

Law Reform Commission of Saskatchewan

September, 2007

**Consultation Paper on Corporate Fiduciary Services:
Should corporate trustees and fiduciaries other than trust companies be permitted?**

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 and provincial 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, 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. 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 businesses will be needed.²

¹C. Yvonne Chenier, “Aging and the Role of Trust in our Society,” Canadian Conference on Elder Law, 2006.

²C. Yvonne Chenier, “Aging and the Role of Trust in our Society,” Canadian Conference on Elder Law, 2006.

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.

This consultation paper examines the law governing corporate trustees and fiduciaries in Saskatchewan, and asks whether the monopoly on trustee services currently possessed by trust companies can still be justified.

2. Background

(a) The present law in Canada

In all provinces of Canada, only trust companies are permitted to act as trustees, executors, and administrators. Certain other fiduciaries, such as guardians, are also caught by the prohibition. Because trust companies can be incorporated federally as well as provincially, the restriction is contained in both federal and provincial legislation.

The federal *Trust and Loan Companies Act*³ provides that

412. No company, other than a company that is a trust company pursuant to subsection 57(2) [that is, one licensed under the *Trust and Loan Companies Act*], shall act in Canada as

(a) an executor, administrator or official guardian or a guardian, tutor, curator, judicial adviser or committee of a mentally incompetent person; or

³Trust and Loan Companies Act, S.C. 1991, c. 45.

(b) a trustee for a trust.

This provision presumably applies only to federally incorporated corporations. Provincial legislation in Saskatchewan, as in most other provinces, extends the prohibition to provincially incorporated companies by reference to the federal *Act*. The Saskatchewan *Trust and Loan Corporations Act, 1997*⁴ provides that:

17(1) No person shall carry on business or hold himself, herself or itself out as carrying on business as: . . .

(c) a trust corporation without a licence authorizing the person to carry on business as a trust corporation.

“Trust corporation” is defined to include any corporate trustee:

2(u) "trust corporation" means a body corporate that:

(i) carries out activities of the type described in section 412 of the federal Act; or

(ii) is one of a class of businesses prescribed in the regulations as a trust corporation.

Thus, only corporations licensed as “trust corporations” can be trustees and personal representatives, and any Saskatchewan company carrying on such business must be licensed under *The Trust and Loan Corporations Act, 1997*.

The prohibition contained in the federal and provincial legislation does not extend to all fiduciary relationships. In particular, powers of attorney are listed. An attorney is classified in law as an agent

⁴ Trust and Loan Corporations Act, 1997, S.S. 1997, c. T-22.2

of the grantor of the power.⁵ At common law, there was no limitation on appointment of corporations as agents. Although the courts in Canada do not appear to have directly considered the issue, it seems likely that, in the absence of legislation to the contrary, a corporation may act as an attorney. However, the Ontario *Substitute Decisions Act*⁶ permits only trust companies to act as corporate attorneys under enduring powers of attorney. The Saskatchewan *Powers of Attorney Act, 2002* provides that “subject to the regulations, a grantor may appoint a corporate attorney.”⁷ This is a new provision, not found in earlier powers of attorney legislation. It was adopted, on the Commission’s recommendation, in anticipation that “not-for-profit organizations dedicated to assisting vulnerable adults” might be “interested in the concept as a possible future development, though none are presently prepared to assume the role of attorney.”⁸

(b) Justification for the present law

D. Waters, *The Law of Trusts in Canada*, suggests that “the object of the Canadian federal and provincial legislation is to ensure that the trust companies discharge their duties as laid down by the

⁵*Drew v. Nunn* (1879), 4 Q.B.D. 661; *Re Parks* (1957), 8 D.L.R. 155 (NBSC).

⁶ *Substitute Decisions Act, 1992*, S.O. 1992, c. 30.

⁷*Powers of Attorney Act, 2002*, S.S. 2002, c. P-20.3, s. 8. The Commission’s attention has been directed to Section 16(1) of *The Administration of Estates Act*, S.S. 1998, c. A-4.1, which provides: “The next of kin regularly entitled to administer an estate may appoint an individual or a trust corporation within the meaning of *The Trust and Loan Corporations Act* as his or her attorney to apply for and receive a grant of letters of administration.” The section does not enlarge or abridge the activities of corporate trustees. It merely refers to the two classes of legal persons who may act as administrators under the general law — individuals and trust companies. Note in addition that it does not in itself authorize an attorney to apply to continue to act after the grantor’s death as administrator.

⁸Law Reform Commission of Saskatchewan, *Enduring Powers of Attorney (Consultation Paper)*, 2001.

law of trusts in a strictly fiduciary manner.”⁹ The legislation attempts 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 or estate has a separate account, each of which must be managed separately according to fiduciary principles.

(c) Services provided by trust companies

Although trust companies were first incorporated in the 19th Century to provide trust services, they have developed into full-service financial institutions. Most are associated with banks:

Trust companies and banks have merged into a single deposit-taking sector through industry consolidation. Trust companies accept deposits and make loans. In addition,

⁹D. Waters, *Law of Trusts in Canada*, 1974, p. 91.

trust companies engage in fiduciary activities-managing assets for estates, registered retirement savings plans, and invest in mortgages, securities and other loans. They are also active in money markets, accepting short-term funds and making short-term loans to corporations and investment dealers.¹⁰

The trust services provided by trust companies are limited, and provide a diminishing part of trust company business. With few exceptions, they take a very traditional approach to trust services, catering to the needs of testators with large, complex estates. Royal Trust, for example, describes its approach in these terms:

Our Private Trust division provides a personal and high touch service for individuals, their families and businesses whose needs are often complex. Our Senior Trust Advisors work closely with their clients' inner circle of advisors to develop customized estate planning solutions, ensuring their clients' needs are fully understood, continually evaluated and met.

The services provided are essentially limited to acting as trustee or executor, and as a financial advisor to trustees or executors.¹¹ Royal does not accept appointment as an attorney, but some trust companies do. Chenier surveyed the services offered by trust companies, and found that "not all trust companies approach the business the same way. Some accept executor appointments only and others accept the full scope of trustee business." But all the companies surveyed were interested primarily in larger estates, and often promote their trustee services only to established customers. Most stated that target customers are "ideally, upper aged clients with over \$500,000 in assets [exclusive of the home]," or "affluent Canadians who require professional executor or trustee services."¹²

¹⁰Government of Ontario, *Ontario Facts: Financial Infrastructure*, n.d.

¹¹Royal Bank of Canada, *RBC Investments: Trust Services*, rbcinvestments.com.

¹²C. Yvonne Chenier, "Aging and the Role of Trust in our Society," Canadian Conference on Elder Law, 2006."

There is, however, some evidence that the trust company sector is beginning to recognize a need for new types of fiduciary services. For example, Support & Trustee Advisory Services (STAS), an Ontario non-profit organization established to assist parents of disabled children has entered into an arrangement with Royal Trust:

This arrangement means that families have access to stable life-long trustee services for their sons and daughters at a reasonable cost. Royal Trust acts as trustee and manages the trust funds under the direction of STAS. Because many families will be involved, the minimum amount for an individual trust fund is \$10,000 (instead of the far greater sums usually required). Support & Trustee Advisory Services acts as Advisor to Royal Trust in these trusts¹³

(d) Other jurisdictions

Waters, *Law of Trusts in Canada*, observes that:

The trust company is a financial institution largely peculiar to Canada. . . . In most other jurisdictions where the trust is a familiar concept for the investment and management of property, trust work of all kinds is handled by the usual financial institutions.¹⁴

In England, banks and insurance companies manage trusts and act as trustees. In Australia and New Zealand, like Canada, banks do not handle trust work. “Trustee Corporations” similar in some respects to Canadian trust companies provide trust services. However, unlike their Canadian counterparts, trustee corporations in Australia and New Zealand have not developed into full-service financial institutions. They remain focused on trust services, and appear to offer a somewhat wider

¹³Support and Trustee Advisory Services, www.supportandtrusteadvisoryservices.ca.

¹⁴D. Waters, *Law of Trusts in Canada*, 1974, p. 91.

range of services.¹⁵

Most American banks have trust departments which provide traditional trust services similar to those provided by trust companies in Canada. However, in recent years a broader-based approach to fiduciary services have been developed by “private” or “professional” fiduciaries. These are typically service providers rather than financial institutions, and offer a variety of support services for elderly and disabled clients. Both non-profit and commercial fiduciary corporations operate in the United States. Their profiles are typically very different from Canadian trust companies. For example, Support Services for Elders, a non-profit organization affiliated with the San Francisco - based Institute on Aging, integrates fiduciary services with a range of other services to assist elderly clients. It describes itself in these terms:

Support Services for Elders (SSE) has been a respectful partner to elders facing the challenges of illness, disability, memory loss, widowhood, and exploitation. . . . SSE provides services tailored to each individual’s needs. These include care coordination, household management, personal support, and assistance with financial affairs. When appropriate, we serve as designated agent, trustee, conservator, or personal representative. Our staff includes licensed clinical social workers, court-certified/state-registered professional fiduciaries, and bookkeepers--all with extensive experience managing the complex needs of older adults.¹⁶

¹⁵ According to the Trustee Corporations Association of Australia, its members provide “Traditional personal wealth management,” including estate planning and acting as trustee or executor, but also services “Protecting vulnerable members of the community, by acting as guardian or financial manager, usually under Court or Tribunal order, for persons unable to look after their own affairs, including minors and the intellectually-disabled..”

¹⁶Institute on Aging, *Support Services for Elders: Professional Care Management and Fiduciary Services since 1989*, www.ioaging.org.

3. Should corporate fiduciaries other than trust companies be permitted?

C. Yvonne Chenier, *Aging and the Role of Trusts in our Society*, makes two criticisms of Canadian trust companies. First, they are often not interested in making their trustee services as widely available as their American counterparts. She suggests that there are many circumstances in which individuals 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” that are not contemplated by the trust services provided by trust companies in Canada.

Chenier 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 businesses will be needed. At this time due to the regulatory environment in the financial services world the barriers to entry are great and it is unlikely that we will see a proliferation of fully-fledged trust companies start up. Something else is needed. Perhaps it is time to explore the situation of the private fiduciaries in the United States to see if a similar structure would work in Canada. If so, the time to start this process is now before the increasing number of members of our aging population create a greater and greater need for a solution

The trust company, which has become what one commentator describes as a “financial supermarket,” may not be the appropriate vehicle for providing a full range of fiduciary services. Permitting corporations that specialize in fiduciary services, and which serve a different client base than trust companies, may be desirable. Our aging population will create the need for new services which may be more effectively supplied by fiduciary and support service organizations rather than financial institutions.

The strongest argument against removing the trust company monopoly is regulatory. Although there have been some disastrous trust company failures in the past, the regulatory system has usually protected the clients of trust companies. Perhaps most important, the capitalization and financial reserve requirements placed on trust companies helps ensure stability. Trust companies are usually big enough financial institutions to remain solvent. Most fiduciary corporations in the United States are not financial institutions and lack the capitalization of typical of trust companies. However, it can be argued that bonding and insurance requirements may provide adequate protection for clients. Other licensing and regulation requirements , though on a different model than presently applied to trust companies, will no doubt remain appropriate, and but can likely be adapted to fiduciary corporations that are not trust companies.

This discussion raises two fundamental questions about the law governing corporate fiduciaries:

1. Is there a place in Saskatchewan for professional corporate fiduciaries other than trust companies?

2. Can adequate protection of trust funds be ensured if corporate trustees and fiduciaries other than trust companies are permitted?

WE WELCOME YOUR COMMENTS AND SUGGESTIONS.