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**Always mention if you need extra facts!**

**Nomenclature**

* **Devise** – that’s a clue that the acquisition of title by the trustee is through a will
* **Demise** – that’s an indication that the transfer is inter vivos
* **Convey/transfer** – inter vivos
* **Transmission** – key word indicating that it was transferred via will
* **Executor/trustee** in testamentary circumstances
* **Disposition** – technical word for transfer to the beneficiary
* **Cestui que trust** – the beneficiary

**“Bare Trust”** = if there is a requirement to always hold an asset and it is a single asset (p.93)

**Trust =** Must; **Power =** May

**Trust to appoint** = T must appoint (subject to stricter scrutiny); **a power to appoint** = T may appoint (p.94)

**Requirements of creating a trust:**

1. Settlor transferring the property must have legal capacity (**Mooney Estate**)
2. The transfer must be regarded as being “perfected” or complete – depends on formalities prescribed for conveying the asset AND the form of dealing that the settlor launches – look @ ch.3
3. The requisite formalities for disposing of the equitable interest in the beneficiary must be satisfied
4. Motive for the trust must be legal (**Parihar**)
5. Three certainty requirements for an express trust (**St. Michael Trust Corp**)

# Intro

## Why do we have trusts?

* Social – family arrangements (*inter vivos* and testamentary): e.g. life estate to widow, remainder to children; protective trusts, guardianship, secret trusts
* Commercial – contractual arrangements incentivized by tax avoidance or deferral (“tax efficiency”); collective investment strategies
* Pensions in employment and labour arrangements – trust versus employer contractual arrangements: UBC compared with Nortel
* Charitable Purpose and non-charitable purposes
* Environmental – Pipelines and National Energy Board
* Statutory – e.g. trades and construction

## Equitable Maxims

Maxims based on good conscience and provide the foundational grid for equity law:

* **Equity follows the law.**
* **Those who seek equity must do equity, or the “clean hands” doctrine.**
* **Equity assists the vigilant and not the tardy** — Laches are not rewarded.
* **Equity is equality** — There must be proportionality among contributors.
* **Equity looks to the intent rather than the form** — Substance trumps form.
* **Equity looks on that which ought to be done as being done.**
* **Equity does not assist a volunteer.**
* **Equity acts *in personam* (between the 2 people)** – when there is an action against the trustee by the B, the T must manage the trust as a prudent biz person.
* **The *in rem* aspects of the equitable interest in a trust** – Trustee has a proprietary right against the world
* **The fiduciary position of the trustee and what that means in general terms.**
* **Equity will not permit a wrong without a remedy.**

# Express trusts

The forms of passing title under an express trust settlement: inter vivos and per mortis causa.

## “Vesting”

**Is this a trust or an out-and-out gift?**

In order for a gratuitous transfer to the beneficiary of the equitable estate to be effective, the legal estate needs to be vested in the trustee. So first, have to establish that the trust assets are **fully vested in the trustee.** For each and every one of the assets that make up the trust fund, the legal title has to be in the name of the trustee – this is called vesting. To determine whether vesting has taken place or not consider the following:

NOTE: in the case of testamentary disposition, transmission (and therefore vesting) occurs upon the death of the settlor/testator.

**Settlor’s form of transacting a conveyance of title in property to a T to perfect an express trust**

The first variable is the “form of dealing” that has been used to produce the express trust. There are 3 ways to create an express trust:

**A) Automatic constitution or personal declaration of trust**

* Donor/settlor declares himself the trustee of the property and continues to hold legal title, while the B holds equitable title. Since the settlor is already the owner of the trust property, no physical transfer is necessary (title is already vested in the settlor). Vesting will occur almost immediately – trustee already holds legal title!
  + Problematic if the settlor creates the trust, but does not actually have legal title to the assets.
* **Watt** is an illustration of a personal declaration: I declare that boat is now owned jointly by myself and Miss. W (p.65) – OK for one person to be both T & B
* An express trust can be constituted by a simple declaration of oneself as T – mere oral declaration acceptable (**Elliot**).
  + ***Issue:*** *whether certain assets fell into the estate of the mom? If mom’s 🡪 YES; if mom was T 🡪 NO, b/c already given equitable interest to dependent child*
* If you make a declaration of trust, then there is a trust, even if the beneficiaries are not aware of the trust (**Glynn**)
  + the court recognized that the children took beneficial interest in the shares when the declaration was made by dad, **even though they didn’t know and happened decades later.** *Directors approved the transfer of shares in the minutes & share register. Although dividends not paid to sons, sum used by dad to support them.*

**B) Declaration of gift & Appointment of a third party trustee**

* The settlor appoints a 3rd party as trustee to hold the property for the beneficiary and transfers the property to that trustee.
* The gift of the beneficial title in the property is only effective if the legal title of the asset is “vested” in the 3rd party trustee, even if administered like a trust. **Milroy** illustrates the importance of vesting the subject (shares in this case) to the trustee – even if administered like a trust, it is not perfected until legal title vests in T (**Milroy** – trust case).
  + *Settlor failed to register T as the owner of the shares 🡪 not an effective trust*
* A promise does not complete the gift – formalities of transfer must be completed in order for the gift to be perfected (**Ratner** – gift case)
  + *Mom promised to give shares back, but did not register transfer of shares, so failed to complete the transfer by vesting legal title in son. Not an effective trust!*
* Whether the transfer to a trustee has effectively taken place is answered by reference to the applicable CL rules of conveyance (“equity follows the law”). Different rules apply for effective conveyance or delivery depending on the **nature or type of property** to be transferred – **ASK: has the appropriate form of delivery taken place?**
  + Realty requires registration of title in LTO
  + Shares in a company need entry in share register (downfall in **Milroy** & **Ratner**)
  + Chattels need actual or symbolic delivery (physically hand over computer or book, vehicle registration etc.)
  + Assignments of certain types of choses need to be in writing (units in a mutual trust)
* NOTE: in some cases, strict compliance w/ formalities unnecessary
* Although equity will not perfect an imperfect gift at law, where the **donor has done everything he is able to do**, legally, in the ordinary course of business **and thereby lost control over the property**, equity deems conveyance as substantially satisfied and so it will treat this almost perfect transfer as complete constitution. If the transfer is delayed by the routine operation of process, the gift is effective and considered substantively perfected when transferor provides the instruction (**Re Rose** – gift case – transferred shares to wife & son). **In the case of land**, execution of a Form A transfer combined w/ the handing of this transfer to the trustee is sufficient to vest title in the trustee even without formal registration of title in the LTO (**Mordo** – gift case).
  + If the transferor intends to transfer the property, the transfer will be complete **when the transferor has relinquished control of the property and put the transferee in a position to complete the transfer** (**Mordo**).
  + *Carson* – an ineffective disposition – to take effect upon grantor’s death 🡪 no intention to be immediately and unconditionally bound (p.69).

**C) Contractual arrangement**

* If the express trust is created through a term in a K between the settlor and beneficiary promising transfer of property at a future date, then the **trust is constituted when the beneficiary can enforce the K** (i.e. when the K is binding).
* If the settlor/donor is bound under an enforceable contractual promise to deliver the property, then, under the rules of equity, title is taken to have vested. This is b/c equity gives pre-eminence to the enforceable intention of the parties and considers it enough to accomplish the transfer – “equity regards as done that which was intended to be done”

**D) Adventitious Transfer**

**X can argue that he is legally entitled to the property on an application of the rule in S v B.**

A person becomes trustee through later “accidental” acquisition of legal title through an extraneous (to the settlement) conveyance/transmission (ex. in a will).

**The rule in Strong v Bird is to this effect:** if an **inter vivos gift** is imperfect solely due to the fact that the **transfer** to the intended donee is **incomplete** (non-vested), the incomplete gift will be perfected (vested) if and when the **donee** subsequently acquires title to the property in his capacity, say, as executor of the donor/settlor’s estate. In other words, if the gift is imperfect because it is a promise w/o execution by way of conveyance, then there is no transfer to the transferee. However, if the transferee (trustee) later gets title, this is enough to trigger the trust making it effective and enforceable. **Hilliard** is a Canadian illustration of the rule.

* probate document has the legal effect of vesting the deceased’s property in the executor/donee
* **Strong v Bird:** *Son’s stepmother moved into his house, and the stepson arranged to borrow money from the stepmother. Agreed to waive rent in lieu of repayment of the loan, but eventually she promised to absolve him of the debt (though not formally executed). The stepmother died, and questions arose about whether the son owed the debt. Son was made executor of the stepmom’s estate // Court decided that on her death the intended gift of the balance became perfected when the defendant became executor of the estate 🡪Debt was absolved; the gift was perfected*
* **Hilliard:** *couple gave their kids, Jennifer & John, title to subdivided parcels respectively. 3rd kid – Harry – lived in the original homestead with Julia working the land & improving the buildings owned by his mom. In recognition of Harry’s contributions to the property, Julia sought to give Harry his own subdivision of land and applied to the City for rezoning and severance of part of her acreage. It was eventually approved but not before Julia’s death. Harry was appointed executor of her estate. Jennifer sought to have the whole of the family property, included the intended parcel earmarked for Harry, distributed according to the will in spite of her mother’s intentions. Harry successfully argued that he was legally entitled to the lands on an application of the rule in Strong v Bird.*

NOTE: the intention to make a gift must not have been withdrawn by promisor.

**LIMITATION: Rule in S v B does not apply to a promise (w/out consideration) to give property at a later date!!!**

General rule – donee can have no benefit from an imperfect gift //exception set out in Strong v Bird – on death of donor gift becomes perfect & donee has priority claim to property over beneficiaries of will. **Four conditions must be met:**

1. donor intends to make immediate gift to donee, but gift is imperfect b/c relevant formalities are not followed

2. immediate gift must be intended (RE FREELAND: F said she would give P her car, but the car was currently at garage being fixed. Car never delivered to P & F died. Exception not apply: gift was not immediate).

3. intention must continue unchanged until donor's death (RE GONIN: M allegedly attempted to give house & garden to daughter. M failed to sign deed & subsequently sold part of garden. Changed intention: by selling garden M still considered herself the owner)

4. donor dies & donee appointed as personal representative, legal title to property now vested in donee & gift is perfect.

## Certainty Requirements

@ this stage, the transfer has taken place! **Determine whether the certainty requirements for having a valid trust are satisfied?**

**The 3 areas of certainty that need to be present in order for there to be an express trust are as follows:**

### 1) Certainty of intention to create a trust – the words of trust

Settlor’s words & conduct must evidence a clear intention to establish a trust. There is a need for some clear signal that the property given to the transferee must be used for a B & not personally.

* Megarry J in **Re Kayford Ltd.** – The question is whether in substance a sufficient intention to create a trust has been manifested? (p.78)

The issue is whether the words “X” impose a trust on Y w/ respect to the property she has received from Z? In other words, are these words a mere request in the context of an out-and-out gift? Or are they a “polite form of command,” thus establishing a trust?

**A) Wording:** **look @ the language used in the transfer of the asset** – whether the specific set of facts provided constitute a request by the transferor to the transferee to take care of X OR a direction? IF it is a request, then it can be ignored and there is no trust on the transferee. BUT IF the language used is more than just the hope that X be looked after, then that set of explanations can be construed as a directive on the transferee. And, the transferee is a trustee and therefor has fiduciary obligations towards the beneficiary.

**Indicative of a trust:**

* If the word “trust” is used, then it would be really hard to say that it is not a trust. UNLESS there is no directive force on the trustee and every action undermines the utilization of the word trust.
  + A document w/ the heading “Trust Settlement” or “Deed of Trust” or “Trust Agreement”
  + Less formal documents like letters, the words “in trust”
* Imperative language when giving directions to the transferee/trustee – “must”

**Things to consider:**

* **There is no need for the actual word “trust”** – Megarry J in **Re Kayford Ltd.**
  + Equity looks at substance, not form
* **Precatory words:** word that seems to suggest a trust, but in actual fact are too precatory (def = expressing a wish) which puts it in the category of a request rather than a direction – ex. in full confidence, in hope, I wish, I request – however, a trust may be found by examining **how the awards are actually operating in the context of the whole document.** **Tough the words used may ordinarily connote permissive signification, in the circumstances of the document read as whole, they may actually reveal an intention to operate as imperatives** (p.79 & 80).
  + “in full confidence” not necessarily words that connote a trust per Rand J in **Hayman v Nicholl** (in keeping with Re Adams and Kensington and late 19th century trend not to import a trust by the words: “in full confidence”)
    - *Deceased had a curious provision in the will – $ to daughter “in full confidence [that] she will dispose [of] it in accordance with the wishes [she] ha[d] expressed to her”//* ***The use of the term “in full confidence” is precatory and something more is required*** *to indicate that daughter was actually a trustee. Also, we are not sure that daughter did not do what she was supposed to do, since we don’t know the instruction given to daughter. Thus, there was not enough to establish a trust in these circumstances.*
* Also, consider relationships (biz associate vs. family member – would you leave $ to biz associate if rly intended it to benefit son)! There is a presumption in favour of a gift, especially in family-type trusts– again equity looks @ substance, not form

**B) Conduct: is the conduct of all the parties concerned sufficiently indicative that a trust was created?**

* Particularly helpful when the words “trust” not used!
* We look @ conduct b/c one of the guiding principles of equity is that equity looks at substance not form.
* **Royal Bank v Eastern Trust Co** (following **Re Kayford**on precatory type wording*)* illustrates the need to show a trust like directive intention from the conduct. Look to all circumstances – including all words and/or lack of words to establish whether there is an imperative (as opposed to permissive or hortatory language) on the transferee to hold as manager of the assets for the benefit of a third-party beneficiary.
  + “An express trust may be created without the use of any technical expressions, but, of course, the intention to create a trust must be indicated with reasonable certainty or must be inferred with reasonable certainty from the context”
  + *C owed RBC $, so assigned rentals to RBC. Sold property to S, who was required to transfer property back if a significant portion of debts discharged. RBC arguing b/c S knew of the situation, $ received was on trust for RBC //* ***The way the transactions were framed did not show that RBC regarded itself as a beneficiary under a trust*** *(it was fairly directive, unlike beneficiaries who are fairly passive)**– Evidence showed that RBC had treated CC as debtors and had taken CC to court as debtors, and thus showed it was not a beneficiary and did not treat CC or S as trustee. Thus, couldn’t impose a trust on the transfers that took place.*

**C) Statute: does the statue impose a trust obligation?**

* **Consumers’ Association of Canada v Coca Cola:** *statute required sellers to take a deposit on bottles of coke sold. Consumer association of the view that this was trust money // not enough in the statute to require transferee to hold it for the benefit of depositors – statue did not help in this case.*

**D) IF NO TRUST is established:** where the intention of the transferor is uncertain as to the creation of a trust, no express trust arises. **Consequently, the transfer that has taken place is an out and out transfer of legal and equitable title to the transferee unencumbered by trustee obligations.**

### 2) Certainty of subject matter of the trust – the trust property

**A) Does the subject matter qualify as a trust asset?**

**Anything that qualifies as a legitimate legal thing in law qualifies as a thing that is transferable as a trust.**

* Land, bonds, stocks, $ in bank account, IP (ex. royalties), life insurance policy, vintage cars, works of art and other valuable chattels, reversionary interests

**There are no real limits on what can constitute a trust asset. Limits on trust assets are limits that you find in law generally.**

* One can’t assign his right to a salary b/c of laws and attitude against slavery.
* Account entries: per **Professional Institute of the Public Service of Canada v Canada**, an entry in a set of accounts, at least in the consolidated revenue account, does not constitute a trust asset. UNLESS there is a purely contractual obligation to fulfill a trust towards the beneficiaries.
  + *The beneficiaries of a pension plan w/ fed pension plan for civil servants argued that there was a fiduciary obligation to deal with the assets identified in the consolidated accounts as trust assets //* ***An entry in the consolidated revenue accounts of fed gov is not regarded as property.***

**B) Clarity of description: to constitute a trust, a two-pronged test of certainty is in effect.**

**(1) Identification of trust assets: First, a description that clearly identifies the trust property, or “subjects” and is exact enough to point a finger at the trust property.**

* The trust “things” can be set out in the trust instrument as particular items of property, OR the instrument can set out a method for their particular ascertainment as long as the articulation of that method is reasonably precise.
  + In **Re Golay**, the executors had been directed “to let Bossy … enjoy one of my flats during her lifetime and receive a reasonable income from my other properties.” // **The Court held that the formula was not uncertain, as long as the settlor/testator has given sufficient indication of intent to “provide an effective determinant of what he intends so that the court, in applying that determinant, can give effect to the testator’s intention.” The court held that “reasonable income” was intended by the testator to mean what is objectively a reasonable income, “reasonable” meaning what a court might sensibly infer.**
* A “residue” has always been held to be sufficient to be an identification of the subject matter of the trust. BUT in **Re Beardmore Trusts**, the court held “net estate” is not ascertainable (Pav: this is strange).

**(2) The beneficiaries’ respective shares:** **Secondly, the law requires a measure of certainty concerning the amount of the beneficial interest to which the beneficiary will have rights in the clearly identified item of property.**

* **IF there are several beneficiaries,** what is the share given to each beneficiary? Sometimes, it is fairly clear that the shares are equal – ex. in the case of children
  + **Problematic words:** the words [some] or [bulk] are not sufficiently clear
    - Ex. I appoint Thomas as trustee and transfer all property to him. And say:
      * I want you to use some for Anna – this won’t qualify as a trust b/c we don’t know which ones to use for Anna – 2 beneficiaries: Anna and I (what is not Anna’s, trustee holds for me on an “implied trust”)
      * I want you to use them so a reasonable income is generated for Anna – this is OK – the court says that it can determine what constitutes a reasonable income (expert evidence); the balance goes to me on a “resulting trust.”
      * Trustee can’t use assets, unless named as B as well

**Both aspects must be described “with sufficient exactness” to meet the criterion of “certainty” of subject.** The requirement of exactitude has a measure of leeway (as in *Re Golay*) – but keep in mind *Re Beardmore* exception!

**Policy:** onerous responsibilities placed on a trustee by law with respect to the proper administration of the trust assets for the beneficiary, so it is crucial for the trustee to know what property is under his control and the extent to which the special obligations under the terms of the trust instrument apply in respect of this beneficiary.

**C) Is this a “floating Trusts”?** = emerges when the trust assets become clear at a later stage – Despite older court rulings, many assert that today the “floating trust” should be viewed as constituting a valid trust.

PAV: both floating trust and equity are OK today!

**(1) Is the floating trust used to circumvent Wills Legislation?**

As illustrated in **Re Beardmore Trusts**, if actions are sufficiently characterizable as an attempt to avoid the formalities of the Wills Act, then the legal Act that you purport to have made is actually illegal and therefore a none act.

* There was a divorce & the arrangements were that the net assets were to be constituted in the trust on the death of the transferor // **This was not a proper trust b/c it was held to be an avoidance of Wills Act formality provisions.**

**(2) Are the trust assets clear at the time the trust was created?**

**Re Beardmore Trusts**, implies that if property is uncertain in the trust b/c it is not identified with sufficient clarity at the date of the trust, the trust will fail.

* Whether property was described with certain degree of certitude by using the word “net estate” // **Court held “net state” is not ascertainable** // Pav thinks this strange

**Sprange v. Barnard**: testatrix left 300 pond annuity to her husband “for his sole use and at his death the remaining part of what is left that he does not want for his own wants and use to be divided between” certain named beneficiaries // There was not sufficient certainty and consequently he took it absolutely – out-and-out gift, not a trust.

* Pav: didn’t know what the trust assets were – but it’s like a residue

**(3) “Floating Trust” vs. “Floating Equity”**

In **Burke v. Hudson’s Bay**,Rosthein J. in dealing with employee/beneficiary entitlement to surplus monies, a constantly fluctuating sum in a pension trust fund, explained the interest of the beneficiary as a “floating equity” which may or may not crystallize – can be trust assets.

**D) If there is a lack of CERTAINTY:**

* Where there is lack of certainty over which assets are trust assets and title is with the transferor, no-one can compel transfer to the transferee/trustee.
* Where some assets have been transferred but the trust fails for certainty, assets held by the transferee are held on a **“resulting trust”** for the transferor (as equitable owner – see Resulting Trusts) – p.85

### 3) Certainty of objects – the beneficiaries

**A) ID style of naming objects – commonly used language styles to appoint beneficiaries:**

* Expressly stating the name of the specific individual – “Bloggs” or, better, “Basil Bloggs” or better still “Basil Bertrand Bloggs”
* Identifying the beneficiary by description – “oldest person residing on Greenacre”
* Identifying the beneficiary as a member of a specified group or class – precise = “my children”, “residents of Greenacre”, “to any of my old friends”, or vague = “my good friends”; the problem is that as a category they are inherently conceptually vague; how you interpret what is a friend is debatable 🡪 conceptually uncertain

**The appropriate test required by law for ascertaining whether the objects have been identified in the instrument of trust w/ sufficient certainty depends on the form of appointment of Bs set out in the trust instrument. So first, determine …**

**B) What is the form of disposition of equitable interest used by settlor/testator in appointing the Bs?** Need to review and assess the words used in the trust instrument to determine which of the three forms of appointment the settlor/testator has chosen (a trust document may contain more than one, p.89).

X is setting out who the Bs are by means of a ….

**(1) Fixed Trust (non-discretionary trust)**: A type of trust in which the settlor/testator sets (fixes) the beneficiaries by name, description, or member(s) of a group, as well as the income or benefits they are to receive from the trustee’s management of the trust assets – Trustee must distribute to the named, individually or by class. Look for use of imperative words, such as “must”! NOTE: trustee has administrative discretion

**(2) Discretionary Trust (Trust Power)**: Trustee must make an appointment from the list of beneficiaries, but has discretion as to whom that object(s) will be. Usually, there will be some indication of how that discretion is to be exercised – ex. among my children, the one who is struggling. He must survey the range of objects in a responsible manner having regard to the purpose of the trust, and must do so in a way that will enable him to carry out the fiduciary duty and make appointments as instructed by the trust instrument.

NOTE: Trustee has administrative and dispositive power

* “on trust w/ power to appoint” – fairly clear that it is a trust power
* T will first administer the estate, then distributed the income generated to either one or both of the Bs whom she will select from w/in the described class (“my children), according to her **evaluation of how well they have satisfied** **testator’s criteria.**

**(3) Power (Power Simpliciter):** Trust gives the trustee (and/or donee of the power) the discretion whether to distribute from the trust assets and to whom among the class – may appoint one or more objects, BUT can choose not to appoint anyone. Trustee only has to consider whether to make a distribution (and if yes, to who) without being motivated by arbitrariness or bad faith. The power of appointment may be given to another person (“donee of the power of appointment” and not the trustee! (ex. a widow who is not a trustee, but will have power to select who amongst her children is to get income from trust property).

Bs can call on Ts to exercise their consideration, but cannot compel them to exercise it (*Re Manistry’s Settlement*), nor can they claim a breach of trust if they refuse to confer benefits. Court may intervene if Ts act irrational, perverse or irrelevant to any sensible expectation of the settlor – ex. make their decision based on B’s height or complexion (p.98). NOTE: potential Bs have no property interest in the trust until selected.

* Must properly consider – so can’t give a blanket statement: “I will never make an appointment”

Clues that it is a power:

* Existence of a “gift-over” – a requirement that the trust assets be transferred to a named person if no appointment w/in a time period has been made – in a trust document suggests that the settlor’s intention was to create a power. It implies that the settlor contemplated that an appointment may never be made (p.97).
* Use of permissive words, such as “may”

Can fall into one of the 3 categories below:

1. **General power:** donee or trustee may appoint anyone as beneficiary, including himself or herself
2. **Special powers:** done/trustee may appoint only persons in the class of objects (*Re Gulbenkian’s Settlements*)
3. **Intermediate/hybrid power:** trustee/donee can appoint anyone except a person in the proscribed class (*Re Manisty’s Settlement; Re Hay’s Settlement*)

**C) Identify & apply the TEST required for semantic (i.e. conceptual) certainty?**

Conceptual uncertainty occurs when the words used by the settlor (i.e. the criteria for identifying or selecting Bs) are inexact, making it unclear who is the intended recipients of the equitable estate in the trust property.

* ex. to “all the good-looking persons in Pav’s trust class” – the court would have great difficulty assessing if a potential beneficiary was w/in the class of objects or not b/c of the extreme lack of clarity of the class description.

**(1) Fixed Trust**: **List certainty test:** the requisite level of conceptual certainty will be met if the language used in the instrument to describe the objects is clear enough to enable the trustee to draw up a “complete list” of eligible beneficiaries with certainty (affirmed in **Broadway Cottages Trust**).

* “my children” – sufficiently certain; “Sid” – if have many friends named sid, then who is the intended B?
* “all my friends” – uncertain; “all my cousins” – vague; is it 1st cousins only? Or 2nd cousins as well?

**(2) Discretionary Trust (Trust Power)**: Initially, list certainty test was the appropriate level of certainty required (**Re Gulbenkian’s Settlements** affirming **Gestetner**). However, **in Baden (1**) list certainty test was abandoned and “is/is not” (**individual ascertainability test**) was adopted. Per **T. Eaton**, latter is the test in Canada.

* Is it sufficiently clear to let T exercise discretion? Admin unworkable if there is a small sum of money

**(3) Power (Power Simpliciter)**

**Individual ascertainability test:** the test is applied by examining the wording in the settlement to determine whether it is clear enough for the trustee (or court) to operate: is a trustee able to determine, with certainty, whether any given individual “is or is not” a potential beneficiary under the settlor’s description of the class of beneficiaries? If one can perform this task, then description of objects in the settlement qualifies as certain (**Re Gulbenkian’s Settlements** affirming **Gestetner**).

* “Friends” is inherently an ambiguous word but if clear “X” is a friend, then GTG – guy on the bus probs not a friend. Becomes more difficult to determine w/ respect to “colleagues”

**D) Is the trust Evidentially uncertain?**

Occurs where the definition of the group or class of potential Bs is clear, but there is insufficient factual info to apply the settlor’s definition to those who may fall w/in the defined group (ex. residents of Greater Vancouver). The evidence needed to ascertain who w/ certainty qualifies as eligible is too great and gives rise to administrative unworkability. Where evidential uncertainty results in administrative unworkability (admin unworkability is relative to how much $ is in the trust), you don’t have a trust.

* **Baden (1):** Beneficiaries of pension were employees and extended to dependents and relatives (anybody who can trace their lineage to a common ancestor) – discretionary power. Given the fact that trustee has to distribute, then how do you deal w/ that? // **where the range of objects in the stated class is so “hopelessly wide” that the trust is administratively unworkable, then the identification of the objects may fail for evidential uncertainty, but not conceptual uncertainty** (i.e. cannot be properly supervised by a court b/c of evidential uncertainty).
  + EX: Trust to benefit the residents of Greater London
    - This is not conceptually uncertain, but is rather evidentially uncertain. The evidence needed to ascertain who with certainty qualifies as eligible is too great and gives rise to administrative unworkability.
* In **Baden (2)**, 3 different approaches to the issue emerged (the court focused on the word “relative” – while it tells us who is in the class, there is not enough exactitude to tell us who is not; said “dependent” is easy to figure out – look @ relationship):
  + **Rigid test: Stamp J:** in law it means next of kin, which has a legal definition – ascertain whether individual before you falls w/in the bucket of next of kin – fixing a definite meaning, which makes it certain 🡪 need both conceptual and evidential certainty (can’t have not sures)
  + The 2 other judges took a diff approach: have person show – there will be lots of “not sure”
    - **Relaxed test: Sachs J:** treat all the Nos and Not sures as Nos together; you have to prove if relative, and even if you are a relative and can’t show, then too bad – this gets us to a level of certainty 🡪 Only conceptual uncertainty is required
    - **Middle ground: Megaw J:** if the word “relative” inherently means that there will be too many not sures, then uncertain 🡪 a high level of evidential uncertainty could void the trust – some evidential uncertainty is tolerable
  + Pav: Having too many not sures is problematic
* Unlikely that a power will fail due to administrative unworkability (**Manisty**; **Re** **Hay’s Settlement Trusts**). Here, the trustee just has to consider once in while whether to make a distribution or not.
  + Might be able to get away w/ “give to anyone in the world”

**If the trust is invalid for uncertainty, the trustee holds legal title, but on a presumed resulting trust to the settlor, unless a gift-over has been specified, in which case, that gifted-over person gets title legally and (likely) beneficially.**

## Purpose Trusts

Trusts which have been constituted to meet the desire of the settlor/testator to apply trust assets/funds to advance a special purpose. There is a transfer of legal title to a trustee, but no disposition of equitable title to an object (or beneficiary). It’s an express trust – so make sure the following criteria are met:

* is it intended to be a trust?
* is there identified subject matter? And identified w/ clarity?
* if there is multiple / proportion – has that been done with certainty?
* The certainty of objects – not of objects as persons but objects as **causes**
  + Causes are divided into **private non-charitable purpose trust** (there is limited scope for these trusts to be given effect) and **charitable purpose trust** (a purpose recognized by the law) to determine which are enforceable by the court.

Uniform Trustee Act, if adopted as law, would allow a person to create non-charitable purpose trust provided its terms are “sufficiently certain to allow the trust to be carried out” (p.115-116)

### 1) Private purpose trusts (non-charitable)

**I: whether the disposition invalid as a private purpose trust?**

Most reasons for prohibition of private purpose trusts are centered around the **beneficiary principle,** which is that you actually need a beneficiary who can enforce the trust (**Astor**). The problem with purpose trust is that you don’t have anybody doing the enforcing. In the case of a charitable purpose trust b/c it is for the benefit of the public, some public official (most of the time the AG) can enforce a purpose trust. Another reason, usually you find these in wills and the question is: why should the estate use estate resources to enforce something that is highly idiosyncratic (ex. teaching frog not to squeak). It is far better to use a viable method to achieve your purpose (ex. give $ to someone who shares the same values) – far better than leaving to a trustee whose actions can’t be policed. Good criticism in theory, but not in practice b/c trustees are generally of good will and will give effect to these. Issue arises when T can’t give effect – if settlor around they’d be concerned (so probs no true that there would be no one around to enforce trust). **The exceptions are as follows:**

**A)** Horses, Dogs, Graves and Monuments

* Trusts that have been established to care for horses (**Pettingall**), dogs, graves and monuments.
* Attempts to expand this common law category have been rejected (**Endacott**; **Re Shaw’s Will** -*$ devoted to establishing a 40 letter alphabet was held to be a private purpose & invalid as a trust, but not as a power – so T empowered to pursue if he wished to do so*)
* Duration is limited by perpetuity laws of the jurisdiction in question – often 21 years.

**B) Denley Rule – Indirect Beneficiary Approach**

**Is it associated intimately w/ the people involved?**

The court in **Re Denley’s Trust Deed** recognized that where the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, this is not excluded by the beneficiary principle.

* *Land had been invested in trustees to be used as a sports ground (serving a recreational purpose) for the employees of a company (an identified class of objects) and such other persons as the trustees might permit to use the facility 🡪 valid b/c he had identified the people who were going to use it (the beneficiary principle in play).*

In Canada, the Denley-type purpose trust has been recognized and followed in **Keewatin Tribal Council v Thompson City**.

* *Tribe seeking exemption from property tax, set up beneficiaries (who were every member of the band) – a purpose trust: avoidance of tax – held: a trust for the benefit of the band*

Purpose explaining why you are giving to a particular group is good, but purpose w/out beneficiary no good.

**C) Unincorporated Associations or Clubs**

**IMPORTANT:** In making a construction of gift there can’t be things that tend to show that you are giving to someone other than the members. Construction has to be supportive of $ coming to member, otherwise setting up a trust of an object – which violates private purpose

Achievement of purposes through a gift to a club or unincorporated associations whose pursuits and objectives just happen to align with those of the donor/testator. A group of people who get together because they have similar interests around a certain cause or project. The members are bound by a set of contractual rules agreed to either expressly or by implication, usually around the administration of money.

* Club might have a constitution (this is a K) – different from constitution of a corporation

Care should be taken in making the donation to the club, so that it doesn’t appear to be gifted to each and every member (i.e. avoid creation of a joint tenancy)

* Because the question will arise: Is this a donation to the members as joint tenants?If they get proprietary interest, then when they leave the club, they can take their share.

At the same time, have to ensure that the donation is not seen as private purpose and therefore invalid. One possible option is to give money to the treasurer to be part of operating funds (issue: it will eventually run out).

Beware of the **contract** because the donation is always subject to the contractual rights of the members.

* may try to prevent the utilization of the money just frivolously utilized by current member by giving to both present and future members (an additional complication of how to deal w/ the perpetuity problem).
* maybe within the contract, there’s something that makes it clear that it has to be used in a way that actually meets your client’s requirements not only for advancing the purpose but ensuring that the money is used properly to advance that particular purpose.

Consider:

* What is the project?
* Who are you giving it to?
* What does the client want?

**Methods**

* **(1) Give to a group** (usually a small group of friends/family), **and everyone gets a proprietary interest**
  + testator may leave funds to an official in an unincorporated association w/ the intention that it be shared in common between its current members – ex. **Cocks v Manners**: *testatrix bequeathed a portion of estate to the supervisor for the time being of X club* – donation valid as a gift to the individuals in the convent as **joint tenants**.
  + Maybe happy w/ group getting a proprietary interest – may his friends
* **(2) Giving it to general purpose operating funds; issue: is that it is used over time – not really a trust**
  + Trust takes the form of **a gift to an official** in the association and is paid in trust as an accretion to the funds of the club – members **DO NOT** own an equitable interest as **joint tenants** – $ regulated according to the rules of the club
  + Going to one member to use for other Bs who are members of club
* **(3) Give it to each of the individuals (so the beneficiary principle met) as a group** – have to identify the purposes: purpose must be clearly supportive of what it is that is being done by this particular private group. If purpose is supportive of generally what is happening, the trust funding that supporting purpose is OK (**Lipinski**) – but if it is outside of that it may fail b/c may be seen as a purpose trust – i.e. too big of a purpose (**Leahy**).
* if supportive of generally what is happening, the trust funding that supporting purpose is OK, but if outside of that it may fail b/c may be seen as a purpose trust
  + Ex. going to members of X society as a group having regard to the constitutional rules that bind them. BUT look @ the contractual provisions to ensure that members are not allowed to take the money away.
  + What happens when the corporation has money, but no longer has members?
  + **Leahy:** purpose identified was given to **contemplative** nuns – private purpose gift was too general – not constrained
    - doesn’t fulfil the public benefit requirement of a religious charitable gift (no benefit to the public if the nun contemplating vs. nuns that provide hospital care)
    - Present and future: shows that the private purpose was to benefit the nuns “as a continuing society and for the furtherance of its work”.
  + Whereas, in **Lipinski** the purpose identified was to supply new buildings (not a charitable purpose), but it was an important adjunct to what they were doing which was much bigger. It was put into the trust and trust was for this purpose, the beneficiaries were the people of this club, and the purpose was ok because it was supportive of what they generally do.
* **(4)** **utilizing the Dalziel stratagem:** charity’s nonperformance of private purpose results in determination of the accompanying charitable endowment through a gift-over provision. To be valid must be couched in determinable language and the amount involved in the non-charitable purpose trust must be relatively small
  + ex. give 1M to run a hospital upon & subject to the condition that maintain memorial for dead dog
    - If condition, not ok!
    - If determinable language /limitation, that’s okay; use when, until

**Gift to an association that does not exist in the form described by the donor/testator** will fail as a private purpose trust and will be held on a resulting trust for the estate, as illustrated in **Re Recher’s Will Trusts** (*where the society named in the will merged w/ other similar societies; even though the donation was to amplify the general fund serving the particular purpose of anti-vivisection it was actually a gift to those specific members of a specified and named society 🡪 failing to meet beneficiary principle & not a charitable purpose, so couldn’t apply Cy Pres –underscores the need for beneficiary principle* )*.* Also, will fail if testator only specifies some of the purposes for which the society is organized – contractual rights among the group (**Re Russell Estate, Wood**).

**D) Private Purpose Trusts as Powers**

The purpose may fail if it is non-charitable but generally, what courts do, if they have been legislatively empowered (have been in BC is), they will be treated as powers. The purpose is an empowerment given to the trustee, who can do it only if he wants.

A purpose can be upheld as valid as a power but as a power, you can’t enforce it. What you can enforce is that the trustee/donee of the power must consider from time to time how and when to distribute. You only have control over whether they consider.

Perpetuities Act deals with the beneficiary principle in PPTs by treating such trusts as powers. BC has gone further and proposed a solution whereby the settlor can appoint a 3rd party delegate or “enforcer” in an instrument w/ the authority to enforce PPTs. These delegates would be subject to the supervision of the court, much like a trustee is subject to court direction on trust administration.

**Section 24 of the Perpetuity Act:**

**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.

**Re Shaw’s Will** – Shaw’s testamentary trust for a 40-letter alphabet was held invalid as a private purpose trust. However, it was upheld in the Court of Appeal and, as a compromise, characterized as a power to spend money for that purpose (page 118).

### 2) Charitable purpose trusts

moving subject – p.144

A form of express trusts. Hence, rules around vesting of assets in the trustee, certainty of intention and subject apply. However, rules insisting on clarity of objects in express trusts do not necessarily apply in charitable trusts. **The terms of the purpose trust must be clear** (**Chichester Diocesan**)

* *Direction to apply the residue of estate “for such charitable institution or institutions or other charitable or benevolent object or objects in England” as they should select was held to be too vague and void 🡪 too broad*

**Advantages:** income of the charitable organization is exempt from the payment of income tax; can give receipts acknowledging gifts to the charity from donors who can use them to obtain tax credits against their individual tax assessment.

Charity might be constituted in a number of ways:

* A trust in which the trust assets are held by trustee for the charitable purpose
* A corp w/ limited liability and w/ a memorandum and articles of Association that preclude the distribution of dividends as profits
* A non-profit incorporated society in which the objects of the charity are identified

Charities may functionally be set up in 2 ways:

* 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
* Funds may be put in the hands of a named charity constituted primarily to generate funds that are then deployed by the trustees to fund specific purpose charities or “foundations”.
  + Organized into public and private foundations

**What is a Charitable Purpose?**

In **Commissioners of Income Tax v Pemsel**, Lord MacNaghten stated (organizes the rambling list of Statute of Elizabeth): “Charity” in its legal sense comprises 4 principal divisions: **1)** Trusts for the relief of poverty; **2)** trusts for the advancement of education; **3)** trusts for the advancement of religion; and **4)** trusts for other purposes beneficial to the community, not falling under any of the proceeding heads.

**Public Benefit Requirement**

Ex. can’t just tie to children, even if advancement of education!!!

To succeed as a charitable trust enforceable by public officials, the purpose **MUST** conform with one of the four groups **AND** **satisfy the “public benefit” requirement.**

* **Native Communications Society**: purpose must be beneficial to the community by coming within the “spirit and intendment” of Statute of Elizabeth.
* **Oppenheim**: Charitable purpose **must address appreciable section of society who are not linked** (ex. relatives, ER)+Charitable purpose trust cannot be a private benefit masquerading as a public benefit + Charitable purpose **must exude a public benefit**
* Determining what is a public purpose is a matter for the court to decide (**National Anti-vivisection Society**). As illustrated in **Everywomen’s Health Centre**, simply having polls does not necessarily mean that it a public purpose.
* Purposes that are illegal or against public policy are eliminated
* Trusts that are set-up to promote political objectives are not valid charitable trusts (p.135).

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| **Oppenheim** | charitable trust failed b/c its purpose was for the education of Company employees numbering over 110,000, all of whom were linked to a common employer – this was not a public benefit! It was a benefit, but not public enough. When public it is a relatively large community. |
| **Gilmore v Coots** | gift on trust to a community of 20 cloistered, contemplative Carmelite nuns was held **not to be a public benefit.** |
| **Neville Estates v Madden** | the members of Catford Synagogue were regarded as **an appreciable section of the public**. Distinguished it from the nuns in Gilmore –the members of the Synagogue spend their lives in the world, whereas the other members in Gilmore live secluded from the world. Don’t know # |
| **Re Scarsbrick** | Testatrix bequeathed cash for **“such of my relations”** as in the opinion of her son and daughters “shall be in needy circumstances.” H: the term “relations” included relations in any degree and so in this very broad sense the numbers of potential persons was large and so supportive of a charitable trust. NOTE: “next of kin” would have been very small and likely invalid – relations regarded as sufficiently public |
| **Jones v T Eaton** | Trust fund for “any needy or deserving Toronto members of the Eaton Quarter Century Club” – valid charitable purpose 🡪 PAV: size important but it is a moving target – this is very advocacy comes in! |
| **Everywomen’s Health Centre** | Object of society concerned medical services of special concern to women. Also, proposed establishing an abortion clinic. The court’s task is to decide whether the purpose of the charity is beneficial to the public and is a matter that does not require clear proof that there is public policy supporting it, nor that the public as reflected, perhaps, in opinion polls, supports it. |
| **In re Pinion** | **example of private masquerading as public** – A chriatbale trust set up to establish a museum memorializing the testator’s art and accoutrements was held to be invalid. The charitable trust failed the public benefit test as the artwork had been described as “atrociously bad” and the court found that there was no educational benefit from “foisting upon the public a mass of useless junk” – just a private purpose probably designed to get some tax benefit – private purpose masquerading as public |

#### Relief of Poverty

* Poverty does not mean destitution (Evershed M.R. in *Re Coulthurst’s Wills Trusts*). **Jones** case illustrates this – the trust was concerned w/ “needy” persons (actually EEs and former EEs) in the Eaton’s Quarter Century Club.
* Provision of luxuries doesn’t discredit the trust. It’s fine to provide poor people with luxuries.
* Hard to say public benefit doesn’t exist! Public benefit is assumed, unless contrary shown. What you have to prove is that it’s not for the public benefit (burden lies on AG to show it doesn’t have a public benefit).
  + Pretty broad and difficult to say the public benefit does not exist – but can be successful as illustrated in *Planned Parenthood*
* **Planned Parenthood v Toronto**
  + the giving of information and advice to members of the public and researching and disseminating information on population control – this purpose did not qualify as relief from poverty (more time based, probs today will fit under the 4th category). Its work was not oriented or **directed** to relief of the poor. Relief of poverty is not w/out boundries.

#### Advancement of Education

A wide category – includes research, scholarships, bursaries, etc.

Similar to relief of poverty, generally easy to show PB – but **Pinion** does not: limits: PB looks @ utility and quality to some extent, even though relatively easy to get through, not always 100%.

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| **Vancouver Society of Immigrant and Visible Minority Women** | The courtendorsed an expansive view of the category of education advancement – legal conception of charity and w/in it the educated man’s ideas about education are not static, but moving and changing. Both change w/ changes in ideas about social values (Pav’s example in class: Today, courts would say porn is educational).   * This case also accepted the fact that the education might be at an introductory level where you’re teaching people who couldn’t speak English. * If the charity is devoted to a segment, that’s fine. * It doesn’t even have to be academic education; it could be technical knowledge or basic skills. * Informal methods of education are now okay. |
| **Incorporated Council of Law Reporting** | The non-profit production of law reports is a charitable purpose. |
| **Pinion** | Where the museum is concerned, and **utility** of the gift is brought into question, the quality of the artworks need to be judged to see whether it will be conducive to the public benefit. For example, library that is devoted to porn or corrupting nature – it will not be allowed. Here, education in fine arts is the object. However, the testator wasn’t trying to educate anyone, but to perpetuate his own name & his family’s repute. The court however thinks that the artwork is worthless.   * Illustrates that there are limits to the category * PAV: "Cultural values will influence “what serves as a public benefit” – a court might say that pornography is so infused in our lives that maybe there shouldbe a library of pornography. |
| **Re Compton** | The beneficiaries under the charity could not be confined to a group, but it is permissible to stipulate preference to an identified subset group (“relations”) within a **broad group** – as long as it is clear that the dominant purpose of the endowment is a charitable one and there to benefit the public at large. |
| **Royal Trust** | Trust will be invalid if it is against public policy – ex. scholarship discriminated based on race/gender/sexual orientation led to an avoidance of the charitable trust. |

#### Advancement of Religion

Very dependent on cultural values. In Canada, given its commitment to multicultural, a broad-based approach of what qualifies as religion is more in keeping w/ the values of Canadian society.

Recognized purposes (p.141)

* organizations within a denomination
* trusts to erect or maintain the fabric of existing churches (including cemeteries attached to them), chapels or synagogues
* extends to promoting religious observances such as choral singing, bell ringing, preaching sermons, prizes for Sunday school, faith healing and saying of masses
* promotion of religion or the financial support of clergy

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| **Bourne v Keane** | court held that celebrating a mass is no longer regarded in law as a superstitious practice 🡪 mass okay! |
| **Thornton v Howe** | Charitable purpose trust established for printing, publishing, and propagation of sacred writings of Joanna Southcote held to be valid |
| **Funnell v Stewart** | to “further the spiritual work now carried on by us together” – a reference to her small circle of associates who met regularly to engage in religious healing in her home by the laying on of hands and the saying of prayers 🡪 **reference to organized religion now unnecessary** |
| **The Church of the New Faith** | scientology qualifies as a religion – court gave 2 criteria   * belief in a supernatural being or principle * acceptance of canons of conduct correlated to that belief |
| **Re South Place Ethical Society** | Study and dissemination of ethical principles and cultivation of rational religious principles” – not a public benefit because of absence of worship, and **essence of religion is that there should be worship**. |
| **United Grand Lodge** | The urging of free masons “to regulate their conduct to be reverent, honest, compassionate, loyal, temperate, benevolent and chaste” did not add up to the advancement of religion. |
| **Gilmour v Coats** | **Public Component** –Charity must apply to a relatively large group of persons. Nuns stayed in & prayed – Court held that the public benefit is too remote here and therefore, is not a charitable trust. |

It is contradictory for atheism to be a religion – Pav: under relief of poverty, Trump set up a 1B$ trust to support the interests of billionaires, so that they may live in a estate that is not impoverished by them not being billionaires.

#### Other Purposes Beneficial to the Community

Charitable purposes that have been accepted under this head have generally reflected societal attitudes as collectively understood as Canadian mores in the mid to late 20th and early 21st centuries, forged in the crucible of our liberal, democratic, welfare state, and multiculturalism.

* \*Promoting the public wheel from a cultural perspective: liberalism & multiculturalism – these are important values used to ID characteristics
* Look @ single stances

**This is a very open-ended category, which includes:**

* Vancouver Society of Immigrant and Visible Minority Women: employment facilitation
* Re Cotton Trust for Rural Beautification:concerns for the environment
* Importance of social welfare 🡪 acceptance of hospitals, hospices, nursing homes, protection of animals (In Re Moss), sport (can be dealt w/ in education too, but also mental & physical health), disaster relief, providing public spaces, local fire brigade.
* public works (Bridges, ports, havens, causeways) – Charitable gifts to vicinities or areas such as country, province, municipality and locality (Cox v Hogan*,* Lecavalier v Sussex)

**Limits:**

* can’t set up a charity to advance the cause of a political party (**National Anti-Vivisection Society**).
* Where description of purpose is too broad, it will be an invalid charity (**Chichester Diocesan Fund**; followed in **Brewer v McCauley** *where a charitable gift to “charitable, religious, education offer loan flop back purposes was held to be void*) – b/c delegating what you need to do in your will to someone else – problem: hard to ascertain testator’s intention – where so broad there is no lack of clarity – just giving something that is really broad

### Mixed Charitable and Non Charitable

**WHERE THE MAIN PURPOSE OF A GIFT IS CHARITABLE, SOME MINOR OR INCIDENTAL NON-CHARITABLE ELEMENT WILL NOT INVALIDATE IT** (**Law and Equity Act, Section 47**)

* **Section 47:** 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 the gift, device 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.
* **Note:** @ CL it would be invalid, but some provinces have statutory relief; Remember if non-charitable purpose is in determinable term, then GTG

**AG v Mathieson [1907] –** When money is given for somewhat indefinite purposes – disaster appeals that are an immediate response to some cataclysmic event can be charitable gifts in the hands of the holder of the funds (often the mayor or some other official).

### Cy-Pres

**Cy-pres is an attribute of charitable trusts only – does not apply to private trusts.**

When dealing with a charitable purpose trust, the trust won’t fail for a lack of certainty because there is an inherent power within the court to actually describe the purpose. This is called cy-pres.

* Trust clear, but subsequent events made it **“impossible or impractical”** to enforce the trust (circumstances arise which produce a lack of clarity) – Leonard Scholarships an example of this, or
* the trust might even start off unclear.

When you are dealing with a fundamental purpose and you **can determine the intentions of the testator**, then the court using its inherent powers under cy-pres will redefine what the charitable object is.

**Canada Trust Company v Ontario Human Rights Commission***– education scholarships “the Leonard Scholarships” could not be awarded to those persons who are not Christians of the White Race, all who are not of the British Nationality or of British Parentage* // Pav: Given the change in society, this became impractical and impossible to put in place b/c butting strong cultural values we have // *court looked @* ***testator’s basic fundamental intentions*** *and held that it was to provide scholarships to advance education – his mode of doing it has become wrong.* We can strike the mode as contradicting PP b/c our basic multicultural value is reflected in a whole lot of legislation starting w/ the constitution and all the provincial human rights legislation. Consequently, they rewrote the trust utilizing the inherent powers of cy-pres.

**Does cy-pres extend to failure of administrative matters in a settlement? Can a trustee approach a court to amend the administrative powers of a charitable trust?**

Per **Sidney and North Saanich v AG (2016)**, doctrine of cy-pres can be applied where administrative changes that are fairly fundamental and seem to create a failure of purpose can result in the re-application of the trust to these other purposes. However, **you’ve got to all the time consider what is the intention of the testator.**

* *Trust established to advance “community, cultural, athletic and recreational purposes” of a particular parcel of land in Sannich. Over the years, parts of the land were expropriated but the functions promoted by this particular trust were kept on in other areas of the city – just was not attached to this land. So, there was an administrative failure of the purpose. //* ***Issue:*** *can this charity stall be served by having the money go to some activities disconnected from the land? Or should the charity be collapsed? //* ***Holding:*** *Intention of the testator was not only created in respect to the land that was expropriated, but it was there for the fundamental purpose of advancing a public wheel – the charity could still be served by fixing it and allowing it to serve the purposes in the new constituted places*

**Re Tacon–** In the case of a gift to a charity where no general charitable intention is present, then (1) if the charity has ceased to exist before the will comes into operation the gift lapses; (2) if the charity is still in existence at the date mentioned, it is effective as a gift to the extent that the interests of the next-of-kin are forever excluded, not-withstanding the later dissolution or disappearance of the charity // In the case of a gift, not to a named charity, but for some charitable purpose where there is no general charitable intention, the gift will wholly fail if the purpose is either so vague or uncertain or so impracticable that the court cannot execute it. The test of vagueness or uncertainty or impracticability is to be applied at the date of the testator’s death; if impracticable, the gift fails altogether and the next of kin take

**Royal Trust Corp.of Canada v Hospital for Sick Children–** illustration of the cy-pres principles:

*Deceased executed his will on December 29, 1933 and died on January 31, 1942. Will provided for specific legacies to the Canadian Institute for the Blind, the Muskoga Hospital for Consumptives, the Tranquille Hospital for Consumptives, the Sunday School of St. Andrews Church and St. George’s Church. Gifts were also left to named relatives. Also left remainder interests for the Crippled Children’s Hospital – but there was no such hospital. However, there are hospitals for disabled children. Court found a clear general charitable intention and so specifically required the funds be applied to related charities in the area*

## Formalities

Formalities: formal requirements for validity/enforceability of transfer of certain types of equitable interest. Formalities protect both the transferor and the transferee when property (often very valuable) is being exchanged gratuitously. So while equity follows the law wrt formality requirements, it also looks to intent rather than form. Rigid adherence to rules of formality in a trust environment can lead to an unjust result, given the vulnerable position of the B.

### 1) Inter Vivos Transfers

* **Disposition of legal interest in land** [s.59(3) LEA] and shares **must be in writing** – but not money
* In BC, there is **no writing requirement for disposition of equitable interest in land** [s.59(1) LEA]
* transfer of equitable estate from a B to a 3rd party must be in writing (s.36 LEA)
* *Statute of Frauds:* s.1 requires transfer to be in writing; s.2 disposition of equitable interest must be evidenced by writing except for BC & Manitoba – T’s CAN p.32

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

### 2) Testamentary Disposition

Compliance w/ formalities of wills legislation is important to avoid intestacy. But there are two exceptions from full compliance w/ wills legislation: secret trusts & half-secret trusts. In BC, these 2 devices may diminish in significance given the remedial powers extended to courts by **WESA** to emphasize testator intent in giving effect to will (as well as changed societal mores). **WESA** empowers courts to look closely at the testator’s actual resolve from a variety of evidentiary sources and not just ex facie the will. Look @ s.59 below

**Formalities of a will**

**37(1) WESA:** **To be valid, a will must be** **(a)** in writing, **(b)** signed at its end by the will-maker, or the signature at the end must be acknowledged by the will-maker as his or hers, in the presence of 2 or more witnesses present at the same time, and **(c)** signed by 2 or more of the witnesses in the presence of the will-maker.

**40 WESA:(1)** Signing witnesses to a will-maker's signature must be 19 years of age or older. **(2)** A person may witness a will even though he or she may receive a gift under it, but the gift may be void under section 43 *[gifts to witnesses]*. **(3)** A will is not invalid only because a witness was, at the time the will was signed by the will-maker, or afterwards became, legally incapable of proving the will, unless the witness was not 19 years of age or older at the time the will was signed by the will-maker.

**A) Fully Secret Trusts**

Usually happens when there is pressure to conform to social pressures. Secrecy can continue, while at the same time maintaining financial support.

**Requirements**

1. **the testator must intend that the B named in the will is to hold the legacy on trust for the real B.** **In Ottaway v Norman**, Ottaway was unsuccessful in getting the residue b/c he did not sufficiently demonstrate that the testator intended for it to be part of the trust.

* *O Sr. leaves home & ½ his estate to H, who is to leave the home to O Jr. upon her death, but H leaves home & ½ of her estate to N’s and gives other ½ to O Jr. O Jr. sues - claims home left on trust. WINS wrt the house & its contents, but not residue.*

1. **The testator must, during his lifetime, communicate to B that he intends B to receive his property on his death as trustee in trust for the real beneficiary. And,**
2. **The named B must acceptance or acquiescence in this proposal.**

* If the named B, has not given the promise to act as trustee, then that B will take for his own benefit.
* If named B has given the promise to act as trustee before the testator dies but learns of the real B’s identity after the testator’s death, the named B will hold the property on a resulting trust for the testator’s estate (**Re Boyes**).
  + *Boyes (B) appoints his solicitor as executor & gives him an absolute gift. Solicitor was told that he was acting as trustee for a person that B would ID later. He never did so, and after death they discovered undelivered letters to solicitor that indicated the ID of true beneficiary. Secret trust failed and solicitor held assets as trustee on a resulting trust for the next of kin of B.*

These requirements have been recently endorsed by the Alberta Court of Appeal in **Peters**.

If the testator has not made a will, the secret trust operates on the reliance that the beneficiary-under-intestate-succession has assured the testator that he will use the inheritance for the benefit of the secret, unnamed B whom the testator had intended to be financially provided for.

**B) Half-Secret Trusts**

T leaves legacy to a legatee and discloses in the will his intention that it benefit another, unnamed B.

**Requirements**

* Before will is made the testator must
  + communicate to the B that he is to hold the property on trust for the real B; and
  + communicate to B the identity or real B
* The named beneficiary/trustee must indicate his acceptance before or at the time the will is made

**Blackwell** is an example of a valid half-secret trust.

* *B names 5 trustees in will. T’s are to hold capital & pay income “to such person(s) indicated by me to them”. Now, his wife & son are contesting, but they were unsuccessful since B’s were wishes communicated clearly prior to or contemporaneous to the will.*

After the will is made, any communication by the testator during his lifetime, however, though accepted by the trustee, is invalid and the trustee will hold the property on a resulting trust for the testator’s estate. NOTE – unlike full secret trusts, half secret trusts can’t be created in intestacy (b/c the intention must be expressed in a will).

**Rectification of a Will – Effect on Secret Trusts**

**WESA 59 (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).

**(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.

## Equitable future interests

**1) Is the equitable interest vested or contingent?** (177 to 180)

**(A) Vested future interest** -- presently-held (vested) future interest (not yet possessory) that is proprietary (can be sold)

* to vest B must be ascertained & the interest ready to take effect -- prevented only by the existence of prior interest
* (1) reversion: A gives LE to B -- when B dies, the property reverts back to A
* (2) remainder: A gives LE to B, remainder to C -- when B dies, the interest passes to C
* LE = life estate

**(B) Contingent future interest** -- future interest (not yet possessory) that is contingent (non-vested) on the occurrence of some future event ---> when contingency occurs or limitation is realized, the interest becomes a (presently) vested FI

An interest is contingent and non-vested if:

* The asset(s) is unidentified, or
* The identity of an actual grantee in existence cannot be established – ex. gift to an unborn
* The right to the interest depend on the occurrence of some event
* If a class gift (ex. to my grandchildren), each member of the class has not been ascertained

**2) What type of contingency?**

**(A) remainders** – interest in a thing subject to a **condition precedent** **(if)** [happening of condition vests]

* “To A for life, remainder to B if she turns 30” -- contingent (non-vested until 30) & future (no immediate possession)

**(B) right of entry** – interest in a thing subject to a **condition subsequent** **(on condition that / but if / subject to / provided that)** [happening of condition UN-vests]

* Transfer from Sam to Tewksbury in trust for BB in fee simple, “on condition that she does not marry Toad”
  + **BB** holds a vested equitable interest in the f/s defeasible upon a condition subsequent, while **Sam** (grantor) has a “reversionary” future interest, a right of entry, contingent on BB not marrying Toad *(vests upon happening of the condition subsequent)*.
* If Sam had added: “and if she does marry Toad, then to Basil, her brother”
  + **Basil** would have an equitable future interest in the form of a right of entry, but as a remainder

**(C) possibility of reverter** – determinable interest subject to divestment upon the happening of a limitation **(until / when / during / while / as long as / though)**

* I, Sid Snooks, transfer Blackacre to BB in f/s until she marries”
  + **BB** obtains a f/s determinable in Blackacre, while **Snooks** holds possibility of reverter in Blackacre *(he has a future interest vested in him immediately)*
* To B and his heirs so long as they do not drink alcohol
  + **Grantor** gets the possibility of reverter -- contingent (non-vested unless limitation met) FI (no possession); **B** has the determinable interest

**3) Legality of the qualifying conditions or limitations** – condition must be legal – ex. can’t say: to Nahal if she murders X

**(A) compliance w/ public policy:** Per **Canada Trust Co v Ontario**, conditions placed on future interests that are contrary to human rights values as expressed generally in the legislation are invalid. Motive of the settlor testator is significant. Thus, discriminations to promote equality are in order.

* *Leonard Scholarships – clause struck as void*

Restraints on marriage are against PP only if they are intended to promote celibacy or induce a divorce. If they are to enhance financial security in the event of single statute they are good: **MacDonald v Brown Estate**.

**(B) compliance w/ legal standards of certainty in the wording used to create the contingency**

1. **Condition precedent** – the test for certaintiny of a condition precedent was set out by Tarnopolsky JA in **Canada Trust Co v Ontario**, as follows: a condition precedent will not be void for uncertainty if it is possible to say w/ certainty that any proposed beneficiary is or is not a member of the class. The condition will not fail for uncertainty unless it is impossible for anyone to qualify.
2. **Condition subsequent** – the test for certainty is that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine (**Clavering v Elisson**).

**(C) the presence or absence of undue restraints on alienation**

* Will cover in ch.8

**(D) the consequences of a void condition –** the applicable rules are summarized in **On Wills**:

* **If land** devised upon a void condition
  + And the condition is precedent, the devise itself is void
  + And condition is subsequent, the devise is absolute
* **If personal estate** bequeathed on a void condition
  + And condition precedent
    - That is originally impossible or illegal malum prohibitum (wrong b/c prohibited), the bequest is absolute
    - Where the performance of condition is the sole motive of the bequest OR its impossible was unknown to the testator OR condition was possible in its creation but has since become impossible by the act of God OR where it is illegal as involving malum in se (wrong or evil in itself), both condition and gift are void
  + And condition subsequent, the bequest is absolute

## Revocation of the express trust by the settlor

Settlor falls out of the transaction once the trust is constituted unless

* s/he is a beneficiary OR
* In constituting the trust has retained the power to amend or revoke the trust (note power to amend doesn’t mean power to revoke & vice versa)

As illustrate in **Bill v Cureton**, this is true even if the trust is formed in favor of people who do not exist. But if she was the sole beneficiary, she would be able to call for an end to the trust under the principles of **Saunders v Vautier**.

**Commercial trusts:**

**Pensions** – An employer (the settlor) may not remove pension contribution held in trust unless a power of revocation be been expressly included in the trust at the time of its inception (**Nolan v. Kerry**).

* *ER couldn’t use the surplus of a defined benefit pension plan to fund its contribution obligations towards a defined contribution pension plan – the pension funds were two separate funds.*

The reserved power of a settlor can be far reaching as observed in Schmidt. But, courts require clarity and specificity on any provision in an instrument reserving to the settlor a right to revoke the trust. As illustrated in **Metro Toronto Pension Plan (Trustee) v City of Toronto**, an amending plan, even a very broadly worded one, does not imply a power to revoke.

* Metro Council established a contributory defined benefit plan in which the administration of the plan was vested in a 3-member board of trustees. Metro City, as the employer, had the power to amend the plan as long as this change did not recover any contributions made by it into the fund nor reduce accumulated benefits that had accrued to the members. Later, Metro Council passed a by-law enabling the City to recover monies it expended on administration connected with the operation of the fund. City was trying to exercise control over the trust fund that had been transferred irrevocably to the trusts – couldn’t do it!
* Amendment means change not cancelation, which the word revocation connotes

# Resulting Trusts

= implied trust

Two broad classes of resulting trusts: **automatic resulting trusts (ART)** and **presumed resulting trusts (PRT)** – created by Megarry V.C. in **Re Vandervell’s Trusts** & Brown-Wilkinson LJin **Westdeutsche Landesbank**. Both share a common basic structure: a grantor has transferred legal title in property, but the grantee holds the property as trustee for the grantor who is, therefore beneficially entitled to the conveyed thing. In both situations, the law will imply a resulting trust, absent rebuttals.

Juridical basis for the Resulting Trust

* Cultural assumptions = we don’t rly give out things for free
* Unjust enrichment
* W/out the RT there would be a gap in answering the Q: in whom does E/T now rest?

## (A) Automatic Resulting Trusts

= where there are surplus trust assets from an express trust that has failed or is only partially fulfilled.

4 Common situations resulting in automatic resulting trusts

1. Transfer of legal title to trustees in a trust that turns out to be void
2. Transfer of legal title in property to a trustee without disposing fully of the equitable interest in it
3. Transfer of property to another with a specific limitation which has not occurred (“*Quistclose* Trust”)
4. Surplus of funds after a trust-purpose has been achieved

### 1) Transfer under a Void Trust

An automatic resulting trust will exist when there has been a transfer of legal title to a trustee, but the express trust fails for non-compliance with one or more of the three certainties. The trustees will be said to hold the trust assets on a resulting trust for the grantor.

* Ex. **IRC v Broadway Cottages** – Trustees couldn’t draw up a complete list of beneficiaries, thus the trust was void. As a result, the trustees continued to hold legal tittle for the benefit of the settlor on the basis of an automatic resulting trust that replaced the invalid express trust.
* In **Re Ames Settlement**, a transfer of the settlor’s estate to trustees under a void marriage settlement was held to be a resulting trust.

### 2) Transfer of Trust Assets with Excess Equitable Interest

Valid trust + trustee has discharged all of his obligations to the beneficiaries (ex. looking out for the educational needs of a child) + there is some equity left; basically there are more trust assets than needed to meet the obligations

**A) Testamentary situation**

**Where there has been a transfer of legal title to a trustee w/out deposing fully of the equitable interest, the balance of the unintended equitable interest is held by the transferee on a resulting trust for the transferor.** Look at how the transfer takes place – if it does not say that trustee gets the balance, then they shouldn’t (**King v Denison**). If grantor is deceased, transferee will hold the remaining assets for the testator’s heirs/next of kin on a resulting trust (**Re West**; relied on the analytical framework developed in **King v Denison**).

* *Testatrix left property on a trust for sale, the proceeds of which would go toward paying off debts, funeral expenses, and legacies // surplus claimed by trustee beneficially – unsuccessful*

**Is there an intention to give to the trustee OR an intention not to give?**

Look @ the trust instrument (i.e. the will) to determine the **intention of the testator** – as illustrated in **Re West**, a clause mandating a sale (i.e. “a trust for sale”) of the property is inconsistent w/ an outright gift b/c it places limits on the uncontrolled powers of management that would otherwise generally accompany a non-trustee owner – same w/ indemnity and reimbursement clauses.

**B) Commercial transactions**

In commercial cases, it is important to **carefully construe the documents** in order to ascertain whether there is a trust w/ governing trust principles and, if there is such a trust, to determine whether there are terms stipulating the disposition of surplus trust moneys or whether an implied resulting trust will resolve the issue. This is illustrated in **Schmidt v Air Products**, where the court held that the disposition of the surplus was to be based on the specific provisions in each of the original pension plans.

* *Catalyst plan – defined contribution implied that employer was never intended to get the surplus*
* *Stearns plan – done under K – so court followed the contractual provisions, and did not use resulting trust*

**Defined contribution plan:** the employees get the money they (the employees and the employer) actually put into the pension plus any improvements that have come about as a result of the investment of that money. **Implies that employer was never intended to get a surplus.**

**Defined benefit plan:** the employee & employer put money into the pension but when the employee retires, they get a defined benefit, so if there is more money in the plan than necessary to meet the obligations for every employee, then you have a surplus, which will be held on a result trust for the contributor (i.e. employer).

### 3) The *“Quistclose* Trust”

Transfer of property subject to a specific purpose that has not been fulfilled. Special purposes (as opposed to permission for transferee to freely dispose) triggers a fiduciary relationship. **3 requirements:** (1) there is a transfer of property that is (2) subject to a specific purpose, condition or limitation, (3) which has not been fulfilled. When these requirements are met, a resulting trust is created in favour of the transferor with regards to the transferred property.

**Special Purpose Loans (not trust)**

This usually arises in the context of loans – when a borrower undertakes to use the loan money in a specific way and he segregates the money from the rest of his property.

When you make specific purpose loans, as Quistclose did to RR, a fiduciary trust arrangement is set up – which means that if the condition is not met, then those sums of money belong in rem to the lender (**Barclay’s Bank v Quistclose**) – with the exception of the *bona fide* purchaser for value. The major implication of this decision, from a commercial perspective, is that the *Quistclose* trust provides a creditor w/ an additional form of privilege protection (get preferred or secured interest in the money), beyond for example, obtaining real security in the form of a mortgage.

* *Borrowed $ subject to express condition that it will only use to “pay dividends to SHs” // in rem (Q got all $ back) relief in bankruptcy*

**Giles** is illustrative of the clear **need for special purpose** as a central concept for the Quistclose trust – a generalized purpose is not good enough (ex. use it for an investment – NO GOOD | $ to pay dividends – GOOD) – and that an important indicator of this specific purpose is a requirement to segregate the funds (though not determinative).

* *Investors put money into a real estate company, but did not explicitly say the money was for investing in real estate // there was no specific declared use of lands// Company went bankrupt // Is there a Quistclose Trust? // NOPE //* ***Just because the investors were motivated to contribute funds to the company, so that the corporate entity could purchase & develop land, did not mean that the advanced funds must only be used for that purpose – no mutual intention of specific use of the funds***

In **Re Westar Mining Ltd.**, BCCA accepted the Quistclose specific purpose loan trust analysis from **Barclay’s Bank** as part of Canadian Law and **extended it to other types of financial arrangements** (beyond loans) that could lead to a resulting trust providing in rem protections for the equitable ownership of the lender and his successors in title (e.g. joint venture using joint venture account).

* **Broadened scope of Quistclose trust** – Quistclose trusts can extend to non-lender types of financial arrangements
* This case also demonstrates the importance a court will attach to evidence of specific purpose for which funds were contributed, while demonstrating how the requirement that funds receive “separate treatment” helps to establish this importance.
* Purpose: operating expenses & capital costs (so not allowed for own general purposes) 🡪 $ was held in favor of suppliers & EEs
* *in rem relief in bankruptcy – joint venture funds segregated to ensure specific purpose // Money set aside to further a joint venture initiative by Westar & Poscan. It was quite specific in a sense that the money was to be used to develop a specific coal mine. Westar went bankrupt & the creditors tried to go after the money because Westar was 80% in the joint venture // $ did not fall within Westar’s general bankrupt estate and instead, it goes towards the creditors that are specific to this JV //* **Q trust casting an obligation on the trustee to use the money for the purpose set aside** on trust for suppliers & EEs

**Per Lord Millett in Twinsectra v. Yardley*,* the threshold Q “in every case is whether the parties intended the money to be at the free disposal of the recipient.”** Also, **in rem relief in form of tracing is available to the lender** (**Twinsectra v. Yardley**).

* *in rem relief in the form of a tracing – had to use $ to develop in a specific area – because it was a special purpose loan in which the condition of fulfilling the special purpose had not been fulfilled, and Twinsectra couldn’t get money from guarantor, Twinsectra could go into Yardley’s account and see what they had used the money for and assert title over those funds/goods.*

Policy: purpose has to be specific enough for it to justify putting the creditor (who made the loan) above all other creditors.

### 4) Surplus Funds in Trust After Trust Objectives Achieved

**Different from #2 b/c focusing on purpose trusts!!!**

Where the trust exhausts only some of the trust property, leaving a surplus of funds after the trust objective has been fulfilled, an automatic resulting trust for the transferor/settlor arises in respect of the surplus.

Examples of where these situations arise:

* disaster relief
* purpose pursued by members of a club – what happens when the trust purpose has been fulfilled
* unincorporated association – what happens when the club is dissolved, either by termination, resolution of the current membership or simply becoming moribund

**What do you do after objective fulfilled and there are surplus funds left?**

**Donation purposes** – some good purpose // ex. for disaster relief

* **If contributors are known,** then surplus will be held on an ART for them and they could get their pro-rata share (**Re British Red Cross Balkan Fund**).
  + *Few donors made large contributions – objective: help people injured in war –*
* **If most of the contributors cannot be identified** (ex. pple just drop coins into a box),the surplus will be paid to the court and then made available to claimants who could prove they made a donation (**Re Gillingham**) – criticism: this is lots of work, maybe better to say $ belongs to the state (Bona vacantia = if no one claims, then goes to the state)
  + *$ collected from a variety of sources (small, medium, large) for disaster relief*

**Unincorporated associations** – ex. disbanded or moribund clubs

If contractual provisions or club rules directly address the allocation of surplus assets when a club winds up or becomes moribund, then those terms, of course, would, quite simple, apply. If club dissolves and there is nothing stipulated in contract re leftover funds, court will look at the source from which the surplus funds originated (**Re West Sussex Constabulary Fund***: UK moved to national police force – I: who gets the surplus from the constabulary funds?*):

1. **Collection boxes:** donors intend to part with the money, and so surplus is bona vacantia (unclaimed goods) – surrender to the state.
2. **Legacies & major donations:** can apply the principle in *Re British Red Cross* – held on automatic resulting trust
3. **Contributions from street entertainments and sweepstakes:** payment for entertainment, rather than making gratuitous contribution. They are simply surplus funds belonging to none once the collecting association is moribund. Hence, funds belong to the Crown as *bona vacantia.*

**Unincorporated associations not engaged in charitable purposes:**

**How would the law characterize the gift?**

**Hanchett-Stamford v AG:** *Association gradually deteriorated to a moribund society w/ only one member, Mrs. H – company assets: 2.5 M pounds (came from subscriptions and donations) – Mrs. H wanted to give $ to a new analogous animal charity // Question: should this be surrendered to the Crown as bona vacantia or should this go to Mrs. H as a windfall? // H: Mrs. H won! Whether she gave $ to the other charity irrelevant!*

**Transferor’s intention unknown, so look @ how the gift was given?**

* If given as a joint tenancy, then property rules apply.
  + If one of the people drops from the association, they are entitled to their share.
* If given in trust to a quasi-body, then trust principles apply, but they might impede the gift
  + Problems: even if you are going to treat the individual single owners as a corporate group, b/c it is not to an individual person you have a beneficiary that is this amorphous group – this makes it a purpose trust and if the purpose is not charitable, then you are in trouble
  + Also, there could be a perpetuity problem.
* **Best method of analysis** is to look at the contract (if you can) – it can have provisions or you can imply provisions
  + *In this case, there was nothing in the gifts made to suggest that anything other than contractual principles should apply. Under the contractual principles, the members owned all the assets. And if only 1 member, she owns all the assets.*
  + Ordinarily, the K takes effect! **If nothing is said, we will treat it as a K.**

**In Re Bucks Constabulary:** can kill a club by virtue of an agreement, and can only do so if there are at least 2 members. Provided there is a resolution of 2 members, $ would be shared among members. If one dies, then there would be only 1 member and that is not a club anymore. Therefore, $ should be bona vacantia. Rejected by **Hanchett-Stamford v AG**!

## (B) Presumed Resulting Trusts

also known as the “purchase money resulting trust”

**= a rule of evidence that provides an answer to the question of who holds equitable title where there has been a gratuitous transfer of title to property. The rule creates a rebuttable presumption of resulting trust** (= transferor retains the equitable estate of the property transferred when legal title is conveyed) **and will not govern where actual evidence of a contrary intention has been adduced** (i.e. intention by a grantor to transfer the benefits (“fruendi”) of title as part of the use (“utendi”) of the property).

If the destination of the equitable interest is unclear, then prima facie there is a presumed resulting trust, and a trust is imposed on the transferee for the benefit of the transferor. The transferor is presumed to have retained equitable title, vesting only bare legal title in the transferee – early authority: **Dyer**; recently affirmed in **Kerr** and **Nishi**

The law gives effect to an assumed, generalized understanding of our society where gratuitous transfers of property usually signify some other self-interested, economic motive rather than a liberality towards the transferee, motivated by an act of generosity. However, the law recognizes that there are many exceptions to this culturally based assumption.

**A PRT applies when there is**

* A purchase of property in the name of another
* A voluntary transfer of property from a transferor to a transferee w/o consideration

**AND** there is no clear evidence concerning the actual intention of the payor or transferor about who is intended to benefit from the transfer.

Can happen in a variety of situations:

* Commercial context – Nishi v Rascal
* Family-assistance type arrangements // operating a joint account
* **Hanbury’s Modern Equity** illustrates that presumption arises in cases of transfer by one person into the joint names of himself and a stranger (p.246)

### Rebutting the Presumption of Resulting Trust

Presumption of resulting trust is a presumption of fact 🡪 rebuttable, unlike legal presumptions

As illustrated in **Re Vinogradoff** (*grandma transferring stocks*), absent evidence to the contrary, PRT will dictate who has equitable title. Actual intention to give both legal and beneficial title, as manifested by conduct, is binding and thwarts the presumption of resulting trust – i.e. transferor can’t rely on the presumption (**Standing v Bowring** – *transferred share certificates to godson and later wanted to take back*). **Onus of proof –** Ordinarily, the onus is on the transferee to rebut the presumed resulting trust: he must show that the transferor intended to pass beneficial title along w/ the legal title. In **Pecore**,Rothstein J. affirmed that @ the heart of the presumption is the allocation of the burden of proof.

**ASK:**

* **Does the evidence rebut the intention of presumption of resulting trust? Evidence of intention**
* **If joint bank account, will X be entitled to the sum beneficially under the right of survivorship rule in joint ownership?** Under joint tenancy, the survivor owns property on her own!

**Successful in rebutting the presumption (resulting trust DIDN’T work)**

* **Standing v Bowring:** *godson got to keep the share certificates.* **Actual intention to give both legally and beneficially, as manifested through conduct of the transferor, rebuts presumption – cannot later revoke.**
* **Commercial context: Nishi v Rascal if K waives your equitable title = not PRT** 
  + *Evidence clear that when he gave $, he had no interest in the property – he owed the $ anyway // presumption rebutted by the facts around the relationship & legal obligations to one another and other parties // P & R friends and intention was to make good on R’s obligation to K by way of payment to N*
  + *The purchase money PRT was rebutted based on the language used at the time $ was transferred from H to N: “without any conditions or requirements and these instructions are irrevocable”*
* **Familial arrangements: Oord v Oord**: intention to live on a property harmoniously together, in addition to the lack of any suggestion that repayment is expected, are sufficient to rebu**t** the presumption – easy to rebut in familial arrangements
  + *T & W & their son & daughter in law agreed to combine resources to buy a property. They intended to live on the property together. All 4 were registered as joint tenants, but T & W paid the purchase price // arrangement was set up to continue and embellish and support a relationship of harmony among these four people – if that’s what your motivation is, then simply giving bare legal title won’t do it.*
* **Joint bank account: Russell v Scott**: Declarations in conjunction with the joint bank account are sufficient to successfully rebut the presumption of resulting trust. **Clear communications to 3rd parties will suffice to show the intent.** 
  + *Testator told her solicitor’s employee that R was to get all the money in the account upon her death //compliance w/ Wills Act inapplicable b/c of the rules of joint tenancy as they pertain to survivorship//* ***Equity seeks to give effect to the testator’s intentions*** *– Russell obtained “a present right of survivorship” when the testator declared her intention to solicitor’s managing clerk that she intended to have the joint account reflect the joint ownership of the moneys she had deposited in that account // R was only holding the funds in a resulting trust while testator was still alive*
* **Joint bank account: Young v Sealey**: even though giving effect to testatrix’s intent was a testamentary avoidance of the Wills Act formalities, the court ruled in favour of nephew. Primarily, the basis was the long standing judicial practice to recognize such transfers in favour of the surviving joint tenant of legal/equitable title, effective upon the death of the testator. **The court will still give effect to the intention if it subverts wills legislation.** 
  + *opened a joint bank account in the names of her nephew and herself. She fed money into this account. Evidence clearly showed that it was her intention that her nephew would have no beneficial rights during her lifetime, but that he would get all amounts in the account upon her death. She repeated this intention in several letters.*
* **Joint bank account: Sawden Estate v Watch Tower Bible** – *left residuary to Watch Tower – prior to death, put $ in joint account w/ his sons // Charity argued that all the money that was placed in account – which effectively disposes all of his money to his children – means in effect that the money is being held in a PRT for Sawden’s estate, which includes the charity // Court held* ***the fact that he transferred all the money to a joint account with his son’s and in their names, rebutted the presumption of resulting trust.*** *They are his children, he knew he was about to die and clearly wanted to make sure his kids got the money.*

**Not successful in rebutting the presumption 🡪 held on a resulting trust**

* **Eisner v Baker**: Acts to appease and avoid turbulence in the relationship are not enough to rebut the presumption – courts will search for actual intention
  + *Fragile relationship – buy a house w/ BF’s inheritance – GF puts name on all documents, but BF doesn’t do anything to keep the peace – court didn’t find clear intention to benefit the transferee*
* **Re Vinogradoff:** *GM transferred stocks into a joint account held by her & GD // GM alone received dividends & on death bequeathed her interest to a 3rd party legatee // GM held equitable title not GD*
* **Joint bank account: Niles v Lake**:Bank agreements regarding a joint account not adequate to rebut the presumed RT – referencing a standard document does not reflect their true intentions. **A standard form K to protect the interests of a bank is insufficient to establish evidence of an intention contrary to PRT.** 
  + *2 sisters open up an account jointly, but the one who is sick puts $ in account – are the heirs of deceased/sick sis entitled to $ that is now held legally by the live sister? Live sis relies on bank agreement to argue an out-and-out gift.*
  + The bank’s standard form (prepared by the bank NOT the transferor) is required at the bank’s insistence for the purposes of protecting the bank as well as enabling account holders to deal with the account in an “unqualified way”
  + This agreement between the bank and joint tenants does not define the relationship between the joint tenants

**Interests in land**

**Property Law Act – Section 19(3):** A voluntary transfer need not be expressed to be for the benefit of the transferee to prevent a resulting trust.

In certain circumstances, even though rebutting evidence is available, the court may render evidence inadmissible – for example, if the evidence shows an illegal scheme/purpose and asks the court to recognize and give effect to that illegality during their analysis of the reasons for the transfer.

### Presumption of Advancement

The rule of PRT is subject to an exception where the purchaser is under a species of natural obligation to provide for the nominee (**Murless**). **The transferee gets full legal and beneficial title where the presumption of advancement operates.** Under the rules of advancement, the onus shifts to the transferor who must show an intention to exclude the operation of the presumption. These presumptions don’t work in our modern society b/c of notion of equality among partners.

**When is it appropriate for the presumption to operate?**

**(A) Matrimonial context**

Not completely disregarded b/c the society is in a transition – there are still traditional marriages.

Unlike other provinces, BC & Manitoba have not legislatively eliminated the presumption of advancement, so Mehta applies. Per **Mehta**, today the presumption lacks something of the vigour it enjoyed in the days before marital property legislation. The strength of the presumption of advancement will also vary according to the circumstances of the case. Where parties are unable to testify, as in Mehta, the presumption of advancement assumes real significances. This is specially so in a “traditional” marriage (*husband was the major provider for the family, and wife’s major roles was as homemaker and mother*) – under the circumstances, understandable that a loving husband should put assets in his wife’s name with the intent that they should be hers as gifts // presumption of advancement has little value in matrimonial property disputes where the parties as available to give evidence as to their intentions.

If in a modern relationship, court will look at evidence to rebut presumption.

A presumption of advancement from wife to husband never operated. Rather, at common law, it is presumed that the husband (transferee) holds the property on a resulting trust for a gratuitous transfer by wife (*Re Mailman Estate*), although, as *Eisner* shows, courts will search for actual intention.

**(B) Paternal context**

**Pecore** *POA didn’t operate b/c daughter was an adult. Therefore, she needed to rebut the PRT. Evidence of her close relationship w/ F & her hardship supported a view that F intended to give D the right of survivorship in their joint account*

* Presumption extended to mothers
* Presumption would only operate in respect of minor children for whom there is a legal obligation. Financially independent children, especially those living away from home, could not expect the presumption to operate in their favor.
* Gifts to **dependent children?**
  + Rothstein J noted that it may be difficult to ascertain what “dependent children” means and what situations the term encompasses. Thus, it falls on the adult child to prove that the transferor intended to give them the right of survivorship.
  + Abella J took the position that presumption should not eliminate dependent children. Arguably, Abella J’s position is preferable – The word “dependent” is clear enough for the purpose of determining a class of objects (true, in different context) in *Baden 1*. (p.253) – PAV likes this view

## Evidence

Applies to both presumptions of advancements & resulting trust!!!

PofA is presumed because of the **special relationship** between transferor and transferee. However, like PRT it may be rebutted by evidence of the **real intention** of the transferor. The courts have given guidance on the circumstances that may qualify as relevant or admissible evidence to rebut a presumption. The focus is on timing and illegality.

**Determine admissibility of the evidence rebutting a presumption** (whether or not the court will give effect to the evidence?)

### (A) Timing of events around the transfer

**Shepherd v Cartwright:** 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 in his favour.

* *The father’s act of making his children sign over the shares may suggest that he never intended a beneficial gift to them from the outset.* ***However, this evidence occurred long after the gift was made, so it was inadmissible*** *(subsequent declarations are only admissible against the party who made them, not in their favour) // inadmissible evidence to rebut POA // Presumption of advancement operated to help kids*

(Pav didn’t talk about these) – Some courts have not strictly followed the finding in **Shepherd v Cartwright**:

* **Lavelle v Lavellee** – Endorsed in Pecore v Pecore: “it seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. Plainly, self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight”
* **Neazor v Hoyle**: Judge used as evidence a transfer of property 8 years after the time in question in his considerations

### (B) Admissibility of illegality

**Effect of illegality in presumption of advancement (possessor prevails) and presumptions of resulting trusts (transferor prevails) is NOT symmetrical!!!**

= when a transferor conveys property to a complicit transferee (i) to pursue some unlawful activity or (ii) to avoid some lawfully protected interest of 3rd parties (ex. avoid creditors). **What do you do when info rebutting the presumption of advancement is messy?**

**Par delictum Rule**

Per **Scheuerman**, courts won’t listen to evidence of illegal justification or explanation (to rebut presumption of advancement) – even if the creditors don’t appear – based on ex turpi causa (from a base cause no action rises) and the Par delictum rule (in cases of equal fault/guilt the possessor of property is preferred) // It’s giving effect to presumption of advancement by relying on a principle for K law.

* *Husband conveyed the house to wife to protect the property against creditors who were pressing him for payment. But wife sold //* ***We won’t use this evidence*** *// didn’t matter that creditors didn’t pursue*
* In **Scheuerman**, the **MAJORITY** of the court held that an intent to violet the law is enough to prevent rebuttal of the presumption of advancement, even though the illegal interest never materialized. **But Justice Duff and the dissenting judge** took the position that intent alone is not enough to bar evidence of illegal intent when creditors are not actually prejudiced. This point of view was accepted by the SCC in **Goodfriend**. But many cases heard subsequently, including**Foster**,have continued to follow **Scheuerman**.
  + *Goodfriend: engaged in “spouse-swapping” – there is no cause of action for “alienation of affections” – trying to defraud creditor, but he couldn’t rly be a creditor*
  + *Foster: dad transferred properties to kids to avoid potential creditors – but daughter refused to give back & argued presumption of advancement // successful on presumption of advancement b/c court won’t hear evidence*

**Goodfriend** picks up on the dissent in **Scheuerman** and holds that if the evidence shows an illegal motivation in which there is no obvious/clear infrastructure to that motive, then the court will hear the evidence because there is no possibility of actualization of the illegal motive.

**Who is the effective initiator?** Transferor (**Scheuerman**) or transferee (**Goodfriend:** *wife tricking husband*) – where the effective initiator is not the transferor, but realistically and in actuality the sly and scheming transferee (as in **Goodfriend**), a different result may have been taken in **Scheuerman**.

**Locus poenitentiae** – this is your way out

**The doctrine operates to allow the inclusion of ordinarily excluded evidence, thus preserving the opportunity to rebut the presumption.** LP applies when the parties **(i)** never actually carry out their illegal scheme and **(ii)** “repent” of their wrongdoing, that is, the transferor withdraws from the scheme – reason for withdrawal irrelevant (**Tribe v. Soiseth**) // If you’re dreadfully sorry and if you’ve made amends to makes sure the parties are adequately compensated.

* *Wife’s parents paid for condo – now that she is divorcing, husband relies on presumption of advancement, before Pecore – But dad rebuts presumption by relying on evidence that the property had only been registered in her name to avoid payment of capital gains // wife argues that she was holding it on a resulting trust for dad // Judge holds that Scheuerman never overruled & good law + invites Mr. Tribe to say that he is sorry and invokes LP + he has to pay capital gain tax upon the sale of property*

If the transferor is claiming title purely on presumption of resulting trust, the court won’t hear evidence of illegal motivation, but they will give effect to the presumption of resulting trust (**Tinsley**, **David** and **Gorog**)

* **David v Szoke**: *P conveyed interest in the house to D (they were cohabitating) to protect the property against execution should the plaintiff injure someone while driving and the impaired person obtain a judgement // court gave effect to a presumed resulting trust w/out the need to hear evidence of fraudulent intent and left equitable/beneficial title w/ him // the court was influenced by the fact that there were no actual creditors at the time of the transfer. No POA 🡪 PRT upheld*
* **Gorog v Kiss**: *conveyed farm to sis to protect from biz associate – biz associate recovered his debt, but sis refused to give back // H: bro won! // court found the resulting trust in favor of bro could not be questioned by additional evidence b/c of the illegal purpose behind the conveyance.*
* ***Tinsley v Milligan*** –  *House in T’s name, but she gets mad and leaves – M argues that my house too b/c I have made mortgage payments – issue: why not put in joint names? – b/c M could get more social security welfare if not registered owner of property –* ***presumption of resulting trust operates – legal title in T – beneficial title split between the two***

**Proportionate Harm Approach:**

***Tinsley v Milligan*** – considers proportionate harm approach, but rejected by HL

**Nelson v. Nelson** (Australian case)

* *Scamming welfare authorities by not having property in her name to get more $ – mom arguing resulting trust – but daughter argues presumption of advancement – mom says we did this to get more $ from gov // judge: a lot of people scamming gov – we have to approach sensibly: there is approach of proportionality (is she rly going to lose her house b/c she managed to scam a few $ from gov?) – is loss proportional to scamming – also guided by what statute says (does it designate a sufficiently large penalty, then that should be enough)*

If illegality is to preclude effective enforcement, ask whether the purpose of the scheme is an “affront to public conscience”. This requires application of two criteria:

1. proportionality: the consequences to the plaintiff of losing the case because of the application of the exclusionary rule must be proportionate to the seriousness of the illegality and
2. civil sanction of evidentiary exclusion must further the purpose of the statute. It must not willy-nilly impose further sanctions for the unlawful conduct. Thus a court needs to review the statute to see what sanctions are contemplated and its frame of reference. If the statute does not over-penalize, then neither should the courts.

# The Beneficiary

Beneficiary can be any legal person (incorporated company or society)

NOTE: residence of trust is where the trustee lives.

**Equitable vs. Beneficial Title** (important when dealing w/ sub-trusts)

* when B1 transfers equitable interest in trust assets to B2 – B1s equitable and beneficial title are separated (segmented into equitable interest that is beneficial and equitable interest that is not beneficial) and B2 gets beneficial title and is entitled to income from assets.
  + B1 acting as a sub-trustee for B2 – can B1 ever get out of this? Yes
* Where there is a sub-trust:
  + trustee remains the same
  + initial B, no longer has beneficial title – holds a bare equitable title
  + sub-beneficiary holds beneficial title and alone is exclusively entitled to the benefits of the property

**What is the role of B?** B has this role of enjoyment (fruendi) – it doesn’t extent to the administration, control, management side (this all embraced by LT held by trustee)

**Keep the roles of Trustee and Beneficiary separate and distinct**

* Per **Schalit v Nadler**, if B acts in a controlling manner with respect to the trust assets, it results in the event being a non-act. This is reaffirmed in **Spencer v Riesberry** (footnote 9, p.276)
  + *Trust asset: lease – Property generating rent – tenant stopped paying rent – sremedy of distrain = common law remedy for a landlord when a tenant does not pay rent. It entitles the landlord to go onto premises and remove furniture and sell them to pay for the unpaid rent – the beneficiary (a company) hired the bailiff – Tenant sued B as someone who did not have authority to do this & won!*
* But as illustrated in **Re Bagot’s Settlements**, there are marginal exceptions (more like you can massage the facts) = B can act as an agent of the trustee and collect rents for the portfolio of properties in the trust
  + B got involved in rent collection – she is very competent, she can be agent of Trustee – but **it must be absolutely clear that acting for trustee, and trustee is ultimately responsible** (i.e. not protected from breach of trust) – rent collection was seen as a way of “reducing expenses to the lowest practicable limit”

**How do we define what the equitable estate is? What does the Beneficiary actually own in a trust?**

**What is the more realistic option?**

**Considering the facts of this case, equitable ownership may be better characterized as [“set meal”] [“a la carte”] ownership**

* **Set meal** and **a la carte** are not mutually exclusively. It is a matter of which one is more appropriate – context/nature of trust investment will be determinative (i.e. the issue that needs to be sorted out).
* **“a la carte” ownership**: does the beneficiary have a real right of beneficial ownership in each item or thing that makes up the trust fund?
  + A relatively simple trust where B is the sole life-tenant
* “**set meal” ownership**: or is it more realistic to say that the beneficiary’s rights are more “personal” than “real”, that is, is he merely entitled to expect that the trustee will properly administer the trust fund as a whole?
  + Where there are multiple life tenants and many remainders
  + Large volumes of different kinds of assets and investments that are shifting (items that fluctuate quickly and constantly) – ex. pensions; income trusts
  + Discretionary trust
* **Baker v. Archer-Shee****= the beneficiary has a distinct equitable interest in the individual items of property that constitutes the trust fund (as oppose to having an interest in the proper administration over the trust fund as a whole)**
  + *Lady A-S was B of a trust that was administered and resided in NY b/c trustees were there – but she was resident of UK. Under the UK law, if resident owned shares, any income generated would be taxable regardless of location. A-S argues that as beneficiary, she does not have ownership of those individual stocks and shares, and that her interest is an equitable estate in the totality as that totality is administered by the trustee – she loses!*
  + Look @ dissent (p.280) – made a compelling case for the “set menu” approach in respect of complex family trusts and business trust.
  + **Archer-Shee v Garland:** *The next yr, the lawyers argued that applicable law was NY – in NY B’s interest is the set meal* 
    - In certain situations, equitable ownership may be better characterized as ‘set meal’ ownership:
      * Where the trustee has exclusive power to dispose of the assets or properties in the trust and can unilaterally extinguish the legal title in each item by lawful exercise of his powers as trustee
      * Where to characterize the beneficiary’s ownership as holding equitable title in each of the individual items of the trust fund has the effect of situating in items that often fluctuate quickly and constantly
        + A common case would be a trust fund of a large pension plan as it often consists of a number of different assets
* **Spencer v Riesberry:** *settlor took a life estate for herself & gave remainder to kids – she allowed daughter, who was one of her co-trustees, to occupy one of the properties in the trust – when daughter divorced, her husband argued that the property should be included in the matrimonial property b/c his X had a beneficial interest in the house (future remainder interest & present interest of occupant) – daughter successfully argued that* ***at this stage of the relationship and her involvement****, the trust asset was not the house but the accumulation of houses in the portfolio and the appropriate administration of it and that is a personal interest – Although* ***personal interest*** *has value, it is considerable less value than ownership of the house. The court held beneficiary has is not ownership of the individual things that makes up the trust, instead they have* ***proprietary rights*** *in the administration of the estate.* 
  + **NOTE:** At some point those individual assets might become important – Ex. if one of the trustees converts one of the houses for her own use – this would be the appropriate right to assert **in rem right** as beneficiary.
  + **Personal right to have assets properly administered**

**In addition to the B’s in personam right against the trustee for breach of fiduciary duty, beneficiary also has an in rem right to trace assets in the hands of a third party in circumstances where the trustee has fraudulently parted w/ property but only if the assets are in the hands of a third party who is not a BFPFV.**

PAV: This distinction may be a false dichotomy

* Must look at the circumstances
  + If the issue is insolvency, then the rights should be in the assets (for *in rem* reasons)

It depends what you are seeking to do to define the property

* If you are seeking to recover assets, then it is important to emphasize in rem rights and linking equitable title to that
* If you are concentrating on remedies against the T in terms of personal rights, there is no reason to see the equitable interest as an equitable chose in action
  + You are defining the equitable property as the rights of the beneficiary as against the trustee

## Disposition of the Equitable Title

The equitable estate is property in the sense that it is transferable (can be disposed on as a “chose in action”).

**Example** (p.289):T1 and T2 are the trustees of $200,000 worth of shares, B is the life tenant, and C is the remainderman. During B’s lifetime, C decides to hand over his remainder interest to his children, X and Y…C can do four things:

1. C can assign his interest to X and Y
2. C can assign his interests to T3 and T4 on trust for X and Y (typical sub-trust)
3. C can declare himself a trustee of his interest (= the equitable interest) for X and Y (this is, in effect, another form of sub-trust) – in effect creating an automatic trust – C will hold equitable estate for X & Y’s benefit
4. C can instruct T1 and T2 from henceforth to hold his interest for X and Y. C thereupon drops out of the trust, and X and Y jointly take his place.

**Timpson’s Executors v Yerbury** sets out the rules: equitable interest can be disposed of in favor of a 3rd party in any of the following ways: the person entitled to it

1. Can assign it to the 3rd party directly
2. Can direct the trustee to hold the property in trust for the 3rd party
3. Can contract for valuable consideration to assign the equitable interest to him
4. Can declare himself to be a trustee for him of such interest – B will hold **bare equitable title**, the sub-B will hold **beneficial equitable title**, and T will hold legal title
   * Don’t need to comply w/ s.36 requirements

### Formalities for Disposition

To determine what the formalities for the disposition of the equitable interest are, need to **consider the subject matter of the trust** and **how the trust is created**. There are different formalities depending on whether the disposition of equitable interest is ***inter vivos***or **testamentary**.

* ***Inter vivos:***In BC & Manitoba, there is no writing requirement for disposition of an equitable interest in land to B – an oral declaration disposes equitable interest in land to the beneficiary. In other provinces there is a writing requirement under the Statute of Frauds.
  + **Rochefoucald v Boustead** – circumstances where the court will enforce equitable disposition to B in relation to land where the transfer was not in writing
* **Testamentary:** Disposition of equitable interest in a trust by testator to beneficiary under a trust established **per mortis causa** must comply w/ the formalities of **wills legislation (WESA)** – applies to all forms of property. If don’t have a valid will, the disposition will be according to the laws of intestate succession.
  + This is modified by recognition of half-secret and fully-secret trusts
  + Courts in BC are empowered by wills legislation to relax the requirement of written evidence in appropriate circumstances
* ***The facts need to be clear that an assignment has actually taken place.*** *Court held that the transfer bestowed a revocable mandate* (**Timpson’s Executors v Yerbury**; *p.290)*
* Assignee (i.e. sub-beneficiary) has standing to sue in his own name without being forced to interpose the assignor (who has privy w/ the debtor (i.e. trustee)) if he complies w/ **s.36 of the Law and Equity Act: (1)** the transfer must be in writing, **(2)** the trusted must be signed by a B, and **(3)** delivered to the trustee (Debtor needs to know b/c B1 might claim that she never transferred debt to B2). Through this facilitative legislation, transfer of equitable interests from one B to another can be effectively enforced against the trustee (the thing is more like a single corpus, rather than an interest in the individual assets). Note that the requirement for writing under section 36 does not apply when the beneficiary declares himself a trustee for the sub-beneficiary.
* **In the absence of compliance** w/ s.36 of LEA, assignee has **no recourse** and the transfer is subject to CL rules and requirements (as un *DiGuilo v Boland*).

### Priority Among Assignees

Priority between claimant assignees would be determined by time, the earlier being preferred over the later (governing principle: Qui prior est tempore, potior est jure = she who is first in time is preferred in law). If a first assignee informs a trustee who later dies, such that the new trustee has not received notice from him, his priority is unaffected (**In Re Wasdale**).

### Protective Trusts (Restraints on Alienation)

**Is settlor worried about someone (ex. big spender, addict, gambler)?**

Usually done by a parent who is worried about kid. Set up so B automatically will lose interest if try to call the trust (i.e. want to prevent operation of the rule that B can call the trust when sui juris) – need to provide an incentive – ex. if you attempt to call, you lose your interest

**Protective Trusts**

**(1)** Transfer legal estate in the assets to the trustee;

**(2)** Give the principal beneficiary (person to be protected) an equitable **determinable** life interest (caution: do not use equitable estate subject to a condition precedent nor an equitable estate defeasible upon a condition subsequent)

* Use words like: as, when, until – DON’T USE: on condition that, but if, subject to (b/c these words connote a condition)

**(3)** Determining events are attempts by the principal beneficiary to alienate/dispose his/her equitable interest, collapse the trust, insolvency;

* Determinable upon any attempt to dispose equitable estate or call for legal title

**(4)** On happening of determining event, automatic disposition of interest as gift over to secondary beneficiaries (usually principal’s children or siblings etc.)

Where the terms of the trust instrument establish a protective trust, the beneficiary’s right to the income will be terminated where any of the determining events have occurred. The capital and income under the trust is shifted onto a new set of beneficiaries, very often the children of the beneficiary. The **PROTECTIVE TRUST** is really two trusts:

**(1)** The settlor transfers assets to a trustee, giving a determinable life interest in favour of the “principal beneficiary,” under terms of transfer providing that,

**(2)** Upon the occurrence of the determining event, the trust property is *ipso jure* to be held on a second trust, which is often a discretionary trust in favour of a class of objects (e.g. beneficiary’s children or settlor’s other children)

When the determining event occurs, the secondary, discretionary trust vests the equitable interest in the new class of beneficiaries; the trustees will appoint the beneficiaries and thereafter administer the trust for their benefit. The determinable interest is **KEY** to the successful creation of a protective trust. It is important for the first gift to be a determinable life interest.

## Termination of the Trust by the Beneficiary

**By applying the rule in Saunders and Voutier, sui juris Bs W/ a vested equitable interest in the estate can ignore conditions that can be said to relate to the timing of enjoyment. Instead, Bs are eligible to enjoy the gift immediately by calling for the legal title in the estate from the executor-trustee once they are person w/ full legal capacity and the age of majority.**

**Beneficiaries may terminate a trust and call for legal title to the trust assets if certain requirements are met –** (**Saunders v Vautier**) (look @ p.293):

* **(1) Beneficiary is sui juris** = age of majority (19 in BC), and compos mentis(can’t suffer from a legal disability)
* **(2) Absolutely entitled to the property** (remember the protected person is not absolutely entitled to the property) = means the interest (i.e. the equitable estate) is fully vested (no contingency OR contingency only intended to suspend enjoyment) – doesn’t need to be vested in possession (i.e. interest of enjoyment – limitation on this OK)
  + **If there is a condition, ASK: is condition postponing vesting of interest or enjoyment of a vested interest?**
  + PAV: ONLY need to worry about condition precedents! Ex. you are the B if you are 25 vs. you’re the B now, but you may only enjoy the income when you’re 25

**Saunders v Vautier**:

*Under the term of the trust V could enjoy” if and when he turned 25” – trust established when V was a minor –* ***issue: did interest vest when trust established or when he became 25?*** *– Between establishment of trust and V turning 25, he became 21 and called the trust. Court looked @ the wording of the trust –* ***V’s interest occurred when the trust became effective*** *(when he was still a minor) – the condition of receiving income when he turned 25 was a condition that spoke to enjoyment NOT vesting of interest* 🡪***V was able to end the trust notwithstanding that settlor wanted him to get income when he turned 25***

**Fargey v Fargey Estate** (p.296) – *testator set up a trust and bequeathed property to his kids – in will said “if one or more kids predeceased him, then kid’s share would go to that kid’s kids” – Bruce died, who had 2 sons: Matthew (a major) and Joseph (a minor) – and both could only enjoy the benefit when turned 25, but at this point older bro wants to take his share* ***– issue: could Matthew collapse the trust now?*** *–* ***court looks @ the provision in the will:*** *trustee MUST “invest and keep invested each such sub-share [allocated to each grandchild] and to pay the income therefrom or so much thereof as may be necessary or advisable in my Trustee’s discretion for the grandchild’s maintenance, education or benefit during his or her minority, (any income not so paid in any year to be added to the capital of the share) and upon my grandchild attaining the age of twenty-five (25) years to distribute the capital of the sub-share to him or her”* *–* ***The ability to use this immediately was there. Income could be applied for maintenance & education of boys when they were minors 🡪 This suggests that the interest has vested. Plus, courts prefer early vesting*** *(unless clear language that interest has not vested).*

**Re Carlson Estate: an example of where interest has not vested and the court did not prefer early vesting** *– testator concerned about protecting 4 people: 1) his wife, and he decided she only deserves $1 because they’ve been separated;2) oldest son – 10% but to be used to pay off his debt; 3) Christopher (minor); 4) Janice (major) – He declared that the assets in this estate were to be all of them, the entire estate –* ***none of it was to be touched b/c all of income generated was to be maintained to educate Christopher. When Christopher turned 21, at that age, the estate was to be broken down into 2 portions – 90% and 10%*** *– The 10% would go to the oldest son. The other 90% was to be split between Christopher and Janice. Janice wanted her money now. When dad died, Janie was a major and Christopher was not. Janice said that the distribution of these assets meant that she could take the 45% now – The court said no, his primary intention was not to give her 45% now. The way the will was structured was to actually create a pool of funds that would deal with the maintenance and education of Christopher. It was only when Christopher turned 21 when Janice will get something. Her interest was not vested – it was only going to vest when Christopher turned 21. At that point, the testator indicated that that was when the division was to take place. The structuring was to first take care of Christopher and then at that point of time, what’s remaining will be distributed. That clearly indicates that the interest was not vested and therefore, Janice, even though she was 21,* ***she had a contingent interest and that interest was not vested*** *(p.301).*

**Basis for the rule: why does the court give so much power to B?** (p.297)

* Court prefers outright ownership – want it to be vested in 1 person rather than fragmented
* When you are an adult you should be autonomous – ultimately, they are the ones to benefit
* Prevent accumulations – law doesn’t like accumulation b/c of perpetuity problems that can arise
* Policy preference for the freer use of property over tying up the property for unduly long periods

NOTE: In province of Alberta, if you want to use S&V you have to take it to court.

### Is it a discretionary trust?

Per **Buschau**, the rule in **Saunders v Vautier** also applies to discretionary trusts w/ **multiple Bs**. If each class member is sui juris, then, if the members are unanimous, they may require all the income to be distributed to them. If the membership of class of beneficiaries is so broad that it is impossible to list all the members, it will be impossible to ascertain that unanimity exists.

An example of a discretionary trust applying the rule: **Re Chodak**

* *Testator bequeathed the whole of his estate to trustees for the benefit of beneficiaries who were children of his siblings living in the Soviet Union (all Bs identified). Trustee was given wide discretion on distribution among the beneficiaries. The money was to be spent on sending parcels. The beneficiaries agreed to calling in the trust // The fact that the trustee had discretion to fix differentiated shares among the beneficiaries did not affect their ability to call in the trust*

### Is the interest vested in possession or enjoyment?

The court in **Re Lysiak** declared that the policy of Chancery “has always leaned against the postponement of vesting or possession or the imposition of restriction, on an absolute vested interest.”

**It is always a matter of construction whether the gift is vested in interest and, accordingly, subject to the Saunders v Vautier termination rules.**

* If construing the terms reveals that the vesting of the very interest is contingent on the happening of some future event, then the rule in Saunders v Vautier **does not** operate and the beneficiaries are ineligible to call for the trust and bring it to an end.
  + **Re Carlson Estate:** *deceased left residue of his estate to his three children to be distributed in proportion he set out only after the youngest son had turned 21* 🡪 *interest vested in that residue once the youngest son turned 21.*
* The presence of a **“gift-over”** may indicate that the interest itself is intended to be contingent – naming another person who will take the interest if the first mentioned person doesn’t qualify. Reciprocally, where the gift-over term is absent, the interest is likely construed as intended to be vested in interest (with enjoyment postponed to the contingent event) and therefore subject to the rule.

This is a disposition in a will where the contingent circumstances surrounding the gift can be construed as conditions that spoke to postponement of enjoyment in the trust assets that have immediately vested in the beneficiaries on the death of the testator.

**Example of a condition subsequent**

**Even though discretionary trust, Bs could combine together to call the trust. Effectively could ignore condition.**

**Re Lysiak:** (discretionary trust) *Testator bequeathed his estate to his wife and son living in Ukraine. A clause postponed distribution of the residue by the trustees “until they are absolutely satisfied that the beneficiaries are free and unhindered to receive said benefits without interference from the regime under which they are presently residing” // I: whether condition referenced enjoyment or possession // The condition dictated how and when the benefits were to be enjoyed according to the broad discretion given to the executor who was simply empowered under the terms of the will to determine the manner and timing of the benefits according to his determination of the amount of freedom the beneficiaries had while living in Ukraine //* ***The giving or vesting of the gift was not suspended by the condition of political freedom – just the timing and manner of its distribution. The condition subsequent relation to Ukraine liberalization was regarded as a clause semantically uncertain and struck out as void.***

### Limits on the Scope of Application of the Rule

**(1) To claim termination of the trust, the beneficiary must enjoy an absolute interest:**

* In a discretionary trust, all the beneficiaries **must be identifiable** (**Re Chodak**)
* For discretionary trusts involving life tenants and remainders, where the beneficiaries are all sui juris, they can also combine to call for the trust (look @ 304 for an example)

**(2) The rule can apply to discretionary trusts with successive equitable interests:**

In **Re Smith v Aspinall**, the court held that if all the objects entitled to both the income and capital **(i)** act in unison and **(ii)** are sui juris, then they can terminate the trust or the direct trustee in a discretionary trust. Following this, they can acquire or deal with the property as they please – both people w/ present & future interests should agree

* *Testator gave trustees ¼ of his estate to pay, at their absolute discretion, the estate’s income for the maintenance of Mrs. A and/or any of her children for Mrs. A’s life,* ***with the remainder to the children****. Mrs. A, her 2 living adult children, and the personal representative for her deceased child combined to assign their beneficial interest to a mortgagee in order to secure a mortgage. The trustee argued that they should pay Mrs. A directly.*

**(3) Where the trust property is (i) divisible, (ii) one or more beneficiaries are sui juris, and (iii) absolutely entitled, they can individually call on the trustee to transfer to them their proportionate share of the property**

* Division is permissible even if the value of the rest of the property suffers some minor reduction
* The operation of the Saunders v Vautier rule may be prevented by difficulties in dividing the trust property or by the **hardships** that dividing the trust property may impose on other beneficiaries

The court in **Re Sandeman’s Will Trusts**, held that sui juris beneficiaries – who are part of a wider group that includes non-sui juris beneficiaries – have the right to terminate the trust in respect of their respective shares – **UNLESS** the termination of the trust for them **unfairly** impacts the trust and its property for the remaining beneficiaries – the trust may be fragmented according to the shareholding proportions of the individual beneficiaries.

**Examples of hardship:**

**Lloyds Bank v Duker**

*Beneficiary wanted to withdraw from the trust and get their stocks. B would have become the controlling shareholder of the released trust shares. The B would have had shares that would be worth more on a per unit basis than the remaining shares that the remaining beneficiaries held****.*** *B could control the company in a way that would hurt the other beneficiaries by structuring it to give him income and stop paying dividends // Court refused a division and denied the application of Saunders v Vautier to his situation. Held that termination could only occur pending an agreement to sell all the shares in the trust.*

**Re Marshall** – **there is no automatic entitlement to call for division where the trust property is land (i.e. land is not divisible)**

*Sub-group of beneficiaries who had called for a ¼ of the shares in a large company. Shown that it would take 20-30 years for all beneficiaries to be sui juris and so eligible to call for legal title. court held that sui juris beneficiaries were not entitled to call for division if the trustees consider that, because of the special circumstances, the division would cause undue hardship on the other beneficiaries.*

**Pensions & Commercial Situations:**

Per **Buschau**, due to the contractual nature of pension plans, and the unique role of the employer in such plans, unless a pension plan is very small (ex. when offered to a few officers of a corporation), the rule in S&V is not applicable.

* Note they don’t discuss what is small and what is large
* Reason: (?)

## Variation of Trusts

The rule in S&V is not automatic – it may not even be desirable, or might want to make changes to the trust to take advantage of something. **What do you do in a situation where no one is appointed w/ the power to make changes, and nothing is contemplated in the terms of the settlement?**

There are 4 exceptions to the general inability of the courts to act and change the terms of the trust. They are confined to augmenting trust management powers, and does not include variations to the quantum or type of beneficiary interest under the trust.

* **(1) Administrative Terms** – can be varied if there is an unforeseen emergency such that the trust is threatened and the settlor could not have foreseen the circumstances. When used, this power is usually applied to protect trust property in some way – ex. essential repairs to buildings
* **(2) Maintenance Jurisdiction** – allows the court to make direct payments to beneficiaries if they need money to live in a manner appropriate to trust expectations (i.e. order that the accumulated income be distributed if the 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 **non *sui juris* beneficiaries** in any judicially sanctioned compromise of a dispute that may have occurred between the trustees and the beneficiary. Look @ TSVA

NOTE: courts can’t rewrite the trust!

### Trust variation legislation (TVL)

**The Trusts and Settlement Variation Act** (TSVA) empowers a court to give its consent to arrangements on behalf of beneficiaries according to the broad proposition that the proposed arrangement is “**for the benefit**” of the person of whom the court is giving its approval.

**For whom can the court give assent? Revocation or Variation**

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

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

* ascertained persons who are not sui juris b/c they lack legal majority or function under some legal disability (p.314)

**(b)** **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, (Pav: @ the time application is made, you don’t know if you’ll be a B)

* Newbury JA in **Buschau**took the position that **“interest”** in s.1(b) only deals with those who have a property-law interest and does not include persons with a mere hope of an interest, a *spes successionis* (such as the heir presumptive – testator can change will), nor to those in a class of objects in a trust pursuant to a wide power of appointment.
  + covers beneficiaries who @ the time of application are ascertainable, but exact identity unknown b/c of the nature of the contingency referable to their future interest (p.315)
    - 1 of group of 4 who can get a remainder, but have to wait & see who the survivor is – this is a future interest 🡪 court can consent on variation on behalf of this group
* doesn’t not include adults that are missing (**Buschau**; *25 out of 112 Bs missing*); Bentall case (court here consented on behalf of missing Bs)
* court is not given power to overrule dissenting Bs w/ legal capacity who constitute a minority (**Buschau**)

**(c)** **any person unborn**, or

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

* Come here when you have to get court approval when the remainder people are not in existence yet
* Ex. **Restate Will Trust** – *a protective trust created by the testator, and B was given a life estate w/ the right to choose the remainder – she chose herself – court said the very purpose of trust was to protect her, and if she gets the remainder interest, then she can call the trust – court refused to agree*
* p.318

**any arrangement** (Pav: means to vary or revoke) 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.

**If “unborn, unascertained and incapacitated”, then look @ s.2**

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

Notes:

* The Public Trustee must receive notice in writing of the application where it involved persons who are not sui juris
* A legal life estate is regarded as a deemed trust – so court can vary life estates where there are successive beneficiaries who are deemed to be incapable of consenting

**On section 2: what is a “benefit”?**

Per s.2, the court must be satisfied that the proposal is of “benefit” to those for whom it will give the necessary asset to make the compact binding.

**Fishleigh-Eaton v Eaton Kent** (2013) – **the court will approve the variation of the trust where:**

1. The basic **intention of the testator** will be kept alive by the proposed variation

* Pav: this is not always the case; have to show something substantively different (saw an example in **Restate Will Trust** – so violently opposed to the testator’s intent that court refused to help)
* Ex. of intention of testator vitiated – **Re Remnant’s Settlements**
* Try and work an intention of testator that is broad enough to take in what you are trying to achieve.

1. The proposed variation is for the **benefit of the minor, unborn, unascertained and incapable beneficiaries**; and where
2. **A prudent adult** motivated by intelligent self-interest, and a sustained consideration of the expectancies and risk of the proposal made, would be likely to accept the benefit to be obtained on behalf of those for whom the court is acting

**Financial interest** (indeed those that have an important bearing on tax advantages) could be an appropriate benefit as illustrated in **Re Burns**, but it is not determinative as illustrated in **Re Weston’s Settlement**, where the **educational & social benefits** **of children lacking legal capacity** were held to trump the very extensive tax benefits that the trust would acquire under the proposed arrangement that would have had the effect of passing huge financial gains to already very wealthy beneficiaries. The court in **Re Remnant’s Settlements** affirmed “benefit” is not confined to “financial benefit” but includes “benefit of any other kind”, in this case, family harmony & marital choice. **BUT** pay attention to the circumstances! In **Re Harris**, the court gave preeminence to financial factors over family harmony – clear testator intent trumps differential benefits for beneficiaries in the same class (i.e. children). Per**Re Tweedie Estate**, can include psychological and family benefits for the living beneficiaries which can be potentially at odds with interest of the unborn – provided differences are slight.

|  |  |
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| **Re Burns** | enlarge investment powers of the trust – tax minimization and advancing the financial interests of the beneficiaries was held to be an appropriate benefit in a proposed arrangement 🡪 arrangement approved |
| **Re Weston’s Settlement** | wanted to move residence of the trust to avoid the new harsh tax regime. Here, the court found that financial benefit is not the only factor to consider, but the **social and education benefit for the infant or unborn child** should also be a factor 🡪 relocation not approved |
| **Re Remnant’s Settlements** | testator wanted beneficial interest to only vest in children who were non-Catholic – one sis protestant, other catholic – family equanimity – application brought to revoke the clause – minor protestants are going to suffer – but court revokes b/c it would promote family harmony and expand spousal options (not restrictive from a social POV) |
| **Re Harris** | An emotionally devastate family – husband committed suicide – one child favored among others (got 5/8) – mom freaking out – clear testator intent trumps differential benefits for beneficiaries in the same class (i.e. children) – court is only coming b/c kids not of age, otherwise won’t even intervene – the financial disadvantage to child it was consenting on behalf of was significant |

In **Russ v BC**, the court held the proper test to determine when it should exercise its discretion to consent on behalf of a person without capacity is the standard of a **“prudent advisor”** – will try to put in place the basic intention of the settlor, but in a prudent manner. Where the proposed arrangement is clearly and centrally a financial matter, then the good bargain test should guide the court’s decision as to whether approve the arrangement – would a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risk, and the proposal made, be likely to accept?

Most cases tend to go on financial issue – Weston & Remnant are really more like exceptions

Look @ Russ b/c court introduces the prudent advisor test.

Financial very important; other factors are additional factors; have to look @ basic intention – usually governing, but not always. If not, then look @ what a prudent person would say? This requires large amount of argument.

# Trustees

The Trustee can be any person – legal and natural – who is of proper legal capacity to contract and own property. As owner of the legal title of the trust assets, the trustee has the power and duty (as to which and to what degree may be described and limited in the trust instrument) to control the assets through: administration and management. He must comply w/ a general duty of utmost good faith towards the beneficiary who is the holder of the equitable interest in those same properties in which the trustee holds legal title – this is known as the fiduciary obligation.

The trust instrument spells out in detail the extent of the trustee’s powers and duties. Two examples of powers:

* **The power of maintenance:** allows the trustee to exercise discretion on how much income (or even, perhaps, capital) is appropriate for the maintenance of a person lacking legal capacity.
* **The power of advancement:** gives a trustee discretion whether to allocate part of trust capital to the beneficiary ahead of the due date, thereby accelerating the B’s entitlement to capital if he chooses b/c the circumstances of the B are appropriate for that allocation.

## Types of Trustee

**(1)** Types of persons who are trustees – **responsible, level-headed, business-like approach with capacity for good judgment**

* Aunt Mabel/Uncle Henry
* Corporate trustees

**(2) Securities investment specialists as part of mutual fund schemes**

**(3) Public Guardian**

* Office of public trustee can appoint trustees to administer the property interests of persons under legal & physical disability (public guardian)
* Also in BC, the Office helps protect charitable assets where needed – ex. gifts to a non-existent charity, or investigations of complaints about alleged misuse of charitable assets
* Entitled by law to charge for services

**(3) Trustees *de son tort***

* non appointed, intermeddlers in the affairs of an existing trust may find liability as trustees
* this happens where evidence points to such an individual as comporting himself as a *de facto* trustee, regardless of whether deliberate or based on naivete

**(4) Advisors to and “Protectors” of the Trust**

* Not intermeddlers, they are persons with power to designate beneficiaries and carry some administrative responsibilities including powers to veto trustee action affecting “asset protection” on tax matters
  + Ex. to monitor actions of offshore trustee(s)
* Can be settlor – but risks categorization by court as a B
* Look @ p.334 for powers given to trust protectors
* Whether a trust protector is a fiduciary will depend on the terms of the trust
* Decision making power is to provide for unexpected events – ex. new legislation that affects an existing tax avoidance or deferral scheme in an “offshore” trust

## Appointment of Trustees

The trust instrument (deed or will as the case may be) usually set out the appointment of trustee(s). Role often defined by mechanism of appointment:

* Express trust – personal declaration, deed
* Resulting trust
* Constructive trust

One crucial requirement is that the person or persons selected must have legal capacity and fulfill any statutory qualifications. Trustee gains authority through transfer of asset (vesting) or under a will through letters of administration.

**Several trustees:** If several trustees are appointed as joint tenants, then they must function/operate with unanimity – unless otherwise specified in the trust instrument. Surviving trustees continue if one of them dies. Only when the last trustee dies will the trust pass to his personal representatives, who then become replacement trustee/s.

**Successor trustees:**

* Usual instances triggering the need for successor trustees: death, retirement, or removal of existing trustees.
* Look @ the trust instrument to see if settlor has made provisions (p. 335) – will also set out an alternative trustee, in case the replacement trustee declines the appointment
* If not, look @ trustee legislation
* Courts have inherent powers of appointment – Through adherence to the **maxim of equity “a trust will not fail for want of a trustee”** the court can, in appropriate situations, ensure the property continuity of a trust through appointment and removals of trustees.
* If all fails, the court will appoint the Public Guardian and Trustee
* When there is new appointment of trustees the assets automatically vest in the new trustee

**Appointment by the Settlor**

**Appointment by Statutes**

**Is trustee dead, disqualified, out of province for more than 12 months, unfit, or want to retire?**

**Power to appoint new trustees // Trustee Act, s.27****(1)** If a trustee, either original or substituted and whether appointed by any court or otherwise, is dead, remains out of British Columbia for more than 12 months, wishes to be discharged from all or any of the trusts or powers reposed in or conferred on him or her, refuses or is unfit to act in them, or is incapable of acting in them, then the **person nominated for the purpose of appointing new trustees by any instrument creating the trust**, OR **if there is no such person or no such person able and willing to act, then the surviving or continuing trustees 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.

**Appointments by Court Order**

Although the court has inherent jurisdiction to appoint trustees, the Trustee Act clarifies the scope of this power, stating that the court will do so “if it is expedient.” The court will do this where persons designated to appoint cannot do it themselves for some reason (e.g. mental or physical inability, deceased, unfit).

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

Where there is dispute over a statutory appointment of a trustee, the beneficiary, co-trustee, or others with some beneficial interest in the property have standing under **s. 36** to apply to the court.

In **Re Tempest [1866]**, the court set out several guiding principles to consider in the appointing of a replacement trustee:

1. The wishes of the settlor or testator, especially in respect of characteristics held by them to be undesirable;
2. Persons who do not have an axe to grind, neither towards the settlor nor the beneficiaries; and
3. Persons who will promote and not impede the execution of the trust.

## Retirement of Trustees

**What should retiree do?**

**(1)** Where there are 2 or more trustees, a trustee using a deed may **declare** a desire to be discharged. **(2)** The declaration must be **served on the other trustees** and, if accepted, the retiring trustee will cease to be holding the assets in that capacity and be divested of the trust property. The remaining trustee(s) will continue as the trustees. **(3)** After acceptance of retirement by other trustee(s), the retiring trustee need to **disengage from the assets**. The trust instrument **cannot** vary this [Section 28, Trustee Act].

**Failure to follow** **the procedure** may result in an ineffectual discharge (i.e. continues as a trustee) with the consequence that the intended retiree retains liability for the trust assets and their proper administration (so if there is a breach of trust by other trustees, retiree who has not complied may be liable even if they have not participated).

## Removal of Trustees

**Is T performing & discharging fiduciary responsibility that he has to the B in relation to these assets?**

There are **three ways** to remove a trustee: **(1)** under the trust instrument, **(2)** under the Trustee Act, and **(3)** through judicial removal:

**(1) Under the Trust Instrument -** First place to look for authority to remove a trustee – if there is no governing provision, then look to legislation or the courts

* Where the settlor/testator has provided the circumstances under which trustee removal can occur, the provisions of the instrument govern (power of removal is often designated to the protector or guardian)

**(2) Under the Trustee Act –** codifies power of court to remove a trustee in very general terms

|  |  |
| --- | --- |
| **Removal of Trustees on Application** | **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. |
| **Power of Court to Appoint New Trustees** | **Where it is clear that their continuance as trustees would be detrimental to the execution of the trust, such as T’s lack of competency or bankruptcy, the Bs or co-trustees can seek removal for reasons that are “expedient” for the operation of the trust.**   * **31** **If it is expedient** to appoint a new trustee and it is found inexpedient, difficult or impracticable to do so without the assistance of the court, it is lawful for the court to make an order appointing a new trustee or trustees, whether there is an existing trustee or not at the time of making the order, and either in substitution for or in addition to any existing trustees. * Expediency takes in misconduct as well as other things. The **test** is whether the trustee is managing the trust for the welfare of the Bs. |

**(3) Judicial Removal** – pursuant to its inherent jurisdiction, the court may remove trustees

* Where the courts need to be drawn in to resolve a dispute, the governing criteria that will guide them with regard to trustee removal are **facts which disclose that the welfare of the beneficiary’s interests are being put at risk.**

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| **If Court Involved in Removal** | |
| **Factors** | **Radford v Radford Estate****sets out the approach of the court towards judicially sought removal of a trustee:**   * 1. the court shall not lightly interfere w/ the discretion exercised by a person in choosing the person or persons to act as his executors and trustees      + represents a choice – freedom of property says we have to give high regard to that choice   2. interfering w/ the discretion and choice of a person in preparing his last will and testament must not only be well justified, but must amount to a clear case of necessity.      + We are going to give respect to choice   3. Removal of an asset trustee should only occur in the **clearest of evidence** that there is no other course to follow.      + There must be clear evidence b/c court also concerned w/ biz reputation of trustee – shouldn’t remove just b/c Bs don’t like T   4. In deciding whether to remove an estate trustee, the **court’s main guide should be the welfare of the beneficiaries.**   5. It must be shown that the non-removal of the trustee will likely prevent the proper execution of the trust.      + Newton Trust – Madam J getting at   6. The removal of an estate trustee is not intended to punish for past misconduct; rather it is justified on the basis that past misconduct is likely to continue and that the estate assets and interests of the beneficiaries must be protected.      + Simple, minor, single instances of misconduct – ex. accounts not handed down to B in a timely manner – won’t afford basis for removal of trustee      + Single instance of fraud will lead to removal      + minor admin breach not sufficient, unless frequent 🡪 court gives high deference to choice of settlor |
| **Friction Between Ts** | Misconduct is not a prerequisite for removal(**Conroy v. Stokes; Re Consiglio Trusts**) – as illustrated in **Re Consiglio Trusts**, it is enough when the continued administration of the trust with due regard for the interests of the trust has become impossible or improbable due to the situation between the trustees.  Conflicts between co-trustees is a legitimate basis to remove a trustee if it leads to improper administration of the trust or if it endangers the trust property (**Re Newton Trust**). |
| **Misconduct** | Per **Re Consiglio Trusts**, misconduct is not a prerequisite for removal |
| **Antipathy** | **Bunn v Gordon**– a track record of antipathy towards beneficiaries is enough to order a removal. |
|  | |

**Re Consiglio Trusts** *–* *Official Guardian and a beneficiary brought an application which disclosed misunderstandings amongst the 3 trustees which made it “virtually impossible for the trustees to agree on policies concerning the efficient management of the trust.” There was no evidence of misconduct // removal ordered //* ***Misconduct is not a prerequisite for removal – it is enough when the continued administration of the trust with due regard for the interests of the trust has become impossible or improbable due to the situation between the trustees.***

**Conroy v. Stokes** *– no misconduct, but friction between beneficiaries and trustees: concern for “welfare of the trust”* – *Appeal court set out the applicable criterion – “****concern for the welfare of the beneficiaries****”*

* This means that removal requires an applicant to point to acts and omissions that endanger the trust property, or that demonstrate a lack of honesty, appropriate capacity or reasonable fidelity
* The applicants must point to acts that impair the welfare (or benefits) of the beneficiaries

**Re Newton Trust** - *Application to court for the removal of a longstanding trustee by the beneficiary (who also recently became one of 3 co-trustees). They disagreed fundamentally on the management of the trust. The respondent trustee was upset that he was not reappointed to a board position, and his professional judgment was called into question as well as his claim to fees for acting as trustee. The petitioner and other trustee could not work with the respondent trustee –* ***Conflicts between co-trustees is a legitimate basis to remove a trustee if it leads to improper administration of the trust or if it endangers the trust property***

## Residency of the Trust

Residence of trust is ordinarily where the trustees reside. However, the SCC in **Garron** (2012) has made it clear that the residence of the named trustees is not determinative of trust residence. The residency test for trust is the *situ* of its central management where the control of the trust de facto occurs (i.e. actually takes place). So here 2 trustee resided in Barbados but the central management and control of them was in Canada.

## Taxation of Trusts

There is a high tax rate in Canada – explains why

* People try to get trust out of Canada
* Trustees resident in the islands (testator unfamiliar w/ them)
* Appointment of guardian or protector – someone settlor has confidence in – be careful in constructing the protector, so that they don’t end up having too much power w/ some duty condition attached

Paid out of revenue generated from by trust. If insufficient revenue, then beneficiary has to pay. In some jurisdictions imposed on trustee, but trustee would get an indemnity @ law from beneficiaries.

## Trustee’s Duties

**What are the duties of the Trustee?**

There are 3 substantive duties:

(1) to take and get control of the trust property;

(2) to protect the value of the trust fund through prudent investment decisions that also are compliant with other trustee obligations;

(3) to distribute income fairly according to the distribution requirements under the trust settlement.

* Ex. if asset is a goldmine, can’t exhaust in a way that there is nothing left for future people who have a remainder interest

### 1) Duty to take Custody of & Personally Manage Trust Assets

On appointment, the trustee must collect & gain custody of the settlor’s property that he is destined to hold in trust. Title must be vested in the name of the trustee to give him authority to deal with the trust assets and to perfect the trust arrangement.

**Trustee to act personally**

There is a common law principle of *delegatus non potest delegare* (A delegate cannot delegate). However, given the complexity of administering most trusts, it is unrealistic to expect trustees to execute literally every aspect or task involved in administering a trust (Pav: if principle was followed strongly today, then there would be a breach of trust). Thus, trustees are entitled to appoint agents to perform many acts of administration in respect of the trust. Per **Speight v Gaunt**, although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may in the administration of the trust avail himself of the agency of third parties such as bankers, brokers (can delegate sale of real estate to a broker) and others, if he does so from a **moral necessity or in the regular course of business**. If a loss to the trust fund should be occasioned thereby, the trustee **will be exonerated unless** some negligence or default of his had led to the result – i.e. be prudent in selection of agent (ex. choose a prudent bank) (*stockbroker turned out to be a fraudster, but trustee was not liable b/c no evidence that trustee chose a bad broker*).

* At Speight’s time it was normal biz practice to hand over $. This is not the case today!

**Implied indemnity of trustees for acts of agents**

**Trustee Act s.95 (BC)**A trustee is not liable for breach of trust when others are in control of trust monies or securities properly delegated unless it happens through the trustee's own willful default. The liability of the trustee will be considered from the standpoint of whether he has discharged his duties using the **standard of a reasonable business-person** controlling and managing his own property. Assessment will entail a review of general biz practices ordinarily followed at a particular time.

* **Re Wilson** is an example of an unlawful delegation – *Buyer came along for a not so good property – B arguing breach of trust not b/c decision bad, but b/c the decision made by managing director as opposed to the board – relying on breach of delegation principle*
* **False** is an example of a lawful delegation – recognized that Re Wilson was totally unpractical – trust companies are handling many estates and expecting the board to make every decision is impractical – **not a breach of delegation principle if** the general corporate arrangement allows for specialized employees of the company, rather than the directors, to make decisions around investment of property.

When you appoint a corporate trustee, you need to be familiar with its operation with regard to how they administer their estates. The directors can now delegate their administrative functions to their staff.

### 2) Duty to Care for & Preserve Value in Trust Assets

The scope of the investment power may be checked by provisions in the trust instrument.

**Check trust instrument: are there specific requirements on investments?** (ex. constraint not to sell a particular asset, or specific requirements on investments)

* Bare trust vs. active trustee
* If there are no constraints, duty to preserve asset value means that in effect the trustee needs to make a decision as to what to keep and what to sell. If don’t do properly, will be in breach of trust.

**There are two broad aspects to Trustee investment:**

1. The **duty to invest** so that the capital fund is preserved from risk, but at the same time yields a reasonable return
2. The investment must be made by the trustee in a way that is even-handed between the different classes of beneficiary (EX life tenant v remainder person)

|  |  |
| --- | --- |
| **Investment of Trust Property** | **Trustee Act s.15.1 (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*](http://www.bclaws.ca/civix/document/id/complete/statreg/00_96418_01).  **(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.   * this permits investment in a trust company’s common trust fund. |
| **Standard of Care** | Per **False**, the SOC and diligence required of a trustee in administering the trust is that of **a person “of ordinary prudence** in managing his/her own affairs” [Formerly **Whitely**, now **Trustee Act s.15.2**].   * **15.2** In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments * now there is no “authorized investments” * this is an objective standard!   The SCC in **False** also affirmed that **the SOC is the same for all trustees** – there is no higher standard for corp trustees, meaning the standard is unitary. |
| **Jurisdiction of Court to Relive T** | Under **Trustee Act s.96**, court may relive a trustee either wholly or partly from personal liability if they acted **honestly & reasonably & ought to be fairly excused.** Per **False**,power of the court to relieve under trustee legislation [s.96] can be selective among the group of trustees – they only relived the wife not the company.   * **96** 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. |
| **T NOT Liable if Overall Investment Strategy is Prudent** | **Trustee Act s.15.3**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.**  Trustee’s performance must not be judged in hindsight. Where a trustee invests as an ordinary, prudent man of business conducting his own affairs, he should not be faulted as negligent (**Nestle**).  Trustees must invest in a prudent manner, regardless of their personal objections to the nature of investment (**Cowan**). |
| **Abrogation of CL Rules: Anti-Netting Rules** | **Trustee Act s. 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.   * You can take a bad performing stock and set it off against a good performing stock – before could not do this |
| **Prohibited** | Under **Trustee Act s.17.1**, a trustee may not invest in its own shares – unique to BC |
| **Delegation** | |
| **Delegation of Authority** | Under **Trustee Act s.15.5**, trustee can delegate to the degree that a “prudent investor might” **unless the trust dead prohibits this.** |
| **Implied Indemnity** | Under **Trustee Act s.95**, trustee is not liable when others are in control of properly-delegated funds, provided that the trustee is not in “wilful default”.   * Trustee gets immunity under this section |

**False:** *deceased bequeathed his estate (consisting mainly of shares in a closely held company called Boyles Brothers) in trust to wife and children in succession – owner of company dies (risk: when these private company’s founders die, their shares go down in value correspondingly) – T has to look @ instrument to see if he is allowed to sell? If yes, then have to decide whether he should sell? Trustee got out of Boil Brothers by going into a high risk company named Inspiration and held on too it for too long. Inspiration went bankrupt & Bs successfully sued. Mom who is a co-trustee unsuccessfully argues that a diff standard should apply to her, but* ***s.96*** *exempted her b/c she had acted honestly.*

* If can’t get unanimity between trustees, then you should go to the court. As a result of this case, trustee companies kept going to court for approval where they could not get majority consent.

**Cowan:** *Trustees attempted to restrict investment when certain stocks were regarded as unethical (ex. cigarette manufacturing company) – they were a coal mining union and did not want to invest in other coal mining companies* – *beneficiaries were indifferent –* court held that as trustee **predominant goal must** be to secure a reasonable financial return. However, this does not mean that can’t exclude certain stocks on the basis of ethical considerations provided that is not going to negatively impact you in terms of discharging and being open towards making major financial contribution (p.363).

**Nestle:** **Illustrates how times change & courts will take that into account** – *wife & daughter had life estate and granddaughter has remainder. When all the life tenants died, the value of the assets were minuet and granddaughter complained. Court found against her.* **You can’t assess performance using old cultural dispositions.** *When this trust was originally constituted, the market was regarded as high risk. People didn’t want to invest in stock exchange stuff, more acceptable were bonds. The problem with those safe investments is that the return is very very small. Consequently, the value of this corpus couldn’t keep up. They were able to say the reason why they did this was to help the life tenants. This is because there were significant tax benefits. Taxation drove this investment, which was good for the life tenants but was quite severe for the remainder person.*

### 3) Duty of Loyalty

**Is there a benefit for the trustee?**

The trustee has a fiduciary duty to the B, and as such owes a duty of loyalty to B. The duty of loyalty is one of the most defining characteristics of a trustee/fiduciary. The trustee is a fiduciary and must therefore act in a way that is described as utmost good faith in his dealings w/ the property as it related to the beneficiary. There are several aspects to the duty of loyalty. **A fiduciary MUST:**

**(1)** **act in good faith** – trustee must not personally profit at the expense of the trust

**(2)** **not misuse his position** and place himself through acquired knowledge or opportunity in administering the trust where his duty and personal interest may conflict with the beneficiary’s interests;

**(3)** **not act for his own benefit or that of a 3rd person** through inconsistent engagement of trust assets without the informed consent of the beneficiary; and

**(4)** **only contract with the beneficiary** in transactions that are fair and in which there has been full disclosure of all matters material to the transaction

NOTE: the only personal benefit that trustee can derive is compensation per statute.

Historically, this duty was very strong but it is no longer an absolute duty.

Per **Keech v Sandford**, trustees could not personally profit from any association with trust property even in circumstances where it was impossible for the beneficiary to benefit. In **Boardman v Phipps**, the **majority** followed the absolute standard adopted in **Keech** – Information and knowledge attained in the course of acting in a fiduciary capacity is trust property. There is a strict approach to the rule that fiduciaries cannot profit from their position w/o the informed consent of beneficiaries. The rule operates so that even when there is no real conflict, the duty of loyalty may still be breached. But in the view of the **dissenting** judges there was realistically no conflict since the trustees declined to buy the shares. Evidence showed that the trustees preferred for Boardman and Tom to buy the shares as opposed to an unfamiliar party. Given this evidence, there was no real **“possibility of conflict”** given that a reasonable person looking at the relevant circumstances could not think that there was a **real, sensible possibility of conflict.** The absolute standard in **Keech** and **Boardman** no longer prevails. And, **THE DISSENT IN BOARDMAN V PHIPPS IS MORE SIMILAR TO THE APPROACH THAT HAS DEVELOPED IN CANADA.**

* Per **Peso Silver Mines v Cropper**, an out-and-out bona fide rejection by the company would be the best evidence that any later dealing w/ the property by anyone is not against its interest.
  + *NOT A TRUST CASE – Peso receives bunch of claims and directors look at these. Directors of Peso didn’t make offers due to lack of funds. Later, a director who launched a company bought the claims rejected by Peso. Peso sued. If absolute standard, he would have to disgorge benefits, but the court held: NO, he can keep profits. Diff philosophies:*
    - *One of the Judges is like it is too much to expect – directors set on multiple boards*
    - *Other J – b/c of complexities of modern world, should be strict*
* **Canadian Aero Services v O’Malley**: Liability to account for profit by an officer does not depend on proof of an actual conflict of duty and promotion of self-interest. However, **the no-conflict rule should not be couched in absolute or statute-like form.** PerLaskin, general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, **must be tested in each case by many factors.** Among them are **(i)** the position held, **(ii)** the nature of the opportunity missed, **(iii)** the ripeness of the opportunity, **(iv)** the relation of the director to the opportunity, **(v)** the amount of knowledge possessed, **(vi)** the circs in which it was obtained, **(vii)** was it a private or special opportunity, **(viii)** time frame that breach occurred w/ respect to employment, and **(ix)** the circs under which the employment rel’nship was terminated—retirement, resignation, discharge (p.373).
* **Top management positions** are treated the same way as directors with respect to their fiduciary responsibilities – they are not mere employees. Faithless fiduciaries who profit through a conflict with the person to whom the duty is owed, will be disgorged of their profits.

|  |  |
| --- | --- |
| **Keech** | lease administered by T & rents used for B. Lease came to an end and tenant trustee went to the landlord to see whether the lease could be renewed. L said no b/c B is under age. Trustee told landlord to give him the lease in his personal capacity. Was trustee liable to B for all the rents that he collected in relation to the lease? Yes!   * **Why?** Finding in favor of the trustee would provide an incentive to create such situations (temptation to fraud) – court held that it is difficult to police. |
| **Boardman v Phipps** | shares in two diff companies – one is performing well, the other no so much (L&H)! Boardman (trustee’s solicitor) and Tom Phipps (one of the beneficiaries) were authorized to investigate into L&H. Through their connection to the trust, they attend various meetings. In a meeting find that company has potential, but it is being administered badly. They informed the trustees. On the basis of that information, they had recommended the trustees acquire a controlling interest in L&H and at a share price that reflected the financial status of the company. Trustees, after consideration, rejected this approach as it involved a risky investment & they believed a purchase of more shares in L&H would be contrary to the terms of the trust. Boardman & Tom Phipps then purchased the shares with their own money – the trustees were broadly supportive of this arrangement. Pissed B complains. Are we going to allocate the profits to the trust? Split decision: Majority follows Keech and say that duty of loyalty is an absolute one. Dissenting J: watering down the absolute standard to real sensible possibility of a conflict.   * Boardman – as solicitor for trustee, he is an agent for the trusts * Tom – hard to argue he is an agent – assumption in judgement that he will suffer the same faith as the solicitor * Court gave them a generous compensation for their huge amount of work. |
| **Canadian Aero Services v O’Malley** | Can Aero (subsidiary of a US company) in biz of geological photos. One of the directors started a competing company, Tera, and brought the president and vice president. They got a gov K that Can Aero had been working hard to get. Can Aero sued successfully.  Assess w/ respect to factors 🡪 end of absolute standard. |
| **Holder v Holder** | Trustee wanted to buy trust property, made intention known to everyone, and resigned as trustee – then bought the property. Beneficiary lost – Under the absolute standard T would not be able to buy the property  **Molchan v Omega Gas and Oil** – the majority approved Holder as Canadian law |

**There are 2 situations where a trustee must personally engage trust property: self-dealing rule & fair-dealing rules.**

**Self-Dealing Rule – BAD**

Trustee is both the seller & the purchases 🡪 this transaction is voidable @ complete discretion of the beneficiary

The self-dealing rule renders **voidable** any transaction where a trustee has purchased or used trust property for himself, or more commonly, a trustee has sold trust property held in his name to himself in his personal capacity without express authorization (transaction is voidable for any reason B chooses – i.e. voidable @ B’s complete discretion). The rationale for the rule is based on the difficulty of determining whether the trustee really served the interests of the beneficiaries well and secured the best price for them – an inevitable consequence given the structural conflict of interest (**Ex Parte Bennett**). It is a structural conflict b/c the T wants to buy from the trust at the lowest price or to sell personal assets to the trust at the highest price.

**Ex Parte Lacey** – a trustee, who is entrusted to sell and manage for others, undertakes in the same moment, in which he becomes a trustee, not to manage for the benefit and advantage of himself.

**Effect:** transfers to the trustee or nominee results in the survival of the trust until the property comes into the hands of a bona fide purchaser for value w/out notice.

**EXCEPTION –** self-dealing rule applies unless justified as in **Holder** – **courts should investigate the facts to determine whether there is a “real” conflict** – *in this case, there was no real conflict as the defendant’s renunciation was well known to all and effective – he also played no part in the negotiations and he paid a fair price* – Also, an inflexible rule prohibiting all transactions is unnecessary and could itself lead to injustice (approved by majority in **Molchan** as Canadian law)

* *In* ***Holder****, trustee only very technically trustee, and full disclosure made*

**Fair-Dealing Rules – OK**

Sale of equitable estate by the beneficiary (seller) to the trustee (buyer) – provided there is complete disclosure. This is less risky than self-dealing as the trustee is on one end of the transaction, and the beneficiary on the other. However, Courts have adhered to a certain approach that scrutinizes whether the trustee acts overbearing upon the beneficiary, fails to disclose, or does not enable independent legal advice (**explained in Denton**).

* **Denton v. Donner:** Transaction is not automatically void – but the burden of proof lies on the trustee to show that every possible security and advantage were given to the beneficiary, and that as much as possible was gained from the transaction as could have been gained under any circumstances.
* **Creighton v. Roman:** transaction voidable by B if it can be shown that trustee has not given full disclosure. If a beneficiary alleges a lack of fair dealing, the onus is on the trustee to show:

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

*Roman purchases mining claims – Creighton and Featherstone contribute as well – Roman uses Peacock as the trustee – Roman & Peacock tried to get a release from Creighton b/c he owed some money – C gave up an enormous interest for release of a small debt – court refused to accept on the basis that C was never properly informed about the enormous wealth attached to the shares being released (R & P knew the value, but did not advise C) – release took the form of fair dealing –* ***failure to give full disclosure*** *🡪 not binding on the seller*

**Effect:** complying w/ the fair-dealing rule puts an end to a trust relationship in respect of the affected trust assets if the trustee has purchased equitable title in them.

### 4) Duty of Impartiality

**Is there an exemption clause in the trust instrument? Does the settlor allow encroachment on capital for the benefit of life tenants?** Keep/sell/ can sell but power to postpone sale

Consider:

* Whether the assets produce an imbalance between equality of the life tenant and remainder?
* How this fits within typical clauses in an instrument that pertain to the rights of the trustee to sell or keep the original assets?

3 variables:

* Testator puts his mind to it specifically
* Nature of the assets & where the instrument is silent on the need to have equality
* There may be provisions in the trust instrument dealing w/ maintenance, keeping or converting trust assets – these prevail – if explicit, no problem – if not, to what extent can you make inferences from the very existence of the different forms these provisions may take.

T is obliged to ensure that each B should get what the trust confers on him. Where there is more than one B, this requirement implies a general duty of T to act impartially – i.e. in a manner that does not unduly prefer one class of successive beneficiary at the expense of another (life tenants (**income beneficiaries**) and the remainders (**capital beneficiaries**)). **The law presumes impartiality is what the testator or settlor wants, unless the settlor/testator in the instrument prescribes or permits partiality or impartiality between successive Bs in the instrument** – must be indicated in the instrument expressly or at a minimum by clear implication. Generally, the way in which you get returns from the assets describes which class it will go to (life tenant receives the income from the property leaving the capital asset for the remainder):

* Dividends: These are income and so prefer the life tenant
* Shares: These are capital and so the remainder is preferred

Unless the clause is put in, the fallback provision will require impartiality and this may be difficult because of the new forms of investments (where you look at total return of the portfolio, not individual assets). Uniform Trustee Act actually abolishes asset driven inequality as a factor that is encumbered on a trustee to correct (note: this is not in effect yet).

* Trustee has to juggle assets to make sure that equality is maintained. Why might testator want to vary? Trust has so many different assets that juxtaposing this duty and meeting the duty of being a prudent biz person doesn’t really wash – hard, unrealistic – so new Uniform Trustee Act wants to abolish

**Where can impartiality arise b/c of the mix of assets?**

**Usual causes of unequal treatment:**

**(1)** **The mix of original trust assets** transferred by the settlor as trust property, in and of itself, causes unequal treatment between classes of beneficiaries. A high yielding trust asset may be accompanied by a correspondingly greater risk that it will deplete or exhaust itself or seriously erode its value and so of the capital base of the trust fund. This, without adjustment, may well be good news to the life tenant (with obvious limits on the degree or quantum of risk exposure), but it may hurt the remainder beneficiaries;

* Examples: royalties in a book: when book is new max royalties – starts diminishing as the life and utility of the book diminishes – styles change – capital asset erodes – Q: should you sell royalty stream and invest money so life tenant gets a fair return, but at the same time preserves the capital base for the remainder 🡪 this is what the trustee has to do if burdened by duty of impartiality
* Small mine – lots of income at initial stage – overtime, will exhaust the mine, and little value left for remainder
* Reversionary interest in pav – but he dies – unequal treatment to pav’s wife b/c pav’s mom getting income 🡪 partiality b/c pav’s children will get the benefit and wife wont (or maybe will get a little) – solution: sell the reversionary interest; if pav’s mom is 95, then it would be worth quite a bit

**(2)** The mix of assets that the trustee has assembled under his investment powers may have inadvertently caused the unequal treatment of the successive beneficiaries;

**(3)** A return from assets that are rapidly exhausting or have become exhausted — both as to income and capital (for instance, a mine); or

**(4)** The trust property could be either capital or income depending on the transferor’s characterization (for instance, certain kinds of shares). A trust portfolio that unduly emphasizes one type of asset over another causes lopsided treatment of the successive beneficiaries.

Structure driven partiality – **Miles v Vince** – Levine Ja: “In my view prudent investment of assets of the Insurance Trust required the trustee to consider the interests of all the beneficiaries …”

* *Sister/trustee took proceeds from insurance policy and used it as a loan for the real estate trust (for the children). The terms of the loans were such that the income from the real estate side was not fair in terms of what was going into the insurance trust that she was administering for the widow – argument: trustee was acting unfairly – could be manipulating it to favour the children over the widow – did not meet standard of prudent biz person & duty of impartiality 🡪 removed*

**Under what circumstances must the trustee sell?**

**The Rule in** **Howe v Lord Dartmouth** (p.382) – follow strictly

The rule describes the circumstances in which a trustee’s duty to sell trust assets arises. It prescribes that:

**(1)** Where a testator/testatrix (this does not apply to inter vivos trusts b/c in theory, you can just ask the settlor what he intention was)

**(2)** leaves residuary

**(3)** personalty (doesn’t apply to realty or legacy)

**(4)** to persons by way of successionand (life tenant/remainder situation)

**(5)** the residue includes a wasting asset (including unauthorized or reversionary asset)

**then the trustee must:**

**(6)** sell the personalty that is a wasting asset (or unauthorized or reversionary asset),

**(7)** invest the proceeds in authorized investments, and (authorized means proper investment)

**(8)** use the income for the benefit of the life tenant beneficiary while the corpus of the fund is preserved for later use by the persons holding the remainder interest.

That is to say, ones that a prudent investor would invest in and which enable the trustee to meet his/her obligations of risk management and fair, impartial treatment of the successive beneficiaries so that there is income and capital growth. Put somewhat differently, these are investments that a prudent investor would regard as acceptable from a risk management point of view and which have yield and capital growth capabilities that enable the trustee to meet the obligation of impartiality between the successive classes of beneficiaries, *i.e*., life tenants on the one hand and remainder persons on the other.

**NOTES:**

* The rule is referable to wills – not to inter vivos settlements. Thus, if you are dealing with an inter vivos trust and you want impartiality, you must put it into the trust document (or imply it).
* **Wasting assets** are those that deteriorate over time to things that are worthless (e.g. mortgages, cars, ships, watches, copyrights, etc.).
* **Unauthorized investments** include assets that consist of speculative shares – say in a small gold mining operation.
* **A reversionary interest** is property in the trust estate in which possession (i.e. enjoyment of it) is not currently available (e.g. remainders in shares, insurance policy on another’s life, debts payable to testator in the future).

**If sold under Howe, then any income prior to sale must be apportioned!**

**Apportionment under Howe v Lord Dartmouth**

**Pending the sale** of a high yielding personalty (ex shares in a small gold mine) 4% (varies depending on the level of inflation) of the value of the personalty (income from degenerating base) goes to the life tenant, and the balance is ploughed into the trust fund to enhance the capital base (for investement in something that is more solid). Thus, while waiting for the sale of the asset that prefers the income beneficiary, a portion of the income goes into the capital base for the capital beneficiary. If it is underperforming, there is not enough income coming, then you wait until the property is sold and you will take some of the purchase price to make up the 4% for the years that have been lost.

**Additional consideration to this apportionment include:**

* 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 they are not sold within a year, the value is taken at the first anniversary of the testator’s death.
* If the duty to apply is in an *inter vivos* trust (because the testator expressly requires impartiality), the value of the trust assets are assessed at the date of the trust.
* If the income received pending sale is less than 4 per cent of the value of the property, the life tenant receives all of the income produced. If the income later exceeds 4 per cent, that difference is paid to the life tenant to make up the shortfall. 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 of the imperfect asset.

**Apportionment under Earl of Chesterfield**

* This applies to **reversionary assets** (e.g. future interest, life insurance policies, etc.) which don’t yield income for the life tenant.
* To apportion the income impartially, the asset must be sold. The life tenant must receive income from the interim period between the testator’s death and sale. The trustee must calculate the amount of income per year at a 4% rate that the life tenant would have received. That multi-year sum must go to the life tenant and the remainder is ploughed into the capital base.
* EX: Trustee sells the reversionary asset for $100k after 3 years after the death of the testator
  + Must figure out how much you would have had to invest 3 years ago, at 4% compounded, to get to the sale price of $100k 🡪 $94,000
  + Thus, 94k will be invested as trust property and the annual income from it given to the life tenant.
  + Life tenant will also receive the $6,000 for being out of pocket for 3 years prior to the actual sale.

#### Special Clauses – Testator’s Ability to Alter Partiality

Clauses that imply that settlor wants you to sell (impartiality) vs. imply to keep (partiality – duty to be impartial doesn’t exist)

**(A) Trust for Sale/ Trust to Convert Clauses** – implied impartiality

* Clauses that require the asset to be sold
* Trust = mandate 🡪 “trust for sale” means I must sell as trustee
* Where in the settlement there is a “trust for sale” of the assets in the trust or a “trust to convert” them, the testator is taken at face value to **imply a requirement of impartiality by the trustee** –unless specific, do not apply to real estate (**Lauer v Stekl**)
  + If it is realty, you are to assume that whatever comes in, it is for life tenant and whatever remains is for the remainder people. If it is to be sold, then it has to be specific in the trust instrument that it is to be sold.
* **so apply the combined rules of Howe and Chesterfield**
* **this is supportive of the fact that there is a requirement on the trustee to be impartial**

**(B) Clauses in Instrument Implying Partiality**

Clauses imply that the duty to be impartial no longer exist!

The intention not to require the exercise of impartiality by the trustee under the rule may be indicated in a number of ways:

1. **Express provisions** in the will that permit partiality of treatment of successive beneficiaries **excludes the rule in Howe v Dartmouth**

* Authorizing total discretion w/r/t assets indicates partiality – an indication that not too worried about issue of impartiality as the testetrix
* Express clauses that require trustee to retain property (“trust to retain”) – the effect is that actual income will go to life tenant, even if effect is deleterious on the remainder person
* If there is a clause that requires you “to maintain” authorized investments, then that tends to suggests that you must retain.

1. The testator’s intention to exclude the rules can be **implied form provisions** in the will that

* Direct the residue (after paying the debts and legacies of the deceased estate) of the assets of the trust be kept or “retained”
* Authorize the trustee to maintain unauthorized investments despite the duty of prudent investment; or
* Direct the life tenant beneficiary to receive income *in specie* (testator is effect saying I prefer the life tenant)

**(C) Express Trusts for Sale w/ Powers to Retain or Postpone**

**Power to retain**

* A power to retain may also imply an ability to enjoy *in specie*, but to a considerably lesser degree than a trust to retain
  + A trust to retain ordinarily implies an intention of partiality b/w beneficiaries
* If the power to retain is strong in terms of all the surrounding circumstances, you may say there is implied partiality
* If the dominant intention is the trust for sale, you must be impartial

**Power to postpone sale**

* Implies inevitable conversion
* A power to postpone, unaccompanied by a trust for sale, could imply an intention by the testator that the life-tenant beneficiary should enjoy the asset *in specie*, its current state, whatever its capital value and income yield.

**Need to determine testator’s dominant intention!!!**

* Is the provision a general empowerment to the trustee **to retain assets** if, as he appraises the situation, that is the appropriate course of action?
* An alternative interpretation is that the provision while **compelling ultimate sale** of the devised asset, is leaving decision of a propitious time in the discretion of the trustee to secure fairness by even-handed treatment of the classes of beneficiaries.

The clause for conversion can be characterized as primary and dominant, and arguable the power to postpone is not a power to postpone sale permanently.

**Lottman v Stanford** – page 387

*Express trust for sale with power to postpone was created – Testator left his estate (mainly real estate and $65k in personalty) to trustees for the benefit of his wife as life tenant and his four children in remainder. The trustees were required to sell “all of his personal estate” but were given a wide discretion to postpone conversion. All assets were sold except one parcel of land which had been leased to the testator’s son for some 20 years at a nominal rate. The widow sued (life tenant sued b/c the land generated very low income) & the children opposed.*

**Issue:** is there a requirement to sell the land?

**Analysis:** Lower courts argued that real estate should not be treated differently, and trustee should sell if imbalance – but SCC took a diff view. SCC followed the **Oliver** case and affirmed that **Howe** should not apply to real estate – old rule not abolished and it would require legislative change if it were to be change.

* Widow was not entitled to notional interest from the real estate and was limited to actual income (rent) generated from it

SCC also included that **Howe** did not apply to the personalty in this case. Testator left express provisions centering on use of the capital needed for medical or emergent expenses of the life tenant widow, thus **rebutting the impartiality presumption**.

**Conclusion:** Rule of HD did not apply

Summary:

* In a device of **real estate** in a trust for sale, until the sale of the piece of real estate actually occurs, the tenant for life is entitled to rents and profits *in specie*.
* In the case of **personalty**, the tenant for life does not get the income *in specie*, but is entitled to a sum representing interest at a fixed rate (4%) on the value of personalty.

Per **Lauer v Stekl**, **implication in a clause can give the trustee the rights to make a decision with regard to what to sell (including land) – THIS CASE IS NOT AN APPLICATION OF HOWE**

* *Court required sale of the real estate and this seemed to be the SCC contradicting itself – but if look @ the clause that is dealing w/ the power of the trustee w/ regards to sale, you will see that the clause itself gives the trustee powers to deal with this with regard to real estate and personalty – The court simply found that the wording of the clause for conversion implied a duty of impartiality to cover all the assets of the estate, including the real estate*

**Royal Trust v. Crawford** – page 390

*Testator left estate to his wife as life tenant and nephews/nieces in remainder. The will had a trust for sale with wide powers of postponement of conversion and retention. The bulk of the estate was shares in a stevedoring service company with few assets and high value in goodwill. Sale of the assets came into the trust as income – resulted in a huge dividend of approx. $450,000 was declared and paid to the widow, who argued that the payment was income and so belonged to her. This reduced the value of the company by 75%.*

**Issue:** whether the wide power to postpone the sale of the assets was such that you could infer any kind of limiting on that capacity? YES, the court came to the conclusion that this was such a hefty bite that it constituted a very severe imbalance for the life tenant and wanted the $450,00 to be more evenly distributed.

**Analysis:** Court stated that an intention of a testator that allegedly displaces the requirements of apportionment must be **clearly gauged** from the will and surrounding circumstances. In this case, while the testator wanted his wife to live in comfort, it was not what the testator wanted above all else. Court pointed to clauses that required conservation of capital as evidence showing this was not the testator’s dominant intention. Thus, the court ordered apportionment. **Where there is a direction to convert (that is, sell) and a power to retain, the real Q is: “Is the power to retain… a power to retain permanently, or only until the trustees can sell advantageously? If a power to retain is ancillary to a trust to convert “it is necessary to find some other indication to say that the life tenant is entitled to the income in specie.”**

**Conclusion:** Must be apportioned.

Dissenting judges: probs motivated by cultural reasons b/c wife LT & nieces/nephews remainder – construed a paragraph of the will as granting the wife “any surplus income”, that is, an *in specie* prerogative that, combined with the wide power of retention by the trustees, justified the trustee’s disposition of the assets to the widow in this case

**(D) Express Powers to Both Sell and Retain the Trust Assets**

A **trust for sale** usually signifies an implied duty on T to act impartial. A **power to sell**, however, does not necessarily prevent the operation of the rule in Howe.

**Re Smith**(page 391) – inter vivos – general principle to be impartial

*Husband/father left everything to son – but there was a precatory trust (i.e. a request) to actually take some of the shares and put in a trust for mom –* *son complied and gave mom a life estate, remainder to himself – mom only got an income of 2.5%, which she argued was far too little and that the duty to be impartial required sale of asset – son not happy & leaned on T who took his side*

**Analysis:** Trial judge found the trustee had administered partially in favour of the remainder person (the son), and the BCAA affirmed this. Found the trustee had erroneously construed the power to retain in the deed as a trust to retain, despite the advice of the widow’s lawyer that they merely had discretion to retain and a duty to be impartial. The trustee, instead, followed the advice of the remainder person’s lawyer who had drafted the document.

**Conclusion:** trustee’s power of sale was enough to trigger the duty of impartiality (interesting b/c this was inter vivos) – Trustee need to be impartial and get into something that gives a fairer outcome to the mother while preserving capital value for the son

**(e) Inferences of Impartiality Where Trust Assets are Settled Shares in a Company**

If T has ability to sell, then OK! But if T has to retain, they are unfair to the extent that the company can send revenue to trust as dividends or preferred shares. The problem is that this is not a choice that the trustee can make. Can the T do anything about this?

* + Dividends regarded as income = for the life tenant
    - A huge dividend can compromise the worth of a company
  + Preferred shares regarded as capital = for the remainder person

**Where trust assets consist of settled shares in a company and the trust instrument gives the trustee a power to retain them or requires retention as a duty, how is the trustee’s duty to be impartial towards successive beneficiaries affected?**

* This is made more complicated by the fact that the company will distribute income based on considerations pertinent to all shareholders, and not just the beneficiaries of the trust.
* A company can also distribute shares and not dividend income to its shareholders –**Should these be distributed as income? Or as capital?**

**Can T do anything?** NO – T has to take the financial return in the form in which it comes according to the maxim that “Form is substance” (this principle is reflected in Re Waters). In other words, how and in what form the company labels the recompense from these settled shares may determine whether, when held in the trustee’s hands, they are income for the life tenant or capital benefiting the remainders [look @ the label given by the company – if paid in capital (i.e. shares), then it will go to the remainder; and if income (i.e. dividends), it will go to the life tenant] (**Re Waters Estate**). However, per **Re Welsh**, where the intention of the testator, although not express (clearly, if it’s express, no problem), is so clearly against the form is substance rule that the trustee doesn’t have to follow it. And, where the children of a deceased are the claimants, the courts quite naturally will lean in their favor and prepare their claim over competing claims by children who are effectively strangers to the deceased – form will understandable not triumph over that substance!

**Re Waters Estate** – page 392

**Facts:** Distribution of income from settled shares was through the issuance of additional shares (for income tax reasons). Shares are capital and thus helps the remainder person. No income is given in the form of dividends at the time of the issuing of shares.

**Issue:** Should there be impartiality?

**Analysis:** If the company utilizes a capital form, the characteristic of the income coming in takes that form - **Form is substance**: if the form is capital, it comes in as capital and thus in substance is for the benefit of the remainder.

**Conclusion:** No impartiality

**Re Welsh** (page 393) – court’s inference of the testator’s actual intention overrode the “form is substance” rule and resulted in the dividend actually being treated as the capital substance that it is.

**Facts:** Settled shares in the deceased’s estate were shares in a company. He and his first wife had 2 children, and his second wife already had children. When the T died the second wife remarried to a third husband. There were thus 2 of the settlor’s blood children, a third husband, and the second wife’s children in contention for the income.

The testator’s will placed settled shares in the trust – the wife was the LT and the children by his first wife were the remainders. The Capital assets were sold & distributed as tax-free dividends & paid to the trust over 6 yr (substance follows form, and thus it is all income per the rule). The wife dies, and her children (not the testator’s) and husband say the income should go to her and not the testator’s blood children.

**Analysis:** Court found that the fact that the assets left the company as income did not mean that they retained that same character once it became part of the estate. Had those monies continued their status as income from shares it would have resulted in an outcome completely at odds with the testator’s intention to care for his widow during her lifetime, and then pass on the capital to his children. In light of the circumstances, the judge held that although the sum in respect of the settled shares may have left the company as income, it was to be characterized as capital.

* The will only makes **social & cultural** sense by regarding the release of funds as capital, and so qualifying as a remainder interest to be shared by the testator’s children.
* Can you really say testator favored 2nd wife’s husband over his own kids? There is nothing in the instrument, but culturally there is a strong possibility that he did not.
* Main and only asset

**Conclusion:** Income should be characterized as capital and given to the blood children

### 5) Duty to Apportion Debts and Other Disbursements

PAV didn’t cover in class.

trustee administration includes the payment of estate debts and disburmnets – “outing” for the estate.

Rule developed in **Alheusen v Wittle** (abolished in section 144 of WESA)

**Section 144 of WESA:** unless the testator requires otherwise, income is not available in isolation for payment of debts. Payments are to be made out of capital – Unless the capital is insufficient to meet the estate’s liabilities, trustees are not to be regarded as having to apply any income of the estate to the payment of debts. Thus, the life tenant takes all of the income arising after the testator’s death.

### (6) Duty to Provide Information

**Abbott v Cross Estate** BCSC case (p.397) – court won’t allow fishing expeditions by Bs.

It’s a **hazard** to provide too much information and it’s **particularly hazardous** to provide information to **discretionary beneficiaries**. It’s part of the trustee’s job to make decisions and not be encumbered in decision making by having to respond to all these beneficiaries.

Unless asked, T need not volunteer info. However, upon reaching the age of majority, B is entitled to seek an obtain info concerning the nature of his equitable interest. **A beneficiary is not entitled to access all information pertaining to a trust.**

Per **In re Londonderry’s Settlements,** as a general rule is that beneficiaries are not entitled to know the reasons indicating why trustees have arrived at a particular decision – There is no duty to disclose a trustee’s agenda, correspondence between Ts, T and B, or minutes of trust meetings. The reason is that if the decision had to be disclosed, no one would want to be a trustee. However, if trustees are acting in bad faith the obligation to disclose can be enforced by court order.

* *B had an interest in the distribution of income among a class of discretionary beneficiaries – B sought to examine the agenda of minutes of the meeting during which the discretion had been exercised – A beneficiary is not entitled to documents covering the trustee’s* ***exercise of a discretionary power*** *of beneficiary selection*
* Pav: Ts can operate more efficiently if this stuff is not freely admissible – court will order disclosure if it suspects that T is acting in bad faith

Modern case: **Schmidt v Rosewood Trust:** If the B has a compelling and strong case as to why disclosure is necessary (i.e. B is a strong/substantive B), then disclosure may be granted (this is part of the court’s inherent jurisdiction, and not a proprietary right – i.e. the B has no entitlement to get disclosed info)

* *Schmidt was a discretionary B, but he was instrumental to pitting the trust together.*
* Balance the B’s need with the need for confidentiality of the corporation

**Disclosure of Legal Opinion:** generally, are not disclosable to Bs – unless it is clearly information about the Bs and their rights. Won’t be disclosed if an opinion shining light on breach of trust by T – that’s opinion for the personal affairs of the trustee – and that’s protected by client-solicitor privilege.

* EX: seeking a direction on how to proceed based on a construction of a provision in the trust as opposed to T’s breach of trust - but per **Froese v. Montreal Trust Co**, it is not an absolute rule

### (7) Duty to Account

As part of his duty of proper administration, T is obliged to account for the trust assets and the B has a right to inspect these records! Per **Sandford v Porter***,* Beneficiaries are entitled to inspect accounts, but are not entitled to an instantaneous response – T’s duty is to make the accounts available for inspection & examination

* If B lives in a remote area, there might be an obligation to post copies

**Section 99 of Trustee Act** – Trustee has 2 years from the date of appointment to file accounts

## Trustee’s Rights

### (1) Right to Remuneration

Duty of remuneration did not exist @ CL – which meant that had to be set out in the instrument, but this has changed w/ s. 88!

In BC, **section 88** **of the Trustee Act allows remuneration of the trustee**:

**(1)** Trustees are allowed **expenses** **plus** a fair and **reasonable allowance** not exceeding 5% of the gross aggregate value of all the assets for their **“care, pains, and trouble”** and administration

* This is like a one-time fee
* Has to be approved by the court

**(2)** judge of Supreme Court of BC (or registrar through delegation) determine remunerative amount

**(3)** **In addition,** trustees can apply for an annual **“care and management fee”** that doesn’t exceed 0.4% of the average market value of the assets

* This payment takes into account the level of skill required to manage the assets
* You probably can’t get it every year but you can get it every so often. This has to be approved by the court – usually the Master.
* Can do this periodically

It is better to deal w/ the remuneration of the trustee in the trust instrument as a so-called “charging clause”. Remuneration can also be arranged in a K w/ sui juris Bs – although such arrangements are not advisable b/c they are vulnerable to an “undue influence” attack.

NOTE: remuneration of trustees forms a lien on the trust

**What is “care and management”?  
Re Sproule Estate:** it is the responsibility of reasonable supervision and vigilance over the preservation or disposition of assets. Also the responsibility of judgment and decision making in the affairs of an estate to resolve problems from time to time arising over and above the usual and regular procedures attendant upon administration.

* The court expressed a preference for lump sum remuneration and opined that the use of percentages would require special reasons.
* *Large asset: single asset w/ bunch of shares – Ts wanted a care & management $, but Bs were like all you are doing is holding on to these shares, which are preforming well – T argued that they actually spent a fair bit of time – shares are bulky and inherently risky, so we have to meet and discuss often – court agreed*

The court in **Re Sproule Estate** endorsed the following as guidelines in helping to set remuneration:

* The magnitude of the trust (particularly its value and complexity – such as a farm, portfolio of investment, realty or running a business)
* Level of care and responsibility arising from it
* The time occupied in performing the duties
* The skill and ability displayed, and
* The **success** that has attended the Trustee’s administration of the trust assets

**Re Pedlar Estate**Relevant factors in determining the “care and management fee”

* Value of the estate assets administered
* The nature of the assets administered
* The degree of responsibility imposed upon the trustee by the terms of the will or other instrument, including length/duration of the trust
* Time expended by the trustee in the care and management of the estate
* The degree of ability exhibited by the trustee in the care and management of the estate
* Success/failure of the trustee in the care and management of the estate
* The rendering of some extraordinary service in the care and management of the estate
* Pav didn’t talk about this

Section 85 of the BC state – trustee’s legal fees

### (2) Right to be Indemnified

As legal owner, the trustee may be liable for trust debts incurred for the trust, but in equity the beneficiary ultimately shoulders them. Thus, trustees are entitled to an indemnity for all debts they incur in executing the trust. They therefore have a claim against the funds of the trust to meet any contractual obligations they incur in administering the trust terms, or against the beneficiaries personally. Indemnity is afforded to all trustees under **s. 95 of Trustee Act**. However, this rule that the trustee should be indemnified is modified only if there is a good reason why the trustee, as legal owner, should personally bear the burdens incurred in carrying out their duties (where T is in part @ fault)

* Inability to recover from all Bs is part of T’s administration – ex. assets divided into all Bs – only 1 out of 5 sui juris – can’t claim against non-sui juris – can you claim all from sui juris B? nope – this is unfair – T should not have divided the trust into that form
* **Hardoon v Belilios**– EX: trustee dividing the trust into several smaller trusts in favour of several beneficiaries, only one of whom is *sui juris*
  + Here, it would be unfair to cast all the costs of each division on to a single *sui juris* B as the non-sui juris cannot be expected to indemnify the T
* **Re Reid**– an illustration of the need to indemnify trustee
  + *T paid UK tax – BC B unsuccessfully relied on Harden and argued T should not have paid b/c he couldn’t be made liable – court: T did what he was legally required to do in that jurisdiction and B has to indemnify*
* **USA v. Harden** – a foreign state is precluded from suing in this country for taxes due under the law of the foreign state. Per **Re Reid**, this rule applies only to any actual attempt by a foreign state (As a plaintiff) to extend its “sovereign authority” in BC.

## Powers of Trustees

Has powers that any owner of property has! Sources:

* Trust instrument
* Common law – bad faith
* *Trustee Act*

Note: *Fox v Fox Estate* – page 404

Administrative Powers

* Trust for sale – carries power of manner of sale – ss5 & 6
* Appointment of solicitors & bankers – s. 7
* Use of insurance – s. 8
* Compound debts – s 23
* Expenditures for repairs and improvements – s 11
* Investment agents – ss. 15.5 & 22
* **Maintenance** of persons (p.407)

## Control of Trustees

**Who can police the trustee’s duties? To what extent can trustee discretion be controlled?**

Settlor falls out of the pic (thus can’t control T) – unless made himself a trusts

### Control by Beneficiaries

Beneficiaries who are sui juris can call for the trust (under the **Saunders v Vautier**) and that gives them a large measure of control over trustees. They can also combine with trustees to amend or redraft the terms of settlement.

**Appointment of Ts:** The **Re Brockbank**decision affirms that the trustee’s power to appoint trustees cannot be controlled by beneficiaries: “the court itself regards such a power as deserving of the greatest respect and as one with which it will not interfere”.

* Courts will reinforce the discretion settlor has given T – unless T acting in bad faith
* *There were two trustees with power to appoint a professional trustee. One of the trustees wished to retire and the beneficiaries insisted that a bank should take their place. The trustees resisted and argued that they had full powers over trustee retirement, removal, and appointment 🡪 T’s call & can’t compel it; if don’t like it, end the trust!*

**Ts Directors:** per **Butt v Kelson**, Bs have the same rights as other SHs, not more – Bs can’t get ahead of other SHs by compelling Ts to disclose info about the company (not the trust) by virtue of that fact that the shares in the trust have enabled T to become directors of company. BUT they can compel trustees to vote the shares as directed or even to change the articles of the company.

* *Butt: Bs demanded to see all the documents & lost!*
* There seems to be a shift in BC in **Re Martin Estate** which said the better way to construe **Butt** is to say we need to **balance the interests** of all stakeholders when dealing with issues of info disclosure.
  + If the information isn’t deleterious to the other shareholders, but it makes sense for the other Bs to know b/c it’s unique to them, then don’t shut it down b/c of Butt – more nuanced approach to issue of info is emerging – also emphasized by a more modern case **Konig v Hobza**
  + Where the corporation has minority stakeholders unassociated with the trust (as in Butt) the B’s request for complete disclosure is more likely to be rejected

### Control by the Court

#### Advice and Opinion from the Court

The courts tend to support the opinions of the trustees because that’s their job and they’ve been selected by the testator (recognizing what they do is something court wants to do). Under **s. 86 of Trustee Act**, the trustees can apply to court in chambers for opinion, advice, or a direction on a **Q of management and administration** of the trust property. **s. 87** **of Trustee Act**, absolves trustees of responsibility where they are acting under court authority, except in abuse of process.

* The immunity does not indemnify a trustee who is guilty of fraud, willful concealment or misrepresentation by obtaining such opinion, advice or direction.

**Are they in an absolute deadlock?**

**B going to court:** Courts do not want to be overburdened with requests for advice, especially where there is stalemate in decision-making among Ts. The leading case on this issue is **Tempest v Lord Camoys***,* where the court acknowledged that the court cannot force the trustee who is refusing consent to take the view that is proper to mortgage the estate in this way. The court will not enforce a decision in a legitimate exercise of discretion.

* *Settlor devised realty to two trustees with a power of sale. The beneficiaries wanted to mortgage the realty and use the proceeds and the sale of another property to purchase “Bracewell Hall” which had been a family home between the reign of Henry I. One trustee approved but the other trustee refused his consent.*

**T going to court:** will probs go when can’t reach unanimity & feels that issue is one that will expose them to breach of trust (Re Write an example).

Furthermore, the court in **Re Wright**, refused to intervene as well, asserting that trustees given discretion should exercise it as they see fit w/out interference. Only in the event of real and **absolute deadlock** will the court intervene. For instance, in a trust with powers to sell and retain where three want to sell and three retain. *Here, there was simply a disagreement on the adequacy of the price (not in a deadlock situation, just in a deadlock w/ respect to this particular sale).* In contrast, in **Re Billes**, the court did intervene b/c there was a serious deadlock between the Ts (p.411). Deadlocked trustees may wish to scour the view of the beneficiaries, though that is not a guarantee of success as they too may be deadlocked.

**Kordyban v Kordyban:** In deciding whether to step in or not, the court gives a lot of value to the settlor’s likely views one the matter, and will give a response when “just & equitable” to do so.

1. the court should step into the shoes of the settlor/testator and surmise what he would have done on the basis of the discernible objectives in the trust document
2. advanced the more general criterion of acting in furtherance of what would be just and equitable

The courts defer to choice of trustee and respect for his assessment of trustee qualifications and this may be a factor too in which a court refuses to control a trustee: **Louis Winkler Alter Ego Trust No 3 v Winkler Estate***.*

#### Intervention where trustee acts outside trust objectives

**Schipper v Gauranty Trust** – Court will “interfere where the trustee is attempting to exercise its discretion to achieve a purpose not intended under the terms of the trust”

#### Failure to be Even Handed

**Re Fleming** – Court will intervene where the distribution of income/capital is unfair or has potential to be unfair

#### Ousting Court’s Jurisdiction

Attempts by settlors/testators to oust court jurisdiction using trust terms that will state that the **T is empowered to make exclusively “binding and conclusive” decisions** will be treated by the courts as invalid due to being contrary to public policy.

|  |  |
| --- | --- |
| **In re Wynn** | * Testator purported to give Ts power to make decisions in acts and proceedings that “shall be **conclusive and binding** upon all persons interested under this will” 🡪 invalid & contrary to PP * Courts have an inherent power “to construe and control the construction and administration of the testator’s will and estate” |
| **Re Tuck’s Settlement** | CAN give a power to adjudicate exclusively to a T in relation to matters of fact, not law. ARBITRATOR  Religious condition – Upheld clause where “the Chief Rabbi of London” was empowered to determine exclusively whether an “approved wife” met the condition set out by the testator. Note that court retains control where rabbi has misconducted.   * One way to strike religious conditions is – what is a catholic? Someone who goes to church once a yr? |
| **Boe v. Alexander** | *Clause no good*  A privative clause will be ineffectual to prevent judicial review where the trustees have acted dishonestly or failed to:   * Exercise a discretion at all * Exercise a level of prudence expected from a reasonable businessperson * Act impartially between classes of beneficiary or prejudicial manner w/r/t their interest |
| **Re Poche** | **Exculpatory clauses** contained in an instrument won’t protect the T in cases where he has been dishonest, in willful breach of trust, or grossly negligent – *in this case T was found to be grossly negligent & removed* |
| **Jones** | There can’t be a clause in a settlement that precludes a B from entitlement to an accounting by the T. |

# Constructive Trusts

Constructive trust was first judicially recognized in **Cook v Fountain** where it was established that a constructive trust **arises by operation of law** whenever the court concludes it would be unconscionable for the owner of property to assert equitable as well as legal title to it.

* Really used as a remedy
* Ex. Thomas has a house – Pav lives w/ him & does lots of work in the house & Thomas is a doc and takes advantage of Pav – OR Pav is a doc & drugs Thomas and manipulates him to transfer the house to him
* Court will intervene and say claimant has equitable title – if claimant always had equitable title, then capture legal title (Rule in Saunders)
* **Is a fiduciary duty owed by the D who has legal title?**
* **Remedial propriety relief in situations where there is no FD obligation** – unjust enrichment situations – not truly a trust b/c it does not emerge out of a fiduciary relationship

La Forest J in **Lac Minerals** sets out where the constructive trust happens. 3 broad categories where a fiduciary relationship arises (p.443):

1. relationship is presumed in certain classes of relationships, such as: solicitors-clients, agent/principal, child/parent, trustee-beneficiary – these are *per se* fiduciary categories

* Corona did not fall into one of these categories nor did the judges seek to extend the category

1. a fiduciary relationship can arise as a matter of fact out of the specific circumstances of the relationship (ad hoc) even when normally it would not be expected to arise – *Guerin*. The hallmark characteristics of specific circumstance fiduciaries are: ascendency, influence, confidence, trust, or dependence. Where they give rise to a situation of fiduciary expectation – that is, a reliance that a person’s affairs are aligned with protection or advancement of that person’s interests – then the presence of these factors will implicate one party in the affairs of the other, to the point the first should protect or advance the latter’s interest.

* Lac was implicated under this category

1. where this would be **instrumental** or facilitative in achieving an appropriate result, it will arise in circumstances as a device where you are reading equity backwards.

* we’re going to read the constructive trust as a remedy in cases where there is unjust enrichment – where we have declared there’s a case of unjust enrichment, even where there was no commencing fiduciary relationship, we are saying that for policy reasons/reasons of justice, the claimant should be entitled to the defendant’s property. When we make that declaration, we are in fact reading equity backwards. Because once we make the declaration, there is a trust relationship between the winning plaintiff and the losing defendant. But prior to that declaration, there may not be that kind of fiduciary relationship. Whereas in ad hoc and per se fiduciary relationships, there IS a fiduciary relationship – as soon as that situation happens, that relationship exists (ex. as soon as become solicitor).
* Used to facilitate a result (i.e. an equitable interest)

## “Institutional” Fiduciaries

For institutional CT, the relationship is such that it’s almost automatic (i.e. court will give) for the P to get a constructive trust b/c of the pre-existing fiduciary relationship. There are two types: *per se* fiduciaries; *ad hoc* fiduciaries

Applies to fiduciaries as a form of equitable relief and to unjust enrichment as restitutionary relief.

### *Per Se* Fiduciaries

**Does the relationship fall w/in one of the per se fiduciary sub-categories?**

List of situations where institutional constructive trusts would be imposed include:

* **disloyal trustees** and their breach of trust
  + **Boardman:** remedy = sharing of profits
  + **Keech v Sandford case:** remedy was constructive trust
  + Self-dealing; profiting from a conflict of interest
* faithless **directors and senior officers** of companies who exploit corporate opportunities from knowledge gained on a board for their personal gain (**Canaero**)
* the delinquent agents in **principal-agent relationships**
  + common law relationship
  + trust will come to rescue of principal who has been abused by agent – will put a constructive trust on agent’s property to give principal in rem remedy in respect to those assets – but make sure there is an agency relationship – simply consulting one does not constitute an agency relationship
* miscreant **solicitors** who have wronged their clients
* overreaching **partners** – commercial partners
* bribers and other similarly **corrupt officials**
* **undue influencers**
* breach of confidence **tricksters**
* intermeddlers in trusts (*e.g*., **trustees *de son tort***)
* persons who knowingly receive trust property
* a doctor who has obtained title to property from unduly influencing a patient
* The hallmark feature, common to all of these instances, is that the wrongdoer is inherently in a fiduciary relationship and has breached his duty of outmost good faith

**Note:** Non Delinquent Fiduciaries (where no wrong has been done)

* vendor’s holding of shares sold and awaiting registration: constructive trustee for buyer
* vendor-purchaser relationship in sales of property – purchaser gets equitable interest in property effective from the date of sale – as equitable owner, purchaser nears the loss to the property for the losses causes by “acts of god” – if seller causes damage, then he is held responsible for the loss (**Rich v Krause:** *purchaser made monthly payment; seller disappeared;* ***held:*** *seller held legal title to land as trustee for purchaser; based on the equitable maxim that the court will give effect to what the parties intended – purchaser could call for legal title as this is the intended outcome of a completed sale*).

Constructive trust may also assist an injured party:

* informal mortgage by deposit of title deeds
* unwritten long lease w/ actual occupation having been granted rent free
* unwritten sale of land has only partly been performed

**Mayo v Leitovski:** *Life tenant mother failed to pay taxes on a small holding property she held. Daughter and son-in-law purchased the property at the tax sale, then transferred the EIFS to their mother. Effect of the sale was to eliminate financial encumbrances, such as the remainder in P. Mother now seemingly owned the same property to which she previously had enjoyed only a life estate.* ***Constructive trust placed on the EIFS of mother for remainder P.***

Based on the facts provided, it seems that none of the per se fiduciary sub-categories are available for X. But, one could argue that Y, in the circumstances of this case. Was an ad hoc fiduciary?

### *Ad Hoc* Fiduciaries

One-off situations in which there are no overt, agreed-upon duties explicitly or impliedly agreed to by the defendant, but one which has arisen b/c of special, somewhat unique circumstances.

**If not a recognized fiduciary relationship – can you establish a dependence by the claimant on the defendant** (person w/ legal title in property) **such that a fiduciary relationship exists? What in a relationship triggers a fiduciary duty? Is there an arrangement w/ a vulnerable group?**

Per **Guerin v. The Queen**, it is the **nature of the relationship**, not the specific category of actor involved that gives rise to the fiduciary duty – category of fiduciary is not closed. The hallmark of a fiduciary relation is that the relative legal positions are such **that one party is at the mercy of the other’s discretion** (Prof E Weinrib endorsed in Guerin).

* *Gov ripped off the first nations and leased the golf course at a cheap price – golf club: BFPFV w/out notice; Ps got equitable damages instead of proprietary remedy; damages are calculated by being fully restorative of position before the breach – meant no golf course, thus leaving open the fact that land could be used for residential development even though @ the time lease agreement entered to that was not a viable solution*.
* Category of fiduciary is not closed to institutional precedents – what is common to the pre se fiduciaries. The court adopts def by Prof E.

In other words, **a relationship where the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.**

In **Frame v. Smith**, Wilson J in a dissenting judgment (now part of mainstream law) proposed a three-step inquiry to determine whether a fiduciary relationship has been established:

1. fiduciary has scope for the exercise of some discretion or power
2. fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests
3. **beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power**

**(CONSTRAINT ON AD HOC)** **Galambos v. Perez** (2009), Cromwell J. elaborated on how courts should classify a fiduciary: “The fiduciary’s undertaking may be the result of the **exercise of statutory powers**, the **express or implied terms of an agreement** or simply **an undertaking** to act in this way…The critical point is that in both per se and ad hoc fiduciaries, there will be **some undertaking on the part of the fiduciary to act with loyalty.**” Also, vulnerability alone not enough – must also show some indication of an undertaking of loyalty: “the fiduciary undertakes to act in the interests of the other party.”

* The duty of loyalty will not arise where D lacks discretionary power to affect the other party’s legal or important practical interests.
* This case is an example of an unsuccessful CT
* *P, bookkeeper, made voluntary cash advances to G (who never asked for it and had no idea until after the transaction). G went bankrupt and P sued for breach of FD (reason for wanting a trust: in rem rights – she wants to be a preferred creditor for $ owed to her) // P argues CT // H: there is general dependency as an EE, but P was not vulnerable in terms of her relationship w/ G – P did everything voluntary. She probs had more knowledge than he did of the perilous estate of the firm’s finances.*
* This is why vulnerability has become key b/c it is easy to find dependency.

**(CRITERIA)** Per McLachlin CJ in **Alberta v Elder Advocates** (2011),for an ad hoc fiduciary duty to arise, the **claimant must show**, in addition to the vulnerability arising from the relationship:

**(1)** an **undertaking by the alleged fiduciary** to act in the best interests of the alleged beneficiary or beneficiaries; (this was missing in *Galambos*)

**(2)** a defined person or class of persons **vulnerable** to a fiduciary’s control (the beneficiary or beneficiaries); and

**(3)** a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary’s exercise of discretion or control.

**What are the limits? If reliant & dependent, @ what point is the injured party entitled to proprietary interest?**

**Trust and confidence in contractual negotiations:** **Lac Minerals v. Corona Resources:**

* *Corona shared info about a claim over the “Williams land” w/ Lac Minerals – LM unilaterally bought the property – majority imposed the remedial CT on the William’s land, giving C a proprietary remedy on the Williams land – disclosure of confidential info*
  + *Act of Lac was tortious, but C was not satisfied w/ damages – wanted the property – to get title have to bring it to a constructive trust*
  + *Did Lac owe fiduciary duty to C?*
  + *Policy Issue: sophisticated; if want something beyond CL, why not make it a condition prior to the negotiations? Other side, why would you have to include it? When negotiating, you don’t disclose everything (ex. selling your lemon car).*
* **McIntyre & Sopinka:** CT can only be applied where there is a dependency/reliance such that there truly is vulnerability by P on D. *Here, vulnerability was absent –* *although Corona was smaller, it was very commercially sophisticated. The misuse of confidential information does not create a wrongful act based on breach of a fiduciary. Rather, it is a wrongful act as breach of the duty of confidentiality in the law of tort.*
  + Policy concern that extreme caution is needed when tinkering @ institutions that impact the centrality of free negotiations in commercial transactions (p.422)
* **La Forest J & Wilson:** reliance & dependency by one party on another can support a finding of a fiduciary relationship (don’t need vulnerability). *Lac had acquired knowledge about the rich mineral qualities of the Williams lands during negotiations which, under a trade practice that it was aware of, obliged Lac not to take advantage of this information.*
  + Preservation of desired social behavior and institutions – ex. bargaining in good faith
* **Lamer** (swing vote): agrees with Sopinka and McIntyre that vulnerability lies at the heart of the fiduciary relationship – vulnerability is an essential ingredient, in addition to reliance and dependence. However, he also agrees with La Forest & Wilson – and votes with them on the remedy.
* Lost on the law, but won on the remedy
* **Look @ degree of vulnerability**

**Professional adviser: Hodgkinson v. Simms:**establishment of a fiduciary is not confined to situations of vulnerability. The existence of a fiduciary duty in a given case will depend upon **the reasonable expectations of the parties**, and these in turn depend on factors such as trust, confidence, complexity of subject matter, community and industry standard.

* Contractual relationships of the “professional advisor type” can become a fiduciary relationship when tainted by self-interest. In this category, test in not confined to just vulnerability – also look at nature of party’s reasonable expectation
* *Bought condos which allowed him to write-off income from biz as stock broker against losses b/c of rapid depreciation rules on the condos. Accountant failed to disclose that he held an interest in the tax avoidance scheme he set up for H (developer was paying). Court said good advice // Holding: H vulnerable b/c of his reliance on S for advice – breach of duty of good faith. Failure to disclose resulted in a CT – CT as a remedy not available b/c he already owns the condos – entitled to equitable damages (far and in excess of breach of K – these were appropriate condos, so no loss in K) // Dissent: his loss had nothing to do w/ the accountant – it was a result of the market collapse.*

**Unilateral undertaking by a parent:** **M.(K.) v. M.(H.):** A fiduciary relationship can arise on the basis of a unilateral undertaking that a parent owes to its child – **fiduciaries are NOT confined to economic interests.**

* *Seeking an exemption from a limitation period – can get if can characterize the relationship as trust as opposed to a tort // Incest between father and daughter*; *Father is arguing that it’s out of time // H: this is a constructive trust; there is a F duty by a parent to its child (dependent/vulnerable)*

**Statutory:** **Sun Indalex Finance v United Steelworkers** demonstrates that a statue may form the basis of an ad hoc FD*.*

* *Company going bankrupt looking for relief – trying to use CCAA provisions that allow restructuring, which allow borrowing $ – $ gets priority over general creditors // Why should this be superior to a claim by the EEs for pension rights? // trustee in bankruptcy may get priority for $ to borrow, but EEs by virtue of their vulnerability get a CT //* ***Pav: principle – CT should operate in these circumstances***
* *FD arose through its functions detailed in the provisions of the Pension Plan Benefits Act, which sets out care diligence skill requirements and no conflict of interest/duty of loyalty. Held: CT not an appropriate remedy in this case – b/c incompatible w/ CBCA – emphasized that the decision whether to impose a construction trust is w/in the discretion of the Court.*

Situations

* Negotiations & disclosures in bargaining in special relationships such as joint ventures – *Lac Minerals*
* Crown acting in reserve land for indigenous peoples – *Guerin*
* Parents and children in situations of abuse – *M(K) v M(H)*
* Professional advisors preferring a special skill – *Hodgkinson*
* Companies & employees in a pension plan – *Sun Indalex*

## “Remedial” CT

* **CT as a proprietary remedy in cases of unjust enrichment**
* CT may be used remedially as a device to correct an unjust situation of property title and where a fiduciary relationship may not prevail. Once court declares a CT, D will have attached to his to his holding of the property fiduciary obligations towards the successful claimant in respect of the management and dealings w/ that property.
* Property acquired through the pursuit of one’s own advantage, but @ the unfair expense of another.
* Examples: Cohabitation outside marriage (not a big issue anymore b/c under FLA courts have jurisdiction to settle property claims); children looking after relatives in their old age

**(TEST) Pettkus v Becker:** Test to prove unjust enrichment to get a constructive trust

1. There must be an **enrichment by the defendant**
2. A corresponding **deprivation by the plaintiff, and**
3. **Absence of any juristic reason** explaining or justifying the enrichment – need for a “**causal connection”** between acts of plaintiff and the property over which CT is sought // **is there a juristic reason for D to retain complete title in disputed assets alleged by** **claimant to constitute an unjust enrichment?**

🡪 X will be entitled to a CT if she can show a causal connection (i.e. a sufficiently substantial and direct link) between her contributions (financial or in kind) and the farms assets, legal title to which reside in Y’2 nam3.

**Consider:**

* 1) Nature of the type of property for which the claim is made – not all property is going to be subject to a CT – see **Tracy case** regarding unlawful finance charges – Newbury JA doubts that it would qualify as unjust enrichment.
* 2) Claimant’s **degree of involvement** in the acquisition or preservation of the property (**Kerr v Baranow**). How direct much the claimant’s attachment be?
  + **To show degree of involvement: if new asset** – that her involvement in acquiring the asset is substantial; **if existing asset** – she paid mortgage, or she worked in the house and as a result of that, his money was used to purchase the house
  + Relationship between P and D need not be a direct one before their relationship to the property in question may be subject to considerations of unjust enrichment – ex. indirect purchases (p.457, footnote 110)
  + **Haigh v Kent:** *joint commercial venture between 2 partners – the fact that one had no expectation in owning the land in question was not significant. What mattered was that the claimant had made substantial and direct contributions to the land that had significantly improved its value.*
* 3) Scope of “juristic reason”
* **Kerr v Baranow:** Cromwell J. set out a two-step analysis when deliberating in the category of “juristic reason”:

1. gifts or benefits proceeding from a **legal obligation** such as a contract between the parties. If that investigation proves inconclusive to determine the presence or absence of juristic reason to explain title of the assets in the D’s name, the court can proceed to step 2.
   * In *Pettkus v Becker,* had Ms. P entered into a K – that would be a juristic reason for Mr. B acquiring the property – simply saying what’s mine is mine and what’s yours is also mine doesn’t cut it – do the parties have a common intention?
2. review whether the facts of the case disclose **reasonable expectations** by the parties to share the assets guided by “policy considerations” that may point to the enrichment as being an unjust one. He would accord a limited role to an analysis based on “reasonable or legitimate expectations”.

* *Here court investigates the fact that there is an unclear reason why title in D’s name especially as there is reasonable expectations – encouraged by policy – to share the assets.*

If this circumstance is held to be unjust, CT, as a facilitative mechanism, will be used to remedy the injustice b/c the property is in the name of the D, but in actual fact, was acquired by the D at P’s expense and that is unconscionable.

**Vanesse v Seguin:** assessment of compensation where a claim for unjust enrichment is valid, and where the constructive trust would be inappropriate.

* Court introduces another idea for calculating value – **value that has survived the relationship** – damages may be assessed on the value of claimant’s contributions during the relationship that have survived. Court assesses this by looking @ the joint effort of the parties in the accumulation of wealth during the relationship and assigning a proportion
* Cromwell J noted that claims for unjust enrichment are not confined to domestic claims.

|  |  |
| --- | --- |
| **Pettkus v Becker** | 2 immigrants found each other & lived together. They both worked very hard and secured assets (including bee farms, chattels and home). From the perspective of good conscience, is it appropriate for 1 party to be entitled to all the property though they both worked really hard?   * Couldn’t argue fiduciary relationship b/c guy made it clear that he was not going to share what was his. * There was an absence of a juristic reason 🡪 P won, but it was very hard for her to realize on title – committed suicide |
| **Kerr v Baranow** | **Degree of involvement IMPORTANT!**  Relationship ended after 25yrs & K claimed a share of property in B’s name based on principles of unjust enrichment.  Court denied K’s claim because she was severely physically disabled at all material times and had not made “in any meaningful sense of the word” an equitable contribution to the acquisition or improvement of the realty registered in B’s name. |
| **Vanesse v Seguin** | They were both professionals & because they had kids, she dropped her job to look after the kids and in the meantime, he’s made a lot of money at work because of an invention. She goes back to work and they separate. It’s hard to pinpoint assets to which she can get a claim because most of the assets are in his name. However, if you look at the assets – there is an imbalance. The court therefore introduces a different idea – the **value that has survived the relationship.** They come in together and they had nothing and when they separate, they have substantial assets. The question is: what was her part in the assembly of those assets? Look at the time she spent, the kind of income that he made – he couldn’t have done it without her looking after the kids. They’re separating it on the basis of the contribution and value of what they’ve supplied. |

**Come here if there is a WRONGFUL ACT, BUT NO UNJUST ENRICHMENT!**

**Soulos v Korkonzilas: constructive trusts may be imposed on either ground**: where there is a **wrongful act but no unjust enrichment** and corresponding deprivation, OR where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Pettkus v Becker.*

four condition “which generally should be satisfied” for the remedy:

1. The defendant must have been under **an equitable obligation**, that is, an obligation of the type the courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
2. The **assets** in the hands of the defendant must be shown to have resulted from deemed or actual activities of the defendant in breach of his equitable obligation to the plaintiff;
3. The plaintiff must show a **legitimate reason for seeking a proprietary remedy**, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; **and**
4. There must be no factors which would render imposition of a constructive trust **unjust** in all the circumstances of the case; *e.g.*, the interests of intervening creditors must be protected.

*S mad at K (real estate agent) – K’s wife ended up buying property S wanted – K denied involvement – S learned of what happened and then sued to have the court to have a constructive trust impressed on the property – S asserted that it had a special value to him because his banker was a tenant there, and this unique fact would have been a source of great pride to him because it would be seen as a status symbol in the Greek community – There was* ***no financial loss to the principal but depriving the principal of an idiosyncratic desire****.*

*McLachlin J endorsed* ***good conscience*** *as the unifying concept of the constructive trust, no unjust enrichment (in this case value of property had actually dropped).*

# Remedies for Breach of Trust

Establishing that funds are trust monies is very important to attract the range of remedies.

## A. Personal Remedies

*In personam* relief accords to the beneficiary the opportunity to receive equitable compensatory damages for breach of trust needed to place the beneficiary in the position he should be in.

### 1. Specific Performance & Injunctive Relief

GIVEN AT THE DISCRETION OF THE COURT.

**Specific performance** is usually given to enforce the terms of any contractual undertaking where CL remedies are inadequate:

* Ordinarily, the court will defer to the trustee's discretion - however, specific performance is more likely to arise where **trustees enter into Ks in breach of trust** (**Bennett v Colley,** *court ordered T to renew renewable leaseholds*)
* Beneficiaries may seek performance where a **beneficiary is entitled to possession of chattels** or **the appointment of new trustees to replace retirees**.
* The right to compel performance can extend to 3rd parties (e.g. trustee’s solicitor who had received money with notice of the trust was ordered to pay it into court).

**injunction** – may be in mandatory or prohibitory form:

* If the course of dealing proposed by the trustee is **inimical to the interests of the beneficiary**, courts will issue injunctions to prevent trustees from failing to perform their duties. To be successful, must show that the course proposed by the trustee will have a negative impact on the trust property or the beneficiary’s interests (**Lee v North Vancouver School District**, extreme or very serious damage will ensure)
* Usually, the beneficiary seeks the court’s help to **prevent the trustee’s breach of trust before it actually occurs** (e.g. a trustee who fails to distribute income or capital as required by the trust can be compelled to do so if the injured beneficiary’s action is successful).
* Alternatively, the court can grant an injunction to **prevent an improper distribution** from being made.
* **Fairclough & Sons Ltd. v Berliner:** court ordered a trustee to take proper steps to defend the trust estate behest.

### 2. Compensation for Loss & Restitutionary Relief

*Hodgkinson* and *Guerin* illustrate that the guiding principle of equitable damages is fully restorative – beneficiary is restored to the position s/he would have been had the breach of trust not occurred.

* Assess at the date of restoration, not date of depravation.
* Equitable damages do not take into account: causation (but, see later *Canson*); foreseeability of damages (remoteness – *Guerin* award ignored foreseeability) and mitigation of damages.

When will it be granted?

* Trust asset unavailable (**Guerin**) – good illustration of equitable compensation
  + *If no breach, then M would have had @ their disposal the ability to use the land*
  + *Court rejected a “fair-return” basis for calculation of compensation. Instead, to effectively provide appropriate compensation in equity, it needed to place a value on the lost opportunity for a high value residential development in Van as @ the date of trial, not at the date of breach when the lease was executed.*
* Trust asset difficult to determine or locate
* Execution against the specific property is unsuitable

**Hodgkinson** – loss was as a result of the real estate market – La Forest characterized it as a FD relationship b/c of the dependence H had on S // Dissent: vulnerability missing & causation was the market not breach of FD

The court in **Canson** identified some circumstances that might **limit** the measurement of equitable compensation: (1) Losses stemming from P’s unreasonable act should be barred, and (2) Common sense causation could circumvent P’s claim

* Assessing quantum of damages
* *New purchaser/owner was suing b/c house he purchased caved in b/c of weakness in the ground (as a result of engineer’s shitty job). Brought action against L (conveyancer & produced K). L didn’t disclose that another client of his was making a secret profit on the transaction. In this case, SCC said causation must be reviewed from POV what is sensible.*
* *Dillon – evolving approach to damages: increasingly courts saying we are going to fashion a remedy that is most equitable & sensible and won’t strictly follow the rules.*

Set-off not allowed under equity:

* **Re Deare:** if loss as a result of trustee not acting according to standard of prudent biz man, then under equitable principles can’t set off the losses against the gains. But now b/c of **s.15 of TA** can do it.

Unjust enrichment (**Kerr v Baranow**)

* Giving propriety interest should not be the first weapon of choice in remedies. First, have to consider giving damages. METHODS:
  + **Quantum Meruit:** calculates enrichment according to “value received” by D as unjust enrichment calculated on a “free for service” basis
  + In *Kerr,* used the “value survived approach” – if there is a link between cohabitation and accumulation of wealth look @ wealth generated during the course of the relationship & apportion interest appropriately (how is diff from resulting trust)
* “Restitutionary damages” (value of D’s enrichment for which he must be disgorged) will be the only option in those cases in which the remedial constructive trust as *in rem* remedy is not appropriate b/c the asset is no longer available – prefer restiturionary damages as the remedy.

### 3. Accounting, including for profits

**Personal remedy** against the trustees to disgorge their profits. Arises as a corollary to the trustee’s duty to account and breach of duty of loyalty.

Fiduciary may receive an allowance for the work he has put into the in appropriate venture; w/in the discretion of the court – ex. **Boardman**

* *Solicitor & B managed to go to the company and assess potential by way of attending a meeting – all the profits were declared to be profits held by the trust – both were compensated for the work they had done*

**Warmen International v. Dwyer**

* Deterrence is at the heart of the remedy to account.
* It is not a defence to assert that the plaintiff was unwilling, unlikely, or unable to have made the profits to which the account relates.
* Ordinarily, a fiduciary will be ordered to render an account of the profits made within the scope of his duty.
* Assessment of the quantum is often very difficult and a “reasonable approximation” is enough; mathematical exactness not required.
* If the loss suffered by the claimant exceeds the profits made by the fiduciary, the claimant – plaintiff must elect one remedy, either the accounting for profit remedy or equitable compensation.
* Defences to an application for an accounting are available, and they are equitable in nature, viz. estoppel, laches, acquiescence and delay.
* *How long do you have to hand over profits for? In this case, 2 yrs. There is no formulated answer.*
* *Warmen decided that it won’t expand biz, against Italian companies wishes. Dwyer separated from Warmen and entered an agreement w/ Italian company that Warmen wouldn’t accept 🡪 breach of FD // W successful in getting profits*

**MacMillan Bloedel v. Binstead:** P successful in its action for an accounting for profits against D even though they suffered no loss

## B. Proprietary Remedies

What? Claim an interest in the property

When?

* Property has increased in value
* Bankrupt loss

*In Rem* claims can take the form of following and tracing

* Details of tracing are not examinable – just have a general idea

### `1. Remedial Constructive Trust

applies to fiduciaries and unjust enrichment. Need to show

* Good conscience (see McLachlin J in **Soulos** p. 447)
* Link between acts of claimant and property sought
* No interference with rights of intervening creditors
  + **Guerin**
  + **Sun Indalex**

### 2. In Rem Claims of Following & Tracing

**Foskett v. McKeown** – per Millet LJ

* **“Following”** – tracking asset as it lodges into the control of different custodians
* **“Tracing”** as the process of identifying a new asset as the substitute for the old: especially cogent for choses in action – money, bank accounts, shares, insurance; also purchase of misappropriated trust funds to purchase another asset (eg house, boat, car etc.)
  + unique to equity
  + only BFPFV is protected

#### When is Tracing Remedy Available?

Just know the 3 factors for the exam!

**3 broad conditions for when tracing is available:**

**(1)** **There must be a misappropriation as a result of the breach of a fiduciary relationship or unjust enrichment;**

* **Tracy Instaloans** (BCCA): pre-existing fiduciary duty is not necessary for the remedy of tracing
* **Chase Manhattan v Israel British Bank London:** *clerical error case; case arguing that they had an in rem interest in the money* – court allowed tracing on the basis that, in good conscience, the bank could not simply keep the funds.
  + Gave in rem remedy to Chase, even though no FD
  + Ability to trace did not depend on a preexistence of a FD

**(2) The trust property sought by the plaintiff should be situated in circumstances or in a form that the rules of equity recognize as traceable; and**

* **Unmixed funds: Re Hallett’s Estate**
  + If unmixed and the trustee purchases an asset, B can trace the asset
  + However, if the trustee withdraws and **dissipates** the trust money (EX: purchases a vacation) and then puts his own money into the account, you can no longer trace
* **Mixed trust and personal funds of the trustee:** only part of misappropriated trust funds used to buy substitute asset. Where there is mixing, **equity presumes:**

1. **When the trustee withdraws money from the combined fund,** trustee is presumed to have drawn and expended his money first – B entitled to remaining $ in account to the extent of his claim – BUT If a trustee adds funds, those added funds are **not traceable** as a proprietary remedy (so available to creditors, not the beneficiary exclusively) (**Hallett**)
   1. The rule in **Clayton’s** followed the “first in, first out” principle – but under the rule in **Hallett**, the trustee is deemed to withdraw 1st if he has withdrawn fund
2. **If the trustee invested the trust monies and personal monies into the trustee’s personal assets** (such as shares or land), the B will be able to **claim a charge** against that asset (**In Re Oatway**) for the amount of the claim, including the proportionate share of the increase in value (**Scott v Scott**). As for the portion of the trust monies used towards the purchase, the B has the option of taking a proportionate share of the property or placing a lien on it (**Foskett v McKeown**).
   1. **Boughner v. Greyhawk Equity Partners:** Ratable approach can be applied in 2 diff ways:
      1. pro rata based on the original contributions
      2. pro rata based on the lowest intermediate balance rule
      3. “Pro rata” sharing” – “lowest intermediate balance rule”: Easy Loan Corp v Base Mortgage (2016) – page 505

**(3)** **No inequitable results must arise from the application of the right to trace. LIMITS**

* Equitable remedy does not affect the rights obtained by a *bona fide* purchaser for value without notice.
* Tracing is not available if result will be unfair according to the maxim that “any person who comes to equity must do equity.”
* Court will not order the tracing remedy against an innocent volunteer who has significantly improved and indivisible property.
* Court can apply defenses of laches, acquiescence or estoppel.
* When trust property can no longer be identified (ex. due to dissipation), the right to trace is extinguished – ex. trust funds having been spent on a holiday or consumed as wine, as opposed to be spent on a car

## C. Acting Against 3rd Parties by the B

A third party or “stranger” can become liable as a fiduciary if he is found to have intermeddled in a trust. Important specially where T insolvent.

### 1. Trustee *de son tort*

When a stranger intermeddles in trust matters by acting as if he were a trustee.

* **Chambers Estate v Chambers**
* To be liable must have possession & control
* Rule in *Air Canada* applies

### 2. Knowing Receipt

When a person receives or deals w/ Trust property for own use knowing it was transferred in breach of trust. There are **3 requirements** that must be satisfied in order for a stranger to be held liable:

1. The existence of a fiduciary duty (*e.g.*, trustee);
2. A breach of that duty by the fiduciary or trustee; and
3. A dishonest and **knowing** assistance by the third party in that design.

* **What level of knowledge & dishonesty is needed for a 3rd party to qualify as a knowing stranger?**
* **Nelson v Larholt:** **“knowing”** determined by an objective standard (actual notice not required) that includes being willfully blind to what would make a RP suspicious – what inferences would a reasonable person in the circumstances have drawn, and would he have had notice? – demonstrates reckless behavior
* Knowing assistance basis for liability in money laundering cases
* Adopts objective standard of recklessness as sufficient for “knowing assistance”
* **Air Canada v M&L Travel Ltd:** **degree of knowledge required for stranger liability is** **“actual knowledge, recklessness or willful blindness.”** However, mere carelessness or “a want of probity” is insufficient.
  + “directing mind” of a corporate trustee liable for innocent/negligent breach of trust if they assisted scheme.
  + Reckless is when you shut out info
* **Royal Brunei Airlines v Tan:** knowledge of a director can be imputed to the company
* Twinsectra Ltd v. Yardley – role of Leach: p.511 – 2 views
* CFI Trust v Royal Bank (2013) – page 513

### 3. Knowing Assistance

When a person knowingly assists a T in a fraudulent or dishonest transaction that is perpetrated by the T or a person who induces the T into a breach of trust.

(1) The existence of a fiduciary duty (*e.g.*, trustee);

(2) A breach of that duty by the fiduciary or trustee; and

(3) A dishonest and knowing assistance by the third party in that design.

**Nelson v. Larholt**adopts objective standard of recklessness as sufficient for “knowing assistance”. **Royal Brunei Airlines v Tan** asserts objective test against individual’s capabilities. But Canadian courts have said test is objective – actual knowledge suffices; will also be caught if recklessness or willful blindness (knowledge will be irrelevant) (**Air Canada v. M&L Travel Ltd**).

* *Air Canada gave travel agents power to issue tickets.*

## D. Alternative & Cumulative Remedies

Can combine multiple remedies if (a) not double recovery & (b) not mutually inconsistent.

* Need to lead evidence (*Assurance v Lloyds*)

## E. Trustee’s Defences

* Exoneration can occur with:
  + Free informed consent of Bs (ex. trustee parent and beneficiary kid forgive)
  + By court order under **s. 96 Trustee Act** 
    - When a minor breach & not a lot of people involved
    - Acted honestly
    - Acted reasonable, and
    - It would be fair to excuse him in the circumstances of the case
  + *False* – application to lay trustee
* Laches and Acquiescence (estoppel) – **M(K) v M(H)** (p.517) need to show P w/ knowledge did nothing even though fully able to launch the action
* Under **s.86 Trustee Act**, trustees can apply to court in chambers for an opinion, advice, or directions on a question of management and administration of the trust property.
* **S.87** absolves a trustee of responsibility where he is acting under court authority. NOTE: doesn’t extend to indemnifying a T who is guilty of fraud, willful concealment, or misrep
* **S.75** courts have power to intervene in stock transfers and give directions @ the behest of Bs or those who think they are entitled

# Assessment Questions

## Chapter 3

3. Snooks holds a registered estate in fee simple in Blackacre, is the registered owner of shares in Acme Inc., and has on deposit with a bank $100,000 in a savings account. He has two children Basil and Belinda. He also has a brother Benjamin. In January he **advised his solicitor, Sam Smith, that he now held Blackacre for his daughter Belinda.** Later, in February **Snooks requested Tewksbury to act as his trustee and hold title and administer the shares in Acme Inc. and pay dividends to his son Basil**. Tewksbury agreed and Snooks then sent a fully completed application to the Board secretary of Acme Inc. applying for transfer of the shares to Tewksbury. Before the share register in Acme Inc. reflected a change in registered title from Snooks to Tewksbury, Snooks died in April. In his will he **bequeathed the residue of his estate to his wife Betsy.** He also appointed Benjamin as his executor. The evidence disclosed that in the previous month, March, **Snooks wrote a letter in which he affirmed that the money in his savings account now belonged to Benjamin**. Consider the effects of these gifts. Would your answer be different if Snooks in a letter had simply *promised* Benjamin $100,000?

* Trust Assets: (1) Registered EIFS in Blackacre (3) Shares from Acme Inc (2) $100k in savings. It is Betsy’s interest to scrutinize the validity of these transactions.
* (1) Personal Declaration of Trust/automatic constitution = Snooks holding Blackacre for Belinda; Unless there is a statutory requirement giving away the equitable interest, Belinda has become the owner
  + S hold LT. When he dies, LT falls into his estate 🡪 trusteeship is exercised by B, the executor.
  + If Betsey sells & transfers Blackacre to a bona fide purchaser for value without notice, then Belinda would lose but until then, Belinda’s in rem rights would prevail against the volunteers (Betsey & Benjamin)
* (2) declaration of a gift & appointment of a T; Tewksbury would need to be vested of title in these shares – shares not yet registered before he died but will prob be considered vested (did everything in his power to transfer but bureaucracy slow) *Re Rose*. TEST is whether you have lost control of the property.
* (3) this was an incomplete gift, but once B became executor – GTG b/c of *Strong v Bird*. Alternatively, personal declaration of trust – now, holding for Benjamin. Either way he is going to win.
  + Is this being done to get around provisions of WESA – if yes, problematic!
  + Pavlich thinks it’s enough to write a letter, but there may be statutory rules that apply (Banking Act)
  + If it was just a promise (not a gift), *Strong v Bird* rule applies (adventitious transfer) when Benjamin becomes executor

## Chapter 4

**From now on I, Sid Snooks, hold half my properties in trust for my children Belinda and Basil.**

* Automatic constitution – Sid purporting to give away beneficial title to Belinda & Basil through a personal declaration of trust.
* Equal shares for each beneficiary – unless there was anything in there that indicated that he was contemplating a differentiated share, then that would fail.

**From now on I, Sid Snooks, hold all of my properties for Belinda and Basil.**

* Which ones, unless evident that they are his kids
* If becomes evident that Sid has two kids named Belinda and Basil, then personal declaration of trust & automatically constituted.

**Tewksbury, my able friend, I, Sid Snooks, have conveyed to you blackacre and 500 shares in Apple Inc. because you are trustworthy, very dear to me, know my wishes and will best take care of the financial needs of my child Belinda as she needs it.**

* Transfer has taken place
* Precatory language, not mandatory – not a trust
* We don’t know if Tewks is a relative or biz associate – would one expect a biz associate to take care of the needs of one’s kids? Pav doesn’t think so
* Look @ what the relationships rly are

**After dinner one night, Snooks says to Tewksbury: here is a check for $100,000. I know you will put it to good use and help struggling members of your family. Tewksbury has a destitute son.** Is son a beneficiary?

* Too vague – maybe there are more struggling members
* Also, note that diff from previous example b/c looking after trustee’s own child

## Chapter 5

**Assessment Question 1**

“I, Snooks, give you, Tewksbury some of my property which I want you to hold because I am confident you will fairly distribute that property among my very best friends in terms of their needs.”

a. Would your answer change if the “beneficiaries” were “all my friends” or “all of my cousins”?

b. What about “first” cousins?

2. I leave my estate on trust for “my children”? (Fixed trust)

3. I leave my estate on trust “for my colleagues in the Poodle Dance Club to advance the cause of animal exercise”? (Fixed trust and trust power)

4. A gift from Snooks to “Tewksbury on trust with power to appoint all those who have ever offered the settlor a seat on the bus except those with big ears”? (Trust power and power *simpliciter*)

5. A gift to Tewksbury on trust for such of the children of Sadie and in such shares as Tewksbury shall by deed appoint within 5 years from the date of the trust instrument. (Tewksbury is the donee of a power and has indicated he will never make an appointment to any of Sadie’s children)?

6. “I give property to trustees on trust to distribute the income among such of my children as they think fit with power to distribute the capital among such of my children as they think fit and at their discretion”?

**Assessment Question 2**

Sid Snooks has just died. You act for Tewksbury the executor and trustee of the estate. You are required to give an opinion on the validity of each of the following bequests in the will:

* + $50,000 to my very good friend Tisdall knowing that he will use the money wisely and ensure the well-being of my two nephews who have given me much respect and enjoyment;
  + My properties in Vancouver on trust for my children Basil and Belinda;
  + My property in Whistler in trust for the use and benefit of my kith and kin who enjoy skiing;
  + My executor and trustee Tewksbury may use the residue of my estate for the benefit of those needy persons who were my colleagues at the University of British Columbia as determined.

Snooks owns 5 properties: two in Surrey and three in Richmond, B.C. – both cities are in the regional district known as Metropolitan Vancouver, but none are in the City of Vancouver.

Who is entitled to own what interests in which property comprising this estate?

## Chapter 6

**Q2:** no formalities are required with respect to Greenacre - but transfer of equitable estate must be in writing (s. 36 LEA)

**Q3:** all 3 requirements of a fully secret trust have been met. Basil can sue Belinda.

I would argue this is a 1/2 secret trust/ This means the arrangement must be set up before the will is signed. If I’m wrong and it is a fully secret trust, then your answer is correct.

**Q4:** this is a possibility of reverter. Beatrice can't argue a 1/2 secret trust because Ben's instructions are not written down. Also, she can't argue that it was a secret trust because Belinda was silent when Ben communicated his intention to her. And, since there is no indication that Ben left a will, Beatrice won't have the option of applying for a rectification under s.59 WESA. It looks like Beatrice is out of luck.

* Rectification of a will under s.59

**Q5:**(i) valid; (ii) Boniface will have a vested equitable interest (valid); Orscilla's sons will get a remainder equitable interest (valid); and their issues will get a reversionary interest, but this will be void for public policy reasons // note: My answer is based on the assumption that we won't have to consider rules against perpetuity

**Q6:**we would need to know whether the trust was created in writing or orally.

NOTE: Question are on p.290

## Chapter 7

**Assessment Question 4 – automatic trust**

Snooks, a building contractor, seeks a loan from Bloggs to help finance future developments and his day-to-day operations. Bloggs agrees to do this on condition the money is held by Snooks’ solicitor Tewksbury and used only to fund future real estate developments. Tewksbury deposits the money in a joint account with the Bank with a letter instructing the bank only to release funds on cheques co-signed by Tewksbury. Withdrawals are inadequately policed and Snooks dissipates the money on holidays and gambling before going bankrupt. Advise Bloggs.

* Specific purpose loan makes it a Quistclose trust – $ for future development
* Close to *Twinsetra* for future developments
* What about day to day operation?
  + *Westar* case is just as general – scope broadend by *Westar* in BC
* In personam rights
* Giles – not specific enough – Pav did not talk about this

**Assessment Question 1 – presumed resulting trust**

Last year Telford Tubbs transferred a large number of shares to his brother Seth (aged 18) whom he helped support, confiding, "I do not want the tax man to know that I own these shares". When Seth received the share certificates indicating that the shares were registered in his (Seth’s) name he gave them to Telford. Also, whenever he received dividends Seth would always hand them to Telford. Very soon after the transfer to Seth, Telford Tubbs also transferred another block of shares to his daughter Felicity saying "Do not tell anyone about these shares. I think I am about to be sued for negligence and I want to give the impression that I have little property so that the action will be abandoned." In fact, Telford Tubbs was mistaken and the victim of his supposed negligence never had any intention of suing. Last month, a house that Telford Tubbs owned was transferred into the name of his friend Ms. Billingsgate. After these events, Telford Tubbs died leaving a duly executed will in which all of his property was left to his wife Tanya Tubbs. Advise Tanya as to any entitlement to the shares transferred to Seth and Felicity and to the house transferred to Ms. Billingsgate.

* Presumption of advancement (doesn’t work for brothers) or presumed resulting trust? Is presumption rebutted? Can you use the evidence?
  + Evading tax is illegal
* 1) Seth
* 2) Felicity
  + How old is daughter? Presumption of advancement? Depends on whether she is dependent or not
  + Illegal?
  + Sherman – if you have that motive, whether it is likely to be implemented is irrelevant
* 3) Billingsgate
* evidence of illegality irrelevant in the case of a presumed trust

**Does Scheuerman only apply when there is a presumption of advancement or can we use it when there is a presumption of resulting trust?**

Yes Scheuerman is concerned with advancing any evidence which reveals illegal or immoral behavior and on which the court must rely in order to give a determination. That said, its scope for operation is more in the presumption of advancement area where the delinquent transferor has the onus off proof and so must advance his/illegal-immoral design. With the presumption of resulting trust the transferee bears the onus of showing why the presumption should not apply sand so huge/she must adduce the evidence. Check the other cases I dealt with in class.

**Q2** (p.267)**:**Based on the facts provided, it is not clear whether the association has a set of rules that outline the way the group is to function. If there are specific rules with respect to what they should do with leftover funds, then those rules prevail. However, in the event that there is nothing stipulated in the contract re leftover funds, per Re West, the court will look at the source from which the surplus funds originated.

* The surplus from the street collections will be bona vacantia.
* $100,000 donation from Percy Potts will likely fall within the legacies and major donations category, so the principle in Re British Red Cross will apply and the surplus money will be held on an automatic resulting trust for Percy Potts.
* The money from the bingo drive will likely be categorized as the third category in Re West, since it is payment for entertainment rather than gratuitous payments. Hence, the funds belong to the crown as bona vacantia.

With respect to the surplus from club subscriptions, the surplus can be split between the 3 since it is by mutual agreement (Hanchett-Stampford).

I am not sure if my answer is correct because I don't think it would be possible to determine what portion of the surplus belongs to each of the sources I have mentioned above. Also, I am not clear on when we would adopt the Re West approach and when we would adopt the Hanchett-Stamford approach.

On your answer to question 2 of chapter 7 your answer is basically correct. Note that if there are provisions in the constating contract the court may imply those dealing with termination. Usually it is that the current members who can amend the agreement including terminate it and divide the proceeds. Your analysis of Re West is accurate in terms of constraints on that diving up and what happens if all members die before terminating the club. So you would use Re West if the club demised without a surviving subscriber. Re Bucks thought this would happen if there was only one survivor. Hatchet-Stamford disagreed and said with one surviving subscriber that person would be entitled to the entire estate of the Club. (Interesting question - what if the Club would up with a negative balance of funds in the estate? Would that survivor be liable??)

Assessment Question 1

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Specific purpose trust / Quistclose Trust.

It’s a Quistclose scenario because there is a specific purpose – “future real estate developments” – compare it with the cases so that it’s more specific than just general investment and more like Quistclose where it’s specific like “paying dividends”. That brings it close to Twinsectra’s case.

It’s a specific purpose loan that makes it similar to Quistclose. It’s close to Twinsectra’s purpose of future developments.

“Day to day operation” – it’s unclear whether money on holidays would be considered as day to day operation. This is hard because if you’re looking at *in rem* remedies, day to day operation is such a general constraint, and if you give him priority over the other creditors then that’s problematic.

In BC – “suppliers and employees” in Westar case was just as general and that was accepted as a Quistclose loan. Day to day operation is broad in which the borrower can expend it on and you want to say that it’s the same as the purpose in Westar.

Policy: it really has to be specific enough for it to justify putting the creditor (who made the loan) above all other creditors.

What can Bloggs do?

Talk about his possible *In personam* remedies and *In rem* remedies.

Assessment Question 2

* Last year Telford Tubbs transferred a large number of shares to his brother Seth (aged 18) whom he helped support, confiding, "I do not want the tax man to know that I own these shares". When Seth received the share certificates indicating that the shares were registered in his (Seth’s) name he gave them to Telford. Also, whenever he received dividends Seth would always hand them to Telford. Very soon after the transfer to Seth, Telford Tubbs also transferred another block of shares to his daughter Felicity saying "Do not tell anyone about these shares. I think I am about to be sued for negligence and I want to give the impression that I have little property so that the action will be abandoned." In fact Telford Tubbs was mistaken and the victim of his supposed negligence never had any intention of suing. Last month, a house that Telford Tubbs owned was transferred into the name of his friend Ms. Billingsgate. After these events, Telford Tubbs died leaving a duly executed will in which all of his property was left to his wife Tanya Tubbs. Advise Tanya as to any entitlement to the shares transferred to Seth and Felicity and to the house transferred to Ms. Billingsgate.

Problematic: you’re making the transfer by seemingly avoiding the clutches of the tax man. Raise *Goodfriend –* is it to evade tax, if it’s to avoid tax – then that’s okay (because it’s not illegal).

Seth – presumption of advancement never happens with brothers. Therefore, there is only a presumption of resulting trust.

Felicity (daughter) – is Felicity a dependent daughter? If yes, then presumption of advancement applies.

If the transferor is under 19, then whoever is executing the formalities will want to know why they’re transferring it away and it might be subject to public trustee’s scrutiny. If Felicity is under 19, then can’t adduce illegal evidence to rebut presumption of advancement.

Ms. Billingsgate – presumption of resulting trust. Will be up to Ms. B to adduce evidence to rebut that presumption of resulting trust.

Transfer is as it is unless you can prove presumption of advancement, where it operates, has been rebutted. Or if it’s a presumption of resulting trust, the evidence is there to rebut that but if you can’t use illegal evidence, then the presumption of resulting trust stays and will not be rebutted.

*Scheuman –* if you have that bad motive, whether it’s likely to happen is irrelevant. Dissent – that’s ridiculous, if it’s not likely to happen, then they shouldn’t be penalized for it (picked up in *Goodfriend*).

Approach: read the problem, zone into the broad framework. Then look at the effect.

Eg. Broad framework > presumption of resulting trust. Effect > the presumption is that it’s a resulting trust, and if you want to rebut it you have to adduce evidence.

Quite clearly, if it is a resulting trust, evidence of illegality is irrelevant. Court can come to a conclusion without using evidence of illegality. More difficult is presumption of advancement – the evidence they’re leading to rebut it, if illegal, is objectionable. If you have to go into the evidence being objectionable, that’s when you look at *Scheuman, Goodfriend, Tribe.*

## Chapter 8

**Assessment Question 1**

Snooks has a reprobate son, Basil, notorious for his irresponsible management of money. He wishes to provide for Basil and his wife and their two minor children for the rest of Basil’s life. Advise Snooks on an appropriate course of legal action.

* Protective trust
* make sure that it is catches in determinable language
* give a life estate to Basil, but place a limitation – that if he tries to dispose of the interest that he has, then it would automatically go to wife and other kids

**Assessment Question 2**

Snooks, now deceased, had created a trust in his will in favour of his two children Basil and Belinda provided they reach the age of 25 years. Their mother predeceased Snooks. Basil is 20 years of age and Belinda is 16. They wish to access the funds now. Advise them.

* What is the age of majority in their province?
* Has the interest vested or not?
* May attack on PP; lack of certainty

**Assessment Question 3**

Belinda is the recipient of a bequest of a large number of valuable shares throwing off considerable income that the testator wants her to enjoy for the duration of her life. The same testator has bequeathed the remainder to the first child of Belinda who reaches the age of 25 years. She and her husband have two children. Belinda wants to surrender her life interest in half of the income for the benefit of her children provided also the children’s interest is delayed to vest at age 30 years and not 25 years. This stratagem would have the effect of reducing considerably the income tax she and the children would pay in taxes. One child is 20 years and the other 15 years. What arguments for and against the proposed arrangement would you advance? **How would you proceed?** Would your answer be different if both were over the age of 19, but under 25? (See *Re Holt’s Settlement*,[1969] 1 Ch. 100.)

* B has a life estate
* She will apply for a variation of the trust, since she wants to change the current terms of the trust
* As soon as you see changing the terms of the trust, think about settlement variation act – why? b/c one of the kids under the age of majority
* What provision would authorize the court to give its approval to this arrangements? And, what is the court going to look at?
* There are 2 Qs: 1) eligibility; 2) benefit
* In this class don’t need to worry about perpetuity
* This is a 1(b) problem
* Are there an ascertained pple? B’s unborn children
* Court has to decide – is this proposed arrangement in their benefit?
* Look to see whether this tax advantage would benefit the children. On the exam say, this is an issue that I will get more info about b/c it will make a significant difference.
* Talk about Knocker & Yule, and in Canada Buschau (even though Newberry was overruled on appeal, she was not overruled on this finding – the need to have a property interest – we know that someone in the group will get it)

## Chapter 9

**October 29 class**

**Assessment Question 1**

Discuss the factors that need to be considered in the appointment and removal of trustees. Describe the circumstances in which a trustee must retire and the consequences that occur if he or she retires voluntarily.

* This is focused on s.27
* Retirement: have to notify all other trustees and disengaged completely – if new trustee then GTG

**Assessment Question 2**

Basil Bloggs, the beneficiary in a trust settlement made allegations against a trustee of unsubstantiated fraudulent misconduct in the administration of the trust. Should a court order the removal of the trustee?

* Clearly if serious misconduct, then results in removal. If can’t substantiate the fraud, then can’t remove by that factor alone. But if can show this allegation is itself a manifestation of prejudice towards B by T, and welfare of assets at risk, then getting into situtionas where you can say it is expedient to remove.
* Cite circumstnaces and values citeed in Ratford

**Assessment Question 3**

In what circumstances can a retired trustee be made liable for a breach of trust that occurs after his/her retirement?

* If being involved, then have not effectively retired
* If effectively retired, and then come back might be liable as trustee de an tort – if there is breach of trust, then will be liable

## Chapter 10

**Assessment Question 1**

Describe the scope and limitations on a trustee’s duty to invest trust assets.

* Behave prudently!!! Now, let’s see if there is anything in the trust instrument that helps us find that.

Tewksbury is the trustee in which the sole asset is a majority of shares in a family company. Trades of shares have been minimal and Tewksbury believes from an analysis of the financial statements that the company is being mismanaged. Tewksbury wants to trade these shares for those in a startup company that does research and manufacturing of clean energy (e.g. solar panels) equipment. He has landed on this company because he and Sam Snooks, the settlor, believe there is a widening market for renewable energies and they personally are ethically committed to business of this type. Belinda Bloggs, one of many discretionary beneficiaries, is a family member of the company now forming the trust asset. She is hostile to the proposal as being “too modern and flackey”. The other beneficiaries are indifferent to the proposal. Your advice?

* Trustees want to make an ethical investment
* Look @ trust instrument. If silent, then look @ whether the startup company is a prudent investment from a reasonable POV. Have to make an assessment of the risks.
* Geographical location – is there lots of sunshine?

**Assessment Question 2**

The Board of Directors of Acme Inc. instructed Bloggs, its CEO, to investigate and scrutinize the profitability of companies that might make excellent investments for Acme to purchase. Bloggs, acting fraudulently, failed to disclose an obviously suitable prospect, Inspiration Inc., instead, taking for himself, an option on the shares of Inspiration. Bloggs then persuaded his friend Snooks to purchase the shares at the option price, which Snooks did. Snooks, who was well aware of the situation, then sold the Inspiration shares to Acme at a huge profit. What is the liability of Snooks and Bloggs to Acme Inc.? (Refer *Canada Safeway Ltd. v. Thompson*, [1950] B.C.J. No. 111, [1951] 3 D.L.R. 295 (B.C.S.C.)).

* Whether Bloggs is a trustee? Does he owe a duty of loyalty?
* Bloggs is the CEO, which makes him different from the **director** (who is on the board – **directing minds of the corporation**). Fiduciary relationship between the directors and the company.
* An EE is not a directing mind – how about a senior officer who feeds info to the board and can manipulate the directors b/c of power of knowledge 🡪 *Can Aero* said that senior officers may owe a fiduciary duty (case didn’t really get inot whether Wells is liable or not)
* Snooks is only liable if blogs is liable – so first determine if blogs has a duty
* Is Snooks liable? May be regarded as trustee des on tort – he has clearly knowingly contributed to a breach of trust
* Start w/ the obvious Qs

**Assessment Question 3 – duty of impartiality**

Thelma is a wealthy widow who has recently died. Tewksbury is her executor and trustee. Her heir is her partner Beryl as life tenant and the remainder is bequeathed to her daughter Belinda. Advise Tewksbury on his obligations in the administration of Thelma’s estate.

The residue of the deceased estate consists of:

* 1. **10,000 shares in Acme Inc. a closely held corporation valued at $1 million;**
* closely held – makes you want to investigate it – maybe risky?
  + Smaller/successful corp; maybe tied to Thelma’s biz acumen and now she is gone and it is risky whether it will be successful 🡪 this is the prudent biz side
* Is this closely held corporation generating so much income for life estate – but b/c it is closely held its base is at risk – remainder pple @ risk if this share is held.
  1. **An insurance policy on the life of her former spouse Jackson, who is still alive aged 55 years;**
* A primary reason for [purchasing life insurance](https://www.jrcinsurancegroup.com/affordable-life-insurance/) on a spouse is to replace the loss of their future income.
* clearly favours remainder people because he is still alive
* must get rid of it under *Earl Chesterfield* rule to get to impartiality
* how tied is this to Thelma – kind of settled
* Problem is that there is no income coming to Beryl – but likely it is going to Belida – need to sell this in order to give income to Beryl & substitute it with an asset that is fair in terms of preserving capital base & giving income to life tenant – pending sale there is issue of distribution; maybe Beryl gets money but only after it gets sold
  1. **Black acre worth $500,000;**
* Little rent for Beryl – then too bad and have to live it – there is no obligation on T to sell from the POV of impartial treatment, might have to sell b/c of other duties
* **Rules don’t apply to realty** – good news for Beryl
  1. **Royalties in a bestselling book she wrote just prior to her death;**
* Sell
* Royalty will really benefit the life tenant, little left for the remainder
  1. **The right to an insurance policy on Beryl’s death; and**
* This one is fuzzy – is it rly an asset that has properly been transferred
* Probs not really an asset – unless other Beryl somehow can’t change it b/c Beryl might choose someone else to be B. Right now, it is Thelma – but she is gone
  1. **$100,000 in her bank account.**
* Invest it in something
* It’s not even earning interest, it is helping neither – if in a savings account, what is the interest rate?

Is there a duty of impartiality (CL assumes impartiality)? What are the implications (look @ the asset mix)? What impact does that nature of the property have on the ability to be to fair and even handed between Bs and Bs in succession? Is the asset mix favoring one set of Bs over the other? If yes, then according to the duty of impartiality need to get rid of the asset and this is reflected in the rule in Howe (testamentary trusts). If partiality has been granted by the settlor/testator, then don’t need to worry!

The rule is that you look at each asset and see whether it is fair to both life tenant and remainder person. Is there enough income coming from this asset to make it fair to life tenant? If yes, but it is disproportionately undermining the capital base, which therefore makes it unfair to the remainder person, then have to get out of it. This duty can clash w/ duty to act as a prudent biz person, where T wants to take advantage of a portfolio form of investment, where you look @ total return (a problem in very large estates - You need to indicate to the settler that total return approach is probably better, where you don’t look @ each individual asset). Look @ each asset to determine if it is generating a decent return (roughly 4%) – if more than that, then there is a problem, especially if doing it at the expense of capital base gain, otherwise its fine and LT can enjoy (ex. a blue chip asset where capital value will grow over time – like apple share)

**Assessment Question 4**

Tisdall dies. He bequeaths real estate to his son, Basil, as life tenant. His will appoints Tewksbury as the executor and trustee of his estate. Tisdall directed Tewksbury to sell the real estate, but gave him a discretionary power to retain. Basil occupies the house rent-free. Tewksbury now wants to sell the property, but the life tenant, Basil, Tisdall’s son, objects. Advise Tewksbury (see *Re Miller*, [1981] O.J. No. 576, 9 E.T.R. 37 (Ont. H.C.J.)).

* What is the testator’s dominant intention?
* What are the 3 factors you have to balance?
  1. impartiality / partiality – all part of the mix that you have to look at in terms of partiality – the driving force for the trustee to be impartial does not apply because this is real estate
  2. issue: who’s calling the shots here? It’s the trustee! He gets to manage the estate – Basil is only one part of the beneficiary – he doesn’t get to call the shots. There’s another beneficiary – the remainder person. Basil could collaborate with the remainder person but they’ll unlikely help him.
  3. Investment – is this a prudent investment? Or should he be getting out of it?

**Assessment Question 5**

* What policy reasons would you advance for a rule that prohibits the ousting of the jurisdiction of a court. Assess the validity of such a rule in this day and age?
  + Deferring to intention of settlor; cost aspect; attempt to eliminate disputes
* Describe the legal exposure of a trustee who refuses to furnish information relating to the trust as demanded by the beneficiary.
  + If serious enough will be removed
* Distinguish the trustee’s administrative powers from dispositive powers.
  + Dispositive power – giving to to Bs – T may have this power
  + Admin power – overall management – this is an inheret power

## Chapter 11

**Assessment Question 1**

Tewksbury is trustee of the Belinda Bloggs Trust. Tewksbury has engaged a money manager, Montague Mars to provide financial advice and services. To this end Tewksbury transfers $1 million of blue chip stock, currently in the portfolio of trust assets, with instructions to invest in Apple shares. Montague advises against this and persuades Tewksbury to allow him to invest in “Stocks and Bonds Inc.”, a company most would classify as a high risk investment. Stocks and Bonds go “belly up”. Tewksbury has taken up residence in Zimbabwe. Montague resides in Vancouver in his expansive mansion with magnificent views that overlook the City and the entrance to Howe Sound. Belinda Bloggs seeks your advice.

* Does being a consultant make you an agent? if no agency, then no FD
* If M is a fiduciary to the trust, he can owe a FD to B. Pav: there are not enough facts!
* Does M fit into one of the categories? Not enough info to be able to put him in one of the categories.

**Assessment Question 2**

When Belinda was 15 years old she was rescued in a drowning incident by a family friend, Tanya Tewksbury, then aged 35 years. Belinda graduated from College 7 years later, got a moderate paying job. She lost her job soon after successfully winning $1 million from the swimming pool operators in a negligence lawsuit. She placed this in very low risk, low interest-bearing, bank account. Belinda grew very close to Tanya who had became her only confidante and close friend and to whom she (Belinda) was extremely grateful and dependent upon for advice on even the most ordinary decisions concerning the ups and downs of life. Five years after graduating, and without a job, Belinda took up residence with Tanya paying full board and lodging from income generated from investments of her judgment award. Shortly thereafter, Tanya easily persuaded Belinda to give her $250,000 as a reward for rescuing her, which Tanya invested in high yield, risky investments that within a year had doubled in value. Belinda’s parents learned of this arrangement, persuaded Belinda to leave the home of Tanya. Belinda seeks legal advice from you. Advise with full reasons.

* Can B get a part of the $250,00 which has increased in value?
* One way to get it is by establishing a constructive trust
* Undue influence
* Go to 3 requirements in Elder – there is no undertaking
* There might be presumption of resulting trust – probably will be rebutted by evidence that she felt indebted for saving her life – maybe she wanted it to be an out an out gift – she is an adult now

**Assessment Question 3**

Basil Bloggs is 40 years old. Since he was 25 years of age he has lived with his now aged aunt, Sabina Snooks of 90 years. At 75 Sabina increasingly, through the years, became unable to care financially for herself and attend properly to the operation of her cattle ranch of some 1000 acres valued at $10 million. Basil took up residence with her as he had lost his job. He increasingly began helping with operations, eventually managing the farm and its 2 employees. Basil is good with his hands and over 15 years performed most of the fencing and hands-on workshop and carpentry repair work including supervision of corralling the cattle. He received for free full board and lodging and was authorized to use petty cash to finance a monthly sojourn to the few bars in the local town. He expected to inherit the ranch and his increasingly grateful aunt hinted at this prospect without undertaking a duty to bequeath it. Sabina Snooks has just died. She has no children and in her will she leaves nothing to Basil and everything to the Rest-in-Heaven Elder Care facility in Vancouver. During the 15 years the farm is a successful business that has increased in value by $500,000. Advise Basil.

* 3 Pettkus criteria:
* Enrichment: there is clearly an enrichment
* deprivation: he could have gone out and worker
* Is there a causal connection between his efforts and increase in value? Her indication that he is going to inherent a good part of the farm
* Hard to show K obligation – probs will get through restitutionary
* Soulus is relevant in terms of showing you are not just dependent on a share of property

## Chapter 12

**Assessment Questions 1**

1. How do you distinguish personal from proprietary remedies? Personal: when pulling the rope, pulling the person // Proprietory = avails against the word; pulling in the thing
2. What are the advantages of the proprietary remedy over personal remedies? Get the thing back, attractive in insolvency situation, if it has increased in value
3. What is the measure for damages for breach of trust? Fully restorative, equitable damages, get everything unlimited by breaks for foreseeability, mitigation and causation
4. What are the characteristics of full compensatory or “equitable” damages and describe the differences with damages in contract and tort? Unlike K damages (compensate for loss occurring through the breach, which require mitigation & causation), w/ equitable compensation don’t have those limiting factors. Musqueen would be in trouble under CL b/c of foreseeability. Canson – if absolutely no correlation, the causation will be a factor
5. In what circumstances would one prefer an accounting remedy? b/c will get more
6. Distinguish “following” from “tracing”. Following asset // tracing, as follow misapplied asset, it has changed form to a substituted asset
7. What are the elements that must be shown to succeed in a tracing remedy in equity? At common-law? Equity: breach of FD or unjust enrichment, ID asset is in traceable form (not decapitated), merged w/ someone else’s property
8. Thomas gave a considerable sum of money to Walsh, a stockbroker, to purchase Canadian bonds. Walsh purchased American investments and gold bars and endeavoured to abscond with the converted money (into U.S. investments). Walsh was apprehended at the Douglas border crossing? Walsh handed the property to his agents and declared bankruptcy. Who is entitled to these investments: Walsh’s trustee in bankruptcy or Thomas? (Refer *Taylor v. Plumer* (1815), 3 M&S 562.0. following – still in its old form
9. A bank acted as trustee for many settlements and so held custody of many trust assets that were deposited into the bank’s holdings. The bank then fell into insolvency. The beneficiaries sought to claim their respective beneficial interests by tracing into the bank’s assets held in an account for the general purposes of the bank. In this way they hoped to gain priority over the bank’s unsecured creditors and so avoid settlement *pari passu.* (Refer *Space Investments Ltd. v. CIBC Trust Co. (Bahamas)*, [1986] 1 W.L.R. 1072. Do you agree with this decision?) tracing Q

**Assessment Questions 2**

Tewksbury is the trustee of a trust in which $100,000 lies in his bank’s trust account as part of the trust fund in favour of the beneficiaries, a married couple named Basil and Belinda Bloggs. Tewksbury has $10,000 of his own personal funds deposited with the bank. Thereafter Tewksbury converts trust funds to fulfill his personal desires as follows:

* + $10,000 from the trust fund is placed into his own personal account with the bank from which he draws cash to buy 10 bottles of expensive wine. On the night of purchase he consumes two bottles at a celebration for his 50th birthday;
  + $50,000 is used to buy a motor boat that, by dint of Tewksbury’s knowledge and shrewd business acumen, has appreciated in value and is now worth $100,000;
  + $20,000 is given to his son, a dealer in vintage cars, who uses the money to help purchase a vintage Rolls Royce for $80,000; and
  + $10,000 is given to his daughter, who is aware of the source of this money and who uses it to pay off her credit card debts to Visa.

Tewksbury is bankrupt with many secured and unsecured creditors. Advise Basil and Belinda.

Exam

* 1 large problem w/ lots of issues! 60 marks
* short problem 30 marks
* Essay Q in form of a problem – what advice would you give as solicitor 10 marks