Law Reform Commission of Saskatchewan

Corporate Fiduciary Services

Final Report

October 2012

The current legislation and regulation surrounding corporate fiduciaries serves the purpose of protecting users of fiduciary services from risk and losses. If corporate trustees and fiduciaries other than trust companies are permitted, these protections may be weakened or lost. In the Commission's opinion, weakening protection is unnecessary given no demonstrated need for reform of the law. Individuals in Saskatchewan should find that they have access to fiduciary services when needed. The Commission recommends no changes to Saskatchewan's corporate fiduciary services legislation and regulation at present.

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Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice and Attorney General. After preliminary research, the Commission usually issues background or consultation papers to facilitate consultation. Tentative Proposals may be issued if the legal issues involved in a project are complex. Upon completion of a project, the Commission's recommendations are formally submitted to the Minister of Justice and Attorney General as final proposals.

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SUMMARY OF RECOMMENDATION

There is no demonstrated need for reform of Saskatchewan's law regarding corporate fiduciary services. At present, two trust corporations offer fiduciary services irrespective of a client's wealth; and, moreover, many people incapable of handling their own affairs will have access to necessary assistance through the office of the Public Guardian and Trustee. Due to lack of a demonstrated need for reform, there is no justifiable reason to limit regulatory requirements, which protect the public, currently imposed on corporate fiduciary service providers.

1. INTRODUCTION

A trust is a legal arrangement under which property is held and managed by "trustees" for the benefit of another person ("beneficiary"). Similarly, a power of attorney is an arrangement under which the property of the person who confers the power is managed for his or her benefit by the "attorney." A trust or power of attorney creates a "fiduciary relationship." The trustee or attorney is under a strict duty to act solely in the interests of the person for whom the trust or power was created.

Trusts have long been an important tool in estate planning. Trusts are often established by will to provide for the testator's family. But the purposes for which trust funds may be established are varied, and are no longer confined to testamentary purposes. Enduring powers of attorney, a relatively recent innovation, are now frequently used to assist individuals who may become incapable of managing their own affairs. As our population ages, fiduciary relationships will almost certainly become more common, and more important. As C. Yvonne Chenier, an investment advisor to the elderly, points out:

> In past centuries, only a few octogenarians who had amassed wealth needed to entrust it to others within some kind of relationship…. Today, as people are living longer and are increasingly becoming incapable of managing the wealth that they have accumulated over a lifetime, more people need to

> establish a trusting relationship with a person or company with regard to their finances.[1]

Most trustees and attorneys are individuals, often a family member, selected by the person who establishes the trust or grants the power of attorney, but the expertise of a professional trustee is sometimes preferred. As trusts and other fiduciary relationships become more common and varied, the potential role of professional trustees can be expected to grow. In Canada, only trust companies incorporated under federal[2] and provincial[3] trust companies legislation are permitted to act as corporate trustees. In Saskatchewan, other corporations may be permitted by regulation to act as attorneys under powers of attorney,[4] but in practice at present, only trust companies provide this service.

Trust companies provide what may be called traditional trust services. They are geared to provide management and investment expertise for the administration of large estates.[5] In other jurisdictions, including the United States and Britain, trust services are more widely available, and more varied in content. Chenier suggests that Canada is out of step with the rest of the common law world, and is failing to meet the emerging needs of our aging population. She asks:

> Who will provide this service to those less affluent if the trust companies, who are in the profit business, are only there to serve those with a larger asset base? If more people in this position have an average amount of assets as opposed to being multi millionaires and if the government does not want to get into the business of being a fiduciary for those people then more fiduciaries or trust types of business will be needed.[6]

This concern has also been expressed by other lawyers and estate planners. The Commission's interest in this topic was generated in part by questions raised by members of the Saskatchewan Bar.

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[1] C Yvonne Chenier, "Aging and the Role of Trust in Our Society" (Paper delivered at The Canadian Centre for Elder Law Studies Canadian Conference on Elder Law, 2005), [unpublished].
[2] *Trust and Loan Companies Act*, SC 1991, c 45.
[3] In Saskatchewan, *Trust and Loan Corporations Act, 1997*, SS 1997, c T-22.2.
[4] *Powers of Attorney Act, 2002*, SS 2002, c P-30.2, s 8.
[5] According to Chenier *supra* note 1, the target customers of trust companies are "ideally, upper aged clients with over $500,000 in assets [exclusive of the home]."
[6] *Ibid*.

In 2007, the Commission issued a consultation paper that examined the law governing corporate fiduciary services in Saskatchewan. The paper included a discussion of the present law in Canada and other jurisdictions, justifications for the present law in Canada, and description of the services provided by trust companies. The paper concluded by asking whether corporate fiduciaries other than trust companies should be permitted in Saskatchewan? The Commission received comments from the Office of the Saskatchewan Superintendent of Financial Institutions, the Public Guardian and Trustee, and a large Canadian bank. We thank all those who contributed to this project.

This report sets out the Commission's final proposals on whether corporate trustees and fiduciaries other than trust companies should be permitted. It provides what we believe should be the law and policy on corporate fiduciary services in Saskatchewan.

2. JUSTIFICATION FOR THE PRESENT LAW/RISK OF REFORM

The current law in Saskatchewan provides many protections for the beneficiaries of corporate fiduciary services. D. Waters suggests that the current law helps "ensure that the trust companies discharge their duties as laid down by the law of trusts in a strictly fiduciary manner."[7] The legislation and regulations attempt to achieve this goal in several ways:

1. Licensing and regulation. Trust companies are subject to oversight by the Saskatchewan Superintendent of Financial Institutions or the federal counterpart. The legislation makes provision for auditing, investigation, and other administrative controls.
2. Promoting financial stability and solvency. The Saskatchewan legislation provides that:

   > 24(1) The superintendent may refuse to issue a licence to an applicant unless the applicant can satisfy the superintendent that it has capital as prescribed in the regulations.

3. Segregation of trust funds. Trust companies, like other trustees, must keep trust funds separate from other funds. The company's funds are divided into capital, deposit, and trust categories, which are not co-mingled. In addition, each trust

[7] D Waters, *Law of Trusts in Canada* (Toronto: Carswell, 1974) at 91.

> or estate has a separate account, each of which must be managed separately according to fiduciary principles.

The Office of the Saskatchewan Superintendent of Financial Institutions highlighted that *The Trust and Loan Corporations Act, 1997*[8] and *The Trust and Loan Corporations Regulations, 1999*[9] impose several requirements that work collectively to promote soundness and stability among Saskatchewan trust corporations, including restrictions on amalgamations and significant dispositions, requirements around self-dealing, investments and annual reporting.[10]

Perhaps the greatest safety net imposed by legislation and regulation is the capital requirements applied to trust companies. The role of capital is as a "[s]ource of financial support to protect against unexpected losses—a key contributor to safety and soundness."[11] Capital requirements promote stability and solvency by ensuring adequate resources and capability to meet unexpected risks and losses. If a fiduciary corporation cannot absorb these losses and traverse these risks, then the company is in danger of failing. The failure of a fiduciary corporation could entail serious negative repercussions for the clients of the corporation.

Some suggest that a bond or insurance policy could help protect clients of corporate fiduciaries. However, bonds and insurance policies do not play the same role as capital in that they are primarily compensatory in nature. Bonding and insurance requirements do not provide "cushion" to meet unexpected risks and losses and do not ensure soundness and stability in the same manner as regulatory capital requirements. Also, it can be very difficult to find adequate bond or insurance products actually available and offered by the surety and insurance industry. When such bonding and insurance products do exist, they can be very costly and, in some cases, difficult to obtain due to exacting qualification requirements.

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[8] *Supra* note 3.
[9] SS 1999, c T-22.2 reg 1.
[10] Letter from the Office of the Saskatchewan Superintendent of Financial Institutions (12 March 2008) received by the Law Reform Commission of Saskatchewan in response to the Commission's "Consultation Paper on Corporate Fiduciary Services, 2007" [Office of the Superintendent of Financial Institutions' letter].
[11] *Ibid* citing Office of the Superintendent of Insurance, "In-House Banking Supervision Seminar" (2006).

In Saskatchewan, beneficiaries of corporate fiduciary services provided by trust companies are protected by current legislation and regulation. Indeed, this is an objective of such legislation and regulation. Because trust companies are currently highly regulated and other corporate fiduciaries may not be subject to the same strict oversight (with increased risk to individuals using these fiduciaries), it is the opinion of the Commission that there must be a strong and demonstrated need to warrant reform of current corporate fiduciary services legislation and regulation.

3. NEED FOR REFORM

Chernier suggests that the current law on corporate fiduciary services must be reformed in light of Canada's aging population.[12] Because trust companies are often not interested in making their trust services widely available, i.e. to those not of great wealth, she suggests that there will increasingly be many circumstances in which individuals may need someone "to step into your financial shoes and look after your affairs when you are unable to and do not have or choose not to have a family member to do this for you"[13] that are not contemplated by the trust services provided by trust companies in Canada. Despite this scenario, the Office of the Saskatchewan Superintendent of Financial Institutions has not received any complaints from the public concerning a lack of access to corporate fiduciary services, nor have any concerns about this issue been raised with the office by members of the Bar or any other industry.[14]

The Commission notes two main reasons why a need for reform has not been voiced in Saskatchewan. First, many people incapable of handling their own affairs will have access, as a last resort, to necessary assistance through the office of the Public Guardian and Trustee. Second, at least two of the trust corporations licensed under Saskatchewan's *Trust and Loan Corporations Act, 1997* are currently providing trust services to a wide client base. Concentra Trust offers a Personal Management Accounts service whereby Concentra Trust will, in a personal situation, provide safekeeping of assets, collection of income, payment of bills and expenses (including Income Tax installments), carrying out investment transactions, and filing Income Tax Returns (at an

[12] Chernier, *supra* note 1.
[13] *Ibid*.
[14] Office of the Superintendent of Financial Institutions' letter, *supra* note 10.

additional fee).[15] Concentra Trust does not require a minimum estate size to provide this service. Mennonite Trust Ltd. also offers an Account Management Service that includes routine bill payment, deposit services, preparation of Income Tax and other forms, and investment management.[16] Mennonite Trust Ltd. also does not require a minimum estate size to provide this service.

The Commission notes that no respondents to our Consultation Paper saw an immediate need for reform. The response from a large Canadian bank did, however, recognize the potential impact of an aging population and, given this, noted that removing the monopoly held by trust companies over corporate fiduciary services may be a logical development, but one that must be approached with caution.

4. RECOMMENDATION

The current legislation and regulation surrounding corporate fiduciaries serves the purpose of protecting users of fiduciary services from risk and losses. It does so in several ways, most notably by imposing exacting capital requirements on trust companies. If corporate trustees and fiduciaries other than trust companies are permitted, these protections may be weakened or lost. In the Commission's opinion (and that of those who responded to the Consultation Paper) weakening protection is unnecessary given no demonstrated need for reform of the law. Other jurisdictions may have seen a need to permit corporate trustees and fiduciaries other than trust companies. In Saskatchewan, however, some trust companies do provide their fiduciary services irrespective of the beneficiary's wealth; and moreover, the Public Guardian and Trustee can provide these services as a last resort. Therefore, individuals in Saskatchewan should find that they have access to fiduciary services when needed. The Commission recommends no changes to Saskatchewan's corporate fiduciary services legislation and regulation at present.

[15] See online: Concentra Financial <https://www.concentrafinancial.ca/Pages/default.aspx>.
[16] See online: Mennonite Trust Ltd. <http://mennonitetrust.ca/account-management/>.