BRITISH COLUMBIA LAW INSTITUTE

1822 East Mall, University of British Columbia
Vancouver, British Columbia V6T 1Z1
Voice: (604) 822 0142 Fax: (604) 822 0144 E-mail: bcli@bcli.org
Website: www.bcli.org

Backgrounder

BCLI Report no. 6— Report on Trustee Investment Powers

Date: April 1999

This report contains recommendations for changes to the provisions of the *Trustee Act* dealing with investments by trustees. The recommendations were implemented by amendments to the Act in 2003.

A trust is a relationship where a designated trustee holds title to assets for the benefit of a person designated as the beneficiary. A trust is established when an owner (called the *settlor*) makes a disposition of property to a trustee on terms describing how the trustee is to administer the property to confer the benefits that the settlor intends. Usually a trustee must invest the trust property.

The report identifies problems that existed with the investment powers under British Columbia's *Trustee Act* before it was amended to implement the report's recommendations. Trustees who were not given express investment powers by a trust instrument had to rely on the narrow powers given by the *Act*, and thus could not invest effectively. The Act limited the range of investments that could be made by trustees to the "authorized" list in section 15. The list was heavily weighted towards government and municipal fixed-rate bonds and imposed severe restrictions on investment in equities. Only the shares of Canadian companies qualified, and only if they met certain tests related to dividends. The report recommends abolition of the statutory "authorized list" of investments and its replacement by the "prudent investor" standard adopted recently in many other parts of the common law world. Under it a trustee is held to the same standard of care as a prudent investor would use in making investment decisions.

General trust law apart from the *Trustee Act* required a trustee's performance to be evaluated using an asset-by-asset assessment. A trustee could be found liable for breach of trust if a decision to acquire a particular security for the portfolio resulted in loss and was considered imprudent. This traditional rule was inconsistent with modern portfolio theory. The power to delegate authority regarding investment was curtailed to an extent inconsistent with conventional business practice in the investment market. The prohibition on delegation of discretionary functions had been applied in some court decisions to prevent trustees from investing in mutual funds. As mutual funds are advantageous to most investors, it was unrealistic to preclude trustees from obtaining their advantages for the benefit of the trust. The Act also contained a number of outdated registration requirements that were inconsistent with modern book-based methods of securities trading.

The recommendations in this report addressed these issues by proposing to allow trustees to apply modern portfolio theory and thus deal effectively and productively in the investment market.