



Proposed Changes to the *Trustee Act* on Investment Powers as they Impact Charities

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Submitted to: The Honourable Yasir Naqvi
Attorney General of Ontario

Submitted by: The Ontario Bar Association



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Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to make this submission to the Attorney General in respect of the *Trustee Act*¹ which, among other things, sets out the powers of trustees to invest trust property, including charitable property.

As you know, Ontario’s charitable and non-profit sector is an important part of the province’s social and economic fabric. A common goal for government and the sector is to build and maintain an appropriate legislative and regulatory framework, free from unclear or unnecessary regulations and “red tape.” The recommendations contained in this submission can be considered in this context.

Our first recommendation is to permit a trustee’s agent (such as a delegated investment manager) to sub-delegate the investment power of trust property. Practically speaking, this will allow for the investment manager of a charity, who works for “Bank A,” to invest in a wider range of products, such as those managed by “Bank B” (such as Bank B’s mutual or pooled funds). This is not currently permitted and therefore unduly restricts investment options for charities that work with delegated investment managers.

The second recommendation requests clarity with respect to the classes of persons or qualifications of persons who are eligible to act as agents relating to the investment of trust property. Our recommendation is that the Attorney General either set out those classes and qualifications, or remove the power to do so that is currently contained in the Act, thereby clarifying the legislative and regulatory framework for the sector.

The OBA

Founded in 1907, the OBA is the largest legal advocacy organization in the province, representing approximately 16,000 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 40 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists legislators with many policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission has been developed primarily by the OBA’s Charity and Not-for-Profit Law Executive, whose members include lawyers who represent the widest possible

¹ R.S.O. 1990, c. T.23.



range of charitable and other not for profit organizations, advising boards, management and membership groups on corporate, tax, fund-raising and other regulatory issues, and who have worked with the provincial and federal governments on legislative reform affecting the sector. Input on this submission has been provided by the OBA's Trusts and Estates Law section, whose members advise trustees with respect to both inter-vivos and testamentary trusts.

Trustee Act

The power to invest set out in sections 27 to 31 of the *Trustee Act* applies to the investment of charitable property by virtue of section 10.1 of the *Charities Accounting Act*.² The *Trustee Act* was amended in 2001 with the addition of section 27.1 and 27.2 and corresponding other amendments in order to provide trustees with the ability to delegate investment decision making to agents (the "2001 Amendments").³ While the 2001 Amendments were a welcome development, as many charities employ the services of delegated investment managers to assist them with the investment of their charitable property, there are two technical aspects of the 2001 Amendments that have proven to be problematic for charities and should therefore be addressed through appropriate amendments to the *Trustee Act* as explained below.

Sub-delegating the Investment of Trust Property

Subsection 27.2 (2) of the *Trustee Act* states that an agent who is authorized to invest trust property on behalf of a trustee as provided for in section 27.1 and 27.2 "...shall not delegate that authority to another person." Subsection 27(3), which authorizes trustees to invest in "...mutual funds, pooled funds or segregated funds under variable insurance contracts" states that "...section 27.1 and 27.2 do not apply to the purchase of such funds." However, subsection 27(3) applies only to trustees as opposed to agents appointed under section 27.1 and 27.2 and therefore does not permit delegated investment managers appointed as agents of charities to buy and sell interests in mutual funds, pooled funds and segregated funds contrary to what is often done within the charitable sector when charities engage the services of an investment manager. As well, there is no corresponding provision in subsection 27.2(2) of the *Trustee Act* that specifically states that the prohibition against sub-delegation does not apply when an agent, who has been appointed in accordance with section 27.1 and 27.2, wants to

² R.S.O. 1990, c. C.10

³ See the *Government Efficiency Act, 2001*, S.O. 2001, c. 9, Sched. B, s. 13.



invest in mutual funds, pooled funds or segregated funds in accordance with subsection 27(3), which is frequently the case. As such, it is recommended that subsection 27.2(2) of the *Trustee Act* be amended as follows:

No further delegation – An agent who is authorized to exercise a trustee’s functions relating to investment of trust property shall not delegate that authority to another person, save and except as provided for in subsection 27(3).

Regulating Agents under section 27.1 of the *Trustee Act*

Paragraph 27.1(5)(a) of the *Trustee Act* provides that in exercising the necessary prudence in selecting an agent in accordance with subsection 27.1(4) of the *Trustee Act*, “...prudence in selecting an agent includes compliance with any regulation made under section 30.” Section 30 of the *Trustee Act* provides that “The Attorney General may make regulations governing or restricting the classes of persons or the qualifications of persons who are eligible to be agents under section 27.1 and establishing conditions of eligibility.” However no regulations have been adopted in this regard. As such, an element of uncertainty has resulted concerning what classes of persons or qualifications of persons should be looked at when selecting an agent to whom delegation investment decision making can be given. As a result, it is recommended that consideration be given by the Attorney General to either adopt regulations under section 30 of the *Trustee Act* to provide clarity in this regard, or, to repeal section 30 and the corresponding paragraph 27.1(5)(a) of the *Trustee Act*.

Conclusion

The OBA supports a vibrant charitable and non-profit sector operating within an appropriate legislative and regulatory framework. We thank you for considering these proposals for reform. If the Attorney General’s office would like to discuss these recommendations further, the Charity and Not-for-Profit Law Section and Trusts and Estates Law sections of the OBA will be pleased to take part in those discussions.