COMMISSION DES INSTITUTIONS
Déposé le : 3 juin 2015
No. : CI-086
Secrétaire : Anik Laplante

EXPOSÉ DE CLAUDE BISSON JURISCONSULTE DES MEMBRES DE L'ASSEMBLÉE NATIONALE

COMMISSION DES INSTITUTIONS

ÉTUDE DU RAPPORT DU COMMISSAIRE RELATIVEMENT À LA MISE EN ŒUVRE DU CODE D'ÉTHIQUE ET DE DÉONTOLOGIE DES MEMBRES DE L'ASSEMBLÉE NATIONALE

Québec, ~~2~~ 3 juin 2015

Monsieur le président, mesdames et messieurs les députés,

Au début de mes remarques vous me permettrez bien de souligner le chemin parcouru par le Commissaire et son équipe au cours des quatre dernières années.

La tâche était immense et elle a été accomplie avec diligence, professionnalisme et grande rigueur, que ce soit sur le plan des conseils et avis aux députés, aussi bien que relativement à la mise sur pied du système des déclarations d'intérêts personnels ou encore à l'occasion des vérifications et enquêtes entreprises par le Commissaire.

Ayant été un témoin constant de l'ardeur et du doigté de Me Jacques St-Laurent au cours des dernières années, je le remercie de sa contribution à cet élément primordial de la démocratie que sont l'éthique et la déontologie des parlementaires.

Ceci m'amène à mon court exposé qui sera suivi de vos observations et questions.

Ce que ma présentation n'est pas :

1. Mes propos, écrits ou verbaux, n'ont pas été et ne sont pas dirigés à l'endroit de l'une ou l'autre des personnes présentement assujetties au *Code d'éthique et de déontologie des membres de l'Assemblée nationale;*

2. En matière de conflits d'intérêts, ces propos n'entendent pas proposer une solution à la situation que pourrait présenter l'un ou l'autre des membres de l'Assemblée nationale. Ce n'est pas mon rôle de le faire;

Ce que ma présentation est:

1. Elle espère être une contribution à définir ce que le *Code* n'explique pas, à savoir ce qu'est une fiducie sans droit de

regard constituée de « titres transigés à une bourse ou pour lesquels il existe un autre marché organisé »;

2. Cette contribution se veut être basée sur des textes qui définissent la réalité de ce qu'est une fiducie sans droit de regard avec des caractéristiques qui lui sont essentielles.

Le paysage législatif canadien donne les mêmes paramètres des éléments essentiels d'un « *blind trust* » que peut ou doit créer un parlementaire :

- fiduciaire sans aucun lien de dépendance avec le constituant;
- patrimoine désormais inscrit au nom du fiduciaire;
- aucun pouvoir de gestion ni de contrôle par le constituant;
- sauf au Commissaire à l'éthique et à la déontologie, le fiduciaire ne fournit aucun renseignement;

- ignorance du constituant quant aux investissements faits par le fiduciaire. Il n'en connaît que la valeur globale;

Ceci me conduit à l'article 45 du *Code*. Cette disposition :

1. Ne s'applique qu'aux membres du Conseil exécutif;

2. Est la première de quatre articles qui constituent le chapitre intitulé CONFLITS D'INTÉRÊTS.

La Question :

Au sens de la lettre et de l'esprit du *Code*, pour un membre du Conseil exécutif, ça consiste en quoi l'obligation de se prémunir contre les conflits d'intérêts vis-à-vis « les entreprises dont les titres sont transigés à une bourse ou pour lesquels il existe un autre marché organisé » (article 45 du *Code*)?

Le *Code* donne une réponse claire à cette question :

- ou bien, ne détenir aucun intérêt dans de telles entreprises;

- ou bien, au moyen d'une fiducie sans droit de regard, être ignorant de l'identité des éléments du patrimoine que le fiduciaire peut décider de placer dans des titres transigés à la bourse.

Défendre au fiduciaire de disposer des titres qu'on lui confie ferait en sorte qu'on conserverait nécessairement un droit de regard et qu'au lieu d'être ignorant du contenu de la fiducie, on en serait au contraire constamment au courant.

Dans un tel cas, l'objectif visé par le *Code* pour éviter les conflits d'intérêts serait-il atteint?

Poser la question, c'est, à mon humble avis, y répondre.

Une fiducie dont la caractéristique fondamentale est d'être figée et sur le contenu de laquelle se perpétue ainsi le droit de regard du constituant ne peut être qualifiée de « sans droit de regard. »

L'absence de droit de regard doit faire en sorte que le constituant n'a aucune connaissance de la composition de son portefeuille d'intérêts dans des entreprises dont les titres sont cotés en bourse.

Ainsi, le membre du Conseil exécutif ne pourra pas être en conflit d'intérêts, ni dans l'exercice de dirigeant du ministère dont il est titulaire, ni à titre de membre du cabinet des ministres. En effet :

1. Ou bien il aura vendu les titres qui auraient pu causer problème;

2. Ou bien il ne connaîtra rien de l'identité des titres gérés par le fiduciaire, ce qui lui évitera de se trouver en conflit d'intérêt ou de donner l'apparence de l'être lorsqu'il posera l'un ou l'autre des gestes de son poste.

Pour réaliser ce dernier objectif, l'acte de fiducie doit évidemment être rédigé et administré de façon fort étanche :

1. Ignorance totale et constante par le constituant des titres faisant partie de la fiducie;

2. Attribution des pleins pouvoirs au fiduciaire dont les nécessaires relations avec le Commissaire à l'éthique et à la déontologie seront entourées de la plus grande confidentialité.

Les seuls renseignements que le fiduciaire pourra communiquer au constituant seront les chiffres nécessaires aux déclarations fiscales, soit la valeur des actifs placés en fiducie à l'exclusion complète de l'identité de ces actifs.

Ce qui distingue la fiducie sans droit de regard instaurée par le *Code* de la fiducie ordinaire, c'est qu'elle a été créée en tant qu'élément essentiel à la base de l'une des raisons d'être du *Code,* ce que j'appellerais son pivot, à savoir l'évitement des conflits d'intérêts.

C'est ainsi qu'à l'unanimité les parlementaires de 2010 l'ont conçu, rédigé et adopté.

Je me permet de souligner que relativement à la déclaration que le membre du Conseil exécutif doit faire de ses intérêts financiers et au sommaire qui en est rendue publique par le Commissaire, les articles 52,6° et 55,6° du *Code* doivent être appliquées en respectant la confidentialité à laquelle la fiducie sans droit de regard est assujettie.

Un modèle particulièrement pertinent d'acte de fiducie sans droit de regard est celui en usage à la législature de la Colombie Britannique et que j'ai en ma possession depuis 2011. Je le dépose en annexe.

Je conclus mes remarques sur la fiducie sans droit de regard en faisant humblement deux suggestions :

1. Une première d'ordre législatif : préciser dans le *Code* les éléments de toute fiducie sans droit de regard; et

2. L'élaboration d'un modèle de l'acte qui crée une telle fiducie et qui, sans faire partie du *Code*, pourrait être recommandé par le Commissaire.

PROVINCE OF BRITISH COLUMBIA
BLIND TRUST AGREEMENT

BETWEEN:

[name] of [address]

The "Settlor"

and

[name] of [address]

The "Trustee"

WHEREAS:

A. The Settlor has been appointed to the Executive Council of the Government of British Columbia and wishes to divest [his/her] commercial and financial holdings by creating a Trust in order to avoid the possibility of a conflict, or appearance of any conflict, between [his/her] private interests and [his/her] public duties;

B. The Trustee is a person who is at arm's length with the Settlor and has been approved by the Commissioner;

C. The Settlor is the legal and beneficial owner of the assets listed on Schedule "A".

NOW THEREFORE the Settlor hereby transfers to the Trustee the assets listed on Schedule "A", together with such other assets as may be transferred during the Trust Term, to be held and administered by the Trustee upon the following terms and conditions:

1. DEFINITIONS

a) "Act" means the *Members' Conflict of Interest Act*, Revised Statutes of British Columbia, 1996, Chapter 287;

b) "Commissioner" means the person appointed under section 14 of the Act;

c) "person" includes a corporation, trust or partnership as well as an individual;

d) "Termination Date" means the earliest of:

   i. the date when the Settlor determines that it is no longer necessary to divest [himself/herself] of all commercial and financial holdings in order to avoid the possibility of a conflict or to meet the requirements of the Act, or

   ii. the date of death of the Settlor;

e) "Trustee" means the person or persons or corporation holding office as Trustee or Trustees under this Agreement;

f) "Trust Agreement" means this Trust Agreement and any amendments made to it as approved by the Commissioner;

g) "Trust Fund" means the investments and any other property, including any investments made by the Trustee, that may be held at any time by the Trustee pursuant to this Trust Agreement and any undistributed or accumulated income from the investments or such property; and

h) "Trust Term" means the period of time commencing on the date of this Trust Agreement until the Termination Date.

2. ACCEPTANCE OF TRUST

2.1 The Settlor hereby creates a Trust, the primary purpose of which is to confer on the Trustee the sole responsibility to administer the Trust and to manage the Trust Fund without the participation by, or the knowledge of, the Settlor.

2.2 The Trustee accepts the appointment of Trustee and agrees to the terms set out in this Trust Agreement.

2.3 The Trust shall become effective on the date of this Trust Agreement.

3. DELIVERY OF DOCUMENTS

3.1 The Settlor shall forthwith

a) deliver to the Trustee any and all certificates and other documents evidencing title to the assets listed in Schedule "A"; and

b) execute and endorse such forms, transfers, assignments, powers of attorney and other assurances that may be required to transfer full and unqualified legal title to any asset listed in Schedule "A" to the Trustee.

3.2 The Settlor will not take any action, give any direction or make any disposition in respect of the Trust Property, except as required for this Trust Agreement to take effect.

4. TRUSTEE POWERS AND DUTIES

4.1 The Trustee may at its uncontrolled discretion hold, sell, convert, pledge, hypothecate and effect any transaction relating to the management or disposition of the Trust Property as if it was the beneficial owner of the Trust Property.

4.2 The Trustee may invest or re-invest the Trust Fund or the proceeds resulting from any sale or other disposition of the Trust Fund or any portion thereof in such form and manner and upon such terms as the Trustee in its sole and uncontrolled discretion may from time to time deem advisable.

4.3 The Trustee shall not be limited in any manner whatsoever and in particular shall not be limited to those investments in which trustees are by the laws of any relevant jurisdiction authorized to invest trust funds.

4.4 The Trustee may exercise any voting rights and other rights incidental to the ownership of any investments or other property included in the Trust Fund, to grant proxies and to participate in any plan or arrangement for the dissolution, merger or reorganization of any corporation or partnership whose shares, bonds, interests or securities are included in the Trust Fund.

4.5 At no time and in no manner during the Trust Term shall the Trustee seek, directly or indirectly, any advice, direction or instruction from the Settlor in connection with the Trust Fund or act upon any advice, direction or instruction which might nevertheless be proffered by the Settlor or by anyone on behalf of the Settlor.

4.6 Except as provided in sections 5.3 and 5.6, the Trustee shall not issue any statements relating to the Trust to the Settlor.

4.7 The Trustee shall not be responsible in any way for any loss or diminution that may occur in connection with its management of the Trust Fund so long as the Trustee acts in good faith and with reasonable judgment.

5. DISCLOSURE

5.1 At no time during the Trust Term shall the Trustee disclose to the Settlor or to anyone on the Settlor's behalf the nature or composition of the Trust Fund, except as specifically provided in this Trust Agreement or as may be required by the Act.

5.2 Except as specifically provided by this Trust Agreement, during the Trust Term the Settlor may not lawfully require the Trustee to re-assign, re-transfer or re-deliver the Trust Fund or any part thereof to the Settlor nor otherwise violate the terms and conditions of this Trust Agreement or of the Act, and this section may be pleaded in estoppel by the Trustee in respect to any action, suit or other proceeding by the Settlor or anyone on behalf of the Settlor to obtain or compel the re-assignment, re-transfer or re-delivery of the Trust Fund or any part thereof.

5.3 The Trustee will issue to the Settlor periodic statements stating the net worth and any increase or decrease in the Trust Fund, but shall not disclose, expressly or by inference,

a) the constituent investments contained in the Trust Fund;

b) the nature of any transaction respecting the Trust Fund which the Trustee may have undertaken; or

c) the nature of any transaction respecting the Trust Fund which the Trustee may undertake;

except where disclosure is directly or indirectly required in order to comply with any applicable statute, regulation or administrative decree.

5.4 Within 60 days of the date of this Trust Agreement, and on an annual basis thereafter, the Trustee shall complete and file a confidential disclosure statement to the Commissioner pursuant to the requirements of section 9 of the Act.

5.5 The Trustee may disclose specific information relating to the Trust Fund to a person designated by the Settlor only if

a) the Settlor provides request to the Trustee in writing;

b) the Trustee considers the disclosure to be for a valid purpose, including

    i. the completion and filing of income tax and corporate returns by the Settlor; or

    ii. the furnishing of information requested by the Settlor's financial institution from time to time;

    and

c) the Trustee has obtained the agreement of such person in writing that the information provided shall be treated as strictly confidential and shall not be communicated, directly or indirectly, to the Settlor.

5.6 The Trustee shall deliver to the Settlor from time to time such data and information in respect of the income and capital gains or losses of the Trust Fund as may be necessary to enable the Settlor to prepare all federal, provincial and other income tax, information and other similar returns required by the law of any relevant jurisdiction.

6. DISTRIBUTIONS FROM TRUST FUND

6.1 The Trustee shall pay to the Settlor such amount of the annual income of the Trust Fund as the Settlor requests in any year by giving written notice to the Trustee.

6.2 The Trustee shall upon the request of the Settlor pay to the Settlor out of the Trust Fund any moneys which in the opinion of the Settlor are necessary for the purpose of paying income or capital gains tax arising from or in connection with the Trust Fund either directly or indirectly.

6.3 If the Settlor at any time during the Trust Term advises the Trustee in writing that the Settlor requires any part of the capital or income of the Trust Fund for any purpose other than the making of an investment in stocks or securities in public companies, the Trustees shall convert and liquidate such portion of the Trust Fund as in its discretion may be necessary or advisable for such purpose and shall issue the proceeds to the Settlor.

6.4 If the Settlor at any time during the Trust Term advises the Trustee in writing that the Settlor requires a portion of the Trust Fund to be pledged to a recognized lending institution designated by the Settlor, the Trustee shall

a) deliver to such institution such securities of the Trust Fund as the Trustee and the institution may agree are proper to be used for such purposes;

b) advise the institution in writing that the information provided must be treated as strictly confidential and must not be communicated to the Settlor either directly or indirectly and the Trustee has obtained the agreement of an authorized representative of the institution in writing that the information provided shall be treated as strictly confidential and shall not be communicated, directly or indirectly, to the Settlor.

7. COMPENSATION OF TRUSTEE

7.1 The Trustee shall from time to time be entitled to receive and deduct from the Trust Fund reasonable compensation for its services and reimbursement for its expenses in connection with carrying out its duties under this Trust Agreement.

7.2 The amount of compensation payable to the Trustee under section 7.1 shall be agreed upon from time to time by the Trustee and the Settlor, or failing agreement, such amounts or such rates payable to trustees from time to time according to the laws in the Province of British Columbia.

7.3 Any professional trustee who performs services of a professional nature shall be entitled to reasonable and proper compensation in respect thereof in addition to trustee's fees.

8. APPOINTMENT AND RESIGNATION OF TRUSTEES

8.1 The Settlor may, at any time during the Trust Term, appoint another person as Trustee in addition to the existing Trustee(s), or in order to replace an existing Trustee, provided that

a) the Commissioner has approved the addition or replacement; and

b) the Settlor provides thirty (30) days written notice to the existing Trustee(s) of the addition or replacement.

8.2 If the Settlor appoints a replacement Trustee under section 8.1, the Trustee being replaced and any continuing Trustees shall provide to the new Trustee an accounting of the Trust Fund from the time of their designation as Trustees until the date of the new appointment.

8.3 A Trustee may resign by giving notice in writing to the Settlor not less than thirty (30) days before the resignation is to take effect, and shall execute all transfers and do all acts or things necessary to transfer the Trust Fund to the new or continuing Trustee(s).

8.4 If a Trustee resigns, becomes incapacitated or dies during the Trust Term, the Settlor shall,

a) advise the Commissioner immediately; and

b) appoint a replacement Trustee; or

c) request the remaining Trustee(s) to appoint a replacement Trustee.

8.5 In each case where a new Trustee is appointed, the appointment shall not take effect until

a) the Commissioner has approved the new appointment;

b) any remaining Trustee(s) have provided a satisfactory accounting of the Trust Fund to the new Trustee;

c) all documents and assurances have been executed and all acts required to perfect the title of the replacement Trustee have been performed; and

d) the Trust Fund has been re-registered in a manner which preserves the confidentiality of the Trust Fund as set out in this Trust Agreement.

9. TERMINATION OF THE TRUST

9.1 Upon the Termination Date occurring because the Settlor is no longer required to comply with the Act and upon the Settlor requesting the Trustee in writing to do so, the Trustee shall transfer and deliver the Trust Fund to the Settlor.

9.2 Upon the Termination Date occurring because of the death of the Settlor and upon receiving written notice of the death of the Settlor from a person claiming to be the personal representative of the estate of the Settlor and satisfactory evidence of that person's due authority to so act, the Trustee shall transfer and deliver the Trust Fund to the estate of the Settlor as represented by such person whose receipt therefore shall be a complete discharge of the Trustee in respect of the Trust Fund.

10. GENERAL

10.1 This Trust Agreement is irrevocable, except as set out in Articles 8 and 9.

10.2 Any reference to the singular shall include the plural where the context so requires.

10.3 This Trust Agreement is binding upon the parties, their heirs, executors, administrators, successors and assigns.

10.4 The Trust shall be interpreted in accordance with the laws of the Province of British Columbia.

IN WITNESS WHEREOF the Settlor and the Trustee have executed this document on this day of , 20__ in the of , Province of British Columbia.

SIGNED, SEALED AND DELIVERED BY THE SETTLOR IN THE PRESENCE OF:

______________________ Signature of Witness	______________________ (seal) Signature of Settlor
______________________ Name of Witness	
______________________ Address of Witness	
______________________	

SIGNED SEALED AND DELIVERED BY THE TRUSTEE IN THE PRESENCE OF:

______________________ Signature of Witness	______________________ (seal) Signature of Trustee
______________________ Name of Witness	
______________________ Address of Witness	
______________________	

SCHEDULE "A"