

A CLOSER LOOK AT FIDUCIARY DUTY

Mattagami First Nation - Trust Workshop

Prepared by



OUTLINE

1. **Introduction** – What is a fiduciary?
 - Definitions; general duties
2. Fiduciary duties in **three contexts**:
 - Trustees
 - Directors of Corporations
 - Chief & Council
3. Conclusion/Questions

FIDUCIARY – WHAT IS IT?

Legal definition of “**fiduciary**”: [*The Dictionary of Canadian Law*]

“...[W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, that party thus empowered becomes a fiduciary ...”

Guerin v R, [1984] 2 SCR 335

FIDUCIARY – WHAT IS IT?

Generally, a fiduciary must:

[DUTY OF LOYALTY]

- Act **prudently, honestly** and in **good faith**;
- Act in the **best interests of the beneficiaries** (i.e. avoid potential conflicts of interests; reap no personal profit; not act in self-interests)
- Exercise the **care, skill and prudence** of an ordinary person (carefully consider the consequences of actions based on common sense and informed judgment)

FIDUCIARY – WHAT IS IT?

Fiduciary duties of...

1. Trustees
2. Directors of corporations
3. Chief & Council

FIDUCIARY DUTIES OF TRUSTEES

Three “classes” of duties:

1. Initial duties upon appointment;
2. Specific duties created by the trust, legislation;
3. **Fiduciary duties:**
 - Loyalty
 - Perform duties personally
 - Act impartially
 - Account & provide information to beneficiaries
 - Invest the trust assets

FIDUCIARY DUTIES OF TRUSTEES:

Duty of Loyalty

Trustees owe fiduciary duties to the **beneficiaries**. They must act solely in the (best) interests of the beneficiaries.

- A transaction will be set aside if the trustee benefits from it, even where the trustee acts honestly
- A trustee cannot place him/herself in a conflict of interest (re. conflict: may be specified by the trust itself)
- A trustee can engage in a transaction where he/she does have a conflict in limited circumstances (consent of beneficiaries; full disclosure)

FIDUCIARY DUTIES OF TRUSTEES:

Duty to perform duties personally

- A trustee's obligation is **personal**.
- **General rule:** trustees cannot delegate duties to others
- **BUT, can** delegate duties in limited circumstances:
 - expressly authorized by the trust;
 - there is no other way for the trustee to perform the duties;
 - common business practice
- Cannot delegate all duties
- Trustees **remain responsible** for making all decisions

FIDUCIARY DUTIES OF **TRUSTEES**:

Duty of impartiality

Also known as the “**even-handedness**” rule...

- Trustees must **act impartially** with beneficiaries in exercising their powers/discretion
- Trustees **cannot give preferential treatment** to any beneficiary, unless authorized by the trust

FIDUCIARY DUTIES OF **TRUSTEES**:

Duty to account & provide information

Duty to account...

- Trustees must **keep accounts** of how the trust property is dealt with (assets acquired, transactions, etc.)
- Trustees must be ready to **produce accounts** for inspection by the beneficiaries
- If the trustee causes any expense through neglect or refusal to provide accounts, the trustee will bear the expense personally

FIDUCIARY DUTIES OF TRUSTEES:

Duty to account & provide information

Duty to provide information...

- Trustees should regularly give beneficiaries information with respect to the state of the trust
- However, beneficiaries do not have an entitlement *as of right* to this information – courts have discretion to confer access
- Trustees are not required to give reasons to beneficiaries regarding decisions made under their discretion

FIDUCIARY DUTIES OF TRUSTEES:

Duty to invest the trust assets

- Trustees must invest the trust funds in **authorized investments**
- When investing, the trustee must:
 - Be even-handed with respect to beneficiaries
 - Act honestly
 - Not make speculative/risky investments
- All investments must be reasonable and in accordance with the required **standard of care**:

The trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

FIDUCIARY DUTIES OF **DIRECTORS**

Directors owe a fiduciary duty to the **Corporation and its shareholders.**

Fiduciary duties:

- Duty of **loyalty**
 - Avoid conflicts of interest
 - Act prudently
 - Act diligently
- Duty of **care**
- Duty of **confidentiality**

FIDUCIARY DUTIES OF **DIRECTORS**

Duty of Loyalty (general)

In the corporate context, the **duty of loyalty** requires Directors to:

- Refrain from “self-dealing”, usurping corporate opportunities and receiving improper personal benefits
- Interested transactions (transactions in which the Director has some interest) are reviewed under a “fairness” standard
- Burden is on the directors to prove fairness

FIDUCIARY DUTIES OF **DIRECTORS**:

Duty of Loyalty – conflicts of interest

A Director must...

- Ensure that his **personal interests do not conflict** with those of the Corporation;
- **Disclose** any personal interests and refrain from voting on any motion/resolution involving those interests
- **Avoid** any appearance of conflict
- **Ask board of directors** for advice

FIDUCIARY DUTIES OF **DIRECTORS**:

Duty of Loyalty - act prudently

A Director must...

- Carefully, deliberately and cautiously try to foresee the probable consequences of any proposed course of action

FIDUCIARY DUTIES OF **DIRECTORS**:

Duty of loyalty - act with diligence

A Director must...

- Attend meetings regularly, actively participate on the Board, examine the action of Officers and Managers, address any wrong-doings of the Board, Corporation or other Directors
- Take all steps reasonable in the circumstances to reach an **informed decision**. This requires that Directors...
 - Be informed of the policies, business and affairs of the Corporation
 - Obtain all necessary information relating to an issue
 - Examine the information
 - Make inquiries, and
 - Seek out expert advice where necessary

FIDUCIARY DUTIES OF **DIRECTORS**:

Duty of care

- Directors must exercise the standard of care of a *“reasonably prudent person acting in the ordinary course of their own affairs”*
 - Exercise due care and carefully consider the consequences of actions, based on common sense and informed judgment
- The standard of care **increases** with the level of expertise a Director may have
- A **higher standard** of care is required for “hands-on” Directors who are actively involved in day to day operations

FIDUCIARY DUTIES OF **DIRECTORS**:

Duty of confidentiality

A director must...

- Protect all confidential information of the Corporation received by them in their capacity as Director
- This includes keeping confidential how each Director voted on any matter
- Confidentiality is always the key to open communication and the prevention of unnecessary discord on a Board

FIDUCIARY DUTIES OF **DIRECTORS**:

Delegation of duties

- Directors **can** delegate responsibilities to officers, so long as they are **competent** to carry out the delegated task and the delegation is not made unreasonably
- Delegation to officers is limited by the Director's general duty to manage
- Directors must not avoid their own duty by excessively delegating (similar to trustees)

FIDUCIARY DUTIES OF **CHIEF & COUNCIL**

“There can be no question that a chief and the members of the band council are fiduciaries as far as all other members of the band are concerned”

Williams Lake Indian Band v Abbey (1992) BC SC

FIDUCIARY DUTIES OF **CHIEF & COUNCIL**

When does the duty arise?

- When Chief & Council makes a **discretionary decision** that stands to **affect the interests of the band or band members** (e.g. deciding how/in what way to distribute/allocate settlement money/band moneys)

FIDUCIARY DUTIES OF **CHIEF & COUNCIL**

To whom is the duty owed?

- The *band* (as a whole)
- Band *members* (individually)
 - The interests/priorities of the band may not always coincide with the those of its members
 - Chief & Council must **balance** what is in the best interests of the band vs. the interests of individual members

FIDUCIARY DUTIES OF CHIEF & COUNCIL

Main priority: refrain from acting in self-interest

A fiduciary cannot “...personally take advantage of a relationship of trust or confidence for her direct or indirect personal advantage ... persons doing their best in difficult circumstances are protected ... from breach of fiduciary duty”

Solomon v Alexis Creek Indian Band, 2007 BCSC 459

FIDUCIARY DUTIES OF **CHIEF & COUNCIL**

- The nature of a fiduciary obligation determines the nature of the breach
- Incompetence or failure to obtain the best result does not constitute breach unless there is also **dishonesty or disloyalty** (*Assu v Chickite*, [1999] 1 CNLR 14)
- A Chief or member of Council may be required to give back to the First Nation any profit realized by advancing their interests over the interests of the First Nation

FIDUCIARY DUTIES OF **CHIEF & COUNCIL**

1. An existing practice/custom of the band might create a fiduciary duty to engage in that practice/custom when making a discretionary decision that affects the band

- **E.g.** a practice of consulting membership before deciding how to use band assets might create a fiduciary duty to do so before deciding if/how to make \$ distributions (*Noble v Ecoforestry Soc. et. al.*, 2003 BCSC 430)

FIDUCIARY DUTIES OF **CHIEF & COUNCIL**

2. A relaxation of duties might be required; e.g. conflict of interest

- Normally, a councillor facing a potential conflict of interest, like a proposal that might benefit a relative, would have to disclose the conflict, withdraw from discussion and abstain from voting on the matter
- In small communities, this might disqualify so many councillors so as to paralyze council
- Only disqualified if receiving a direct personal benefit – can participate in discussions, but must withdraw/abstain from voting (*Assu v Chickite*, 1998, BCSC)

FIDUCIARY DUTIES OF **CHIEF & COUNCIL**

Examples where **breach of fiduciary** duty was found:

- A Chief participated in decisions to use the band's funds for selfish purchases (repay student debt; cover children's tuition fees) [*Gilbert v Abbey*, [1992] 4 CNLR 21 BCSC]
- Chief and two Councillors awarded themselves lucrative contracts at the end of their term [*Annapolis Valley First Nations Band v Toney*, 2004 FC 1728 (CanLII)]
- Failure to follow the First Nation's established procedure for Chief and Council to make decisions [*Balfour v Norway House Cree Nation*, [2006] 4 FCR 404]

FIDUCIARY DUTIES OF **CHIEF & COUNCIL**

Examples where **breach of fiduciary** duty was **NOT** found:

- Chief & Council have given funds held for the benefit of a child to the child's caregiver rather than keeping the funds in an interest-bearing account until the child reached the age of 19 [*Williams v. Squamish First Nation*, 2003 FCT 50 (CanLII)]
- Chief & Council appointed a relative of a member of Council as Manager of the First Nation but that member withdrew when all decisions about the appointment were being made [*Assu v Chickite*, [1999] 1 CNLR 14 1998]

FIDUCIARY DUTIES OF **CHIEF & COUNCIL**

Best practices for Chief & Council

- Place the interests of band/members ahead of personal interest;
- If there is a personal interest in a matter to be decided by Chief and Council, disclose interest to Council, leave the meeting while it's being discussed; refrain from voting on the decision;
- Follow any band procedure/policies/customs that exist with respect to making any discretionary decisions