

Responsibility, even risk, in trustee role



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**By
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In both teaching estate planning and managing trust investments over the years, I have found that many people know very little about the roles and responsibilities of a trustee.

A trustee can be a trust company or at least three people – living in Canada – charged with sound trust investment practices. If the trust is set up using three trustees, at least one needs to be independent from the settler (the person who transfers assets into the trust).

The most popular method of setting up a trust is the three-person structure. Unfortunately, many people accepting a trustee appointment do not fully comprehend their roles. Trustees risk serious liability if they violate laws surrounding fiduciary responsibilities.

Before someone accepts the position, he should have a firm understanding of the trust. These duties include hiring and overseeing professional advisers in carrying out the responsibilities of the trust. Trust administration includes maintaining all documentation as well as receiving and depositing all contributions into the trust fund.

The trustee should know all the professional advisers and understand their roles, and be familiar with the assets held in the trust and how they have been invested.

The trustee helps put together the information to file a T3P to the Canada Revenue Agency (CRA). A T3P is a trust income tax return.

The T3P must be filed within 90 days after the year-end of the trust. If this form is late CRA can impose penalties. Unless it has been specified in the trust documents, trustees must act unanimously on any decisions concerning trust assets. Some trusts allow for the majority of the trustees to make decisions.

If the trustees allow one of their members to manage the assets, all trustees are still responsible for decisions and how trust assets are employed.

Beneficiaries of trusts should expect an objective test of what is careful, skillful and prudent and the trustee must document his conduct. Below are the investment guidelines that a trustee must follow:

- A trustee must exercise the care, skill, diligence and judgment that a prudent investor would in making investments;
- A trustee may invest in any form of property in which a prudent investor might invest;

• Any law that prohibits a trustee from delegating powers does not prevent the trustee from investing in mutual funds;

• If trust property is held by co-trustees and one of the co-trustees is a trust corporation, any law that prohibits a trustee from delegating powers or duties does not prevent the co-trustee from investing in a common trust fund maintained by the trust corporation.

A trustee must consider the following criteria in planning the 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 with 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;

• A trustee must diversify the investment of trust property to an extent that is appropriate within the requirements of the trust and general market conditions;

• It is not a breach of trust for a trustee to rely on advice if a prudent investor would under comparable circumstances.

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