

Estate-Owned Operating Companies: Key Considerations in Trustee Powers

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**Martin Rochweg, Partner and
Rahul Sharma, Associate**

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Introduction

- Various reasons why an estate could come to hold a controlling interest in a business
 - Spousal trust
 - U.S. estate tax planning
 - Poor Will and estate planning
 - Unexpected death

Fiduciary Obligations – Estate Trustees and Corporate Directors

- Estate trustees may need to be appointed as corporate directors
 - Declare dividends, approve financial statements, declare bonuses, signing authority
 - Wills should provide trustees with the power to appoint themselves as corporate directors and officers
- Duty to keep an even hand between income and capital beneficiaries
 - Capital dividends

Creditor Proofing

- Strict two-year limitation period for estates under subs. 38(2) of the *Trustee Act* (Ontario)
- Dividends paid up to the estate may be sheltered
- Consider trustee power enabling funds to be lent back to the corporation and secured with a GSA

Selecting Estate Trustees and the Rule Against Self-Dealing

- Is an estate trustee likely to purchase shares from the estate?
 - Common law rule against self-dealing would be violated
 - Equitable duty to avoid conflicts of interest violated
- Consider trustee power to permit self-dealing
 - Disclosure and approval of other trustees?
 - Possible involvement of the Children's Lawyer?

Tax-Driven Trustee Powers

- Post-mortem freezing
- Maximize lifetime capital gains exemption planning
- Incorporate beneficiary corporations for non-resident beneficiaries
- Settle Canadian or foreign trusts for beneficiaries, including non-residents

Conclusion

- Trustee powers may be more than just “boilerplate”!
- Beneficial to carefully consider trustee powers and discuss them with the testator

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Martin J. Rochweg, Partner
Phone: (416) 596-2116
mrochweg@millerthomson.com

Rahul Sharma, Associate
Phone: (416) 597-4335
rsharma@millerthomson.com

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