standard ideals expressed by the ULCC. Furthermore, each province and territory would clearly state that a charitable organization is accountable for the standards expressed in the province's or territory's reformed and modernized Trustee Act. Such a position would provide a uniform standard for Canadian charities investing their funds across the country and would provide a uniform standard for those charitable organizations that seek to maximize their charitable resources for the realization of their beneficial goals.

However, we do not live in a perfect world. As such, charities that operate in more than one province or territory are left with the imperfect situation of being subject to contradictory investment powers. Arguably, the most prudent approach for these types of charities would be to comply with the most stringent applicable investment standards in order to protect themselves from potential liability for failure to comply with such standards. However, this prudent approach will likely yield lower income for charities which will make it more financially difficult for them to meet their obligations and carry out their purposes. Furthermore, charities that have greater latitude in their investment powers may be accused of failing to achieve the

optimum investment return if they invest too cautiously. Clearly, not a desirable situation for charities.

Another alternative would be for charities to segregate their investment dollars by province or territory in which they were received or donated. Each segregated provincial or territorial fund could then comply with the investment powers in each provincial or territorial Trustee Act. There are numerous reasons why this option is undesirable. The administrative detail required to determine the location of the source of funds, the maintenance of each fund and the need for multiple investment policies are clearly disadvantages to this option. Furthermore, a charity could receive a greater investment return if it pooled all of its available assets.

For those charities that are just starting out, consideration should be given to incorporating federally so that they are arguably not subject to any provincial or territorial Trustee Act. However, as discussed above, the Ontario Public Guardian and Trustee claims jurisdiction over charities that have their head office or principal place of operations in Ontario. While such a position may not withstand a constitutional challenge, charities generally will not want to expend their time and limited resources arguing the point with the Public Guardian and Trustee. A change of jurisdiction is not an option for existing charitable corporations as there is currently no mechanism to continue a non-share capital corporation under the *Canada Corporations Act*.

Since the trust instrument prevails over any statutory requirements, careful consideration should be given to the trustee investment powers set out in the trust instrument or, for corporations, the charter documents. One of the drafting alternatives suggested by Philip Renaud in his paper *Alberta's "Prudent Investor" Rules*[32] is to adopt the investment provisions of a specific provincial or territorial statute regardless of the governing jurisdiction of the charity. The trust instrument or charter documents could also give the trustees or directors the ability to adopt the investment provisions of another jurisdiction should they choose to do so. However, it is unclear whether the courts would uphold such provisions in the trust instrument or charter documents.

Another drafting alternative suggested by Renaud is to give the trustees or directors absolute discretion in the investment of the assets of the charity. However, if such a provision came before the courts, one would assume that the courts would impose some form of investment standard. Furthermore, if no investment standard were included in the trust instrument or charter documents, the courts would likely interpret any indemnification provisions in favour of the trustees or directors very narrowly.

V. CONCLUSION

Abolishing a restrictive legal list and then enabling a trustee to invest prudently is only one step towards modernizing trustee investment powers. Modernizing trustee liability must follow as well. In the absence of investment language within a trust document, trustees need to be free to

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[32] Alberta's "Prudent Investor" Rules, Estates, Trusts & Pensions Journal, Volume 22, 2003.

prudently capitalize on the modern investment marketplace if they are to maximize their trust property and provide for their beneficiaries.

APPENDIX "A"

SUMMARY OF CANADIAN TRUSTEE ACTS

	ALBERTA – TRUSTEE ACT[33]
Does Trust Instrument Prevail over Statute?	Yes. *S. 2(1) Sections 3 to 9 [investment rules] are subject to a contrary intention expressed in the instrument creating a trust.*
Investment Standard of Care	*S. 4(1) A trustee is not liable for a loss in connection with the investment of trust funds that arises from a decision or course of action that a trustee exercising reasonable skill and prudence and complying with section 3 could reasonably have made or adopted.*
Review Standard of Care	*S. 3(3) A trustee must review the trust investments at reasonable intervals.*
General Investment Selection Requirements	*S. 3(2) A trustee must invest trust funds with a view to obtaining a reasonable return while avoiding undue risk, having regard to the circumstances of the trust.*
Specific Allowance for Mutual Funds	Yes. *S. 6 Investment in a mutual fund or segregated fund … is not a delegation of investment authority.*
Anti-Netting?	No. *S. 4(2) A court assessing the damages payable by a trustee for a loss … may take into account the overall performance of the investments.*
Investment Delegation Permitted?	Yes. *S. 5(2) A trustee may delegate to an agent the degree of authority with respect to the investment of trust funds that a prudent investor might delegate in accordance with ordinary investment practice.*
Investment Advice Permitted?	None.

[33] *Trustee Act*, R.S.A. 2000, c. T-8.

	BRITISH COLUMBIA – TRUSTEE ACT[34]
Does Trust Instrument Prevail over Statute?	*S. 15.1(2) Subsection (1)* [authorizing investment in any form of property or security] *does not authorize a trustee to invest in a manner that is inconsistent with the trust.*
Investment Standard of Care	*S. 15.2 In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.*
Review Standard of Care	When delegating to an agent, s. 15.5(3)(d) states that a trustee *must exercise prudence in monitoring the performance of the agent to ensure compliance with the terms of the investment delegation.*
General Investment Selection Requirements	None.
Specific Allowance for Mutual Funds	Yes. S. 15.1(1) allows a trustee to invest in *a security issued by a mutual fund.*
Anti-Netting?	No. S. *15.4(1) The rule of general trust law that requires the assessment of the decisions of a trustee on an investment by investment basis if the decisions are called into question is abrogated. S. 15.4(2) The rule for the assessment of damages for breach of trust that prohibits losses from being off set by gains is abrogated except in respect of circumstances in which the breach is associated with dishonesty on the part of the trustee.*
Investment Delegation Permitted?	Yes. *S. 15.5(2) A trustee may delegate to an agent the degree of authority with respect to the investment of trust property that a prudent investor might delegate in accordance with ordinary business practice.*
Investment Advice Permitted?	None.

[34] *Trustee Act*, R.S.B.C. 1996, c.464, as amended.

	MANITOBA – THE TRUSTEE ACT[35]
Does Trust Instrument Prevail over Statute?	Yes. S. *4 Nothing in this Act authorizes a trustee to do anything that he is in express terms forbidden to do, or to omit to do anything that he is in express terms directed to do, by the instrument creating the trust.*
Investment Standard of Care	*S. 68(2) Subject to any express provision of the will or other instrument creating the trust, in investing money for the benefit of another person, a trustee shall exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in administering the property of others.*
Review Standard of Care	None.
General Investment Selection Requirements	S. 68(1) Subject to any express provision of law or of the will or other instrument creating the trust or defining the duties and powers of the trustee, and subject to subsection (2) (the investment standard of care - prudence, discretion and intelligence), a trustee may *invest in any kind of property, real, personal or mixed.*
Specific Allowance for Mutual Funds	None.
Anti-Netting?	None.
Investment Delegation Permitted?	Yes. *S. 35(1) Trustees may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stock broker, or other person, to transact any business or do any act required to be transacted or done in the execution of the trust … and are not responsible for the default of any such agent if employed in good faith.*
Investment Advice Permitted?	None.

[35] *The Trustee Act*, R.S.M. 1987, c. T160.

	NEW BRUNSWICK – TRUSTEES ACT[36]
Does Trust Instrument Prevail over Statute?	Yes. S. 2 states that *unless a trustee is otherwise authorized or directed by an express provision of the … instrument creating the trust … he may invest trust money in any kind of property*…
Investment Standard of Care	S. 2 states that when investing, a trustee *shall exercise the judgment and care that a man of prudence, discretion and intelligence would exercise as a trustee of the property of others.*
Review Standard of Care	There are no requirements listed when a trustee acts alone, however, when delegating authority, s. 2.1(2)(b) states that a trustee shall use the same investment standard of care in monitoring the performance of the delegate.
General Investment Selection Requirements	None.
Specific Allowance for Mutual Funds	None.
Anti-Netting?	None.
Investment Delegation Permitted?	Yes. S. 2.1(1) (b) states that a trustee may *delegate to another person his or her authority to make investments.*
Investment Advice Permitted?	Yes. S. 2.1(1)(a) states that a trustee may *obtain and rely on the advice of another person in relation to the investment of trust money.*

[36] *Trustees Act*, R.S.N.B. 1973, c. T-15, as amended.

	NEWFOUNDLAND AND LABRADOR – TRUSTEE ACT[37]
Does Trust Instrument Prevail over Statute?	Not specifically addressed.
Investment Standard of Care	S. 3(1) states that in investing trust funds a trustee *shall exercise the care, diligence and skill that a reasonably prudent person would in comparable circumstances.*
Review Standard of Care	None.
General Investment Selection Requirements	S. 3(1) states *a trustee may invest trust funds in any property* subject to the investment standard of care.
Specific Allowance for Mutual Funds	None.
Anti-Netting?	None.
Investment Delegation Permitted?	None.
Investment Advice Permitted?	None.

[37] *Trustee Act*, R.S.N.L. 1990, c. T-10, as amended.

	NOVA SCOTIA – TRUSTEE ACT[38]
Does Trust Instrument Prevail over Statute?	Yes. S. 10(2) states that *nothing in this Act … authorizes a trustee to do anything that he is in express terms forbidden to do or omit to do anything that he is in express terms directed to do by the instrument creating the trust.*
Investment Standard of Care	S. 3 states that *a trustee may, for the sound and efficient management of a trust, establish and adhere to investment policies, standards and procedures that a reasonable and prudent person would apply in respect of a portfolio of investments to avoid undue risk of loss and to obtain a reasonable return." S. 7 states that "nothing herein shall relieve the trustee of his duty to take reasonable and proper care with respect to the investments so authorized.*
Review Standard of Care	None.
General Investment Selection Requirements	None.
Specific Allowance for Mutual Funds	None.
Anti-Netting?	None.
Investment Delegation Permitted?	None.
Investment Advice Permitted?	None.

[38] *Trustee Act*, R.S.N.S. 1989 c. 479, as amended.

	NORTHWEST TERRITORIES AND NUNAVUT – TRUSTEE ACT[39]
Does Trust Instrument Prevail over Statute?	Yes. *S. 2(a) Unless otherwise authorized or directed by an express provision of the … instrument creating the trust or defining the duties and powers of the trustee … a trustee is authorized to invest in every kind of property, real, person or mixed*.
Investment Standard of Care	*S. 2(b) in investing money for the benefit of another person, a trustee shall exercise the judgment and care that a person of prudence, discretion and intelligence would exercise as a trustee of the property of others.*
Review Standard of Care	None.
General Investment Selection Requirements	None.
Specific Allowance for Mutual Funds	None.
Anti-Netting?	None.
Investment Delegation Permitted?	No. *S. 6(3) Nothing in this section gives the power to appoint a personal representative.*
Investment Advice Permitted?	None.

[39] *Trustee Act*, R.S.N.W.T. 1988, c. T-8, as amended and as duplicated for Nunavut by s. 29 of the *Nunavut Act*, S.C. 1993, c. 28.

	ONTARIO – TRUSTEE ACT[40]
Does Trust Instrument Prevail over Statute?	Yes. S. *68 Nothing in this Act authorizes a trustee to do anything that the trustee is in express terms forbidden to do, or to omit to do anything that the trustee is in express terms directed to do by the instrument creating the trust.*
Investment Standard of Care	*S. 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.*
Review Standard of Care	S. 27.1(4) states that if a trustee has authorized an agent to exercise any of the trustee's functions relating to investment as per s. 27.1(1), a trustee is required to exercise prudence in monitoring the agent's performance to ensure compliance with the terms of the agent's authority. Subsection 27.1 (5)(b) defines prudent monitoring as including: *(a reviewing the agent's reports;* *(b) 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;* *(c) considering whether directions should be provided to the agent or whether the agent's appointment should be revoked; and,* *(d) providing directions to the agent or revoking the appointment if the trustee considers it appropriate to do so.*
General Investment Selection Requirements	*S. 27(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.*
Specific Allowance for Mutual Funds	Yes. *S. 27(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.*
Anti-Netting?	No. *S. 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.*
Investment Delegation Permitted?	Yes. *S. 27.1(1) 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 practise, would authorize an agent to exercise any investment function*. However, s. 27.1(2) requires a trustee to prepare a written plan or strategy before authorizing an agent, and the plan must ensure that the functions will be in the best interests of the beneficiaries. As well, s. 27(3) requires that the trustee and agent have a written agreement that includes a requirement that the agent comply with the plan, and report at regular stated intervals. Furthermore, s. 27.2(2) bars an agent from further investment delegation.

[40] *Trustee Act*, R.S.O., c. T.23, as amended.

Investment Advice Permitted?	Yes. S. 27(7) A trustee may obtain advice in relation to the investment of trust property, and s. 27(8) provides that 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.

	PRINCE EDWARD ISLAND – TRUSTEE ACT[41]
Does Trust Instrument Prevail over Statute?	Yes. S. 2(2) states that trustees may not invest *in a manner that is inconsistent with the trust*. With regards to investment delegation, s. 3.5(6) states that *this section does not authorise a trustee to delegate authority under circumstances in which the trust requires the trustee to act personally.*
Investment Standard of Care	*S. 3 In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments*
Review Standard of Care	S. 3.5(3)(b) states that a trustee who delegates must exercise prudence in *monitoring the performance of the agent to ensure compliance with the terms of the delegation.*
General Investment Selection Requirements	*S. 3.1 A trustee must diversify the investment of trust property to an extent that is appropriate having regard to (a) the requirements of the trust; and (b) general economic and investment market conditions.*
Specific Allowance for Mutual Funds	Yes. S. 2(1) states that a trustee may invest in *a security issued by a mutual fund.*
Anti-Netting?	No. *S. 3.3 A court assessing the damages payable by a trustee for a loss to the trust arising from the investment of trust property may take into account the overall performance of the investments.*
Investment Delegation Permitted?	Yes. *S. 3.5(2) A trustee may delegate to an agent the degree of authority with respect to the investment of trust property that a prudent investor might delegate in accordance with ordinary business practice.*
Investment Advice Permitted?	Yes. *S. 3.4(1) A trustee may obtain advice in relation to the investment of trust property.*

41 *Trustee Act*, R.S.P.E.I 1988, c. T-8.

	QUÉBEC – CIVIL CODE OF QUÉBEC, TITLE SEVEN[42]
Does Trust Instrument Prevail over Statute?	The Code distinguishes between two types of administrators: simple and full. Simple administrators are charged with the *preservation* and *maintenance* of property, while full administrators although also charged with preservation, are additionally charged with the *increase in patrimony* where the interest of the beneficiary or the pursuit of the trust's purpose requires it. The Common Law's concept of a trustee is more in keeping with the Code's understanding of a "full" administrator. Within the Code, the trust instrument prevails. Title Seven, Chapter I, 1299 states *that the rules of this Title apply to every administration unless another form of administration applies under the law or the constituting act, or due to circumstances*.
Investment Standard of Care	Title Seven, Chapter III, Division I, 1309. *An administrator shall act with prudence and diligence. He shall also act honestly and faithfully in the best interest of the beneficiary or of the object pursued*. Title Seven, Chapter III, Division V, 1339 lists investments which are "presumed sound". This list is not restrictive, however if a trustee chooses to invest within this list, the onus is on a beneficiary claiming liability to prove that the trustee has breached his duty. However, if the trustee invests outside this list, the onus is on the trustee to prove that the investments were prudent and diligent. *Investments in the following are presumed sound:* *(1) titles of ownership in an immovable;* *(2) bonds or other evidences of indebtedness issued or guaranteed by Québec, Canada or a province of Canada, the United States of America or any of its member states, the International Bank for Reconstruction and Development, a municipality or a school board in Canada, or a fabrique in Québec;* *(3) bonds or other evidences of indebtedness issued by a legal person which operates a public service in Canada and which is entitled to impose a tariff for such service;* *(4) bonds or other evidences of indebtedness secured by an undertaking, towards a trustee, of Québec, Canada or a province of Canada, to pay sufficient subsidies to meet the interest and the capital on the maturity of each;* *(5) bonds or other evidences of indebtedness of a company in the following cases: (a) they are secured by a hypothec ranking first on an immovable, or by securities presumed to be sound investments; (b) they are secured by a hypothec ranking first on equipment and the company has regularly serviced the interest on its borrowings during the last ten financial years; (c) they are issued by a company whose common or preferred shares are presumed sound investments;* *(6) bonds or other evidences of indebtedness issued by a loan society incorporated by a statute of Québec or authorized to do business in Québec under the Loan and Investment Societies Act,*

[42] Civil Code of Québec, Title Seven.

	provided it has been specially approved by the Government and its ordinary operations in Québec consist in making loans to municipalities or school boards and to fabriques or loans secured by hypothec ranking first on immovables situated in Québec; *(7) debts secured by hypothec on immovables in Québec: (a) if payment of the capital and interest is guaranteed or secured by Québec, Canada or a province of Canada; (b) if the amount of the debt is not more than seventy-five per cent of the value of the immovable property securing payment of the debt after deduction of the other debts secured by the same immovable and ranking equally with or before the debt; (c) if the amount of the debt that exceeds seventy-five per cent of the value of the immovable by which it is secured, after deduction of the other debts secured by the same immovable and ranking equally with or before the debt, is guaranteed or secured by Québec, Canada or a province of Canada, the Central Mortgage and Housing Corporation, the Société d'habitation du Québec or a hypothec insurance policy issued by a company holding a permit under the Act respecting insurance;* *(8) fully paid preferred shares issued by a company whose common shares are presumed sound investments or which, during the last five financial years, has distributed the stipulated dividend on all its preferred shares;* *(9) common shares issued by a company that for three years has been meeting the timely disclosure requirements defined in the Securities Act to such extent as they are listed by a stock exchange recognized for that purpose by the Government on the recommendation of the Agence nationale d'encadrement du secteur financier, and when the market capitalization of the company, not considering preferred shares or blocks of shares of ten per cent or more, is higher than the amount so fixed by the Government;* *(10) shares of a mutual fund and units of an unincorporated mutual fund or of a private trust, provided that sixty per cent of its portfolio consists of investments presumed sound and that the fund or trust has fulfilled in the last three years the continuous disclosure requirements specified in the Securities Act.*
Review Standard of Care	None.
General Investment Selection Requirements	Title Seven, Chapter III, Division V, 1340. *The administrator decides on the investments to make according to the yield and the anticipated capital gain; so far as possible, he works toward a diversified portfolio producing fixed income and variable revenues in the proportion suggested by the prevailing economic conditions. He may not, however, acquire more than five per cent of the shares of the same company nor acquire shares, bonds or other evidences of indebtedness of a legal person or limited partnership which has failed to pay the prescribed dividends on its shares or interest on its bonds or other securities, nor grant a loan to that legal person or partnership.*
Specific Allowance for Mutual Funds	Yes. The tenth entry in the list of investments presumed sound is mutual funds. Therefore, within the rules outlined below, trustees in Quebec can invest in mutual funds and they will be considered *sound investments*. Title Seven, Chapter III, Division V, [investments presumed sound] 1339 (10) *shares of a mutual fund and units of an unincorporated mutual fund or of a private trust, provided that sixty per cent of its portfolio consists of investments presumed sound and that the fund or trust has fulfilled in the last three years the continuous disclosure requirements specified in the Securities Act.*

Anti-Netting?	None.
Investment Delegation Permitted?	No. Title Seven, Chapter III, Division IV, 1337, provides that although *an administrator may delegate his duties or be represented by a third person for specific acts; he may not delegate generally the conduct of the administration or the exercise of a discretionary power.*
Investment Advice Permitted?	None.

	SASKATCHEWAN – THE TRUSTEE ACT[43]
Does Trust Instrument Prevail over Statute?	Yes. S. *3(2) Subsection 1 (investment authorization) does not authorize a trustee to invest trust property in a manner that is inconsistent with the instrument creating the trust.*
Investment Standard of Care	*S. 3.1 A trustee must exercise the care, skill, diligence and judgment that a reasonable, prudent investor would exercise in making investments.*
Review Standard of Care	None.
General Investment Selection Requirements	*S. 3.2 A trustee must diversify the investment of trust property to an extent that is appropriate having regard to: (a) the terms on which the trust property is held; and (b) general economic and investment market conditions.*
Specific Allowance for Mutual Funds	Yes. S. *3(1) A trustee may invest in any form of property or security in which a reasonable, prudent investor would invest, including … a mutual fund or similar investments.*
Anti-Netting?	None.
Investment Delegation Permitted?	Yes. S. *44(2) A trustee may delegate to an agent the degree of authority with respect to the investment of trust property that a reasonable, prudent investor would delegate in accordance with ordinary business practice.*
Investment Advice Permitted?	Yes. S. *3.3(1) A trustee may obtain advice respecting the investment of trust property. S. 3.3(2) A trustee is not in breach of trust for relying on advice obtained … if a reasonable, prudent investor would rely on the advice in comparable circumstances.*

[43] *The Trustee Act*, R.S.S., 1978, c. T-23, as amended.

	YUKON TERRITORIES – TRUSTEE ACT[44]
Does Trust Instrument Prevail over Statute?	Yes. S.2(1) *Unless a trustee is otherwise authorized or directed by an express provision of the law or of the will or other instrument creating the trust or defining his powers and duties, he may invest trust money in any kind of property, real, personal or mixed…* S.4 *The powers conferred by s.2 (authorized investments) are in addition to the powers conferred by the instrument, if any, creating the trust; but nothing in this Act authorizes a trustee to do anything that he is in express terms forbidden to do or to omit anything that he is in express terms directed to do by the instrument creating the trust.*
Investment Standard of Care	S.2(1) *In investing trust money, he shall exercise the judgment and care that a person of prudence, discretion and intelligence would exercise as a trustee of the property of others*
Review Standard of Care	None.
General Investment Selection Requirements	None.
Specific Allowance for Mutual Funds	None.
Anti-Netting?	None.
Investment Delegation Permitted?	None.
Investment Advice Permitted?	None.

[44] *Trustee Act*, R.S.Y. 2002, c. 223.

APPENDIX "B"

TRUSTEE INVESTMENT CONSIDERATIONS

	BC[1]	AB	SK	MN[1]	ON[2]	PQ	NB[1]	NS[1]	PEI[3]	NFLD	NWT[1]	YK[1]
General economic conditions			X		X				X	X		
Inflation and deflation			X		X				X	X		
Expected total return			X		X				X	X		
Purpose and duration of Trust; needs and circumstances of beneficiaries		X	X		X							
Duty to act impartially towards beneficiaries and between different classes of beneficiaries		X										
Other resources of the beneficiaries									X	X		
Special relationship or value of an asset to the purpose of the trust or to one or more of the beneficiaries		X	X		X				X	X		
The need to maintain the real value of the capital or income (preservation of value)		X	X		X				X	X		
The need to maintain a balance (risk, return, liquidity) that is appropriate to the circumstances of the trust		X	X						X	X		
Diversification appropriate to the Trust		X										
Role of each investments in the Trust portfolio		X	X		X				X	X		
Costs such as commissions or fees		X										
Tax consequences		X	X		X				X	X		

1. Does not specify investment considerations to be taken by a trustee.
2. Ontario's *Trustee Act* lists specific considerations, but states that these are "in addition to any others that are relevant to the circumstances".
3. Prince Edward Island's *Trustee Act* contains permissive language. It specifies that a trustee "may have regard" to these criteria, whereas Ontario's *Trustee Act* states that a trustee "must consider" the criteria, Saskatchewan's *Trustee Act* and Newfoundland's *Trustee Act* state that a trustee "shall have regard" to the criteria, and the Alberta *Trustee Act* states that a trustee "must consider" the criteria.

APPENDIX "C"

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