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INTRODUCTION AND HISTORY

• Law of trusts is dynamic - allows courts and users to be creative and adjust to changing circumstances
  o Example: Trust law used as a means to divide property after failed relationships (constructive trusts)
• Law of trusts is basically the ‘law of property’ as developed by the English Courts of Equity

IN GENERAL: A ‘Trust’ arises whenever there’s a split between LEGAL and BENEFICIAL ownership of a property...when the person who holds legal title (the ‘trustee’) is OBLIGED to manage the property for the benefit of the person who holds beneficial title (the ‘beneficiary’)

1. **Ownership/title to property is SPLIT**
   - Legal Title → control and management property (given to trustee)
   - Equitable Title → enjoyment of property (given to beneficiary)
   - BOTH legal and equitable titles are freely alienable (i.e. can be transferred to other parties)

2. **Trustee owes a fiduciary obligation to beneficiary**
   - Policing of this duty is the responsibility of the BENEFICIARY; can due for breach of trust

A. HISTORY AND EMERGENCE OF TRUSTS

• Middle ages Western European universities derived from Roman-law three broad categories of rights that came with ownership:
  - Use or management of property (tangible/intangible) – *ius utendi*
  - Enjoy (benefit from) property – *ius fruendi*
  - Dispose/transfer/destroy (if consumable-not land) the property – *ius dispoendi*
• Common law endorses these three rights
• Court of Chancery (gives rise to equity) – developed in such a way that separate persons could hold *ius utendi* and *ius fruendi*
  - Common law never acknowledged this development – legal title under common law maintained all 3 rights in one person
  - Chancellor would compel person holding legal title to use property for rightful benefit of the hold of the *ius fendi*
  - This right became property when it was acknowledged that the *ius fendi* came with a *ius despoendi* and could be transferred
• Although common law courts and court of chancery have been fused – courts still will handle disputes utilizing common law rules first and then adjust the result if a rule of equity is appropriate
  - “Equity follows the law” – wherever possible court of equity respect common law rules and give effect to them – requires clear principle of conscience to depart
• Trustee – always holds legal title and thus *ius utendis*, but its scope is restricted by fiduciary duty imposed by equity.
  - Must use property in way that advances economic interests of beneficiary
  - Cannot directly benefit from trust property – restricted to remuneration outlined in trust agreement (if none, then what is set out in *Trustee Act*)
• Beneficiary – the equitable interest in property creates *in rem* rights as well. A right in the property itself which can be enforced generally against the world (except perhaps BFPV)
  - Useful in situations where trustee fraudulently misappropriates trust assets

Example regarding Trusts: X conveys interest in land to A, asking that A hold it for the benefit of X’s daughter, B. A Agrees, but then reneges on promise. B turns to Common Law, but gets no relief because A owned property interest. B seeks intervention of Chancellor, who compels A to hold land for exclusive use and benefit of B.

B. THREE CHARACTERISTICS OF A TRUST

1. **The SPLIT of Common law title in a ting into “legal title” and “equitable/beneficial title” of that things held by the trustee and beneficiary, respectively.**
2. **Fiduciary obligations** of trustee leads in effect to “asset stripping” of his/her Common Law ownership by implementing obligations relative to the beneficiary.
   - Holder of legal title has administrative duties and powers to handle the property for the benefit of the beneficiary,
and to ensure his/her interests do not conflict with those of the beneficiary.

3. The **IN REM** characteristic of equitable title (‘right in the THING itself’).
   - **Transferability:** The beneficiary has “property” because they can transfer his or her equitable interest to another person, and the trustee is obliged to direct the benefits of the trust property to this new person.
   - **Tracing:** Because of *in rem* characteristic of Trusts, if the trustee transfers title to a third party IN FRAUD, the beneficiary can still claim the benefits of the property from the third party (even though the third party thought the beneficial interest in the property were his or hers outright).
     - This is important in situations where the trustee goes bankrupt (beneficiary’s interests continues), or a transferee goes bankrupt.
     - Ordinarily, titleholders are treated as ordinary creditors and only get a pro-rata share of bankrupt’s assets. However, if you have a lien on the property (or some beneficial interest), then you can get interest in property back intact.
   - **EXCEPTION** (‘Equity’s Sweetheart’):
     - If the property holder obtained the property after:
       1. Paying consideration;
       2. In good faith (no fraud, willful blindness, etc.); AND
       3. Without notice
     ...they are considered a ‘bona fide purchaser for value’ and the beneficiary’s equitable interests end.

### C. PRINCIPLES OF EQUITY
- **Equitable Maxims** – Arise as a means to help the systemization of conscience into law of Equity.
  - **Equity will not permit a wrong without a remedy:** Focused on fairness, and promoting just outcomes
  - **Equity follows the law:** Compromise with Common Law – if two counteracting equitable maxims apply, then the outcome is determined by the CL
  - **Those who seek equity must do equity:** “clean hands”
  - **Equity assists the vigilant, not the tardy:** If you have a grievance, you must promptly make it apparent
  - **Equity is equality:** Courts look to proportionality
  - **Equity looks to intent, rather than form:** Substance trumps form
  - **Equity will not assist a volunteer:** No assistance unless there’s consideration
  - **A trust will never fail for want of a trustee:** Courts will strive to find/appoint someone to step into the trustee’s shoes.

#### (1) Equitable Interests
- **Emerged from circumstantial remedies applied by the Courts of Equity.**
- **Equitable interests can’t be defined precisely** – collection of concepts – can be created as:
  - **Express Trusts** (express trusts, wills, partnerships, charitable trusts, contract of sale)
  - **Resulting Trusts** (court imposed ‘constructive trust’, trust arising out of implication of law).
- **Equitable interests are typically in personam** (right against the PERSON), but have proprietary in rem (right to the THING) characteristics as well. EG – Beneficiary can:
  - Terminate trust and demand legal title to the property (‘call the trust’ – See Saunders v. Vautier);
  - Sell or mortgage beneficial title to another
  - Devise an equitable interest in a will.
  - Through tracing, pursue equitable interest into hands of third parties.

#### (2) Legal Interests vs. Equitable Interests
- **In General:** Legal interests take precedence over beneficial interests where property has been acquired *bona fide.*
  - EG: If holder knows of a prior equitable interest, his conscience is bound to serve that prior equitable interest.

#### (3) Mere Equities vs. Equitable Rights
- **A right that is usually ancillary to the recognition of an equitable interest.**
  - Not an “equitable right”, but a right of a holder to claim relief in equity.
  - **DOES NOT** have a substantive proprietary (in rem) equitable interest in any property.
    - Example: Right to set aside a transaction because of undue influence or unconscionability.
D. TRUST APPLICATIONS

- Very flexible in structure – person creating trust has enormous freedom to define scope of fiduciary duty/trustee duties and circs under which beneficial interest may be enjoyed
  - Utilizes the trustee arrangement (settlement or deed of trust) – outlines obligations/requirements and transfer of assets is usually gratuitous (gifting)
    - Can either set out rules or leave them to the general rules of equity
  - In contrast to contractual/commercial arrangement trust
    - Traditionally used by partnerships or unincorporated companies – treated the managing partners/board of directors as trustees to the partnerships assets and issued equitable shares to the partnership

1. Tax avoidance or deferral
   - Trustees and beneficiaries are taxed differently than corporations.
     - In Medieval England, Lords would enjoy beneficial; title while vesting legal title into multiple people jointly – done to avoid payment of deferred taxes upon death of Lord.

2. Provision for family settlements
   - EG: Successive property interests and with conditions of compliance with future interest restrictions.

3. Incapacity
   - EG: Public Trustee or Public Guardian’s Office’s.

4. Corporate
   - Explains why REITs are so popular – able to avoid corporate taxes, as only “beneficiaries” are taxed in Trusts.
     - REITS – property must be (1) income producing; and (2) 90% of revenue is distributed directly to beneficiaries.
     - If these are satisfied, then only beneficiaries are taxed.
   - For a period, many corporations were converting into income trusts – with the intentional exception of REITs, this loophole has since been closed.
   - Corporate Trusts – common for corporations to act as trustees for a fee.
     - In order to ensure corporations use money for benefit of beneficiary, settlor can appoint a protector to oversee actions of the trustee.
     - ‘Protectors’ arose in face of mismanagement of trust property by trust companies operating in offshore jurisdictions, such as the Cayman Islands.

5. Investments
   - Mutual funds are structured as income trusts – pool money for investment purposes.

6. Pension Funds and RRSPs
   - Both are often structured as trusts rather than contracts.

7. Estate administration on account of death

8. Charitable and non-charitable purpose trusts/foundations
   - Charitable purposes originally articulated in Statute of Elizabeth.

9. Environmental Protection
EXPRESS PRIVATE TRUSTS

- **In General:** An express trust is one that is created intentionally—it’s the conscious act of a person to transfer property to one party, with the stipulation that property is to be held for the benefit of another.
- Enables a settlor to place assets he or she owns into a separate fund in which a trustee has legal title entitling him or her control and administrative rights (*ius utendi*), but which assets are not from a beneficial perspective part of the trustee’s own, personal estate of property.

**Creation:** May be created in TWO WAYS:
1. *inter vivos* (while the settlor is alive); or
2. *per mortis causa* (after the settlor has died) – either by Will or Intestacy.

**Four Requirements:** Must be satisfied for an express trust to be considered valid:
1. All parties must have proper capacity
   a. Testator/settle must NOT be a minor, mentally incompetent (except as permitted by Statute).
   b. Beneficiary could be ANY person or purpose (subject to certainties).
2. The Trust must be completely constituted:
   a. Trust must be declared AND title must have conveyed to the trustee.
3. The Three Certainties must be satisfied;
4. All requisite formalities must be met.

**A. COMPLETELY AND INCOMpletely CONSTITUTED TRUSTS**

**Rule:** No trust is created UNLESS the property in question has VESTED with the Trustee.
- In order to vest, the Trustee must have LEGAL TITLE to all property that is meant to be used to serve welfare of the beneficiary.
- Even if all three certainties are satisfied, no trust arises unless CONSTITUTION (vesting) has occurred.

**1. Constitution: The Concept of Vesting**
- There are 2 VARIABLES to consider when determining whether vesting has taken place:
  1. **Forms of Dealing**
     - Trust Settlement/Deed
     - Declaration of a Trust
     - A gift? – Generally unenforceable unless certain formalities are completed (under Seal).
  2. **Type of Property** (requirements of transfer)
     - Land – transferred by registration at LTO.
     - Securities – Transferred only by registration in corporate records (*BCA s.111*)
     - Money – Transfers upon change of possession.
     - Chattels (chose in possession) – Transfers upon change of possession.
     - Debt (chose in action) – Transfers by assignment.
- **Constitution can be:**
  1. Direct transfer of property by Settlor to Trustee(s)
  2. Transfer of Property to Trustees by a 3rd party [ie: from estate executor to trustee];
  3. Declaration of self as Trustee

**2. Transfers to Third Parties**
- For trusts where a third party serves as trustee, legal title must be TRANSFERRED (VESTED) in the trustee in order to “complete” the trust. (*Milroy v. Lord*)
- The requirements for transfer/vesting depend largely on the *type of property* involved.

**i) Transfers in the form of GIFTS**
- **Rule:** Equity will not perfect an imperfect gift at law (*Milroy v. Lord*), but WILL treat as effective an intended transfer where donor has done everything he personally is able to do in the ordinary course of business to transfer the gift to a trustee (*Re Rose*).
**Gifts:** “Equity will not perfect an unperfected gift” – If a gift is not perfected, then there is no transfer, and consequently, no trust created.

**Milroy v. Lord (1862)**

**Facts:** Trust deed executed by Medley as Settlor in favour of niece (later married to Milroy).
- Lord = the trustee. Trust property included 50 shares in a company, which could only be transferred by registering the change of ownership in company books under Lord’s name (as trustee, he must have legal title).
- Settlor failed to register the change in ownership in company books.
- However, Lord also had a power of attorney over the estate.

**Issue:** On settlor’s death, did Lord hold the shares as trustee in favour of Milroy, or as executor in favour of Settlor’s heirs?

**Decision:** No change in register meant no transfer of legal title to Lord. As such, no effective gift to Milroy as beneficiary of the trust, as no trust was created!

**Notes:** While 50 shares were not part of trust property, Court held that shares purchased by Lord in a Fire Insurance Company were part of trust property, as Lord owned legal title!

**Example of rule in Milroy**


**Facts:** Son transferred shares to mother b/c suited tax planning at time. Understood that at some point in future would transfer shares back to him
- Used income from shares for her own medical care
- 10 years later son convinced mom to execute document gifting shares back to him – daughter had her seek legal advice and she cancelled the gift
- Verbal understanding that shares would be regifted found to be unlawful restraint
- Re-gifting of shares in writing was not adequate to complete gift – shares would have had to be actually conveyed
- Shares conveyed when name of transferee entered into Register of Shares of company
- Verbal promise gift to be returned is unlawful restraint

**(ii) Transferor has done everything in their power**

**Exception to Milroy v Lord:** Once the Settlor has done everything in her power to divest ownership and execute the transfer of the trust property, the law will treat the transfer as complete.

**Re Rose (1952)**

**Facts:** Man transfers shares in company to his wife and son for purpose of creating a Trust – deceased executed transfer of shares, but company didn’t register the transfer in it’s books until 3 months later.
- In England at the time, tax law would claw back property, which transferred within 5 years before Settlor’s death.
- Tax man wants money!

**Issue:** When was the transfer of shares made effective?

**Ratio:** De facto loss of control over the gift asset by the donor is the key factor for a completed gift
- At the time of the transfer on 30 Mar transferor had done everything in power to give effect to transfer thus he became trustee for his wife/son
- Must do everything personally/legally able to do in ordinary course of business and thus lose control of the trust asset to perfect the gift

**(iii) De facto loss of control in relation to LAND**

Completion of Form A and submission to T sufficient – in BC under torrents system it is sufficient to complete Form A and convey to Trustee to vest title w/o formal registration at LTO

**Morda v Nitting (2006) (BCSC)**

**3. Personal Declaration of a Trust**

**Rule:** Automatic constitution occurs where a settlor declares him/herself as trustee of a property for the benefit of another, so long as there is CLEAR EVIDENCE that settlor intended to be legally and unconditionally bound! (Carson v Wilson).
- No issue re: constitution, as legal title is already vested in the settlor.
- But, there must be sufficient evidence of INTENTION to become the trustee of the property for a 3rd person (Carson v Wilson).
While oral trusts are permitted in BC (Law and Equity Act, s.59), it’s better to get Trust Deed in writing.

Physical Transfer NOT req for personal declaration

**Elliot v Elliot Estate (2008) (OSCI)**

Facts: Testator left disabled dependent daughter out of will w/ intention providing through trust; evidence adduced that arranged for other children contribute from their inheritance into trust fund; children also claimed that mother intended a GIC that was being held in the estate to be part of the trust fund.

Decision: Mother had declared self to be trustee – transfer was not necessary as property already vested in Mother.

Gift vs. Trust: A court will not “discover” a trust where the facts of the situation demonstrate it was intended as a gift – must entail intention by settlor to be unconditionally bound!

- Beneficiaries need not be aware of the existence of a trust!

**Glynn v. Commissioner of Taxation (1964) Australia**

Facts: Father buys shares issues to himself “as trustee for 2 sons”, certificate signed by father “as trustee for sons”. But, company share register only shows father as owner of the shares.

- The father collected the dividends, and never told his sons about the “trust”.
- Father dies, tax man argues shares NOT held on trust by dad, but rather a life estate with remainder for sons (thus to collect tax).

Issue: Trust or life estate w/ remainder?

Decision: Transfer was valid declaration of a trust (no life estate) – many other people knew about the trust, lots of evidence a personal declaration was made; intention to be legally and unconditionally bound.

Notes: Retention of dividends did not negate the trust, did not create life estate – may mean Father was in breach of trust if payments never received.

(i) Intention to be unconditionally bound

Trustee/Settlor MUST demonstrate INTENTION to be immediately and unconditionally bound!

**Carson v. Wilson (1960) Ont. CA**

Facts: During his life, Settlor assigned deeds and mortgage interests to beneficiary, but gave them to the lawyer with instructions not to make the transfer effective until his death.

- During his life, the settlor would retain the profits.

Issue: Was this an effectively constituted trust?

Decision: NO – held to be ineffective testamentary disposition.

- The Settlor was not a trustee over the assignments, and no indication he indented to be bound immediately and unconditionally.

4. Covenants in Favour of Volunteers (no consideration)

- Covenant without consideration = beneficiary cannot enforce until title transferred: In general, covenants under Seal are enforceable by volunteers in law (no consideration) but not in equity (‘equity does not assist a volunteer’).
  - As such, trustee can sue to enforce transfer of property (because it’s under Seal); however, beneficiaries cannot enforce a trust where the trustee is acting without receiving consideration.
- Contractual covenants (with consideration): This is beyond the “volunteer” category, and as such beneficiary’s right to title is enforceable through specific performance.
  - Defaulting promissor is declared a constructive trustee holding title for the promissee.

5. Rule from Strong v. Bird (Re: Incomplete gifts to executors [helps executors only])

- Rule: When an incomplete gift is made during donor’s lifetime, and donor appoints the would-be recipient as executor of estate, the vesting of the property in the donee AS EXECUTOR may be treated as completion of the gift.
- Applicable for both real and personal property.

If an *inter vivos* gift is imperfect by reason only of the fact that the transfer to the intended donee is incomplete (non vested), the incomplete gift will be perfected (vested) when the donee subsequently acquires the property in the capacity of executor of the donor/settlor’s estate.
### Strong v. Bird (1874) UK

**Facts:** Stepmother loans money to Bird in exchange for lower rent; later forgives debt orally without consideration. Upon stepmom’s death, Bird is named executor of her estate. Legal title vests in Bird (he’s now both creditor and debtor with respect to the same loan!).

- Testator’s intention did not change prior to death
- Intended legal recipient became legal owner (as executor).

**Issue:** Is debt forgiven, given that gift was not perfected during the life of the settlor?

**Decision:** Court held it was sufficiently clear that intention of stepmother was sufficiently clear in fact she voluntarily continued to pay full rent.

- Fact stepson was trustee (had legal title in the property) was sufficient for property to be considered vested.

**Rationale:** It would be ridiculous for executor to sue himself to recover the debt – makes sense, but somewhat surprising given the restrictions in trust law re: self-dealing and conflicts of interest.

### Application of Strong v Bird

**Hilliard v Lostchuk (1993) (Ont)**

**Facts:** Mother sought to give son sub-divided parcel of land; pursued zoning to allow this, but died before it was completed

- He was appointed executor of her estate
- Other heirs claimed that gift was imperfect

**Decision:** Requires evidence of continued intention – here the ongoing pursuit of the zoning application sufficed

- Application of Strong v Bird – equity perfected the gift

(i) Incorrect application of *Strong v. Bird*

**Wrongly decided: Strong v. Bird** only applies between donor/donee, not alleged donor/trustee/beneficiary [CHECK]

### Re Halley Estate (1959) Nfld SC

**Facts:** Facts pari material with *Strong v. Bird*, however the rule from that case was not applied by the Court due to a misunderstanding of the law.

**Decision:** Court held (wrongly) that *Strong* (completing unconstituted gifts when donor appoints would-be-recipient as executor) didn’t apply.

- Court says “in all cases…a particular person, already vested the legal estate, is also given the beneficial interest...”
- In reality, the opposite is true (ie: property given as a trust, NOT outright gift!).

### B. THE THREE CERTAINTIES

- In order to be valid, EACH of the three certainties MUST BE SATISFIED!
- If any of the three certainties is not satisfied, the trust is VOID FOR UNCERTAINTY
  1. **Certainty of words** – Intention to create a trust
  2. **Certainty of subject matter** – The trust property or trust assets
  3. **Certainty of objects** – Identity of beneficiary(ies)

- Trustee continues to hold legal title, but on an automatic resulting trust in favour of the settlor (*IRC v. Broadways Cottages*).

### 1. Certainty of Subject Matter – Trust Property/Assets

- In a valid Trust, BOTH the TYPE OF PROPERTY and the AMOUNT/VALUE of beneficial interest MUST BE IDENTIFIED in sufficient detail AT THE TIME the trust is created (*Beardmore*).

  **Rationale:** This is due to the onerous responsibilities placed by the law on the trustee – they must know what they’re dealing with exactly in order to give effect to the intentions of the Settlor.

### TEST for Certainty of Subject Matter:

- The subject matter (type and amount) must be either ASCERTAINED or ASCERTAINABLE at the time of the trust’s creation (*Beardmore*).
- Cannot have a wait and see approach to subject matter – trust assets must be ascertainable at time of creation of trust (i.e., when trust is executed) – here they weren’t ascertainable until he died.
“Ascertained” when it’s:
1. Fixed in amount (ie: money), OR
2. A specified piece of property (ie: a car).

“Ascertainable” – when a method by which the subject matter can be identified is available from the terms of the Trust Deed or otherwise.

Each of these must be described “with sufficient exactness” to meet the criterion for certainty, but COURTS LEAN TOWARDS FINDING CERTAINTY (Beardmore).

(i) How trusts may fail for uncertainty of subject matter
• Semantic uncertainty – linguistic uncertainties
  o Eg: “reasonable income” – wtf does this even mean?
  o Trust will fail if trust property is certain, but beneficial interest is not (Sprange v. Barnard):
    ▪ EG: “A transfers 10,000 shares in ABC Co. to T in trust “to provide some shares to B1 and remainder to B2” – property clear (10,000 shares), but beneficial interest is not!
    ▪ You know what the subject matter is, but not the proportion to which it’s supposed to be divided.
• Evidential uncertainty – no means of adducing evidence for ascertaining.
  o Describes how to ascertain in deed, but the method is basically impossible to apply or implement.

(ii) Ensuring subject matter is certain
1. Provide reference to specific piece of property (ie: LTO description of land).
2. Provide reference to specific fund or fixed amount/proportion in a specific fund.
3. Provide a formula to determine the amount of the trust.

Type of property and amount of beneficial interest MUST BE SUFFICIENTLY CERTAIN ... need to describe with sufficient exactness AT THE TIME THE TRUST WAS CREATED!

Re Beadmore Trusts (1952) Ont.
Facts: Separation agreement required husband to create a trust for children. The drafted deed states: “transfer 3/5 of my net estate to kids. Transfer not to take place until I die”. Father died.
Issue: Was the subject matter sufficiently certain?
Decision: NO – subject matter unclear – “3/5 of net estate” was not legally ascertainable!
• Can’t have ‘wait and see’ approach. In this case, it was ‘wait and see’ how much is left after father died.
Note: “3/5 of residue of my estate” probably would have been okay. “Residue” clarified that it’s everything that’s left.
• Pavlich: Not clear as to why this is the rule; doesn’t it make more sense that certainty of subject matter measurement should be key date when beneficiaries entitled to payment?
• If trust assets (type/amount of property) not described sufficient clarity then would be trustee vested w/ legal and equitable title
  o If trust assets described sufficiently, but beneficial interest described inadequately (e.g., shares transferred to A, some for benefit B and rest for C) then trust still fails, but trustee holds trust for settlor

Beneficial interests declared MUST BE CERTAIN in order to raise a trust.

Sprange v Barnard (1789) UK
Facts: Testatrix: “I desire as my last will and testament. I bewill to my husband $300, stocks, etc; all that is remaining in stock that he doesn’t have use for, to be equally divided between my brothers and sisters” – TRUST for siblings.
Decision: Too uncertain to make an effective trust – property not sufficiently identified by “remaining part of what is left” – husband got legal and beneficial title of $300 anuity.
Notes: Is this really a good enough reason to invalidate the trust? It would be easy enough to see how much of annuity remains after trustee (husband)’s death.
• Trusts of income from property are also not ascertainable, though they can be valid.

“Reasonable Income” sufficiently exact – court can objectively determine

Re Golay (1965) (UKCH)
2. Certainty of Words/Intention

- **There must be an obvious intention that the trustee is placed under imperative obligation to hold the property for the benefit of another.**

- **TEST:** Is there a certain and immediate INTENTION to create a trust?
  - Most common dilemma: Gift or Trust?
  - Word “trust” need not be used, but the imperative connotation must be CLEAR!
  - At very least have “in trust” and be directed towards a person who we can purport to be trustee
    - Use imperative language (e.g. must) when giving directions to trustee re dealings with trust assets relation beneficiary
  - However, use of “trust” is not requirement – if words clearly indicate intention to create imperative responsibility to carry legal title for benefit of another
  - Precatory words (I wish, I hope, I request) – will be viewed in context of document to determine if intended to be imperative even though everyday would be precatory – see HAYMAN v NICOLL
    - Not as clear, suggest avoiding them
    - Courts look at whether language indicates:
      - Intent to form trust w/ obligations on trustee; or
      - Title is result out and out gift and precatory terms are in fact that, mere hopes/exhortations by transferee that asset be used assist another – presumption in favour of a gift when precatory statements used, especially in family settlement situations
  - Intent simply benefit 3rd party other than transferee is too general for constitution of trust
    - Must be actual intent create trust: usually gauged by intent impose obligation on transferee hold property benefit 3rd party

(i) Precatory “Trusts” VS. Gifts and Trusts

1. Out-and-out gifts
   - NOT A TRUST – no obligation on any trustee to do anything.

2. Trusts
   - Must impose an obligation on the trustee (ie: legal title transfers, but not beneficial/equitable title).
   - May result from a gift, but gift would have to confer a beneficiary interest to another party.
     - EG: “I give you a computer, in trust of person X” – Can rent out computer and give X the money, could sell compute and give X money, but can’t use the computer for trustee’s own benefit!

3. Precatory Trusts
   - NOT A TRUST – EG: “I give you X, but please give some to Aunt Mable”.
   - Uses words such “I hope”, “I wish”, “I request”.
     - Not obligation on trustee to do anything, just a strong suggestion to do something.
     - If words indicate precatory trust, no trust is created and the person with legal title or in control of the property is entitled to it beneficially (Hayman)
     - See Hayman v Nicoll

Precatory trusts create the presumption of an absolute gift!
- For the words of a trust to be sufficiently certain, they must convey more than a mere WISH or MORAL obligation – there must be evidence of an intention to bind the trustee.

**Hayman v. Nicoll (1944) SCC**

**Facts:** Testatrix states: ‘I gift money to daughter in full confidence she will hold it according to my wishes”. BOTH testatrix and daughter die - sibling claim that daughter’s executor holds money on resulting trust for testatrix’s estate.

**Decision:** No semi-secret trust – at most a precatory trust (expressing “wish”). Daughter took the money as an absolute gift, NOT as a trustee.
- Insufficient evidence of communication and acceptance to create a fully-secret trust!

**Notes:** SCC noted change in meaning of “in full confidence” – under English law, it used to imply a trust.
- Now, in Canada, it merely implies a hope by the testatrix that her wishes be followed (“precatory words”).

**Conduct of B can indicate if there is a trust**

**Royal Bank v Eastern Trust Co (1951) (PEI SC)**

**Facts:** Crossman owed money to RBC; assigned rental income from property to bank
Later sold property; agreement included provision: “Stetson is to hold deed of [property] until Crossman raises a Mortgage on [property] to repay taxes and insurance premiums, also [judgment] and indebtedness at [bank].”

**Decision:** How you pursue your rights in relation to a potential trust is important; the Bank sued in personam for a garnishment order on the rent income – this combined with other conduct was enough to show that it wasn’t a trust, didn’t act in manner that allowed for it to be characterized as beneficiary.

### 3. Certainty of Objects – certainty of the identify of the beneficiary

- With the EXCEPTION of charitable trusts (as articulated in *Jones v. The T. Eaton Co. Ltd.*), all trusts must have a person or group of persons as a beneficiary!
  - **Statute of Elizabeth** – Charitable trust can only apply in 4 circumstances: religion, health, education, relief of poverty.
    - As such, a trust to teach bulldogs how to dance would be void for uncertainty, as it doesn’t fall under a charitable trust, and the objects are too uncertain. (no definite beneficiary).
- **RULE:** The beneficiary must be ascertainable for the court to enforce the trustee’s administration of a trust!
  - The applicable test for certainty depends largely on the legal vehicle used to disposed of the property to the beneficiary. As such, determining which vehicle is used is essential!
- Different Tests for Different Vehicles: Our enquiry is to identify tests of certainty of who are the objects/beneficiaries by the settlor appropriate for the form of appointment (eg: trust, power, trust-power) set out in the trust agreement.

### C. LEGAL VEHICLES FOR DISPOSING OF TRUST PROPERTY TO OBJECTS

#### 1. Fixed Trust – ‘...must distribute to John Smith’

- Rigourous level of certainty required – fits with mandatory nature of vehicle.
- Trustee MUST provide for beneficiary/members of the beneficiary class.
  - This makes certainty very important – if objects are unclear, then potential beneficiaries can object and appeal to a court to interpret the intention of the settlor.
  - Must be able to identify all members of the class in order for Trust to be effective.

**TEST FOR CERTAINTY** – Must draw a ‘COMPLETE-LIST’ of ALL BENEFICIARIES in order for certainty of objects to be validly expressed in the trust document! (*IRC v Broadway Cottages Trust*).

#### 2. Discretionary Trust (Trust Power) – ‘...must distribute to one or more of my children’

- Has aspects of both Powers and Trusts.
- Trustee is REQUIRED to exercise a DISCRETION in selecting beneficiaries from a class and/or determine the quantum of interest to be enjoyed by members selected from that class.
  - MUST select a beneficiary, but MAY select who.

**TEST FOR CERTAINTY** – Trust is valid if it can be said with certainty that any given individual ‘IS or IS NOT’ a member of the class of beneficiaries with concern for administrative unworkability (*McPhail v Doulton (Baden No.1)*).

#### 3. Powers of Appointment – ‘may distribute’

- Authority bestowed on a person to distribute property that is not his/hers (ie: they do not necessarily have legal title).
- The Trustee/donee of power of appointment need only CONSIDER whether to distribute.
  - There is no fiduciary duty for the Trustee/donee of power to distribute to anyone!
  - Cannot compel donees of power of appointment to act – Courts will not intervene unless the donee acts capriciously (*Re Manistry’s Settlement*).
- **NOTE:** Presence of a gift-over in a trust document implies a settlor’s intention to create a power (how could settlor mandate anything if there was possibility of a gift-over?)

**TEST FOR CERTAINTY** – Trust is valid if it can be said with certainty that any given individual ‘IS or IS NOT’ a member of the class of beneficiaries (*Re Gestetner*).
(i) Classification of Powers
   a) General Powers
      o Wide scope of discretion; no qualification on discretion.
      o EG: “I give you Blackacre, and you may use it for the benefit of the world”.
   b) Special Powers
      o Narrower scope; discretion qualified in some way.
      o EG: “…may give it, but only to my relatives”.
   c) Hybrid Powers (Intermediate Powers)
      o Mix of both – general power, mixed with an exemptive clause.
      o EG: “to anyone (general), except my brothers and sisters (narrow)’’.

(ii) Precautory Trust vs. Point of Appointment
   • Precatory Trusts involve an out-and-out gift (‘this is yours, but please give some to Aunt Mable’); whereas a Power does not bestow legal or beneficial title (as would an out-and-out gift), but rather, only the ability to determine who will receive any beneficial title.

(iii) Trusts vs. Powers
   • Powers
      o Discretionary – donee has obligation to “consider” using the power, but there is no obligation to use the power!
        ▪ Courts will typically not intervene so long as the donee has “considered” the distribution and do not act capriciously/arbitrarily/display bad faith
      o EG: “Power of Appointment” refers to the ability of the donee of the power of appointment to transfer property belonging to another person to a beneficiary.
      o Often, the donee of the power of appointment will be the Trustee, but it’s important to know in what capacity the Trustee is acting in such a situation in order to properly apply the test for certainty.
      o “Administrative Powers”:
        ▪ Special type of power that gives the Trustee discretion to act in carrying out his or her mandatory duties.
        ▪ Gives flexibility for Trustee to deal with changing circumstances
   • Trust
      o Mandatory – the Trustee MUST distribute according to the wishes of the settlor – if not, risks being sued for breach of trust!
        ▪ Courts will intervene to give effect to the intention of the settlor.
        ▪ Trustee is under a fiduciary obligation to exercise the appointment as described and distribute to the beneficiaries.

(iv) Discretionary Trusts vs. Powers
   1. Fiduciary Nature - Discretionary Trust is still a trust – has a fiduciary obligation.
      o Powers lack this characteristic.
   2. Administrative unworkability [“Evidentiary uncertainty” - see below] is not an issue for powers (Hay’s Settlement Trusts)
      o However, it can make a discretionary trust void.
      o As such, administrative unworkability is a major factor in distinguishing a mere Power from a Discretionary Trusts, despite the fact the test for uncertainty is identical.
        ▪ Note: ‘All the people in Greater London’ - McGarry J in Hay’s Settlements thought that there were circumstances where such beneficiaries made sense.

4. History of the Test for Certainty of Objects
   • For decades, COMPLETE LIST test applied to both fixed and discretionary trusts (the approach in Broadway Cottages).
   • By contrast, the more flexible ‘IS OR IS NOT’ test was applied in Re Gestetner regarding powers of appointment.
      o Harmon J: less strict standard because it’s virtually impossible to draw up complete list for powers of appointment at any time.
   • Growing use of trust powers (discretionary trusts) in large pension plans made reliance on the COMPLETE LIST test untenable!
   • In Gulbenkian Settlements (1970) HL upheld COMPLETE LIST test from Broadway Cottages as applying to trust powers (discretionary trusts) as well – meaning IS OR IS NOT was only applicable to powers simpliciter.
• RATIONALE (advanced by Lord Eldon in Morice v. Bishop of Durham – accepted in Broadway Cottages): A valid trust must be possible for court to control and execute. Absence of COMPLETE LIST of beneficiaries means that only a subset of the beneficiary class can be identified, and thus beneficiaries cannot call/terminate the trust.
  • Also, courts cannot enforce the ‘equity is equality’ maxim regarding the execution of the trust.

- However, many observers argue that despite the problem, the rigidity of the COMPLETE LIST TEST undermined testator intention – IS OR IS NOT test provides needed flexibility.
- In Baden I, HL REVERSED its position from Gulbenkian and REJECTED the COMPLETE LIST test for trust powers (discretionary trusts) – and adopted the common sense approach of applying ‘IS OR IS NOT’ test to trust powers as well!
  • Lord Wilberforce: Task facing one trustee with a power of appointment and one with trust power (discretionary trust) is a “matter of DEGREE and NOT SUBSTANCE”.
  • Trustees with duty to distribute among a very large class (trust power) would never require a COMPLETE LIST – would conduct due diligence and reasonable enquiry, and then take factors into account before choosing who to distribute to.
  • “Trustee examine the field by class/category and depending on amount of trust assets make diligent/careful enquiries to determine composition needs particular classes beneficiaries; then decide on priorities and proportions; then select individuals according to needs/qualifications”
  • Equality likely contrary to testator intention: “equal division among all may, and probably would, produce a result beneficial to no one.” As a result equal division in most cases would likely be “the last thing the settlor ever intended.”
  • Trust powers (discretionary trusts) require a large degree of practicality (particularly in light of modern business and circumstances).

- Today widely held that Baden I approach (‘IS or IS NOT’ test) applies to both trust powers (discretionary trusts) and powers of appointment.
  • If Trustee doesn’t allocate property (malfeasance), they can be restrained by court on application by qualified member of class.
  • If Trustee doesn’t allocate at all (nonfeasance), court can replace them
  • In remote chance that no trustees allocate as requested, court can apply cy-pres doctrine and could administer the trust and make a list for a modified class in order to roughly give effect to testator’s intentions.
- These prophylactic mechanisms help to ensure that the Trustee doesn’t abuse its power through this less-rigourous test for certainty of objects!

5. Conceptual Uncertainty, Evidential Uncertainty, and Administrative Unworkability

- Conceptual Uncertainty – Can you identify what the group actually is?
  • Satisfied through the COMPLETE LIST and IS OR IS NOT tests [above].
  • If this is not satisfied, the trust/trust power(discretionary trust)/power of appoints is VOID!

- Evidential Uncertainty – Whether evidence can be adduced to determine if an individual is part of an enumerated class of beneficiaries.
  • EG: Where number of beneficiaries is hopelessly large - “All the residents of Greater London” (Lord Wilberforce in Baden I).
  • Powers – no effect – will not fail due to administrative unworkability/evidentiary uncertainty. (Re Hay’s Settlement)
  • Trusts/Trust Powers (discretionary trusts) – can make them VOID for administrative unworkability!
    - Stamp J in Baden II: Need both conceptual AND evidential certainty for discretionary trust.
    - Sachs J in Baden II: Only need conceptual certainty!

Courts will endeavour to find certainty (all three judges found certainty, with varying consequences on the administration of the trust!)

- Stamp J’s Rigid approach: BOTH conceptual and evidential certainty required! (re: trust power).
  • Here, “relative” means “next of kin”, which is not difficult to prove.
  • The test includes the word “any” it will brook no “maybes”

- Sachs J’s laissez faire approach: Only conceptual certainty is required; no evidential certainty just means NO distribution to that person!
  • A “maybe” merely means no distribution to that person; anyone that is a maybe bears the onus of proving w/ certainty that they are a member of the class

- Megaw J: Trust is valid so long as certainty works for a “substantial number” of beneficiaries; good so long as at least “one
A trust power can withstand maybes, but they must be in proportion to the members it can evaluate with certainty; use common sense.

Baden II (1970)

Facts: Trustees of Baden I came back to court for assistance into how to administer the trust.

- Executors could determine who IS a relative, but not who IS NOT.
- What does it mean to be a “relative”?

D. FUTURE INTERESTS AND THE RULE AGAINST PERPETUITIES (RAP)

RATIONALE: Designed the limit the length of time a transferor may effectively control the enjoyment of property by future generations by making property the subject to a serious of successive interests.

1. Present and Future Interests in Property

(i) Present Interests

- “Property” is all about legally recognized social relations between individuals, as mediated by “things”.
  - Social relations include the rights to manage, use, and enjoy the “thing” in question.
  - Such rights can be exercised in present time either:
    - (1) Indefinitely – EG: Freehold, Estate in Fee Simple; OR
    - (2) Defined, Limited Time – EG: leasehold.

- Leaseholds:
  - Tenant has a present interest in possession of control, enjoyment of the premises.
  - Freeholder (landlord) has a presently-held, future interest – the reversionary interest in the property once the lease has expired.

(ii) Future Interests

- Future interests are presently-held rights, which, after (i) the passage of time OR (ii) the realization of some described circumstances, will lead to possessory rights.
- Future interests can be held as:
  1. Vested, presently-held future interests
     - EG: Reversions and Remainders
     - Interest is vested on transfer (ie: presently-held) with possession of property postponed until the future.
  2. Unvested, contingent future interests – Vests once condition is satisfied! CONDITION PRECEDENT
     - Not currently vested right to future possession of a thing, but they can still constitute “property” on basis that interest may become vested in the future.
     - Once the contingency occurs or the limitation realized, the contingent future interest becomes a vested future interest entitling the owner of it to immediate possession of the thing.
     - RULE: To qualify as “property” an unvested, contingent future interest MUST, among other things, comply with the RULE AGAINST PERPETUITIES. It must be shown that the contingency will not have the effect of vesting the interest in the future at a time that is too remote (as set out by RAP).

2. Contingent Future Interests

- Examples:
  1. Conditions Precedent
     - EG: “To Orville, if he turns 30 years of age”
     - Contingency = turning 30 years old.
  2. Conditions Subsequent (Defeasible)
     - EG: Rights of entry – “To Orville, but if (or “subject to” or “on the condition that”) she ceases to use the property for educational purposes, then to Bloggs”.
     - Condition = ceasing to use property for educational purposes.
  3. Determinable Interests
(i) Are contingent, future interests “Property”?

- Unlike reversions or remainders (vested, presently-held future interests), these interests are not immediately vested as future interests. To become vested, the contingency must occur.
- Despite this, such contingent future interests can still be “property” provided the realization of the contingency does not occur too far into the future (i.e., is too remote).

3. Conditions for Vesting / Legal Validity

A remainder is VESTED if TWO CONDITIONS are satisfied:

1. The person or persons entitled to the interests must be ascertained!
2. The interest must be ready to take effect forthwith, and be prevented from doing so only by the existence of some prior interest(s).

If either condition is not satisfied, the remainder is CONTINGENT.

- To be legally valid, CONTINGENT FUTURE INTERESTS must:
  1. Comply with the RAP as laid out in the Perpetuities Act; AND
  2. The circumstances identified in the condition or delimitation MUST NOT:
    a. Effectively bar alienation of the thing; OR
    b. Be vague and/or contravene public policy.

4. Rule Against Perpetuities (RAP)

- Prevents “remoteness in vesting” – i.e., the creation of property interests where vesting is to occur ONLY after many generations into the future.
- In Trusts, the RAP deals primarily with the vesting of equitable title in the beneficiaries.

Rationale:

1. Prevent perpetual trusts: The rules reflect a policy measure to prevent settlors from creating “perpetual” trusts through the use of conditions.
   - The rule requires that beneficiary’s interest must vest absolutely, if it to vest at all, within a defined time period that begins from the time the trust comes into effect (i.e., with perfection of legal title in the trustee).
   - Restrictive rules on recognizing contingent, future interests as “property” help prevent one generation from ossifying land use for succeeding generations by ‘ruling from the grave’.
   - Such rigid conditions, while undermining the ability of future generations to enjoy the property, could also create major problems for free markets.

2. Facilitate the right of beneficiaries to TERMINATE – Essentially, within a defined period, the beneficiaries must be capable of being identified (by vesting in them the equitable interest) AND be able to become qualified (i.e., fully entitled to the property interest because all conditions and limitations have been satisfied) so that they are in a position to terminate the trust if they wish.

(i) The Common Law RAP

“Certainty of Vesting Requirement”: Contingent future interests MUST VEST, if it is to vest at all, within the “lives in being” at the time the interest was created, plus 21 years. If vesting could occur (however unlikely or absurdly) outside of this period, the contingent future interest is DISQUALIFIED as property on the bases that the possible period of vesting is too remote!

- Practical or biological impossibilities (i.e., the fertile octogenarian) are disregarded in conceiving possibilities of a spectral or phantom beneficiary.
- But, even if there was a remote, plausible change of a beneficiary existing beyond the established parameters, the trust is deemed void
  - This rigidity made the law ineffective!
(ii) Legislative Amelioration of the RAP – Perpetuities Act (BC)

- While the social objectives of the CL RAP were sensible, it’s rigid application because problematic.
  - Modern drafter could easily and understandably make a mistake that would ruin the plans and render a settlor’s intended disposition of property impossible – often with no justifiable policy objective.
  - Also, the problems inherent in family trusts (reason RAP was created) had limited application, if any, to the newer social welfare trusts like pensions (which were also structured as trusts).

- The Perpetuities Act remediates this absurdity in THREE PRINCIPLED WAYS:
  1. **Wait and See Approach** - Allows actual events to unfold within the allowed period.
     a. Section 8 – No disposition is void because of “possibility” of vesting beyond perpetuity period.
     b. Section 9 – presumption of validity (“wait and see”).
  2. **Allows for:**
     a. Recognition of natural limitations of giving birth (s.3(a); s.14).
        i. Males = >14
        ii. Females = 12 – 55
     b. Reduction of age contingencies (s.3(c); s.11)
     c. General cy-pres (“as near as possible”) (s.3(e)); s.13).
  3. Allows settlors/devisors to choose a **straight 80 year perpetuity period** as a substitute for “lived in being + 21 years” (s.7).

**Legislative Provisions of Perpetuities Act**

Section 8. Possibility of vesting beyond period (‘Wait and See’). 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.

(1) Every contingent interest in property that is capable of vesting within 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 section 11, 12 or 13, becomes void.
(2) A disposition conferring a general power of appointment, which but for this section would have been void on the ground that it might become exercisable beyond the perpetuity period, is presumed to be valid until the time, if any, it becomes established by actual events that the power cannot be exercised within the perpetuity period.

Section 7. Eighty-year perpetuity period permitted.
(1) Subject to subsection (2), an interest in property which either
   (a) according to the express terms of the disposition creating it, or (b) by necessary implication from the terms of the disposition creating it must vest, if at all, not later than 80 years after the creation of the interest does not violate the rule against perpetuities.
(2) For the purpose of subsection (1) only, an interest created under the exercise of a special power must be considered to have been created at the date of the creation of the power.”

Section 3 - The remedial provisions of this Act must be applied in the FOLLOWING ORDER:
(a) section 14 (capacity to have children)
(b) section 9 (wait and see)
(c) section 11 (age reduction)
(d) section 12 (class splitting)
(e) section 13 (general cy pres).

Section 14 - Presumptions and evidence as to future parenthood.
(1) If, in a proceeding respecting the rule against perpetuities, a question arises that turns on the ability of a person to have a child at some future time, then, it must be presumed that
   (a) a male is able to have a child at the age of 14 years or over, but not under that age, and
   (b) a female is able to have a child at the age of 12 years or over, but NOT under that age or over the age of 55 years.
(2) Despite subsection (1), in the case of a living person, evidence may be given to show that the person will not be able to have a child at the time in question.
(3) Subject to subsection (4), if any question is decided in relation to a disposition by treating a person as able or unable to have a child at a particular time, then the person must be so treated for the purpose of any question that may arise respecting the rule against perpetuities in relation to the same disposition, even if the evidence on which the finding of ability or inability to have a child at a particular time is proved by subsequent events to have been 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 that a person may at any time have a child by adoption or legitimation must not be considered in deciding a question that turns on the ability of a person to have a child at some particular time, but, if a person does subsequently have a child by that means, then subsection (4) applies to that child....

Section 11 – Reduction of age to prevent making interest void

(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 within 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.

(iii) Critiques of Perpetuities Act (BC)

1. Act is unnecessarily cumbersome, and does not ameliorate unintended consequences unknown to an unwary draftsperson.
2. Is there even a need for a RAP in modern society?
   - Manitoba has abolished it.
   - In England, Perpetuity Act has been amended to incorporate:
     - A straight 125 year perpetuity period for the vesting of any type of future interest; AND
     - Complete abolition of the RAP regarding pensions.
   - NOTE: In BC, many statutory bodies are exempt:
     - Universities (s.52 of University Act).
     - Government disposiions (s.5 of the Perpetuity Act).

D. FORMALITIES

- There are technical legal requirements that must be satisfied for a trust or devise to be considered binding.
- EG: Section 59 of Law and Equity Act mandates that contracts for the sale of land be in writing!

1. Inter Vivos – Statute of Frauds and Law & Equity Act

- Formalities are typically different than for testamentary trusts, because the Settlor is still around to oversee execution!

(i) Statute of Frauds

- TRADITIONALLY:
  - Section 1 – Agreement regarding interest in land (both creation and transfer) not enforceable unless in writing and signed.
  - Section 2 – Assignment of a beneficial interest in property (via a trust) not enforceable unless in writing and signed.

(ii) Law and Equity Act

- NOW: Section 54 of the Law and Equity Act insured that it superseded the Statute of Frauds.
  - Equitable interest – NO FORMALITIES: In BC, section 59 of the Law and Equity Act has ABOLISHED the necessity for formalities in creating and transferring equitable interests IN LAND inter vivos from settlor to beneficiary (but NOT for the transfer of legal estate from the settlor to the trustee!).
    - However, from a practical and evidentiary standpoint, it’s good too commit the interests to writing through a trust document.
  - Legal interest = FORMALITIES! According to section 59 of the Law and Equity Act, the ultimate transfer of legal interest IN LAND from the settlor to the trustee MUST BE IN WRITING!
ENFORCEMENT

- Equity will permit evidence of alleged trusts to be introduced to court, such to prevent FRAUD!
  - Conflicting maxims: “equity follows the law” VS. “substance over form”.
  - Formalities pose a blunt solutions, but can be manipulated to become instruments of fraud.
  - As such, evidence will be admitted where it demonstrates intention to create a trust, communication and acceptance of trust occurred.
  - **POLICY:** This has lead to a complicated set of case law as courts grapple to navigate between these principles in search for a just solution that supports policy.

2. Per Mortis Causa – *Wills Act* and *Wills, Estates and Succession Act*

- According to the *Wills Act* and the *Wills, Estates and Succession Act*, a testator MUST manifest his or her intention to leave property to persons in a Will – ie: a WITTEN memorial, SIGNED by the testator/testatrix in the presence of TWO INDEPENDENT WITNESSES.
  - Must be in writing (section 3).
  - Must be signed for formal execution (section 4).
  - Failure to comply invalidates the Will and the rules of intestate succession will apply.
    - However, new Act provides a wide cast of exemptions to this.
    - There are also exemptions in EQUITY – the Secret and Half-Secret Trusts (but these will become less significant with passage of new Act).

3. Wills: Secret Trusts

(i) Fully Secret Trusts – No mention of the trust in the Will document (ie: illegitimate child?)

- Bequeath looks like an absolute gift on the face of the Will, but communication otherwise by testator outside the scope of the Will to create the Trust (‘ex facie’ the will).
- Used historically to care for illegitimate children, mistresses, etc.
  - Saved family from embarrassment.
- To prevent trustee fraudulently keeping property for himself in breach of promise to testatrix
  - See *McCormick v Grogan*
- To fulfill equity’s principle give effect to a testator’s actual/real intention

Requirements for a Fully-Secret Trust

1. Testator INTENDED that the beneficiary named in the will it to hold the legacy in trust (as trustee) for the real beneficiary (See *Ottaway v. Norman*)
2. During the testator’s lifetime, he or she COMMUNICATED to the named beneficiary that he or she intends the named beneficiary to receive the property on the testator’s death as a trustee, in trust for the real beneficiary (See *McCormick v. Grogan*)
3. The named beneficiary (ie: the trustee) ACCEPTS or ACQUIESCES to the testator’s proposal to act as secret trustee (See *Re Boyes*)
   - Must accept proposal before; although instructions may be given after.
   - Must be told names of beneficiaries before testators death (although can be done after the creation of will) (Re Boyes)

Secret Trusts still subject to the Three Certainties: Even where requirements of a secret trust are met, certain aspects of the trust can be found invalid due to uncertainty of subject matter.

**Ottaway v. Norman (1972) UK**

**Facts:** Father left house, money, and reside of his estate to common law spouse (with a secret trust for his son).
- Spouse agreed to be “primary donee”, but in her will she left the ⅔ of her estate to the son (plaintiff) and ⅓ to defendant.
- Son sued for spouse’s estate.

**Issue:** Did she agree to hold the property for the benefit of the son?

**Decision:** There was valid intention, acceptance, and communication of a secret trust.
- However, while court granted the son the house, it did not grant him interest in the money (left in her estate).
- Reason: Uncertainty of subjects – unclear whether “everything” was to be held in the trust, or just the house.

**Notes:** If court found that son did have a valid interest in the residue (money), a floating trust would be set up in son’s favour. This
would be difficult in practice:
- Are restrictions of wife’s spending?
- What of income generated from residue?
Easily just to set up as a life estate for wife, with remainder interest to son.
[requirements for secret trust met, but subject matter too uncertain!]

Instructions must be communicated BEFORE death to allow legatee to ACCEPT:
- Discovery of documents after Testator’s death DOES NOT create a binding trust obligation – Donor must bind the conscience of the donee, and there must be evidence of this prior to death.

**McCormich v Grogan (1869) HL**
**Facts:** Testator left estate to Grogan. On deathbed, told Grogan that his will/letter was in his desk.
- Letter named various intended beneficiaries / gifts.
- “I leave it entirely to your own good judgment to do as you think I would, if living, and as the parties are deserving”.
- Intended beneficiary sues.

**Decision:** if a Will contains a gift, which appears absolute, clear evidence if necessary for Court to assume testator intended otherwise.

**Note:** If you put instructions in sealed envelope and ask legatee to open envelop only after death, it is likely okay so long as legatee accepts those instructions PRIOR to death of donor.
- Must show that legatee accepted order, and that testator believed the trust would be carried out.

**Named beneficiary (real trustee) must ACCEPT or ACQUIESCE to settlor’s proposal.**
- If B has not given A the promise to act as trustee, then B will take beneficially.
- If B has given the promise to act as a trustee before A dies, but only learns of C’s identity after A’s death, B will hold on a resulting trust for A’s estate.

**Re Boyes (1884)**
**Facts:** Testator left property to his solicitor “absolutely”; solicitor had drafted the will, appointed as trustee to provide for a woman and child the testator did not want to mention in the will.
- Testator failed to give timely communication of the trust (never mailed letters).

**Decision:** Instructions never communicated, therefore secret trust is INVALID.
- Solicitor held the property as trustee for “next of kin” (as per Wills Act).

**(i) Half-Secret Trusts**
- The trust is declared in the Will, but the object (beneficiary) is not (ie: named Beneficiary is actually the Trustee for the “real”, but undisclosed, beneficiary.

**Requirements for a Half-Secret Trust**
1. Testator must communicate to the named beneficiary that he or she is to hold the property in trust for the true beneficiary before the Will is made! *(In Re Keen)* (as opposed to fully-secret, where communication must take place only before settlor dies).
2. Testator must communicate to the named beneficiary the identity of the true beneficiary before the Will is made (no apparent rationale for this difference – but suggested rationale by Lord Sumner in *Blackwell v. Blackwell*).
3. B must indicate his acceptance before or at the time the Will is made!

Main difference from Fully-Secret Trusts: With Half-Secret Trusts, everything must be done before the Will is made, however with Fully-Secret Trusts everything must be done only before the time of Testator’s death.
- Parole evidence is allowed to identify the testator named in the will, on the condition that the testator identifies the beneficiary before the will is executed.
- Reason for identification requirement: Viscount Sumner - Prevent testators from by-passing the requirement of *Wills Act* by telling legatees from time to time who he at that moment wants to benefit after his death.

**Blackwell v Blackwell (1929) HL**
**Facts:** Disposition in Will “for purposes indicated by me to them…to such persons indicated by me as they see fit”.
• Before the Will is drafted, 3 people agree to hold legacy on trust for lady and her child, who testator does not want named in Will.

**Decision:** Gift was made on trust, but no beneficiaries specified – Court holds that trust was fully communicated to testator at time of will’s execution.

- Parole evidence is allowed to enable proof of the identify of the beneficiary indicated in the will – this is allowed because the evidence does not serve to vary the will, it simply gives effect to testator’s wishes.
- Viscount Sumner “It is communication of the purpose to the legatee, coupled with acquiescence or promise on his part, that removes the matter from the provision of the Wills Act and brings it within the law of trust”.

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For Half-Secret Trusts, the terms of trust, including the identity of the beneficiaries and the nature of the interest conferred, must be communicated BEFORE the Will is made!

- Telling trustee to ‘give whatever I say to give to whoever I say to give it to’ in a note after Will is drafted does not meet the requirements of a Half-Secret Trust!

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**In Re Keen**

**Facts:** Disposition of a Will “to be held upon trust, disposed by legatee among such persons as may be notified by me to them during my lifetime”.

- Testator later sealed envelope and gave it to legatee to undertake trust.

**Issue:** Did sealed envelope constitute “communication” regarding the identity of the beneficiaries?

**Decision:** Court held because words in will seem to refer only to something hypothetical, (‘what testator may choose to do’), trust for persons named in envelope DOES NOT SUCCEED!

**Note:** Would probably be okay if testator gave trustee an envelope not to be opened until testator’s death IF trustee knows envelope contains terms of a secret trust AND he’s agreed to carry it out.

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**(iii) Reasons for Enforcing Secret Trusts**

- To prevent the fraud of a trustee keeping the property for his/her own use in breach of the promise to the testatrix (Lord Westbury, in McCormick v Grogan).
  - Secret trusts are NOT caught by the formalities of the Wills Act – this equity must ensure that the law is not used to perpetuate fraud.
- Enforcement gives effect to intention of testator/testatrix.

**Secret trusts will be enforced in order to prevent the fraud of the trustee keeping the property for his or her own personal use, in breach of his or her promise to the testator/testatrix!** (Lord Westbury)

- Qualification by Lord Hatherley: Secret trusts should only be enforced in clear cases of fraud!

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**McCormick v. Grogan (1869) HL**

**Decision:** (Lord Hatherley stated: “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.”)

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4. Secret Trustees as Beneficiaries

**A Trustee of a Half-Secret Trust cannot be a beneficiary under that trust IF such an arrangement would heighten the risk of fraud to intolerable levels.**

**In Re Rees (1950) UK**

**Facts:** Will drafted for testator by solicitor; Will stated that solicitor and another friend were to take entire estate in trust for certain beneficiaries half-secret trust).

- Solicitor had letter from testator stating that after estate was disbursed, the remainder went to solicitor and the friend (aka trustees had remainder interest, and were therefore beneficiaries as well).
- Estate was very valuable, lots left over.

**Decision:** Court REFUSED to allow solicitor to keep residue.

- If the solicitor was the one who drafted the Will, and is allowed to adduce extrinsic evidence showing he was intended to benefit, the chance of fraud is simply too great!
5. Time for Vesting of the Beneficial Interest

- **Secret Trust** – terms must be communicated to secret trustee before testator’s death!
  - If communication does not happen before testator’s death, secret trustee remains property for himself.
  - Communication still effective even if done by sealed enveloped with details of trust *(Re Keen)*

- **Half-Secret Trusts** – terms must be communicated to secret trustee before the will is made!

**VESTING RULE:** Beneficial interests vests at the time the half-secret trust is created!

### In Re Gardner (1923) UK

**Facts:** Testatrix drafted a Will - gave her entire estate to her husband for use and benefit during his life, “knowing he will carry out my wishes”.

- 4 days later, a signed memo indicating her wishes was drafted.
- Wife died, husband died without being able to prove her Will.

**Issue:** Did memo create an absolute trust for name beneficiaries, subject to husband’s life estate?

**Decision:** Husband held property in trust for 2 nieces and 1 nephew.

- Normally, gift to deceased niece would have lapsed, but here the equitable interest was vested at the time the trust was created (before the niece’s death).
- As such, her 1/3 share was payable to her “estate”, notwithstanding the fact she predeceased the testatrix.

(i) What happens if Trustee dies before the testator?

- **Secret Trust:** Trust fails, as on the face of the Will there is no mention of the trust, just the initial beneficiary.
- **Half-Secret Trust:** Trust survives – existence of trust is already apparent on face of the will.

6. Rectification of a Will – Eroding need for secret trusts

- **Eroding need for Secret Trusts:** Changing social mores towards legitimacy of children and tolerance of extra-marital affairs has largely overtaken the need for secret trusts.
- Furthermore, use of Secret Trusts will likely be obsolete given the wide powers of a court to ascertain and give effect to actual intentions in the *Wills, Estate and Successions Act*.
  - The very wide powers vested in a court to give effect to testator intention likely reduce significantly the need to resort to the somewhat arcane rules of and seemingly unnecessary distinctions between secret and half-secret trusts.

### Section 59 of the new *Wills, Estates and Successions Act* provides:

“(1) On application for rectification of a will, the court, sitting as a court of construction or as a court of probate, 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 circumstance described in subsection (1).

**Limitation period**

(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.

E. REVOCATION BY THE SETTLOR – CANNOT UNILATERALLY TERMINATE TRUST

- Once a Trust has been created, the Settlor leaves the picture completely – cannot unilaterally undo what they have executed *(See Bill v. Cureton)*
  - The Settlor may include powers in the express trust for the amendment or revocation of the trust.
  - The Settlor may also revoke the trust before it is constituted!
- Without a reservation of this power, only the beneficiary under the rules of *Saunders and Vautier* can terminate the trust!

Once a trust is created and executed, the Settlor may not unilaterally undo the trust. Sole beneficiaries, or all beneficiaries by agreement, may terminate a trust under the principles of *Saunders and Vautier*.

### Bill v. Cureton

**Facts:** Settlor gives assets to Trustee for benefit of “husband, children”.

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*Law 451: Trusts* – Dennis Pavlich
Fall 2015 – Final CAN
• The Trustee accepted – the transfer was perfected.
• However, the Settlor didn’t actually end up marrying or having any children – wanted to undo the trust.

**Decision:** Court held she couldn’t undo the trust – if she died without a husband or children, trust assets would revert to her estate.
• But, she can’t have the money now!
• Pepys MR: “That a voluntary settlement, where the trust is actually created, is binding upon the author... is so fully established... that the author of this settlement is bound by it, and is not entitled to the assistance of this court to release herself from it...”
**IMPLIED OR RESULTING TRUSTS**

**Implied /resulting trusts DO NOT DEPEND on the expressed intentions of a settlor.**
- In a resulting trust, the equitable interest jumps back to the grantor/settlor/testator’s estate while the legal interest is held by the grantee as trustee.
  - Implied/resulting trusts: Trusts based on unexpressed, but presumed intention.
  - Constructive trusts: Trusts imposed by law, irrespective of expressed or implied intention.

**A. CONCEPT OF THE RESULTING TRUST**
- Traditionally, both ARTs and PRTs were regarded as examples of trusts giving effect to the common intention of the parties
- EG: the settlor’s presumed intention NOT to give beneficial interest to the Trustee.

**TWO CATEGORIES: ART and PIRT.**
- Distinction first laid down by Megarry J in *Vandervell’s Trusts 2 (1974)*:
  - ARTs serve to prevent UNJUST ENRICHMENT of the beneficiary by receiving a beneficial interest greater than initially intended.
    - Unjust enrichment prevented by having beneficiary hold legal title of assets in question with ART in favour of settlor.
    - No need for ”presumed intention”, occurs AUTOMATICALLY (*Re Vandervell’s Trusts*)
  - Conversely, PIRTs are based on PRESUMED INTENTION not to give beneficially in circumstances of gratuitous, or “voluntary” transfers.

**CRITIQUE OF DISTINCTION:** Brown-Wilkinson JL in *Westdeutche Landesbank v. Islington*:
- Consequence of justification under unjust enrichment is to give the transferor a proprietary interest in the assets of a bankrupt transferee, thus preferring the transferor over other creditors in the insolvent estate.
- In other words, should proprietary relief be given to someone as a victim of unjust enrichment that he or she actually instigated, by transferring the LEGAL TITLE to the transferee? Should the remaining equitable interest of the transferor act in rem and in preference over other creditors of the transferee who is almost certainly bankrupt?

**B. AUTOMATIC RESULTING TRUST (ART)**
- Arise where settlor transfers property to Trustee on an express trust for the beneficiary, but the trust FAILS TO TAKE (uncertainty of objects, etc) OR does not exhaust all the available beneficial interests in the trust property.

**(1) Situations Where ARTs Occur**

**(i) Transfer of legal title to trustees in a TRUST THAT TURNS OUT TO BE VOID**
- Results with express trust fails for one of the THREE CERTAINTIES (*Broadway Cottages*).

Where a trust fails due to uncertainty of objects (or any of the three certainties), the would-be trustee holds legal title in an ART in favour of the Settlor!

<table>
<thead>
<tr>
<th>IRC v. Broadway Cottages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facts: Not possible to draw up a complete list of all objects in a discretionary trust = trust declared invalid.</td>
</tr>
<tr>
<td>Decision: Court orders that trustees hold legal title on ART for benefit of settlor.</td>
</tr>
</tbody>
</table>

**(ii) Transfer of legal title to trustee WITHOUT DISPOSING FULLY OF ALL THE EQUITABLE INTEREST**

**GIFT:** If disposition is an absolute gift (not only in trust), trustee may keep the remaining surplus of equitable interest.

<table>
<thead>
<tr>
<th>Re Foord</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facts: Disposition in Will; amount given to a sister to hold and pay annuity to wife; there was a surplus.</td>
</tr>
<tr>
<td>Issue: Does the sister hold the surplus beneficially, or was she trustee for next-of-kin?</td>
</tr>
<tr>
<td>Decision: Sister got the property as an absolute gift (not only in trust), so whatever’s leftover from wife’s annuity should stay with sister.</td>
</tr>
</tbody>
</table>
NOT A GIFT: Where the disposition is not an absolute gift, the trustee only holds legal estate, with surplus held on a resulting trust for next-of-kin (estate of settlor).

**Re West**

**Facts:** Testatrix left property in trust for sale to pay debts, funeral expenses, legacies.
- Trustees performed as directed; claimed there was a surplus.

**Decision:** Next-of-kin got surplus. Trustees hold legal title, but on resulting trust for testatrix's next-of-kin, who hold equitable estate.
- Q: devise on trust for whole estate or merely on trust for portions earmarked for other legatees?
  - A.k.a. is the whole subject matter a trust or is it a gift with some of it segregated on trust for a purpose?
- Lord Eldon in *King v. Dennison* highlighted two types of transfers:
  1. A gift of assets personally but from which existing debts must first be discharged (as in *Re Foord*)
  2. A gift that is subject to certain purposes described as trusts (as in *Re West*).
  - In these cases, beneficial interest of surplus belong to heirs.

**ART requires initial EXPRESS TRUST:** Assets will be treated differently depending on the structure of the transfer scheme:
- If pension structured as a trust, then surplus will depend on trust law and purpose of trust.
- If pension plans structured as a contract, then surplus subject to contract/plan provisions.

**Schmidt v Air Products Canada Ltd. (1994) (SCC)**

**Facts:** Two companies (Stearns-Roger Canada Ltd and Catalytic Enterprises) merged to form Air Products, which then dissolved and had $9 million surplus in combined pension plan.
- Company claimed surplus was held for it on ART.
- Beneficiaries claim surpluses was theirs.

**Decision:** Court examined documents creating each pension plan – looked for terms dealing with dispositions of surplus.
- Surplus attributed differently under each pension scheme.
- Catalytic plan was created as a trust, and as such pension plan belonged completely to beneficiaries (money stayed with them).
  - As a defined contribution plan it was not possible for it to have a surplus.
- Stearns plan was created under contract, and since no trust was created the surplus of funds reverted back to company.

**Notes:** Similarly, if there is a pension short-fall, then beneficiaries are left with a deficit.
- Pensions must now have provision explicitly dealing with fund surpluses.

(iii) Transfer of property to another, subject to a specific LIMITATION or CONDITION PRECEDENT WHICH HAS NOT OCCURRED or BEEN ACHIEVED

**Quistclose Trust:** Where primary condition or purpose on loans fails to be executed, the borrower holds the money as a resulting trust in favour of the lender.
- By placing condition on loan, lender has equitable interest (right of reverter) to the money.
- As such, if condition not met, the borrower holds the money in trust of the lender (ART).


**Facts:** Loan was made for specific purpose that wasn’t carried out – money was only to be used to pay a dividend (condition precedent on funds).
- Just before dividend to be paid out, recipient goes bankrupt.
- Quistclose argued money belonged to it – while recipient holds legal title to money, it owns beneficial title.

**Issue:** Was money to fall into general estate of recipient business to pay off creditors, or does it revert back to grantor through a resulting trust?

**Decision:** Quistclose: Created where creditor has lent money to debtor for a particular purpose or base on a particular condition, and the debtor has used the money for some other purpose (ie: has not met the condition).
- Any money inappropriately used can be traced and belongs to debtor.
- Property did not become part of general property of the borrower.
- Specific purpose of the loan must be fully identified by the lender to impress a duty on the borrower to use the amount solely for the purpose agreed to by the lender.
- Lord Wilberforce: Explained result in TWO-STEP analysis:
1. Primary duty – tantamount to trust for specific purpose.
2. Secondary duty – equitable, works like an ART – Where primary duty fails, the secondary duty (the ART) arises.

Notes: Quistclose trust gives another means of privileged protection to a creditor (besides obtaining security in the form of a mortgage). This raises a few points, however:

- Exception to general rule that a lender has no interest in money once advanced to a borrower or its agent.
- Gives the lender an equitable interest in the money – a priority claim over other creditors in the event of insolvency.
  - Lender has in rem right in the property.

Essay Topic: Is this a case of the doctrines of contract and trust being improperly conflated, leading to a lender having an in rem right to money under a loan contract?

- To me, no, it’s just a use of trust principles to enforce the terms of the contract; easier remedy that having to seek damages (may not be any left). Proprietary remedy warranted.
- Particularly if the borrower becomes bankrupt – gives creditor preferred status fro funds advanced for an unfulfilled objective (if it’s a condition on the loan).

Quistclose Trust: Consideration by the UKHL

_Twinsectra Ltd v Yeardsley (2002) (UKHL)_

Facts: Y took loan from T for purpose acquiring property
- T would only give loan if backed by solicitor’s guarantee – Y’s solicitor wouldn’t do it so a different solicitor did
- Loan given to solicitor who promised to only release it to his client for use in purchasing a property
- Solicitor released to client unconditionally; client used it for other things; solicitor eventually went bankrupt
- T sues Y on basis Quistclose Trust

Decision: Three stages to Quistclose trust
1. When money advanced for purpose, lender has equitable right to see applied only for that purpose
2. Once applied then lender becomes ordinary creditor
3. If purpose not carried out look to intentions of parties from cirrs of case and terms of their agreement
   - Will usually require funds to be segregated from D’s general funds
Q: Can B use money as he pleases (free of obligations) or is it for express purpose based on cirrs and agreement

Quistclose Trust: Consideration by the UKHL

_Re Westar Mining (2003) (BCCA)_

Facts: Joint venture coalmine: W owned 80%, P owned 20%
- W also held position as manager of mine; to operate made occasional cash calls and P & W deposited requisite funds to special joint venture account
- W went bankrupt: suppliers/employees of mine said funds in joint venture acct had express purpose trust for them

Decision: JV agreement provided W had two capacities: owner and manager; received funds in JV acct as later
- This was evidence of mutual intent that money JV Acct not property of W and W only entitled use for operation mine, not own purposes
- Bank (main general creditor) aware of special purpose of JV Acct and exempted from monthly sweeps of W’s accts; confirming that it was separate from W’s funds
- Purpose funds must be kept separate
- Purpose trusts cannot change debts into trusts retroactively

(iv) SURPLUS OF FUNDS after trust purpose has been achieved (Re: PURPOSE TRUSTS)

Where a trust exhausts only some of the trust property, thus leaving a SURPLUS of funds after the purpose has been fulfilled, a resulting trust for the transferor / settlor may arise in respect to the surplus  

_Re Gillingham_

- Distinction between this and #2:
  - This category is focused on PURPOSE TRUST – there is generally an unincorporated society whose members are designated with carrying out a specific purpose.
    - Recall: “purpose trusts” are limited to those enunciated in Statute of Elizabeth.

Where contributors NOT easily identifiable, pay to court:
- Resulting trust imposed in favour of contributors, with money payable to court for administrative simplicity.
Re Gillingham Bus Disaster
Facts: Funds raised to pay for funeral expenses of army cadets killed in a bus crash. A surplus results.
Issue: How should surplus be distributed?
Decision: Traditionally, surplus of non-charitable benevolent fund held on resulting trust for subscribers.
- This fund came from public donations – how to return surplus (how do you identify contributors?)
- Court HELD that resulting trust principles applied:
  - Money to be paid into the Court, with contributors expected to come to the court and collect their residue share of the money.
  - RATIONALE: If money goes uncollected after a specific amount of time, it becomes state property anyway. Might as well have it payable to court for administrative simplicity.

[Trust for accident victims]

Where contributors ARE identifiable: Surplus shared ratably among contributors – held as ART for individual subscribers.

Re British Red Cross Balkan Fund (1914)
Facts: Fund raised by public subscription for assistance of wounded in Balkan War – surplus leftover after veterans were assisted.
Issue: What to do with surplus funds?
Decision: Surplus was ratably held on ART for individual subscribers, who were all identifiable (veterans).
- Court held:
  1. Contributors could be provided with pro rata share of money, if they can be located.
  2. Under doctrine of cy-pres, the court created a new fund whose objects are as close as possible to the contributors of the initial fund.

2. Unincorporated Associations: CLUBS as a bypass to SPECIAL PURPOSE TRUSTS
- Unincorporated associations are created when there are two or more people (Harmon J in Re Buck) who come together to further a common purpose (sports, politics, social, religious).
- Club / organization collects money from members; can collect through solicitation, fundraisers, dues, etc.
- This is fine so long as club is operational, but what if club dissolved?
  1. Can be allotted by contract through organization’s constituting documents, or
  2. The organization can be argued to constitute a trust:
     - Claim the money put forward in trust for benefit of organization’s members, who have merely chosen to use the money for a particular purpose.
- What happens to money after unincorporated association DISSOLVES?
  a) Money held on an ART by members?
  b) Money held by members under rules of contract (equity is equality)? OR
  c) Money surrendered to Crown as bona vacantia?

Facts: Unincorporated animal rights association (league); had 250 members in 1960s
- By 2006 H-S only surviving member and League had Â£2.5 million in assets
- Wanted to wind up and transfer to active animal charity – sought court order declaring T trustee of assets
- AG was defendant since such an order would imply funds not bona vacantia
Issue: Who gets the money?
Decision: A gift to UA can fall into 3 cats: 1) gift to members at date as joint-tenants (severable); 2) Gift to existing members subject contractual rights/liabilities one another as members (not severable); 3) on trust for purpose of association as quasi-corporate body
- Usually the 2nd
- Members beneficial right to assets subject contract between them
- UA w/ 2 or more members can by majority/unanimity vote alter contract b/w them – could call for division of assets; these rights are contractual not equitable
- When cease to be member lose interest in assets – e.g., death
- Association dissolves when only one member and they are entitled to the assets – barring contractual provisions
  - Would be absurd to hold otherwise: last two surviving members could separate assets, but once 2nd last member dies the final surviving member loses any rights to the assets? NO
Contract
- Identifiable contributions held as ART for donors (not members) and heirs, remaining surplus surrendered to State as bona vacantia.
- If contract says members not entitled to money, they do not benefit from ART – goes to State as bona vacantia: “equity does not impute an intention which it considers absurd on the face of it”.

Re West Sussex Constabulary Fund (1971) UK
- Depends on source of contribution
  - Collection boxes: givers intended part with money, surplus bona vacantia
  - Legacies/major donations: purpose is important, so if achieved and excess then that excess is held on ART
  - Street entertainment, raffles, sweepstakes – founded in contract not trust. Contributors not actually donating, just paying. Thus any surplus is

Re Bucks Constabulary Fund (1979) UK
Facts: Different from Re West Essex – fund was registered under the Friendly Societies Act – stipulates that remaining funds belonged to the society’s members.
Decision: Court held that subsisting members were entitled, on dissolution, to surplus property equally (as per principle ‘equity is equality’).
- Walton J: Different decision justified by different statutory framework.
- However, Court held that property would NOT be surrendered to State as bona vacantia as money was essentially acquired and held on an ART for donors and their heirs.

BC POLICY IMPLICATIONS:
- BC Law Reform Commission has held that surplus from public appeal funds should be subject to cy-pres.
- Trustees of those funds should be able to distribute funds of up to $10,000 to other charities as well.
- In other words, neither ART nor the rules of bona vacantia should apply!

C. Presumed Intention Resulting Trusts (PIRT)

IN GENERAL: PIRT occurs when there is:
- a) A purchase of property in the name of another OR
- b) A voluntary transfer of property to another; AND
- c) There is NO CLEAR EVIDENCE concerning the actual intention of the transferor about who is intended to benefit from the transfer.

(i) Effectively, a ‘Rebuttable Presumption’
- Presumption: Court presumes that if X gratuitously transfers property to Y, X did not intend to do so beneficially.
- Rebuttable: But, if counter EVIDENCE exists suggesting X did in fact intend to transfer beneficial interest in the property to Y (ie: Y is X’s child), then absolute gift would be inferred!
  - Evidence will determine whether transaction is:
    1. An out and out gift in which full (legal and equitable) title vests in the donnee; (Standing v. Bowring) OR
    2. An express trust in which legal title alone vests in the transferee/trustee.
- Examples:
  - A sells good to B, B pays price and transfers good to C ➔ C presumed to hold legal title of good in PIRT for B.
  - A voluntarily transfers (gifts) good to B, with no consideration ➔ B is presumed to hold legal title in PIRT for A.

1. Evidential Issues
- Presumption exists SO LONG AS there is no evidence of contrary intention by the testator.
- Preclusion of Evidence: In certain circumstances, even though rebutting evidence is available, a court may preclude its production, and render the evidence inadmissible!
  - EG: Evidence around the circumstances of why property is transferred with generally be precluded where that evidence shows an illegal scheme/purpose that the court is asked to recognize and give effect to in order to understand the reasons for the transfer.
- Unclear Evidence: If the destination of the equitable interest is UNCLEAR, then prima facie there is a PIRT and a trust is
imposed on the transferee for the benefit of the transferor.
  - Transferor is PRESUMED to have retained equitable title with bare legal title vested in the transferee (*Dyer v. Dyer*).

2. Rebutting the Presumption
   - Onus of Rebutting – Ordinarily, the onus is on the transferee to rebut the PIRT (ie: he or she has to show that the transferor intended the passage of beneficial title with legal title to them).

(i) General Rule
   - **General Rule:** PIRT can be displaced by EVIDENCE that transfer was an out-and-out gift! – Actual intention as manifested by conduct is binding

### Standing v. Bowering (1885) (UKCA)
**Facts:** Plaintiff transfers British Consol bonds (perpetuity bonds) into joint names of herself and her godson, to whom she was NOT in loco parentis (in the place of the parent – ie: not a guardian, etc).
- She seeks to re-transfer the stock into her own name only.
**Decision:** There was prima facie a Resulting Trust, which was, however, displaced by evidence of intention.
- Evidence showed she intended to benefit him personally.
- Re-transfer fails – was an outright gift.

### Purchase Money Resulting Trust: contribution expressly w/o conditions/requirements is a legal gift

### Nishi v Rascal Trucking (SCC) (2013)
**Facts:** R assisted N in acquiring property through funding
- R wanted interest in property – N refused, R still offered funding “w/o any conditions or reqs”
- After sale R brought action for an interest 50% property based on purchase money resulting trust
**Decision:** Purchase money resulting trust species gratuitous transfer resulting trust: occurs when advance $ towards purchase price and don’t take legal title
- To rebut must show that transferor intended money as a gift or intended to retain no beneficial interest
- Can take into account evidence subsequent to transfer but it is really evidence before or at time of transfer that counts
- Here the presentation of money along w/ assertion that had no conditions/requirements constituted a gift

(ii) Joint Bank Accounts

**Standard form contract provisions (ie: right to survivorship) DOES NOT REBUT PIRT – not sufficient evidence to rebut presumed intention of a resulting trust.**
- Implies that something more is necessary (ie: a specifically drafted provision)
- Purpose of standard form bank agreement pertains to relationship between depositors and bank, not between depositors themselves!

### Niles v. Lake (1947) SCC
**Facts:** Mrs Arnott (deceased) opened joint account with her sister – joint account had right of survivorship.
- When Arnott dies, sister claims everything in the account.
- Executor argues that all money is the property of Arnott’s heirs, not her sister specifically!
**Issue:** Has PIRT been rebutted in sister’s favour? Does joint account (right of survivorship) rebut the presumption of RT?
**Decision:** Bank used a standard form document for the account creation, which did NOT rebut presumption of RT.
- Bank’s standard form is to protect the bank and enable account holders to deal with the accounts in an “unqualified way” – in the bank’s words, purpose is “to preclude any challenge to the irrevocable authority of either of the depositors to deal with the account in an unqualified fashion and as is she were the sole owner of the funds”– does not imply one depositor gets residue upon death of other!
- Bank agreement does not deal define the relationship of the joint depositors inter se.
- Sister therefore had legal title, but RT created for money put in for deceased in favour of deceased’s heirs.
**Note:** Abella J in more recent Pecore v Pecore: “The wording of bank document should be deemed s clear intention; common sense dictates this – should have to adduce evidence that joint tenancy was just intended re access to funds in acct and not beneficial interest in right of survivorship
(iii) Joint Bank Accounts + Declaration by depositor to give balance to co-tenant

- Where joint bank account is set up to help look after depositors affairs AND there’s a declaration by the depositor to give balance to co-tenant on death → this is NOT “avoidance” of Wills Act (perfectly allowed).
- However, courts will sometimes interpret this as a “testamentary gift,” and in violation of Wills Act.

Express declaration of intention by testator/testatrix is SUFFICIENT EVIDENCE to rebut PIRT!

- Satisfactory affirmative proof of intention to confer beneficial interest displaces presumption of RT.
- “The presumption of resulting trust does no more than call for proof of an intention to confer beneficial ownership” (Dixon J.)

**Russell v. Scott (1946) Aus HC**

Facts: Testatrix opened joint bank account in both her and nephew’s name. She put money in account, enabling nephew to withdraw and care for her.

- Testatrix told solicitor that money in account would belong to nephew upon her death (declaration).

Issue: When she dies, did the account form part of the estate?

Decision: Account money did NOT form part of estate!

- Nephew had obtained “present right of survivorship” when testatrix declared her intention to solicitor (reflecting joint ownership of money). – vested future interest and thus not testamentary
- Equity tries to give effect to intention of testatrix.

Note: Because it was Aunt Nephew, there was no presumption of advancement; instead, prima facie PIRT.

Express declaration of intention by testator/testatrix MAY BE SUFFICIENT EVEN where the declaration amounts to “avoidance” of the Wills Act.

**Young v. Sealey (1949) UKCD**

Facts: Testatrix opened joint account with nephew.

- Evidence showed she intended to confer NO beneficial rights during her lifetime, but he would get the money in the account upon her death.
- Upon her death, Executor of her estate claimed the money in the account.

Decision: Court found that her joint account bank agreement, and declaration that nephew would have no beneficial rights, amounted to avoidance of Wills Act.

- However, longstanding court practice to recognize such outright transfers of legal and equitable title was TOO ESTABLISHED in England and Ontario to change it now.

Note: How can court just ignore the Wills Act?

D. PRESUMPTION OF ADVANCEMENT (VERY CIRCUMSCRIBED TODAY)

**In General:** The Presumption of Advancement (PA) operates in transfers from:

1. Parents (mother and father) to minor children
   - Since Pecore, only applies to minor children.
   - Historically, only applied to transfers from fathers to children of any age.
2. Husbands to wives
   - This should be treated very cautiously today!

(i) Effect of PA

- Effect of PA is that the beneficiary as transferee owns beneficially (as well as legally), without the need to rebut a PIRT.
- Transferee gets full legal and equitable title where the PA operates.

(ii) Onus of Proof

- Under PA, onus shifts to the transferor to show an intention that excludes the operation of the PA.

(iii) Rationale for PA

- “The general rule [of PIRT]... is subject to an exception where the purchaser is under a species of natural obligation to provide for the nominee” (Lord Eldon in Murles v. Franklin (1818))
Notion that natural affection leads one to infer that gift was supposed to be outright.

Historical Origins:
- PA originated in 18th century, and from 19th – 20th centuries, it reflected social practices and expectations of middle class and wealthy families.
- Today, social and economic circumstances have changed radically.
- As a result, PA lacks the vigour it had before marital property legislation was created (See: Huband J.A. in *Mehta Estate v. Mehta Estate (1993)*). – Has to be very traditional marriage
- Most provinces have abolished PA (except BC and Manitoba).

1. Operation of PA in Different Relationships

(i) Father/Mother to Child
  - Rationale: Not extended to adult dependent children because of difficulty in defining “dependency” (*Young v. Young (1958) BCCA*) – SEE PECORE NOTES!

(ii) Husband to Wife
- Only Man and BC have not abolished presumption outright in legislation
- Court will look at traditional vs. contemporary lifestyles.
  - PA originated in 18th century – reflected social practices and expectations not necessarily applicable to modern times.
  - Today, PA is tenuous re: husband and wife (easy to rebut) – largely usurped by marital property legislation

PA in marriage – declined in significance; will require strong evidence regarding relationship

**Eisener v Baker (2007) (BCSC)**

Facts: GF snuck her name on the bill of sale for house; house purchased with BF’s money and no intention of ever having her name on bill of sale or knowledge that she put her unwitnessed signature on there

Decision: Evidence regarding the functioning of the relationship is admissible; here the BF had no intention of even putting her name on the title let alone gifting any sort of title especially beneficial

At Common Law, PA extends to in loco parentis ‘in the place of the parent’ (ie: executor).
- PA re: husband and wife is not dead – but “PA lacks some of the vigour it enjoyed in the days before marital property legislation”.
- The strength of the presumption will VARY depending on the circumstances of the case.
- PA is more significant where the spouses are not alive to testify.

**Mehta Estate v. Mehta Estate (1993) Manitoba**

Facts: Concerned Air India tragedy, husband, wife, and 2 children each die.
- Dispute between estate of husband and estate of wife.
- Husband left his property to wife, with remainder to children; wife dies intestate.
- Most of wife’s estate consisted of assets purchased with husband’s money in wife’s name for tax purposed.
- Husband’s estate claims half interest in those assets as PIRT (as he gave them to her);; Wife’s estate argues that she gets both legal and beneficial title under PA.

Decision: Here, case was not a matrimonial action.
- Husband was primary provider for family; wife was largely a housewife.
- PA UPHELD – completely normal for loving husband to put assets aside for wife.

(iii) Wife to Husband
- NO Presumption of Advancement AT COMMON LAW – it is presumed that a husband transferee HOLDS ON RT for the transferring wife (*Re Mailman Estate (1941)*)
  - [Why is this – assumed any property she had was inherited? Should go back to her?]
  - Presumed wife’s property was from inheritance, and should revert back to her?
(iv) Mother to Child

- Presumption of Advancement operates in:
  - a) Relationships of dependency, AND
  - b) In Loco Parentis.

- It DOES NOT OPERATE in favour of children who are no longer minors!

2. Joint Bank Accounts: Withdrawals and Purchases

PIRT and PA can be good to drive finality in concluding cases

- Matrimonial cases:
  - o PA for all joint assets that have resulted in a “common purse”.
  - o Husband held house as trustee for wife’s ½ equitable interest.

- NOTE: This case differs from Niles v. Lake and Russel v. Scott [above, under PIRT] in that those cases did not involve husband/wife relationships!

Warm v. Warm (1969) BCSC

Facts: Matrimonial dispute – he owns house and she wants. Interest in it and all assets – he wants distribution according to their financial contributions.

Decision: PA applied. Court finds they’ve established a “common purse”, so she gets ½ interest in all purchases.

- Everything comes from joint account, so owned equally.
- House in his name, but he holds as trustee for her. Equitable interest.

E. REBUTTING PRESUMPTIONS – EVIDENTIARY RULES ( APPLY TO BOTH PA AND PIRT)

- Like a PIRT, the Presumption of Advance can be rebutted by evidence of the real intention of the transferor.
- However, law of evidence has developed RULES that limit the adducement of evidence to rebut a presumption. These limits focus on matters of:
  - a) Timing – once you’ve given the gift, you cannot change your mind – evidence must be prior or contemporaneous to transaction in question; AND
  - b) Illegality

1. Evidentiary Rule #1: Timing

- The timing of evidence is important if the transferor seeks to rebut a presumption! – SEE PECORE FOR MORE UPDATES

Timing: Court will ONLY look at evidence from the transferor regarding things that occurred BEFORE the transaction, or AT THE TIME OF the transaction – NOT AFTER!

- Evidence of things that occurred after the transaction is inadmissible!

Shephard v. Cartwright (1955) HL

Facts: Father allotted shares to 3 kids without their knowledge.

- Later, directed them to sign withdrawals (kids don’t understand significance). And father uses proceeds for himself.
- Upon his death, kids claimed against his estate for amount that father had withdrawn from them.

Decision: Court looked as evidence from before AND at the time of purchase.

- Court found that there was evidence suggesting Father’s gift not intended to confer benefit – was subject to his overriding control – however, this evidence occurred long after the transaction in question.
- “The acts and declarations of the parties before or at the time of the purchase or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration. But, subsequent declarations are admissible as evidence only against the party who made them, and not to his favour”.
- Court held this evidence (in favour of father retaining shares as PIRT) was inadmissible, and thus PIRT yielded to PA!
- Children got interest in the shares!

2. Evidentiary Rule #2: Illegality and Presumption

- The Problem: A transferor conveys a property to a complicit transferee in order to pursue some unlawful activity or avoid some lawfully protected third party (eg: transfer is effected to avoid creditors).
Later, transferor wishes to regain title to the property and seeks retransfer relying on PIRT; transferee refuses.

Issue: Can the transferor ask the court to help, given the impropriety I motive for effecting the transfer in the first place?

- Should the transferor be able to rely on the PIRT?
- Can the transferor rebut the PA by adding evidence of the impropriety? If not, does the complicit transferee get to keep legal AND equitable title because rebutting evidence of PA is excluded from court’s consideration?

(i) Original Approach: STRICT RULE

- Strict Approach under doctrine of es turpi causa non action oritur (‘can’t pursue action that arises out of illegal act’):
  - Evidence tainted in illegality is INADMISSIBLE!

**Scheuerman v Scheureman (1916) SCC**

**Facts:** Husband conveys house to wife in order to protect property from creditors (intention to defraud credits is contrary to fraudulent conveyance legislation).

- Wife agreed to hold property until danger passed.
- In the mean time, husband paid the debt, creditors never sued.
- Wife sold the house and husband unsuccessfully sued for price, asserting wife was a trustee for him (PIRT operated in his favour).

**Decision:** NO – title stayed with wife – equity did not allow enforcement of beneficial title by husband (ie: NO PIRT).

- Rationale: to allow evidence of illegal motive/intent in order to rebut PA would enable the litigant to prosecute case without CLEAN HANDS.
- Intent to defraud unclean hands cannot seek equity’s assistance. – even though they didn’t actually defraud anyone or harm any creditors

**POLICY:** Problem with this approach is that it gives the transferee a windfall – even in situations where they are complicitous in the fraudulent conveyance (whether actively or passively).

- Nonetheless, this rule prevailed, and result was seen was inevitable byproduct of court’s justifiable refusal to deal with cases tainted by illegality under par delictum rule (‘clean hands’).

(ii) Doctrine of Locus Poenitentiae: EXCEPTION to Strict Rule

- Locus Poenitentiae (‘place of repentance’) – enabled production or ordinarily excluded evidence to rebut the PA where the parties never actually carried out their illegal scheme, and “repent” of it (ie: transferor withdraws from the scheme).
- Doctrine applies regardless of reason for withdrawal – whether parts withdrew because of a change of heart, or if it become unnecessary to execute the plan.
- EG: If transferor withdrew from plan to hide assets by conveyancing to another by paying the outstanding debt.

**Locus Poenitentiae:** Illegal intent simpliciter is NOT ENOUGH to preclude evidence that would rebut PA – must actually be able to carry out the fraud (regarding non-existent causes of action).

- Courts may be persuaded to allow otherwise inadmissible evidence in event where transferee is the orchestrating mind behind the fraudulent conveyance.
- Must cause actual harm to person/creditor

**Goodfriend v. Goodfriend (1972) SCC**

**Facts:** Goodfriends and the Coxe’s were into wife-swapping.

- Mrs. G feared that Mr. Coxe might sue Mr. G for “alienation of affections” – there is no cause of action for this, and no writ was ever issued.
- Mrs Goodfriend persuaded Mr. Goodfriend to transfer farm into her name in order to hide the farm assets from the “impending litigation” by Mr. Coxe.
- Mrs. G left Mr. G – Mr. G sought declaration that he had equitable title due to PIRT; sought reconveyance.
- Mrs. G asserted that she held BOTH legal and equitable title due to PA – also argued that Mr. G had no evidence to rebut PA, as it involved illegal activity!

**Issue:** Is illegal intent simpliciter enough to preclude the evidence that would rebut the PA? [NO]

- Does the exclusionary rule apply when evidence showed a scheme that could not (and never could be) carried out? [NO]
**Decision:** To rebut PA, Mr. G would have to show transfer was done to protect the farm from a judgment in an “impending action”.
- But, evidence showed the scheme would never be carried out!
- Court found PIRT for Mr. G, and allowed evidence to rebut PA.
- Mrs. G orchestrated the illegal scheme, and thus could not rely on PA; also, no creditors or third parties were prejudiced in any way.

[wife swappers]
See, also, *Tinsley v. Millian* [below].

### (iii) The Pari Delictum Rule: Where parties are EQUALLY AT FAULT
- Court may simply chose to ignore the evidence of the wrongful conduct altogether, and let the matter be decided by the competing presumptions (PIRT vs. PA) *(David v. Szoke)*
  - DP: Permit the action to go forward and simply refuse to hear the evidence of fraudulent intent that would rebut the presumption, but in all other aspects give effect to the transaction.

#### (i) Where PA DOES NOT APPLY
- Works against the transferee with a deceitful intent to transfer, as PA not there to trump PIRT, and tranferee is unable to adduce evidence of the illegal motive.

*Pari delicto ('equal in fault')*: Where parties are equally at fault, a Court may choose to not hear any evidence regarding the illegality and just let the outcome be governed by the competing presumptions (PIRT vs. PA).

#### David v. Szoke (1973) BCSC
**Facts:** Plaintiff and defendant pooled money to buy a house as joint owners.
- He (plaintiff) later conveyed his interest to her (defendant), per her advice that they didn’t want to leave the house vulnerable to potential litigation due to his drinking problems – he had been convicted of impaired driving – defendant was worries victim in collision might go after the property as damages.
- She then left him, and sought to retain legal and equitable ownership of house (PA); He sought title back as PIRT.

**Decision:** Evidence clearly indicated he did not intend to make the conveyance a gift (PA doesn’t apply)
- Both plaintiff and defendant had unlawful motive/intent to protect property from any impending judgments.
- Court found in favour of Plaintiff – gave effect to PIRT.
  - Justification: At the time of the dispute, there were no impending actions against Plaintiff, nor any creditors.
[both parties blameworthy]

**PIRT CANNOT BE REBUTTED with evidence arising out of a fraudulent or illegal act! PA DOES NOT APPLY for brother/sister relationship! Therefore, PIRT prevails!**

#### Gorog v. Kiss (1977) Ont CA
**Facts:** Plaintiff owned farm, transferred title to sister (defendant) on advice of solicitor, for purpose of defeating plaintiff's creditors (was being sued by former business associated).
- Later, plaintiff called on defendant to re-convey the property, but she refused (PA vs. PIRT).
- Sister had onus of rebutting PIRT; PA does not apply as transfer was from brother sister.

**Decision:** Court found for plaintiff; defendant held farm on TR for plaintiff (gave effect to PIRT).
- Transfer from brother sister, so PA does not apply.
- PIRT could not be rebutted by evidence because of illegal purpose behind the conveyance.

**Evidence of illegality OKAY if used to show something else or if not central to case: Evidence pertaining to fraudulent or illegal conduct MAY BE ADDUCED where case can be pleaded without relying on the illegality.**
- Illegality serves to block evidence relating to the illegal conduct, but DOES NOT block PIRT!

#### Tinsley v. Milligan (1994) HL
**Facts:** Plaintiff and defendant (lesbians) purchased a house, title registered only in name of plaintiff (both had contributed payment; common intention was tenancy-in-common).
- They didn’t jointly register, to enable defendant to fraudulently get social assistance.
- Defendant repented fraud, reported the matter to authorities.

**Issue:** Did plaintiff have claim to title, or was it held on trust for both parties in equal shares? [held on trust]

**Decision:** Despite illegal motive defendant could succeed if case could be pleaded without relying on illegality.
- Court gave effect to PIRT - Defendant paid half of purchase price, thus plaintiff held on RT.
- PIRT gave her a proportion of equitable title regardless of whether there was an illegal purpose.

**Note:** PA does not apply to lesbian couples!

**Dissent:** Once Court becomes aware of illegality, it will assist neither party (Schuerman).

**Note:** All judges disapproved of a new “public conscience” test put forward by CA, which determined admissibility of tainted evidence after weighing adverse consequences of granting relief vs. adverse consequences of refusing it [See Nelson, below]

**Aside:** (MY alternative explanation): Isn’t this just an operation of the court giving effect to the PIRT because PA doesn’t apply, and evidence resulted from illegal conduct (PIRT prevails by default/)

### (ii) Where PA DOES APPLY

- Works against the transferor, as it trumps the PIRT, and transferor is prevented from adducing evidence of the illegal motive.

**Refusal to hear tainted evidence works against the transferor with a fraudulent or deceitful intent to transfer.**

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**Foster v. Foster (1978) BCSC**

**Facts:** Father transferred 4 properties to daughter to avoid potential creditor (his wife).

- As it turned out, creditor was not thwarted – no harm.
- Father demanded re-transfer of properties; defendant (daughter) refuses – argues PA applies, and rebutting evidence inadmissible because transfer had fraudulent/illegal purpose.
- Father argues PIRT.

**Decision:** Court (reluctantly) did NOT allow evidence to rebut PA – daughter got property on PA.

- Toy J: “It is with great reluctant that I hold the evidence concerning the agreement to re-convey cannot be used to rebut the presumption of advancement in favour of the defendant”.

**Note:** English CA decision decided differently in Tribe v. Tribe.

- Distinguishing fact: In Tribe (creditor-avoidance case), intent was also not put into effect by applying locus poenitentiae – transferor repented!
- May have been different under influence of Tinsley

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**Summary by BCSC**

**Summary of Developments**

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**Tribe v Soiseth (2006) BCSC**

**Facts:** T & S met in law school, married, moved into condo purchased by T’s parents

- Title in T’s name, granted second mortgage to parents and an option to purchase that registered but never exercised
- On divorce T sought order that EQ title remained w/ parents and adduced evidence that legal title only w/ her for tax purposes (this was before PECORE so advancement still applied)

**Notes:**

- In all cases where recovery denied there were creditors or potential creditors and the illegal purpose actually carried out (some delay/harm to creditors)
- Locus poenitentiae still applies – if repent before illegal act given effect then not tainted – if given partial effect then not available
  - Actual repentance not required just voluntary withdrawal from scheme
- Even if illegality adduced it is still possible to rebut the PRT or PA with other evidence regarding intention

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**(iv) Interesting Developments (Australia) – Tainted evidence to rebut PA admitted!**

**Australian rule (NOT APPLICABLE IN CANADA):** If illegality is to preclude effective enforcement, must be an “affront to public conscience”. This is determined by examining:

1. Proportionality – adverse consequences of allowing evidence vs. adverse consequences of refusing it.
2. Whether the civil sanction would further the purpose of the statute; it should not impose further sanction for the unlawful conduct.
   - Court needs determine whether legislation contemplated penalties beyond those set in statute – if statute doesn’t over-penalize, then neither should the courts!

Facts: Mother provided purchase money for home, conveyed to children (defendants).
- Transfer done so mother could claim social benefits (system denied assistance to home owners).
- Mother intended to retain equitable interest; daughter wanted to keep beneficial title to the property.

Decision: Court agreed that PA operated, BUT it had been rebutted (even though rebuttal involved evidence of mother’s illegal purpose).
- Court came to this outcome after applying calculus to balance adverse consequences.
- McHugh J: Rules re: illegality came about in antiquated society – in “modern times”, ex turpi causa rule has to be considered in light of what is acceptable conduct from “public conscience” perspective.
  - Regulated nature of modern society has changed the legal environment.
- Balancing adverse consequences of granting relief VS. adverse consequences of refusing relief.
  - Would illegality preclude effective enforcement? Is purpose of scheme an affront to public conscience?
  - Proportionality is paramount!
  - Civil sanction should further purpose of the statute, not capriciously impose sanctions for wrongful conduct.
  - Court looked at statute to see what was a reasonable sanction; statute doesn’t over-penalize, so courts should not either!
- Here, if daughter were to win, mother would LOSE HER HOME (drastic consequences).
THE BENEFICIARY

A. NATURE OF BENEFICIARY’S INTEREST IN TRUST PROPERTY

- Generally, owner of property has a REAL RIGHT in it: ius utendi (possession, management) fruendi (enjoyment) et abutendi/disponendi (alienation).
  - “Real Right” has TWO CHARACTERISTICS:
    1. Exclusivity of possession – enforcement over 3rd parties who happen to receive or come into contract with the property;
    2. Priority – should person currently in possession (ie: borrower) become insolvent, “owner” has priority.
- Proprietary interests come in DIFFERENT FORMS – reflect different content and scope.
  - Content: refers to scope of the interest; what uses are exclusively for owner’s use.
  - Strength/Durability: resilience of the interest; by whom; in what circumstances it will be terminated.
    ▪ See tracing [last section] for application of durability.
- Title to property can be broken down into split into “legal” and “equitable” title.

1. Legal Title (to the Trustee)

- Trustee has legal title to the trust property – has ALL LEGAL RIGHTS AND POWERS associated with property management and control.
  - Trustee’s powers are both administrative and dispositive, and include:
    ▪ Making contracts;
    ▪ Exercising power to maintain or enhance the value of the property;
    ▪ Passing benefits (money) to beneficiaries.
  - Trustee must comply with duties under the terms of settlement.
  - Trustee is a fiduciary – must exercise powers with best interests of beneficiary in mind.

2. Equitable / Beneficial Title (to the Beneficiary)

- Beneficiary has equitable title in the property; bestows in rem rights in individual items of trust assets (Baker v. Archer-Shee) + personal rights against the trustee (Shalit v. Nadler) to enforce:
  - Trustee’s compliance with terms of settlement; and
  - Trustee satisfying his or her fiduciary obligations – must act:
    1. In good faith, taking reasonable care in dealing with things in trust;
    2. In beneficiary’s best interests;
    3. To make only authorized dispositions of trust property.
- Beneficiary gets exclusive enjoyment of the benefits (fruendi) of the trust property/assets.
- Beneficiary does NOT exercise administrative or dispositive powers (utendi) over the trust property/assets.
- In limited circumstances, beneficiary can assert beneficial title against 3rd parties (tracing).

NOTE: Sub-Trusts

- Very important to distinguish between “equitable” and “beneficial” title in sub-trust scenario.
- This is because not all equitable titles are beneficial entitlements.
- EG: Bloggs (beneficiary) can declare a trust regarding his/her equitable title in the trust property in favour of Biggles (sub-beneficiary)
  - Thus Bloggs still has “equitable title”, despite fact that Biggles now has “beneficial title”.
- “Sub Trust” occurs when:
  - Beneficial no longer has beneficial title; sub-beneficiary does.
  - Beneficiary has bare equitable title in relation to sub-beneficiary, who alone now entitled to benefits of property
  - Trustee remains the same.

B. KEEPING THE ROLE OF TRUSTEE AND BENEFICIARY SEPARATE AND DISTINCT

- In a cestui que trust, beneficiary does not have legal capacity to exercise administrative or dispositive powers over trust property.

(i) Beneficiary has no power to administer or dispose of trust property, subject to agency
- **STRict RulE:** Beneficiary has no power to exercise administrative or dispositive powers over property in trust.
  - Beneficiary only has right of action against Trustee for breach of trust; has NO ABILITY to exercise real right (in rem) (such as disdraining/seizing property), which only lies with the trustee!

**Schalit v. Nadler (1933) KB**

Facts: Beneficiary attempts to disdrain (seize) for unpaid rents against property in which he had equitable interest.

Decision: Invalid distrain! Should have been executed by Trustee or Agent. Beneficiary simple has a personal right (in personam) to bring action against Trustee for breach of trust; Disdrain is exercise of real right (in rem) – right which only lies with legal owner.

Agency Exception: Court has inherent jurisdiction to allow a beneficiary to take possession of an asset as an AGENT of the trustee.
- But, if beneficiary acts inconsistent with best interest of other beneficiaries, can be fired as an agent by trustee.

**Re Bagot’s Settlement (1894)**

Facts: Plaintiff was beneficiary of farm property in trust for life; remainder to his children. Plaintiff thought she should manage property, rather than Trustee, because trustee was not an expert at farming.

Issue: Would this contradict nature of a trust, given that legal title is held by trustee?

Decision: Court has discretion, inherent jurisdiction, to give beneficiary an order of possession; usually with terms to ensure asset is preserved (ie: inalienability).

(ii) **NATURE and SCOPE of beneficial title: Interest in individual items, or just proper admin? (CONTROVERCY)**
- **Issue:** is “Equitable Title” referable to the individual things that make up the Trust Fund, or to the more general expectation of trustee performance under the general duty to properly administer the Trust Fund?

Beneficiary has proprietary interest (in rem) in trust property (B = owner; can point to trust income as “theirs”).
- Beneficiary has distinct equitable interest in EACH ITEM (ie: stocks) of trust property that constitutes the Trust Fund (not interest is property administration of Fund as a whole).

**Baker v. Archer-Shee (1927) HL**

Facts: Beneficiary argues she did not “own” the individual items in the trust, but rather, owned cluster of personal rights against Trustee for proper administration of property.
- Fund included stocks, where income generated from trust fund stocks did not enter UK.
- UK tax authorities say that that all stock income was taxable – tried to collect taxes from beneficiary for income generated.
- Beneficiary argues that she only had interest in income stream; not in actual stocks, and thus did not “own” the stocks.

Decision: Court rules NO – beneficiary has distinct equitable interest in individual items of property in the trust (rather than interest in property administration of trust as a whole).
- Beneficiary is beneficial owner of the items themselves (stocks), and was income generated property was taxable.
- Problem - how does this fit in with discretionary trusts – where, until appointed, beneficiary is only a potential beneficiary – given appointment is contingent on the exercise of trustee discretion.
  - Nature of beneficiary’s interest under discretionary trust is of rights against the trustee for proper administration, NOT TO ITEM ITSELF [Garside v. IRC - 1968].

Dissent: Viscount Sumner – viewed equitable ownership as extending only to the FUND AS A WHOLE, because:
- Trustee is one with dispositive powers (can dispose of property); beneficiary cannot.
- Trust property changes quickly (ie: large pension plans) – seems kind of ridiculous to say beneficiary has interest in each individual fraction of a stock in a pension plan.

Problems with Sumner’s Dissent:
1. Beneficiary can terminate trust at any time and acquire outright (legal AND equitable) title in property under rule from Saundra v. Vautier.
2. How do you RECONCILE between beneficiary have right to administration of trust as a whole and beneficiary’s in rem right to “trace” individual items of misappropriated property?
  - Where trustee has fraudulently parted with trust property and third party is not a bona fide purchaser for value, the beneficiary can recover from that third party – in that respect, right is in rem in each item, in addition to personal right against trustee for breach of duty.

**Note:** In Archer-Shee v. Garland, A-S won as it was found that NY law mirrored Viscount Sumner’s dissenting option in Baker v. A-S.
B doesn’t want to pay taxes; says she was not the “owner”.

C. ALIENATION OF BENEFICIAL INTEREST: TRANSFER OF EQUITABLE TITLE FROM BENEFICIARY TO ASSIGNEE

• As “property”, beneficial interests can be DISPOSED OF as a chose-in-action. However, there are formalities involved in this form of transfer, known as an “assignment”.

1. Formalities under the Law and Equity Act

Section 36 of the Law and Equity Act – Provides for a written document, signed by the Beneficiary, delivered to the Trustee, to assign beneficial entitlement from beneficiary 1 to beneficiary 2.

- Explicitly give the Assignee (sub-beneficiary) the right to being action against the Trustee, without having to sue through the original beneficiary (who may have died; disappeared),
- This was not possible at common law, although it was possible in equity.

REQUIREMENTS:

1. Assignment must be absolute [no conditions] and for whole interest of assignor;
2. Assignment must be in writing and signed by assignor;
3. There must be notice to the Trustee.

Section 36. Assignment of debts and choses in action.

(1) An absolute assignment, in writing signed by the assignor, not purporting to be by way of charge only, of a debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, is and is deemed to have been effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this Act had not been enacted, to pass and transfer the legal right to the debt or chose in action from the date of the notice, and all legal and other remedies for the debt or chose in action, and the power to give a good discharge for the debt or chose in action, without the concurrence of the assignor.

(2) If the debtor, trustee or other person liable in respect of the debt or chose in action has had notice that the assignment is disputed by the assignor or anyone claiming under the assignor, or of any other opposing or conflicting claims to the debt or chose in action, the debtor, trustee or other person

(a) is entitled to call on the persons making the claim to interplead concerning the debt or chose in action, or
(b) may pay the debt or chose in action into court, under and in conformity with the Trustee Act”.

(i) RATIONALE behind Section 36 of Law and Equity Act

Reasons why Law and Equity Act allows assignee to bring action against Trustee, without joining assignor.

Di Giulo v. Boland (1958) Ont CA

- Chose in action = form of property describes “all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession”; (include equitable interest in a trust).
- Common law did not recognize transfers of choses in action, because contracts create strictly personal obligations between parties to it (privity).
- Thus:
  o Before statute, cause of action had to be styled in the name of the assignor only (ie: assignee had to sue through the assignor) because of lack of privity with Trustee.
  o Chancery intervened with injunction against assignor to facilitate actions brought by the assignee.
  o Chancery only allows this exception where interest was absolute; where it was not absolute, assignor had to be party to court proceedings.
- Section 36 of Law and Equity Act sets aside this difference – assignee can appeal to any court without need to interpose the assignor in an action.

[allow enforceability of equitable interests, without resorting to equity]

2. If FORMALITIES NOT SATISFIED:

- Common law applies – assignee must either:
  1. Pursue the action through the assignor (previous beneficiary); OR
  2. If interest transferred is absolute, appeal to EQUITY (Timpsons Executors)
Mechanism in which equitable interest may be disposed:

1. The beneficiary can assign it to the third party directly ("I, Orscilla, immediately and irrevocably assign my rights as the sole beneficiary of ABC Trust to Emmarentia"): writing required.
2. The beneficiary can direct the trustee to hold the property in trust for the third party - "As beneficiary of the ABC Trust, I, Bloggs, direct my trustee Tewksbury to now hold my entire interest for the benefit of Biggles" —
   - Writing required. This disposition is okay and follows from the rule in Saunders v Vautier provided requirements (e.g. sui juris or legal capacity, see infra) are met.
3. The beneficiary can contract for valuable consideration to assign the equitable interest to the assignee.
   - Writing is clearly prudent, but it is not clear if it is necessary as the vendor holds equitable estate on a constructive trust for the buyer as soon as the contract is effective and binding. (Constructive trusts arise by operation of law and need not be in writing. However, the arrangement does seem to fit within the purview of section 36.)
4. The beneficiary can declare him/herself as beneficiary to be "trustee" for the transferee of such interest ("I, Bloggs, now hold my interest as beneficiary under the ABC Trust on trust for Biggles").
   - This is a sub trust (i.e. with a trustee, a beneficiary with non-beneficial, equitable title and a sub-beneficiary with beneficial equitable title and the trustee still in charge).
   - Although ordinarily there are no formalities in a declaration of trust, where a beneficiary declares himself/herself trustee for an assignee of the equitable estate, compliance with s. 36 is not required though prudent to ensure the original trustee’s powers are abrogated.

**Timpson’s Executors v. Yerbury (1936)**

**Facts:** Property located in NY, created to benefit UK resident. Beneficiary tries to transfer beneficiary interest to children.

**Issue:** Was equitable interest validly assigned to children? What constitutes disposition of an equitable interest?

**Decision:** If equity interest has been transferred, she wouldn’t have been taxed on it; income would’ve come from NY, children would pay taxes.

1. But, no assignment took place — letter did not bestow on so-called beneficiaries any rights against the Trustee. Rather, Beneficiary had given to so-called "sub beneficiaries" (her children) a revocable mandate (sub beneficiaries, not assignment).
2. “Revocable mandate” in that it only passes if mandate is acted upon (can be revoked).

**Note:** This case shows how classification can be important in tax arrangements.

**D. PRIORITY AMONG ASSIGNEES — ‘FIRST IN TIME IS FIRST IN RIGHT’**

**GENERAL RULE:** Priority between claimants is determined by TIME – the earlier being preferred (qui prior est tempore, potior est jure)

**In Re: Wasdale (1899) Ch.D.**

**Facts:** Beneficiary assigned same beneficial entitlements to two different parties; Both assignees notified Trustee at time of their respective dispositions.

**Decision:** Court affirmed principle that priority b/w claimants is determined by time – earlier being preferred.

1. Even though first assignee informed a Trustee who later died, his priority was maintained even though 2nd trustee did not get notice from him.
2. If only inform some of Ts then vulnerable to claim from later assignee; if inform all trustees then claim is secure even if all Ts change.

**E. RESTRAINTS ON ALIENATION – THE PROTECTIVE TRUST**

**PROTECTIVE TRUST** – Essentially, to protect beneficiaries from themselves!

1. Sometimes called ‘spendthrift trust’ purports to terminate beneficiary’s right to income in circumstances where “he or she shall have committed or suffered or does or attempts to do or suffers to be done any act or thing or UNTIL any event happens whereby if the said income were payable to him absolutely he or she would or might be deprived of the right to receive the same or any part thereof”.
2. Courts don’t like to control how beneficiaries use income, but will try to respect settlor’s wishes re: “spendthrift children”.
3. After happening of such an event, both the capital and income of the beneficiary’s held in trust are shifted to new beneficiaries – usually the children of the erstwhile beneficiary as they attain age of majority.
### MECHANISM FOR CREATING PROTECTIVE TRUST = determiable interest

- Determinable interest – conditional interest; grantee gets interest, subject to conditions (triggering event).
- Protective Trust is really two trusts. Settlor transfers assets to a trustee:
  - Giving determinable interest in favour of the “principle beneficiary” (often a spendthrift or prodigal child), that also provides that,
  - On the occurrence of a determining event, the trust property is to be held on a second trust, which is often a discretionary trust in favour of a class of objects/beneficiaries (usually, the principal beneficiary’s children or the settlor’s other children).
- Determining events are usually:
  - Attempt by principal beneficiary to assign this/her equitable estate to another
  - Where there’s an attempt to charge this/her interests
  - Event of bankruptcy.

1. **Trust law only recognizes DETERMINABLE, not DEFEASIBLE interests – Limitations vs. Conditions**
   - Protective trusts REQUIRE determinable, NOT defeasible interest!
   - **Determinable interest is KEY**, because equity followed the distinction at common law b/w:
     1. Defeasible interest – subject to divestment under a condition subsequent (condition) AND
     2. Determinable interest (limitation).
   - **Defeasible Interests** - interests subject to divestment under condition subsequent (“on condition that...” “but if...”, “subject to...”) are VOID!
     - Beneficiary would get trust property absolutely!
     - But, restraint couched as a Determinable Interest (“until...”, “when”, “as long as”, “during”, etc) are ACCEPTABLE as they simply defiant he scope of a limitation.
       - Protective trust is enforceable.
   - **RATIONALE for trust law only recognizing determinable interests**
     - Defeasible interests are VOID under Trust law. This is because of:
       1. History: Conditions that barred and severely restricted alienation were void, whereas determinable interests that determine upon alienation were not.
       2. Condition subsequent is strictly construed and if uncertain, the condition is struck down and gift made absolutely. This means beneficiary would take the property without the protective instrument intended by settlor.
       3. Settlor cannot transfer property on protective trusts for him or herself ([Re Brewers Settlement] [1896]).

### E. TERMINATION OF TRUST BY THE BENEFICIARY – Rule from **Saunde v. Vautier**

- Beneficiary can terminate (‘call for the trust’) the trust by directing the Trustee to direct legal title to the beneficiary provided:
  1. Beneficiary has attained majority (in BC, 19 years old).
  2. Beneficiary is compos mentis (‘of sound mind’).
  3. Beneficiary is absolutely entitled to the trust (ie: settlement is not contingent – must be vested in interest, through enjoyment of it postponed through contingency).
- **TEST**: Determining whether property has vested in interest OR is a contingent interest is a matter of interpretation –
  - BUT, recall **Courts will lean towards interpretation that favours EARLY VESTING.**
    - Presence of gift over indicates that interest is contingent (determinable), meaning beneficiaries CANNOT terminate the trust.

**RULE**: Where a legacy is directed to be accumulated for a certain period, or where payment is postponed, the legatee, if he has a absolute indefeasible interest in the legacy, is not bound to wait until expiration of that period, but may require payment the moment he is competent to give a valid discharge.
- **But, cannot ignore conditions if it relates to the VERY RECEIVING of the interest**! (ie: if interest is contingent).

### Saunders v. Vautier (1841) (UKLCC)

**Facts**: Trust to accumulate dividends until Beneficiary turns 25 years old; B turned 21 (age of majority) and claimed the assets of the fund.

**Decision**: Vautier was sole beneficiary, income was vested in him by law at date of the gift, with enjoyment postponed until age 25.
• Court held he could ‘call for the trust’ – Vautier has a vested interest on the testator’s death, and the postponement of enjoyment beyond majority was against public policy, and thus should be ignored.

1. RATIONALE for Rule in Saunderv Vautier

• Why does law permit termination by beneficiary?
• Should it enable beneficiaries to get trust property despite settlor’s clearly delineated limitations (protective trust)?
• Should it prefer beneficiary’s intentions over the Settlor’s?

Rationales are similar to those regarding RAP

• Economic Rationale: The law prefers outright ownerships (as opposed to trust ownership).
  o Policy preference for freer use of property, rather than tying it up for unduly long periods of time.
  o Promotes free transferability of property for better, more efficient use.
  o Reflects long-standing common law rule attitude that ownership and freedom that maximizes use, enjoyment, and disposition of property is best for society.
  o Rule is really concerned with accumulations in perpetuity/period so long as against public policy b/c property outside effective commercial circulation
• Agent Autonomy: Reluctance to allow testators to ‘rule from the grave’.
  o While courts are generally supportive of owner intent on how property is to be used and to whom it should descend also places limitations on extent of social control over others.

2. Application of Saunderv Vautier: Law favours early vesting!

Equity favours immediate vesting: Chancery leans against postponement of vesting / possession, or imposition of restrictions on an absolute vested interest.

• If interest is absolute, presumption that vesting is not delayed!

Re Lysiak (1975) Ont HC

Facts: Testator bequested estate to wife and son living in Russia – clause postponing distribution of residue “until beneficiary’s are free to receive benefits without interference of Soviet regime”.

Decision: Gift was immediately vested in executor, with broad discretion to determine manner and timing of benefits (enjoyment) – vesting of the gift was not suspended, just the distribution!

• When beneficiary ‘called for the trust’, they were immediately entitled to equitable interest, as gift was made absolutely
  o Gift not suspended, just the timing of its distribution!
• Court stated ‘policy of Chancery has always leaned against the postponement of vesting or possession or the imposition of restriction, or an absolute vested interest’.
• Discretionary aspects exercisable by trustee seen as repugnant to full investiture of interest; and condition regarding to end of Communist regime was uncertain.
• Presence of a gift over will indicate that interest is not vested

3. Application of Saunders v. Vautier: Discretionary Trusts

• In order to terminate a trust, the beneficiary must have an absolute interest.
• But, this is NOT POSSIBLE under a discretionary trust (particularly the Baden type), where the class of beneficiaries is so wide.

RULE: Where feasible, the beneficiaries of a discretionary trust can combine to ‘call the trust’.

• To do so, all of the beneficiaries in the discretionary trust MUST:
  1. Be identifiable under the trust such that they can act together as sui juris (legally competent) AND
  2. Unanimously agree to terminate the trust (Re Smith).
• EG: If two parties jointly own an equitable interest in trust property, while neither can individually terminate the trust, they can act jointly to demand transfer of legal title into their joint names.
• NOTE: Life tenants and remainder person – all sui juris – can combine to call a trust.
• NOTE: If X and Y jointly own equitable interest in real estate, while neither can terminate the trust, they jointly can.

If (1) all objects entitled to both income (ie: life tenant) and capital (ie: remainderperson) act in unison, and (2) if they are all sui juris, they can direct the trustee in a discretionary trust to terminate trust.
**Re Smith (Trustee) v. Aspinall (1928) (UKCD)**

Facts: Testator gave Trustees of estate to pay, at their absolute discretion, income for maintenance of wife and/or children as a mortgage, remainder to children.

- Wife and children (beneficiaries) combined and assigned beneficial interest as mortagors to another party.

Decision: If all the objects entitled to income act in unison (and are sui juris), they can terminate/direct trustee in a discretionary trust.

- “...you treat all the people [beneficiaries] put together just as though they formed one person for whose benefit the trustees were directed to apply the whole of a particular fund”.

**Different beneficiary allotments: Fact that Trustee had discretion to fix differing percentages of shareholdings DOES NOT AFFECT the ability of beneficiary to call the trust in unison!**

**Re Chodak (1975) Ont HC**

Facts: Testator gave whole estate to Trustees for entire benefit of various beneficiaries. Trustee was given wide discretion, and sought direction re: validity of the discretionary trust. – delivery of packages to children in USSR w/ no gift over

Decision: Court held discretion was INVALID; testator had attempted to bequeth absolutely and then restrict their right to take absolutely via discretionary powers to trustee.

- As such, beneficiaries got immediately vested interest on testator’s death, with time and payment only postponed per Trustee’s discretion (similar to Re Lysiak).
- Equal division was ordered.
- Cannot make absolute gift subject to T discretion re manner/time of payment – need make entirely dependent on T discretion or have gift over

4. Application of Saunders v. Vautier: Reduction in value of trust property if distributed

- Terminating a trust is easy when the trust property is limited to money; but gets complicated when the trust property are shares or land.

Division can occur where is only result in a minor reduction in value of the trust property.

- Giving one beneficiary controlling stake = too high a destruction in value of other shares.
- See Sandman.

**Lloyds Bank v Duker (1987) (UKCD)**

Facts: All beneficiaries agree to terminate the trust (trust assets = shares in company), but one beneficiary stood to get controlling stake.

Decision: Court held that reduction in value was too great (as controlling shareholder his shares would have been worth more than the remaining shares of the other beneficiaries and, moreover, he could control the company in way that hurt minority beneficiaries (ie: appoint himself manager, pay himself high salary and declare no dividends).

- Share had to be sold, and majority beneficiary got his share of the money (form which he could buy the shares).

Division of shares = sell and give money

**Re: Shares – beneficiaries should be able to terminate trust in respect of their respective shares only, UNLESS their termination of the trust would unfairly impact the trust property for the remaining beneficiaries.**

- Should be allowed to terminate trust where all evidence suggests beneficiaries would exercise voting powers in bona fide manner.

**Re Sandman [1937] (UKCD)**

Decision: Call for shares by sui juris beneficiaries ALLOWED even though it meant trustees would no longer have control of the company.

- Clauson J: reasoned there was no reason to believe beneficiaries would use voting powers in many ways that was bona fide.
- This distinguishes Sandman from Daker – as in Daker one beneficiary stood to be a controlling shareholder – result in undue influence over value of other shares/company.

Trustee discretion re: ‘undue hardship’ on other beneficiaries:

- Doesn’t matter if property held in trust for sale with power to postpone sale – trustee can refuse to terminate trust if he or she believes special circumstances would cause undue hardship on the other beneficiaries.
Re: LAND - For this reason, there is no entitlement to call for division if the trust property is land!

Re Marshall (1914) (UKCD)
Facts: Certain beneficiaries called for a quarter of the shares of a large company, as it would take 20-30 years for all beneficiaries to be eligible.

5. Exclusion of Rule in Pension Trusts

Saunders v Vautier DOES NOT apply in pension cases – they are governed by Pension Benefits Standards Act 1985 regarding termination/distribution of assets, Parliament intended to cover the field

Buschau v Rogers Communication Ltd (2006) (SCC)
Facts: B was one of 112 RCI employees who were members to pension plan; defined benefit w/ large actuarial surplus
- Q: whether pension plan members could call the plan under the rule in Saunders
Notes: Right to surplus only crystallizes on plan termination
- Pension plans not lend well Saunders – not stand alone Tis, subject to overall Plan of pension – can’t terminate w/o contemplation legislation and Plan
- Pension funds not gratuitous: employees either contribute directly or view as delayed remuneration.; can’t terminate pension w/o defeating social purpose of financial security to retirees
- Since employees only have contingent interest in surplus subject to plan cancellation cannot employ Saunders w/ non-non vested interest
- Contractual nature also precludes Saunders

F. VARIATION OF TRUSTS

- Trusts normally have a very long duration; circumstances change or are unforeseen.
- As such, terms of settlement may over time need to be changed, as terms that were originally appropriate may become inadequate or even obstruct the beneficiary’s best interests.
- ASIDE: Law of variation of trusts developed largely to address changes in trust structure necessary to preserve trust property in light of changes to tax regimes!

1. Common Law: limited power for court to vary a trust – At Common Law, Courts have NO POWER to authorize a variation of the terms of a trust, even though all adults assented to the change, and the change would have obviously benefited the beneficiary who were minors as well (Chapman v. Chapman).

(i) FOUR EXCEPTIONS to Common Law rule:
1. Administrative terms can be varied if there’s an unforeseen emergency such that trust is threatened and the circumstances were unanticipated by the settlor.
   - Court’s authority is limited to vary trustee’s management powers – not authorized to vary quantum or type of beneficiary interest (ie: Courts cannot vary dispositive powers).
   - Not easily invoked – done only to effect “essential repairs to buildings” or “reconstruction of capital matter in a company to make it more realizable” (Re New (1901)).
2. Maintenance jurisdiction – allows court to direct payments to beneficiary if they need money to live in a manner appropriate to trust expectations (ie: if child beneficiaries are inadequately provided for).
3. Conversion jurisdiction – allows the conversion of an infant’s trust property from realty to personalty, and vice versa.
4. Compromise jurisdiction – enables a court to give approval for those not sui juris in any judicially sanctioned compromise of a dispute.
   - Limited to augmenting management powers – NOT AUTHORIZED to vary quantum or form of interest (ie: court’s not authorized at common law to vary dispositive powers in a settlement).

(ii) Loophole to Common Law Rule
- Beneficiaries could previously get around this CL rule by terminating the trust pursuant to Saunders v. Vautier and resettle it on new trusts with varied terms.
- Requires beneficiaries to be sui juris!
- This loophole has been filled by “variation legislation” in most common law jurisdictions [SEE BELOW].
2. **Trust and Settlement Variation Act (1996, RSBC Ch. 463).**

**Section 1** – “Court approval of variation.
- 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) Contingent interests - any person, whether ascertained or not, who may 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 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 proposed by any person, 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.
- NOTE: Legal Life Estates: legal life estate is regarded as a deemed trust so the court is given powers to vary life estates where there are successive beneficiaries).
- Arrangement means any proposal vary/revoke trust *In re Steed’s Will Trusts* (2) Court can agree IF IT’S SATISFIED that the variation is for the “benefit of the parties interested”.

[See case law below re: situations where courts have and have not been satisfied]

3. **“Benefit to parties interested” – What does this mean?**
- As per section 1(2) of the **Trust and Settlement Variation Act**, court MUST NOT approve variation on behalf of persons enumerated under subsections 1(a-c) UNLESS the variation appears to be for the: *benefit of parties interested*.
  - Allows court to IMPLY CONSENT – This INCREASES THE SCOPE of court’s inherent power – empowers it to approve any arrangement proposed by any person varying or enlarging the powers of trustees to manage or administer the property in a reconfigured form by giving consent that may be needed form:
    - Persons (ascertained) who are not sui juris.
    - Unascertainable beneficiaries
    - Unborn persons
    - Persons whose interests arise through a discretionary power (usually under a protective trust).

**RULE:** Court must be persuaded that the proposed amendment is for the benefit of the person on whose behalf it is giving consent.
- This area of law is susceptible to HUGE array of discrepancy. [see case law, below]

(i) **Financial advantages from Tax Reductions**
**POSITIVE:** Investment powers may be changed in special circumstances: here tax minimization/financial interests of B
- Subject to qualification regarding “education and social benefits” [See Re Westin’s Settlements, below]

*Re Burns (1970) BCSC*
**Facts:** Settlor sought consent of unborn persons to an amendment to his (defective) trust settlement.
- Proposed arrangement would enlarge investment powers of Trustees; All living beneficiaries were sui juris, and agreed to arrangement
**Decision:** Court GAVE CONSENT on behalf of unborn persons
- Tax minimization, advancing financial interests of beneficiaries, was held to be an appropriate variation.

(ii) **Education and Social Benefits**
Financial benefits not only consideration regarding infants and unborn children – court must consider “education and social benefits” as well!

*Re Westin’s Settlements (1969)*
**Facts:** Amendment to improve tax position of beneficiaries – beneficiaries wanted to discharge English trust and appoint two new trustees in Jersey (Channel Island) in order to avoid UK capital gains tax inaugurated in 1965.
**Decision:** Denning MR: REFUSED CONSENT for beneficiaries lacking capacity; financial benefits not the only consideration in determining what benefits a minor.

- “Social and education” benefits are also important.
- “I do not believe it is for the benefit of children to uproot from England...simply to avoid tax...Are they to be wandered over the face of the earth, moving from this country to that, according to where they can best avoid tax? I cannot believe this to be right. Children are like trees: they grow stronger with firm roots”. (Denning MR).
- Role of court to protect those who cannot protect themselves – to live in England is more beneficial than money, especially for wealthy family where lives of beneficiaries would not be effected by increased taxes.

**Note:** Trustee had to be moved to Jersey, not the actual beneficiaries – seems like kind of ridiculous logic on Denning’s part.

(iii) **Family Cohesion and Marital Choice**

*Court approves due to “family cohesion” and “greater breadth of marital choice”.*

- Not followed in *Re Harris* [See, below].

**Re Remnant’s Settlement (1970) (UKCD)**

**Facts:** Trust with contingent interest; forfeiture clause if beneficiaries practice Catholicism.

- Arrangement proposed deletion of the clause to prevent family conflict.

**Decision:** Court APPROVED variation, because:

1. it benefited beneficiaries (wider scope of potential spouses) AND
2. it would prevent serious dissension among family members regarding enforceability of forfeiture clause.

(iv) **Settlor Intent and Financial Benefit vs. Family Cohesion**

*Considerations other than financial should be taken into account by a reviewing court!*

- BUT, social, emotional, and psychological well-being of underage beneficiaries can be OUTWEIGHED by disproportionate financial disadvantages.

**Re Harris (1974) (BCSC)**

**Facts:** Mother of an emotionally devastated family (father committed suicide) sought variation re: disproportionate financial dispersions. Mother wanted harmony, equal sharing.

**Decisions:** Court REFUSED consent, because it would financially detriment the son, who was to receive much greater share under the terms of the settlor’s instrument.

- Also, unborn children of son (who were also beneficiaries under the trust instrument) would not benefit at all from the “harmony” and “equal sharing”.
- Have to balance potential family/social benefits w/ assured financial cons – here the family cohesion was supposed, there was no animosity yet b/c of the split and there may not have been

**Note:** Did court pay too much attention to settlor’s intention? Isn’t changing the trust in these situations the whole point of the legislation?

- I don’t think so – settlor may have had good reason to give son lion’s share of company.

(v) **Settlor Intent and Prudent Advisor – Standard of “prudent advisor” (objective VS. subj)**

*Proper Test in exercising court discretion to consent on behalf of a person without capacity is that of prudent advisor (OBJECTIVE standard).*

- Court need not consider intention of settlor – there are many variations that will not be consistent with settlor’s intent.
- Subject to SUBJECTIVE approach used in *Re Steed* [see inset].

**Russ v. Public Trustee (1994) BCCA**

**Facts:** Trust arrangement would have resulted in termination of old trust, creation of new one ...(this is very complicated).

**Decision:** Proper test re: discretion to consent is that of prudent advisor.

- Court need not consider whether basic intention of settlor is preserved.
- Most variations will, in some way, be at odds with settlor’s intentions.

**Note:** This case differs from ruling in *Re Steed’s Will* – more of a paternalistic decision where court took a subjective approach to determining whether consent should be granted.

- In *Re Steed* Court held that provision in trust was there to protect subsequent beneficiaries, as such it would be contrary to intention of settlor to allow trust to be called.
Note: In Re Tweedie: Court held paramount consideration is possibility of unborn realizing a financial benefit; when likelihood is small, then liberal interpretation of “benefit” is appropriate.

(vi) Financial “Good Bargain” – re: beneficiaries with contingent interests
Court has jurisdiction to consent to variation on behalf of people with contingent interests (s.1(b) of Trust and Settlement Variation Act)

- ‘Good Bargain’ test: would a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks of the proposal made be likely to accept?

*Bentall Corp. v. Canada Trust Co. (1996) BCSC*

Facts: Varying pension plan structured as a trust; 97% of beneficiaries approved of new arrangement.
- Wanted to vary defined contribution pension plan with $6.7 million surplus; give $2 million to members; $3 million to Bentall; and $1.7 million as a “contribution holiday”.

Decision: Act allowed Court to consent to variation on behalf of beneficiaries whose interest in contingent (implying there were unascertained people who would benefit), even though not all of union members approved.
- Here, Court has jurisdiction because some unascertained persons may benefit from arrangement in the future – interests of members is SPLIT into presently-held interests (entitlement to fund available to support pension) and future-contingent interests (division of surplus in event Bentall terminated plan).
- Suggests a “good bargain test” – would prudent adult be likely to accept?
- Court gave “great weight” to fact 97% of people supported the plan.
- Court HOLDS proposal by Bentall is a “good bargain”, and so the court supplies the consent of the future members who would benefit from any surplus when the plan is terminated.

Overrules Bentall – court DOES NOT have jurisdiction to consent on behalf of contingent interests – designated/assigned Bs have contingent interests.
- There is no interest in an actuarial surplus until the plan is actually terminated (Schmidt) – thus cannot be brought under s1 – there is no division in interest b/w plan fund and actuarial surplus

*Buschau v Rogers Communication (2004) (BCCA)*
THE TRUSTEE

A. APPOINTMENT, RETIREMENT AND REMOVAL OF TRUSTEES

- Typical trustee today is a paid trustee - ie: a corporate trustee (eg: Canada Trust Co, now part of TD).
  - Trust corps are empowered by memo or articles to engage in trust administration and management.
  - If remuneration is greater than that set out in Trustee Act, it must be prescribed in the trust instrument!

1. Appointment

- Typically, chosen by settlor.
- Trustee must ACCEPT appointment!
  - Settlor will usually set out an alternative trustee in event first refuses.
  - If instrument is silent, court has inherent powers of appointment – ‘equity will not allow a trust to fail for want of a trustee’!
    - Representative of last surviving trustee will generally make appointment.
  - If both law and equity fail, Court will appoint public trustee.

Continuance of trust occurs through trustees appointed by:

  a) An express power (in trust instrument).
  b) A general statutory power (Trustee Act)
  c) The beneficiaries under the principles of *Saunders v. Vautier*
  d) The Court, on application by beneficiaries (s.36).

(i) Appointment under *Trustee Act*

Power of surviving trustees to appoint new trustees – Section 27 – deals with trustee appointments. Trustee may die, become incapacitated, leave the country/disappear, or just not want to be trustee anymore.

- Note: s.27 allows trustee to be absent for up to one year.

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**Section 27** – Power of surviving trustees to appoint new trustees

(1) If a trustee, either original or substituted and whether appointed by any court or otherwise, is (i) dead, (ii) remains out of British Columbia for more than 12 months, (iii) wishes to be discharged from all or any of the trusts or powers reposed in or conferred on him or her, refuses or is unfit to act in them, or (iv) 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 for the time being, or the personal representatives of the last surviving or continuing trustee, may by WRITING appoint another person or persons to be a trustee or trustees in the place of the trustee who is dead, remains out of British Columbia, wishes to be discharged, refuses or is unfit or incapable.

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

- the number of trustees may be increased,
- a separate set of trustees may be appointed for a part of the trust property held on trusts distinct from those relating to any other part of the trust property, even though no new trustees are to be appointed for other parts of the trust property, and an existing trustee may be appointed or remain one of the separate set of trustees, or if only one trustee was originally appointed, then one separate trustee may be so appointed for the part of the trust property held on trusts distinct from those relating to any other part of the trust property,
- it is not obligatory to appoint more than one new trustee if only one trustee was originally appointed, or to fill up the original number of trustees if more than 2 trustees were originally appointed but, except in a case in which only one trustee was originally appointed, a trustee must not be discharged under this section from his or her trust unless there will be at least 2 trustees to perform the trust, and
- the assurances or things required for vesting the trust property or any part of it jointly in the persons who are the trustees must be executed or done.

(3) Same powers as original trustee - 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.

(4) The provisions of this section relating to

(a) a trustee who is dead include the case of a person who is nominated a trustee in a will but who dies before the testator, and
(b) a continuing trustee includes a refusing or retiring trustee, if willing to act in the execution of the provisions of this section. (5) Cannot have opposite intention in trust instrument - 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.)

People may apply to Court to be named trustee – Section 36 – Beneficiary and others with a beneficial interest in the property have standing to apply to court to become trustee.

Section 36 – Persons who may apply for court order to be named Trustee
(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 in the land, stock or chose in action, whether under disability or not, or on the application of a person duly appointed as a trustee of it.
(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.)

TEST: For whether Court will approve new Trustee – Section 31 – Courts may appoint new trustees where it “is expedient” to do so.
• “Expedient” refers to situations where persons designated to appoint in will or instrument CANNOT do so for whatever reason.

Section 31 – Power of court to appoint new trustee – 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.

CASE LAW TEST: Guiding Principles for Court to consider set out in In Re: Tempest (1866) to include:
 a) Wishes of the settlor/testator – especially regarding undesirable characteristics.
 b) Persons who do not have axe to grind (have no alterior motives) – either towards settlor or beneficiaries.
 c) Persons who will promote and not impeded execution of trust.

Rights and Powers of new trustees - Section 32 - SAME RIGHTS and POWERS as they would if appointed by decree or judgment in proceeding.

Section 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.

Vesting of assets in new Trustees – Section 29
• Automatic vesting of many types of trust assets.
• Instrument of appointment generally serves as vesting instrument too!

General – Section 29 (1) If a deed by which a new trustee is appointed to perform a trust contains a declaration by the appointer to the effect that an estate or interest in land subject to the trust, or in a chattel subject to the trust, or the right to recover and receive a debt or other thing in action subject to the trust, vests in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration operates, without a conveyance or assignment, to vest in those persons, as JOINT TENANTS, and for the purposes of the trust, that estate, interest or right.”
(3) Exception – securities that require registration – 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.”

Land – Section 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 person or persons who on the appointment are trustees for the estate that the court directs and the order has the same effect as if the persons who before the order were the trustees, if any, had duly executed all proper conveyances of the land for the estate.

Stocks and chose-in-action – Section 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.
2. Multiple Trustees

- If several individuals are appointed as trustees, the usually hold trust property as joint tenants.
  - If one dies, the surviving trustees continue.
  - Only when the last trustee dies does the trust pass to his/her representatives who then become trustee.
- Unanimity required for all decisions UNLESS trust deed provides otherwise.

3. Retirement

- **Section 28** – provides that:
  - Where there are 2 or more trustees, a trustee using a deed may declare a desire to be discharged.
  - That declaration must be served on the other trustees (can’t just walk away – fiduciary duty).
  - If accepted, he or she will cease to be trustee and divested from the trust fund.
  - Retirement cannot be inconsistent with trust instrument!

   **Retirement of Trustee – Section 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.**

4. Removal

(i) Under Trust Instrument

- Usually, power of removal is given to a designated person – the so-called “protector” or “guardian”.
- Very common due to emergence of dodgy offshore trusts.
- Protector/Guardian in legally precarious position – if too much non-fiduciary power allotted, then trust could be viewed as an agency rather than an actual trust.

(ii) Under **Trustee Act**

**Section 30** – Provides that sui juris beneficiary (with support of majority in interest and number) can apply to court to have trustee removed for REASONS that are expedient to the operation of the trust.

- This may be necessary in situations where differences among beneficiaries have precluded termination under *Saunier v Vautier*.
- New trustee can be appointed by the Court under section 31 [above].

Removal of trustees on application – **Section 30** – A trustee or receiver appointed by any court may be removed and a trustee, trustees or receiver substituted in place of him or her, 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 of the trust beneficiaries who are also not under legal disability.

(iii) Judicial Removal of Trustees

- Court will also remove trustees where it’s clear that their continuance would be detrimental to execution of the trust.
- Governing criteria: Welfare of the beneficiaries!

**GENERAL RULE for removing trustees:** Removal requires an applicant to point to:

1. Acts or omissions that endanger the trust property OR
2. Show want of honesty, appropriate capacity, or reasonable fidelity.
   - The main consideration is the welfare of the Bs collectively (dissension b/w some Bs and the Ts is insufficient)

**Conroy v. Stokes (1952) BCCA**

**Facts:**  Trial Judge removed Trustees on application from 2 of 5 Beneficiaries;
• Did not find misconduct or breach of trust by Trustees;
• Trial Judge DID FIND “friction” between 2 beneficiaries, testator’s widow, and trustees.

**Decision:** Appeal Court set out CRITERIA FOR REMOVAL = welfare of beneficiaries!
• Here, failure to produce accounts once DID NOT amount to impairing welfare of beneficiaries (persistent failure, however, probably would).
• CA OVERTURNED trial judge’s removal order!

**Inability of trustees to work together:** Trustees can be removed “when the continued administration of the trust with regard to the beneficiary has by virtue of the situation ... between the trustees become impossible or improbable”. – Misconduct not req

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**Re Consiglio Trusts (1973) Ont CA**

**Facts:** Official guardian and Beneficiary brought application which claimed it was “virtually impossible for Trustees to agree on anything regarding efficient management of trust” But no misconduct.

**Decision:** Court HELD misconduct is NOT prerequisite.
• Applicant MUST SHOW that, because of situation between Trustees, continued administration of the trust has become impossible.
• Here, removal ordered!

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**B. TRUSTEES RIGHTS, RESPONSIBILITIES AND POWERS**

• Trustee = legal owner, has all the rights and responsibilities to deal with issues regarding possession of trust property, particularly management and administration of trust property.

**(i) Three Substantive Duties (as opposed to administrative or operational):**
1. Take and get control of trust property;
2. Fiduciary Duties - protect the value of the trust property through prudent investment decisions compliant with trust obligations;
3. Impartiality - distribute income fairly according to distribution requirements under trust settlement.

**1. Trustees’ Power of Delegation**

• Traditionally, at CL, trustees were subject to maxim ‘delegatus non potest delegare ’ – “a delegate cannot in turn delegate to another”
• If this rule was applies rigourously, it would be inconvenient, expensive, and calamitous:
  ○ Administering trusts = complex; CANNOT EXPECT trustees to manage every single part of trust.
• Today, trustees are entitled to appoint agents to perform many acts of administration regarding trust.

**(i) Statutory authorization to appoint agents – Trustee Act**

**Section 7 – Power to employ SOLICITORS and BANKERS**

(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 or concurred in making 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 or concurred in making 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 July 1, 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.

**Section 95 – Implied indemnity for trustees:** Trustee not a guarantor; generally not liable for mismanagement by agents
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 or discharge out of the trust premises, all expenses incurred in or about the execution of his or her trusts or powers.

(ii) CL authorization to appoint agents
Although a trustee CANNOT DELEGATE THE DUTIES HE/SHE HOLDS, a trustee can nonetheless retain third parties to execute the administration of the trust, such as bankers, brokers, and others. (agents – must be normal course of business or from moral necessity)

- Trustee not liable unless negligence or fault of his/her own lead to result.

**Spreight v Gaunt (1893) (UKHL)**

**Facts:** Trustee appointed a stockbroker as agent who misappropriated funds. Trustee had followed standard business practices re: purchase and sale of shares (received “bought note”).

**Issue:** Did trustee breach trust?

**Decision:** “Bought Note” was essentially worthless, but Trustee NOT LIABLE.

- Trustee followed the standard business practice.
- Trustee can’t delegate away the duties he holds, but can, in the administration of the trust, avail himself to the agency of parties (bankers, brokers, etc).

**Note:** What is trustee didn’t properly research the broker?

(iii) Unlawful Delegation – can’t delegate away fid. duties!

**Trustees cannot delegate away responsibility to exercise judgment under fiduciary obligations!**

- Here, Board of directors had fiduciary duty to serve in best interests of corp – namely, the exercise judgment regarding trust property
  - While board can appoint agents, cannot delegate away fiduciary responsibility (even to GM of trust company, who is essentially an agent).
- **NOTE:** Probably wouldn’t be viewed as “improper delegation” anymore [see inset].

**Re Wilson (1937) Ont CA**

**Facts:** Testator entrusted estate to trust company, in favour of beneficiaries.

- Offer made to purchase one property, directed to GM of trust company, who rejected it and failed to communicate decision to the Board.
- Board had allowed GM to manage the trust estate as he thought best (essentially, delegating their authority).

**Decision:** Board’s failure to consider offer was a breach of trust – A trust company is personally responsible for exercise of judgment; cannot escape responsibility by delegating another (in this case, the GM) to exercise judgment.

**Note:** Compare to Fales [below]:

- Bull JA REJECTED in obiter that only corporate directors can exercise discretionary powers for corporate trustees – argued this amounted to treating each director as a trustee.
- According to Fales, entire company is the trustee, not individual directors, as settlor expects corporate structure to effect trust process.
- This shows that cases similar to **Re Wilson** probably would NOT be viewed as an improper delegation anymore.
- **Erosion of Rule from Re Wilson:** Today, corporate board members typically delegate actual investment decisions to specialized experts, so rule from **Re Wilson** should only be seen as extending to fiduciary obligations generally, not actual investment decision.

**[rule has since been eroded by modern practices in corporate trusts]**

2. Fiduciary Responsibilities: Trustee’s Duty of Loyalty to the Beneficiary

**General Rule:** Trustees, as fiduciaries, MUST NOT place themselves in position where their interests may conflict with those of their principals/beneficiaries.

- Trustee must exercise their duties and responsibilities in good conscience, in good faith, and in advancement of the
interests of the beneficiary.
• Trustee cannot pursue his/her own interests or of someone other than the beneficiary in a way that does not accord priority to the beneficiary.
• Trustee must not place himself in a position where his duty and personal interests may conflict with beneficiaries (Keech v. Sandford).
• Trustee must not profit at expense of trustee (Boardman v. Phipps)
• Trustee may only contract with beneficiary in transactions that are fair, in which there is full disclosure in all matters.

(i) NO CONFLICTS RULE: Progressive relaxation of strict standard

**Strict Approach to Conflicts of Interests:** Trustees, as fiduciaries, must not place themselves in position where their interests may conflict with those of beneficiaries. – 0 tolerance even when no evidence fraud/dishonesty: cannot gain from position as T

### Keech v. Sandford (1726)

**Facts:** Trustee held lease on trust for beneficiary who was a minor. Trustee (as tenant) sought to renew lease on behalf of beneficiary, landlord refused to renew the lease if it was connected to a minor.
- Trustee entered into new lease, but now on his own behalf.
- Beneficiary sued Trustee for assignment of a lease.

**Decision:** Court directed Trustee to hold lease for Beneficiary.
- Trustee should not have taken lease because potential “conflict” with beneficiary’s interests (even though landlord wouldn’t have given it to beneficiary anyway).
- Even though Trustee wasn’t fraudulent, he should have let lease run out rather than renew it for himself.
- “Although I do not say there is fraud in this case, yet the trustee should rather than let the lease run out, then to have had it to himself. It may seem hard that the trustee is the only person of all making who might not have the lease, but it is very proper that the rule should be strictly pursued, and not in the lease relaxed; for it is very obvious what would be the consequences of letting trustees have the lease, on refusal to renew to the cestui que use”.
  - **Floodgate argument:** To allow trustee to have lease would yield unacceptable consequences, set dangerous precedent.

**Strict Approach:** Trustees cannot benefit from information they obtained in the course of fulfilling their duties as trustee, and hence fiduciary.
- “fiduciaries cannot profit from their position without the informed consent of the beneficiaries” *(Hodson and Guest LJs)*
- **Dissent:** Lord Upjohn – majority being ridiculous; trustee had opportunity but didn’t take it = no real conflict – thinks TEST should be “real sensible possibility of conflict”.

### Boardman v. Phipps (1967) HL

**Facts:** Trust with interests in 2 companies; Trust’s solicitor wanted to do something about one of the companies – a poorly performing company in which the trust had a minority stake.
- Solicitor and one beneficiary suggested trust should acquire a majority stake in company and improve its profitability.
- Trustee REJECTED this idea.
- Solicitor and client went out and bought shares for themselves, without consent of all beneficiaries.
- Investment turned out to be very successful; one of the beneficiaries launches this action, arguing they breached fiduciary duties.

**Decision:** Solicitor and beneficiary were held to be fiduciaries – acted as agents of the trust by inquiring about the company; thus breached fiduciary obligations!
- Guest LJ: Information obtained through positions as T becomes property of trust – Ts cannot profit from this w/o explicit consent of Ts/8s
- Hodson LJ: not all information obtained as T is trust property: only special (confidential, proprietary etc) knowledge only obtained b/c of position as T
- Cohen LJ: defendants’ information and purchaser opportunities arose purely from their position and relationship to be trust.

**Dissent:**
- Viscount Dilhorne and Lord Upjohn: Emphasized that trustees as a group had opposed purchasing further shares in Lester & Harris for the trust and so, realistically, there was no conflict!
  - **Also,** trustees favoured the purchaser by Phipps and Boardman, as it put majority control in friendly hands.
- ***Lord Upjohn:** “phrase ‘possibly may conflict’ means that reasonable man, looking at the relevant facts and
Relaxation of strict standard: Must look at situation within complicated context of modern business practices.
  • With dissent...

**Peso Silver Mines v. Cropper (1966) SCC**

**Facts:** Peso was offered a number of mining claims; Directors of Peso refused them due to lack of funds.
  • After refusal, Cropper (a director of the company) launches his own company, which buys the mining claims.
  • Peso sues arguing claims were held for peso under a constructive trust, as director breached his fiduciary duties to company.

**Decision:** Court HELD ‘no conflict’ principles are strict, but care should be taken to interpret them in light of modern practice.
  • Standard needs to be more flexible to deal with modern, corporate business arrangements: (Bull JA): “the no conflict principles are strict.... [but]...in this modern day when it is accepted substantially all business...undertakings...are carried on through the corporate vehicle with the attendant complexities involved by interlocking subsidiary and associated corporations, I do not consider it enlightened to extend the application of these principles beyond their present limits...care should be taken to interpret them in the light of modern practice and way of life”
  • Defendant NOT IN BREACH of fiduciary duty to Peso; Directors had acted in good faith by rejecting offers.
  • Information received by defendant was not confidential (although Cropper likely wouldn’t have obtained it had he not been a director).
  • Defendant acted in capacity as an individual.

**Dissent (Norris JA):** History of corporate scandals means rule should be strictly enforced; possibility of fraud of public loss so real that there should be increased recognition of fiduciary position.
  • “It seems to me that the complexities of modern business are a very good reason why the sale should be enforced strictly in order that such complexities may not be used as a smoke screen or shield behind which fraud might be perpetrated....In order that people may be assured of protection against improper acts of trustees it is necessary that their activities be circumscribed within rigid limits....The history today of the activities of many corporate bodies has disclosed scandals and loss to the public due to the failure of the directors to recognize the requirements of their fiduciary position.”

Reconciling between *Keech v Sandford & Boardman v Phipps* AND *Peso Silver Mines*
  • Basis for no-conflict rule is not compensating beneficiary, as typically they lose nothing.
  • Rather, the historical basis is RESTITUTIONARY – disgorgement by a fiduciary of unauthorized profits! This is done on principle that no one should profit from his or her wrongdoing – explains why courts have typically taken such a strict approach.
    o Courts used this approach as in 18th/19th centuries, it was widespread practice for trustees to purchase assets from insolvent estates they were required to liquidate (at below market prices).
    o This practice is long gone, so perhaps the more flexible approach in *Peso Silver* is preferable.
    o Then again, ‘chicken & the egg’ – is the practice gone because of the rigid enforcement (dissent in *Peso*)?
  • NOTE the approach taken in *CanAero v. O’Malley* [below].

**Less strict than Keech or Boardman**, but more strict than *Peso*?

Fiduciary duties extent to corporate officers as well: Senior officers in position of “top management” are, in appropriate circumstances, to be treated in same way as corporate directors concerning fiduciary responsibility – and not “mere employees” (as found by Ont CA).
  • Persons in a position of direct control, with power to direct the affairs of the corporation, owe that corporation the utmost good faith!
  • TEST: Determining whether loyalty and conflict rules have been breached must be done on CASE-BY-CASE BASIS, with attention to FACTORS [see below]

**CanAero v. O’Malley (1974) SCC**

**Facts:** Defendants where officers of CanAero, but not directors.
  • CanAero in business of aerial photography and cartography.
  • Defendants eventually started they own company to compete with CanAero, which won a contract with the government of
Guyana (CanAero lost).
- CanAero sues for breach of fiduciary duty, due to conflict of interest.

**Decision:** As officers, defendants were placed in the same position as directors, because they had effective control over the company.
- Even though defendants were not acting in bad faith, they were still liable as “faithless fiduciaries”!
- Laskin CJ: Standards of loyalty, good faith, avoidance of conflict and self interest must be assessed on CASE-BY-CASE basis, by assessing following FACTORS:
  - Position of office held,
  - The nature of the corporate opportunity, its ripeness, its specificity and the director’s or managerial officer’s relation to it,
  - The amount of knowledge possessed,
  - The circumstances in which it was obtained and whether it was special or, indeed, even private,
  - The factor of time in the continuation of fiduciary duty, where the alleged breach occurs after the termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

(ii) **SELF-DEALING RULE:** Trustee purchasing trust property for Personal Use

Self-dealing rule renders VOIDABLE any transaction where a trustee purchases trust property FOR HIMSELF, or more commonly, sells his/her property to himself as trustee (unless expressly authorized.
- More likely to be a valid bargain when equitable interest is sold – as beneficiary is the seller and trustee the buyer (but, this is still subject to court’s review (cannot have failure to disclose, inability to seek independent legal advice).

**RATIONALE:** Difficulty in determining whether the trustee has really served the interests of the beneficiaries well and secured the best price for them – an inevitable consequences of doubt given the structural conflict of interest (**Ex parte Bennett, 1805**).
- “Structural” as trustee acts both in personal capacity and as ‘the trust’ – at both ends of transaction!

**UK RULE = flexible:** “A man may not be both a vendor and a purchaser” – however, flexible approach still required – Court need to make decision based on the facts! – self dealing transactions voidable by B w/in reasonable time
- Sachs LJ: “an inflexible rule prohibiting all transactions is unnecessary and could itself lead to injustice”.

**Holder v. Holder (1968) UK**

**Facts:** Father left assets in trust for children, with children as trustees. One child (defendant) appointed as executor of father’s estate, but renounced position shortly after doing a few tasks.
- Defendant not formally removed as trustee.
- Other Trustees sold farms to defendant, but agreed he played no part in the decision – defendant purchased farm at public auctions and at fair market price.
- One beneficiary decided to challenge this as self-dealing.

**Decision:** Sale was outside mischief of self-dealing rule = OKAY!
- Defendant bought farm for fair market price at public auction.
- No “real conflict”, defendant renunciation was well-known and public.

**Note:** This case marks UK departure from rulings in *Keech* and *Boardman* – (was Holder exceptional?)

**SCC approval of Holder:** Need flexible approach – rigidity can lead to “patent injustices”.

**Molchan v. Omega Oil & Gas (1988) SCC**

**Decision:** Majority (Wilson J. dissenting and favouring the strict approach) adopted *Holder* as Canadian law – leaned against the “rigidity of rules as can cause patent injustice”.
- Should seek court approval before the transaction; but technically court could approve after the transaction (would require exceptional circs and very few Canadian cases have; SCC did here)

**Note:** Is this less stringent than Lord Upjohn’s test of sensible possibility of conflict of interest (*Boardman v. Phipps*).

(iii) **FAIR-DEALING RULE:** Beneficiary sells beneficial interest to Trustee

- Beneficial has equitable interest that can be sold and transferred to another person.
- If sold to Trustee → Fair-Dealing Rule kicks in.
RULE: If beneficiary alleges a conflict, the onus is on the trustee to prove that Fair-Dealing Rule has been satisfied.

_Crighton v. Roman (1960) SCC_

**RULE:** Trustee must “make full disclosure” and show:
1. No fraud of concealment of advantage by trustee;
2. Beneficiary had independent legal advice; every kind of protection; full information;
3. Consideration was adequate.

(iv) **Difference between Self-Dealing VS Fair-Dealing rules**

- “No doubt where a person is trustee for sale, and he sells the estate to himself, the transaction is absolutely and ipso facto void; but if a trustee purchases from his cestui que trust his reversionary interest...I do not assert it is absolutely void, but certainly the burden of proof lies on the trustee to show that every possible security and advantage were given to the cestui que trust, and that as much as possible was gained from the transaction as could have been gained under any circumstances.” (Romilly MR in _Denton v. Donner (1852)_).
  1. Fair-Dealing is less risky, because seller is the Beneficiary, and buyer is Trustee; With Self-Dealing, Trustee is BOTH seller and buyer (both sides of transaction = high chance of fraud!)
    - As a result, self-dealing much more likely to be void than fair-dealing. [See _Denton v. Denton_, above].
  2. If Fair-Dealing Rule is satisfied, and Trustee purchases all of the trust assets, the TRUST TERMINATES as trustee will have lawfully acquired both legal and equitable title.
    - Self-Dealing CANNOT PRODUCE THIS RESULT, transfers to trustee or nominee result in survival of trust, UNLESS property comes into hands of bona fide purchaser for value.

3. **Investment Duties and Power: Care of Trust Assets**

   **In General:**
   1. Trustee not bound to avoid all risks;
   2. Trustee not liable for errors of judgment made while acting with reasonable care, prudence and circumspection (_Re Godfrey_);
   3. Exoneration of technical breaches may occur under s.96 of _Trustee Act_.

   **Settlor can set parameters and:**
   1. Authorize the trustee to make any type of investment having regard to the purposes of the trust (income-generating vs. capital value enhancement because of need to supplement income);
   2. Set the standard of investment; AND
   3. Set the circumstances of its application.

   **TWO BROAD ASPECTS of Trustee Investment**
   1. Duty to invest so capital fund is preserved from risk, and yields a reasonable return;
   2. Impartiality – Investment must be made in a way that in even-handed between different classes of beneficiaries (ie: life tenants vs. remainder persons).

   (i) **CL Duty of Care re: investments** – duty of care of an ordinary prudent person taking care of his or her own investments, mindful that those investments are to benefit persons for whom she is morally obliged to provide.
   - This OBJECTIVE STANDARD shifted law away from previous subjective standard that existed with respect to family/friend trustees: administer to own personal, honest best abilities.

   (ii) **CL Standard of Care re: Investments** – On accepting appointment to benefit cestui que trust, trustee takes obligation to act as a prudent person of business would act in managing his or her own affairs (_Spreight v. Gaunt_).
   - Trustee is not required to beat the market and is not responsible for general downturns.
   - See s.15.2 of _Trustee Act_ for statutory standard of care.
   - S15.3 exonerates T from liability if losses were a result of implementation “plan/strategy for investment trust property” and reflected “reasonable assessments of risk/return” that prudent investor would adopt – affirms portfolio theory

   (iii) **Statutory Standard of Care re: Investments**
15.2 Standard of care
- In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

Standard of Care: Should there be a spectrum of Trustee competencies (higher for corporate, less for lay-persons)?
- The standard of care and diligence requires of a trustee in administering the trust is that of a “person or ordinary prudence in managing his/her own affairs”.
- The standard is the SAME FOR EVERYONE – no higher standard for corporate trustees – “unitary standard”.
  - Note: Trial judge (Monroe J.) said there was; Bull JA disagreed on appeal
- Section 96 of Trustee Act can relieve and thus act remedially in favour of trustees needing special consideration.

Fales v. Canada Permanent Trust Co. (1974) SCC (from BC)
Facts: Widow and Canada Permanent Trust appointed as trustees to manage estate property for benefit of wife and children in succession.
- CPT invested property into “risky” stock; invested on speculation that no Canadian blue chip had ever let its subsidiary go bankrupt.
- Trust company intended to convert stock into “authorized investments”; but held onto stocks for too long, and then lost lots of money once stocks were finally converted.
- T held 60% of trust fund in speculative company for 3 years even when indication of failure

Decision: Gift to beneficiaries in succession duty to convert as soon as “advantageously possible”.
- Same criteria for all Trustees: “expected to act as ordinarily prudent person would act”.
- Here, COURT HELD there was a breach of trust because Trustee didn’t act like a prudent business person
- CPT held liable for breach of trust, but Court found that mother acted “honestly and reasonable”, and thus Trustee was relieved under s.96 of Trustee Act.
- When trust for sale w/ power postponement: heavy burden on T to show that in situation loss resulting from delay of sale, that delay was reasonable and proper in circumstances
- S96 (Bull JA): not construed narrow sense; honest/reasonable conduct necessary but not sufficient: must show fair to excuse; court must endeavor put itself in position of T at time of breach; relief depends on circs of each case

Note: Isn’t this kind of ridiculous – Court says there is not “spectrum of competencies”, but then says that s.96 can be used to relieve people needing “special consideration” – isn’t this effectively accomplishing the same thing?

(iv) Ability of Courts to exonerate trustees from liability

Section 96 - Jurisdiction of court to relieve trustee of breach of trust. 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.

(v) Type of Investments in which Trustee may invest – Section 15.1 & 15.2 of Trustee Act
- Before 2002, Trustee Act limited investments to maximum percentages of specific investment types (ie: real estate, mortgages, securities), and their location outside Canada (“authorized investments”).
- Now, much simpler [see below].

15.1 Investment of trust property
1. A trustee may invest property in any form of property or security 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.

15.3 Not liable for reasonably planned investment losses - A trustee is not liable for a loss to the trust arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor would adopt under comparable circumstances.
Investment decision should not be judged in HINDSIGHT: Need to examine the prudence of Trustee by examining the reasonableness of the investment decision at the time it was made!


**Facts:** Testator left life estate to wife (£54,000), remainder to granddaughter; Will instrument authorized investments, power to retain (Trustee had wide discretion).
- In 1986, granddaughter got remainder interest but claimed it should’ve been worth a lot more (received £270,000, claimed fund should be worth £1.8 million).

**Decision:** Court held trustee had fallen short of maintaining real value of fund.
- BUT, nonetheless, claimant FAILED, as Trustee had deliberately invested conservatively because it benefited life tenants (to ensure there was a remainder!).
  - Invested in tax-exempt bonds; shielded trust from inheritance tax.
  - Bank showed that prior to 1959, equities were very risky assets).

(vi) Exclusion of investments on MORAL GROUNDS

Trustees cannot refuse to make investments on moral grounds, if such investments would be of greater benefit to the beneficiaries if invested in other alternatives.
- ASIDE: [not in case] But, if sui juris beneficiary shares the trustee’s moral belief, such restraint in investing could arguably be a “benefit” to the beneficiary.

**Cowan v. Scargill (1985) (UKCD)**

**Decision:** Trustees must put aside their own personal interest and views. In their own affairs they’re free to abstain from certain investments (ATFs), BUT IF under a trust, such investments would be more beneficial to beneficiaries than otherwise, they should be made.
- Where trust to provide financial benefit to Bs then usually means maximizing financial returns
- “Benefit” is wide and not limited to $, but if other measure of benefit is used onus is on T to show that action maximizes benefit to Bs
- If assets return equally financially can evaluate w/ other criteria

4. Duty of Impartiality

**Duty to be Impartial:** Where there is more than one beneficiary, and subject to opposite indications in the settlement, trustee has a duty to act IMPARTIALLY between beneficiaries (ie: some beneficiaries don’t benefit at other’s expense).

**Rebuttable Presumption:** Law assumes that IMPARTIALITY is the intention of the Settlor or Testator. However, settlor/testator can DIRECT OTHERWISE in the trust instrument (ie: prescribe partiality or indifference to it), in which case that instruction will prevail.

Issue arise particularly where trust deals with beneficiaries in succession (ie: life tenants with remainder persons). This is because:
1. Nature of trust property itself may derive unequal treatment (ie: exhaustible vs. appreciable assets).
2. Trustee’s investment strategy may derive unequal treatment.
   - ie: do they invest in income-yielding [benefits life tenant] vs. higher yields [benefits remainder person].

(i) Asset Type and Impartiality

1. Wasting Assets – deteriorate over time (ie: mortgages, cars, ships, and copyrights.
   - Can include unauthorized, speculative (risky) investments.
   - LIFE-TENANTS GAIN AT REMAINDERPERSON’S EXPENSE!
2. Reversionary Interests – interests that are not immediately available (ie: not in possession) on death of testator, and will only be available at some time in the future
   - EG: remainder in shares, insurance policy on another’s life; debts payable to testator in future.
   - REMAINDERS GAIN AT LIFE-TENANTS EXPENSE!

(ii) Contrary Intention: Indicia implying intention of partiality
- Application of Rule in Howie v. Lord Dartmouth [BELOW] is subject to contrary intention by settlor:
  1. Express provision in Will or trust instrument that specifically establishes partiality, or says that Howie v Lord Dartmouth does not apply.
2. Directions that can be implied such that:
   a) A direction that the residue be kept of “retained”
   b) Authorization for the trustees to maintain unauthorized investments; OR
   c) The life tenant beneficiary is to receive income in specie.

   • But, if no such indicia are present, the Trustee has a duty to convert and apportion such to execute his or her duty of impartiality!

5. REMEDIES FOR IMPARTIALITY

   • In order to be impartial, Trustee may have to restructure the investment portfolio of the trust assets.
     o This is accomplished through “conversion” and “apportionment”:
     o ‘Duty to Apportion’ is typically a corollary to the ‘Duty to Convert’, but it may be excluded if conversion alone is sufficient.

(1) Conversion – Trustee sells some of the trust assets and redirects (“convert”) them into authorized investments that favour neither the income account nor the capital account; AND

   • Riddall J.A.: “these are investments that a prudent investor would regard as acceptable from a risk management point of view which have yield and capital growth capabilities that enable the tee to meet the obligations of impartiality between the successive classes of beneficiaries”

(2) Apportionment – Trustee may also be required to “apportion” income so as to benefit the life tenant (“income beneficiary”) on one hand and remainder person (“capital beneficiary”) on the other.

   • Accomplished by either by:
     a) Directing income into capital fund (favours remainder person) OR
     b) Allocating sum from capital fund and using it to generate income (favours life-tenant).

(i) Conversion and Apportionment for “Wasting Assets”

Rule in Howe v Lord Dartmouth – Re: Wasting Assets/Reversionary interests/unauthorized investments

   • When conversion required: Where a testator or testatrix
     1. Leaves residuary personalty,
     2. To persons by way of succession AND [NOTE: does not apply to real property!]
     3. The residue includes a wasting assets (including unauthorized investments or reversionary interests)...  
     • ...then the TRUSTEE MUST:
       1. Sell the personalty that is wasting asset (and unauthorized investments / reversionary intersts)
       2. Invest the proceeds in an authorized investment; AND
       3. The INCOME of which is for the benefit of the life tenant beneficiary, and the “corpus of the fund” (CAPITAL) accruing for later use by the persons holding the remainder interest.

Formula for Apportionment for ‘wasting assets’ – Rule of Thumb: Life tenant should get 2-7% of income from the assets.

   1. Assessment of asset value: If the shares are sold within a year of the testator’s death, the value of the shares is assessed at the date of sale. If not sold within a year, the value is taken at the first anniversary of the testator’s death
   2. Inter Vivos trust: If the duty is to apply in an inter vivos trust the value of the trust assets are assessed at the date of the trust
   3. Formula:
      o If the income received pending sale is less than 2 -7% of the value of the property, the life tenant receives all of the income produced
      o If the income later exceeds 2 - 7% that difference is paid to the life tenant to make up the shortfall.
      o If the shortfall is not made up before sale of the asset the life tenant can get it made up from the proceeds of sale.

Howe v. Lord Dartmouth (1802) UK

Facts: Non income-producing (reversionary interest) assets disadvantaged life-tenant.

Decision: Where there’s a duty to be impartial, there’s a duty on Trustee to sell assets and invest them to eliminate partiality (conversion) AND to ensure funds that are realized are properly apportioned.

[compels conversion of wasting/unproductive assets, and investment of proceeds]

(ii) Express trust for sale of “Reversionary Assets” – apportionment required!  A=P[1+(r/n)]^(nt)

Where there’s an express trust for sale (duty to convert) of reversionary asset, proceeds MUST BE APPORTIONED upon sale of
trust property!

- Formula for Apportionment of “reversionary assets”:
  - Trustee must calculate what portion of sale price, had it been invested at the date of the testator’s death, would have produced 2-7% (compounded) per year and risen to the sale price.

**Earl of Chesterfield’s Trusts (1883) Ch**

- For express trusts, sets out companion rules on apportionment after sale of trusts with reversionary assets.
- Typical “reversionary interests” is a remainder interest that was owned by the settlor/testator and now forms part of estate.

[apportionment between capital and income of proceeds b/t life estate and remainderperson]

**(iii) Express Trusts for Sale/Convert VS. Express Trusts to Retain**

1. Express Trust for Sale – implies intention to convert!
   - Also implies a testator intention for impartiality among the beneficiaries.
2. Express Trust to Retain
   - Implies that the trustee need not concern itself with impartiality.
   - How can trustee be impartial when clear wish of settlor is to not sell the trust assets?
   - This distinction becomes COMPLICATED when the two are combined, one as a trust (sell of retain) the other as a power (to sell or to retain).

**(iv) Express Trusts for Sale with Powers to Retain or Postpone**

- Often, trust for sale is combined with power to retain or postpone (these are different!):  
  - Power to Retain may also imply an ability to enjoy in specie.
  - Power to Postpone implies inevitable conversion.
    - But, as a matter of construction, power to postpone can carry an intention by testator that the life tenant beneficiary enjoy asset in specie
  - Conversely, a ‘Trust to Retain’ implies an intention for life tenant to enjoy in specie.

**(v) Howe v. Dartmouth DOES NOT APPLY TO REAL ESTATE!**

Re: real estate - Rule from Howe v. Dartmouth DOES NOT APPLY to real estate!

- Perhaps subject to language in trust instrument, as per Re Lauer and Stekl.

**Lottman v. Stanford (1980) SCC**

Facts: Testator left estate to Trustees for benefit of wife as life tenant, remainder to children.

- Trustees requires to sell “personal estate” but given wide discretion to postpone conversion.
- Assets were sold, except one parcel of land, which was rented to a son on 20 year lease for low rent (so low it didn’t even cover property taxes!).
- Wife sought relief.

Decision: Ont CA held that H v. D should be extended to cover real estate as well – ordered executors to sell real property and, pending conversion, allow her to have a share on property at 7% of its value determined one year after testator’s death (as per H v D), but payable from date of death to date of conversion

- SCC HELD that Howe v. Dartmouth DOES NOT APPLY to real estate – refused to extend rule to cover it.
- Widow NOT ENTITLED to notional interest from real estate, only **limited to actual income generated** (ie: none, because of low rent price).

Note: Regarding treatment of real estate, this case is in line with In re Oliver (1908) Ch, where combined assets in personalty and realty in deceased’s estate were not treated together as personalty for purpose of applying H v D.

- As such, for realty, life tenant entitled to rent and profits in specie; with personalty, life tenant entitled not to income in specie, but sum representing interest at fixed rate (2-7%) on value of personalty.

Here, Rule from Howe v Dartmouth WAS applied to both personalty and realty!

Re: Lauer and Stekl (1974) BCCA, affirm’d without reasons by SCC

Facts: Deceased estate (daughter = life tenant; grandchildren = remainder) consisted of both realty and personalty.

- Trust to convert ALL the estate, but also wide powers to postpone or retain property.

Decision: Court characterized clause for conversions as primary and dominant. Here, trust to convert with wide discretion re:
conversion extended to ENTIRE ESTATE (unlike Lottman).

- Court held there was a duty for impartiality – required payment from all assets to life tenant at fixed rate.
- A power to postpone does not usually entail power to postpone indefinitely (unless clear intention of that)

**Note:** Distinguishing *Lauer and Stekl* from *Lottman v Stanford*: Wording of trust instrument = essential (McIntyre J. was presiding in both cases)!

- In this case, trust to sell/convert extended to ENTIRE ESTATE.
- In *Lottman*, trust to convert restricted to personality only!

(vi) Apportionment in face of “unforeseen circumstances”

Unforeseen Circumstances and testator intention: Intention of testator that clearly displaces the requirements of apportionment must clearly be gauged from the will and surrounding circumstances.

- EG: If trust has wide powers of retention, apportionment may nonetheless be necessary if something happens to undermine value of capital for remainder-person.

“Real question” (Kellock J.) = ‘whether power to retain in ‘power to retain permanantly ’, OR only until the trustees can sell advantageously – in other words, whether the power to postpone and the power to retain are merely ancillary or subsidiary to the trust for conversion” – if latter then must find other indication of rejection of apportionment and intention for life tenant enjoy in specie

*Royal Trust Co v. Crawford (1955) SCC*

**Facts:** Testator left heirs in succession: wife as life tenant, nieces/nephews in remainder; estate consisted of securities/shares.
- Huge dividends declared and paid to widow (which reduced value of company by 75%).
- Will had trust for sale with wide powers of postponement of conversion and retention.

**Issue:** Is this ground for apportionment between income and capital?

**Decision:** While testator wanted wife to live in comfort, testator did not want encroachment on capital above all else.

- COURT ORDERED APPORTIONMENT!

**Dissent:** (Cartwright and Estey JJ): thought paragraph of trust instrument indicated intent for wife to get “any surplus income”;
justified wife getting enormous dividends at expense of remainderpersons (niece and nephews).

(vii) Trusts to Retain VS. Powers to Retain

Easy to mistaken “power to retain” with “trust to retain” [very different].

- Trust to Retain would exclude Rule from *Howe v Lord Dartmouth* – implies NO DUTY of Impartiality.
- Power to Retain does NOT exclude Rule from *Howe v. Dartmouth* – need to look at circumstances [see *Royal Trust Co*, above].
  - Will trigger duty of impartiality subject clear contrary intention from S

*Re: Smith (1970) Ont HC*

**Facts:** Precatory clause in father’s will, wanted son to care for mother.

- Son made inter vivos trust, income from shares in Imperial Co. for her benefit for life, remainder to him.
- Yearly income was insufficient to let widow live high standard she was used to.
- Widow asked Trustees to vary investment portfolio to invest in company with higher yield, but son wanted to stay invested in Imperial shares.
- Trustee obliged son’s interest instead (who wanted no variation).

**Decision:** Court found Trustee had been partial to remainder person (son).

- Trustee had erroneously construed power to retain as a trust to retain.
- Trustee followed advice of remainder person, rather than seeking advice.

(viii) Impartiality in case of Settled Shares in a Company

- Assets of a corporation are its CAPITAL.
- Corporation creates benefits for shareholders by making profits from use of that capital, and distributing it as INCOME in form of dividends.
  - Dividends treated as income by shareholder – return on shares it holds as capital.
    - As INCOME, dividends go to life tenant.
    - As CAPITAL, shares go to remainder person.
- **Issue:** What if company distributes profits in the form of shares?
Are these “share-dividends” treated as INCOME or CAPITAL?

**General Rule (‘Form is Substance’):** Generally, courts look to intention of the company and give effect to the form the board of directors chooses to distribute the funds to its shareholders (EG: Do Directors classify shares as income or capital?)

- BUT, there are EXCEPTIONS (see Re Welsh).

**Importance of INTENTION:** ‘Form is substance’ principle of corporate intent in nonetheless subject to the testator’s overriding intention.

**Re: Welsh (1980) Ont HC**

**Facts:** Testator gave life estate to second wife, remainder to children from previous marriage.

- Wife receives dividends, then dies, leaves her property to new husband and her own children.

- Capital assets were sold off and distributed as “dividends” (as characterized by the company).

- Dividends = income, so this go to wife and her estate at expense of remainder-children?

**Decision:** Court regarded it absurd that assets released as “stock” would go to kids, while assets released as “dividends” would go to wife’s estate.

- Court regarded release of funds as CAPITAL, as per intention of testator for fair, impartial treatment.

- If ‘form is substance’ applied, remainder person would get share-dividends, and life tenant would get cash-dividends (income) – thus, children would get virtually nothing!

**Note:** Facts are similar to Royal Trust Co. v. Crawford – capital of company wiped out and distributed as dividends, so it’s kind of ridiculous to say that life tenant should get the dividends as income when that “income” was derived from liquidated capital of company.

(ix) Apportionment of Debts and Other Disbursement

- Trustee administration requires estate management, including payment of trust estate debts and disbursements.

- This may require apportionment of funds as capital and income in assessing payments as legacies, taxes, insurance premiums, cost of repairs, and debts.

**PROBLEM:** life tenant is entitled to income soon after testator dies, but sale of assets may be required to pay trust debts, etc and will be completed in the future.

- In mean time before sale, assets will be producing income!

- In fairness to remainder person, life tenant (income beneficiary) should only get income from net estate (after taxes).

**NOTE:** Debts and Disbursements are still subject to Rules re: Impartiality – requires Trustees to review investment from perspective of yields, capital appreciation, and risk.

**Common Law Rule:** Required life tenant receiving income immediately on establishment of trust to make a contribution to payments made in administration of the trust (including to pay debts, etc).

- Typically, capital + 1 year’s income seen as assets available to pay debts (takes 1 year, generally, to sell assets).

**Allhusen v. Whittel (1867)**

**Decision:** Court required life tenant receiving income immediately on establishment of the trust to make a contribution.

- Debts aren’t paid until a year after appointment.

- Accordingly, capital + 1 year’s income were considered as “assets” available to pay debt.

**Notes:** This cumbersome rule has been replaced with section 10 of the Trustee Act.

**Statutory Rule** – Common Law overruled by Section 10 of Trustee Act

- Unless testator says otherwise, all income is available for payment of debts – treated as part of residual estate, UNLESS there’s contrary intention by testator.

**Section 10(1) Abolition of rule in Allhusen v. Whittel.** Unless the will contains an express direction to the contrary,

(a) the personal representative of a deceased person, in paying the debts, funeral and testamentary expenses, estate, legacy, succession and inheritance taxes or duties, legacies or other similar disbursements, must not apply and must not be considered to have applied income of the estate in or toward 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 person, and

(b) until the payment of the debts, funeral and testamentary expenses, estate, legacy, succession and inheritance taxes or
duties, legacies or other similar disbursements referred to in paragraph (a), the income from the property required for their payment, with the exception of any part of that income applied in the payment of any interest accruing due on them after the date of death of the deceased, must be treated and applied as income of the residuary estate, provided 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.

(3) Despite subsections (1) and (2), in any case in which 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.

6. Trustee’s Duty to Provide Information

• Traditionally, thought inappropriate for Trustee to provide beneficiary with information about trust.
• Today, beneficiary has a RIGHT to require a trustee to provide information that will enable a judgment whether the trust is or is not being properly managed.
• Beneficiary (including discretionary and contingent), on reasonable notice, has a right to see trust accounts, investments, the trust document, and all reasonable information concerning the management of the property.
• But, NOT ALL information is subject to this duty [See Re Londonderry’s Settlements]

“Reasonable information” regarding the beneficiary’s right to information DOES NOT INCLUDE documents concerning the exercise of trustee discretion.

In Re Londonderry’s Settlements (1965) Ch

Facts: Beneficiary had interest in distribution of income among a class of discretionary beneficiaries – wanted the agenda and minutes of the meeting in which discretion was exercised.

Decision: Harmon J.: Beneficiary NOT entitled to documents concerning exercise of a discretionay power (ie: the reason Trustee came to its ultimate decision).

Note: If Trustee is acting in bad faith, obligation can be enforced by court order.

(i) Legal Opinions given to the trust

• Disclosure depends on purpose and solicitor-client privilege.
• Traditionally, legal opinions were only for trustee who need not give copy to beneficiaries.
• Modern Approach
  o Allows disclosure when it is clearly dealing with issues of benefit to both trustee and beneficiaries (eg: a direction on how to proceed based on a construction of a provision in the trust as opposed to an opinion on trustee for breach of trust) (Camosun College Faculty Association v. College Pension Board of Trustees (2004)).

7. Trustee’s Duty to Account

Beneficiaries entitled to inspect accounts, but are not entitled to instantaneous response!

Sanford v. Porter (1889) Ont CA

Decision: Duty of Trustee is to make accounts available for inspection and examination. If Beneficiary lives in remote location, they may be obligation to mail copies of accounts.

• Every case depends on the circumstances.

Note: Today, instantaneous response is easy with internet; however, maintaining accuracy and currency may not be.

C. RENUMERATION OF TRUSTEES

• At Equity, trustees expected to act voluntarily, meaning services they render are unpaid.
• In MODERN APPROACH, remuneration can is regulated by the terms of the trust instrument.
• Can also be governed by a contract between Trustee and sui juris Beneficiary – but not advisable as subject to undue influence attack.
• Courts retain inherent jurisdiction (Boardman and Phipps), and can order compensation.
• Remuneration - Section 88(1) of Trustee Act - “trustees are allowed expenses plus “a fair and reasonable allowance” not exceeding 5% on the gross aggregate value of all the assets for their “care, pains and trouble” and administration.”

TEST for s.88(1) – Lump-sum remuneration is preferred to percentage amounts – percentages only for “special cases”.
**FACTORS for setting remuneration (s.88(1)):**
1. Magnitude of the trust (as per Re Pedlar, “value and complexity”)
2. Care and responsibility arising from trust
3. The time occupied in performing trust duties
4. Skill and ability displayed by trustee in managing trust assets
5. Success which has attended its administration of trust assets.

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**Re Sproule (1979) Alta CA**

**Facts:** Trust involved large interest in units, which did NOT PRODUCE INCOME.
- Beneficiaries argues for lower fees, since Trustee was little more than passive guardian.
- Trustee argues care and management of high value assets was inherently risky, argued for remuneration as percentage of asset value.

**Decision:** Court expressed preference for lump sum over percentage – would only use percentages in special cases.
- While trial judge awarded $100,000 in fees – CA lowered this to $30,000.

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**Care and Management Fee – Section 88(2) of Trustee Act** – Trustee can also apply annually for “care and management fee” not exceeding 0.4% of average market value of assets.
- Court or Registrar, if delegated, determines remunerative amounts.

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**TEST for s.88(2) –** In order to obtain “care and management fee” under s.88(2), TRUSTEE MUST RENDER a general summary of the estate and of his services performed in the care and management of the estate.

**FACTORS for setting “care and management fee” under s.88(2):**
1. Value of the estate assets being administered;
2. Nature of the assets being administered (ie: business, farm, investment portfolio)
3. Degree of responsibility imposed on Trustee (including duration of trust)
4. Degree of ability demonstrated by trustee
5. Time expended by trustee in course of care and management
6. Success of failure of trustee in care and management
7. Whether or not extraordinary service was rendered in care and management.

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**Re Pedlar (1952) BCSC**

**Decision:** Trustee Act permitted “care and management fee” in addition to remuneration.
- Trust must give general summary of estate, services rendered (see: Sproule) but this DOES NOT automatically entitle Trustee to s.88(2) fee!
- Court can determine % - up to 0.4%.

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**D. INDEMNITY OF TRUSTEES**

- Basic principle of Equity (not law) that beneficiaries who get all the benefit of the property should also shoulder the burdens.
- Trustee may be liable for trust debts as legal owner, but in equity debts ultimately on the shoulders of equitable owner, UNLESS there’s a good reason for trustee to be responsible.

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**In General:** Trustees are entitled to an INDEMNITY for all debts they incur in executing the trust, UNLESS there’s a “good reason” for trustee to be solely responsible (Re Reid v. Yorkshire and Canadian Trust):
- They have claim against the funds of the trust to meet any contractual obligations they incur in administering the trust terms.

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**Employers are not liable for Pension plan expenses – T to pay reasonable pension plan expenses out of pension fund if explicitly allowed in pension plan; employer may use actuarial surplus from defined benefit portion of plan to meet contribution requirements under defined contribution portion OF SAME PLAN**

**Nolan v Kerry (2009) (SCC)**

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**1. EXCEPTION: Where there’s “Good reason” for Trustee to be Liable**
• EG: In *Hardoon v. Belilios*, Lord Lindley gives example of trustees dividing the trust into several smaller trusts in favour of several beneficiaries – would be unfair to cast the increased liabilities of those divided trusts onto the sole sui juris beneficiary.

**Beneficiary being situated in country not subject to taxes on trust property is NOT a “good reason” to eliminate trustee’s right to indemnification!**

**Re Reid v. Yorkshire and Canadian Trust (1970) BCCA**

**Facts:** Remainder person and absolute Beneficiary argued that indemnity of the UK-based Trust, for taxes paid in UK, should be confined to value of assets in UK.

- Trustee had paid more in taxes than actual value for the assets.

**Decision:** Here, Trustee was personally liable because UK legislation made it liable.

- Trustee paid money because it was personally accountable for it by UK statute.
- Beneficiaries argued that there “good reason” for beneficiary to not indemnify Trustee was that trustee should have refused to pay the UK-based taxes under the rule set out in *US v. Harden* – namely, foreign state is precluded from suing in this country for taxes due under the law of the foreign states.
- CA REJECTED this as a ‘good reason’ – *Harden* only applies where there’s an attempt by foreign state to extend ‘sovereign authority’ in BC.
- Thus, trustee COULD SEEK INDEMNIFICATION from BC beneficiary.

**E. CONTROL OF TRUSTEES – POLICING TRUSTEES IN EXECUTING THEIR DUTIES**

- Beneficiaries and courts both ensure Trustees execute their duties properly.
- Where Trustees have discretion/power, they only need to consider whether to exercise it.
  - Recall: Trustees cannot be compelled to explain their reasons for exercising or refraining to exercise the discretionary power bestowed on them.
- NOTE: Trustees have incentive to do job well (whether for love of settlor/beneficiary, avoid corporate liability, attract clients).

**1. Control over Trustees by Beneficiaries**

**Beneficiaries have NO RIGHT to interfere with trust powers of the Trustee (such as power of appointment).**

**Re: Brockbank (1948) (UKCD)**

**Facts:** Testator appointed wife as B of life estate, remainder to children.

- 2 Trustees with power to appoint a professional Trustee.
- 1 Trustee wishes to retire; beneficiaries insisted his spot should be replaced by a bank.

**Decision:** Court REFUSED beneficiaries’ request – this was a matter within the discretion of the Trustees.

- Beneficiary could not interfere – essentially had 2 options: (1) accept trust or (2) terminate it as per *Saunders v Vautier*.

Trustees as directors: When trustees are also directors of company to which shares are issued, beneficiaries only have same rights as shareholders (no more).

**Butt v. Kelsen (1952)**

**Facts:** Through their control of shares, Trustees appointed themselves as sole directors of the company from which shares are issued.

- Beneficiaries unhappy with management wanted all docs in Trustee’s possession.
- Trustees argued that as directors, they had duties to company; beneficiaries only entitled to certain docs.

**Decision:** Beneficiaries cannot control trustees who are directors.

- Beneficiaries have same rights as shareholders, but no more!
- However, beneficiaries can compel Trustees to vote the shares as directed!

**2. Guardians / Protectors**

- Because of impersonal nature of trust corps, settlor will often appoint a “protector” or “guardian”, who serves to personalize a corporate trust, or provide for unexpected events (notably in “offshore trusts”, inspired by tax avoidance).
  - Also provides settlor with way to indirectly control the trustee.
  - Family-friend-trustees of yesteryear no longer dominant; historically, such trustees did not require remuneration, but rather, served as trustee as courtesy to family/friends.
Trustee will often have to get guardian permission in order to execute certain actions (ie: appoint beneficiaries; distribute capital; etc).

Must BE CAREFUL not to give guardians/protectors too much power, as they may then be treated as trustees!

3. Control of Trustees by the Courts

- **General Principal:** Only in cases of bad faith, or refusal to discharge duties should a court step in to control the exercise of the discretion of a testator/testatrix *(Tempest v. Camoys)*

**Application for Direction – Section 86 of Trustee Act** - Trustee can apply to court in chambers for an opinion, advice, or directions on a question of management and administration of trust property.

**Section 86.** Application for directions

(1) A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge 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.

(3) The costs of an application under subsection (1) are in the discretion of the court.

**Effect and exception – Section 87 of Trustee Act** – Absolves trustee of responsibility where they act under court authority under s.86.

- NOTE: This immunity DOES NOT INDEMNIFY trustee guilty of fraud, willful concealment or misrepresentation by obtaining such opinion, advice, or direction.

**(i) Courts only interfere for “real issues”**

**Courts very hesitant to interfere with Trustee’s exercise of discretion** (first articulated in *Tempest v. Camoys* (1882)).

- But, court will interfere with “real issues” (ie: fundamental scope of trust powers).

**Re Wright (1976) Ont HC**

**Facts:** Trustee agreed to sell shares, but offer to purchase was rejected by 3 trustees because they believed price was too low.

- Other trustee (trust company) applied to court for advice and direction.

**Decision:** Court REFUSED, asserting Trustees given a discretion should exercise it property as they see fit; without interference (even from court).

- Here, simply a disagreement (not a real deadlock).

**(ii) Court intervention upon “deadlock”**

**Court MAY interfere in trustee’s exercise of discretion in the event there is “serious deadlock” between Trustees (such that exercise of discretion impossible, essentially).**

**Re Billes (1983) Ont HC**

**Facts:** Some beneficiaries (charities) were dissatisfied with small income stream (only 2%).

- Trust company wanted to sell shares, but son and widow (also Trustees) opposed.
- Trustees had absolute power to convert and retain shares.

**Decision:** Court found serious deadlock and proposed diversification of trust assets, to avoid risk.

**(iii) Court intervention for improper conduct (Outside Trust Purpose)**
Court will interfere where the trustee is attempting to exercise its discretion to achieve a purpose not intended under the terms of the trust, or contrary to testator’s intentions.

**Schipper v. Guaranty Trust Co. of Canada (1989) Ont CA**

**Facts:** Testator gave trust company “uncontrolled discretion” to administer trust for “welfare, benefit, comfort, enjoyment” of wife.
- She wanted to encroach into capital, trust company refused.

**Decision:** Court recognized it would generally refuse to interfere with “uncontrolled” discretion, but would interfere where Trustee is attempting to exercise discretion to achieve purpose NOT intended under terms of trust.
- Trustee failed to give effect to testator’s intention to “provide” for wife.

(iv) Court interference due to undue ‘partiality’

**Impartiality:** Court will interfere to ensure that Trustee is being even-handed; fulfills duty to be impartial between beneficiaries.

**Re Fleming (1973) Ont HC**

**Facts:** Testator gave life estate to wife, appointed her as executor.
- Trust asset had surplus; could distribute as income or capital.

**Decision:** Court affirmed it wouldn’t relieve Trustees from duty to exercise discretion honestly and intelligently.
- BUT, court ORDERED company to distribute surplus as capital in the form of redeemable preference shares favouring life-tenant wife, who had otherwise been short-changed – in order to be even-handed between life tenant and remainderperson.
- This was because of:
  1. Adverse tax consequences of treating surplus as income
  2. Prospects of future income enhancement for the life tenant from other sources and income from enhanced capital; AND
  3. The need to be even-handed between the life tenant and remainder persons.

**F. OUSTING COURT JURISDICTION**

**In General:** Attempts by a Settlor to oust court jurisdiction through privative clauses giving the trustee exclusive power to make “binding and conclusive” decisions will be treated as INVALID as against public policy *(Re Wynn)*
- BUT, power to adjudicate regarding matters of fact (as opposed to law) CAN be given exclusively to trustee (ie: courts show deference to trustee re: questions of fact).

**Attempts to oust court jurisdiction are contrary to public policy Bs entitled to have court consider and uphold their rights**

**Re Wynn (1952) UKCD**

**Facts:** Testator allows Trustees to treat Beneficiaries differentially – make “conclusive and binding” decisions.

**Decision:** COURT HELD attempts to oust court jurisdiction are contrary to public policy;; Court have power to “construe and control construction and administration of testator's will and estate”.

1. **Privative Clauses – Test for Effectiveness**

Privative clauses will be ineffective where 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; OR
3. Act impartially between classes of beneficiaries, or acted in a manner prejudicial to their interests.

**Boe v. Alexander (1987) BCCA**

**Facts:** Pension plan gave Trustees wide authority to determine questions of coverage, eligibility, etc.
- Trustees relied on seemingly exclusive jurisdictions to make final, binding determinations.
- Privative clause: “any determination or construction by them in good faith shall be binding upon all parties and the beneficiaries”.

**Decision:** Trustees must act according to trust law (fiduciary relationships) and are subjective to court supervision if they do not.

**Policy Aside:** Isn’t this kind of an empty standard? It’s basically like saying privative clauses are effective ‘so long as they aren’t needed’ – basically ineffective whenever the Trustee does something wrong.
2. EXCEPTION to general rule: independent third parties

Settlor may partially limit court jurisdiction by delegating decision-making ability to an independent third party – regarding decisions concerning facts (not law) and is subject to third party acting reasonably and w/o misconduct

<table>
<thead>
<tr>
<th>Re Tuck’s Settlement (1978) UKCA</th>
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<tbody>
<tr>
<td><strong>Facts:</strong> Clause were “Chief Rabbi of London” was empowered to determine “conclusively” whether an “approved wife” met testator’s condition (aristocratic Jew).</td>
</tr>
<tr>
<td><strong>Decision:</strong> (Denning MR) UPHELP CLAUSE - This clause partially limited court’s discretion.</td>
</tr>
<tr>
<td>• Court did retain control where Rabbi may misconduct himself, come to “unreasonable decision”.</td>
</tr>
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3. Exculpatory Clauses

- Shields trustee from liability, BUT NOT where trustee has been:
  1. Dishonest;
  2. In willful breach of trust;

Settlements that purport to shield trustees in cases where he or she is dishonest through exculpatory clauses will FAIL where the trustee has been dishonest or is in willful breach of trust. – OR GROSS NEGLIGENCE

<table>
<thead>
<tr>
<th>Re Poche (1984) AB QB</th>
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<tbody>
<tr>
<td><strong>Facts:</strong> Sister of deceased was Trustee; life estate to wife with remainder to daughter.</td>
</tr>
<tr>
<td>• Trustee failed to gather all assets, put her mind to sale of those assets, and to act evenly between two beneficiaries.</td>
</tr>
<tr>
<td><strong>Decision:</strong> Court found breach of trust through grossly negligent behaviour.</td>
</tr>
<tr>
<td>• Trustee was NOT protected by shield of the exculpatory clause w/consent, judge removed her as Trustee.</td>
</tr>
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THE CONSTRUCTIVE TRUST

- Basis in Equity: Arose from residuary power of Courts of Equity ‘do justice’ by using their historical jurisdiction based on good conscience.

A. BENEFITS OF CONSTRUCTIVE TRUST:

1. Relief is ‘in rem’ – Provides property to successful claimant that enables in rem relief
   - By giving the complainant an equitable interest in the property in question, the Constructive Trust serves as a TRIGGER for the mechanism in *Saunders v. Vautier* such that the “beneficiary” can terminate the trust and demand legal title.
   - Particularly important where the fiduciary is insolvent, and has credits after assets (puts constructive beneficiary in PRIORITY).
2. Tracing: provides entry by claimant, not only into fiduciary-defendant’s property, but also property in hands of third parties who are not bona fide purchasers for value.
3. Increase in value of property stays with beneficiary.

B. CATEGORIZING CONSTRUCTIVE TRUSTS – FROM *GUERIN V THE QUEEN*

- Jurists have grouped the miscellany of types of institutional CTs into sub-categories, according to similar characteristics:
  1. Breach of trust or an existing fiduciary duty [INSTITUTIONAL]
  2. Involvement in property inconsistent with the trust [INSTITUTIONAL]
     - EG: acting beyond the scope of trust authority.
  3. CTS without a pre-existing fiduciary relationship [REMEDIAL (below)]
     - EG: non-spousal domestic relationships (See *Pettkus v Becker*).

C. HISTORICAL ORIGIN: THE “INSTITUTIONAL” CONSTRUCTIVE TRUST

- Root in “good conscience” – Since 1600s, exercise of ‘good conscience’ by Courts of Equity has resulted in recognition of a number of now developed, discrete legal categories in which constructive trusts can be imposed “by operation of law”.
- “Institutional” in that the law has established a set of rules with “substantive requirements” that need to be established in order for the court to impose a CT vis-a-vis the relationship between plaintiff and fiduciary-defendant.
  - Used almost exclusively in the commercial context!
- Institutional CTs arise automatically when the legally established criteria has been satisfied.
- Situations where Institutional CT will be imposed on property of defendant-fiduciaries:
  1. Wrongs of faithless directors;
  2. Delinquent agent in principal/agency relationship (eg: lawyer-client);
  3. Overreaching partners
  4. Bribers and other corrupt officials;
  5. Undue influence;
  6. Breach of confidence tricksters;
  7. Intermeddlers in a trust (eg: trustees de son tort).
  8. Vendor-purchaser relationships (purchaser said to have “equitable interest” in the thing sold as at date of sale).
  9. Unjust enrichment (eg: separating and erstwhile cohabitating persons) (See *Pettkus v. Becker*).

1. Institutional Trusts = not a closed list of categories!

- Common element between categories of institutional CTs is the FIDUCIARY RELATIONSHIP, NOT the types of actors involved.
- “It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agents, trustee, partner, director, and the like. I do not agree. It is the NATURE OF THE RELATIONSHIP, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like of negligence should NOT BE CONSIDERED CLOSED!” (*Guerin v. The Queen*, 1984, SCC, Dickson J.)

D. RECENT DEVELOPMENT: THE “REMEDIAL” CONSTRUCTIVE TRUST

- Institutional CTs raised a question: Should constructive trusts be imposed in situations beyond those enumerated under the institutional categories?
- ANSWER came largely from cases dealing with non-spousal cohabiting partners, where courts created REMEDIAL
CONSTRUCTIVE TRUSTS in concluding that it is absolutely unfair for only one party to have everything when a relationship comes to an end (Pettkus v. Becker).

- Law emerged in this area first because family law legislation only dealt with married couples!
- Unlike Institutional CTs, which arise automatically, REMEDIAL CTs depend on the court’s discretion:
  - Court must declare a CT (giving proprietary relief) as the best available remedy to do justice between the plaintiff and the defendant in the specific case before it.
  - Remedial CT has prospective effect with equitable title (and so the right to call for legal title) in the assets claimed by the plaintiff;
  - Assets vest in the plaintiff by court declaration.

E. TOWARDS A GENERAL THEORY OF CONSTRUCTIVE TRUSTS

- Given the two kinds of CTs discussed above, Canadian courts have sought to UNIFY THE CONCEPT of Remedial Constructive Trusts under a unitary rationale.
  - POLICY RATIONALE: Enhance predictability of result and to promote certainty in the law.

1. Unjust Enrichment – Pettkus v. Becker

- In Pettkus v. Becker, court reasoned that there were essentially TWO WAYS to give effect to the rights of the claimant:
  1. Common Intention Resulting Trust (hasn’t been adopted under Canadian law, although exists in UK); AND
  2. Unjust enrichment – requires [adopted by Court]:
     a. Enrichment
     b. Corresponding deprivation; AND
     c. Absence of juristic reasons to justify the deprivation.

Roots Remedial CT under principles of unjust enrichment.

- CRITERIA: UNJUST ENRICHMENT, necessitating a REMEDIAL CT, requires the following:
  1. An enrichment by the defendant;
  2. An corresponding deprivation by the plaintiff; AND
  3. An absence of any juristic reason explaining or justifying the enrichment.

<table>
<thead>
<tr>
<th>Pettkus v. Becker</th>
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<tr>
<td><strong>Facts:</strong> Mrs. Becker had contributed time and money to cohabitation with Mr. Pettkus.</td>
</tr>
<tr>
<td>• Pettkus held legal title to bee farms but did not give Becker any share of ownership after a falling out, despite her substantial contributions.</td>
</tr>
<tr>
<td><strong>Decision:</strong> Court HELD contributions were substantial enough to entitle Becker to a portion of the profits realized from the sale of the properties in question.</td>
</tr>
<tr>
<td>• To do otherwise would yield an unjust enrichment on the part for Pettkus, as the [above] criteria had been satisfied.</td>
</tr>
<tr>
<td>• Becker was awarded an equitable estate in the property, which, ex post facto, she could then call for shared legal title (until then solely vested in Pettkus).</td>
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**QUESTION:** This case raised another question: Is UNJUST ENRICHMENT ‘at the heart’ of the Remedial Constructive Trust?

- For quite some time, it was said that a CT could be applied either (1) under any of the enumerated institutional cases; or (2) in cases of unjust enrichment.
- However, Guerin decision [below] established that Canadian courts have moved BEYOND the parameters of unjust enrichment, to imposing CTs in cases where there is a breach of FIDUCIARY DUTY!

2. Breach of Fiduciary Relationship: beyond mere ‘unjust enrichment’

(i) Guerin v. The Queen

Not “unjust enrichment”, but a breach of fiduciary relationship is the PRIMARY PRINCIPLE guiding the court’s discretion to impose a constructive trust – need to establish fiduciary relationship in order to impose CT!

- Hallmark of a fiduciary relationship is that one party is at the mercy of the other’s discretion! (VULNERABILITY)
  - Fiduciary Relationship = “a relation in which the principal’s interests can be affected and are therefore dependant on the manner in which the fiduciary uses the discretion which has been delegated to him”.
  - Alternative Remedy: If CT is impossible to implement, Court my order trust damages!
**Guerin v. The Queen (1984) SCC**

**Facts:** Land was vested in aboriginal group (Musqueem). As such, in order to transfer, group would have to surrender land to Crown, who would then have to transfer the land to the private party.

- Musqueem surrendered land to Crown.
- Much later, it was discovered that the terms for surrender of the land, which the Musqueem band council had required as a condition of transfer, were IGNORED by the Federal Government.

**Decision:**

- Court held there was a breach of trust!
  - ASIDE: No express trust, or even a resulting trust — as such, it was inaccurate to speak of a “breach of trust”.
- Court illustrated situation as an unjust enrichment of the Crown at the Musqueem’s expense, warranting either (1) constructive trust (giving the land back) or (ii) compensation.
- Land could not be given back, as Crown had leased it to the Shaughnessy Gold Course; as such only remedy available was trust damages.
  - Had title been clear of leasehold, constructive trust MAY have been imposed.
- Trust damages:
  - Greater than tort/compensatory damages (where damages are limited to foreseeability).
  - Greater than contract/expectancy damages (no duty to mitigate the loss).
  - As such, trust damages impose a MUCH GREATER burden on liable party than damages otherwise would — can be used in lieu of a CT as a remedy, where a CT is impossible to implement.

(ii) Test for “fiduciary”: Frame v. Smith — adopts Guerrin-principle re: fiduciary duty

**TEST:** Characteristics of an actionable fiduciary duty (Wilson J — dissenting opinion — adopted in LAC):

1. The (alleged) fiduciary has scope for the exercise of some discretion or power;
2. The (alleged) fiduciary can unilaterally exercise that power or discretion 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.

**Frame v. Smith (1987) SCC**

- Notion of “fiduciary duty” articulated in Guerrin picked up by the Court.
- Shows scope of CT has been broadened by Canadian courts.
- The majority in LAC Minerals endorsed Wilson J.’s criteria for a fiduciary relationship (as per Sopinka J.)
- However, Sopinka J. emphasized vulnerability as the only indispensable component of the test.
- This was controversial, and lead to a SPLIT DECISION in LAC Minerals - Sopinka & McIntyre JJ endorsing vulnerability VS Wilson & La Forest JJ endorsing a broader set of circumstances.

(iii) Vulnerability and Dependence: Beyond “unjust enrichment” – LAC Minerals

**CONFIRMED that SCOPE OF CT is broader than a mere unjust enrichment – SOLIDIFIED CT as requiring a fiduciary relationship!**

- EXPANDED fiduciary obligations to bind a broader spectrum of agents (ie: commerce and contractual negotiations).

**LAC Minerals v. Corona (1989) SCC**

**Facts:** Between two large Canadian mining companies (Corona is a junior mining company; LAC is a senior mining company — much larger).

- Corona finds extensive gold on 17 parcels of land to which they hold mineral claims – the two companies proceed negotiations to execute a joint venture agreement in order to develop the mineral claim parcels for production – as is common practice in the mining industry.
- Corona has communicated information NOT disclosed to the public regarding their research into potential gold on the adjoining
- “Williams Property”, which consisted of 11 mineral claims immediately beside the 17 Corona already owned.
- Before joint venture agreement is concluded, LAC had already purchased land surrounding the claim land.
- Corona sues for breach of confidence and breach of fiduciary duty.
  - Argues they had abused the confidence of the information provided by purchasing the properties without involving Corona.

**Issue:** Can the court comply with Corona’s request that the title in the Williams property be transferred to them under a
Constructive Trust (allowing them to call legal title under the rule in Saunders v. Vautier)?

**Decision:** Bizarre ruling – no fiduciary relationship, but CT imposed due to breach of confidence.

Court looked at THREE ISSUES:

1. What is a “fiduciary duty”?
   - Comes from “fiducia” – meaning “reliant on” – describes relationships of reliance!

2. Does fiduciary duty extend beyond institutional categories? [YES]

3. If so, in what circumstances does fiduciary duty apply?
   - McIntyre and Sopinka JJ: Adopt Wilson J’s definition of “fiduciary” from Frame v. Smith [Lamer CJ agrees with this definition]:
     - **Vulnerability is Key:** When one party is vulnerable to the discretion that another has over their interests = fiduciary!
     - Vulnerability is the only inseparable characteristic of a fiduciary relationship.
     - Here, McIntyre and Sopinka hold that Corona was NOT VULNERABLE – it was a large, sophisticated mining company – as such, NO FIDUCCIARY RELATIONSHIP!
     - Rather, McIntyre and Sopinka JJ held there was a breach of confidence – this was aligned with standard trade practice that companies are prohibited from disclosing information disseminated in regard to a proposed business venture (REMEDIED IN TORT!).
   - Wilson and La Forest JJ: Took a much WIDER view of the criteria for establishing a fiduciary relationship:
     - Includes vulnerability, but this is not the only aspect – broader spectrum of facts can create fiduciary relationship: ascendency, confidence, trust, or dependance.
     - KEY FACTOR: “fiduciary expectation” – does relationship create expectation of creating fiduciary obligations? Was there a reliance on that expectation?
     - Here, Wilson and La Forest JJ held that Corona WAS relying on a fiduciary expectation = fiduciary relationship, warranting a CT or trust damages.
     - [Lamer CJ, despite agreeing with Sopinka and McIntyre JJ re: the test for “fiduciary”, AGREES WITH IMPOSING A CT].

   - Because Lamer CJ agreed with Wilson and La Forest JJ re: the outcome, CORONA WON.

**Notes:** This is a very STRANGE RESULT – Lamer CJ agreed with Sopinka and McIntyre re: the criteria for establishing a “fiduciary relationship”, yet ultimately sided with Wilson and La Forest JJ re: imposing a constructive trust.

### CONTROVERSY

- This decision caused a great deal of controversy among corporate lawyers.
- Nonetheless, the subsequent decisions by La Forest J in Hodgkinson v. Simms and M v. M SOLIDIFIES that La Forest and Wilson JJ’s model of “fiduciary relationship” is now the GOVERNING LAW!

### POLICY ASIDE: Is LAC Minerals a “good decision”?

- Perhaps a “good result” at the cost of creating confusion in the law.
- **GOOD RESULT:** Proprietary remedy required! Monetary award is insufficient!
  - Facts of the case pertained to a senior mining company taking advantage of information disseminated in confidence by a junior mining company regarding speculated mineral finds on a property.
  - Business of junior mining companies is EXPLORATION – they raise just enough money to explore a site, and then generally find a senior mining company to develop the property – either through a sale (equity or asset), an investment, or as a joint venture.
  - In any case, the most valuable asset of the company is the PROPERTY – not the cash it has on hand; holding claims to the property is of great value to shareholders; holding vast sums of cash is not unless there’s a property to explore!
  - As such, a CT was the most appropriate remedy, given the circumstances.

- **CONFUSED LAW:**
  - However, despite the appropriateness of this result, it came at the cost of MUDDLING THE LAW.
  - Now, extremely unclear what exactly constitutes a “fiduciary relationship”, of where law regarding its creation would go [BUT, see Soulod v. Korkontzilas re: resurrection of good conscience].

#### (iv) Beyond Vulnerability: La Forest and Wilson JJ.’s rule prevails

La Forest and Wilson JJ’s criteria for “fiduciary relationship” adopted – vulnerability NOT required – rather, need to look at the
nature of the relationship.

- Trustee-beneficiary relationship emerged out of “power-dependency”! – look for trust/dependency/reliance
- Demonstrates further broadening of fiduciary relationships into other areas.

**Hodgkinson v. Simms (1994) SCC**

**Facts:** Material non-disclosure by an account regarding financial services.
- There was a period where you could get accelerated depreciation if you purchased a Multiple Urban Residential Swelling (MURD) – allowed citizens to buy condos, and get benefits from accelerated depreciation of capital – can shelter income by writing off expenses.
- Hodgkinson was a broker – bought a MURD in order to shelter income – went to Simms (accountant) to make the necessary arrangements.
- MURD market collapsed.
- Meanwhile, Hodgkinson lost his job, faced prospects of having to sell MURDS.
- Hodgkinson finds out what Simms did – argues he had breached his fiduciary duty, and sues him for compensation.

**Issue:** Was Hodgkinson “vulnerable” to the discretion of Simms?

**Decision:** Court held NO – was not “vulnerable” – but, was DEPENDANT on Simms.
- DEPENDANCE and RELIANCE were sufficient for breach of fiduciary duty by Simms.
- Fact that Simms didn’t disclose his dealings meant that Simms breached his fiduciary duties to Hodge.
- Court awarded trust damages.
- A broker client is not necessarily a fiduciary relationship but it became here when H placed trust/confidence in S to make decisions.

**Dissent (Sopinka J):** Vulnerability is CORE – improper to open the floodgates by over-broadening fiduciary relationships – particularly in realm of business and contracts.

**Fiduciary duty in familial setting – fiduciary relationships not confined to commercial settings**

**M v. M**

**Facts:** Plaintiff suing father for damages due to incest.
- Father argues he was shielded by Limitations Act.
- Plaintiff argues there was a breach of fiduciary duty, as there is no limitation period for such grievances.

**Decision:** Court found there is ALWAYS a fiduciary duty re: parents and child.
- Fiduciary breaches have no limitation period!

3. Good Conscience: Even broader scope of fiduciary relationship?

- Through recent case law, it seems evidence that this ‘unifying general theory’ of CTs revolves around the ideas of good conscience.

(i) **Soulos v. Korkontzilas**

The Governing Principle that guides the law surrounding constructive trusts is that of GOOD CONSCIENCE! *(Soulos v Korkontzilas, 1997 SCC)*.

- **Korkontzilas** decision motivated largely by Cardoza J. in *Beatty v. Guggenheim* – “the holder of legal title may not in good conscience retain the beneficial interest”.
- **SOULOS TEST for Constructive Trust**
  1. D must have been under an equitable obligation in relation to the activities that gave rise to the assets (fiduciary duty).
  2. Assets @ issue must be shown to have come into the possession of the D due to a breach of his or her equitable obligations (not unjust enrichment?)
  3. P must show that there is a legitimate reason for seeking proprietary remedy (such as trust) rather than monetary remedy.
  4. Must be no other factors that would make imposing a Constructive Trust unjust (ie, interests of intervening creditors or other third parties must be protected).

- **Flexibility:** Provides a means of opening the system of law to meet new social and economic situations – provides flexible mechanism for imposing CTs.
• Canadian courts have explained that if the holder of title were to keep the property in circumstances contrary to the principle of good conscience, he or she would be unjustly enriched!
• This unjust enrichment can be disgorged through the imposition of a CT on the property or through a restitution of money.
  o CT becomes a facilitative device to make person with legal title hold it beneficially for the wronged person with home he has a juristic relationship.

4. Lampooning from Abroad
• This development of fiduciary relationships in Canada has created “vast differences” (Breen v. Williams) between the law in Canada and other common law jurisdictions.
• In UK, there is NO DOCTRINE OF A REMEDIAL CONSTRUCTIVE TRUST – only Institutional!!!
• In Breen v. Williams, Mason CJ of the Australian High Court ridiculed the Canadian approach, stating: “all of Canada is divided into three parts: those who owe fiduciary duties, those to whom fiduciary duties are owned, and judges who keep creating new fiduciary duties”
A. Non-Charitable purpose trusts (Private Purpose Trusts)

Why They Are Void
• General:
  o Problem with private purpose trusts is that it is difficult for the court to get control of the trust (because there is no beneficiary)
  o Even if there is someone who will come forward and help with the administration of the purpose trust – court feels that it doesn’t have the power to re-constitute the trust if things are missing
  o If there is a beneficiary - court can reshape trust according to what will suit the beneficiary, as identified in the trust instrument

Re Astor’s Settlement Trusts - 1952 - CHD
Facts: A attempted to create a trust for the “maintenance of good understanding sympathy and cooperation between nations, and the preservation of the independence and integrity of newspapers and the encouragement of the adoption and maintenance by newspapers of fearless educational and constructive policies”
Issue: Is this trust administrable?
Ratio: Trust is void because only beneficiaries are persons who are unascertainable, so it is difficult who could initiate proceedings to enforce the trust

Exceptions to Private Purpose Trusts (Big 4)

1. Animals and Statues
• Astor: Old people die - set up trust to maintain/support pets (cats/dogs/horses) = valid
  o Trusts can only survive for about 21 years in perpetuity jurisdictions (which is usually enough time to administer to the animal)
    ▪ Usually there is a residuary beneficiary - they will make sure that trust comes to an end because they have financial incentive to end it within 21 years
• Petingall: Trust to look after horse valid because residuary legatees could supervise performance of trust
  o Monuments - testator leaves money for upkeep of grave, setting up tombstone, construction of statue and having the statue maintained
  o Allowed but subject to the perpetuity rule of 21 years
  o Usually will be a residuary beneficiary

2. Purpose Trust for Indirect Beneficiaries (Denlies)
• Basically doing 2 things: 1) Purpose trust + 2) Beneficiaries (usually allowing trustee discretion in choosing the beneficiaries to carry out the purpose of the trust)
• Purpose is not allowable, but because it is co-dependant on the beneficiaries (which is allowed) then it is ok
• Name beneficiaries as a class that are actually pursuing the purpose that the settlor wants

Re Denlies - 1969 - CHD
• T invested land in trustees to be used as a sports ground for the employees of a company and other persons the trustees permit to use the facility
• Purpose trust + defined class of objects = outside the mischief that the prohibition on non-purpose trusts attempts to stop (no beneficiaries to enforce it)

Keewatin Tribal Council v Thompson - 1989 - MQB
Facts: Council constituted itself as a trustee for a number of bands over land that it owned to provide residences for first nations students attending school in Thompson
• Object was to provide residential facilities, but to do it in a way that avoided property taxes Court
• Indirect beneficiaries of the the trust are the individual members of the bands; real benefits in that the children are entitled to use the properties free of charge as accommodation while attending school
• No problem with trust because there are people who can enforce it

3. Gift for Unincorporated Association to Further Objectives

• Testator/Settlor can find a compatible club to their objective and leave money to the unincorporated association
• Unincorporated association = must be more than an amorphous group of individuals
  o Political parties are often not good enough because of the frequent change of membership
• Have to be somewhat careful because the rules of the organization determine how the money is utilized; be reticent of this when structuring your gift
  o Ex. If transfer is to present and future members the absence of those future members when the gift is effective may result in the characterization of the gift as a purpose rather than to members in conformity with the beneficiary principle
• Common situation is T leaves funds to official in unincorporated association with the intention that it be shared in common between current members = valid (Cocks)
• Another common situation - Gift to official in the association and is paid in trust as an accretion to the funds of the club; donation is used with general-purpose funds to advance purposes of association
  o Monies are then regulated according to the rules/contract between members
  o Members as co-owners do not beneficially hold the gift, so a member who dies or resigns from the club has no claim to the gift
  o PAVS - this is a roundabout way to institute a purpose trust - but it is effective

Re Retchers -1972 - CHD

• Gift to society, before it was received society dissolved in order to amalgamate with another club
• Gift was to members of named society, and even though the donation was to amplify the general fund serving the particular purpose the gift had been made for, it was actually a gift to those specific members of the named society
• As this group had amalgamated with others, members were no longer bound contractually - so the gift failed and was held on resulting trust for the estate

***POINT - when you are looking at the means of fulfilling a purpose through people, you have to look at the people you have chosen - there must be certainty in the objects that you have selected, otherwise it will fail***

Re Russel, Wood v The Queen - 1977 - APC

• Legacy gift was made to society
• Gift was held valid as a charitable purpose trust but court still examined validity as non-charitable purpose on the basis that it was a gift to the members subject to their contractual rights

Court: Did not meet the test for valid private purpose trust - used the word “trust” in the will, and only scantly specified the purposes for which the society is organized

***PAVS - care should be taken where a testator conveys property in trust for an association to prevent the construction of the gift as primarily to advance a private purpose trust and not for the benefit of its members (further demonstrated in Leahy)***

Leahy v NSW - 1959 - PC

Facts: Gift was to an order of nuns which the trustee could select - given to contemplative nuns = non-charitable gift

Issue: What happens when you give to a group you think it is sustaining a charitable purpose, but in actual fact the group can’t achieve this purpose because they are not recognized to achieve the purpose?

Ratio: Clear intention of T was to establish an endowment for nuns that would continue into the future
  • Thus, disposition was valid under trust only where the trustees selected members of charitable orders
  • As these nuns pursued purely private purposes - the gift failed

Re Lipinki’s Will Trust Gosschalk v Levy - 1977 - CHD

Facts: Unincorporated society that provides social, cultural, and sporting activities for Jews in Hull who are members of the association
  • On dissolution, club rules directed the assets be held by trustees as a fund in order to set up another Jewish youth organization with similar aims and objects
  • T transferred residuary estate to the society to be used solely in the work of constructing new buildings/ improving buildings for the association

Issue: Is this a private purpose trust that is valid?
Ratio: Yes - the will should be construed as disposing of property for the benefit of ascertainable beneficiaries and the purpose was simply descriptive of the manner of enjoying that benefit

- If gift to augment funds of an association is valid, then there is no sound reason why a similar gift that specifies purpose within the power of the association and which members of the association are beneficiaries, should not also be valid
- Beneficiaries of the association could enforce the purpose

***PAVS - case has been criticized in that the representation of the facts does not make it clear whether this type of gift was intended for each member such that the stated purpose could be disregarded, or whether it was a purpose trust in which the stated objective is perceived as simply the motive explaining a gift to individual beneficiaries***

4. Private Purpose Trusts as Powers

- Instead of trust being construed as trust for purposes, it gives the trustee power to utilize the funds to further a particular objective
- If the power is not exercised, the money becomes held on a resulting trust for the settlor - goes to testator’s residuary heirs
  - Provides a group of people to keep an eye on the purpose of the gift - able to state whether or not it has been fulfilled, can call on court to control it

Re Shaw’s Will Trusts

- S created a testamentary trust for a 40 letter alphabet
- Upheld - characterized the trust as a power to spend money for that purpose
- Law reform leans in favour of giving effect to private purpose trusts

BC Perpetuities Act

s. 24(1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person must be construed as a power to appoint the income or the capital, as the case may be.

(2) Unless a trust described in subsection (1) is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised either by the original trustee or the original trustee’s successor within a period of 21 years, even if the disposition creating the trust showed an intention, either expressly or by implication, that the trust should or might continue for a period longer than that period.

(3) Despite subsection (2), if the trust is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of the opinion that by doing so the result would be closer to the intention of the creator of the trust than the period of validity provided by this section.

(4) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended within a period of 21 years, or within any annual or other recurring period within which the disposition creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person who would have been entitled to the property comprised in the trust, if the trust had determined at the expiration of the 21 year period, is entitled to that unexpended income or capital.

BC law reform has suggested that the government go further and create legislation that permits the settlor to appoint a 3rd party enforcer in an instrument with the authority to enforce private purpose trusts

- Delegates would be subject to the supervision of the court in a similar manner to trustee
- Settlor/testator who does not wish the conversion to trust powers can prohibit this - expressly or impliedly

B. Charitable Trusts

General

- Charitable trusts are a form of express trusts = all rules apply with exception of certainty of objects given absence of specific individuals as beneficiaries
- Most important is probably certainty of purpose (ie intent to create charitable trust for x purpose)
  - Ex. Chichester - T directed that executors apply the residue of his estate for charitable institutions in England
  - HL: disposition is too vague, and void
  - Upheld by SCC in Brewer
- Charities may be functionally set up in 2 ways:
  1. Administration of trust assets can take the form of a permanent endowment in which income is generated from investments and used to further the specifically identified or declared charitable purpose
  2. Funds are put into assets that are then deployed by the trustees to fund specific purpose charities or foundations
• These are classified by the CRA as public and private charities - where the second one is usually set up by a family and is incentivized by favourable tax treatment
  o CRA has a rule in the second case whereby a certain amount of the income generated must be spent each year on the charitable purpose - so it becomes important to know what constitutes a charitable purpose
• Political purposes to do not qualify for characterization as charitable purpose trusts
• Anti-Vivisection - invalid because the court has no means of judging whether a proposed change in the role will or will not be for the public benefit and therefore cannot say that a gift to secure the change is a charitable gift
• Political purpose = one that has as its focus the aim of changing the legal situation prevailing in an area of human life, or to further the objects of political parties
• However, no impediment of charities adopting political positions on matters, especially if this is designed to secure the objectives of the charity

Framework of Analysis

Native Communications Society of BC v MNR - 1986 - FCA

• CT identified the preliminary considerations to determine whether a particular purpose can be regarded as charitable - accepted 4 categories from Pensthal
  1. Purpose must be beneficial to the community in a way which the law regards as charitable by coming within the “spirit” and “intendment” of the Preamble to the Statute of Elizabeth (does it fit within the 4 categories)
  2. Whether a purpose would or may operate for the public benefit is to be answered by the court on the basis of the record before it and in exercise of its equitable jurisdiction in matters of charity

Public Benefit Requirement

• Distinguishes charitable purpose from private purpose
  1. Charitable trust must address an appreciable section of society - must be truly public
    o Court must be satisfied that the potential beneficiaries of the trust are not numerically negligible and that they are not linked to each other by relationship to a common person
    o Oppenheim - charitable trust failed because its purpose was for the education of 110K company employees who all were linked to a common employer = didn’t serve public widely
    o Neville Estates Ltd. - gift made to members of synagogue was regarded as an appreciable section of the public
      ▪ Case differs from Gilmour in that the members of the synagogue spend their lives in the world, where members in Gilmour live secluded
  2. Charity must exude a public element - this will rely on advocacy skills
    o Gilmour - gift on trust to a community of 20 contemplative nuns was held not to meet the public element test
    o Jones - Disposition directed to the officers of Eaton to be used as fund for any needy/deserving Toronto members of the Eaton Quarter Century Club = valid, public enough
      ▪ PAVS - has some doubts with this - seems to indicate that movement in case law towards rebuttable presumption for trusts fitting within the 3 main heads that they are benefitting public
      ▪ Will not be void if settlor has expressed preference in favour of specified individuals
  3. Charitable purpose must promote the public wellbeing or policy as determined by the court, not the settlor
    o National Anti-vivisection Society - Matter is not charitable simply because the settlor or members of the society believe that what it is doing is for the public benefit
      ▪ If Ct is not satisfied that the propaganda and expenditure of a society is beneficial to the community, the societies acts are not charitable
      ▪ May be enough for the court to find that the proposed charitable activities do not offend public policy provided the purpose conforms to at least one of the categories
    o Re Pinion (see below) - Invalid - failed the public benefit test as the artwork has been described as atrociously bad; no education benefit from foisting upon the public a mass of useless junk

Re Scarisbrick - 1951 - ENG (Public Benefit in Family Context)

Facts: T bequeathed money for those in family that, in the opinion of her son and daughters, were in needy circumstances
Issue: Does this serve the public widely enough?
Ratio: Court: Could be held that by the word “relations” (note I replaced this word with family in the facts) included relations in any
degree so in this sense the number of potential people was large and so supportive of a charitable trust
• PAVS - likely that if it had said next of kin, it would have been too small for charity = invalid
• Thus, if it is a gift to family, courts will look at the breadth of family captured to determine if it is a private or charitable purpose trust

Everywomen’s Health Centre Society v MNR - 1992 - FCA
Facts: Objects of the Society included medical services of special concern to women
• Argues that the charitable purpose was invalid as political because the society also proposed establishing an abortion clinic
Issue: Is purpose invalidated where it is politicized?
Ratio: Task is to decide whether the purpose of the charity is beneficial to the public, which does not require clear proof that there is public policy supporting it nor that the public supports it

What is a charity? Commissioners of Income Tax v Pensthal
Charitable Purpose Trusts that Exist for the Relief of Poverty
• Poverty is relative - does not mean charity needs to cater only to the destitute - must be directed towards poor/aged/sick
• Re Coulthurt’s Will Trusts - referencing people who go short
• Sometimes poverty is circumscribed by public benefit- needs to be a charity for poverty that benefits a wide group of people

Planned Parenthood of Toronto v Toronto - 1979 - OHC
Facts: Societies purposes were giving of information and advice to members of the public and researching and disseminating information on population control
Issue: Whether or not dissemination of information to public about population control is for relief of poverty - argument was made that most of the people who utilized the service are poor
Ratio: Met the public benefit test, and although charity assisted the poor, it did not qualify under this particular heading
• Noted the fact that there is no means test in terms of clients who came in (i.e. rich people could use services)

Charitable trusts created for advancement of education
• Education is widely defined - not confined to academic subjects
• However, cannot infer that any kind of knowledge will qualify
• Council of Law Reporting for England and Wales - non-profit production of law reports = charitable purpose for education
• Influenced by the fact that lawyering is a learned profession and law reports provide basic material for legal research, study, and education

Vancouver Society of Immigrant and Visible Minority Women v Canada - 1999 - SCC
• Iacobucci: So long as information and training is provided in a structured manner and for a genuinely educational purpose, not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education

Re Pinion
Facts: T had bequeathed collection of art into a charitable with the intention of enabling education around artistic pieces
Issue: Did this satisfy the requirement for “advancement of education”
Ratio: Gift was not for public benefit - expert evidence from art experts unanimously opined that the collection was of very low artistic quality - no educational benefit of foisting upon the public items of no or questionable value
• T’s object was not to educate anyone, was to further the repute of his family, and in this case the collection of art is worthless
• PAVS - case demonstrates importance of meeting the public purpose criteria
• Essential to know at least something of the quality of the proposed exhibits in order to judge whether they will be conducive to the education of the public (in the context of museums, but why not other things as well?)

Charitable trusts created for advancement of religion
• Until the 20th century there was a strong Christian bias
• Ex. Thorntons (Historic) - CT approved of a charity that was established for the purposes of printing/propagating writings of
some woman who believed she would give birth to next Messiah
  - CT noted that while the writings were incoherent/confused, and that she was a ridiculous woman, her works were designed to extend the influence of Christianity = charity
  - Foolishness is not a bar to religion
- Became more important throughout the 20th century - to promote multiculturalism other criteria were looked at to move charity outside of judo Christian
- **Funnel** - T bequeathed estate to further spiritual work carried on by a small group that she was part of who regularly engaged in spiritual healing in the T’s home
  - Here: religion legit - shows that reference to organized religion is not even necessary
- Advancement of religion contains organizations/trusts to erect/maintain holy places, organizations/trusts promoting religious observances, etc.
- Public component of public benefit test is more clear - charity must apply to a relatively large group of persons
  - Gilmour - there must be come limit to the kind of institution that will constitute a public benefit - here the nuns were contemplative which really did not apply any public benefit at all
- However, in certain cases, what constitutes as advancing religion has been quite technical
  - This is the case regarding associations that carry out public benefit in a similar manner to religious organizations
- OVERALL - it seems now that the Canadian court is going with the more open approach to religion espoused in Church of New Faith, moving away from Re South Place

### Church of the New Faith v Commissioner of Pay-Roll Tax - 1983 - AUS

**CT:** Recognized scientology as a religion
- 2 criteria around which activities counting as religious purpose for charitable trust determinations can relate:
  1. Relief in a supernatural being or principle
  2. Acceptance of canons of conduct correlated to that belief

### Re South Place Ethical Society - 1980 - CHD

**Facts:** Objects of society were the study and dissemination of ethical principles and the cultivation of rational religious sentiments
**Issue:** Whether SPES was a charitable body
**Ratio:** One of the requirements of a charity isn’t that there should be some element of public benefit in the sense that it must not be a members club devoted to the self-improvement of its own members (not the problem here – but interesting comment)
  - Problem here was that society did not engage in “worship” in the sense of adoration of some numinous entity
  - Mere appreciation (worship for humanist religions) is not good enough
**PAVS** - decision followed United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council in which court rejected Free Masonry as a religion. Didn’t find that free mason code of being “reverent, honest, compassionate, loyal, temperate, benevolent, and chaste” as advancing of religion**

### Trusts for other purposes beneficial to the community
- Wider category that allows the court over time to bring new ideas into the recognized charities
  - Tied into public morality - PAVS seems to think that these are usually accepted under public good because it does good for the public in that area
  - Many relate to public purposes in a local area
  - Where there is a dispute, usually at the behest of revenue authorities
- **Vancouver Society of Immigrant and Visible Minority Women** - court has always had the jurisdiction to decide what is charitable; nonetheless the law of charities had proceeded by way of analogy to the purposes enumerated in the preamble of the **Statute of Elizabeth**
- Some of the categories:
  1. Charities with purposes that promote the welfare of sick and disabled persons
  2. Charities with objects that advance and secure human life
  3. Protection of the old and infirm through nursing homes
  4. Concerns for the environment (Re Cotton Trust for Rural Beautification)
  5. Trusts to assist sport with scientific knowledge showing clear linkages between exercise and good, physical and mental, health
  6. Protection of animals (Re Moss)
  7. Improvement of public spaces
  8. Monitoring of corporate governance
9. Charitable gifts to vicinities or areas
   • **Lecavalier** - T left residue of his estate to Sussex, NB for such purposes as may be advisable and appropriate - deceased had a long involvement with community in that locale
     o CT: if an area is identified and no other descriptive words are used to outline trust purposes, court will assume charitable purposes within that area were intended

**Miscellaneous**

**Mixed Charitable and Non-Charitable Purpose (Re Dalziel + s. 47 of Law & Equity Act)**
   • Where the main purpose of a gift is charitable some minor or incidental non-charitable element will not invalidate it
     o Because it has beneficiary, which is general public, and the guardian of the general public is a sufficient guardian

**s. 47 - Law and Equity Act**
   • Where a person gives, devises or bequeaths property in trust for a charitable purpose that is linked conjunctively or disjunctively in the instrument by which the trust is created with a non-charitable purpose, and to the gift, devise, or bequest would be void for uncertainty or remoteness, the gift, devise or bequest is not thereby invalid but operates solely for the benefit of the charitable purpose
   • Severance may also resolve the problem of mixed charitable and non-charitable purpose trusts, though this may not be possible according to the intent of the donor or the structure of the gift

**Re Dalziel - 1943 - CHD**

**Facts:** T made disposition to Hospital of 20K to be added to the existing discretionary fund and used to upkeep a mausoleum in a cemetery

**Issue:** Is this charitable or non-charitable purpose? Or both? What should be done?

**Ratio:** Upkeep of tomb costing over 20K necessarily involved more than a trifling amount
   • Here amount was large relative to the residue, and if not spent on the specified purpose there was a gift over of the fund to two other charities
   • This indicates a legal requirement to use the money in this way
   • Thus, whole gift failed, but it would have been upheld without the gift over, and the actual amount to upkeep the tomb in relation to the gift

**PAVS seems to suggest that this case illustrates how arcane the distinctions must become to give effect to private purpose trusts - invalidity of which is based on a marginal premise**
   • i.e. failed because the gift over indicated that the private purpose was more important than the charitable purpose - amount was not sufficient to sustain both charitable and private purpose

**Perpetuities**
   • Rule against perpetuities does not act against beneficiary aspect of a charity, will apply to gift to the trustee
     o Idea behind this is that charities are expected to endure for a long time, so holding it subject to the rule of perpetuities seems silly
   • Disposition in one charity, that vests in another charity on the happening of a certain condition or event is not invalid for remoteness of vesting if that condition or event occurs outside the perpetuity period
   • At CL in the absence of initial vesting within perpetuity, the entire gift is void
     o For this reason, courts favour early vesting, and construe ambiguities this way - endeavour to construe an absolute immediate gift to charity with a mode of execution dependent on future events which might happen outside the perpetuity period
   • Charitable purpose trusts are also not usually subject to the rule against inalienability
     o Thus, charities can preserve the trust as capital indefinitely with income used for purpose

**Certainty of Objects and Cy-Pres**
   • Where the identification of a public purpose beneficiary is unclear, the court may be called upon and is empowered to provide clarity so that the trust will not fail for uncertainty
     o Property or gift may be applied cy-pres to some other charitable purpose as close as possible to the one seemingly described
   • Another situation can be where it becomes impossible or impracticable to carry out the purpose of the trust - ex. trust does not earn enough income to do what it is supposed to do
In these situations instrument may have a provision that empowers trustees to select another appropriate charity which they may apply the income.

- If no such power has been conferred on the trustees, the court may direct that the trust property be used to secure some other charitable purpose.

*Re Fitzpatrick* - cy-pres order should combine the virtues of proximity, usefulness and practicability with mind to the testators intention.

- Note: (1) Trustees do not inherently possess power of cy-pres - court does (2) Cy-Pres is an attribute of charitable trusts only and does not extend to private trusts - thus, variation legislation sets the circumstances wherein courts are empowered to intervene.

**Re Taylor - 1888**

**Rule:** If upon the whole scope and intent of the will you discern the paramount objective of the testator was to benefit a particular form of charity independently of any special institution or mode, then although he may have indicated the mode in which he desire that to be carried out, you are to regard the primary paramount intention chiefly.

**Canada Trust Co. v. Ontario HRC - 1990 - OCA**

**Facts:** Concerned educational scholarships that could not be awarded to persons who are not white Christians

**Issue:** CY-Pres?

**Ratio:** Can apply cy-pres if the settlor had a charitable intention; court should never depart from the testator’s true intention discerned from reading the instrument as a whole.

- If ct decides on the basis of the evidence that the settlor would not have established the trust if it could not be executed in the way specified in the instrument, then there is no general charitable intention, and the trust fails at that point.

- Here - intention of the donor was fundamentally to promote leadership through education, means of expression could be attributed to shifting cultural values over time.

- Factors influencing decision:
  1. Guy was a philanthropist who believed education was key to a strong and prosperous country;
  2. There was a clause that allowed the trust income to be severed for other purposes conducive to the promotion or encouragement of education.

**Re Tacon - 1958 - CHD**

**Discusses use of Cy-Pres:**

1. In the case of a gift to a specific charity, where no general charitable intention is present:
   a) If the charity has ceased to exist before the will is executed = gift lapses
   b) If the charity is still in existence at the execution of the will = gift to charity
2. Gift for charitable purpose where there is no general charitable intention
   a) Will fail if purpose is too vague or uncertain that the court cannot execute it at the testator’s death

**Re Boyd - 1969 - OHC**

**Facts:** T leaves will providing a scholarship to this college

- Over the years college changes names, changes to a high school, supervision of high school is changed to another board.

**Issue:** Cy-Pres?

**Ratio:** T intended to further the work of education - fact that this purpose was now being carried in a different building and at a different school in the area was irrelevant.

**Royal Trust Corporation of Canada v Hospital for Sick Children - 1997 - BCSC**

**Facts:** T provided specific legacies for many hospitals

- Also gives residuary to “crippled children’s hospital in Vancouver”
- Problem: no crippled children’s hospital; lots of hospitals for disabled children.

**Issue:** Cy-pres?

**Ratio:** Clear general charitable intention, so required the funds to be applied to related charities in the area.
REMEDIES FOR BREACH OF TRUST

• Every duty/obligation on T confers a right to B
  o Important ones: loyalty of administration, prudent and business-like management, and distribution income/capital according to Bs interest under TI

IN PERSONAM REMEDIES:

Specific Performance and Injunctive Relief
• Specific performance – force to perform duties; injunction – force to not do something
• Look at this more in depth in a course on Eq remedies

Compensation for Loss
• Liability for loss is based on full compensation, so called “equitable compensation”
  o B must be put in position would be in if breach had not occurred
  o In general terms, B must be compensated fully – restitutionary or restorative principle
• Liability for damages limited by general CL principle of remoteness (need not be foreseeable at time of breach) in tort or mitigation in contract
• Caution is very generously and easily found (Canson)

Eq takes care to compensate to the maximum – the Eq concern is to give full restitution rather than compensate for loss
Assess value of loss at date of restoration not at date of breach

Guerin v The Queen

Facts: Musqueam had to surrender land to federal gov in order to have it leased
• Fed gov unilaterally entered into a lease below market value that the Band had rejected
• Evidence that the golf course would never have entered into a lease to the terms the Band wanted
• Fiduciary duty imposed on gov under constructive trust

Decision: Court rejected a fair rate of return analysis that would have compensated for difference b/w real lease and lease Band wanted
• Instead calculated damages based on the value of the land if it had been retained and developed over the period (under Eq Band did not have to prove that it would actually have developed, under contract it would have)

P’s loss should be calculated with full benefit of hindsight; foreseeability is not a concern but it essential that losses compensated are only those that ON COMMON SENSE VIEW of causation were caused by breach
• P not required to mitigate – but losses stemming from unreasonable behavior of P will not be compensated

Canson Enterprises v Boughton & Co (1991) [SCC]

Facts: Solicitor handled real-estate case; failed to disclose to client C that a 3rd party was making a secret profit
• 3rd Party SM was also a client of S
• The property later completely subsided (fell into the earth) and was valueless through the fault of engineers (not the solicitor)

Decision: S found to be a faithless fiduciary (breach of fiduciary duty) but not liable for subsidence because was not in any common sense way attributable to breach of fiduciary duty
• Purpose of Eq damages is to restore person to position before the breach; this also includes damages that occur after the breach but are not caused by the fiduciary (as long as connected to breach in some way)

Set Off
• S 15.4 allows for set off to function in BC – compare losses of individual assets to gains of other assets in the trust portfolio
• 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.
**Accounting for Profit**

- Accounting for profits and compensation are mutually exclusive; a P can only receive one
- Remedy is available for breach of fiduciary duty and breach of trust (also for unauthorized use of confidential information)
- Accounting of profits can occur over a time period that can sometimes be very long
  - Courts will often make an approximation – essential purpose of remedy however is for fiduciary to disgorge all profits attributable to breach
- Basis of remedy is preventing unjust enrichment
  - Especially useful where T has misappropriated funds or information and invested in profitable asset or business

May be inappropriate to account for profits indefinitely especially where increase in profits generated by skill/efforts/property/resources of fiduciary and were introduced by fiduciary in such way that it can't be reasonable said that increases in profit the product of P's property
- Onus on D to show that an award of entire profits from business would be inequitable given the circs

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**Facts:** D was general manager of WI
- WI was distributor of Italian gearboxes in Aus; the relationship between supplier and WI was rocky and not likely to last
- D floated own company w/ employees from WI and took the suppliers contract from WI

**Decision:** Breach of fiduciary duty here; accounting for profits makes sense; although allowance made for D’s skill, expertise, efforts, capital etc.
- Here the accounting was limited to two years b/c the court felt that the evidence showed the relationship b/w WI and supplier would not have lasted much longer than that if even that long

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**Proportionate Share**

Where trust assets mixed with T’s personal assets, the B’s may be entitled to a proportionate share of the increase in value in the purchased item

**Scott v Scott (1963) (AusHC)**

**Facts:** Life tenant sold house he was bequeathed (w/ remainder to his children) for £1014 and used that to purchase new house for £1700
- He then left the house to his second wife
- Children brought action for accounting claiming the original sum plus proportion of value of new house based on purchase price (£1014/£1700)

**Decision:** Children were successful based on principal that equity prevents T from making any profit directly or indirectly form trust assets

**Note:** follows that T cannot make profits from a reinvestment, where profit made from combination trust money and T’s personal funds the B is entitled to profits of at least proportion to trust contribution

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**Defences**

- Consent: where free and informed consent of all B’s and T’s then the T is exonerated
- S96 – See *Buschau* and *Fales*