UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION

UNIFORM TRUSTEE ACT

FINAL REPORT OF THE WORKING GROUP

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Whitehorse, Yukon
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Origins and Purpose of the *Uniform Trustee Act*

[1] The *Uniform Trustee Act* is the result of a project initiated by the Civil Section of the Uniform Law Conference of Canada (ULCC) in 2008. In establishing the project, the ULCC directed that the Uniform Act should be based on the 2004 Report of the British Columbia Law Institute: *A Modern Trustee Act for British Columbia* (The BCLI Report). The ULCC directed that the provisions of the Act should be suitable for enactment across the country, without provisions particular to any one jurisdiction, and informed by trust law initiatives such as the Saskatchewan *Trustee Act* of 2008 and the 2007 Symposium of the Society of Trust and Estate Practitioners of Canada (STEP), entitled 'Trust Law Reform in Canada'.

[2] The law of trusts is preponderantly non-statutory. Statutes relating to trusts, which may be referred to as trustee statutes, have centered on providing enabling trustee powers 'to allow for the proper administration of trusts with a minimum of court involvement in cases where trustees had not been given adequate powers at the time the trust was created' (BCLI Report, page 2). These enabling trustee powers, with the exception of certain provisions considered to be essential, may be overridden by the terms of a trust. Trustee statutes have also had the important function of ensuring sufficient powers in the court to provide direction and relief to trustees where necessary, and to deal with a trust that may not be operating properly.

[3} The trust concept has demonstrated an immense versatility of application to diverse relationships and to an increasingly broad range of forms of property. The BCLI Report notes a number of these: the pooling of funds for investment purposes, pension funds, income trusts, real estate investment trusts, royalty trusts and mortgage syndicate trusts.

[4] However, while the trust concept has adapted to meet the needs of modern capital, commerce and property, trustee statutes have become increasingly outdated and in need of reform. The result is that trustee acts have become of such diminished usefulness that they ironically counteract their original purpose of providing for enabling powers that would not need to be specified in a trust instrument, and instead compel settlors and trust practitioners to draft trust instruments so as ensure that various archaic provisions of trustee statutes will not apply. This is a particularly unfortunate consequence for those who, with limited access to advice, would most benefit from the application of such legislation.

[5] The purpose of trustee statutes remains as important as ever. By supplementing the general law of trusts and supplying needed powers that may be lacking, a default statute 'can prevent the defeat of a settlor's intention through an oversight of the drafter' and 'reduce the complexity of trust documents.' (BCLI Report, page 6). While this may be of greatest value to personal or family trusts, for example, for estate planning purposes, the benefits of such an act apply to trusts generally, insofar as they are not regulated by other legislation.

[6] The original and immensely important purpose of trustee statutes can be fulfilled by a reformed and modern statute. Further, because of the commonality of the principles of trust law, a uniform act is both desirable and practical.

[7] Given the need for the modernization of trustee statutes, they have been the subject of reform efforts in Canada and in other Commonwealth countries. In 1984, the Ontario Law Reform Commission published the *Report on the Law of Trusts*, containing a comprehensive review of the Ontario *Trustee Act*, and a draft of a proposed reformed statute. The ULCC first recommended reforms to trustee investment powers in 1970 (1970 Annual Proceedings, pp. 35 and 117). The ULCC adopted the prudent investor standard of care in the *Uniform Trustee Investments Act*, 1997 (1996 Annual Proceedings, pp. 53-54) which has been carried forward in the *Uniform Trustee Act*.

[8] The BCLI Report is based on seven years of study and consultation by the British Columbia Law Institute (BCLI) Project Committee on the Modernization of the Trustee Act, whose members were drawn from the wills and trusts bar, the professional fiduciary sector and academic specialists in the law of trusts. The Report was preceded by consultation papers and the following reports: *Trustee Investment Powers, Statutory Powers of Delegation, Statutory Remuneration of Trustees and Trustees' Accounts, Exculpation Clauses in Trust Instruments, Total Return Investing by Trustees, Variation and Termination of Trusts* and *Creditor Access to the Assets of a Purpose Trust.* The BCLI Project Committee then prepared a draft, using as a template the draft act prepared by the Ontario Law Reform Commission, modifying content and language as it deemed necessary or desirable. The BCLI Report expresses the indebtedness of the Project Committee to the Ontario Law Reform Commission for the Commission's excellent work in the area of trust law.

[9] The ULCC established a working group to carry out the preparation of the *Uniform Trustee Act* with the following members: Greg Blue, Q.C., of the British Columbia Law Institute, Arthur L. Close, Q.C., of the British Columbia Law Institute, Rodney Fehr of the British Columbia Ministry of Justice, Russell Getz of the British Columbia Ministry of Justice, Joanna Knowlton, Public Trustee of Manitoba, Peter Lown, Q. C., of the Alberta Law Reform Institute, Tim Rattenbury of the New Brunswick Department of Justice, Philip Renaud, Q.C., of Duncan & Craig, LLP, Edmonton, Alberta, Madeleine Robertson, Q.C., of Saskatchewan Justice (until her retirement), and Donovan D.W. Waters, Q.C., of Horne Coupar, Victoria, BC.

[10] The French language version has been graciously prepared by the Ontario Ministry of the Attorney General Office of Legislative Counsel.

[11] As directed by the ULCC, the working group brought to the 2009 annual meeting tentative recommendations on four policy issues on which it wanted guidance and direction from the Civil Section. The working group recommendations were: that trustees be able to act by majority; that where all the beneficiaries are competent adults and consent, they should be able to vary, as well as to terminate a trust; that provisions respecting charitable trusts be included in the Uniform Act; and that the rules against perpetuities and accumulations be abolished. This fourth recommendation was based on law reform reports and legislation in Manitoba and Saskatchewan. These issues were identified, not because of controversy within the working group, but because of their fundamental importance. The Civil Section approved the working group's recommendations for the reasons set out in the descriptions of significant reforms below. With

respect to including charitable trusts in the Uniform Act, the Civil Section concluded that although the potential of a separate statute that would embody a general reform of charity law should be explored, it is important that the opportunity afforded to achieve much needed improvements in the law of charitable trusts not be lost.

Nature and Scope of the *Uniform Trustee Act*

[12] The purpose of the *Uniform Trustee Act* is to provide a modernized statute that addresses as comprehensively as is practicable the administration of trusts, including the appointment and removal of trustees, the vesting of trust property, the duties and powers of trustees, trustee remuneration and accounts, and the variation, termination and resettlement of trusts. It also addresses charitable trusts and non-charitable purpose trusts. The Uniform Act makes substantive reforms to both statutory and non-statutory rules when deemed appropriate on grounds of legal principle and modern practice. The Uniform Act also thoroughly revises the language and structure of existing trustee statutes. Modern drafting conventions are applied. Provisions are clarified and conceptually grouped with other provisions dealing with similar subject matter into distinct parts.

[13] The *Uniform Trustee Act* is not a code of trust law. Rather, it is enabling and supplementary to the general, and largely non-statutory, law of trusts. Except for certain provisions which are essential to the operation of trusts and expressly stated to prevail over a conflicting term of a trust instrument, the Uniform Act's provisions would apply only when a trust instrument does not make other provision or is silent. As such, it retains the default character of existing trustee statutes.

[14] The *Uniform Trustee Act* applies to trusts generally, including charitable trusts, charitable corporations acting as trustees, and non-charitable purpose trusts, insofar as they are not subject to other enactments. For example, pension trusts are appropriately regulated by particular legislation: their relation to employment law and the typically huge numbers of beneficiaries involve situations often not encountered by trustees generally. Similarly, income trusts are the subject of the *Uniform Income Trusts Act.* It may be that mutual fund trusts may someday become the subject of special legislation.

[15] The Act does not apply generally to an implied trust, a resulting trust, a constructive trust or any other trust that arises by operation of law other than an enactment, or through a judgment or order of a court. Because such trusts have an essentially remedial function in deeming that certain property is not the trustee's own and in expediting its transfer to the rightful owner, it is not necessary or desirable that the administrative provisions relevant to an express trust apply to them. The Act also lists a number of provisions that do not apply to a trust that arises by operation of an enactment. A statute may cause a trust to arise for a very specific purpose, and the provisions set out pertain to matters not properly applicable to such a trust.

[16] The *Uniform Trustee Act* applies to the exercise of trustee functions, both *inter vivos* and testamentary, while leaving provisions pertaining to the functions of personal representatives other than as trustees to be provided for in other legislation (for example, estate and succession

statutes). With respect to the provisions on statutory compensation and passing of accounts, however, a trustee is defined as including a testamentary executor or administrator, a committee of an incapacitated person, and a testamentary guardian. This is because compensation is assessed similarly with respect to all these fiduciary offices, and it is therefore appropriate that the same principles should apply to all of them.

[17] The *Uniform Trustee Act* carries forward the provisions of the *Uniform Trustee Investments Act* and the *Uniform Variation of Trusts Act.* The *Uniform Trustee Act* does not affect the *Uniform Trusts–Conflict of Law Rules Act* or the *Uniform International Trusts Act.* However, the following uniform statutes would be superseded by this Act: the *Uniform Accumulations Act* the *Uniform Perpetuities Act.*

Significant Reforms

[18] The following paragraphs describe the principal reforms made by the *Uniform Trustee Act.*

[19] The general administrative powers of a trustee respecting trust property are clarified as being equivalent to those of a vested legal owner, subject to the Act and the trustee's fiduciary obligations. They are also broadened by permitting a trustee to sell or lease trust property whether or not there is an express or implied power, subject to a contrary limit in the trust instrument; and a trustee is permitted to purchase, rent or build a house for the use of a beneficiary who is entitled under the trust to the money spent for that purpose (Section 24).

[20] The substantive principle of a trustee's good faith duty of care is given statutory form as it is foundational to the exercise of all trustee powers and duties. It specifies that the standard of care is that of a person of ordinary prudence. The law is changed to provide that professional trustees are to be held to a standard of care corresponding to the degree of skills they bring, or ought to bring, to the administration of a trust (Section 26).

[21] The duty of a trustee to report to beneficiaries is clarified (Section 28).

[22] The reforms of the *Uniform Trustee Investments Act* have been carried forward (Part 4, Division 3).

[23] Trustees would have the power to apportion expenditures between income and capital accounts. They would be empowered to transfer funds between the income and capital accounts to recover or reimburse expenditures between accounts. These powers would not apply to certain trusts defined in the *Income Tax Act* (Canada) unless expressly allowed by the trust instrument (Section 38).

[24] Charitable trusts and non-profit organizations would be able to invest on a total return basis so as to gain an optimal return without having to distinguish between income and capital sources and receipts. A trust instrument could confer the same powers on the trustees of a private trust (Section 40).

[25] The rules respecting the delegation of trustee powers are significantly changed. Generally speaking, the existing basis for determining whether a trustee power may be delegated is whether it is discretionary, which may not be delegated, or non-discretionary, which may be delegated. By contrast, the policy of the Uniform Act is that, subject to the limits provided for in the Act, the basis upon which a trustee power may be delegated is whether it is administrative in nature, in which case it may be delegated if it is reasonable and prudent to do so; or distributive, in which case it may not be delegated. Powers of distribution are at the core of trustee duties, and may not be delegated unless the trust instrument so provides (Section 47). Subject to the requirements set out, trustees may also engage agents to invest trust property that a prudent investor might delegate, consistent with ordinary business practice (Section 48). A trustee is liable for a loss caused by an agent if the trustee fails to exercise prudence in the selection and supervision of the agent. An agent may sub-delegate, subject to restrictions relating to delegation established by the trustee (Section 49). Subject to the limits and safeguards provided for, a trustee may temporarily delegate trust powers by means of a power of attorney, where to do so would be preferable to the resignation and replacement of the trustee (Section 50).

[26] Trustees of a private trust may act by majority, unless the terms of the trust provide otherwise (Section 53). This is a major change to the law. It reverses the existing default rule that trustees must act with unanimity if the terms of the trust are silent on the matter. This change brings the default rule with respect to private trusts into accord with the rule governing charitable trusts. Indeed, it brings the default rule into accord with actual general practice: it is common for trust instruments to empower trustees to act by majority, as it promotes the efficient management of trust property and limits the need for court involvement in trustee decision making. A settlor could still override the majority rule by requiring the trustees to act unanimously. The section provides that a trustee who disagrees with a decision or act of the majority may state it in writing but must join in carrying out the majority decision unless it is illegal. A trustee who dissents in writing would not be liable for any breach of trust resulting from the majority act or decision. To preserve the intention of settlors of existing trusts, the existing default rule requiring unanimity will continue to apply to trusts created before the coming into force of this section.

[27] An 'arrangement' (meaning a variation, resettlement or termination) of a trust may be effected without court approval if all the beneficiaries are of full capacity and give their consent (Section 59). This is a major reform of the law. Under the existing rule, known as the rule in *Saunders v. Vautier,* the legally competent beneficiaries may terminate, but not vary, a trust. The change recognizes that there can be good and practical reasons why all the beneficiaries, if of full capacity, may wish and agree to effect changes to a trust rather than to terminate it. To allow this is consistent in principle with their existing ability to terminate a trust: to allow this is to enable capable adult beneficiaries to deal, as they determine, with that which is their property.

[28] The court may give its consent to an arrangement on behalf of a beneficiary generally on the same kinds of grounds as provided for in the *Uniform Variation of Trusts Act*; but also, in a significant change in the law, on behalf of a charitable organization incapable of consenting, or for a charitable purpose or a non-charitable purpose as defined in the Act (Section 60(7)). In another significant change in the law, the court may also consent on behalf of a competent adult

who opposes the arrangement, if the court is satisfied that the arrangement will not be detrimental to the person's financial interests *and* that a substantial majority of the beneficiaries who represent a substantial majority of the beneficial interests in the trust property have consented or the court has consented on their behalf *and* that not approving the arrangement would be detrimental to the administration of the trust and the interests of the other beneficiaries (Section 60 (5) and (6)). These requirements will not be easily met and this power is likely to be used only when the beneficial interests are widely distributed and a small number of beneficiaries are holding out against a generally desired change.

[29] Rules respecting compensation of trustees are changed to provide a statutory right of a trustee to 'fair and reasonable' compensation, including reasonable fees for professional skills employed in reasonably necessary services to the trust (Section 64). The Act also provides for rules under which a trustee may be permitted to take interim compensation without prior court authorization, subject to a final determination of the court pursuant to an application by a beneficiary (Section 65). The Act provides that passing of a trustee's accounts may be ordered on application of a beneficiary or trustee on a single occasion or at intervals set by the court, rather than being initially required within two years of the trustee's appointment, as at present (Section 67). If the court determines that the compensation to which a trustee is entitled is less than that taken without court authorization, the trustee must repay the difference (Section 68).

[30] When a charitable trust fails, the court may approve a *cy-pres* scheme without the requirement of finding the donor had a 'general charitable intent', as it can be very difficult to establish such a subjective intention. Also, even if the purposes of a charitable trust or charitable gift have not failed, the court may vary its terms, if the variation would better realize the intention of the settlor (Section 70).

[31] The Act contains provisions to address the disposition of surplus monies collected through a public appeal for a non-charitable purpose that has failed, in the event that a jurisdiction does not enact the *Uniform Informal Public Appeals Act* (Section 71).

[32] A significant change is the recognition of non-charitable purpose trusts beyond the existing narrow legal restrictions, to encompass such legitimate public purposes as those for which a non-profit society may be created under provincial and territorial legislation, performance of a function of government in Canada, or a purpose that a jurisdiction may specify by regulation.

[33] The Act addresses the effect of 'exemption clauses' in trust instruments that aim to excuse a trustee from liability for conduct that would constitute a breach of trust. To balance the protection of beneficiaries and the right of a settlor to include such a clause, the Act provides that exemption clauses are effective according to their terms but that the court may, on application of a beneficiary, declare that because a trustee's conduct has been so unreasonable, irresponsible or incompetent, the exemption clause is not effective (Section 81).

[34] The Act abolishes the rule against perpetuities and the law relating to accumulations (Part 9). In so doing, the Act follows the reforms enacted by Manitoba in 1982 pursuant to the recommendations of the Manitoba Law Reform Commission *Report on the Rules against*

Perpetuities and Accumulations of 1982, and by Saskatchewan in 2008, pursuant to recommendations in the 1987 Report of the Saskatchewan Law Reform Commission, *Proposals Relating to the Rules against Perpetuities and Accumulations.* Also, the rule against accumulations is no longer operative in Alberta and British Columbia. These reforms are based on the conclusion that the social and economic conditions of landed society that gave rise to the rules no longer obtain. It is no longer a significant concern that a settlor would seek to control trans-generational dispositions in perpetuity. It is more likely to be the case that a bequest might fail due to inadvertence as a result of the application of the rules. A potential instance, however unlikely, of someone endeavouring to exercise such perpetual control is better addressed by means of modern legislative provisions respecting variation of trusts, rather than by reliance on the application of a complicated rule and technical body of case law.