

Workshop on Trusts

What is a Trust?

- Where one person (the trustee) holds property for the benefit of someone else
 - Trustee must keep trust property separate from other property
- To have a trust you need:
 - A trustee, trust property, one or more trust beneficiaries, [a settlor]
- Optional elements:
 - Protector
- Very flexible device for holding and managing property

Examples:

- Family trust
- Testamentary trusts
- Tax-free savings plans (RRSPs, RESPs, TFSAs)
- Charities
- Employee benefit plans
- Business trusts (even traded on stock exchange)
- Settlement trusts

Why put money in a trust? Why not put in government bank account or spend it?

Usual reasons:

- Desire to segregate funds from other government funds
- Desire to protect and maintain that fund for future generations
- Prevent change in use of funds

Legal Framework

- Common Law (judge made law)
 - Creation
 - Default rules for trusts and trustees
- Legislation
 - Supplements and sometimes changes common law
 - E.g., *Trustee Act* (Yukon), *Wills Act* (Yukon), *Perpetuities Act* (Yukon)
- Trust Deed
 - Provides rules for trust
 - Can override, modify and clarify many default common law rules
 - Sets out roles of various persons

Role of trustee: duties

- Major default duties:
 - Hold and manage property/money for benefit of beneficiaries
 - Keep trust property separate from own
 - Avoid conflicts of interest
 - E.g., cannot sell trust assets to self
 - Act impartially between beneficiaries
 - Invest trust property (Prudent Investor Rule)
 - Account and provide information
 - File tax returns
- Other duties set out in common law or trust deed
- Trust deed can clarify or modify duties

Role of Protector

- Not required, Flexible concept
- Created by trust deed
- A type of check/balance
- Someone who exercise some control over the trustee – e.g.:
 - Veto of trustee decision;
 - Replacement of trustees;
 - Arbitrate between trustees in case of disagreement
- May act in place of beneficiary
- Usually has duties similar to that of trustee but without direct control over trust property

Role of Settlor

- Required to create a trust (property must come from somewhere)
- Not required to have an ongoing role
- Sometimes is the trustee
- Sometimes is a beneficiary
- Can have on-going protector role

Tax

- Trustee owns trust property, but for tax purposes trust treated as a separate person
- General Rule: All trusts are taxable
 - Rate is highest personal rate in Prov/Terr (48% in Yukon)
 - Set up to take advantage of government tax exemption (band, municipality, modern treaty nation, etc)

Own Source Revenue (OSR)

- Fiscal arrangements between self-governing Indigenous governments and Canada provide that cost of government is a shared cost.
- Funding from Canada may be reduced by the Indigenous government's own source revenues.
 - Even if income of trust exempt from tax, could income in trust – or funds distributed from trust - result in reduction of federal funding to Indigenous government?
- Currently there is an OSR moratorium in place.
 - Expect moratorium to continue while Canada revamps its fiscal policy for self-governing Indigenous governments.
 - Expect moratorium to eventually expire
- Post-moratorium rules unknown

Tr'ondëk Hwëch'in Trust

Purpose:

- “preserve the Trust Property for future generations of the Tr'ondëk Hwëch'in”
- “receive, hold, manage, invest, allocate [...] any income earned by the Trust for the purposes of promoting, funding or carrying out social, community or economic development activities of direct benefit to the Tr'ondëk Hwëch'in .”

Tr'ondëk Hwëch'in Trust

Settlor: Tr'ondëk Hwëch'in (government)

Trustees: Individuals (no professional or institutional trustee)

Protector: a Tr'ondëk Hwëch'in citizen

Beneficiaries:

- Tr'ondëk Hwëch'in government, Tr'ondëk Hwëch'in citizens, Tr'ondëk Hwëch'in government owned corporations, Every charity designated as a beneficiary by trustees

Tr'ondëk Hwëch'in Trust

- Designed to be at arm's length from TH government:
 - Trustees have wide discretion
 - Has a protector who can:
 - Replace trustees
 - Appoint a successor
 - Approve certain fees payable to trustees
 - Approve certain distributions that would otherwise not be permitted
 - General Assembly approves Guiding Principles (which constrain trustee discretion to make distributions) and (after Sept 24 2019) can replace Protector
 - Council could recommend Guiding Principles or replacement protector for General Assembly approval
 - Limited ability to amend trust terms

Tr'ondëk Hwëch'in Trust

- Trustee powers include:
 - Act as owners of trust property
 - Invest trust property in accordance with Guiding Principles
 - Distribute trust property to beneficiaries
 - Must be in accordance with Guiding Principles
 - 10-year restriction on distribution of capital
 - Not required to maintain "even hand"
 - Transact business
 - Lend trust property
 - Obtain professional assistance
 - Amend trust (limited)
 - Charging the trust certain fees (upon approval of the protector)
 - If a lawyer, accountant, or other professional, charge professional fees for some services (upon approval of the protector)

Tr'ondëk Hwëch'in Trust

- Trustee duties include:
 - Exercise powers in good faith and in best interest of the Trust and the Trust beneficiaries, and to standard of a reasonably prudent trustee
- Trustees not required to interfere in management of businesses

Questions for Community

- Purpose for which funds are held?
- What should trust money be invested in?
- How difficult should it be to access funds?
- How difficult should it be to change trust terms?
- What influence should the General Assembly or Council have over use and distribution of funds?
- Relative weight of tax concerns?
- Who should the trustees be?