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# Chapter 1: Nature and History of Equitable Interests

**What is a trust**

* **The concept of a trust as a device to transfer and hold property in a relationship that creates “legal” and “equitable” title in two different sets of persons respectively: the trustee and the beneficiary. The functional distinction between “legal” and “equitable” interests in property as, respectively, control and management of the property on the one hand and enjoyment of it on the other.**

**What is Property**

* Things, Relations among people mediated by things, Legal interests permitted in things (– rights and remedy based aspects of those relations: Real and personal rights, Powers, Duties, Privileges,) Ownership – possession/Control (***ius utendi –to use, control, manage, fruendi- to enjoy, benefit, et abutendi/disponendi- dispose or transfer)***

**THREE HALLMARKS of TRUST**

* 1. ability to split ownership - legal/use to trustee, equitable/enjoyment to beneficiary - disposition to both
* 2. **In Rem** rights - qualified in beneficiaryʼs case not trusteesʼ - except the bona fide purchaser for value without notice (equity sweetheart)
* 3. Fiduciary duties – There is a fiduciary duty of trustee to exercise rights and powers over trust property for gains and profits of beneficiary. Uttermost good faith is placed with trustee, and beneficiary has the power to sue for breach of duty and violation of beneficiary’s interest.

**Where do we see trusts?**

1. Tax avoidance or deferral – “tax efficiency”: trustees and beneficiaries taxed differently. This may be particularly advantageous at a particular time and place – depending on the jurisdiction and laws at that time.
2. Provision for family settlements through, for example, successive property interests and compliance with future interest restrictions
3. Incapacity
4. Corporate – joint ventures, REITS, debentures, insolvencies
5. Investments – mutual fund trusts as devices for pooling money for investment purposes
6. Pension funds and RRSPs – both often structured as trusts rather than as contracts though latter often also significant
7. Estate administration on account of death
8. Charitable and non-charitable purpose trusts/foundations
9. Environmental protection – trustee reclamation funds paid in advance to remediate mining: the trust fund, assembled through periodic payments by the polluter, is later used to reclaim from environmental despoliation caused by mining activities

## Maxims of Equity

Equity is the conscience of the law. Some maxims include:

1. Equity will not permit a wrong without a remedy
2. Equity follows the law: absent an unconscionable outcome, equity will respect and give effect to common-law rules.
3. Those who seek equity must do equity: “clean hands” doctrine
4. Equity assists the vigilant and not the tardy: laches not rewarded (not delayed)
5. Equity is equality: proportionality among contributors
6. Equity looks to the intent rather than the form: substance trumps form
7. Equity looks on that which ought to be done as being done: substance matters
8. **Equity does not assist a volunteer**
9. **Equity acts *in personam***
10. **The *in rem* aspects of the equitable interest in a trust.**
11. **The fiduciary position of the trustee and what that means in general terms.**
12. “**Equity will not permit a wrong without a remedy.**”

## Types of trust

1. Express Trust 🡪 set out in a will or K b/w parties
2. Resulting Trust🡪 implied
3. CNT (constructive trust) 🡪 enforced by court in good conscience

# Express Trusts- Created Intentionally

## How to create a trust\*\*

1. First ask: *inter vivos* or *per mortis causa*? (just identify at this stage)
2. if inter vivos – property must be transferred and vested in T,
3. if Per Mortis Causa - transmission of the deceased’s property is effected through a WILL (aided by statutory supplements) or, if there is no will, by intestate succession.

2) Secondly: does the testator and trustee have capacity (*sui juris*)?

3) Third, identify the form of dealing:

1. **Personal declaration of trust by settlor** (“I hold x as a trustee for my child”)
   1. In BC, may be in writing or oral, but must **have intention** on Settlor to be **immediate and unconditionally bound**. *Carlson v Willson* – trust become effective after death is invalid, can’t make testamentary disposition without complying with formality of Wills Act.
   2. Once done, it is irrevocable and whether B knows or not (*Glynn v Federal Commissioner of Taxation*)
   3. There is no transfer stage b/c the trustee (=settlor) has legal title🡪**a mere oral declaration is sufficient to execute the gift** (*Elliot*) – vesting occurs immediately
2. **Settlor may appoint 3rd-party trustee**
   1. Equity follows the law – there must be transfer of legal title to 3rd party for this to be effective and this depends upon the requirements for transferring particular types of property (*Milroy*)
   2. Must intend to be immediately and unconditionally bound (removing yourself from the asset—this must be done) (*Milroy v Lord; Mordo v Nitting*)\* bottom line
3. **Contractual agreement:** settlor and beneficiary agree to appoint a trustee (business arrangements or pension)
   1. These tend *not* to be gratuitous transfers—usually consideration given.
   2. Ask is the contract fully constituted and enforceable
   3. If yes, then can get court order of specific performance, and B gets equitable title
   4. Equity regards as done that which was intended to be done”
4. **An incomplete or unperfected gift** (promise)that is **later perfected** if the title is later given (e.g. when executor gets legal title) 🡪 the rule in *Strong v Bird*
   1. *Hilliard v Lostchuk* – 3rd son, subdivided property, executor
   2. *Strong v bird* –mother gave debt to son which the son owed – later perfected because son became T.

*There can be no trust unless legal title is vested in the trustee*

**4) Vesting in trustee (of legal title)**: if conveyance does not occur, the trust will fail (*Milroy v Lord*)

- Vesting perfects the gift because you can’t get it back, because court recognize human nature don’t give out things for free, want to make sure we really wanted to give. That is why it must vest, not just promise to vest

* *Trustee Act*, s. 29 – vests if the trust document declares that it vests
* confer or bestow (power, authority, property, etc.) on someone (legal) full control, administration, management – T and benefit - B as well
* Must **intend to be immediately and unconditionally bound,** if you done everything you could to relinquish control = met requirement (removing yourself from the asset—this must be done) (*Re Rose; Mordo v Nitting*).

5) Formal requirements of conveyance to trustee (of legal title)? *Milroy*

* Shares: register in company books, chattel needs symbolic delivery, assignments sometimes need to be in writing.
* Land: in writing and deposit LTO (Note - *MacLeod v. Montgomery* – even if deposited, Dup title must be in LTO)
* No transfer necessary for personal declaration
* Money – exchange hands

6) The **three certainties** (necessary but not sufficient)

7) Look to the beneficial interest🡪 vesting issues

**Personal Declaration of Trust**

### **Elliott v Elliott Estate 2008 ONSC** – **PD** to everybody = enough

**F**: Parents decided not to provide for their handicap child in the will; rather, they wanted the other children to take care of the child once the parents had died; agreement by children that they’d help support the disabled person. The mother had declared to everybody that the certificates were for the handicap child—she wanted everyone to understand that they were not part of the estate and that they were for the handicap child. The public trustee wanted to make it absolutely clear that the GIC certificate actually belonged to the handicap child.

**D**: Ct held that it was a sufficient declaration of trust; the GIC certificates did not fall into the mother’s estate

**A**: Through the declaration of personal trust, the mother transformed herself from owner *simpliciter* to a trustee and therefore, the GICs did not fall into her estate.

### **Glynn v Fed Commissioner of** **Taxation** – **PD is irrevo** and B has no knowledge/Tee use dividend not matter

**F**: Father had shares registered in his name. He died. Taxation authority wanted those included in the estate, for tax purposes. The father had made a declaration of personal trust, although he hadn’t told his kids. The father still used the dividends.

**A**: Neither the lack of knowledge by the beneficiaries of the trust *nor* the appropriation of trust assets affected the fact that the father had made a declaration of personal trust.

**R**: A personal declaration of trust by the settlor is an irrevocable act.

**Appointment of third-party trustee**

### **Milroy v Lord** – legal title **must vest** with tee to make trust effective/conveyance needs to comply with CL rules

**F**: Mr. Medley created a trust for his niece when she moved out; he took 50 very valuable shares and gave them to Mr. Lord and gave power of attorney to Mr. Lord but the shares were never registered in the name of Mr. Lord in the Bank’s books; Medley died and executor wanted to include the shares in his estate

**D**: Shares still owned by Mr. Medley because the trustee had never been given actual title of the shares

**A**: It was always open under the rules of the CL for Medley to tell Lord not to go through with the transfer

**R**: Legal title must be vested in the trustee in order for the trust to be effective. This requires that the transfer of the trust property complies with common law conveyance rules.

### **Ratner v LH Ratner Construction**- After conveyance to tees, **Trust is irrevocable**

**F**: The son (Ratner) had shares in a company and was moving to the US. To avoid income tax, he gave the shares to his mother. For tax purposes, the transfer had to be absolute; however, he extracted from her a promise that when he came back to Vancouver, she would retransfer the shares to him. When he came back, he asked her and she complied with a written document, stating that she would comply with transferring the shares back to her. After convincing from her daughter, the mother does not transfer them back.

**R**: If you transfer something absolutely, you have no claim to it. It’s repugnant to say that the transfer is absolute and not-absolute.

### **Re Rose** – equity look at what ought to be done, if **done all possible** – transfer is effective

**F**: Deceased transferred property to his wife and children. Five years later he dies. It turns out that the company did not register the changes in their books. Deceased was found to have done everything in his power to transfer the property.

**R**: Equity will treat the intended transfer as effective where the settlor has done everything that he is personally able to do in order to transfer the gift to the trustee. (equity looks at what ought to have been done as though it was done)

### **Mordo v Nitting** – transfer sufficient if intention is that trust asset is **immediate and unconditionally** bound

**F:** The male child has falling out with parents and sister; he fires his sister; the mother took steps to disinherit the son but she was scared of wills variation statutes; she transfers her jewelry to her daughters and a warehouse property to herself and her daughter in trust under a joint tenancy. She takes step to divest herself. However, the trustee (Mr. Wilson) did not have the warehouse registered.

**A**: When the mother died, she intended to be immediately and unconditionally bound—she wanted the trustee to do it (the law said: this is sufficient).

**R**: If something less than perfect transfer is effected by the settlor, the court will find the **intended** transfer to be sufficient if the intention to be **immediately and unconditionally bound** is established.

**The rule in *Strong v Bird* (subsequently perfected gifts)**

### **Strong v Bird**- 1) declare gift, 2) fail transfer 3) intent persist, 4)Donee later = Tee **subsequent perfected gifts**

**F:** A stepmother gave her stepson a loan. She arranged that he could repay her by her not having to pay board/lodging until such time as the debt was repaid. After one of these repayment periods, she released her stepson from the debt and continued to repay the debt. This was a promise and she did not execute any documents of release from repayment of the debt. The release/forgiveness of the debt was therefore undelivered. The mother died and an executor was appointed. Executor’s assemble all the assets and all the debts. Someone noted that the stepson owed a lot of money. However, the executor was actually the stepson. He became the owner of the debt that he owed to his mother’s estate.

**A:** Through law/statute, when you become executor, you gain legal title of all the deceased’s estate.

**D**: Legal title to the debt was given to the stepson upon death of the stepmother. The gifted debt- release was perfected. Stepson became legally vested when he became executor.

**R**: A gratuitous transfer which was not complete because it had never been executed *may become complete* if the transferee later receives legal title. The incomplete gift is thus completed.

Steps: 1) testator made immediate gift during life time 2) fail to complete gift transfer, 3) Testator’s intent persisted through life, 4) Donee appointed executor after Testator dies

### **Hilliard v Lostchuk 1993 ONCJ –** same as above

**F**: One of three children of a widow lived with her for a considerable amount of time and helped her with the farm. The two other kids had subdivided property. The mother took steps to subdivide property for the third child but she died before the subdivision was completed. The third child was also the executor.

**R**: A previously promised gratuitous gift was finalized (transferred) when the transferee became executor of the transferor’s estate.

# Express Trusts: The 3 Certainties

1. Certainty of Words (intention)
   1. Is it given to the trustee personally or in trust? In other words, was this intended to be a trust?
2. Certainty of subject matter
   1. Identify what is the trust property
3. Certainty of objects
   1. Identity of beneficiaries

## Certainty of Words (Intention)

\*Ask: Did the settlor intend for this to be a **trust** or an **outright gift**?\* 🡪all about settlor’s intent (*RBC v Eastern Trust)*.

- In whom does Equitable Interest lie.

Distinguish between precatory words and words intended to create a trust (*Hayman*):

### **Hayman v Nicoll 1944 SCC** – “**In full confidence**” (moral appeal) no longer signals trust but precatory word

**F:** The mother and daughter had a close rel’nship. The mother died. In her will, she gave property to her daughter “**in full confidence**” that her daughter would dispose of it as they had discussed. Three years later, the daughter also died. Some of the heirs in the mother’s estate, although left out of the daughter’s estate, wanted to access that money from the daughter’s estate by arguing that the daughter held it in trust for them.

**P**/**H**: Court of Appeal concluded that it was a trust through looking at precedent and the two words “in full confidence” and “dispose”. They concluded that the gift was for someone else’s benefit.

**I**: What does it mean to say “**in full confidence**”? Are these **words to create a trust** or are they **precatory words**?

**D**: The mom’s gift involved a moral plea and therefore, it was an **outright gift**.

**R**: The term “in full confidence” no longer automatically signals a trust. It may simply signal a moral appeal. Also word **disposed** could mean gift.

### **Royal Bank v Eastern Trust Co 1951 PEISC –** Ask could S/T really **intend bank to be Bs**?

**F:** Mr. Crossman signed an agreement with RBC to assign funds from one of his apartments. Mr. Crossman was having a lot of problem so he enters an agreement with someone else, Stetston. Stetson ends up getting title to Crossman’s property. The bank noticed that in the Stetson – Crossman agreement, there was an acknowledgement of the RBC debt/agreement. RBC tries to create an argument in which Stetson is the trustee and RBC is the beneficiary. RBC wants to exercise the *in rem* remedy as beneficiary.

**I**: Was the gift to Stetson an outright gift or did Crossman intend Stetson to be a trustee?

**A**: The court tries to determine the settlor’s intention. The word “trust” is never used—although that is not determinative. However, there wasn’t enough to show an intention to create a trust. Plus, RBC didn’t look like a beneficiary, but a creditor.

**R**: The court should examine the settlor’s intention to determine whether there was a clear intention to create a trust. Could he have intended bank to be B when they are creditors that bothered and sued him.

## Certainty of subject matter (Identity of Trust Assets)

Elements:

1. The **identity of the property** (*property is capable of legal transfer—not a salary)* and
2. the **amount of the beneficial interest** (*Beardmore*)
3. must be sufficiently certain in that they are described with sufficient exactness (*Beardmore*)
4. so that you can ascertain the subject matter upon execution (this must be upfront, no “wait and see” (*Beardmore*))

**Courts tend to lean towards certainty of subject matter (*Beardmore*)**

Later cases have been more charitable: **gift need not be totally clear**, but **sufficiently intelligible** for the court to **give effect to the settlor’s intent** (*Sprange; Re Golay*).

Suggestions:

1. Reference a specific piece of property (e.g. LTO description)
2. Refer to a specific fund or fixed amount/proportion of a fund
3. Provide a formula to determine the amount of the trust

### **Re Beardmore Trusts**- 3/5 net estate when dead/**certainty immediate upon execution** of trust not wait and see

**F**: Father created a trust for his kids in the context of a separation agreement. The deed stated that “**3/5 of the net estate**” would go to the kids but that the transfer would not occur until his death.

**I**: Was the subject matter sufficiently certain?

**D**: No

**A**: “3/5 of net estate” not legally ascertainable. This **requires a “wait and see approach**” to see how much the father had left when he died🡪 need to be able to tell upfront.

**R**: Courts lean in favour of finding certainty.

**R2**: Not only must the subject matter be sufficiently certain but the specific beneficial interest must also be sufficiently certain. If not conform to Wills Act = no trust

**R3**: Immediately upon execution of the trust (ie death), you must be able to ascertain the subject matter with sufficient exactness.

### **Sprange v Barnard** – B1 use as much he wants, but on death leave rest to B2/**floating trust rejected**(cf. Burke)

**F**: Wife gave to husband in a floating trust (£300 to him of what he wanted and the rest to beneficiaries).

**I:** was there certainty of subject?

**D:** No, floating trust = gift. However Pavlich says is this really the reason to reject? Because in *Burke v Hudson Bay Co,* floating trust seems to be ok

**R**: Floating trust rejected in this case, also rejected because did not conform to the formality of wills

### **Burke v Hudson Bay Co2010**- **floating equity is in pension** – because may or may not crystallize

**F:** Pension investment made 500 million surplus. Bs wants the Surplus and argued because floating trust, it is not a trust therefore they were given to Bs as gift.

**R:** a constant fluctuating sum in a pension trust fund, explained the interest of B as floating equity which may or may not crystallize.

### **Re Golay; Morris v. Bridgewater 1965 UK** – **reasonable income** might be obj determinable = ok

**R**: The term “reasonable income” is sufficiently exact for the court to objective determine.

## Certainty of Objects (beneficiaries)

1. Is at least one beneficiary a legal or natural person? **Private purpose trusts** are impermissible.
2. Certainty standards:
   1. List Certainty: the trustee could draw up a complete list of all the Bs
   2. Individual Ascertainability Test: is the class described clear enough to say of any *propositus* that s/he “is or is not” a member of the class.
3. Ascertain which of the following is implicated (a trust document may contain more than one):
   1. **Fixed trust**: Trustee *must* distribute to the named, individually or by class
   2. **Trust power/Discretionary Trust**: trustee must choose beneficiaries that fit criteria but has discretion as to whom that object(s) will be. LC until Baden, Now Is or is not, cannot be admin unworkable
   3. **Power *simpliciter***: trustee (or donee of power of appointment) must consider whether to appoint from group of objects – but never has to actually appoint. S/he *may* appoint one or more objects, need only consider (in good faith) (*Re Manisty’s Settlement)*
4. Determine whether **conceptual certainty** has been met
   1. Fixed trust: list certainty (*Broadway Cottages*)
   2. Trust power: – LC until Baden, now **Is or is not test** (Baden)
   3. Power *simpliciter*: is/is not test (*Re Gulbenkian Settlemen*t)
5. Naming Examples
   1. Specific: Basil Bartend Blogs, By Description: Oldest person in UBC, By Group: My children
6. Determine whether **evidential certainty** has been met
   1. **Fixed trust**: *Baden 1* test (1) terms must be clear and (2) category can’t be so hopelessly wide as to be administratively unworkable.
   2. **Trust power**: *Baden 1* test (1) terms must be clear and (2) category can’t be so hopelessly wide as to be administratively unworkable.
      1. Sachs J (*Baden II*; trust powers) 🡪 actually evidential uncertainty has no effect
      2. Stamps J (*Baden* II; trust powers) 🡪 yes it does!
         1. Courts will try to find certainty for trust powers so if you’re unsure about one party, it will likely succeed (*Baden II*)
   3. **Power *simpliciter*** : unnecessary—evidential uncertainty rules don’t apply (*Re Hay’s*)
      1. **Power** may fall into three categories below as well (general, special, intermediate)
7. Is there a Donee **power of appointment**? (3rd party person who is not trustee given power to select Bs)
   1. If yes, what kind?
      1. General power: donee or trustee may appoint anyone, including himself or herself
      2. Special powers: done/trustee may appoint only persons in the class of objects
      3. Intermediate/hybrid power: trustee/donee can appoint anyone except a person in the proscrib class
   2. **Who** is the donee of the power of appointment? (**identify**)
   3. Is the power of appointment clear?
      1. Conceptual: test is is/is not (*Gestetner’s Settlement*)
      2. Evidentiary – treat like a power *simpliciter* (then already met—Hay’s)

**Note:** initially, List certainty test was appropriate test for trust powers(Re Gulbenkian), but has problem with Pension, so changed to Is or Is not test in (Baden 1.)

### **Fixed Trust –** “distribute to x”

Note Bare trust: identity of B is stated, no duty other than to hold legal title. (no fiduciary)

Identity of B stated – or group of Bs, (fiduciary)

* Conceptual certainty: This requires **list certainty**—the objects of trust must be identified int eh trust instrument with such precisionthat Bs can be individually named (*Broadway Cottages*).
* Evidential certainty: Cannot be administratively unworkable—ie “so hopelessly wide” (*Baden I*) 🡪 not sure if anything would succeed on list certainty but fail here…

### **Trust power** – “distribute to 1 of my kids”

A class of potential Bs listed in terms of trust, must choose which from the list. (fiduciary)

* Conceptual certainty: The test for certainty is the **is/is not (individual ascertainability)** test – from the language in the trust document, can it be said with certainty whether any given individual is or is not a member of the class (*Baden 1*).
* Evidential certainty: (i) term must be sufficiently clear and – if uncertain not fatal (Baden 2) (ii) range of objects cannot be so hopelessly wide so as to make administration impossible (*Re Baden 1*) – ridiculously over burdensome

### **Power simpliciter** – “may distribute”

The selection must be rational + defensible ground.

The trustee has a *power to choose*:

1. **Whether** or not **to give at all** *and*
2. If so, **who** within the group of objects to give to

If there is a gift over🡪 power simpliciter. If an appointment is not made🡪 gift over *or* PRT.

The trustee **need only** ***consider*** (in good faith) making an appointment (*Re Manisty’s Settlement*). Courts will only intervene if the appointment is made in bad faith (capricious, arbitrary, irrational – *Manisty’s*).

Those within the class of objects subject to a power *simpliciter* have no property interest until selected as a beneficiary (*Manisty’s*)

* Conceptual certainty: The test for certainty is the “**is/is not” (individual ascertainability)** test (*Re* *Gulbenkian* Settlement).
* Evidential certainty: these rules do not apply to power simpliciter/admin unwork also not apply (*Re Hay’s*).

### **Power of appointment** – “may select which B

The settlor may create a power of appointment in which someone other than the trustee gets to determine the beneficiary (“donee of the power of appointment”). The settlor may also give the trustee the power of appointment (trust power). For powers, there must be certainty of objects.

If the power of appointment **is never exercised**, there may be (i) a gift over or (ii) the trustee will hold on a PRT for the settlor.

**Classification of Powers**

1. General power: donee may appoint anyone, including himself or herself
2. Special powers: donee may appoint only persons in the named specified class of objects
3. Intermediate power: donee may appoint anyone at all except a person or class as prescribed by the donor

### **Re Manisty’s Settlement UK (1974)** – **POA is broad**- Limited only by 1) capricious, 2) perverse,3) relevancy

**J**: Templeman, J.

**F**: Trustee has broad powers to add beneficiaries as objects of the trust. The power was intermediate (meaning that the power was exercisable in favour of anyone w/ certain exceptions). Trustee was attempting to add the mother and any widow of the settlor to the class of beneficiaries. The other members of the existing class of beneficiaries challenged this. They claimed that the power was so wide that the trustee could not consider how to perform the duty and no judge could ever judge performance of the power (uncertainty argument).

**I**: Is an intermediate power *prima facie* invalid due to uncertainty?

**D**: No

**A**: A trustee must exercise the discretion given to them by the settlor reasonably, giving effect to the intention of the settlor as discerned by the terms of the power, the terms of the settlement, the surrounding circ.s and individual knowledge.

**A**: Although a broad intermediary power is not *prima facie* invalid, the courts may intervene if the trustee exercises their wide discretion capriciously—irrational, perverse, or irrelevant to any sensible expectation of the settlor. Otherwise, the settlor’s intention to create a broad power with some restraints (exceptions in the intermediary power) can be seen as a way that the settlor may guide the trustee while otherwise trusting them to exercise discretion.

**R**: An intermediary trust is not automatically invalid simply because the number of individuals who fall within the class of beneficiaries is broad. The test for certainty with the power of appointment in intermediary trusts is is/is not.

**R2**: A trustee must give effect to the intent of the settlor by considering the terms of the power, all other terms of the settlement, and surrounding circumstances and their individual knowledge.

**R3**: A settlor may validly repose absolute discretion to the donee of the power of appointment. The only right that the class of objects has is to call on the trustee to consider the claim (they have no property interest).

**R4**: Although the trustee may have a wide power, it does not extend to capricious, perverse, or irrelevant exercises of discretion.

### **Re Gestetner’s Settlement**- POA use **is/is not test**

**R**: With the power of appointment, list certainty is not appropriate—it’s better to use the “is/is not” test. If anyone comes before the court, you must be able to say whether they are or are not an object.

**Fixed Trust**

### **IRC v Broadway Cottages** – fixed trust = **LC** - objects must be id with such precision so Bs be indivi named

**R**: For a fixed trust, the test for certainty of objects is the complete list test.

**Trust powers and power simpliciter**

### **Re Gulbenkian Settlements** 1970 HL = Trust power uses LC = **overruled**

**R**: Only power simpliciter uses the “is/is not” test. Trust powers use the complete list approach.

(*extended/overturned* in Baden 1)

### **Baden 1 HL** – 1) **TP** **use Is/is not test** (give effect to intent)/ but defeat by Admin unwork

**I**: What do you do when you have a trust power with large numbers of people under a widely-defined category?

**\*R**: Individual ascertainability (is/is not) extends to trust powers. It’s motivated by a desire for practice outcome, not defeating settlor’s intent. The practical task of the trustee w/ the power to appoint and one with the trust power are matters of degree, not substance.

**R2**: Even where the definition is reasonably clear (semantic certainty), the trust may fail if it is administratively unworkable (the trust power is *so hopelessly wide*).

Note: prior to this case, the test for trust powers was the list certainty test. As a result, a huge # of pensions were rendered invalid. Courts would try to get around this by categorizing clear trust powers as powers *simpliciter*.

### **Re Hay’s Settlement – TP subject to Admin unwork/1)admin unwork not to PS** (only have to consider)

**R**: The rules against evidential uncertainty and administrative unworkability do not apply to a power *simpliciter*; whereas they do apply for trust powers. Because – the trustee only has to make a decision whether to exercise or not, therefore does not matter if uncertain list or unworkable.

**R2:**Trust power is affected by admin unworkable.

### **Baden 2 CA** – **evidentiary uncertainty not fatal in TP**/ court will help

**I**: How does the is/is not work for trust powers treat evidential uncertainty?

**Analysis:**

**Stamps J** (rigid) 🡪 need both conceptual and evidential certainty for a trust power; if you’re a “maybe”, you’re out

**Sachs J** (*laissez faire*) – so long as you have conceptual certainty, you don’t need evidential uncertainty. If someone is a “maybe”, they have the onus of proving themselves to be a member of the class in order to get distribution.

**Megaw J** – so long as one person is “certain”, that’s fine; trust power can withstand maybes

**R**: Courts will try to find certainty. If you’re not sure for some people, that’s not fatal.

# Express Trusts: Vesting

## History

The fact that equitable future interests are free from the CL remainder rules initially allowed land owners to create long series of future interests, extending into the future (“perpetuity”). The land was virtually inalienable and no person was in a position to transfer the fee simple. The courts responded with the rule against perpetuities.

The rule resulted in its own anomalies. Manitoba abolished it in 1983, other jurisdictions reformed it, including BC which passed reforming leg’n in 1975 (*Perpetuity Act*).

Despite the reforming statute, one must still know the modern rule because: (i) the operation of the *Act* is generally only prospective in effect (see s. 2), (ii) even for the future, the *Act* confirms the rule but provides modifications of its operation in certain circumstances, (see s. 6) and (iii) the Act is only applicable where a future interest infringes the rule. Only if it infringes the rule will the leg’n operate to potential save the future interest from being void in whole or in part.

## Steps 🡪 Is the Equitable Interest vested?

\*This all proceeds on the prior establishment that the legal title is vested in the trustee\*

Also, none of the CL remainder rules work in trusts. Equity does not follow the law there.

**Anything put in a will is an equitable interest (*Re Robson*)**

Upon noticing that an express trust (either *inter vivos* or in a will), ask the following (**about beneficial interest**):

1. Identify the **words of purchase** (who gets what) and the **words of limitation** (what is being “got”).
2. Does the holder of the equitable estate have a **present** right to **possession** **or** a **future** right to **possession**?
   1. Present (freehold or leasehold) = no problems, that’s vested
   2. Future = keep going (#3)
3. Given that the interest is for future possession, is the holder vested in interested? Could they take possession now?
   1. Yes = Vested = no problems
      1. that’s a present vested interest in future possession, but future interest for shorthand
      2. E.g. remainder following a life estate (without conditions)
   2. No, would need to meet **contingencies** = examine contingency (#4)
      1. Contingent future interests mean that there is no immediate right to possession and that the interest holder must meet qualification(s)
4. Given that it is a contingent future equitable interest, what is the nature of the contingency? It may be:
   1. Trust asset (T.A.) to B for life if x
      1. B has **contingent life estate upon a condition precedent** (e.g. if)
   2. T.A. to B but if x, to C
      1. C = right of entry in remainder
      2. B = interest defeasible upon a condition subsequent (e.g. but if)
   3. T.A. to B until x, then to C
      1. B has a determinable interest (e.g. while, until)
      2. C has a possibility of reverter in remainder
5. Continue to examine the contingency—is it invalid due to:
   1. Illegality
      1. If you kill x
   2. Public policy
      1. Racial qualifications and other human rights discriminations
      2. Dictating celibacy
   3. Uncertainty/lack of clarity
      1. “of the Caucasian race”
      2. “adherent of X church”
6. What type of trust asset is it?
   1. If it’s reality
      1. Determinable interest (“until, while” x)🡪 strike out the whole transfer
      2. Interest upon condition precedent (“if x”) 🡪 strike out whole transfer
      3. Interest defeasible upon a condition subsequent (“but if”) 🡪 strike out qualification
   2. If it’s personalty
      1. If it’s *mallum in se* (evil in itself)🡪 strike out the *whole transfer* and revert to transferor
      2. If it’s *mallum prohibitum* (wrong by law)🡪 strike out the “x” (no qualification)
7. The rule in *Whitby v Mitchell* has been abolished by s. 6(2) of the *Perpetuities Act*. Does the contingency comply with the modern rule against perpetuities
   1. Identify all the lives in being (including those in *utero*, s. 1) at the time the will is executed
   2. Is it possible that all of those LIB might die and the future interest would be capable of vesting later than 21 years?
      1. There must be absolute certainty of vesting at the commencement of the trust (*if it vests at all*)
   3. Is this test met? Is there a single reasonable hypothetical (e.g. everyone dies)?
      1. Modern rule met--Yes (and passed 5) = no problem
      2. Modern rule not met--No 🡪 go to the Perpetuities Act

## 3 types of contingent future interest:

* (1) Estate subject to a **condition precedent** (“if”)
  + E.g. To B if X (that’s the condition precedent)
  + *(A* ***remainder*** *may be created in a third party, e.g. C – “remainder to C”)*
* (2) Estate defeasible upon a **condition subsequent** (“but if, subject to”)
  + E.g. To B, but if (subject to, on condition that) X, then to C
  + *(The* ***right of entry*** *gives the 3rd party (C) the ability to enter the land and resume possession after bringing an action to recover)*
* (3) **Determinable Estate** (“While, during, until, so long as”)
  + E.g. To B while (so long as, during, when, until) X, and when not-X, C.
  + *(The* ***possibility of reverter*** *is an automatic right. Once the estate determines, it automatically transfers to the 3rd party remainderperson.)*

## Perpetuities Act

Modern rule: **No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.** (LIB = in utero or alive)

### Property Act s. 6 (rule against perpetuities)

Except as provided by the Act, the rule of law known as the modern rule against perpetuities continues to have full effect.

### Perpetuity Act s. 3 (order in which remedial provisions are app’d)

The remedial provisions of this Act must be applied in the following order: (a) s. 14 (capacity to have kids), (b) s. 9 (wait and see), (c) s. 11 (age reduction), (d) s. 12 (class splitting), (2) s. 13 (general cy pres).

### Perpetuity Act s. 7 (80 year perpetuity period)

(1) … An interest in property which either (a) expressly or (b) impliedly must vest, if at all, no later than 80 years after the creation of the interest does not violate the rule against perpetuities

### Perpetuity Act s. 8 (possibility of vesting beyond period)

No disposition creating a contingent interest in property is void as violating the rule against perpetuities only because of the fact that there is a possibility of the interest vesting beyond the perpetuity period.

### Perpetuity act s. 14 (presumption and evidence as to future parenthood)

(1) If a proceeding regarding the rule against perpetuities turns on the ability of a person to have kids, it must be presumed

(a) male 14 years or over

(b) female 12 – 55

(2) Despite (1), a living person may show evidence that they cannot have kids

(3) If any question is decided based on a person’s ability or inability to have a child, then for any further questions which may arise respecting the rule against perpetuities in relations to that same disposition, the person must continue to be treated as able or unable regardless of subsequent events which have shown the presumption to be erroneous

(4) If a question is decided in relation to a disposition by treating a person as unable to have a child at a particular time and that person subsequently has a child at that time, the court may make an order as it sees fit to protect the right that the child would have had in the subject of the disposition as if that question had not been decided and as if the child would, apart from the decision, have been entitled to a right in the subject of the disposition not in itself invalid by the application of the rule against perpetuities as modified by this Act.

(5) For the purposes of this section, the possibility of adoption or legitimation are not considered but if a person does subsequently have a child by that means, subsection (4) applies to the child

### Perpetuity Act s. 9 (presumption of validity—wait and see)

(1) Every contingent interest that is capable of vesting w/in or beyond the perpetuity period is presumed to be valid until actual events establish that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of ss. 11, 12 or 13 becomes void.

…

### Perpetuity Act s. 11 (reduction of age)

(1) If a disposition creates an interest in property by reference to the attainment by any person of a specified age exceeding 21 years, and actual events existing at the time the interest was created or at any subsequent time establish

(a) that the interest, but for this section, would be void as incapable of vesting w/in the perpetuity period, but

(b) that it would not be void if the specified age had been 21 years,

The disposition must be construed as if, instead of referring to the age specified it had referred to the age nearest the age specified that would have prevented the interest from being void

(2) One age reduction to embrace all potential beneficiaries must be made for the purposes of subsection (1).

(3) If in the case of any disposition different ages exceeding 21 years are specified in relation to different persons,

(a) the reference in subsection (1)(b) to the specified age must be construed as a reference to all the specified ages, and

(b) the subsection operates to reduce each such age so far as is necessary to save the disposition from being void for remoteness.

### Perpetuity act s. 12 (exclusion of class members to avoid remoteness)

 (1) If the inclusion of any persons, being members or potential members of a class or unborn persons who at birth would become members or potential members of the class, prevents section 11 from operating to save a disposition from being void for remoteness, those persons must be excluded from the class for the purposes of the disposition, and that section has effect accordingly.

…

### Perpetuity act s. 13 (general cy pres provision)

(1) If a disposition would be void solely on the grounds that it infringes the rule against perpetuities (apart from the provisions of this section), an interested person may apply to the court who may vary the disposition to give effect as far as possible to the general intention of the disposition within the rule against perpetuities (so long as the general intention of the disposition can be ascertained in accordance with normal principles of interpretation and the rules of evidence)

(2) Subsection (1) doesn’t apply if the disposition has been subject of a valid compromise

# Express Trust: Formalities

This outlines the formalities relevant for both the transfer of **legal title** and **beneficial title**.

Despite these formalities, courts always try to give effect to the settlor/testator’s intention based upon the freedom of property.

## Inter vivos

1. What type of interest in land?
   1. Legal
      1. Must be in writing (s. 1 *Statute of Frauds*)
      2. BC still requires writing (s. 59 *LEA*)
   2. Equitable
      1. Must be in writing (s. 2 Statute of Frauds)
      2. LEA abolished writing requirements for equitable interests in land
      3. *Equity follows the law*🡪 may need to follow formalities for legal interest
      4. *Substance trumps form* in order to avoid fraud

According to the **Statute of Frauds**, a written memorial is necessary to effectively transfer (s. 1) an **interest in land** or (s. 2) a **beneficial interest in property**.

The ***Law and Equity Act***, abolished written formalities for equitable interests in land (s. 59). However, the transfer of legal title from settlor🡪trustee requires writing requirements.

**For trusts**, equity follows the law in that certain types of equitable interests will have formal writing requirements; however, the equitable maxim that equity “looks to intent rather than form” is given preeminence so as to **frustrate fraudulent** attempts to misuse legal requirements.

### **Law and Equity Act, s. 59 – land = written memo**

\***Briefly**: There are **writing requirements** but it does **not** go to an interest **under a trust or in a will**

**59** (1) In this section, "**disposition**" does **not include**

(a) … an interest under a **trust**, or

(b) a testamentary disposition.

(2) This section does not apply to

(a) … lease of land for a term of 3 years or less,

…

(3) A K (or **disposition**) respecting land… is not enforceable unless

(a) writing requirement by the party to be charged (indicates subject matter and charge)

(b) the party to be charged has done an act…that indicates that a contract or disposition not inconsistent with that alleged has been made, or

…

(4) For the purposes of subsection (3) (b), an act of a party alleging a contract… includes a payment or acceptance by that party… or part payment of a purchase price.

…

(7) A writing can be sufficient for the purpose of this section even though a term is left out or is wrongly stated.

## Gifts *Per Causa Mortis*

When someone dies, legal title🡪 executor or personal representative (either intestacy or named in a will).

### **s.37 WESA– valid will** = 1) write 2) signed by willmaker 3) 2 indep witness presence(19 yrs- s.40.1)

**s.37:A testator must manifest their intention to leave to persons in a will – to be valid a will must be**

**a) in writing, b) signed at its end by the willmaker, and c) 2 independent witnesses signs in presence of Will maker**

**s.40.1: signing witnesses must be 19 or older. 40.2: if person receiving signs, may void gift.40.3: a will is not invalid only because witness at the time of signing later became legally incapable of proving will, unless witness was not 19 at the time of signing.**

**s. 3 – Writing requirement**

**s. 4 – Must be signed for formal execution**

**Consequence of failing to meet formalities: estate 🡪 intestacy**

### **Mordo v Nitting 2006 BCSC** – settlor reserve power to call trust doesn’t mean it violates wills legislation

**F**: Mother disinherited jerk son. To avoid a wills variation action by son, she transferred assets to her daughter. One piece of land was transferred to trustee. Evidence was that the mother intended to create trust effective immediately; however, the trust contained a provision in which she (mother) reserved the power to call for transfer of the legal title by simply handing over a form. Son argued that the reservation of the power to call in the real property made the trust testamentary and so an attempt to avoid formalities.

**R**: If the settlor reserves the power to call a trust to a close, that does not mean that the trust is in fact a testamentary attempt to subvert wills leg’n.

## Fully Secret + Half Secret Trusts

Equity operates such that secret and half-secret trusts are **exempt from full compliance** with the **formalities** of transfers *per mortis causa* as set out in wills leg’n. Secret trusts allowed property to be left in legacy 1) without disclosing the identity of the true beneficiary in the testamentary instrument. 2) These were historically used to hide socially-shameful beneficiaries (e.g. children outside of wedlock) 3) still support of Bs. Regardless there remained **some requirements**.

**🡪Fully Secret Trusts:**

On its face, the bequest shows no intention that the stated beneficiary should actually act as trustee for the trust, undisclosed beneficiary. These may operate by **intestacy** or through a **will.** It may also operate in an ***inter vivos*** transfer (*Gardner*).

The **requirements** are as follows:

1. The testator (A) must **intend** that the beneficiary named in the will (T, the intended trustee) hold the legacy on trust for the real, undisclosed beneficiary (C). (*Ottaway v Norman*)
2. The testator must **communicate** **within** his or her **lifetime** (ie prior to death, vs prior to making will) that s/he the testator wishes for the named beneficiary to hold in trust for the true, **identified** beneficiary. (*Re Boyes*) (listed B must know he is acting in the capacity of T)
   1. If T otherwise agrees but only learns of C’s identity after A’s death, T will hold on a **resulting trust** for A’s estate (*Re* ***Boyes***)
   2. Communication must occur prior to death to bind conscience of T and get acquiesce of T (must agree) (*McCormich v Grogan*)
3. The named beneficiary (i.e. intended trustee) must accept to the testator’s proposal (#2).
   1. If T does not accept A’s proposal (3 is not met), T will **take title beneficially**. (*Re Boyes*)
4. If it fails🡪 s. 59 WESA gives courts broad powers to give effect to testator’s intent (below, rectification)

Worth noting:

1. The trustee of a secret trust may not also be a beneficiary—risk of fraud “intolerably” high (*Re Rees*).
2. **If trustee predeceases settlor, the trust fails**

### **Re Boyes 1884** UK– **must communicate identity to T before death** or RT

**F**: The testator has his solicitor draft a will appointing the solicitor “absolutely”; the testator advises the solicitor that the latter will be acting as a trustee for a person that the testator will later identify. The testator dies before disclosing the identity of the intended beneficiary. After the testator’s death, unsent letters to the solicitor were discovered which identified the intended beneficiary, Nell Brown.

**I:** If the solicitor was aware that they were a trustee for an unidentified beneficiary and accepts such a designation, is that sufficient to establish a secret trust?

**D**: No, the trust failed and the solicitor was to hold on a resulting trust for the testator’s estate instead.

**R**: If a testator does not communicate the identity of the beneficiary of a secret trust to the trustee *prior* to death, the trust will fail and the trustee will hold the trust assets on a resulting trust for the testator’s estate.

### **McCormick v Grogan 1869 HL** – giving effect to secret trust is intended to **prevent fraud**

This doctrine (of secret trusts) requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the legislature to pass the *Statute of Frauds*, and it is only in clear cases of fraud that this doctrine has been applied — cases in which the court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform (briefly: original motivation was to prevent fraud)

### **Ottaway v Norman 1972 UK-** someone was successful in arguing secret trust

**F**: Testator bequeathed his bungalow and ½ the residue of his estate to his CL-spouse, Ms. H. Family agreed that if she survived, she would leave the bungalow to the son of the testator. Ms. H’s will on her death left half of her estate to the son and the other half and the bungalow to the Normans. The son sued the Normans. He succeeded in obtaining the bungalow and furniture on the basis of a fully secret trust. In respect of the residue (money) the son was unsuccessful, as an intention by the testator to do this was not sufficiently demonstrated. If it had, a floating trust would have been set up in the son’s favour. This would be difficult to apply in practice.

**🡪Half-Secret Trusts:**

Unlike secret trusts, these will note that the original “beneficiary” is actually a trustee, holding for the true, undisclosed beneficiary. However, the real intended beneficiary is never named or identified in the trust instrument. These may only operate through a **will**.

These are not caught by all the formalities in *WESA* to prevent fraud by a trustee (court does not want to be a tool of fraud). In addition, it’s in line with the goal of upholding the settlor’s intent.

The **requirements** are:

1. **Prior** to **making the will**, the testator must tell the intended trustee that they will be holding on trust for the undisclosed beneficiary; (*Re Keen*)
2. **Prior to making the will,** the testator must **disclose** the **identity** of the beneficiary to the trustee; and (*Re Keen*)
3. Prior to (or at) the time the will is made, the trustee must accept the role.
4. If it fails🡪 s. 59 WESA (broad rectification powers to court)

Worth noting:

1. The beneficial interest vests at the time the half-secret trust is created (*re Gardner*)
2. **If trustee predeceases testator, the trust survives b/c existence of trust is apparent on face of will**

### **Blackwell v Blackwell 1929 HL** – **RT results** if name of real B not disclosed

**F**: In his codicil, Mr. Blackwell made a gift of £12,000 to 5 friends to be held on trust and paid out “to such person or persons indicated by me to them…” At the time of drafting the codicil, Mr. Blackwell instructed one trustee verbally (and communicated to the others) and he wrote the information that specified the name and address of the intended beneficiaries.

**COA**: Mrs. Blackwell and her son contested the gift.

**L**: At the time, there was the *Statute of Frauds* and the *Wills Act*.

**I**: To what extent is it possible to give effect to the testator’s intentions so far as they conflict with statute?

**D**: The disposition was upheld.

**A**: At the time, one of the justifications for upholding the testator’s intention in fully secret trusts was that to do otherwise would allow the intended trustee to perpetuate a fraud. For half-secret trusts, the trusteeship is identified and therefore, if a beneficiary is not identified, the trustee merely holds on a resulting trust; the fraud justification doesn’t hold.

### **Re Keen**- trustee of half secret trust **must consent**

**F**: A will noted that the disposition was “to be held upon trust, disposed by legatee among such persons as may be notified by me to them during my lifetime”. Testator sealed envelope and gave it to legatee to undertake the truste.

**I**: Did the sealed envelope “communicate” the identity of the beneficiary?

**D**: Failed b/c the half-secret “trustee” did not know that the envelope contained terms of a secret trust and he did not agree to carry it out.

## Rectification of a will: Effect on Secret Trusts

Today, the need to comply with the rules to successfully set up a secret/half secret trust may be less significant given the tendency of the courts to give effect to the real intention of the testator.

### **s. 59 of WESA- court has power to rectify will** 1) accidental error/2) misunder instruct/3) fail to carry out

(1) On application for rectification of a will, the court… may order that the will be rectified if the court determines that the will fails to carry out the will-maker's intentions because of

(a) an error arising from an **accidental slip or omission**,

(b) a **misunderstanding** of the will-maker's instructions, or

(c) a **failure to carry out the will-maker's instructions**.

(2) **Extrinsic evidence**, including evidence of the **will-maker's intent**, is admissible to prove the **existence of a circumstanc**e described in subsection (1).

(3) An application for rectification of a will must be made no later than 180 days from the date the representation grant is issued unless the court grants leave to make an application after that date.

## Transitory Role of Settlor and Attempts to Revoke a Trust

After a settlor creates a trust, they fall out of the relationship that he or she initiated (*Bill v Cureton*). This is so **unless** 1) the settlor creates/reserves the **power** for the amendment or **revocation** of the trust or 2) Settlor is B

### **Bill v Cureton UK** – once settlor creates trust, they **fall out unless sole Bs**, spectral/future Bs interests not good

**F**: The plaintiff created a trust in which her trustees were to invest property and pay dividends to her for her life and remainder to her husband for life, with remainder to their children. She reserved no power to terminate the trust. She had a debt issue so she applied to terminate the trust. At the time of application, she had no children and no husband.

**A**: Had P been the sole beneficiary of the trust, she would have been able to terminate pursuant to the rule in *Saunders v Vautier*; however, because of these spectral/future husband and children, she fell out of the picture and could not terminate the trust.

**\*\*R: Once the settlor creates the trust, they fall out of the picture and cannot terminate the trust or reclaim the assets.**

### **Nolan v Kerry (Canada) Inc 2009 SCC** – Pensions – employer(S/T) cannot terminate trust

**F**: This is a pension/commercial context for the same rule as *Bill*. Employer wants to terminate Trust

**R**: Without the power of revocation in the trust instrument, a settlor loses power over trust assets and may not interfere with them once they have been placed in the trust fund.

### **Metro Toronto Pension plan v Toronto 2003 OJ** – power to amend not equal power to revoke

**R:** reserve power to amend, even if broad power to amend does not imply power to revoke. Amend = change not cancel

### **Saunder v Vaultier 1841**- Settlor who is sui juris B can call trust

**Ratio:** ofcourse sui juris Bs can call for the trust.

# Resulting Trusts

A resulting trust means that although legal title has been transferred, equitable title remains with the transferor. **Automatic** and **presumed** resulting trusts were described in *Re Vandervell's Trusts* #2. This is a helpful starting point, but some cases will fall between or outside these categories. A third category, common intention resulting trusts, was used to deal with property in non-spousal cohabitation. In Canada, this is instead dealt with by **constructive** trusts. The common intention resulting trust is not part of the law in Canada (*Pettkus v Becker*; *Kerr*). Unjust enrichment has been used to explain the use of resulting trusts. A gratuitous transfer of equitable title would unjustly enrich the transferee. This is criticized because it gives in rem rights to the transferor

* trusts which are based on unexpressed but presumed intention
* In the RT the equitable estate jumps back to the settlor/testator’s estate
* AUTOMATIC: where the trust fails or doesn’t exhaust the assets
* PRESUMED: where there is a gratuitous transfer

• CONSTRUCTIVE: court imposed where conscience demands it

Traditionally, both ART and PRT considered to give effect to the common intention of the parties – it gives effect to settlorʼs intention not to give beneficially to the trustee PIRTs - the resulting trust is based on a presumed intention not to grant equitable title even though legal title has been transferred to a grantee. ARTs - the basis does not depend so much on the settlor having intended the beneficial interest to revert to him

## which operate in preference to other creditors.1) 🡪 Automatic Resulting Trusts (ART)

ARTs spring back when there is either a **failed express trust** *or* **surplus trust assets from a partially fulfilled trust.** This is the “clean-up operation”—something didn’t go completely right. This occurs **automatically** (*Re Vandervell’s Trust*).

**The trust is void (but legal title transferred to trustee)**

This is where an **express trust** fails for non-compliance with one or more of the **three certainties**.

### **IRC v Broadway Cottages** - if **voided three certainties = ART**

**F**: Express trust set up to apply income for the benefit of a large and fluctuating class of objects: the settlor’s wife, specific relations, employees, their wives and widows, and a charity (Broadway Cottages Trust). At the time, the test was “complete list”—not is/is not—so the trust was declared invalid.

**D**: Trust invalid, trustee holds legal title on an **ART** for the settlor.

**Legal title is transferred to the trustee without fully disposing of the equitable interest**

### **Re West 1900 UK** – **undistributed trust assets = ART**

**F**: Testatrix left property on trust for sale for payment of debts, funeral expenses, and legacies. The trustees fully performed but there was a remaining surplus. The trustees claimed it for their personal benefit.

**I**: When a trust is fully performed yet there remains trust assets, who has equitable title over those assets?

**D**: Decided for the next of kin of the testator

**R**: When a trustee fully performs a trust and yet there remain undistributed trust assets, the beneficial interest in those assets will return to the settlor or the testator’s estate on an ART.

### **Schmidt v Air Products 1994 SCC**– Defined Benefit Pen surplus = ART to boss, DCP to employee

**F**: Stearns Rogers (operating as a business w/ pensioned employees) and Catalytic Plan (also has pensioned employees)—the two combine and form Air Products (which has pensioned employees). Both SR and CP have folded into the same company, AP. And AP has a surplus of $9 million. AP wants to claim that money. SR has a defined benefits pension. AP had a defined contribution pension.

**A** (defined benefits pension--SR): obligation of employer is to ensure that the employee gets a return at a certain specified level (a “defined benefit”). The employer sets up the arrangement and has an obligation to make sure the employees are paid according to the scheme. If there is surplus, that belongs to the employer on the basis of a RT.

**A (**defined contribution pension--AP): PP in which the employees put money into a trust fund (w/ contributions as well from employer) and set up a trustee. When $$ leaves the employer, the trust sets up accounts for each member and each member has a share in the assets of that PP. Each has their own account in the trust fund. In such an arrangement, there may be no surplus because the $ must find its way into an employee’s account.

**A**: None of the money from SP formed the pension in AP.

**D**: Decision for Schmidt, the claim of an ART for AP was rejected.

**R**: In a defined pension plan, surplus belongs to the employer on a resulting trust. In a defined contribution pension plan, there is no surplus—it all belongs to employees—and therefore there is no surplus, and no need for a RT.

**Transfer of property to another subject on a condition precedent which has not occurred (“Quistclose” trust)**

These are in the form of contractual agreements with specific contract purposes. If the primary purpose/condition of a loan is not executed, the borrower holds on a RT in favour of the lender. By placing this condition on a loan, the lender has an equitable interest (right of reverter) to the $$ (*Barclays v Quistclose*).

### **Barclays Bank v Quistclose 1970 HL** – $ forward on condition not met, ART for lender (**Quistclose T)**

**F**: Q gave loan for the specific purpose of paying a dividend to RR. Q made this very clear and made it clear w/ the bank, B, who put it in a very special, separate account. Before the dividend was paid out, the borrower went bankrupt. The bank took the money owed by RR to B. Q argued they had a beneficial title to that money.

**A**: Normally if you give $ in a loan and the person who has the $ goes bankrupt, you have a claim only as a concurrent creditor—the only way you get out of that is if you have “real” security (e.g. mortgages). This is a way around that general norm—giving creditors preferred status.

**R**: Where money is forwarded for a particular purpose (or on conditions), if it is not used for that purpose, the lender holds beneficial title to that money.

\*Note\*: this gives the creditor a priority claim in situations of insolvency

### **Twinsectra Ltd v. Yardley 2002 HL –** B can **trace money** (equitable), if cond met, lender just creditor

**F**: Y took a loan from T for the purpose of a property development project. T would not give the money unless Y was backed by a solicitor guarantee (undertaking). Y’s solicitor refused but suggested another solicitor. The 2nd solicitor was supposed to only give the money to Y for the purposes of purchasing property; he released it unconditionally. Y frittered the money away—it was not wholly in another bank account. Y went bankrupt. 2nd solicitor went bankrupt.

**Remedy**: Allowed T to trace $$ to the many other bank accounts of Y

**R**:

1. When a loan is given with conditions/purpose, the lender has an equitable interest in seeing the money app’d for that purpose
2. Once the lendee/debtor uses the money for that purpose, the lendor/creditor becomes an ordinary creditor.
3. If the purpose is not carried out, you need to look at the intention of the parties through the terms of their agreement

### **Re Westar Mining Ltd 2003 BCCA-** **Quistclose accepted in BC**

**F:** Joint Venture b/t Poscan and W- written agreement: P would pay money over to W and get 20% of costs and 20% profit – clearly not to merge money into gen assets of W. P went bankrupt, creditors want W’s money.

**A:** Court found that money had been put in, not as a loan but as part of a specific obligations and this money does not belong to P.

**R**: Quistclose has been accepted in BC.

**Note:** As North J explained in *Gibert v Gonard* (1884) 54 LJ Ch 439, 440:

"It is very well known law that if one person makes a payment to another for a certain purpose, and that person takes the money knowing that it is for that purpose, he must apply it to the purpose for which it was given. He may decline to take it if he likes; but if he chooses to accept the money tendered for a particular purpose, it is his duty, and there is a legal obligation on him, to apply it for that purpose."

**Surplus of funds after trust purpose has been achieved**

When a trust exhausts only some of the trust assets and leaves a surplus after the trust purpose has been fulfilled, an ART arises in respect of the surplus

Example:

* Disaster: money is given for disaster relief, disaster relief completed, who owns surplus?
* Unincorporated associations (no difference b/w corporate entity and shareholders): those who supply the finances *are* the company

Disbanded unincorporated associations

1. Assume not caught under charity leg’n (*Hatchett*)
2. What type of donations?
   1. See *West Sussex*\*\*\*\*
3. Given that it’s an ART, further consider the K of the organization (Hatchett)
   1. At the time of donation, gifts were intended to be given to members as joint tenants so that any **member could sever her share and claim it** whether nor they continue on as a member
   2. Intention to gift to existing members (**ART**) according to contractual rights that prevail among members in the governing agreement
      1. This was what the court chose in *Hatchett*
      2. Likely no interest goes to estate after death of member (Hatchett)
   3. The terms of the gift or the rules of association may indicate that the gift is not at the disposal of members; it is held on trust to be applied for purposes of the club
      1. But note private purpose trusts are void

### **Re West Sussex Constabulary Fund (1971)-** collection box, street perform= **bona vacantia, Major donate = ART**

When an unincorporated association becomes moribund, the outcome depends on the following classification:

1. Collection boxes (*Re Gillingham Bus Disaster*)
   1. Intent of donor: part with money
   2. Surplus is *bona vacantia* (“unclaimed goods”) belongs to crown
2. Legacies and major donations (*Re British Red Cross*)
   1. Intent of donor: give to the *specific* purpose
   2. Surplus is held on an ART for the donor
3. Street entertainments, raffles, and sweepstakes
   1. Intent of donor: receive entertainment, not donate to a fund,
   2. The relationship between collector and giver formed in K not trust. Surplus is neither gratuitous or founded on a void settlement, so once the club becomes moribund (i.e. on the verge of termination), those surplus funds are *bona vacantia* and belong to the Crown

### **Re British Red Cross1914 UK** – **major donation** surplus after achieving result = **ART for donor**

Note: case where a few very wealthy people gave a lot of money.

**F**: Through public subscriptions by individual donors, money was raised at the end of the Balkan War to assist the wounded. The money was applied and a surplus remained in the hands of the trustees. All of the donors were known.

**D**: ART for the individual subscribers who had committed to the fund—they were entitled to receive their share of the surplus if they so chose

### **Re Gillingham Bus Disaster 1958 UK** –**court holds fund for ppl (Not followed\*)**

Note: case where a lot of people gave a bit of money.

**F**: Donations were collected from many people in street collections. Many donors could not be identified. The donations exceeded the amount needed to serve disaster relief.

**D**: The court held that for a certain period of time, individuals could come to court and claim their contribution

\*This has NOT been followed because later courts have alluded to the impossibility of applying an ART

to them\*

### **Hatchett-Stamford v AG – 2008** **UK** –$ to **unincorp groups** not JT but existing member to perform assn goal

Lewison J. Gifts made to the group - likely by persons who support its purposes take one of

three forms:

**F**: In 1914, the Performing and Captive Animals Defence League was founded as an unincorporated association. It sought to prevent animal cruelty through law reform. After the death of her husband in 2006, Ms. H was the sole remaining member with an asset portfolio worth £2.5 million. Ms. H wanted to wind up the assn. and transfer the assets to an active animal charity. She sought a court order to appoint herself and her solicitor as trustees of the remaining assets to enable the transfer. The implication would need to be that her funds were not *bona vacantia*.

**I**: After a club purpose has been achieved, where do the surplus funds go in the case of an unincorporated association? To whom do the assets of an unincorporated association belong?

**A**: The assn. was found not to be a charity under UK leg’n. and Ms. H was determined to be the sole living member. The court considered the nature of the unincorporated assn. Given that they are not incorporated under leg’n, the member rel’nship is under contract. Gifts to unincorporated groups without separate legal personality take three forms:

1. Gift to the members as joint tenants (at the time of donation) so any member may sever her share and claim it whether or not she continues as a member
2. **A gift to existing members, not as JTs, but according to K’l rights (express, implied) that prevail among members in the governing agreeme**nt; or
   * **A voluntary association which is not a CO., governed by k, trust comes in but holds money**

**beneficially for all the members who, by k, can agree to change the k and give themselves the money.**

1. Terms and circ.s of the gift or the rules of assn. may indicated that the gift property is not at the disposal of the members but to be held in trust for or applied for the purposes of the club conceived *de facto* as a quasi-corporate body.

Court reasoned that 3 was irrelevant because the concern was w/ the final destination of the existing assets *plus* it would render the gift in trust void as a direct non-charitable purpose trust which is not allowed by law. Therefore, the **court settled on #2** since #1 would present considerable complications. **Usually gifts of money**, as well as any money coming from **subscribers**, is for the **benefit of members but is not distributed to them**, but must accord with the K arrangement that lies at the heart of the assn.

**\*R**: Funds given to an unincorporated, non-charitable assn. are held on trust for the members but are not distributed to members usually, instead they are generally used in accordance w/ the K at the heart of the association.

**\*R2**: The existing funds of a moribund club may go to the last-member standing if only one remains upon dissolution. (disagreement w/ Bucks Constabulary on this point)

**R**3: On a member’s death, he/she ceases to have any interest in the assets of an unincorporated assn. because accretion on death is inherent in a beneficial interest held as a JT in equity and that is reinforced by contractual restrictions such as the rules of the assn. Therefore, the e**state of a deceased member can have no claim to the assets.**

### **Re Bucks Constabulary Society 1979 UK** –$ in moribund unincorp not to last mem(can’t k self). (**not followed**)

**R**: Members of an unincorporated assn. are beneficially entitled to its assets, subject to the K’l agreement b/w them. Upon the dissolution of the association, this may result in the distribution of the existing funds to the members. However, undistributed funds cannot go to the last member because a person cannot contract w/ him/herself (this last point was rejected in *Hatchett*).

## 2)🡪Presumptive Resulting Trusts (PRT) – just like presumption of law or fact

**Occasions for the application of presumed resulting trust**

PRTs spring back when there has been a **gratuitous transfer of property**. (*cf ART if express trust fails*). They continue to have a role to play in the context of gratuitous transfers where evidence of the transferor’s intent is unavailable or unpersuasive. They are advantageous because they provide certainty and predictability. (Pecore v Pecore – 2007 SCC)

**A PRT results when**:

1. Property is purchased; and
   1. In the name of another (*purchase money resulting trust—Nishi)*; or
   2. Voluntarily transferred to another (*gratuitous transfer resulting trust*);
2. There is no clear evidence about actual intention (re: intended beneficiary of the transfer).
   1. *Prima facie* PRT (*Kerr v Baranow* 2011 SCC; *Nishi v Rascal*)
   2. Because clear evidence of actual intention rebuts PRT
   3. A standard form K to protect the interests of a bank is insufficient to establish evidence of an intention (*Niles*)
   4. Clear communications to 3rd parties will suffice to show the intent (*Russell v Scott*)
   5. The court will still give effect to the intention if it subverts wills leg’n (*Young v Sealey*)

**If there is clear (and admissible) evidence** of the transferor’s intention regarding the equitable interest, the evidence will either result in:

1. An out-and-out gift to the transferee; or
2. An **express trust (not PRT)** in which legal title vests in the transferee and beneficial interest in another party
   1. I guess b/c a PRT only results if there is no rebuttal
   2. No need to argue PRT if evidence is clear (*Eisner*)

**Onus of proof:** The onus of rebutting the PRT is on the transferee.

**Rebutting the PRT**

Evidence of actual intention always trumps presumed intention (unless the evidence demonstrates an illegal scheme) (*Standing v Bowring*).

### **Oord v Oord** – voluntary transfer = RT, but intent contrary or for can rebut (**live harmoniously = rebut)**

**F:** Tina (wife) and Wiebe (husband) and son Bill, and daughter in Law Jackie. Combine resources to purchase a property. All 4 registered as joint tenant. The property entirely paid by Tina and Wiebe.

**I:** is this gift or RT

**A:** The presumption = Tina and Wiebe’s payment presumes resulting trust on the latter parties. However, latter intentions prove that Wiebe and Tina intended to live harmoniously and without repayment was sufficient to rebut the presumption.

**D:** It is a gift, not RT

**R:** voluntary transfer = presumed to be RT, however Intent to give freely will rebut the presumption of resulting trust. Similarly intent to only give legal but not equitable title will rebut the presumption of advancement.

### **Standing v Bowring** **1885 UK** – if clear **intent to gift cancels PRT**, cannot later revoke

**F**: P transferred “shares” to her godson-defendant and herself. The notations in the book of the Bank (that issued the shares) reflected their names as owners. P was an aging widow. The evidence suggested that she intended to benefit her godson, personally. D was unaware of the transfers into his name. Two years later, she remarried and sought to revoke the gift. She brought the action seeking return to her name alone. D resisted.

**I**: Was the PRT rebutted?

**A**: The evidence suggested a clear intention to benefit D—therefore give beneficial and legal title.

**R**: Actual intention to give both legally and beneficially, as manifested through the conduct of the transferor, will be binding and will thwart the PRT.

### **Nishi v. Rascal Trucking Ltd 2013 SCC** – if **contract waives your equitable title** = **not PRT**

*PRT in the commercial context*

**F**: Ms. P and Mr. Nishi were common-law partners. Ms. P controlled Kismet. Kismet owned 2 property. The property was subject to a mortgage in favour of CIBC. Mr. H, a long-time friend of P + N, was the principal of Rascal Trucking. Kismet leased the land to Rascal. Rascal operated a topsoil production business, creating nuisance complaints. The City had to intervene. Costs were lodged against the title as tax arrears. Despite the lease provision which required Rascal to repay Kismet, it did not. As a result, Kismet could no longer pay its mortgage payment (w/ the added tax arrears). CIBC paid the arrears and foreclosed. Mr. H tried to buy the property, CIBC rebuffed. Mr. Nishi then purchased the property with the assistance of Rascal, who contributed about $110K (the exact amount of tax arrears). Rascal attempted to secure an interest; Nishi rejected. Then Mr H withdrew his request stating that the $85,000 was without conditions (which were irrevocable) and was to be applied to the purchase. His request for a financial interest of subdivision was “just a possibility, for future consideration, and that’s all”. 7 years later, Rascal claimed a ½ undivided interest (that’s this action).

**COA**: Rascal sought a PRT, or alternatively a CNT on the basis of unjust enrichment.

**D**: Both applications were dismissed.

**Argument**: Nishi first argued: (1) money purchase resulting trusts no longer apply in Canada, and (2) if one was found, he sought to rebut (one was found, so this was the action in the case).

**Analysis (rebuttal)**: The purchase money PRT was rebutted based on the language used at the time the money was transferred from Mr. H to Mr. N🡪”without any conditions or requirements and these instructions are irrevocable”. Further, the evidence disclosed that Mr. H did not attempt to attain a beneficial interest in the property.

**R**: Money purchase resulting trusts continue to apply in Canada. (*Nishi argued otherwise*)

### **Eisner v Baker 2007 BC** – If PRT onus is on **transferee to prove gift**

**F**: man moved away from woman because of her drug problems, man buys property, woman while faxing puts her name on it as co-purchaser. Both now holds joint title. Man didn’t contest because don’t want arguments

**I:** who has onus of proof

**R**: onus on transferee: Must show transferor intended to pass beneficial title along with the legal title. Clear evidence of a contrary intention is sufficient.

### **Re Vinogradoff** – **merely held JT not enough to rebut**

**R:** Grandma alone held dividend, and JT with daughter, this is not enough to rebut PRT. Merely held title for her

### **Niles v Lake 1947 SCC**–**standard form agreement with bank not enough**

**F**: Mr. A and Ms. L owed a joint bank account. They were sisters. Ms. A was in poor health. She put money into the account. Ms. L made withdrawals to pay for Ms. A’s living expenses. Mrs. A died. The bank made them sign an agreement which exonerated the bank from liability for unauthorized transfers. It identified the sisters as joint tenants.

**I**: Is Ms. L a JT, taking legal and beneficial title after the death of Ms. A or is there a PRT held by Ms. L for Ms. A? (*the latter*)

**D**: Although Ms. L make have been the only legal title holder after Ms. A’s death, she did not have beneficial title. She had a PRT.

**R**: A standard form contract to protect the interests of a bank is insufficient to establish evidence of an intention contrary to the PRT. The agreement b/t JT and bank does not define the inter-relationship of joint tenants.

Policy: May come up increasingly with elder care

### **Russell v Scott 1936 AUS CT**– **told employees and solicitor sufficient to rebut,** no formality with wills act is ok

**F**: Testatrix, Mrs. R, opened a joint bank account in her name and that of her nephew, Percy Russell (PR). The evidence was that she put money in the account so that PR could draw monies and assist with her living. She told this to an employee and her solicitor. She also advised both that the money would belong to PR on her death. On her death, Percy Scott (PS) was her heir. PS claimed the $ left in the joint account.

**P/H**: Trial J found that the gift was testamentary and failed due to lack of compliance w/ the *Wills Act*. PR appealed and won.

**A**: Wills Act doesn’t apply to right of survivorship under joint tenancy. The evidence was clear that Mrs. R intended joint ownership. After Mrs. R’s death, PR ceased to be the resulting trustee and he got the *ius accrescendi*, which gave him beneficial rights as the joint tenant.

**R**: Mrs. R’s communication to the bank manager and her solicitor of her intention was sufficient to rebut the PRT.

### **Young v Sealey 1949** – **s.59 of WESA allow courts to rebut PRT** even if subverts legislation.

**F**: Mrs. J opened a joint bank account in her name and that of her nephew. She fed the account. She did not intend her nephew to have beneficial rights during her lifetime; only after her death. The estate claimed the monies in the accnt.

**D**: The estate lost.

**A**: The court found that Mrs. J was trying to avoid the *Wills Act*; however, the jurisprudence was established in finding for the surviving JT when there were transfers of legal and equitable title on death of the other JT.

**R**: If the deceased holds legal title as a JT and holds beneficial title alone during his/her lifetime but clearly intends for the other JT to receive both legal and beneficial title upon the death of the deceased party, the court will give effect to that intention and find against a PRT, despite the presence of subverted legislation.

### **Sawden Estate** – if before you die you **give all your money to your kids = not PRT, but gift**

**F:** Bible and Tract society was heir of Sawden, Before he died, he took all his asset and liquidated them into money, put them into bank and then made all his children joint holders. Bible society wants the money.

**I:** is that PRT

**A:** there are his children, he knew he was about to die and he clearly wanted to make sure his kids got the money.

### **S.19(3) of Property Law Act BC** – no need to say for benefit of transferee to prevent RT.

“A voluntary transfer need not be expressed to be for the use or benefit of the transferee to prevent a resulting trust.”

## 3)🡪Presumption of Advancement (POA)

Basis: applies to trump presumption of RT where transferor has a natural obligation towards the transferee.

The presumption of advancement used to operate in transfers from:

1. Father to child of any age
   1. *Today*🡪
      1. Age: only minor children (*Pecore*)
      2. Parent gender: applies to mothers as well (*Pecore*)
2. Husbands to wives
   1. Never wife to husband, that was PRT (*Re Mailman Estate*, 1941)
   2. Does not apply to homosexual couples (*Tinsley v Martin*)
   3. *Today*🡪
      1. abolished by statute in most jurisdictions
      2. Not abolished in BC (or MB, *Mehta*) but there is such wide discretion that courts will likely only use the presumption in older and increasingly dying old-style marriage relationships (e.g. *Mehta Estate v Mehta Estate*) (conventional family = man worked, wife stayed home)
         1. Will not operate in modern, equal relationships (*Eisner*)

To rebut

1. Onus on transferor
2. Actual evidence trumps POA
   1. Timeframe: only evidence prior to/at time of transfer (*Shepard v Cartwright*)
3. Must not be illegal (see below)

**Onus** of rebutting the presumption is on the transferor.

**Actual** (admissible—ie not illegal) contrary **evidence** **trumps** the presumption of advancement.

### **Mehta Estate v Mehta Estate 1993 MB** – POA from man to wife applies to MB and BC, **only to conven fam**

**F**: A husband, wife, and their 2 kids were killed in the Air India crash. H’s will left his property for life to W, remainder to kids. W died intestate. H’s estate was ~$330K, W’s ~$260K. Many of her assets were purchased out of H’s employment income and put in W’s name for tax-planning purposes. H and W’s estate were fighting over the assets in the wife’s estate. H’s estate argued PRT. W’s estate argued POA.

**I**: Does the POA still exist today with respect to gratuitous transfers from a husband to wife? (*yes but greatly narrowed to very traditional marriage relationships*)

**A**: At common law, the POA still exists. In Manitoba, it has not been statutorily abolished by statute (note *nor in BC*). H was the breadwinner; M performed a traditional homemaking role. In those circ.s, and without the ability of either party to testify as to intent, it’s “understandable” that H might put assets in W’s name with the intent of gifting her. However, this argument lacks much of its vigour w/ marital property leg’n and a social climate where equal division of marital property is the custom.

### **Pecore v Pecore 2007 SCC** – **POA only for minor child**/ not adult, same for man and woman

**F**: Prior to death, F gratuitously transferred the bulk of his assets to a joint account with his daughter, PP. PP was the closest of any sibling to F. She was also the only sibling who was not financially secure. She had employment issues and a quadriplegic husband, M. In his will, F gave a specific bequest to each child and gave the residue to PP and M. PP also redeemed the balance of the accounts on the basis of the right to survivorship out of the joint account (worth nearly $1 mil). PP and M got divorced. M argued that the funds in the joint account were held by PP on a PRT and therefore, should form part of F’s estate and be distributed in the will.

**P/H**: Trial J found in favour of PP, finding a POA. The ONCA resolved the case based on the evidence, without resorting to the POA.

**D**: Appeal dismissed

**A**: In this case, the POA did not operate b/c PP was an adult. Therefore, she needed to rebut the PRT. Evidence of her close rel’nship w/ F and her hardship supported a view that F intended to give PP the right to survivorship in their joint account.

**R**: The presumption of advancement also applies when women make gifts to their *minor* children.

**R2**: The POA applies only to minor children—not otherwise adult but dependent children (*despite Abella concurring in result*).

**R3**: The PRT still exists.

### **Eisner v Baker 2007 BC** **– not abolished in BC**, **Not work in contemporary family**

**F**: In January 2002, AE and RB began living together. In June 2002, they moved from Chilliwack to Salmon Arm so that AE could get away from her drug issues. RB inherited money and bought a residence in Salmon Arm for himself, Amanda, and her child from a prior rel’nship. In the purchase of buying the residence, he signed and interim agreement and asked AE to fax it to the realtor. Before doing so, she placed her signature below RB’s on the agreement w/o his knowledge and w/o a witness. On subsequent correspondence, AE was listed as a co-purchaser and RB did not attempt to remove her from the title. RB and AE held joint tenant. They broke up and AE wanted a share in the increased value of the home.

**A**: The court did not decide whether the POA still operated in BC. They noted that like MB (where Mehta was decided), it had not been abolished. Instead, they found evidence of RB’s clear intention which rebutted the PRT. On the evidence, it was clear that RB didn’t intervene with AE’s intervention in the transaction process because he wanted to appease her and avoid a fight.

**R**: Clear evidence of intention *not to give beneficially* will render unnecessary an argument on the basis of PRT.

**R2**: The POA will not exist in contemporary matrimonial arrangements. (*maybe, sketchy ratio, suggested in prof notes but would prefer ratio on clear evidence*)

## Rebutting the POA

Timeframe of acts that can be used to rebut the POA:

### **Shepherd v Cartwright 1955 HL** – relevant timeframe of **intention is the time of transfer**

**F**: In 1936, a father allotted shares to kids w/o their knowledge. 5 years after gift father had kids sign withdrawals; father used proceeds for himself. Kids claimed against estate of father for amount that he had taken

**A**: The POA operated so that when the shares were registered in the name of the children, the transfer occurred; therefore, the kids owned the shares when the father took them back.

**A** (rebutting presumption): (i) acts or statements before or at the time the transaction occurs are admissible for or against the transferor as evidence of his/her intention but (ii) subsequent declarations are *only* admissible against the transferor

**R**: The relevant timeframe for determining the intent of the settlor is the time of transfer (i.e. when the trust is creating). All prior and contemporaneous acts are relevant.

## Illegality and Presumptions

(*in this sxn, when I discuss admissibility, it’s not in the way that you would think of admissibility in evidence law—this is more whether or not the court will give effect to the evidence*)

Where one party seeks to admit evidence that rebuts the PRT or POA but shows an illegal intention, courts may take 1 of 4 approaches:

1. ***Par Delictum*** rule: in cases of equal guilt, the possessor is preferred. The court refuses to hear evidence of the tainted transaction. They leave title as is. (*Scheuerman* – 1916) – status quo preferred
2. **Pontius Pilate:** this not evil act, even though an evil intent. If no actual wrong but just a bad intention, then we will relax the rule and hear evidence, and if so found rebut POA(Foster v Foster)
   1. If Immoral intent/act instead of evil act, court will hear evidence and rebut POA (*Goodfriend* – 1971)
3. **Side-stepping approach:** Where the POA *is not implicated*, the courts will apply the PRT without giving weight to rebuttal evidence. This is not a matter of *par delictum* but of the court simply not giving effect to the illegal intent and allowing the PRT to operate (*David v Szoke*- 1973, *Gorog v Kiss* – 1977)
   1. However, if the case can be made without the illegal evidence, the courts will try (*Tinsley*)
4. Evidence which would ordinarily be excluded due to its illegality may nevertheless be used under the doctrine of ***locus poenitentiae*** (repentance). This occurs when the parties (i) had an illegal scheme but (ii) the scheme is not carried out due to repentance. “Repentance” may be either moral or because matters changed so that the scheme became unnecessary (*Tribe*). (declare your apologies to the court and ask for forgiveness)
   1. E.g. If the transferor and the transferee have a scheme which in effect, would have the transferee holding on a PRT and the transferor effects the transfer based on that scheme but later repents the scheme, the transferor may bring evidence of the scheme to show an intention which rebuts the PRT, regardless of the bad nature of that intent/scheme.
5. *Nelson* (Australia—not accepted in Canada) suggested a **proportionality test** given the regulatory nature of our modern existence.
   1. **Proportionality – what are the consequences** of the plaintiff losing b/c of the app’n of the exclusionary illegality rule?
   2. **Does the operation of the exclusionary rule operate to further the purposes of the statute?** If the statute does not seek to penalize greatly infractions, than neither should the courts. Also, does the statute contemplate penalties beyond those set out in the statute? No, then courts should not add additional penalties.

### **Scheuerman v Scheuerman 1916 SCC** – **par delictum applied** – no clean hand not hear evidence = **status quo**

**F**: H was in debt and was being pressed for repayment by his creditors. To protect his house, he transferred it to his W until the danger had passed. The danger passed because H repaid the creditors, who never did sue for possession of his house. W sold the house and H sued for the proceeds of that sale. H alleged a PRT.

**D**: H’s motion failed, W kept house

**I**: When two parties are complicit in fraudulent intent and as a result, one transfers property to the other, which party is preferred by the courts in a motion to return property to the transferor? (*transferee*)

**Analysis (majority)**: Allowing the admission of evidence of illegal motive or intent in order to rebut PRT would have the effect of allowing H to come to the court’s for an equitable remedy **without clean hands**. The mere fact of his illegal/immoral motive was sufficient to bar the remedy, even though no actual prejudice occurred to the creditors. This is so despite the windfall gain to the complicitous transferee. This is made on the basis of *ex turpi* and *par delictum*.

**Dissent (Duff, Anglin JJ)**: Did not like the windfall gained by the complicit transferee. Did not see it as an “inevitable byproduct”. They thought that intent alone was insufficient to bar evidence of actual intent, however illegal or immoral. Because the creditors were not actually prejudiced, the mere intent should not have barred H from being granted the equitable remedy.

**R**: Where the transferor gives to the transferee with the intent to create a PRT for some illegal or immoral purpose, the court will not grant a remedy to the transferor who did not come to the courts with clean hands. With application to the *par delictum* rule, the transferee who has current possession will be preferred.

### **Foster v Foster 1978 BCSC** – **illegal intent inadmissible** (now narrowed to minor child)

**F**: F transferred 4 properties to his daughters to avoid a potential creditor (wife, maintenance claim). The creditor was not thwarted. After the “coast was clear”, F asked for the return of the properties. Two daughters agreed, one refused. The defendant daughter argued (i) POA and (ii) evidence of illegal intent inadmissible.

**D**: Decision for defendant daughter

**R**: Evidence of illegal intent is inadmissible to rebut the POA.

Note: The precedential value of this case has been narrowed by *Pecore* (re: POA🡪minor kids only).

### **Tribe v Soiseth 2006 BCSC** – **Locus Poenitentiae**, tax credit weren’t claimed(evil intent no evil act)

*They need to rebut POA (pre-Pecore)🡪 admit repentance evidence*

**F**: T and S married in 2001 and moved into a condo bought by Ms. T’s parents. On closing, title was registered in Ms. T’s name and in addition to a 1st mortgage to RBC, a 2nd mortgage was granted to her parents. The father gave evidence that he had no intention of making a meaningful gift to Ms.T. Ms. T also signed an option to purchase in favour of her parents that allowed them to purchase for $10, although was never exercised. The couple split up and the condo was valued at $850,000, having appreciated significantly. Ms T sought a declaration that she had no beneficial interest in the condo and was holding for her parents. She said that she held under her name so that she could claim it as her principal residence and her parents could avoid capital gains taxation.

**I1**:Is evidence of illegal or improper conduct admissible to rebut the POA?

**\*I2**:Does the doctrine of *locus poenitentiae* (repentence) operate in the circumstances of illegal or improper conduct in deciding whether to admit evidence of contrary intent which may rebut POA or PRT? (*yes*)

**A**: Neither the father nor Ms T had actually claimed the capital gains exemption, which neither was entitled to. The court was willing to hear evidence of repentance.

### Goodfriend v Goodfriend 1971 SCC – **Locus Poenitentiae-** **immoral intent not evil act** = will hear evidence

**F**: The Goodfriends and Coxes engaged in spouse-swapping. Mrs. G convinced Mr. G that Mr. C might sue him for a non-existent tort, alienation of affections, due to his relationship with Mrs. C. In order to protect himself, Mrs. G suggested he transfer his farm to her. He did so. Mrs. G later left Mr. G and he applied for conveyance. He argued PRT. She argued POA. He wanted to admit the above evidence, she argued that it was inadmissible based on *Scheurmann* (his base, avoidance motive).

**D**: Evidence was admitted, for Mr G

**R**: In exceptional circumstances of a conniving transferee, courts may allow the admission of evidence that goes to a base/immoral motive in order to rebut the POA. This is particularly so where the improper motive fails that failed to materialize because the perceived problem was a non-issue.

Note: These are remarkable facts/circ.s, re: precedential value

### **David v Szoke 1973 BCSC** – if no POA, PRT upheld

**F**: the male plaintiff and female defendant pooled their money to buy a house as joint owners. They were unmarried. In 1966, he was drunk driving and injured someone. The defendant convinced him to convey his interest so that the house was not vulnerable in ensuing litigation. He did so. She left him. The evidence was clear that he didn’t intend to gift his share.

**A**: The parties were held to be *in pari delicto*, having both held the unlawful intent to protect the property against an injured party. There were no actual creditors at the time of the transfer. The court found for the plaintiff, finding a PRT.

**R**: When there is no POA, courts may give effect to the PRT without accepting rebutting evidence that goes to an immoral intent.

**Clarified w/ Pav: it’s strictly admissible, in an evidentiary manner, but the courts just might not give it effect**

### **Gorog v Kiss 1977 ONCA** – evidence used to rebut PRT if illegal = PRT results

**F**: The plaintiff, L, owned of farm. His business associate, G, was suing him. L wanted to put his farm out of reach of G so he transferred to his sister, K. After G recovered his debts without needing to execute on the farm, L asked for re-conveyance from K. She refused.

**A**: Brother asserts PRT. Sister must rebut but to rebut, she’d need to introduce evidence of illegal motive and cannot do so, therefore, the PRT operates.

**D**: Decision for the brother, L. Sister re-conveyed.

**R**: Outside the context of the POA, the party seeking to rebut PRT with evidence of illegal intent will not be able to do so and will need to re-convey on the basis of PRT.

### **Tinsley v Milligan 1993 HL** – did not agree to Nelson, once illegality**, court will not assist either**.

**F**: A lesbian couple, T and M, both contributed money to the purchase of a house, with a common intent to have tenancy in common. Title was registered only in T’s name so that M could get welfare. Both used the welfare money. M repented and reported the matter to the Department of Social Security. Later, the couple fell out and T, the registered owner, sought to evict M.

**D**: Decided for M

**A**: M did not need to rely on evidence of her welfare fraud to show that she contributed money to the purchase of the house.

**\*R**: Even in a case where the court is aware of some illegality, a person may still succeed in recovering the property if the case can be pled without the need to rely on the illegality. The presence of illegality does not repulse the court from any involvement.

***Obiter***: The POA does not apply to gay and lesbian couples.

**Dissent**: Once the court is aware of illegality, it will assist neither party, based on the *Sceuerman* formulation.

Note: none of the court agreed w/ the approach in *Nelson*

### **Nelson v Nelson 1995 Aus High Court** – not used in Canada

**F**: The appellant mother bought a house and then conveyed it to her son and daughter. This was done so that she could get a subsidy under social leg’n that denied eligibility to home owners. The mother intended to remain the beneficiary. She later called for legal title.

**A:** The whole court agreed that the mother could adduce evidence of the scheme and was not precluded b/c of the exclusionary illegality rule.

**A (McHugh**): considered the highly regulated society in which we live where the opportunity to do something technically illegal through a regulatory infraction is great. This was not the society that existed when the rule was originally framed. Instead of giving black/white effect to *ex turpi*, he suggested balancing the adverse consequences of granting relief against the adverse consequences of refusing relief, ultimately asking whether there is an affront to public conscience. The following 2 criteria had to be assessed:

1. **Proportionality – what are the consequences** of the plaintiff losing b/c of the app’n of the exclusionary illegality rule?
2. **Does the operation of the exclusionary rule operate to further the purposes of the statute?** If the statute does not seek to penalize greatly infractions, than neither should the courts. Also, does the statute contemplate penalties beyond those set out in the statute? No, then courts should not add additional penalties.

Note: **not accepted in Canada** or the UK

# Chapter 6: The Beneficiary

## Nature of title and interest in equitable property

The equitable interest in property is an ***in rem* right**. This is significant because it **avails against the world**. If the property is in possession of someone (usually a trustee) who goes bankrupt, that means that the beneficiary may recover the thing and will not rank as a mere concurrent creditor.

## Role of Trustee and Beneficiary – Distinguishing

The clear rule is that the beneficiary *cannot* manage, control, or administer the trust assets. That is a role limited to the trustee (*Schalit*). An exception is (*Bagot’s Settlement*).

### **Schalit v Nadler 1933 (UK)** – the **B may not engage in acts of management** with respect to trust property

**F**: The beneficiary was a corporation. Its shares were wholly owned by the trustee. The beneficiary attempted to distrain (for unpaid rent) a subtenant of the property in which the corporate beneficiary had equitable title under the trust.

**A**: Distraint requires legal title; therefore, the trustee should have sought the action. It was an attempt at management, which the beneficiary could not validly carry out.

**R**: The beneficiary may not engage in acts of management with respect to the trust property.

### **Re Bagot’s Settlement 1984 UK** – court allow pragmatic mod to the role of B(control), may be fired if violate

**F**: The beneficiary wanted to collect rents from a trust asset to which she was solely beneficially entitled. She wanted to do this to reduce expenses to the lowest practicable limit.

**R**: The court may exercise discretion to allow a pragmatic modification to the role of the beneficiary, allowing the beneficiary to take on a management, control, or administration responsibility normally restricted to the trustee. However, in so doing, the beneficiary may be fired if they do not act in the best interests of the beneficiary (themselves).

## Does the beneficial title attach to each item of the trust fund?

Yes (*Baker v Archer-Shee*) although ‘policy-like’ discussion:

Factors that support a view beneficiary have title in each individual thing comprising the trust assets (in rem):

* The beneficiary may call on the trust and gain legal and equitable title to each item of property (*Saunders v Vautier*)
* The beneficiary’s *in rem* right to trace individual items (except insofar as *bona fide* purchasers for value are concerned)

Factors that support an idea of beneficiary have equitable title of the trust fund as a corpus (personam):

* The trustee has the exclusive power to dispose of assets—therefore legal title in each item can be unilaterally extinguished
* Items in trust funds fluctuate quickly and constantly
* The beneficiary has a *very restricted* ability to deal with individual items in a trust pursuant to their equitable interest (*cf* the trustee who has the power/duty to do so)

### **Baker v Archer-Shee 1927 HL** – Bs have distinct **equ interest in indi items of property** – In Rem (not US)

**F**: Ms. Archer-Shee was a resident of the UK. She was the beneficiary of a trust outside the UK. The incomes from the trust never entered the UK. The UK sought to tax the fund on the basis of leg’n which rendered taxable possessions that were “stocks, shares ore rents” outside the UK.

**Argument (A-S)**: She argued that she had equitable interest in the income which arose from the trust fund of assets which was administered by the trustee. She argued that she owned a cluster of personal rights which were enforceable against the trustee. She argued that she didn’t hold title to the individual items in the fund, which were constantly changing. Further, her cluster of personal rights to proper administration of the property was not included in the tax statute and therefore not taxable.

**D**: Decision for Baker—not A-S

**R**: The beneficiary of a trust has a distinct equitable interest in the individual items of property that make up the trust fund. (English law)

Note: The exact same matter was brought under New York law and A-S won.

## Sub-trusts and Assignments

If B1 has the equitable title to x (Xe), B1 may become a testator, declaring a trust in respect of Xe for the benefit of B2. B1 and B2 may both hold equitable titles in relation to x but B1 has a bare equitable title alone, whereas B2 has the beneficial title as well. B1 must then administer their equitable interest (Xe) for B2 but *may not administer the trust assets* (x) *(i.e. legal title*).

What type of beneficial interest?

1. *Equity follows the law*🡪 may need to follow formalities for legal interest.
   1. *Substance trumps form* in order to avoid fraud
2. In land:
   1. Must be in writing (s. 2 Statute of Frauds)
   2. LEA abolished writing requirements for equitable interests in land
3. In personalty:
   1. *Statute of Frauds* does not apply to personalty
   2. Chose in action (debt, company shares, negotiable instruments, copyrights, rights of action founded in tort or breach of K, equitable interest in a trust, etc) require formalities:
      1. Was assignment absolute and in writing, signed by assignor (s. 36 LEA)
         1. No
            1. Privity would usually not allow this🡪 assignor must be a party in the proceedings (*Di Guilo*)
            2. Chancery may intervene to issue an injunction, forcing assignor to facilitate actions brought by assignee against debtor
            3. If in a will, WESA will apply flexibly to uphold settlor’s intent

If none of this works out, the interest of the assignee won’t be enforceable (*Timpson’s*).

* + - 1. Yes🡪 Assignor may bring an action

### **Di Guilo v Boland 1958 ONCA** – if no conform to s.36 of LEA = common law rule

**R**: Prior to s. 36 of the *LEA*, the assignor had to be a party in proceedings b/w the assignee and debtor/trustee in order to give the assignor effective and enabling enforcement against a trustee (despite the absence of privity of K)

### **Law and Equity Act, s. 36** – assignment of debts and choses in action – in writing

**36** (1) An absolute assignment, in writing signed by the assignor… of a debt or other legal chose in action, of which express notice in writing has been given to the… trustee… is deemed to have been effectual in law…

### **Timpson’s Executors v Yerbury UK**

**F**: The beneficiary, Mrs. T was a UK resident and the UK sought to tax income from the trust. Mrs. T had directed the trustees to make payments to her children from time-to-time. The money came from the US to the UK to each child (although some children were not in the UK).

**A**: The court found that the direction to pay sums to the children was a “revocable mandate” and *not* an assignment because it did not bestow on the supposed child-beneficiaries, enforceable rights against the trustees.

A “**chose in action**” (a debt under a contract, say) is a form of property that describes “all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession”. They include debts, company shares, negotiable instruments, copyrights, rights of action founded in torts or breach of contract etc. And, of course, **equitable interests in a trust.**

## Priority Among Assignees

### **Re Wasdale UK** - The assignee who is **first in time will have priority between claimants**.

**F**: Beneficiary assigned same beneficial entitlement (a reversionary interest) to two different parties. The reversionary interest became possessory. Both parties notified the trustee of their respective dispositions.

**A:** The 1st trustee had received notice from the 1st assigned and then died. The new trustee was unaware. That’s not relevant to priority.

**R**: The assignee who is first in time will have priority between claimants.

## Restraints on Alienation and Protective Trusts

Restraints on alienation are generally not acceptable. If a settlor wants to make provision for a spendthrift child, it must be worded very carefully as a determinable life estate.These involves determinable equitable life estate to the “principal beneficiary” (the reckless one), with a possibility of revert for another beneficiary (or class of objects).

Equity follows the CL here so it must be a determinable life interest (rather than an interest subject to divestment upon a condition subsequent)🡪 so look for langue of “until”, “when”, “as long as”, “during”, etc. In substance, this distinction is meaningless but the law treats them differently. Words such as but if, on condition, however, provided that – if condition subsequent – then principal B takes gift unconditionally.

A settlor cannot transfer property on a protective trust for him/herself. That is against public policy (*Re Brewers Settlement*).

## Termination of the Trust by Beneficiary (*Saunders v Vautier*)

A beneficiary may terminate the trust by directing the trustee to transfer legal title provided that the beneficiary:

1. Is *sui juris* (“full legal capacity”), which includes:
   1. Reaching the age of majority (19 in BC);
   2. *Compos mentis – sound mind*; and
2. Vested in interest (*cf vested in possession*) 🡪 must be absolutely entitled
   1. If there is a contingency, courts will prefer to read it as a contingency to enjoyment (rather than interest)🡪 *Re Lysiak*
   2. Judges favour early vesting; interpretation usually gives effect to that preference🡪 *Re Lysiak*
3. If there is a class of beneficiaries, they must act collectively
   1. If there is a huge class (*Baden*) in a discretionary trust, this will not be feasible.
   2. However, if it is feasible, they may call on the trust so long as
      1. They are all identified
      2. They are all *sui juris*
   3. This includes a remainderperson and life tenant coming together (*Re Smith v Aspinall*)
   4. This also includes discretionary trusts where the trustee decides *who* to give to so that not all will benefit despite being in class of objects
4. It *cannot be a* ***pension*** (*Buscheau*)
5. If the beneficiaries fail to act collectively, try to divide the property

**Ask: Is the trust property divisible**?

But note: there is **no entitlement** to call for a division of trust property (***Re Marshall*** *– 1914).*

**🡪Yes**: One or more beneficiary who is *sui juris* and absolutely entitled may call on the trustee to transfer the share. The trust will continue for those who did not call on it. Easy with money, difficult with shares and land.

**Unless**, termination for the one beneficiary will unfairly impact the property of the remaining beneficiaries (*Sandeman’s*, *Lloyds Bank v Duker*)

* + In ***Re Sandeman’s*** *Will Trusts* (1937), permitted division, with some beneficiaries calling on the trust because **termination did not unfairly impact the property of the remaining beneficiarie**s. The fact that termination resulted in the trustee losing control over the company was not a bar to the beneficiaries calling on their respective shares.
  + In ***Lloyds Bank v Duker*** (1987), the court **refused to allow termination** of one beneficiary’s respective share because that **beneficiary could harm the interests of the other beneficiaries** (he could appoint himself manager and take a salary instead of giving dividends).

**Except:** Division is permissible if there is a *minor reduction* in the value of the property.

**🡪No**: Then no beneficiary is permitted to call on the trust.

### **Saunders v Vautier 1814** – court likes early vesting and **sui juris vested in interest can call for trust**

**F**: Stock was bequeathed upon trust to V. S (the trustee) was the accumulate the income until V turned 25, then turn over the capital and accumulated income to V. At age 21 (age of majority), V sought transfer of the trust property from the trustees.

**A**: V was the sole beneficiary. The income and capital was vested (in interest) in V at the date of the trust. He was not vested in enjoyment though—that was contingent upon turning 25.

**R**: A beneficiary who is absolutely vested in interest and has reached the age of majority will be able to call on the trust. (*also presumably requirement of compos mentis—but not in fact pattern*).

**Policy**: This overcomes the settlor’s clearly delineated limitations. Why should this rule stand?

1) Law prefers outright ownership over trust ownership (prefers freer use of property over unduly tied-up property) – policy: efficiency/economics (want to maximize use, enjoyment, and disposition of property in the hands🡪 should have free ownership)

2) Liberalism – the desire to treat adults as autonomous agents and restrict testators who seek to rule from the grave

3) Given that the beneficiary’s interest is absolute, no other person has a beneficial claim to the property so in effective, that’s a strong cxn to having legal title as well

4)Enjoyment of property is a key component of ownership; the beneficiary should decide how they enjoy the property.

5) Concern with the accumulation of income in perpetuity because the property is outside commercial circulation

### Re Lysiak 1975 ONSC – early vesting preferred but **must vested in interest**.

**F**: The testator bequeathed his estate on trust for his wife and son in Russia. The trustee was instructed to distribute the residue of the estate only when satisfied that the beneficiaries were free and unhindered from the political regime (the condition subsequent related to the liberalization of Ukraine). The beneficiaries called on the trust.

**A (vesting in interest or possession)**: The vesting of the gift was not suspended by the condition of the political freedom, only the timing of distribution (i.e. enjoyment) was affected by the political conditions. The beneficiaries were vested in interest from the date immediately on the death of the testator**. The contingency on enjoyment was interpreted as a manner to allow the trustee to delay distribution based on the political climate**.

**A (condition subsequent – vague)**: The c.s. relating to the liberalization of Ukraine was semantically uncertain. It was struck down as void. The discretion exercised by the trustee was repugnant to full investiture of the interest.

**R**: The court favours interpreting as early vesting.

**R2**: To call on the trust, the beneficiaries must be vested in interest (not necessarily possession or enjoyment).

### **Re Smith v Aspinall 1928** – **collectively call for trust allowed**

**F**: Testator gave trustees absolute discretion to pay ¼ of the estate to Mrs. A or any of her children during Mrs A’s life, remainder to the children. Mrs A had 2 adult children and one deceased child (who had a personal rep). Those were the sole objects of the trust. The 4 of them combined and assigned the beneficial interest to a mortgagor.

**R:** If all of the objects of the trust collectively agree, they should be treated as one person.

### **Re Chodak 1975 ONSC** – **even discretionary trust can also be called**

**F**: There was a discretionary trust where the trustee had to fix differing percentage of shareholding. All of the beneficiaries (testator’s nephews) agreed to call the trust.

**COA**: Trustee sought guidance from court whether or not the discretionary trust was operative

**A**: Court did stat interp—finding that the testator intended for the trustee to have discretion to give equally or unequally to the nephews. However, testator also intended for the nephew-beneficiaries to take the beneficial interest *immediately* so only the enjoyment was postponed. That discretion wasn’t operative and the nephews took equally.

**R**: Discretionary trusts may also be called by classes of objects who are in agreement.

**R2**: The discretion in the trust was invalid because a testator cannot absolutely give a beneficial interest in property while at the same time restricting rights to enjoyment (through discretionary apportionment of enjoyment).

### **Buschau v Rogers Comm 2006 SCC** – **Pension Benefit Standards Act – displaced call for trust.**

**F**: B was one of 112 employees of Rogers Communications (RC). B was subject to a defined benefit pension plan. Throughout the 1980s, the plan developed large actuarial surplus and RC sought to reap the benefits by amending the plan so that surplus reverted to RCI on termination, merging the plan with other plans, and taking contribution holidays. A string of lawsuits followed. This case dealt with whether pension plan members are entitled to collapse the trust under the rule in *Saunders*.

**I**: Does the common law rule on termination of a trust (*Saunders*) apply to pensions? (*no*)

**R**: The *Pension Benefit Standards Act* has displaced the common-law regarding the termination of pension plans and the distribution of assets.

**\*\*\*R:** The rule in *Saunders* does not operate in pensions.

Policy: The purpose of pensions is to provide benefits upon retirement. A person should not be able to thwart collective arrangements by withdrawing funds prematurely. This would have a negative impact on the power of collective action which large pension funds enjoy (this presumably applies to unit trusts or mutual benefit plans).

## Variation of trusts: Common Law

*If you fail to divide the trust or call upon it, as a beneficiary, your next step would likely be to try to vary the trust—first at CL, then by statute.*

At common law, courts have very limited jurisdiction to vary a trust. The 4 narrow exceptions are:

1. **Administrative** **terms** may be varied if there is an **emergency** that threatens the trust and which was unforeseen by the settlor.
   1. May only vary trustee’s management/administration powers
   2. May *not* vary quantum or type of beneficial interest
   3. This is not easily evoked (*Chapman v Chapman*)
   4. Often used to protect trust property, e.g. effect essential repairs to a building *or* split shares in the reconstruction of capital matters to make them more realizable (*Re New* – 1901)
2. **Maintenance** jurisdiction – courts may direct payments to beneficiaries in order to allow them to live in a manner appropriate to trust expectations (usually inadequate provisions for child beneficiaries)
3. **Conversion** – may convert infant’s trust property from realty to personalty and vice versa
4. **Compromise** – courts can approve of judicially-sanctioned compromises of a dispute for a party that is not *sui juris*

### **Chapman v** Chapman – at **CL**, court has narrow power to vary trust – **narrowed to 4 exceptions**

The court has no power to authorize a variation of terms of a trust even though all adults had assented to the variation and all the minors and unborn child beneficiaries were obviously benefited by the variations.

## Variation of Trusts: Statute

If an application is brought under ss. 1 and 2 of the ***Trust and Settlement Variation Act*** for a person who is not *sui juris*, the **Public Trustee *must* receive notice in writing**. The PGT must also be able to appear/be heard in court.

1. **In which circ.s will court agree to vary the trust?**

(a) anyone who has an interest under the trust (direct, indirect, vested, contingent) who by reason of infancy or incapacity is incapable of assenting

(b) anyone, ascertained or not, who may become entitled, at a future date, to an interest under the trust

(c) anyone who isnʼt born yet

(d) anyone whose interest may arise through discretionary power exercisable after failure of existing

### **Trust and Settlement Variation Act, s. 1** – **1)minors 2) future interest,3) unborn, 4) discretionary power** – benefit

**1** If property is held on trusts arising before or after this Act came into force under a will, settlement or other disposition, the Supreme Court may, if it thinks fit, by order approve on behalf of

(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who **by reason of infancy or other incapacity** is incapable of assenting,

(b)[[1]](#footnote-2) any person, whether ascertained or not, who may[[2]](#footnote-3) become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of a specified description or a member of a specified class of persons,

(c) any person unborn, or

(d) any person in respect of an interest of the person that may arise by reason of a discretionary power given to anyone on the failure or determination of an existing interest that has not failed or determined,

any arrangement[[3]](#footnote-4) proposed by any person[[4]](#footnote-5), whether or not there is any other person beneficially interested who is capable of assenting to it, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

### **Bentall Corp v Canada Trust 1996 BCSC** – **good bargain = prud guy IQ self-int consider risk likely to accept?**

**F**: varying a pension plan set up as a defined contribution plan and carrying a $6.7m surplus. Bentall wants $2m to go to members, $3m to Bentall and $1.7 as a “contribution holiday” for 4-5 years.

**A:** s 1(b) allows court to consent to a variation on behalf of Bs whose interest is contingent. Here court has jurisdiction because the interests of members is split into a presently held interest (entitlement to funds available to support pension) and a future contingent interest –division of the surplus in the event Bentall terminates the plan.

• **Good Bargain TEST**: would “**a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made**” be likely to accept

• Applying this test the court concludes the proposal is a good bargain and gives the consent of the future members who would benefit from any surplus when the plan is terminated

• gave “great weight” to the fact that 97% approved the proposed arrangement by Bentall – ie. influenced by fact that most Bs wanted this

• Here the test for consent was based strictly on financial considerations. **A**: This is significant b/c the court was asked to agree on behalf of *sui juris* people, who specifically disagreed, and there was a requirement of unanimity.\*\*

### **Buschau v Rogers Comm** – TSVA 1.b = consent for future contingent interest, unascertainable.

Newberry JA also distanced herself from the construction of the group in section 1(b).

**R**: Purpose of *Trust and Settlement Variation Act* is not for courts to substitute their decision. S. 1(b) requires an interest—contingent or vested—and at the time, you don’t know. In those circs, courts can agree. Under s. 1(b), you are unascertained (if it’s not clear who will get the interest) and only in those circs can you go to court and have it consent on behalf of the whole class when you don’t know who will be the oldest, surviving person.

1. **What counts as a “benefit” in the statute?**

### Trust and Settlement Variation Act, s. 2 – **Benefit** to parties interested

**2 The court must not approve an arrangement** on behalf of a person coming within section 1 (a), (b) or (c) unless the carrying out of it **appears to be for the benefit of that person**.

**What’s a benefit?**

* Financial (*Bentall Corp; Re Burns*)
  + Test for a financial benefit is the good bargain test—would a prudent adult, motivated by “intelligent self-interest” and sustained consideration of the expectancies and risks and the proposal made, likely accept the arrangement (*Bentall Corp*)
  + Includes minimization of tax (*Re Burns*)
* **Non-financial benefits**
  + What types?
    - Social and educational, ie growing up in the UK (*Re Westin*)
    - Family harmony and marital choice (*Re Remnant’s*)
    - Psychological, family, emotional (*Tweedie*)
  + Can they **outweigh financial benefits**?
    - Yes—social and educational benefits may outweigh financial benefits, particularly where the beneficiary is wealthy (*Re Westin’s—*Denning!)
    - **How big is the financial benefit**?
      * Small
        + Yes if the likelihood of the financial benefit is small (*Tweedie Estate*)
      * Great
        + Court will hesitate when there is a substantial financial loss (*Re Harris*)
    - Will the non-financial factors (e.g. family harmony) remain in the lifetime of the unborn-beneficiary? If not, not persuasive in the face of a contradictory financial interest (*Re Harris*)

### **Bentall Corp v Canada Trust 1996 BCSC** – TSVA s.2 = **what is benefit = good bargain test**

**Test - R**: Where the considerations in defining “benefit” are financial, the test is the “good bargain” test. The question is whether a prudent adult, motivated by “intelligent self-interest” and sustained consideration of the expectancies and risks and the proposal made, would likely accept the arrangement (*may just be another name for the same test—prudent advisor*).

### **Re Burns 1970 BCSC**- minimize **tax** = benefit

**F**: The settlor, with the consent of the trustees and the agreement of all the alive beneficiaries (who were all *sui juris*) applied for the court’s consent on behalf of the unborn beneficiaries. The proposed arrangement would give trustees investment powers that were excluded from the settlement. Those powers would enlarge the investment powers of the trustees and enable the trustees to minimize tax and succession duties.

**I**: What is an appropriate benefit under the *Act*?

**R**: The minimization of tax and the advancement of the financial interests of the beneficiaries is an appropriate benefit in a proposed arrangement.

### **Re Westin’s Settlement 1969 UK** – **social education** benefits can outweigh financial benefits

**F**: The settlor wanted to avoid capital gains taxes. In moving the trust, there would be very extensive tax benefits that the tax would acquire and pass huge financial gains to already very wealthy beneficiaries. However, there were underage children who lacked legal capacity.

**D**: Court (ie Denning) withheld consent on behalf of the underage children

**A**: Denning considered that the benefits of living in England (“educational and social” and “firm roots”) for the children outweighed the financial gains to an already very wealthy family.

**R**: Social or education benefits to the beneficiaries may outweigh financial benefits, thus causing the court to withhold consent on behalf of the beneficiaries.

### **Re Remnant’s Settlement Trusts 1970 UK** – **family harmony** = benefit

**F**: The trust gave contingent interests to the children of 2 sisters, D and M. The trust contained a forfeiture clause if the kids practiced Catholicism or married/lived with a Catholic. D’s kids were Protestants. M’s kids were Catholics. They wanted to delete that clause.

**A**: The deletion of the clause would financially disadvantage D’s kids who benefited from it. However, the benefits of deletion included: (i) family cohesion and (ii) a broadening of the scope of potential spouses.

**R**: Benefits under the Act are broader than financial benefits; they may include benefits such as family harmony and marital choice.

### **Re Harris 1974 BCSC**- **substantial loss vs family harmony = hesitate**, esp unborn children interest effected

**F**: The estranged father/husband trustee committed suicide. He left 5/8th of his estate to his eldest son and only 1/8th for each of his other 3 kids. If any child died before 21 leaving a child, it would gift over to those children. The mother/wife sought to vary the will so that the children had equal shares. All of the children were underage.

**A**: The court looked to the substantial financial loss to the 1st son—more than half of his share would be lost. It also considered the psychological upsets to him, noting that those adverse psychological impacts would not pass to the 1st son’s unborn children, who also had to be considered.

**\*R**: Although both financial and non-financial considerations should be taken into account when assessing the benefit under s. 2 of the *Act*, the court will likely hesitate when there is a substantial financial loss to the party for whom they must consent *or* if the factor which balances against the financial consideration (e.g. family harmony) will be absent for some of the (possibly unborn) beneficiaries.

**R2**: The potential harm to emotional and psychological wellbeing is insufficient to justify a substantial rewrite of the trust.

### **Russ v BC (Public Trustee) 1994 BCCA** - **court** is prudent advisor **not bound by settlor intent**

**R**: In exercising its discretion to consent on behalf of incapable beneficiaries, the court should act as a prudent advisor. The court is not bound to preserve the basic intention of the settlor.

### **Re Tweedie Estate 1975 BCSC** – small financial benefit vs huge, and **compare to other benefit**s

**R**: The court should consider the likelihood of the unborn beneficiary receiving a financial benefit. If that likelihood is small, then “benefits” should be broadly understood to include psychological, family, emotional, and other benefits.

### **eaton v eaton – kent 2013**- Court when varying will **tend to keep alive the basic intention** of testator

**R:** The Court will approve the variation of the Trust where:

(a)               the basic intention of the testator will be kept alive by the proposed variation;

(b)               the proposed variation is for the benefit of the minor, unborn, unascertained and incapable beneficiaries; and where

(c)               a prudent adult motivated by intelligent self-interest, and a sustained consideration of the expectancies and risk of the proposal made, would be likely to accept the benefit to be obtained on behalf of those for whom the court is acting.

# Chapter 7: Trustee Appointment, Removal, and Retirement

### **s. 2 Trustee Act –** TA applies to all deed, will, codicil

Except as provided in this Act, this Act extends to persons entitled or acting under a deed, will, codicil or other instrument irrespective of the date of its execution.

## Initial Appointment of Trustee

1. Settlor has right and freedom to choose individual(s) w/ full legal capacity and remains in jurisdiction to act as trustees (e.g.s good friend or trust corporations, etc.)
2. Trustee gains authority through transfer of asset (vesting) or under a will through letters of administration
3. Upon execution of the trust, the settlor falls out of the picture unless they’ve maintained powers (*Bill v Cureton***)**
4. In addition to appointing trustee(s), they may also appoint a “protector” or “guardian” that may personalize the trust or make decision when unexpected events occur
   1. Can’t make too many decisions or they are trustees
5. Bs by agreements can appoint Tees by rule of Saunder v Vaultier.
6. Court appoints where all else fails – “expedient” – on application of beneficiaries (section 31) – *Re Tempest*
7. More than one trustee may be appointed—they hold as joint tenants (so that when one dies, the others have the right of survivorship)
   1. When the last one dies, their personal rep’ve becomes the trustee- Tees don’t have delegation powers
   2. When there are several, they must be unanimous in their decisions (unless stated otherwise in the trust deed)
8. After the settlor appoints the trustee, they must accept
   1. If they refuse:
      1. Was an alternate trustee provided for in the will?
         1. Yes🡪 do they accept?
         2. No🡪 court has inherent power of appointment because equity will not allow a trust to fail for want of a trustee (e.g. appoint the PGT)
9. Did the trust document contain a clause declaring that the **property is vested in the trustee**?
   1. If yes, automatic vesting (s. 29)
   2. If no, address
10. Corp Trustees almost always used in major corporate-interest trusts
11. Because trust corps are so large, often S or Bs become appointed as “protector” or “guardian”
    * Tees making decisions on certain topics need consent of the protector when exercising specified

powers, examples:

* + - To add or remove beneficiaries
    - To distribute capital or income
    - To vary the terms of the trust
    - To appoint or remove trustees
  + Protector canʼt act as Tee or they can become defacto Tee! and the trust will collapse! Beware!

## Retirement, Death or Absence from Jurisdiction

A trustee may leave due to (i) death, (ii) retirement, or (iii) removal. The trust document may deal with these occurrences but if they do not, the *Trustee Act* can fill the gaps.

1. Has the trustee retired, left the jurisdiction, or wishes to retire?
2. Does the trust document deal with this?
   1. If not, *Trustee Act* fills the gaps
3. (s. 27) If dead, outside jurisdiction for 12+ months, wishes to be discharged from *any* trust or power, is unfit or incapable:
   1. Any person nominated to appoint trustees (“Protector”); or
   2. Surviving or continuing trustees; or
   3. Personal reps of last surviving trustee
      1. May by writing appoint any person(s)—can increase #
      2. Appointee becomes vested and has all the same powers
   4. An app’n to appoint a new person under this section may be brought by the beneficiaries (“whether under disability or not”) or by the trustee (s. 36)
4. (s. 28) If a trustee wishes to retire and there are more than 2 trustees:
   1. Then the one wishing to retire should create a deed declaring the wish (declaration)
   2. If the cotrustees consent (and “protector”) to retirement and vesting alone in remaining trustees (consent)
      1. Then, retiring trustee is discharged (must disengage from trust assets)
      2. Only permissible if not contrary to settlor’s directions in trust deed
   3. Vesting occurs immediately in cotrustees w/o conveyance or assignment (s. 29) unless shares that need to reg’d in company books, land subject to mortgage, etc

* The restriction on unilateral retirement is to prevent fraud and breach of fiduciary duty

### **S.27 TA-** **(power to appoint new tees)** retire/12 months/incapable – remain T in writing appoint(property vest)

(1) If a trustee…is **dead**, **remains out of British Columbia for more than 12 months**, **wishes to be discharged** from all or *any* of the trusts or powers…, **refuses or is unfit to act in them**, or is **incapable of acting in** **them**, then the person nominated for the purpose of appointing new trustees by any instrument creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees… or the personal representatives of the last surviving… trustee, **may by writing** **appoint** another personor persons… in the place…

(2) On the appointment of a new trustee for all or part of trust property,

(a) the number of trustees may be increased…

(3) A **new trustee appointed under this section**, as well before as after all the trust property **becomes** by law, by assurance or otherwise **vested** in the trustee, has the same powers, authorities and discretions, and may in all respects act as if he or she had been originally appointed a trustee by any instrument creating the trust.

Briefly: If you lose a trustee (death, outside jurisdiction, wishes to retire), then the person appointed by the trust document to appoint new trustees will make the appointment, or the surviving trustees (or the personal rep of the last trustee) may make an appointment in writing.

### s**.28 TA** (retirement of a trustee)- if >2 tees remain, by deed declare wish to retire. If consent = discharge

**28** (1) If there are **more than 2 trustees** and one of them **by deed** **declares** that he or she **wishes to be discharged** from the trust, and **if the co-trustees** and **any other person empowered to appoint** trustees by deed **consent to the discharge**, and to the **vesting in the co-trustees alone** of the trust property, then the trustee who wishes to be discharged is **deemed to have retired** from the trust, and is, by the deed, **discharged from the trust under this Act, without a new trustee being appointed in his or her place.**

(2) The assurances or things required for vesting the trust property in the continuing trustees alone must be executed or done.

(3) This section applies only **if and as far as a contrary intention is not expressed in any instrument creating the trust**, and has **effect subject to the terms of that instrument**.

Purpose: This should be done to avoid liability if the remaining trustees do something wrong

### **S.29 TA(vesting)** – if declare says legal int vest in T, then **the int vests without convey**(not mort land, unreg shares)

(1) If a **deed by which a new trustee is appointed** to perform a trust contains a declaration… that an estate or interest in [land], or in a chattel…, or the [chose in action], vests in the [trustees], that declaration operates, **without a conveyance** or **assignment**, to **vest in those persons, as joint tenants**…

(2) If a **deed by which a retiring trustee is discharged under this Act** contains a declaration referred to in this section by the retiring and continuing trustees, and by any other person… empowered to appoint trustees, **that declaration operates, without a conveyance or assignment, to vest in the continuing trustees alone, as joint tenants**…

(3) This section does not extend to land conveyed by way of mortgage for securing money subject to the trust, or to a share, stock, annuity or property that is only transferable in books kept by a company or other body, or in a manner directed under any Act of the Legislature.

### **s.36 TA** (**persons who may apply for orders to appoint new T**)- tees or any person beneficially interested

**36** (1) **An order** under any of the above provisions for the **appointment of a new trustee**, or concerning land, stock or a chose in action subject to a trust, **may be made on the application of any person beneficially interested**…whether under disability or not, **or on the application of a …trustee…**

(2) An order under any of the above provisions concerning land, stock or a chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

Briefly: this says that a trustee or any person with beneficial title may apply for an order in any provision, including s. 27

## Removing a Trustee

1. Is there a provision in the trust instrument which gives authority to remove a trustee? If so, that provision governs.
   1. For example, is there a designated protector or guardian who has the power to remove?
2. If no such provision exists, look to the *Trustee Act* (or see three)
   1. A beneficiary with legal ability who has consent/approval of the majority of beneficiaries (in interest and number), may apply to the court to remove a trustee and substitute a trustee or trustees (s. 30)
   2. The court may grant an order to appoint a new trustee if expedient (s. 31)
      1. If court makes order to appoint new trustee, should use *Re Tempest* guidelines:
         1. Does the appointment accord w/ the wishes of the settlor, especially those wishes respecting undesirable traits of trustees?
         2. Does the appointee chosen have an axe to grind w/ the settlor or the beneficiaries?
         3. Will the appointee chosen promote rather than impede execution of the trust?
3. The court may also remove trustees w/ their inherent jurisdiction, using general principles of equity (*Letterstedt*). Although they are less likely to do so due to the leg’v provisions.
   1. Meet the **test in *Conroy v Stokes***
      1. Have there been:
         1. Acts and omissions that endanger trust property; or
         2. Want of honesty, appropriate capacity, or reasonably fidelity?
      2. If one can be shown that is more than a single mistake but which impairs the welfare of the beneficiaries, the court may use its equitable jurisdiction to remove the trustee.
   2. If the trustees can’t work together, that might also be grounds (*Consiglio*)
   3. If trustees endanger the trust (Re Newton) – one trustee disagree with another tee whose also a B, about navy store. High friction, fired manager

### **s.30 TA** (removal of trustees on app’n) – **majority sui juris Bs can apply to court to remove**

**30** A trustee… appointed by any court may be removed and a trustee [or] trustees… substituted in place… at any time **on application to the court** by any trust **beneficiary** who is **not under legal disability**, with the **consent and approval** of a **majority** in interest and number… **not under legal disability**.

### **s.31 TA** (power of court to appoint new trustees) – **inexpedient, impracticable,**

**31** If it is **expedient** to appoint a new trustee and it is found **inexpedient, difficult or impracticable to do so without the assistance of the court**, it is lawful for the court to make an **order** **appointing** a new trustee or trustees, **whether there is an existing trustee or not** at the time of making the order, and either in substitution for or in addition to any existing trustees.

### **Conroy v Stokes1952 BCCA**- acts/omissions **endanger trust** and lack honesty, capacity, fidelity, not single act

**A (test)**: The court’s main focus is on the welfare of the beneficiaries. As such, applicants seeking to remove a trustee must show:

1. Acts and omissions that endanger the trust property; or
2. Want of honesty, appropriate capacity, or reasonable fidelity.

The must shows acts that impair the welfare of the beneficiaries—not a single mistake.

### **Re Consiglio Trusts #1 1973 ONCA** – if tee couldn’t get along to a point where **admin of trust impossible**,

**F**: No misconduct by the trustees but they couldn’t get along.

**I**: Must there be misconduct by the trustees to warrant a court removal order? (*no*)

**D**: Removal was ordered

**R**: Trustee misconduct is not a prerequisite to removal. It’s sufficient that trustees can’t get along or work together, making continued administration of the trust by the trustees “impossible or improbable”.

### **Re Tempest 1866** – factors considered in appoint T, 1) S/T’s wish, 2) not axe to grind with S/B 3) not impede trust

When a court makes an order, appointing a trustee, they should use the following guiding principles:

1. Accords with the wishes of the settlor, especially those wishes respecting undesirable characteristics
2. The person chosen does not have an axe to grind with the settlor or beneficiaries
3. The person chosen will promote rather than impede the execution of the trust

## Vesting Assets in New Trustees

1. If there was a retirement under s. 28 (consent, writing)🡪 vest by s. 29
2. If there was a removal under s. 27 (dead, jurisdiction), a new trustee may be appointed and they are deemed to be vested.
3. If court appoints a new trustee, in that order or in a subsequent order they may:
   1. Vest title to land in the trustee (s. 33)
   2. Vest title to stock or chose in action in the trustee (s. 34)

### **S.29 TA**: **automatic vest in new Tees as JT** w/ respect to many trust assets

(1) If a **deed by which a new trustee is appointed** to perform a trust contains a declaration… that an estate or interest in [land], or in a chattel…, or the [chose in action], vests in the [trustees], that declaration operates, **without a conveyance** or **assignment**, to **vest in those persons, as joint tenants**…

(2) If a **deed by which a retiring trustee is discharged under this Act** contains a declaration referred to in this section by the retiring and continuing trustees, and by any other person… empowered to appoint trustees, **that declaration operates, without a conveyance or assignment, to vest in the continuing trustees alone, as joint tenants**…

(3) This section does not extend to land conveyed by way of mortgage for securing money subject to the trust, or to a share, stock, annuity or property that is only transferable in books kept by a company or other body, or in a manner directed under any Act of the Legislature.

Briefly: Automatic vesting in new trustees as joint tenants occurs w/ respect to many trust assets (but not exceptions in s. 29(3))

### **s.32 TA** (rights and powers of new trustees) – **New Tees get same rights/powers** as others

**32** The persons who, **on the making of an order under section 31**, are trustees have the **same rights and powers** as they would have had if appointed by a decree or judgment in a proceeding.

### **S.33 TA** (power of court to **vest** **land** in new trustees)

**33** The court, **on making an order appointing a new trustee**, may, **by** **that order or a subsequent order**, **direct** that **land** subject to the trust **vests** in the [new trustees] and the order has the same effect as [if it had been duly executed and conveyed by old trustee].

### **s.34 TA** (power of new trustees to transfer stock or chose in action)

**34** The court, on making an order appointing a new trustee, may, **by that order or a subsequent order, vest the right** to call for a transfer of a stock subject to the trust, or to receive the dividends or income of it, or to sue for or recover a chose in action subject to the trust, or any interest in respect of it, in the person or persons who on the appointment are trustees.

# Duties of Trustees

The trustee’s powers of administration are restrained by duties prescribed by law, including those set out by the settlor in the trust instrument and statute.

## The Duty to Take Custody and Personally Manage Trust Assets

1. The trustee gains title upon appointment
   1. Ensure vested
2. They must then collect or gain custody of the property
   1. Shares—register in company books
   2. Money – may involve ct action
3. Trustee should review the powers in the trust instrument/will
   1. From there, decide whether to keep the assets, sell them, invest them, etc.
      1. Trust for sale = you must sell
      2. Power to postpone = you must sell but may postpone
      3. Trust to retain = you must retain
   2. This may require the assistance of agents
      1. Bank – store the money
      2. Solicitor – collect the debts
      3. Stockbroker – sell the shares
      4. Property manager – collect the rents
   3. At common law, *delegatus non potest delagare* (a delegate may not delegate)
      1. Common law change (*Speight v Gaunt*): a trustee may not delegate unless they avail themselves of a 3rd-party agent such as a banker or broker out of (i) moral necessity or (ii) the regular course of business. If this is the case, trustee not liable if the agent is negligent.
      2. But if trust document requires personally responsibility of trustee, they cannot escape liability by delegating another party – trustee is liable for that unlawful delegation (*Re Wilson*)
         1. But today: if a testator appoints a **corporate trustee**, exercise of discretionary power is not lmtd to board of directors—directors are not individual trustees, *contra* to *Wilson* (*Fales*)
   4. The *Trustee Act* has also added changes:
      1. Control over money, consideration, or property
      2. S. 7 (1) and (2): may appoint solicitor or banker as agent to receive/discharge $ or valuable consideration or property
         1. Trustee not liable for that appointment alone
      3. S. 7(3): if left in hands of solicitor or banker for period longer than reasonably necessary🡪 not exempt from liability incurred w/o Act
      4. S. 7(4) does not authorize trustee to do anything trust document forbids
      5. Control over investment authority
      6. S. 15.5(2): may delegate investment authority that a “prudent investor might delegate”
      7. S. 15.5(3) A trustee who delegates must determine the investment objectives of the trust *and* exercise prudence in
         1. Selecting the agent
         2. Establishing the terms and limits of the authority delegated
         3. Acquainting agent w/ investment objectives
         4. Monitory performance to ensure compliance w/ terms of delegation
      8. Trustee has duty to exercise reasonable care to comply with terms of delegation. The trustee who complies with subsection 3 is not liable for decisions of the agents.
      9. S. 95: indemnify trustee unless trustee willful default

### Corporate Trustees Today

Today, a testator who appoints a corporate trustee is implicitly choose the decision-making (management) structure set out in the company practices or policies.

### **Speight v Gaunt 1893 HL**- normally can’t delegate, but if **regular course of buz** – like **banker, broker, not liable**

**F**: The trustee, Gaunt, appointed an agent-stockbroker to purchase municipal bonds. The broker committed fraud, taking the money and giving him written and oral assurances that he had purchased stocks. The trustee was then sued for breach of trust.

**R**: Generally, a trustee may not delegate to others; however, the trustee may avail himself of a third-party agent such as a banker or broker if he does so out of (i) moral necessity or (ii) in the regular course of business. The trustee is not liable for losses occasioned by that agent unless the former was negligent.

### **Re Wilson 1937 ONCA** – **Tees liable if they unlawfully delegated power**

**F**: A testator entrusted an estate to a trust company. The Board had delegated to the GM to manage the trust as he thought best. There were two estate properties: one was profitable, the other was causing losses. An offer was made to buy the latter. The offer was rejected by the GM, who did not communicate his decision to the board.

**A**: Found to be an unlawful delegation. They could not escape their responsibility by leaving it to the exercise of another. Therefore, the Board was liable for GM’s act and in breach due to their failure to consider the offer.

**R**: If a trustee is personally responsible for exercising judgment, they may not escape that responsibility by delegating the power to another party. They will be liable for the acts of the party exercising the unlawfully delegated power.

### **Fales v Wohllenben Estate 1976 SCC** – for corp trust, exercise of trust power, **boards not ind trustees**.

*Court of appeal - Obiter* (Bull JA): When a testator appoints a corporate trustee, the exercise of discretionary power is not limited to the board of directions—that would be tantamount to treating directors as individual trustees.

### **S.7 TA** (power to authorize receipt of money; **employ agent banker or solicitor** and not liable unless breach)

**7** (1) A trustee **may appoint a solicitor** to be the trustee's **agent** to receive and give a discharge for money, or valuable consideration or property receivable by the trustee under the trust, and a **trustee is not chargeable with breach** of trust **merely for having made**… **that appointment.**

(2) A trustee may appoint a **banker** or **solicitor** to be the trustee's agent to receive and give a discharge for money payable to the trustee under or because of a policy of assurance, by **permitting the banker or solicitor to have the custody** of and to **produce the policy of assurance with a receipt signed by the trustee**, and a **trustee is not chargeable with a breach** of trust merely for having made… that appointment.

(3) This section **does not exempt** a **trustee from** any **liability** the **trustee would have incurred if** this **Act** had **not** been **enacted**, **if the trustee permits** the money, valuable consideration or property to **remain** in the hands or **under the control of the banker or solicitor** for a **period longer than is reasonably necessary** to enable the banker or solicitor to pay or transfer it to the trustee.

(4) This section **applies only if the money** or valuable consideration or property is **received after** July1, **1905.**

(5) This section **does not authorize a trustee to do anything the trustee is in express terms forbidden to do**, or to omit anything the trustee is in express terms directed to do, by the instrument creating the trust.

### **S.15.5 TA** (delegation of authority w/ respect to investment) – **when select – prudent**

(1) … "**agent**" means any person to whom a trustee delegates **investment responsibility**.

(2) A trustee may **delegate to an agent the degree of authority** with respect to the **investment** of trust property that a **prudent investor might delegat**e in accordance with ordinary business practice.

(3) A trustee who delegates authority under subsection (2) **must determine the investment objectives for the trust and exercise prudence** in

(a) **selecting** an agent,

(b) **establishing** the terms and **limits** of the **authority delegated**,

(c) **acquainting** the **agent** with the investment **objectives**, and

(d) **monitoring** the **performance** of the agent to **ensure compliance** with the terms of the delegation.

(4) In performing a delegated function, an **agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation**.

(5) **A trustee who complies** with the requirements of subsection **(3)** is **not liable**… for the decisions or actions of the agents…

(6) This section does **not authorize a trustee to delegate authority** under circumstances in which the **trust requires the trustee to act personally**.

(7) Investment in an investment fund referred to in section **15.1 (1)** or a common trust fund referred to in section **15.1 (3) is not a delegation** of authority with respect to the investment of trust property.

### **s.95 TA** (implied indemnity of trustees) – if prudent buz man satisfied, T not liable and indemnified

**95** A trustee, **without prejudice to the provisions of any instrument creating the trust,** is **chargeable only for money** and securities **actually received** by the trustee even though the trustee signed a receipt for the sake of conformity, and is answerable and **accountable only for the trustee's own acts, receipts, neglects or defaults**, and **not for those of other trustees or a banker, broker or other person with whom trust money or securities may be deposited**, nor for the **insufficiency or deficiency of securities or any other loss**, unless it happens through the **trustee's own willful default**, and **may reimburse himself or herself**, or pay… out of the trust premises, **all expenses incurred** in or about the **execution** of his or her trusts or **powers**.

Briefly: (i) trustee is not guarantor, (ii) trustee is held to SoR of reasonable business person, (iii) trustee not responsible for acts of co-trustees or agents and (iv) trustee may be reimbursed for expenses

## The duty to take care of trust assets: investment duties and powers

1. Look to the trust document to determine investment duties and powers:
   1. Type of investment?
   2. Purpose of investment?
   3. Standard of investment?
2. Assuming that nothing has been set out above:
   1. Type of investment:
      1. **Shares**
         1. Historically = impermissible
         2. 15.1 = permissible – may invest in a security “in which a prudent investor might invest”
         3. 15.3 = portfolio strategy permissible (plan for investment with a reasonable assessment of risk and return that a prudent advisor would adopt)
            1. Neither of these are delegations under s. 15.5 so that means trustee is personally liable—not investment fund manager?
   2. Purpose of investment
      1. May affect duty of **impartiality**
      2. Unless the trust document says otherwise, the primary purpose is **financial**, not **ethical** (*Cowan*)
   3. Standard of investment (Standard of Care)
      1. **Originally, a low standard:** the honest best of the trustee, who is a man of ordinary prudence, managing his own private affairs (*Whiteley*)
      2. Now, standard of a **prudent businessperson managing his own affairs** (*Speight*) or the person of ordinary prudence managing her own affairs (*Fales*)
         1. The **stnd is the same**, whether it’s a corporate trustee or a lay person (*Fales*)
            1. However, a layperson is more likely to have relief from liability under s. 96 (acted honestly, reasonably, ought fairly to be excused)
      3. **Speculative** investments are impermissible
         1. S. 15.3 only allows portfolio plan that has a reasonable assessment of risk and return that a prudent advisor would adopt
3. What if something goes **wrong** in the investment?
   1. The trustee is **not** a **guarantor** of investment (s. 95)
   2. **Errors** in **judgment** do not lead to liability if trustee acted with reasonable care, prudence, and circumspection (*Re Godfrey*)
   3. Even if the returns are **abysmal**, **hindsight** appreciation of the foolishness of an investment will not render the trustee negligent if they’ve invested as an ordinary prudent “man of business conducting his own affairs” (*Nestle*)

### **Re Whiteley 1886** – old standard **(individual best),** **not used**

The SoC was the personal, honest best of the trustee🡪 this was a subject stnd, appropriate for the family-friend trustee.

**R**: The man of ordinary prudence in the management of his own private affairs

### **Fales v Wohlleben Estate 1976 SCC** – for personal and corp trust – SoR = **prudent busman managing own affair**

**F**: Trustees held mediocre stock for 11 years before reinvesting into speculative stock. They lost everything. The trustees were both corporate and familial (testator’s widow).

**A**: Corporate trustee (CPT) held liable for breach of trust but not given s. 96 concession. CPT tried to get a contribution from the widow, who was co-trustee, but she was relieved under s. 96.

**R**: There is only one SoR and it applies uniformly to all people. It is the standard of a person of ordinary prudence.

### **Cowan v Scargill 1985 UK** – **considers financial**, not ethical or moral

**F**: This was a pension for unionized mining employees. The pension fund was investing in a rival company that was seen as a threat to the union. The union members objected to the investment on the basis of moral grounds.

**R**: The primary objective of a trustee must always be to secure a reasonable financial return for the beneficiaries. The trustee must put to side ethical considerations in choosing how to invest. However, if a trust is silent on non-financial criteria, they may be considered if the predominant goal remains the securing of a reasonable financial return for the beneficiaries.

Note: Prof suggests that if all beneficiaries are *sui juris* and share the same moral values as the trustee, they may vary the trust to work towards that moral benefit.

### **Nestle v National Westminster Bank 1993 UK** – **don’t use hindsight in judging prudent buz rule**

A trust was created in 1922. It had been invested incredibly conservatively to the extent that the judge found that the trustees fell “woefully short of maintaining the real value of the fund, let alone matching the average increase in the price of ordinary shares”. Prior to 1960s, it was hown that investing in shares was seen as very risky. The judge commented that the bank succeeded in part because of the battle of experts.

**R**: Where returns are abysmal, a trustee may be shielded from liability if they are nevertheless found to be acting as an ordinary prudent “man of business conducting his own affairs”. This is so even if hindsight shows that this was a poor decision. (*Hindsight appreciation of the foolishness of an investment will not render the trustee negligent if nevertheless she has acted as an ordinarily prudent businessperson conducting her own affairs*).

### **Trustee Act, s. 15.1** (investment of trust property)

**15.1** (1) A trustee may invest property… in which a prudent investor might invest, including a security issued by an investment fund as defined in the Securities Act.

(2) Subsection (1) does **not authorize** a trustee to invest in a **manner** that is **inconsistent** with the **trust**.

(3) Without limiting subsection (1), a trustee may invest trust property in a **common trust fund managed by a trust company**, whether or not the trust company is a co-trustee.

### **Trustee Act, s. 15.4** (Abrogation of CL rules: anti-netting rules) – **can use gain to offset loss**

**15.4** (1) The **rule** of general trust law that **requires** the **assessment** of the decisions of a trustee on an **investment by investment basis** if the decisions are called into question is **abrogated**.

(2) The **rule** for the assessment of damages for breach of trust that **prohibits losses from being offset by gains is abrogated** **except** in respect of circumstances in which the breach is associated with **dishonesty** on the part of the trustee.

### **Trustee Act, s. 15.2** (stnd of care) – **Prudent investor std**

**15.2** In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a **prudent investor** would exercise in making investments.

### **Trustee Act, s. 15.3** (**trustee not liable if overall investment strategy conforms to prudent investor**)

**15.3** A trustee is not liable for a loss… arising from the investment… if the **conduct** of the trustee that led to the loss conformed to a plan… for the investment of the trust property, comprising **reasonable assessments of risk and return**, that a **prudent investor** would adopt under comparable circumstances.

### **Trustee Act, s. 96** (**court can relieve trustee from liability** for breach partly or wholly if honest, unfair etc)

If it appears to the court that a **trustee**…is or may be **personally liable for a breach of trust**…but has acted **honestly** and **reasonably**, and **ought fairly to be excused** for the **breach** of trust and for **omitting to obtain the directions of the court** in the matter in which the trustee committed the breach, then the **court may relieve the trustee either wholly or partly** from that personal liability.

## Duty of Loyalty to the Beneficiary

**Duty of Loyalty to Bs requires: 1) act in good faith, 2) not abuse position, 3) not for personal benefit**

**The No Conflicts Rule**

1. Has the trustee profited through association with the trust?
   1. This includes gaining property at a fair price (*Keech v Sanford*) and gaining knowledge in the course of acting as trustee (*Boardman v Phipps*)
   2. Was it at the expense of the beneficiary?
      1. Yes🡪 duty of loyalty breached
      2. No
         1. Even if the beneficiary had no possibility to benefit, the trustee *cannot* benefit for preventative/policy reasons (*Keech v Sanford*)
         2. Even with no real conflict, beneficiary must still give informed consent or the duty is breached (*Boardman v Phipps*)
            1. Result: disgorgement of profits (*beyond compensation—semi-punitive*) regardless of whether there was an actual loss by beneficiaries (*Boardman v Phipps*)
            2. Except: Canadian approach tries to be mindful of modern day conflict in corporate settings, so that where there is in reality no real conflict, the duty won’t be breached (*Peso Silver*)
            3. Strict conflict rules relaxed w/ faithless directors, need to assess: (i) position held, (ii) nature of opportunity missed, (iii) ripeness of opportunity, (iv) relation of director to the opportunity, (v) amnt of knowledge possessed, (vi) circ.s in which it was obtained, (vii) pvt or special opportunity, (viii) time frame that breach occurred in relation to employment, and (ix) circ.s under which employment was terminated (*Canaero*)

### **Keech v Sanford 1726 UK**– **can’t personally benefit** even if it is impossible for B to benefit **(strict-CL)**

**F**: A testator left a lease for an infant. The trustee applied to have the lease renewed for the benefit of the infant. The landlord adamantly refused given that the beneficiary was a minor. Given that it was clear there would be no renewal and the lease was a good one, the trustee obtained it for himself. The infant brought an action to have the lease assigned to himself.

**A**: The court did not find fraud, nor was there any real conflict of interest because it was clear that the beneficiary was not going to get the lease from the landlord. However, the courts gave a fulsome and strict interpretation of the duty of loyalty so that it was preventative, finding a breach even where there was no bad faith. This strictness is necessary for policy reasons. The result is that the trustee is the only one who could not have the lease.

**D**: The lease was assigned to the infant. The testator had to also give profits to infant beneficiary.

**R**: Under the traditional CL approach, trustees could not personally profit from any association with trust property even in circumstances where it was impossible for the beneficiary to benefit.

### **Boardman** **v Phipps 1967 HL** – **strict approach – even if no real conflict, duty of loyalty still be breached**.

**F**: A trust consisted of a controlling interest in a well-performing company (Phipps & Son) and a minority shareholding in a poorly managed company (L & H). The trustees wanted to do something about the latter. They contacted their solicitor, Boardman. B and one beneficiary, TP, attended L&H meetings. They received a lot of valuable insider knowledge about L&H and on that basis, suggested that the trustees acquire a controlling interest in L&H and change its fortunes. The trustees declined, finding it to be a risky investment, contrary to the terms of the trust. B and TP then bought the shares with their own money. All of the trustees were supportive. The beneficiaries were also advised of B and TP’s strategy of enriching L&H. Their move was very beneficial to them. The beneficiaries also benefitted in having L&H in competent hands—they received favourable dividends. However, one beneficiary, JP, was dissatisfied and sought an order requirement the disgorgement of profits by placing a CNT on the shares as a consequence of the breach of the no-conflict rule.

**D**: Decision for JP, CNT ordered.

**A**: TP and B acted in good faith. They put their own money at risk when they pursued the shares. Nevertheless, they acted as fiduciaries in their attendance at the meetings and used trust property (knowledge) for their own benefit without “informed consent of the beneficiaries”.

**R**: Information and knowledge attained in the course of acting in a fiduciary capacity will be held to be trust property.

**R2**: This case is an example of a strict approach to the rule that fiduciaries cannot profit from their position w/o the informed consent of beneficiaries. The rule operates so that even when there is no real conflict, the duty of loyalty may still be breached.

**R3**: The remedy for a breach of the duty of loyalty when the trustee breaks the rule against conflicts results in disgorgement of profits, even where beneficiary has had no losses (and has actually gained) due to the impugned acts of the trustee.

Dissent: There was realistically no conflict since the trustees declined to buy the shares. In fact, evidence showed that the trustees preferred for TP and B to buy the shares (rather than an unfamiliar party). Given this evidence, there was no real “possibility of conflict” given that a reasonable person looking at the relevant circumstances could not think there was a real, sensible possibility of conflict.

* Dissenting approach more similar to Canadian approach

### **Peso Silver Mines Ltd v Cropper 1966 SCC** – **Rule relaxed? –** P refused initial offer, D bought instead

**F**: Cropper was a director of Peso. Peso had refused to put offers on a number of mining claims due to a lack of funds. After a particular refusal, C launched his own company and bought claims that were rejected by P. P sued C, arguing a CNT.

**D**: Decision for C, the CNT was rejected

**R**: In interpreting and applying modern day conflict rules, the court should consider modern practice and way of life, including modern corporate practices.

### **Canadian Aero Services v O’Malley 1974 SCC** – senior officer also liable, faithless = disgorge, factors considered

**F**: Wells (director), O’Malley (president), and Zarzycki (VP) were all employees and senior officers at Canaero. W quit. W persuaded O’M and Z to float and join a new company (Terra) that competed with Canaero. They did and Terra won a government K ($2.3 million), beating out Canaero.

**COA:** Canaero sued, arguing breach of fiduciary duty through conflict of interest.

**D:** Decision for Canaero

**Remedy**: Z and O’M had to disgorge their profit (set at $125,000)

**A**: O’M and Z had not acted in bad faith but by acting as “faithless fiduciaries”, defaulting Canaero of the opportunity, they had to disgorge profits.

**R**: Senior officers in “top management” positions are treated the same way as directors w/ respect to their fiduciary responsibilities—they are not mere employees.

**R2**: Faithless fiduciaries who profit through a conflict with the person to whom the duty is owed, will be disgorged of their profits.

**R3**: Relaxation of the strict rule against conflict, assessing the directors conduct against (i) the position held, (ii) the nature of the opportunity missed, (iii) the ripeness of the opportunity, (iv) the relation of the director to the opportunity, (v) the amount of knowledge possessed, (vi) the circs in which it was obtained, (vii) was it a private or special opportunity, (viii) time frame that breach occurred w/ respect to employment, and (ix) the circs under which the employment rel’nship was terminated—retirement, resignation, discharge.

**Note:** Holder v Holder and *Molchan v Omega Oil & Gas Ltd (1988) SCC*  – suggest minority decision in Kipp is new standard, the absolute standard is melting down

**The Rule Against Self-Dealing**

1. Has the trustee purchased trust (asset) property for her own personal use?
   1. This is when the trustee is at both ends of the transaction
   2. Justification for the rule:
      1. Conflict b/w wanting to sell at highest price (for beneficiary) and purchase at lowest price (for trustee)
      2. Difficult to determine if best interest of beneficiary was served (*Bennett*)
   3. Were the circumstances of the case so as to fall outside of the mischief contemplated by the rule against self-dealing? (*Holder v Holder*)
      1. The rule may be applied flexibly so as not to lead to injustices where the executor did not engage in any of the mischief contemplated by the rule (*Holder*)
         1. Holder did not have any special knowledge, did not participate in decision to sell, bought at a fair price, public auction, everyone knew he renounced, etc.
         2. The same approach was adopted in Canada in *Molchan v Omega* – the rules were relaxed so as not to cause patent injustice. No breach was found because:
            1. There is no evidence of bad faith by the trustee
            2. Consideration was adequate
            3. The sale is in the best interest of the beneficiary
            4. The beneficiary was fully aware that the terms of the trust agreement allowed the trustee to dispose of the property at any time.
   4. If the self-dealing does not fit within the exception in *Holder*, the transaction is **voidable**.

### **Holder v Holder 1968 English CA** – absolute rule in Boardman relaxed**, flexible approach** due to patent injustice

**F**: D was an executor of his father’s will. He performed a few minor tasks then renounced his position. The whole family and the solicitors knew that he renounced so that he could act as a sell. He gained no special knowledge as executor. He was not part of the trustees’ decision to sell the farms. The defendants subsequently bought the farms at a fair price when they were put up for public auction. One of the beneficiaries sought to have the sale put aside.

**A**: Although a person may not be both vendor and purchaser, this particular sale fell outside the mischief that the self-dealing rule prohibits. There was no real conflict in this case given the defendant’s well-known and effective renunciation.

**R**: This is a flexible application of the self-dealing rule contrary to *Keech* and *Boardman* which found that the conduct complained of was not the mischief contemplated in the rule and that a lack of flexibility could itself lead to injustice.

### **Molchan v Omega Oil & Gas 1988 SCC** – follows this relaxed approach in Holder and **factors considered**

**F**: General partner was holding on trust for other partners. The general partner had a fiduciary duty but there was no breach found.

**A**: Duty was not breached because:

* There is no evidence of bad faith by the trustee
* There was no evidence of inadequate consideration by trustee
* The sale is in the best interest of the beneficiary
* The beneficiary was fully aware that the terms of the trust agreement allowed the trustee to dispose of the property at any time.

**R**: Adopted flexible approach to self-dealing, as outlined in *Holder*. The rigidity of rules was recognized as undesirable due to its ability to cause patent injustice.

**The Fair Dealing Rule**

1. Rather than a trust asset, the trustee purports to purchase the equitable interest. Here, the beneficiary is on one end, and the trustee on the other (*cf* self-dealing).
2. Trustee has burden of showing every possible security and advantage given to beneficiary (*Denton*)
3. If a beneficiary alleges a lack of fair dealing, the onus is on the trustee to show:
   1. An absence of fraud or concealment of advantaged based on information acquired while acting as a trustee;
   2. That the beneficiary had fulsome and independent advice and protection; and
   3. That the consideration was adequate.
4. If found not to be fair dealing🡪 trust continues to survive (unless in hands of *bona fide* purchaser for value w/o notice), and the transfer is voided and must account for profits (*Crighton*)

### Denton v Donner – 1852 –

In these situations, the transaction isn’t automatically void but the trustee will still have the burden of showing that every possible security and advantage was given to the *cestui que* trust and that as much as possible was gained under the transaction.

### **Crighton v Roman 1960 SCC** - **lacking full disclose c**an render fair dealing void/fraud too

**R**: If a beneficiary alleges a lack of fair dealing, the onus is on the trustee to show:

1. An absence of fraud or concealment of advantaged based on information acquired while acting as a trustee;
2. That the beneficiary had fulsome and independent advice and protection; and
3. That the consideration was adequate.

**Remedy**: the release that C had signed was invalidated, constituting an ineffective transfer of the beneficial interest. Furthermore, R was held as a trustee and had to account for dividends.

## Duty to be Impartial

1. Are there beneficiaries in succession?
2. Did the testator/settlor intend partiality or impartiality?
   1. Does the trust instrument (explicitly or implicitly) prescribe partiality?
      1. Explicit partiality:
         1. Express provisions in the will to the contrary, such as asserting the rule in *Howe v Dartmouth* doesn’t apply
      2. Implicit partiality:
         1. If it’s an *inter vivos* settlement (although it may—see *Re Smith*)
            1. b/c settlor assumed to intend for the benefit to lay to the person to whom it is given
         2. If it may be implied through directions or authority to:
            1. Keep or retain the residue (trust to retain)
            2. Maintain unauthorized investments despite the duty of prudent investment
            3. Give income *in specie* to the life tenant (power to postpone)
      3. Implicit impartiality:
         1. Trust for sale
            1. Realty🡪 until sold, life tenant gets profits *in specie*
            2. Personalty🡪 until sold, life tenant gets 4% property value
      4. Is there a conflict with the testator’s signals? (e.g. trust for sale with a power to retain or postpone)
         1. Court should engage in interpretive exercise to determine the **dominant and primary intent** of the testator (*Lauer and Stekl*)
         2. Is the power permanent or temporary with a requirement to sell eventually when it’s advantageous to do so?
            1. If latter🡪impartiality (and life tenant gets 4%, not *in specie* (if personalty)) (*Crawford*)
   2. If not clear from trust instrument, the CL assumes settlor intended impartiality.
3. Trustee should assess the types of assets in the trust. Are there any of the following:
   1. Wasting – lots of income but capital base deteriorates (mortage, copyright, car)
   2. Unauthorized – highly speculative assets which have high yields in short-term and nothing in long-term (gold mine shares)
   3. Reversionary—assets not immediately avl. and don’t produce income for life tenant (e.g. future interests in possession)
4. If a duty of impartiality exists:
   1. With **wasting or unauthorized assets**, they should be sold and apportioned under the rule in *Howe v Lord Dartmouth* (4% income to life tenant and remainder to capital base) if the following is met:
      1. A testator or testatrix (i.e. in a will only—exception *Re Smith*; most *inter vivos* gifts are presumed to benefit the person on whom they fall)
         1. Re Smith is explained likely because the father’s will (precatory words) led to this *inter vivos* trust, so the latter was quasi-testamentary)
      2. Leaves a residuary (i.e. not specifically devised, *Lottman*)
      3. Personalty
         1. *Not* real estate, (*Lottman*)
         2. *Except* circs where testator signals realty should be sold + treated like personalty (*Lauer and Stekl*)
      4. To persons by way of succession and
      5. The residue includes a wasting or unauthorized asset
      6. Then the trustee must:
         1. Sell the wasting personalty
         2. Invest the proceeds in authorized investments
         3. The income of which goes to the benefit of the life tenant, the corpus of which accrues to the remainderperson in the capital base.
   2. With **reversionary assets**, the asset must be sold. Based on sale price, calculate 4% income per year and give that income to the life tenant. The rest of the sale price should be ploughed into the capital base + invest in things that will generate a fair income for life tenant (The rule in *Earl of Chesterfield* – you don’t have to sell it right away, but if you postpone, you must make up for the income lost for LT)
5. Calculating the “4%”
   1. Was there a power of postponement?
      1. Value of goods is taken at date of death
   2. Was the gift in a will?
      1. Was it sold within 1 year of testator’s death?
         1. Yes – value at date of death
         2. No – value at 1st year anniversary of death
   3. Was it an *inter vivos* gift?
      1. The property value is assessed at the date of the trust.

**Note:** 1) express intention = give effect to expressed intention, 2)if no such expressed provision, the default rule of equity is impartiality for Will. 3) look for implied intention, [TOS = impar], [TOR = par], [TOS + POR/P = default is impar – but look for dominant intent], [Intervivos = implied partiality – enjoyment in specie: but note Re Smith], [Power to sell + Power to retain – note POS does not equal trust for sell but could trigger impar, POR does not equal trust to retain], 3) if found for impar – and wasting + unauthorized invest = Howe, and 4) if reversionary interest – then Earl, 5) Realty does not apply although can argue it is lumped into investment portfolio. 6) if POP, value at death, if will, value at death if sold <1 year, if >1 at first year, if inter vivos, value at date of trust.

### **Howe v Lord Dartmouth 1802** – residuary or personalty that is wasting, unauthorized

Trust assets must be sold and reinvested so that 4% of the income stream may go to the life tenant, with the balance augmenting the capital base of the trust fund.

Where

1. a testator or testatrix (*not a settlor—they are presumed to intend the share that results while they place assets in the fund during their life*) – except in *Re Smith*
2. leaves a residuary (*ie residue of estate, not devised specifically to someone*--Lottman)
3. personalty (*ie not real estate--*Lottman)
4. to persons by way of succession and
5. the residue includes a wasting or unauthorized asset

then the trustee must

1. sell the wasting personalty
2. invest the proceeds in authorized investments
3. the income of which goes to the benefit of the life tenant, the corpus of the funds accruing for the remainderpersons

### **Earl of Chesterfield’s Trusts 1883** – apportionment if **reversionary interest**

This applies to reversionary assets (e.g. future interest, life insurance policies, etc.) which don’t yield income for the life tenant. To apportion the income impartially, the asset must be sold. The life tenant must receive income from the interim period between the testator’s death and sale. The trustee must calculate the amount of income per year at a 4% rate that the life tenant would have received. That multi-year sum must go to the life tenant and the remainder is ploughed into the capital base.

**R:** To correct unequal treatment where a life tenant has been disadvantaged by a reversionary trust asset, the reversionary trust assets are sold and are apportioned based on 4% from the date of inception of the trust to the date of sale.

**R**: The trustee has a *duty to convert reversionary interests into income-producing assets.*

**R**: Where there is an express trust with a trust for sale of a reversionary asset, the proceeds must be apportioned amongst the life tenant and remainderpersons.

### **Lottman v Stanford 1980 SCC** – **Howe will** **not apply to realty** and only to personality that is residuary

**F**: The testator left an estate consisting of mostly real estate and about $65,000 in personalty. He left it for the benefit of his wife for life, remainder to his 4 kids. The trustees were directed to sell all of the personal assets but were given a wide **discretion to postpone**. All was sold except one parcel of land. One child lived on that land and paid minimal rents that were insufficient to cover taxes. As a result, the widow received no income. The widow sued and was opposed by her kids.

**P/H**: ONCA applied the rule in *Howe*, finding real estate to no longer be a “sacred cow”. They ordered conversion and income payments of 7% with the value beginning one year after the testator’s death until the time of sale.

**D**: Appeal allowed—decision for kids

**R**: The rule in *Howe v Dartmouth* does *not* apply to realty.

**R2**: The rule in *Howe v Dartmouth* will *not* apply to personalty that the testator has expressely devised in the will (*recall: must be residuary*).

### **Re Lauer and Stekl 1974 BCCA** – TOS + POS – look at intent, Realty can be lumped if intended

**F**: The testator left realty and personalty to successive beneficiaries: life estate to his daughter, remainder in his grandchildren. There was a **trust to convert** all of the estate into money and a **wide power to postpone** and retain.

**A (interp)**: The court interpreted the trust to convert as the primary clause in the trust instrument, finding the power to postpone as not a permanent power of postponement. The dominant intent was that the trustee should sell both realty and personalty. (*the rule in Howe was not implicated through this interpretive exercise—the scope of that rule remains unchanged*).

**R**: When there appears to be a conflict between a trust for sale and a power to retain/postpone, the court should engage in an interpretive exercise to determine the dominant and primary intent of the testator. That should be given effect.

**R2**: Real estate may be lumped together with personalty and treated like personalty if that appears to be the intention of the testator, upon a fair construction of the will.

### **Royal Trust v Crawford 1955 SCC** – TOS + POR, **depends on intention**

**F**: The bulk of the testator’s estate was shares in stevedoring, a company with few assets. The testator left his estate to his widow for life, and his nieces and nephews in remainder. He left as a trust for sale with wide powers of postponement and retention (even of unauthorized investments). A huge dividend of $450,000 was paid to the widow, reducing the value of the company by 75%.

**A**: The intention of the testator was for his wife to continue living in the comfort to which she was accustomed, even if that required encroachment on capital. However, the court found that it wasn’t what he wanted above all else because of the clauses that required conservation of capital by the trustees. This indicated that the testator did not intend *in specie* enjoyment by the widow.

**D**: Apportionment was ordered.

**R**: When there is a trust for sale and a power to retain, the court must ask whether the power is a permanent power or whether the postponement is only until the trustee can sell advantageously. In the latter case, more is necessary to hold that the life tenant is entitled to income *in specie*.

Note: The dissent judges found equally sound reasons to find that the testator intended *in specie* gift to his wife🡪 this shows the difficulty with construing the intention of the testator.

### **Re Smith** **– inter vivos usually enjoy in specie**, because involves a will this case, testator’s intent taken into acct.

**F**: The father died and in his will, directed his son to place income from 1/4 of the shares towards the care of his mother. The son, Peter (PS), set up an *inter vivos* trust deed in which he gave a life interest to his mother and a remainder for himself. There was a power to retain. The yearly income was insufficient to maintain the widow. The trustee (Canada Trust) ignored her request for a variation of the investment portfolio that would yield more income. PS, the remainder beneficiary, was opposed to the trustee moving out of the Imperial shares. The trustee took PS’s side despite any really good reason to retain the shares.

**R**: To override the duty of impartiality, there must be clear intention to do so. A mere power to retain is not sufficiently clear.

**R2**: A power to retain (as opposed to a trust to retain) is not demonstrative of sufficiently clear intention to do away with the duty of impartiality.

**R3:** Although *inter vivos* transfers usually invokes a clear intent of partiality, it was not in this case because the intention of the settlor was not evident, resulting in an application to the rule in *Howe v Dartmouth*. (this is probably explained by the nature of the father’s will which led to this inter vivos transfer—quasi testamentary; precatory words)

## Impartiality – Settled Shares in a Company

When a company **distributes its largesse**, it may do so by giving **dividends** (income in the hands of shareholders) or it may **distribute more shares** (ploughing into capital). In the context of a power to retain (or a trust to retain), the **distribution of income is contingent upon how the company categorizes the dividend** (*Re Waters Estate*).

**However**, corporate intent (“form is substance”) is nevertheless **subject to the testator’s overriding intention**, particularly where the interest of a close family member are purportedly overridden by those of a relative stranger (*Re Welsh*).

### R**e Waters Estate 1956 SCC** – **form is substance**, the classification by company will dictate whether capital or income.

**F**: Company profits were capitalized into preferred shares and distributed to shareholders in lieu of dividends. When the preferred shares were given to the trustee, they were treated like capital.

**R**: **Form is substance**. The classification by the company will dictate its nature in the trust—capital or income.

### **Re Welsh 1980 ONSC** – **form is substance subject to testator’s intention**. esp involving family kid

**F**: The testator’s estate had settled shares in a company. He left a life interest for his 2nd wife, remainder for his kids from his 1st marriage. The wife remarried and died in 1979. The company liquidated all of its capital assets and distributed them as dividends. The wife’s kids from her 1st marriage and her 3rd husband argued that “form is substance” in an attempt to get the assets, depriving the children of the testator (the effect would be complete disinheritance).

**A**: Although the shares left the company in the form of dividends, they did not retain that character in the estate because that would have been in conflict with the testator’s intention: to care for the widow during her life and pass on the capital to the children. Therefore, although the settled shares left the company as income, they entered the trust estate as capital from which the widow could claim an income and, if necessary, encroach on capital.

**R**: The principle of law regarding corporate intent that “form is substance” is nevertheless subject to the testator’s overriding intention, particularly where the interest of a close family member are purportedly overridden by those of a relative stranger.

## Duty to Apportion Debts and other Disbursements

* Note rule in *Allhusen* then note it’s abolished by s. 10.
* S. 10 (Trustee Act) dictates that unless the testator says otherwise:
  + **Payments of debt are made out of capital alone**.
  + The life tenant may take all the income arising after the testator’s death *unless* the capital is insufficient to meet the estate’s liabilities.
* S. 144 of WESA says the same thing.

### **Allhusen v Whittel 1867** – originally, capital and 1st yr income together available to pay debts (**rule abolished)**

**R**: Debts must be apportioned from the residuary estate in a manner that is impartial to successive beneficiaries.

App’n: This requires that when the life tenant receives income upon the establishment of the trust, he or she must make a contribution to later payments. Debts (and legacies) are paid 1 year after the appointment trustee, so capital plus one year’s income were taken together as assets available to pay debts.

Note: Very difficult and expensive to apply so the rule was commonly excluded

### **s.10 TA** – **Allows income to go to LT unless capital not enough to pay debts (Abolished Allhusen)**

**10(1)** unless the will contains an express contrary direction

(a) personal representative of deceased, paying debts, disbursements – canʼt apply income of the estate toward payment of the capital of those disbursements

(b) until payment of the debts, disbursements – income from the property required for their payment must be treated and applied as income of the residuary estate, provided that, in the case where the assets of the estate arenʼt sufficient to pay disbursements in full, the income must be applied in making up the differenceprovided that, in any case where the assets of the estate are not sufficient to pay those disbursements in full, the income must be applied in making up the deficiency.

(2) Subsection (1) is deemed always to have been part of the law of British Columbia.

### **WESA s. 144** (Abolition Allhusen v Whittel) – **same as Tee act s.10**

**144 (1)** Unless the will of a deceased person contains an express direction to the contrary,

(a) the personal representative of the deceased person, in paying the debts, funeral and testamentary expenses, estate, legacy, succession and inheritance taxes or duties, legacies or other similar disbursements in relation to the administration of the estate of the deceased person, must not apply and must not be considered to have applied income of the estate in or towards the payment of any part of the capital of those disbursements or of any part of any interest due or accruing due on them at the date of death of the deceased person, and

(b)until the payment of the disbursements referred to in paragraph (a), the income from the property required for their payment, except for any part of that income applied in the payment of any interest accruing due on the payments from the date of death of the deceased person, must be treated and applied as income of the residuary estate,

but if the **assets of the estate are not sufficient to pay those disbursements in full, the income must be applied in making up the deficiency.**

(2) Subsection (1) is conclusively deemed to have always been the law of British Columbia.

(3) Despite subsections (1) and (2), if the personal representative has, before April 1, 1966, applied a rule of law or of administration different from subsection (1), the application is valid and effective.

Briefly: same as s. 10 Trustee Act

## Duties (and limits) to Provide Information

1. Historically: trustees **not accountable** to beneficiaries over **admin’ve matters**, therefore:
   1. **Don’t** need to **volunteer** info
   2. If *sui juris* beneficiary seeks info concerning nature of equitable interest, provide.
2. Today, beneficiaries increasingly have rights to require a trustee to provide info so that the beneficiary can hold an opinion as to whether the trust is being properly managed
   1. Includes info such as **trust accounts, investment portfolios, trust docs**., etc.
3. If **reasonable notice is given,** all reasonable info concerning management of trust property should be given.
   1. Reasonable info includes that which deals with issues relevant to both trustees and beneficiaries (e.g. how to construe a trust provision) *(Camosun*)
4. Nevertheless, beneficiary is **not entitled to access all info**:
   1. May not access info regarding the trustee’s exercise of a **discretionary** power *nor* **reasons** for a decision (e.g. agendas, correspondence b/w trustees (or beneficiaries), minutes of meetings, etc.) (*Londonderry’s Settlement*)
      1. Unless there is **bad faith**, then it may need to be disclosed by court order (*Londonderry’s Settlement*)
   2. May not access **info relevant only to the trustee** (e.g. solicitor correspondence giving info to trustee regarding a potential breach) (*Camosun*)
   3. *Schmidt v Rosewood*🡪 There’s **no right to disclosure of trust documents**. This rule is strongest when:
      1. Commercial or personal confidentiality is at stake
      2. Competing interests need to be balanced (dif beneficiaries, trustees, 3rd parties) (*Butt v Kelsen*)
      3. Applicant has no more than a theoretical possibility of benefit
         1. If the court does order disclosure, partial disclosure may be ordered in order to provide safeguards for above

### **Re Londonderry’s Settlements 1965 UK** – **B not entitled to disclose exercise of discretion**, subj to bad faith

**F**: The beneficiary had an interest in the distribution of income among a class of discretionary beneficiaries. She sought the agenda and minutes of the meeting in which the trustee’s discretion was exercised.

**A (policy)**: The rule is motivated by protection of confidentiality between beneficiaries and trustees. It is also aimed at ensuring that people will be trustees (if the rule didn’t exist, nobody would be a trustee)

**R**: A beneficiary is not entitled to documents covering the trustee’s exercise of a discretionary power of beneficiary selection nor to the reasons why a trustee arrived at a decision. Agendas, correspondence between trustees and trustees and beneficiaries, and minutes of trustee meetings are not subject to disclosure.

**R2**: Notwithstanding the above, trustees acting in bad faith may be obliged to disclose information based on a court order.

### **Schmidt v Rosewood Trust 2003 UK** – **affirms londonerry**, strongest if competing interest and unvested Bs

**F**: There was an off-shore tax-haven trust. The beneficiary was a possible object within a very wide power and sought info about the trust.

**R**: Affirms that a beneficiary has no right to disclosure of anything that can plausibly be described as a trust document. This rule is strengthened when there are issues with personal or commercial confidentiality, in which the court will need to balance competing interests of different beneficiaries, trustees, and third parties. To evaluate competing interests, the court will need to evaluate the claim of the beneficiary. If the applicant has no more than a theoretical possibility of benefit, it’s unlikely that disclosure will be ordered. If disclosure is ordered, there may be limits and safeguards.

### **Camosun College Faculty Assn v College Pension Board of Trustees 2004 BCSC**

**R**: Disclosure may be ordered when dealing with issues of benefit to both trustee and beneficiaries (e.g. how to construe a provision in the trust *not* an opinion to the trustee regarding a potential breach)

### **Butt v Kelsen 1952 CA** – disclosure beyond sh rights = depends on **exploit of trade secrets**

**F**: The trusts contained shares in a private company. Through their control of those shares, the trustees appointed themselves sole directors of that company. The plaintiff-beneficiary was unhappy with the management of the company and wanted to see documents which were unavailable to all shareholders. The trustees held that they could not disclose those documents because, as directors, they had duties to the company and minority shareholders.

**R (policy)**: Trustees who are directors of companies cannot be compelled to provide information flow beyond that available to all shareholders. To hold otherwise, beneficiaries would be able to exploit company secrets. However, beneficiaries may compel trustees to vote for the shares as directed and change articles of the company.

## Duty to Account

The Trustee is obliged to maintain records and also a duty to maintain accounts. The beneficiary has a right to inspect the accounts.

### **Sanford v Porter 1889 CA** – **account not entitled to instantaneous response**

**R**: Although a beneficiary is entitled to inspect accounts, they are **not entitled to instantaneous response**. There may be delays in transmission (although reduced with technology) or in maintaining currency and accuracy (arduous to expect on a daily basis).

### **Trustee Act, s. 99 (passing of trustee’s account**) – **trustee has 2 years to file accounts**

In the case of a will, the **trustee has 2 years from** the **date** of **appointment** (or granting of probate) to **file the accounts**.

# Trustees’ Rights

## Remuneration of Trustees

The **rule of equity** is that a trustee volunteers and is **unpaid**. Today, remuneration may be set out in:

1. Trust instrument (by settlor)
2. Under contract w/ *sui juris* beneficiaries (not advisable—vulnerable to undue influence attack)
3. By the court
   1. Court has inherent jurisdiction (*Boardman v Phipps*)
   2. S. 88 (1) of the *Trustee Act* –fair and reasonable allowance
      1. Fair and reasonable pay does not exceed 5% of gross aggregate value
   3. S. 88 (3) and *Sproule* – care and management fee
      1. It is only awarded for administration that is “above and beyond” (*Sproule*)
      2. This fee does not exceed 0.4% but courts prefer lump sum payments which are assessed with the following *Sproule* factors, as elaborated in *Pedlar*:
         1. The **value** of the estate **assets** administered
         2. The **nature** of the **assets** administered (types of investments)
         3. **Degree** of **responsibility** imposed on the trustee by the terms of the will, including the length and duration of the trust
         4. The time expended by the trustee in the care and management
         5. The degree of ability exhibited
         6. The success or failure in the care and management
         7. Whether or not some extraordinary service has been rendered

### **TA, s.** **88** – allowance 5% of gross aggregated value, management fee: 0.4% market value of assets

**88** (1) A trustee… is entitled to… a **fair and reasonable allowance, not exceeding 5% on the gross aggregate value**, including capital and income, of all the assets of the estate by way of remuneration for his or her care, pains and trouble…

(2) The court… may make an order under subsection (1) **from time to time**, and the **amount of remuneration must be allowed**… in passing his or her accounts, in addition to any other **allowances for expenses** actually incurred to which the trustee… may by law be entitled.

(3) A person entitled to an allowance under subsection (1) may apply annually to the Supreme Court for a **care and management fee** and the court may **allow a fee not exceeding 0.4% of the average market value of the assets**.

### **Re Sproule Estate 1979 ABC** court like **lump sum**/ **factors** considered, management fee only if **beyond bare T**

**F**: There was a large interest in shares that did not produce revenue. The beneficiaries argued for a lower fee since they argued that the trustee was little more than a passive custodian. The trustee argued that the care and management of high-value assets was inherently risky and required constant monitoring. The trustee argued for a remuneration based on a percentage of the asset value.

**P/H**: Trial J awarded $100,000

**D**: Award reduced to $30,000

**I**: How should the court assess an application for a **care and management fee**?

**R**: The court will prefer lump sum remuneration over percentage-based remuneration for a care and management fee. The court will consider the following guidelines in setting the remuneration:

1. The magnitude of the trust, including its value and its complexity
2. The care and responsibility arising under #1
3. The time required of the trustee to perform the duties
4. The skill and ability displayed by the trustee
5. The trustee’s success in administering the trust assets.

**R2**: Courts will only award a “care and management fee” for administration that is above and beyond.

### **Re Pedlar 1982 BCSC** – again **T bears onus to prove service performed**, factors considered.

**R**: To succeed in gaining a “care and management fee”, the trustee must give a general summary of the estate and the services performed in the care and management of same, including the factors set out in *Sproule*. If this is done, the trustee is not entitled to 0.4%--the court may determine an amount up to that maximum and the percentages to be applied to the income and capital, respectively.

**R2**: Reiteration/elaboration on *Sproule* factors:

1. The value of the estate assets administered
2. The nature of the assets administered (types of investments)
3. Degree of responsibility imposed on the trustee by the terms of the will, including the length and duration of the trust
4. The time expended by the trustee in the care and management
5. The degree of ability exhibited
6. The success or failure in the care and management
7. Whether or not some extraordinary service has been rendered

## Indemnification of Trustees

1. Beneficiaries who get all the benefit should also shoulder burdens (principle of equity)
   1. Trustees are entitled to indemnification for all debts incurred in execution of the trust (s.95).
   2. Unless there’s a good reason for trustee to be responsible instead:
      1. In circumstances were a trustee made an unnecessary payment due to poor performance of a duty, then the right to indemnification does not arise. However, courts generally try to indemnify the trustee (*Re Reid v Yorkshire*).

### **Trustee Act, s. 95** (Implied indemnity of trustees)

**95** A trustee… is answerable and accountable only for the trustee's own acts… and not for… any other loss, unless it happens through the trustee's own willful default, and **may reimburse himself or herself,** or pay or discharge out of the trust premises, **all expenses incurred** in… the execution of his or her trusts or powers.

### **Re Reid v Yorkshire and Canadian Trust 1970 BCCA** – **Bs might be tax free, but T in trouble**

**F**: The trustee paid taxes in the UK that exceeded the value of the trust. The remainderperson (and absolute beneficiary) argued against indemnification because the trustee allegedly had a “good reason” not to make those taxation payments to the UK. That good reason was the rule in *Harden,* that a foreign state is precluded from suing in Canada for taxes due under the law of a foreign state.

**A**: The rule did not apply because it only extends insofar as a foreign state attempts to extend its sovereign authority into Canada (or BC), which were no the facts of this case. Rather, the trustee was being held personally liable under UK legislation due to the type of trust. The trustee therefore paid out of his personal accounts and could seek indemnification.

**R**: In circumstances were a trustee made an unnecessary payment due to poor performance of a duty, then the right to indemnification does not arise. However, courts generally try to indemnify the trustee (as was the case here).

# Powers of Trustees

Trustee gets broad powers same as legal owner subject to laws – such as nuisance, by-laws. Also limited by good faith, and testator’s intention – freedom of property. **(Dispositive power =** select B)

To determine the powers of a trustee, look to:

1. The written trust instrument (settlor’s intent)
   1. Often, testator gives **power** to trustee to **advance sums** from capital to **assist** the **beneficiary**. The testator must do so fully conscious of fiduciary obligations:
      1. A transfer to a beneficiary in order to provide sum to repay trustee for prior incurred loan is not an exercise of good faith and is void (*Molyneux v Fletcher* – 1898)
      2. This may require the trustee to supervise the beneficiary to ensure that the money is being used for the purpose for which it was advance (*Re Pauling’s Settlement Trust* – 1964)
2. Common law precedents on managerial powers of owners
3. *Trustee Act* (all statutory powers unless excluded or curtailed by settlor):
   1. If subject to a trust for sale, power and discretion to choose the **form of sale** (e.g. public auction) and is exempted from good faith exercises of that discretion (ss. 5 and 6)
   2. Power to **appoint a solicitor/banker** to receive/discharge money (s. 7)
   3. Power to **insure property** (s. 8)
   4. Where expedient, power to **compound debts**, abandon debts, issue releases, and refer disputes over debts to arbitration; not liable to beneficiary for same (s. 9)
   5. **Spend money** (incl through loans) on **repairs or improvements** to prevent deterioration of land (s. 11)
   6. Power to **delegate specialist agents to invest** in accordance with investment objectives of trust, **ensuring due diligence in the selection of agents** (s. 15.5)
   7. Power to **vary investment decisions** (s. 22)
   8. Power to **exercise discretion** around **corporate management** and **reorganization** in respect of **companies to which shares relate** (s. 23)
   9. Power to apply trust property for the **maintenance and education of infants** (s. 24), including the sale of property if necessary because of insufficient income upon application to court (s. 25)

### **Trustee Act, s. 8** (power to insure property)

**8** (1) A **trustee may insure against loss or damage by fire any building or other insurable property to any amount**… not exceeding 3/4 of the full value of the building or property, and pay the premiums for that insurance out of the income of… any… property subject to the same trusts, without obtaining the consent of a person who may be entitled to all or part of that income.

(2) This section does not apply to… property that a trustee is bound to convey absolutely to a beneficiary promptly...

(3) This section does not authorize a trustee to do anything the trustee is in express terms forbidden to do…

# Control of Trustees

## Control By Settlor

1. Obviously terms of trust devise
2. But after trust is created, settlor cannot control trustee unless they’ve reserved the power (*Bill v Cureton*)

## Control by Beneficiaries

*Sui juris + vested in interest* beneficiaries may:

* Call on the trust (*Saunders*)
  + May have averse financial consequences - TSVA
* Combine w/ trustee to amend/redraft terms
* **Compel** trustees to **vote** for the shares as directed *or* change articles of the company (if they sit as directors) *Butt v Kelsen*
* May NOT compel trustees to exercise administrative powers in a particular way (e.g. appoint a certain cotrustee) – *Re Brockbank*

### **Re Brockbank 1948 UK** – **Power to appoint trustee cannot be controlled by Bs**

**F**: There were 2 trustees with a power to appoint a professional trustee. One was going to retire. The beneficiaries were pushing the continuing trustee to appoint a bank as a professional trustee; the continuing trustee refused.

**I**: Can the beneficiaries compel a trustee to exercise a discretionary power of co-trustee appointment? (*no*)

**R**: The power of trustees to make trustee appointments is not controllable by beneficiaries (and the court should not interfere with it either).

### **Butt v Kelsen 1952 CA** – disclose not beyond SH

**F**: The trusts contained shares in a private company. Through their control of those shares, the trustees appointed themselves sole directors of that company. The plaintiff-beneficiary was unhappy with the management of the company and wanted to see documents which were unavailable to all shareholders. The trustees held that they could not disclose those documents because, as directors, they had duties to the company and minority shareholders.

**R (policy)**: Trustees who are directors of companies cannot be compelled to provide information flow beyond that available to all shareholders. To hold otherwise, beneficiaries would be able to exploit company secrets. However, beneficiaries may compel trustees to vote for the shares as directed and change articles of the company.

### **Re Martin Estate** – disclose may go beyond SH if Bs holds controlling interest in company

## Control by the Courts:

**Advice and Opinion from Court**

1. Trustees can apply to court in chambers for an opinion, advice or directions on a question of management and administration of the trust property (s. 86(1))
   1. They must serve notice upon all interested parties (s. 86(2))
   2. In acting upon that advice, they are not liable unless they acted fraudulently or w/ wilful concealment or misrep when they sought the advice (s. 87)
2. Courts do not mediate stalemates between trustees (*Tempest*)
   1. Courts will give opinion on scope of fundamental trust powers/duties (*Re Wright*) but not on matters like the sale price of a trust asset (*Re Wright*)
3. The court will only provide an opinion if there is a serious, unworkable deadlock (*Re Billes*)

### **Trustee Act, s. 86** (**trustee may seek opinion/direction, must serve notice to all interested**)

**86**(1) A trustee, executor or administrator may… apply by petition to the court, or by summons… in chambers, for **the opinion, advice or direction** of the court on a question respecting the **management** or **administration** of the **trust property** or the assets of a testator or intestate.

(2) The application under subsection (1) **must be served on**, or the hearing attended by all persons interested in the application, or by those that the court thinks expedient.

### **Trustee Act, s. 87** **(trustee acting on court opinion is not liable**, except w/ fraud or misrep to ct)

**87** (1) The trustee… acting on the opinion, advice or direction given by the court, is deemed… to have **discharged** his or her **duty** as trustee… in the subject matter of the application.

(2) This Act does not extend to indemnify a trustee… in respect of an act done in accordance with the opinion, advice or direction referred to in subsection (1) if the trustee… has been guilty of fraud, willful concealment or misrepresentation in obtaining the opinion, advice or direction.

### **Trustee Act, s. 75** (**beneficiary seek court intervention** – stock transfers)

A person entitled… for an order from the court may present a petition to the court for the order to which the person thinks he or she is entitled, and may give evidence… before the court, and may serve notice… on any person…

Effect: the beneficiary may seek court intervention in stock transfers if they think they are entitled under the trust

### **Tempest v Lord Camoys 1882** – courts **not mediate stalemates** and force hand of tee **unless unworkable**

**F**: The trust had 2 trustees and a power to sell realty. The beneficiaries wanted to mortgage the realty and use the proceeds to purchase Bracewell Hall, which had been a family home for 500 years and had returned to the market. One trustee approved, the other withheld consent.

**R**: **Courts** **do n**ot want to **mediate stalemates** between the decisions of trustees. Where there is no agreement, they will not intervene to force the hand of one trustee.

### **Re Wright 1976** – **don’t come to court for price issues**

**F**: There were 400,000 shares in an insurance company and the trustees agreed to sell them. There was an offer to purchase but 3 trustees rejected because they had expert advice that the price was too low. Canada Permanent Trust, another trustee, app’d to court for advice and direction and an order for sale.

**D**: Application refused.

**R**: Trustees, acting honestly and with due care, must exercise the discretion reposed on them and not shift it to the court simply where there is disagreement on price (*cf* disagreement about fundamental scope of powers which would be appropriate for court).

**R2**: A disagreement over the adequacy of a sale price is insufficient to warrant court intervention.

### **Re Billes 1983 ONSC** – only **serious deadlock will court intervene, serious and undermines the trust**

**F**: The testator left shares in Canadian tire which were work $51.5 million in 1983. The testator left the estate to his widow and children (and grandkids through kids) and some charities. On the death of the widow and children, the capital was to be divided among 23 charities. Some of the charities were dissatisfied w/ the income stream of 2.2%. National Trust suggested selling shares and diversifying trust assets in order to reduce the risk of concentration in CT, enable greater income for beneficiaries, and bring stability to the capital value. The widow and son adamantly opposed the proposal. The son was a franchisee and director of CT.

**A**: The court accepted the proposal of National Trust, in part because it would remove the conflict of interest w/ the son. It ordered the sale of the shares at “an advantageous and beneficial” time.

**R**: Only in cases of serious deadlock between trustees will the court step in to control the exercise of discretion reposed in the trustees by the testator.

**Intervention when the Trustee is outside of the trust purpose**

### **Schipper v Guaranty Trust of Can 1989 ONCA** – if **exercise discretion incons with purpose of T = Interven**

**F**: The testator gave GT (trustee) an “uncontrolled discretion” to administer and manage the trust for the general welfare, benefit, comfort, and enjoyment of the wife. The wife wanted to encroach on capital. All of the residuary beneficiaries were in unanimous consent. Two trustees approved; GT refused, choosing instead to preserve capital for future contingent beneficiaries.

**R**: The court will generally refuse to interfere with the “uncontrolled” discretion of a *bona fide* trustee; however, it will **interfere** if the trustee is attempting to exercise discretion in a manner inconsistent with the purpose of the trust.

**Where the trustee fails to be even handed**

### **Re Fleming 1973 ONSC** – **intervene if thinks need of even-hand**

**F**: The wife had renounced her right to encroachment. She was getting very low-yield returns. The trustees were faced with deciding how to distribute a surplus of income, in consideration of (i) tax consequences, (ii) prospect of future income enhancements, and (iii) the need to be even handed.

**R**: Despite the general principle that the court will not relieve trustees from their duty to exercise their discretion honestly and intelligently, the court here stepped in to order the trustee to exercise discretion in a particular way that would favour the life tenant who had been previously short-changed.

## Ousting Court Jurisdiction

Ouster terms: Terms in a trust which attempt to **oust** courts are **invalid as against public policy** (*Re Wynn*; *Jones v Shipping*). However, the power to adjudicate matters of *fact*, rather than law may be validly conferred on trustees—it can help to clarify semantic uncertainty (*Re Tuck’s Settlement*).

Privative clauses (shield liability):

1. Trustees must act according to trust law and are subject to court supervision (*Re Poche*)
2. PCs can’t shield liability where the trustee has been dishonest, grossly negligent, or in willful breach of trust (*Re Poche*)
3. PCs won’t shield dishonest trustee or trustee who failed to (*Boe v Alexander*):
   1. Exercise a discretion at all
   2. Exercise the level of prudence expected from a reasonable business person
   3. Act impartially b/w classes of beneficiary
   4. Or acted in a manner prejudicial to the interests of the beneficiary

### **Re Wynn 1952 UK** – **can’t oust court** on review of will

**R**: Attempts to oust the court from review of a will is invalid as contrary to public policy.

### **Re Tuck’s Settlement 1978 UKCA** - 3rd party decide semantic uncertainty, but **if unreasonable, c/t will intervene**

**F:** The will contained a Jewish faith clause in which the “Chief Rabbi of London” was empowered to determine “conclusively” whether an “approved wife” met the condition set out by the testator.

**R**: The testator may validly designate a third party to conclusively decide matters of fact where semantic uncertainty arises; however, if that third party is wholly unreasonable or engages in misconduct, the court retains jurisdiction to intervene.

### **Boe v Alexander 1987 BCCA** – **PC can’t block JR if dishonesty**, 4 factors

**F**: a pension plan administered by trustees gave wide authority to determine all Qs of coverage, eligibility, and methods of providing or arranging benefits. Any good faith determination was binding on all parties. The pension plan was established under a collective agreement in which contributions were to be made by employers only. The trustees also took contributions from some members. The trustees relied on their exclusive jurisdiction under the plan to make determinations that were final and binding on all parties.

**R**: Privative clauses are ineffectual to prevent JR where the trustees have acted dishonestly or failed to:

1. Exercise a discretion at all
2. Exercise the level of prudence expected from a reasonable business person
3. Act impartially b/w classes of beneficiary
4. Or acted in a manner prejudicial to the interests of the beneficiary

### **Re Poche 1984 AB QB** – **exculpatory clause will fail** if Tees acted dishonestly, gross neg, willful breach

**F**: Sister of deceased was made the trustee. The sister was incredibly incompetent. She didn’t do anything! The widow had a life estate, remainder to their daughter. The trustee was found to be grossly negligent. The trust included an exculpatory clause to shield her from liability.

**D**: Breach of trust; trustee removed

**R**: Trustees must act according to the law of trusts and are subject to court supervision. Settlements that purport to shield liability through exculpatory clauses will fail where the trustee has been dishonest, grossly negligent, or in willful breach of trust.

### **Jones v Shipping Fed’r of BC 1963 BCSC** – **cannot use clause to completely oust court**

**F**: A pension plan in favour of the plaintiffs (longshoremen) was funded entirely by the defendant shipping company. The arrangement stated that “no person other than the Fed’r may require an accounting or bring an action against the trustee w/ respect to the said Plan… or its actions as trustee.”

**R**: The court will not allow the trust to contain a clause which entirely ousts the jurisdiction of the court.

# Fiduciaries and the Constructive Trust (CNT)

## Why do you want a CNT?

**CNTs give an *in rem* right.** It is imposed by law. The justification is for the necessary good conscience of the court of equity. Not intended to be as elaborate as express trusts, but merely intended to do justice in a specific situation.

**In rem right** gives Plaintiffs 1) equitable interest in the property as B. can call for property under Saunder v Vautier 2) get property from insolvent Ds. Get priority 3) the ability to “trace” so that they can get their property against the defendant and third parties (exception, *bona fide* purchasers for value). 4) claimant entitled to any increase in value in property accumulated.

The effect of CNT is remedial, imposed by court as good conscions demands

## Is there a Fiduciary Relationship? Does a CNT Arise?

**Similarities between CNT, ET, RT**

* You have 1) property/assets, 2) split into legal and equitable title, and 3) reposed them into different ppl
* Fiduciary duty/ note unjust enrichment doesn’t have this duty

1. What type of fiduciary relationship?
   1. **Institutional** constructive trusts emerged with respect to certain collapsed relationships where the courts of chancery felt a fairer distribution of property was required.
      1. **Fiduciary *per se***: relationship where Court routinely and consistently imposed CNT, trust exist based on transfer of property, name references the person whom fiduciary duty imposed upon. Just have to prove these relationships, then a fiduciary duty will be imposed
         1. Disloyal trustee (*Keech v Sanford*)
         2. Faithless directors (e.g. directors making profits at the expense of their company)—or top management (*Canaero*)
         3. Delinquent agent-principal
         4. Solicitor-client
         5. Overreaching partners
         6. Bribers and corrupt officials
         7. Undue influencers
         8. Breach of confidence tricksters
         9. Intermeddlers in trusts
         10. Abusive parents: child (*M(K) v M(H))*
         11. Doctor: patient (where the DR gains title through undue influence)
         12. Vendor-purchaser (purchase of land under enforceable K gives latter equitable interest effective at the date of sale even if formal transfer has not occurred, *Re Rose*)
         13. Informal mortgagor-mortgagee
         14. Even if rel’nship fits into category, it must **relate to particular transaction at the time** (*Galambos v Perez*)
         15. **Institutional and Non-Delinquent**: Vendor’s holding of shares sold and awaiting registration: constructive trustee for buyer (*Menard v. Menard)*
         16. **LT** fiduciary duty to Remainder – (*Mayo v. Leitovski)*
      2. ***Ad hoc* fiduciary**: this doesn’t fit into the categories above, but an assessment of the relationship leads to a fiduciary relationship
         1. “The categories of fiduciaries should not remain closed” (*Guerin*)
         2. *Assessment*
            1. Fiduciary has scope for the exercise of discretion or power (*Lac Minerals*)
            2. Fiduciary can unilaterally exercise that power/discretion in a way that affects the legal or practical interests of the beneficiary (*Lac Minerals*)
            3. The relative legal positions of the parties are such that one party is **vulnerable** or at the **mercy of another’s discretion** (*Guerin)*

Vulnerability is *necessary* (majority – *Lac Minerals*)

Vulnerability is indicative but not conclusive (dissent – *Lac Minerals; Hodgkinson*)

* + - 1. Even without vulnerability, if there is a “power-dependency rel’nship” in which one places trust + confidence in the expertise of another, while the latter assiduously fosters that trust and gives advice🡪 exercise of power (*Hodgkinson*)
  1. **Relationship of unjust enrichment**:
     1. Test in *Pettkus*:
        1. An enrichment by the defendant
        2. A corresponding deprivation by the plaintiff (w/ causal cxn to #1)
        3. Absence of any juristic reason to explain or justify the enrichment

1. Does a CNT arise?
   1. If a fiduciary *per se* or *ad hoc* fiduciary is found, the court has no discretion but to find a CNT (**institutional CNT**)
   2. If unjust enrichment is found, the CNT arises with the court order (**remedial CNT**)
   3. *Soulos* (1997 SCC)—repeated in *Sun Indalex* (2013):The unifying concept behind a CNT is good conscience. It may apply absent an established loss in order to (a) condemn a wrongful act and (b) maintain the integrity of the trust relationship. The test is:
      1. (1) D must have been under an equitable obligation in relation to the activities giving rise to the assets.
      2. (2) D gained possession of the assets due to a breach of an equitable obligation to P in the course of D’s agency activities for P
      3. (3) P must have a legitimate reason for seeking a proprietary remedy (personal or broader policy reason to ensure other defendants remain faithful in their duties)
      4. (4) No factors which would render imposition of a CNT unjust in all the circ.s of the case (e.g. interest of intervening creditors; third parties)
   4. A CNT disgorges the disloyal fiduciary of all the profits, even when there was no loss (*Boardman v Phipps*)

## Fiduciary *Per Se* (institutional CNT)

### **Keech v Sanford 1726** UK -

**F**: A testator left a lease for an infant. The trustee applied to have the lease renewed for the benefit of the infant. The landlord adamantly refused. The trustee liked the lease and obtained it for himself. The infant brought an action to have the lease assigned to himself.

**A**: The court did not find fraud. The trustee is the only one who could not have the lease. This strictness is necessary for policy reasons. Otherwise, many trustees would seek it for their benefit instead of the beneficiary.

**D**: The lease was assigned to the infant. The testator had to also give profits to infant beneficiary.

### **Canadian Aero Services (Canaero) v O’Malley** 1974 SCC: agent/employee to company = Fiduciary duty

**F**: Wells (director), O’Malley (president), and Zarzycki (VP) were all employees and senior officers at Canaero. W quit. W persuaded O’M and Z to float and join a new company (Terra) that competed with Canaero. They did and Terra won a government K ($2.3 million), beating out Canaero.

**COA:** Canaero sued, arguing breach of fiduciary duty through conflict of interest.

**D:** Decision for Canaero

**Remedy**: Z and O’M had to disgorge their profit (set at $125,000)

**A**: O’M and Z had not acted in bad faith but by acting as “faithless fiduciaries”, defaulting Canaero of the opportunity, they had to disgorge profits.

**R**: Senior officers in “top management” positions are treated the same way as directors w/ respect to their fiduciary responsibilities—they are not mere employees.

**R2**: Faithless fiduciaries who profit through a conflict with the person to whom the duty is owed, will be disgorged of their profits.

**R3**: Relaxation of the strict rule against conflict, assessing the directors conduct against (i) the position held, (ii) the nature of the opportunity missed, (iii) the ripeness of the opportunity, (iv) the relation of the director to the opportunity, (v) the amount of knowledge possessed, (vi) the circs in which it was obtained, (vii) was it a private or special opportunity, (viii) time frame that breach occurred w/ respect to employment, and (ix) the circs under which the employment rel’nship was terminated—retirement, resignation, discharge.

### **Menard v. Menard** - Vendor’s shares awaiting registration, **Vendor holds CNT for B**

### **Mayo v Leitovski** - **LT has fiduciary duty to Remainder**, fiduciary or else CNT.

**F:** son give LT to mom, and remainder of son sold to Mayo. Mom didn’t pay property tax, municipality sold it, the son bought the home and remainder in fee simple, gave fee simple to mom. Mayo was left out in this. Mayo sued,

**R:** court said, Mom – the LT had a fidiciary duty to remainder. Therefore Mayo gets remainder.

**Note:** must have trace to **A PROPERTY**. Without trace to a property, no point in arguing CNT

## *Ad Hoc* Fiduciaries

### **Guerin v The Queen 1984 SCC** – ad hoc fiduciary est if one party **at mercy** of another’s discretion

* The nature of a relationship may give rise to a fiduciary duty. The categories of fiduciary should not be considered close. These fiduciaries are quite apart from *per se* fiduciaries where a specific category of actor gives rise to a fiduciary duty.
* The **hallmark** of a fiduciary relationship is the **relative legal positions of the parties** which are such that **one party is at the mercy of the other’s discretion**. Fiduciaries obligations control the discretion. (dependent)
* Where by **statute, agreement, or unilateral undertaking**, one party has an **obligation** to **act for the benefit of another**, and that obligation carries with it a **discretionary power**, that party is empowered to become a fiduciary.
* Gov’t only party that can control the contract, only way could be done through gov’t, **therefore musquin is at the mercy and subject to the discretion**, vulnerable of the actions of the federal gov’t – this is classical fiduciary situation, this is where all the CT characteristic comes in play including equitable damages – either In Rem or CT on the property or equitable damages (quite close to in rem).

### **Re Frame v Smith 1987 SCC** – ad hoc fiduciary = **must have vulnerability**

L: Wilson, in dissent: A fiduciary obligation will be imposed when:

1. The fiduciary has scope for the exercise of some discretion or power.

2. The fiduciary can unilaterally exercise that power so as to affect the beneficiary's legal or practical interests

3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

### **Lac Minerals v International Corona Resources 1989 SCC –** is vulnerability required? – split court

**F**: Corona begins negotiations with LAC to purchase a piece of land a develop a gold mine on it together. C informs LAC of the geological study they have done that indicate gold is on the property. LAC purchases the property for themselves. Breach of contract damage not enough. C wants equitable damages claimed breach of fiduciary duty and wants CT.

**I**: 1) Was LAC in a fiduciary position towards Corona? 2) in rem damage CT + (equitable damages)

**L**: For 1st issue: Sophinka and Major said – you can’t get fiduciary duty from 2 sophisticated companies, none is vulnerable or at mercy at another. Therefore can’t be fiduciary duty – therefore no CT. La forest and Wilson says you can have fiduciary here – because there is dependency here. Dependency coupled with some vulnerability leads to fiduciary duty therefore yes to equitable damages. The last judge – Lamer said no fiduciary here, but agreed on equitable damage….

**La Forest** (there is dissent on this issue): **Vulnerability** is not a necessary agreement to finding a fiduciary relationship. Rather, the "issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other." The essence of the fiduciary relationship is the "preservation of desired social behaviour and institutions." There are three categories in which a fiduciary relationship can arise:

1. Presumed, in certain classes of relationships (directors, trustees, agents)

2. Arising out of the facts of this specific relationship, like here.

3. An instrumental use of the term. Not appropriate because it "reads equity backwards".

**Sopinka**: Although not all of Wilson's characteristics (from Frame) are necessary, dependency **vulnerability** is absolutely required. The dependency that usually attracts a fiduciary duty is the parent child or priest-penitent type scenarios. This may exist between corporations, but not between large, experienced businesses with access to experts and lawyers.

A wrongdoing that would arise in a fiduciary relationship does not cause a fiduciary relationship to exist – so a breach of confidence may be a breach of fiduciary duty where there is an existing fiduciary relationship (lawyer-client), but a breach of confidence alone does not CREATE a fiduciary relationship.

**Lamer**: Agrees with Sopinka regarding the existence of a fiduciary relationship.

**Wilson: Although a fiduciary relationship may not exist between parties, a fiduciary duty may arise out of specific conduct engaged in by them. Thus, in this case, when Corona disclosed confidential information to LAC, LAC became subject to a fiduciary duty with respect to that information.**

**C**: Sopinka's analysis of a fiduciary duty is in the majority. Wilson says the innocent party should be given the best remedy - La Forest says damages were too unreliable/problematic. **So remedy was fiduciary** **remedy RCT = in Rem right in property.**

### **Hodgkinson v Simms 1994 SCC** – Ad Hoc rel’ship **may result in absence of vulnerability** – minority says no

**F**: The appellant was a stock broker who was inexperienced in tax planning. H was very successful and quite smart. He wanted independent professional advice respecting tax planning and sheltering so he hired Simms, the respondent. S specialized in providing general tax shelter advice, but particularly on the basis of MURBs. H relied heavily on S. S told H to invest in MURBs (multiple unit residential buildings), a real estate investment project for which S was acting. S did not disclose to H that he was acting for MURBs at the relevant time. H lost a lot of money during the 1980s recession. This was so despite the government pamphlets that suggested great returns. After discovering S’s interest, H alleged a breach of a fiduciary duty and a breach of K against S in the performance of his K for investment advice due to material non-disclosure. H wanted to be put back in the same position.

**P/H**: At the BCSC, the trial J allowed his action for breach of fiduciary duty and breach of contract and awarded him damages.

The BCCA upheld the trial judge on the breach of contract issue, but reversed on the issue of fiduciary duties. It also varied the damages award, setting damages at an amount equal to the fees received by respondent accountant from the developers on account of the four projects, prorated as between the various investors in those projects.

**D**: Appeal allowed

**Majority** **analysis** (La Forest, Gonthier, L’H-D plus supported by Iacoboucci): H was vulnerable due to his reliance on S for guidance. **Vulnerability is a golden thread but is unnecessary** (as in LAC). The existence of a K does not preclude fiduciary obligations. A broader definition of fiduciaries so that categories of fiduciaries are not closed is necessary to ensure the integrity of the marketplace.

**R**: Broader group of relationships that may result in a fiduciary are **“power-dependency”** relationships. When one party places trust and confidence in the expertise, loyalty, or confidentiality of the other in order to make business decision, this gives rise to a fiduciary relationship. If one party places trust and reliance on the other, who assiduously fosters that trust, the latter’s advice is in substance an exercise of power or discretion.

**R2**: *Ad hoc* fiduciary relationships may result in the absence of vulnerability (dissent disagrees).

**Dissent analysis** (Sopinka, McLachlin, Major): H put trust and confidence in S and relied on S to make business decisions. This was a fiduciary relationship that S breached in failing to disclose his pecuniary interest in the MURBs. Analytically, they held that **vulnerability remained essential.**

**Note:** in this case, equitable remedy – he doesn't want in rem rights (CT) (condos worth nothing) he wants equitable remedy.

If you don’t want CT you get equitable remedy.

Galambos v. Perez***:***

**“The fiduciary’s undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or simply an undertaking to act in this way….The critical point is that in both *per se* and *ad hoc* fiduciaries, there will be some undertaking on the part of the fiduciary to act with loyalty.”**

### **M(K) v M(H) – 1992 SCC –** **Parent child is fiduciary in ad hoc**

**F**: The plaintiff sued her father for damages arising from incest — both in tort and the law of fiduciaries.

**R**: The parent-child relationship is a traditional head of fiduciary obligation. The victim-child had a right not to personal injuries beyond those from reasonable parental discipline. The sexual abuse was a breach of fiduciary duty.

### **Galambos v Perez 2009 SCC** – Ad hoc 1) statute,2)terms in k 3) undertake fiduciary4) **vulnerability is key**

**F**: P was an office manager in G’s law firm. P was also G’s client for a couple of transactions. G was a lawyer. G was having severe financial difficulties. P made voluntary cash advances of $200,000 to G. She often made cash advances to G’s creditors without informing G beforehand. G had instructed P to repay herself with interest on one occasion. G went bankrupt. P was an unsecured creditor; she received nothing. P sued G for a breach of fiduciary duty. She wanted to assert an *in rem* right in the money she handed over.

**A**: P was not vulnerable and had not relinquished decision-making power to G. Despite there being a solicitor-client rel’nship w/ regard to prior transactions, that did not create a generally applicable fiduciary *per se* relationship.

**R**: Not all power dependency relationships are fiduciaries. Even if the relationship may fit into a fiduciary relationship *per se*, it must relate to the particular transaction at issue.

**R**: In assessing whether *ad hoc* fiduciary obligations arise, the court must look to the circumstances of the case in order to establish whether a power-dependency relationship based on the weaker party’s reasonable expectation and the mutual understanding of both parties that one must act for the interests of the other. The inquiry focuses on the position**/vulnerability** of the parties which results *from the relationship* (rather than from external factors which pre-date the rel’nship). They also require an undertaking of loyalty and one party must have discretionary power to affect the interests of the other.

### **Elder v Alberta 2011 SCC** – **Final test for Ad hoc**:1) undertake best int of B 2) **vulnerability\*** 3) adverse to B

**R:** “In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship ...  
(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;

(2) a defined person or class of persons vulnerable to a fiduciary’s control (the beneficiary or beneficiaries); and

(3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary’s exercise of discretion or control.”

* Vulnerability issue resolved, now Vulnerability is key to ad hoc

### **Sun Indalex LLC v United Steelworkers 2013 SCC** –yes ad hoc fidu on undertaking or statute but trumped by fed statute

## Unjust Enrichment: A New Circ for CNT

### \***Pettkus v Becker 1980 SCC** – rules for unjust enrichment and remedial CNT 3 factor test.

**F**: Two newly landed immigrants cohabited for 20 years, building up their farms and beehive business from nothing. They became quite wealthy. The plaintiff wanted to marry the defendant but he didn’t want to; however, they continued to cohabit. The defendant kept all of the assets in his name and made it clear that he intended to do so. The plaintiff contributed her efforts and money to the farm, including her salary and domestic work. The couple split. The defendant kept everything, giving the plaintiff some relatively worthless crap.

**A:** There was clearly no common intention for the two to share equally so the UK “common intention trust” could not be made out. The court ordered a CNT for the plaintiff, held by the defendant, wherein she got a share of the property. They used the doctrine of unjust enrichment.

**R**: The test for unjust enrichment is:

1. An enrichment by the defendant
2. A corresponding deprivation by the plaintiff (w/ a causal cxn to #1)
3. Absence of any juristic reason explaining or justifying the enrichment

## CNT

### **Soulos v Korkontzilas** **1997 SCC** –A CNT can apply in absence of loss. 4 tests.

**F**: K was a real estate broker, acting as an agent for S. S made an offer to buy a building from a 3rd party seller. Once the agent and seller agreed on the price, K instructed his wife to buy the property with the name “Panagiota Goutsoulas” then convey it to Panagiota and Fotios Korkontzilas. S found out and sued. The property apparently had a special value to him.

**P/H**: At trial, a breach of the duty of loyalty was established but the trial judge found no enrichment of K (he bought the property at market value) so he declined to find a CNT. ONCA reversed the decision. K appealed to the SCC.

**D**: Appeal dismissed. (K held as a trustee on a CNT for S)

**Analysis**: This is a breach of a *per se* fiduciary (agent-principal). It was wrong but P really suffered no loss. D paid the fair market price for the property.

**R1**: The unifying concept of CNTs are “good conscience”. Unjust enrichment is not sufficiently broad. Under the broad umbrella of good conscience, a CNT may be found due to (i) a wrongful act like fraud or breach of duty of loyalty or (ii) unjust enrichment and corresponding deprivation.

**\*R2**: A CNT may **apply absent an established loss** in order to condemn a wrongful act and maintain the integrity of the relationships of trust. This is based on broader concept of “good conscience”. The test is:

(1) D must have been under an equitable obligation in relation to the activities giving rise to the assets.

(2) D gained possession of the assets due to a breach of an equitable obligation to P in the course of D’s agency activities for P

(3) P must have a legitimate reason for seeking a proprietary remedy (personal or broader policy reason to ensure other defendants remain faithful in their duties)

(4) No factors which would render imposition of a CNT unjust in all the circ.s of the case (e.g. interest of intervening creditors; third parties)

**Note: When property has been acquired in such circumstances that the holder of the legal title may not**

**in good conscience retain the beneficial interest, equity converts him into a trustee**."

### **Boardman v Phipps 1972 HL – equitable damages can include disgorgement where no loss**

**F**: A trust consisted of a controlling interest in a well-performing company (Phipps & Son) and a minority shareholding in a poorly managed company (L & H). The trustees wanted to do something about the latter. They contacted their solicitor, Boardman. B and one beneficiary, TP, attended L&H meetings. They received a lot of valuable insider knowledge about L&H and on that basis, suggested that the trustees acquire a controlling interest in L&H and change its fortunes. The trustees declined, finding it to be a risky investment, contrary to the terms of the trust. B and TP then bought the shares with their own money. All of the trustees were supportive. The beneficiaries were also advised of B and TP’s strategy of enriching L&H. Their move was very beneficial to them. The beneficiaries also benefitted in having L&H in competent hands—they received favourable dividends. However, one beneficiary, JP, was dissatisfied and **sought an order requirement the disgorgement of profits by placing a CNT** on the shares as a consequence of the breach of the no-conflict rule.

**D**: Decision for JP, CNT ordered.

**A**: TP and B acted in good faith. They put their own money at risk when they pursued the shares. Nevertheless, they acted as fiduciaries in their attendance at the meetings and used trust property (knowledge) for their own benefit without “informed consent of the beneficiaries”.

**R**: Information and knowledge attained in the course of acting in a fiduciary capacity will be held to be trust property.

**R2**: This case is an example of a strict approach to the rule that fiduciaries cannot profit from their position w/o the informed consent of beneficiaries. The rule operates so that even when there is no real conflict, the duty of loyalty may still be breached.

**R3**: The remedy for a breach of the duty of loyalty when the trustee breaks the rule against conflicts results in **disgorgement of profits**, even where beneficiary has had no losses (and has actually gained) due to the impugned acts of the trustee.

### **Sun Indalex LLC v United Steelworkers 2013 SCC** –yes ad hoc fidu on undertaking or statute but trumped by fed statute

**F**: Indalex sponsored and administered 2 employee pension plans, one for salaried employees and one for executive employees. Indalex became insolvent. It sound protection from creditors under the *Companies’ Creditors Arrangement Act*. With the approval of the *CCAA* court, Indalex sold its business to a purchaser who did not assume pension liabilities. The proceeds were not sufficient to pay back debtors. The reorganization by the CAA court seemed to ignore the pension plan members. The plan members challenged the priority granted in the *CCAA* proceedings.  They claimed that they had priority in the amount of the wind‑up deficiency by virtue of a statute and a CNT arising from Indalex’s alleged breaches of fiduciary duty as administrator of the pension funds.

**P/H**: Trial judge dismissed the plan members’ motions concluding that the deemed trust did not apply to wind up deficiencies.  He held that, with respect to the wind‑up deficiency, the plan members were unsecured creditors.

The decision was reversed on appeal. The CA held that the pension plan wind‑up deficiencies were subject to deemed and constructive trusts which had priority over the financing priority and over other secured creditors.  In addition, the Court of Appeal rejected a claim brought by the United Steelworkers, which represented some members of the salaried plan, seeking payment of its costs from the latter’s pension fund.

**D**: Appeal allowed (for Indalex). Cross-appeal by United Steelworkers was dismissed.

**A**: a CNT was unavailable b/c proprietary remedies are generally awarded only w/ respect to property that is directly related to a wrong or that can be traced to such property. The conditions are:

1. the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands;
2. the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;
3. the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and
4. there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

### **Kerr v Baranow 2011 SCC** – **default- money compensation**, if want must propriety interest(CT) must demonstrate.

**L**: In applying the test for unjust enrichment, the third stage requires full consideration of all the factors, including the autonomy of the parties and their legitimate expectations. There are established categories of jurisitic reasons include contract, disposition of law and donative intent. The defendant can attempt to raise and show another juristic reason to deny recovery.

A successful claim of unjust enrichment can give rise to damages or a constructive trust.

* Damages are usually appropriate and should be assessed flexibly.
* In order to obtain a constructive trust the plaintiff must 1) identify the property and 2) show a substantial link between their contributions and the property at hand.3) Further, they must show why a monetary award would be insufficient. The extent of the interest should be proportional to the plaintiff's contributions.

Factors in determining whether there is unjust enrichment in a joint family venture:

* Mutual effort, economic integration, actual intent, priority of the family.

Note: Quantum meruit = quasi contractual approach – not used unless clear it is service – problem is hard to list all service

# Chapter 9: Remedies For Breach

## Personal Remedies:

1. Advice and Direction (see *Trustee Act*)
2. Specific performance and injunctive relief
   1. Specific Performance awarded to enforce the terms of the trust
   2. Injunction – preventative: stops trustees from pursuing a course of activity that will have a negative impact on the trust property and/or the beneficiary
3. Compensation for loss

## Compensation for Loss

If a breach has occurred and is attributable to the trustees, they are liable to return the trust estate to the same position. This means full restitution (“equitable compensation”). This is to address circ.s where a trust asset may not be avl. (e.g. bona fide purchaser for value w/o notice; *Guerin*).

Damages are not subject to CL principles like remoteness or mitigation. Causation is very generously and easily found, with limits (*Canson*).

Losses may be set off (repealed s. 15.4 TA) by gains despite the common law stance that they could not (*Re Deare*).

### Guerin v The Queen –restitutionary damage, restore estate the money equivalent of value of estate + lost opportunity

**F**: Fed’l Crown, contrary to Band instructions, negotiated lower-than-mkt rent in a long lease w/ Shaughnessy Golf Club. The Crown, following the requirements of the Royal Proclamation of 1763 had interposed itself between the Musqueam and the Shaughnessy Golf Club with regard to Musqueam’s interest in their reserve land.

**R (fiduciary duty):** On account of the Royal Proclamation, a fiduciary duty arises in the surrender process. Crown had a fiduciary role.

**R2 (assessment of damages)**: Where restitutionary relief is given instead of placing the property in a constructive trust then that relief requires the defaulting trusteeto restore the estate the money equivalent of the value of the assets, assessed at date of restoration (not at date of deprivation). The damages were also based on the lost opportunity of residential development at the date of trial (w/ presumption given effect w/o Band proof).

### Canson Enterprises v Boughton 1991 SCC – P’s own unreasonable or common sense causation can prevent P to damage

**F**: The fiduciary solicitor was handling a real estate transaction and failed to disclose to a client-purchaser that there was a secret profit to be made by a third-party-client ($115K). Later, the building fell apart due to faulty engineering.

* Much easier to sue Lawyer than Engineer, because Engineer couldn’t be found. But the building didn’t fall apart due to Lawyer’s fraud, but the rationale was that if Lawyer disclosed 3rd party, P might not have bought it. (P argued that damage not limited to caused damage (115k) – he is responsible for all)

**A**: The purpose of equitable damages is to restore the person to whom the breached duty is owed to the position they would have been in had the breach not occurred. This flows from equity which seeks to deter persons from acting against the conscience of the court.

**D**: Lawyer liable for $115K but not for the fault attributable to the engineers. Machclin said: well he can’t be liable for all the damages…

**R**: Compensation in equity leads to restoration or restitution. Equitable remedies is sensitive to policy and will seek to deter persons from acting against the conscience of the court. However, equitable remedies may be reined in based on (i) losses stemming from the plaintiff’s unreasonable act and (ii) common sense causation which prevents the plaintiff’s claim.

* Foreseeability not necessary—full benefit of hindsight
* *But*, must only compensate for damages where there is a common sense view of causation
* Mitigation is not necessary but P cannot act clearly unreasonably and ask for damages flowing from that unreasonable behaviour

## Accounting for Profit (“Disgorgement”)

May not be combined w/ a claim for equitable compensation. Disgorgement is based on (i) duty of trustee to account (disclose dealings through periodic financial statements and distribute those accounts to beneficiaries) may be compelled by court *and* (ii) a fiduciary is not entitled to have a conflict (and sometimes not to make a profit) so when they breach same, they have made unauthorized profits attributable to their fiduciary position.

Beneficiary may apply to court for an order requiring the trustee to account for administration (Trustee Act)

If a trustee inappropriately disposes of trust assets (unauthorized) to self, that trustee will need to use personal money to effect a proper account of the terms of the trust. Goal: prevent unjust enrichment.

The court may make allowances (*Boardman*); however, the onus is on the defendant to establish that an award for all the profits would be inequitable. Assessments are very difficult and require “reasonable approximations”. The goal is to disgorge profits made w/in scope of the duty.

### Boardman v Phipps – could receive allowance

**R**: The fiduciary may receive an allowance for work that she has put into an inappropriate venture (increases w/ great skill, good faith).

### Warman International v Dwyer – 1995 Australian HC – court can fix a term (2yrs in this case) for disgorge profit

**F**: D was general manager of WI, a company that distributed Italian gearboxes made by Bonfiglioli. B wanted to joint venture with WI, which declined. Later, B contracted with D who took employees from WI in setting up their joint venture.

**R**: Accounting is a personal remedy which applies whether or not the claimant suffered a loss.

**R2**: Deterrence is at the heart of accounting; therefore, it’s no defence that the P was unwilling to make the profits on their own.

* The question is: is the P able to claim profit forever? The court usually fix a term – in this case 2 years.

### Scott v Scott – 1963 Aus – proportionate share allowed ( because property increased in value)

**R:** A trustee cannot retain the profits from a reinvestment. Where a profit is made with a combination of trust money and the trustees personal money the beneficiary will be entitled to profits *at least* in proportion to the trust contribution (this case they got all).

## Defences

### Consent

The free and informed consent of all affected beneficiaries will exonerate the trustee for breach of trust. This extends to fair-dealing by trustee purchase of the equitable estate.

### M (K) v. M (H) – consent and Laches could be defense

### Trustee Act, s. 96 – exonerate honestly, reasonably, fair to excuse T

If it appears to the court that a trustee, however appointed, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, then the court may relieve the trustee either wholly or partly from that personal liability.

Under this section, trustee must establish:

1. Acted honestly
2. Acted reasonably
3. It would be fair to excuse him in the circs

In practice: this may be applied to lay trustees (*Fales*). Usually involves innocent breaches of strict duties or esoteric provisions.

## Proprietary Remedies:

The beneficiary should seek a proprietary remedy when they prefer the asset (in its original, unconverted form) over compensation for loss. Arises when:

* Property increased in value
* Bankrupt estate

## Remedial Constructive Trust – remedy for Unjust Enrichment

In the case of unjust enrichment, the following should be noted:

1. Has there been UE (*Pettkus; Peter*)?
   1. An enrichment of D
   2. A corresponding deprivation of P (w/ causal cxn to enrichment of D)
   3. Absence of a juristic reasons
      1. Consider: (*Peter*)
         1. Did P confer benefit as a valid gift (or obligation owed) to D?
         2. Did P submit to or compromise to D’s honest claim?
         3. Does public policy support the enrichment?
      2. Includes consideration of the legitimate expectations of the party (argument of natural maternal love and affection as reason for volunteering childcare work was refused; vitally important contribution to family resources) – *Peter*
2. To remedy UE, you should first consider monetary relief (*Kerr*). In most cases, monetary relief is sufficient but it is difficult to calculate (*Kerr*).
   1. A fee-for-services approach is permissible but the P is not restricted to such an award. However, dueling quantum meruits might be inappropriate in the context of a joint domestic/family venture (Kerr)
   2. There is also a more flexible approach: the surviving value assessment of damages:
      1. Where the UE is more realistically characterized as 1 p. retaining a disproportionate share of assets resulting from a joint family venture, and a monetary award is appropriate, it should be calculated on the basis of the share of those assets proportionate to the claimant’s contribution. (*Kerr*)
      2. To be entitled to a monetary remedy of this nature, claimant must show
         1. There was in fact a joint family venture *and*
         2. The link b/w her contribution to it and the accumulation of wealth
      3. The existence of a joint family venture is assessed w/ regard to all the relevant circ.s, including:
         1. Mutual effort
         2. Economic integration
         3. Actual intent
         4. Priority of the family (i.e. forgoing economic benefit w/ expectation of economic wellbeing arising from stability of rel’nship)
3. If monetary relief is inappropriate or inadequate, the court may grant a remedial CNT. A remedial CNT is imposed w/o reference to the intention to create a trust (*Kerr*)
   1. To get a remedial CNT, P must establish a causal link (“sufficiently substantial and direct”) b/w her contribution and the improvement or acquisition of the disputed property.
      1. E.g. contributing purchase money or labour
   2. The court will consider the contribution of both p.s. to accord them a proportionate share.
   3. In deciding whether monetary relief is inappropriate or insufficient, courts can consider the likelihood of recovery (*Kerr*)

### Peter v Beblow 1993 SCC – for CNT, $ compen must be inadequate,must be link between service and property claimed

**F**: Defendant and Plaintiff (both with their own kids) cohabitate for 12 years until the children have left and the defendant becomes an abusive alcoholic. During that time, P did yard work, homemaking, and child care. She also received an income but it was substantially less than that of D. She sought a CNT on the residence for which he had legal title. D had few shareable assets so monetary damages were unlikely and she wanted the house.

**R**: In order to establish a CNT, monetary compensation must be inadequate *and* there must be a link b/w the services rendered and the property claimed in trust (“special link w/ property”).

* Equitable compensation: appropriate when claim is based on value rec’d
* CNT: appropriate if the value survived is the measure and they want the value of the property attributable to claimant’s services (assets apportioned according to contributions made by each)

**R**2: Affirms Pettkus: The test for unjust enrichment is:

1. An enrichment by the defendant
2. A corresponding deprivation by the plaintiff (w/ a causal cxn to #1)
3. Absence of any juristic reason explaining or justifying the enrichment
   1. Consider:
      1. Did P confer benefit as a valid gift (or obligation owed) to D?
      2. Did P submit to or compromise to D’s honest claim?
      3. Does public policy support the enrichment?
   2. Includes consideration of the legitimate expectations of the party (argument of natural maternal love and affection as reason for volunteering childcare work was refused; vitally important contribution to family resources)

### BC Family Law Act

* Property matters go through extensive ADR, enumerated in statute.
* Cohabitation included (“marriage-like”) – live together for 2 years
* Property brought into rel’nship or inherited is excluded *except through value added* during course of rel’nship

### \*\*\*Kerr v Baranow – CNT created when money inappropriate or insufficient, cxn b/t contribution and improvement

**Cromwell, J?**

**R**: Don’t look at the value received (*quantum meriut*), place a CNT on everything and determine proportionate contributions.

Personal Remedy: With unjust enrichment, consider monetary awards first. In most cases, they are sufficient. However, very difficult to calculate. Past cases have suggested calculation on a quantum meruit basis (Peter) but this will lead to “dueling” quantum meruits as both parties render services. A more flexible approach is the value-survived basis (looking to overall increase in wealth during the rel’nship).\*\*should be flexible, not quantum meruit

Proprietary award

* A remedial CNT may be created where moentary award is inappropriate or insufficient. It is imposed w/o reference to the intention to create a trust.
  + Court can also consider the probability of recovery
* Requires P to establish a link or causal cxn b/w her contribution and the improvement, acquisition, etc. of the disputed property. Then a share proportionate to the unjust enrichment can be impressed in a CNT in her favour
  + This link must be sufficiently substantial and direct, “causal cxn”
  + Might include contributing money or labour
* Court will consider the contributions of both parties in order to make proportionate shares

### Sun Indalex v United Steelworkers

## In Ren Claims and Tracing and Following

Tracing is an *in rem* remedy to pursue trust property that was lost/misused through a series of dealings. Tracing is available when:

* Other personal remedies are insufficient
* The traceable asset has increased in value and is worth more than the original asset

Tracing and following stops when you encounter **the *bona fide* purchaser for value w/o notice**.

**Tracing v Following**

With **Following,** the beneficiary gets the **benefit** of **improvements in value**. They get to recover the actual trust asset, provided it is not in the hands of a *bona fide* purchaser for value w/o notice. They may take possession or obtain a charge against the property. Following is a CL remedy

**Tracing** involves pursuing the path of the thing in its **substituted form**, whether a physical assets or different “choses” in different accounts. Tracing is not CL remedy because CL hesitant to go into grey area of which property belongs to who.

* Often results in a substitute of a chose in action in monetary terms with proof that it’s in an account🡪 equitable ownership of funds that originated in a purchase
* Very valuable remedy which allows a beneficiary to move into accounts and follow the chose in its different forms (*this is not so w/ CL where you can’t follow into a bank account*)
  + May follow to volunteers or trustee🡪 stops at *bona fide* purchaser for value w/o notice
* Even if money is mixed with trustee or 3rd party doesn’t bar recovery.

### Foskett v McKeown – 2011- tracing and following defined

**F**: Made substantial deposits for condos but developer never built the condos. Developer dissipated the money and used it in his own accounts. He became insolvent. Beneficiaries wanted *in rem* relief. Some of the money (2/5) had been used to purchase an insurance policy and then he killed himself and his heirs were his kids. The beneficiaries wanted part of the insurance payment.

**D**: 40% of the insurance policy went in preference to the beneficiaries

**A**: Once money is dissipated (drank it all away, for eg) and there’s nothing you can get your hands onto, it stops there.

**R**: Following and tracing are both exercises in locating assets but they are distinct. Following is the process of following the original asset as it moves from one person to another. Tracing is the process of identifying a new asset as a substitute for the old. The person entitled to a proprietary remedy in equity may choose one of the two, however, the choice is usually dictated by circumstances.

### Re Diplock’s Estate – 1948 English CA – volunteer holding trust funds innocently belongs to Bs

**R**: If a volunteer innocently holds receives trust funds, that interest is defeasible at the hands of the beneficiary so that the volunteer holds on a CNT for the beneficiary.

### Chase Manhattan v Bank of Israel- mistake transfer = belong to original bank. Tracing/following

**F**: Mistaken transfer. Israeli bank acknowledged, then went bankrupt. There was no bad faith here.

Did the $2 million mistakenly-transfer amount belong to Israeli bank or Chas Manhattan?

**R**: Tracing was allowed as a result of good conscience, despite the law of fiduciary rel’nship.

## Actions Against 3rd Parties

Three categories of intermeddlers:

* Trustees *de son tort* – person not appointed but who intermeddles in the trust matter, acting as if they are a trustee. (Chambers ESTATE V Chambers)
* They will be treated as a trustee for the purposes of a breach
  + Held personally liable for breach if they knowingly participate in the breach
  + Must not be appointed
  + Must have assumed trust obligations through intermeddling
  + **Must have possession or control of trust property**
* Knowingly receiving/dealing with trust property for own use
* Knowingly assisting a trustee in a fraudulent/dishonest transaction perpetrated by the trustee (*Nelson; Air Canada*)
  + Existence of a fiduciary duty (e.g. trustee)
  + Breach of that duty by the trustee and
  + Dishonest and knowing assistance by the 3rd party in that design

### Nelson v Larholt– knowing = constructive knowledge – reasonable person would know

A bookie was the third party in this case. The executor of an estate drew 8 cheques from the estate and without authority paid them to the bookie in breach of trust. The trustee as executor signed each cheque. The money could not be traced and so the beneficiary successfully sued the bookie. *Although* the bookie had given value for the cheques he had received, he also had had notice that they belonged to the estate.

That notice was gauged not by actual notice, but notice as determined by inferences a reasonable person would in the circumstances have drawn. He was taken to have known what any reasonable person would know in the circumstances.

**R**: Constructive knowledge (what a reasonable person would know) 🡪 also wilful blindness and recklessness

### Royal Brunei Arilines v Tan – 1995 PC – willful blindness = objectivey assessed.

Wilful blindness is assessed on an objective basis—do not need to consider personal attributes.

### Air Canada v M & L Travel – reckless or willful blindness is sufficient knowledge

**F:** Travel agents could issue tickets. They signed K that allowed them to do that. Under K, travel agent undertook to put all monies rec’d by travelers into a trust account. M&L didn’t do that. Clearly it was in breach of trust. Operation side was organized by M; L was more of a sleeping partner.

**I**: Which of the two partners were liable?

**A**: Both were held liable—the one that obviously knew and the “sleeping partner” who should have known. This is an objective stnd. There must be some signaling which took place which you failed to follow up on.

**R**: Reckless or wilful blindness is sufficient knowledge to be assisting in breach of trust

### Twinsectra Ltd v Yardley – Mr.Leech is not liable too far. Careless won’t suffice, must be grossly negligence

**F**: Money lent to party for specific purpose of real estate transactions. T lent the money but only for one purpose and wanted an undertaking by property developer (Mr Yardley) that it will only be used for real estate transactions. Mr. Leech wouldn’t give it but pointed to Mr. Simms who would do the undertaking. Mr. Yardley disappeared. Mr. Simms was liable. Mr. Simms was also bankrupt. Could you get Mr. Leech?

**A**: The majority held that Mr. L didn’t participate in the breach—taking it too far. Mr. L didn’t know the breach. One dissent – said: he should have known. Maybe the court is saying – not gross negligence, just little carelessness does not qualify

**A**: quistclose case.

## Yes to Alternative and Cumulative Recovery but not Double recovery

# Non- Charitable Purpose Trust

## Why prohibit Non-Charitable Purpose Trust

* Prohibition on Non-charitable purpose trust due to 1) Lack of enforceability, 2) Uncertainty of Object, 3) Offends the rule against perpetuities, 4) court can’t control (*Re Astor’s)*

### **Re Astor's Settlement Trusts UK 1952-** trust void due to 1) tee don’t know if duty fulfill, 2) no B to enforce

F: - Lord Astor purported to create a trust applying income from shares held in a newspaper for the purposes of "the maintenance of good understanding between nations and the preservation of independence and integrity of newspapers"

I: - Was this a valid non-charitable purpose trust for the advancement of journalism?

J: - No, trust void for uncertainty, as it wasn't for individuals and there was nobody to enforce

A: - Two reasons why the trust was void:

a) Means by which the T's were to attain the stated aims were unspecified

- Purpose was non-charitable and did not directly benefit the B's

b) No person who was entitled, as of right, to enforce the trust

- Purposes drafted too broadly

R: - **If there are no persons with the power to enforce rights in a trust, there equally can be no duties imposed on trustees and the trust will be void (Lord Eldon – court can’t enforce)**

## Exceptions

1)Pets, 2) Graves and Monuments, 3) Indirect purpose with Bs, 4) Unincorp Associations 5) private purpose trusts as powers

Unincorp Associations

1. S/T leave funds to official in unincorp association with intention that it be shared in common b/t current members. Here gift is only to subsisting members of association = Valid (Cocks v Manners). If everyone can claim, it undermines your purpose
2. S/T gift official in the association and is paid in trust as accretion to the funds of club. These monies regulated according to the rules of club – subsisting contract between club members. These members as co-owners do not beneficially hold the gift and so member who resigns from club has no claim to gift. This is ok – give to members to advance the purpose. Donate for their service – ind no claim = better, look at contract and their aim
3. Re Recher’s Will Trusts: shortly after will was executed, the society ceased to exist – merged with other similar societies and seized to exist. because the gift was to members and even though donation was to amplify general fund serving particular purpose, it was actually a gift to those specific member of named society. As group disbanded, the memebrs no longer bound contractually and so the gift, failed and was held on resulting trust.
4. Re Russel Wood v The Queen: given to club but enunciated and specified only some of the purposes for which society is organized. The gift was given subject to their contractual rights inter se.
5. **Leahy v AG for New South Wales 1959:** the contract of association was for charity, but because charity failed, and your donation is to members, the nuns get your money, you don’t want that, you need to check
6. In Re Lipinski’s will trust Gosschalk v Levy: S/T transferred some estate to society “in memory of my wife to be used solely in the work of constructing the new buildings for association and improvement of said building” – court said this is valid – the word is just descriptive. If donate to society is valid, this is valid.

Private Purpose trust as powers

* *De Lege Ferenda –* BC and Man proposed to spark enabling legislations that permits 3rd party delegate or enforces in instrument with authority to enforce private purpose trusts. These delegates under supervision of court.

### **Pettingall v Pettingal – 1) Hoses ok (Pets)**

* Recognize our connections to our pets and want to take care of them after we die
* Don’t violate rule of perpetuity because they don’t live past 21 years.

### **Massett v Bingle 1876 – 2) Take care of graves and monuments**

* Again recognize we are dead, and want people to remember us.
* Again must not be more than 21 years – usually reversionary interest after 21 years so ppl enforce
* Legatees could supervise the performance of trust

### **Re Denley:** **although for purpose, 3) directly or indirectly appoint Bs = ok**

F: - Land was given to T's to hold on trust to be maintained and used as a sports ground primarily by employees of a limited company and, secondarily, by other such persons as the T's might allow until the expiration of a perpetuity period

I: - Is the trust void for uncertainty due to a lack of beneficiaries to enforce the trust?

J: - No, it's a valid trust for the benefit of employees/individuals

A: - On its face, the disposition appears to constitute a non-charitable purpose trust, as the purpose provides a direct benefit to employees of the company

- However, Court finds a trust based on answering the three problems with purpose trusts generally:

a) **Uncertainty of objects alleged**

- Employees were ascertainable beneficiaries with standing to enforce

b) **Violates rule against perpetuities**

- Trust had a specific end date with a gift over

c) **Nobody to enforce**

- Employees had a sufficiently direct interest in the due administration of the trust that they were given standing to apply to the courts to enforce it

R: - **Purpose trusts will fail only if the benefit to individuals is so indirect that individuals will have no standing in court to enforce the trust**

### **Schmidt v. Air Products: purpose with employees as Bs = ok**

### **Leahy v AG for New South Wales 1959 – 4) give to unincorp ok if not violate rule against perpetuity**

F: - Testator left certain realty "upon trust for such order of Nuns of the Catholic Church as the Christian brothers as my executors and trustees shall select"

- Agreed that gift extended to the Nuns and so was not wholly charitable

- T's, anxious to have the power to select orders of Contemplative Nuns, argue that since the disposition was not wholly charitable the gift was valid in its entirety

I: - Is the bequest valid as a gift if it is a non-charitable purpose trust?

J: - No, gift is for a non-charitable purpose and its perpetual so it's invalid

A: - Here, the gift was to an unincorporated association

- Gifts may be made to individuals, but not for the "general purposes of the association" because then the court must ask what is the trust for and which B's can enforce the trust

- Here, the gift wasn't for individuals because there may be numerous members around the world

- Court can't believe that the testator intended each B to take

- Also, subject matter was 730 acres of grazing property with a homestead/buildings, and it would be impossible for all members to become beneficial owners of such property

- Trust also perpetual because the intention to benefit it was for a continuing society and the furtherance of its work

- Therefore, **if a gift is to an association for its purposes, there is a perpetuities problem if the society is perpetual**

R: - **Non-charitable purpose trusts can't be perpetual and must be construed as to individuals**

### **De Lege Ferenda- purpose as power**

* enabling legislations that permits 3rd party delegate or enforces in instrument with authority to enforce private purpose trusts

# Charitable Purpose Trust

Historically, Courts have disliked dealing with purpose trusts, as there are problems with enforcement and there is potentially infinite duration (and in comes the rule against perpetuities)

**Chartitable purpose trust**: a trust created by a settlor/testator for a purpose that is generally perceived as being for the public good, it is still subject to 3 certainties, just Object is purpose.

**Test:**

**A) must fit one of 4 categories,**

* 1. Relief Poverty
  2. **2) advancement of education,**
  3. **3) trust for religion,**
  4. **4) benefit to community**

**B) public benefit requirements**

1) address appreciable section of society

- not numerically negligible – not linked by relationship or employee, must be truly public – not private benefit masquerading as public one. (Oppenhein v Tobacco Securities Trust co)

2) relieving poor, education, religion – prima facie regarded as benefiting public (Jones v T Eaton Co)

3) promote public weal or policy as determined by court not settlor – must be clear benefit for community (National Anti-vivisetion soecity)

## What is Charitable Purpose (Statute of Elizabeth)

### **Statute of Elizabeth – 4 categories of charity + Preambles give indication of what is charity**

### **Commissioners of Income tax v Pemsel – 4 categories (**relief poverty, education, religion, benefit to community)

* 1. Relief Poverty
  2. **2) advancement of education,**
  3. **3) trust for religion,**
  4. **4) benefit to community**

### **national anti-vivisection society v IRC- test: 1) whether fall into 4 categories 2) benefit to public widely**

### **oppenhein v Tobacco securities trust co –** public widely **– 110k Employees not enough**

### **Gilmour v Goats**: **20 cloistered, contemplative Carmelite nuns = not public** benefit (because **secluded world**)

### **Neville Estates v Madden –** member of categord synagogue = yes public, (because spend **lives in world**)

### **Jones v T Eaton Co SCJ –** this is public – **relief poverty or education prima facie regarded as benefit public**

**F:** used as a trust fund for any needy or deserving Toronto members of Eaton quarter century club.

### **National Anti-vivisection society- public weal or policy as determined by court not settlor**

## Relief of Poverty

### **Re Coulthurst’s Will –** poor does n’t mean just destitute

### **Re Hart 1950 –** relief poor – in a city of Halifax is ok, as long as community of some size

### **Planned Parenthood v Toronto** –**giving info and advice to members of public = not relief poor**

* The idea = wealthy can also get advice

## Advancement of Education

* **What is education is not quite wide**
* **not confined to academic subjects, can be technological**

### **Vancouver Society v Canada 1999 SCJ – expansive view of category of education advancement**

### **Incorporated council of law v AG – law report = education**

### **Re Pinion** 1964 ER– **the work advanced must have educational benefit** if so bad = not educational

* Trust of charity to enable museum stuffs
  + expert evidence from audits unanimous that the collection was low quality, charity failed because art work was atrociously bad. No educational benefit from these crap.

## advancement of religion

* Depends on social attitude to religion – in middle ages = gifts to catholic church for variety of reasons. Need priest to pray

### **Thornton v Howe 1862 – opens up religion from just catholic**

### **Bourne v Keane 1919 – opens up religion –** celebrating mass not superstitious practice

### **Funnell v Stewart 1996 ER- religious healing = religion**

### **Church of New Faith v Commissioner Vic1983 CLR:** **test\* 1) belief supernat principle 2) accept of canons**

* + - 1. Belief in a supernatural being or principle
      2. Acceptance of canons of conduct correlated to that belief

### **Re South Place Ethical Society 1980 WLR – Canada followed New Faith Church.**

## Other Purposes Beneficial to the Community

* **National Anti-Vivisection Society v Inland Revenue Commissioners** 
  + “a purpose regarded in one age as charitable may in another be regarded differently

### **Vancouver Society v Canada – Statute of Elizabeth Preamble provide some references**

### **Re Cotton Trust for Rural Beautification 1980 PEIJ –** **concern for environment = charity now**

### **Re Moss 1949 UK- protection of animal = yes**

### **Cox v Hogan, Lecavalier v Sussex; leaving to municipal/province/country = ok improve space quality**

## What is not charitable

1. **Political purposes = not –** *National Antivivisection society v IRC.* Political is to support public change, but Court don’t know if it is public change is good. But not impediment for charities to adopt views on political matters.
2. **Body established to make a profit might not be charitable**
3. If the group is voluntary association in which the assets are to be distributed among members on dissolution – Neville estates v madden 1962 AC
4. Testator places parameters too wide on the scope of charitable purposes – Chichester Diocesan fund v simpson – e.g. “for such charitable institution or institutions or other charitable or benevolent object or objects in England…
   1. ***Brewer v McCauley SCJ 1954 “***CHARITABLE, RELIGIOUS, EDUCAITONAL OFFER LOAN FLOP BACK PURPOSES” = not good.

## Mixed Charitable and Non Charitable Purposes

### **s.47 of LEA –** works solely for the benefit of the charitable purpose

## Perpetuities

* Must not violate perpetuity.
* **Re Lord Stratheden – Failed because failure of a certainty of vesting within perpetuity period.**
* Don’t your charity to change from time to time. Want it to last.

## Certainty of Object and CY-PRES

1. Trustees do not inherently possess powers of cy-pres – the court does
2. Cy-pres is an attribute of charitable tursts only and does not extend to private trusts, thus variation legislation sets the circumstances wherein courts are empowered to intervene.
3. ) ***Cy pres*** - Court's *cy pres* ("as near as possible") jurisdiction allows a Court to order a scheme when charitable purposes intended by the S are impossible or impracticable to carry out, thus preventing application of the resulting trust doctrine

### **Re Fitzpatrick 1984 MJ –** Opined Cy-pres consider proximity, usefulness, practicability and testatrix’s intention

### **Re Tacon 1958** – if no general intent

1. **If charity ceased to exist before will comes into operation the gift lapse**
2. **If charity is in existence at date mentioned, it is effective as a gift to charity, and next of kin interest is forever excluded, not withstanding the later dissolution or disappearance of the charity.**

### **Re Boyd 1969 –** the approach of Re Fitzpatrick taken into consideration here.

### **Royal Trust Corp v Hospital for sick child -** No crippled child hospital, but hospital for disabled child – gave latter\*

**R:** court found existence in the will of clear general charitable intention and so specifically required the funds ot be applied to related charities in the area.

1. This is an unascertainable class of beneficiaries; there may be a contingency referable to their future interest e.g. all of A’s kids alive when B dies—A may have 3 kids but who knows when B will die (not a vested interested) [↑](#footnote-ref-2)
2. *May* meaning they might be part of a large class of objects subject to a wide power of appointment; also includes those with a broadly-framed possibility in hope to succession (*spes successionis*) [↑](#footnote-ref-3)
3. Arrangement means any proposal to vary or revoke the trust *Re Stee’ds Will Trusts* (1960, CA – England) [↑](#footnote-ref-4)
4. “any person” must be *locus standi in judicio* (can bring an action) and *must not* be an adult of full capacity in whom the entire trust is vested. At least one of the beneficiaries must fall into category a - d [↑](#footnote-ref-5)