APPENDIX E / ANNEXE E

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UNIFORM INCOME TRUSTS ACT

LOI UNIFORME SUR LES FIDUCIES DE REVENU

Wayne Gray, Ontario

UNIFORM INCOME TRUSTS ACT

Preliminary Comment: A Reference to a "Recommendation" in this Act is a reference to the corresponding Recommendation set out in the *Report of the Uniform Income Trusts Act Working Group to the Uniform Law Conference of Canada*, Civil Section (July 2006)(the "Report"): http://www.chlc.ca/en/poam2/Uniform_Income_Trusts_Act_Report_En.pdf

A reference to the "CBCA" is a reference to the ***Canada Business Corporations Act*, R.S.C. 1985, c. C-44)** current to February 27, 2008: http://laws.justice.gc.ca/en/showtdm/cs/C-44

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PART 1 – INTERPRETATION AND APPLICATION

Interpretation

1(1) In this Act,

"affairs" means the relationship among the trustees and the unit-holders of an income trust;

"affiliated entity" means an entity that is affiliated with a trust within the meaning of section 3;

"associate", in respect of a relationship with a person, means

(a) a body corporate of which that person beneficially owns or controls, directly or indirectly, shares or other securities currently convertible into shares carrying more than ten per cent of the voting rights under all circumstances or by reason of the occurrence of an event that has occurred and is continuing, or a currently exercisable option or right to purchase such shares or such convertible securities;

(b) a partner of the person acting on behalf of the partnership of which they are partners;

(c) another trust or estate in which the person has a substantial beneficial interest or in respect of which that person serves as a trustee or liquidator of the succession or in a similar capacity;

(d) a spouse of the person or an individual who is cohabiting with the person in a conjugal relationship, and has done so for a period of at least one year;

(e) a child of the person or of the spouse or individual referred to in clause (d); and

(f) a relative of the person or of the spouse or individual referred to in clause (d), if the relative has the same residence as that person;

"body corporate" includes a company or other body corporate wherever or however incorporated;

"Commission" means [*securities regulator for the jurisdiction*];

"court" means the [*specify provincial superior court*];

"entity" means a body corporate, a partnership, a trust, a joint venture or an unincorporated association or organization;

"income trust" means a trust, other than a mutual fund, the units of which are traded on or through a prescribed marketplace;

"individual" means a natural person;

"mutual fund" means an issuer in which investors are entitled to receive, after demand, an amount calculated by reference to a proportionate interest in the net assets of the fund;

"ordinary resolution" means a resolution passed by a majority of the votes cast by the unit-holders who voted in respect of the resolution;

"parent trust" means, in relation to a subsidiary trust, an income trust through which a beneficial interest is held in

- **(a) a majority of the units of any class or series of the subsidiary trust; or**
- **(b) more than fifty per cent of the assets held under the subsidiary trust;**

"person" includes an individual, entity or personal representative;

"personal representative" means a person who stands in place of and represents another person including, but not limited to, a trustee, an executor, an administrator, a receiver, an agent, a liquidator of a succession, a guardian, a tutor, a curator, a mandatary or an attorney;

"prescribed" means prescribed by the regulations;

"reporting issuer" means a reporting issuer as defined under the *Securities Act* or under the securities legislation of another province or territory of Canada.

"reporting issuer" means an entity

- **(a) that has issued securities under a prospectus for which a receipt has been issued under securities legislation of a province or territory of Canada; or**
- **(b) the securities of which are or were listed *[and posted for trading on the Toronto Stock Exchange or the TSX Venture Exchange or are traded over the counter on the Canadian Trading Quotation System.]***

"send" includes deliver;

"series" means, in relation to units of a trust, a division of a class of units;

"special resolution" means a resolution passed by a majority of not less than two-thirds of the votes cast by the unit-holders who voted in respect of that resolution;

"subsidiary trust" means a trust, other than an income trust, that is controlled by an income trust;

"trust" means an income trust or a subsidiary trust;

"trust instrument" means the document or documents that establish or continue a trust or a mutual fund, as amended from time to time.

Comment: As stated in the Report, the primary focus of the Act is publicly traded income trusts in Canada. The Act does not address trusts (in particular other types of private *inter vivos* trusts) other than income trusts, subsidiary trusts (described below) and mutual funds in which investors are entitled to receive, after demand, an amount calculated by reference to a proportionate interest in the net assets of the fund (in the Act, these latter trusts are defined as "mutual funds"). Each type of trust has its own unique functions and attributes. Consideration of trusts that are not publicly traded (other than subsidiary trusts) falls outside the scope of this Act.

Subject to the exceptions set out in Section 5, the Act, therefore, only applies to:

(a) trusts (other than mutual funds) that are publicly traded in Canada (the "income trust"); and

(b) any trust (the "subsidiary trust"):

  (i) a majority of whose units, directly or indirectly, or the majority of whose assets are owned by or for the benefit of the income trust; and

  (ii) none of the units of which are themselves publicly traded.

For purposes of the Act, reference to a "trust" means either an income trust or a subsidiary trust but not a mutual fund, as described more fully in Recommendation 3 below (Recommendation 1).

Subsidiary trusts are *inter vivos* trusts that are, directly or indirectly, owned by the publicly traded issuer (or more accurately by the trustees of the publicly traded issuer). Subsidiary trusts are part of a larger income trust structure. Income trust structures often involve a combination of entities that include a publicly traded mutual fund issuer at the top and, beneath that, layers of subsidiary trusts, limited partnerships and/or corporations. Beck & Romano, *Canadian Income Funds: Your Complete Guide to Income Trusts, Royalty Trusts and Real Estate Investment Trusts* (John Wiley & Sons Ltd.: Toronto, 2004), at pp. p. 81-3.

The underlying business is actually owned and operated by one or more of these subsidiary entities, the "subsidiary entity" consisting of a body corporate, partnership, trust, joint venture or unincorporated association or organization that is, directly or indirectly, controlled by the trustees of the income trust. Since trustees of the subsidiary trust are also capital markets participants and since trustees of the top-level income trust are often also trustees of the subsidiary trust, it is important that the liability regime that is adopted for the trustees of an income trust also apply to the trustees of any underlying or subsidiary trust. Otherwise, whatever liability regime may be established for trustees of the income trust will be incomplete.

The securities laws of the Northwest Territories and Nunavut do not define the term "reporting issuer". For these jurisdictions, the Act needs a default definition. Therefore, where the securities legislation of an enacting jurisdiction does not contain a definition of "reporting issuer", "reporting issuer" will mean a trust (a)

that has filed a final prospectus for which a receipt has been issued under provincial securities legislation or (b) any of whose securities are listed and posted for trading on any exchange in Canada (Recommendation 2). Some jurisdictions may wish to prescribe specific marketplaces by regulation.

Control

2 For the purposes of this Act, an entity is controlled by an income trust if

(a) securities of the entity to which are attached more than fifty per cent of the votes that may be cast to elect directors, or persons acting in a similar capacity, of the entity are held, other than by way of security interest only, by or for the benefit of the income trust or by or for the benefit of the unit-holders of the income trust; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors, or the persons acting in a similar capacity, of the entity.

Affiliated trusts

3 For the purposes of this Act, a trust is affiliated with

(a) another trust if one of them is a subsidiary trust of the other;

(b) a body corporate or other entity if the trustees of the trust control the body corporate or other entity; or

(c) another trust, body corporate or other entity if both of them are affiliated with the same income trust.

Trusts, mutual funds not legal persons

4 Except to the extent otherwise provided in any other enactment, a trust or a mutual fund is not a body corporate or other legal person.

Comment: Except to the extent otherwise provided in any other statute of the enacting jurisdiction, an income trust, subsidiary trust or mutual fund is not a legal person and nothing in the Act shall be construed as making an income trust, subsidiary trust or mutual fund a body corporate (Recommendation 6).

Application

5(1) Subject to subsection (3), this Act applies to an income trust or a subsidiary trust.

(2) Section 4, clauses 6 (1) (a), (b) and (c), subsections 6 (2), (3) and (4), and sections 7 and 9 apply to a mutual fund.

(3) The Act does not apply to a trust that is a non-resident of Canada within the meaning of the *Income Tax Act* (Canada).

Comment: As noted in the comment to section 1 above, the Act does not apply to a trust in which investors are entitled to receive, on demand or within a specified period after demand, an amount computed by reference to the value of a proportionate interest in the whole or part of the net assets of the fund. Note that this type of trust is defined as a "mutual fund" for the purposes of this Act (Recommendation 3).

The Act also does not apply to a trust that is a non-resident of Canada for the purposes of the *Income Tax Act* (Canada) (Recommendation 4).

Governing law

6(1) Other than the rules of conflict of laws, the following matters are governed by the law of the jurisdiction for a trust or a mutual fund:

(a) the validity of the trust or mutual fund;

(b) the construction of the trust or mutual fund;

(c) the administration of the trust or mutual fund;

(d) a matter set out in Parts 3, 4 and 5.

(2) Subject to subsection (3), the jurisdiction for a trust or mutual fund is,

(a) if the trust instrument states that it is governed by the laws of a province or territory of Canada, that province or territory; or

(b) if the trust instrument does not state that it is governed by the laws of a province or territory of Canada, the province or territory where the administration of the trust or mutual fund is principally carried out.

(3) For the purposes of subsection (2), at a special meeting of the unit-holders of a trust or mutual fund, the unit-holders may, by special resolution, amend the trust instrument to designate or change the jurisdiction for the trust or mutual fund.

Comment: The Act sets out express conflict of laws rules to determine the governing law of an income trust, a subsidiary trust or a mutual fund. If the trust instrument sets out a law governing the instrument, that law will be the governing law of the trust. If the trust instrument omits a choice of law provision, the governing law will be the place where the administration of the trust is principally carried out. Each jurisdiction in Canada is to give reciprocal recognition to a trust instrument choosing the law of another Canadian jurisdiction (Recommendation 36).

The Act specifies that, in addition to any other requirement provided for in a trust instrument, holders of not less than 2/3rds of units voted may change the governing law of an income trust, subsidiary trust or mutual fund to another jurisdiction. A trust instrument may provide a greater, but not lesser, approval threshold (Recommendation 37).

PART 2 – UNIT-HOLDER IMMUNITY

Unit-holder immunity – mutual funds

7 The liability of a unit-holder of a mutual fund, as a unit-holder, for any obligation or liability arising out of or from the administration, management or assets of the mutual fund or any conduct of a trustee, administrator or manager of the mutual fund, is limited to the unit-holder's interest in the units of the mutual fund.

Unit-holder immunity – income trusts

8 The liability of a unit-holder of a trust, as a unit-holder, for any obligation or liability arising out of or from the administration, management or assets of the trust or any conduct of a trustee, administrator or manager of the trust, is limited to the unit-holder's interest in the units of the income trust.

Retroactive effect

9 Sections 7 and 8 apply to and must be given effect in every action or proceeding, whether commenced before, on or after the date this Act comes into force.

Comment: The Act subsumes any stand-alone provincial statute providing a liability shield in favour of the unit-holders of publicly traded trusts, making it apply on a uniform basis in all provinces and territories. The liability shield would extend to unit-holders of income trusts, subsidiary trusts and mutual funds.

Following the *Income Trust Liability Act* (British Columbia), which expressly declares that it has retroactive effect (thereby confirming the consensus view of the common law and the pragmatic effect of the income trust structures that have been put in place), the "unit-holder immunity rule" in the Act applies with retroactive effect (Recommendation 8).

PART 3 – UNIT-HOLDER RIGHTS AND REMEDIES

Unit-holder rights

10(1) Despite a provision of the trust instrument to the contrary, if an income trust has only one class of units, the rights of the unit-holders are equal in all respects, and include the right

(a) to vote at any meeting of unit-holders of the trust;

(b) to receive any distributions made with respect to the trust; and

(c) to receive the remaining trust assets on dissolution.

(2) Unless the trust instrument otherwise provides, each unit of a trust entitles the holder to one vote at a meeting of unit-holders.

(3) If units of a parent trust are held through a subsidiary trust, or if a body corporate or other entity that is controlled by the trustees of an income trust holds units of that income trust, the trustees of the subsidiary trust, the body corporate or the other entity, as the case may be, shall not vote those units.

(4) A trust instrument may provide for more than one class of units and, if it so provides,

(a) the rights, privileges, restrictions and conditions attaching to the units of each class shall be as set out in the trust instrument; and

(b) the rights set out in subsection (1) shall be attached to at least one class of units but all such rights are not required to be attached to one class.

Comment: The Act provides that all units of the same class or series are equal in all respects but that a controlled subsidiary entity is not permitted to vote any units that it holds in its parent income trust (Recommendation 10).

Election of trustees

11(1) Before the first meeting of unit-holders, the trustees of an income trust may appoint one or more additional trustees who shall hold office until the close of the first meeting of unit-holders.

(2) Unit-holders of an income trust shall, by resolution at the first meeting of unit-holders and at each succeeding annual meeting at which an election of trustees is required, elect trustees to hold office for a term expiring not later than the close of the third annual meeting of trustees following the election.

(3) It is not necessary that all trustees elected at a meeting of unit-holders hold office for the same term.

(4) A trustee not elected for an expressly stated term ceases to hold office at the close of the first annual meeting of unit-holders following the trustee's election.

(5) Despite subsections (1) and (3), if trustees are not elected at a meeting of unit-holders, the incumbent trustees continue in office until their successors are elected.

(6) If a meeting of unit-holders fails to elect the number or the minimum number of trustees required by the trust instrument by reason of the lack of consent, disqualification, incapacity or death of any candidates, the trustees elected at that meeting may exercise all the powers of the trustees if the number of trustees elected constitutes a quorum.

(7) After the first meeting of unit-holders, the trustees may, if authorized by the trust instrument, appoint one or more additional trustees, who shall hold office for a term expiring not later than the close of the next annual meeting of

unit-holders, but the total number of trustees appointed under this subsection may not exceed one third of the number of trustees elected at the previous annual meeting of unit-holders.

(8) If authorized by the trust instrument, a person designated in accordance with the trust instrument may appoint one or more trustees to hold office for the term provided in the trust instrument.

(9) A person who is elected or appointed to hold office as a trustee is not a trustee and is deemed not to have been elected or appointed to hold office as a trustee unless

- **(a) the person was present or represented at the meeting when the election or appointment took place and the person did not refuse, directly or through a representative, to hold office as a trustee; or**
- **(b) the person was not present or represented at the meeting when the election or appointment took place and**
  - **(i) the person consented to hold office as a trustee in writing before the election or appointment or within ten days after it, or**
  - **(ii) the person has acted as a trustee pursuant to the election or appointment.**

Comment: Provision for the election of trustees is a standard feature of all income trusts. However, the Act enshrines flexibility in the election or appointment of trustees by permitting designated unit-holders such as sponsors to continue to elect or appoint one or more trustees in accordance with the terms of the trust instrument. As well, between annual meetings, trustees are empowered to appoint replacement trustees to fill vacancies and, as under corporate law, expand the number of trustees by up to 1/3rd the number of trustees elected at the last annual meeting where the trust instrument so provides. The right to increase the number of trustees is useful where, between annual meetings, the income trust expands through acquisition or other unexpected opportunities arise. Before the first annual meeting, even greater flexibility is warranted. Often trustees are added after the preliminary prospectus but before the first annual meeting.

The Act provides that trustees of an income trust may be elected or appointed at unit-holder meetings by the unit-holders or subset of unit-holders entitled to vote thereon in accordance with the trust instrument. Before the first annual meeting, trustees in office shall have the right to appoint additional trustees in accordance with the trust instrument. Between annual meetings, trustees in office shall have the right to appoint replacement trustees to fill any vacancies and, if the trust instrument so provides, appoint up to 1/3rd the number of trustees elected at the last annual meeting. Unit-holders entitled to elect any particular subset of the trustees would have the exclusive right to fill any vacancies within that subset (Recommendation 11).

Removal of trustees

12(1) Despite any provision in a trust instrument to the contrary, if the unit-holders of an income trust are entitled to elect a trustee of the income trust, the unit-holders may by ordinary resolution at a special meeting remove the trustee.

(2) Where the holders of any class or series of units of an income trust have an exclusive right to elect one or more trustees, an elected trustee may only be removed by ordinary resolution at a special meeting of the unit-holders of that class or series.

(3) A vacancy created by the removal of a trustee may be filled at the special meeting of the unit-holders at which the trustee is removed or, if not so filled, may be filled under section 11.

Comment: According to a survey conducted by Goodmans LLP for Industry Canada (the "Goodmans Survey"), 76% of the trust instruments surveyed permitted unit-holders to remove trustees by a majority vote and 22% provided that only a super-majority of 2/3rds of units voted could remove trustees. [Goodmans LLP, "Governance of Income Trusts in Canada", Report to Industry Canada (December 31, 2005)]. The Goodmans Survey consisted of 53 income trusts, representing approximately 22% of all income trusts then in existence in Canada.

To place unit-holders in substantially the same position as shareholders of a corporation, no more that a simple majority of votes cast by unit-holders entitled to vote on the election of the trustees, or the subset of trustees affected, is required to remove the trustees, or the members of the subset, elected by those unit-holders. To clarify, public unit-holders are not given the power to remove trustees who are not subject to election by those unit-holders.

One issue that merited a close examination was whether a new uniform rule on removal of trustees should be imposed on existing trusts whose trust instruments provide super-majority approval, removal for cause or some higher or other removal threshold. Alternatively, should existing trust instruments be grandfathered? In support of the uniform rule were arguments based on uniformity of fundamental investor rights in publicly traded vehicles and the value of avoiding the bifurcation that would otherwise take place between grandfathered and post-grandfathered income trusts. The counterveiling argument posits that legislators should avoid doing violence to existing consensual arrangements found acceptable to the parties. On balance, it was felt that, in this instance, the fundamental nature of the investor rights and the advantages to investors in having largely uniform expectations outweighed the arguments in favour of grandfathering.

The Act, therefore, provides that, notwithstanding any contrary provision in a trust instrument, trustees who are elected or appointed by holders of publicly traded units may be removed or replaced by a simple majority vote (*i.e.* a majority of votes cast) of those entitled to vote thereon (Recommendation 12).

Proposals

13(1) Subject to subsections (2) and (3), a registered holder or beneficial owner of units of an income trust that are entitled to be voted at an annual meeting of unit-holders may

(a) submit a proposal by giving notice to the trustees of any matter that the person proposes to raise at the meeting; and

(b) discuss at the meeting any matter in respect of which the person would have been entitled to submit a proposal.

(2) To be eligible to submit a proposal, a person must be, for at least the six-month period immediately before the unit-holder submits the proposal, the registered holder or the beneficial owner of one or more units of the income trust.

(3) A proposal submitted under subsection (2) must be accompanied by the name and address of the person.

(4) The information provided under subsection (3) does not form part of the proposal or of the supporting statement referred to in subsection (7) and is not included for the purposes of the maximum word limit set out in subsection (8).

(5) If requested by the trustees within fourteen days after the trustees receive the proposal, a person who submits a proposal must provide proof, within twenty-one days after the request, that the person meets the requirements of subsection (2).

(6) If the trustees solicit proxies, the trustees shall set out the proposal in, or attach the proposal to, an information circular sent to unit-holders.

(7) If requested by the person who submits a proposal, the trustees shall include in an information circular or attach to it a statement in support of the proposal by the person and the name and address of the person.

(8) The statement and the proposal must together not exceed 500 words.

(9) A proposal may include nominations for the election of trustees if the proposal is signed by one or more holders of units representing in the aggregate not less than five per cent of the units, or five per cent of the units of a class or series of units, of the income trust entitled to vote at the meeting to which the proposal is to be presented, but this subsection does not preclude nominations made at a meeting of unit-holders.

(10) The trustees are not required to comply with subsections (6) and (7) if

(a) the proposal is not submitted to the trustees at least ninety days before the anniversary date of the notice of meeting that was sent to unit-holders in connection with the previous annual meeting of unit-holders;

(b) it clearly appears that the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the trustees, the trust assets or the unit-holders;

(c) it clearly appears that the proposal does not relate in a significant way to the management, administration, assets or affairs of the income trust;

(d) not more than the two years before the receipt of a proposal, a person failed to present, in person or by proxy, at a meeting of unit-holders, a proposal that, at the person's request, had been included in a information circular relating to the meeting;

(e) substantially the same proposal was submitted to unit-holders in a management information circular or a dissident's information circular relating to a meeting of unit-holders held not more than two years before the receipt of the proposal and, of the units entitled to vote at the meeting in respect of the previously submitted proposal, less than ten per cent of the votes were cast in support of that proposal; or

(f) the rights conferred by this section are being abused to secure publicity.

(11) If a person who submits a proposal fails to continue to hold or own a unit referred to in subsection (2) up to and including the day of the meeting, the trustees are not required to set out in any information circular, or attach to it, any proposal submitted by that person for any meeting held within two years following the date of the meeting.

(12) No trustee or person acting on the trustee's behalf incurs any liability by reason only of circulating a proposal or statement in compliance with this section.

(13) If the trustees refuse to include a proposal in an information circular, the trustees shall, within twenty-one days after the day on which they receive the proposal or the day on which they receive the proof of ownership under subsection (5), as the case may be, notify in writing the person submitting the proposal of their intention to omit the proposal from the information circular and of the reasons for the refusal.

(14) On the application of a person submitting a proposal who claims to be aggrieved by the trustees' refusal under subsection (13), the court may restrain the holding of the meeting at which the proposal is sought to be presented and make any further order it thinks fit.

(15) The trustees or any person claiming to be aggrieved by a proposal may apply to the court for an order permitting the trustees to omit the proposal from a information circular, and the court, if it is satisfied that subsection (10) applies, may make any order it thinks fit.

Comment: A unit-holder proposal regime is an important vehicle for dialogue between management and unit-holders of an income trust, the real value of the proposal regime. The unit-holder proposal regime is loosely modeled on the equivalent shareholder proposal provisions of the CBCA.

As checks against potential abuse, for example, some of the anti-harassment devices found in the CBCA are included in the Act. These include the right to reject any proposal that is not received at least 90 days before the anniversary date of notice of the previous annual meeting, any proposal whose primary purpose is to enforce a personal claim or redress a personal grievance, any proposal that is being used to secure publicity or any proposal that does not relate in a significant way to the property or affairs of the income trust. Other counterweights to making the proposal mechanism available to unit-holders include placing a 500-word limitation on the proposal and any supporting statement, requiring minimum levels of support and timeframes before similar proposals may be resubmitted and temporarily suspending the proposal submission rights of any unit-holder who submits a proposal but then fails to present it at the ensuing meeting (Recommendation 13).

Requisition of meeting

14(1) The holders of not less than five per cent of the issued units of an income trust that carry the right to vote at a meeting sought to be held may requisition the trustees to call a meeting of unit-holders for the purposes stated in the requisition.

(2) The requisition referred to in subsection (1), which may consist of several documents of like form each signed by one or more unit-holders, shall state the business to be transacted at the meeting and shall be sent to each trustee.

(3) On receiving the requisition referred to in subsection (1), the trustees shall call a meeting of unit-holders to transact the business stated in the requisition, unless

- **(a) the trustees or other unit-holders have called a meeting of unit-holders and notice of the meeting has been given; or**
- **(b) the business of the meeting as stated in the requisition includes matters described in clauses 13 (10) (b) to (f).**

(4) If the trustees do not within twenty-one days after receiving the requisition referred to in subsection (1) call a meeting, and subsection (3) does not apply, any unit-holder who signed the requisition may call the meeting.

(5) A meeting called under this section shall be called as nearly as possible in the manner in which meetings are to be called pursuant to the trust instrument.

(6) Unless the unit-holders otherwise resolve at a meeting called under subsection (4), the trustees shall reimburse the unit-holders the expenses reasonably incurred by them in requisitioning, calling and holding the meeting.

Comment: While not frequently invoked in practice, the existence of a shareholder requisition constitutes an important disciplinary check on management, posing the possibility that, at any time between annual meetings, shareholders could remove a board they feel is either untrustworthy or simply underperforming.

There is no compelling reason to deny unit-holders of income trusts the right to requisition unit-holder meetings. One observation from the Goodmans Survey is that, although all trust instruments included in the survey provided for the requisition of unit-holder meetings, the threshold at which unit-holders could invoke the provision varied widely. Instead of the uniform rule under corporate legislation, only 37% of trust instruments prescribed a 5% threshold for calling a meeting, while 48% of trust instruments had a 10% threshold, 4% had a 15% threshold and 11% had a 20% threshold. It is also possible for trust instruments to exclude unit-holder requisitions completely, although none of those included in the Goodmans Survey had done so.

Despite economic efficiency arguments supporting freedom of contract, it is difficult to justify allowing different thresholds depending on whether the publicly traded issuer is a corporation or an income trust. Investors in corporations and income trusts would benefit from having a uniform threshold equal to that found in corporate statutes. Since Parliament and provincial and territorial legislatures have generally set the threshold at 5%, it would be more democratic to adopt as the uniform rule the lower corporate threshold rather than one of the higher thresholds currently found in 63% of trust instruments. Also, grandfathering existing trust instruments created before the Act goes into effect would create an awkward and confusing bifurcation between publicly traded issuers subject to the 5% threshold and the grandfathered income trusts that would continue to be subject to a higher threshold.

The Act, therefore, overrides any contrary provision in a trust instrument, providing that registered or beneficial unit-holders of an income trust holding not less than 5% of the voting units may requisition a meeting of unit-holders (Recommendation 14).

Investigation

15(1) A unit-holder of an income trust or the Commission may apply, in the absence of the trustees or other respondent or on such notice as the court may require, to the court for an order directing an investigation to be made of the income trust, a subsidiary trust or a trustee of the income trust or subsidiary trust.

(2) If, on an application under subsection (1), it appears to the court that

(a) the administration or affairs of the trust is or was carried on with intent to defraud any person;

(b) the management, administration or affairs of the trust is or was carried on or conducted, or the powers of trustees are or were exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a unit-holder;

(c) the income trust or any of its subsidiary trusts was formed for a fraudulent or unlawful purpose; or

(d) a person has acted fraudulently or dishonestly in connection with the formation, management, administration, assets or affairs of the income trust or an affiliated entity,

the court may order an investigation to be made of the trust or a trustee.

(3) An applicant under this section is not required to give security for costs.

(4) An application made under this section in the absence of the trustees or other respondent shall be heard in private.

(5) No person may publish anything relating to a proceeding referred to in subsection (4) except with the authorization of the court or the written consent of the trustees.

Powers of the court - investigation

16 In connection with an investigation under section 15, the court may make any order it thinks fit including, without limiting the generality of the foregoing,

(a) a further or amended order to investigate;

(b) an order appointing an inspector, fixing the remuneration of an inspector, and replacing an inspector;

(c) an order determining the notice to be given to any interested person, or dispensing with notice to any person;

(d) an order authorizing an inspector to enter any premises in which the court is satisfied there might be relevant information, and to examine any thing and make copies of any document or record found on the premises;

(e) an order requiring any person to produce documents or records to the inspector;

(f) an order authorizing an inspector to conduct a hearing, administer oaths, and examine any person on oath, and establishing rules for the conduct of the hearing;

(g) an order requiring any person to attend a hearing conducted by an inspector and to give evidence on oath;

(h) an order giving directions to an inspector or any interested person on any matter arising in the investigation;

(i) an order requiring an inspector to make an interim or final report to the court;

(j) an order determining whether a report of an inspector should be published;

(k) an order requiring an inspector to discontinue an investigation; and

(l) an order requiring the costs of the investigation be paid out of the income trust assets.

Powers and duty of inspector

17(1) An inspector appointed under an order made under section 15 has the powers set out in the order.

(2) In addition to the powers set out in the order of appointment, an inspector appointed to investigate a trust may furnish to, or exchange information and otherwise cooperate with, any public official in Canada or elsewhere who is authorized to exercise investigatory powers and who is investigating, in respect of the trust, any allegation of improper conduct that is the same as or similar to the conduct described in subsection 15 (2).

(3) An inspector shall, on request, produce to an interested person a copy of any order made under section 15 or 16.

Hearings

18(1) Any interested person may apply to the court for an order that a hearing conducted by an inspector be heard in private and for directions on any matter arising in the investigation.

(2) A person whose conduct is being investigated or who is being examined at a hearing conducted by an inspector has a right to be represented by counsel.

Privilege (defamation)

19 Any oral or written statement made by an inspector or any other person in an investigation has absolute privilege.

Solicitor-client privilege

20 Nothing in sections 15, 16 and 17 shall be construed as affecting solicitor-client privilege.

Comment: Statutory investigations can prove extremely useful in getting to the bottom of complex commercial wrong-doings. Part XIX of the CBCA sets out what has become the accepted statutory model. Although a few trust instruments contain contractual investigatory powers, these contractual provisions are narrower than the statutory investigations that are available under corporate law. Corporate investigations are conducted by an inspector under court supervision and, as a result, have certain legal protections, powers of compulsion and evidentiary privileges not otherwise available. Even though they may be used infrequently, it is important that the power to investigate frauds and other wrong-doings in complex settings be extended to income trusts – in part as a prophylactic against abuse and in part for its intrinsic utility.

The Act, therefore, sets out an investigation regime for income trusts that is similar to Part XIX of the CBCA (Recommendation 15).

Interpretation

21 In sections 23 and 24,

"action" means an action under section 23 or 24;

"complainant" means

(a) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a unit of an income trust, or

(b) a trustee or a former trustee of an income trust.

Application of section 23

22 Section 23 does not apply to or in respect of an income trust or subsidiary trust unless the trust instrument of the income trust states that a complainant has the rights set out in section 23.

Application to court re oppression

23(1) A complainant may apply to the court for an order under this section.

(2) If, on an application under subsection (1), the court is satisfied that in respect of an income trust or of an affiliated entity

(a) any act or omission of a trustee of the trust effects a result,

(b) the management of the assets or the administration of the affairs of the trust are or were carried on or conducted in a manner, or

(c) the powers of the trustees of the trust are or were exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any unit-holder or trustee, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager of the whole or any part of the assets of the income trust or of an affiliated entity;

(c) an order to regulate the management of the assets or administration of the affairs of the trust;

(d) an order amending the trust instrument;

(e) an order directing an issue or exchange of units or other securities;

(f) an order appointing trustees in place of or in addition to all or any of the trustees then in office;

(g) an order directing the trustees to purchase on behalf of the remaining unit-holders the units of a unit-holder with payment to be made out of the income trust assets;

(h) an order directing the trustees or any other person to pay, out of the income trust assets, a unit-holder any part of the money that the unit-holder paid for the unit;

(i) an order varying or setting aside a transaction or contract to which a trustee is a party and compensating the unit-holders or any party to the transaction or contract;

(j) an order requiring the trustees, within a time specified by the court, to produce to the court or an interested person financial statements in the form required under the *Securities Act* or an accounting in such other form as the court may determine;

(k) an order compensating an aggrieved person;

(l) an order directing rectification of the registers or other records of the trustees of an income trust;

(m) an order liquidating the trust assets;

(n) an order directing an investigation under section 15 to be made; and

(o) an order requiring the trial of any issue.

(4) A unit-holder is not entitled to dissent under section 26 if an amendment to the trust instrument is effected under this section.

Comment: The oppression remedy may have value *in terrorem*, *viz*. as an omnipresent warning to management and controlling shareholders that all corporate conduct is subject to scrutiny and possible remedial action by a court under a broad fairness standard. Even though unit-holders of an income trust might (subject to the terms of the trust instrument, perhaps) have an alternative action in equity for breach of duty by the trustees, such an action is untested.

In the absence of a definitive analysis of costs *versus* benefits to widely-held public corporations, the oppression remedy is not extended as a mandatory rule applicable to income trusts. As well, as a practical matter, income trusts pay out most or all of their taxable income, which, in practice, severely limits the discretion available to management and makes management highly dependent on the markets to raise expansion capital. Finally, to qualify as a mutual fund trust, unit-holders are usually given the right, subject to limitations, to retract units at close to trading value. Even though this right has been seldom exercised in practice, it is something usually given to unit-holders for which there is rarely a counterpart in corporate law outside the realm of mutual fund corporations or retractable preferred shares issued by other types of corporations.

Accordingly, this is an area where an optional provision may be warranted. Underwriters and, ultimately, purchasers of units can decide for themselves the relative advantages and disadvantages of the oppression remedy with respect to their particular income trust. An opt-in provision allows unit-holders of those trusts choosing it to have access to the courts in the same way that shareholders of a corporation have access to the courts to rectify oppressive or unfairly prejudicial conduct. The Act creates the statutory framework for the remedy, leaving it to the marketplace to decide whether adopting it is value-enhancing or value-reducing for a particular income trust.

The Act provides a counterpart to the corporate oppression remedy modelled on s. 241 of the CBCA, except that the oppression remedy would apply only if the applicable trust instrument opts-in to the remedy. The remedy applies to conduct at the level of the income trust or at the level of any controlled subsidiary entity.

Sections 22 and 23, therefore, establish an optional oppression remedy for unit-holders – the remedy is not available unless the trust instrument "opts-in". If a trust instrument opts-in, this legislation provides certainty for unit-holders as to the scope of the remedy (Recommendation 16). Alternatively, jurisdictions may wish to make the remedy available to unit-holders with respect to all income trusts, regardless of whether a particular trust instrument opts-in.

Commencing representative action

24(1) This section does not apply to or in respect of an income trust or a subsidiary trust of an income trust unless the trust instrument of the income trust states that a complainant has the rights set out in subsection (2).

(2) Subject to subsection (3), a complainant may apply to the court for leave to bring an action, or intervene in an action, on behalf of the unit-holders of an income trust or a subsidiary trust for the purpose of prosecuting, defending or discontinuing the action on behalf of the unit-holders.

(3) No action may be brought and no intervention in an action may be made under subsection (2) unless the court is satisfied that

- **(a) the complainant has given notice to the trustees of the income trust of the complainant's intention to apply to the court under subsection (2) not less than fourteen days before bringing the application, or as otherwise ordered by the court, if the trustees of the trust do not bring, diligently prosecute or defend or discontinue the action;**
- **(b) the complainant is acting in good faith; and**
- **(c) it appears to be in the interests of the unit-holders that the action be brought, prosecuted, defended or discontinued.**

Powers of the court – representative action

25 In connection with an action brought or intervened in under section 24, the court may at any time make any order it thinks fit including, without limiting the generality of the foregoing,

(a) an order authorizing the complainant or any other person to control the conduct of the action;

(b) an order giving directions for the conduct of the action;

(c) an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present unit-holders of the trust; and

(d) an order requiring the trustees to pay reasonable legal fees incurred by the complainant in connection with the action.

Comment: There are two types of derivative actions at corporate law. The most common type of derivative action is where a shareholder (or other complainant) brings or continues an action on behalf of a corporation to enforce a corporate right. The decision on whether to pursue an action against a third party is normally a management decision of the corporation's directors or officers. If the directors or officers chose not to expend corporate resources on either an action against the directors or officers for breach of their fiduciary duties or an action against a third party (*e.g*. an action for breach of contract or in tort), a shareholder can seek leave to enforce the corporation's rights, the fruits of which generally accrue to the indirect benefit of the shareholders.

The less common type of derivative action is where the shareholder (or other complainant) defends an action brought against the corporation.

In both cases, the shareholder (or other complainant) is not enforcing a personal right or defending a personal obligation but is instead enforcing a corporate right or defending against an alleged corporate obligation.

The statutory derivative action was introduced into corporate law to overcome some of the obstacles imposed by the infamous rule in *Foss v. Harbottle* (1843), 2 Hare 461 (H.L. *per* Wigram V.-C.). Since a corporation is a separate legal entity, actions to enforce rights or remedies belonging to, or defend actions against, a corporation could only be brought, or defended, by the corporation itself. The authority to commence, or defend, an action resided with the board, or ultimately with shareholders as a general body. At common law, the possibility of ratification by the majority would be enough to stop a derivative action, except in limited circumstances such as where those in control of the corporation were perpetrating a fraud on the minority. A derivative action is particularly useful where the alleged wrong-doers are in control of the corporation and, therefore, cannot be expected to authorize a corporate action against themselves. It is rare for a shareholder to be given leave to bring or continue an action against a third party where the exercise of business judgment by directors is untainted by self-interest.

These obstacles and issues are not precisely the same in the case of trusts. Since a trust is not a separate legal entity, there is no separate person whose interests can be pursued or defended by an investor in the trust.

If trustees commit a breach of fiduciary duty, there may be no need for the beneficiaries to bring a derivative action. The duties are owed by the trustees directly to the beneficiaries. Any right of action belongs to the beneficiaries and not an artificial person that they own. The trustees are defendants. They cannot sue themselves on behalf of the beneficiaries. Where there are many beneficiaries who have been harmed by the breach of trust, the action might best be brought as a class proceeding under provincial legislation or rules of court.

Where trustees have an action against a third person on the basis, for example, of breach of contract entered into in the administration of the trust or a tort arising in the context of the trust administration, but fail to bring it, one or more of the beneficiaries might sue the trustees alleging that their decision not to bring such an action was a breach of trust (and such an action by multiple beneficiaries might be pursued as a class proceeding). The trustees might then join the third person.

Derivative actions and shareholders' personal actions in representative form existed at common law but were found wanting. The statutory derivative action supplanted the common law regime and brought some certainty for investors. Likewise, a derivative action for investors in an income trust may prove salutary. It gives unit-holders a straightforward, well-recognized method of enforcing rights of the income trust and any subsidiary entities. It enables the court to impose filters on the derivative action such as the requirements for leave; advance notice of intent to bring the action; the applicant's *bona fides*; and that the action is *prima facie* in the apparent best interests of the unit-holders. Again, for reasons similar to those discussed in connection with the oppression remedy, at this time, the derivative action is only available on an opt-in basis, leaving it for unit-holders to decide for themselves whether the advantages of the derivative action outweigh any perceived disadvantages.

The Act provides a counterpart to the corporate derivative action modelled on ss. 239 and 240 of the CBCA, except that an applicant only has the right to apply for leave to bring a derivative action if the applicable trust instrument opts-in to the statutory provision. Leave can be granted to bring an action on behalf of the trustees or on behalf of any subsidiary entity. If a trust instrument opts-in, this legislation provides certainty for unit-holders as to the scope of the remedy (Recommendation 17). Alternatively, jurisdictions may wish to make the remedy available to unit-holders with respect to all income trusts, regardless of whether a particular trust instrument opts-in.

Right to dissent

26(1) A holder of units of any class of units of an income trust may dissent with respect to a resolution of the unit-holders of the income trust if

(a) the trustees resolve that the rights under this section apply to a transaction or proposed transaction, or

(b) a resolution is submitted to the unit-holders that, under the terms of the trust instrument, give rise to the rights under this section.

(2) In addition to any other right the unit-holder may have, a unit-holder who complies with this section is entitled, when the action approved by the resolution from which the unit-holder dissents or an order made under subsection 43 (2) (d) becomes effective, to be paid by the trustees, out of the income trust assets, the fair value of the units in respect of which the unit-holder dissents, determined as of the close of business on the day before the resolution was adopted or the order was made.

(3) A dissenting unit-holder may claim under this section only with respect to all the units of a class held on behalf of any one beneficial owner of units.

(4) A dissenting unit-holder shall send to the trustees, at or before any meeting of unit-holders at which a resolution referred to in subsection (1) is to be voted on, a written objection to the resolution, unless the trustees did not give notice to the unit-holder of the purpose of the meeting and of the unit-holder's right to dissent.

(5) The trustees shall, within ten days after the unit-holders adopt the resolution, send to each unit-holder who has filed the objection referred to in subsection (4) notice that the resolution has been adopted, but such notice is not required to be sent to any unit-holder who voted for the resolution or who has withdrawn the unit-holder's objection.

(6) A dissenting unit-holder shall, within twenty days after receiving a notice under subsection (5) or, if the unit-holder does not receive such notice, within twenty days after learning that the resolution has been adopted, send to the trustees a written notice containing

(a) the unit-holder's name and address;

(b) the number and class of units in respect of which the unit-holder dissents; and

(c) a demand for payment of the fair value of such units.

(7) On sending a notice under subsection (6), a dissenting unit-holder ceases to have any rights as a unit-holder other than to be paid the fair value of the unit-holder's units as determined under this section except where

(a) the unit-holder withdraws that notice before the trustees make an offer under subsection (8),

(b) the trustees fail to make an offer in accordance with subsection (8) and the unit-holder withdraws the notice, or

(c) the trustees revoke the resolution or abandon the transaction that gave rise to the dissent right,

in which case the unit-holder's rights are reinstated as of the date the dissenting unit-holder sent notice under subsection (6).

(8) The trustees of an income trust shall, not later than seven days after the later of the day on which the action approved by the resolution is effective or the day the trustees received the notice referred to in subsection (6), send to each dissenting unit-holder who has sent such notice a written offer to pay for the unit-holder's units in an amount considered by the trustees to be the fair value, accompanied by a statement showing how the fair value was determined.

(9) Every offer made under subsection (8) for units of the same class or series shall be on the same terms.

(10) The trustees of an income trust shall pay for the units of a dissenting unit-holder within ten days after an offer made under subsection (8) has been accepted, but the offer lapses if the trustees do not receive, within thirty days after the offer has been made, written notice that the offer has been accepted.

(11) If the trustees fail to make an offer under subsection (8), or if a dissenting unit-holder fails to accept an offer, the trustees may, within fifty days after the action approved by the resolution is effective or within such further period as the court may allow, apply to the court to fix a fair value for the units of any dissenting unit-holder.

(12) If the trustees fail to apply to the court under subsection (11), a dissenting unit-holder may apply to the court for the same purpose within a further period of twenty days or within such further period as the court may allow.

(13) A dissenting unit-holder is not required to give security for costs in an application made under subsection (11) or (12).

(14) On an application to the court under subsection (11) or (12),

(a) all dissenting unit-holders whose units have not been paid for shall be joined as parties and are bound by the decision of the court; and

(b) the trustees shall notify each affected dissenting unit-holder of the date, place and consequences of the application and of their right to appear and be heard in person or by counsel.

(15) On an application to the court under subsection (11) or (12), the court may determine whether any other person is a dissenting unit-holder who should be joined as a party, and the court shall then fix a fair value for the units of all dissenting unit-holders.

(16) The court may in its discretion appoint one or more appraisers to assist the court to fix a fair value for the units of the dissenting unit-holders.

(17) The final order of the court shall be rendered in favour of each dissenting unit-holder for the amount of the units, as fixed by the court, and directing that the trustees shall make payment of the amount out of the income trust assets.

(18) The court may in its discretion allow a reasonable rate of interest on the amount payable to each dissenting unit-holder from the date the action approved by the resolution is effective until the date of payment.

Comment: The dissent and appraisal right is generally an expensive remedy for a shareholder to invoke, particularly where there are adequate market substitutes. Thus, the dissent and appraisal right may be illusory to investors in certain types of widely-held or highly-liquid publicly traded issuers. On the other hand, the existence of the dissent and appraisal right may serve to limit the flexibility of certain fundamental changes that would trigger the right, such as continuances, amalgamations and certain recapitalizations.

The remedy is value-reducing to the extent that it constitutes an obstacle to legitimate transactions without any meaningful offsetting protections for investors. A final, serious difficulty is deciding what triggering events should give rise to the dissent and appraisal right. Triggering events under corporate law such as amalgamating two or more corporations, changing the restrictions on what businesses may be carried on, imposing or removing restrictions on share transfers, carrying-out going private transactions or carrying-out squeeze-out transactions may have limited analogues for income trusts and even under corporate law sometimes are counter-intuitive. Arguably, a change of governing law should only give rise to a dissent and appraisal right if it adversely affects unit-holders in a substantive way – something that would be avoided if the Act were uniformly adopted.

As in the case of the oppression remedy and the derivative action, the Act does not, for the time being, adopt the dissent and appraisal remedy as a universal, mandatory rule. However, if the unit-holders of an income trust decide for themselves that the dissent and appraisal remedy would add value to their trust, they should be free to adopt it either on formation of the trust or by amending the trust instrument. Indeed, as in the case of the oppression remedy and the derivative action, demand for the dissent and appraisal right may be starting to develop in the marketplace. Consistent with this customized approach, the appropriate triggering events may be specified in the trust instrument. In addition, as under corporate arrangements, the court has the power to extend the statutory dissent and appraisal remedy to dissenting unit-holders.

If the dissent and appraisal remedy is available in the Act, trustees might choose to have it apply on a transaction-specific basis. For example, Multilateral Instrument 61-101 (*Protection of Minority Security Holders in Special Transactions*)

provides an exemption from the majority-of-the-minority approval requirements for business combinations and related-party transactions where a statutory or contractual appraisal remedy is available and certain other criteria are met.

The Act, therefore, includes a general dissent and appraisal right, modelled on s. 190 of the CBCA, except that the right would apply only: (a) to the extent, and upon the triggering events, specified in the applicable trust instrument, or, where the trust instrument so provides, to specific transactions designated by the trustees; or (b) where specifically ordered by the court as part of a statutory arrangement (Recommendation 18).

PART 4 – POWERS AND DUTIES OF TRUSTEES

Disqualification of individual trustees – income, subsidiary trusts

27 An individual is disqualified from being a trustee of a trust if the individual

(a) is less than eighteen years of age;

(b) is of unsound mind and has been so found by a court in the enacting jurisdiction or elsewhere; or

(c) has the status of bankrupt.

Qualification of corporate trustees – income trusts

28(1) Subject to subsection 30 (1), a body corporate is qualified to be a trustee of an income trust if it is incorporated or licensed

(a) under [*insert name of local enactment for incorporation or licensing of trust companies*]; or

(b) under the law of Canada, or of another province or territory of Canada providing for the incorporation or licensing of trust companies.

(2) Despite subsection (1), if a body corporate is incorporated under a law other than a law referred to in subsection (1), on application by an income trust or the body corporate, the Commission may order that the body corporate is qualified to be a trustee of an income trust if the Commission is satisfied that to do so is not prejudicial to the public interest.

(3) The Commission may impose conditions, restrictions or requirements in an order made under subsection (2).

Qualification of corporate trustees – subsidiary trusts

29 Subject to section 30, a body corporate is qualified to be a trustee of a subsidiary trust if it is incorporated

(a) under [*insert name of local enactment for the incorporation or licensing of trust companies*];

(b) under the law of Canada or another province or territory of Canada providing for the incorporation or licensing of trust companies;

(c) under [*insert name of local enactment for the incorporation of general business corporations*]; or

(d) under the law of Canada or of another province or territory of Canada providing for the incorporation of business corporations.

Disqualification of corporate trustees

30(1) A body corporate is disqualified from being a trustee of a trust if the body corporate has the status of bankrupt.

(2) If it considers it in the public interest to do so, the Commission may, on its own motion or on application by an interested person, order that paragraphs 29(c) and (d) do not apply to a subsidiary trust or a class of subsidiary trusts.

Comment: Under the CBCA, only individuals (*i.e.* not corporations) can be directors.

Income trusts, however, have both corporate and individual trustees. The Act confirms that trustees of an income trust or a subsidiary trust can consist of individuals or corporations.

There appears to be no compelling reason to mandate that income trusts jettison corporate trustees in favour of individual trustees. More particularly, if an income trust chooses a corporate trustee, it will continue to have the power to choose as its trustee a corporation formed or licensed under federal or provincial trust company legislation. As well, if the provincial securities commission provides an exemption, an income trust would have the power to choose as its trustee an ordinary business corporation.

In effect, under the Act, the corporate trustee of an income trust must be a trust company (unless the provincial securities commission specifically allows an ordinary business corporation to act), while a corporate trustee of a subsidiary trust could additionally be an ordinary business corporation (unless the provincial securities commission, acting in the public interest, orders otherwise with respect to a particular subsidiary trust or class of subsidiary trusts) (Recommendation 25). The trustees of the parent income trust still must exercise care in selecting the trustee of any subsidiary trust, thereby (along with the provincial securities commission) protecting the interests of public unit-holders.

To facilitate flexibility in the appointment of corporate trustees for income trusts and subsidiary trusts, provincial trust company legislation may have to be amended to expressly allow ordinary business corporations to act as trustees of income trusts or subsidiary trusts. The Act is only enabling legislation. It would not override provincial laws regulating the operation of corporations offering their services to the public as trustees.

Ceasing to be trustee

31(1) A trustee of a trust ceases to hold office,

(a) in the case of an individual, when the trustee dies;

(b) in the case of a body corporate, when the body corporate dissolves;

(c) when the trustee resigns;

(d) when the trustee is removed in accordance with section 12; or

(e) when the trustee becomes disqualified under sections 27 or 30.

(2) A resignation of a trustee becomes effective at the time a written resignation is sent to the other trustees, or at the time specified in the resignation, whichever is later.

(3) Despite subsection (2), if a resignation of a trustee of an income trust will result in no trustees remaining in office with respect to the trust, the resignation is not effective unless

(a) approved by the court, or

(b) delivered on or after the appointment of a trustee in bankruptcy, receiver, receiver-manager or interim receiver to administer all or substantially all of the income trust assets.

Comment: Corporate directors are free to resign at any time. Finding replacement directors is an issue for the remaining directors or for the shareholders, not for the director who resigns.

Trustees are not generally able to resign until a replacement trustee is appointed – generally concurrently. The inability to resign could pose a significant problem should a trust be on the verge of insolvency. The incumbent trustees would want to resign in order to minimize their personal liability for statutory obligations such as wage payments to employees, withholding taxes and environmental claims. However, at that point, no responsible person could be expected to step into the shoes of the resigning trustee. Nor is it fair to allow some trustees to leave at the expense of the last trustee on board. Accordingly, the last trustee should be permitted to resign in favour of the prior or concurrent appointment of a trustee in bankruptcy, receiver or receiver-manager of the trust estate.

The Act, therefore, provides that trustees are free to resign at any time provided that at least one trustee remains. The last trustee of an income trust or subsidiary trust is permitted to resign at any time: (a) if approved by the court; or (b) on or after the appointment of a trustee in bankruptcy, receiver, receiver-manager or interim receiver to administer the whole, or substantially the whole, of the assets of the trust (Recommendation 30).

Duty to manage or supervise management

32(1) The trustees of a trust shall

(a) administer or supervise the administration of the affairs of the trust, and

(b) manage or supervise the management of the assets of the trust.

(2) The trustees of a trust may, but are not obliged to, comply with a direction of the unit-holders of a trust.

(3) Subsection (2) does not apply to a trust established before this Act came into force.

Comment: Trustee functions, duties, liabilities and immunities are critical subject matters for the Act. It is as important for maximizing enterprise value that income trusts attract and retain committed, honest and capable trustees as it is that corporations attract and retain committed, honest and capable directors.

As a general principle, the Act seeks parity for trustees with the functions, duties, liabilities and immunities of corporate directors. The investment community benefits from consistency and ease of understanding. Boards and trustees benefit from having substantially the same or similar roles and obligations, the same exposure to liability and the same indemnification rights. If parity is achieved, income trusts will be in the same position in recruiting and retaining trustees as corporations are with respect to recruiting and retaining directors.

Unlike most publicly traded corporations, most income trusts are not direct operating entities. Rather, the typical income trust merely holds property consisting of shares, debt obligations, real estate, intellectual property or other assets that generate income from property. Akin to directors, therefore, trustees should have power to manage, or supervise the management of, the property (not the business) and affairs of the trust. A similar formulation has, in the corporate realm, accommodated the widest conceivable variety of board-management configurations and extent of board delegation to management – a flexibility that is needed as much for income trusts as it is needed for publicly traded corporations.

Under the CBCA, directors have the power to manage, or supervise the management of, the business and affairs of the corporation. Thus, under corporate law, directors, not shareholders, are entrusted with managing or supervising the management of the business and affairs of the corporation. Shareholders cannot generally pass resolutions that bind the board. The remedy of the shareholders is to replace the directors.

The Act, therefore, sets out mandatory rules whereby trustees of an income trust have the power to manage, or supervise the management of, the property and affairs of the income trust and, similarly, trustees of a subsidiary trust have the power to manage, or supervise the management of, the property and affairs of the subsidiary trust. In addition, unit-holders no longer have the power to direct or compel the

trustees to take particular actions. This latter provision does not apply to trusts formed in the enacting jurisdiction before the Act goes into effect unless the trust instrument is amended to provide otherwise (Recommendation 19).

Delegation

33(1) The trustees of a trust may appoint,

(a) from their number, a managing trustee or a committee of trustees;

(b) a manager pursuant to a management agreement,

and delegate to the managing trustee, committee or manager any of the powers of the trustees.

(2) Despite subsection (1), no managing trustee, committee or manager has authority to

(a) submit to the unit-holders any question or matter requiring the approval of the unit-holders;

(b) fill a vacancy among the trustees or in the office of auditor;

(c) appoint additional trustees;

(d) approve a management information circular required under the *Securities Act*;

(e) approve a take-over bid circular or trustees' circular prepared in relation to a take-over bid;

(f) approve any financial statements required under the *Securities Act*; or

(g) amend the trust instrument.

(3) Subsection (2) does not apply to a trust established before this Act came into force.

Comment: As it is in the case of corporations, the power to delegate is important in the case of income trusts. Trustees may delegate their powers to internal management, to committees of trustees or to external, or third party, managers. In the latter case, trustees enter into a management agreement setting out the rights and obligations of the parties, including the compensation of the external manager. There tends to be a much greater variety of management arrangements in the case of income trusts than prevail in the case of publicly traded corporations. Thus, management arrangements tend to be highly customized to fit the circumstances of the particular trust, and the timing of the management arrangements necessarily meets the expectations of initial and subsequent investors who buy units in the trust.

The Act codifies the power of trustees of an income trust or a subsidiary trust to delegate any part of their authority to internal (including a committee of trustees)

or external management. There are certain non-delegable powers, *viz.*: submitting questions for the approval of unit-holders; appointing or removing trustees except to fill vacancies or as otherwise provided in the Act; appointing or removing an auditor; approving management information circulars; and approving audited financial statements. Trustees are able to delegate the power to issue or repurchase units in the trust. These rules do not apply to income trusts or subsidiary trusts that were formed before the Act goes into effect unless the trust instrument is amended to provide otherwise (Recommendation 20).

Duties of trustees

34 Every trustee of a trust, in exercising the trustee's powers and discharging the trustee's duties to the unit-holders, shall

(a) act honestly, in good faith and with a view to the best interests of all unit-holders generally; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

No exculpation

35 No provision in a contract, the trust instrument or a resolution relieves a trustee from the duty to act in accordance with this Act or the regulations or relieves the trustee from liability for a breach of this Act or the regulations.

Comment: The CBCA provides that every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall: (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The first duty is commonly referred to as the "statutory duty of loyalty". The second is commonly referred to as the "duty of care".

Recently, the Supreme Court of Canada in *Peoples Department Stores Inc. v. Wise* (2004), 244 D.L.R. (4th) 564 (S.C.C.) held that, while the duty of loyalty of a director of a CBCA corporation is owed exclusively to the corporation (and not directly to other stakeholders such as shareholders and creditors), the duty of care is owed not only to the corporation but also to other stakeholders.

A corporation is a separate legal person, while an income trust is not. Trustees of an income trust should, therefore, owe their duty of care directly to unit-holders as a whole – the position both at common law and under the *Civil Code of Quebec*. Since there seems to be no compelling reason to extend the duty of care of trustees to creditors, the Act does not state that trustees owe a duty of care to creditors or other stakeholders.

Nor is it possible to map the fiduciary duties of trustees of an income trust onto that of corporate directors. Directors owe their fiduciary duties exclusively to the corporation and not to shareholders or any other stakeholders. However, unlike corporations, income trusts are not separate legal persons. Trustees must owe their

duties of loyalty directly to unit-holders as a general body. Thus, the Act states that the duties of loyalty and care of trustees are owed exclusively to unit-holders as a whole.

There may be theoretical differences between the duties of loyalty and care imposed on trustees at common law and the statutory duties of loyalty and care imposed on corporate directors and officers. *Prima facie*, the duties imposed on trustees may be higher than the duties imposed on directors and officers. However, the duties imposed on trustees may be varied in the trust instrument, whereas the CBCA, and corporate statutes modelled on the CBCA, generally prevent any lowering of the standards imposed on directors and officers. For example, according to the Goodmans Survey, trust instruments generally adopt CBCA standards for the duties of loyalty and care, not the stricter common law standards imposed on trustees. The implicit assumption here is that the corporate standards are more appropriate to an environment where, like corporate directors, trustees of an income trust are intended to take commercial risks, not merely to preserve the *corpus* of the trust. In fashioning a special set of rules for the trustees of an income trust, the intention is to not derogate in any way from the duties imposed on trustees of other types of trusts.

The Act, therefore, states that trustees of an income trust owe their fiduciary duties exclusively to unit-holders as a general body and that the trustees of a subsidiary trust owe their fiduciary duties exclusively to beneficiaries of the subsidiary trust as a general body (Recommendation 21).

The Act also states that trustees of an income trust owe their duties of care exclusively to unit-holders as a general body, that trustees of a subsidiary trust owe their duties of care to beneficiaries of the subsidiary trust as a general body and that, in both cases, the standard of care is to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances (Recommendation 22).

The Act states that no provision in a trust instrument, contract or a resolution relieves a trustee from the duty to act in accordance with the Act or relieves the trustee from liability for breach of the Act (Recommendation 23).

Disclosure of interest

36(1) A trustee of a trust shall disclose to the other trustees of the trust, in writing or by requesting to have it entered in the minutes of meetings of trustees or of meetings of committees of trustees, the nature and extent of any interest that the trustee has in a material contract or material transaction, whether made or proposed, with the trust, if the trustee

(a) is a party to the contract or transaction;

(b) is a trustee, director or an officer, or a person acting in a similar capacity, of a party to the contract or transaction; or

(c) has a material interest in a party to the contract or transaction.

(2) Subject to subsection (3), the disclosure required by subsection (1) shall be made

(a) at the meeting at which a proposed contract or transaction is first considered;

(b) if the trustee was not, at the time of the meeting referred to in clause (a), interested in a proposed contract or transaction, at the first meeting after the trustee becomes so interested;

(c) if the trustee becomes interested after a contract or transaction is made, at the first meeting after the trustee becomes so interested; or

(d) if a person who is interested in a contract or transaction later becomes a trustee, at the first meeting after the person becomes a trustee.

(3) If a material contract or material transaction, whether entered into or proposed, is one that, in the course of the management of the trust assets or administration of the affairs of the trust, would not require approval by the trustees or unit-holders, a trustee shall disclose, in writing to the other trustees of the trust, or request to have it entered in the minutes of the meeting of trustees or of the meeting of a committee of trustees, the nature and extent of the trustee's interest immediately after the trustee becomes aware of the contract or transaction.

(4) A trustee required to make a disclosure under subsection (1) shall not vote on any resolution to approve the contract or transaction unless the contract or transaction

(a) relates primarily to the trustee's remuneration as a trustee of the trust;

(b) is for indemnity under section 40 or insurance under section 41; or

(c) is with an affiliated entity.

(5) For the purposes of this section, a general notice to the other trustees declaring that a trustee is to be regarded as interested, for any of the following reasons, in a contract or transaction made with a party, is a sufficient declaration of interest in relation to the contract or transaction:

(a) the trustee is a trustee, director or officer, or a person acting in a similar capacity, of a party referred to in clause (1) (b) or (c);

(b) the trustee has a material interest in the party; or

(c) there has been a material change in the nature of the trustee's interest in the party.

(6) The unit-holders of the income trust may examine the portions of any minutes of meetings of trustees or of committees of trustees that contain disclosures under this section, and any other documents that contain those disclosures, during usual business hours.

(7) A contract or transaction for which disclosure is required under subsection (1) is not invalid, and the trustee is not accountable to the unit-holders for any profit realized from the contract or transaction, because of the trustee's interest in the contract or transaction or because the trustee was present or was counted to determine whether a quorum existed at the meeting of trustees or a committee of trustees that considered the contract or transaction, if

(a) disclosure of the interest was made in accordance with subsections (1) to (5);

(b) the trustees approved the contract or transaction; and

(c) the contract or transaction was reasonable and fair to the unit-holders when it was approved.

(8) Even if the conditions of subsection (7) are not met, a trustee, acting honestly and in good faith, is not accountable to the unit-holders for any profit realized from a contract or transaction for which disclosure is required under subsection (1), and the contract or transaction is not invalid by reason only of the interest of the trustee in the contract or transaction, if

(a) the contract or transaction is approved or confirmed by a special resolution;

(b) disclosure of the interest was made to the unit-holders in a manner sufficient to indicate its nature before the contract or transaction was approved or confirmed; and

(c) the contract or transaction was reasonable and fair to the unit-holders when it was approved or confirmed.

(9) If a trustee fails to comply with this section, the court may, on application of another trustee or any unit-holder, set aside the contract or transaction on any terms that it thinks fit, or require the trustee to account to the unit-holders for any profit or gain realized on it, or do both those things.

Comment: Corporate legislation contains a code governing conflicts of interest for directors and officers. The statutory code sets out a mandatory, minimum standard. It does not preclude the corporation from adopting higher standards in its by-laws, corporate codes of conduct, executive employment agreements or management contracts.

The default conflict of interest rule that applies to trustees at common law is certainly higher than the statutory minimum standard set out in the CBCA. At common law, trustees are held to a strict duty of utmost good faith such that trustees cannot allow their own interests to conflict with the interests of beneficiaries. Trustees have been rendered liable to account for profits made even though no beneficiary suffers damages from the loss of a trust asset. However, in practice, it is possible to modify the strictness of the default common law rule through exculpatory provisions in the trust instrument.

Historically, corporate law also held directors and officers to a strict standard. The CBCA conflict of interest regime substitutes for a strict common law prohibition a more permissive regime with checks and balances designed to ensure that transactions in which directors and officers are conflicted simulate arm's length transactions.

If the corporate law standards applied, trustees would either have to avoid material conflicts of interest or ensure that these conflicts of interest were fully disclosed, were reasonable and fair to unit-holders and received approval either from a majority of disinterested trustees or from not less than 2/3rds of the votes cast by unit-holders. It is considered a fair trade-off to make the new regime a mandatory, minimum standard so that it may not be further lowered in the trust instrument.

The Act, therefore, contains a minimum conflict of interest code modelled on s. 120 of the CBCA providing that material conflicts of interest must be disclosed at the earliest moment, that, except in limited circumstances, trustees must abstain from voting for the approval of contracts or transactions in which they are interested, that a majority of the disinterested trustees or not less than 2/3rds of the votes cast by voting unit-holders must approve the interested contract or transaction and that the contract or transaction must be reasonable and fair to the unit-holders at the time that it is made. If these conditions are satisfied, the contract or transaction is not void or voidable, and the trustees have no liability to account for any profit they may make as a result of the contract or transaction. However, trustees are expressly permitted to vote on their own compensation as trustees, contracts of indemnity or insurance in their own favour and contracts or transactions involving subsidiary or affiliated entities (Recommendation 24).

Trustee liability – debt, contract

37(1) This section does not apply in respect of a debt instrument or contract

(a) entered into before this section comes into force; or

(b) that specifically provides for the personal liability of a trustee that is a party to the instrument or contract.

(2) If a liability of a trustee arises as a result of or in relation to the performance of the trustee's duties as trustee under a contract or in respect of any debt obligation issued by a trustee, the trustee is not liable for any amount in excess of the realizable value of the trust assets less the aggregate of all liabilities associated with the trust.

Comment: Under corporate law, directors are generally not liable for the debts and obligations of the corporation, which is a separate legal person. Despite this general rule, there is a large body of federal and provincial statute law that imposes liabilities (and frequently strict liabilities) on directors of corporations in a wide variety of circumstances. In these instances, while the corporation is primarily liable for the underlying claim, directors have secondary liability. All directors can

be sued with respect to the corporation's obligation, but the directors generally have a right of indemnification from the primary obligant, the corporation, and a right of contribution from the other directors.

To place trustees in approximately the same position as directors, the general liability of trustees is limited to the trust assets, and trustees have a right of indemnification out of those assets, subject to very limited qualifications. Except in instances where directors would be personally liable (such as for unpaid employee wages and source deductions), trustees do not incur liability beyond the assets of the trust. Trustees continue to have direct liability for unpaid employee wages and source deductions, as there is no other primary obligant. In these instances, the trustees would have a right of indemnification out of the trust assets, but their liability cannot be limited to those assets without making trustees better off than unindemnified directors.

The Act, therefore, provides that, unless the debt instrument or other contract expressly states otherwise, the liability of trustees of an income trust or a subsidiary trust under any debt instrument or other contract expressly entered into in their capacity as trustees be limited to the *corpus* of the trust. This rule does not apply to debt instruments or other contracts entered into by trustees in their capacity as such before the Act goes into effect. Nor does it derogate from an exclusion or limitation of liability contained in any debt instrument or other contract whether entered into before or after the Act becomes effective (Recommendation 26).

Trustee liability – general

38(1) This section does not apply in respect of

(a) a liability arising under section 34 or 36;

(b) a liability arising from disclosure made, or the failure to make disclosure required, under the *Securities Act*; or

(c) a liability arising under a debt instrument or contract.

(2) If a trustee of a trust is required to make a payment under this Act, or if any other liability of a trustee arises as a result of or in relation to the performance of the trustee's duties as trustee, the trustee is not liable for any amount in excess of the realizable value of the trust assets less the aggregate of all liabilities associated with the trust.

Comment: Recourse against trustees for non-contractual (*e.g.* tort) claims is limited to the *corpus* of the trust if the liability arises as a result of or in relation to the performance of the trustee's duties as trustee.

These rules do not apply retroactively and do not apply to statutory liability such as for breach of the duties of loyalty or care set out in the Act or for misrepresentation under securities legislation. The rules roughly level the playing fields between trustees and directors and between unit-holders and shareholders. Unit-holders continue to be protected by fiduciary duties and the duty of care applicable to

trustees and by other relevant legislation (such as liability for prospectus and continuous disclosure misrepresentation in securities legislation) (Recommendation 27).

Indemnification – specific payments

39(1) In this section, a reference to indemnity means indemnity to be paid out of the assets held in trust.

(2) If a trustee of a trust makes a payment under section 23, 26, 37, 38, 40 or 43 the trustee shall be indemnified with respect to the payment and against all costs, charges and expenses related to the payment.

(3) A payment referred to in subsection (2) may be paid directly to the intended recipient out of the assets held in trust.

Indemnification – general

40(1) In this section, a reference to indemnity means indemnity to be paid out of the assets held in trust.

(2) The trustees of a trust may indemnify a trustee, a former trustee or another person who acts or acted, at the trustees' request, as a trustee, director, officer or a person acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred in respect of any civil, criminal, administrative, investigative or other proceeding in which the trustee, former trustee or other person is involved because of the association with the income trust, subsidiary trust or other entity.

(3) The trustees may advance money to a trustee, former trustee or other person for the costs, charges and expenses of a proceeding referred to in subsection (2).

(4) A trustee, former trustee or other person that has received money under subsection (2) shall repay the money if the person does not fulfill the conditions of clause (5) (a) or (b).

(5) The trustees may not approve indemnity under subsection (2) unless the trustee, former trustee or other person

- **(a) acted honestly and in good faith with a view to the best interests of the unit-holders generally, or, as the case may be, the best interests of the other entity for which the person acted as a trustee, director, officer or a person acting in a similar capacity at the trustees' request; and**
- **(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the trustee, former trustee or other person had reasonable grounds for believing the conduct was lawful.**

(6) The trustees may, with the approval of the court, approve indemnity for a trustee, former trustee or other person referred to in subsection (2), or advance money under subsection (3), in respect of an action by or on behalf of the trustees or other entity to procure a judgment in favour of the unit-holders, the trustees or the other entity, to which the person is made a party because of the person's association with the trust or other entity as described in subsection (2), against all costs, charges and expenses reasonably incurred by the person in connection with the action, if the person fulfils the conditions set out in clause (5) (a) or (b).

(7) Despite subsection (2), a trustee, former trustee or other person referred to in that subsection is entitled to indemnity in respect of all costs, charges and expenses reasonably incurred in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the person is subject because of the person's association with the trust or other entity as described in subsection (2), if the person

(a) was not judged by the court or other competent authority to have committed any fault or omitted to do anything that the person ought to have done; and

(b) fulfils the conditions set out in clause (5) (a) or (b).

(8) A trustee, former trustee or other person referred to in subsection (2) may apply to the court for an order approving an indemnity under this section and the court may make the order and make any further order that it sees fit.

(9) On an application under subsection (8), the court may order notice to be given to any interested person and the person is entitled to appear and be heard in person or by counsel.

Comment: Trustees have a general right of indemnification out of trust assets, and indemnification is unavailable only if the trustee was not acting honestly and in good faith with the view to the best interests of the unit-holders as a whole or, in the case of a criminal or administrative proceeding enforced by a monetary penalty, the trustee had no reasonable grounds for believing that his or her conduct was lawful. Indemnification should not depend on whether the trustee complied with the trust instrument. Rather, like directors under the CBCA, trustees should have a right to indemnification if they do not run afoul of the foregoing conditions and are not adjudged, by a court or other competent authority, to have committed any fault or omitted to do anything that they ought to have done.

Adoption of this rule places trustees in approximately the same position as directors. Indemnification of trustees does not, in practice, amount to a significant departure in the law or enrich trustees at the expense of unit-holders. Nevertheless, indemnification is particularly important in the case of trustees to the extent that their liability is primary, not secondary. Indemnification is also important to ensure that income trusts continue to attract and retain the best trustees available.

The Act, therefore, provides that trustees of an income trust or a subsidiary trust have rights of indemnification out of trust assets similar to those available to directors under the CBCA, provided that the trustees comply with their fiduciary duties and, in the case of criminal or administrative proceedings enforced by a monetary penalty, have reasonable grounds to believe that their conduct is lawful. If these conditions are satisfied, a trustee has the right to be indemnified so long as the trustee was not found by the court, or other competent authority, to have committed any fault or omitted to do anything that he or she ought to have done (Recommendation 28).

Insurance

41 The trustees of a trust may purchase and maintain insurance for the benefit of a trustee, former trustee or other person referred to in subsection 40(2) against any liability incurred

(a) by the person in the person's capacity as a trustee; or

(b) by the person in the person's capacity as a trustee, director, officer or a person acting in a similar capacity, of another entity, if the person acts or acted in that capacity at the trustees' request.

Comment: Limitations on the insurance that a corporation can purchase on behalf of its directors and officers have been removed from the CBCA, leaving it to the insurance marketplace to regulate the scope of permitted coverage. Likewise, the Act permits trusts to acquire insurance for trustees free of any statutory restrictions. In addition, like directors, trustees are permitted to vote on the approval of insurance even though it clearly involves a conflict of interest. Insurance is part of the matrix of protection designed to attract and retain the best trustees available.

The Act, therefore, expressly permits trustees of income trusts or subsidiary trusts to approve the purchase of liability insurance out of trust monies and to vote thereon despite the conflict of interest (Recommendation 29).

Unsecured creditors

42 If a debt or other liability arises as a result of or in relation to the assets or affairs of a trust, a person to whom the debt or other liability is owed may claim against the assets held in trust.

Comment: The status at common law of the claims of unsecured trade creditors, other unsecured creditors and claimants with unliquidated claims against a trust is unclear. The unsecured creditor or claimant may have no claim against the trust assets *per se* because, again, the trust is not a separate legal person. According to this theory, an unsecured creditor or claimant only has a claim against the trustees. Creditors and claimants may have an indirect claim against trust assets through the doctrines of subrogation or specific performance or other legal theories. There remains much uncertainty in Canadian common law on these points, however.

The Act resolves these issues in a manner consistent with the legitimate expectations of creditors and other claimants that have business dealings directly with an income

trust or subsidiary trust and also meets the legitimate expectations of trustees and unit-holders. Thus, unsecured creditors and claimants are able to look directly to the assets of the trust, have no other right to recover from unit-holders directly and only have recourse against assets of trustees outside the *corpus* of the trust in circumstances analogous to those in which a creditor can look to directors personally. These circumstances include fraud, breach of warranty of authority or personal commission of an independent tort (such as a negligent misstatement made outside the scope of his or her duties) but not a duty of loyalty to creditors or a breach of contract claim between the creditor and the trust. Clarifying that third parties have recourse directly against trust assets is the reverse-side of the new rules regarding liability of trustees and trustee indemnification out of trust assets. Secured creditors, on the other hand, can protect themselves by taking security in the trust assets.

The Act, therefore, provides that unsecured creditors, including unsecured trade creditors and persons with unliquidated claims, of an income trust or a subsidiary trust have a direct unsecured claim against the *corpus* of the trust subject to the terms of their claim (Recommendation 31).

PART 5 – ARRANGEMENTS AND COMPULSORY ACQUISITIONS

Arrangement

43(1) In this section, "arrangement" includes

(a) an amendment to the trust instrument;

(b) a transfer of all or substantially all the assets of an income trust or an affiliated entity to another entity, subsidiary trust or body corporate in exchange for assets, money or securities of the other entity;

(c) an exchange of securities of an income trust for assets, money or other securities of another entity;

(d) the occurrence of any event specified as such in the trust instrument;

(e) the occurrence of any event specified by the trustees if the trust instrument authorizes the trustees to specify events that are arrangements for the purposes of this section; and

(f) any combination of the foregoing.

(2) In connection with an application under this section, the court may make any interim or final order it thinks fit, including, without limiting the generality of the foregoing,

(a) an order determining the notice to be given to any interested person or dispensing with notice to any person;

(b) an order appointing counsel, the fees and expenses of which are to be paid by the trustees out of the trust assets, to represent the interests of the unit-holders;

(c) an order requiring the trustees to call, hold and conduct a meeting of the unit-holders or options or rights to acquire units in such manner as the court directs;

(d) an order permitting a unit-holder to dissent under section 26; and

(e) an order approving an arrangement as proposed by the trustees or as amended in any manner the court may direct.

(3) An arrangement becomes effective on the date ordered by the court.

Comment: Section 192 of the CBCA allows a court to approve arrangements involving CBCA corporations. Among other things, statutory plans of arrangement have been extremely useful in implementing mergers involving publicly-traded target corporations. Notably, statutory arrangements have also been useful in converting corporations into trusts and converting debt obligations into equity. Arrangements are useful in complex transactions, such as tax-driven transactions or transactions where exemptions are needed under U.S. securities laws.

Currently, however, there is no analogous statutory regime applicable to trusts *per se*. Rather, efforts are sometimes made to shoe-horn trusts into statutory corporate arrangements by involving subsidiary corporations. Adoption of a statutory arrangement provision for trusts will facilitate transactions while, simultaneously, ensuring court protection of the interests of minority or dissenting unit-holders.

As in the case of corporations, the court has the power to make interim and final orders, appoint independent counsel, convene meetings of unit-holders, approve arrangements that receive the necessary approvals and are fair and reasonable, and exercise discretion to make the appraisal remedy available to dissenting unit-holders.

The Act, therefore, includes a statutory arrangement provision modelled on s. 192 of the CBCA empowering the court to approve arrangements that effect fundamental changes in the affairs of an income trust provided that the arrangement satisfies the statutory conditions and the fair and reasonable test. A trust arrangement becomes effective in accordance with the terms of the court order (Recommendation 32).

Reorganization

44(1) In this section, "reorganization" means a court order made under

(a) section 23;

(b) the *Bankruptcy and Insolvency Act* (Canada) approving a commercial proposal; or

(c) the *Companies' Creditors Arrangement Act* (Canada) approving a plan of arrangement.

(2) If an income trust or subsidiary trust is subject to an order referred to in subsection (1), the trust instrument may be amended by an order of the court to effect any change that the court considers appropriate.

(3) If the court makes an order referred to in subsection (1), the court may also

(a) authorize the issue of debt obligations associated with the trust, whether or not convertible into units of any class or having attached any rights or options to acquire units of any class, and fix the terms thereof; and

(b) appoint trustees in place of or in addition to all or any of the trustees then in office.

(4) A reorganization becomes effective on the date ordered by the court and the trust instrument is amended accordingly.

(5) A unit-holder is not entitled to dissent under section 26 if an amendment to the trust instrument is effected under this section.

Comment: Another CBCA provision that, in recent years, has proven to be a useful tool for certain transactions is s. 191, the statutory reorganization provision. Section 191 is commonly used in insolvency contexts as a companion or supplement to a plan of arrangement under the *Companies' Creditors Arrangement Act* (Canada) ("CCAA") or a commercial proposal under the *Bankruptcy and Insolvency Act* (Canada) ("BIA"). In particular, s. 191 has been used to extinguish shares that have become worthless or consolidate shares that have little residual value.

The Act, therefore, includes a statutory reorganization provision modelled on s. 191 of the CBCA empowering the court to amend trust instruments, authorize the issue of debt obligations or appoint additional or replacement trustees where the court has made an order in respect of the income trust under the CCAA or the BIA. Again, the reorganization becomes effective in accordance with the terms of the court order (Recommendation 33).

Take-over bids – compulsory and compelled acquisitions

45(1) In this section and section 46,

"dissenting offeree" means, where a take-over bid is made for all the units of a class of units, a holder of a unit of that class who does not accept the take-over bid and includes a subsequent holder of that unit who acquires it from the first-mentioned holder;

"offer" includes an invitation to make an offer;

"offeree" means a person to whom a take-over bid is made;

"offeree income trust" means an income trust the units of which are the object of a take-over bid;

"offeror" means a person, other than an agent, who makes a take-over bid, and includes two or more persons who, directly or indirectly,

(a) make a take-over bid jointly or in concert; or

(b) intend to exercise, jointly or in concert, voting rights attached to units for which a take-over bid is made;

"take-over bid" means an offer made by an offeror to unit-holders of an income trust at approximately the same time to acquire all of the units of a class of issued units, and includes an offer made by the trustees of an income trust to repurchase all of the units of a class of the units of the income trust;

"unit" means a unit, with or without voting rights, and includes

(a) a security currently convertible into a unit of an income trust; and

(b) currently exercisable options and rights to acquire a unit of an income trust or a security convertible into units of an income trust.

(2) If, within one hundred twenty days after the date of a take-over bid, the bid is accepted by the holders of not less than ninety per cent of the units of any class of units to which the take-over bid relates, other than units held at the date of the take-over bid by or on behalf of the offeror or an affiliated entity or associate of the offeror, the offeror is entitled, on complying with this section, to acquire the units held by the dissenting offerees.

(3) An offeror may acquire units held by a dissenting offeree by sending by registered mail within sixty days after the date of termination of the take-over bid and in any event within one hundred eighty days after the date of the take-over bid, an offeror's notice to each dissenting offeree stating that

(a) offerees holding not less than ninety per cent of the units to which the bid relates accepted the take-over bid;

(b) the offeror is bound to take up and pay for or has taken up and paid for the units of the offerees who accepted the take-over bid;

(c) a dissenting offeree is required to elect

(i) to transfer the dissenting offeree's units to the offeror on the terms on which the offeror acquired the units of the offerees who accepted the take-over bid, or

(ii) to demand payment of the fair value of the units in accordance with subsections (12) to (20) by notifying the offeror within twenty days after receiving the offeror's notice; and

(d) a dissenting offeree who does not notify the offeror in accordance with clause (4) (b) is deemed to have elected to transfer the units to the offeror on the same terms that the offeror acquired the units from the offerees who accepted the take-over bid.

(4) A dissenting offeree to whom an offeror's notice is sent under subsection (3) shall, within twenty days after receiving the notice, elect

(a) to transfer the units to the offeror on the terms on which the offeror acquired the units of the offerees who accepted the take-over bid; or

(b) to demand payment of the fair value of the units in accordance with subsections (12) to (20) by notifying the offeror within those twenty days.

(5) A dissenting offeree who does not notify the offeror in accordance with clause (4) (b) is deemed to have elected to transfer the units to the offeror on the same terms on which the offeror acquired the units from the offerees who accepted the take-over bid.

(6) Within twenty days after the offeror sends an offeror's notice under subsection (3), the offeror shall pay or transfer to the trustees of the offeree income trust the amount of money or other consideration that the offeror would have had to pay or transfer to a dissenting offeree if the dissenting offeree had elected to accept the take-over bid under clause (4)(b).

(7) If the trustees of the offeree income trust receive money under subsection (6), the trustees shall deposit the money in a separate account in a bank or other body corporate any of whose deposits are insured by the Canada Deposit Insurance Corporation, and shall place the other consideration in the custody of a bank or such other body corporate.

(8) The trustees of the offeree income trust are deemed to hold in trust the money or other consideration the trustees receive under subsection (6) and that trust is deemed to be separate and distinct from the income trust.

(9) The trustees of an income trust that are making a take-over bid to repurchase all of the units of a class of its units are deemed to hold in trust for the dissenting unit-holders the money and other consideration that they would have had to pay or transfer to a dissenting offeree if the dissenting offeree had elected to accept the take-over bid under clause (4)(b) and that trust is deemed to be separate and distinct from the income trust.

(10) The trustees of an income trust that are making a take-over bid shall, within twenty days after a notice is sent under subsection (3), deposit the money in a separate account in a bank or other body corporate any of whose deposits are insured by the Canada Deposit Insurance Corporation, and shall place the other consideration in the custody of a bank or such other body corporate.

(11) Within thirty days after the offeror sends a notice under subsection (3), the trustees of the offeree income trust shall,

(a) if the payment or transfer required by subsection (6) is made, register the offeror as the holder of the units that were held by dissenting offerees;

(b) give to each dissenting offeree who elects to accept the take-over bid terms under clause (4)(b) the money or other consideration to which the offeree is entitled, disregarding fractional units, which may be paid for in money; and

(c) if the payment or transfer required by subsection (6) is made and the money or other consideration is deposited as required by subsection (7), send to each other dissenting unit-holder a notice stating that

(i) the dissenting unit-holder's units have been cancelled,

(ii) the trustees or some designated person holds in trust for the dissenting unit-holder the money or other consideration to which that unit-holder is entitled as payment for or in exchange for the units, and

(iii) the trustees will, subject to subsections (12) to (20), send that money or other consideration to that unit-holder.

(12) If a dissenting offeree has elected to demand payment of the fair value of the units under clause (4) (b), the offeror may, within twenty days after it has paid the money or transferred the other consideration under subsection (6), apply to the court to fix the fair value of the units of that dissenting offeree.

(13) If an offeror fails to apply to the court under subsection (12), a dissenting offeree may apply to the court for the same purpose within a further period of twenty days.

(14) Where no application is made to the court under subsection (13) within the period set out in that subsection, a dissenting offeree is deemed to have elected to transfer the dissenting offeree's units to the offeror on the same terms that the offeror acquired the units from the offerees who accepted the take-over bid.

(15) A dissenting offeree is not required to give security for costs in an application made under subsection (12) or (13).

(16) On an application under subsection (12) or (13)

(a) all dissenting offerees referred to in clause (4) (b) whose units have not been acquired by the offeror shall be joined as parties and are bound by the decision of the court; and

(b) the offeror shall notify each affected dissenting offeree of the date, place and consequences of the application and of dissenting offeree's right to appear and be heard in person or by counsel.

(17) On an application to the court under subsection (12) or (13), the court may determine whether any other person is a dissenting offeree who should be joined as a party, and the court shall then fix a fair value for the units of all dissenting offerees.

(18) The court may in its discretion appoint one or more appraisers to assist the court to fix a fair value for the units of a dissenting offeree.

(19) The final order of the court shall be made against the offeror in favour of each dissenting offeree and for the amount for the units as fixed by the court.

(20) In connection with proceedings under this section, the court may make any order it thinks fit and, without limiting the generality of the foregoing, it may

(a) fix the amount of money or other consideration that is required to be held in trust under subsection (7) or (8);

(b) order that that money or other consideration be held in trust by a person other than the trustees of the income trust that is the subject of the bid;

(c) allow a reasonable rate of interest on the amount payable to each dissenting offeree from the date that the offeror receives notice of the election under clause (4) (b) to the date of payment; and

(d) order that any money payable to a unit-holder who cannot be found be paid to the *[specify body, and, if necessary, specify means by which a payment can be made out by that body]*.

Comment: Under corporate law, a compulsory purchase is a transaction in which, following a successful take-over bid of 90% or more of the minority-held shares of a target corporation, the successful bidder may expropriate the dissenting minority interest. Compulsory purchases are provided for under Part XVII of the CBCA. A mechanism to cash-out the interests of dissenting shareholders is important in striking a balance between the interests of the majority and the interests of the minority. Apart from transactions to which Multilateral Instrument 61-101 (*Protection of Minority Security Holders in Special Transactions*) apply, securities laws do not provide a mechanism to cash-out the interests of dissenting unit-holders.

In practice, compulsory purchases are not used frequently, particularly in light of MI 61-101 (and its predecessors, OSC Policy Statement 9.1 and OSC Rule 61-501) and, in the case of corporations, the statutory arrangement mechanism.

Compulsory acquisitions following a take-over bid are generally addressed in trust instruments – typically as an analogue of s. 206 of the CBCA. Provision for a statutory arrangement provision applicable to trusts reduces the need for a compulsory acquisition regime to effect friendly take-overs. However, a compulsory acquisition is still needed to eliminate the minority in the case of a hostile take-over bid. Also, some trust instruments contain compulsory acquisition mechanisms that have been unworkable, and most trust instruments do not allow a dissenting unit-holder to seek fair value in court. Hence, to provide uniformity of treatment, to ensure that all trusts have workable compulsory acquisition provisions particularly in hostile bid situations and to reduce the length of trust instruments, a compulsory acquisition regime patterned after s. 206 of the CBCA is included in the Act.

The Act, therefore, includes a compulsory acquisition provision to facilitate take-over bids for all units of income trusts patterned after s. 206 of the CBCA. A dissenting offeree is entitled to challenge the fair value of the offeror's buyout price (Recommendation 34).

Obligation to acquire units

46(1) If a unit-holder does not receive an offeror's notice under subsection 45(3), the unit-holder may

(a) within ninety days after the date of termination of the take-over bid, or

(b) if the unit-holder did not receive an offer pursuant to the take-over bid, within ninety days after the later of

(i) the date of termination of the take-over bid; and

(ii) the date on which the unit-holder learned of the take-over bid,

require the offeror to acquire those units.

(2) If a unit-holder requires the offeror to acquire units under subsection (1), the offeror shall acquire the units on the same terms under which the offeror acquired or will acquire the units of the offerees who accepted the take-over bid.

Comment: Under corporate law, a compelled purchase is the countervail of a compulsory purchase. In a compelled purchase, a shareholder whose interest was not acquired as part of the successful bid for 90% or more of the shares may force the bidder to acquire the shareholder's interest.

Again, while minority shareholders do not appear to invoke the compelled purchase provision often, the true measure of its value may be in its disciplining effect. To ensure that unit-holders enjoy at least the same level of protection as minority shareholders of publicly traded corporations, the Act contains a provision similar to s. 206.1 of the CBCA. Section 206.1, which was only introduced as part of the reform of the CBCA that took place in November 2001, provides that a dissenting

offeree has the right to compel the offeror under a take-over bid to acquire his or her minority interest. As under the CBCA, once the take-over bid receives 90% acceptance (excluding units held by the bidder or affiliated entities or associates of the bidder), the unit-holder triggering the forced purchase is only able to do so on the terms of the successful take-over bid. The unit-holder does not have the right to contest price where arm's length unit-holders representing 90% or more of the relevant units have accepted that price. Finally, like the CBCA, only in an issuer bid is the target trust required to purchase the units of the minority. In other circumstances, the minority could force the third party offeror (rather than the target trust) to purchase the units.

To protect minority unit-holders in a change of control transaction, the Act, therefore, includes a compelled acquisition provision patterned after s. 206.1 of the CBCA (Recommendation 35).

PART 6 – GENERAL

Power to make regulations

47 The Lieutenant Governor in Council may make regulations respecting those matters for which this Act provides that requirements or other matters be prescribed.

Consequential Amendment to the Partnerships Act

48 Section 2 of the [*equivalent section in the Partnerships Act of the enacting jurisdiction*] is repealed and the following substituted:

Partnerships Act (Ontario)

2(1) Partnership is the relation that subsists between persons carrying on a business in common with a view to profit.

(2) Despite subsection (1), the following are not partnerships within the meaning of this Act:

- **(a) the relation between the members of a company or association that is incorporated by or under the authority of any special or general Act in force in the [*enacting jurisdiction*] or elsewhere, or registered as a corporation under any such Act;**
- **(b) the relation between unit-holders of an income trust, subsidiary trust or mutual fund within the meaning of the Income Trusts Act.**

Comment: Partnership legislation is amended to stipulate that the relationship among unit-holders in an income trust, a subsidiary trust or a mutual fund is not a partnership to forestall an argument that trustees could be carrying on a business as agents for unit-holders as principals and that the relationship amongst the unit-holders is that of partnership. It is desirable to amend provincial and territorial partnership legislation to add a provision akin to that stating that the relationship among shareholders of a corporation is not that of partnership.

This amendment does not constitute all consequential amendments that may be necessary in an enacting jurisdiction. The amendment has been structured as an amendment in accordance with Recommendation 9 of the Report. It refers to the *Partnerships Act*, R.S.O. 1990, c. P.5 for illustrative purposes. Complementary amendments to trust companies, conflicts of laws regarding trusts, business corporations and securities legislation may also be necessary (Recommendation 9).

Commencement of Act

49 This Act shall come into force on a day fixed by Proclamation.