

KEY CONSIDERATIONS IN
DEVELOPING
TRUST AGREEMENTS
FOR ABORIGINAL BENEFICIARIES

Nancy Kleer
Olthuis, Kleer, Townshend
Barristers and Solicitors
229 College Street, Suite 312
Toronto, ON M5T 1R4
nkleer@oktlaw.com
416-981-9336

May, 2008

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Introduction

Aboriginal parties across Canada have settled or are in the process of settling comprehensive land claims agreements or treaty land entitlement claims that result in large cash payments and sometimes in acquisition of real property. Settlements for a variety of other land claims and other grievances both through the courts and through negotiations have also led to large one-time cash settlements. Revenues generated from on-reserve projects have resulted in substantial revenue streams for some First Nations. Some aboriginal communities that have successfully negotiated Impacts and Benefits Agreements with resource companies are receiving or will receive large fixed annual payments, or payments spread out over the period during which a development is in commercial production that may vary with the market price of the product, or a combination of both, and some are receiving percentages of provincial revenues.

These revenues are in addition to (and can affect – although that is another topic altogether) the monies that are received by First Nations from Indian Affairs and Northern Canada under Comprehensive or Alternative Funding Agreements pursuant to funding “formulae”, which agreements come with a long list of reporting obligations and for which audited statements must be completed annually.

When large sums of money are anticipated from sources other than AFAs and CFAs, many First Nations and other aboriginal organizations have decided that they would like to ensure that those monies are well-invested and well-managed for the long-term. Trusts have become the vehicle of choice for many such organizations.

Once it has been determined that a trust agreement is the way in which the monies will be handled, then the detailed planning and work in developing that trust agreement must begin. A First Nation or other aboriginal organization which embarks on developing a trust soon realizes that a trust agreement is not a “one-size-fits-all” agreement that can be pulled off a shelf and signed once the names of the trustees have been inserted.

In this paper, I will explore some of the issues that should be considered when developing the terms of a trust agreement.

1. Who will develop the terms of the trust?

Although the trust may, for example, have as its beneficiaries the First Nation as an entity, a Council may decide that they want community involvement in establishing the terms of the trust as well as or even apart from Council members themselves. If so, that committee will need to develop a reporting relationship with the Chief and Council during the time they are working on developing the trust, since the First Nation will (in a typical First Nation's trust) ultimately be the settlors of the trust. It will often make sense that the people working on developing the trust are intended to become the first trustees.

Putting together the terms of a good trust also requires professional advisors: Investment advisors or independent investment counsel can assist on advising on the investment provisions of the trust. Tax advisors can help ensure that the taxable income of the trust is minimized (and an Advance Tax Ruling may be advisable). Financial advisors who can competently advise on expected revenues that the trust will receive over time (e.g. in the case of trusts set up to hold IBA payments that will be based upon future commodity prices) can help the developers of the trust consider the terms of the trust dealing with distribution/retention of capital and income. Lawyers will help in ensuring the trust meets legal requirements relating to matters like perpetuities periods and accumulations periods, setting out discretionary powers vs. duties, and that the trust when implemented will meet the legal requirements necessary to be a valid trust (e.g. certainty of objects/beneficiaries).

2. Objectives/Purposes of the Trust

Objectives of the trust may be predetermined (e.g. Casino Rama revenues were to be used for certain objectives), but in other cases, it will be up to the settlors to decide what these objectives will be. It is common to include social, cultural and economic development objectives.

When a trust will be used to fund proposals made by or for the benefit of the beneficiaries, it can be helpful to identify in the trust potential purposes that could fulfill those objectives, to give guidance to beneficiaries who are developing proposals. These purposes should take into account the particular circumstances of the community. For example, purposes might include things like provisions of goods, programs or services:

- (a) to support capacity training of beneficiaries;
- (b) to support and promote the health, safety and wellness of beneficiaries
- (c) to provide housing for elders;
- (d) to protect and promote culture and language retention;
- (e) to support sports and recreation programs;
- (f) to assist in improving the situation of women in the community by addressing issues relating to violence against women;
- (g) to address and prevent physical, emotional and sexual abuse of beneficiaries;
- (h) to provide support for beneficiaries who are victims of crime in the community
- (i) to provide scholarships and bursary funding for beneficiaries pursuing post-secondary education;
- (j) to promote children staying in school;
- (k) to provide assistance to members who wish to pursue a traditional way of life on the land;

The settlors of the trust may also want to consider whether certain purposes should be *excluded* from being funded out of the trust. For example, do the settlors want to prohibit the trust property from being used to fund “per capita payments”, or to make distributions to minors or payments when they reach the age of majority, or to fund business ventures proposed by community members? There are no right or wrong answer to these questions; each community must decide for itself whether these are permissible uses of the trust property.

It is also prudent to consider including, as exclusions, purposes which could result in extensive resources of the trust (which may not have a permanent staff) being devoted to addressing numerous small requests from beneficiaries: e.g., funding travel requests to visit relatives who are out of the community for a variety of reasons. In many remote First Nation communities, these are the kinds of daily requests that Councils face given that hospitals are usually not located in the communities, and other more specialized services are often available only in major urban centres, but funding for such requests isn’t available through any other source. To address this kind of community need and to avoid placing undue administrative burdens on the trustees

who will likely not have staff to deal with this kind of request, the settlors might decide to include in the trust as a specific purpose the establishment of a fund for the Council office or other community-run offices to handle such travel requests.

3. How long will the Trust last?

When planning a trust, thought needs to be given to whether the trust should last as long as it can at law (which varies from province to province), or whether the desire is that the trust property could be expended in a shorter period of time. Some communities may consider (as in the case of revenues from IBAs) that because it is the future generations who will suffer the long-lasting impacts of a development that leaves its footprint on their traditional territory and forever removes resources, that the trust should last for as long as possible. In other cases, the beneficiaries may consider that the existing generations deserve to be compensated so that the trust life need not be extended to the maximum extent.

4. Who will the Trustees be, and how will they be replaced?

When the beneficiaries of a trust are one or more aboriginal communities and their members, there is of course a desire that some or all of the trustees will be members of the community (including possible representation for off-reserve members), given their affiliation with and understanding of their community. This is especially so when trust property will be used to fund different proposals that come from the community or (as may be permitted) that come from other parties who may make proposals that are for the benefit of the community although the applicant may not be a community member.

As known by any community trustee who has administered a large trust which includes discretion as to how funds will be handled for the benefit of his or her community, the community trustee is often placed in the position of making tough and sometimes quite unpopular decisions about whether a proposal should or should not be funded from the trust. Conflicts with elected Councils, or with other aboriginal leaders who are not entirely satisfied with how the trust is being administered, or who are dissatisfied with decisions made by the trustees if the trustees are not “at the pleasure” of the elected Council, are not uncommon. In some cases, this tension could reduce over time as the role of the trust (separate from the role of

Chief and Council) comes to be better understood, but it is to be expected that this will take time or that some level of tension may always remain.

The developers of the trust need to be realistic about the possibilities for this kind of tension. Because they best know their community, they should aim to make decisions about how best to ensure the trustees can function at doing their job – managing the trust property in accordance with the terms of the trust agreement. This might lead to a decision that the community trustees should include, as a majority or even be comprised entirely of persons appointed by elected Council. Alternatively, the settlors might decide that the Council should have a trustee representative, but not a majority voice, amongst the community trustees. In other cases, it may be the desire to completely separate the functions of Council from that of the Trust. If that is the case, it is wise to consider building into the trust the requirement for meetings with Council, to ensure as far as possible that decisions of the trust and the Council are well-integrated for the best interest of the community.

Trusts will often include provision for a corporate trustee position as well as community trustee positions. The trust should prescribe the minimum requirements a corporate trustee should meet: e.g., that they be a trust company and carry deposit insurance. The corporate trustee's functions will include record-keeping and banking functions (custodial functions), but will the functions go beyond that?

The trust agreement should set out the degree of involvement of the corporate trustee in relation to disbursements from the trust in response to proposals received by the trust. It may be the case that the settlors and the corporate trustee do not want the corporate trustee to have any decision-making role in that process, given that the corporate trustee is not likely to be familiar with the needs of the community. However, the corporate trustee may be given the role of gatekeeper of the process for receiving and considering proposals. For example, a corporate trustee could assist in ensuring that proposals are appropriately ranked to allow proposals to be objectively compared.

Provisions allowing for replacement of the corporate trustee should be prescribed in the trust. Provisions for benchmarking of the corporate trustee's performance against appropriate benchmarks could also be included.

Another key consideration will be how the trustees will be replaced once their terms are up. First, as a matter of essential good planning, it will make sense to have the terms of the trustees staggered to allow for continuity and passing on of knowledge. The key question as to appointments is will they be appointed by the Council or other elected body (e.g. a board of directors), or will they be elected by the beneficiaries? An election process comes with costs, monetary and otherwise, so this decision needs to be made with knowledge of how the community works best. Appointments by Council, if the terms of the trustees run concurrently with the term of Council, can result in the trustees becoming caught up in political campaigns, which could place the trustees in an unacceptable position that could render it difficult for them to carry out their fiduciary obligations to the beneficiaries. If independence of the trust from the Council is desired, then the trustees' terms (if appointed by the Council, rather than elected) cannot run concurrently with those of the elected Council. These are important issues that the settlors must consider carefully at the outset.

The number of trustees needs to be carefully considered. Obviously, the quantum of trust capital that is to be placed into the trust, and whether the trustees will be required to make discretionary decisions about proposals to be funded out of the trust, will be the first consideration in determining the appropriate number of trustees. If trustees are to be remunerated by payment of fees as well as their out-of-pocket expenses, it will not be prudent to have a large number of trustees. As well, decision-making can become unwieldy with a large number of trustees.

To ensure that the trustees are carrying out their duties, it is a good idea for the trust agreement to include provisions for automatic removal of and replacement of trustees who fail to show up for a certain number of meetings of the trustees without reasonable excuse.

5. Disbursements from the Trust

As noted above, the trust can include specific purposes for which the trustees can disburse part of the trust fund. The trust should also specify answers to the following issues:

-What proportion (100% or less) of annual income should be available for disbursements from the trust? In the case of a trust established for a First Nation with a reserve, the trust may contain provisions requiring the trustees to pay any undisbursed annual income out to the First Nation Council by way of a demand promissory note before the end of each fiscal year, for tax-planning reasons.

-What proportion, if any, of annual income should be reinvested each year?

-What are the definitions of “income” and “capital”?

-Will any proportion of the trust capital be available for disbursement during the life of the trust, on a regular basis?

-Can there be encroachments during the term of the trust on the “protected” portion of the trust capital for specific purposes, like “Emergencies”? If so, how will “Emergency” be defined or will it be left to the discretion of the trustees to give meaning to that term?

-Will the trust include any “first priorities” for which available income will first be disbursed (e.g. perhaps to be paid to a Council for housing purposes, or for an elders’ fund?)

-What will be the process for consideration of proposals for disbursing the trust fund?

Though too much prescription in the trust agreement could unduly tie the hands of the trustees, the trust should set out some elements of the process for considering proposals, such as:

-whether the trust will announce the amount available for proposals in a given year

-ability for trustees to set deadlines for receipt of proposals

-formal requirements for proposals; e.g., must they be in writing or will oral proposals be accepted, which might facilitate receiving proposals from portions of the community who cannot afford to prepare detailed written proposals?

-ability of the trustees to seek more information/clarifications from those who submit proposals before making decisions

-prescribing that the submitter of the proposal must explain how the criteria contained in the trust would be satisfied by the proposal

-a requirement that successful applicants comply with monitoring and reporting requirements established by the trustees

-an entitlement for the trustees to require successful applicants to provide financial statements (audited or unaudited), and to meet other measures related to the objectives of transparency and accountability.

-will any decisions (e.g. for proposals above a certain quantum) be brought back to the community for ratification? The cost of such a ratification process, and the expectations of the trustees who were appointed or elected to make decisions that meet the objectives of the trust, need to be considered.

6. Investment clauses in the Trust

When a trust is handling a large amount of money, it is advisable that the trust prescribe that the trustees must develop, adopt and review and, if appropriate, revise from time to time an Investment Policy Statement. This Statement (rather than the trust) would then provide detail on the types of eligible investments. This allows for much greater flexibility in meeting investment objectives than if the trust itself sets out the eligible investments.

If the Investment Policy Statement route is taken, it is advisable that the trust contain provisions authorizing the trustees to retain portfolio managers. This will allow the community trustees (who may not have investment experience in relation to large amounts of capital) to appoint portfolio managers -- who can be investment dealers (i.e. brokers) or independent investment counsel -- whose job it is to manage the portfolio of the trust, rather than simply to provide investment "advice" while leaving the decision-making on that advice in the hands of the trustees.

If portfolio management is allowed by the terms of the trust, this means that the investment philosophy of the Trust, and other details that flow from that philosophy, would be set out in the Investment Policy Statement. The portfolio manager's job will then be to invest in accordance with the Investment Policy Statement approved by the trustees, rather than the trustees making the day-to-day investment decisions themselves.

The roles of investment dealers (brokers) and investment counsel are very different, and usefully distinguished, in "The Insider's Guide to Selecting the Best Money Manager" by S. Kelly Rodgers of Rodgers Investment Consulting (1993).

It is appropriate to consider whether the trust should prescribe whether the corporate trustee or any of its affiliates will be able to be appointed to provide investment/reinvestment advice or to be portfolio managers.

The trust could also contain a requirement that the investment advisors or portfolio manager's performance be measured independently against appropriate benchmarks on a regular basis during the term of the trust.

7. Other powers and authorities of the Trust

In addition to investment powers, it is important that the trust include a list of powers that the trustees are permitted (or not) to exercise. Such powers could include the following:

- powers to lend to beneficiaries, and power to lend the trust property under security arrangements that the trustees determine are sufficient
- strategic planning powers for short- and long-term management and use of the trust property
- power to seek advice and act upon advice about minimization of tax
- power to vote and to exercise other rights incidental to investments that form the trust property
- powers to borrow

-powers to guarantee indebtedness of beneficiaries (e.g., to allow for the trust to guarantee small business loans)

-powers to fix the value of assets held by the trust

-administrative powers (e.g. how will the trustees be legally able to sign on behalf of the trust – do they all need to sign for the instrument to be legally binding? Can they delegate signing authority?)

-powers to employ advisors, agents and other assistants to administer the trust

-ability for the trust to set up separate funds for individual beneficiaries and to separately invest those funds

8. Reporting by the Trust to the beneficiaries

The beneficiaries are of course entitled to and should know how the trust property is being administered on their behalf. Clear reporting is important for the trustees to be able to use to establish that they are doing their jobs in accordance with the terms of the trust and in accordance with the legal requirements they have as fiduciaries.

The trust should be required to prepare audited financial statements each year, and to make those available to the beneficiaries (perhaps on a review-only basis if there is a need to ensure that the amount of the trust property not be made public). Beyond that, the settlors should consider what level of further reporting is appropriate. Considerations about reporting provisions include the following:

- Is the cost of holding an annual meeting a reasonable requirement?

-Could the annual meeting of the trust be combined and held at the same time as the annual meeting of the Council?

-How will access to the minutes of decisions of the trust be provided to beneficiaries?

9. Provisions for varying the Trust

If a trust is going to last for a long time, it is prudent to allow for variations of the trust. Circumstances of the aboriginal beneficiaries may change over time – a major unanticipated financial need could be faced in the future so that capital needs to be encroached upon, for example.

Key considerations for inclusion in the trust related to future variance of the trust could include the following:

1. Providing that there be a period of time during which, at the outset, the trust cannot be varied (other than to deal with clerical errors and the like). The community (its leaders and its members) need to be given time to see how the trust functions before they decide if it is working as was anticipated. It is worth considering not allowing any variations for at least several political terms, so that the trust does not become a political football.
2. Any variation should be reviewed by professional advisors before it can be approved, to cover off any concerns about tax liability and ensuring the revised trust is functional.
3. Consider having the community vote to approve any variations that the settlors might want to make. It will often be the case that the community ratified the settlement or agreement that led to the establishment of the trust in the first place, and as they are ultimately the beneficiaries of the trust, community involvement in this decision will improve the reception of the improved trust.
4. Are there basic requirements that an improved trust must continue to meet? If so, those should be specified in the original trust agreement.

10. Alternative Dispute Resolution

The tensions that may arise between trustees and Councils or other beneficiaries can and have led to legal disputes before the courts. The trust will need to provide for payment of reasonable fees and disbursements incurred by the trust in such a case (provided that the trustees have met

their legal obligations as fiduciaries). But apart from that, it is useful to consider whether the trust should include a provision allowing for an alternative dispute resolution process between the trustees and beneficiaries.

Mediation (perhaps involving members appointed by the trustees and the other disputant, with the cost of mediation being an expense of the trust) could be an option prescribed in the trust. Settlement by binding arbitration, with provisions about who shall be entitled to be arbitrators (e.g. perhaps again some or all of the arbitrators could be prescribed to be members of the community) could also be provided for. Whether the arbitrators should be entitled to require one or more of the disputants to bear some or all of the costs of the arbitration should likely be included, to discourage frivolous disputes. Limited but fair rules allowing for appeals in only limited circumstances could also be included (failing which a court would likely read in more expansive grounds for appeal.)

11. Trust Expenses

It is of course obvious that the trustees are not entitled to make unreasonable expenditures out of the trust property, but it may be helpful to set out some provisions about expenditures in the terms of the trust. For example:

-how will the trustees' remuneration be set and reviewed?

If the trustees are required to make difficult decisions and meet on a regular basis, in order to attract capable trustees, the trust may set out provisions for minimum payments for attendance at trustees' meetings, or salaries if the time commitment will be fairly extensive.

-power to pay for investment advice, portfolio managers and accounting, tax and legal advice should be prescribed in the trust

-are any of these expenses capable of being paid out of capital, and if so, under what limited circumstances?

12. Conclusion

The above discussion addresses some of the key provisions that should be considered when drafting a trust agreement to hold funds for the benefit of an aboriginal community. Careful

planning can hopefully provide that the trust provides trustees with a clear roadmap and sufficient discretion to allow them to administer the trust property in a transparent and accountable way.