



Ruling

Category: Business and Powers

NOTICE*

Subject: Acting as trustee for a trust

No: 2002 - 01

Issue: The issue was whether the nomination by a federally regulated insurance company of one of its employees for election as trustee of a trust would cause the insurance company to be in contravention of section 466 of the *Insurance Companies Act* (ICA). That section provides that an insurance company shall not act in Canada as a trustee for a trust.

Background: An insurance company proposed, together with other investors, to create a joint venture to invest in a specified type of assets. The arrangement between the investors provided that the joint venture would be structured through a series of trusts rather than a body corporate or partnership. One of the trusts would be responsible for overseeing the investment of the joint venture in accordance with the investment policies put in place by the investors. That Trust would be headed by a group of individuals to be elected by the investors to act as trustee. Each investor would have the right to nominate an individual for election as trustee. However, the group of individuals to be elected to act as trustee of the Trust would not be limited to employees or other representatives of the investors. The insurance company wanted to nominate one of its employees for election as one of the trustees of the Trust.

Considerations: Based on the representations of the insurance company, OSFI determined that the role and duties of the individuals to be elected by the investors to act as trustee of the Trust would be comparable to those of a director or officer of a body corporate, had the joint venture been structured through a body corporate. OSFI appreciated that the right that each investor had to nominate an individual for election as trustee for the Trust was intended to allow the investors to monitor their respective investments in the joint venture. However, it appears that each individual to be elected as trustee would have a fiduciary duty to act in the best interest of the object pursued by the investors through their joint venture, by virtue of the proposed agreements that would establish and govern the joint venture, as well as applicable laws. In particular, as evidence of the independence of the trustees, OSFI took into consideration that the individuals to be elected by the investors to act as trustee of the Trust (one of whom would be an employee of the insurance company) would, by nature of the proposed agreements and applicable laws:

1. have full, absolute and exclusive power, control and authority over both the Trust's property and the affairs of the Trust, subject to specific limitations contained in the various agreements that would establish and govern the joint venture;
2. be required to exercise their powers and carry out their functions honestly and in good faith with a view to the best interests of both the Trust and the investors (i.e., the unitholders) and, in that regard, would be expected to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;
3. have to render account of their administration of the Trust's properties and the affairs of the Trust to all investors; and
4. be liable to all investors if they did not exercise their powers or carry out their functions in the best interest of the Trust and in accordance with applicable laws and the terms and conditions specified by the investors.

Further, the insurance company confirmed that the employee to be nominated would, in his/her capacity as trustee, be acting independently of the insurance company and that there would be no agreement, commitment or understanding, whether formal or informal, between the insurance company and the employee regarding the role of the employee as trustee of the Trust, other than:

- the agreements that would be put in place by the insurance company together with other investors regarding their joint venture; and
- an indemnification agreement on terms and conditions similar to those that would be put in place had that employee been asked by the insurance company to act as a director or officer of a body corporate.

Conclusion: OSFI concluded that, in this case, the fact that the insurance company would nominate one of its employees for election as trustee of a trust would not result in the insurance company itself acting in Canada as a trustee for a trust. Therefore, the insurance company would not be in contravention of section 466 of the ICA.

Legislative References:

Section 466 of the ICA states that no company shall act in Canada as

- a) an executor, administrator or official guardian or a guardian, tutor, curator, judicial adviser or committee of a mental incompetent person; or
- b) a trustee for a trust.

Table of Concordance:

Section Description	BA	TLCA	ICA	CCAA
Restriction on fiduciary activities	412, 544	412	466	378

The table of concordance makes cross-references to similar provisions of other federally regulated financial institutions legislation that may be of relevance to the reader.

* Rulings describe how OSFI has applied or interpreted provisions of the federal financial institutions legislation, regulations or guidelines to specific circumstances. They do not negate the need to obtain any necessary approval of the transaction under the relevant federal financial institutions legislation. Rulings are not necessarily binding on OSFI's consideration of subsequent transactions as these transactions may raise additional or different considerations. Legislative references in a Ruling are not meant to substitute provisions of the law; readers should refer to the relevant provisions of the legislation, regulation or guideline, including any amendments that came into effect subsequent to the Ruling's publication.