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## Backgrounder

### **BCLI Report no. 17 – Exculpation Clauses in Trust Instruments**

**Date: March 2002**

An exculpation clause in a trust instrument is a clause that relieves a trustee from liability for the negligent administration of a trust. A trustee is a person or institution to whom legal title to property is entrusted for the benefit of another. Trustees assume a fiduciary duty in relation to the named beneficiaries on the trust instrument. Exculpation clauses are also known as “exoneration clauses,” “immunity clauses,” “exemption clauses,” and “excusing clauses.”

When there is a breach of a trust, the conduct of the trustee may fall within a spectrum of possibilities, ranging from a wholly innocent to guilty of fraudulent activity. The exculpatory clause is intended to shift the risk of any losses flowing from a breach of trust from the trustee, who would ordinarily be liable, to the beneficiaries.

As there are core obligations that trustees owe their beneficiaries, an exculpation clause cannot presumably exonerate a trustee for failing to fulfill those obligations. It is uncertain whether Canadian courts will give legal effect to exculpation clauses that relieve against losses that flow from gross negligence, which is an act or omission in reckless disregard of the consequences to the safety or property of another person. The debate over exculpation clauses tends to focus on the division between fraud and gross negligence. The concept of gross negligence is not clearly defined in Canadian law.

This report recommends the enactment of a legislative statement concerning the status and enforceability of exculpation clauses. While ultimately the legal consequences of an exculpation clause must rest on judicial discretion, an alternative regime of discretionary relief could be triggered by the presence of an exculpation clause in a trust instrument.

This report is part of a series of reports forming part of a larger project on reform of the *Trustee Act* and related laws to meet present-day requirements of trusteeship.