

YUKON FIRST NATION TRUSTS: ESTABLISHING A LEGACY FOR FUTURE GENERATIONS



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NOVEMBER 2011

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MAY 2011

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I. INTRODUCTION

Over the course of the last fifteen years, Yukon First Nations have accumulated a great deal of wealth as a result of the settlement of lands claims, economic development activities and resource development on their lands. Yukon First Nation governments have responsibilities to secure and grow these monies for the long term benefit of their citizens. As a result some First Nation governments have examined and established investment and economic trusts to protect their citizens' long term financial interests.

The CYFN SGS recognizes that Yukon First Nations have established a great deal of experience in the development and management of trusts. These materials are intended to build upon such experience for the benefit of those Yukon First Nations who have yet to establish a trust, to assist with the ongoing management of Yukon First Nation trusts and to inform those First Nations citizens interested in becoming trustees.

These materials are developed to support Yukon First Nations and their citizens to understand the: (i) basics of establishing a trust; (ii) value a trust can provide to Yukon First Nation interests; and (iii) importance of proper management to achieve maximum long term benefits.

The main part of these materials is the trust manual, which provides a summary of the legal aspects of trusts, establishing a Yukon First Nation trusts, and considerations for proper management of respective trusts. The second part of the materials provides user friendly trust management basic for citizens and trustees.

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II. TRUST MANUAL

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1. What is a First Nation trust?

A trust established for a First Nation is more than a bank account or portfolio of investments. It is a legal instrument that is separate and independent from the First Nation that is established to hold and manage certain assets of the First Nation. These assets may include any financial compensation the First Nation receives on behalf of its citizens. By establishing a trust, the assets of the First Nation are not managed by First Nation leadership, but by certain trustees who have been appointed specifically to oversee the management of the trust assets. The trustees are legally obligated to ensure that their management of the trust assets is consistent with the terms of the agreement that created the trust. This is known as a trust agreement.

A defining characteristic of a trust is the fiduciary relationship that it creates between the trustees and the beneficiaries. The fundamental role of a trustee is to manage and administer property and assets on behalf of another, and to hold that property exclusively for the other's benefit. The trustee is expected to give first priority to the interests of the trust and the beneficiaries whenever he is carrying out his duties or exercising his powers as a trustee.

Trusts are established for a variety of reasons. A trust may be established to create a separate entity where the funds and property are protected from the creditors and any debts and liabilities of the settlor. Or a trust may be established so that contributions can be made from the trust to specific charities with certain tax benefits. A trust can also be used to save and invest money for some later date or purpose. For example, a group of people may decide to contribute to a trust that is managed and invested for the benefit of that group. The pool of funds is then invested in order to grow and make more money for the group, whereas individual contributions would be too small to invest on their own. These trusts have been used as an investment tool for a variety of purposes, including pensions and mutual funds.

2. Why would a First Nation establish a trust?

Today First Nations across Canada are accumulating significant wealth. This wealth may be provided as financial compensation and a share of resource revenues and tax revenues under a land claim and self-government agreement. First Nations are also involved in economic development activities and projects that generate revenues for them. Other First Nations have negotiated impact benefit agreements with industry proponents, which in some cases provide payments to the First Nation.

As First Nations accumulate wealth, they need a way to manage and administer their funds wisely and in accordance with the objectives and goals of the community. This wealth is often seen to be the foundation for the development of a healthy and vibrant community. It is intended to supplement key programs and services, such as education and housing and fund community priorities, including healing initiatives and cultural revitalization activities. While this wealth may be used to meet the current needs of the community it is meant primarily for the benefit of the community's future generations. Therefore, the community needs to ensure that this wealth is managed and administered with a high degree of accountability and transparency.

Many First Nations have found that a trust can be used to manage their assets effectively for several reasons. First, under a trust, trustees have legal duties to manage the assets in a prudent manner in accordance with the objectives and goals of the community as set out in the trust agreement. Second, a trust will reduce the amount of tax payable. Finally, a trust ensures that the trust property is protected from the debts and liabilities of the First Nation.² In the end

² Which includes but is not exclusive to First Nation governing bodies and corporations.

the trust clarifies roles and identifies responsibilities with respect to the management and administration of the assets, which, in turn, enhances accountability and transparency. In general, First Nation trusts are to protect the trust property for the long term and are not be affected or impacted by the outcomes of any elections or political changes within the First Nation. The goals and objectives of the trust, as set out in the trust agreement, will govern the management of the trust property without political influence or interference.

Some have asserted that the management and administration of a First Nations' financial compensation and other assets under a trust is costly and administratively cumbersome and inconvenient. In response, others have stated that such costs and inconvenience are not a concern if the assets are protected and managed prudently in a transparent and accountable manner.

3. Benefits of a Trust

There are several benefits if a First Nation transfers its assets to a trust to be managed by trustees. As discussed below, these benefits include protection of the trust property, increased transparency and accountability of the management of the trust property and reduced taxes.

3.1 Protection of trust property

The assets in a trust are known as “trust property.” Trust property has certain protections from the creditors of the First Nation, in that it is protected from any debts or liabilities of the First Nation.

In other words, if the First Nation or the First Nation’s economic development corporation was found by a court to owe money to a third-party, that third-party would not be able to claim any portion of the First Nation’s assets that were transferred to the trust. For example, if a person is injured while using a road located on settlement land of the First Nation and a court finds that the First Nation’s negligence was the cause of the accident, the injured person would not be able to claim any portion of the First Nation’s financial assets that were transferred to the trust in order to compensate for his/her injuries or losses.

3.2 Enhanced transparency and accountability

As previously mentioned, trustees are appointed to be legally responsible for the management of the trust property in accordance with the trust agreement. The trustees have a legal duty to act in the best interests of the beneficiaries of the trust with respect to the management and administration of the trust property.

The First Nation has no role in the management and administration of trust assets. Instead, the trustees would determine when, why and how much money should be withdrawn from the trust for any given purpose. It is the trustees who determine how the trust property is invested to realize the objectives and goals of the trust agreement. Usually, the trustees will hire a competent investment manager and other agents to make financial decisions, and then the trustees oversee the performance of the manager and agents. This ensures that the trust property is managed and administered with a high degree of expertise, attention and oversight, while remaining free from political interference.

Trustees are required to give full and comprehensive reports to the beneficiaries regarding the activities and transactions of the trust. These reports would set out the expenses of the trust, including any management fees and trustee remuneration, as well as the earnings of the trust property, if any.

The trustees are legally obliged to adhere to the provisions of the trust agreement and conduct themselves according to the legal principles of trustees, including the fiduciary duty they owe to the beneficiaries.

3.3 Minimize tax liability

There are significant tax benefits to putting assets into a trust. If managed correctly, there may be no tax payable with respect to trust property. A trust can earn tax-free income, including property income and business income, which can then be distributed to the beneficiaries.

If a trust is managed properly, the trust funds will not be subject to tax while they remain in the trust. Further, the income that is created from the trust funds will be tax-exempt when it is transferred out of the trust and into the hands of the First Nation beneficiary by relying on the First Nation's tax-free status for each year it is a public body performing a function of government in Canada within the meaning of paragraph 149(1)(c) of the Income Tax Act (Canada).³

In this way, trusts can be used as "flow-through" mechanisms, avoiding tax entirely if proper measures are taken. To the extent a trust makes its income distributable to its beneficiaries, it is the beneficiaries and not the trust that may be liable to pay any tax. The proper designations have to be made in order for the beneficiaries to avoid paying tax on payments received from the trust. It is recommended that trustees obtain tax advice before making any disbursements to minimize any tax liability for the beneficiaries.

4. The elements of a trust

Three elements are needed for the creation of a trust: the settlor, the trustee and the beneficiaries. The settlor creates the trust terms which are set out in the trust agreement, and transfers the trust assets to the trustee; the trustee assumes legal ownership of the assets and administers them according to the trust terms; and the beneficiaries enjoy the trust property as permitted by the terms of the trust.

The positions of settlor, trustee and beneficiaries are not mutually exclusive. In other words, one person can be "wearing more than one hat" under a trust agreement. This means that a beneficiary may also act as a trustee. In fact, in a First Nation trust, the First Nation is often both the settlor and beneficiary.

It is important to understand that a trust establishes checks and balances to ensure that the trust property is managed and administered according to the objectives and goals of the trust agreement. As discussed below, the checks and balances within the trust include the oversight provided by a protector, the reporting provided by a trust custodian, the guidance provided by an investment policy and, perhaps most importantly, the due diligence undertaken by the trustees, such as the review of quarterly reports that are provided by an investment manager. Each element of a trust has a specific function that helps promote and enhance accountability and transparency of the management and administration of the trust property.

³ Tr'ondëk Hwëch'in Self Government Agreement, s.15.

4.1 The settlor

The “settlor” or “grantor” places the property into the trust and relinquishes or transfers the control and ownership over that property to the trustee. In some cases, a third-party will transfer property to the trustees.

The initial settled amount or the amount placed in the trust by the settlor, including any subsequent amounts transferred to the trust, constitute the “trust property.”

The trust agreement will set out clear rules, restrictions and procedures for the use and distribution of the capital of trust property and any earnings or income that arise from the investment of the capital.

4.2 The trustees

The trustees manage and administer the trust property according to the trust agreement and their general duties as set out in the common law – that is, legal principles made by judges in their decisions. The trustees are the legal owners of the trust property but, as noted above, the beneficiaries of the trust receive the benefit of the trust in accordance with the terms of the trust agreement.

Most trust agreements establish several trustee positions. In some trusts, the settlor may declare himself to be the trustee.

Under most trust agreements, a trustee is not liable for any error of judgment or mistake of law or a loss caused by a co-trustee or agent of the trust. However, a trustee would be liable for willful neglect or default, willful misconduct or willful breach of the terms of a trust agreement. If it can be shown that a trustee willfully defaulted in the exercise of his own duties, he may be held liable. Notably, trusts are required to provide “errors and omissions” insurance for the trustees.

4.3 The beneficiaries

The trustee has a legal duty to manage the trust property for the benefit of the beneficiaries. As stated, beneficiaries receive the benefit of the trust in accordance with the terms of the trust agreement. This means that while the trustees legally own the trust property, the beneficiaries are the “beneficial owners.”

Some trusts specifically name persons or corporations as beneficiaries. A trust can also be established so that there is more than one class of beneficiaries with different entitlements under the trust. If the trust establishes classes of beneficiaries, the classes must be defined with sufficient certainty. If not, the trust may fail for what is called “lack of certainty.”

4.4 The protector

The settlor may wish to restrain some of the trustees’ power relating to the management and administration of the trust property. If a settlor chooses to restrict certain powers of the trustees, a “protector” will be appointed under the trust instrument to direct or restrain the trustees in their administration of the trust. The protector may also be known as a guardian, committee, curator or advisor in other trusts.

The protector has a legal duty to fulfill his⁴ role and carry out his responsibilities under the trust agreement. It is arguable that a protector owes a fiduciary duty to the settlor and the beneficiaries. If he fails or refuses to fulfill his duties and powers, he may be liable for any losses or damages suffered by the trust or the beneficiaries. In such a circumstance, he should be removed from his office.

While the protector may work closely with the trustees from time to time, the protector is not a trustee and has responsibilities and powers distinct from those of the trustees. The protector operates at arm's-length from the trustees.

4.5 Agents of the trust

It is understood that trustees may not have all the necessary skill and experience to properly administer and manage trusts. Trustees may employ agents, from investment managers to accountants, to provide professional advice and services to support the management of a trust. In other cases, it may be appropriate and has been done, for trustees to delegate certain tasks to an agent, if permitted by the trust agreement.

Agents would include an investment manager who would be responsible to invest the trust property according to the direction and guidance set out in an investment policy, approved by the trustees. As such, trustees would open an account with a trust custodian to hold the trust property and the investment manager would provide instructions to the trust custodian regarding the investment of the trust property. This means that the trust custodian would always hold the trust property. In this way, neither the investment manager nor any other agent would have access to the trust property.

In addition, trustees should hire an investment advisor to provide ongoing reviews and analyses with respect to the investment performance of the trust property and the investment manager's service. Trustees would also need to retain legal counsel to provide advice regarding tax matters or other trust management matters.⁵ As well, trustees should retain both an accountant and an auditor.

5. What are the duties of a trustee?

The duties of a trustee have been established in the common law and are set out in statutes enacted by public government. In the Yukon, the Trustee Act (Yukon)⁶ sets out the general duties of a trustee in the Yukon Territory.⁷ These duties are generally applicable so long as they are not contradicted by the trust agreement. Therefore, the trust agreement along with both the common law and statutes must all be examined together to determine the full range of a trustee's duties.

Overall, the foundation of a trustee's duties is clear: a trustee must always hold and manage the trust property for the benefit of the beneficiaries.

A trustee is a person who is under a fiduciary obligation to hold property, of which he is technically the legal owner, for the benefit of another. The duties of a fiduciary include loyalty to the beneficiaries and taking reasonable care of the assets within the trustee's custody. The

⁴ Any reference to the male gender is to be read to include the female gender.

⁵ In addition to legal tax implications, Yukon First Nations trustees have hired lawyers to deal with issues of conflict of interests and the establishment of corporate entities, for example limited partnerships with First Nation corporations, to oversee economic development matters.

⁶ R.S.Y. 2002, c.223.

⁷ Inclusive of Yukon First Nation trusts.

trustee as a fiduciary must ensure their actions are for the advantage of the beneficiaries. Thus, a trustee cannot do anything that is not solely directed towards the best interests of the beneficiaries of the trust. The best interests of the beneficiaries are paramount over the trustee's personal interests and, as a result, the trustee cannot permit himself to be in a position where his personal interests may conflict with his duties as trustee.

General duties of the trustees include the following:

5.1 Duty to act as a "person of ordinary prudence"

A trustee must discharge his duties, exercise his powers and fulfill his responsibilities as a "person of ordinary prudence," as he would with the management of his own affairs.

In other words, a trustee must show ordinary care, skill and prudence. Section 2(1) of the Trustee Act directs that a trustee act as a prudent person with discretion and intelligence would act in dealing with his own affairs. Prudence means taking into account all the factors and circumstances before making a decision. This standard of care applies to all trustee functions, including investment decisions and any delegations.

A person may speculate with his own money and be negligent in the administration of his own affairs, but as a trustee he is exercising the powers and discretion of an owner in favor of others. Prudence does not imply that a loss in the investment of the trust property will never occur. It is possible that a trustee can satisfy the standard of care even though the investment of the trust property has fallen in value.

A trustee does not necessarily satisfy the standard of care by simply taking advice since the question remains whether "the prudent person" would have been satisfied with the source or nature of the advice given. On the other hand, keeping beneficiaries informed and getting their consent on certain decisions may be enough to demonstrate that a trustee acted properly.

No trustee is expected to defend his actions or omissions against a complainant whose charges are based upon the advantage of hindsight. The only question can be "what the prudent person would have done had he stood in the trustee's shoes when the disputed events took place?"

It is important to note, that no distinction can be drawn between the lay trustee and the professional trustee. Both are held to the same standard and are required to act as the prudent person would act.

5.2 Duty not to delegate

A trustee may delegate where a person managing his own affairs would employ an agent with specialized skill or experience. Section 23 of the Trustee Act permits a trustee to appoint a lawyer or a chartered bank to be the trustee's agent to receive and distribute any property receivable under the trust. However, a trustee may not delegate his duties when the nature of the task is one that he is required to perform personally. Any act of an agent purportedly carrying out such a task would have no legal effect. It would bind neither the trust nor any third-party dealing with the trust.

It is often difficult to determine when a duty will be held to be non-delegable. The determination is largely a question of construction. A court will determine this issue by taking into account the nature of the duty and the provisions of the trust agreement.

It is reasonable to think that trustees cannot delegate the disposition powers of a trustee to distribute trust property to a beneficiary, but can delegate administrative powers relating to

dealing with the trust property in the course of its management and administration. For example, trustees, as investors, need to be able to sell, invest, insure and consent as shareholders to company reorganizations. Most of these tasks require business experience and skill and are areas where one would expect that an agent would be conducting trust business if the trustee himself does not possess that skill. Despite this rationale, any delegation of administrative power or discretion is subject to the requirement that the trustee make policy decisions himself.

5.3 Duty of impartiality amongst beneficiaries

A trustee has a duty not to favor certain beneficiaries over others and must act impartially. A trustee must act in such a way that, if there are two or more beneficiaries, each beneficiary receives exactly what the provisions of the trust agreement confer upon him and does not receive any advantage or suffer any burden which other beneficiaries do not share equally. In this manner, a trustee acts impartially. He must hold an even hand, subject to the terms of the trust agreement.

While the settlor has the right to give disproportionate interests to various beneficiaries, it is the duty of the trustees to carry out the terms of the trust agreement as they find them and to ensure that in the administration of the trust they do not give advantage or impose burden when that advantage or burden is not set out in the trust agreement.

The duty to act impartially is usually associated with circumstances where the trustees have administrative powers that involve the exercise of discretion. The trustees would exercise such discretion when the trustees decide to make a payment to each of the beneficiaries upon a certain age or an event.

However, not all functions of trustees involve a duty of impartiality. For example, a discretionary trust may require trustees to decide which of the named beneficiaries will benefit from the trust property and in what amount. Where trustees have flexibility in how they exercise their impartiality, the trustees may be judged by the courts in terms of whether, in the overall management and administration of the trust, they have acted honestly and reasonably in the discharge of their duties, including the duty to act impartially.

5.4 Duty of loyalty

A trustee must avoid any conflict of interest. This includes a duty to act in the best interests of the beneficiaries.

5.5 Duty to disclose accounts and information

A trustee has a legal obligation to account for his management and administration to those who may have an interest in the trust property, whether as a beneficiary or a creditor.

The information related to accounts means generally the statement of assets held at the beginning and close of the accounting period, sales and purchases of assets, credits, debts or liabilities arising during that period. This includes dispositions made to beneficiaries, expenses paid and trustee fees charged or taken.

The trustees may be required to disclose information relating to their exercise of powers and discretions granted under the trust agreement.

5.6 Detailed duties

In greater detail, the duties of a trustee include the following:

- invest the trust property prudently in authorized investments in accordance with the trust agreement;
- ensure disbursements of the capital and income from the trust property are made only for authorized purposes and on a timely basis;
- maintain complete and accurate records of trust activities, including any transactions, and minutes of each meeting of the trustees, including any decisions or resolutions;
- avoid and disclose any conflicts of interest;
- be accountable and transparent to the beneficiaries of the trust; and
- retain agents and give full consideration to their advice.

The trustees have a duty to comply with the provisions of the trust agreement. In some cases, a trust agreement may set out exculpatory⁸ provisions that relieve a trustee of certain liabilities.

6. What are the powers of trustees?

The powers of a trustee are different from his duties.

The powers of a trustee are authorizations to take certain actions or make certain decisions. Unlike duties, powers do not create legal requirements to take such actions or make such decisions. A trustee has the discretion to exercise his powers, or not.

It is important to highlight that to exercise a discretionary power lawfully, a trustee must:

- understand the scope of the discretionary power and not exceed that authority;
- understand the objectives and goals of the trust;
- maintain an objective approach with respect to decision-making;
- review and consider all relevant information and not take into account irrelevant information; and
- be able to show that he took into account any professional advice and considered any relevant materials and information before making a decision.

The Trustee Act sets out the general powers of trustees to manage the trust property. In particular, it provides that a trustee may invest the trust property but must “exercise the judgment and care that a person of prudence, discretion, and intelligence would exercise as a trustee of the property of others.”

Section 2 provides the following:

Authorized investments

2(1) Unless a trustee is otherwise authorized or directed by an express provision of the law or of the will or other instrument creating the trust or defining the

⁸ Essentially means will not be blamed.

trustee's powers and duties, the trustee may invest trust money in any kind of property, real, personal, or mixed, but in so doing, the trustee shall exercise the judgment and care that a person of prudence, discretion, and intelligence would exercise as a trustee of the property of others.

(2) A trustee may, until the investment of any trust money, deposit it during any time that is reasonable in the circumstances in any bank or trust company or in any other corporation empowered to accept money for deposit that has been approved for that purpose by the Commissioner in Executive Council. R.S. c.173 s.2.

The powers set out in the Trustee Act are in addition to the powers of the trustees established in the trust agreement, if any. Again, these common law and statutory powers are generally only applicable to the extent that they are consistent with the trust agreement, as "nothing in the Trustee Act authorizes a trustee to do anything that the trustee is expressly forbidden to do or to omit anything that the trustee is expressly directed to so by the trust agreement."⁹

The Trustee Act also authorizes a trustee to appoint agents, such as legal counsel and banking institutions, and to receive and discharge trust funds.

Other general powers of a trustee can include:

- delegating investment authority (usually to one or more investment managers);
- paying authorized expenses from either the income or capital of the trust property (some trust agreements require the approval of the protector to pay such expenses);
- hiring agents as the trustees determine to be necessary;
- making procedural rules to be followed at trustee meetings;
- executing all documents required to administer the trust; and
- instituting, prosecuting and defending any suits or actions or proceedings affecting the trust property.

Again it must be emphasized that the trust agreement may set out additional trustee powers that are not included in the common law or statute and each trust agreement may include or prevent different powers.

7. Recommendations relating to trustees

Along with the trustees' duties and powers previously outlined, it is recommended that trustees also satisfy the responsibilities set out below.

7.1 Training

Training is a valuable investment in the community. Ongoing training assists current trustees in properly performing their duties and powers and some trust agreements direct that only qualified persons – that is, persons who have completed training – may be appointed as

⁹ Trustee Act, s.4.

trustees. As a result, training is necessary to ensure that citizens are qualified to be appointed as trustees if required.

In particular, it may be important to train citizens who live in the community since some trust agreements direct the protector to “strive to ensure that a majority of trustees reside on settlement land” of the self-governing First Nation.

Although there is a cost that comes from the trust to provide training, it is recommended that training opportunities be provided to both current and prospective trustees. Although not all citizens who have taken the training may become trustees, it is important that citizens have an appreciation of: the treatment of First Nation financial compensation and other assets, how trusts are established, the skill and experience required to properly manage a trust and to understand trustees’ responsibility to beneficiaries.

7.2 Communications with citizens

In addition to reporting to the beneficiaries, trustees should hold information meetings with the First Nation community and government from time to time. These meetings are important to provide updates to citizens about the trust and investment performance of the trust property and ensure transparency and accountability. While it is recommended that such meetings be held annually, other meetings should be held, as required. For instance, it may be advisable to provide an update to the citizens and the First Nation government if there are significant fluctuations in global economic markets that may affect the performance of the trust investments.

While community meetings may be costly, it is important that the trustees take steps to communicate with the citizens and make information available.

Other forms of communication with citizens can include a website that provides current information about the trust and contact information. It is not recommended that the website set out any details about the trust property or the investment of the trust property, as it may be inappropriate to disclose such information publicly.

7.3 Due diligence

It is not unusual for trustees to retain various agents from outside the Yukon Territory. For instance, investment managers and trust companies are likely located in British Columbia, Alberta or provinces.

It is recommended that the trustees maintain regular contact with their agents and visit their offices from time to time. Not only is this contact a necessary part of the trustee’s duty of due diligence and ongoing professional development, it is also important for the trustees to establish relationships with the various agents of the trust, including the investment manager and trust custodian.

8. Establishing and operating a First Nation trust

8.1 How will the trust be constituted?

In most First Nation trusts, the First Nation government on behalf of its citizens or land claims beneficiaries, will pass a resolution transferring specific assets to the trustees to be managed in accordance with the trust agreement. As noted, First Nation trust property is often comprised of financial compensation from a land claim agreement, payments under an impact benefit agreement, or business revenues. In this way, the ownership and control of the assets are

transferred from the First Nation to the trustees subject to the provisions of the trust agreement.

It is recommended that the First Nation government work with and involve its citizens to develop the trust agreement. Since the trust agreement will govern the management and administration of the trust property, it must reflect the objectives and goals of the community. For example, the objectives and goals of First Nation trusts often are: to ensure long-term growth while remaining within acceptable levels of risk; to provide for the needs of both current and future generations; and to produce stable and consistent income for the current generation. Some First Nation trust agreements set out principles to guide the administration and management of a trust (see Schedule “A” First Nation Guiding Principles, as an example).

Examples of Yukon First Nation trusts include the establishment of a Lanalxh (Prosperity) Trust Act, which is a Carcross/Tagish First Nation law based upon First Nation principles and values to promote economic prosperity. The Lanalxh (Prosperity) Act provides for the establishment of the trust agreement (deed) which is required to be consistent with the terms of the said Act. This approach ensures that the First Nation community, through the establishment of the Lanalxh (Prosperity) Act (which is established by the Carcross/Tagish First Nation General Assembly), determines how economic funds, provided through their land claims agreement, will be managed and administered under the trust.

8.2 Who are the beneficiaries?

In a First Nation trust, the beneficiary is typically the First Nation, the citizens of the First Nation, or both. This means that the First Nation and its citizens are the “beneficial owners” of the trust property and would receive the benefit of the trust in accordance with the terms of the trust agreement.

8.3 Who is the protector?

The trust agreement may appoint a specific person or an institution, such as a bank or trust custodian, to be the initial protector. The trust agreement may also establish more than one protector. Given the significant responsibilities and powers of the protector, a First Nation may prefer to appoint a professional, such as a lawyer, who has the trust and confidence of the community, to be the protector.

Under most First Nation trusts, the position of the protector is established to oversee and supervise the work of the trustees. The protector ensures that the trustees are fulfilling their duties and obligations according to the trust agreement and, as discussed below, in accordance with a code of conduct.

Overall, the protector must ensure that trustees are acting in the best interests of the beneficiaries. As directed by the trust agreement, the protector usually reports to the settlor or beneficiaries.

In particular, a protector often has the power under a trust agreement to:

- declare that any act by the trustees requires the approval of the protector;
- remove any person as a trustee;
- fill any vacancy among the trustees;
- increase the number of trustees and appoint additional trustees;
- decrease the number of trustees; and

- approve of the trustees' remuneration (pay).

If a trustee is failing to fulfill his duties, the protector must exercise his powers under the trust agreement in a timely manner to deal with any concerns. Otherwise, he would be failing to fulfill his responsibilities as the protector.

Notably if the protector is provided the power to appoint new trustees, he must ensure that an interested person is eligible to be appointed and qualified to assume the duties and powers of a trustee. As mentioned, some First Nation trust agreements direct that any prospective trustees complete the appropriate training to understand the structure and operation of the trust and the nature and scope of their responsibilities. It is also equally as important that prospective trustees also understand the time commitment required to fulfill their duties and powers.

A trust agreement should provide for a process to appoint a new protector or remove a protector.

For the reappointment of a protector a trust agreement may authorize either the current protector or the beneficiaries to appoint a new protector.

For the removal of a protector, a trust agreement may provide that the protector can resign in writing to the First Nation and the trustees. Or it could provide that a court could remove the protector, which in these circumstances, the beneficiaries would appoint a new protector.

In some cases, the trust agreement provides that the beneficiaries may remove the protector ten years after the establishment of the trust. Since the protector may be faced with difficult decisions with respect to the management and administration of the trust property which may be unpopular with beneficiaries, some trust agreements make it difficult to remove the protector during the period following the establishment of the trust. During that period, it is important to maintain continuity with respect to the management and administration of the trust property in accordance with the objectives and goals of the trust agreement.

8.4 Who are the trustees?

A trustee must have "legal capacity." Minors, legally incompetent persons and unincorporated associations do not have the required legal capacity to be a trustee. The Trustee Act provides that, upon application, a court may remove certain persons as a trustee, such as any person convicted of an indictable offence or an insolvent person.

In addition, the trust agreement may establish eligibility qualifications for a person to be a trustee. For instance, under some First Nation trust agreements, only a "qualified" person can be appointed as a trustee which is defined as a person who:

- has satisfactorily completed training sessions or undertakes to complete such training within a certain period of time after his appointment as a trustee;
- is of good character and reputation and has not committed any indictable offence within the previous five years or certain other criminal offences; and
- has not been bankrupt or insolvent within the past five years.

In the case of First Nation trusts, it is recommended that serious efforts be made to ensure that the trustees include citizens of the First Nation who have the respect and trust of their community. This will ensure that the community has a connection to the management and administration of the trust property. In some cases, a person who is neither a citizen nor

member but has experience and knowledge may be appointed as a trustee. An institutional trustee, such as a chartered bank, may also be appointed. Whatever the appointment process, a trustee must accept the appointment voluntarily since a person cannot be compelled to act as a trustee.

Most trust agreements provide a mechanism or process for the removal or retirement of a trustee. There may also be recourse to the courts for the removal of a trustee. It is recommended that the trust agreement permit the reappointment of a trustee upon the expiry of his term. Some First Nation trusts provide that a former trustee cannot be reappointed for twelve months following the expiry of his term.¹⁰ There does not appear to be any practical rationale for such a restriction. Notably it is a significant investment for a trust to train and develop competent and skilled trustees and, at times, it has been challenging for some First Nation trusts to find citizens who are prepared to make the commitment necessary to act as a trustee. Such types of restrictions must be carefully considered and balanced with the overall benefit to serve the interests of the beneficiaries.

8.5 Investment of trust property

Most trust agreements set out the general objectives and goals of the trust property and provide the trustees with the power and discretion to invest the trust property. However, the trust agreements do not usually specify how to make those investments. As a result, trustees need to deal with several issues such as capacity to invest, investment choices and monitoring the investments.

First, the trustees should determine whether they have the capacity to manage the investment of the trust property. In most cases, the trustees retain an experienced investment manager and delegate that responsibility to them.

Second, the trustees need to develop a concise statement detailing how investment decisions will be made. Who makes such decisions? What types of investments? What are the expectations with respect to the earnings or income? What level of investment risk is acceptable? It is recommended that these matters be set out in an investment policy. The development of the investment policy must involve not only the trustees but also the members of the First Nation council and its citizens. Notably, the policy should reflect the values and perspectives of the community.

An investment policy would provide direction and guidance to the investment advisor and other agents of the trust regarding the investment of the trust property. It would also provide transparency and accountability on behalf of the trustees. In particular, it should set out the investment objectives, asset allocation and investment risk. It should also confirm what investments are permitted. For example, the investment policy should confirm if the trust property can be used to purchase securities on margin, make loans to individuals, or do short sales? Can the trust property be used to guarantee any borrowing?

Third, the trustees need to establish a system to monitor the investment of the trust property to ensure that they are meeting the terms of the trust agreement and the investment policy. The investment policy could also set out monitoring procedures in relation to the investment manager. For instance, the trustees may require the investment manager to present quarterly statements of the investment performance of the trust property for their review and consideration. The trustees could also require the investment manager to make an annual report to the beneficiaries.

¹⁰ See Part 5 section 11 of the Lanalxh (Prosperity) Trust Act.

An investment policy could direct the investment manager to provide on a quarterly basis a letter of compliance with the provisions of the investment policy indicating, as the case may be, instances where the policy guidelines and restrictions are not being respected. An investment policy could also set out conflict of interest rules for the trustees and agents of the trust.

From time to time, an investment policy should be reviewed and, if necessary, amended by the trustees.

8.6 Selecting investment managers

There may be several factors to take into account in an objective selection of investment advisors and managers for a First Nation trust. Key factors should include: the past performance of their investment approach; their commitment to work with the trustees and the community; and the amount of their professional fees.

It is recommended that the trustees undertake some research to determine the appropriate advisory team and explore the options available. There are different types of investment firms that provide a range of investment options and approaches. For example, the trustees could retain one of the following to manage the investment of the trust property: a bank, a large investment firm, a specialized boutique for managing investments, or individual investment advisors.

In some cases, trustees have retained an investment consultant to identify prospective managers based on certain criteria and arrange interviews. If trustees retain such an investment consultant to facilitate the selection process, they need to ensure that the process is fair and objective and that the needs of the trustees and community are driving the selection process. For instance, the trustees must ensure that the investment consultant does not have any business relationship with the prospective managers that could taint or bias the selection process.

8.7 Monitoring and evaluating investment and service performance

The roles of the trustees and the investment manager and other agents of the trust must be clearly understood.

As discussed above, if the trustees retain an investment manager to invest the trust property, the trustees must monitor the performance of the investments. This means reviewing the statements, maintaining communication with the investment manager and evaluating the performance of the investments.

In accordance with their fiduciary obligations owed to the beneficiaries, the trustees must not only monitor but evaluate the investment manager. However, it is often difficult to evaluate the investment of the trust property to determine if the investments are consistent with the objectives and goals of the trust. As noted earlier, if the trustees develop an investment policy that identifies guidelines and targets, the trustees will be better able to gauge the performance of the investments.

While the trustees have the power to delegate as necessary and appropriate in accordance with the trust agreement, they are the ultimate decision-makers with respect to the management and administration of the trust property. In fact, they remain responsible for the trust property despite any delegation. As a result, the investment manager and other agents should provide their professional opinion and expert advice within the scope of the matters delegated to them for review and consideration of the trustees. The trustees should never allow the agents of the trust to fetter their discretion or decision-making as trustees.

It is also recommended that the trustees establish a relationship with the investment manager and communicate on a regular basis with agents in order to carry out effective monitoring. If the investment manager is not willing to commit to the development of such a relationship, fails to maintain regular communications with the trustees, or fails to attend meetings with the beneficiaries, the trustees should re-examine whether that manager is capable of meeting the needs of the trust and beneficiaries.

9. Code of conduct for trustees

Given that the duties and powers of a trustee may not be comprehensively set out in the trust agreement, it is recommended that the protector require the trustees to commit to a code of conduct. This will ensure that the trustees will be able to understand the scope and nature of their duties and powers as set out in the trust agreement and established in common law (see Schedule “B” Code of Conduct and Policy on Conflicts of Interest as an example).

The purpose of such a code would be twofold: it would set out expectations for the trustees in relation to their duties and responsibilities, and it would establish a standard for the trustees to meet as they carry out their duties and responsibilities.

In general, the code of conduct would be based on the principle that each individual trustee must be an active participant to enable the trustees as a whole to function effectively and efficiently.

It is also recommended that the code of conduct set out:

- conflict of interest guidelines;
- rules addressing gifts and hospitality to the trustee,
- confidentiality expectations; and
- a process to deal with complaints and disputes involving trustees.

The code should include an “oath of office” and “confidentiality agreement.” Under the oath, a trustee would declare that he has read, understands and agrees to comply with the trust’s code of conduct, policy on conflicts of interest and other applicable rules and policies. Under the oath, a trustee agrees to immediately resign as a trustee of the trust in the event that he, or his fellow trustees or the protector have concluded that he breached the oath.

10. Can a trust be revoked or terminated?

A settlor cannot revoke or set aside his trust unless he has expressly reserved the power to do so in the trust agreement.

The trust is a disposition and once the trust agreement has taken effect, the settlor has alienated the property as if he had given it to the beneficiaries by way of gift. The settlor does not retain a right or power to intervene once the trust has taken effect, whether to set aside the trust, change beneficiaries, name other beneficiaries, take back part of the trust property or do anything else to amend or change the trust. He has effectively transferred the property completely, subject only to the restrictions set out in the trust agreement upon who is entitled to enjoy the benefits of the trust property and to what degree.

If all the beneficiaries of a trust can be identified, have full legal capacity, and are entitled to all of the beneficial interest of the trust, they may apply to have the trust property distributed and the trust terminated. This is known as the rule in Saunders v. Vautier based on the 1841 English Chancery Division decision (1841), 41 E.R. 482.

If a trustee is given discretion to distribute trust property to unidentifiable beneficiaries, for example, unborn children, then the rule set out in Saunders v. Vautier cannot apply, as the first requirement is impossible to satisfy. As a result, the rule is unlikely to apply to most First Nation trusts because trustees are given the power to distribute the trust property to the “citizens of the First Nation” including the future generations who are not yet born.

Since most First Nation trusts are intended to manage and administer the trust property for the long-term and on an indefinite basis, the Saunders v. Vautier rule ensures that First Nation trusts are not likely to be terminated in the foreseeable future.

III. TRUST MANAGEMENT TOOLS

Built upon the Trust Manual, the following section is to provide Yukon First Nations and their citizens with quick references to key aspects of trusts and trust management. It is important to review the Manual to appreciate the complexities of these elements that inform the establishment and management of First Nation trusts.

A.

TRUST BASICS: ESTABLISHMENT OF A TRUST

- First Nations throughout Canada have used trusts to hold and manage settlement monies and allocate resources to support the growing needs of their First Nation communities. If properly structured and prudently managed trusts provide financial structures that provide transparent controls and protection for a First Nation's major financial assets.
- Trusts are to be administered and managed in accordance with the common law, statute (Yukon Trustee Act) and the trust agreement.
- There are five key elements to a trust: (i) settlor (ii) trust property (ii) trustees (iv) trust agreement and (v) beneficiaries.
- A trust is a legal arrangement where the settlor will transfer legal title over trust property and will relinquish control to trustees who have a fiduciary obligation to protect, administer and manage the trust property (according to the terms of a trust agreement) for the interests of the beneficiaries.
- A trust cannot be revoked nor terminated unless expressly stated within the trust agreement. However, there is a common law principle known as the Saunders v. Valtier rule that identifies that a trust can be terminated based on the following factors whereby all beneficiaries of a trust can be (a) identified (b) all have legal capacity and are (c) entitled to all the beneficial interest of the trust. Then the beneficiaries can apply to have the trust property distributed and the trust terminated.

TRUST BASICS: BENEFITS OF A TRUST

If established and managed properly a trust can provide a number of benefits to Yukon First Nations, which include:

- Protection from third party claims against either the First Nation government (or any of its entities) or the First Nation economic development corporation. A trust essentially creates a firewall from creditors. It is important that trustees oversee the administration and management of the trust and not the First Nation (particularly its governing bodies, i.e. Executive Council, Justice Council, Directors, etc). Otherwise there is a potential to expose the trust to creditor's claims.
- Enhanced transparency and accountability to First Nation beneficiaries, whereby trustees have clear duties and authorities outlined within the trust legislation and trust agreement to provide regular reporting to the beneficiaries, the authority to hire skilled and competent services to protect and advance the interests of the said beneficiaries (i.e. investment managers).
- Tax benefits where no tax is payable on the trust property and that the trust can earn tax free income. If the income is transferred into the hands of the First Nation government, on behalf of the First Nation citizens, as long as the First Nation government is a body that performs public functions as a government, as recognized by the Income Tax Act (see s.149(1)(c)) the monies should remain tax exempt.
- Recent developments in Yukon FTA negotiations may require First Nations to turn to the use of trusts to protect revenues acquired from sources such as impact benefit agreements.

TRUST BASICS: BECOMING A TRUSTEE

- Most Yukon First Nation trust agreements (deeds) outline the eligibility requirements for an individual to become a trustee which can include and is not exclusive to:
 - ✓ have legal capacity (mentally competent or be the age of majority);
 - ✓ be of good character and reputation;
 - ✓ not commit any indictable offences or criminal offences within the previous 5 years;
 - ✓ not be bankrupt or insolvent with the past 5 years; and
 - ✓ completed training (or will undertake to take training).
- For those individuals who are interested in becoming a trustee, it is recommended that they consider the following:
 - ✓ take reasonable steps to understand what the trust is for;
 - ✓ understand the requirements to become a trustee;
 - ✓ read annual reports, policies and meet with existing trustees to gain insight from their experiences;
 - ✓ read the governing documents (trust agreement, policies and relevant laws);
 - ✓ ask questions and understand what your legal responsibilities will involve;
 - ✓ understand the scope and limitations of your authority and powers; and
 - ✓ understand the time commitment required.

TRUST BASICS: TRUSTEE AUTHORITY

- Trustees generally have discretion to exercise their authority, or not. Such discretion does not allow one to act at their own pleasure or for their own convenience but rather for the interests of the beneficiaries as reflected in the trust agreement.
- Trustees are to exercise their authority as a “person of ordinary prudence” taking into account all facts and circumstances before making a decision.
- Trustees’ authorities are outlined in both the trust legislation (Yukon Trustee Act) and trust agreement.
- To properly exercise one’s discretionary power a trustee must:
 - ✓ understand the scope of the discretionary power and not exceed that authority;
 - ✓ understand the objectives and goals of the trust;
 - ✓ maintain an objective approach with respect to decision making;
 - ✓ review and consider all relevant information and not rely on irrelevant information; and
 - ✓ show that decisions took into account professional advice.
- Trustees generally have the authority to:
 - ✓ manage the trust property in accordance with the trust agreement;
 - ✓ invest the property;
 - ✓ delegate investment authority;
 - ✓ hire agents (i.e. investment managers, accountant, lawyers) as determined necessary; and
 - ✓ execute all documents required to administer the trust.

TRUST BASICS: TRUSTEE DUTIES

- Trustees have a duty to ensure that their own personal interests do not interfere with their fiduciary obligation to the beneficiaries of the trust;
- Trustees have a duty to act with integrity and manage the trust property for the benefit of the beneficiaries;
- Generally trustee duties include:
 - ✓ attend regular scheduled meetings;
 - ✓ develop, review and monitor compliance with trust documents (legislation, trust agreement and policies);
 - ✓ ensure annual audits occur;
 - ✓ maintain and keep accurate records; and
 - ✓ develop and maintain relations with trust beneficiaries through open communications, regular reports and information distribution (website).
- Specifically trustee duties, as outlined in the Trust Manual include:
 - ✓ duty to act as a person of ordinary prudence with respect to the management of the trust;
 - ✓ not to delegate duties where the nature (no specialized skill such as investment) would require a trustee to perform the duty himself;
 - ✓ to act impartial and not favour a particular class of beneficiaries;
 - ✓ be accountable, transparent and loyal to beneficiaries (avoid conflicts of interests);
 - ✓ invest the trust property prudently based on skilled advice; and
 - ✓ ensure disbursements from the trust (capital or income) are authorized and provided on a timely basis.

TRUST BASICS: TRUST MANAGEMENT

- While trustees have legal control and title to the trust property there are circumstances where a settlor may seek to restrain the trustees' authority, through the appointment of a protector. These types of appointments can be found in First Nation trusts where the trust property has a substantial value (such as land claims compensation monies).
- A protector is NOT a trustee; however, the protector also has a fiduciary obligation to both the settlor and the beneficiaries, to ensure that the trust is being administered and managed in accordance with the trust agreement. Therefore it is important that a protector work with the trustees at arm's length.
- It is important that trustees keep the protector apprised of the trust activities (administratively and financially).
- The trustees in most circumstances will not have all the necessary skill and experience to deal with investments, economic development, or financial management of complex matters and therefore trustees have the authority to employ agents to provide professional advice when required. It is prudent for trustees to ensure that such advice is qualified.
- Trust management requires that trustees have an ability to:
 - ✓ be well informed on issues and matters;
 - ✓ work as a team;
 - ✓ analyze and understand budgets, financial statements and investment reports;
 - ✓ recognize one's limitation of skill and knowledge and seek advice on complex issues in a timely fashion; and
 - ✓ have knowledge of investment management and practices related to trusts.

B.

FINANCIAL STATEMENTS: THE BASICS

- There are four types of financial statements: (a) balance sheet (b) income statement (c) cash flow statement and (d) statement of shareholders' equity.
- It is important for trustees to understand the basics about financial statements because some trusts provide investments into stocks, bonds or limited partnerships (for example for economic development).
- A balance sheet will provide trustees with a clear picture of the financial condition of a company as a whole, looking at the company's **assets** (current assets: cash, securities, accounts receivable; fixed assets: long term investments in the company such as land, leaseholds; and other assets: patents, copyrights or intellectual property, royalties) the company's **liabilities** (loans, sale of property, or mortgages) plus the company's **net worth** (net profits or dividends).
- An income statement provides a snapshot on whether a company made a profit and how a company's **net profits** were gained during a certain period. An income statement provides information that outlines a company's gross revenues, operating costs, depreciation of company assets, taxes to provide the bottom line, or "net income." If there are shares within the company an income statement can provide information to shareholders of what they would receive if each share of stock they owned in the company was distributed for the period of review. **Earnings per share** are calculated as follows: net income divided by number of outstanding shares in company.
- A cash flow statement provides important information on whether a company has cash to operate and purchase assets. A cash flow statement will show changes in the net increase or decrease in cash over a certain period, based upon monies that come from operating activities (net income), investing activities (purchases, long term assets or investment securities) or financing activities (sale of stocks and bonds or bank loans).

FINANCIAL STATEMENTS: THE BASICS II

- A statement of shareholder's equity provides detail to a shareholder on whether their equity has changed over the year. Shareholder's equity comes from the money they **originally invested** in the company (and any additional investments thereafter) and from **retained earnings** in which the company is able to accumulate over time through its operations. This statement is important for complex and diverse equity structures.
- One other financial report which is important is the audit statement which provides information on whether a company's finances are being properly stated and satisfy generally acceptable accounting principles. An audit examines evidence to support the amounts disclosed and assessing the overall financial statement presentation. Every organization (private business or public owned corporation) must prepare financial reports. These reports provide valuable information to shareholders, employees and the public on a company or organization's financial status.
- Each statement while outlined separately are related. The balance sheet assets and liabilities will be reflected in the income statement (in the revenue and expenses), which reflects the company's gains or losses. As well the cash flow statement listed on the balance sheet are related to the net income on the income statement. No single statement will provide a complete picture; however, together the information is important for investment managers and investors (such as trustees).

C.

FINANCIAL MARKETS: OVERVIEW

- Some Yukon First Nation trusts are investment trusts whereby they use the trust property to invest in shares of other companies on the stock exchange. Such investments are overseen by investment managers who are hired by the trust to manage the investments governed by trust policies. While trustees can look to the specialized advice and skill of their investment managers, it is important for trustees to have a general appreciation of financial markets.
- Stock exchange. A stock market or equity market is a public entity for the trading of company stock (shares) and derivatives at an agreed price; these are securities listed on a stock exchange as well as those only traded privately. It is a vital area of a market economy because it provides companies with access to capital and allows investors to own companies and participate in economic growth. A stock exchange is an entity that provides services for stock brokers and traders to trade stocks, bonds, and other securities. Stock exchanges also provide facilities for issue and redemption of securities and other financial instruments, and capital events including the payment of income and dividends. Securities traded on a stock exchange include shares issued by companies, unit trusts, derivatives, pooled investment products and bonds.
- To be able to trade a security on a certain stock exchange, it must be listed there. Usually, there is a central location at least for record keeping, but trade is increasingly less linked to such a physical place, as modern markets are electronic networks, which gives them advantages of increased speed and reduced cost of transactions. Trade on an exchange is by members only.
- The initial offering of stocks and bonds to investors is by definition done in the primary market and subsequent trading is done in the secondary market. A stock exchange is often the most important component of a stock market. Supply and demand in stock markets is driven by various factors that, as in all free markets, affect the price of stocks.

FINANCIAL MARKETS: OVERVIEW II

- Stock market index. A stock market index is a method of measuring a section of the stock market. Many indices are cited by news or financial services firms and are used as benchmarks, to measure the performance of portfolios such as mutual funds. Stock market indices may be classed in many ways. A 'world' or 'global' stock market index includes (typically large) companies without regard for where they are domiciled or traded. Two examples are MSCI World and S&P Global 100.
- A 'national' index represents the performance of the stock market of a given nation—and by proxy, reflects investor sentiment on the state of its economy. The most regularly quoted market indices are national indices composed of the stocks of large companies listed on a nation's largest stock exchanges, such as the Canadian TSX 60, American S&P 500, the Japanese Nikkei 225, and the British FTSE 100.
- Bond market. The bond market (also known as the debt, credit or fixed income market) is a financial market where participants buy and sell debt securities, usually in the form of bonds. Bond markets, which provide financing through the issuance of bonds, enable the subsequent trading.
- A bond is a formal contract to repay borrowed money with interest at fixed intervals. It is a debt security, in which the authorized issuer owes the holders a debt and, depending on the terms of the bond, is obliged to pay interest (the coupon) and/or repay the principal at a later date. This is known as the maturity of the bond.
- Bonds provide the borrower with external funds to finance long-term investments or, in the case of government bonds, to finance current expenditure.

- Foreign exchange market. This is the market where currencies are traded. It is the world's largest market consisting of almost \$2 trillion in daily volume. Not only is the foreign exchange market the largest market in the world, but it is also the most liquid, differentiating it from the other markets. There is no central marketplace for the exchange of currency, but instead the trading is conducted over-the-counter. All trades that take place in the foreign exchange market involve the buying of one currency and the selling of another currency simultaneously.
- Derivatives market. The derivatives market is where the exchange of derivatives take place. Derivatives are one type of security whose price is derived from the underlying assets. Value of these derivatives is determined by the fluctuations in the underlying assets. These underlying assets are most commonly stocks, bonds, currencies, interest rates, commodities and market indices. The derivatives can be classified as future contracts, forward contracts, options, swaps and credit derivatives. A forward contract is an agreement between two parties to exchange at some fixed future date a given quantity of a commodity for a price defined today. The fixed price today is known as the forward price.
- Commodity market. This is an open and organized marketplace where ownership titles to standardized quantities or volumes of certain commodities (at a specified price and to be delivered on a specified date) are traded by its members. Although samples of the commodities are physically examined and graded, physical delivery of the commodity rarely occurs because the delivery contracts are usually exchanged or closed out (traded out) before their expiration date.
- Commodity exchanges are divided into three main types: metals exchanges, fuels exchanges and soft (agricultural) commodity exchanges. Other exchanges deal in currencies and commodity indices.

FINANCIAL MARKETS: OVERVIEW IV

- Real estate market. The potential buyers and sellers of real property at the current time. It includes markets for various property types, such as the housing market, office market, condominium market and the bare land market.
- Private equity market. The private equity market has become an important source of funds for start-up firms, private middle market firms, firms in financial distress and public firms seeking buyout financing.
- In finance, private equity is an asset class consisting of equity securities in companies that are not publicly traded on a stock exchange. Investments in private equity most often involve an investment of capital into an operating company or the acquisition of a company. Capital for private equity is raised primarily from institutional investors.
- There are other forms of trust investments characterized as “active investments” achieved through limited partnerships, joint ventures or project financing.
- Limited partnership. A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners.
- The limited partners take a completely passive role in the ordinary course of operations of a limited partnership. If they do not, they will lose their limited liability protection, which may have been the reason for choosing a limited partnership vehicle as opposed to an “ordinary” partnership vehicle.

- Joint venture agreement. A joint venture is an entity formed between two or more parties to undertake economic activity together. The parties agree to create a new entity by both contributing equity and/or services and they then share in the revenues, expenses and control of the enterprise. The venture can be for one specific project only or a continuing business relationship. This is in contrast to a strategic alliance, which involves no equity stake by the participants, and is a much less rigid arrangement. Therefore, a joint venture may be a corporation, limited liability company, partnership or other legal structure, depending on a number of considerations, such as tax and tort liability.
- Business proposals. When considering business proposals, including the acquisition, a number of matters should be considered.
 - ✓ How long has the company been in business? If it is a start up or has only a brief operating history, are you being asked to pay more than the shares are worth?
 - ✓ Consider whether management is dealing unfairly with investors by taking salaries or other benefits that are too large given the company's stage of development or by retaining an inordinate amount of the equity of the company compared with the amount investors will receive. For example, is the public putting up 80 percent of the money but receiving only 10 percent of the company's shares?
 - ✓ How much experience does management have in industry and in a small business? How successful were the managers in previous businesses?
 - ✓ Do you know enough about the industry to be able to evaluate the company and make a wise investment?
 - ✓ Does the company have a realistic marketing plan and does it have the resources to market the product or service successfully?

- Project financing. Project financing is the long-term financing of infrastructure and industrial projects based upon the projected cash flows of the project rather than the balance sheets of the project sponsors. Usually a project financing structure involves a number of equity investors, known as sponsors, as well as a syndicate of banks that provide loans to the operation. The loans are most commonly non-recourse loans, which are secured by the project assets and paid entirely from project cash flow, rather than from the general assets or creditworthiness of the project sponsors. The financing is typically secured by all of the project assets, including the revenue-producing contracts. Project lenders are given a lien on all of these assets and are able to assume control of a project company has difficulties complying with the loan terms.

Schedule "A"

First Nation Guiding Principles

The trustees will manage the capital of the Trust as a legacy for the benefit of all members of the First Nation and in so doing will govern its investment decisions as follows:

1. Maintain a legacy orientation towards the capital of the Trust.
2. Preserve the capital of the Trust except in cases where a fund is established with specific conditions that require depletion of its capital.
3. For any of the capital not invested in specific business or investment opportunities with specific guidelines, maintain an investment portfolio that avoids exposing the capital to risk that can erode the capital.
4. Follow industry standard investment guidelines for investing the Trust Property including but not necessarily limited to:
 - ✓ exercising the care, skill, diligence and judgment that a prudent investor would exercise in making investments;
 - ✓ considering general factors for investments, such as general economic conditions, possible effects of inflation or deflation, tax consequences and effects on the overall trust portfolio; and
 - ✓ considering general factors for the overall portfolio, such as liquidity needs, income stream, acceptable levels of risk and diversification strategies.
5. Adhere to ethical guidelines that are generally consistent with any policy established by the First Nation, including but not necessarily limited to avoiding investing the capital in areas that:
 - ✓ will pose a threat of irreparable environmental damage;
 - ✓ directly jeopardize, prejudice or otherwise compromise outstanding indigenous rights claims; or
 - ✓ create more negative than positive social impacts on local indigenous peoples.
6. Utilize the best available expertise to ensure that the Trust Property is managed according to the highest level of investment management discipline possible, including the use of outside expertise whenever deemed appropriate with the understanding that it is not a breach of trust to rely on expert advice if a prudent investor would rely on similar advice under comparable conditions.
7. Ensure periodic updates on the financial performance of the Trust are available to the First Nation and its citizens.

Schedule “B”

Code of Conduct and Policy on Conflicts of Interest”

GENERAL

- 1.1 **Application.** This Code of Conduct and Policy on Conflicts of Interest (the “Code”) has been approved by the Trustees of the First Nation Trust (the “Trust”). The Code is intended to govern the conduct of the Trustees of the Trust and sets out guidelines for avoiding and disclosing conflicts of interest.
- 1.2 **Definitions.** Unless otherwise specified, the words and expressions used in this Code shall have the same meaning as in the deed of settlement of the Trust.
- 1.3 **Interpretation.** This Code shall be, unless the context otherwise requires, construed and interpreted in accordance with the interpretation provisions of the deed of settlement of the Trust.

DUTIES AND RESPONSIBILITIES OF A TRUSTEE

- 2.1 **Responsibilities.** Each Trustee is expected to be an active participant so that the Trustees are able to function effectively and efficiently as a whole. A Trustee is responsible to:
- (a) be informed of the documents and materials related to the Trust, including its deed of settlement, investment policy, codes and policies;
 - (b) be prepared to make informed decisions in the best interests of the Trust on behalf of the Beneficiary;
 - (c) keep informed about the activities and affairs of the Trust;
 - (d) attend the quarterly meetings of the Trustees and other meetings, activities and events relating to the Trust;
 - (e) serve on committees and working groups of the Trust, as appropriate;
 - (f) contribute to the work of the Trust and be part of the Trustee’s decision-making process;
 - (g) work effectively and cooperatively with the Protector and the staff and advisors of the Trust or on committees of the Trust;
 - (h) communicate effectively with the other Trustees in order to carry out their duties in an effective manner and be available and respond promptly to communications from other Trustees or the staff and advisors of the Trust so that business relating to the Trust can be dealt with expeditiously;
 - (i) exercise, in the performance of their duties, the degree of care, diligence and skill required of a Trustee in accordance with the terms of the Trust’s deed of settlement;
 - (j) be prepared to take further training in order to enhance his or her abilities and skills to carry out his or her duties as a Trustee;

- (k) hold, maintain and care for any property of the Trust in his or her possession required for carrying out his or her duties and return such property when it is no longer required or when he or she is no longer a Trustee;
- (l) be independent and impartial;
- (m) not be influenced by self-interest, outside pressure, expectation of reward or fear of criticism;
- (n) act with honesty and integrity and conduct him or herself in a manner consistent with the nature and the responsibilities and the maintenance of public confidence in the conduct of the business of the Trust;
- (o) voice, clearly and explicitly at the time a decision is being taken, any opposition to a decision being considered by the Trust;
- (p) maintain solidarity with fellow Trustees in support of a decision that has been made in good faith in a legally constituted meeting, by Trustees in reasonably full possession of the facts;
- (q) ask the Trustees to review a decision, if he or she has reasonable grounds to believe that the Trust has acted without full information or in a manner inconsistent with its obligations;
- (r) exercise vigilance for and declare any apparent or real personal conflict of interest in accordance with the Trust's policies, and in particular with this Code; and
- (s) comply with all other codes and policies approved by the Trustees from time to time.

2.2 Conduct of the Trustees. A Trustee will at all times conduct himself or herself in a manner that:

- (a) supports the objectives of the Trust;
- (b) serves the overall best interests of the Trust;
- (c) subordinates his or her personal interests, and those of any particular constituency, to the best interests of the Trust;
- (d) brings credibility and goodwill to the Trust;
- (e) respects principles of fair play and due process;
- (f) demonstrates respect for individuals, fellow Trustees and staff and advisors of the Trust;
- (g) respects and gives fair consideration to diverse and opposing viewpoints;
- (h) demonstrates due diligence and dedication in preparation for, and attendance at meetings, events and activities relating to the Trust;
- (i) demonstrates good faith, prudent judgment, honesty, transparency and openness in his or her activities on behalf of the Trust;
- (j) ensures that the financial administration of the Trust is conducted in a responsible and transparent manner with due regard for his or her responsibilities;
- (k) avoids real or perceived conflicts of interest; and

- (l) conforms to the Trust's deed of settlement and rules and policies approved by the Trustees, in particular this Code and the Oath of Office and Confidentiality Agreement.

CONFLICT OF INTEREST GUIDELINES

3.1 Integrity. These Conflict of Interest Guidelines are intended to ensure the highest standards and maintenance of the integrity of the Trust. The Trustees shall act at all times in the best interests of the Trust rather than in the interests of particular constituencies. This means putting the interests of the Trust ahead of any personal interest or the interest of any other person or entity. It also means performing his or her duties and transacting the affairs of the Trust in such a manner that promotes public confidence in the administration of the Trust.

3.2 No Pecuniary Benefit.

- (a) No Trustee shall directly or indirectly receive any profit from his or her position as such. But the Trustees may receive reasonable payment for their services and reimbursement for reasonable expenses incurred by them in the performance of their duties in accordance with the Trust's deed of settlement.
- (b) The pecuniary interests of immediate family members (including the immediate family members of a Trustee's partner) or close personal or business associates of a Trustee are considered to also be the pecuniary interests of the Trustee.

3.3 Definition of Conflict of Interest.

- (a) A conflict of interest refers to situations in which personal, occupational or financial considerations may affect, or appear to affect, a Trustee's objectivity, judgment or ability to act in the best interests of the Trust and includes conflicts as described in subsection 3.4.
- (b) A conflict of interest may be real, potential or perceived in nature.
- (c) A real conflict of interest arises where a Trustee has a private or personal interest, for example, a close family connection or financial interest.
- (d) A potential conflict of interest may arise when a Trustee has a private or personal interest such as an identified future commitment.
- (e) A perceived or apparent conflict of interest may exist when a reasonable, well-informed person has a reasonable belief that a Trustee has a conflict of interest, even if there is no real conflict.
- (f) Full disclosure, in itself, does not remove a conflict of interest.

3.4 Examples of Conflict of Interest on the Part of a Trustee.

The following examples constitute Conflicts of Interest under this Code.

- (a) Any circumstance that may result in a personal or financial benefit to a Trustee or his or her family, business associate or friend. This includes, but is not limited to, accepting any payment for services rendered to the Trust other than payment for services of a Trustee as permitted in this Code, including contracted work or honoraria; or accessing financial or other resources for personal use, i.e. transportation, training costs, supplies, equipment, etc.

- (b) Personal interests which conflict with the interests of Trustees or are otherwise adverse to the interests of the Trust.
- (c) Seeking, accepting or receiving any personal benefit from a supplier, vendor or any individual or organization doing or seeking business with the Trust.
- (d) Being a board member or staff of another body or organization which might have material interests that conflict with the interests of the Trust and, dealing with matters on the other body or organization which might materially affect the Trust.
- (e) Any involvement in the hiring, supervision, evaluation, promotion, remuneration or firing of a family member, business associate, or friend of the Trustee.

3.5 Principles for Dealing with Conflict of Interest.

- (a) During their term of office as a Trustee, a Trustee must openly disclose a potential, real or perceived conflict of interest as soon as the issue arises to the Trustees.
- (b) If the Trustee is not certain whether he or she is in a conflict of interest position, the matter may be brought before the Protector for his or her advice and guidance.
- (c) If there is any question or doubt about the existence of a real or perceived conflict, the Trustees will determine by majority vote if a conflict exists. The Trustee potentially in conflict of interest shall be absent from the discussion and shall not vote on the issue.
- (d) It is the responsibility of the other Trustees who are aware of a real, potential or perceived conflict of interest on the part of a fellow Trustee to raise the issue for clarification, first with the Trustee in question and, if still unresolved, with the other Trustees.
- (e) The Trustee in question must abstain from participation in any discussion on the matter, shall not attempt to personally influence the outcome, shall refrain from voting on the matter and, unless otherwise decided by the Trustees, must leave the meeting room for the duration of any such discussion or vote. Although the Trustee in question must leave the room, he or she shall remain part of the quorum.
- (f) The disclosure and decision as to whether a conflict exists shall be duly recorded in the minutes of the meeting. The time the Trustee left and returned to the meeting shall also be recorded.
- (g) The Trustees may invite the Protector to attend the meeting where they are discussing the existence of a real or perceived conflict and may seek his or her views and opinions.

3.6 Gifts and Hospitality. The Trustees shall not directly or indirectly offer or accept cash payments, gifts, gratuities, privileges or other personal rewards, which are intended to influence the activities or affairs of the Trust. The Trustees may, however, give or receive modest gifts or hospitality as a matter of general and accepted business practice, provided the foregoing does not include cash or other negotiable instruments and provided further proper accounting of any such expenses is made and disclosed to the other Trustees.

3.7 **Complaints and Disputes Involving Trustees.**

- (a) The Protector shall review any complaints that a Trustee has violated any provision of the Trust's deed of settlement, or rules or policies approved by the Trustees, in particular, this Code and its Oath of Office and Confidentiality Agreement.
- (b) The Protector shall similarly review disputes between Trustees that interfere with their ability to carry out their duties and the ability of the Trust to operate effectively and efficiently.
- (c) Allegations of illegal activity related to his or her duties as a Trustee shall be immediately referred to appropriate authorities for investigation. Any Trustee against whom such allegations are made shall take a leave of absence as a Trustee pending completion of the investigation.
- (d) The review of such complaints or disputes shall include an opportunity for the Trustee concerned to present his or her position.
- (e) Every attempt should be made to resolve such matters expeditiously and fairly.
- (f) The decision of the Protector shall be final. If the Trustee refuses to abide by the decision, the Protector may take disciplinary action. Such action may include formal or informal censure by the Protector, suspension, a request for the Trustee's resignation or removal of the person as a Trustee.

CONFIDENTIALITY

- 4.1 **Confidential Information.** It is the responsibility of the Trustees to know what information is confidential and to obtain clarification when in doubt. Except as he or she may be compelled by applicable legal process, a Trustee must, both while having and after ceasing to have that status, treat as confidential all information regarding the policies, internal operations, systems, business or affairs of the Trust obtained by reason of his or her status as a Trustee and not generally available to the public. A Trustee shall not use information obtained as a result of his or her involvement as a Trustee for his or her personal benefit. Each Trustee shall avoid activities that may create appearances that she has benefited from confidential information received during the course of his or her duties as a Trustee.
- 4.2 **Review of Code.** Each Trustee, forthwith after being appointed, shall meet with the Trust's legal counsel or, in his absence, with the Secretary, Treasurer or Protector, to review this Code and such other policies of the Trust that apply to Trustees.
- 4.3 **Oath of Office and Confidentiality Agreement.** Each Trustee is required to sign and agree to comply with the Oath of Office and Confidentiality Agreement.

Oath of Office and Confidentiality Agreement

I, _____, a Trustee of the First Nation Trust (the "Trust"), declare that I have read, understood and agree to comply with the Trust's Code of Conduct, Policy on Conflicts of Interest and other applicable rules and policies, and that in carrying out my duties as a Trustee, I will:

1. exercise the powers of my office and fulfill my duties and responsibilities honestly, in good faith and in the best interests of the Trust;
2. exercise these responsibilities, at all times, with due diligence, care and skill in a reasonable and prudent manner;
3. respect and support the Trust's rules, policies, including this Code of Conduct and Policy on Conflicts of Interest, and decisions of the Trustees and Protector;
4. keep confidential all information unless the Trustees determine that such information is public and this shall include, but not be limited to, information about personnel, any personal information, and matters dealt with during in camera meetings of the Trustees;
5. conduct myself in a spirit of collegiality and respect for the collective decisions of the Trustees and subordinate my personal interests to the best interests of the Trust;
6. immediately declare any personal conflict of interest that may come to my attention; and
7. immediately resign my position as a Trustee of the Trust in the event that I, or my Trustee colleagues, or the Protector, have concluded that I have breached this Oath of Office.

Signature: _____

Date: _____

Witness: _____

Date: _____

Schedule "C"

GLOSSARY OF TERMS

1. **Beneficiary:** has beneficial interest and holds equitable title in the trust. It is not uncommon for a First Nation citizen who as a class is a beneficiary of a trust, to also serve as a trustee on the trust. However, it is advisable that representatives of a First Nation government, (an entity who may be a beneficiary on behalf of the citizenship), should not serve as a trustee, otherwise the government connection may expose the trust to third party liability claims.
2. **Due Diligence:** is a legal obligation for a trustee to take reasonable steps and be well informed when exercising their responsibilities on behalf of the trust and beneficiaries.
3. **Fiduciary:** is considered a legal or ethical relationship of confidence regarding the protection of interests from one party to the other. In a trust context the trustee will have a fiduciary obligation to the beneficiaries to protect their interests. As well the protector will have a fiduciary obligation to protect the interests of both the settlor and the beneficiaries to ensure the trust terms and objectives are being upheld.
4. **Lack of Certainty:** a trust can fail for a "lack of certainty" if the class of beneficiaries are not clearly defined within the trust agreement.
5. **Person of Ordinary Prudence:** a trustee has a duty to exercise their authorities and to fulfill their duties as a person of ordinary prudence. A trustee is to exercise good judgment, common sense, seek advice on issues where required and take into account all material information before making a decision.
6. **Protector:** also known as guardian in some trusts. Is appointed under the trust agreement to direct or restrain trustees in the administration of the trust. Has a fiduciary duty to the settlor and beneficiaries to ensure that the trust terms and objectives are being upheld. Subject to the terms of a trust agreement the protector is responsible to appoint and remove trustees (if required).
7. **Settlor:** is the person who settles the property, creates the trust terms and transfers the assets for the benefit of a beneficiary. In First Nation trusts the settlor is often the First Nation government entity (executive council) who would place the First Nation citizens' land claims compensation monies into a trust.
8. **Trust:** is a relationship between three parties, the settlor, trustee and beneficiary. The settlor will transfer property to be held by the trustee for the benefit of the beneficiary.
9. **Trustee:** has legal title and control over trust assets. A trustee has a fiduciary obligation to protect, administer and manage the trust property for the beneficiaries recognized by the trust agreement. A trustee cannot allow their personal interest to interfere with their obligation to the beneficiaries. A primary duty is for a trustee to be loyal to the beneficiaries and give first priority to the interests of the trust.

10. **Trust Agents:** the nature of trusts may require specialized knowledge and technical support. First Nation trusts often need investment managers, legal counsel, and accountants.
11. **Trust Agreement:** also called a trust instrument or deed of trust, which constitutes the trust. Generally, the trust agreement provides for the terms and objectives of the trust, defines the trust property, trustee powers and duties, the protector's powers and duties and the terms of distribution to beneficiaries.