CONTENTS

INTRODUCTION

- **Definition:** a trust arises whenever there is a split in legal and beneficial ownership to property
    - **Trustee** – person holding legal title
        - Manages property on behalf of cestui que trust (beneficiary)
        - Fiduciary position – owes a duty of utmost good faith and loyalty to B
        - *Trust won't fail for want of trustee* – if original Tee won't do it, go to court and get a new one
    - **Beneficiary** – person holding equitable/beneficial entitlement

EQUITABLE MAXIMS

- **Equity will not permit a wrong without a remedy**
    - Equity will give a remedy where there is none at CL
- **Equity follows the law**
    - Equity doesn't replace CL – usually leads to same result
    - CL prevails unless it is important to modify the result
- **Those who seek equity must do equity (clean hands doctrine)**
- **Equity assists the vigilant and not the tardy**
    - **Laches** – delay minimizes the equity you might have received
- **Equity is equality**
    - Remedy proportionate to loss suffered
    - Distributing funds – equity will generally distribute in proportion to the contributions of parties
- **Equity looks to the intent rather than the form**
    - Focus on what parties intend – not precise wording
- **Equity looks on that which ought to be done as being done**
    - Not focused on form – so will often view an agreement/transaction as complete before it is actually valid at CL
- **Equity acts *in personam* (against the person)**
    - ***In personam* rights** – right between parties (not entitled to the thing – only to a right of compensation)
    - ***In rem* rights** – right between parties in relation to a specific thing (you are entitled to the thing itself instead of just a right of compensation)
    - Refers to remedies of specific performance and injunction
    - There are some equitable remedies that look more like proprietary interests (ex. constructive trust)
- **Equity will not assist a volunteer (someone who hasn't given consideration)**
    - If someone does give consideration – equity will try to ensure that agreement is performed
    - Law scrutinizes gift scenario to ensure settlor giving gift really intended to give out-and-out gift
- **If the equities are equal – the law will prevail**
    - Legal interest will usually take precedence over equitable interest if acquired without notice and for value

EQUITABLE INTEREST

- An interest in property that is not a legal interest – but gives the person who holds it rights to the property
- Very flexible – can be adjusted to meet many different situations
- Classically seen as ***in personam* rights** – they attach to persons

    - If affected property is outside court's jurisdiction – if trustee is in jurisdiction court will assume control of case
    - Court imposes remedy on the person of the Tee when good conscience requires it
- But can have characteristics of ***in rem* rights**
    - Allows a B to terminate trust and demand legal property, sell/mortgage his interest to another, devise his interest in a will, pursue his interests into the hands of third parties (tracing)
- **Arise through:**
    - 1. Express creation – ex. express trusts, wills, partnerships
    - 2. Contract for the sale of property
    - 3. Circumstances where the court recognizes the assignment of legal interest when CL or statutory formalities have not been complied with
    - 4. By implication of law – ex. resulting trust
    - 5. By operation – where court imposes a constructive trust
- **Competing legal and equitable interests** – generally a legal interest will take precedence over an equitable interest where it has been acquired *bona fide* (without notice) for value
    - If holder knows of prior equitable interest his conscience is bound by that interest
    - Value = consideration (doesn't have to be full value)
    - Operation of maxim: **if equities are equal the law will prevail**
- **Competing equitable interests –** prior equitable interests will be given priority over subsequent legal interests where there is notice of the prior equitable interest
    - Operation of maxim: **he who is first in time is first in law** (qui-prior est tempore prior est jure)
- "mere equities" – a right that is usually ancillary to the recognition of an equitable interest
    - Court focuses on conduct of parties rather than quality of the interest
    - Holder has a right to claim relief in equity – but no substantive equitable interest
        - Mere equities can lead to an equitable interest
    - Ex. right to set aside transaction for undue influence, right to enforce oral mortgage under doctrine of part performance

EXPRESS TRUSTS – COMPLETION/VESTING

FORMS OF DEALING WITH EQUITABLE INTERESTS

- S can assign property to the party directly to hold on trust for the benefit of himself
- S can declare himself a Tee of the interest for the B (as Tee the S retains title)
- S can direct/appoint a Tee to hold the property on trust for a B
- S can agree/contract with a B that a Tee be appointed to hold the trust property for the B
- **Express trust can be created *inter vivos* or *per mortis causa***

THE CONCEPT OF VESTING

- There must be proper vesting in order for a trust to be valid
    - The form of dealing and type of property will determine what needs to be done to effect a completed trust (ie. to vest title in the Tee)
- S must be legally obliged to be immediately and unconditionally bound (***Milroy***)
    - Where there is self –vesting, S must be shown to have intended to be immediately and unconditionally bound by the gift he made (***Carson v Wilson***)
- Where S declares himself Tee – title to property already vested in him (completely constituted trust)

TWO QUESTIONS FOR DETERMINING VESTING

1. Form of Dealing – transactional context

Ex. gift or contract; has S declared himself as Tee or appointed a third party to act as Tee (either by appointment under declaration of trust or pursuant to contractual obligation)

- Relevant form of dealing is determined by the actual intention of the donor
- Intention determined by looking at: the document, the context of the writing and surrounding circumstances

2. Type of Property – what property forms the subject matter of the trust will determine what needs to be done to affect a transfer and thus complete the trust with title vested in Tee

- Requirements necessary for vesting vary according to type of property involved

GIFTS

- Without consideration – S is essentially making a gift to a B through the medium of a Tee
    - As gift – equity requires same formalities as the law to give effect to a valid transfer
        - Real property = registration in LTO
        - Chattels = actual delivery
        - Shares = registration in co's share register

TRANSFERS TO A THIRD PARTY

Milroy v Lord (1862) All ER Rep

- To render a voluntary settlement valid and effectual, the settlor must have done everything which according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him
    - **There is no equity in this Court to perfect an imperfect gift**
    - The Bank shares were an imperfect gift and therefore not in trust for Milroy
- The settlor made a perfect gift of the dividends of the shares and the insurance shares were purchased with these dividends – because the dividends were a gift to Milroy and the shares were bought with this money the shares in Medley's name would be a resulting trust to Milroy
- **No proper transfer to the Tee = no effective gift to the B (ie. no effective trust created)**
- *Maxim: Equity won't assist a volunteer* – the law doesn't want to make every promise legally enforceable; without consideration promises are idle and the law doesn't want to be enforcing them

Re Rose

- **Issue:** whether the transfer of shares were effective on the day on which they were executed and delivered or on the day of registration
- **Held:** shares transferred on date of execution by husband; the transfers were effective to pass the beneficial interest in the shares and that pending registration the husband was the trustee of the legal estate in the shares – therefore no estate duty owed
    - **Equity will treat as effective an intended transfer where the S has done everything he is personally able to do legally in the ordinary course of business to transfer the gift to the Tee**
    - *Maxim: equity looks at what ought to have been done as though it was done*

PERSONAL DECLARATION OF TRUST

- S makes himself Tee – no need to transfer title, it is already vested in the Tee

* Cases in this area are all very fact driven

Glynn v Commissioner of Taxation (1964) Aust H Ct
Facts: No communication to Bs about the trust, dividends were kept by the father, but to support the sons (Bs)

- Proof of a formal statement by the owner of property to the effect that he holds it upon trust for another is not conclusive proof of the trust
    - Must look at surrounding circumstances to determine if S intended to create a trust
- **For personal declaration of trust to be effected you don't have to tell Bs about the trust, or transfer property into B's name**

Carson v Wilson (1960) Ont CA

- For personal declaration of trust to be valid must be **intention on part of S to be immediately and unconditionally bound** – to constitute required vesting
- Can't make a testamentary disposition without complying with the formalities of the *Wills Act*

COVENANTS IN FAVOUR OF VOLUNTEERS
Prospective B can enforce agreement with S to transfer property to Tee on trust for B if:
1. B has given consideration for the promise (binding contract – can enforce by specific performance)
2. S gave the promise under seal – conscious creation of document and attaching your seal is seen as enforceable at CL

These are both cases where the B is not a volunteer
Otherwise: *equity will not assist a volunteer* and B can't compel S to carry out his promise

WHEN EQUITY WILL ASSIST A VOLUNTEER
1. doctrine of part performance
2. equitable estoppel
3. gift *mortis causa* – "if I die, this is yours, if not I'm keeping it" (with transfer)
4. rule in ***Strong v Bird***

Strong v Bird – helps <u>executors</u> only; renders imperfect gift effective

- Where *inter vivos* gift is imperfect by reason only of fact that intended transfer to donee is incomplete (non-vesting) the incomplete gift will be perfected (vested) if donee acquires the property in the capacity of executor of the donor's estate
    - Can also apply where testator dies intestate and donee appointed administrator of estate
- Rule applies to both real and personal property
- Rule is based on presumption that by making donee the executor, deceased likely intended to free executor from unpaid debts (also practical basis: executor won't sue himself for recovery of debt)
    - But this rule runs contrary to many duties in trust law not to self-deal

CONDITIONS FOR APPLICATION OF STRONG V BIRD RULE:
1. at some time in his lifetime the testator made an immediate gift of property to another person
2. testator's intention at the time was that what he did should take effect by way of present gift – it failed to do so because it didn't comply with the legal requisites for a complete divesting of title from donor to donee
3. testator still had (at time of death) the intention that property be treated as if it had been given to donee
4. testator left a will appointing donee as the executor (or one of the executors)

Re Halley Estate – refused to extend ***Strong v Bird*** to trusts
PROF: ***Strong v Bird*** should have been applied (therefore should be extended to trusts)
Facts: Shares for benefit of granddaughter, mother was executrix

- Granddaughter never received legal title – therefore trust was imperfect
- PROF thinks ***Strong v Bird*** should have been applied = effective trust for benefit of granddaughter
- BUT, court was confused – said ***Strong v Bird*** applied where person has legal title and then gets beneficial interest (it is the opposite – beneficial interest then gets legal title)
- (could have argued that like in ***Re Rose*** – gift was effective because testator did all he could do to effect the transfer but was frustrated by eventual death)

EXPRESS TRUSTS – THE THREE CERTAINTIES

SOME APPLICATIONS OF TRUSTS:

- Property held for those without legal capacity (ex. minors, mentally incompetent)
- Devise under a will (ex. devise to children with trust to spouse in lifetime)
- Superannuation or pension fund
- Unit trusts – allow small investors to pool funds to participate in larger investment schemes
- Charitable and non-charitable purposes
- Tax avoidance or deferral

Within a single trust settlement Tees may:

- Hold some property on **non-discretionary** trust – ex. property in trust for specific B
- Hold other property on **discretionary** trust – ex. trust for one or more members of group of Bs
- Hold other property subject to **power to appoint** someone in a named group (special power)
    - Power of appointment may go to someone other than Tee – **"donee of the power of appointment"**

1. CERTAINTY OF SUBJECT-MATTER (THE PROPERTY OR ASSETS)

- Subject matter of trust must be "property" – anything of value that is legally capable of transfer (ex. can't be right to salary because that is not transferable)
- Both the property and the amount of beneficial interest (to each beneficiary) must be sufficiently certain to constitute a trust
    - TEST: is the trust property and the beneficial interest ascertained or ascertainable?
        - described "with sufficient exactness" (***Beardmore Trusts***)
        - courts generally lean in favour of finding certainty
- If property is uncertain = trust fails and the transferee holds legal and beneficial title
- "Residue" is sufficiently certain (it has a fixed legal meaning) = what is left after you've assembled all of deceased's assets and paid all their debts

Re Beardmore Trusts

- Trust void because subject matter of the trust is not described with sufficient exactness to permit that such matter be ascertained at the time the trust was exacted
    - Description of the trust must permit the identification of the trust *res* or no valid trust is created
    - ie. you cannot have a trust where you have to wait to see what the assets will be [sidenote: today there is some debate about whether this kind of "floating trust" should be allowed]

Re Golley

- Court held that "receive a reasonable income from other properties" was sufficiently certain because there is an objective standard of reasonableness that can be established and applied

London Wine Company

- To have certainty of subject matter: must be able to ascertain with certainty what the interest of B is
    - **Also must be able to ascertain what property that interest attaches to**

2. CERTAINTY OF WORDS (INTENTION TO CREATE TRUST)

- Certainty of intention is FUNDAMENTAL – courts will examine the words very carefully to consider if a trust is formed
- When looking at words to determine intention: look for whether the words used and surrounding circumstances impose an obligation on the person getting title to use the property for the benefit of someone else
    - Using the word "trust" doesn't automatically mean the court will find a trust is formed; but this is pretty indicative of a trust so it will be hard to get past it
    - If precatory words are used (ex. hope, desire, request, wish, with confidence, etc.) starting assumption is that no trust is formed
        - These words alone only create a moral obligation; not a legally binding trust
        - But court will look at entire document and the surrounding context to decide if a trust is created even though precatory words were used [*Maxim: equity looks at intent rather than form*]
    - **What you are looking for is "must" (imperatives) – MUST = TRUST**
- TEST: is there a certain and immediate intention to create a trust (not just a general intent to benefit)

Nicoll v Hayman (1944) SCC

- There must be certainty of language for creation of an express trust
    - **Courts will look at the ordinary meaning of the words used and how the words operate in the context of the document**
- "in full confidence" – seen as precatory words, doesn't create an imperative that she must dispose of property to Bs; it was actually a gift and therefore, no creation of a trust
    - **There is a presumption in favour of gift** (where precatory words used) – especially in family type trusts
- In this case we also don't even know if she has already "disposed" of the property to the unnamed Bs, so to take it away from her estate (and return it to original testator on resulting trust) would be unfair

EFFECT OF UNCERTAINTY OF WORDS/INTENTION

- Where intention of transferor is uncertain as to creation of a trust – no express trust arises
- The person with legal title or in control of the property is entitled to it beneficially

3. CERTAINTY OF OBJECTS (BENEFICIARIES)

SUMMARY:

- In the case of a **fixed trust**, the objects of the trust have been set out with such precision that s/he/they can be **individually identified*** and, if more than one (i.e. a class of objects), **completely listed**

- In the case of **discretionary trusts or trust powers**, where the description of the objects meets the **certainty of criterion** test and the range of objects is not so "**hopelessly wide"** that the trust is administratively unworkable (i.e. cannot be properly supervised by a court because of "**evidential** uncertainty")

    (The **certainty of criterion** test means that a court is able to determine with certainty of any given individual whether s/he **is or is not** a member of the class of potential beneficiaries described in the objects clause of the trust instrument)

- Need to have certainty of objects so the court can enforce the Tee's administration of the trust
- **Certainty of objects requires two things:**
    - 1. Trust must be in favour of persons, not non-charitable purposes
    - 2. The class of Bs must be described in sufficiently certain terms that the trust can be performed
- Can have conceptual uncertainty – where criteria for selecting Bs is uncertain; or evidential uncertainty – where there aren't enough facts to apply the settlor's definition of B
    - When naming the B, S should be as specific as possible
        - Can give name of specific individual, identify by description, or as member of specific group or class
- Need certainty of objects to: ensure Tee is fulfilling S's intentions; the right Bs are taking; the Bs can enforce the trust; the court is able to distribute the trust if the Tee is failing its duties
- **Bare trust -** Simplest form of trust; identity of B is stated; Tee holds property for this B and has no active duties unless the B calls for legal title to the property – Tee is really only there to hold legal title; B is in control; B can terminate the trust easily

THREE TYPES OF APPOINTING PROVISIONS:

1. Fixed trust

- Identified individual or narrow group of specifically described people who are object of trust
- Tees have no discretion to decide who Bs are or in what proportion they take
    - Interests of the Bs are specified in the trust instrument or are ascertainable
- *TEST for certainty:* "list certainty test"; group has to be sufficiently identified so you can draw up a complete list of every B (***IRC v Broadway Cottages***)
    - Court requires a high degree of certainty with a fixed trust – if a comprehensive list is not possible because description of the class is conceptually/semantically uncertain the trust fails because:
        - Tee can't comply with the imperative implicit in the trust
        - Without full list of Bs only a subset can be identified – means that they can't call for execution and termination of the trust because they aren't all the Bs (***Morice v Bishop***)
    - Trust also fails if list can't be drawn up because of evidential uncertainty; may be precise, but it is an impossible job for the Tees – focus is on capability of enumerating the objects

2. Discretionary trusts (aka Trust power)

- Tee of power is under fiduciary obligation to exercise the appointment – Tee MUST distribute the trust
    - Tee has fiduciary duty to consider the most appropriate way to exercise their discretion; must be fully informed about options under the trust and then must distribute
    - Wider, more comprehensive range of inquiry is required in exercise of trust powers than mere powers
- *TEST for certainty:* "criterion certainty" test - must be possible to say whether any given individual is or is not a member of the class (***Baden No. 1***) [this overruled previous law that said the test for all trust powers (fixed and discretionary) was the "list certainty test" (***Gulbenkian***)]
    - Even if trust is certain – could become void if it is administratively unworkable
    - Range of objects must not be so hopelessly wide that the trust is administratively unworkable
- This test is not problematic because:
    - Once Tees accept a trust they are likely ok with its terms; including parameters of exercising discretion
    - If Tees exercise their discretion improperly and distribute to a non-object they can be restrained on the application of a qualified member of the class

- If the Tee improperly chooses not to make any appointments the court can replace the Tee on application of eligible objects
    - If all replacement Tees refuse to make appointments (very unlikely) the court can exercise its discretion to declare a trust for Bs it chooses from the class

3. Powers of appointment

- Under power of appointment donee of power is not required to make an appointment; has duties to consider whether to make a distribution and ensure it is made on rational, defensible grounds (no fiduciary duties like with discretionary trust)
    - **General power** – donee can appoint anyone including himself
    - **Special power** – donee can appoint only persons from named specified class of objects (ex. ***Gulbenkian***)
    - **Intermediate/hybrid power** – donee can appoint anyone at all except person or class proscribed by the donor (ex. ***Re Manisty***)
- *TEST for certainty:* "criterion certainty" test – can a court determine with certainty if any given individual is or is not a member of the class of potential Bs (***Gestetner*** – "complete list test" for fixed trust doesn't apply to powers of appointment***; Gulbenkian***- establishes test for mere power)
- If failure to exercise the power or invalid exercise of power = there is a resulting trust in favour of the settlor
- Under discretionary trust and power of appointment because of "is or is not" test – potential Bs have a right to be considered and evaluated consistent with the terms of the trust and the intention of the S

DETERMINING BETWEEN TRUST POWER OR MERE POWER:

- Whether Tees are compelled to act versus enabled in their discretion to act (shall vs may; mandatory vs permissive)
- Determine whether Bs have an interest in the trust property (vested, contingent, vested subject to divestment)
- MUST = trust; MAY = power
- Existence of a gift-over likely implies intention to create a power (it means that there was consideration of what would happen if fund weren't distributed)

In re Gulbenkian

- Power of appointment is valid if it can be said with certainty whether any given individual is or is not a member of the class
    - Doesn't fail simply because it is impossible to ascertain every member of the class

Baden No 1

- Court abandoned the "list certainty test" for discretionary trusts
    - Adopted the test from ***Gulbenkian*** for mere powers – "is or is not test" aka "criterion certainty test"
    - **Test for certainty of objects for both discretionary trust and mere power is the same = criterion certainty test**
- Court viewed the practical task of a Tee with a power of appointment or a discretionary trust as relatively similar
- **Trustees' duty of inquiry or ascertainment:** in each case the trustees ought to make such a survey of the range of objects or possible beneficiaries as will enable them to carry out their fiduciary duty
    - A wider and more comprehensive range of inquiry is called for in the case of trust powers than in the case of powers
- Evidential uncertainty alone shouldn't invalidate a trust power because it is always possible to get directions from the court

- Enforcement of these large trusts with many Bs should be considered practically:
- The court could ultimately enforce this by appointing new Tees, having them prepare a scheme of distribution for the court to review, and giving Tees suitable directions
- Where the class is smaller the court could order equal division

Re Manisty's Settlement

- **A power cannot be uncertain merely because it is wide in ambit**
- **The terms of a special power do not necessarily indicate in themselves how the Ts are to consider the exercise of the power – that consideration is confided in the absolute discretion of the Ts**

- If a person within the ambit of the power is aware of its existence he can require the Ts to consider exercising the power and to consider a request on his part for the power to be exercised in his favour
  - Ts must consider this request and if they decline to do so or can be proved to have omitted to do so – the aggrieved person may apply to the court which may remove the Ts and appoint others in their place
  - **This is the only right and only remedy of any object of the power**
- The court may intervene if the Ts act "capriciously" (ie. for any reasons which could be said to be irrational, perverse, or irrelevant to any sensible expectation of the S)
- A capricious power negatives a sensible consideration by the Ts of the exercise of the power
- A wide power doesn't negative or prohibit a sensible approach by the Ts to the consideration and exercise of their powers
- Trust power is not invalid merely because it is too wide (ie. administratively unworkable)
- Trust power would be held invalid if it was exercised capriciously

Re Hay's Settlement

- Donee of an intermediate power of appointment has to consider what persons or classes are to be objects
  - Doesn't have to compile a list of them or even accurately assess the number of them
  - Needs an "appreciation of the field" – **numbers are not a barrier**
- Duties of Tees under a discretionary trust are more onerous than those of Tees under a power of appointment
  - Must survey the range of objects in a responsible manner having regard to the purpose of the trust
- **Administrative unworkability doesn't render a power of appointment invalid**
  - A discretionary trust would be administratively unworkable because of numbers
  - Difference between discretionary trust and power of appointment = the Bs under a trust have rights of enforcement which mere objects of power lack
    - If a power of appointment is given to a person who is *not in a fiduciary position* there is nothing in the width of the power which invalidates it per se
- Duties of a T which are specific to a mere power:
  - 1. Obeying the trust instrument and making no appointment that is not authorized by it
  - 2. Consider periodically whether or not he should exercise the power
  - 3. Consider the range of objects of the power
  - 4. Consider the appropriateness of individual appointments

Jones v The T Eaton Co

Facts: "to be used by them as a trust fund for any needy or deserving Toronto members of the Eaton Quarter Century Club as the said Executive Officers in their absolute discretion may decide, the sum of $50,000."
Issue: if the trust was charitable = no problem of uncertainty because no charitable trust can fail for uncertainty; if the trust was not charitable court would have to decide whether the class of "needy or deserving Toronto members" of the Club was sufficiently certain.

- SCC considered the words of the trust in light of the testator's previous history
- SCC decided the trust was charitable – and therefore can't fail for uncertainty
    - Minority of SCC: applied the ***Baden No 1*** test and found certainty of objects (gave weight to surrounding provisions which he thought gave Tees enough criteria to understand and apply the trust)

Donavan Waters in *The Law of Trusts in Canada* (3rd edition, 2005) page 162 sets out the state of the law in these terms: "Provided certainty is attained as to who would or would not qualify as a member, and it is possible, given the nature of the instrument and the circumstances, to point to a reasonable number of persons as coming within that class description, the requirement of certainty is satisfied for a mere power, a discretionary trust, and any other form of trust power."

CONCEPTUAL/SEMANTIC UNCERTAINTY

- where testator makes bequest or gift under a condition in which he hasn't expressed himself clearly enough; has used words that are too vague and indistinct for a court to apply
    - Court will discard the condition as meaningless
    - Conceptual/semantic uncertainty will defeat the power of appointment
- **Conceptual certainty is met if the criterion test can be successfully applied**

EVIDENTIAL UNCERTAINTY

- Arises where Tees have difficulty getting evidence to identify the potential class of objects even though the terms are precise
    - Doesn't invalidate a power
    - Doesn't, on its own, invalidate the trust power – Tees can apply to court for assistance and directions
- When evidential uncertainty becomes administratively unworkable then the discretionary trust will likely fail – class is too large for the imperatives of trust law to apply

Baden No 2

- SACHS LJ: It is essential to keep in mind the difference between conceptual uncertainty and evidential difficulties
    - Linguistic or semantic uncertainty – if unresolved by the court renders the gift void
    - Evidential difficulties – difficulty in ascertaining the existence or whereabouts of members of the class, which the court can appropriately deal with on an application for directions
- Once the class of persons to be benefited is conceptually certain it then becomes a question of fact to be determined on evidence whether any postulant has on inquiry been proved to be within it: if he is not so proved, then his is not in it
    - The suggestion that trusts could be invalid because it might be impossible to prove of a given individual that he was not in the relevant class is wholly fallacious
- MEGAW LJ: a trust for selection will not fail simply because the whole range of objects cannot be ascertained
- It is not that it must be possible to show with certainty that any given person is or is not within the trust, but that it is not, or may not be, sufficient to be able to show that one individual person is within it

ADMINISTRATIVE UNWORKABILITY

- Occurs where range of potential Bs is so hopelessly wide that practically it doesn't form anything like a real class of Bs
    - ***Baden No 1*** – said discretionary trust may be void in these circumstances

        - Discretionary trust will fail where the class of objects is too wide making the power too difficult to supervise and enforce
    - ***Morice*** – said trust can't be executed in these circumstances
- Usually created for tax avoidance – because it makes it difficult to place a value on the trust (***Gulbenkian***)
- Because administrative unworkability doesn't apply to powers but does to discretionary trusts – makes the tests for certainty of the two not identical
    - **A power will not fail because of administrative unworkability** (***Re Hays, Re Manisty***)
        - A power will be held invalid if it was exercised capriciously (***Re Manisty***)
    - In a trust (including discretionary trust) the Tees must be able to formulate reasonable and clear criteria to guide their discretionary distribution to Bs

FACTORS REQUIRED TO CREATE AN EXPRESS TRUST

- Completely constituted or vested trust or perfected trust
- Certainty of intent/words
- Certainty of subject matter
- Certainty of objects
- Also require
    - Compliance with rule against perpetuities
    - If formalities are prescribed they must be complied with
    - Trust must not be created to further an illegal purpose (ex. defraud creditors)
    - Trust must not infringe the rule against inalienability and accumulation of income

THE RULE AGAINST PERPETUITIES

INTRO: FUTURE INTERESTS

- **Future Interest -** presently-held (real) rights which, after the passage of defined time or the realization of described circumstances (i.e. in the future), will lead to possessory rights of occupation and use.
    - Can be held as vested interests or as unvested, contingent, future interests – depending on their creation
- **Vested (presently-held) future interests** - the interest is immediately vested on transfer with possession of the property postponed to the future: i.e. presently-held rights to future possession. (ex. reversions and remainders)
- **Unvested, contingent future interests** –the future interest is a right to future use of the property that is not immediately vested as future interest until the contingency happens (may also be legally recognized as property)
    - ex. "To A (who is alive and at date of transfer 14 years old) when he turns 19 years of age."
    - **To qualify as property they need to comply with the rule against perpetuities.**
- Examples of contingent future interests:
    - Transfers subject to a **condition precedent** ("To Orville if he turns 30 years of age")
    - Transfer subject to **condition subsequent** (e.g. "rights of entry" – "To you, but if you cease to use property for educational purposes, then to Bloggs")
    - Transfers subject to **determinable interests** (e.g. "rights of reverter" - "To you while you are married to Orscilla, when you are not, to Snooks")
- **Contingent future interests (even though based on a contingency that may never happen) could qualify as legally-recognized property if:**
    - The contingency does not effectively bar alienation of the thing

- The content of the contingency is not one that is void for vagueness or contravention of public policy
- The contingent future interest complies with the rule against perpetuities – i.e. vesting of the contingent future interest to become a vested, presently-held, future interest is not too remote
  - ie. whether the contingent, future interest is capable of vesting in a person within the perpetuity period

WHEN RAP COMES UP

- RAP deals with the vesting of title in the Bs
- Issue of **"vesting equitable title in a beneficiary"** surfaces where - in order to qualify as a B (with an equitable interest in the property), some condition precedent (qualifying condition) has to be first fulfilled
  - Ex. being in existence (e.g. trust for an unborn child)
  - Age (sometimes you must be as much as 30 years to get the equitable interest)
  - Adherence to and/or practice of a specific religious belief; marriage (many permutations); etc

REASONS FOR THE RULE – PREVENT REMOTENESS OF VESTING

- **RAP** - helps prevent one generation ossifying land use for succeeding generations by effectively ruling from the grave
  - Unless checked, a person from one generation is able to mandate the future ownership, use and marketability of property by eliminating or seriously restricting the freedom of later generations of owners to deal with the property according to their best judgment.
  - If the practice is widespread it creates a problem for free markets
  - Court started to move towards balancing interests of trust creators and general public economic interests
- **RAP is to prevent the creation of property interests where vesting in individuals is to occur only after many generations in the future** (usually settlor/devisor's objective is to lock property within the family forever)
  - In other words, the rule **prevents remoteness of vesting**
  - The CL rule against perpetuities cuts off how far you can "rule from the grave" – as matter of policy the law doesn't like ruling from the grave
- **RAP: an interest that is being put forward must vest within a defined period of time**
- Policy measure to deter settlors/devisors from creating "perpetual" trusts through the use of conditions precedent – requires that the B's interest must vest absolutely within a defined time period that begins from the time the trust comes into effect (when legal title vests in the Tee)
  - Means that there must be a point during the time period at which all the Bs have come into existence and their interests determined and in their enjoyment
  - This discourages a perpetual trust because the vested Bs can combine and terminate the trust if they want – in order to do this all Bs are required; therefore all must be in existence to allow for termination (under the rules in ***Saunders v Vautier***)
    - Within the defined period the Bs must be able to terminate the trust by agreeing to do so - but you can't agree until your contingent interest has become vested
    - Once contingent interest is vested they can come together and collapse trust
    - By having ability to collapse the trust each B gets full legal title to property to start their own economic initiatives (supports capitalism)
    - **Trying to balance the wishes of the S and the interests of a capitalist economic society**
- Doesn't mean that trusts must only last for a defined period

- **Means that by a certain period the beneficiaries must be capable of being identified (by the vesting in them of all the equitable interests) and able to become qualified (i.e. fully entitled to the thing) so that they are in a position to terminate the trust if they wish**

THE COMMON LAW RULE

- Under CL rule - had to be able to say at the outset of the trust and with absolute certainty that under the terms of the trust the **vesting of equitable interests if they were to occur would do so within lives in being at the time of the creation of the trust plus an additional 21 years**
    - The time period of the rule enabled settlors/devisors to create trusts in favour of their grandchildren who reached the age of 21 years (the age of majority at that time)
    - There must be a "life in being" to attach the perpetuity clock to
    - The law doesn't care if the interest ever actually vests or not – it is enough that it may vest
        - **Failure of RAP is based on possibility that interest could vest after perpetuity period; doesn't matter if it could never vest at all**
- A trust was void if one could construe the terms of the instrument as enabling even one **possibility**, however remote, of an interest of a beneficiary vesting outside the period of lives in being at the time the property interest was created plus 21 years
    - ie. **if there was possibility of even one person getting their interest outside of the time period (lives in being + 21 years) the whole trust was void**
    - CL rule is very aggressive – doesn't wait and see, but requires that it is apparent from the date the document takes effect that all potential interests will vest within the perpetuity period
    - Trust void because S was viewed as intending the trust as set out - if the full terms of the trust can't be realized because the law has rendered a gift to a B illegal for remote vesting then the trust was void since it couldn't be implemented as intended by S
- Practical and biological impossibilities were disregarded in conceiving possibilities of a **spectral or phantom beneficiary** attaining an equitable interest that could vest outside the perpetuity period.

LEGISLATIVE REFORM (PERPETUITY ACT)

Perpetuity Act (BC)

s 8 *disposition of property which creates a contingent interest isn't void for violation of RAP only because there is possibility of interest vesting beyond perpetuity period*

s 9 (1) *contingent interests are presumed valid until actual events show that the interest is incapable of vesting within the perpetuity period (at that point the interest becomes void – unless it fits exception in the Act)*
(2) *disposition giving general power of appointment is presumed valid until it becomes established by actual events that the power can't be exercised within the perpetuity period*
(3) *disposition giving general power of appointment is presumed valid; becomes void for remoteness if the power is not fully exercised within the perpetuity period*

s 3 *The remedial provisions of this Act must be applied in the following order:*

(a) section 14 (*capacity to have children*)
(b) section 9 (*wait and see*)
(c) section 11 (*age reduction*)
(d) section 12 (*class splitting*)
(e) section 13 (*general cy pres*)

s 7 (1) *under this section an interest must vest within 80 years after the creation of the interest – to not violate the RAP* [extends perpetuity from CL "lives in being + 21 years → straight 80 years]

- *Perpetuity Act* attempts to preserve overall policy of the rule but eliminate absurdities
- CL rule results in absurdities because the harsh consequences of finding the trust void can result where trust wording merely hypothetically enabled the possibility of a B obtaining an equitable interest outside the perpetuity period [**ie. the CL rule is very unforgiving**]
    - Application of this rule became unfair where trusts were void merely because people were unaware that wording could lead to this result
    - Act allows for easier drafting to ensure interests vest in perpetuity period; less harsh consequences where interests don't vest (rather than just immediately void)
- **The Act remediates this absurdity in three principal ways:**
    - 1. Allows actual events to unfold (**"wait and see"**) within the allowed period and will void when the time comes if at that point the trust has failed [**ss 8 & 9**]
    - 2. Allows for reduction of age contingencies; recognition of natural limitations on giving birth, general *cy-pres* etc. [**s 3**]
        - Allows inheritance at a younger age even if S sets out higher age contingency
        - Gives overall discretion to court (under *cy-pres*) to look at intention and give substitutes
    - 3. Allows settlors/devisors to choose a straight 80 year period as a substitute for "lives in being + 21 years" [**s 7**]
        - Just have to create a trust where all contingent interests vest within 80 years
- **Critiques of *Perpetuity Act***
- Unnecessarily cumbersome; this could still be problematic for the unwary draftsperson
- Do we even need a rule today?
    - People generally don't create wills which freeze property anymore; even when they do it is not as common as in the past, therefore less of an issue for free markets, capitalism, etc.)
    - Manitoba has abolished the RAP completely; in England they have straight 125 year perpetuity period
- **Note**: in BC many statutory bodies are exempt from the rule
    - Ex. Universities (*University Act* **s 52**), the gov when it creates dispositions (*Perpetuity Act* **s 5**)

FORMALITIES

- **Formalities:** formal requirements for validity/enforceability of transfer of certain types of equitable interests

INTER VIVOS TRANSFERS

- Contracts for the sale of land need to be in writing [*Statute of Frauds*/*Law and Equity Act* **s 59**]
    - *Statute of Frauds* is inapplicable in BC with regards to an inter vivos transfer
    - In BC the *Law and Equity Act* (**s 59**) overrides *Statute of Frauds* - a disposition that would ordinarily require writing does not in relation to a trust
        - **s 59(1)(a)** A disposition of land does not include the creation, assignment or enunciation of an interest in a trust
- **No writing requirement from S to B for transfer of equitable estate, but there is a writing requirement from B to third party of equitable estate**
    - Where B is transferring his equitable interest in the trust (a chose in action) *Law and Equity Act* **s 36** governs.
    - *Law and Equity Act* **s 36** – absolute assignment must be in writing; signed by assignor (B); express notice must be given to Tee

- Formalities pose blunt solutions and can be manipulated to become, paradoxically, instruments for perpetrating fraud
    - "*Equity follows the law*" but it also "*looks to intent rather than form*" and won't allow fraudsters to hide behind the law
    - ***McCormick v Grogan***: Personal fraud – Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud
        - Converted into Tee on principle that an individual shall not be benefited by his own personal fraud
        - You must show clearly and distinctly that the person you wish to convert into Tee acted *malo animo* - must show that he knew that the testator or the intestate was beguiled and deceived by his conduct
- For reasons of complication and contradiction - certain jurisdictions have abolished the need for formalities for the creation, surrender and termination of equitable interests, including those pertaining to land
    - In respect of land, Manitoba and British Columbia are the only two provinces in Canada that have abolished the necessity for formalities in creating and transferring **equitable interests in land** *inter vivos* from settlor to beneficiary [*Law and Equity Act* **s 59**]
- From practical standpoint – still a good idea to evidence trust in writing

- **Keep in mind:** writing requirement for disposition of **legal interest in land** still exists [*Law and Equity Act* **s 59**]
    - So S transferring to Tee must do this in writing to properly vest the legal interest in Tee (and complete trust)

WILLS

- The situation is (somewhat) different with regard to dispositions ***per mortis causa*** where compliance with formalities is important to avoid intestacy
    - **Transferring on death** - formalities are found in the *Wills Act*
- *Wills Act/Wills, Estates and Succession Act* - testator must manifest his intention to leave property to persons in a <u>will</u>
    - *Wills Act* **s 3** – the will must be in writing
    - *Wills Act* **s 4** – must be signed by testator, in presence of 2 witnesses who also sign
    - Failure to comply invalidates the will and the rules of intestate succession apply (exemptions from these requirements are broad in *Wills, Estates and Succession Act*)
        - 2 exemptions by equity – the secret and half secret trusts – will become less significant in BC under the new Act
- Both secret and half secret trusts take effect on testatrix's death despite a failure to comply with the provisions of the *Wills Act*

Exemptions available under new *Wills, Estates and Succession Act*:
s 4 (1) *provisions of the Act can be subject to contrary intention in the instrument or necessary implied into the instrument*
(2) *extrinsic evidence of testamentary intention only admissible if: provision in will is meaningless; ambiguous; or expressly permitted by the Act*

s 58 (3) *even if a will is not made in compliance with the Act the court can order that a record, document, writing or marking on a will be fully effective as if it had been made as the will*

s 59 (1) *court can order that a will be rectified if it doesn't carry out the will-maker's intentions; still requires formalities of Wills Act, but allows for wider scope of rectification; gives court wide discretion to rectify issues*

FULLY SECRET TRUSTS

- In a fully secret trust - intention to benefit a B with a legacy is not disclosed *in* the will
    - Will would simply have named a stated "beneficiary"
    - That "beneficiary" would need to know that he is taking under the will as a Tee and not personally as an ordinary B (operation of ***Strong v Bird***?)
- However, the bequest would look like any other bequest - with no intention expressed in the will that the stated beneficiary is actually intended to act as a trustee of property

- **Requirements for a fully secret trust:**
    - 1. Testator must intend that the beneficiary named in the will, B, is to hold the legacy on trust for the real beneficiary, C [see ***Ottaway v. Norman* (1972)**]
    - 2. During testator's lifetime, he must communicate this intention to B
    - 3. B must accept or acquiesce in this proposal
        - If B has not given the promise to act as Tee (ex B learns of the testator's intention) then B will take beneficially – ie. B will get the property for himself
        - If B has given the promise to act as Tee before the testator dies but learns of C's identity only after testator's death - B will hold on a resulting trust for the testator's estate [see ***Re Boyes (1884)***]

Ottaway v Norman (1972)

- **Essential elements of a secret trust:**
    - 1. The intention of the testator to subject the primary donee to an obligation in favour of the secondary donee
    - 2. Communication of that intention to the primary donee
    - 3. The acceptance of that obligation by the primary donee either expressly or by acquiescence
- Basis of the doctrine of secret trust is the obligation imposed on the conscience of the primary donee – it doesn't matter what method the donor intends that the obligation be carried out
- Re: money – if the obligation is confined to money derived under Harry Ottaway's will, the obligation is meaningless and unworkable unless it includes the requirement that she keep it separate and distinct from her own money
    - If she had the right to mingle her own money with that derived under the will, there would be no ascertainable property upon which the trust could bite at her death

Re Stead (1900)

- If A induces B to leave property to A and C as tenants in common, by promising that he and C will carry out B's (the testator) wishes and C knows nothing about it until A's death – A is bound and C is not bound
- If the gift were to A and C as joint tenants
    - Where will is made on basis of an antecedent promise by A – the trust binds A and C
    - Where will is left unrevoked on the faith of a subsequent promise – A is bound and C is not bound

Re Boyes

Facts: B had solicitor C draft a will appointing C "absolutely" but C was told he was acting as Tee for a person the testator would later identify. B never disclosed the identity of the beneficiary. After B's death papers were discovered with letters to C that were never delivered indicating C was to hold for the benefit of Nell Brown. The FST failed and Brown didn't receive - C held as Tee for the next of kin instead

- If it is expressed on the face of the will that the legatee was a trustee, but the trusts were not declared in the will, no trust afterwards declared by a paper not executed as a will could be binding
    - In this case, the legatee would be trustee for the next of kin
- Where no trust appears on the face of the will but the testator has been induced to make the will by a promise on the part of the legatee to deal with the property in a specified manner – the court has compelled performance of this promise
    - Otherwise a fraud would be committed as it is assumed the gift would not have been made without the promise
- If the trust was not declared when the will was made - to make it binding it should be communicated to the legatee in the testator's lifetime and the legatee must accept that particular trust (**communication and acceptance**)
    - If testator gives legatee a sealed envelope with trust instructions which legatee opens upon testator's death = communication and acceptance
    - Where the trust is declared in an unattested paper discovered after the testator's death – the legatee might be a trustee, but the trust declared by that paper would not be good

HALF-SECRET TRUST

- In a **half** secret trust the will reveals that the person named in the will as beneficiary is actually receiving the property as **a trustee** for a real, but **undisclosed,** beneficiary
    - Half secret trust = name the trustee but don't name the beneficiary
    - Other details of the trust are not revealed (ie who is the real intended object of the bequest - the B)
    - Communication and acceptance of the objects can only be made prior to, or contemporaneous with, the making of the will
    - Any later communication by the testator in his lifetime, though accepted by the trustee is invalid and the trustee holds the property on resulting trust for the testator's estate
- Half-secret trust created when the existence of a trust appears on the face of a will but the objects of the trust are communicated to the trustee outside of the will
    - In this case, the trustee can't commit fraud by claiming the property beneficially
- Fully secret trusts can be created with intestacy (the B undertakes with the testator to receive on intestacy as Tee and not as a true B)
    - Half secret trusts can't - by definition the capacity of "beneficiary" named in the will is indicated to really be that of Tee of a real beneficiary unnamed in the will

- **Requirements for a half-secret trust**
    - 1. A must communicate to B that he is to hold the property on **<u>trust</u>** for C ***before the will is made***
    - 2. A must communicate to B the **<u>identity</u>** of C ***before the will is made***
        - PROF: no apparent, rational reason for this difference with fully secret trusts
        - But see ***Blackwell v. Blackwell***
    - 3. B must indicate his **<u>acceptance</u>** ***before or at the time the will is made***

Blackwell v Blackwell

- If a testator in his will makes a gift to a named legatee who at the time of making the will has promised he will hold the benefit of the gift for certain defined and lawful purposes – the Court will enforce against the legatee the trust in promised obedience to which he received the gift (***McCormick v Grogan***)
- A testator having been induced to make a gift on trust in his will in reliance on the clear promise by the trustee that such trust will be executed in favour of certain named persons, the trustee is not at liberty to suppress the evidence of the trust and thus destroy the whole object of its creation, in fraud of the beneficiaries

- **Necessary elements: intention, communication and acquiescence**
    - The testator intends his absolute gift to be employed as he and not as the donee desires
    - He tells the proposed donee of this intention
    - Either by express promise or by acquiescence the proposed donee encourages him to bequeath the money in the faith that his intentions will be carried out
- Court holds that parol evidence is allowed to enable proof of the identity of the B indicated in the will
    - Allowed because the evidence doesn't vary the will - simply gives effect to the testator's intent
    - Hence the terms of the will in this respect can be established in substantial part by oral evidence - despite writing requirement under the *Wills Act*
    - Limits to this allowance include:
        - Identifying the B before the will is executed (otherwise testators could give the "go-by" to the requirements of the *Wills Act* by simply telling the legatee from time to time who he at that moment wants to benefit after his death)
- **It is communication of the purpose to the legatee, coupled with acquiescence or promise on his part, that removes the matter from the provisions of the *Wills Act* and brings it within the law of trusts**

REASONS TO ENFORCE SECRET TRUSTS

- **Suggested reasons to enforce secret trusts:**
- To prevent the fraud of a Tee keeping the property for his own use in breach of a promise to the testatrix
    - ***McCormick v. Grogan (1869)*** - "This doctrine (of secret trusts) requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the legislature to pass the *Statute of Frauds*, and it is only in clear cases of fraud that this doctrine has been applied – cases in which the court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform."
    - If the Tee was allowed to use the *Wills Act* to keep property intended for someone else – the court would be participating in that fraud
- They operate outside of wills as part of equity's principle to give effect to a testator's actual or real intention
    - *Maxim: equity looks to intent rather than form*
- Accordingly, secret and half secret trusts are a means of devolving property to a beneficiary without complying with the formalities required by the *Wills Act* for transfers to beneficiaries *per mortis causa*.

In Re Keen ????? not sure about this

- Letter setting out intended beneficiaries was received by the legatee prior to the will being executed
    - The will stated that the notification should happen at the same time, or after execution of the will
- It is possible to provide trustees with sealed envelope containing beneficiary information – but this must be done in accordance with the conditions of the will (to create a valid trust)
    - Here the communication didn't follow the will and therefore the trust was invalid

REVOCATION BY THE SETTLOR

- **A settlor may include powers in the express trust for the amendment or revocation of the trust**
- Without a reservation of this power the settlor falls out the picture and only the B can terminate the trust
    - Terminate trusts under the rules of ***Saunders and Vautier***

Bill v Cureton

Facts: P had created a trust in which her Tees were to invest property and pay her the dividends for life, remainder to her husband for life, remainder to their children. Unmarried and without children, she and creditor sought to terminate the trust

- Court held she could not terminate the trust because of the interests of the spectral spouse and children under the trust
- **The settlor of the trust is bound by it and is not entitled to the assistance of the court to release himself from it**
    - "That a voluntary settlement, where the trust is actually created, is binding upon the author…is so fully established…that the author of this settlement is bound by it, and is not entitled to the assistance of this court to release herself from it…."
- **Note:** as sole B she would have been able to call for an end to the trust under the principles of ***Saunders and Vautier*** ; she was not the sole B and for obvious reasons couldn't collaborate with the other Bs to call for an end to the trust

Power point lecture 4 slide 32

IMPLIED OR RESULTING TRUSTS

- Do NOT depend on the expressed intention of a S
- Implied or resulting trusts – trusts which are based on unexpressed but presumed intention
    - In the RT the **equitable** estate jumps back to the settlor/testator's estate
    - (The legal estate is in the grantee holding as tee)
- **Arise in three circumstances:**
    - 1. Where an express trust doesn't initially exhaust the whole beneficial interest [**Automatic RT**]
        - Or, once validly created, it fails for any reason – trust property results to the S
    - 2. Where there has been a gratuitous transfer of property, or purchase with title in the name of another and the question is whether the gift was intended [**Presumed intention RT**]
        - Courts generally assume gift was unintended and there is presumption of RT
        - Person alleging a gift must rebut that presumption and prove a gift was intended by the transferor
        - For certain classes of relatives – it is presumed that a gift was intended (**presumption of advancement**)
    - 3. Where owner of property and one or more persons have a common intention that the owner shall hold the property as a trustee

REASONS FOR RESULTING TRUSTS

- Traditionally, both ART and PIRT considered to give effect to the common intention of the parties – it gives effect to settlor's intention not to give beneficially to the trustee
- **PIRTs** - the resulting trust is based on a presumed intention **not** to grant equitable title even though legal title has been transferred to a grantee.
- **ARTs** - the basis does not depend so much on the settlor having intended the beneficial interest to revert to him
    - ***Re Vandervell's Trusts(2)*** – shares given to charity; court found they were held on ART for Vandervell; he didn't want them back because of severe tax consequences
    - Presumed intention that property returns to S is not proper basis for resulting trusts in some situations because the S may not actually want the property to return to him (like ***Vandervells***)
        - Now the law analyses this from the perspective of unjust enrichment

- ARTs operate automatically - because the B is perceived as getting a beneficial interest greater than intended – this would result in unjust enrichment of that B
- To prevent this he (the trustee?) holds the legal title (beneficial interest) he now has on an ART for settlor – ie as trustee for settlor

- Chambers, *Resulting Trusts*: The transferor does not intend the transferee to benefit from the property delivered to him and so, even though legal title has transferred to the transferee an equitable title arises in the transferor to ensure that the transferee is not unjustly enriched at expense of the transferor
  - This view was somewhat rejected in ***Westdeutsche Landesbank v Islington London Borough Council*** because of the ramifications of giving the transferor a proprietary interest in the thing preferring him over other creditors in an insolvency.

AUTOMATIC RESULTING TRUSTS

Situations in which they occur:

- Common situations where ARTs occur can be grouped as follows:
  - 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 subject to a specific limitation which has not occurred
  - 4. Surplus of funds after trust purpose has been achieved

1. TRANSFER OF LEGAL TITLE TO TRUSTEES IN A TRUST THAT TURNS OUT TO BE VOID

- **ART will occur when an express trust fails for non compliance of one or more of the three certainties**
- This happened in ***IRC v. Broadway Cottages*** – trust lacked certainty of objects and was therefore void; Tees were viewed as holding legal title on an ART for the settlor

2. TRANSFER OF LEGAL TITLE TO TRUSTEE WITHOUT DISPOSING FULLY OF ALL THE EQUITABLE INTEREST

Re West (1900)

Facts: Testatrix left her property on trust for sale for payment of debts, funeral expenses and legacies. The trustees fully performed as directed. There was surplus left over and the trustees claimed it for their personal benefit. Court found for next of kin.

- **Where proceeds from an estate are not fully exhausted trustees still hold legal title, but not the equitable estate unless specifically granted to them beneficially –** unless there is specific direction in the will saying the Tees can keep what is leftover; Tee holds legal title on ART for the testator's estate
  - Their entitlement is only of the legal estate transferred to them which they hold on a resulting trust for the testatrix's heirs/next of kin who are actually vested with the equitable estate.
- Where the transfer is a gift subject to certain purposes described as trusts: where the whole legal interest is transferred for satisfying the expressed trusts – if the beneficial interest isn't exhausted in doing that, what's left belongs to the heirs
- Existence of the clause "mandating a sale" - is not consistent with an outright gift
  - It is placing limits on the uncontrolled powers of management that usually accompany a non trustee owner

Re Foord (1922)

- Compared to ***Re West*** – here, the court construed the ambiguous granting words in a self drawn will in favour of a gift to his sister with a requirement that she pay his debts and grant an annuity to his wife.
  - Words like "my" "sister" and "absolutely" – showed affection, and pointed to intention of outright gift to the sister with condition to pay debts and take out an annuity

Schmidt v Air Products Canada Ltd (1994) SCC

- **Illustrates the need to carefully construe documents to ascertain whether there is a trust with governing** trust principles and, if so, whether there are terms dealing with the disposition of surplus trust monies
- RT may arise if objects of trust satisfied and money remains in trust fund
    - Normally remaining trust will revert to the S of the fund
    - RT will not arise if at the time the trust is created the S demonstrates an intention to part with his money outright – ie. indicates that he will not retain any interest in any remaining funds
        - In most cases a non-reversion clause will be evidence of a permanent intention to part with the trust property and will therefore preclude the operation of the RT
- **Practical reality that factual circumstances which could trigger the operation of a RT will rarely occur in pension surplus cases**
- Where employers and employees (by virtue of their contribution) are Ss of the trust – surplus funds remaining on termination can revert on a RT to both employers and employees in proportion to their respective contributions

<u>Analysis for pension funds:</u>

- 1. Determine whether pension fund is impressed with a trust
    - Must be determined according to ordinary principles of trust law
    - A trust will exist where there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for specific beneficiaries
- 2. If no part of the pension fund is a trust – then apply principles of interpreting contracts to the plan
- 3. If the fund is a trust:
    - The trust is not a trust for purpose, it is a classic trust
    - It is governed by equity and if equitable principles conflict with plan provisions, equity prevails
    - The trust will in most places extend to any surplus
        - But an employer may explicitly limit the operation of the trust so that it doesn't apply to surplus
    - Employer, as S of the trust, may reserve a power to revoke the trust (if S wants to revoke – see ***Bill v Cureton***)
        - To be effective this power must be clearly reserved at the time the trust is created
        - Power to revoke can't be implied from general unlimited power of amendment
    - Surplus funds remaining in pension trust may be subject to a RT
        - Before RT can arise all objectives of the trust must be clearly fulfilled
        - No RT where the terms of the plan show intention to part outright with all money contributed to the pension fund
        - In contributory plans – it is not only employers but also employees intentions which must be considered – both are Ss of the trust, both are entitled to benefit from reversion of trust property

3. TRANSFER OF PROPERTY TO ANOTHER, SUBJECT TO A SPECIFIC LIMITATION OR CONDITION PRECEDENT WHICH HAS NOT OCCURRED OR BEEN ACHIEVED - QUISTCLOSE TRUST

Barclays Bank Ltd v Quistclose **– ART created for loan made for specific purpose that wasn't carried out**
Facts: Quistclose lent money to Rolls Razors subject to the express condition that RR would only use the money to pay a dividend to its shareholders. The loan was paid into a separate account with Barclays Bank and it was opened specifically for this purpose, a fact known by Barclays Bank. Before the dividend was paid RR went into receivorship and BB claimed to use the amount held in an account with the bank against overdrafts on RR loans.

Problem: Attempt to circumvent bankruptcy law. Normal order: secured creditors paid first, then remainder split between other creditors. To allow RT would allow QT to put itself in front of other creditors by simply declaring its purpose

- When lender advances money for specific expressed primary purpose – lender has equitable right that money be applied to that purpose
- If the primary purpose can't be carried out, the question arises if a secondary purpose (ie. repayment to the lender) has been agreed, expressly or by implication
    - If it has the remedies of equity may be invoked to give effect to it
- A **secondary** duty in favour of the lender arose upon failure of the **primary** duty (to pay the dividend)
    - **The terms of the loan by Q were such that they impressed on Quistclose's loaned money a trust in favour of Quistclose in the event of the dividend not being paid (secondary trust)**
    - The secondary duty is equitable and works like an ART: the lender transfers property in contract and the borrower holds in equity
- Since Barclays had notice of the nature of the loan it could not legally set off the amount held in the dividend account against RR's loans - It held that money on an ART for Quistclose
    - **Specific purpose of the loan must be fully identified by the lender to impress a duty on the borrower to use the amount solely for the purpose agreed by the lender**
- The ***Quistclose*** trust offers another means of protection to a creditor (besides obtaining security)
    - It gives the lender (settlor) an equitable interest in the money – a priority claim over the other creditors in the event of the borrower's insolvency
- Where is equitable interest held before the borrower's insolvency? Most commentators seem to agree beneficial title is with the lender (Q in this case)
    - Court says the lender has an "equitable right" to enforce the arrangement
    - So borrower holds money on trust (i.e. as a trustee) for the lender to be used only for the stipulated purpose
    - Lender is the beneficiary and can restrain borrower from using money for any other purpose
- This analysis has been criticized: The primary duty is tantamount to a trust for purpose (allowed only in exceptional circumstances – tomb maintenance, protection of animals etc)
    - Question of whether there is a B to enforce the "trust" at this stage – but if equitable interest is held by the lender all along, then they are the B who can enforce the purpose of the trust
- Giving Quistclose beneficial title - continuing proprietary interest in property that it has handed on to someone else without requiring normal procedure for getting preferred creditor situation

4. SURPLUS OF FUNDS AFTER TRUST PURPOSE HAS BEEN ACHIEVED

- Where the trust exhausts only some of the trust property leaving a surplus of funds after the trust purpose has been fulfilled, a RT for the transferror/settlor may arise in respect of the surplus.
- A trust analysis will determine the ultimate destination of legal title in the unused funds to the transferor [see ***Re British Red Cross*** and ***Gillingham Bus Disaster***]
    - Using RT principles (equitable title to the interest) – the unused funds vest in the transferor
- Using contract law analysis – destination of unused funds held to be ***bona vacantia*** (funds belonging to no one – and as such become the property of the Crown) [see ***In re West Sussex Constabulary***]

Re British Red Cross Balkan Fund (1914)

Facts: fund was raised by public subscription for assistance of wounded in the Balkan War. The money was applied and at the end of the war there was a surplus in the hands of the trustees.

- Court held that the fund had come about through subscriptions (many large sums from individual donors)
    - Therefore, surplus was rateably held on an ART for the individual subscribers (all known)

        - Donors received back the same proportion (not amount) they had contributed
    - Those who did not wish the funds to remain for the general purposes of the Society were entitled to their share of the surplus
        - Those who wanted to could leave money in fund for other general purposes of the Society

Re Gillingham Bus Disaster Fund (1958)

- Found an ART for proceeds taken in from street collections
    - ***This has NOT been followed because later courts have alluded to the impossibility of applying an ART to them***
    - In this case court held money could be paid into court and if someone wanted to collect money back they could go to court and prove what they had given and get back a proportionate amount
    - Unclaimed money becomes categorized as *bona vacantia* – becomes Crown money

In Re West Sussex Constabulary Fund (1971) (UA not under legislation = contract law applied)

- Analysis supports contract versus trust law distinction
- Court held: where surplus funds originated in collection boxes the givers intend to part with the money
- Legacies and major donations – excess funds held on an ART for the donors or their heirs
- For monies collected through sweepstakes, entertainments and street collections (from sources outside the association):
    - **Impossible to apply the doctrine of RT for two reasons:**
    - 1. The relationship is one of contract and not trust – purchaser pays his money as the price of what is offered and what he receives
    - 2. There is no direct contribution to the fund at all – it is only the profit, if any, which is ultimately received and there may even be none
- Under the contract the members could not derive any benefit – only third party dependents could receive property; so under terms of contract members were not entitled to receive property and all dependents had already been paid out – no one entitled to claim the surplus = *bona vacantia*
- Because no RT arises and the organization no longer existed the money became *bona vacantia* and went to the Crown
- **Court looked at the way money was collected and determined where collected in small amounts through street collection, tickets, etc. givers intended to part with their money** (therefore surplus = *bona vacantia*)

Re Bucks Constabulary Fund (No 2) (UA under legislation; no contract terms re: surplus = trust law applied)
Decision favours application of ART; distinguished from ***In Re West Sussex*** because in this case Society was registered and operating under specific legislation (*UK Friendly Society Act* s 49 – vests all property in Tees for sole benefit of members)
PROF: this decision is more practical and in accord with reality than ***In Re West Sussex***

- Legislation the Society was registered under provided that all property is vested in Tees for the sole benefit of members
    - On dissolution Tees hold on ART for the members - **should distribute the surplus equally according to the trust principle "*equity is equality*"**
    - Differs from ***In Re West Sussex* –** there rights of entitlement on dissolution were to be determined only by contract law (and not trust law); once the contract is performed (by doling out benefits) the dependents have no further claim
- On termination of the society if no provision has been made in the society's rules for the distribution of its funds – those funds are divisible among the existing members at the time of termination or dissolution (**present members only who have right to assets**)

    - Where a member has ceased to be a member of the society – he no longer has any interest in the funds
    - Membership ceases on death – so estates of deceased members have no interest in the assets
- Where society becomes defunct by all members dying or becoming so reduced in numbers it is impossible to continue the society – the surplus funds may:
    - If purposes of the society are charitable – the surplus will be applicable *cy-pres*
    - If the society is not a charity – the surplus belongs to the Crown as *bona vacantia*
- If a society is reduced to a single member he can't say he is or was the society (one can't associate with oneself) and therefore entitled solely to its fund – **if there is only one member the society as such must cease to exist and the assets have become ownerless**
    - PROF: While it is true such an association ceases with less than 2 members, it is less clear why the remaining two members can share the beneficial interests but the last surviving member cannot
- Conclusion: on dissolution there were members of the society in existence, its assets are held in trust for those members to the total exclusion of any claim on behalf of the Crown
- **Distribution of assets:** *prima facie* distribution of surplus is on basis of equality; unless terms of contract provide otherwise The interests and rights of persons who are members of any type of unincorporated association are governed exclusively by contracts
    - Prima facie the distribution of surplus assets is on the basis of equality – unless there is another method provided in the terms of the contract

UNINCORPORATED ASSOCIATIONS

- In context of trusts they arise as "clubs" advancing a <u>*purpose*</u>

General information about UAs:

- UA are 2 or more persons bound together by one or more common purpose – sports, politics, social, religious, etc.
- They will usually have a set of rules or conventions, understandings on how group is to function. Often bound together by contract that exist as "rules" for the group; or written constitution

Issues in context of ART relate to:

- How unincorporated associations acquire property
    - Member subscriptions
    - Donations or contributions from supporters/street collections/raffles etc [***In Re West Sussex; Re Buck***]
- How that property is held
    - By individual members, or
    - By the secretary/treasurer on trust for the group
    - Restrictions???
- What happens to funds on dissolution of the unincorporated association; what ***Re West Sussex*** and ***Re Bucks Constabulary*** are concerned with. Is property:
    - Held on an ART by the members
    - Held by members under contract rules – equality is equity
    - Held by the Crown as *bona vacantia*
- *Purpose trusts, apart from limited exceptions, aren't allowed – there is no B to enforce the trust*
    - *Must have someone to enforce the trust (can't be the S unless they have set aside specific powers for themselves to do this)*
- *People get around this by creating these UAs – UA enters into contract (impliedly, by conduct, etc.)*

- *Consider to what extent these contracts apply when there are surplus funds*

LAW REFORM RE: SURPLUS OF FUNDS AFTER PURPOSE ACHIEVED

- Recommendation of BC Law Reform Commission:
  - Surplus from public appeal funds should be subject to *cy-pres*
  - *Cy-pres*: use the *bona vacantia* funds for other charitable purposes
- Trustees of those funds should be enabled to distribute surplus funds up to $10,000 to other charities
- Neither ART nor *bona vacantia* rules should apply

PRESUMED INTENTION RESULTING TRUSTS

- **Presumed intention resulting trusts (PIRT) - create a rebuttable presumption that gratuitous transfers are not intended to transfer the beneficial interest**
  - Court presumed that if X gratuitously transfers property to Y he doesn't intend to do so beneficially.
- **Presumption of advancement (PA) – creates rebuttable presumption that gratuitous transfers to family are meant to be gifts (beneficial interest transfers)**
- Presumptions will operate only in the absence of evidence of actual, contrary intention
  - Evidence of **actual intention trumps** the **presumption**
  - (BUT: evidence of actual intention may be inadmissible if evidence around circumstances of the transfer shows an illegal scheme/purpose that the court is asked to recognize and give effect to
    - In this case - presumptions will settle who has legal and beneficial ownership - even though that conclusion is not in accord with the transferor's actual intention (rebutting presumption is impossible if evidence of actual intention is inadmissible)
- **Onus of rebutting the presumption of RT is on the transferee (recipient of gifted legal title)**
  - If successful, the transferee will then get to call for legal title and own the property outright
  - Onus of rebutting the PA is on the transferor

- **PIRT occurs when:** there is a purchase of property in the name of another, or a voluntary transfer of property to another and there is no clear evidence concerning the actual intention of the transferor
  - If there is **clear** evidence in whom the transferor intended the equitable or beneficial interest to repose then this will settle whether the transaction is a gift in which full (legal and equitable) title vests in the donee, or an express trust in which legal title alone vests in the transferee/tee)
  - If the destination of the equitable interest is **unclear** then *prima facie* there is a PIRT and a trust is imposed on the transferee for the benefit of the transferor
- **Transferor is presumed to have retained equitable title with bare legal title vested in transferee**

APPLICATION OF THE RULE

Standing v Bowring

Facts: shares transferred by P into her and D's names. He was unaware of transfer. She tried to get legal title changed back to her name alone. D refused to cooperate with re-transfer. She tried to get court to order him to cooperate – she lost.

- Trusts are neither created or implied by law to defeat the intentions of donors or settlors – they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied
  - **Actual Intention to give legal and beneficial title as manifested by conduct is binding and is not thwarted by PIRT**

- At the time of transfer the transferee clearly was intending to benefit the D – this rebuts presumption of RT

REBUTTING PIRT – JOINT BANK ACCOUNTS

Niles v Lake [joint bank accounts – an evidential question]
Does bank's standard form for joint accounts rebut the PIRT?

- In ***Mailman*** it was decided that the form prepared by the bank and used by the parties didn't rebut the presumption of a resulting trust
  - "It would be unfortunate if the appellants could not succeed in this case where Mrs. Arnott executed a document prepared by a bank for its own protection and without regard to the real intention of any one signing it."
    - **The arrangement with the bank doesn't define the relationship of the joint depositors**
  - The form was necessary for the purpose of the bank – but she didn't intend its language to touch any interest in the money as between her and her sister
- In the case Lake as co-owner of the account may have had legal title, but she held it on a RT for money put in the account by Arnott (Lake's sister) – **agreement with bank regarding joint account (right of survivorship) wasn't adequate evidence to rebut PIRT**

Russell v Scott [joint bank accounts – testamentary question]
Facts: Testatrix (Mrs. Russell) opened joint bank account in name of herself and her nephew Russell. She put money into the account. Purpose was to enable him to draw monies from it to look after her. After opening account she stated money would go to Russell after she died. When she died she left the residue of her estate to Russell and another nephew, Scott in equal shares. Scott claimed amount in the account at the time of her death formed part of the estate.

- Presumption of RT does no more than call for proof of an intention to confer beneficial ownership
  - Court stated that where there is no presumption (of advancement) then one needs "satisfactory affirmative proof" of intention to confer a beneficial interest
  - In this case – satisfactory proof exists because of her declaration of intention to the solicitor's employee (not because of joint bank account on its own)
  - So Russell gets a "present right of survivorship" when Mrs. Russell declared intention that he benefit when she dies
- Voluntary transmission on death of an interest which up to the moment of death belongs absolutely and indefeasibly to the deceased must be done by a will (to comply with *Wills Act*; didn't apply here because of rules re: joint survivorship)
  - This was not true of the chose in action created by opening and maintaining the joint bank accounts
  - If the nephew survived the donor (the aunt) and the account contained any remaining money – his legal interest was allowed to take effect unfettered by a trust

Young v Sealey [joint bank accounts – testamentary question]
Facts: Mrs. Jarman opened a joint bank account containing her money in the names of herself and her nephew. The evidence 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 at her death. On her death her estate claimed the monies in the account. The estate lost.

- Court: giving effect to the testatrix's intent to fully transfer on her death did avoid the *Wills Act* but jurisprudence to recognize such outright transfers of legal and equitable title was too established in England and Ontario to change it now – violates the *Wills Act* with impunity
  - Court found in favor of the nephew as the intention of PIRT had been rebutted by the evidence

PRESUMPTION OF ADVANCEMENT

- **Presumption of advancement operates in transfers from:**
    - Parents to minor children (used to be only father to children)
        - PA only applies with minor children [***Madsen Estate; Pecore***]
    - Husbands to wives (approach cautiously today) [***Mehta Estate***]
    - Wife to husband
    - Mother to child – *in loco parentis*
- When PA applies transferee will own outright (both legal and equitable title)
    - Presumption is rebuttable by evidence of real intention of transferor (to only transfer legal title)
    - Onus on transferor to show intention that excludes operation of the PA
- "The general rule [of PIRT]…is subject to an exception where the purchaser is under a species of **natural obligation** to provide for the nominee." (***Murles vs. Franklin (1818)***)
    - Natural affection led one to draw the inference that the gift was intended to be outright
- **PA is a presumption of meaningful gift to the transferee and is presumed because of the special relationship between transferor and transferee**
- Most provinces have abolished the presumption by legislation
    - There has been no abolition in BC and Manitoba – but, given the wide discretionary power of the courts in matrimonial disputes in property matters the PA may be effectively unnecessary
    - PA is still important in contexts outside of marital separation, ex. where they can't testify

HUSBAND TO WIFE

Mehta Estate v Mehta Estate (1993 Man CA)

Facts: dispute between H and W estates. H estate claims half interest in assets of W estate which were purchased with his employment income based on PIRT. W estate argues title in all assets in her estate based on PA

- Where purchaser causes the conveyance to be made to his wife the relationship implies a consideration and the law presumes that the conveyance was intended as an advancement by him – and the presumption is that there is no RT as between them
- **Where the litigation doesn't arise from marital breakdown and where the spouses are unable to testify – the presumption of advancement assumes real significance**
    - This is particularly so in the context of a "traditional marriage"
    - Under these circumstances it is entirely understandable that a loving husband should put assets in the name of his wife with the intent that they should be hers as gifts
- Court noted that the PA at common law extends to those ***in loco parentis and extends to W in all common-law provinces***
    - "I do not quarrel with the view that the PA has little value in marital property disputes where the parties are available to give evidence as to their intentions, and in a social climate where equal division of marital property is the custom."
- **The strength of the presumption of advancement will vary according to the circumstances of the case**
    - **PA between husband and wife is tenuous – easily rebutted**
    - Here: case wasn't matrimonial action; parties are unable to testify; "traditional" marriage; H was the major provider; W's employment was part-time and generated modest income, her major role was homemaker/mother
    - Under these circumstances it is entirely understandable that a loving H should put assets in the name of his W with the intent they should be hers as gifts."

- **Note:** *Trial judge had held that the PA no longer operates in transfers from husband to wife*

FATHER TO CHILD

Shephard v Cartwright [presumption of advancement – father to child]
Facts: father allotted shares to kids w/o their knowledge. 5 years after gift father had kids sign withdrawals; father used proceeds for himself. Kids claimed against estate of father for amount that he had taken.

- if a man purchases shares and they are registered in the name of a child or one to whom the purchaser then stood in *loco parentis* there is no RT, but a **presumption of advancement**
    - because of PA, trust assets were already owned by the kids when father took them back for himself
    - the presumption may be rebutted – but this shouldn't be easy to do
- Evidence to rebut the presumption:
    - **The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction – are admissible for or against the party who did the act or made the declaration**
        - **Subsequent declarations are admissible as evidence only against the party who made them, and not in his favour**
- The action of the father in making his children sign over the shares **after** the gift may have tended to suggest that he never intended a beneficial gift to them. BUT this evidence (in support of the father as retaining the beneficial interest in the shares - ie PIRT) occurred long after the gift was made – 5 years later - and so was inadmissible as evidence to rebut the PA and show he had never really intended a beneficial gift
    - **So the evidence to rebut the PA was inadmissible** - PIRT yielded to PA
- Events that happened after trust was formed were like father had changed his mind – but S doesn't get to change his mind re: trust (***Bill v Cureton***)

Foster v Foster
Facts: father wanted to avoid property being vulnerable to a debt to his wife so he gave the property to the kids to get it out of his name

- Clearly this was illegal - trying to defraud the wife by removing these particular assets
- Daughter refused to return property to father and court held in her favour and said presumption of advancement took effect
    - He couldn't adduce evidence of his illegal intention in order to rebut the PA so it applies

MOTHER TO CHILD

- Mother's gift to child - in ancient law the presumption of resulting trust would apply; if father gave to child the presumption of advancement applied
    - Today where there is a custodial obligation for a child then whether it is mother or father doesn't matter - the presumption of advancement should operate
    - Flows from *in loco parentis* situation
- Traditional rule – there is a presumption of RT when a mother transfer to, or buys in the name of her child
    - Even if there is a presumption of RT it may be easy to rebut that presumption – particularly in some cases, ex. where the mother is a widow (ie. where there is no husband providing?) [***Fidler v Barnes***; ***Edwards v Bradley***]
- Some cases have decided or proceeded on the assumption that there was a presumption of advancement on a transfer by a mother to a child [***Radway v Radway***, ***White v Reid***, ***Hewitson v Johnstone***]

WIFE TO HUSBAND

Re Mailman Estate; Biljanic v Biljanic [presumption of RT – wife to husband]

- It is presumed that a husband transferee holds on RT for a transferring wife

PRESUMPTION OF ADVANCEMENT AND JOINT BANK ACCOUNTS

Warm v Warm (1969)

Facts: marital dispute; H had registered title in their house; W sought ½ interest in it and all assets including money in the joint bank account. H wanted distribution according to their financial contributions to the account. Account had his income and joint earnings from investments; withdrawals paid for family expenses, his personal expense, cost of house and investments

- Court found that the "common purse" they had established through the account carried through to purchases from it
- Everything purchased through the joint account held to be owned equally
    - Includes the house in his name alone: he holds as trustee for her ½ equitable interest
    - The PA applies to the money that is jointly held and rolled over into house (and other assets purchased with them – except his clothes)

ILLEGALITY

Four ways that courts can deal with illegality in relation to the presumptions:
1. ignore precedent
2. *locus poenitentiae*
3. hear the case but ignore the illegality portions
4. public conscience test

Scheuerman v Scheuerman

Facts: H transferred house to W to protect property from claims by creditors (claims never made and debts were actually paid out). W sold house and H tried to sue for price claiming W was trustee under PIRT. He lost.

- Court strictly applied *ex turpi causa* - no disgraceful matter can give rise to an action; invoked where a given plaintiff genuinely seeks to profit from his illegal conduct
    - **Where this arises – court prefers the person in possession** [*pari delictum* – where there is equal guilt the court prefers the possessor]
    - Court refuses to give effect to any presumption because this would result in court participating in the illegal scheme
- Title stayed with the person who had it at the time of the action and equity did not enable enforcement of the beneficial title
- **Rationale:** to allow evidence of the illegal motive/intent that explained the transaction would enable a litigant to prosecute his/her case without clean hands [violates maxim: *those who seek equity must do equity*]
    - Results in transferee gaining a windfall; even where they may have been complicit in the illegal transaction
    - This result was viewed by early cases simply as an inevitable byproduct of the court justifiably refusing to deal with a case tainted by illegality.

Goodfriend v Goodfriend

Facts: couple into spouse swapping. Mrs persuaded Mr to transfer a farm into her name because she feared Mr might get sued for "alienation of affections"; no cause of action for this, so never sued. Mrs left Mr; Mr sought beneficial title under PIRT. Mrs asserted legal and equitable title under PA. To rebut PA he had to show that the

transfer was done to enable him to be judgment-proof. Mrs argued that this intention was inadmissible (***Scheuerman***)

- **Intent to defraud is not enough to preclude evidence rebutting PA – bad intent is not enough to apply *ex turpi causa***
    - While there was illegal intent, this scheme could never be carried out to defraud anyone, therefore the court felt it wasn't enough to make evidence inadmissible
- Relevant to Spence J was the fact that there were no creditors "defeated, hindered or delayed" by the transfer.
- Laskin J pointed out that the scheme to retransfer was hers and so she could not rely on the PA.
- SCC effectively overruled ***Scheuerman***

Locus Poenitentiae

- CL doctrine that allows for production of ordinarily excluded evidence to rebut the presumption
- The doctrine applies where the parties never actually carry out their illegal scheme and "repent" of it
    - If A transfers to B to effect an unlawful plan but they then withdraw from the scheme before it has been fully executed, A is not precluded from bringing evidence of their actual (dishonest) intentions in making the transfer in a claim to recover the property.
- Doctrine applies whether the parties withdraw from the plan because they had a change of heart or because as matters turned out full execution of the plan was unnecessary
    - **Only able to repent if you have undone the damage – if no creditors were actually defrauded**
    - **If creditors were defrauded you have to reimburse them before making this argument (repenting)**
- ***Tribe v Tribe (English court)*** – a creditors avoidance case where intent was not put into effect; applying ***locus poenitentiae***

David v Szoke (BCSC)

Facts: P and D cohabiting; pooled money to buy house as joint owners; he did lots of work on house then transferred his interest in it to the D. Did this to avoid house being vulnerable to litigation if he got into drunk driving accident. Then she leaves him. Clear that he had not intended a gift.

- Court found for P - was influenced that there were no actual creditors at the time of transfer
    - **Gave effect to PIRT without the need to hear evidence of fraudulent intent**
- Court permitted action to go forward and simply didn't hear the evidence of fraudulent intent that would rebut the PIRT – in all other aspects gave effect to the transaction
    - **In other words let the presumptions determine outcome without the rebutting evidence that explains why the transaction (with its illegal intent) took place**
- Here there was clear evidence that he didn't intend the transfer as an outright gift – this rebutted PA without him needing to rely on illegal intent evidence

Gorog v Kiss (Ont CA)

Facts: P owned farm; transferred to his sister to put it beyond reach of business associate who had sued him. Action against P was successful but associate was able to recover debt without the farm. Sister refused to re-convey; P sued for recovery of the farm and won

- Court found PIRT in P's favor could not be questioned
    - Defendant sister as transferee had the onus of rebutting PIRT
        - Any additional evidence inadmissible because of illegal purpose behind the conveyance
    - (Notice that the PA does not apply because this was a brother/sister relationship.)

Tinsley v Milligan (English Law)

Facts: P and D, lesbian couple (PA doesn't apply); purchased a house. Title registered only to T, but both paid and common intention for tenancy in common. Title registered only to T so the D, could fraudulently obtain social security benefits; that money was used for both of them. D, repenting fraud, reported the matter. They separated; P left house and sought to evict D. D gave evidence of her contributions to the purchase price asserting beneficial title under PIRT

- Even in the case of illegality which was known to the courts a person could succeed in recovering the property if the case could be pleaded without the need to rely on the illegality
    - D could establish an interest in the house without relying on the illegal purpose – PIRT gave her equitable title whether illegal purpose was revealed or not
- Dissent: held that once the court becomes aware of the illegality it will assist neither party (***Scheuerman*** formulation)
    - All the judges overruled "public conscience" test put forward by the court of appeal - court would decide admissibility of tainted evidence after weighing the adverse consequences of granting relief against the adverse consequences of refusing it [***Nelson v Nelson***]

Foster v Foster [illegality and PA]

Facts: father transferred 4 properties to daughter to avoid wife's potential maintenance claim; clearly part of an illegal agreement. Creditor not actually thwarted. Father demanded retransfer from daughter; she refused argued PA. She argued evidence to rebut PA was inadmissible because of illegal intent – done to avoid creditor

- Court found the parties *in pari delictum* but found evidence of illegal agreement inadmissible
    - "It is with great reluctance that I hold the evidence concerning the agreement to re-convey cannot be used to rebut the presumption of advancement in favor of the defendant."
- **Where PA involved - refusal to hear tainted evidence works against the fraudulent transferor**
- E**ffect of the *par delictum* rule is to favor the possessor**

Nelson v Nelson (Australia HC) [English law rejected this test (Tinsley v Milligan)]

Facts: Appellant mom paid purchase price for house conveyed into names of her kids, the respondents; transferred to allow mom to get social security money. Mom intended to retain beneficial interest; she called for legal title from kids. Daughter wanted to do it; subject to her retaining beneficial interest under legally non rebuttable PA

- Court held that: PA had operated but had also been rebutted, even though to rebut it involved evidence disclosing the mother's illegal purpose
    - Allowed mom to adduce evidence of scheme; wasn't inevitably precluded because of exclusionary rule (applied locus poenitentiae?)
- **McHugh J**: rules around illegality had been originally framed in a very different society. Today, we live in a highly regulated society and that has changed the legal environment
    - *ex turpi causa* rules should be updated for modern times - **"public conscience" test**
        - involves "balancing the adverse consequences of granting relief against the adverse consequences of refusing relief."
    - **TEST requires application of these criteria:**
        - **(1) proportionality** – is the law proportionate
        - **(2) civil sanction must further the purpose of the statute and not impose sanctions for the unlawful conduct which the statute doesn't consider** - review the statute to see what sanctions are contemplated (don't want to over penalize)
- Applied the criteria: If daughter won, the mother losing her home would be a drastic consequence. The court must then ask whether the Act contemplates penalties beyond those set out in the statute. McHugh took the view that they did not so he allowed evidence to rebut the PA. Mother wins.

COMMON INTENTION RESULTING TRUST

- Presumption of intention is inferred from the conduct of the parties
    - Intended as a formula for doing equity

Pettkus v Becker

DISSENT: Contributions by one partner in a conjugal relationship and accepted by the other raises a PIRT

- Where people have lived together and together they have amassed property - even though it may be in one party's name, if they both collaborated you can infer a common intention that property is to be held jointly (equally)
- **Basis for Common Intention RT:**
    - "Contribution made by one spouse and freely accepted by the other for use in the acquisition and operation of a common household give rise to a rebuttable presumption that, at the time the contributions were made and accepted, the parties both intended that there would be a RT in favour of the donor to be measured in terms of the value of the contributions made."

MAJORITY: rejected Common Intention RT; used constructive trust for preventing unjust enrichment

- **Requirements for constructive trust to address unjust enrichment:**
    - 1. Enrichment
    - 2. Corresponding deprivation
    - 3. Absence of any juristic reason for the enrichment
        - Person in relationship prejudices self in interest of enriching property; it would be unjust to allow recipient to retain it
- For UE to apply there must be some causal connection between acquisition of property and corresponding deprivation
    - Ms Becker contributed time and money: was her contribution sufficiently substantial and direct to entitled her to a portion of the profits realized from properties of sale of property?
    - Court held that she believed she had some interest, this expectation was reasonable and the guy freely accepted the conferred benefits
        - Extent of interest must be proportionate to contribution, direct or indirect, of claimant

THE BENEFICIARY

NATURE OF THE BENEFICIAL INTEREST

- Owner's "real right" to property has 2 hallmark characteristics:
    - **Exclusivity of possession** which extends to enforcement over third parties who happen to receive or come into contact with the property
    - **Priority** should the person currently in possession (borrower, say) become **insolvent**
- Tee has ***legal title*** to the property = alone has all the legal rights and powers associated with the property
- B has the ***equitable title*** in the property = personal rights against the trustee:
    - Tee must comply with his/her **duties under the terms of the settlement** and,
    - Tee must exercise all his powers over the property so as to advance the best interests of the B (because Tee is a fiduciary)
        - Performs these duties within parameters of trust instrument, or if it is silent, by law
- **"Equitable Title"** – B gets the exclusive entitlement to the benefits of a given asset
    - **Not all equitable titles are beneficial entitlements**

        - Where B declares a trust re: his equitable title, this passes beneficial title to a sub-beneficiary; the original B then has a bare equitable title in relation to sub-B who is the only one entitled to the benefits of the property
    - Under equitable title B only gets the right to enjoy the property (and no rights to manage/control) – therefore B can't exercise administrative or dispositive powers over the property in the trust [***Schalit v Nadler***]
        - **Equitable title has limits – it is confined purely to the question of enjoyment**
- Tracing = B has rights that enable the tracing of individual assets from a trust fund into the hands of a third party
    - Where the Tee has fraudulently parted with trust property and the third party is not a ***bona fide*** purchaser for value the beneficiary can recover from that third party.
    - In that respect the beneficial interest is proprietary or ***in rem -*** seemingly in each item
    - This remedy of the beneficiary is in addition to the B's ***personal*** right against the trustee for breach of fiduciary duties

SUMMARY OF NATURE OF BENEFICIAL INTEREST

- Beneficial interests are property interests (*in rem* - with remedy of tracing available)
    - that reference B's equitable title in the subject matter of the trust (they have durability – ie. are strong/resilient rights)
- B has rights over the things in the trust that can be asserted against Tee - only in respect of the administration of the fund as a whole, through an action in breach of trust
    - This is because the trustee must act in good faith and reasonable care in dealing with things in the trust in the beneficiary's best interest to make only authorized dispositions under the trust (fiduciary duty; exercised within limitations of the trust instrument)
- In certain circumstances, somewhat restricted, the beneficiary can assert his/her beneficial title against third parties (ex. third parties who receive trust property knowing or with reason to know that the property was derived through breach of trust)

Schalit v Nadler

Facts: B endeavoured to distrain for unpaid rents against a property in which he had an equitable title under a trust. **Held to be an invalid distraint**

- Distraint = seizure of property to obtain payment for rent (right to distrain lies with the legal owner of the property *in rem*)
- **B can't effect actions that only the legal owner has a right to effect (ie. the Tee has to levy this action)**
    - **B only has a personal right to bring action against the Tee for breach of trust – can't take over Tee's duties**

Baker v Archer Shee (HL)

Facts: Lady Archer-Shee ("A-S"), a UK resident, was the beneficiary in a trust of several properties (shares, stocks etc) outside of England. Income generated from the trust fund did not enter the UK. UK revenue authorities sought to tax the fund (administered in the UK) under legislation that, for UK residents, rendered taxable possessions that were "stocks, shares or rents" outside the U.K. Is the B, Lady A-S, the "owner" of the stock, shares or rents in the trust fund for tax purposes. A-S lost.

- A-S argued that individual items of trust weren't vested in her – her equitable interest was in the income stream of the whole trust of assets the proper administration of which she was entitled to enforce as part of her personal rights against the Tee

    - What she "owned" was the cluster of personal rights pertaining to proper administration by the Tee in respect of a fund with individual things that changed constantly, which she didn't equitably own individually
    - On this view A-S did not own the "stock, shares or rents" that made up the fund - cluster of personal rights against the tee for proper administration is the property she owned and it was not taxable
- **Court held: B has a distinct equitable interest in the individual items of property that make up the trust fund (as opposed to having an interest in the proper administration of the trust fund as a whole)**
    - But only the Tee has exclusive power to dispose of shares (or other trust assets) and unilaterally extinguish the legal (and therefore the B's equitable) title in the individual items of property – supports idea of equitable interest in the fund rather than the individual items
- DISSENT: Is it not better to view the B as having a proprietary interest in equity to the fund of (shifting) assets, rather than in each of the specific items that make up the fund at any given point in time
- However, if the dissenting view is more in accord with the reality of practice and administration, it, too, gives rise to anomalies:
    - Issues with the dissent view too: B can terminate the trust and acquire outright (legal and equitable) title in the property under the rules in ***Saunders v. Vautier***

Archer-Shee v Garland (New York)
- A-S won on same facts as ***Baker v Archer-Shee*** but this time in New York
- Court agreed that B's equitable interest is in the fund as a whole rather than in each of the specific assets that make up the fund at any given point in time

POSSESSION OF THE TRUST PROPERTY

In Re Bagot's Settlement
Facts: B wanted to manage real estate in the trust; can B as B demand possession for the purpose of rent collection
- B's ability to deal with the individual items in a trust because of his/her equitable interest is very restricted - Tee alone has this power and duty
- If the B as B were able to manage the property this would contradict the nature of a trust – that legal title is held by the trustee
    - Although there was no right of B to claim possession, the court exercising its discretion, could allow B to act as an agent of the trustee and collect rents
    - If she acted contrary to the best interests of the Bs (herself included) she could be removed.

ALIENATION OF THE BENEFICIAL INTEREST

METHODS AND FORMALITIES
- As property, the beneficial entitlement can be disposed of as a chose in action
    - *Law and Equity Act* **s 36** - requires formality of written document signed by B delivered to the Tee
- If Tee doesn't receive notice, as required under **s 36 –** can administer the trust according to the original trust instrument

***Law and Equity Act* s 36 – Assignment of debts and choses in action**
36 (1) *Assignment of legal chose in action requires: written document, signed by B, express written notice to Tee prior to assignment*

(2) *If Tee has notice that the assignment is being challenged by B, (a) Tee may call on persons making claim to interplead concerning the chose in action or (b) Tee may pay the chose in action into court in conformity with Trustee Act*

Di Guilo v Boland [reasons for Law and Equity Act, s 36]

- **"chose in action":** a form of property that describes "all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession"
- Prior to legislation:
    - assignee could sue for specific performance in his name in the courts of equity (if absolute transfer – ie. no rights left with assignor)
    - if suing for damages this had to be done in the name of the assignor (because CL didn't recognize transfer of contract to assignee; assignee was not in privity with Tee)
- *Law and Equity Act* **s 36** - sets aside this difference
    - Compliance (written notice to trustee/debtor etc) allows for the assignee to sue alone, in his/her own right, in any court without the need to interpose the assignor in an action
- **Where there is no compliance with formalities set out in s 36:**
    - Assignment by the beneficiary to the new beneficiary without formality compliance is an "equitable assignment" subject to the above rules
    - Where assignment is not in compliance with the legislative formalities – the new beneficiary needs the assistance of the original beneficiary to sue
- The requirements of section 36 are also sensible from a **proof** of transfer perspective
- **Failure to comply with s 36 doesn't vitiate the transaction – but makes it very difficult to enforce**

Timpson's Executors v Yerbury

Facts: no assignment had taken place; B had given to the sub-Bs (her children) – a "revocable mandate." Mrs. T had directed the trustees to make payments to her children from time to time; the money came from NYC to the UK to each child. Amount paid to the kids was included in Mrs. T's assessments. **She argued that those sums had actually been alienated in NYC, did not belong to her and so were not taxable in her hands**

- *Ways that the beneficial interest in an equitable title can be disposed of by the beneficiary:*
    - **1. B can assign it to the third party directly**; writing is required
    - **2. B can direct the Tee to hold the property in trust for the third party**; writing required
        - Must follow the requirements set out in ***Saunders v Vautier*** to do this transfer
    - **3. B can contract for valuable consideration to assign the equitable interest to the assignee**
        - writing is a good idea; but not necessarily required - vendor holds equitable estate on a constructive trust for the buyer as soon as contract is effective
        - Constructive trusts arise by operation of law and need not be in writing. However, the arrangement does seem to fit within the purview of section 36
    - **4. B can declare himself as B to be Tee for the transferee of such interest**
        - But where B declares himself Tee for an assignee – compliance with **s 36** is important to ensure the original Tee's powers are abrogated
        - Otherwise there is a **sub trust** (i.e. with a trustee, a beneficiary with non beneficial equitable title and a sub-beneficiary with beneficial equitable title) Notice to the beneficiary is not required.
- Court found instructions to the Tees was a <u>revocable mandate rather than an assignment of equitable interest</u> to the children - as it did not give the beneficiaries enforceable rights against the Tees
- (A revocable mandate is a form of authority to act: an interest cannot pass until the mandate is acted upon. If the mandate is acted upon the mandate will be complete, if revoked before it is acted upon the assignment fails.)

PRIORITIES BETWEEN ASSIGNEES

In Re Wasdale

- Priority among assignees is determined by time – the first assignee gets priority
    - The fact that a trustee informed by the first assignee had died did not affect his priority even though the new trustee has not been given notice by him.

RESTRAINTS ON ALIENATION

The Protective Trust

- **Protective trust ("spendthrift trust"):** terminates B's right to income when they have done something, or something happens that the S sets out in the trust instrument
    - After the happening of any such event, both the capital and income of that B are shifted to new beneficiaries – usually the children of the original B as they attain the age of majority
- Protective trust is, in reality, two trusts:
    - S transfers assets to Tee with determinable life interest in favour of principal B and providing that on the occurrence of a determining event the trust property is then held on a second trust which is often a discretionary trust in favour of a class of objects (ex. principal B's children)
    - On the happening of the determining event the secondary, discretionary trust vests the equitable interest in the new class of beneficiaries and the trustees administer for them and appoints from them
- **Use of determinable interest is important**
    - if restraint on alienation is worded as a condition subsequent it is void ("on condition that")
    - if restraint on alienation is worded as a determinable interest it is ok ("until", "when")
- Based on historical CL distinction between conditions subsequent and determinable interests
- **If found to be a condition subsequent** – the condition is struck down and the gift remains without the condition
    - Means the principal B takes without the protective instrument intended by S
- S can't transfer property on a protective trust for himself; it's against public policy; restraint of alienation [***Re Brewers Settlement***]

TERMINATION OF A TRUST

B can terminate the trust by directing the Tees to direct legal title B
Requirements to terminate the trust (combination = *sui juris*):

1. B has attained the age of majority
2. B is *compos mentis* and
3. B is absolutely entitled to the trust property (there aren't contingencies)

Saunders v Vautier

Facts: Trust said at 25 V was to get capital and accumulated income. V turned 21 (age of majortity) and wanted to terminate the trust; V succeeded

- V was sole B; the interest had vested in him at the date of the gift; but enjoyment of capital and accumulated income was postponed until he was 25 – ie. he held an immediately vested indefeasible equitable interest in the capital with enjoyment (payment) postponed until he was 25
- He could terminate the trust when he turned the age of majority = 21 years

- **The interest in the trust was vested in V at time of the testator's death - intentions of the testator concerning pay out date were ignored in preference to those of the B**
- What counts as vested or contingent interest is a matter of proper interpretation of the will/grant
    - Law leans toward an interpretation that favours early vesting (will find early vesting where they can) – if the language is unclear, will be interpreted to give early vesting

REASONS FOR ALLOWING TERMINATION BY BENEFICIARY

- Allowing B to terminate the trust violates the S's clearly intention
- Rationales for rule in ***Saunders v Vautier***:
    - The law prefers outright ownership (instead of trust ownership) – because it allows for freer use of the property; easier alienation; economically preferable as promoting free market
    - Rule is more in line with historical CL concepts of ownership and freedom to use, enjoy and dispose of property
    - Desire to treat adults as autonomous agents able to care for themselves- don't want dead hand ruling from the grave
    - B's interest is absolute so there is no one else who has any beneficial claim to the property anyway

Re Lysiak

Facts: testator gave estate to wife and son living in Russia. Contained clause postponing distribution of residue by Tees "until they are absolutely satisfied that the beneficiaries are free and unhindered to receive the said benefits without interference from the regime under which they are presently residing"; held to be a vested interest

- Court held that the giving/vesting of the gift wasn't suspended; just timing and manner of distribution (ie. the enjoyment) – therefore interest was absolutely vested and Bs could terminate the trust
    - Court also held the clause was semantically uncertain – so held it void
    - Discretionary aspects were too uncertain – therefore B entitled to the gift absolutely

TERMINATION OF DISCRETIONARY TRUST

- To terminate trust B must have absolute interest
- In discretionary trust where class is too wide this is impossible (ex ***Baden*** type)
- If all Bs in discretionary trust are identifiable under the trust they can act together and if combination is *sui juris* – can unanimously agree to terminate the trust
- Also the life tenant and remainderpersons – if all *sui juris* – can combine to call for the trust
- Where equitable interest in real estate owned jointly – neither party can collapse the trust on their own; but together can demand transfer of legal title into joint names
- If the vesting of the interest is contingent on some future event = vesting only occurs on the realization of that event (ex. age
    - Presence of gift over may indicate interest itself is intended to be contingent
- **The policy of the courts is to favour early vesting in interest and so construe the contingent words as referable to the vesting of enjoyment or possession, and not interest**

In Re Smith

Facts: testator gave trustees ¼ of estate to pay at their absolute discretion, income for the maintenance of W and/or all or any one or more of her children for W's life, remainder to the children. Bs combined and assigned the beneficial interest to a company to secure a mortgage

- Held that the sole Bs collectively were entitled to assign their interests to the mortgagee
    - The third party mortgagee is then entitled to demand payment from the Tees until mortgage is discharged

    - The trustees had wanted the option to pay Mrs. A directly rather than Legal and General Assurance. The company was unsuccessful
- **If all the objects entitled to both the income and capital act in unison and if they are *sui juris* they can terminate/direct trustee in a discretionary trust and can acquire/deal with the property for their benefit**
    - you treat all the Bs together as if they formed one person for whose benefit the Tees were directed to apply the whole of a particular fund

Re Chodak
Facts: Testator gave whole estate to Tees for the absolute benefit of multiple Bs who were children of siblings living in USSR. Tee given wide discretion for distributing among Bs. Money was to be spent on sending parcels (no more than 3 parcels/person chosen in any year)
- Court held the discretion was invalid:
    - Testator had attempted to do the impossible - bequeath absolutely and then restrict the right to take absolutely (evidenced by an absence of a gift over) through discretionary powers given to the trustees
    - Held that Bs had immediately vested interest on testator's death - mode and time of payment only was postponed to the exercise of discretion by Tees
    - Equal division between Bs was ordered
- **Discretionary trusts held to be presently vested interest with future enjoyment subject to exercise of discretion by Tees**

REDUCTION OF TRUST PROPERTY VALUE IF DISTRIBUTED
- Where trust property is divisible and one or more Bs are *sui juris* and absolutely entitled - they can individually call on the Tee to transfer to them their share of the property
    - Easy with money as trust property, often more difficult with shares and **impossible with land**
- This division can occur even if it results in a **minor** reduction in value in the rest of the property
- ***Lloyds Bank v Duker*** - the reduction was too great and therefore not allowed (as controlling shareholder his shares would have been worth more than the remaining shares of the other beneficiaries)
    - Shares had to be sold and B calling trust got his share of the money
- ***Re Marshall*** – where trust property is divisible and one or more Bs are *sui juris* and absolutely entitled, they can call on Tee to transfer to them, their share of the property; even if division would cause reduction in value of trust property
    - certain Bs called for a quarter of the shares in a large company as it would take 20 to 30 years for all Bs to be eligible – this was allowed
    - It doesn't matter if property is held on a trust for sale with a power to postpone sale
- ***Re Sandeman*** - If division would cause undue hardship on other Bs – you can't divide the trust property; case favours termination by some of the Bs of their share <u>unless clearly unfair to the others</u>; court favoured giving effect to the Bs' rights to division
    - Undue hardship rule = no entitlement to call for division if trust property is land

VARIATION OF TRUSTS

- Trusts often have a long lifetime – original terms may become inadequate or obstacles to B's best interest
- Need to vary trusts usually arise where you have multiple B and contingent interests
- CL gives courts very little jurisdiction to vary a trust
- ***Chapman v. Chapman*** - court declared it has no power to authorize the variation of terms of a trust even though all adults assent and the variation is for the benefit of all infants

FOUR EXCEPTIONS to this general inability of the courts to act:

1. Inherent jurisdiction – to vary administrative terms in unforeseen emergency; unanticipated by S

Court can only vary Tee's management powers
Not authorized to vary quantum or type of beneficiary interest under the trust
This power is not easily invoked - used to protect trust property in some way

2. Maintenance jurisdiction

Where trust is to support maintenance and it is not achieving that purpose
Court can direct payments to Bs if they need money to live in manner appropriate to trust expectations

3. Conversion jurisdiction

Converts infant's trust property from realty to personalty and vice versa; where maintenance of child requires asset mix to be changed

4. Compromise jurisdiction [no longer existed – ***Chapman***]

Where conflict between parties – court has jurisdiction to vary trust in accordance with compromise met by those parties – to avoid litigation
Chapman has eliminated the courts' ability to do this

Trust and Settlement Variation Act (BC)

Court approval of variation

(1) *if property is held in trust, the Supreme Court can approve on behalf of*

(a) *anyone who has an interest under the trust (direct, indirect, vested, contingent) who by reason of infancy or incapacity is incapable of assenting*
(b) *anyone, ascertained or not, who may become entitled, at a future date, to an interest under the trust*
(c) *anyone who isn't born yet*
(d) *anyone whose interest may arise through discretionary power exercisable after failure of existing interest* [protective trust]

Any arrangement proposed to vary or revoke the trust; or give trustees more managing/administrative powers

- Increases the scope of the court's inherent power to vary trust instruments – by allowing to give consent for unborn, born but not *sui juris*, or those at risk of protective trust
- Court is able to approve an arrangement varying the trust by giving consent that may be needed on behalf of listed parties – this allows you to get unanimity among Bs which is required under ***Saunders v Vautier***
- Statute allows variation of beneficial interests where the trusts have Bs that can't exercise termination rights

Benefit to parties interested

2 *court can't approve an arrangement on behalf of someone listed in* ***s 1(a), (b) or (c)*** *unless it appears to be for that person's benefit*

- "benefit" has been construed broadly to include: financial, moral, educational and social benefits
- See ***Re Weston's Settlement; Re Remnant's Settlement***; ***Re Harris*** (limits "benefit" in some cases)

Deemed trust (includes life estate where there are successive Bs)

4 (1) *Supreme Court can exercise its powers under this Act in respect of land subject to a legal life estate*
(2) *under this section:* **(a)** *the holder of the legal life estate is deemed to hold land in trust for himself and successive holders; and* **(b)** *Bs of the trust are deemed incapable of consenting to the arrangement*

Court appearances

5 *Public Guardian and Trustee is entitled to appear and be heard; and to any costs the court orders*

Re Burns

Facts: S seeks consent of unborn persons to arrangement to vary trust to give Tees investments powers to enable minimization of tax and succession duties; arrangement would enlarge investment powers of Tees; all living Bs were *sui juris* and had agreed to arrangement

- Court assent needed because the class of beneficiaries also included unborn persons
- Court gave consent on their behalf to the arrangement
    - **Tax minimization, advancing financial interests of the Bs - held to be appropriate arrangement**
    - **"benefit" includes financial benefit of tax minimization**
- Note ***Re Sandwell and Royal Trust***: example of consent given by court for unborn Bs under a proposed variation of a pension plan that would benefit all persons including those lacking capacity, ascertained and unascertained.

Re Weston's Settlement [expands "benefit" beyond merely "financial benefit"]

Facts: Lord Denning for the Court - refused to consent for Bs lacking capacity (minors), to an arrangement that would appoint two new trustees from Jersey to enable resettlement of a UK trust into a Channel Island trust and a discharge of the English trust; S seeking to avoid capital gains tax

- **Court stated that financial benefits are not the only consideration in determining what benefits a minor**
    - Role of court is to protect those who can't protect themselves
    - Educational and social benefits are equally important (to financial benefits)

Re Remnant's Settlement Trusts [expands "benefit" beyond merely "financial benefit"]

Facts: Trust gives contingent interests to kids of two sisters. Trust contained forfeiture clause if they became; married; lived with Catholic. Dawn's kids are Protestants, Merrial's are Catholics. Arrangement proposed deletion of the forfeiture clause

- **Court affirms that "benefit" in the Act is not confined to financial benefit – includes: benefit of any other kind**
    - Here the benefit of family harmony and marital choice was sufficient benefit to vary the trust and remove forfeiture clause
- Variation clearly disregards intention of S – court's power to provide consent to variation is a strong power

Re Harris [limits using emotional benefit to get consent to variation]

Facts: Mom of emotionally devastated family wanted to vary a trust under the will of estranged husband who had committed suicide; trust left 5/8th to eldest son and 1/8th to the other 3 kids. Gift over to children's children in event any of them died before 21, leaving a child. All kids at time of application were under age.

- Mom wanted family harmony by equal sharing - court refused to consent to the proposed variation holding that arrangement didn't financially benefit the eldest son and his possible (as yet unborn) children
- Considerations other than financial may, and should, be taken into account
    - **But emotional and psychological well being, which may or may not occur in the future, isn't enough to justify a substantial variation to the trust**
- Sometimes social and emotional well being of the group of underage Bs is outweighed by disproportionate financial disadvantages that would flow to one of them

Russ v British Columbia (Public Trustee) [Test for exercising discretion]

- **TEST in exercising court discretion to consent on behalf of a person without capacity is that of a "prudent advisor**"
    - Court should look at what S's intent was, but isn't bound to preserve it
    - Many variations are actually at odds with that S's intention
- PROF: case shows courts looking more to what benefits the Bs, than to S's intention

- ***In Re Tweedie***: **Paramount in the consideration is the possibility of the unborn realizing a financial benefit. Where the likelihood is small, give a very liberal interpretation to the word "benefit."** Under the circumstances of this will, there was a minute chance of an unborn receiving any benefit. All Bs, all of full capacity, had agreed to the proposed arrangement which would have removed a financial burden on one family member giving a "real psychological, emotional and family benefit" to her
    - Look at how likely it is that a B will be born or fit into the contingency - the less likely, the more willing the court will be to go along with the variation the current vested Bs

Bentall Corp v Canada Trust Co

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

- Court: **s 1(b)** allows court to consent to a variation on behalf of Bs whose interest is contingent
    - Here court has jurisdiction because the interests of members is split into a presently held interest (entitlement to funds available to support pension) and a future contingent interest –division of the surplus in the event Bentall terminates the plan.
- **Good Bargain** TEST: would "a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made" be likely to accept
- Applying this test the court concludes the proposal is a good bargain and gives the consent of the future members who would benefit from any surplus when the plan is terminated
    - gave "great weight" to the fact that 97% approved the proposed arrangement by Bentall – ie. influenced by fact that most Bs wanted this
    - Here the test for consent was based strictly on financial considerations.

ADMINISTRATION OF TRUSTS – THE TRUSTEE

APPOINTMENT

- Trust instrument usually sets out the appointment
- S has freedom to choose who/how many persons will act as Tee(s)
    - BUT person(s) selected must have legal capacity
    - Tees must be people who live in the jurisdiction
- S may choose individuals, of any sophistication level
- If several Tees appointed - usually hold as joint tenants; if one dies surviving Tees continue
    - Only when last Tee dies will trust pass to his personal representatives who then become Tee
- **Trustees don't have ability to delegate their responsibilities**

CORPORATE TRUSTEE

- **Corporate Tee** = a corporation empowered by its memo and articles to engage in trust administration and management (often called a trust corporation)
    - If he doesn't know anyone with sufficient integrity, good judgment or management and investment capabilities - S may decide to use the services of a specialized corporate trustee
    - Corporate Tee almost always used in major corporate-interest trusts
- Because trust corps are so large, often S or Bs become appointed as "protector" or "guardian"
    - Tees making decisions on certain topics need consent of the protector when exercising specified powers, examples:
        - To add or remove beneficiaries
        - To distribute capital or income
        - To vary the terms of the trust
        - To appoint or remove trustees

- **When you create a protector be careful** – protector can't act as Tee or they can become defacto Tee and the trust will collapse

APPOINTMENT OF NEW TRUSTEES

- A trustee must accept an appointment – position of trustee is a fiduciary relationship, and some individuals may not want to take on that responsibility
  - If one Tee refuses – trust instrument usually sets out an alternative trustee to be appointed
  - If instrument is silent - court has inherent powers of appointment **– equity will not allow a trust to fail for want of a trustee**
  - If all else fails - court will appoint the Public Trustee (entitled by law to charge for services)
- Mechanism to appoint new Tees is provided under the *Trustee Act* **s 27**
- When a trust is created with several trustees they hold as joint tenants – right of survivorship arises
- **Unanimity is required for all decisions unless the trust deed provides otherwise**
- If one Tee dies the survivors continue alone - personal representatives of the last survivor succeeds as Tee until replacement Tees appointed [*Trustee Act* **s 27**]
- Continuance of the trust occurs through trustees appointed by:
  - an express power (in trust instrument)
  - a general statutory power (in *Trustee Act*)
  - the beneficiaries under principles of ***Saunders and Vautier***
  - the court on application by the beneficiaries (*Trustee Act* **s 36**)

Trustee Act

Power to Appoint New Trustees

s 27 (1) *If Tee is dead, out of jurisdiction for more than 12 mos, wants to be discharged, refuses, or is unfit to act in them, or incapable of acting in them then the person named in the trust instrument as the one to appoint new Tees (or if trust instrument is silent – the surviving or continuing Tees for the time being, or personal representatives of last surviving or continuing Tee) can by writing appoint a replacement Tee*
(2) *On appointment of a new Tee* **(d)** *the things required for vesting the trust property in the persons who are the new Tees must be executed or done*
(3) *Once trust property is vested in new Tee – they have same powers, authorities and discretions as original Tee*
(4)(a) *Tee who is dead – includes a person who is nominated as Tee in a will but dies before testator*
(4)(b) *Continuing Tee – includes refusing or retiring Tee if willing to act execution of the provisions of this section*
(5) *Section applies only if there isn't a contrary intention expressed in the trust instrument*

- Essential function of **s 27** = to ensure there will be someone who can appoint, to minimize applications to court to make appointments
- B, Tee and others with a beneficial interest in the property have standing to apply to court (*Trustee Act* **s 36**)

Vesting of Trust Property in Trustees

s 29(1) *deed which new Tee is appointed under can operate to vest, as joint tenants and for the purposes of the trust, the estate, interest or right*

Deed must contain a declaration by the person appointing the new Tee that the property vests in the person who becomes Tee by virtue of the deed, for performing the trust

(3) *vesting section doesn't extend to land conveyed by mortgage for securing money subject to the trust, or that a share, stock, or property that is only transferable in books kept by a company or other body*

- **s 29** – automatic vesting of many types of trust assets on the declaration of new Tees
  - shares require registration in companies' books as well
- instrument of appointment acts as a vesting instrument too

Power of court to vest land in new trustees
s 33 *court can make an order that directs that land subject to the trust vests in the new trustee – has same effect as if interest had vested through proper conveyances of the land*

Power of new trustees to transfer stock or chose in action
s 34 *court can make an order vesting the rights related to stocks and choses in action in the new trustees*

Power of Court to appoint new trustees
s 31 *if it is expedient to appoint a new Tee and it is difficult to do so without the court's help, the court has jurisdiction to make an appointment of a new Tee – either as replacement or in addition to other Tees*

- Courts have inherent jurisdiction to appoint trustees
    - But **s 31 –** clarifies scope of this power; enables court to appoint new Tees where "expedient"; it will do this where persons designated to appoint in the will can't do so because they are mentally or physically unable to perform or have predeceased the testator

Persons who may apply for orders
s 36 *order relating to appointment of new Tee, or relating to trust property, may be applied for by person with beneficial interest in the trust property, and persons appointed as Tee in the trust instrument*

In Re Tempest

- **Guiding principles for the court in appointing new Tees:**
    - Wishes of the settlor/testator – especially in respect of the characteristics set out as undesirable
    - Persons who do not have an axe to grind – either towards the settlor or the B(s)
    - Persons who will promote and not impede the execution of the trust
- Looking for broadminded, evenhanded people

RETIREMENT OF TRUSTEES

***Trustee Act* s 28**
28 (1) *if 2 or more Tees and one wishes to be discharged and co-trustees (and anyone else empowered to appoint Tees under the trust instrument) consent to discharge and vesting of trust property in co-Tees alone – the Tee who wants to be discharged is deemed to have retired*
(2) *vesting in the continuing Tees alone must be completed*
(3) *applies only if no contrary intention expressed in the trust instrument; it's subject to terms of trust instrument*

- Where there are 2 or more trustees, a trustee using a deed may declare a desire to be discharged.
    - That declaration must be served on the other trustees.
    - If accepted he will cease to be trustee and will be divested of the trust property
    - Remaining trustee(s) continue
- The founding trust instrument must not prescribe otherwise

REMOVAL OF TRUSTEES

- Trust instrument may provide the circumstances under which trustee removal can occur
    - Usually power of removal given to a designated person – "protector" or "guardian"
- (Precise legal status of the protector is unclear: if too many non-fiduciary powers/rights bestowed on him the trust could be viewed as bogus; more appropriately characterized as agency or some other relationship)

Trustee Act

Removal of trustees on application

s 30 *Tee may be removed and a new Tee substituted in his place on application to the court by any B who is not under legal disability, with support of a majority in interest and number of the trust Bs who also have capacity*

- Provides that a ***sui juris*** B (with the support of a majority in interest and number) can apply to court to have a trustee removed
    - May be necessary if differences among Bs have precluded termination under ***Saunders v Vautier***

Power of court to appoint new trustees

s 31 *if it's expedient to appoint a new Tee and it is difficult to do w/o court's help, the court may make an order appointing a new Tee(s) whether there is existing Tee or not at that time, and either as substitute or addition to existing Tees*

Conroy v Stokes

- Applicable criterion for stepping in to remove trustees - **welfare of the beneficiaries**
    - **Removal requires an applicant to point to acts and omissions that endanger the trust property or show want of honesty, appropriate capacity or reasonable fidelity**
    - Collectively these things point to acts that impair the welfare (or benefits) of the Bs
- Failure to produce accounts doesn't amount to impairing the welfare of the beneficiaries unless persisted in

Re Consiglio Trusts (No 1) (1973, Ont. CA)

Facts: Official Guardian and a B brought an application in the context of "domestic relations proceedings" which disclosed "widespread misunderstandings" among the three Tees giving rise to accusations and bitterness and making it "virtually impossible for the Tees to agree on policies concerning the efficient management of the trust"; no misconduct - Removal ordered

- **Misconduct by trustees is not a prerequisite for removal**
    - It is enough "when the continued administration of the trust with regard to the B has, by virtue of the situation between the Tees becomes impossible or improbable"
    - Because there must be unanimity among Tees – where there is widespread disagreement, the trust can be ruined by inactivity
- Trustee issues which affect administration of the trust will affect welfare of the Bs

TRUSTEE DUTIES AND POWERS – GENERAL

- Tee (as legal owner of the property) has all the rights and powers to deal with management, use and administration of all property entrusted initially and in the trust on a continuing/changing basis subject to lawful directions in the trust instrument
    - Powers and duties are assembled to make sure Tee uses trust property to promote benefit for B
- Because of fiduciary responsibility to B - **Tees must exercise rights and powers in good conscience**
    - Means a Tee, because he **must act in good faith and advance the interests of the B** – can't pursue his own interests or someone other than the B's in a way that doesn't give B priority
    - **Places unique obligations on Tees re: fair dealing and self dealing in course of administering the trust**
- Tee has duties and powers to advance S intention as set out in the trust instrument (favouring the B)
    - **Requires Tees have a measure of competence to meet the objectives of the S**
    - Issue of competence is considered by looking at what the objectives of the trust are
- **Tees have no automatic right to be paid for their services** – this must be agreed upon
    - Include a provision in trust instrument if Tees are supposed to be paid for their duties

- **Tees can't place themselves in a position where their interest conflicts with that of the B**
    - If they do – they have to disgorge those profits to the B
    - **Tees are prohibited from "self dealing" (purchasing trust property for personal use)**
    - However, a Tee can purchase the B's equitable interest under the "fair dealing" rules
        - ie. Tee at one end of transaction B at other end (transaction voidable if there is power imbalance etc)

DUTY OF INVESTMENT

- **First look at trust instrument:** it may direct how Tee is to deal with the property
    - Trust to retain property
    - Trust for sale – property must be sold
    - Trust for sale with power to retain – must sell property but don't have to sell immediately; allows for sale at advantageous time (but Tee doesn't want to hang onto it too long; leaves you open to damages for breach of trust)
- Where trust is for financial welfare of B – Tee has obligation to manage the property
- Tee on accepting an appointment takes on obligation to act - **as an ordinary prudent person of business would act in managing his own affairs** [***Speight v Gaunt (1883)***]
    - Requires Tee to put his mind to the matter of investing the property; not required to beat the market; or be responsible for a general downturn in the market because of economic conditions
    - Ordinarily this requires a diversified portfolio in which risk is spread
    - Unless permitted by the settlement a trustee may not invest speculatively and must avoid as far as possible hazardous investments
- Trustees can seek advice from investment experts
- Tees must invest in compliance with ss 15.1, 15.2 of *Trustee Act*; unless settlement provides otherwise
- Failure to act appropriately will result in a breach of trust

<u>There are two broad aspects to trustee investment:</u>

- 1. Duty to invest so that capital fund is preserved from risk, but at the same time yields a reasonable return
- 2. Investment must be made by Tee in a way that is even handed between different classes of Bs (ex. life tenant versus the remainder person)

Trustee Act

- Prior to 2002 the *Trustee Act* limited Tees to maximum % of specific types of investments and their location outside of Canada - "authorized investments"
- The matter is now less prescribed; governed by the general terms set out in ss. 15.1 and 15.2

Investment of trust property

15.1 (1) *Tee may invest property in any form of property/security which prudent investor might invest in*
(2) *this doesn't authorize Tee to invest in a manner that is inconsistent with the trust*
(3) *Tee may invest trust property in a common fund managed by a trust company; whether or not it is a co-Tee*

Allows for much broader investments than old provisions – only limitation is prudent investor test

Standard of care

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

Legislates the ***Speight v Gaunt*** test

Fales v Canada Permanent Trust Co (SCC)

Facts: Testator gave estate, consisting mainly of shares in Boyles Brothers to his W and kids in succession in trust administered by W and Canada Permanent Trust; CPT sued by the children Bs for breach of trust; CPT had W joined in the action

- Because of gift to Bs in succession – there was no duty to retain; Tees were under a duty to convert the shares "as soon as advantageously possible"
- Standard of care and diligence required of a Tee in administering the trust is - that of a person "of ordinary prudence in managing his own affairs"
- Prudent person TEST operates uniformly for all Tees: "every trustee has been expected to act as the person of ordinary prudence would act"
    - Standard unity – no higher standard for corporate Tees; duty of care is the same standard for professional trust companies and individual Tees
    - **s 15.2** doesn't alter this - likely confirms it
- Both co-Tees were found liable for breach of trust for their failure to invest as a person of ordinary prudence
    - Court considered that CPT should have sought a court order to deal with this matter if W was being difficult
    - [for some reason W wasn't considered to have to seek the court's direction]
- But the W was exempted from liability under *Trustee Act* **s 96** (she acted honestly, reasonably and was uninformed by co-Tee)
    - **s 96** – can relieve Tees who need special consideration
    - To be relieved from liability under **s 96** – must have acted honestly and reasonably

Trustee Act

Jurisdiction of court to relieve trustee of breach of trust

96 *if court thinks a Tee who is personally liable for breach of trust has acted honestly and reasonably, and ought fairly be excused for the breach and for failing to get direction from the court re: the matter in which breach was committed, the court may relieve the Tee wholly or partly from personal liability*

Trustee not liable if overall investment strategy is prudent

s 15.3 *exempts a trustee from liability if the losses were the result of the implementation of a plan or strategy of investment of trust property and that plan reflected reasonable assessments of risk and return that a prudent investor would adopt*

Cowan v Scargill (1985)

- Exclusion of investments on moral grounds?
    - Tees must put on one side their own personal interests and views. Tees may have strongly held social or political views and object to any form of investments - in the conduct of their own affairs they are free to abstain from making any such investments
    - Under a trust if investments of this type would be more beneficial to Bs than other investments, Tees can't refrain from making the investments by reason of the views they hold
    - Trustees may even have to act dishonourably (though not illegally) if the interests of their Bs require

OUSTING COURT JURISDICTION

- Trust terms that the Tee is empowered to make exclusively "binding and conclusive decisions" will be treated by courts as invalid – considered against public policy
    - ***In Re Wynn (1952)*** - attempts to oust jurisdiction of the court are contrary to public policy - courts have the power "to construe and control the construction and administration of a testator's will and estate"

- Power to adjudicate can be given exclusively to a Tee in relation to matters of fact, not law
- ***Re Tuck's Settlement*** - CA upheld a Jewish faith clause where "the Chief Rabbi of London" was empowered to determine "conclusively" whether an "approved wife" met the condition set out by the testator; BUT the court retained control where rabbi may misconduct himself or make decision that is "wholly unreasonable"
- ***Boe v Alexander (1987 BCCA)*** – courts will allow ousting jurisdiction to a certain point, but a privative clause will be ineffectual to prevent judicial review where Tees have:
    - 1. Failed to exercise a discretion at all
    - 2. Acted dishonestly
    - 3. Failed to exercise level of prudence expected from a reasonable business person
    - 4. Failed to act impartially between classes of Bs or acted in manner prejudicial to their interests
    - **Tees must act according to the laws of trusts (based on fiduciary relationships) and are subject to court supervision**
- ***Re Poche (1984, Alta QB)*** - Settlements that shield the liability of the Tee through exculpatory clauses won't protect the Tee in cases where he has been dishonest, in willful breach of trust or grossly negligent

TRUSTEE DUTIES AND POWERS – SPECIFIC

DELEGATION

- The general duty of the trustee is to act personally – S had confidence in Tee personally; so they must personally fulfill their responsibilities
    - Therefore - ***delegatus non potest delegare*** applies; if you have been delegated authority you can't delegate it to someone else unless specifically allowed to do so
- Given the complexity of administration it is unrealistic to expect Tees to act in all matters of the trust – especially with regard to the many aspects of being custodian of the property
    - Tees are entitled to appoint agents to perform acts in respect of the trust – where it is specifically allowed by law or statute

Speight v Gaunt

Facts: action for breach of trust because Tee had appointed a stockbroker as agent; he had misappropriated trust funds entrusted by Tee who had followed standard business practices at that time for purchase and sale of shares; Tee found not liable as this was the standard business practice of purchasing stock

- Although a Tee can't delegate to others the confidence reposed in himself - **Tee may in the administration of the trust avail himself of the agency of third parties, if he does so from a moral necessity or in the regular course of business**
    - If a loss to the trust fund results from that - Tee will be exonerated unless it resulted from some negligence or default on his part

Trustee Act

s 7 *authorizes Tee to appoint a solicitor or banker; Tee can't leave the money in hands of these agents for a period longer than reasonably necessary; not authorized to do anything that is forbidden in express terms of the trust instrument*

s 95 *creates implied indemnity for Tees; Tee not liable for breach of trust when others are in control of trust monies properly delegated (under **s 7** – to solicitors or bankers); unless Tee proven to have been in wilful default*

Tee should research the particular group being used as agent – to avoid liability

Statute focuses Tee liability on requirement that they discharge their duties according to the standard of a reasonable business person; Tee is not insurer of trust fund – therefore if they have given reasonable consideration to potential risks, and have dealt with them in prudent manner, you aren't liable

Re Wilson
Facts: testator entrusted estate to trust co for benefit of Bs. The estate contained 2 properties: one profitable, other carrying charges exceeding income. An offer made on loss property; directed to GM who rejected it, didn't communicate decision to the Board (standard practice of that co); Board's failure to consider offer was breach of trust

- Tee who is personally responsible for exercise of judgment can't escape responsibility by leaving the matter to another person
    - Unlawful delegation where the exercise of board discretion was needed
    - **Board should decide where discretionary powers regarding sale, retention or investment of the trust property are involved**
- COMPARE ***Fales*** *obiter*: rejected that in trust co only directors can exercise discretionary powers – this is tantamount to treating the directors as trustees rather than the corporation

PROF: more likely that S has to look at governance structure of co (look at constating documents); as S who appoints a corporate Tee you're expected to be aware of this

LOYALTY

- Tee must exercise powers according to the terms of the trust to ensure the benefit of the beneficiary
- The trustee is a fiduciary and like all fiduciaries owes the B a duty to act in good faith.
    - **Defining obligation of a fiduciary is the duty of loyalty**

<u>Fiduciary must:</u>

- Act in good faith
- Not personally profit at the expense of the trust
- Not place himself in a position where his duty and personal interest may conflict – where his personal interest may conflict with interests of the B
- Not act for his own benefit or that of a third person without the informed consent of the principal
- Only contract with his B in transactions that are fair and there has been full disclosure of all material matters of the transaction
- **If you don't meet these obligations you are required to disgorge your profits and to continue to deal with trust property for benefit of Bs**

NO CONFLICT RULE

Trustees can't place themselves in a position where their interests <u>may</u> conflict with the interests of B
No-conflict rule applies to elected politicians such as city mayors [***Hawrelak v City of Edmonton [1976] SCC***]
PROF: rule has moved away from strict application to more relaxed; likely results in voidable transactions (instead of previous void transaction result)

Keech v Sandford
Facts: Tee held lease on trust for a minor B. Tee as tenant sought to renew the lease on behalf of the trust. Landlord refused to renew lease in favour of a minor. Tee entered into new lease - now for his own account

- Court required Tee to hold the lease for B even though when Tee took the lease there was no conflict with B since the landlord had refused to renew the lease involving a minor
- **The no conflict rule should be strictly applied**

- Case reflects a preventative approach to conflicts of interest – even though there was no fraud here, potential for fraud is too great to relax the rule
    - **The decision is designed to act as a deterrent to other trustees who might act contrary to the interests of their beneficiaries**

Boardman v Phipps

Facts: trust had a minority shareholding yielding little to Bs. Ds attended AGM accessing its accounts; allowed at meeting because of connection with trust; suggested Tees acquire controlling interest in co; Tees refused; Ds purchased shares with their own money; Tees ok with this, Bs advised; everyone made money; one B sues for disgorgement; Ds had acted in good faith and had put their own money at risk. Court found a conflict, disgorged

- Court extends the definition of who a fiduciary is – Ds held to be fiduciaries because they had attended meetings as agents or representatives of the trust
    - Acquiring shares and deriving personal profit from them = breach of fiduciary obligations
- The functioning tees had all approved, yet it was held B and Tom P owed duties "to the trust" and, therefore to the Bs (court is unclear why this connection is made)
- Tom Phipps was presumably acting as Boardman's agent and so liable in that respect (as a B he can ordinarily purchase trust assets)
- Court split on whether the Ds had breached a fiduciary duty
    - Majority held that a fiduciary can't profit from their position without informed consent of the Bs
    - Dissent emphasized that Tees had opposed the purchase for the trust; realistically there was no conflict. Moreover, Tees favoured the Boardman/Phipps purchase as it would put the shares in friendly hands.
    - TEST the Dissent applied: "possibly may conflict" means the reasonable man looking at the relevant facts and circumstances of the particular case would think there was a **real sensible possibility of conflict**
- Ds were given an allowance to be assessed "on a liberal scale" for their hard work – concession by majority that this strict approach was problematic

Peso Silver Mines Ltd v Cropper (SCC)

Facts: Peso offered a number of mining claims; directors refused them mainly for lack of funds; much later Cropper, a director of Peso, launched a company that bought the claims, Peso sued arguing the claims were held for Peso under a constructive trust

- MAJORITY: The no conflict principles are strict – but should be interpreted in light of modern practice and way of life
- DISSENT: complexities of modern business require strict application of the rule; to ensure people are protected it is necessary that Tees' activities are circumscribed within rigid limits

Canadian Aero Services v O'Malley (SCC)

Facts: Canaero engaged in geophysical exploration through aerial photography; employees and senior officers initiated project in Guyana that eventually got a government contract; employees and officers resigned and joined new co in competition with Canaero; this co ultimately won the government contract in Guyana. Canaero sued arguing breach of fiduciary duty through conflict of interest

- Fiduciary relationship – top management were placed in the same position as directors because of their control of the company
    - **If you are placed in a position where you can direct the affairs of the co you owe it a duty of utmost good faith**
- Ds weren't acting in bad faith and Canaero actually couldn't have been successful but D's found liable as "faithless fiduciaries" - had to disgorge their profit

- **In determining liability, factors to be considered:**
    - position of office held
    - nature of the corporate opportunity - ripeness, specificness and director's/officer's relation to it
    - amount of knowledge possessed
    - circumstances in which it was obtained and whether it was special or even private
    - factor of time in the continuation of fiduciary duty where the alleged breach occurs after the termination of the relationship with the company
    - circumstances under which the relationship was terminated - whether by retirement, resignation, discharge

Holder v Holder (UK)

Facts: D appointed an executor of father's will; later renounced position, was not part of decision to sell farms in the estate; remaining executors auctioned farms which D and former Tee bought. P, a B, wanted sale set aside

- Court upheld the sale – considered sale outside the mischief that the self-dealing rule prohibits
- No "real" conflict because:
    - D's renunciation was well known and effective
    - He paid a fair price
- **An inflexible rule prohibiting all transactions is unnecessary and could lead to injustice**
    - Courts should investigate the facts to determine whether there are grounds sufficient to set aside the contract
- Case moves away from previous UK case law: ***Keech v Sandford***, and ***Boardman v Phipps*** type

This case is adopted in Canada in: ***Molchan v Omega Oil & Gas Ltd***

SELF-DEALING RULE

- Self dealing rule renders voidable any transaction where a Tee purchases trust property or sells his property to the trust (unless expressly authorized)
    - Rationale for rule: it is difficult to determine if the Tee has served the B's interest by securing the best price because of structural conflict of interest involved
    - Structural conflict of interest – in buying from trust the Tee is at both ends of the transaction

FAIR DEALING RULE

- Fair dealing – where Tee purchases equitable interest in trust property from the B
    - Not as risky as self-dealing because Tee is not at both ends of the transaction; B is on other end
- Idea that where Tee enters into contract with B for equitable interest – this will be fair
    - Obligation will be on Tee to show that there was no fraud or concealment of advantage taken by him
    - Duty of utmost good faith still applies – so Tee must disclose everything to B

Crighton v Roman

- For "fair dealing" transaction to stand, Tee must should:
    - (1) that there has been no fraud or concealment of advantage taken by him of information acquired by him in the character of Tee
    - (2) that the B had independent advice, and every kind of protection, and the fullest information with respect to the property; and
    - (3) that the consideration was adequate

*Only one situation where the B loses – *bona fide* purchaser for value

If Tee transfers assets to *bona fide* purchaser for value – B only has personal remedy against Tee left

DUTY OF IMPARTIALITY – ISSUE ARISES MOSTLY WITH WILLS

- It is duty of the trustee to act impartially between the beneficiaries
    - Assumed that this is what the testator wants (where trust instrument is silent)
    - Settlor/testator can direct partiality in trust instrument and that will prevail
    - Partiality assumed in *inter vivos* settlements???
- If S creates an *inter vivos* trust for successive Bs he will transfer specific assets to the trust - S through assigning the particular assets demonstrated his intention that those assets were to be enjoyed by the successive Bs in the form they took
    - This precedent led to the position that in these circumstances there was no need for the Tees to put these assets into authorized investment form – it was construed that the S didn't intend that the assets be so converted
- **Discretionary trusts** – Tees likely invested with powers allowing them to choose which Bs to benefit at particular points in time including the ability to encroach on capital if needed
    - Terms of the trust will indicate, expressly or impliedly, if partial treatment among Bs is required
- **Duty requires the Tee to administer the trust in a way that one B doesn't benefit at the other's expense**
    - May put special requirements on investment powers of Tee: the trust-asset portfolio may have to be (re)structured to enable impartiality
- **Property may produce uneven treatment for one of these reasons:**
    - The original trust assets transferred by the S
    - The asset mix assembled by the Tees under their investment powers under the trust
    - Income return may constitute both income and capital
    - Property could be capital or income according to way the transferor characterized it
- **Duty of impartiality may impose obligations on Tee to sell some of the trust assets and convert them into authorized investments that neither favour unduly the income account nor the capital account**
- Tee may also have to apportion income to benefit the life tenant ("income" beneficiary) on the one hand and a remainder person ("capital beneficiary") on the other
    - May do this by enhancing the capital fund by taking a portion of income generated and ploughing it into capital; or Tee may apportion capital sums received for the benefit of the remainder person by allocating some of it as income for the life tenant

Howe v Dartmouth

- **RULE:** *Where a testator leaves residuary personalty to persons by way of succession and the residue includes a wasting asset the trustee must sell the personalty that is a wasting asset, invest the proceeds in authorized investments, the income of which is for the benefit of the life tenant B*
    - Where the trust instrument has a clause with an express trust for sale – the income must be apportioned once the wasting and unauthorized investments, that form part of the residue left to persons in succession, have been sold
- Authorized investments = ones that a prudent investor would invest in and which enable Tee to meet his obligations of risk management and fair, impartial treatment of successive Bs so there is income and capital growth
- Express trust for sale = provision in the trust instrument that mandates selling of the initial trust asset(s) and conversion into other asset forms
- Apportioned = into income for distribution to the life tenants and the balance ploughed into the capital base for the benefit of the remainder persons
    - Life tenants generally should get between 2 – 7% income/year from the assets
- Wasting assets = those that deteriorate such as mortgages, cars, ships, watches, copyrights, etc
- **Application of the rule is subject to contrary intention indicated by:**

- Express provisions in the will which state that ***Howe and Dartmouth*** does not apply
- A direction that the residue be kept or "retained"
- Authorization for the Tees to retain unauthorized investments
- A direction or implied intention that the life tenant B is to receive income *in specie*

Earl of Chesterfield's Trust

- **Where there is an express trust for sale of a reversionary asset - when it is sold the proceeds must be apportioned**
- Reversionary interests = interests in property in the estate which aren't immediately available (ie. in possession) on the death of the testator and which will only be available sometime in the future
  - Typical reversionary interest = a remainder interest that was owned by the testator and now forms part of his estate – ie. he never came into possession of it and so, while alive, held it only "in expectancy"
- **Income received prior to sale of the personalty that are wasting or hazardous assets and which Tees under *Howe v Dartmouth* rule - must sell, is not to be paid *in specie*; must be apportioned**
  - Pending sale of personalty, income producing assets that diminish must be apportioned: with 4% - 7% (depending on conventional interest rates) of the value of the personalty given to the life tenant and balance ploughed into the fund to enhance the trust's capital base of investments
- If shares sold within a year of testator's death - value of the shares is assessed at the date of sale
  - If not sold within a year - value is taken at the 1st anniversary of the testator's death
- If income received pending sale is less than 4% of the value of the property - life tenant receives all of the income produced
  - If income later exceeds 4% that difference is paid to make up the shortfall
  - If the shortfall is not made up before sale of the asset the life tenant can give it made up from the proceeds of sale
- ***Earl of Chesterfield* supports this formula for apportionment of sale of wasting income producing assets and capital assets not producing income**
  - After the sale of a non-income producing asset - Tee must calculate what portion of the sale price, had it been invested at the date of the testator's death, would have produced income of 4% (compounded) per year and risen to the sale price
    - Ex. if sale of the reversion for $10,000 and it was sold 3 years after testator's death, $9,400 of the $10,000 would have generated 4% per year over the 3 year period before actual sale $9,400 will be invested and the annual income from it given to the life tenant. In addition he will receive $600 for being out of pocket for 3 years

Lottman v Stanford

Facts: Testator left estate (mainly real estate and some $65,000 of personalty) to Tees for benefit of W as life tenant and 2 kids in remainder. Tees were required to sell the assets, but given a wide discretion to postpone conversion. Assets sold except one parcel of land which was leased to testator's son at a rental that was insufficient to even pay property taxes. W sought relief; was opposed by kids

- ***Howe v Dartmouth* does NOT apply to real estate**
- If income is from real estate then payment is *in specie*
  - W wasn't entitled to notional interest from the real estate and was limited to the actual income generated from it

In Re Oliver

- Combined assets of personalty and realty in a deceased estate were not together treated as personalty for the purpose of applying ***H v. D*.**

- In a devise of real estate in a trust for sale, until 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 on the value of the personalty

Re Lauer and Stekl
Facts: Deceased estate consisted of mixed assets of realty and personalty. There was a trust to convert all the estate, but also wide powers to postpone and retain

- **Court characterized the clause for conversion as primary and dominant - so at some point in the future conversion would have to have taken place for all assets**
    - **Testator's dominant intention was the trust to convert – so the powers to postpone and retain are secondary**
- But that time could be lengthy, putting life tenant in an adverse financial situation that would be unfair
    - Accordingly, without changing the scope of ***H v. D***, the court simply found that the duty of impartiality required payment from all assets to the life tenant at a rate to be fixed by the trial judge
    - **The trust for sale precluded payments *in specie***
- Distinguish from ***Lottman*** – here, a trust to convert, with wide discretion as to manner of the conversion, extended to the entire estate (realty and personalty), unlike ***Lottman*** where it was restricted to personalty only

Often the trust for sale is combined with either a power to postpone or a power to retain:

- Power to postpone implies inevitable conversion – but as a matter of construction a power to postpone can carry an intention by the testator that the life tenant B enjoy the asset *in specie*
    - power to retain <u>may</u> imply ability to enjoy *in specie*
    - trust to retain <u>does</u> imply such an intention.

Royal Trust Co v Crawford
Facts: Testator left heirs in succession (W as life tenant, nieces and nephews in remainder); huge dividend of $450,000 declared and paid to W

- T**he law requires that the intention of the testator to displace apportionment must be clearly gauged from the will and surrounding circumstances**
    - While testator wanted W to live in the comfort to which she was accustomed – even to the extent of encroachment of capital - this is not what he wanted above all else
    - clauses existed which required conservation of capital by the Tees
- So *in specie* enjoyment was not intended and apportionment ordered
- Where there is a direction to convert (sell) ***and*** a power to retain - **question is "whether the power to retain is a power to retain permanently, or only until the Tees can sell advantageously; in other words, whether the power to postpone and the power to retain are merely ancillary or subsidiary to the trust for conversion. If the latter, it is necessary to find some other indication to say that the life tenant is entitled to the income *in specie***
- Dissent: construed a paragraph of the will granting W "any surplus income" as an *in specie* prerogative

In Re Smith
Facts: *inter vivos* settlement of Imperial shares on Tee; father wanted son to care for mother by placing income from ¼ of the shares for her benefit for life; son did this. Yearly income was constant 2.5%; insufficient to let W live life she had enjoyed. Tee ignored her request for variation of investment portfolio which would enhance her income; son didn't want to sell Imperial shares and Tee went along with that.

- Tee had been partial to the remainder person - **had erroneously construed the power to retain in the deed as a trust to retain**
    - **Tee had discretion to retain and a duty to be impartial**

IMPARTIALITY RE: SETTLED SHARES

- If a company distributes profits to its shareholders in the form of shares - are these "dividend shares" income or capital
    - Form is substance = form that director's order the dividend to be paid out will determine if it is capital or income
- ***Re Welsh (1980, Ont. H.C*)** – capital assets of co sold and distributed as cash dividends; distribution of cash dividends held to be a distribution of surplus capital, therefore goes to the remainder interest holders;
    - *Form is substance* – is subject to testator's overriding intention; testator's will only makes sense by regarding the release of funds as capital (to go to kids holding remainder interest instead of W's new husband)

DISBURSEMENTS

- Trustee administration requires estate management: including payment of debts and disbursements
    - May involve apportionment of funds as capital and income in assessing payments as legacies, taxes, insurance premiums, cost of repairs and debts.
- ***Allhusen v Whittel (1867)*** - attempted to strike fair balance between life tenant and remainder person in respect of payment of debts in an estate during initial administration.
    - In fairness to remainderpersons – the income B should only get income from the **net estate**
    - Rule in ***Allhusen v Whittel* -** required the life tenant receiving income immediately on establishment of the trust to make a contribution to payments made later in the administration
        - Since debts (including legacies) have to be paid after a year of an appointment of the Tee - **capital plus one's years income** were taken into reckoning as assets available to pay debts.
        - In practice this rule was difficult and costly to apply; *Trustee Act* overrules this case

Trustee Act* - Abolition of rule in *Allhusen v. Whittel

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

(a) *personal representative of deceased, paying debts, disbursements – can't apply income of the estate toward payment of the capital of those disbursements*

(b) *until payment of the debts, disbursements – income from the property required for their payment must be treated and applied as income of the residuary estate*

Provided that, in the case where the assets of the estate aren't sufficient to pay disbursements in full, the income must be applied in making up the difference

- **Unless testator says otherwise, <u>all income</u> is available for payment of debts etc. and is to be treated as part of the residuary estate**
- Trustee must still keep impartiality in mind, unless terms of the agreement don't require it

INVESTMENTS

- Look to the trust instrument to see what the Trustee is allowed to invest in
- *Trustee Act* (BC) – Tees can invest "in any form of property or security in which a prudent investor might invest" [**s 15.1**] in respect of which they "must exercise the care, skill, diligence and judgment that a prudent investor would exercise" [**s 15.2**]
- Where there are successive Bs - investment policy and strategy should, absent a contrary instruction by the testator, be fair to the different classes of Bs

- Tee prudence requires reviewing the investment from the perspectives of yields, capital appreciation and risk
- Practical result of investment powers and duties – means investments need monitoring and change or could be potential breach of trust

Nestle v National Westminster Bank
Facts: Testator left life estate to W and 2 sons; remainder to granddaughter, the P. Investment in bonds and shares was authorized and there was a power to retain. P claimed the remainder interest should have been worth more.

- Court found that the Bank had done a horrible job in its administration of the fund
- But the B still failed; the Bank was able to:
  - (1) show it had deliberately invested in tax exempt bonds which had suited the life tenants and shielded the trust from inheritance tax
  - (2) win the battle of the experts - its expert witnesses showed that in the past equities had been regarded as risky investments
- **Trustee's performance can't be judged with hindsight** – where a trustee invests as an ordinary prudent man of business conducting his own affairs would, can't be faulted as reckless
- (Today investments made in line with **portfolio theory** - investments are diversified, considerations of risk are made from the perspective of the entire portfolio rather than each item of investment in isolation; looks more to the overall total return on investments.)

Cowan v Scargill
Facts: pension with 10 Tees; 5 from Union wanted to prohibit overseas investment and investment in competing industries

- Trustee powers must be exercised in the best interests of the present and future beneficiaries - usually means their best financial interests; **financial benefit is the main concern**
  - Union Tees were in breach of trust by bringing ethical considerations into account when exercising their investment discretion
- **In considering what investments to make trustees must put aside their own personal interests and views**
- If all Bs are *sui juris* and share Tees' moral values it may be a benefit to Bs not to invest in vehicles they agree are immoral
  - Trust can be varied to reflect this; "benefit" can have wide meaning
  - The overriding duty of the trustee is an undivided loyalty to the beneficiaries.
- W**here a trust is silent about the use of non-financial criteria - Tee should not be under a legal disability to consider non-financial criteria, provided the predominant goal remains the securing of a reasonable financial return**
  - Tee who uses non-financial criteria should continue to be obliged to meet the usual standard of prudent practice

PROVIDING INFORMATION

- B has a right to require Tee to provide info necessary to determine if the trust is being properly managed
  - **B (including discretionary and contingent) on reasonable notice: has a right to see trust accounts, investments, trust document and all reasonable information concerning management of trust property**
  - Not entitled to see everything – information about Tee making actual decisions is confidential; Tees are given freedom to decide and change their minds without being subject to review
- ***Re Londonderry's Settlements (1965, Ch*)** - B is not entitled to documents covering the Tee's exercise of a discretionary power

- B aren't entitled to the reasons indicating why Tees came to a decision
- If Tees are acting in bad faith then the obligation to disclose can be enforced by court order
- **Documents not subject to disclosure:** agenda, correspondence amongst Tees, correspondence between Tees and Bs, minutes of trustee meetings

- ***Froese v. Montreal Trust Co (1993) BCSC*** – On application of B court ordered production of a legal opinion obtained by the Tees on the topic of breaches of trust alleged by the B
  - Defence of solicitor-client privilege was rejected
  - Information sought by the B related to the management of the trust
  - Opinion letter was held to be proprietary information belonging to the trust
  - Even if the opinion letter had related to Tee's fear of a personal action against him it would not have been privileged if paid for by the trust

***Trustee Act* s 99 – Passing of trustee's accounts**
99 (1) *Trustee must file the accounts within 2 years from the date of appointment*
(2) *If a person with a beneficial interest in the trust serves notice on the Tee, he must file accounts annually within one month from anniversary of appointment*
(3) *if accounts aren't filed, or are incomplete/inaccurate, Tee may be required to attend at court to explain why; court may give directions, including removal of Tee and appointment of new Tee, and payment of costs*

- ***Sanford v Porter (1889, Ont. CA*)** - although Bs are entitled to inspect accounts they are not entitled to an instantaneous response
  - Duty of the Tee is to make the accounts available for inspection and examination
  - If B lives in a remote place there may be an obligation to mail copies of the accounts
  - Every case depends on its circumstances
- PROF: now with electronic communication there may be a more instantaneous requirement to account; but difficulty of inputting info instantaneously may limit this

TRUSTEE REMUNERATION
- No automatic right to remuneration – trust instrument may specify whether there will be remuneration, on what scale and level
  - Bs can also act together to modify the trust instrument to provide for remuneration
- Note: court's inherent jurisdiction to provide for remuneration (***Boardman and Phipps*** – liberal allowance)

***Trustee Act* s 88 – Setting remuneration of trustees and guardians**
s 88 (1) *Tees are entitled to; and court can allow him; a fair and reasonable allowance not exceeding 5% on the gross aggregate value of the assets of the estate – as remuneration for Tee's care, pains and trouble, and time spent on trust administration*
(2) *court can make an order under (1) from time to time and the remuneration must be allowed; Tee will also get reimbursed for any expenses actually incurred*
(3) *person entitled to allowance under (1) can apply annually to the court for a care and management fee – not to exceed 0.4% of the average market value of the assets*
"care and management fee" provided to Tees where they are doing something special

s 89 - Application for remuneration
The court may, on application, settle or direct settlement of the amount of compensation

s 90 – Application
Nothing in ss 88, 89 applies where the allowance is set out in the trust instrument

s 91 - Review of order or certificate of registrar
(1) *order made under ss 88, 89 is subject to review by the court, on application, before 14 days after order made*
(2) *unless varied or discharged by the court – the order is binding on the Tee and all parties interested in the trust*

***Re Sproule (1979) Alta CA*)** – Bs argued for lower fees since, Tee was little more than passive custodian of the shares; Tee argued the care and management of a high value asset, inherently risky (given speculative nature of shares) imposed need for constant monitoring

- Court preferred lump sum remuneration - the use of percentages would require special reasons
- "Care and management fee" applies where –there is responsibility requiring judgment and decision making to resolve problems from time to time arising over and above the usual regular procedures of administration
    - Court didn't like application of the care and management fee unless there were special reasons for it
- **Guidelines for setting remuneration:**
    - Magnitude of the trust (***Re Pedlar*** - its value and complexity)
    - The care and responsibility arising from it
    - The time occupied in performing the duties
    - The skill and ability displayed
    - The success which has attended its administration

***Re Pedlar (1852) BCSC*)** - Court accepted that **s 88(2)** allows for "care and management fee" in addition to "fair and reasonable remuneration (under **s 88(1)**)

- To get care and management fee, Tee needs to give - general summary of the estate and his services performed in the care and management of the estate; including info from ***Re Sproule***
    - Doesn't automatically entitle Tee to 0.4% of the value of the assets - the court can determine the percentage up to a maximum of 0.4%; and %s to be applied to income and capital respectively
- **Relevant factors in assessing a "care an management fee":**
    - Value of the estate assets being administered
    - Nature of the assets being administered (active business, farm, real property held for appreciation, portfolio of investments and type of investments)
    - Degree of responsibility imposed on Tee by the terms of the will/trust instrument, including length or duration of the trust
    - Time expended by the trustee in the care and management of the estate
    - Degree of ability exhibited by the trustee in the care and management of the estate
    - Success or failure of the trustee in the care and management of the estate
    - Whether some extraordinary service has been rendered in the care and management of the estate

INDEMNITY OF TRUSTEE – INDEMNITY AGAINST WHO? TAX COLLECTOR?

- Basic principle of equity that B who gets all of the benefit of the property should also shoulder its burdens
    - Tee may be liable for trust debts as legal owner - in equity they fall ultimately on the equitable owner – unless there is good reason for the trustee to be responsible for them
- **Trustees are entitled to an indemnity for all debts they incur in executing the trust**
    - If expenditures made in administering trust, Tee can claim indemnity from the trust or the Bs
    - If there is good reason why Tee should bear responsibility then they can't be indemnified by B

***Trustee Act* s 95 – Implied indemnity of trustees**

s 95 *Tee chargeable only for money actually received by the Tee; answerable only for Tee's own acts; not liable for actions of other Tees, agents; not liable for any loss unless it occurs through the Tee's own willful default; Tee may reimburse himself for expenses incurred in execution of trust, from trust property*

Hardoon v Belilios [1901] – example of reason that Tee can't be indemnified by B = where Tees dividing the trust into several smaller trusts in favour of several Bs; it would be unfair to cast the increased liabilities of those divided trusts onto say the one and only *sui juris* beneficiary

***Re Reid v Yorkshire and Canadian Trust (1970 BCCA*) –** Tee had made payment of UK taxes on trust; B argued Tee shouldn't have made payment and that B shouldn't have to indemnify

- "Good reason" for Tee not to have made payments = **Sovereign Authority Rule:** a foreign state is precluded from suing in this country for taxes due under the law of the foreign state (***USA v Harden***)
    - Court rejected this as a good reason
    - Rule in ***Harden*** applies only to any actual attempt by a foreign state to extend its "sovereign authority" in BC; therefore didn't apply here
- Tee was personally liable because UK legislation made Tee liable in this type of trust, and Tee had therefore paid the money because it was personally accountable for it by UK statute – couldn't seek indemnification from the BC beneficiary

Stringman v Dubois (1993) Alta CA – everything in US, except Alberta farm; B called for transfer of legal title; representative of Tee refused, thought farm should be sold to cover death duties in USA; B won

- **Even an indirect attempt by a government to collect taxes offends sovereign authority rule; so is a good reason for the trustee not to pay taxes and so avoids the beneficiary-indemnity-of-trustee requirement**
    - Court applied the rule in ***Harden* -** asserting that the government need not be a party to the lawsuit for the rule to apply
- Court ruling against B indemnifying Tee clearly motivated by - fact that there were considerable estate assets in the US; also the farm appeared to be *in specie* legacy and so should not be sold by the trustee

CONTROL OF TRUSTEES

- Bs and the court have power to ensure that trustee duties are properly performed

***In re Brockbank (1948*) –** discusses powers of control by B
Facts: One Tee wanted to retire; Bs insisted he be replaced by a bank. Tees argued they had full powers over trustee retirement, removal, appointment. Non-retiring Tee refused to consent to bank appointment as Tee; Bs sought order from court compelling non-retiring trustee to comply with their direction

- Court refused to force trustee compliance
- **This is a matter within the discretion of trustees and neither the courts nor the Bs should interfere in it**
    - **Fiduciary power of trustees to make trustee appointments is not controllable by beneficiaries**
- Beneficiaries have 2 options:
    - 1. Accept the trust as is with its discretionary power to appoint trustees
    - 2. Extinguish the trust under ***Saunders v Vautier***

***Butt v Kelsen (1952*)** - Estate consisted of shares in private co; through control of those shares Tees appointed themselves as sole directors; B wanted to see all co documents in Tee's possession; argued Tees were directors only because of their ownership of shares as trust property

- Tees said that as directors they had duties to the co and minority shareholders so that the Bs were entitled only to those documents available to all shareholders - court agreed with the trustees

- **Beneficiaries can't control Tees who are directors in terms of information flow - Bs have the same rights as shareholders – not more**
    - Bs can compel Tees to vote the shares as directed, even to change the articles
    - PROF: but Bs have an equitable interest in the trust, but not legal title to the shares – they aren't shareholders

Trustee Act
s 86 *Trustee can ask the court for advice or direction re: administering the trust property*
s 87 *Trustee acting on the advice of the court is deemed to have discharged his duty as Tee; but Tee isn't indemnified if he has committed fraud, willful concealment or misrepresentation in obtaining that advice*

Re Wright (1976) Ont. HC - offer to purchase was rejected by 3 of the Tees because the price was, on the advice of experts, too low; other Tee (corporate Tee) applied to court for advice and directions and order for sale

- Court refused to provide advice or an order for sale – **Trustees given a discretion should exercise it as they properly see fit and without interference from the court**
    - **Trustees acting honestly and with due care must exercise the discretion reposed in them and not shift it to the court simply where there is disagreement on price, rather than on the fundamental scope of powers written in the trust**
    - Only in the event of a real and absolute deadlock will the court intervene

Tempest v Camoys - only in the case of bad faith or refusal to discharge duties should a court step in to control the exercise of the discretion a testator has reposed in the trustees

Re Lohn (1991) BCSC – Tees with wide discretionary powers, embarked on rearrangement of trust for tax avoidance. Tees applied for court approval of a tax adviser's advice

- Court held it had no jurisdiction under *Trustee Act* **s 88** – to substitute its discretion for that of the Tees
- It is not expedient for a court to interfere in the details of the management of trust estates and the discretion entrusted to Tees by the testator to exercise honestly and intelligently
- **It is an abuse of the statutory power in s 88 to unload the responsibility as to these details on the court especially where the task is calling for careful enquiry and the exercise of tact and discretion**
    - In effect the Tees wanted court ratification of the tax advice that the Tees clearly approved

Re Billes (1983) Ont. HC - estate of Canadian Tire shares; income left to W, kids and some charities; some of the charities were dissatisfied with the income stream of 2.2%; National Trust (Tee) wanted to sell the shares but was opposed by son and W, also Tees. Tees were given an absolute power to convert and to retain the shares

- **Court found a "serious deadlock" - so adopted proposal of National Trust to diversify trust assets**
    - Held that this proposal would avoid an unwarranted risk, enable distribution of substantially greater income to income Bs and bring stability to the capital value
    - It would also remove the conflict of interest of Billes, son and co-executor of the estate who was also a franchisee and director of Canadian Tire
- **Court ordered the sale of the shares at "an advantageous and beneficial" time**

Re Blow (1977) Ont HC - Two trusts: one in favour of daughter for life; remainder to her children; other identical, in favour of his son and children. Tees given uncontrolled discretion to encroach on capital for the son and daughter. Side memo written by testator as guide arguably qualified the manner of exercise; Canada Permanent Trust (CP) refused to advance capital to the daughter on the basis of the memo

- CP had incorrectly relied on memo and should only take direction from the trust instrument; Court held that it had the ability to intervene and direct the Tees, but refused to do so
    - Court can interfere even if Tees have uncontrolled discretion – if there is bad faith, improper purpose, failure to consider, absence of reasons available to the court, irrelevant considerations, unreasonable decisions, lack of prudence
    - Court will also intervene in cases of deadlock – to the extent that administration of the trust becomes difficult and Tees fail to address the discretion conferred on them
- **Court will not intervene unless failure to do so would be manifestly prejudicial to the beneficiaries**

***Schipper v. Guaranty Trust Co of Canada (1989) Ont. CA* -** testator gave Guaranty Trust "uncontrolled discretion" to administer and manage the trust for the general welfare, benefit, comfort and enjoyment of W; she wanted to encroach into capital; GT refused other two trustees approved

- Court will generally refuse to interfere with the "uncontrolled" discretion of a *bona fide* trustee
    - **BUT will interfere where the Tee is attempting to exercise its discretion to achieve a purpose not intended under the terms of the trust**

Re Fleming (1973) Ont. HC – testator gave life estate to W and appointed her an executor; Tee faced with surplus, could distribute surplus as income (favouring W) or capital, as redeemable preference shares

- Court ordered the corporate Tee to distribute the surplus as capital in the form of shares favouring the life tenant who had previously been shortchanged by low yield returns; **courts will intervene where Tee has failed to be evenhanded**
- In making this order; the court considered:
    - The adverse tax consequences of treating the surplus as income
    - The prospects of future income enhancements for the life tenant from other sources and income from enhanced capital, and
    - The need to be even handed between the life tenant and remainder persons,

CHARITABLE TRUSTS

- **Charity:** defined under *Income Tax Act* **s 248**; registered with the government; not necessarily a trust; exempt from income tax, capital gains tax; ownership passes to charity outright
- **Charitable Trust**: set up by individuals to accomplish public purposes that warrant certain advantages; purpose trust – paramount obligation is to fulfill task of trust creator; legal and beneficial ownership passes to trustee for charitable benefit; indirect beneficiary is public or segment thereof
- **Historically charitable trusts get special protection:**
    - (1) treated favorably by taxation statutes (defined in *Income Tax Act* **s 248**)
    - (2) enjoy an extensive exemption from the rule against perpetuities
    - (3) do not fail for lack of certainty of objects
    - (4) if the S doesn't set out sufficient directions, the court will supply them by designing a scheme
    - (5) courts may apply trust property *cy-prés* providing they can discern a general charitable intention (***Canada Trust Co v Ontario Human Rights Commission***)
- Focus is on the purpose instead of on certainty of objects
    - Important role of courts in deciding the subject matter, object, etc.
    - Attorney General has the duty to enforce charitable trusts
- **The law is very strict about what is considered "charitable"**
    - Conception of what is charitable has been elaborately worked out so that the courts are able to determine whether a particular gift is charitable or not (***Chichester Diocesan Fund vs. Simpson***)

- *Constitution* says regulation of charitable entities/trusts is a matter in provincial jurisdiction; BUT most regulation of charitable entities and trusts is federal (under federal statutes) – only ON and AB have regulated charitable entities

Statute of Elizabeth

- Charity is construed in accordance with the preamble to the *Statute of Elizabeth*; concept of charity in the statute is to include:
    - *Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning, free schools and scholars in universities; repair of bridges, ports, havens, causeways, churches, seabanks and highways; education and preferment of orphans; relief, stock or maintence for houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; relief or redemption of prisoners or captives, and for aid or case of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes*
- Courts most often interpret what is charitable based on analogies to the words of this preamble

Vancouver Regional FreeNet Assoc v MNR

- Court looked to preamble of *Statute of Elizabeth* and determined that the internet was analogous to a highway
    - A highway is in the public interest; will benefit society – therefore as analogous to a highway the provision of the internet is charitable

Commissioners of Income Tax v Pemsel (1891)

- "Charity" 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
    - 4. Trusts for other purposes beneficial to the community, not falling under any of the preceding heads
        - Must be public in nature
        - Without political purpose

        Has been found to include:

        Relief of sick, disabled, aged
        Recreational facilities and activities
        Administration of law
        Promotion of health
        Relief of suffering and distress
        Promotion of agriculture
        The environment
        Foreign charities

Native Communications Society of BC v MNR (1986) FCA

- For a particular purpose to be regarded as charitable under the fourth head of classification:
    - Purpose must be beneficial to the community in a way which the law regards as charitable by coming within the "spirit and intendment" of the preamble of the *Statute of Elizabeth* if not within its letter
    - Whether a purpose would operate for the public benefit is to be answered by the court on the basis of the record before it and in exercise of its equitable jurisdiction

RELIEF OF POVERTY

- **The courts have very broadly interpreted "trusts for the relief of poverty"**
- This head doesn't only include the poverty-stricken; doesn't refer to poverty exclusively
    - Possible Bs can be economically-able
- Bequests in aid of suffering or distress such as trusts on behalf of mentally ill; blind children; widows; orphans; neglected children; unmarried mothers; refugees or displaced persons; and ex-members of the armed forces have been considered charitable under this head of charitable trust

ADVANCEMENT OF RELIGION

- Interpreted more strictly than relief of poverty
    - Under *Statute of Elizabeth* – only construction of churches fits into religious advancement; courts have since widened this head, but are still cautious in determining what the elements of religion are
- **Considerations: is it a recognized religion and, does it promote or advance such religion**
- **Considerations of the elements of religion: spirituality, worship, faith, among others**
- *I do not say that you would need to find every element in every act which could properly be described as worship, but when you find an act that contains none of those elements it cannot, in my judgment, answer to the description of an act of worship the society therefore fails in my judgment to make out its case to be charitable on the ground of the advancement of religion* (***Re South Place Ethical Society*** – found the charity was not within the head of advancement of religion, but did fit within advancement of education)
- Considering what is for the "benefit of society" – courts will usually consider what S was thinking; why he felt it was important
- ***Thornton v Howe*** – court held charitable trust valid under advancement of religion; although writings were crazy it was seen as extending Christianity; court can't declare the trust void just because it thinks the opinions are foolish or unfounded (court said if promotion of an immoral, adverse religion wouldn't be upheld)
- ***Gilmore v Coats*** – benefit wasn't for the community because it was too removed (nuns were cloistered); **belief by S that it was for the benefit of the public isn't determinative**

ADVANCEMENT OF EDUCATION

- Dissemination of knowledge, training, encouragement, publication, training of the mind, improvement of a useful branch of human knowledge, etc.
- Court focuses on what is being taught
    - Sports – *Trusts for the support of sports in the context of education will be regarded as charitable* (***IRC vs. McMullen***)
    - Arts, Chess, and Gardens for contemplation (***McGarth v Cohen***) have been considered beneficial to the community under this heading
- *The word **education** must be used in a wide sense, certainly extending beyond teaching, and that the requirement is that, in order to be charitable, research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge…* (***Re Koettgen's Will Trusts***)
- ***In Re Pinion*** – experts found no value in the art that was property of the trust; court found that there was no educational purpose or public benefit in having this art preserved in a museum; not a valid charitable trust
- ***Re Hopkin's Will Trusts*** – teaching/education is not necessary to fit within educational head; it is enough to have valuable information pass into store of educational material

FOURTH HEAD – OTHER

- Under this head the court will be very careful to look at what the public benefit is, and who is the community that will benefit
- Trend in Canadian courts now: looking at the activities the organization is engaged in and how those activities engage with the purpose

Vancouver Society of Immigrant & Visible Minority Women v MNR
Facts: purpose was to support women from visible minorities in Canada; organized activities such as: workshops, and maintained a directory of women seeking a job. Denied registration as a *charitable* society

- The four heads of charity require looking at what is provided
- "for the benefit of the community" requires looking at who is the recipient
- **The test must focus on charitable purposes as well as activities, since the charitable character of an activity can be ascertained only through reference to the purpose for which it is being undertaken**
- Court found no support for the notion that immigrant aid per se was a charitable object under the fourth head in ***Pemsel*** (the "other" category)

THE BENEFICIARY: must be a definite community or section of community; must be identifiable as such
What identifies the community can't depend on a personal relationship to a particular individual or individuals; population must be an integrated part of the society
Individual potential beneficiaries can't sue to enforce a charitable trust – only the AG can enforce

Oppenheim v Tobacco Securities Trust
Facts: settlement established with purpose of "providing for or assisting in providing for the education of children of employees or former employees of British-American Tobacco Co."

- **The possible beneficiaries must not be numerically negligible, and the characteristic that distinguishes them from other members of the public must be essentially impersonal and must not depend on their relationship to a particular individual**
- The purpose of the trust was decided not to be charitable

Dingle v Turner
Facts: testator created trust with intention - provide pensions for poor employees of a co and any successor co

- Trust was a valid charitable trust – seen as benefiting the poor people in that company; these were poor people within that community

POLITICAL PURPOSE

- An organization formed to pursue political purposes cannot be charitable
- Advocating for change in the laws is usually considered a political purpose

National Anti-Vivisection Society v Inland Revenue Commissioners
Facts: A Society that intended to *educate* people regarding the use of animals for experiments was denied its registration as charitable. The courts confirmed the decision of the agency.

- Court found that the aim of the society wasn't for beneficial to the public
- **Advocating for change of laws can't be considered charitable**
- "*But there is another and essentially different ground on which in my opinion it must fail; that is because its object is to secure legislation -to give legal effect to it. It is, in my opinion, a political purpose…*"

Everywoman's Health Centre Society v MNR

- An organization will not be charitable in law if its activities are illegal or contrary to public policy

    - An activity can't be contrary to public policy if no definite policy exists; shouldn't conflate public policy with public opinion
- The CA ruled, by analogy, using the preamble of the Statute of Elizabeth the following: "In a Canadian context, I would suggest that the words "health care" or "health care services" be substituted to the words "medical care for the sick…"

CY-PRES DOCTRINE

- If a charitable trust fails there is a possibility that the property may be applied *cy-pres* - to some other charitable purpose as close as possible to the one originally provided for
    - Where original objective of S becomes impossible, impracticable, or illegal to perform, doctrine allows court to amend terms of charitable trust as closely as possible to the original intention of the S, to prevent the trust from failing
    - The mode pointed out by the testator is only one way, though the preferable way, of carrying out the charitable purpose; and if cannot, with regard to the general charitable intention, be carried out in that way, it will be carried out cy pres

Law and Equity Act
s 44 *If person gives property in trust for a charitable purpose and the gift would be void for uncertainty or remoteness, it is not invalid but operates solely for the benefit of the charitable purpose*

Jewish Home for the Aged of BC
Facts: guy left his estate in trust; directed income to three funds, the first for a Jewish hospital, the second for a Jewish orphan asylum and the third for a Jewish old men's home; no such institutions were in existence at the date of the testator's death; appellant society claimed the third fund (it attended to aged men and women)

- **If the Court can see an intention to make an unconditional gift to charity, then the gift will be regarded as immediate -not subject to any condition precedent, and therefore not within the scope of the Rule against Perpetuities**
- A charitable gift shouldn't be allowed to fail because application to a particular purpose is postponed

RULE AGAINST PERPETUITIES

- A gift to charity is not allowed to fail merely because the application to the particular purpose is postponed, as by a direction to accumulate
- An immediate gift to a charity is valid, although the particular application of the fund directed by the will may not of necessity take effect within any assignable limit of time, or may never take effect at all except on the occurrence of events in their essence contingent and uncertain

FIDUCIARY RELATIONSHIPS AND THE CONSTRUCTIVE TRUST

Why have a contstructive trust – allows you to claim the actual property itself

- CT is imposed by law – justification that imposition of CT is necessary for good conscience of court of equity
    - Not intended to be as elaborate as express trusts – just intended to do justice in specific situation
- Provides successful plaintiff with right to property that is in the hands of the fiduciary – especially important where there are lots of unpaid creditors
    - Use of the CT effectively says that equitable ownership is vested in the plaintiff
- Allows for tracing – provides an entry to property by a claimant (not only property in hands of fiduciary, but also in hands of third party who is not a *bona fide* purchaser for value)
- Beneficiary is able to receive any increase in value of the property that may have accumulated

- **Constructive trusts can only arise where there are existing assets to which the CT can attach**
    - Can't be forward looking (like express trusts)

INSTITUTIONAL CONSTRUCTIVE TRUSTS

- Over the years - development of a list of established legal categories where CTs have been imposed (ie. institutional CTs)
- List where CT will be imposed includes:
    - the wrongs of faithless directors
    - the delinquent agent in principal and agency relationships
    - overreaching partners
    - bribes
    - undue influence
    - breach of confidence
    - intermeddlers in trusts – "trustee de son tort"
        - ***Mara v Brown*** – trustee de son tort: if one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or do acts characteristic of the office of trustee – he may make himself a trustee of his own wrong
    - unjust enrichment through overpayment etc.
    - among separating, cohabiting persons etc (recent addition to the list of institutional CTs)
- List sets out established situations where a CT will operate
    - The list is not closed – as demonstrated by recent edition of last category (***Pettkus v Becker***)
    - Although the list is not actually closed – it is very difficult to open; development of new categories has been on *ad hoc* basis
- The law sets out the "substantive" requirements that need to be established in order for the court to impose the CT on the relationship of the plaintiff and defendant

Three categories of institutional trusts:

1. Breach of a trust or of an existing fiduciary duty - CT captures the unauthorized gain for the beneficiary

Ex. breach of conflict rules by trustees ***Keech v Sandford***; directors making profits at expense of co

2. Involvement in property inconsistent with the trust: examples include persons acting in the trust without authority

Ex. intermeddlers; knowingly receiving trust property; actively participating in a breach of trust

3. CTs without a preexisting fiduciary relationship

Ex. non-spousal domestic relationships as in ***Pettkus and Becker***

- Situations falling into the first two categories acquires a CT described as "substantive" or "**institutional"**
    - Arise **automatically** when the legally established criteria, based on judicial precedent, have occurred in the relationship of this particular plaintiff or defendant
- The third category, relatively new, may have the same effect of cloaking the property held by the non fiduciary defendant with a CT, and in this sense has become "institutional"
    - But the CT operates **prospectively** –through court declaration and in that sense is regarded also as **"remedial"**
    - Requires application to the court in order to receive CT
- "Institutional" label - means success in a CT case doesn't depend on discretion of the court to open a new basis for the CT
    - CT simply operates by law from the date the alleged facts generating the CT took place as fitting the requirements of the particular institutional CT

UNJUST ENRICHMENT

- Canadian approach – moving beyond the existing list of specific institutional CTs, but not abandoning the list outright; look to general purpose behind the CT in order to suggest conditions where the list might be opened to new situations
- The overall intention appears to:
    - set out general conditions under which a trust should be applied on property held by a person outside an express or resulting trust
    - not confine the CT to the institutional list of specific CTs
    - guide with some degree of certainty and predictability the circumstances under which court will apply a CT as remedy
- **Overarching principle that results in remedial CT over the defendant's property and establishes a fiduciary relationship is the circumstance of unjust enrichment**
- In all of the described relationships the court comes in to help the victim of unjust enrichment
    - **Unjust enrichment is the factor that connects all CTs**
- Where unjust enrichment has occurred and must be disgorged – the constructive trust is used as a device to facilitate making the person with legal title hold it beneficially for the wronged party with whom he has a juristic relationship
- Remedial CT is used as a remedy – gives the claimant an equitable interest in the property with a right to call for legal title from the defendant
    - Differs from institutional CT - in that action the dispute is generally about whether the facts have been proved to support the recognized elements of the specific CT
    - Remedial CT is imposed prospectively according to the court's exercise of its discretion
- **Unjust enrichment occurs when there is (*Pettkus v Becker*):**
    - An enrichment
    - A corresponding deprivation
    - And an absence of any juristic reason for the enrichment
- Notes said that what makes enrichment unjust is fiduciary relationship? I don't think that's right?

THE FIDUCIARY RELATIONSHIP

- Relationship in express and resulting trusts is intentionally a fiduciary one

In constructive trusts imposed by law:

- Institutional CTs - jurisprudence has identified varied situations that result in fiduciary relationship
- ***Frame v Smith* [1987] - characteristics of an actionable fiduciary relationship that went beyond the trust:**
    - The fiduciary has scope for the exercise of some discretion or power
    - The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests
    - The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power
- ***LAC Minerals*** - endorsed these criteria asserting, however, that not all had to be present before a fiduciary relationship exists
    - Vulnerability is the one necessary feature in order to find a fiduciary relationship
    - This emphasis on vulnerability is somewhat controversial

Pettkus v Becker

- Fiduciary relationship was found to exist between the titled owner of property (Pettkus) and the person who was considered to co-own in equity (Becker)
    - The court imposed a fiduciary relationship the remedy the unjust enrichment
- CT was used remedially to give B an equitable estate in the property
    - She could then call for shared legal title
- The court imposed the CT because not to do so would have resulted in the unjust enrichment of P at B's expense
    - The principle of unjust enrichment lies at the heart of the CT

Guerin v The Queen

- The category of CTs is not closed: it is not "established and exhausted by the standard categories of agent, trustee, partner, director and the like"
- **It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty**
    - 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
    - Where by statute, agreement, or unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary
    - Where the principal's interest can be affected by, and is therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him
- In this case, action on the property wasn't possible – therefore P was awarded damages
    - Crown had not been enriched by the surrender transaction so a remedial CT wasn't available; Crown's fiduciary obligation to the Indians is therefore not a trust
    - He said that the surrender relation was more akin to agency

LAC Minerals Ltd v International Corona Resources Ltd

- CT is remedial here - a proprietary remedy in the place of an award for damages
- **Three broad categories where a fiduciary relationship arises:**
    - 1. Fiduciary relationship is presumed in certain classes of relationship (directors, solicitors and clients, parents, trustees, agents/principals)
    - 2. Fiduciary relationship can arise as a matter of fact out of the specific circumstances of a relationship - even one where normally it would not be expected to arise
        - **The hallmarks making the specific circumstance fiduciary are: "ascendancy, influence, trust, confidence or dependence"**
    - 3. "instrumental or facilitative" - achieving an appropriate result
        - The term fiduciary is used as a conclusion to justify a result and "reads equity backwards"
        - Here the CT should be avoided as "counter predictive"
- One feature indispensible to existence of fiduciary relationship - is that of dependency or vulnerability
- WILSON: CT ensures that the wrongdoer in no way profits from its wrongdoing
    - Damages is too dependent on the reliability of valuation techniques
    - A proprietary claim should be granted when it is just to grant the P additional benefits that flow from recognition of a property right
        - It is appropriate where the P should have changes in property value accrued to his account rather than the wrongdoer
- LA FOREST: vulnerability is relevant, but not necessary to find a fiduciary relationship

- Imposes a fiduciary duty on LAC in order to "preserve desired social behaviour and institutions" (such as bargaining in good faith)
- SOPINKA and MCINTYRE: don't find a breach of fiduciary duty because of the absence of vulnerability/being at the mercy on the part of Corona – felt vulnerability couldn't be found where talking about 2 large cos
    - Corona's vulnerability here (if any) was their own fault for not entering into a confidentiality agreement; only breach of confidence found, therefore would award damages for this breach

Hodgkinson v Simms

Facts: material non-disclosure by an investment adviser/accountant, who provided tax-related financial services; adviser sold MURBs without disclosing personal financial interest in product due to relationship with developer

- No remedial CT possible – value of property had severely deflated; seeking damages
- **Focus on the nature of the breach rather than on the nature of the loss**
- Court found P was vulnerable to D because of his reliance on D for guidance and advice
    - The concept of vulnerability is not the hallmark of a fiduciary relationship though it is an important indicia of its existence
- **Fiduciary can exist where - given all the surrounding circumstances, one party could reasonably have expected that the other party would act in its best interests with respect to the subject matter at issue**
    - Fiduciary duty contains special elements of trust, loyalty and confidentiality that in a fiduciary relationship give rise to a corresponding duty of loyalty
- Existence of a contract does not preclude the existence of fiduciary obligations
    - **Nature of the relationship determines whether it is fiduciary or not – not legal categories**
    - Contractual relationships of the professional adviser type can establish a fiduciary relationship
- Duties of a fiduciary:
    - ordinarily they include skill and competence and the special elements of trust, loyalty and confidentiality
- Categories of fiduciaries are not closed
- Determining when a fiduciary relationship arises:
    - **discretion, influence, vulnerability and trust are non exhaustive examples of evidential factors to be considered in making the determination**
    - As fiduciary you relinquish your own self interest
- Court assessed damages (*in rem* remedy not appropriate – shares of no value) on a restitutionary basis: restored to the position he was in before the transaction
    - Restitutionary basis would put the appellant in as good a position as he would have been in had the breach of trust/fiduciary duty not occurred - claimant is entitled to be restored to the position he was before the transaction = an amount reflecting return of capital plus consequential losses minus income tax savings
- DISSENT: emphasized that vulnerability (being at the mercy of the other's discretion) is at the core of fiduciary relationships
    - Adopt test from ***Guerin***: 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
    - Find no fiduciary duty is owed - would assess damages on breach of contract basis

M v M

Facts: P sued her father for damages arising from incest –in tort and law of fiduciaries

- Fiduciary law is not confined only to matters of economic interest
- **Canadian cases have recognized the parent-child relationship as a traditional head of fiduciary obligation**
    - Based on victim's right not to have personal injuries beyond reasonable parental discipline.
    - Court finds breach of fiduciary duty as an independent head of liability available in incest cases

SUMMARY OF CONSTRUCTIVE TRUSTS

- Canadian courts have moved away from the development of list of situations as "institutional CTs
    - Instead moved to principles and rules that create legally significant fiduciary relationships that embrace the substantive CT
- CT used to describe *in rem* remedy that can be used for breach of trust, where appropriate (instead of remedy of compensation)
- There is disagreement among the judges of the SCC on the scope of the conditions needed to create a fiduciary duty
    - These developments have now created "vast differences" (***Breen v Williams***) in approaches taken by the various common-law jurisdictions

REMEDIES FOR BREACH

- Trustees are liable for breach of trust where they fail to perform their duties by either omitting to do any act they are supposed to perform or doing something that they shouldn't
- The beneficiary is the principal person to enforce those rights using the remedies that equity makes available for a breach by the trustee.

COMPENSATION FOR LOSS

- Compensation is generally based on full restitution – in most cases the court will order full compensation
    - Means that the trust must be fully compensated for any loss caused by the breach of trust
    - Once a breach has been committed the Tees are liable to put the trust estate in the same position it would have been but for the breach
- Extent of liability is not limited by CL principles of remoteness of damage, or mitigation; causation considerations are also very generously and freely applied although there are limits
    - ie. where there is a breach of trust – getting damages under trust law won't be subject to these limitations
- Damages for breach of trust apply where the trust asset may be unavailable or difficult to determine (ex. ***Guerin***)
- **Starting principle: trustees that are in breach are liable to put the trust estate in the position it would have been in but for the breach**

Guerin v The Queen

Facts: looking for compensation for lease of a golf course on surrendered land; restitution in damages instead of CT because the land was in hands of a *bona fide* purchaser for value – can't go against that property

- Crown breached its fiduciary duty – when it leased the land on non-approved terms
- Over the course of the action the value of the land increased significantly
- Fiduciary law – damages are assessed more liberally to ensure maximum compensation possible; this differs from CL damages for tort or breach of contract
- In a CT the defaulting trustee must restore to the estate of the victim - the assets which B had been deprived of as at the date of restoration not as at date of deprivation (ie. the assets at date of court order; not the assets at date breach was made)
    - Where restitutionary relief given instead of CT – it is based on defaulting trustee restoring to the estate the money equivalent of the assets which it has been deprived of; assessed at the date of restoration (not deprivation)

- Court rejected a fair return basis for calculating compensation (ie. difference in return between existing lease and "a fair and reasonable" lease)
- To effectively achieve restitution (as required by fiduciary law) – court had to put a value on the lost opportunity for a residential development on the land as at the date of trial (not date of breach)
    - In contract court would have required proof that the land would have been developed; in equity presumption is made to that effect
    - Don't have to look at foreseeability, mitigation, etc. – just look at the opportunity lost
- Have to consider realistically at the date of trial – what you could do with that property; it is what you are deriving the value from

Canson Enterprises Ltd v Boughton

Facts: liability of fiduciary solicitor who, in handling a real estate transaction, failed to disclose to client purchasers a secret profit made by a third party, also a client

- Solicitor-client relationship is designated fiduciary relationship (institutional constructive trust) – therefore this was a breach of trust
- **Is solicitor liable only for losses directly flowing from the breach of fiduciary duty or also for losses caused by an intervening act unrelated to that breach**
- The purpose of equitable damages is to restore the person to whom the duty is owed to the position they would have been in had the duty not been breached
    - **Equitable remedies are very elastic and policy considerations should apply**
- Court sets out two qualifications on availability of equitable remedies:
    - 1. Losses stemming from the victim's unreasonable act should be barred
    - 2. Common sense causation could circumvent the victim's claim
- **The victim's actual loss as a consequence of breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach**
    - Victim is not required to mitigate – but losses resulting from clearly unreasonable behaviour will be viewed as flowing from that behaviour and not from the breach
- So court does not find lawyer liable for the loss caused by subsidence as this was attributable to the fault of the engineers and pile drivers
- *Equitable damages are very broad in scope – but, based on common sense causation, they must flow out of the breach*

SET OFF

In Re Deare

Facts: Tees breached trust by keeping among the assets of the trust some unauthorized stock for a very long time. The stock had greatly fallen in value.

- Trustees had also invested in unauthorized stock which had very good returns
    - asked the court to allow a set off of the profit of one stock against losses of the other
    - If you applied set off the trust estate was actually ahead.
- **The court refused to allow set off as "the rule is well settled that a trustee could not set off the profit from one breach of trust against the loss resulting from the other."**

ACCOUNTING FOR PROFIT

- A primary duty of a trustee is to "account" for his stewardship of the trust - disclose to the B his dealings with the trust property
    - A fiduciary must account for any unauthorized profit he has received that are attributable to that fiduciary position
- Such an accounting of profits can be ordered by a court and continue for a period of time
- Accounting remedy is available for breach of a fiduciary duty and breach of trust
- Basis of the remedy is to prevent unjust enrichment
    - But it is possible for the fiduciary to receive an allowance for the work he has put into the inappropriate venture (see ***Boardman v Phipps***)
- The accounting requirement is not a regime that will continue forever; court will fix a timeline
    - Where a breach has occurred it's sometimes difficult to determine the period to which the accounting should apply – to calculate the exact profit that must be disgorged
    - Court will often just make an approximation in this case

Warman v Dyer

- Accounting for profits remedy is a personal one – applies whether or not the claimant has suffered injury or loss
- **Deterrence is at the heart of the remedy to account**
    - Assertion that the claimant was unwilling, unlikely or unable to have made the profits is no defence
    - Defences to an application for an accounting are available - they are equitable in nature (estoppel, laches, acquiescence and delay)
- Ordinarily, a fiduciary will be ordered to render an account of the profits made within the scope of his duty
    - Assessment is often very difficult and a reasonable approximation is enough
    - Mathematical exactness is not required
- **If the loss suffered by the claimant exceeds the profits made by the fiduciary the claimant must elect which remedy: accounting or compensation**
- Where accounting is ordered – it may be inappropriate to account for all profit indefinitely
    - Especially where there is an increase in profits generated by the skill, efforts, property and resources of the fiduciary, the capital which he has introduced and the risks he has taken - then it may be said that the relevant proportion of increased profits is not the product or consequence of the plaintiff's property
    - Onus is on the defendant to prove that an award of the entire profits would be inequitable
- Here the court ordered accounting of profits for 2 years
    - An allowance was made in the accounting for D's skill, expertise, efforts, capital etc

Scott v Scott

Facts: Tee mixed trust assets with his own in the form of reinvestment in a more expensive house

- **Equity prohibits a trustee from making any profit by his/her management, directly or indirectly**
    - It follows that a trustee cannot retain the profits from a reinvestment
- Where a profit is made with a combination of trust money and the trustees personal money the beneficiary will be entitled to profits at least in proportion to the trust contribution
- Approved the position that where trust monies are mixed with monies of the Tee and the mixed fund is used to acquire other property which is not severable, the Bs are entitled to claim a proportionate interest in the property

REMEDIAL CONSTRUCTIVE TRUST – ONLY USE THIS REMEDY IF SIGNIFICANT CONNECTION TO PROPERTY

Peter v Beblow

Facts: She sought a CT on the Sicamous property or monetary damages as compensation for her labour on the basis of unjust enrichment

- Two possible remedies for unjust enrichment:
    - 1. Monetary – *quantum meriut* (ie. payment for services)
    - 2. Constructive trust – available where real estate is the form of enrichment
- I**ssue in this case is whether the CT extends to real estate for services rendered in a family cohabitation situation**
- Constructive trusts will be applied where: there is a contribution to the property, sufficiently substantial and direct as to entitle the claimant to a portion of the profits realized upon the sale of the property
    - A special link to the property must exist
- **CT will be applied as a remedy**:
    - where monetary damages are inadequate and
    - where there is a link between the contribution that founds the action and the property in which the CT is claimed
- In establishing a causal nexus one must consider what the legitimate expectations of the parties are (in both commercial and marital cases)
- **Test for unjust enrichment** (from ***Pettkus v Becker***)**:**
- 1. Enrichment
    - Here the W's work around the house enriched H by enabling him to pay off mortgage
- 2. Corresponding deprivation
    - W had provided these services without compensation
    - Cory J: love does not imply a gift of services – provision voluntary out of natural love and affection argument fails
- 3. Absence of juristic reason
    - Involves an enquiry into the legitimate expectation of the parties
- **The CT should be applied where monetary compensation is inadequate and there is a link between the services rendered and the property in which the trust is claimed**
- Extent of W's interest in the CT property should be based on value survived – portion of the value of the property that is attributable to her services or contributions (appropriate measure where a CT awarded)
    - Not assessed based on value received – amount of money that would have been paid for the services assessed on a purely business basis (this is appropriate measure where monetary award)
        - Here assets are apportioned on the basis of the contributions made by each

ACTIONS AGAINST THIRD PARTIES

- Third parties can become liable as fiduciaries or "constructive" trustees where they intermeddle in a trust
    - Where they act like a trustee and deal with the trust property
    - They will be liable for breaches of trust
- **There are three categories of intermeddlers:**
    - 1. Trustee *de son tort* ("of his own wrong")
        - Person not appointed as Tee but intermeddles in trust matters
        - Becomes treated as a trustee for purposes of breach of trust
    - 2. Knowingly receiving or dealing with trust property for his/her own use
    - 3. Knowingly assisting a Tee in a fraudulent/dishonest transaction perpetrated by the Tee or fiduciary
- In each case the third party is bound to the B using principles of unconscionability

- They may be held personally liable even though they have derived no benefit (treated as a trustee – so may be able to avail self of same defences a Tee could use, ex. *Trustee Act*)

- **The requirements for liability are:**
  - The existence of a fiduciary duty (e.g. trustee)
  - A breach of that duty by the fiduciary/trustee and
  - A dishonest and knowing assistance by the third party in that design

Most cases deal with the level of knowledge and dishonesty necessary to hold third party liable

Nelson v Larholt

Facts: A bookie was the third party in this case; executor of estate drew cheques from the estate; without authority paid them to the bookie in breach of trust. Each cheque was signed by the trustee as executor.

- The money could not be traced and so the beneficiary successfully sued the bookie
- Bookie had given value for the cheques but had notice that they belonged to the estate (not *bona fide*)
- Notice = deemed to know what any reasonable person would know in the circumstances
- The beneficiary was entitled to recover from the third party

Air Canada v M&L Travel

Facts: M&L sold tickets for AC on trust. Required to keep the monies received on trust in a separate bank account; it didn't. M&L's bank withdrew money from co's account under a demand note; AC sued shareholders personally for money owed to it for ticket sales; third party liable

- **Degree of knowledge required for a stranger to be liable: Actual knowledge, recklessness or willful blindness**
  - Carelessness or a want of probity is insufficient
- M & L as trustee, was in breach of trust because by not setting up the trust account it took a risk to the prejudice of the rights of the beneficiary [AC] which risk was known to be one for which there was no right to take
  - **AC was exposed to becoming a general creditor rather than having its funds protected in a trust account**
- Shareholder had actual knowledge of the breach of the trust – his conduct showed he was willfully blind to the breach, or reckless in his failure to realize there was a breach
  - He knew the terms of the agreement with AC (he signed it) and the need for a separate trust account
  - He also benefited from the breach of trust – his personal liability for the line of credit was extinguished (supports the idea that he was willfully blind)

Royal Brunei Airlines v Tan

- The PC found Tan liable. He had assisted in the breach of trust by "causing or permitting" BLT to undertake transaction in full knowledge that the monies were to be held in trust. This was dishonest conduct
- BLT was dishonest by using the trust money of the airlines since Tan's state of mind as its director was to be imputed to the BLT company
- **UK cases require actual knowledge by third party** - not what a reasonable person would know
  - Subject approach - considers third party's personal attributes; such as personal intelligence and business experience
  - It's hard to prove actual knowledge though – here the court looked at personal attributes of Tan and concluded that he must have knowledge
- *Canadian courts – just look objectively at what is reckless; willfully blind; don't take into consideration personal characteristics; look at what a reasonable person would have done and base decision on that*

TRACING

- Equitable process – allows trust property which has been misused to be pursued by the beneficiary
    - Proprietary remedy that is available where a personal remedy is insufficient – ie. if trustee or third party intermeddler is bankrupt
- In CL there are remedies available to pursue and recover property:
    - Principle of *nemo dat*
    - But CL principles stopped once money had been deposited into an account – at the door of the bank
- In equity – this barrier to tracing money is lifted;
    - But the ability to follow the property and recover it stops with the *bona fide* purchaser for value
- Tracing applies in two cases then:
    - 1. Volunteers – are not *bona fide* purchasers for value
        - ***Re Diplock's Estate (1948)*** - volunteer holds the property on a CT for the beneficiary
    - 2. People who have given value but– have taken from fiduciary/Tee in bad faith; or deemed to have had notice

CHANGE IN FORM

- Tracing allows B to take possession; obtain a charge against the property itself or can claim an amount that reflects increases in the value of the property (***Scott v Scott***)
    - When you recover the property you get it in its enhanced value state
- **Tracing is especially valuable as it enables a beneficiary to recoup lost property even when its form has changed (shares converted into money in the bank and *vice versa*)** (at CL when property changed form that was the end of your claim)
    - Allows the B to pursue the proceeds of a transaction that results in *bona fide* purchaser for value holding original trust property
    - When B runs up against a bona fide purchaser for value B is able to back track - bouncing his claim from the trust property in the hands of the bona fide purchaser onto the proceeds from that exchange (in the hands of the trustee etc.)
- **Three requirements in order for tracing to take place:**
    - 1. There must be a breach of trust or of a fiduciary relationship (questionable; may be changing)
    - 2. The property must be in a traceable form
    - 3. No inequitable results must arise from the application of the right to trace

1. MUST BE BREACH OF FIDUCIARY RELATIONSHIP

- There have been cases where the courts have allowed tracing without a previous fiduciary relationship
- ***Chase Manhatten v Israel British Bank London [1979]*** - **suggests that a fiduciary relationship may not be a precondition for tracing**
    - Extra money in account due to clerical error; no fiduciary relationship; but this was unjust enrichment
    - **Court allowed owner to trace on the basis that in good conscience it couldn't be retained**
- ***Brady v Stapleton*** – no fiduciary relationship; but court found that a thief held stolen money on a constructive trust for its rightful owners
- Consider also the unjust enrichment cases in breakdowns of common-law spousal relationships where a CT is imposed by the court (***Peter v Beblow***, ***Pettkus v Becker***)

So the need for a fiduciary relationship is in question

2. PROPERTY IN TRACEABLE FORM

- Tracing doesn't arise in relation to trust dealings in ordinary administration of the fund (only requires dealing with property as a prudent investor managing their own affairs would)
- Breach of trust by trustee in one of two ways:
    - 1. Misapplies trust assets (ex. purchasing unauthorized investment)
    - 2. Misuses proceeds of that misapplication as his own personal asset
- In both cases of breach - B will, effectively ask the court for specific performance of the trust by the trustee
    - Court order is sought to compel the trustee to carry out his duties properly

Tracing into Unmixed versus Mixed Funds

- If Tee withdraws trust money and uses it to buy an asset for himself, or deposits in his own account – B can trace into that asset (follow and claim it)
    - The asset is regarded as security for the trust money used to purchase it (***Re Halletts Estate***)
- If Tee withdraws and dissipates trust money without mingling it with his own – the right to trace in priority to Tee's other creditors is lost
    - But if the trust funds have been mixed with the Tee's other funds the claim doesn't fail (as it would under CL)
    - Equity presumes that when Tee withdraws money from the combined fund – his own money is assumed to be expended first
    - The B is therefore entitled to the remaining money in the account to the extent of his claim (***Re Hallet's Estate***)
- If Tee invests trust and personal monies into his personal assets – B will be able to claim against the asset for the amount of his claim (***Re Oatway***)
    - Includes a proportionate share into the increase in value (***Scott v Scott***)
- Where funds from multiple trust funds have been combined – court must separate according to the different claimant funds
- **Two approaches can be taken to separating the funds:**
    - 1. Rule in ***Clayton's*** - money first into the account is money first out
        - If a withdrawal of money is made from a mixed fund account withdrawals are presumed to be from funds initially deposited into the mixed account (Note: Tee is deemed to withdraw his personal funds first if he has withdrawn under ***Re Hallett***)
    - 2. Rateable approach –gives the various tracers an interest in proportion to their contribution to the fund (a *pro rata* approach – based on equitable principle of contribution)
        - ***Ontario Securities Commission v Greymac Credit Corp***
        - Rateable approach is regarded as fairer and increasingly followed

EQUITABLE CONSIDERATIONS

There are limits on the right to trace:

- Remedy doesn't affect the rights of a *bona fide* purchaser for value w/o notice
- Not available if the result would be unfair under maxim that *any person who comes to equity must do equity*
    - Ex. where innocent volunteer has improved/expended on the property believing it to be their own – there can't be tracing because you would be forcing a sale of what is now the volunteer's property
- When trust property can no longer be identified right to trace is extinguished (ex. dissipated)
- Tracing that would give rise to inequitable results is not allowed

REMEDIES SUMMARY

- **A number of remedies may be open to a beneficiary who has suffered a breach of trust:**
    - Recovery of losses from the trustee

    - Recovery of gains the trustee obtained from the breach
    - Third parties who have wrongfully received trust property
    - Third parties who have dishonestly assisted the trustee in the breach
    - Recover property to which the beneficiary can identify a subsisting equitable interest
- **If multiple remedies are available – they can be combined**
    - They do not lead to double recovery
    - They are not mutually inconsistent