

Considerations and Best Practices For Your Trust

AFOA SASKATCHEWAN CHAPTER

September 29, 2015

Presented by

Domenic Natale
Vice President
Aboriginal Trust Services

Leanne Flett Kruger
Regional Manager Western Canada
Aboriginal Services

Jack Jamieson
Vice President
Aboriginal Services





Morning Agenda

- Trust Structures – Basic Concepts
- Trust Structures – Which Model Works For You
- *Health Break*
- Trust Structures – Roles & Responsibilities
- Choice of Trustee
- Other Considerations in Developing Your Trust



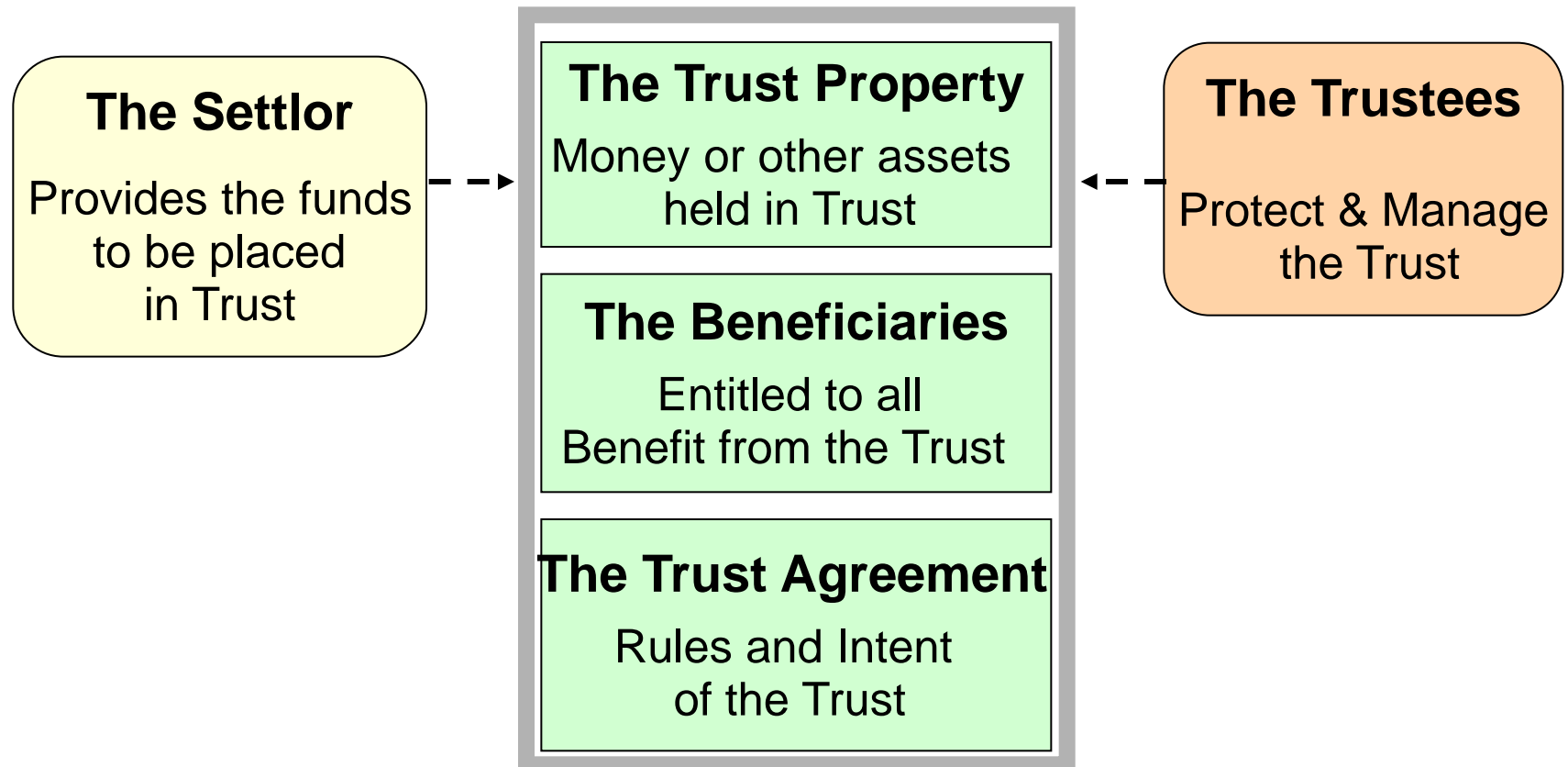
Trust Structures

Basic Concepts



What is a Trust?

A right of property held by one person or group of people (**the Trustees**), for the benefit of another person or group (the Beneficiaries).





Whose Property is It?

Settlor: Originally owned the property but divested itself of legal ownership when the property was placed into the Trust.

Trustees: Became the *legal owners* of the property as soon as they agreed to act as Trustees of the Trust.

Beneficiaries: The *beneficial owners* of the Trust Property. That means *all* benefits flowing from the Trust belongs to them.



Is a Trust Different from a Contract?

- Each is governed by a different law
- Each requires different elements in its formation
- Changes or amendments are handled differently
 - Contracts can usually be changed by agreement between the parties who signed the contract
 - Material changes to a Trust usually require the approval of a majority of the beneficiaries in a referendum vote



Why Use a Trust?

- To protect and segregate assets: not mingled with any other Community funding
- To preserve and grow their trust capital – for the long term benefit of the Community
- To generate a stable and sustainable annual payment for the Community's benefit
- To provide access to debt financing for capital investment (other than trust capital)
- To ensure transparency and accountability for the use of all Trust funds



Key Questions When Developing a Trust

- What is the purpose of the Trust?
- How should we plan for the Trust and who should be involved?
- How will decisions be made around the use of Trust property?
- Who should act as Trustee(s)?
- What annual income will be needed to meet the needs of the Community today...and in the future?
- What limitations or restrictions should be imposed?
- How will investments of Trust funds be handled?
- Will there be any tax consequences?



Trust Structures

Which Model Works for You



Different Trust Models

Based on:

- Objectives -Trust Purposes
- Operation of the Trust - Disbursement process
 - Growth mechanism
- Administration - Choice of Trustee
- Time Horizon



Objectives - Trust Purposes

- Treaty Land Entitlement
- Community Development
- Business/Economic Development
- Funds held for Minors



Objectives – Trust Purposes

Treaty Land Entitlement

- Capital held to purchase specific lands
- Land purchase often takes years to complete
- Income earned
 - Can flow to the First Nation
 - Can be retained in the Trust to assist with costs related to land purchase (*potential tax issue to address*)



Objectives – Trust Purposes

Community Development

- For the overall benefit of the Community
- Funds typically used for activities related to:
 - Education and Youth
 - Elder support
 - Promotion of culture and language
 - Infrastructure
 - Housing



Objectives – Trust Purposes

Business/Economic Development

Funds used for business and economic development

- May be provisions to finance large capital projects through loans and loan guarantees
- May be provisions to promote small businesses through loans or grants



Objectives – Trust Purposes

Funds Held for Minors

- Per capita distributions for minors are generally held in Trust until they reach the age of majority.
- Payments usually includes accrued interest or an inflation adjustment for each year held
- Can be challenging to administer for the 18 or 19 year period.



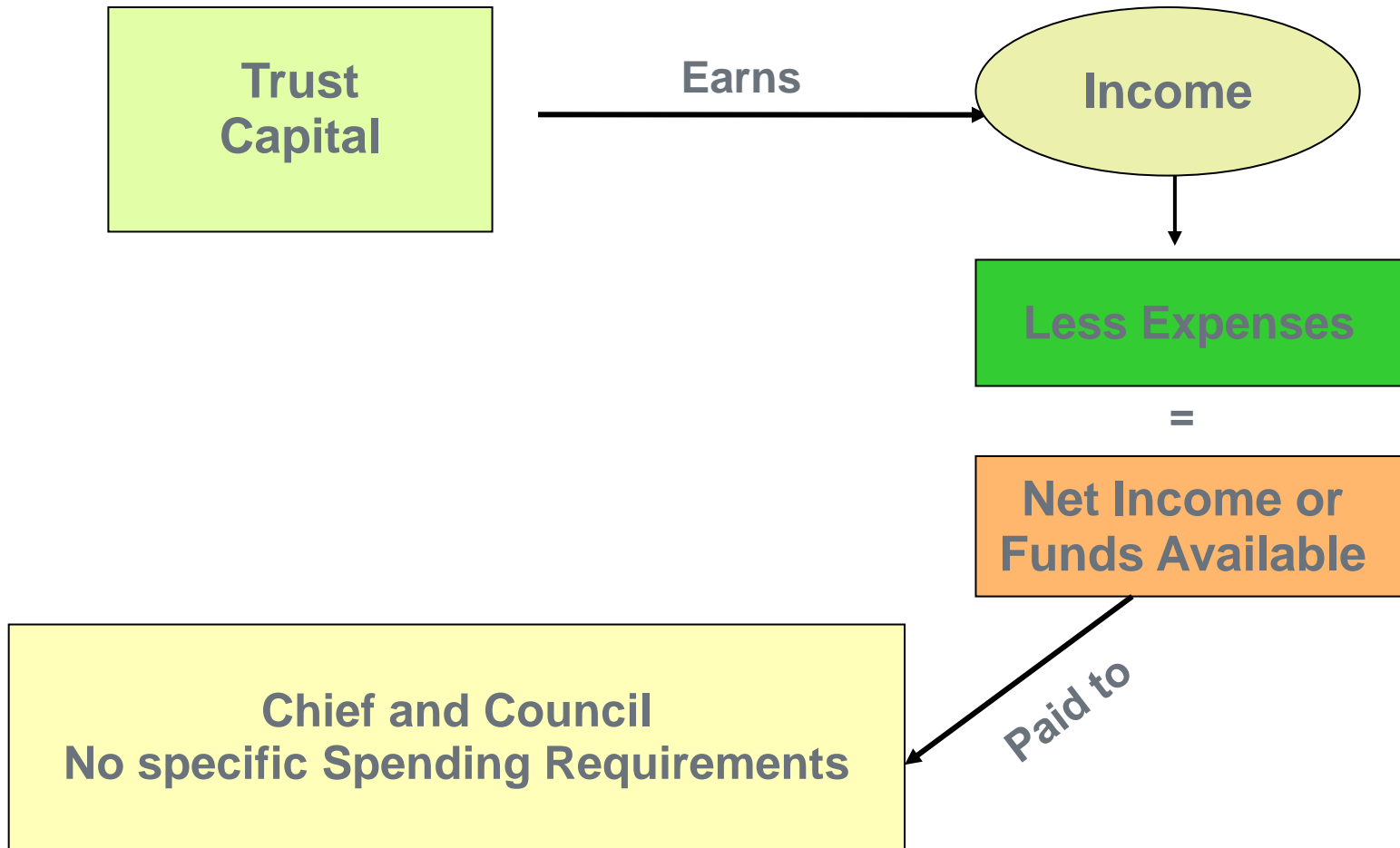
Operation of the Trust

Disbursement Process

- How much can be disbursed each year?
- Will Trust capital be available for any shortfall?
- Who will approve disbursement of funds?
 - Chief and Council
 - Trustees
 - Community Members
 - A combination of these

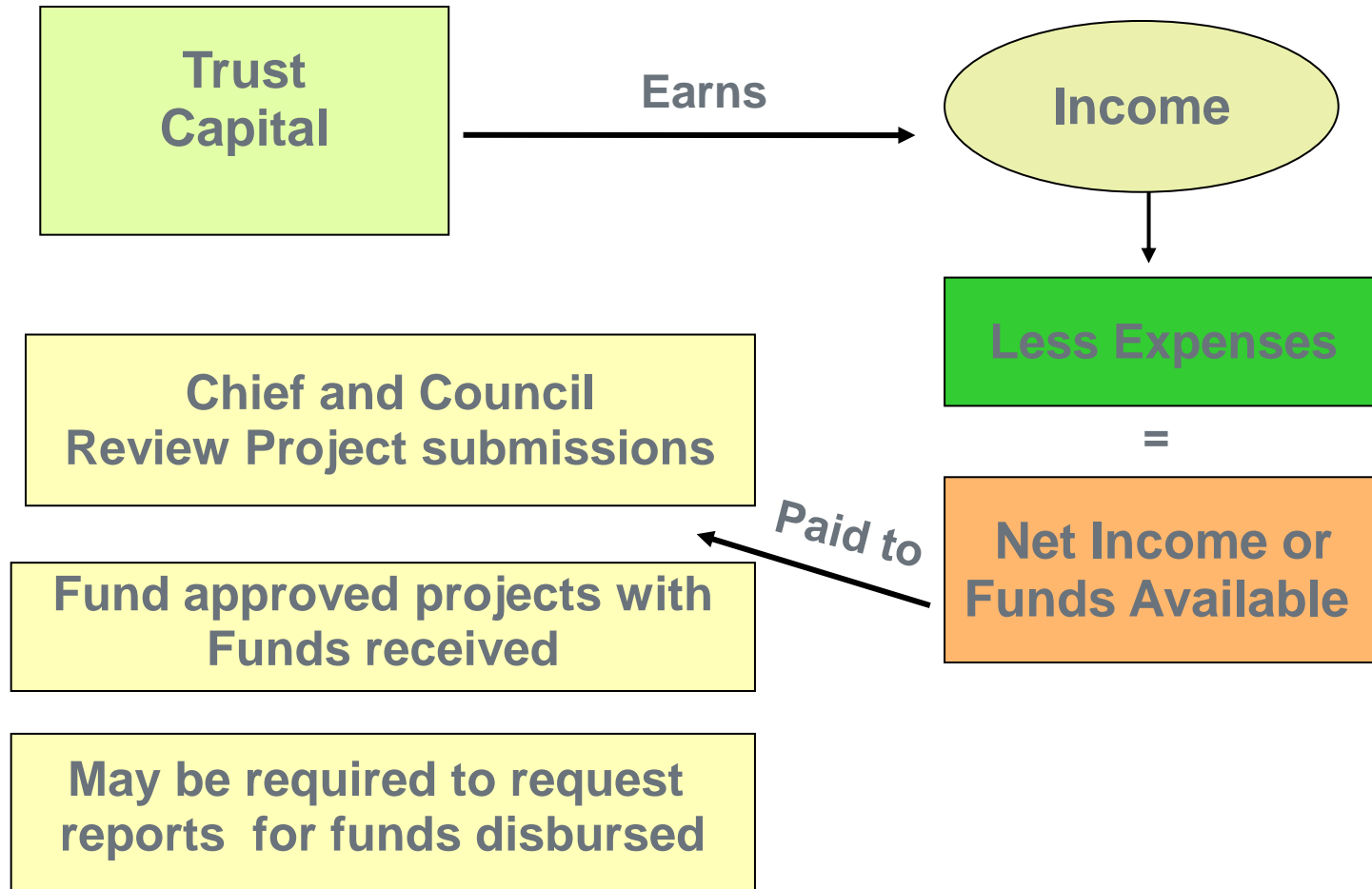


Example: Council Discretion





Example: Council Approval





Example: Trustee Approval

Net Annual Income or Funds Available

Qualified funding requests submitted to the Trustees for review & approval

May be from Council or the Members

Trustees disburse approved funds
May need to prioritize projects

May be to Council or to Members

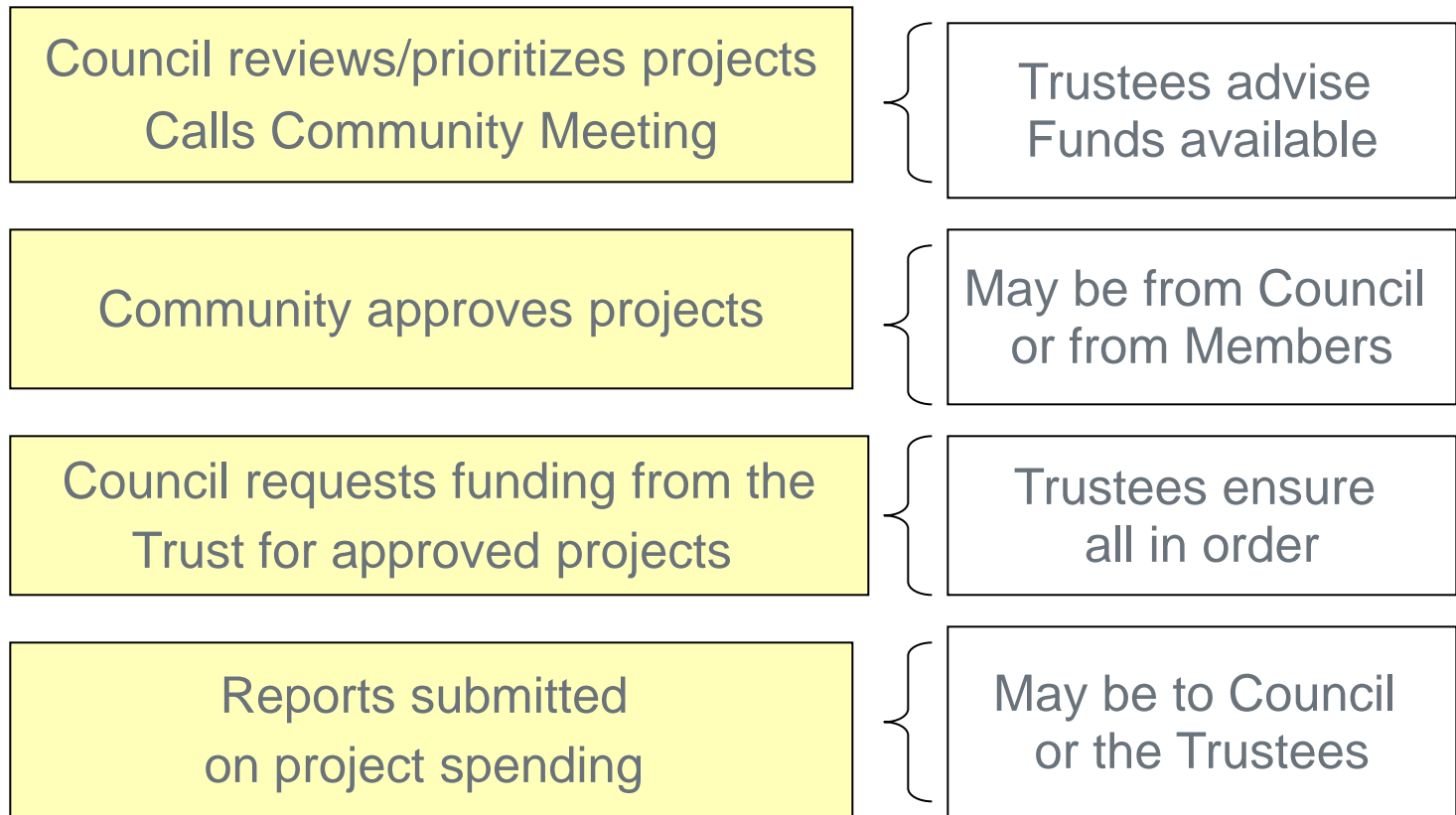
Reports submitted to the Trustee on use of funds

May be from Council or the Members



Example: Community Approval

Net Annual Income or Funds Available





Disbursement Based on the Market Value of the Trust

- The annual payment may be based on a percentage of the current value of the Trust Property
- The payment would be made up of
 - (a) Net taxable income of the Trust
 - (b) Capital funds to make up a shortfall of income (if any)

Example:

- Annual payout based on 4% of \$15,000,000 = \$600,000
- Net taxable income (income less expenses) = \$525,000
- Capital funds required to complete the payout = \$75,000



Operation of the Trust

Growth Mechanism

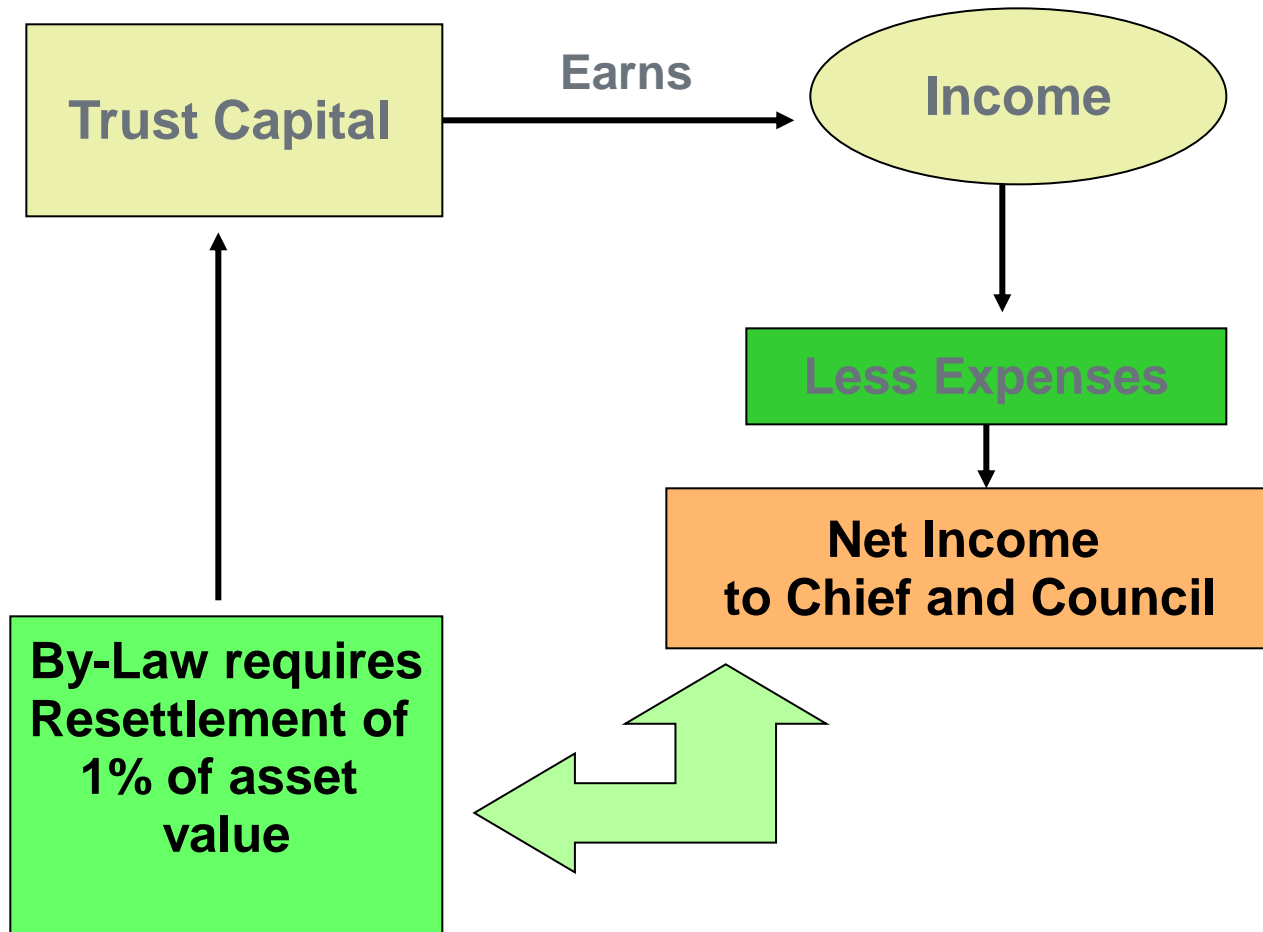
- Will some income be reinvested?
- Is there a floor value to be maintained?

To cope with inflation, provisions that provide some level of growth in value of the Trust should be considered.

Increasing asset value will ensure ongoing income earned will increase over time as well.

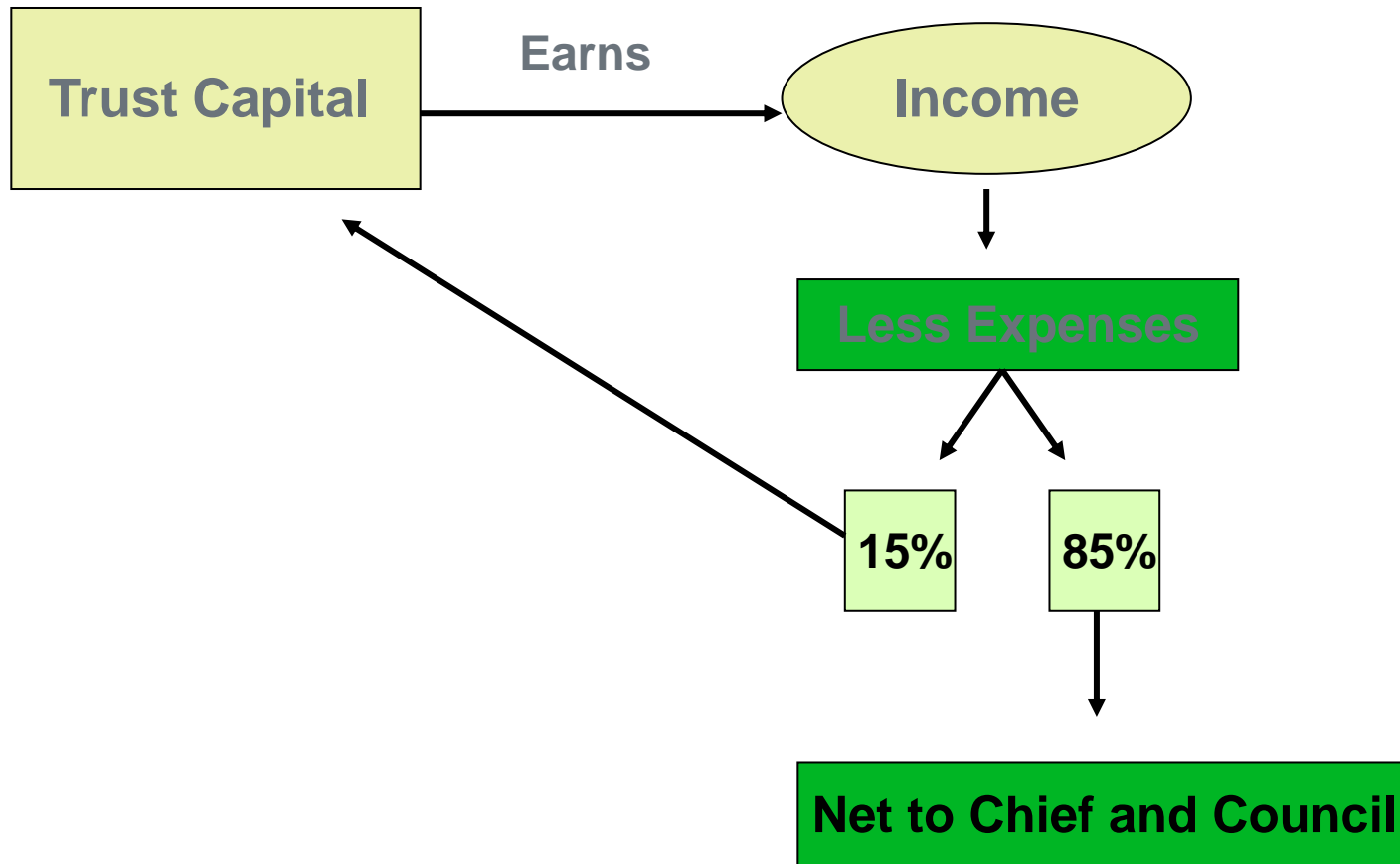


Reinvestment; - through By-Laws of the First Nation





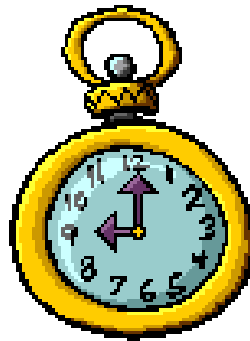
Reinvestment: - Mandated in Trust Agreement (e.g. @ 15%)





Health Break

15 Minutes





Trust Structures

Roles and Responsibilities



Roles & Responsibilities: Who Does What?

The Trustees

- Ensure the Trust Property is safeguarded
- Attend to the management of the Trust
- Income collection
- Expense payments
- Disbursements
- Make all decisions and perform all duties required
- Ensure appropriate accounting and reporting
- Use additional powers provided in the Trust when necessary



Fiduciary Duty of Trustees

What Does It Mean?

One person or group (the Fiduciary) has a duty to act in the best interest of another person or group (the Beneficiary)

A Trustee, as fiduciary, must follow the exact terms & requirements of the Trust Agreement and act only in the best interest of the Beneficiary



Trustee Liability – Breach of Trust

- Trustees can be held personally liable for
 - Fraud, negligence or wrongdoing; not performing the duties required; not protecting the Trust Property
 - Taking personal benefit from the Trust
 - Allowing the Trust Property to be used in any way that is not allowed under the terms of the Trust
- ***But*** Most Trust Agreements:
 - Contain terms that forgive legitimate mistakes made by Trustees acting in good faith
 - Indemnify Trustees against challenges as long as they are not guilty of fraud, negligence or wrongdoing



Roles & Responsibilities: Who Does What?

Chief & Council

- Appoint Corporate Trustee
- May be involved in appointment of Member Trustees
- Approve hiring of Investment Manager(s)
- May have authority re annual income spending
- May have responsibility for project submissions & approvals
- May be required to reinvest a portion of the annual income back into the Trust
- May be required to account on the use of annual funding



Roles & Responsibilities: Who Does What?

Community Members

- May be involved in submission of Projects for funding
- May be involved in election of new Trustees
- May be asked to attend an Annual Meeting to review the operation of the Trust



Roles & Responsibilities: Who Else To Involve

- To liaise between Council & the Trustees
- To act as a point of contact for Members
- To assist with administration at the Band level
 - Minor's payments
 - Project submissions
 - Fund disbursements to project managers
 - Trust statement organization
- To coordinate meetings with Council and the Community

Trust
Manager?

Band
Manager?

Administrative
Clerk?

The choice will depend on both the size of the Trust and the complexity of the Trust administration.



Trust Structures

Choice of Trustee



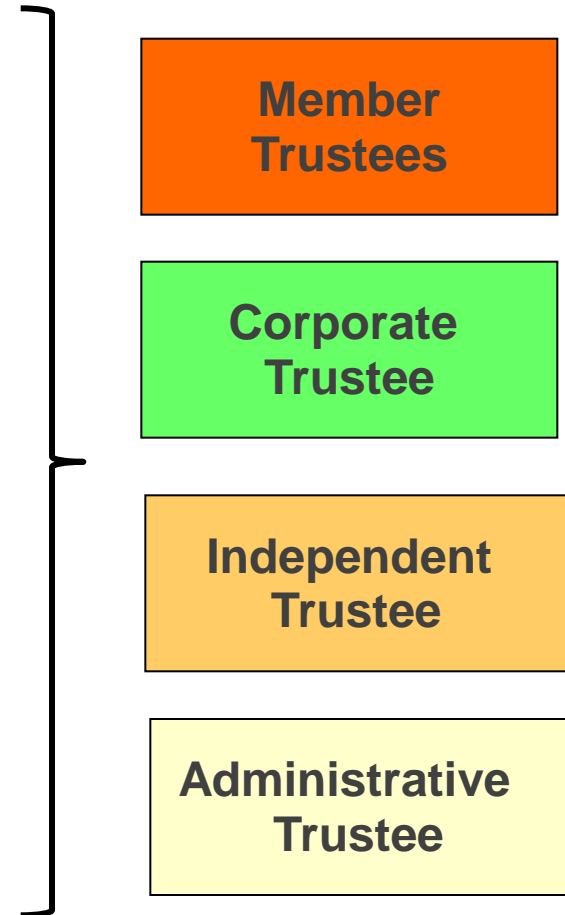
Choice of Trustee(s)

- Sole Corporate Trustee
- Member Trustees with Corporate Trustee
- Member Trustees with Independent Trustee
- Member Trustees only with a Custodian to safeguard the Trust assets
- A Protector may be included



Selection Considerations

- Knowledge and experience
- Objectivity and independence
- Decision-making capability
- Permanence and continuity
- Capacity building & training
- Custody of the trust assets
- Specialized trust reporting
- Communication





Considerations re Member Trustees

- Selection process:
 - Appointed by Council
 - Elected by the Community
 - Include or Restrict Member(s) of Council
- Qualifications and Bonding
- Terms of office – staggered, renewable
- On Reserve and/or Off Reserve
- Honorariums and Fees



Other Considerations *in Developing Your Trust*



Investment Clauses

- Ability to hire: delegate investment decision to qualified Investment professionals
- Flexibility around authorized investments
- “Basket clause”; to allow participation in Community business initiatives
- Suitable Lending provisions
- Restrictions – ethical considerations



Trust Expenses

Potential Operating Costs

- Corporate Trustee fees
- Member Trustee honorariums
- Travel and meeting costs
- Investment professional fees
- Accounting fees
- Fees for other professional advisors
- Trust Office expenses
- Community meeting expenses
- Trustee election expenses



Trust Expenses (*continued*)

Considerations

- What is a reasonable level for expenses (general benchmark is 1% of the value of the trust property)
- How should expenses be authorized
- Should expenses be payable only from income?
- Should the Trust Agreement include any restrictions as to what can be covered by the Trust?
- Should an Annual Budget be required and if so, who should review and approve?



Potential Taxation

Most Aboriginal Trust Agreements are developed with consideration to minimizing potential income taxes payable by the Trust to the extent possible.

Consideration should be given to obtaining an Advance Tax Ruling from Canada Revenue Agency.



Accountability & Reporting to the Community

- Safekeeping & Maintenance of Trust Records
 - Original documents, financial records, Meeting Minutes

Minutes of all Trustee Meetings

- Summarizing topics discussed and decisions made

- Regular statements to Council
 - Detailing all financial & investment activity of the Trust

- Audited Financial Statements
 - Confirming the financial numbers

- Annual Report & Presentation to the Community



Term of the Trust

- How long will the Trust last?
 - For a set time frame (e.g. 80 years)
 - Until death of the last Member who was alive at the time the Trust was created

- What happens to any capital remaining at the end of the term of the Trust?

The Trust may direct that it be:

 - Returned to the First Nation or
 - Resettled by the First Nation into another Trust



Amendment of Trusts

What to consider:

- Correction of typographical or clerical errors or other apparent omissions
- Changes of an administrative or procedural nature
- Amendment due to changes in tax law
- Amendment to vary specific provisions of the Trust
- Should there be specific restrictions on what can be changed? For example, some Trusts do not allow:
 - Changes to the definition of Beneficiary
 - Changes to the minimum amount that must be retained in the Trust



Amendment of Trusts

How Can It Be Accomplished?

- Decision of the Trustees
 - By Resolution

- Decision of the Trustees and Council
 - By Joint or Special Resolution

- Decision of the Adult Voting Members
 - By Referendum Vote

 - Requires a certain percentage of Members to vote in favour of the change



Setting Up the Administration of Your Trust

- Collection of Key Contact Information
- Review of duties & responsibilities - prioritize
- Time lines for specific duties – diarize
- Meeting schedule
- The Trust Budget
- Training- workshops and on-line courses



Lunch

1 hour

