**Trusts**

**S = Settlor**

**T = Trustee**

**B = Beneficiary**

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# Maxims of Equity

* + Equity will not permit a wrong without a remedy
  + Equity follows the law
    - If the equities are equal, the law will prevail
  + Those who seek equity must do equity
  + Equity assists the vigilant and not the tardy
  + Equity is equality
  + Equity looks to the intent rather than the form
  + Equity looks on that which ought to be done as being done
  + Equity acts *in personam* (result: court has jurisdiction if the T is in the jurisdiction)
  + Equity will not assist a volunteer

# Completion of Trusts – vesting + formalities of tsf

* How the trust is perfected depends on **form of dealing** & **type of property**
* The form of dealing is determined by the intention of the settlor (look at the document, context of writing, and surrounding circumstances)
* If the form of dealing requires someone other than the settlor to be the trustee, then the legal title of the property must vest in the trustee (look to type of property)
* If the settlor declares himself a trustee, then legal title is already vested in the T.
* Need an intention to be immediately and unconditionally bound for the trust to be effective.

**Forms of dealing:**

* Settlor can **assign** property to the party directly (no trust)
* Settlor can **declare** her/himself a trustee of the interest for the beneficiary (note as trustee settlor retains title)
* Settlor can **direct/appoint** a trustee to hold the property on trust for a beneficiary
* A settlor can agree/**contract** with a beneficiary that a trustee be appointed to hold the trust property for the beneficiary

**Types of Property:**

* Land – registration in the LTO
* Chattels – delivery
* Shares – registration in the company’s share register

## Milroy v Lord – legal title must vest in T for trust to be completed

**Facts:** S executed deed of trust for shares for niece, later married to Milroy. But legal title was never tsfed to T because S never registered the shares into T’s name.

**Held:** Shares are part of S’s estate because the trust was never perfected.

## Re Rose – equity will treat as effective an intended transfer where the donor has done everything he personally is able to do legally in the ordinary course of business to tsf the gift to T or donee.

**Facts:** S tsfed shares to T, those tsfs were registered in the company’s books 3 months later. S died 4 yrs + 10 mths after that. There was a tax for assets owned within 5 years before death.

**Held:** Not taxable. B’s received equitable title when S had done all that he could do, which was over 5 yrs prior to death.

## Glynn v Commissioner of Taxation – no need to tsf legal title when S is the T. B’s knowledge (or lack thereof) of the trust does not make the trust void.

**Facts:** S declared himself as T for shares for his sons. Dividends were used by S to support his sons. His sons never knew about the trust.

**Held:** There was a proper trust. Sons didn’t need to know. Dividends were used properly.

## Carson v Wilson – S must intend to be immediately and unconditionally bound by the trust to be T.

**Facts:** S held some land. Wanted to give it to some Bs. Drew up deeds & assignments but instructed solicitor to hold them until after death of S.

**Held:** Not effective. In contravention of Wills Act, and there was no intention to be immediately and unconditionally bound.

* Sometimes, will have:

Contractual covenants with consideration (creates a constructive trust where the promissor is the T)

Covenants under seal (will create a resulting trust, since equity doesn’t help a volunteer)

## Strong v Bird – if an inter vivos gift is imperfect for lack of legal tsf to the donee, the law will allow it to be perfected if the legal title tsfs to the donee upon S’s death because the donee is S’s executor

**Facts:** Stepmother agreed to forgive debt. For lack of consideration, this gift would not be enforceable. Stepmother dies & her heirs call on stepson to repay. Stepson is the executor of her estate.

**Held:** Legal title has tsfed to stepson, this means the gift is perfected.

**Notes:** Underlying assumption is that the S who makes the donee an executor means to free the donee from unpaid debts. This is probably also a pragmatic decision of the court not to expect the executor to sue himself.

## Re Halley Estate – situation where the rule in Strong v Bird would be applied

**Facts:** Grandfather wrote to company - wanted to deed the shares to granddaughter, K, for her education when she turned 17 (not perfect gift). Grandfather died, & daughter (mother of K) became the executor.

**Held:** The daughter now holds legal title. The gift is perfected (mother has a duty to look after daughter).

**Notes:** Court actually messes up Strong v Bird here. But this is a situation where it would have applied.

# Express Trusts – The 3 Certainties

* Trusts may be created *inter vivos* or *per mortis causa*
* Need to have 3 certainties:

1. Certainty of subject matter (ie the property)

Test: is the subject matter ascertained or ascertainable (by a method set out in the trust doc)?

1. Certainty of words (ie intention to create a trust)
2. Certainty of objects (ie the identity of B’s)

* Uncertainty may arise from semantics/linguistics (fuzziness of the word, eg. “some”) or evidential (enumeration, scope, quantity)

**Certainty of Subject Matter**

## Re Beardmore Trusts - Both type of property and the amount of the beneficial interest must be sufficiently certain to constitute a trust – need to describe “with sufficient exactness”

**Facts:** Intervivos trust - result of a divorce - provided for child support to take effect on the settlor's death. - would be comprised of 2 thirds of the net estate.

**Held:** Contrary to Wills Act and uncertainty of subject. At the creation of the trust, the subject matter (property) would not have been known.

**Notes:** Now, courts would probably find that this is certain enough...

## Sprange v Barnard – trust failed for lack of certainty of subject matter 🡪 T holds legal + beneficial title

**Facts:** S left an annuity to her husband “for his sole use and at his death the remaining part of what is left, that he does not want for his own wants and use to be divided between” certain named Bs.

**Held:** No trust arose – uncertainty of subject. The husband took the annuity legally and beneficially.

**Notes:** Is this really a sufficient reason as a matter of policy to invalidate the trust? It is easy enough to see what property from the annuity is left for the Bs on the T’s death. Now we have a more relaxed view of certainty.

## Re Golay – “reasonable” = certain

**Facts:** Executors directed to “let B enjoy one of my flats during her lifetime and receive a reasonable income…”. Could be semantically or evidentially uncertain.

**Held:** Not too uncertain.

**Notes:** Courts have created certainty for some words (“reasonable”)

## Re London Wine Company - can’t argue trust without certainty of subject matter

**Facts:** B had prepaid for a bottle of fine wine. Merchant went bankrupt. B argued merchant was holding the bottle in trust for B. - ie couldn't sell the bottle for creditors. No bottles were earmarked.

**Held:** Not a perfect and complete trust because subject matter is too uncertain. Not sure whether the bottles (or which ones) in stock are for B.

**Certainty of Words**

* Concern of words goes in both directions -
* if the word trust doesn't appear, but there is clear intention, then courts will carefully examine words to see if there is a trust
* If the words trust do appear, but it's quite clear that there is an intention not to create one, the courts examine the words very carefully
* Need intention to create a trust, general intent to benefit is not enough.
* Court will look to words but precatory words (“in confidence”, “wish”) does not necessarily preclude a trust – examine the entire document + context.
* If intention of the transferor is uncertain, no express trust is created 🡪 Legal title holder owns it beneficially also.

## Nicoll v Hayman – need clear intention of trust – “in full confidence” expresses only a wish – presumption of gift in families

**Facts:** S dies. She leaves money to her daughter “in full confidence she will dispose of the same in accordance with the wishes I have expressed to her”. Does this impose a trust? (“polite form of command” or a request?)

**Held:** SCC says no trust. “in full confidence” are precatory words, expressing a wish or desire but not expressing a MUST. Money stays with daughter.

**Certainty of Objects**

|  |  |  |  |
| --- | --- | --- | --- |
| Bare Trust | Fixed trust | Trust Powers (aka Discretionary trust) | Powers of appointment (aka Bare or Mere powers) |
| 1. Trustee 2. Identity of B is stated 3. No duty other than to hold legal title | 1. Trustee (fiduciary) 2. Identity of B - can be group of B's (eg. my sisters) | 1. Trustee (Fiduciary relationship) 2. Settlor identifies a class of potential B's (eg. class of 2011) & trustee MUST choose a B 3. Duty to exercise discretion most appropriately | 1. Donee of the power (not a fiduciary relationship) 2. Identifies class of potential B's & trustee MAY choose one B 3. Gift over will signal a power 4. Duty to consider whether to distribute & ensure it is on rational + defensible grounds |
|  | Listable test | Certainty of criterion  Workability test | Certainty of criterion |

* Conceptual/semantic/linguistic uncertainty = words used by the settlor to select Bs are inexact
  + Listable test, aka class ascertainability: must be able to make a comprehensive list of the (potential) beneficiaries
  + Certainty of criterion, aka individual ascertainability, aka is-or-is-not test: can determine whether any given person is or is not a potential beneficiary
* Evidential uncertainty = don’t have enough factual information to apply the S’s defn of a B
  + Evidential uncertainty doesn’t exactly render the **trust** uncertain
  + The requirement is there so that courts can supervise properly
  + Also does not invalidate a power of appointment (*Baden 2*)
  + By itself, does not invalidate a discretionary trust (parties may apply to the courts for directions), but may make the trust administratively unworkable (ie void)
* Administrative workability test: group of objects is not so “hopelessly wide” that the trust is administratively unworkable (execution of the trust presents an impossible job for the Ts).
* The Bs must be people – purpose trusts (teaching poodles to dance) are invalid unless they are charitable trusts because there would be no enforcer
* Types of naming:
  + Giving the name
  + Identifying by description
  + Members of a specific group or class
* Powers are classified as:
  + General power – donee can appoint anyone (including himself)
  + Special power – donee can appoint from a specified group of people
  + Hybrid/Intermediate power – donee can appoint anyone except for a specified person/group (*Re Manisty* = authority for the existence of the special power)
* Historically, the listable test applied to fixed trusts & discretionary trusts (test was developed in *IRC v Broadway Cottages Trust,* then *Re* *Gulbenkian Settlements* said, in *obiter*, the test applied to discretionary trusts)
* The is-or-is-not test applies to powers of appointment (*Re Gestetner Settlement*)
* Then, *Baden 1* 🡪 the is-or-is-not test applies to discretionary trusts (court preferred this “practical outcome” rather than defeating the trust & S’s intentions)
  + Why? Too many business trusts being improperly characterized as powers instead of discretionary trusts in order to save them (eg pensions)
* If a trust is uncertain, the T holds legal title, but on presumed resulting trust to the S, unless a gift over has been made (then that person gets title legally + beneficially)

## Re Manisty’s Settlement – the hybrid/intermediate power exists. There is a duty to consider

**Facts:** Ts had power to appoint any person as a B, except for the S, his wife, and anyone else who added property to the settlement + their wife. Ts wanted to benefit the mother & widow of the S. Other Bs challenged this – they argued that an intermediate power is too wide which makes the trust uncertain.

**Held:** *Gestetner*, *Gulbenkian*, & the *Baden* cases say that a power cannot be uncertain merely because it is wide in ambit. An argument against an intermediate power being too “vague” doesn’t hold water when special/general powers may also not provide guidance to Ts. Just look at the S’s intentions/expectations.

**Notes:** Court may intervene if:

A person within the ambit of the power requests the T to consider exercising the power in his favour and the T doesn’t consider, or

The T acts “capriciously” – ie acts for reasons which are irrational, perverse, or irrelevant to any sensible expectation of the S (this may also extend to the creation of a capricious power – eg. a power to benefit “residents of Greater London” – this negates sensible expectations of the S because it asks the Ts to consider a random conglomeration of persons. Don’t confuse this with a wide ambit.)

## Re Hays – what is required of T’s when they are both a T and hold an intermediate power

**Facts:** Ts held an intermediate power. No problem when “T” is really a donee of the power and has no fiduciary duties. But what about when T has fiduciary responsibilities?

**Held:** T must:

1. Consider periodically whether or not he should exercise the power
2. Consider the range of objects of the power (just an “appreciation of the width of the field”, not exact #s)
3. Consider the appropriateness of individual appointments – again, not exact calculation of whether X is more deserving than Y, but should determine whether it is appropriate

**Notes:** if there is a real problem in the execution/administration of a power, court may hold it to be invalid, but will be slow to do this.

## IRC v Broadway Cottages Trust – list certainty test applies to trust objects

**Facts:** Ts held property for the benefit of the S’s wife, specific relations and a charity (the Broadway Cottages Trust).

**Held:** Trust is void for certainty of object. Could not draw up a complete list of all the objects (but it was possible to determine whether any one person was a member of the class).

## Gulbenkian Settlements – listable test applies for fixed trusts & in discretionary trusts (obiter)

## Re Gestetner Settlement – the is-or-is-not test applies to powers

## Baden 1 – list certainty test does not apply to discretionary trusts. Instead, use is-or-is-not.

**Facts:** Discretionary trust for a large class: employees + ex-employees of a large company plus their “dependants” + “relatives”. Was this discretionary trust void for uncertainty of objects?

**Held:** Not invalid. Test for discretionary trusts is the “is or is not” test. Even though a person may not be able to provide sufficient evidence to say that they are not a relative (eg if there was any illegitimate ancestry), the Ts would just have to decline to make the grant.

**Note:** this is a U-turn from the *obiter* in *Gulbenkian Settlements*

## Baden 2 – 3 ways to deal with the unknowns of is-or-is-not test

**Notes:** court is never defeated by evidential uncertainty. Difficulties in determining whether someone is a dependent are evidential, and raises questions of fact, not law.

Sachs – Unknowns are in the ‘is-not’ category

Megaw – can have a substantial number of unknowns as long as there are a large number in the ‘is’ category

Stamp – agrees with Ts. Can’t have any unknowns. One is either is, or is not, and must show sufficient evidence to show it. Here, a relative could be legitimately restricted to the next-of-kin.

# Express Trusts – The Rule Against Perpetuities

* Express trusts need to also comply with the rule against perpetuities
* “Future interest” = presently held rights which will lead to future possessory rights of occupation and use
* Future interests may be: vested OR unvested & contingent
  + Contingent future interest examples: transfers subject to a condition precedent, condition subsequent, or determinable interests
* Contingent interests must:
  + Not effectively bar alienation of the property
  + Not be void for vagueness or a contravention of public policy
  + Not violate the rule against perpetuities (prevents remoteness of vesting)
* Rule against perpetuities at CL: one must 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 21 years
  + Practical & biological impossibilities didn’t matter. As long as there was a possibility of vesting outside of the perpetuity period, the trust would be void.
* Legislative response: Perpetuity Act
  + S. 8-9: allow for actual events to unfold - wait-and-see
  + S. 14: recognize natural limitations on giving birth
  + S. 11: reduction of age contingencies
  + S. 13: general cy-pres
  + S.7: allows settlor to choose 80 yr period as substitute for lives in being + 21
* Some other jurisdictions have abolished or amended the rule to something simpler

# Express Trusts – Formalities, Secret/half-secret Trusts

* Formalities required were being used for perpetrating fraud 🡪 some jurisdictions abolished the need for formalities for dealing with equitable interests
  + 2 competing maxims: equity follows the law (which requires writing) and equity looks to intent rather than form
* BC – *inter vivos* dispositions of equitable interests in land require no formalities [s. 59 of the Law and Equity Act]
  + Note this only applies to S🡪B, not B1🡪B2
* Dispositions *per mortis causa* still need formalities (Wills Act – need declaration of disposition in the will, which must be signed by testator, witnessed by 2 ppl, not Bs)
  + When dispositions *per mortis causa* do not follow these formalities 🡪 secret trusts
* Different rules for secret & half secret trusts – some formalities/requirements
* Secret trust:
  + S names a “B” in the will, but *ex facie* (or outside of) the will, S asks the B to be a T for a secret B (usually the secret B is an illegitimate child or a non-spousal sex mate)
  + Requirements:
    - S must intend for “B” to hold in trust for B
    - During S’s lifetime, S must communicate to “B” that he is to hold on trust for B
    - “B” must accept or acquiesce
* Half-secret trust:
  + S names a “B” in the will, but the will reveals that this “B” is actually a T for a secret B
  + Requirements:
    - Before the will is made, S must communicate to “B” that he is to hold on trust for B and the identity of B
    - “B” must accept or acquiesce before or at the time the will is made
* Why the requirement of communication of B’s identity before the will is made? No apparent reason – see *Blackwell v Blackwell*
* Secret trusts may be created with intestacy (the heir undertakes to hold in trust) but not half-secret

## Ottaway v Norman – requirements of Secret trusts

**Facts:** S leaves everything to partner (“B”), but asks her to hold the property for his son (B). Not contested that that was S’s intention. “B” creates a will & gives effect to the promise, but just before she dies, she amends the will & gives part to Normans.

**Held:** Property was not for “B” to give. Sets out requirement for secret trusts.

## Re Boyes – Communication requirement of secret trusts must occur in S’s lifetime

**Facts:** S leaves estate to his solicitor, “B”, and communicates intention to create secret trust. S says he will write to him with further instructions. “B” never receives communication. Letters found post death, indicating identities of B.

**Held:** S didn’t communicate in his lifetime. Trust fails.

## Re Keen – communication requirement (before creation of will) of half secret trusts met if S gives “B” an envelope with B’s name, not to be opened until S’s death.

## Blackwell v Blackwell – possible reasons for difference in communication requirements

**Notes:** maybe to allow T to reject oblig, or so the S can’t delay terms of his will until death?

## Re Rees –T of a half secret trust cannot also be a B (opportunity for fraud is too great)

## Re Gardner – B’s interest vests when the will is created

**Facts:** S gives estate to “B” to carry out wishes. Wishes are to benefit X, Y, Z. (half secret trust created) X dies, then S dies, then “B” dies. Does X still get part of the estate?

**Held:** operative trust took effect outside of the will when “B” agreed to be T.

**CAUTION: possibly wrong decision – in essence says that secret trusts are not testamentary, and come into effect upon creation of the will instead of the death of the S.**

# Express Trusts – Revocation by Settlor

## Bill v Cureton – S falls out of the picture once a trust is created

**Facts:** S creates trust, dividends to herself & future husband, remainder to future children. Later, S is still unmarried, wants trust set aside.

**Held:** S falls out of the picture once trust is created.

**Notes:** a settlor may include provisions in the trust instrument for revocation or amendment powers (*Schmidt v Air Products Canada*)

# Resulting Trusts - general

* Based on presumed intention (ie the intention is not express)
* In a RT, equitable estate jumps/bounces back to the S
* Implied/resulting trusts arise in 3 ways:
  1. Automatic resulting trust: An express trust is validly created, but
     1. Does not initially exhaust the whole beneficial interest
     2. The trust fails for any reason, and (part or all of) the property results back to the settlor/testators/testator's estate
  2. Presumed intention resulting trust: Gratuitous transfer of property or a purchase where title is not in the name of the purchaser (generally presumed that the transferor doesn't intend an absolute gift to the transferee)
  3. Common intention resulting trust: Owner + 1 or more have a common intention that the owner shall hold the property as trustee

## Re Vandervell’s Trust – 3 situations in which a RT arises

**Facts:** S wanted to donate shares to a charity. He included an option for a trust to be able to purchase back the shares (after the charity received the dividends). Trust re-purchases the shares, but it turns out the trust is set up incorrectly.

**Held:** T holds shares in an ART for the S. Not the intention of S to get shares back because of tax conseq.

**Notes:** Prior to *Re Vandervell’s Trust*, ARTs and PIRTs were thought to be based on common intention also. But this case was an example of the T not intending at all for assets to result back to him. But it was necessary because

The B is perceived as getting a beneficial interest greater than intended.

B has been unjustly enriched

To prevent this he holds the legal title on an ART for S

# Automatic Resulting Trusts

* 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 (eg. *IRC v Broadway Cottages*)
2. Transfer of legal title to a trustee without disposing fully of the equitable interest (eg. *Re West; Re Foord; Schmidt v Air Products Canada*)
3. Transfer of property to another subject to a specific limitation which has not occurred (eg. *Barclays Bank Ltd v Quistclose Investments*)
4. Surplus of funds after trust purpose has been achieved (eg. *Re British Red Cross Balkan Fund*; *Re Gillingham Bus Disaster Fund*; *Re West Sussex Constabulary Fund*)

* #4 depends on what the source of funds is (*Re West Sussex Constabulary Fund*):
  + 1. **Proceeds of entertainments, raffles, and sweepstakes**
       - Can't apply resulting trust to these funds because -
         1. There is a K relationship, not trust relationship (money purchases something - consideration is given)
         2. No direct contribution to the fund (only the profit of the raffle goes to the fund)
    2. **Proceeds of collecting boxes**
       - *Re Hillier's Trusts* [1954] - someone contributing to a collection box would not intend for that money to be returned should there be a surplus after the purpose has been completed.. Even if the objective was never achieved. The donor has no further interest in the money
    3. **Donations (including legacies)**
       - *Cunnack v Edwards* [1896] Eng Ch D *-* contributions to the fund by former and surviving members are *bona vacantia*
       - *Re Abbott* [1900] Eng Ch D - legacies and donations are held on a resulting trust

## Re West – if legal interest is tsfed, but equitable interest isn’t fully disposed, ART results.

**Facts:** Testatrix left her property on trust for sale for payment of debts, funeral expenses and legacies. The Ts fully performed as directed. There was surplus left over and the Ts claimed equitable title.

**Held:** Equitable title belongs to 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.

**Notes:** ***King v Dennison*** characterized the issue as whether the S gave 1. A gift of assets personally, but from which existing debts must be discharged, or 2. A gift subject to certain trust purposes.

## Re Foord – comparison to Re West; S may show intention to give legal AND equitable interest (no ART)

**Facts:** Testator left residual estate "absolutely" to his sister "Margaret Juliet" to hold in trust to pay his wife an annuity of $300. There was more than enough to cover the annuity - did Margaret hold the remaining beneficial title? Or did she hold in trust for his next of kin?

**Held:** The word "absolutely" indicative, but testator drafted the will himself. Used “my sister, Margaret Juliet” (first name only) 🡪 probably means to give beneficial title.

## Schmidt v Air Products Canada – surplus in pensions.

**Facts:** Pension plans are over-funded. Does that surplus go back to the company? Or to the employees? 2 companies – SR and CE- had merged into Air Products (pension plans merged too)

**Summary of the law:**

* 1. Is the pension fund impressed with a trust? (test: was there an express or implied declaration of trust + alienation of trust property to a trustee?)

If not, then K principles rule

* 1. If yes, then the trust is a classic/true trust - not a purpose trust and equitable principles prevail
  2. The trust fund generally includes any surplus + whatever is required to provide employee benefits (but employer can include in the trust doc that surpluses are not included)
  3. Employer may reserve the power to revoke a trust - but must be in clear language (unlimited power of amendment doesn’t count)
  4. A resulting trust may arise once all the objectives of the trust have been fully satisfied

No resulting trust if settlor intends to part completely with their funds (generally the case)

Must account for both employer + employee contributions

* 1. Employer may have a right to take a contribution holidays unless this right is excluded by the terms of the trust (if silent on this issue, there is a right to take the contribution holiday)

**Held:** SR held funds in trust 🡪 surplus given to employees. CE held funds under K 🡪 surplus held under ART for CE (now Air Products)

## Barclays Bank Ltd v Quistclose Investments Ltd - An art was created with regard to a loan made for a specific purpose which was not carried out

**Facts:** R borrowed money from Q in order to pay dividends to its investors. Q put money in the bank (B) under a special acct, only for the purpose to pay the dividends (known to both B and R). If further financing was not obtained, the money was immediately returnable to Q. R went into bankruptcy, while their general acct with B was still in a large overdraft. B applied the amt from Q towards the overdraft.

**Held:** for Q. An ART was created, and was binding on B -there was sufficient notice that the monies would only go towards dividends.

**Notes:** Lord Wilberforce uses 2 step analysis. Borrower (R) and agent (B) owe primary duty to lender use funds as stipulated. Secondary duty to hold funds on RT arises when primary duty fails. This analysis has been criticized because the primary duty amounts to a purpose trust (no beneficiary to enforce?). But, most commentators agree that the beneficiary is the lender. So borrower = T and lender = B.

## Re British Red Cross Balkan Fund – large donations by individual donors 🡪 ART upon surplus

**Facts:** Here a fund was raised by public subscription for the assistance of the wounded in the Balkan War. Funds came from many large sums from individual donors. Surplus after helping the wounded.

**Held:** Surplus was rateably held on an ART for the individual subscribers (all known).

## Re Gillingham Bus Disaster Fund – street collections → ART, paid into court to distribute. Surplus = bona vacantia

**Facts:** Source of funds = street collections (small amts each)

**Held:** ART for contributors. Payment into court, and then court would distribute to applicants. Surplus funds = *bona vacantia*

**CAUTION:** would probably not find ART post *Re West Sussex*.

**Unincorporated associations (ie. a club)**

* Ppl come together to advance a/some common purpose(s)
* Issue arises when property is acquired by ppl- no corporation to hold the property and can’t have a purpose trust
* So, a K is entered into - expressly, by conduct, in writing, etc
* Issues in a club?
  + How property is acquired:
    - Member subscription
    - Donations or contributions from supporters
  + Who holds the property:
    - Individual members? But then any one member could run with the property..
    - Secretary/treasurer on trust for the group?
    - Restrictions? - could have donations for current and future members.. But rule against perpetuities could create problems

## Re West Sussex Constabulary Fund – different sources of funds into trust = different ways to distribute surplus; no ART applied

**Facts:** Constabulary fund – members contracted to benefit dependants of members who had died on duty. Constabulary ceased to exist in January. In June, its (ex)members decided to purchase annuities for widows with remainder.

**Held:** Under the rules of the fund (K principles rule), only dependants of the WSC’s members could benefit. Members argued they owned the surplus on an ART for those dependants, but Goff J said – under the K, police/dependants can’t get the money and there was no legacy - funds are *bona vacantia.*

## Re Bucks Constabulary Fund (post Re West Sussex) – ART applied to surplus of constabulary fund

**Facts:** Constabulary fund to benefit dependants of members who had died on duty. Constabulary ceased to exist. The society was registered under the Friendly Societies Act

**Held:** ART to distribute the funds equally (equity is equality). Differentiated from Re West Sussex because of the Friendly Societies Act – s.49: all of the property is vested in the trustees for the use and benefit of the society and the members thereof and of all persons claiming through the members.

**Notes:** Walton J notes that if there were only one member remaining, the society would cease to be an “association” 🡪 funds would be *bona vacantia* or cy-pres.

**Law in BC:** surplus from public appeal funds should be subject to cy-pres & Ts can distribute up to 10k to other similar charities.

# Presumed Intention Resulting Trusts

* Presumption is that when X transfers gratuitously to Y, X does not intend to do so beneficially
* 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

* So, evidence of actual intention trumps presumption (sometimes, evidence of actual intention will not be admitted if the purpose was for an illegal scheme)
* PIRT creates a bare trust with legal title vested in the transferee and beneficial title in the transferor
* Onus of rebutting the presumption is on the transferee
* **Presumption of advancement:** If X transfers gratuitously to his child or spouse, then he IS presumed to do so beneficially (onus of rebutting PA is on the transferor)
  + Abolished in all provinces except Manitoba and BC
  + Presumption only applies to minors (*Madsen Estate v Saylor*; *Pecore v Pecore*)
  + Husband to wife.. rule is weak now because of marital property legislation & wide discretion of courts

## Standing vs. Bowring – No PIRT if intention to give beneficially is clear

**Facts:** Shares transferred in books of Bank of England by plaintiff into her name and the defendant’s. The evidence showed she intended to benefit him personally. She sought to have legal title re-transfer into her name alone. The defendant learned of this and refused to cooperate in the re-transfer

**Held:** Found for the defendant. He is a legal and beneficial owner of those shares.

## Niles v Lake – ROS agreement not sufficient to rebut PIRT

**Facts:** X & Y open a joint account & sign a ROS agreement . X deposits money into the acct. X dies. Does the money go to X’s estate or Y? ie. is the ROS agreement enough to rebut the PIRT?

**Held:** ROS agreement not sufficient to show intention to give beneficial interest. ROS agreement only protects the bank & changes the joint tenants’ relationships with the bank.

## Russell v Scott – joint tenant may hold present right of survivorship

**Facts:** money placed into joint acct for nephew to help aunt with affairs. Aunt told lawyer’s clerk that the remainder was to go to the nephew (ie the joint acct – ROS is effective). Is this enough to rebut PIRT? If so, does it violate the Wills Act?

**Held:** Intention was clear- enough to rebut PIRT. Doesn’t violate the Wills Act because the nephew received a present right of survivorship.

## Young v Sealey – compare to Russell v Scott. Gift of beneficial interest after death using joint accts violates the Wills Act, but is ok because it is a well established practice.

**Facts:** money placed into joint acct for nephew to help aunt with affairs. But: the aunt declares that the nephew doesn’t get beneficial rights during her lifetime but only upon her death.

**Held:** This DOES violate the Wills Act - however, it is always violated and this practice is too established to change it now.

## Murles v Franklin – Basis for Presumption of Advancement

“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”

## Warm v Warm – purchases from the “common purse” are held jointly (everything except clothing)

**Facts:** Husband & wife separate – wife claims half interest in property, held in the husband’s name.

**Held:** since the house was purchased with the “common purse” established by the joint acct, both hold equal beneficial interest.

## Shephard v Cartwright - what evidence may be used to rebut PA

**Facts:** father bought shares in kids’ names. 5 yrs later got kids to sign papers allowing him to withdraw (they were unaware of the gift & purpose of signing). Father ended up losing a lot of the money. Kids sue estate, argued PA applied and father was a T. Estate said father obtaining right to withdraw rebuts the PA. What evidence can be used to rebut PA?

**Held:** 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 may be used for or against the party who made them. Subsequent declarations (not part of the transaction) may only be used against the party who made the declaration, and not for him.

# PIRT & Illegality

* If the transferor conveys property for some illegal purpose (eg. to avoid creditors), then wants the property returned:
  + Should the transferor be able to rely on PIRT?
  + Should the transferor be able to adduce evidence of the illegal purpose to rebut PA?
* Originally, courts applied strictly the doctrine of *Ex turpi causa* – claimant cannot pursue a cause of action if it is connected to his own illegal act (mere intent to do an illegal act is enough)
* Then, courts loosened up – mere intent was not enough; could get around it by ignoring the illegal scheme all together and just looking at intentions, using the PIRT or PA
* *Lous Poenitentiae* – applies when a party never actually carries out his illegal scheme and **repents** of it. The party is then allowed to adduce evidence of their illegal scheme to recover the property.
  + Reason for not completing illegal plan is irrelevant
* So, some ways to deal with Scheuerman
  + Ignore precedence - but then how will you deal with the clean hands doctrine?
  + Use *locus poenitentiae*
  + Listen to the case (all the evidence) but ignore the bad parts.. (ie. prove that X had title before. Prove that it was a gratuitous transfer to Y. Don’t listen to the illegality stuff. Then there is no *in pari delictum -*  ie going back to PIRT and not dealing with the bad stuff.)

## Scheuerman – first case on illegality, strictest application of ex turpi causa

**Facts:** husband transferred to wife to avoid creditors. Wife agreed to hold legal title until danger passed. Creditors never ended up suing and debt was repaid. Wife sold the house.

**Held:** for wife. Evidence of illegality (here, mere intent) is not admissible in court.

**Notes:** basis for excluding evidence: clean hands doctrine. Then transferee held legal & beneficial title, despite her involvement in the illegal scheme. This odd result seen as a by product of the court’s refusal to deal with a case tainted with illegality.

## Goodfriend v Good friend – mere intent is not enough

**Facts:** Cox’s & Goodfriends swapped spouses – Mrs. G convinced Mr. G to tsf property into her name in case Mr. C sued Mr. G for “alienation of affections” (cause of action doesn’t exist). Mrs. G left Mr. G, who sought return of the property. Mrs. G argued PA. Mr. G wanted to rebut PA with evidence of the scheme.

**Held:** for Mr. G. Illegal intent to defraud is not enough – no creditors were defeated, hindered, or delayed. Also, Mrs. G could not rely on PA since the illegal scheme was hers.

## David v Szoke – can give effect to PIRT without hearing evidence of illegal intent.

**Facts:** couple held house jointly. He had a drinking problem, so tsfed his half interest to her in order to protect it (in case of a personal injury tort action against him). She left him. He sought re-transfer.

**Held:** parties were *in pari delicto* – each had unlawful intent. Court found for male plaintiff by giving effect to PIRT without hearing evidence of fraudulent intent.

## Gorog v Kiss – can give effect to PIRT without hearing evidence of illegal intent if not required

**Facts:** Brother tsfed property to sister to avoid a creditor. Debt was settled without the need to sell the property. Brother sought re-conveyance and sister refused.

**Held:** for brother. Gave effect to PIRT without hearing evidence of illegal intent.

## Tinsley v Milligan – UK case of giving effect to PIRT without hearing evidence of illegal intent

**Facts:** couple’s intention was to hold property as tenants in common, but only one person held legal title so that the other could obtain social security benefits. (she later repented & reported the fraud)

**Held:** PIRT applies. Majority held that PIRT/PA could be given effect without hearing evidence of illegal scheme, even if the court knows of the illegal scheme (Dissent held that knowledge of the illegality would bar the court from helping either party.

**Notes:** Court approved of a “public conscience” test – court would decide on admissibility after weighing the adverse consequences of either granting or denying relief.

## Foster v Foster – can’t use evidence of illegal scheme to rebut PA (even if no creditor is actually defeated)

**Facts:** father tsfed properties to kids to avoid wife (stepmom) from taking in divorce. Creditor was never actually defeated. Father sought re-transfer. Daughter opposed admissibility of evidence to rebut PA.

**Held:** both parties are *in pari delicto* – can’t use evidence of illegal scheme to rebut PA.

**Notes:** the effect of the *par delictum* rule favours the possessor of legal title.

## Nelson v Nelson (Aust HC) – ex turpi causa rules should be reconsidered – test is whether it is an affront to public conscience

**Facts:** Mother bought house in son & daughter’s names in order to claim a subsidy for social welfare

**Held:** for mother. She was allowed to adduce evidence of her illegal purpose to rebut the PA.

**Notes:** the court noted that *ex turpi causa* rules should be reconsidered as nowadays, it is very easy to fall into *ex turpi causa*. Should take “public conscience” perspectives & balance adverse consequences, and ask whether the scheme is an “affront to public conscience”. Use as guidance:

1. Proportionality

2. Does the civil sanction further the purpose of the statute? Does the statute contemplate this sanction?

# Common Intention Resulting Trust

* Basis for CIRT: “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.” Per Ritchie J.
* Now that legislation mainly resolves disputes btwn family members, CIRT not used much anymore
* Problem with CIRT – easy to rebut (Pettkus v Becker) – constructive trust may be more appropriate

# The Beneficiary – nature of title, tsf of beneficial interest

* As a general proposition, the owner of property has a real right in it – the ***ius utendi*** (possession, management)***, fruendi*** (enjoyment) ***et abutendi*** (alienation) that avails against everyone else (“the world” – a “real” right)
* This real right 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**
* The extent of the real rights can be thought of in terms of:
  + **Content** (the scope of the interest – eg. full possession, right of way, enjoyment) and
  + **Durability** (the strength of the interest – ie by whom and how can the right be defeated)
* B holds equitable title & beneficial title (ie the exclusive entitlement to the benefits of the trust assets)
  + This gives B a personal right against the T (who must comply with his duties under the terms of the settlement and, as a fiduciary, act in the best interest of the B
  + Beneficial title means that the B also has a property right (*in rem*, with a right of tracing).
  + The beneficiary has rights over the things in the trust that can be asserted against the trustee, **only in respect of the administration of the fund as a whole**, through an action in breach of trust
* Not all equitable titles are beneficial entitlements
  + Eg. T1 holds legal title. B1 holds equitable title. If B1 then declares himself as a T2 for B2, then B1 (aka T2) would have equitable title, but not beneficial title. B2 would have both equitable and beneficial title.

## Schalit v Nadler – B only has ius fruendi, giving him a personal right against the T. T holds ius utendi, a real right.

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

**Held:** This was an invalid distraint. This was because it had been effected by the beneficiary whereas it should have been levied by the trustee or agent. The B only has a personal right (in personam) against the T for breach of trust, and distraint is the exercise of a real right (“i*n rem”)* that lies with the legal owner of the property.

## Baker v Archer-Shee - The 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)

**Facts:** B lived in the UK. Trust fund had shares/stocks etc outside of England. Income from the fund did not enter the UK but the fund was administered from the UK. Tax authorities were allowed to tax stocks/shares outside of the UK that UK residents owned. Did B own the stocks/shares? B argued she held equitable title to the income stream, and she had personal rights to enforce the proper administration of the fund – ie she did not own the individual stocks/shares, she just owned rights.

**Held:** B owns the individual stocks and shares (despite that the individual stocks/shares fluctuate & change constantly). Therefore taxable.

**Notes:** possible that this case is only authority as a tax case confined to its facts in its analysis of the nature of equitable interests in a trust fund.

Problem with majority opinion is that it means the T can extinguish equitable title in the assets at any time by selling the asset.

Dissent held that the B had a proprietary interest in equity to the fund of shifting assets rather than the individual items that make up the fund at any given time.

Though the dissenting view may be more in accord with realities of trust administration, it is inconsistent with some of the rights of the B (B can terminate trust and acquire legal rights to the assets; B has an *in rem* right to trace individual items)

## Re Bagot’s Settlement – B can’t manage trust assets in the role of B. But B could as an agent for T.

**Facts:** the beneficiary wished to manage a piece of real estate covered by a trust. Can a beneficiary *qua* beneficiary demand possession for the purpose of rent collection?

**Held:** This would contradict the nature of a trust given that the legal title is held by the trustee. But the court could exercise its discretion to allow her 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.

**Formalities for transferring equitable title**

* *Inter vivos* tsfs governed by the *Law and Equity Act* (s. 36 – assignment of a *chose in action*)
  + Chose in action = personal rights of property which can be claimed or enforced only by action and not by taking physical possession (eg. debts, shares, rights of action founded on tort or breach of K)
  + **36**  (1) An absolute assignment**, in writing signed by the assignor**, not purporting to be by way of charge only, of a debt or other legal chose in action, of which **express notice in writing has been given to the** debtor, **trustee** or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, **is and is deemed to have been effectual in law**, subject to all equities that would have been entitled to priority over the right of the assignee if this Act had not been enacted, **to pass and transfer the legal right to the debt or chose in action from the date of the notice, and all legal and other remedies for the debt or chose in action**, and the power to give a good discharge for the debt or chose in action, **without the concurrence of the assignor**.

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

(a) is entitled to call on the persons making the claim to interplead concerning the debt or chose in action, or

(b) may pay the debt or chose in action into court, under and in conformity with the *Trustee Act*.

* S. 36 says - in the case where B1 wants to assign equitable title to B2, if the assignment is in writing and the T is given notice, then the tsf has occurred and B2 can enforce his rights without the cooperation of B1.
  + If no compliance with s. 36, then law set out in *Di Guilo v Boland* still prevails
* 4 ways that the beneficial interest in an equitable title can be disposed of (*Timpson’s Executors*):
  1. B1 can assign it to B2 directly (“I, Orscilla, immediately and irrevocably assign my rights as the sole beneficiary of ABC Trust to Emmarentia”): **writing required**
  2. B1 can direct the T to hold the property in trust for B2 (“As beneficiary of the ABC Trust, I, Orscilla, direct my trustee Snooks to now hold my entire interest for the benefit of Emmarentia”): **Writing required**. This disposition is okay and follows from the rule in *Saunders v Vautier* provided requirements (e.g. *sui juris)* are met.
  3. B1 can contract for valuable consideration to assign the equitable interest to B2. Writing clearly prudent, but not clear if necessary as the vendor holds equitable estate on a constructive trust for the buyer as soon as contract 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. B1 can declare himself to be trustee for B2 (“I, Orscilla, now hold my interest as beneficiary of the ABC trust on trust for Emmarentia”) Compliance with s. 36 not required, but prudent in order to ensure the T’s powers are abrogated. Otherwise, would have T, bare T/equitable title holder, and equitable + beneficial title holder
* *Per mortis causa* tsfs governed by the Wills Act

## Di Guilo vs Boland (1958) Ont CA – who can enforce rights when choses in action are assigned

CL: assignee of a chose in action could only enforce his rights in the name of the assignor (because of privity)

Equity:

* 1. If the chose in action was equitable, and was absolutely assigned, then the assignee could enforce his rights in his own name
  2. If the chose in action was equitable but not absolutely assigned, then both the assignor and assignee were required
  3. If the chose was legal, then equity would compel the assignor to collaborate with the assignee

End up with 4 types:

* + Legal assignment of legal choses (assignee can sue alone)
  + Legal assignment of equitable choses (assignee can sue alone)
  + Equitable assignment of legal choses (need both assignor & assignee)
  + Equitable assignment of equitable choses (assignee can sue alone only if it is an absolute assignment)

## Timpson’s Executors v Yerbury – court sets out 4 ways for a B to dispose of beneficial interest

**Facts:** Tax case. B lived in UK, trust in NYC, B wanted to benefit her children - some of whom lived in the UK. She instructed her T with a "revocable mandate" - ie until the money reached the children, they had no rights to it.

**Held:** This was not an assignment of an equitable estate.

## Re Wasdale – if more than one assignee, the first in time is the first in right

**Facts:** B assigned the same beneficial entitlement to two different parties. Both assignees had notified the then existing Ts at the time of their respective dispositions.

**Held:** first in time is first in right (*qui prior est tempore, potior est jure*). The fact that a T informed by the first assignee had died did not affect his priority even though the new T has not been given notice by him. Ie. the first assignee did not have to inform every new T of the trust of his beneficial title.

# Restraints on Alienation – the Protective Trust

* Protective trusts (aka Spendthrift trusts) are usually used when the S is afraid the B will be reckless in their use of the income stream.
* The trust purports to terminate the B’s rights to the beneficial title upon the happening of some event – on that event, the title usually goes to new Bs via a discretionary trust

Recall: A determinable interest is a set of legitimate limitations (not conditions) - which determines the scope of a particular estate or interest. (S retains a possibility of reverter)

* + It is ALMOST identical - linguistically, not philosophically - to a conditional interest
    - Conditions which restrain alienation are void for public policy (need to have freedom of movement of goods for a capitalist society - want to be able to move property from a good use to a better use)
    - A condition is “outside” of the gift & creates a defeasible interest
    - In a conditional interest, the S holds a right of entry if the condition occurs
  + Language differences:
    - A condition is signaled by "but if", "subject to", "on condition that"
    - A determinable interest is signaled by "when", "until", "as long as"
* Protective trusts should be created as determinable interests instead of defeasible interests.
  + Conditions restricting alienation may be found void where as determinable interests that terminated upon alienation are not void
  + If there is a "bad" condition (uncertain or void for public policy), then the grantee gets the gift unconstrained
  + S cannot tsf property on protective trusts for himself because it is against public policy (*Re Brewer’s Settlement*)

# Termination of the Trust – Rule in *Saunders v Vautier*

* Rule = a B can terminate the trust by directing the T to direct legal title to the B if B is *sui juris* and absolutely entitled to (or is vested with) the trust property (ie the settlement is not postponed. Ok if enjoyment is postponed through contingency.)
* Sui juris means the B is:
  + At the age of majority (age of majority in BC is 19) and
  + *Compos mentis*
* Broader stmt of the rule in *Saunders v Vautier* given by Donovan Waters: if there is more than 1 B (whether entitled concurrently or successively), and they are all *sui juris*, and are absolutely entitled to all the beneficial rights of the trust property, then they can modify/extinguish the trust if they are all of one mind, without reference to the wishes of the settlor or the trustees.
* This means law leans in favour of early vesting.
* Essentially *Saunders v Vautier* says that postponement of enjoyment beyond the age of majority is against public policy. Why?
* The law prefers outright ownership (as opposed to trust ownership) because we want freer use of property rather than tying it up (**economic policy**)
* Rule is more in line with **historical**, common-law concepts of ownership and freedom to use, enjoy and dispose of property
* Desire to treat adults as **autonomous agents** able to care for themselves- abhorrence of testator’s ruling from the grave
* The beneficiary’s interest is absolute in that there is no one else who has any beneficial claim to the property
* Termination by the rule in *Saunders v Vautier* sometimes is not possible for **discretionary trusts** if the class of Bs is too wide – need Bs to have absolute interest (see *Re Smith v Aspinall*)

## Saunders v Vautier – B may call for the trust once he is sui juris if the interest has vested in B

**Facts:** T was to hold assets and allow income to accumulate until B reached age 25 – then everything to B. B sought tsf at age 21 (age of majority). B was the sole B.

**Held:** At the date of the gift – indefeasible equitable interest vested in B with rights to enjoyment postponed. So, B can call for the trust.

## Re Lysiak – application of Saunders v Vautier

**Facts:** S bequeathed property to Bs living in Russia. Instructed Ts not to distribute until they are absolutely satisfied that the Bs are free and unhindered to receive the funds without interference from the regime under which they are currently presiding. Bs called for trust assets

**Held:** Bs can do so under *Saunders v Vautier* – the Bs have a vested equitable interest though the distribution was postponed.

## Re Smith v Aspinall – if all the Bs in a discretionary trust are sui juris, they can act in unison to terminate the trust or direct the T.

**Facts:** S gave Ts absolute discretion to pay ¼ of estate for the maintenance of B & her children. B & her children (incl legal rep for deceased child) wanted to assign their equitable interest to a mtg co.

**Held:** 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.

## Re Chodak - Courts favour early vesting; however, gift over may indicate contingent vesting

**Facts:** S gave his estate to Bs in Russia. T could only send parcels & was given wide discretion on distribution among the Bs. Ts sought directions on the validity of the discretionary trust.

**Held:** Invalid – cannot bequeath absolutely and then restrict Bs’ right to take absolutely. Equal division.

**Notes:** Courts favour early vesting, but if the vesting of the very interest is contingent on the happening of some future event then vesting only occurs on the realization of that event (age, say). The presence of a gift over may indicate that the interest itself is intended to be contingent.

**Reduction in value if 1 of n Bs calls for the trust**

* If there is more than 1 B, each sui juris B can individually call on the Ts to transfer to him his share of the property. Easy if money is trust property, often more difficult with shares and impossible with land because the rest of the trust assets may be greatly reduced in value.
* Division can occur if there is a **minor** reduction in value in the rest of the property.
* Even if property is held on a trust for sale with a power to postpone sale: general rule is that if a B calls for the trust, the T should give the B’s share to him even if it would diminish the value of the other shares– ***Re Marshall (1914) Ch (CB 352) –*** here certain beneficiaries called for a quarter of the shares in a large company as it would take 20 to 30 years for all beneficiaries to be eligible
* The entitlement described in ***Marshall*** does not apply if the trustees consider that because of special circumstances the division would cause **undue hardship** on the other benficiaries. For this reason there is no entitlement to call for division if the trust property is land –  ***Re Marshall.*** *Cf.* ***Re Sandeman [1937] Ch., CB 355)*** which favours termination by some of the beneficiaries of their share unless clearly unfair to the others.

## Duker – reduction in value if 1 B calls for trust

**Facts:** 1 B out of a number of Bs wanted to call for his part of some shares held in trust.

**Held:** The reduction was too great (as controlling shareholder his shares would have been worth more than the remaining shares of the other beneficiaries) and so not allowed. Shares had to be sold and he got his share of the money (from which he could buy the shares)

## Re Sandeman – courts will not easily deny sui juris Bs calling for their trust assets

**Facts:** *sui juris* Bs called for trust assets which were shares.

**Held:** for Bs, even though it meant the Ts would no longer have control of the company which could reduce the value of the shares for the remaining Bs. Court said only special circumstances would make the court deny B’s right to call for assets.

# Variation of Trusts

* At CL, courts had very limited jurisdiction to vary a trust
* But there were 4 exceptions:

1. In an emergency, administrative terms could be varied to change the T’s management power. An emergency only arises where an event happen which the S did not and could not have foreseen (see *Re New*)
2. Maintenance jurisdiction - Usually occurs where there is a trust for accumulation, but infant B needs money to be properly cared for.
3. Conversion jurisdiction - converts infant's trust property from realty to personalty and vice versa.
4. Compromise jurisdiction – arose where Bs dispute about something and want to go to court. However, Bs reach a compromise before getting to court. Court can then approve for those not yet *sui juris*, and amend the trust doc to comply. (*Chapman* – the dispute must be real. Can’t use pretend disputes to amend.)

* So jurisdiction of court is limited to augmenting T’s management powers. Courts could not vary the dispositive powers of the Ts (ie can’t amend form or quantity of B’s interests)
  + Could get around this by using *Saunders v Vautier* to collapse and resettle the trust, but all Bs have to be *sui juris*
* Now, have variation legislation: *Trust and Settlement Variation Act* (in BC)

#### Court approval of variation

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

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

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

(c) any person unborn, or

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

any arrangement proposed by any person, whether or not there is any other person beneficially interested who is capable of assenting to it, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

#### Benefit to parties interested

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

* S. 1 means a court is empowered give consent on behalf of
  + Persons (ascertained) who are not ***sui juris*** (infants)
  + Unascertainable beneficiaries
  + Unborn persons
  + Persons whose interests arise through a discretionary power (usually to protect spouse and/or children of B in a protective trust)

for any arrangement proposed by any person varying or enlarging the powers of trustees to manage or administer the property in the trust in reconfigured form

* Note s. 4 of the *Act* deems legal life estates as trusts – so courts may vary life estates where there is a successive B

## Chapman v Chapman – courts have no inherent power to vary a trust

The court declared it had no inherent power to authorize the variation of terms of a trust even though all adults had assented and the variation was for the benefit of all infants. The court had no inherent power to rearrange the beneficial interests as delineated by the settlor/testator

## Re Burns –using s.1 of the Trust and Settlement Variation Act to give consent on behalf of unborn Bs

**Facts:** S wanted to amend his trust settlement which was defective because it gave the Ts no investment powers to enable minimization of estate tax and succession duties. Proposed arrangement would enlarge investment powers of trustees that would include winding up of a family business – “Burns Holding Ltd”. All living Bs were *sui juris* and had agreed to the arrangement. Court assent needed because the class of Bs also included unborn persons.

**Held:** Court gave consent on behalf of the unborn Bs. Tax minimization (advancing the financial interests of the Bs) was held to be an appropriate arrangement that would benefit the unborn Bs.

## Re Sandwell and Royal Trust – eg. 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 Westin’s Settlement – other benefits should be considered by court when applying s.1

**Facts:** S wanted to appoint two new Ts from Jersey to enable resettlement of a UK trust into a Channel Island trust and a discharge of the English trust. S was seeking to avoid capitals gains tax. Consent needed for Bs lacking capacity.

**Held:** Financial benefits are not the only consideration in determining what benefits a minor. Denning MR says role of court is to protect those who cannot protect themselves. To live in England is more beneficial than money, especially for this very wealthy family where increased taxes would not affect the privileged lives of its members. Educational and social benefits are equally important**.**

## Re Remnant’s Settlement Trusts – “benefit” in s.1 can be financial or any other kind of benefit. Here, family harmony and increased marital choice were viewed as benefits.

**Facts:**Trust gave contingent remainder interests to the children of two sisters, Dawn and Merrial. Trust contained a forfeiture clause if they practiced Roman Catholicism, or had anything to do with Catholicism. Dawn’s kids are Protestants, Merrial’s are Catholics. Arrangement proposed deletion of the forfeiture clause and advancing the remainder interest.

**Held:** Arrangement approved in order to prevent family conflict and increase the size of the pool of potential suitors by opening it up to Catholics. Even though Dawn’s kids did not appear to benefit financially from the arrangement the court still said they were better off because the clause had narrowed their field of spouses to non Catholics only. Clause could cause “serious dissension between the families of the 2 sisters. Court affirms that “benefit” in the Act is not confined to “financial benefit” but includes “benefit of any other kind” – here family harmony and increasing scope of marital choice.

## Re Harris – sometimes, social well being is outweighed by disproportionate financial disadvantage

**Facts:** S left 5/8th of estate to eldest son and 1/8th to the other 3 other kids. There was a gift over to the children’s children in the event anyone of them died before age 21 years leaving a child. Mother wanted family harmony by equal sharing, and needed court assent as all children were underage.

**Held:** The arrangement will not financially benefit the eldest son and his possible unborn children. Amending the trust would disproportionately disadvantage him – court cannot consent on his behalf in this case. The benefits of equal splitting are not yet materialized, unclear, and do not benefit his unborn whereas his loss is more than half of his financial interests.

## Russ v Public Trustee – court doesn’t have to preserve basic intention of settlor when using s.1 – test is whether the B will benefit, and exercise discretion like a prudent advisor

**Held:** Court’s proper test in exercising its discretion to consent on behalf of a person without capacity is that of a “prudent advisor.” Court held it was not bound to preserve the basic intention of the settlor: indeed, it noted that many variations are at odds with that intention. Enhancement of benefits for the beneficiaries is the court’s sole concern.

## Re Tweedie – Courts will consider how likely a B is going to become a B in contingent interests when consenting on their behalf

**Facts:** Under a will, there was a minute chance of an unborn B receiving any benefit. All the Bs, all of full capacity, had agreed to a proposed arrangement which would have removed a financial burden on one family member giving a “real psychological, emotional and family benefit” to her.

**Held:** Court will consider how likely a B subject to a contingency is going to become a B (eg is it a real potential that the unborn will be born?). If the likelihood is small, then court will liberally interpret “benefit”.

## Bentall Corp. v. Canada Trust Co – application of s. 1(b) of Trust and Settlement Variation Act

**Facts:** Corp has an overfunded, defined-contribution pension plan. Corp wanted to take surplus and pay some to members, some to the corp, and some for a contribution holiday. Corpsuggested a “**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? (Is this the “prudent adviser” test in a different guise?)

**Held:** proposal is a good bargain. The court gave “great weight” to the fact that 97% approved the proposed arrangement. Here the test for consent was based strictly on financial considerations.

**Notes:** 1(b) allows court to consent on behalf of Bs whose interest is contingent. Here the interest of each member is split into their presently held interest (entitlement to funds to support pension) and a future contingent interest (because if the corp terminates the plan, members would get a share in the division of any surplus) It is this contingent interest which gives the court jurisdiction to consent on behalf of existing members.

# The Trustee – Appointments, retirements, removals

* If several Ts are appointed, then they usually hold property in joint tenancy so that if one dies, the others can continue. If all Ts die, then property passes to the last surviving T’s personal rep (new T)
  + Unanimity required for decisions
* A corporateT, broadly speaking, is a corporation empowered by its memo and articles to engage in trust administration and management. (often called a trust corporation)
* S may appoint a “protector” or write a “letter of wishes” to personalize a corporate trust or for off-shore accts. Then Ts need consent from protector if they want to:
  + To add or remove beneficiaries
  + To distribute capital or income
  + To vary the terms of the trust
  + To appoint or remove trustees
* T has to have legal capacity & accept the appointment
* If T refuses, the trust doc will usually name an alternative
  + Or, court has inherent power to appoint
  + If no one available, court will appoint Public Trustee (entitled by law to charge $)
  + Follows from equitable maxim that a trust will not fail for want of a T
* S. 27 of the Trustee Act provides for ways to appoint new Ts

#### Power to appoint new trustees

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

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

(a) the number of trustees may be increased,

(b) a separate set of trustees may be appointed for a part of the trust property held on trusts distinct from those relating to any other part of the trust property, even though no new trustees are to be appointed for other parts of the trust property, and an existing trustee may be appointed or remain one of the separate set of trustees, or if only one trustee was originally appointed, then one separate trustee may be so appointed for the part of the trust property held on trusts distinct from those relating to any other part of the trust property,

(c) it is not obligatory to appoint more than one new trustee if only one trustee was originally appointed, or to fill up the original number of trustees if more than 2 trustees were originally appointed but, except in a case in which only one trustee was originally appointed, a trustee must not be discharged under this section from his or her trust unless there will be at least 2 trustees to perform the trust, and

(d) the assurances or things required for vesting the trust property or any part of it jointly in the persons who are the trustees must be executed or done.

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

(4) The provisions of this section relating to

(a) a trustee who is dead include the case of a person who is nominated a trustee in a will but who dies before the testator, and

(b) a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

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

* S. 36 allows for Bs, Ts, or others with a beneficial interest in the property to apply to court to raise concerns over persons who may impede the execution of the trust
* Ss. 29-34 deal with the powers of the court to order the vesting of trust properties in new Ts
* On the declaration of new trustees, s. 29 authenticates an automatic vesting of many types of trust assets (not shares transferable by registration in a company’s books)

#### Vesting of trust property in trustees

**29**  (1) If a deed by which a new trustee is appointed to perform a trust contains a declaration by the appointor to the effect that an estate or interest in land subject to the trust, or in a chattel subject to the trust, or the right to recover and receive a debt or other thing in action subject to the trust, vests in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration operates, without a conveyance or assignment, to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest or right.

(2) If a deed by which a retiring trustee is discharged under this Act contains a declaration referred to in this section by the retiring and continuing trustees, and by any other person, if any, empowered to appoint trustees, that declaration operates, without a conveyance or assignment, to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest or right to which the declaration relates.

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

(4) For the purposes of registration of the deed in a land title office, the persons making the declaration are deemed to be the conveying parties, and the conveyance is deemed to be made by them under a power conferred by this Act.

(5) This section applies only to deeds executed after July 1, 1905.

#### Power of court to appoint new trustees

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

* S. 28 deals with retirement of Ts (retiring T needs to declare & other Ts have to consent –trust doc must not prescribe otherwise)

#### Retirement of trustee

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

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

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

* Sometimes, the S specifies in the trust doc a person who has the power to remove a T
  + S. 30 also provides that a *sui juris* B (or the majority in interest and number of the other *sui juris* Bs) can apply to court to have a T removed
  + S. 31 allows a court to remove a T if it is clear that the T’s continuance would be detrimental to the trust

## In re Tempest – sets out guiding principles for the court in appointing Ts

- Wishes of the S – 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

## Conroy v Stokes – Criteria for court’s removal of Ts (acts that seem to impair welfare of Bs)

**Facts:** 2 of 5 Bs applied to have Ts removed - friction had developed between the 2 Bs, the widow (testator’s 2nd wife and stepmother of the 2 Bs) and the Ts

**Held:** Trial judge did not find misconduct or breach of trust by the Ts but removed them nonetheless. The CA set out the applicable criterion which, broadly speaking, is the welfare of the Bs. This means that the applicant must to point to acts and omissions that endanger the trust property or show want of honesty, appropriate capacity or reasonable fidelity. Failure to produce accounts doesn’t amount to impairing the welfare of the Bs unless persisted in. Trial judge’s order of removal was overturned because applicants did not meet the criteria.

## Re Consiglio Trusts – misconduct not required for court to order Ts removed

**Facts:** The Official Guardian and a B brought an application in the context of “domestic relations proceedings” which disclosed “widespread misunderstandings” among the three Ts giving rise to accusations and bitterness and making it “virtually impossible for the trustees to agree on policies concerning the efficient management of the trust”. (no misconduct by Ts)

**Held:** Misconduct is not a prerequisite. It is enough “when the continued administration of the trust with regard to the B has by virtue of the situation…between the Ts become impossible or improbable.” That had happened here. Removal ordered.

# The Trustee – General Rights, Responsibilities and Powers

* T, as legal owner, has all the rights and powers to deal with the management, use and administration of all property
* Ts have a fiduciary responsibility to B 🡪 Ts must exercise rights and powers in good conscience. (ie act in good faith and advance the interests of the B as set out in the trust doc) 🡪 T cannot pursue his/her own interests or someone other than the B’s in a way that does not accord priority to the B
* Ts required to have a measure of competence to meet S’s objectives
* Ts have no automatic right to be paid (must be agreed upon in the trust doc.)
* Because Ts have to advance interests of the B, they are prohibited from **self-dealing** (ie. T purchasing trust property for T’s own use – note that the T would be on each end of the transaction)
  + T can purchase under **fair dealing** rules – T at one end and B on the other – but transaction is voidable if there is a power imbalance
* T has a duty to account & provide info to B

# Investment Powers

* S may allow T to invest assets, set the standard of investment and when to invest
* A T who accepts has an obligation to invest as an ordinary prudent person of business would act in managing his/her own affairs - *Speight v. Gaunt (1883)*
  + This requires the trustee to put his/her mind to the matter of investing the property; he/she is not required to beat the market nor be responsible for a general downturn in the market because of economic conditions
* There are two broad aspects to trustee investment:
  + The duty to invest so that the capital fund is preserved from risk, but at the same time yields a reasonable return
  + The investment must be made by the T in a way that is even handed between the different classes of beneficiary (e.g. life tenant versus the remainder person)
* Before 2002, *Trustee Act* had a list of “authorized investments” but now, more general requirements set out in 15.1 & 15.2 (note that a S can waive compliance with these sections):

#### Investment of trust property

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

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

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

#### Standard of care

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

#### Trustee not liable if overall investment strategy is prudent

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

* Since experience of Ts can range from Uncle Harry to specialized trust companies, may be attractive to have a variable duty of care – but SCC rejected this (sort of). There is a unitary standard to act as a person of ordinary prudence (*Fales v. Canada Permanent Trust* (1974) SCC )
* Unless permitted by the settlement, a T may not invest speculatively and must avoid as far as possible hazardous investments (but note s. 15.3)
* Ts are allowed to seek advice from investment experts

## Fales v Canada Permanent Trust – Unitary std of ordinary prudence. Application of s.96

**Facts:** S gave property (mainly shares) in trust to CPT (trust co) and his wife. (Bs = wife + children) No duty to retain, but Ts were under a duty to convert shares as soon as advantageously possible. Ts waited 11 yrs to convert, then bought risky shares in Inspiration and didn’t sell those for 3 yrs. Inspiration went bankrupt. Children sued CPT. CPT tried to join mother in the action.

**Held:** All Ts in breach of T duty to invest as a prudent person would. CPT argued that they had tried to convince the widow to sell shares earlier, but she had an emotional attachment to original shares. Court rejected their argument, saying that CPT’s efforts were half hearted. CPT tried s. 96 – held that they acted honestly but not reasonably. However, court exempted widow on s. 96 because CPT had not kept her fully informed & she acted honestly and reasonably.

**Notes:** court affirmed standard is “ordinary prudence in managing his own affairs”. Says it is a unitary std. But s. 96 will act remedially in favour of Ts needing special considerations.

## Cowan v. Scargill - investment decisions shouldn’t be based on moral grounds

**Facts:** Ts of a pension fund for coal workers refused to invest approve a policy change which allowed investments in overseas or competing industries.

Held: Ts in breach of trust. Ts have to put aside their own personal interests and views. Ts must not 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 (primarily financial interest) of their Bs require it.

**Note:** maybe not very realistic – Ts can probably choose investments that are beneficial to Bs and that are not morally objectionable to the T, provided the primary goal is financial return.

If all Bs are *sui juris* and share T’s moral values, then it may be a “benefit” to invest accordingly.

## Nestle v National Westminster Bank (1993) – T may be liable if he has investment powers & power to convert but doesn’t monitor/change investments

**Facts:** S left remainder interest to granddaughter. From 1922 to 1986, the investments grew from L54,000 to L270,000. B claimed it should have been worth L1.8 million.

**Held:** for the T. The T showed that it had deliberately invested in tax exempt bonds which suited the life tenant’s interest & shielded the funds from inheritance tax. Also its expert witnesses showed that equities were regarded as risky investments before 1959. Court noted the T had fallen “woefully short of maintaining the real value of the fund, let alone matching the average increase in price of ordinary shares” and that there was “not much for the Bank to be proud of in its administration of the…trust.” However, hindsight is 20/20

# Liability of Trustees

* Court has discretion to relieve T of liability – s. 96

#### Jurisdiction of court to relieve trustee of breach of trust

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

* Settlements purporting to oust court jurisdiction are void as contrary to public policy (*Re Wynn*) – but S may give Ts a power to adjudicate on matters of fact (eg. to remediate uncertainty of words) (see *Re Tuck’s Settlement*)

## Re Wynn - Settlements purporting to oust court jurisdiction are contrary to public policy

**Facts:** Spurported to give Ts power to make decisions in acts and proceedings that “shall be conclusive and binding upon all persons interested under this my will…”

**Held:** The court held that attempts to oust the jurisdiction of the court are contrary to public policyfor the courts have the power “to construe and control the construction and administration of a testator’s will and estate.”

## Re Tuck’s Settlement – S may appoint powers to determine facts

**Facts:** S included 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 S.

**Held:** clause is ok. The court retained control where a rabbi may misconduct himself or come to a decision that is “wholly unreasonable”.

## Boe v Alexander – clause giving apparent exclusive jurisdiction to Ts will not prevent JR in certain situations

**Facts:** Pension plan gave Ts wide authority on questions of coverage, eligibility, and methods for providing or arranging benefits. Any determination or construction by them in good faith “shall be binding upon all parties…and the beneficiaries….” Bs sued Ts because they took contributions from some members which was prohibited in the collective agreement. Ts relied on exclusive jurisdiction given by the clause.

**Held:** a privative clause will not prevent judicial review where the Ts have

- Failed to exercise a discretion at all

- Acted dishonestly

- Failed to exercise that level of prudence expected from a reasonable business person

- Failed to act impartially between classes of Bs or acted in manner prejudicial to their interests.

Ts must act according to the laws of trusts (based on fiduciary relationships) and are subject to court supervision.

## Re Poche – shielding T through exculpatory clauses will not work if T has been dishonest, in willful breach of trust, or grossly negligent

**Facts:** The sister of the deceased was T where the wife had a life estate with remainder to their daughter. The T had failed to gather in all the assets, put her mind to sale of those assets (despite a trust for sale with power to postpone) and to act evenly between the two classes of beneficiary.

**Held:** Breach of trust based on T’s grossly negligent behaviour. The T was not protected by the shield of the exculpatory clause. (With consent, the judge removed her as trustee).

# Delegation

* *Delegatus non potest delegare* – a delegate (the T) cannot delegate
  + But the realities are that Ts have to appoint agents sometimes to perform acts for the trust
* S. 7 of the Trustee Act allows for Ts to employ bankers and solicitors without being in breach
* S. 95 of the Trustee Act implies indemnity for Ts – not liable when others in control of trust $

#### Implied indemnity of trustees

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

* Statute structured so that the T is not a guarantor – liability focuses on whether the T has discharged their duty

## Speight v. Gaunt – Ts are allowed to appoint agents if they do so in regular course of business or if it is morally necessary

**Facts:** T appointed a stockbroker as an agent. T followed std business practice at that time for purchase/sale of shares. Stockbroker misappropriated the funds. Bs sued T for breach of trust.

**Held:** T not liable because T followed the std business practice for purchase/sale of shares. Ts can have 3rd party agents “if he does so from a moral necessity or in the regular course of business.” T is not liable for a loss due to the agent unless some negligence or default of his has led to the result.

## Re Wilson – example of unlawful delegation. Board of directors of trust co. has to decide when it is a discretionary decision regarding sale, retention, or investment of the trust property

**Facts:** Trust co managed some trust assets. One of the properties was not profitable (charges > income). Someone offered to purchase this property, and the GM of the trust co rejected it without communicating with Board of directors first. In practice, the Board of directors allowed the GM to manage the trust as he thought best.

**Held:** This is an unlawful delegation – Board should have considered the offer. Board has to decide when it is a discretionary decision regarding sale, retention, or investment of the trust property.

**Notes:** when an S chooses a corporate T, S may be making an implicit decision on how trust will be administered (need to read the constitution & review company practice)

# Duty of Loyalty & No Conflict

* The defining obligation of a fiduciary is the duty of loyalty. This means the T must:
  + 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
  + Not act for his own benefit or that of a 3rd party without the informed consent of the B
  + Only contract with the B in transactions that are fair and in which there has been full disclosure of all matters material to the transaction
* The “no conflict” rule is the basis for many other T obligs – eg. account for any profit where there may be a conflict
* No conflict rule leads to self-dealing vs fair-dealing rules
* Self-dealing rule: renders voidable any transaction where a T purchases trust property or sells his property to the trust (before, would be void. Now, voidable)
  + Rationale: difficult to determine whether T has served the interests of the Bs because of the structural conflict of interest (structural = T is at both ends of the transaction)
* Fair-dealing rule: if the T is purchasing the equitable title from the B, the transaction is less risky because T is not at both ends of the transaction
  + But courts are still cautious towards these transactions

## Keech v. Sandford – strict application of the no-conflicts rule

**Facts:** T held a lease on trust for a B who was a minor. When the lease expired, the T sought to renew but the landlord refused to renew for the benefit of the B. Landlord offered the lease to the T for himself instead. T took it & B sued when he grew up.

**Held:** T has to disgorge his profits. Found trust for the B. No fraud in this case, but the T should have let the lease run out instead of renewing in his own name. Need to have strict application of the rule.

**Notes:** An explanation of such a strict approach may be that, for policy reasons, the court wants to generally discourage disloyalty of Ts.

## Boardman v. Phipps - similar strict approach of Keech of the no-conflicts rule

**Facts:** Trust assets included a minority shareholding in L&H Ltd, a poorly-managed company yielding little to the Bs. Boardman was the T’s solicitor and Tom Phipps was one of the Bs. Because of their connection to the trust they attended L&H’s AGM & other meetings, gaining valuable information on L&H, shareholders, & the shares. They suggested the Ts acquire a controlling interest and change the fortunes of L&H. T refused this approach as a risky investment and contrary to the terms of the trust. Boardman and Phipps purchased the shares with their own money. The Ts were okay with this. The Bs were advised though they were not given full information of the strategy and the enrichment of Boardman and Phipps. The purchase turned out to be considerably favourable for Boardman and Phipps and the other Bs because control of L&H was in friendly hands. **John** Phipps (a B), however, was dissatisfied and launched this action for Boardman & Tom to disgorge their profits (their shareholding) by a constructive trust on the shares as a consequence of a breach of the no conflict rule.

**Held:** for John. Boardman and Tom are fiduciaries because they had attended the various meetings as agents or representatives of the trust, and had, by acquiring the shares and deriving a profit from them, breached their fiduciary obligations “to the trust” and therefore, to the Bs. Not clear whether owing duties “to the trust” meant to the Ts or the Bs.

Tom was presumably acting as Boardman’s agent and so liable in that respect. (As a B he can ordinarily purchase trust assets.) The court split on whether the defendants had breached a fiduciary duty. The majority held that a fiduciary cannot profit from their position without the informed consent of the Bs.

**Dissent:** Ts as a group had opposed purchasing further shares in L&H for the trust and so realistically there was no conflict. Moreover, the Ts favoured the Boardman/Phipps purchase as it would put the shares in friendly hands. On the test to be applied Lord Upjohn said:

*“ The phrase “possibly may conflict”…means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a* ***real sensible possibility of conflict****; not that you could imagine some situation which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.*

**Notes:** Better to say, perhaps, that the fiduciary obligations to beneficiaries arose when Boardman acted as representative of the tees when attending company meetings and used information which belonged to the trust and had acquired property of the trust in that representative capacity for his personal gain. The defendants were allowed an allowance to be assessed “on a liberal scale” for their hard work.

## Peso Silver Mines Ltd. v. Cropper – relaxation of no-conflict rules

**Facts:** Peso was offered some mining claims. Directors refused mainly because they didn’t have enough funds. Much later, Cropper (a director of Peso) created a company that bought the claims. Peso sued, sought order of constructive trust.

**Held:** Noconstructive trust. No-conflict rules are strict, but need to carefully apply them in this modern day where substantially all business is carried on with corporations + subsidiaries + associated corps.. Shouldn’t extend the application of no-conflict rules beyond their present limits.

Canadian Aero Services (Canaero) v.O’Malley - employees of companies in senior positions may be held to fiduciary duties (like directors). No-conflict rule should be viewed in context.

**Facts:** Canaero’s employees O, Z, & W (president, vice president and director) were senior officers, but not directors. They initiated a project in Guyana that took over 5 years to maturate into a government K. During that time, W resigned and persuaded O and Z to do the same and join a new company they floated called Terra Nova that operated in competition with Canaero and ultimately won the govt K in Guyana. Canaero sued arguing breach of fiduciary duty through conflict of interest.

**Held:** for Canaero. O and Z as top management were placed in the same position as directors because of their control of the company. Even though O and Z were not acting in bad faith and it became apparent that Canaero could not have been successful, the SCC found O and Z liable as “faithless fiduciaries” who by defaulting Canaero in its corporate opportunity had to disgorge their profit.

**Notes:** Laskin J stated that the no-conflict rule should not be couched in absolute or statute-like form.

*“The general standards of loyalty, good faith and avoidance of a conflict of duty and self interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors….Among them are the factors of position of office held, the nature of the corporate opportunity, its ripeness, its specificness and the director’s or managerial officer’s relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after the termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.”*

The no-conflict rule applies to elected politicians such as city mayors – see, for instance, *Hawrelak v. City of Edmonton [1976] 1 S.C.R. 387*

## Holder v Holder – UK approach to no-conflict rule. Departure from Keech v Sandford and Boardman

**Facts:** Def was an executor for a will. He performed a few minor tasks and then renounced his position. Remaining executors decided to sell 2 farms of the estate in a public auction. The Def bought them. Plaintiff (a B) sought to have the sale set aside.

**Held:** for the Def. The court reviewed the facts of the purchase and concluded that the sale was outside the mischief that the self dealing rule prohibits. There was no “real” conflict as the def’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 grounds sufficient to set aside the contract.

## Molchan v. Omega Oil & Gas Ltd (1988) – SCC approves Holder as Cdn law

Court leaning against the “rigidity of rules as can cause patent injustice” (per Lord Sachs)

## Crighton v. Roman – SCC regards fair dealing transactions with caution

Cartwright J endorsed the following from Halsbury (p 498 ln 23)

“Such a transaction is always regarded by courts of equity with the utmost jealousy, and in order that it may stand, if it is impeached within a reasonable time by the B…, the T must show (1) that there has been no fraud or concealment of advantage taken by him of information acquired by him in the character of T; (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.”

# Duty of Impartiality & Apportionment

* T must act impartially btwn classes of Bs, especially where there is a power to sell/retain, settled shares, disbursements, investments.
* S can waive the duty of impartiality (intentions paramount)
* Where there is a duty to be impartial, there is a duty to sell assets and reinvest them if they do not benefit the Bs equally. This may arise because the property is producing uneven treatment for 1 of these reasons
  + May be the original trust assets transferred by the settlor/testatrix
  + May be the asset mix assembled by the Ts under their investment powers under the trust
  + Income return may constitute both income and capital
  + The property could be either capital or income according to the way the transferor has characterized it
* The T may have to enhance the capital fund by taking a portion of income generated and ploughing it into capital; or, conversely, the T may apportion capital sums received for the benefit of the remainder person by allocating some of it as income for the life tenant
* The law governing the circumstances in which the trustee must establish a trust fund that enables even handed treatment of testamentary beneficiaries is known as the rule in ***Howe v. Lord Dartmouth***
* That rule deals with the circumstances of re-investment and apportionment where a will is silent on impartial treatment of Bs.
* With express trusts, companion rules on apportionment of sales of trusts with reversionary assets is set out in the ***Earl of Chesterfield’s Trust.***
* Howe v Lord Dartmouth – sets out general duties for re-investment & the rule for wasting assets (ie deteriorating. Eg. mtgs, goldmines):

The rule prescribes that

* + 1. Where a testator/testatrix
* Why not for *inter vivos* trusts? Because the S knows at the time of the settlement what the trust assets are behaving like (wasting/reversionary). His intention is already clear.
  + 1. Leaves residuary
    2. Personalty (shares, debts, etc, NOT real estate)
    3. To persons by way of succession
    4. And the residue includes a wasting (including unauthorized or reversionary – see *infra*) asset

then the trustee must:

* 1. Sell the personalty that is a wasting (and unauthorized or reversionary) asset
  2. Invest the proceeds in authorized investments the income of which is for the benefit of the life tenant B
  + Authorized investments = ones a prudent investor would find acceptable in terms of risk, and which have yield & capital growth capabilities that allow the T to meet duty of impartiality
* Rule in *Howe v Lord Dartmouth* doesn’t apply if there is a contrary intention in the will:
  + Express provisions in the will that ***Howe and Dartmouth*** does not apply
  + A direction that the residue be kept or “retained”
  + Authorization for the Ts to retain unauthorized investments
  + A direction or implied intention that the life tenant B is to receive income *in specie*
* Earl of Chesterfield’s Trusts sets out rule for reversionary assets (ie assets are immediately available. Eg.debts payable in the future)
  + Where there is an express trust for sale of a reversionary asset, then when it is sold, the proceeds must be apportioned
* Pending sale of the wasting/reversionary asset (these rules also generally apply when there is an express trust for sale):
  + If the income received pending sale is less than 4% (4-7%) of the value of the property, the life tenant receives all of the income produced (and there is a shortfall that needs to be made up). If the 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 get it made up from the proceeds of sale. If there is extra $ left after the life tenant has gotten their share, it is ploughed back into the capital
    - The value of the property: If the shares are sold within a year of the testator’s death, the value of the shares is assessed at the date of sale. If not sold within a year, the value is taken at the 1st anniversary of the testator’s death
  + If the asset is non-income producing, then upon the sale of the asset, the T has to determine what the value of the property would have been:
    - (value at death) x 1.04^(# of yrs since death) = (sale price)
    - Then (sale price) – (value at death) = (amt given to the life estate holder)
    - Calculations are actually a little different because of tax
* A power to postpone can imply that the S intends the life tenant B to enjoy asset *in specie*
* A trust to retain does imply such an intention, but a power to retain may imply it

## Lottman v. Stanford – SCC confirmed that Howe v Lord Dartmouth rule is limited to personalty

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

**Held:** SCC overturned CA to say that *H v D*does not apply to real estate and it refused to extend the rule to cover it. So the widow was not entitled to notional interest from the real estate and was limited to the actual income generated from it i.e. $0! *H v. D* also did not apply to the personalty in this estate as it was excluded by the testator’s detailed, express provisions in the will concerning the conversion of the personalty.

## Re Oliver - if assets are a mix of personalty and realty, treat them separately

**Facts:** combined assets of personalty and realty – could they together be treated as personalty?

**Held:** No. Easy enough to separate them

**Notes:** Accordingly, in a devise of real estate in a trust for sale, until sale of the piece of real estate actually occurs the life tenant 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 (affirmed, without reasons, by SCC).

**Facts:** estate had realty & personalty, trust to convert all the estate with wide discretion to postpone & retain. Bs were a life tenant + remainder.

**Held:** the clause for conversion is primary and dominant 🡪 in the future, need to convert all assets. But future time could be far off due to the wide discretion given to Ts, which is adverse for life tenant. Duty of impartiality requires pmts from ALL assets to the life tenant at a rate set by the judge. The trust for sale precluded payments *in specie.* (Perhaps this case can be reconciled with the later *Lottman* (MacIntyre J was judge in both cases) in that the 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.)

## Royal Trust v. Crawford – look to intention of S when determining whether Bs can enjoy in specie or if T needs to apportion. Power to postpone by itself doesn’t show intent of in specie enjoyment.

**Facts:** testator gave life estate to wife, remainder to nieces & nephews. Estate consisted mostly of shares in a co with few assets but high value in good will. Will had a trust for sale with wide powers of postponement of conversion and retention. Huge dividend (450k) declared & paid to widow.

Should all of it or part of it be apportioned as capital?

**Held:** SCC stated that the intention of the testator must be clearly gauged from the will and surrounding circumstances. Testator wanted wife to live in comfort but clauses requiring conservation of capital by the Ts shows that this was not his desire at all costs 🡪 *in specie* enjoyment was not intended. SCC ordered apportionment. If there is a trust to convert + power retain, need to ask whether the power to retain is a power to retain permanently, or only until the Ts can sell advantageously? If it is only a power to postpone, then we need to find some other indication that the life tenant is entitled to the income *in specie*.

## Re Smith- a power to retain does not remove the duty of impartiality

**Facts:** S wanted son to care for his mother by placing income from ¼ of the shares for her benefit for life. Son put ¼ of the shares in trust for her, remainder to himself. Yearly income 2.5% was insufficient to let the mother live the high std she had enjoyed. T ignored her request for variation in the investment portfolio which would give higher yields because the son opposed it.

**Held:** T had been partial to the remainder B. T thought the power to retain in the deed was a trust to retain – a power to retain does not remove the duty of impartiality. T removed.

**Note:**  *inter vivos* trusts are ordinarily not subject to the duty of impartiality under the CL. However, the court imposed it, and extended the duty to apply to the Ts here. Prof P thinks the reasons are:  
1. Courts like the duty of impartiality, and  
2. The son created that trust in accordance with his deceased father's wishes, so could sort of say there was a connection with an estate...

## Re Welsh – impartiality when corporations release capital by paying out cash dividends

**Facts:** testator gave life interest to 2nd wife and remainder to kids from 1st marriage. Estate consisted mostly of shares in a co. Co’s capital assets were sold & distributed as tax free dividends, paid over 6 yrs. Wife received 200k in dividends then died. Does this go to her estate? Or to the remainder Bs? Wife’s estate argued “form is substance”.

**Held:** Form is substance is subject to the testator’s overriding intention – intention was likely not to deprive his own kids of benefit just because the co. released its capital assets as cash dividends. Will only makes sense by regarding the release of funds as capital.

# Administration of the Trust

* When testator dies, life tenant is entitled to income from estate soon after. However, sale of the assets need to pay debts, etc could occur some time later. In the meantime, the life tenant gets assets. This is unfair to remainder interest Bs. The court attempted to strike a balance btwn life tenant’s & remainder’s interests with a rule which was complicated to apply (*Allhusen v Whittel* (1867)). Now, s. 10 of the Trustee Act abolishes that rule: Unless testator says otherwise, all income is available for payment of debts etc. and is to be treated as part of the residuary estate.

## Allhusen v Whittel – old rule of debt pmt from capital vs income

Debts (including legacies) have to be paid after a year of appointment. Accordingly, capital plus one’s years incomewere taken into reckoning as assets available to pay debts*.*

* Bs have a right, on reasonable notice, to see trust accounts, investments, the trust doc, & other reasonable info regarding management of the trust property

Re Londonderry’s Settlements – B not entitled to docs covering the T’s exercise of a discretionary power

**Facts:** B had an interest in the distribution of income among a class of discretionary B. She wanted the agenda and minutes of the meeting in which the discretion was exercised.

**Held:** a B is not entitled to documents covering the T’s exercise of a discretionary power. Bs are not entitled to the reasons indicating why Ts came to a decision. If they were, few would want to be Ts. If Ts are acting in bad faith then the obligation to disclose can be enforced by court order.

## Froese v. Montreal Trust Co – BCCA orders disclosure of legal opinion re breach of trust

**Facts:** the plaintiff claimed he was a B of a pension fund and alleged a breach of trust by Montreal Trust (MT). On an application of a B, the master ordered production of a legal opinion obtained by the tees on the topic of breaches of trust alleged by the B. The defence of solicitor-client privilege was rejected.

**Held:** The information sought by the B related to the management of the trust. The opinion letter is proprietary information belonging to the trust. Even If the T had feared an action against it personally and had obtained an opinion for that purpose, it would not be privileged if paid for by the trust.

* S. 99 of the Trustee Act says that a T has to file accounts within 2 yrs of appointment

**Passing of trustee's accounts**

**99**  (1) Unless his or her accounts are approved and consented to in writing by all beneficiaries, or the court otherwise orders, an executor, administrator, trustee under a will and judicial trustee must, within 2 years from the date of the granting of the probate or letters of administration or within 2 years from the date of his or her appointment, and every other trustee may at any time obtain from the court an order for passing his or her first accounts, and he or she must pass his or her subsequent accounts at the times the court directs.

(2) Despite subsection (1), an executor, administrator and trustee, including a judicial trustee, if so required by notice served on him or her at the instance of a person beneficially interested in the property covered by the trust, must pass his or her accounts annually within one month from the anniversary of the granting of the probate or letters of administration or of his or her appointment, but the court may on application make an order it considers proper as to the time and manner of passing the accounts.

(3) If an executor, administrator or trustee fails to pass any accounts under this section, or if his or her accounts are incomplete or inaccurate, he or she may be required to attend before the court to show cause why the account has not been passed or a proper proceeding in connection with it taken and proper directions may be given at chambers or by adjournment into court, including the removal of a trustee and appointment of another, and payment of costs.

(4) Subsection (1) does not apply to official administrators appointed under Part 5 of the *Estate Administration Act*, or to any executor, administrator or trustee under a will if the date of the granting of probate or letters of administration or of his or her appointment is before May 1, 1949.

## Sanford v Porter - although Bs are entitled to inspect accounts, they are not entitled to an instantaneous response.

The court noted that every case depends on its own circumstances. Today, with reliance on computer technology, perhaps instantaneous transmission may not be arduous, though their state of day-to-day, up-to-date accuracy may.

* Ts generally are unpaid – can be set out in the trust doc, or by K with the *sui juris* Bs (latter is uncommon because of possible conflicts), or court has inherent jurisdiction
* S. 88 of the Trustee Act allows for application for remuneration:
  + Ts are allowed expenses plus “a fair and reasonable allowance not exceeding 5% on the gross aggregate value of all the assets for their “care, pains and trouble” and administration.
  + Ts can also apply annually for a “care and management fee” not exceeding 0.4% of the average market value of the assets.
  + Supreme Court of BC or registrar, if delegated, determines amounts

**Setting Remuneration of Trustees and Guardians**

**88  (1)** A trustee under a deed, settlement or will, an executor or administrator, a guardian appointed by any court, a testamentary guardian, or any other trustee, however the trust is created, is entitled to, and it is lawful for the Supreme Court, or a registrar of that court if so directed by the court, to allow him or her a fair and reasonable allowance, not exceeding 5% on the gross aggregate value, including capital and income, of all the assets of the estate by way of remuneration for his or her care, pains and trouble and his or her time spent in and about the trusteeship, executorship, guardianship or administration of the estate and effects vested in him or her under any will or letters of administration, and in administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate as the court, or a registrar of the court if so directed by the court thinks proper.

**(2)** The court or a registrar of the court if so directed by the court, may make an order under subsection (1) from time to time, and the amount of remuneration must be allowed to an executor, trustee, guardian or administrator, in passing his or her accounts, in addition to any other allowances for expenses actually incurred to which the trustee, executor, guardian or administrator may by law be entitled.

**(3)** A person entitled to an allowance under subsection (1) may apply annually to the Supreme Court for a care and management fee and the court may allow a fee not exceeding 0.4% of the average market value of the assets.

**Application for remuneration**

**89**  The court may, on application to it for the purpose, settle or direct the registrar to settle the amount of the compensation, although the estate is not before the court in an action.

**Application**

**90**  Nothing in section 88 or 89 applies in any case in which the allowance is set by the instrument creating the trust.

**Review of order or certificate of registrar**

**91  (1)** An order or certificate made by a registrar under section 88 or 89 is subject to review by the court on application by summons to be made before the expiration of 14 clear days after the entering of the order or the filing of the certificate.

**(2)** Unless varied or discharged by the court, the order or certificate is binding on the trustee, executor, administrator or guardian, and all parties interested in the trust estate.

## Re Sproule - guidelines for setting remuneration of Ts

**Facts:** trust assets did not produce revenue. The Bs argued for lower fees since, they alleged, T was little more than a passive custodian of the shares. The T argued that the care and management of a high value asset inherently risky (given the speculative nature of the shares) imposed a need for constant monitoring and argued for a remuneration based on a percentage of the asset value

**Held:** Trial judge gave 100k in fees. The CA reduced this to 30k. Prefer lump sum remuneration and using percentages would require special reasons. “Care and management” is the ”responsibility of reasonable supervision and vigilance over the preservation or disposition of assets, but also the responsibility of judgment and decision making in the affairs of an estate to resolve problems from time to time arising over and above the usual and regular procedures attendant upon administration”.

Guidelines for setting remuneration:

* + - 1. The magnitude of the trust (explained in *Re Pedlar* as its value and complexity e.g. farm, portfolio of investment, realty, running a business)
      2. The care and responsibility arising from it
      3. The time occupied in performing the duties
      4. The skill and ability displayed
      5. The success which has attended its administration.

## Re Pedlar – guidelines for care + management fee

Trustee Act s. 88 allows for a care and management fee in addition to the s 88(1) remuneration for care, pains & trouble. T may choose to apply annually. T needs to give a general summary of the estate and of his services performed in the care and management of the estate including the information from *Re Sproule.* Then, court will determine percentage up to 0.4% and decide the percentages to be applied to income & capital. (eg. 2/3 from capital & 1/3 from income)

Guidelines for care & management fee:

* 1. The value of the estate assets being administered
  2. The nature of the assets being administered – such as active business, a farm, real property held for investment for appreciation,, a portfolio of investments and the type of in vestments
  3. The degree of responsibility imposed upon the trustee by the terms of the will or other instrument, including the length or duration of the trust
  4. The time expended by the trustee in the care and management of the estate
  5. The degree of ability exhibited by the trustee in the care and management of the estate
  6. The success or failure of the trustee in the care and management of the estate
  7. Whether or not some extraordinary service has been rendered in the care and management of the estate
* The T may be liable for trust debts as legal owner, but in equity the B is ultimately liable– unless there is good reason for the T to be responsible for them.
* Thus Ts are entitled to an indemnity for all debts they incur in executing the trust i.e. they have a claim against the funds of the trust to meet any contractual obligations they incur in administering the trust terms. (If there are no funds the trustees themselves are then personally liable!) or against the Bs personally.

## Re Reid v Yorkshire and Canadian Trust

**Facts:** T administering trust in the UK & funds were in the UK. B in Canada. In paying UK taxes, the T actually paid more than the value of the assets. B argued T should not have paid those taxes for a good reason - because a foreign state is precluded from suing Canada for taxes due under the law of the foreign state (*USA v Harden*). B argued that the indemnity of the T should be confined to the value of the assets in the UK.

**Held:** not a good reason – the rule under *USA v Harden* (SCC) applies only to an actual attempt by a foreign state to extend its sovereign authority in BC. But court found for B because T was personally liable under UK law for the taxes – thus T could not seek indemnification from B.

## Stringman v Dubois – doesn’t follow Re Reid. Rule in USA v Harden doesn’t require an actual attempt

**Facts:** The testatrix, domiciled in Phoenix, appointed the Valley Bank of Oregon as T and bequeathed her Cdn farm (the rest of her assets were in the USA) to her niece, a U.S. resident. B called for transfer of legal title. T refused, arguing the farm should be sold to pay debts including $143,000 owed to the US government as death duties.

**Held:** for the B. Even an indirect attempt by a government to collect taxes offends the sovereign authority rule. Although disagreeing with the policy behind the rule in *Harden,* the court applied it asserting that the government need not be a party to the lawsuit for the rule to apply. In any event, the court was motivated by the fact that there were considerable estate assets in the US and also by the fact that the farm appeared to be an *in specie* legacy for B.

* How can T discretion be controlled? – Bs + court can oversee administration of the trust, but very few powers in controlling T discretion.

## Re Brockbank – Appointment of Ts is within T’s discretion – B’s can’t interfere with it.

**Facts:** Testator left life estate to wife & remainder to children. There were 2 Ts with power to appoint a professional trustee. One of the Ts wished to retire and the Bs insisted his spot should be replaced by a bank. The Ts argued that they had full powers over T retirement, removal and appointment. Bs sought an order from the court compelling the non retiring trustee to comply with their direction.

**Held:** for the Ts. This was a matter within their discretion & courts/Bs can’t interfere with it. Bs could either accept Ts’ decision or terminate under *Sauders v Vautier*.

## Butt v Kelsen – Ts holding legal title of shares become directors for a co. B’s cannot compel more info than that which regular shareholders get.

**Facts:** the estate consisted of shares in a private company and through their control of those shares, the Ts appointed themselves as sole directors. B was unhappy with the management of the co and demanded to see all company docs that the Ts had, arguing that the Ts were only directors because of the trust. The Ts said that as directors they had duties to the company and minority shareholders - the Bs were entitled only to those docs available to all shareholders.

**Held:** for the Ts. The Ts do not hold their director powers for the Bs. To find otherwise would allow Bs to have inside info. Bs have as many rights as shareholders – not more. However, Bs can compel Ts to vote shares as directed or change the co’s articles.

* Ts can apply to court in chambers for an opinion, advice or directions on a question of management and administration of the trust property (section 86 of the Trustee Act).
  + If the T is acting under court authority, the T is absolved of responsibility (s. 87) unless the T is guilty of fraud, willful concealment or misrepresentation by obtaining such opinion, advice or direction.
* The courts have set limits on trustees applying to court under s. 86.

## Re Wright - can’t apply to court to have the court exercise the discretion given to the Ts

**Facts:** Ts needed to decide whether to accept an offer to purchase shares of the trust fund (worth millions). 3 Ts rejected offer because the price was too low according to experts. Other T applied to court for advice & directions and an order for sale.

**Held:** Ts given a discretion should exercise it as they see fit and without interference. Shouldn’t shift this discretion to the court when there is a simple disagreement on price. (CAN apply to the court when, for example, there is a disagreement on the fundamental scope of powers in the trust – eg. to convert or retain) Court will only intervene when there is a real & absolute deadlock (for example, in a trust with powers to sell and retain where 3 want to sell, 3 retain)

**Notes:** Only in the case of bad faith or refusal to discharge duties should a court step in to control the exercise of the discretion given to the T (see leading authority - *Tempest v Camoys)*

## Re Lohn – abuse of s. 88 to unload the responsibilities of decision making onto the court.

**Facts:**Ts had wide discretionary powers – wanted to rearrange trust to avoid tax for the 40mill estate. Ts applied to court for approval of a tax adviser’s advice on the proposed plan under the Trust & Settlement Variation Act, but the matter was within the discretion of the Bs.

**Held:** Court has no jurisdiction under s.88 to substitute the T’s discretion with its own. It is not expedient for a court to interfere & it is an abuse of the statutory power in s. 88 to “unload the responsibility as to these details on the court…particularly when…the task is calling for careful enquiry and the exercise of tact and discretion” (cited with approval from *Re Boukydis [1927])* In effect Ts wanted court ratification of the tax advice that the Ts clearly approved of.

## Re Billes – example of serious deadlock 🡪 court interference

**Facts:** Testator left estate for wife, children, & some charities. Ts were National Trust and widow and son. 95% of estate was in Cdn tire stock. Charities were dissatisfied with the income stream of 2.2%. The Ts were given an absolute power to convert and to retain the shares. National Trust wanted to sell the shares but was opposed by the son and widow.

**Held:** this is a “serious deadlock” **–** selling the shares would avoid an unwarranted risk and enable distribution of a substantially greater income to the income beneficiaries and bring stability to the capital value. Also, it would remove the conflict of interest of A.D. Billes, son and co-executor of the estate who was also a franchisee and director of Cdn tire. Court ordered sale of the shares at “an advantageous and beneficial” time.

## Re Blow – when will a court interfere with uncontrolled discretion

**Facts:** testator created 2 trusts – 1 for his daughter for life, remainder to children, the other to son & his children. Ts given uncontrolled discretion to encroach on capital for the son and daughter. A side memorandum written by the testator as a guide arguably qualified the manner of exercise. T refused to advance capital to the daughter on the basis of the memo.

**Held:** Ts have erroneously relied on the memo, but because they have uncontrolled discretion, court won’t intervene. If Ts have uncontrolled discretion, court can interfere where there is bad faith, improper purpose, failure to consider, absence of reasons available to the court, taking irrelevant considerations into account, unreasonable decisions and lack of prudence. The court will also intervene in cases of deadlock to the extent administration of the trust becomes difficult and where the Ts fail to address the discretion conferred on them. It will not intervene unless ”failure to do so would be manifestly prejudicial to the Bs”.

## Schipper v. Guaranty Trust Co of Canada - Court will intervene if T uses discretion for a purpose not in the trust

**Facts:** testator gave Guaranty Trust an “uncontrolled discretion” to administer and manage the trust for the general welfare, benefit, comfort and enjoyment of his wife. She had wanted to encroach into capital. T co refused its consent, the other two Ts approved.

**Held:** Court would generally refuse to interfere with the “uncontrolled” discretion of a *bone fide* T, but it will “interfere where the trustee is attempting to exercise its discretion to achieve a purpose not intended under the terms of the trust.” Here the T had failed to give effect to the testator’s first and foremost intention to provide for his wife. Instead it chose to preserve capital for future contingent Bs and failed to take into account the unanimous consent of all living residuary Bs.

## Re Fleming – court will intervene where T fails to be even handed (ie impartial)

**Facts:** testator gave life estate to wife & appointed her an executor. She had renounced any right to encroachments on capital. The Ts, as directors of a corporate, trust asset, faced with a surplus, could distribute that surplus either as income (overwhelmingly favouring the income beneficiary) or as capital in the form of redeemable preference shares.

**Held:** court affirmed the principle of not relieving Ts from the duty to exercise their discretion honestly and intelligently. However, it did interfere here. Given:

* + the **adverse tax consequences** of treating the surplus as income, and
  + 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,

the court ordered the company to distribute the surplus as capital.

# Charitable Trusts

* Special privileges of charitable trusts:
  1. Taxation
  2. Exempt from the rule against perpetuities
  3. They do not fail for lack of certainty of objects
  4. Court will supply a scheme if S doesn’t give sufficient directions
  5. Courts may apply *cy-pres*
* Charitable trusts = purpose trusts. Non-charitable purpose trusts are treated in the same way as charitable trusts (no tax exemption)
* AG is the enforcer of charitable trusts
* Can have a charitable entity/organization which isn’t a charitable trust

|  |  |
| --- | --- |
| Charity | Charitable trust |
| * Defined at s. 248.1 *Income Tax Act* * Registered with govt * Not necessarily a trust * Exempt from income tax, corporate tax, capital gains tax * Ownership passes to charity outright | * Set up by individuals to accomplish public purposes that warrant certain advantages * Purpose trust – paramount obligation to fulfill task of trust creator * Legal and beneficial ownership passes to trustee for charitable benefit * Indirect beneficiary is public or segment thereof |

* Looking at a trust:
  1. Is the purpose charitable?
  2. "Can it be said that the purposes of the appellant fall within 'the spirit and intendment' of the preamble to the Statute of Elizabeth and, therefore, within the four heads of Lord Macnaghten's definition of the word 'charity'?
  3. Are the activities of the organization defined by its purpose?
  4. Are the resources devoted to these activities?
  5. Are the possible beneficiaries, a “section of the community”?
  6. Do the possible beneficiaries have a relationship/nexus to a particular individual/private entity?
  7. Is it beneficial to the community (4th category)?
  8. Is it altruist? Voluntary?

**General Principles**

* Lord Mcnaghten from ***Pemsel*** case [1891]
  + "Four principal divisions; trusts for the relief of **poverty**, advancement of **education**, advancement of **religion**, for **other purposes for the benefit of the community**, not falling under any of the preceding heads"
  + “Other purposes” requirements:
    - public in nature with a benefit to society
    - exclusively charitable purpose
    - without political purpose
* “Other purposes” accepted:
  + - 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
* Preamble from Statute of Elizabeth (1601)
  + 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 maintenance 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.'
* Most regulations related to charitable trusts are federal

## Commissioners of Income Tax vs. Pemsel, 1891 – what is a charitable purpose

**Facts:** Pemsel, as treasurer of the Church of the United Brethren, applied for tax rebate. Rejected by CIT.

**Held:** for Pemsel. Discussed Scottish & British meanings of charitable. Examples of charitable purposes above.

## Vancouver Regional Freenet Association v MNR (1996) – can use analogies from Statute of Elizabeth

**Facts:** Assn wanted to be a charitable entity – sought to provide internet hotspots. MNR said – you can’t control what ppl will do with the internet you provide.

**Held:** internet is like a highway, so yes, it is charitable. Used an analogy from the Statute of Elizabeth.

**Poverty**

* Broadly interpreted – Bs not necessarily economically poor. Bequests in aid of suffering or distress such as trusts in 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.

**Religion**

* 3 considerations:
  + Is it a recognized religion?
  + Does the trust promote/advance such religion?
  + Elements of religion: spirituality, worship, faith

## Re South Place Ethical Society, 1980 1 WLR 1565 Ch.D. – what makes a recognized religion

“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 our its case to be charitable on the ground of the advancement of religion… “

In this case, the court did not find ANY element of religion but upheld its charitable purpose under advancement of education.

## Thornton v Howe (1862) – valid charitable purpose in supporting writings of an odd religious person.

**Facts:** Testatrix left residue to print/publish/propagate writings of X, a Christian(?) who thought she could speak dead people. Gift charitable and valid?

**Held:** Valid. There is no value/benefit here.. but ct cannot declare bequest void just b/c opinions are foolish or unfounded. Testatrix believed in this.. so falls under advancement of religion. Generally, ct will not assist in execution of bequest if sect has doctrines adverse to foundations of religion and morality (i.e. no evil sects).

## Gilmore v Coats (1949) – supporting friars who pray for society not a valid purpose. Benefit too remote

**Facts:** Trust to benefit X (group of friars). X was part of the Catholic Church. X never left the church. Prayed & worshipped.

**Held:** Not a valid charitable purpose. How can it be a public purpose if they never leave the church? The benefit is too remote. Belief of S that it was for benefit of public is not determinative of issue.

**Education**

* Dissemination of knowledge, training, encouragement, publication, training of the mind, improvement of a useful branch of human knowledge, etc.
  + Arts, Chess, and Gardens for contemplation have been considered beneficial to the community under this heading.
* Sports – Trusts for the support of sports in the context of education will be regarded as charitable (*IRC vs. McMullen*, 1981)
* 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* 1954)
* Content is important here – cases turn on it. **What is being taught? Is there educational value?**

## Re Pinion (1965) – giving bad art ≠ charitable purpose

**Facts:** Testator left artwork + studio to the National Trust to become a museum.

**Held:** Not a valid charitable trust. Next of kin takes b/c art was too crappy to advance education or benefit public. Expert evidence determined gift had no educational value.

## Vancouver Society of Immigrant & Visible Minority Women v MNR – 1st 3 heads focus on the B, “other” head focuses on the benefit to the community. Also need to consider the activities of the trust.

**Facts:** Purpose was to support female visible minorities in Canada. It organized activities such as: workshops, and maintained a directory of women seeking a job. It was denied the registration as a charitablesociety.

**Held:** Iacobucci J. reviewed some of the relevant case law and concluded on the basis of it that there was no support for the notion that immigrant aid per se was a charitable object under the fourth head in Pemsel.

Difference btwn the first 3 heads of charitable purposes & the last “other” head is one of focus. **First 3 focus on the recipient**, whereas the **“other” focuses on the benefit to the community**.

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.

**The Beneficiary**

* 3 Requirements:

1. Must be identifiable as a definite community or section of the community;
2. What identifies the community cannot depend on any personal relationship to a particular individual or individuals.
3. Population must be an integrated part of the society.

* Individual potential beneficiaries cannot sue to enforce a charitable trust.

## Oppenheim v Tobacco Securities Trust (1951) – Bs can’t be chosen based on a personal relationship to someone. Company trust to benefit employee’s children not charitable.

**Facts:** Trust for education for the children of employees & ex-employees. (>110,000 such Bs)

**Held:** Not a charitable trust. “the characteristic that distinguishes them [Bs] from other members of the public must be essentially **impersonal** and must not depend on their relationship to a particular individual”. # of Bs doesn’t matter. Have to look at whether class of persons is a "section of community".

## Dingle v Turner (1972) – contrast with Oppenheim. Less danger when company trust gives money to poor employees than when company trust is for education.

**Facts:** Trust to provide pensions for poor employees of company

**Held:** Valid charitable trust. Benefit going to a community of poor people in the co. Distinguished from Oppenheim - while tps shouldn’t have to contribute to a benefit for a company by making their conditions of employment more attractive, in the field of poverty, the danger is not so great as in the field of education…the existence of the income, which is free of tax, does not constitute a very attractive “fringe benefit” for these poor employees.

**Notes:** when dealing with a company, will still be hard to argue charitable trust. Dingle may just be wrongly decided.

**Political Activities**

* An organization formed to pursue political purposes cannot be charitable. (*Monahan*, 2000)
* Consider 149.1 (6.1) (6.2) of the ITA
* Advocating a change in the laws is usually considered a political purpose.

## National Anti-Vivisection Society v Inland Revenue Commissioners - lobbying for law reform = political purpose → fail on charitable purpose.

**Facts:** Society wanted to educate ppl on using animals for experiments & advocate change in laws.

**Held:** “Any assumed public benefit in the direction of the advancement of morals and education is far outweighed by the detriment to medical science and research and consequently to the public health which would result if the society succeeded in achieving its object, and that, on balance, the object of the society, so far from being for the public benefit, is gravely injurious thereto… "

“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…”

**Notes:** Demonstrates how judge’s view on what is good for society will always be imported into decision. Also, trend in looking to activities of the trust.

## Everywoman’s health centre society vs. MNR, [1992] FCA – illegal activities ≠ charitable. Public opinion not relevant.

**Facts:** clinic mainly performed abortions. Wanted to become a hospital & educate on contraceptives etc.

**Held:** Charitable purpose. Used an analogy to the Statute of Elizabeth preamble: “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…”

**Notes:** Well established that if a trust’s activities are illegal or against public policy, then it is not a charitable trust.

“…The court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift…” – ie. purpose of advocating of law reform will not be charitable.

Charity and public opinion do not always go hand in hand; some forms of charity will often precede public opinion, while others will often offend it. Courts are not well equipped to assess public consensus which is a fragile and volatile concept. – ie. **public opinion not relevant**.

## Native Communications Society of BC v MNR [1986] – Court considered whether the purpose furthered the objectives of the Charter.

**Facts:** Society aimed to train and develop radio/tv programs for first nations people.

**Held:** Valid charitable purpose. Court considered that the purpose was conducive to Charter – s. 35.

**Cy-près doctrine**

* CL ct of equity; means "as near as possible" or "as near as may be"
* Where original objective of settlor or testator became impossible, impracticable, or illegal to perform, doctrine allows ct to amend terms of charitable trust as closely to possible to the original intention of the testator or settlor, to prevent the trust from failing, as long as there is a general charitable intention
* *Law and Equity Act* s. 44 @ p. 219

## The Jewish Home for the Aged of British Columbia v. Toronto General Trusts Corporation, [1961] SCC – courts may apply cy-pres doctrine to trusts. Rule against perpetuities doesn’t apply to charitable trusts

**Facts:** S died in 1936. He directed the accumulation out of residuary income of 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. The appellant society, incorporated in 1950, claimed the third fund. Family argued the organization did not fit within requirements & 21 yrs had passed.

**Held:** 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. (why immediate? Policy – we want the $ to benefit ppl asap.)

Ts can apply to court to apply *cy-pres* if the assignment by S is not possible.

The court decided that the appellant was entitled to the fund and 1/3 of the residue as it existed on July 5, 1957 and that all surplus income after that date must be applied cy-près and a scheme settled by the Court.

# Constructive Trusts

* Benefits of the CT:
  + Enables *in rem* relief (ie recovery of the property itself)
  + Priority above creditors of the T
  + Tracing allows for recovery from 3rd parties who are not BFPVs
  + Any increase in value to the property goes to the B
  + Damages are much larger than in tort/K law, so even if B can’t get the property back, a CT is still desirable
* CTs are trusts imposed by the courts (aka occur by operation of law) based on good conscience (*Beatty v. Guggenheim Exploration (1919))*
* From 1600s on, courts have created categories – ie a list – of specific situations in which a CT will be imposed (ie “institutional” CTs)
  + the wrongs of faithless directors; the delinquent agent in principal and agency relationships; overreaching partners; bribes; undue influence; breach of confidence; intermeddlers in trusts (*Mara v Brown*: someone who doesn’t have trust authority but meddles in the trust); unjust enrichment through overpayment etc. and, more recently, among separating, cohabiting persons etc
* List of situations is not exhaustive (*Pettkus v Becker*), but it was not easily changed. Development happened on an ad hoc basis.
* To find an institutional (aka “substantive”) CT, law sets out some substantive requirements that must be met for the court to impose the CT
  + Once the requirements are met, the CT arises automatically (ie. the CT does not depend on the discretion of the court)
* Authors have attempted to group the way in which CTs arise into categories. Eg:
  1. Breach of a trust or of an existing fiduciary duty (e.g. breach of conflict rules by trustees or faithless directors making profits at the expense of the company etc). The CT captures the unauthorized gain for the B
  2. Involvement in property inconsistent with the trust: examples include persons acting in the trust without authority (“intermeddlers” or trustees de son tort; knowingly receiving trust property or actively participating in a breach of trust
  3. CTs without a preexisting fiduciary relationship e.g. non-spousal domestic relationships as in *Pettkus and Becker*
  + In these groupings, #1 & 2 are categories of institutional CTs. #3 is a “remedial” CT and operates prospectively
* The US courts view the CT instrumentally: as a facilitative device to make a person with legal title hold it beneficially for the wronged party with whom he has a juristic relationship
* Cdn courts are trending towards a principled approach to rationalize the basis for the different categories, and to enable an opening of the list (but with predictability)
  + But courts are not leaving the institutional CT behind – the categories still apply. The new approach just allows for recognition of more CTs
* Overall intention of the new approach:
  + set out the general conditionsunder which a CT should apply on property held by a person outside an express or resulting trust
  + Not confine the CT to the institutional CTs
  + guide with some degree of certainty and predictability\* the circumstances under which a court would deploy the CT as remedy given the complex and extensive variety of human life and its continuously evolving social and economic activities in which injustice might occur and call for remediation
* Since a fiduciary relationship is the basis for a trust, recent Cdn courts have set themselves the task of defining by when a fiduciary relationship exists beyond express and implied trusts and the established list of categories in the institutional CT. To do this, they have looked to the general purpose of a CT – **unjust enrichment** (*Pettkus v Becker*)
* *Guerin v The Queen* adds that a fiduciary relationship exists when a party is at the mercy of the other party.
* From the perspective of the principles of unjust enrichment & dependency, the CT is used remedially – it is used to provide a prospective remedy to the victim
* Effect of the principled approach: something that would have met the requirements of the institutional CT (breach of pre-existing fiduciary duty) may also meet the requirements of unjust enrichment (set out in *Pettkus v Becker*)
* The line that splits “just” & “unjust” enrichment is the fiduciary relationship, which imposes special responsibilities

|  |  |  |
| --- | --- | --- |
| Comparison | Institutional/substantive Const. Trust | Remedial Const. Trust |
| How they arise | Automatically, once requirements are met | Court must ask is there a fiduciary relationship here? |
| Requirements | Depends |  |
| Benefits | Predictability | Flexibility allows courts to do equity |

## Pettkus v Becker – basis for CT is unjust enrichment. Sets out what constitutes UE

**Facts:** Pettkus & Becker cohabited. Becker used her funds to support them while Pettkus saved & bought assets. All property in Pettkus’ name. Both worked to create thriving honey business. They split. Couldn’t establish a CIRT & couldn’t say there was a fiduciary relationship.

**Held:** P held property on CT for B. Court can use CT to prevent unjust enrichment. UE occurs when:

1. There is an enrichment
2. A corresponding deprivation
3. An absence of any juristic reason for the enrichment

## Guerin v The Queen – hallmark of a fiduciary relationship is dependency. Category of CTs not closed

**Facts:** Musqueam surrendered land to Crown in expectation of a lease to Shaughnessy Golf Club for reasonable rent. Crown rented out for much lower than expected.

**Held:** Crown was fiduciary for Musqueam, but can’t apply CT because the asset is with a BFPV now.

**Notes:** The category of CTs is not closed. It is the nature of the relationship, not the labels of the parties, that is important. Majority agreed that the hallmark of a fiduciary relationship is that one party is at the mercy of the other party’s discretion (aka dependency).

## LAC Minerals v Corona - vulnerability is hallmark of fiduciary relationship

**Facts:** Corona sought to enter into a joint venture in mining with LAC because LAC had access to more $. Corona gave LAC some confidential info on a piece of land – info showed potential for profit. LAC & Corona did not enter into a confidentiality agreement, but the industry standard was that this info was not to be shared or used to the provider’s disadvantage. LAC then went behind C and bought the land.

**Held:** Corona gets the remedy of a CT. All agree that LAC breached a duty of confidence.

**Sopinka + MacIntyre:** There has been an enrichment, but is there a fiduciary relationship? Central theme of a fiduciary relationship is vulnerability. Both parties were sophisticated, rich co’s and used lawyers. Courts don’t want to start refereeing complex K relationships. Need true vulnerability (being at the mercy of another carries a strict meaning) to find a fiduciary relationship. However, there is a breach of confidence in tort. Awarded tort damages.

**La Forest + Wilson:** 3 broad categories of fiduciary relationships:

1. Presumed in certain relationships (eg. parent-child; solicitor-client)
2. One that arises out of specific circumstances of a relationship. Hallmarks are: ascendancy, influence, trust, confidence, or dependence (*Frame*). (note dependence, aka **vulnerability, is not required**)
3. As instrumental or facilitative – ie. used as a means to get to a CT – reads equity backwards. CT should be avoided here.

There was a breach of confidence and this itself gave rise to a fiduciary duty because the form of negotiations gave rise to a relationship of trust & confidence (type #2). Fiduciary relationship came into existence when LAC got the confidential info (at that point, industry stds created confidentiality, and C was vulnerable to LAC). There was a fiduciary relationship here & LAC breached it.

Also, CT as a remedy is available for breach of confidence – ensures that wrongdoer doesn’t benefit from his wrongdoing.

CT is equitable when the property holder has a right to benefit from increases in value, rather than allowing the wrongdoer to keep them.

**Lamer:** Agrees with Sopinka’s idea of a fiduciary relationship, and there was no fiduciary duty here. ButCorona should get a CT.

## Hodgkinson v Simms – vulnerability not determinative to fiduciary relationship.

**Facts:** S, an investment adviser, gave advice to H to buy MURBs (Multiple Urban Residential Buildings). S did not disclose that he had a personal financial interest in those MURBs because of a relationship with the RE developers. H paid fair market value for the MURBs. Then, RE crash & H loses a lot of money. H sues S for breach of fiduciary duty & seeks damages, including losses from crash. Note he doesn’t want the property – he wants a CT so he can get more damages.

**Held:** Majority this time says - Vulnerability is not the hallmark of a fiduciary relationship, but an important indicator. Nature of the relationship determines whether it is fiduciary (doesn’t matter that there was also a K relationship). Compensation was calculated on a restitutionary basis – put H back in the position he would have been in had it not been for the breach.

**Notes:** difference btwn duty of care & fiduciary relationship? Duty of loyalty.

In fiduciary law, court focuses on nature of the breach rather than nature of the loss

Should courts be stepping into sophisticated, commercial context?

## M v M – parent-child relationship is a traditional fiduciary relationship

**Facts:** Pf sued her father for damages arising from incest –both in tort and the law of fiduciaries.

**Held:** “Canadian cases have recognized the parent-child relationship as a traditional head of fiduciary obligation, albeit *obite*r”. Based on victim’s right not to have personal injuries beyond reasonable parental discipline. Court found breach of fiduciary duty as an independent head of liability available in incest cases. Damages were levied by jury on instructions appropriate to tort of battery and assault.

McLachlin J held that assessment under law of fiduciary not necessarily the same because fiduciary law can impose a measure which will deter future breaches – it is based on breach of **trust**.

**Note:** Case makes it clear (see*Frame v Frame)* that fiduciary law is not confined to matters that involve only economic interests

**Conclusions of Constructive Trusts & Fiduciaries:**

* Canadian courts have moved away from the development of the miscellany of situations embraced as the “substantive” or “institutional” CT of English law
  + - Canadian courts have instead moved to articulate the principles and rules that create legally significant fiduciary relationships that embrace the substantive CT of English and Australian law and in which, unarguably, even the law of trusts becomes a mere species.
    - Canadian courts have adopted American usage of the term “CT” to describe the ***in rem*** remedy that a breach of trust can in appropriate circumstances be used instead of the remedy of compensation.
    - Have the courts found a unitary theme that binds CT? Probably - through the better articulation of fiduciaries.
    - The concept of fiduciaries is more informative than the Cardozo formulation. However it overreaches traditionally viewed CT because fiduciary law covers express and resulting trusts too. Perhaps that’s okay?
    - There is disagreement among the judges of the SCC on the scope of the conditions needed to create a fiduciary duty between the defendant and the plaintiff. Is it the restricted circumstances set out by Sopinka J or the more expansive conditions of La Forest?
    - These developments have now created “vast differences” (***Breen v Williams*** 1996 186 CLR 71) in approaches taken by the various common-law jurisdictions .

# Trust Remedies

* The T’s liability for breach of trust is based on compensation, that is it is based on full restitution.
* Damages for breach of equity/trusts recognizes that the trust asset may not be available or even difficult to determine (as occurred in ***Guerin)***
* This means, in general terms, that the trust must be compensated ***fully*** for any loss caused by the breach of trust.
* **Consequence: The extent of that liability is generally not restricted by CL principles of remoteness of damage (foreseeability) in tort or mitigation in contract. Causation considerations are also very generously and freely applied.**
* Once a breach has been committed the Ts are liable to put the trust estate in the same position it would have been but for the breach.
* Remedies:
  + Property held on CT for B
  + Damages where property cannot be returned
  + Accounting for profits

## Guerin v The Queen SCC – if awarding damages instead of property in CT, apply “lost opportunity” assessed as at the date of trial

**Facts:** Musqueam surrendered land to the federal crown in expectation of a lease. Crown got the lease but rent was way below market value.

**Held:** No express trust, but all elements of a fiduciary relationship existed. However, to find a constructive trust remedy for the Musqueam, need to identify the property. Now that the legal title was held by Shaughnessy Gold Club, a BFPV, band would not be able to get property back. So, assess for damages. Court applied “**lost opportunity basis**” – assess the lost opportunity **as at the date of trial**. Reason is that the CT tries to give a more complete restitution. SCC found the lost opportunity to be residential development of the land. (no need for band to prove that they would have developed it – a presumption is made in trust law – not the same in K law)

## Canson Enterprises v Boughton SCC – T only liable for damages that flow from the breach.

**Facts:** Solicitor failed to disclose conflict of interest (another client’s secret profit). After the plaintiff bought the building, it was discovered that faulty engineering caused issues with the building. Value decreased. Plaintiff argued that, but for the T’s failure to disclose, he would not have purchased the building and thus would not have suffered such losses from the depreciation. Wanted T liable for ALL.

**Held:** Generally, causation is not an issue in restitution. However, still need common sense causation – ie limits the damages to those that flow from the breach. Also, damages will not extend to losses flowing from B’s unreasonable acts.

## Re Deare – set off will not be used in assessing damages

**Facts:** Unauthorized stock in trust kept declining in value until it was gone. T’s were in breach – but they argued “set-off” – other stocks in the trust had risen. The losses should be set off against the profits.

**Held:** Can’t set off losses against profits.

**Note:** now, portfolio balance is generally seen as prudent.

## Warman International Ltd v Dwyer – accounting for profit

**Facts:** W distributed product for A. A wanted to extend distribution to Aus, but W declined. D, as a GM of W, said he would do it. D left W and took some employees with him to start the joint venture with A.

Held: for W. D was in a fiduciary relationship with W. Remedy – accounting for profits. The court noted that the **remedy is a personal one** and applies whether or not the claimant has suffered injury or loss – similar to the B in *Boardman v Phipps*. Up to the defendant to show that an award of the entire profits would be inequitable (ie that the def added his own capital of skills or knowledge)

**Notes:** Deterrence & preventing unjust enrichment are at the heart of the remedy.

It is not a defence to assert that the plaintiff was unwilling, unlikely or unable to have made the profits to which the account relates.

Assessment of profits is often very difficult and a “reasonable approximation” is enough.

If the loss suffered by the claimant exceeds the profits made by the fiduciary the claimant/plaintiff must elect which remedy: accounting or compensation.

Defences to an application for an accounting are available and they are equitable in scope: estoppel, laches, acquiescence and delay.

## Scott v Scott – profit from trust $ + T’s own money → B entitled to profits in proportion to trust contribution

**Facts:** Wife died, leaving house to husband (life tenant) and children (remainder Bs). Husband sold house, using majority ($1000) of the sale price + his own $700 to buy another house. Husband died, left house (now increased in value) to 2nd wife. Children claimed equitable title of the house.

**Held:** 2nd wife held on CT for the children. Children retained proportion – 1000/1700 – plus the proportional increase in value. Ie. Where a profit is made with a combination of trust money and the T’s personal money the B will be entitled to profits at least in proportion to the trust contribution.

## Peter v Beblow SCC – Unjust enrichment may lead to remedy of CT if RE is the form of enrichment

**Facts:** CL spouses – she cared for family and house – he worked. Both contributed to household expenses (her to a lesser extent). They split – clear title to the house in his name (mtg paid off during their time together), she sought CT on the property or monetary damages as compensation for her labour on the basis of unjust enrichment.

**Held:**

Unjust enrichment → remedy of *quantum meruit* or *quantum valebat* i.e. payment for the services*.*

Unjust enrichment requires:

* Benefit
* Corresponding deprivation
* Lack of a juristic reason

If RE is the form of unjust enrichment, could → CT… IF:

* Monetary damages are inadequate
* There is a link between the contribution that founds the action and the property (need the contribution to be sufficiently substantial & direct)
* When considering the “lack of a juristic reason” portion of UE, a review of the legitimate expectations of the parties (ie a look into their relationship) does not vitiate the claim.

The extent of the claimant’s interest in the CT property should be based not on the value received by the defendant (the appropriate measure where a monetary award or ***quantum meruit*** is given), but on the “value survived” i.e. that portion of the value of the property claimed that is attributable to the claimant’s services. Here the assets are apportioned on the basis of the contributions made by each.

**Third Parties**

* Third parties or “strangers” can become liable as Fs or “constructive” tees where they intermeddle in a trust
* Persons intermeddle in a trust where they don the cloak of a tee and deal with trust property.
* There are three categories:
  1. Trustee ***de son tort*** (“of his own wrong”): this is a person who though not appointed a tee intermeddles in trust matters. S(he) becomes treated as a tee for purposes of breach of trust
  2. Knowingly receiving or dealing with trust property for his/her own use
  3. Knowingly assisting in a fraudulent or dishonest transaction on the part of the tee or F
* These cases bind the third party because of **unconscionability**. They may be held liable even though they derived no benefit.
* The requirements for liability are:
  + The existence of a F duty (e.g. tee)
  + A breach of that duty by the F and
  + A dishonest and knowing assistance by the third party in that design

## Nelson v. Larholt – “knowingly assisting in a fraudulent tx” does not require actual notice. Constructive notice will also create liability.

**Facts:** 3rd party = bookie. The executor of an estate drew 8 cheques from the estate and without authority paid them to the bookie in breach of trust. Each cheque was signed by the T as executor.

The money could not be traced and so the B sued the bookie.

**Held:** for the B. Although the bookie had given value for the cheques he had received, he also had had notice that they belonged to the estate. That notice was gauged not by actual notice, but notice as determined by a reasonable person. He was taken to have known what any reasonable person would know in the circumstances. (Cheques were all signed “B.A. Potts, executor of Wm Burns decd”).

## Air Canada v. M&L Travel – “knowing assistance” in breach - actual knowledge, recklessness or wilful blindness is enough.

**Facts:** M&L was a travel agency that sold tickets for AC on trust. It was a requirement of the K that M&L keep the monies received on trust in a separate bank account. It didn’t. Then M&L’s bank withdrew $15,000 from the company’s bank account under a demand note securing a line of credit. AC sued Martin and Valliant (share owners) personally for $25,000 owed to it for ticket sales as parties to the trust.

**Held:** CA held M&L liable, and also found Martin (the managing director) and Valiant (a director intermittently involved in daily affairs) liable to AC.

SCC dismissed M & V’s appeal. Their actions were characterized as as “knowing assistance” in the T’s (i.e. M&L) breach. The degree of knowledge required for a stranger to be liable is “actual knowledge, recklessness or wilful blindness”. However, carelessness or “a want of probity” is insufficient.

**Note:** Where the T is a corporation the problem of ascribing dishonesty is particularly problematic because the corporation acts through human agents who are also the strangers to the trust.

## Royal Brunei Airlines v. Tan

**Facts:** similar to above – *Air Canada v M&L.* BLT the corporate T to hold funds.

**Held:** The PC found Tan liable. He had assisted in the breach of trust by “causing or permitting” T to undertake transaction in full knowledge that the monies were to be held in trust. This was dishonest conduct.

Lord Nicholls in this case said that although honesty has a strong subjective element, the standard of liability was objective. He added: “acting in reckless disregard of others’ rights …can be a tell-tale sign of dishonesty.

BLT was dishonest since Tan’s state of mind as its director was to be imputed to the company

**Note:** This case shows shift from actual, subjective knowledge test to an objective one. Cf. idea of lifting corporate veil, finding another source to recover from

**Tracing**

* Tracing is an *in rem* or proprietary remedy that is available
  + where a personal action is insufficient
  + in common law (as of right, to follow your property wherever it may be) and recover under the *nemo dat quod non habet* principle
  + In equity at the discretion of the court
* Here we shall consider tracing in equity recalling that the ability to follow the property and recover it stops with equity’s sweetheart: the *bona fide* purchaser for value without notice
* So we are looking at tracing from the point of volunteers or persons who have given value, but who in bad faith have taken from the F/tee or are deemed to have had notice.
* We have seen that if a volunteer innocently (usually a charity) receives trust funds his/her interest is defeasible at the hands of the B.
* In ***Re Diplock’s Estate (1948)*** it was held that the volunteer will hold the property on CT for the B.
* The equitable rules of tracing allow the B to pursue misused property – even through a **series** of dealings provided certain conditions are met.
* It is a valuable remedy for the B can trace to the property and so recover it from an insolvent, faithless F.
* As we have seen in another context (*Scott v. Scott*) the B can take possession or obtain a charge against the property for the amount of the claim - and enjoy increases in value
* 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*)
* Thus, when the beneficiary runs up against a bona fide purchaser for value, the beneficiary is able to back track (as it were) bouncing his/her 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.)
* For the remedy to be available in equity 3 conditions must be satisfied:
  + There must be a **breach** of trust or of a fiduciary relationship (questionable)
  + The property must be in a **traceable form**
  + **No inequitable results** must arise from the application of the right to trace
* Traceable form:
  + The usual circumstances of tracing occurs where the trust property is afundand the fiduciary/T is insolvent.
  + A T, in the normal course of administration, will exchange one item of trust for another and enhance the trust fund with dividends arising from that management. Tracing, of course, does not arise in respect of trust dealings in the course of regular administration.
  + A misbehaving trustee usually acts in one of 2 ways
    - Misapplies trust assets (e.g. by purchasing an unauthorized investment)
    - Misuses the proceeds of that misapplication as his/her own, personal asset (e.g. a car or a painting)
  + In both instances of breach the B will, in effect, ask the court for specific performance of the trust by the T – an order of court is sought to compel the T to carry out his/her duties properly
  + Obviously, where the trust fund remains intact and is kept in a separate account, the insolvency of the T has no adverse tracing impact on the B who can trace into the fund to the exclusion of the T’s creditors
    - Where a T withdraws trust moneys and uses it to buy an asset for himself, the B can trace (i.e. follow and claim) into that asset. The asset is regarded as security for the defalcated trust money used to purchase it – *Re Hallett’s Estate (1880)****.***
    - However, where the T withdraws and dissipates (e.g. takes a vacation) trust money without mingling that money with his/her own, the right to trace in priority to the T’s other creditors is lost.
  + Unlike the common-law approaches to property recovery, in equity the B’s claim does not fail if the trust funds have been mixed with other funds
  + **Where trust funds have been mixed with the T’s other funds** equity presumes that:
    - When the T withdraws money from that combined fund the T is presumed to have expended her/his money first. This means that the B is entitled to the remaining money in the account to the extent of her/his claim – *Re Hallett’s Estate*
    - If trust and personal monies have been invested by the T in the T’s personal assets - shares or land, say - the B will be able to claim a charge against that asset for the amount of her/his claim ***–*** *Re Oatway (1903) Ch* (including a proportionate share into the increase in value (*Scott v Scott, supra*))
  + Where funds from several different trust funds are combined the court must segregate according to the different claimant funds. Two approaches can be taken:
    - The rule in ***Clayton’s*** case (1816) follows the principle of ‘money first into the account is money first out’. In other words, 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.
    - The rateable approach which under the equitable principle of contribution gives the various tracers an interest in proportion to their contribution of the fund – i.e. a *pro rata* approach: See *Ontario Securities Commission v Greymac Credit Corp* (19860, 23 ETR 81 (ONT CA)(This approach is regarded as fairer and increasingly followed.
* No inequitable results:
  + There are limits on the right to trace
  + We know that the equitable remedy does not affect rights obtained by a BFPV without notice.
  + However, tracing will also not be available if the result will be unfair according to the maxim that any person who comes to equity must do equity.
  + Thus, an innocent volunteer who has improved the property or has expended monies on it believing the property to be his/hers, there can be no tracing charge otherwise you would be forcing a sale of what is surely now the volunteer’s property.
* Limits on Right to Trace – Summary:
  + The *bona fide* purchaser for value without notice is impervious to tracing
  + When trust property can no longer be identified – dissipated, say (e.g. trust fund has been spent on a holiday or consumed wine (as opposed to a car)) – the right to trace is extinguished
  + A tracing that would give rise to inequitable results (so-called “change of position” defence) is impermissible
  + The claimant must show that the property was held under a fiduciary relationship (including, of course, a trust), though the absolute character of this has been questioned (*supra).*

## Chase Manhatten v Israel British Bank London [1979] - suggests that a fiduciary relationship may not be a precondition for tracing.

**Facts:** In that case $2 million was paid into a banking account due to a clerical error. The bank had not rectified the error after the discovery of the error and before going bankrupt (4 weeks later).

**Held:** The bank (Israel British) and customer (Chase) were not in a fiduciary relationship, but the court allowed the owner to trace it on the basis that in good conscience it could not be retained.

Note: At CL, tracing would not be allowed once money had been lodged into a banking account. Again, surely a thief would be found to hold stolen money on a constructive trust for its rightful owner? (see, for example, *Brady v Stapleton (1952) 88 CLR 322)*

Consider also the unjust enrichment cases in breakdowns of common- law spousal relationships where a CT is imposed by the court.

So the need for a fiduciary relationship has been questioned.

**Remedies - Summary:**

* As we have previously observed 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
* The rule with the availability multiple remedies is that they can be combined provided
  + - They do not lead to double recovery
    - They are not mutually inconsistent