# Recent Legal Developments

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Three recent decisions of the Ontario courts should be noted by charity trustees.

## Mutual Fund Investments by Trustees

First, in *Re Haslam and Haslam* [(1994), 114 D.L.R. (4th) 562 (Ont. G.D.)] the issue was whether mutual funds should be held to be permissible trust investments under the *Trustee Act* [R.S.O. 1990, c. T-23]. They are not expressly included in the list of permissible investments in the *Act*, and Rosenberg, J. held, after briefly citing a few authorities, that mutual funds *per se* "are not a permitted investment", but went on to consider whether there might be circumstances under which mutual funds could be an acceptable investment. Although he did not say so expressly, by implication the answer was in the negative.

What he did say was, firstly, that even if a mutual fund actually invested only in investments otherwise permitted by the *Trustee Act*, it would not be a permitted investment so long as the manager of the fund was able to make investments outside the permitted list. Thus what mattered was not what was done by the fund, but the possibility of investing outside. He then went on to consider whether the investment could be saved by taking away the manager's discretion to invest outside. Here he held that such action by trustees would fun afoul of the rule against trustees abdicating their responsibility to make investment decisions. Trustees may take advice, but they may not delegate the investment power. In the result, one can imply, investment in mutual funds would only be permitted if (a) the fund only invested in otherwise permitted investments, and (b) the fund gave the power to decide which investments it made to trustee members, not to a fund manager. Given that the latter would defeat the purpose of a mutual fund, one can conclude that the current law is that mutual funds are not a permissible investment for any trustee, including trustees of funds held for charitable purposes.

## Investment Powers of Trust Companies

Two related cases have dealt with the investment powers of trust companies in their own common trust funds. In *Canada Trust Company* v. *Rutherford*, (1995), 7 E.T.R. (2d) 270 (Ont. Ct. General Division, Lane J.), it was held that a trust company may invest in its own common trust fund because there is no delegation involved.

That case did not involve the question of permissible investments, an issue that was squarely raised in *Central Guaranty Trust Company* v. *Sin-Sara* (1995), 24 O.R. (3d) 820 (Ont. Ct. General Division). Central Guaranty Trust, which had invested in its common trust fund which it called the Equity Fund, argued that it was not bound by the list of permissible investments in the *Trustee Act*, but by the *Loan and Trust Corporations Act* [R.S.O. 1990, c. L-25], which specifically permitted investment by the company in its own common trust fund. That is, it was suggested that there were two regimes for approved investments: trustees who are trust corporations are bound by the *Loan and Trust Corporations Act*, all other trustees by the *Trustee Act*. Spence J. rejected this argument in favour of giving "greater integrity and coherence to the scheme of regulation of trustee investments", and thus ruled that trust corporations are governed by the *Trustee Act*.

## Summary

This last victory for the Public Trustee leaves the following position:

1) Mutual funds are not generally a permitted investment even if they conform to the *Trustee Act* list, because of the delegation problem;

2) Common trust funds used by trust corporations do not attract the delegation problem, but trust corporation may only invest trust monies in them if the *Trustee Act* list is complied with.

This last statement, of course, does not apply where specific provisions of trust deeds permit particular trustees to go outside the *Trustee Act* list. It also does not apply where legislation similarly permits the *Trustee Act* to be bypassed. In both circumstances the trustees still must not delegate, and where there is legislation those responsible for investments need to be careful to remember that any statutory permission will apply only to an organization's unencumbered funds, not to money donated to it for particular purposes and for which the organization acts as trustee under the terms of the gift. In any event, outside of these special situations, the *Trustee Act* always applies. And the import of the decision in *Central Guaranty Trust Company* v. *Sin-Sara* is that it applies notwithstanding general legislation such as the *Loan and Trust Corporation Act* and legislation which creates a regime for the incorporation of nonprofits.

Charitable trustees may be wise to review their current investment policies in the light of these decisions.