



Succession Planning:

Handing Off the Ball (Without a Fumble)

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During the course of a trustee's term there may come a time when he or she will want to retire or resign from the board. When that happens the remaining trustees will likely want to replace that person and do so as quickly and efficiently as possible. But how does a board of trustees ensure a smooth transition from the past to the future? This article will outline and explore the process involved in the retirement of trustees, the introduction of new members to the board and the growing trend of succession planning and how it can be valuable to the progression and advancement of boards of trustees.

In the realm of employee benefit plans, trustees carry out a significant function; they hold and invest property on behalf of employees and their families. That property may relate to an employee's pension or health and welfare benefits. It may pertain to an employee's death benefits or retirement income. In any case this property is enormously valuable to the employee for whom it is being held, and as a consequence it is paramount that each and every member of a board of trustees be thoroughly equipped to handle the responsibilities and duties that accompany the role, from the first day as trustee to the last.

Succession Planning

A standard definition for *succession planning* is "the process of identifying and preparing suitable employees, through mentoring, training and job rotation, to replace key players within an organization as their terms expire."¹ This concept should be distinguished from merely replacing retiring or resigning trustees. While the steps outlined in the following sections are necessary for a successful transition, any board of trustees that additionally engages in succession planning will not only ensure a successful transition but also enhance the strength and success of the board.

Succession planning involves a proactive as opposed to a reactive approach to replacing members of any organization. It necessitates determining who might be leaving the board and taking steps to replace him or her with a qualified candidate prior to his or her departure. It involves understanding what unique skills, education and experiences the retiring trustee brings to the board in order to understand the gap that will be left.

Succession planning also requires the remaining trustees to examine both their short-term and long-term goals for the trust fund. They must ask themselves if the needs of this board of trustees will be different tomorrow than they are today. If the answer is *yes*, and in any progressive body it will

be, these future needs of the board should be taken into account when choosing potential candidates and when designing a training strategy for them.

Succession planning in a standard corporation is going to be somewhat different from succession planning with a board of trustees that administers an employee benefit trust fund. There are confidentiality concerns that may exist in a board of trustees that do not exist in the same way for the chief executive officer (CEO) of a corporation. Items such as the board minutes, for instance, are usually kept confidential to allow for full and frank discussions at meetings. As such, they would not be available to a potential candidate for review. In the same vein, most trustees meetings are not open to nontrustees unless they are expressly invited to attend. Trustees may also be reluctant to provide potential candidates with copies of other trust documents for confidentiality reasons. Consequently, succession planning for trust fund trustees may not follow the traditional route of corporations that engage in hands-on training that often involves the candidate stepping into the shoes of the person he or she is potentially replacing, at least in a limited way.

That being said, there are numerous ways in which a board of trustees can use succession planning to its benefit and to the benefit of the incoming trustee.

First, any potential candidate should appreciate the role of the trustees and their basic common law duties. These duties are applicable to all trustees irrespective of the particulars set out in the trust documents. Learning and appreciating the common law will set a good foundation for the candidate and will instill the importance of taking on such a role. Potential candidates should also become familiar with statutes such as the Trustee Act² and the Pension Benefits Act³ because portions of these statutes may apply to their trusteeship.

Second, if the board of trustees is given advance notice that a trustee is planning to retire and has selected a candidate to replace that trustee, the board may choose, on the consent of the remaining trustees or by another decision-making method set out in the trust agreement, to give the candidate access to these confidential trust documents if he or she signs a nondisclosure agreement. Likewise, the trustees may permit the candidate to sit in on trustees meetings to experience the process firsthand. This will also allow the new trustee to observe and ask questions of the other trustees.

Third, the board may choose to invest in its future candidates by providing them with both general educational material pertaining to trust funds and employee benefit plans and by sending them to educational seminars and conferences where they can build on this foundation and find out what it takes to be an effective and efficient trustee. Permitting the candidate to prepare in these ways for their upcoming role will provide for better continuity and a smoother transition overall.

Certainly, the most important reason for a board of trustees to use succession planning is that it prevents the trustees from making hasty, uncalculated decisions when

replacing retiring members. Not every retirement or resignation can be foreseen; however, if the board always has several potential replacement trustees prepared to take over on short notice it will not be left scrambling for qualified candidates when the time comes.

Retirement or Resignation of a Trustee

Most trust funds are governed by and administered in accordance with a trust agreement or trust declaration.⁴ The trust agreement commonly sets out the steps that must be taken when a trustee wishes to retire or resign. This is the first place a trustee should look when contemplating retiring or resigning from the board. Some standard trust agreement provisions pertaining to the departure and appointment of board trustees will be discussed below.

If there is no express provision in the trust agreement relating to the issue of retirement or resignation, trustees can look to the Trustee Act, which addresses the issue, albeit in a limited way.⁵ Section 2 of the act states that providing there are a minimum of two trustees remaining that consent by deed to the discharge of the trustee and to the vesting of the trust property in the remaining trustees, then a trustee may retire without any new trustee being appointed. Section 2 also requires if there are any other people who are empowered to appoint trustees, they also must consent by deed to the discharge of the trustee and to the vesting of property in the remaining members of the board.⁶ The Trustee Act also deals with the appointment of new trustees at Section 3, including who may appoint a new trustee and how a new appointment is made.⁷

Steps to Take When Retiring or Resigning as Trustee

Most employee benefit plans are administered by a board of trustees and governed by a trust agreement. Although every trust agreement is different, there are some standard provisions that are found in most trust agreements. These are outlined and explained below.

Generally speaking, any trustee wishing to retire or resign from the board of trustees must give written notice to all other trustees. The notice should clearly state the date on which the resignation will take effect. It is that date or the date which the successor trustee has filed his or her acceptance of trusteeship for (whichever is earlier) when the resignation will be effective. Afterward, the trustee will cease to be part of the board.

If the board of trustees has invested in real property, every trustee wishing to retire or resign from the board should arrange for the execution of any documents necessary to convey, assign and transfer titles to all assets of the trust fund prior to retirement or resignation.

In addition, the trustee should also turn over to the successor trustee (or where there is no successor trustee immediately appointed, to the remaining trustees) any and all documents, books, records and any other property or assets of the trust fund in the trustee's possession. This might include copies of the trust agreement, professional adviser reports and minutes taken at trustees meetings. The trustee should be particularly

careful to return all documents that may contain confidential information pertaining to the board and to the trust fund.

The Successor Trustee

The person authorized to appoint a new trustee is usually designated in the trust agreement. The identity of this person will vary depending on the composition of the board and the type of trust fund. When dealing with a multi-employer benefit plan, generally the union will choose the new trustee if it is a union trustee who is retiring; the employer association will choose the new trustee if it is an employer-side trustee who is retiring.

Prior to a trustee's acceptance of the trusteeship, however, it is important that he or she consider and disclose any circumstances that might conflict with his or her interests and the duties of an incoming trustee.⁸ This precaution is advantageous to both the trust fund and any new trustee wishing to avoid future liability that may result from such a conflict. If a potential trustee is uncertain whether or not his or her interests may be in conflict with those of the trustees, he or she should err on the side of caution and disclose all relevant facts, letting the current board decide.

If the board of trustees determines that no such conflicts exist, the new trustee must sign an acceptance of trusteeship and file it with the administrator of the trust fund and the other trustees. This action indicates acceptance of the trust created and established by the trust documents and denotes consent to act as trustee and agreement to hold, invest and administer the trust fund as provided in the trust declaration and/or trust agreement.

The signing and filing of the acceptance of trusteeship is only the beginning. The new trustee has much work to do in order to prepare for the responsibilities and duties that lie ahead.

Most importantly, the new trustee must know and appreciate all the rules before playing the game. The first thing the new trustee should do is become familiar with the terms of the trust.⁹ The trustee should also review and understand the terms of the trust agreement and inspect and appreciate any other documents pertaining to the trust or trust property, such as any collective agreements, insurance policies and fidelity bonds. Some but not all of the powers and duties of the trustees can be found in these types of documents. (Trustees are also subject to common law duties, discussed below.) The trust agreement will also generally outline which duties and responsibilities can be delegated to other parties. Becoming wholly familiar with the contents of the agreement and other significant documents will help prevent the trustee from unintentionally committing breaches of trust.

Reviewing the terms of the insurance policies will give the trustee an appreciation for what is and is not included in the policy and what steps a trustee should take in the event of being charged with a breach of trust. The new trustee should become familiar with the terms of the collective agreement because the terms may include particulars regarding the employee benefit package. The board of

trustees should make an effort to have all of these documents readily available to the new trustee.

The new trustee should become familiar with the history of the board and the issues that have arisen in the past. New trustees can review the board minutes and make note of recent, recurring and unresolved issues. It may be useful to speak to the experienced members of the board if clarification is needed. Board members should be encouraged to set aside time to speak to a new trustee about their experiences on the board.

The new trustee should become familiar with basic but important procedures, such as voting and quorum requirements,¹⁰ and what happens in the event of a deadlock vote. These procedures are usually outlined in the trust agreement itself.

If the board of trustees utilizes professional advisers, such as actuaries, auditors and legal counsel, the new trustee should also learn who these advisers are and the parameters of their positions and expertise. Improperly delegating duties may constitute a breach of trust, even if done with the best of intentions. Being aware of each adviser's role will help prevent the trustee from inadvertently delegating duties that should not be delegated. Reviewing reports or opinions that were prepared by the advisers will also help the new trustee.¹¹ These documents will give insight into the advisers' role as well as impart knowledge about the subject matter at hand. The more the new trustee knows about the board and the trust fund, the better off he or she will be.

Furthermore, it is important that the new trustee ensure that the trust property has been invested in accordance with the terms of the trust and the Trustee Act.¹² Since the trustee is replacing a department member and therefore joining an existing board of trustees, he or she should also ensure that there were no prior breaches of trust. This usually involves a passing of accounts by the trustee who is retiring or resigning. If there is a breach of trust for which losses were sustained, the new trustee has an obligation to take steps to recoup the loss to the trust property.¹³

In addition, if applicable, the new trustee should ensure that all the property subject to the trust is vested in the joint names of himself or herself and his or her co-trustees and that all title deeds are placed under their joint control.¹⁴

It is also of utmost importance that the board of trustees advise the new trustee of the common law duties that affect any trusteeship. While these duties are not necessarily found in any written trust document, they have evolved over the years through the court system and are just as binding on trustees. These common law duties stem from the fiduciary relationship between the trustee and the beneficiary, in this case, the employee. Common law duties include but are not limited to:

- Acting scrupulously for the benefit of the trust and never for personal gain
- Actively carrying out those duties and performing them with complete integrity
- Carrying out those duties personally as a result of the trust and confidence reposed in the trustee

- Acting impartially between the beneficiaries unless the trust instrument authorizes favouritism.¹⁵

The courts have also found that a trustee must act honestly and with the level of skill and prudence that would be expected of a reasonable businessperson administering his or her own affairs.¹⁶ This is an objective test, meaning that a lack of knowledge, skill or experience is not satisfactory justification for a trustee's inability to carry out their duties in accordance with statutory provisions and common law principles. Consequently, a new trustee cannot use inexperience as an excuse if faced with breach-of-trust charges. Any new trustee must thoroughly educate and prepare for trusteeship.

The final step that any new trustee should take is purchasing errors and omissions insurance to cover any losses that may result during the term of trusteeship. It should be noted though that this insurance is limited, and anyone who takes on the role of trustee may still remain personally exposed to a substantial amount of risk.¹⁷

Summary

If a trustee wishes to retire from the board of trustees, he or she should:

- Give notice in writing to all other trustees, specifically noting the effective date
- Execute any documents necessary to convey, assign and transfer titles to any assets of the trust fund
- Turn over to the successor trustee (or to the remaining trustees) any and all documents, books, records and other property.

Any new trustee appointed to the board of trustees should:

- Consider and disclose any circumstances that might be a conflict of interest with trustee duties
- Sign and file an acceptance of trusteeship with the administrator of the trust fund and any other trustees
- Know all the rules before playing the game: Become familiar with the terms of the trust, the trust agreement and any other documents pertaining to the trust or trust property; review the history of the board and make note of recent, recurring and unresolved issues before the board; review and appreciate board procedures; and find out which duties are delegated to professional advisers and the parameters of their positions.
- Ensure that all trust property has been invested in accordance with the terms of the trust and the Trustee Act
- Make certain that there have been no prior breaches of trust before joining the board of trustees
- Ensure that all property subject to the trust is vested in the joint names of himself or herself and the other trustees
- Learn and appreciate the common law duties that affect all trustees
- Invest in errors and omissions insurance to cover any losses that may result during the term as trustee.

Conclusion

Boards of trustees change and progress over time. Members come and members go, bringing with them the benefit of their skills and education and gaining a unique experience to take with them when they leave. But this transition from the past to the future need not be cause for concern. The use of succession planning, in addition to satisfying the primary requirements set out in trust documents and by common law, will ensure that the evolution of the board and of its trustees is smooth and seamless.

Endnotes

1. Wikipedia, the free encyclopedia, "Succession Planning" (2006) online: en.wikipedia.org/wiki/Succession_planning (last modified September 2, 2006).
2. Trustee Act, R.S.O. 1990, c. T.23.
3. Pension Benefits Act, R.S.O. 1990, c. P8.
4. Hereinafter collectively referred to as "trust agreement."
5. Trustees who deal with pension plans are also governed by the Pension Benefits Act, R.S.O. 1990, T. c. 23.
6. *Supra*, note 3, s. 2.
7. *Ibid*, s. 3.
8. A.J. Oakley, *The Modern Law of Trusts*, 8th ed. (London: Sweet & Maxwell, 2003) at p. 562.
9. *Ibid*.
10. Raymond Koskie et al., *Employee Benefits in Canada*, 3rd ed. (Brookfield: International Foundation of Employee Benefit Plans Inc., 2001) at p. xxxiii.
11. *Ibid.*, at p. xxxiii.
12. Corina S. Weigl, "How a Trustee's Duties Arise" (A Badge of Honour—Trustee's Duties, Liabilities and Obligations), OBA Continuing Legal Education, 7 April 2003) at p. 13.
13. *Ibid.*, at p. 14.
14. Note 9, at p. 562.
15. Note 11, at p. xxx.
16. Note 13, at p. 14.
17. Note 11, at p. xxxii.

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