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I. Introduction

This report, the third made by the *Trustee Act* Modernization Committee of the British Columbia Law Institute, contains recommendations for changes to provisions of the *Trustee Act* dealing with the powers of delegation by trustees and related matters. A description of the project on modernizing the *Trustee Act*, the Committee and its approach is set out in Appendix G.

Fiduciary relationships, of which the trust is one, are highly personal in nature. They are based upon the dependence of one person on the ability and judgment of another. Beneficiaries of a trust are dependent on the ability and judgment of trustees, who are chosen by the settlor precisely because of their qualities. In keeping with the essentially personal nature of the trust, the historic rule of general trust law was that a trustee could not delegate the status and powers of trusteeship to another person.

Since the middle of the eighteenth century, however, it has been recognized that trustees cannot always be expected to perform every task connected with the performance of the trust personally.¹ Exceptions to the basic principle of non-delegation appeared in case law. Successive pieces of legislation in England expanded on trustees' powers, including those enabling delegation of some trust powers and duties. British Columbia, like other common law provinces, adopted some of the earlier English trustee legislation on the subject, and these provisions are found in the *Trustee Act*.² A power of delegation may also be conferred expressly by a trust instrument, of course, and very wide powers of delegation are commonly found in trust instruments.

By present-day standards, the provisions in the *Trustee Act* are very restrictive. In fact, they are narrower than the scope allowed for delegation and use of agents under the case law. The *Trustee Act* is potentially misleading in this regard, since it appears to imply that trustees may not delegate except in the very limited cases it mentions.

The *Trustee Act* Modernization Committee has examined the statutory powers of delegation in connection with its review of the *Trustee Act*. Some recommendations on delegation, specifically in connection with investment of trust property, were made in an earlier Report by the Committee.³ Additional recommendations are made in this Report concerning how delegation of trust powers, duties, and discretions should be treated

1. *Ex parte Belchier*, (1754) Amb. 218, 27 E.R. 1941.

2. R.S.B.C. 1996, c. 464.

3. Trustee Investment Powers (BCLI Report No. 6, 1999) 16, 22.

generally in a revised *Trustee Act*. It was preceded by a Consultation Paper that the Committee circulated in order to obtain the benefit of other views before formulating its final recommendations.⁴

II. The Current Law on Trustee Delegation

A. Delegation Powers Apart From Statute

1. Ministerial Tasks

So called “ministerial” tasks, namely ones requiring only the execution of an act without the need for any independent exercise of judgment, may be delegated to others whenever it is practical for the trustee to do so.⁵ For example, a trustee can always delegate the task of cutting a lawn. The trustee can also delegate the submission of land transfer documents for registration to a solicitor rather than submitting them personally.

2. Transacting Business Through Agents: the *Speight v. Gaunt* Rules

A trustee also has power under general trust law to carry out business through an agent out of necessity, or if it is in the ordinary course of business to use an agent to carry out a particular kind of transaction. For example, it would be entirely proper to acquire and dispose of securities for the trust portfolio through a stockbroker, as this is done in the ordinary course of business. The rules associated with the use of agents by trustees are usually referred to as the rules in *Speight v. Gaunt*,⁶ after the English case with which they are most often associated.

3. Limits on *Speight v. Gaunt* Delegation

The principal qualifications on the *Speight v. Gaunt* rules are that: the task assigned

4. Consultation Paper on Statutory Powers of Delegation by Trustees (November, 1999).

5. *Attorney General v. Scott*, (1750) 1 Ves. Sen. 413, 417-418, 27 E.R. 1113, 1117; *Re Hetley and Merton's Contract*, [1893] Ch. 269 (C.A.).

6. (1883) 9 App. Cas. 1 (H.L.).

to the agent must be one that is in the agent's ordinary course of business to perform,⁷

the trustee must act with prudence in selecting the agent,⁸ and also in supervising the agent.⁹

Delegation is not permissible under the *Speight v. Gaunt* rules where the settlor clearly intended the trustee to act personally.¹⁰

There is also a category of trustee responsibilities to which the rules in *Speight v. Gaunt* do not apply, though the boundaries of the category are only vaguely delineated in the case law. These are duties or discretions which are so central to the achievement of the settlor's intentions that delegation is seen as wholly inappropriate. One example of a non-delegable power might be the exercise of a discretion to distribute capital and income among the beneficiaries of a sprinkling trust.¹¹ It has sometimes been said that dispositive functions (determining when, and how much, a beneficiary will receive under the trust) are non-delegable, while purely administrative powers (ones relating to the management of the trust property) may be delegated to others. This is not the case, however, as trustees have been held in breach of trust for delegating discretions that can only be described as administrative.¹² Intrinsically non-delegable trustee powers have also been explained in terms of the requirement for a *policy* decision. A policy decision has been described in turn as "one which, if dispositive, determines how much and at what time a beneficiary takes; if administrative, it directly affects the likelihood of the trust's object or purpose being achieved."¹³

7. *Fry v. Tapson*, (1884) 28 Ch. D. 268 at 280. Thus, it would be a breach of trust for a trustee to employ a person who is not registered to deal in securities to carry out transactions connected with investment of the trust property, since it would not be in the ordinary course of business of an unregistered person to handle such matters.

8. *Re Weall*, (1889) 42 Ch. D. 674.

9. *Low v. Gemley*, (1890) 18 S.C.R. 685.

10. *Robinson v. Long*, [1923] 4 D.L.R. 918 at 921 (N.B.S.C.) App. Div.

11. A sprinkling trust is a trust in which the beneficiaries do not receive fixed shares of income or capital, but in which the trustee has a discretion to determine which beneficiaries shall receive distributions, and the timing and size of distributions of income or capital.

12. *Re Wilson*, [1937] 3 D.L.R. 178 (Ont. C.A.). In *McLellan Properties Ltd. v. Roberge*, [1947] S.C.R. 561, the Supreme Court of Canada considered the decision to exercise a power of sale to be non-delegable. See also *Wagner v. Van Cleeff*, (1991) 5 O.R. 3d 477 (Gen. Div.).

13. Waters, *Law of Trusts in Canada* (2nd edition, 1984) 707.

A trustee may not delegate to a co-trustee, because trustees must act jointly. A delegation of this kind would be an abdication of trust powers and duties.¹⁴

B. Statutory Delegation Powers

1. Section 7 of the *Trustee Act*

Section 7 of the *Trustee Act* confers a specific power on trustees to appoint a solicitor to be an agent for the purpose of receiving and giving a discharge for money or other property which the trustee is entitled to receive under the trust, and to appoint a banker or solicitor to receive insurance money payable to the trustee.¹⁵ Section 7 is modelled on Section 2 of the English *Trustee Act 1888*,¹⁶ which was passed to clarify the law because previously it had been considered a breach of trust for a trustee to allow an agent to receive trust money.

2. Sections 13 and 14 of the *Trustee Act*

Section 14 of the *Trustee Act* allows a trustee who is absent from the province to delegate the exercise of any trusts, powers and discretions by power of attorney to any person, other than a sole co-trustee.¹⁷

Section 13 states the circumstances in which a trustee is deemed to be engaged on war service: when the trustee is “engaged in connection with” a war in which Canada is a belligerent, or if the trustee is a prisoner of war or is interned by a neutral power. Thus, the power of attorney under Section 14 may only be used under those narrow circumstances.

The attorney appointed by a trustee may subdelegate by a further power of attorney for the specific purpose of transferring “shares or inscribed stock.”¹⁸

14. *Maritime Trust Company v. Eastern Trust Company*, [1949] 2 D.L.R. 497 (N.B.S.C.). There is an exception to this rule under limited circumstances: if one trustee has special qualifications for a particular task that would allow him or her to be engaged as an agent under the rules of *Speight v. Gaunt* if not a trustee, then delegation to that trustee of a task within the scope of those qualifications is permissible: *Re Gascoigne*, [1894] 1 Ch. 470 (C.A.).

15. Section 7 and other selected provisions of the *Trustee Act* are reproduced in Appendix A.

16. 51-52 Vict., c. 59.

17. See Appendix A.

18. Section 14(9).

The power of attorney is in effect only while the trustee is out of the province and is automatically revoked when the trustee returns.¹⁹

Provisions similar to these were first enacted in the British Columbia *Trustee Act* in 1940.²⁰ They were modelled on English legislation passed at the beginning of the First World War.

Sections 13 and 14 provide the only means by which a trustee relying on British Columbia legislation may delegate his or her entire powers, discretions, and duties without an express power to do so in the trust instrument. Due to the very narrow range of circumstances in which the power of attorney procedure can be used, section 14 provides a very insignificant statutory power. Manitoba²¹ and New Brunswick²² have enacted provisions similar to Section 25 of the English *Trustee Act 1925*, which permit delegation of all the trustee's powers by power of attorney when the trustee is absent from the jurisdiction for any reason for longer than one month.

C. Liability of the Trustee for Losses Caused by Agents and Delegates

1. Apart From Statute

As long as a delegation of a specific task to an agent meets the test in *Speight v. Gaunt*, and the trustee exercises prudence in selecting and supervising the agent, the trustee will not be liable for losses caused by the agent's acts or omissions.²³

19. Section 14(3).

20. *Trustee Act Amendment Act*, S.B.C.1940, c. 53. s. 2.

21. *The Trustee Act*, R.S.M. 1987, c.T-160, s. 36.

22. *The Trustee Act*, R.S.N.B., c.T-15, s. 6. Section 6(1) also allows a non-resident trustee to make use of a power of attorney to delegate in this manner.

23. *Re Weall*, (1889) 42 Ch. D. 674.

2. Under Statute

(a) *Section 95 of the Trustee Act*

Section 95 of the *Trustee Act*²⁴ states that a trustee is only liable for “his own acts, receipts, neglects or defaults, and not for those of other trustees or a banker, broker, or other person with whom trust money or securities may be deposited, nor for the insufficiency or deficiency of securities or any other loss, unless it happens through his own willful default ...”

Section 95 originated in English legislation of 1859.²⁵ It is duplicated in the trustee legislation of most of the common law provinces in Canada. The meaning of “willful default” is the subject of controversy as a result of the English decision *Re Vickery*.²⁶

In *Re Vickery* “willful default” was held to refer to a conscious breach of trust, or reckless carelessness as to whether a particular act or omission is a breach of trust or not. This was a departure from the interpretation placed on the section before *Re Vickery* was decided, and also from the equitable principles courts had applied up to that time in connection with trustee liability for the acts of agents. Under those principles, as we have seen, a trustee would be held liable for failing to exercise prudence in selecting and supervising the agent, even though there might be no suggestion of a deliberate or reckless breach of trust. *Re Vickery* has been applied nevertheless in one Canadian case.²⁷

Section 95 appears to exonerate a trustee from liability if an agent holding trust money or securities misappropriates them, unless the trustee has consciously permitted this to happen or is recklessly careless as to how the agent deals with the trust money or securities.

In other cases, a trustee must show that the delegation satisfied the *Speight v. Gaunt* principles and was prudently chosen and supervised in order to avoid liability for losses resulting from the acts of the person to whom authority was delegated.

24. See Appendix A.

25. *An Act to further amend the Law of Property, and to Relieve Trustees*, 22-23 Vict., c.35, s. 31 (*Lord St. Leonard's Act*). The section was enacted to provide all trustees with the benefit of the kind of exonerating clause that, by 1859, was nearly always inserted in trust documents at that time: Waters at 698.

26. [1931] 1 Ch. 572.

27. *Brown v. Brown*, [1931] 4 D.L.R. 420 (Ont. H.C.); reversed on other grounds [1932] 2 D.L.R. 819 (Ont. C.A.).

Interpreted according to *Re Vickery*, section 95 would appear to excuse trustees altogether for losses resulting from ordinary negligence in selecting and supervising an agent. The relationship between section 95 and the non-statutory principles governing a trustee's liability for the conduct of an agent remains obscure. It seems section 95 will govern in any case where the loss is in respect of trust money or securities "deposited" with a person referred to in the section. It is unclear whether the words "any other loss" are in any way qualified by the mention of particular kinds of losses in the wording preceding them. If not, section 95 may override the non-statutory principles governing trustee liability altogether.

(b) *The Special Case of Delegation Under Power of Attorney*

Section 14(2) of the *Trustee Act* provides that a trustee on war service who executes a power of attorney under Section 14 of the *Trustee Act* remains fully liable for all the acts and omissions of the attorney he or she appoints. Thus, delegation by power of attorney imposes a more onerous degree of responsibility on the trustee than informal delegation.

III. Reform of the Statutory Delegation Powers

A. General

Statutory reform of trust law is usually preceded by a trend over a long period of inserting express powers in trust instruments to enable trustees to do things that the general law does not allow them to do, or to relieve them of liability for doing those things. Given that extremely broad delegation powers are frequently inserted in trust instruments, should the *Trustee Act* now reflect this trend? Certainly, the general trend of reform is towards liberalizing trustees' freedom of action. Many law reform bodies in the Commonwealth and the U.S. have recommended that trustees have wider statutory powers of delegation, especially in relation to investment.

B. Some Models

1. Section 23 of the English *Trustee Act 1925*

As early as 1925, a highly controversial provision was enacted in England stating that trustees could employ an agent to "transact any business or do any act required to be done in the execution of the trust ..." and would not be responsible for the default of the agent

“if employed in good faith.”²⁸ Since the scope of the section is difficult to determine, it has rarely been invoked. It has had little impact on the development of trust law. Manitoba, alone among Canadian provinces, has enacted a similar section in its *Trustee Act*.²⁹

2. The U.S. *Uniform Trustees’ Powers Act*

The *Uniform Trustees’ Powers Act*,³⁰ which dates from 1964 and has been adopted in sixteen U.S. states, contains a section which allows trustees to:

- (a) employ attorneys, auditors, investment advisers or agents to advise or assist the trustee in the performance of administrative duties;
- (b) act on their recommendations without independent investigation on the part of the trustee; and
- (c) employ agents to perform any “act of administration, whether or not discretionary.”

The reference to “administrative duties” and “acts of administration” in this provision³¹ is not without significance. American courts make a firm distinction between administrative and dispositive functions, considering dispositive ones to be non-delegable. The scope of delegation that is allowed by the *Uniform Trustees’ Power Act* is still quite broad, allowing discretionary authority to be conferred on an agent for administrative purposes.

3. Draft U.S. *Uniform Trust Act*

The National Commissioners on Uniform State Laws are in the course of developing a new *Uniform Trust Act*,³² portions of which would replace the 1964 *Uniform Trustees’ Powers Act*. Section 807 of the draft *Uniform Trust Act* also addresses delegation powers. It would allow delegation of “duties and powers that a prudent trustee of

28. *Trustee Act, 1925*, 15-16 Geo. 5, c. 19.

29. *The Trustee Act*, R.S.M. 1987, c.T-160, s. 35(1).

30. See Appendix B.

31. *Uniform Trustees’ Powers Act*, National Conference of Commissioners on Uniform State Laws, 1964, Section 3(c)(24).

32. *Ibid.*

comparable skills could properly delegate under the circumstances.” It requires the trustee to exercise reasonable care, skill, and caution in:

- (a) selecting an agent;
- (b) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- (c) periodically reviewing the agent’s actions in order to monitor performance and compliance with the terms of the delegation.

A trustee who complies with these requirements is absolved of liability for losses resulting from the conduct of the agent.

Section 807 of the draft Uniform Statute appears to impose a general criterion of prudence as the test of the propriety of delegation in any case. It does not preserve the clear distinction in the 1964 Uniform Act between administrative and dispositive functions, but the specific reference in the 1964 Act to the ability to delegate *discretionary* administrative powers has not been carried forward either. Thus, it is not clear whether Section 807 of the draft *Uniform Trust Act* is really broader or narrower than the 1964 provision on delegation to agents.

4. English and Scottish Law Commission Recommendation

The English and Scottish Law Commissions recently released a joint report³³ on trustees’ powers containing a series of recommendations on delegation. These contemplate the ability to delegate any administrative power, including those with respect to investment and management, but not powers of decision as to the distribution of income or capital among beneficiaries.

5. Section 5 of the Ontario Law Reform Commission Draft Trustee Bill

In its 1984 *Report on the Law of Trusts*, the Ontario Law Reform Commission proposed a statutory delegation power that appeared to fall midway between the controversial Section 23(1) of the *English Trustee Act 1925* and the *American Uniform Trustees’ Powers Act*. Section 5 of the draft Trustee Bill prepared by the Ontario Law Reform Commission would permit trustees to use agents to carry out “any act required to be done in the administration of the trust” but not to exercise any discretion as to the transfer or

33. *Trustees’ Powers and Duties* (LC 260, Sc. LC 172, 1999). See Appendix C.

distribution of trust property to or among beneficiaries.³⁴ It also incorporated a slightly modified version of the *Speight v. Gaunt* rules in stipulating that agents could only be used where “it is reasonable and prudent in the circumstances,” that the agent was to be personally selected by the trustee, and that the trustee must exercise prudent and reasonable supervision of the agent.

C. A New Statutory Power of Delegation for British Columbia’s *Trustee Act*

1. General

This Committee has already recommended expanded powers of delegation in relation to investment. Those recommendations were intended to allow discretionary decisions such as selection of securities, timing of acquisitions and realizations, and the debt/equity mix to be delegated to fund managers who handle the day-to-day operation of the trust portfolio. Those recommendations contemplated that the trustee would set the overall investment policy for the trust and supervise the performance of the fund manager.³⁵ They were made in order to allow trustees to obtain the benefit of professional investment management as other investors can do, while the trustee retained overall fiduciary responsibility for the portfolio and investment policy.

Arguments in favour of larger scope for delegation are chiefly made in relation to administrative discretions, such as those connected with investment or management of trust property. From the response to the Consultation Paper and its informal consultations with the trust industry and trusts practitioners, the Committee has not found significant demand in British Columbia for statutory powers of delegation that would extend to dispositive discretions, i.e. power to decide how trust property is to be distributed between beneficiaries.

In fact, the Committee’s perception is that except in the area of investment, where rigid application of the basic anti-delegation principle has prevented trustees from investing as efficiently as other investors may do,³⁶ there is little demand for powers of delegation going beyond the *Speight v. Gaunt* context of the use of agents to facilitate particular transactions or tasks. Delegation in which it is intended that the delegate should step into

34. Ontario Law Reform Commission, *Report on the Law of Trusts* (OLRC 79, 1984) 487. See Appendix D for text of s. 5 of the Draft Trustee Bill.

35. British Columbia Law Institute, *Trustee Investment Powers* (Report No. 6, 1999) 16, 22.

36. See the discussion of the problem created by *Re Haslam and Haslam*, (1994) 114 D.L.R. 562 (Ont. Gen. Div.) in the Committee’s Report, *Trustee Investment Powers*.

the shoes of the trustee with respect to some or all of the trust powers, seems to be rarely needed, if at all.³⁷ The presence of wide delegation clauses in trust instruments and wills is possibly explicable in terms of a desire to build enough flexibility into the trust terms to meet any future contingency, or to protect trustees who act pragmatically from liability for technical breach of trust. In some cases, it may only reflect an over-dependence on drafting precedents.

2. Delegation of Specific Powers and Discretions

The Committee does see a case for replacing section 7 of the current *Trustee Act* with a provision that is at least no narrower than the scope allowed to trustees to delegate authority under the non-statutory principles. To ignore this opportunity to clarify the law would perpetuate the present situation in which the *Speight v. Gaunt* rules co-exist with a narrow and likely superfluous statutory power, resulting in confusion and obscurity.

Formulation of a statutory delegation power requires that a boundary be drawn between the aspects of trusteeship that should be delegable in the interests of efficient trust administration and those that require the individual judgment of the trustee to be applied, and which therefore should be non-delegable. The ideal distinction between the two would be based on planning or policy decision-making versus operational decision-making, but this is a very elusive distinction in practice. For example, is a stop-loss instruction to a stockbroker a matter of investment strategy to divest the portfolio of volatile securities (policy) or day-to-day portfolio management (operational). Is postponing the sale of land in a rising market in anticipation of further capital growth a policy decision, or is it the execution of a decided policy of maintaining real estate in the portfolio of assets?

The distinction between administrative (management of the trust property) and dispositive functions that is made in section 5(1) of the Ontario Law Reform Commission's draft Trustee Bill has the advantage of being clear-cut and easy to apply. The Committee prefers to adopt this practical distinction although it does not have the theoretical appeal of a test based on deciding policy vs. execution of decided policy.

In the Committee's view the existing non-statutory principles governing liability of the trustee for the acts of an agent are adequate and fair, and should be preserved in a

37. Section 27 of the *Trustee Act* allows for appointment of a substitute trustee, without the need to apply to court, when an existing trustee wishes to be discharged, is incapacitated, or intends to remain out of British Columbia for more than 12 months. The availability of a simple procedure for substitution under s. 27 weakens the case for a broader statutory delegation power, other than in the pure agency sense.

provision replacing section 7. Once it is accepted that some trust business must be carried out with the assistance of others, it follows that a trustee who selects and supervises them prudently should be excused of liability. We do not think that the test of liability for the acts of the delegate should be deliberate neglect or recklessness. A trustee is held to the standard of prudence in other contexts, and there is no cogent reason why beneficiaries should have less protection when a loss arises from the conduct of a delegate, than when the trustee causes the loss by his or her personal act or omission.

The words “willful default” in Section 95 of the *Trustee Act*, which have so confused this issue, as illustrated by *Re Vickery*, should be deleted and the Section redrafted so that it will be clear in the context of a revised *Trustee Act* that the standard of prudence applies rather than one of intentional neglect or recklessness.³⁸

The Committee recommends:

1. (1) Section 7 of the Trustee Act should be repealed and replaced by a provision stating that a trustee may delegate³⁹ to another person, within or outside the province, the authority to carry out any act or exercise any power or discretion relating to the administration of the trust, where it is reasonable and prudent to do so.

(2) Recommendation 1(1), does not authorize the delegation of authority to act upon or exercise any express, implied, or statutory discretion as to the transfer or distribution of trust property to or among the beneficiaries of the trust.

(3) The provision described in Recommendation 1(1) should require a trustee exercising the power of delegation to exercise prudence in selecting the person to whom the authority, power, or discretion is delegated and in supervising the conduct of that person.

(4) A trustee should not be liable for a loss arising from an act or omission of a person to whom any authority, power, or discretion is delegated under the provision described in Recommendation 1(1) unless the trustee is in breach of the requirements in Recommendation 1(3) and the loss is a consequence of the breach.

38. Section 95 is a jumbled mass of several distinct propositions, only one of which relates specifically to delegation, i.e. delegation of authority to receive and maintain custody of trust property. Each of these propositions would be clearer as the subject of self-standing provision.

39. The issue of subdelegation is dealt with in Recommendation 4.

(5) *Section 95 of the Trustee Act should be amended by deleting the words “willful default and redrafting the Section to make it clear that liability for the conduct of an agent appointed by the trustee depends on whether the trustee has acted prudently in selecting and supervising the agent and setting the scope of the agent’s authority, rather than on neglect or recklessness.*

Draft provisions are set out in Appendix F.

3. Delegation of Full Trustee Powers Under Power of Attorney

The replacement of section 7 by a more generalized statutory power raises the question whether there is any need to retain a provision for an alternate means of delegation by power of attorney. Since the delegation of specific powers could be accomplished informally under the provision replacing section 7, a power of attorney would seldom, if ever, be used except for a full delegation of a trustee’s entire powers and discretions. The need for such a delegation would be a rare occurrence, but might arise when, for example, a trustee has reason to fear temporary physical or mental incapacitation or will be out of the jurisdiction for an extended period in circumstances where the opportunity for a timely response will not exist. A trustee in such a case could always resign and a substitute could be appointed, and modern communications make temporary absence much less of a problem today than it was in the past. Resignation and replacement of a trustee would not be desirable in all cases, however, and extended absence may still produce considerable inconvenience.

Section 14 as it presently stands is obviously of very little use. If it is to have any counterpart in a revised *Trustee Act*, it would have to be usable in a much broader range of circumstances. The similar power in section 25 of the English *Trustee Act, 1925* may be used for any reason, though the power of attorney has a maximum duration of 12 months.⁴⁰ The Manitoba and New Brunswick equivalents, usable in the case of intended absence for a month or more, have no maximum duration, but are automatically revoked by the trustee’s return.

Given proper safeguards, such as a limited permitted duration for the power without its express renewal, the power of attorney in our observation has a useful role to play as a vehicle for delegation by trustees. It can provide a convenient alternative to the resignation and replacement of a trustee, and in some circumstances this would be to the benefit of the objects of the trust. For example, the individual trustee may not be able to attend personally to trust business during a time of pressure with other business or of

40. *Supra* n. 28. The relevant subsections of s. 25 are included as Appendix E to this report.

extensive business travel. Nevertheless, we will suppose, resignation and replacement would create their own problems for the continuing trustee or trustees, or the adult beneficiaries and the representatives of beneficiaries who are minors would prefer for the future that the particular trustee remain in office. Provision is therefore needed for the temporary period of absence.

The principal safeguard which we have in mind takes into account that a power of attorney gives the trustee the ability to delegate the totality of the trustee's duties and powers. Moreover, we have noted that the power will normally be used in this way. The delegation of particular powers, as of duties, is likely to be authorized in different ways. For instance, the conferment of a trustee power may itself carry the authorization to delegate that power, or a general power of delegation is carefully descriptive of the powers (or duties) it is intended to cover. A general power may also be qualified as to when the settlor or testator envisages delegation. The safeguard to which we refer recognizes that with total delegation a great deal of care is called for in the selection of an attorney. We believe that the best way in which to ensure that the necessary level of consideration is given to that task is to place the risk of wrongful or negligent conduct by the attorney squarely on the appointing trustee rather than on the trust beneficiaries. This is achieved by carrying forward the feature of the present section 14 that imposes full liability on the trustee for acts and omissions of the delegate. This pattern is also followed, we would note, in the trustee legislation of other jurisdictions that provide for a power of attorney. By way of example of Commonwealth trustee legislation, we would mention section 25(5) of the *Trustee Act, 1925*, as amended, of England.

Apart from the continuing liability of the appointing trustee, we see two main safeguards that should surround the delegation of full trustee powers by power of attorney. The first is a “sunset clause” that would limit the effective duration of the power of attorney to twelve months from the time it takes effect.⁴¹ This period is consistent with the duration of a power of attorney under the corresponding provision of the English legislation. We do not believe it is appropriate to allow the power to extend for an indefinite period. Where a greatly extended period is contemplated, it may be preferable for the trustee to resign rather than engage in a full delegation.

The second safeguard is to require notification of the grant of the power of attorney to various persons who have an interest in the proper administration of the trust. Creating a notification rule is not free of difficulty because there are issues as to who ought to

41. Since it is possible to create a “springing” power of attorney, it might actually take effect on the happening of a contingency sometime after its actual creation or on a stipulated future date.

receive the notification and what the legal consequences should be if there is some defect in the notification.

Potential recipients are the other trustees, persons who are entitled to appoint new trustees, and beneficiaries of the trust. It is the last group that has the potential to raise the most difficulties in relation to notification. The trust, for example, may be a pension plan with the beneficiaries being all persons entitled to participate in the plan - perhaps several thousand. Must each member of the pension plan be notified? Under private donative trusts some of the beneficiaries may be contingent only and the contingency may be a relatively remote one? Should they also be entitled to notification?

It is easy to see that simply requiring that notification be given to “all beneficiaries,” in all circumstances, might, in practice, put the power of appointing an attorney beyond the reach of trustees in a large number of cases. Should the notification requirements be less onerous? We note that the English legislation requires that notification be given only to co-trustees and persons entitled to appoint new trustees (who will normally also be co-trustees). This strikes us as a sensible position to take where there are others, such as co-trustees, who are concerned to safeguard the interests of beneficiaries. We believe that notification to them of the appointment of an attorney should be sufficient.⁴²

The English legislation, however, though it provides in s. 25(2) of the *Trustee Act, 1925*, as amended, that a trustee may not appoint as attorney the sole co-trustee, does not expressly address the situation where there are no co-trustees. The possibility that concerns us is that a sole trustee be able and think fit to appoint an attorney to exercise any or all of the trustee powers, and notify no one. It is this situation that calls for consideration of the requirement that the beneficiary or beneficiaries be notified of the (intended) conferment of the power. The trustee who appoints an attorney should be required to notify every competent adult beneficiary whose interest has vested or who is the surrogate of a beneficiary.

There may be some defect in the notification process. One or more beneficiaries may not be notified or the notice itself may not set out all the information it should. What should be the legal consequences of such a defect?

One possibility is to regard the appointment of the attorney as a nullity with a result that all acts or transactions carried out by the attorney are similarly tainted. This would be a

42. One correspondent suggested that where a trustee seeks to appoint an attorney, the consent of any co-trustee to the appointment should be required. While we can see that the injection of an attorney into the administration of trust, where there has been no consent or consultation, might be regarded as an unwelcome development, we do not believe that it is appropriate to give co-trustees what would amount to a veto over selection of an attorney.

drastic and, we believe, undesirable result. It could result in significant loss for third parties with whom the attorney deals.⁴³ The third party has no responsibility for the notification process and will normally be an innocent party. The goal is to induce the trustee to comply with the notification requirements and this goal is hardly advanced by imposing loss on innocent third parties.

This possibility was also of concern to the framers of the English legislation. Their notification section contains a proviso that “failure to comply with [the notification requirements] shall not, in favour of a person dealing with a donee of the power, invalidate any act done or instrument executed by the donee.” We believe this is the proper approach and would favour its inclusion in any reforming legislation.

In the introduction to this Report we noted that very wide powers of delegation are commonly found in trust instruments. Our attention has been drawn to the possibility that such provisions might permit the creation of a full power of attorney by a trustee without reference to the statutory powers we have just recommended. We find this prospect somewhat unsettling since a power of attorney purportedly created under the terms of the instrument would lack the safeguards that we have just recommended in relation to the statutory power such as limited duration and notification. While we make no recommendation on the point we do believe that those drafting trust instruments should be sensitive to the possibility that these clauses might be used as vehicle for the creation of a power of attorney and expressly limit their effect unless there is good reason to do otherwise.

The Committee recommends:

2. (1) *Sections 13 and 14 of the Trustee Act should be repealed and replaced with a provision allowing a trustee to delegate by power of attorney any or all trusts, powers and discretions to another person⁴⁴ for a period of not more than 12 months from the time it is to take effect.⁴⁵*

43. The third party might lose the benefit of a favourable bargain and have changed his or her position in reliance on it.

44. We use “person” in the same sense as the *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29 to include a corporation.

45. Good drafting practice suggests that the power of attorney should contain an express power in the appointing trustee to revoke it before the expiration of its term. The legal consequences of reliance by a third party on a power of attorney that has been revoked are spelled out in s. 4 of the *Power of Attorney Act*, R.S.B.C. 1996, c. 370.

(2) *The provision described in Recommendation 2(1) should state that a trustee who grants a power of attorney delegating trusts, powers, and discretions under it remains liable for losses caused by the donee of the power to the same extent as if the trustee had caused the losses under the same circumstances.*

(3) *The provision described in Recommendation 2(1) should require a trustee who grants a power of attorney to notify, within seven days of the execution of the power of attorney,*

- (a) *all other trustees; and any other person entitled under the trust instrument, if any, to appoint new trustees;*
- (b) *where there is no person to whom notification can be given under paragraph (a) then to every adult beneficiary of the trust whose interest has vested and the guardian or committee of any minor or incapacitated beneficiary whose interest has vested;*
- (c) *where there is no person to whom notification can be given under paragraph (a) or paragraph (b), then to the public trustee*

that a person has been appointed to exercise trusts, powers, and discretions vested in the trustee.

(4) *The notification under Recommendation 2(3) should identify the donee of the power of attorney, describe the extent of the trusts, powers and discretions affected by the power of attorney, the reason for the appointment, the date or event on which the appointment is to take effect, and the intended duration of the appointment.*

(5) *The failure of a trustee who is granted a power of attorney under recommendation 2(1) to comply with recommendation 2(3) or 2(4) shall not, in favour of a person dealing with the donee of the power, invalidate any act done or instrument executed by the donee.*

4. Delegation to a Co-Trustee

The Committee does not favour a change in the present law preventing delegation of specific authority to a co-trustee unless the delegation would be warranted if the co-trustee had not been a co-trustee.

It should not be possible to exercise the ability to delegate all trust powers by power of attorney in favour of a co-trustee at all where the terms of the trust contemplate two trustees serving at any given time, as the power of attorney could be used to defeat the settlor's intention.

The Committee recommends:

3. (1) *The powers of delegation conferred by the provisions described in Recommendations 1 and 2 may be exercised in favour of a co-trustee only if the delegation is both reasonable and prudent.*

(2) *Where the terms of the trust specify that there should be a minimum of two trustees at any given time, the power of delegation by power of attorney under the provision described in Recommendation 2 should not be exercisable so as to delegate to a co-trustee under any circumstances when there are only two surviving trustees.*

5. Subdelegation

The Committee recommends no change in the law preventing subdelegation by agents without concurrence of the trustee. If subdelegation by agents were permitted (other than of purely ministerial tasks), the trustee could lose control over the exercise of the delegated power or discretion too easily.

The Committee recommends:

4. *Subdelegation by agents of trust powers and discretions without the written consent of the trustee should not be permissible.*

IV. Summary of Recommendations

It is important to note that the recommended provisions of the *Trustee Act*, and most of its other provisions, define a default position with respect to trust law. In almost every case⁴⁶ the Act can be overridden by specific provisions of the instrument creating the trust. Readers should bear this in mind when considering these recommendations.

46. Exceptions would be where the Act expressly states that it operates notwithstanding the contents of the trust instrument or where the instrument purports to confer powers that violate some fundamental policy of the law.

1. (1) *Section 7 of the Trustee Act should be repealed and replaced by a provision stating that a trustee may delegate to another person, within or outside the province, the authority to carry out any act or exercise any power or discretion relating to the administration of the trust, where it is reasonable and prudent to do so.*

(2) *Recommendation 1(1), does not authorize the delegation of authority to act upon or exercise any express, implied, or statutory discretion as to the transfer or distribution of trust property to or among the beneficiaries of the trust.*

(3) *The provision described in Recommendation 1(1) should require a trustee exercising the power of delegation to exercise prudence in selecting the person to whom the authority, power, or discretion is delegated and in supervising the conduct of that person.*

(4) *A trustee should not be liable for a loss arising from an act or omission of a person to whom any authority, power, or discretion is delegated under the provision described in Recommendation 1(1) unless the trustee is in breach of the requirements in Recommendation 1(3) and the loss is a consequence of the breach.*

(5) *Section 95 of the Trustee Act should be amended by deleting the words “willful default” and redrafting the Section to make it clear that liability for the conduct of an agent appointed by the trustee depends on whether the trustee has acted prudently in selecting and supervising the agent and setting the scope of the agent’s authority, rather than on neglect or recklessness.*

2. (1) *Sections 13 and 14 of the Trustee Act should be repealed and replaced with a provision allowing a trustee to delegate by power of attorney any or all trusts, powers and discretions to another person for a period of not more than 12 months from the time it is to take effect.*

(2) *The provision described in Recommendation 2(1) should state that a trustee who grants a power of attorney delegating trusts, powers, and discretions under it remains liable for losses caused by the donee of the power to the same extent as if the trustee had caused the losses under the same circumstances.*

(3) *The provision described in Recommendation 2(1) should require a trustee who grants a power of attorney to notify, within seven days of the execution of the power of attorney,*

- (a) *all other trustees; and any other person entitled under the trust instrument, if any, to appoint new trustees;*
- (b) *where there is no person to whom notification can be given under paragraph (a) then to every adult beneficiary of the trust whose interest has vested and the guardian or committee of any minor or incapacitated beneficiary whose interest has vested;*
- (c) *where there is no person to whom notification can be given under paragraph (a) or paragraph (b), then to the public trustee*

that a person has been appointed to exercise trusts, powers, and discretions vested in the trustee.

(4) The notification under Recommendation 2(3) should identify the donee of the power of attorney, describe the extent of the trusts, powers and discretions affected by the power of attorney, the reason for the appointment, the date or event on which the appointment is to take effect, and the intended duration of the appointment.

(5) The failure of a trustee who is granted a power of attorney under recommendation 2(1) to comply with recommendation 2(3) or 2(4) shall not, in favour of a person dealing with the donee of the power, invalidate any act done or instrument executed by the donee.

3. (1) *The powers of delegation conferred by the provisions described in Recommendations 1 and 2 may be exercised in favour of a co-trustee only if the delegation is both reasonable and prudent.*

(2) *Where the terms of the trust specify that there should be a minimum of two trustees at any given time, the power of delegation by power of attorney under the provision described in Recommendation 2 should not be exercisable so as to delegate to a co-trustee under any circumstances when there are only two surviving trustees.*

4. *Subdelegation by agents of trust powers and discretions without the written consent of the trustee should not be permissible.*

Draft provisions implementing these recommendations are set out in Appendix F to this Report.

V. Conclusion

The recommendations for amendment of the *Trustee Act* set out in this report should rationalize the legislation dealing with delegation of trustee powers in a manner that should encourage careful and productive trusteeship while, at the same time, giving trustees the tools they need to carry out their duties efficiently and effectively. The Committee hopes that the legislature will give them early and favourable attention.

Appendix A

Trustee Act - Selected Provisions
R.S.B.C. 1996, c. 464, ss. 7, 13, 14, 95

Section 7 — Power to authorize receipt of money

- 7
- (1) A trustee may appoint a solicitor to be the trustee's agent to receive and give a discharge for money, or valuable consideration or property receivable by the trustee under the trust, and a trustee is not chargeable with breach of trust merely for having made or concurred in making that appointment.
 - (2) A trustee may appoint a banker or solicitor to be the trustee's agent to receive and give a discharge for money payable to the trustee under or because of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee is not chargeable with a breach of trust merely for having made or concurred in making that appointment.
 - (3) This section does not exempt a trustee from any liability the trustee would have incurred if this Act had not been enacted, if the trustee permits the money, valuable consideration or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor to pay or transfer it to the trustee.
 - (4) This section applies only if the money or valuable consideration or property is received after July 1, 1905.
 - (5) This section does not authorize a trustee to do anything the trustee is in express terms forbidden to do, or to omit anything the trustee is in express terms directed to do, by the instrument creating the trust.

Section 13 — Interpretation

- 13
- For the purposes of section 14, a trustee is deemed to be engaged on war service
 - (a) if the trustee is engaged in connection with a war in which Canada is a participant as a member of the military, naval or air forces of the Crown, or
 - (b) if in connection with the war the trustee is a prisoner of war in an enemy country, or is interned in the country of a neutral power.

Section 14 — Trustee engaged on war service

- 14
- (1) A trustee, whether or not a sole trustee, who is engaged on war service and intends to leave British Columbia and remain out of British Columbia for a period exceeding one month, or who is engaged on war service out of British Columbia and does not intend to return within one month, may, despite any rule of law or equity to the contrary, by power of attorney delegate to any person, including a trust company, the execution or exercise of all or any trusts, powers and discretions vested in him or her as trustee, either alone or jointly with any other person or persons, but a person who is the only other co-trustee must not be appointed to be an attorney under this subsection.
 - (2) The donor of a power of attorney given under this section is liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.
 - (3) The power of attorney does not come into operation unless and until the donor is out of British Columbia and is revoked by his or her return.
 - (4) The power of attorney must be attested by at least one witness.
 - (5) All jurisdiction and powers of any court apply to the donee of a power of attorney given under this Act in so far as respects the execution of the trust in the same manner as if the donee were a trustee of the trust.
 - (6) An affidavit by the donee of a power of attorney, under which the execution of a trust is delegated, that the donor is engaged on war service within the meaning of this Act and is out of British Columbia, and that in any transaction the donee is acting in execution of the trust, must be accepted as conclusive evidence of those facts by the court and all other persons dealing with the donee.
 - (7) Subject to subsection (11), the Power of Attorney Act applies to powers of attorney given under this section.
 - (8) In favour of a person dealing with the donee, any act done or instrument executed by the donee is, even though the power has never come into operation or has been revoked by the act of the donor or by his or

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her death or otherwise, as valid and effectual as if the donor were alive and of full capacity and had himself or herself done the act or executed the instrument, unless the person had actual notice that the power had never come into operation or of the revocation of the power before the act was done or instrument executed, or, unless in the case of an instrument within the meaning of section 1 of the Land Title Act before the registration of the instrument in the land title office of the land title district in which the land comprised in the instrument is located, notice of revocation by death or otherwise, or notice that the power has never come into operation, is filed in that land title office.

- (9) For the purpose of executing or exercising the trusts or powers delegated to him or her, the donee may, subject to any limitation contained in the power of attorney, exercise any of the powers conferred on the donor as trustee by statute or by the instrument creating the trust, including the power, for the purpose of the transfer of shares or inscribed stock, to delegate to an attorney power to transfer, but not including the power of delegation conferred by this section.
- (10) The fact that it appears from a power of attorney given under this section, or from evidence required for the purposes of that power of attorney or otherwise, that in dealing with shares or stock the donee of the power is acting in the execution of a trust must not be considered for any purpose to affect a person in whose books the shares or stock are inscribed or registered with notice of the trust.
- (11) The fact that the donor of a power to which this Act applies is reported “missing” or “missing and believed to be killed” does not give persons who have knowledge of such report actual or constructive notice of the death, although in fact the death has occurred.

Section 95 — Implied indemnity of trustees

- 95 A trustee, without prejudice to the provisions of any instrument creating the trust, is chargeable only for money and securities actually received by the trustee even though the trustee signed a receipt for the sake of conformity, and is answerable and accountable only for the trustee's own acts, receipts, neglects or defaults, and not for those of other trustees or a banker, broker or other person with whom trust money or securities may be deposited, nor for the insufficiency or deficiency of securities or any other loss, unless it happens through the trustee's own willful default, and may reimburse himself or herself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his or her trusts or powers.

Appendix B

National Conference of Commissioners on Uniform State Laws

Uniform Trustees' Powers Act

s. 3(c)(24)

Section 3 — Powers of Trustees Conferred by this Act

- 3 (c) A trustee has the power ...
 - (24) to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

Draft Uniform Trustee Act

Section 807 — Delegation by trustee

- (a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances.

The trustee shall exercise reasonable care, skill, and caution in:

- (1) selecting an agent;
 - (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust;
- and

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- (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
- (b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
- (c) A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for a decision or action of the agent to whom the function was delegated.
- (d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

Comment

This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. The language is derived from Section 9 of the Uniform Prudent Investor Act. See also John H. Langbein, *Reversing the Non-delegation Rule of Trust-Investment Law*, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether particular functions of the trustee are delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegation of trust administration and reporting duties might be prudent for a family trustee but unnecessary for a corporate trustee.

This section applies only to delegation to agents and not to delegation to a co-trustee. For the provision authorizing delegation to a co-trustee, see Section 703(d)(2).

Under subsection (a)(3), the duty to review the agent's performance includes the periodic evaluation of the continued need for and appropriateness of the delegation of authority. In particular circumstances, the trustee may need to terminate the delegation to comply with the duty under subsection (a)(1) (duty to use reasonable care, skill, and caution in selecting agent).

Appendix C

The English and Scottish Law Commission Recommendations on Trustees' Powers and Duties

- 8.15** Subject to the expression of any contrary intention in the trust instrument, trustees —
- (1) should have power to delegate to agents their powers to administer the trust (other than powers to appoint or replace trustees), including their powers of investment and management; but
 - (2) should have no authority to delegate their powers to make decisions as to the distribution of the income or capital of the trust for the benefit of its objects.
- The power to delegate under (1) could either be in relation to a specific act or acts, or by way of a general retainer. There should be no requirement that the delegation should be made by power of attorney.
- 8.16** Trustees should, so long as the delegation continues, keep under review the arrangements relating to it and the manner in which those arrangements are implemented.
- 8.17** These recommendations should be without prejudice to —
- (1) the power of an individual trustee to delegate all or any of his or her trusts, powers and discretions under section 25 of the Trustee Act 1925; or
 - (2) the need to comply with any conditions laid down by law or by the instrument creating the trust in relation to the exercise of any power of investment or management.
- 8.22** Where it is reasonably necessary for them to do so, trustees should have power —
- (1) to authorise their agents to employ sub-agents;
 - (2) to employ agents on terms which limit their liability; and
 - (3) to authorise conflicts of interest by their agents.
- 8.29** Trustees should have a power —
-

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- (1) to appoint a person to act as their nominee in relation to such of the assets of the trust as they determine, provided that such person carries on a business which consists of or includes acting as a nominee; and
- (2) to appoint a person to act as a custodian in relation to such of the assets of the trust as they determine, provided that such person carries on a business which consists of or includes acting as a custodian, this power to be without prejudice to the existing right of trustees to leave trust documents in the custody of one of the trustees;

Appendix D

Ontario Law Reform Commission Draft Trustee Bill

s. 5

Section 5 — Power to employ agents

- 5 (1) Where it is reasonable and prudent in the circumstances so to do, trustees may employ one or more persons as agents within or outside Ontario to carry out any act required to be done in the administration of the trust, including the execution of documents, the payment, transfer and receipt of money or other property, and the giving of discharges for receipts, but excluding the exercise of any express or statutory discretion as to the transfer or distribution of trust property to or among beneficiaries of the trust.

Duty of care in appointing agents

- (2) In employing an agent, trustees shall personally select the agent and be satisfied of his suitability to perform the act for which he is to be employed, and they shall carry out such supervision of the agent throughout his employment as is prudent and reasonable.

Responsibility for loss by default of agent

- (3) Trustees are only chargeable for loss caused by the default of an agent if the loss is due, wholly or partly, to a breach of subsection (1) or (2), or otherwise to their negligence or wilful wrongdoing.

Trustees' right to rely on professional advice

- (4) Trustees are not liable for any loss to the trust if they rely reasonably and in good faith upon a written statement of an agent who is a duly accredited member of the legal, accounting, engineering, medical or any other profession. *New.*

Appendix E

Trustee Act, 1925 (UK) Section 25

25 (1) Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate for a period not exceeding twelve months the execution or exercise of all or any of the trusts, powers and discretions vested in him as a trustee either alone or jointly with any other person or persons.

(2) The persons who may be donees of a power of attorney under this section include a trust corporation but not (unless a trust corporation) the only other co-trustee of the donor of the power.

(3) An instrument creating a power of attorney under this section shall be attested by at least one witness.

(4) Before or within seven days after giving a power of attorney under this section the donor shall give written notice thereof (specifying the date on which the power comes into operation and its duration, the donee of the power, the reason why the power is given and, where some only are delegated, the trusts, powers and discretions delegated) to

—

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- (a) each person (other than himself), if any, who under any instrument creating the trust has power (whether alone or jointly) to appoint a new trustee; and
- (a) each of the other trustees, if any;

but failure to comply with this subsection shall not, in favour of a person dealing with the donee of the power, invalidate any act done or instrument executed by the donee.

(5) The donor of a power of attorney given under this section shall be liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.

[Sub-ss (1)-(5) were substituted for the original sub-ss. (1)-(8), as from 1 October 1971.]

Appendix F

Draft Provisions Implementing Committee Recommendations

Power to employ agents

- 7 (1) Where it is reasonable and prudent in the circumstances so to do, a trustee may engage one or more persons as agents within or outside the province to carry out any act required to be done in the administration of the trust, including the execution of documents, the payment, transfer and receipt of money or other property, and the giving of discharges for receipts.

[See Recommendation 1 (1)]

Discretion exclusions

- (b) Subsection (1) does not authorize the delegation of authority to act upon or exercise any express, implied, or statutory discretion as to the transfer or distribution of trust property to or among the beneficiaries of the trust

[See Recommendation 1 (2)]

Duty of care in appointing agents

- (3) In engaging an agent, a trustee must personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is to be engaged, and the trustee must carry out such supervision of the agent as is prudent and reasonable.

[See Recommendation 1 (3)]

Responsibility for loss by default of agent

- (4) A trustee is only chargeable for loss caused by the default of an agent engaged under subsection (1) if the trustee is in breach of the requirements of subsection (3) and the loss is a consequence of that breach.

[See Recommendation 1 (4)]

Delegation to co-trustee

- (5) A delegation under subsection (1) must not be made to a co-trustee unless the delegation would have been reasonable and prudent if the proposed delegate had not been a co-trustee.

[See Recommendation 3 (1)]

Subdelegation

- (6) An agent to whom a delegation has been made under subsection (1) must not subdelegate any trust powers and discretions without the written consent of the trustee.

[See Recommendation 4]

Power to delegate by power of attorney

- 13 (1) Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate to an attorney the execution or exercise of all or any of the trusts, powers and discretions vested in that trustee, either alone or jointly with any other person or persons, for a period not exceeding twelve months from the time it is to take effect.

[See Recommendation 2 (1)]

Continuing liability of trustee

- (2) Notwithstanding section 95, a trustee who creates a power of attorney under subsection (1) is liable for the acts or defaults of the attorney in the same manner as if they were the acts or defaults of the trustee.

[See Recommendation 2 (2)]

Notice required

- (3) Before or within seven days after a trustee executes a power of attorney under subsection (1) the trustee must give written notice that an attorney has been appointed to exercise trusts, powers, and discretions vested in the trustee.

[See Recommendation 2 (3)]

Persons to receive notice

- (4) A notice under subsection (3) must be given to the following persons:
- (a) every other trustee and every other person who under the trust instrument has power (whether alone or jointly) to appoint a new trustee,
 - (b) if there is no person to whom notice can be given under paragraph (a) then to :
 - (I) every competent adult beneficiary,

- (II) the guardian of any minor beneficiary, and
 - (III) the committee of any incapacitated beneficiary
- but only if the interest of the beneficiary is vested.
- (c) if there is no person to whom notice can be given under either paragraph (a) or paragraph (b) then to the Public Trustee.

[See Recommendation 2 (3)]

Contents of notice

- (5) The trustee must ensure that a notice given under subsection (3) sets out
 - (a) the identity of the attorney appointed under the power of attorney,
 - (b) a description of the extent of the trusts, powers and discretions affected by the power of attorney,
 - (c) the reason for the appointment,
 - (d) the date or event on which the appointment is to take effect, and
 - (e) the intended duration of the appointment.

[See Recommendation 2 (4)]

Third party rights preserved

- (6) The failure of the trustee to comply with subsections (3) , (4) or (5) does not, in favour of a person dealing with the attorney, invalidate any act done or instrument executed by the attorney.

[See Recommendation 2 (5)]

Co-trustee as attorney

- (7) Where there are only two trustees and the terms of a trust specify that there should be a minimum of two trustees at any given time , neither trustee may, by a power of attorney created under subsection (1), appoint the other trustee as attorney.

[See Recommendation 3 (2)]

Idem

- (8) Subject to subsection (7) a trustee may appoint a co-trustee as attorney provided that appointment is both reasonable and prudent.

[See Recommendation 3 (1)]

Liability of trustee

- 95** (1) A trustee is liable only for the acts or omissions of that trustee.

Idem

- (2) A trustee is only chargeable for money, securities, or other property that the trustee actually receives even if the trustee joins in signing a receipt with a co-trustee because of the requirement for trustees to act jointly.

Idem

- (3) A trustee is liable for the conduct of a financial institution or financial intermediary with whom trust property is deposited only if the trustee fails to exercise prudence in the selection and supervision of the financial institution or financial intermediary.

[See Recommendation 1 (5)]

Reimbursement of trustee

- 95A** A trustee is entitled to be reimbursed from the trust property for reasonable expenses actually incurred in carrying out the trust, or be paid for them directly from the trust property.

[See Recommendation 1 (5)]

Appendix G

Further Information on the Project and the Committee

This report is the third made by the *Trustee Act* Modernization Committee of the British Columbia Law Institute. The first and second reports made by the Committee recommended changes to the provisions of the *Trustee Act* dealing with investment by trustees and their statutory remuneration. Since this report is one of a series, we thought it appropriate to provide a brief explanation of project and the Committee's objectives and methodology.

This is one of the first projects undertaken by the British Columbia Law Institute after its formation in 1997. The Committee, through which the Institute is carrying out this project, is addressing various aspects of the *Trustee Act* that are in need of reform in a series of short consultative documents and reports. The consultative documents, which will contain proposals for reform and the explanation for them, are circulated to interested sectors such as the trust and fiduciary industry, the Bar, and non-profit foundations to obtain comment on the proposals. They are also be made available to the public upon request. Following this consultation phase, the Committee develops a final position on the matters addressed by the proposals and presents recommendations for legislative change in a report that is submitted to the Attorney General.

The ultimate aim of the Committee is to prepare a comprehensive draft of a reformed *Trustee Act* in modern, easily comprehended language. The Statute will contain new provisions required for the legal and financial climate in which trustees now fulfil their duties as well as those elements of the existing Act that must be retained.

The members of the *Trustee Act* Modernization Committee are:

Dr. Donovan Waters, Q.C. (Chair)

Professor James MacIntyre, Q.C.

Arthur L. Close, Q.C.

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