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INVESTMENT, TAX AND LIFESTYLE PERSPECTIVES FROM RBC WEALTH MANAGEMENT SERVICES

## Trustee investment powers

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A trustee's job is to hold legal title of all assets in a trust and to manage those assets for the benefit of the trust beneficiaries. When an individual takes on the role of trustee, they're taking on the responsibility of investing those assets on behalf of the beneficiaries. The rules around the types of investments trustees can make are sometimes complicated, but they stem from the basic concept of "prudent investing." If you're acting as a trustee, this article provides helpful information and details about a trustee's obligations and powers when investing assets of a trust.

### General overview

The power to invest trust assets is rooted in provincial and territorial trustee legislation or the Civil Code of Quebec ("CCQ") (hereinafter referred to as "trustee legislation"). At law, trustees are given conservative investment powers which emphasize the trustee's primary duty of preserving trust assets. The intention is to protect beneficiaries from risky investment strategies that may deplete trust assets before beneficiaries are able to benefit from the trust. If there's a situation where the "trust instrument" (trust deed or Will) is silent with respect to the trustee's investment powers, the trustee may rely on the statutory investment powers enacted under the trustee legislation that governs the trust. In general, if the trust instrument does not specify what law

is to govern the administration of the trust, a trust is governed by the laws of the jurisdiction in which the trust decisions are made.

The trust instrument may provide the trustee with discretionary investment powers; these powers will modify the statutory investment power. The powers granted by the settlor (the person who created the trust) through the trust instrument will override the investment powers authorized by law. This may broaden the trustee's investment powers beyond the scope of the trustee legislation. Alternatively, the trust instrument may limit the trustee to certain types of investments which will bind the trustee with regard to the investment of trust assets, even if other investments allowable by law may provide a potentially higher return.

One specific detail to highlight, however, is that the trust instrument cannot alter the trustee's primary duty of preserving trust assets. Furthermore, the common-law has established a standard of care, referred to as the "prudent investor standard" that's an overarching principal all trustees must abide by, regardless of the breadth of discretionary powers granted in the trust instrument.

If a trustee makes an unauthorized or imprudent investment, they may be found to be in breach of trust and in that situation, they may become personally liable to the beneficiaries of the trust for any losses to the trust assets that result. In such a case, they may be required to reimburse the trust for the shortfall.

In addition to the trustee obligations mentioned, it's also important as a trustee to be aware of the following principles when making investment decisions:

- a. Unless otherwise specified in the trust instrument, the trustee should always try to be even-handed in investing the trust assets for the income and capital beneficiaries (if they are different persons). There may be tension between these two parties because the income beneficiaries will generally want the trustee to generate as much income as possible and the capital beneficiaries will generally want to preserve the purchasing power of the capital;
- b. The trustee must act honestly. The trustee has been selected by the settlor of the trust to manage and distribute the trust assets in accordance with the settlor's outlined wishes; and
- c. The trustee must avoid personal conflicts of interest at all times and must act for the benefit of the beneficiaries.

### Prudent investor approach

In previous years, most trustee legislation provided a list of authorized investments in which the trustee could invest. These lists have been gradually replaced by a "prudent investor" standard, which generally requires a trustee to exercise the care, skill, diligence and judgment that a "prudent investor" or "prudent person" would when making investment decisions. All common law provinces and territories use some variation of the "prudent investor" rule. This approach offers more flexibility than the rigid legal list approach, because it permits greater latitude of investment types while still providing protection for the trustee from personal liability.

The standard of prudence varies among the provinces and territories. In certain provinces and territories, the general standard of prudent behaviour is further refined in the trustee legislation to include a specific list of criteria

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for a trustee's investment consideration. For example, Ontario's Trustee Act mandates a trustee to consider a number of criteria including: general economic conditions, the expected tax consequences of investment decisions or strategies and the expected total return from income and the appreciation of capital. Where this type of list is provided, trustees must carefully consider it in their investment selection. Keep in mind that a trustee who chooses to disregard these criteria will not be protected from personal liability.

The Quebec CCQ still contains a codified list of investments, but it is not restrictive. The CCQ presents a list of presumed sound investments, which include federal and provincial bonds, certain common shares, preferred shares and mutual funds. If a trustee invests within this legal list, the trustee will be presumed to be acting with prudence and diligence. A trustee may invest outside of the list but may then need to prove prudence and diligence.

### Delegation of investment powers

The general rule under common law is that a trustee (a person with delegated authority) is not entitled to delegate their duties to someone else. This includes a trustee's investment powers. This rule against delegation, however, may be modified by statute or by the delegation powers granted to the trustee under a trust instrument or Will.

For example, most provincial and territorial statutes permit a trustee, subject to certain conditions, to delegate their investment decision-making power to agents. In doing so, the trustee must exercise prudence in their selection of an agent, in establishing the terms of an agent's authority and in monitoring the agent's performance to ensure compliance with applicable terms.

Most provincial and territorial statutes also allow the trustee to invest in mutual funds. Historically, there was uncertainty as to whether trustees could invest in mutual funds. This is because by investing in a mutual fund, the trustee can be viewed as improperly delegating their decision-making authority to a mutual fund manager. Most provincial and territorial legislation have now clarified this matter by providing that mutual funds are permitted investments by trustees.

## Trustee's indemnity

Unless otherwise provided under a trust instrument, a trustee who adheres to the prudent investor rule will be relieved from liability resulting from loss to the trust assets. A settlor of a trust is also able to include a clause within the trust instrument to limit a trustee's exposure to liability for the poor performance of investments. That being said, in general, such a limitation clause in the trust instrument wouldn't make a trustee exempt from gross negligence in the exercise of their power.

## Appointing a corporate trustee as agent

The role of a trustee is an extremely important one, involving several key legal obligations and fiduciary duties, as well as significant managerial and administrative responsibilities. Trustees are faced with many complexities and obligations and may feel burdened by the tasks of administering a trust, or simply lack the time or expertise to undertake the role.

A trust company, like RBC Royal Trust, can help by acting as the trustee, co-trustee, or as an agent for the named trustee, to manage the trust assets. Some of the advantages of a corporate trustee include neutrality, availability, expertise, and continuity for long-standing trusts. Appointing a corporate trustee can help ensure the administration of the trust is done in accordance with the relevant laws. It can relieve your family members and friends of the burden of administering the trust assets and mitigate any potential conflict among your trustees or with beneficiaries. A corporate trustee can either be appointed while the settlor is alive, or be appointed by a trustee(s) as agent after the settlor's passing, according to a fee schedule similar to compensation that may be payable to family members or other trusted professionals acting as trustee.

If you have questions about who to appoint as a trustee or the typical responsibilities of a trustee, please speak to your RBC advisor to find out more about the services provided by RBC Royal Trust.

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## Managing trust investments

As part of the role, trustees have an inherent power under trustee legislation to invest trust assets, which may be further modified by the trust instrument. In making investment decisions, a trustee should act in a reasonable and prudent manner and should take into account the interests of all of the trust's beneficiaries. In most common-law jurisdictions, trustees have been granted the power to delegate their investment powers, provided the trustees exercise care in the selection of their expert agents, establish limits on their delegated authority and monitor the agent to ensure compliance with the terms of the delegation. When it comes to developing an investment strategy with respect to trust assets, it's important to recognize that prudent trustees, particularly ones who may not be knowledgeable in investment matters, should seek advice from qualified professionals to assist them in this process.

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