# Chapter 1: Introduction and History of Equitable Interests

**Definition of Trust (*Gillese and Milczynski*):** It is a split in legal and beneficial ownership to property.

Trustee: has legal title (*ius utendi*)

Beneficiary: has beneficial title (*ius fruendi*)

Dispose of/transfer/destroy (if consumable – not land) the property (*abutendi/disponendi*)

**Trusts give beneficiaries *In Rem* rights**. The beneficiary can recover the asset from the trustee or third party estate as “owner” of the equitable title. Beneficiary ranks above other creditors.*.* S/he can **claim the trust asset itself** – except where the thing is in the hands of “equity’s sweetheart” (**the *bona fide* purchaser for value without notice** (“BFPV”).

**The Maxims of Equity**

Some principles or maxims of equity include:

* Equity will not permit a wrong without a remedy:: substance not form
* Equity follows the law: compromise after ***Earl of Oxford*** case
* Those who seek equity must do equity: “clean hands” doctrine
* Equity assists the vigilant and not the tardy: laches not rewarded
* Equity is equality: proportionality among contributors
* Equity looks to the intent rather than the form: substance trumps form
* Equity looks on that which ought to be done as being done: substance matters
* Equity acts *in personam:* the person is what counts most, but note increasing proprietary aspect of equitable interests
* Equity will not assist a volunteer (someone who has not given value)
* Equity will not fail a trust for want of a trustee

## Nature of Trusts

Competing interests in Trust law, taking care of the interests of the Testator/Settlor, and the equitable rights of the Beneficiary (and how any restrictions by the testator may be attached to the trust)

### History of trusts

*a.* *The law of trusts is notoriously difficult to define because, like a child with sticky fingers, it leaves its imprint on a number of different areas ranging from wills and estates to divorce proceedings and pension schemes. What must be remembered, however, is that the law of trusts is primarily oriented toward the protection of beneficiaries, who are entitled to have the trust property administered in their best interest. –* Para 186 (Lebel J in Dissent in *Nolan v. Kerry (Canada) Inc*. 2009 SCC)

b. Although law and equity are dealt with in the same courts, many believe that they are not actually fused. This is clear in the law of trusts where there is a distinction between legal and equitable ownership.

c. The principles on which the law of trusts are based have been around for centuries.

d. They evolved from an English principle called "the use" and they developed because the English judicial system had separate courts for law and equity.

### Court of equity

a. Equity began in the office of the Chancellor, who was given the power to do justice in situations where justice was not being achieved in the common law courts.

b. This power resided in the King who then delegated this power to the Chancellor. This branch of law was eventually given the name equity.

c. People often turned to the Chancellor for help if they felt unable to obtain justice in the common law courts, usually because the wrongdoer was rich and powerful. The Chancellor examined both sides of the case and relief was granted as he saw fit.

d. Although the common law bench felt that the Chancellor interfered with their jurisdiction, equity did not in fact conflict with the common law. The *Supreme Court of* *Judicature Act* of 1873 fused the courts of equity and common law so that all courts could rule on both. Before this occurred the Court of Chancery was often involved with uses.

### The “use”

a. Led to the development of trust law.

b. The "use" is an obligation on a person to whom property has been conveyed.

c. Basically even though X held title to the property, the benefits of the property were not enjoyed by X but rather held "for the use of" Y.

d. In around the 1400s the Chancellor began to enforce uses.

e. The common law had no concepts to deal with the use, it only recognized the rights of the person who held the title to the property.

f. The Chancellor began to demand that the persons holding title in the land honour their obligations and take care of the property for the *cestui que* *use*.

### Statute of uses

a. In 1535 the *Statute of Uses* was enacted which transferred legal title of the property to the beneficiary.

b. The passing of this legislation led to the end of uses.

c. The King enacted this legislation as he did not enjoy that his rights were diminished through a use. As a result of this statute the rights of the beneficiary were enforceable in the courts of law.

### The trust

a. Lawyers found a way around the *Statute of Uses* by applying a second use.

b. Thus instead of conveying property to a person to hold for the use of another, property was transferred to the use of another to the use of another. The first use was not valid due to the *Statute of Uses* but the second use was not executed because it was a use upon a use.

c. The Chancellor began to enforce the second use, which became known as a trust.

# Chapter 2 & 3: The Express Trust

## How to Create an Express Trust

The express trust is created by a settlor/testator using one of three forms of dealing:

* ***Declaring***, orally or in writing,her/himself a trustee of the property and continuing to hold only the legal title to the property (beneficiary needs not be aware, ***Glynn v Commissioner***)
* ***Directing/appointing*** a trustee to hold the property on trust for a beneficiary (can be done in an trust deed or a will) Then one must consider issues of **vesting**.
* ***Agreeing*** under a **contract** with a beneficiary that a trustee be appointed to hold the trust property for the beneficiary

o Trust is constituted when the contract is binding.

o **Contractual covenants (with consideration)** are outside of the “volunteer” category and so title to property in the beneficiary becomes enforceable through specific performance of the contract. The defaulting promisor is declared a **constructive trustee** holding title for the promise.

i. Trust declaration + promise made under seal, or if potential trustee gives consideration for the promise = declarer will be forced to constitute the trust.

ii. May also use breach of contract to obtain damages if beneficiary gave valuable consideration for the trust promise.

iii. May include specific performance if damages are not sufficient.

## Revocation by Settlor of the Express Trust:

Settlor may **include** powers in the express trust for the amendment or revocation of the trust, if he doesn’t, only the beneficiary can terminate the trust (***Bill v Cureton***:woman created trust for her life, with a remainder to husband and children. She didn’t have husband or children. she tried to revoke trust but court said settlor cannot revoke)

## Requirements for a valid trust: (A) Vesting; and (B) The Three Certainties.

**A. Vesting of Interests**

* The vesting will depend the **nature of the types of property** (e.g. land, money, shares, car, boats, cattle, copyrights, reversionary interests etc) forming the subject matter of the proposed settlement and **the rule of transfer** that the law requires for such type of property.
* **Legal Requirements:** For vesting, the settlor must have done everything legally required to transfer that specific type of property (***Milroy v Lord***: settlor didn't register stocks in co’s books as required).
* **Within the power of the settlor:** when the settlor has done all within his or her power, then title will be deemed vested (***Re Rose:***settlor executed transfer before crucial date, but transfer registered after crucial date due to admin lag).
* **Intention must be immediate:** There must be an intention to be immediately and unconditionally bound (***Carson v Wilson****)*
* **Perfecting the Imperfect:** If a trust was intended to be effectuated by one mode of transfer, the court will not give effect to it by applying another mode (***Milroy v Lord*:**the trust was intended to take place by mode of transfer/assignment of shares to trustee, not by declaration of settlor as trustee. So any evidence of his intention to create a trust cannot be used to perfect the trust through different mode).
* **Gifts (to eventual testator) must be Continuous Intention: (Rule in *Strong v Bird*):** an *inter vivos* gift that is not perfectly vested will be perfected or cured when the donee subsequently acquires legal ownership of the property (i.e.: in the capacity of executor of the donor’s estate) as long as the courts find a continuous intention to give (***Strong v. Bird***).

**Facts**: Stepmother forgave the debt and resumed payment to defendant of the full rent. The new arrangement was not binding in law for lack of consideration, but the *intention to release the debt continued until her death* when the legal ownership was effectively transferred (i.e: the defendant was appointed the stepmother’s executor under her will).

**Issue**: was he required to pay the balance of the debt?

**Held**: The court held that the intended gift of the balance became perfect on the death of the testatrix.

* Neither an intention to give, nor recollection of the intention, need be present in the instrument that vest legal title in donee. (***Strong v Bird***)
* The principle does not apply to property to be acquired in the future by the would be donor (***Morton v Brighouse***, SCC 1927).
* **Testamentary Trust:** Testamentary trust must be in accordance with ***Wills Act*** (***Carson v Wilson***:court refused to complete gift as transfer only to be made upon death because didn't comply with Wills Act)

**B. The Three Certainties**

**If the trust is invalid for uncertainty** the trustee holds legal title – but on a presumed resulting trust to the settlor unless a gift over has been specified in which case **that person** gets title legally and (likely) beneficially - **See Resulting Trusts (Chapter 5)**

### a) Intention/Words:

### the trust deed or will must disclose with sufficient certainty the intention to create a trust (no need for technical language or expressions) (*Nicholl v. Hayma*)

* **Meet Requirement for Certainty if:** Trustee is placed under an obligation to hold on trust and distribute property for the benefit of another.
* **Presumption in favour of gift especially in family-type trusts** and “in full confidence does not signal a trust” – (***Nicholl v Hayman*** “in full confidence” does not signal a trust, but rather a hope by the testatrix that her wishes will be followed).
* **No Certainty inferred from:** “I wish…”, “I hope…”, “I request,” “in full confidence”
* **Consideration when drafting/assessing:** wording (be imperative), heading of the document (“deed of trust”/”trust settlement”); equity looks at substance.

**b) Subject Matter**

* **Both** the **property** and the **amount** of the **beneficial interest** need to be **(a)** **ascertained or (b) ascertainable** at the moment of creation of trust (***Re Beardmore***: trust for what was left by husband after payment of all debt was not ascertained or ascertainable at time of creation of trust, so held invalid; (***Sprange***: a testatrix left $ to her husband “for his sole use and at his death the remaining part of what is left that **he does not want for his own wants** and use to be divided between” certain named beneficiaries failed for uncertainty **(see criticism below)**
  + **(a) “ascertained”:** the trust instrument clearly describes the portion of property which each beneficiary is to receive; or
  + **(b) “ascertainable”:** the trusts vest the discretion to so decide in the trustees (but before admitting complete failure, look to criticism in ***Sprange*** and ***Golay***)
* **Criticism to Sprange:** Once these assets are known they may well be changed into better performing assets that generate more income, so trust assets may not necessarily stay constant in the trust - isn’t it better to know what the assets are at the time when beneficiaries would take title?
  + **Support: “Reasonable income” not too uncertain *Re Golay* :** provided the settlor/testator has given sufficient indication of his intention “to provide an effective determinant s so that the court in applying it can give effect to the testator’s intention...”**Results:** If there is a formula for determining the future subject matter → suggest saving using ***Golay.***  Courts are predisposed to **floating trusts**, anyway.

##### c) Objects

* All trusts must have a person or group of persons sufficiently identified as beneficiaries, based on whether it is a:   
  **(i)** **fixed trust:** beneficiaries identified by name, description or as members of a class,
  + Trustee has no discretion & specified b(s) **MUST receive** the benefits equally**.**

**(ii)** **a trust power or discretionary trust:** trustee **must** choose one or more members of *a group* and/or determine the quantum of interest, and must carry out purpose (not necessarily distribute all funds).  
**(iii)** **a power of appointment**: the “donee” (not necessarily the trustee) **may** appoint someone to receive whatever amount of funds he wants.

* + **Duty of donee** **only to consider:** No obligation to distribute on rational and defensible grounds (Templeton J in ***re Manisty’s Settlements***, cf. Lord Wilberforce’s use of this example in ***Baden (1)***).
  + The courts cannot insist on the donee applying a particular principle (***Re Manisty’s Settlement***)
  + In the event the donee of the power dies before making an appointment the settlor often will provide for a **“gift over”**. Accordingly, **the existence of a gift-over in a trust document likely implies a settlor’s intention to create a power.**
  + **Three types of Powers:**
    - **General powers**: donee can appoint anyone including her/himself – “you may transfer to anyone.”
    - **Special powers**: donee can appoint only person(s) in or from named specified class of objects (e.g. ***Gulbenkian Settlements* (1970)**). The extent of information about who is in the class not as detailed given the power holder’s overall discretion around choosing a person to whom a distribution should be made – “you can give it to one among my relatives” or “among the residents in Greater Vancouver.”
    - **Hybrid /Intermediate powers**: donee can appoint anyone except for a person or class prescribed by donor **(*Re Manisty and Re Hay’s Settlements*)*.*** Like a general power, an appointment is not likely to fail, but you risk gifting an undesirable person from the excluded class– “you can give it to anyone except my brothers and siblings.”
* **Conceptual uncertainty** occurs when the words used by the settlor are inexact making it unclear who is the intended recipient of the equitable estate in the trust property.
* **Evidential uncertainty** occurs where the definition of the group or class of potential beneficiaries is clear but there isn’t enough factual information to apply the settlor’s definition (e.g. to the residents of “Greater Vancouver”. It would not render a power of appointment invalid.

## Tests For Certainty

* **(i) Fixed trust:** complete list or list ascertainability test (every object must be listable) (***Broadway Cottages***)

##### Conceptual and evidential certainty are required.

##### (ii) Discretionary Trust: “is or is not” test (*Baden (1)* displacing complete list test from *Broadway Cottages, Manisty*)

##### If conceptual uncertainty, then it is invalid (*Baden(2), Eaton Co, Waters*)

##### If evidential uncertainty, it will not necessarily be invalid as trustees can apply to court for assistance/ directions (*Baden (2)*)

##### Evidential certainty required (Stamp J): a class of “don’t knows” is not allowed (relative = next of kin)

* + - **Evidential certainty is not required** (Sachs J): “not sure” are “no’s”. (relative=descendants of common ancestor)
    - **Some evidential uncertainty is tolerable** (Megaw J): substantial number of “not sures” OK provided enough “yeses”!
  + **Administrative unworkability:** The range must not be **hopelessly wide** that the trust is administratively unworkable (when it cannot be properly supervised by a court because of “evidential uncertainty”) (Lord Wilberforce gives the example of the class “all the residents of Greater London…. in ***Baden*** *(1)*)
* **(iii) Power of Appointment:** “is or is not” test (***Gestetner, Gulbenkian, Hayes***)
  + Evidential uncertainty will *not* invalidate a power
  + Even if evidentially uncertain + administratively unworkable, will likely still be valid (***Hay’s Settlement***)

# Chapter 4a: Perpetuities

**GO THROUGH THESE STEPS IF POSSIBLE PERPETUITY PROBLEM**

**(1) Who’s getting what?**

**(2) Are there any conditions or limitations? Is it vested?**

* **Future interest:** It’s a current present interest to future possession of property. There’s two kinds:
  + **Vested future interest:** presently-held rights to future possession (such as **remainders and reversions**). They are property.
    - A future vested interest is **(a)** created in a living, ascertainable person and **(b)** not subject to any condition precedent **except** the natural termination of the prior (life) estate.
  + **Contingent future interest:** the interests and the possession vest in the future. Subject to legal conditions, they may be property
    - **Condition precedent** (interest is a **remainders**): “To Orville if s/he turns 30 years of age”. Becomes vested in Orville when contingency occurs.
    - **Condition subsequent** (creates **rights of entry**): “To Orscilla, *but if* (or *“subject to” or “on condition that”)* she ceases to use the property for educational purposes (which is a condition subsequent for Orcilla), then creates a right of entry for Bloggs”
      * When condition subsequent occurs, the interest does not vest automatically in Bloggs; it must claim be claimed.
    - **Determinable interests** (creates **rights of reverter**): “To Orville *while* (or “so long as”, “during”) you are married to Orscilla, when you are not, to Snooks”

**(3) Is the reminder valid?** All the requirements below must be stated in the exam, even if briefly, when assessing the validity of a trust.

* **Is it certain? (**example religion.)
* **Is there a restraint on alienation?**
* **Does it violate public policy?** See Human Rights legislation on prohibited discriminations such as race, gender sexual orientation etc. or conditions that dictate celibacy)
* **Does it violate the rule against perpetuities?** 
  + **Common-law formulation:** one must be able to say (a) with **absolute certainty** at the outset of the trust that under its terms the vesting of equitable interests if they are to occur will do so (b) within **lives in being** at the time of the creation of the trust (c) **plus an additional 21 years** (plus 9 months in the case of an unborn child).
  + **Apply CL Perpetuity Rule:** if not met, trust was void.
    - If there’s’ a chance that the beneficiaries will not reach the contingency in the perpetuity time then the contingent interest is **not property**.
    - Conceive of a hypothetical situation, no matter how artificial, where a potential beneficiary could take outside perpetuity period. (e.g. at moment of creation of trust every life-in-being dies, clock starts, and a hypothetical beneficiary would not meet the condition within the 21 year period)
  + **Apply *Perpetuity Act* to salvage the validity of the interest**
    - **80 year period substitution at time of creation (s 7 )**: it could be used by a settlor at the time of creation of the trust to substitute lives in being plus 21 years (can apply to a corporations)
    - **Possibility of vesting beyond period (s 8) “Its not void yet”:** No disposition creating a contingent interest in property is void as violating the rule against perpetuities **only because** of the fact that there is a possibility of the interest vesting beyond the perpetuity period*.*
    - **Section 3:** The remedial provisions of this Act must be applied in the following order: **14, 9, 11, 12 and 13**.
    - **Capacity to have children (s 14(1)):** it must be presumed that
      * **(a)** a male is able to have a child at the age of 14 years or over, but not under that age, and
      * **(b)** a female is able to have a child at the age of 12 years or over, but not under that age or over the age of 55 years.
    - **Wait and see - presumption of validity (s 9):** every contingent interest in property is valid, until actual events establish that the interest is incapable of vesting within the perpetuity period and the interest is not validated by sections 11, 12 or 13. (applies to life-in-being and to possible beneficiaries)
    - **Age reduction (s 11):** the disposition creating an interest in property by reference to the attainment by any person of a specified age exceeding 21 years must be construed as if it had referred to the age nearest the age specified that would have prevented the interest from being void.
    - **Class splitting (s 12):** if the inclusion of any persons, born or unborn members or potential members of a class would cause the disposition to be treated as void for remoteness, those persons must be excluded from the class for the purposes of the disposition, and that section has effect accordingly.
    - **General cy pres (s 13):** if the intention can be ascertained, on application by an interested person, the disposition may be varied so as to give effect to it.
    - **Note in BC** many statutory bodies are exempt from the rule e.g. the universities (see s. 52 of the *University Act*), the government when it creates dispositions (s 5 of the *Perpetuity Act*).

# Chapter 4b: Formalities for the Transferof the equitable interest

***Inter vivos* - Equitable interest in land:** British Columbia has **abolished the necessity for formalities** in creating and transferring **equitable title** (**s 59 of *Law and Equity Act*)**  (i.e. from settlor to beneficiary).

* But not for the legal estate from settlor to trustee.
* That said, it is, of course, a matter of good sense from a practical, evidentiary standpoint to commit to writing the interests in a trust document.

**Validity of Will:** compliance with formalities is important to avoid intestacy.A testator must manifest his/her intention to leave property to persons in a will (Under the ***Wills Act/Wills, Estates and Succession Act*)**

* **Will Requirements:**
  + written memorial
  + signed by the testatrix in the presence of two independent witnesses (not beneficiaries).
* **Rectification** (**s 59** of the new ***Wills, Estates and Succession Act***): the courts may on application
  + **(a)** an accidental slip or omission,
  + **(b)** a misunderstanding of the will-maker's instructions, or
  + **(c)** a failure to carry out the will-maker's instructions.

## Validity of Trusts Created through Wills: (a) Secret, (b) Half-Secret:

* **(a) The secret trusts:** the intention to benefit a beneficiary is not disclosed in the will (only ‘“*ex facie”* the will). Instead the will would simply have named a stated “beneficiary” who is meant to act as trustee for the real B.
  + **Requirements** (***Ottaway v. Norman*** (1972)):
    - **Intention** that the beneficiary named in the will, B, is to hold the legacy on **trust** for the real beneficiary,
    - **Communication** during testator’s lifetime (not necessarily before will is made) to named beneficiary B **of intention** that B receives property as trustee in a trust for C. The identity of C must be known before testator’s death to avoid a resulting trust for the testator’s estate (***Re Boyes*** (1884)).
    - B’s **acceptance of or acquiescence** in this proposal
* **(b) Half-secret trusts** (less significant in BC with the arrival of the new Act): the person named in the will as beneficiary is actually receiving the property as **a trustee** for a real, but **undisclosed,** beneficiary.
  + Other details of the trust (i.e. the real intended object) are not revealed.
  + **Requirements (before the will is made)** (***Blackwell v Blackwell*** 1929):
    - A must communicate to B that he is to hold the property on trust for C;
    - A must communicate to Bthe identity ofC; and
    - B must accept(this could take place at the time when the will is made)

# Chapter 5: Resulting Trusts

A grantor transfers property to a grantee, but only the **equitable** estate **jumps back** to the grantor/settlor/testator’s estate, so the grantee holds the property as trustee for the grantor.

**Two types resulting trusts:**

**(a)** Automatic resulting trusts (ART)

**(b)** Presumed intention resulting trusts (PIRT)

## (a) Automatic resulting trusts (ART)

An express trusts **fails to take** or **does not exhaust** all of the available beneficial interests in the trust property.

### Situations in which ARTs occur:

### (i) Void Trust: : Transfer of legal title to trustees in a trust that turns out to be void; for example, because of non-compliance with one or more of the three certainties (*IRC v Broadway Cottages*: discretionary trust did not pass the “complete list” test (applicable at the time before rejection of it in *Baden* *(1)*)

### (ii) Surplus Trust Monies: Transfer of legal title in property to a trustee without disposing fully of the equitable interest in it (validly granted) (*Re West*) *Re West*, 1900: A testatrix left her property on trust for sale for payment of debts, funeral expenses and legacies. There was surplus left over and the trustees claimed it for their personal benefit. Court found, for the next of kin, who succeed to the equitable estate that would have vested in the testator under ART were she alive, because equitable title has not been specifically granted to trustee);

### Pensions: Schmidt v Air Products Canada, SCC 1994:

* + **Defined-Contribution Pension Plans:** the totality of the funds must be distributed, so there **cannot** be surplus (or a resulting trust).
  + **Defined-Benefit Plan:** the benefit is set, so if the funds exceed such amount, then a resulting trust may guide the distribution of surplus to contributors.
  + **Look to:**
    - **(i) Provincial Legislation:** see if any provincial legislation deals with surplus monies.
    - **(ii) Trust Creation:** Equity would govern over the plan provisions. If the PP was generated from a trust, and objectives have been met, then there may be surplus and therefore a resulting trust, unless there is evidence showing that the contributor intended to part outright with the money.
    - **(iii) Contract Law:** If the pension plan is not subject to a trust, then the issues must be resolved by applying the principles of contract law.
  + **Revocation:** the settler of the trust may reserve the power to revoke the trust; must have done so clearly and at the time the trust was created; such a power cannot be implied from a general unlimited power of amendment.
  + **Note on current law:** Registration of pension plans requires a provision that, on termination, any surplus in excess of the statutory maximum level of employee benefit must revert to the employer.

### (iii) Transfer with Condition Precedent not met: Transfer of property to another subject to a specific limitation which has not been achieved (*Quistclose*,1970 HL)

* + It usually arises in the context of loans, giving lenders an equitable interest and priority over other creditors.
  + ***Quistclose*** Facts:Q Ltd lent L210,000 to Rolls Razors **(a)** subject to the express condition that RR would **“only”** and **“exclusively”** use the money to pay a 120% dividend to its shareholders; **(b)** **notice** was given to the bank where the money was deposited **at the time**. **Why not to characterize the transaction as a loan?** There is no reason why the law should not give effect to the intention to create a secondary trust if the primary trust could not be carried out.  
    Critics of the case: The primary duty is tantamount to a trust for purpose (allowed only in exceptional circumstances such as monument and tomb maintenance and protection of animals).  
    Note: the authority of this case has been confined to factual scenarios meeting points (a) and (b).

### (iv) Surplus of funds after trust purpose has been achieved (*British Red Cross Balkan Fund*): Similar to #2, but here there is a specific purpose; examples: money left to maintain graves, monuments, statues, pets or charitable purposes (helping individuals) are exceptions to the rule (from the 17th century) that purpose trusts are invalid.

* + **Individual known donors** will have money returned pro rata; (***Re British Red Cross Balkan Fund***, 1914); or
  + **Unknown donors/ non-specified donors**
    - **If contract law** **binds the relationship** between the collector and giver, no resulting trust and funds may be treated as *bona vacantia* (funds go to Crown, not returned to donors) (Goff J in ***West Sussex Constabulary***, 1971; example: street entertainments, raffles and sweepstakes);
    - **Legacies and Major Donations (resulting Trust):** Once purpose of donation has been satisfied, deposit surplus into court fund to be accessed by claimants/donors who can prove amount donated; if people don’t claim then it becomes state $ (***Re Gillingham Bus Disaster Fund***, ***WestSussex*** example: donors want to help victims of bus disaster, but once they helped them want $ back.)
    - **Small donations (intention to part with the money):** any surplus is *bona vacantia* (based on  ***re Welsh Hospital, re Hillier’s Trusts***; example: collecting boxes);
    - **Redistribute the money into another fund if available** that has a similar purpose (***Cy Pres* Doctrine, *British Red Cross*) (Note:** this is not actually a resulting trust).

**Unincorporated Associations or “clubs” (funds come from members only)**: the issue is how the funds are to be distributed on dissolution if the contract binding the members is silent:

* + **The court has the following options for re-distribution:  
    (a)** **on an ART for the members** (***Re Bucks***: 49 of the UK Friendly Society Act applied vesting all property for the sole benefit of the members. However, the court criticized *West Sussex*, on the basis that contractual relationship should have released the assets to the members);  
    Exception: an unincorporated company left with a single member would not entitle the member to all the remaining assets because that member could not be “an association” - then *bona vacantia.*   
    **(b)** **to members under contract rules** – equity is equality (each person gets same);   
    **(c) to the Crown as *bona vacantia***(***Re West Sussex***: contractual relationship found where “only members’ dependents” could benefit, so there could be no resulting trust for members (i.e. they have had all they contracted for - the protection of their dependents); or   
    **(d) surplus’ from public appeal funds should be subject to *cy-pres***, with surplus funds up to $10,000 distributed to other charities.
  + **Consider:  
    (a)** Whether a statute determines the outcome (***Re Bucks***)  
    **(b)** How unincorporated associations acquire property  
    **(c)** Member subscriptions (***Re West*:** contract for the benefit of third-parties)  
    **(d)** Donations or contributions from supporters/street collections/raffles etc (see *W****est Sussex*** above).  
    **(e)** Whether group’s rules regulate the matter (***Re West***)  
    **(f)** If no express contractual-based rule then the term to be implied by contract. (And the term commonly implied is that the surplus funds (after paying debts etc) belong to members at date of dissolution in equal shares) (***Re Bucks*** – obiter).

• If only 1 member (***Re Bucks***): the association is moribund and funds pass to Crown as *bona vacantia*.

## (b) Presumed intention resulting trusts (PIRT)

Unlike ART, PIRTs are created from **gratuitous transfers of property**.

**The Rule:** Rebuttable presumption that only the legal title was intended in the transfer and that the transferor has retained equitable title (in effect, transferor is a beneficiary (***Dyer***).

* **Application:** Look to context.
* **Onus of Proof:** ordinarily, the **transferee** must rebut the **PIRT** (i.e. s/he has to show that the transferor intended the passage of beneficial title with the legal title)

**Situations in which PIRTs occur: Joint-Accounts.:** A depositor puts funds in joint account with others, intending to retain control over the funds and to withdraw from them when proper. The issue is whether the other person is, at the death of the depositor, a trustee for the estate (i.e.: presumption applies) or the holder of the beneficial interest too (i.e.: rebutted or presumption of advancement applies).

* Joint accounts alone don’t rebut PIRT (***Niles v Lake*,** SCC 1947: the arrangement with the bank does not define the relationship between them)
* Actual intention of transferor manifested by conduct can rebut PIRT and is binding (***Standing v Bowering***, following ***Bill v Cureton*** rule)
  + Knowledge of the transferee that he has received equitable and legal title is not required (***Standing v Bowering***)
* If there is a joint bank account and the transferor demonstrates further intention that the transferee should get beneficially as well as legally, this rebuts the presumption.(***Russell v Scott***- Rebuttal occurred when declaration of her intentions to the solicitor’s employee was found to be “satisfactory affirmative proof” of intention to confer a beneficial interest on her nephew when she died)
* Vesting the beneficial title on her death does not turn the gift into a testamentary gift and is not avoidance of the ***Wills Act* (**because the Act applies only to the voluntary transmission on death of an interest which belongs absolutely to the deceased; not the case in joint bank accounts**- *Russell v Scott***, AustHCt 1936)
  + **Criticism (*obiter*):** succession post mortem and testamentary successions are indistinguishable (***Young v Sealey*,** ChD 1949)

**IF FIND PIRT CONSIDER WHETHER IT IS REBUTTED BY PRESUMPTION OF ADVANCEMENT (PA) (next page) or BY ILLEGALITY (2 pages down)**

### Presumption of Advancement (PA): can rebut PIRT

**Form of Rebuttal:** between certain classes of relatives, the gift is presumed to have been intended.

* + **Father to child** (***Shephard v Cartwright***, HL 1954): confined to minor children below the age of majority (***Madsen Estate v Saylor***, SCC2007 and ***Pecore v Pecore****,* SCC 2007: parent transferred property to daughter over the age of majority and died, daughter only got legal title.).
  + **Mother to child:** it has been found in a few cases (in relationship of dependency and *in loco parentis*), but it usually creates a PIRT for the mother*.*
  + **Adult children:** no PA because of difficulty defining dependency(***Young v Young***, BCCA 1958)
  + **Husband to wife (*Warm v Warm*):** abolished by all Canadian provinces by legislation except Manitoba and BC (which likely apply the presumption similarly)
    - BC and Manitoba count with wide discretionary power of the courts in matrimonial disputes in property matters;
    - The PA was upheld for dependent spouses, but the court’s reasoning suggests that it may not apply to non-dependent spouses (***Mehta Estate v Mehta Estate***, 1993 Manitoba CA the relationship was so traditional and she was so dependent so court applied presumption of advancement).
    - **PA is weaker** in marital property disputes where:
      * **(-)** there is an overriding legislative scheme for the division of assets;
      * **(-)** the parties are available to give evidence as to their intentions; and
      * **(-)** in a social climate where equal division of marital property is the custom.
    - **PA is stronger**: in cases where:
      * **(-)** the case is not a matrimonial action;
      * **(-)** the parties are unable to testify;
      * **(-)** it is a “traditional” marriage where the husband was the major provider of the family;
      * **(-)** her major role was as homemaker and mother -- so it’s entirely understandable that a loving H should put assets in the name of his wife with the intent they should be hers as gifts.
  + **Wife to Husband:** no presumption of advancement at common law, but a resulting trust for a gratuitous transfer by a wife (***Re Mailman Estate****,* SCC 1941)

### Rebutting the PA:

The PA may be rebutted by evidence of the real intention of the transferor, subject to some rules:

* + **Timing**:the acts and declarations of the parties that go to rebutting the PA must take place before, at the time or immediately after the transaction to be admissible (***Shepherd v Cartwright*** a father allotted shares to his 3 kids without their knowledge; he tried to rebut it with evidence of what he did years later).
  + **Illegality (**subject to views on social justice and the economic and social circumstances surrounding the transfer of property for illegal reasons):   
    Arises when a transferor conveys property illegally and then wishes to regain title relying on PIRT and rebutting PA.
    - **Old view: courts would not assist**, justifiable by the refusal to deal with a case tainted by illegality and the consequences of the *par delictum* rule (“a party should not obtain satisfaction from a court of law with where his own conduct is wrongful”) (***Scheuerman***, SCC 1916).
      * **Exception (the doctrine of *Locus Poenitentiae*):** opportunity to abstain before the illegal scheme is carried out.
    - **Current approach:** Intent to defraud is not enough to preclude evidence rebutting PA (***Goodfriend v Goodfriend***, SCC 1972: distinction because no one was harmed - there was no potential for actual illegality; useful in cases where other party might unjustly benefit).
      * Distinguish ***Goodfriend*** from ***Foster***, where **(i)** the effect of the par delictum rule favoured the daughter ("in equal fault, better is the condition of the possessor"); and **(ii)** there was an actual illegality at stake.

### Rebutting the PIRT:

* + **Illegality:** where there is a PIRT the presumption will be upheld despite the illegal purpose since the transferor does not need to rely on the illegality (***David v Szoke***, BCSC 1973; ***Gorog v Kiss***, OntCA 1977; PA doesn’t apply; ***Tinsley v Milligan***, HL 1994 (PA doesn’t apply):
  + All the judges in ***Tinsley*** disapproved of a new “public conscience” test put forward by the court of appeal i.e. a court would decide admissibility of tainted evidence after weighing the adverse consequences of granting relief against the adverse consequences of refusing it. (see ***Nelson****, infra.)*
  + **Latest Development (Australia):** The rebuttal may involve evidence disclosing illegal purpose (***Nelson v Nelson***, AustHC 1995 – not the law in Canada: mom rebutted PA, even though evidence disclosed the mother’s illegal purpose)
  + Society is so highly regulated that infractions and technical illegalities are sure to arise. So, the *ex turpi causa* rule (from a dishonorable cause an action does not arise") should be considered in the context of highly regulated societies, which involves **“balancing the adverse consequences of granting relief against the adverse consequences of refusing relief.”** The court should look at proportionality between the mischief performed and the adverse consequencesand review the statute to see what sanctions are contemplated and its frame of reference.

# Chapter 6: The Beneficiary

**Equitable Title:** it bestowson the holder **personal** rights (*in personam*) against the trustee for breach of trust:

**(a)** duties under the terms of the settlement, or

**(b)** fiduciary duties, to advance the best interests of the beneficiary.

## Beneficial Title:

The beneficiary gets the exclusive entitlement to the benefits of a given asset.

* **Cannot act as trustee:** The beneficiary cannot exercise the administrative powers that belong to the trustee. (***Schalit v Nadler***, 1933KB: beneficiary attempted to collect rent)
  + However, with the consent of the trustee the beneficiary may be given as agent the power to do limited administration when it makes financial sense to do (***In Re Bagot’s Settlement*** 1894 ChD: beneficiary wanted to manage trust property).
* **Equitable Title does not necessarily mean beneficial title (i.e.: sub-trusts).**
  + **Sub-trust occurs:** a beneficiary can **declare** a trust in respect of **his/her equitable title** in the trust property, leaving himself or herself with a **bare equitable title** in relation to the sub-beneficiary (the only one entitled to the benefits who also has equitable title). The original trustee remains trustee with legal title.

## The Nature of Equitable Title:

The beneficiary has a distinct equitable interest in the individual items of property (i.e. realty, stocks and shares) as opposed to the fund as a whole. (English Law - ***Baker v Archer-Shee***, 1927 HL).

* **Alternative approach (New York):** she later won by having the laws of NY apply (***Garland v Archer-Shee***)***.*** In NY they did recognize that the nature of the equitable estate was due administration by trustee of trust fund. Canada, we still follow ***Baker v Archer-Shee***.
* **Policy (for the fund as a whole):** **(1)** the fact that since it is the trustee, not the beneficiary, has exclusive power to dispose of assets in the trust fund and can unilaterally extinguish the legal title in each item; and **(2)** the items fluctuate quickly and constantly;
* **Policy (for individual items): (1)** the beneficiary can terminate the trust and acquire outright (legal and equitable) title in the property under the rules in ***Saunders v Vautier***; **(2)** it’s inconsistent with the beneficiary’s i*n rem* right to “trace” **individual items** of misappropriated property in that fund.
* **Discretionary Trusts:** the beneficiaries cannot have equitable title in each and every item in the fund because their appointment or the extent of the benefits is contingent on the exercise of trustee discretion (so the nature of beneficial interest is of rights against the trustees for proper administration of the estate, ***Garside v IRC*** 1968).
  + the right is still the interest in the individual items, when you are receiving them (as B) but that is only true temporarily for the year you receive them, and is looked at anew each time the trustee re-distributes.

## Transfer of the Equitable Title from Beneficiary to Assignee

* **Purpose of compliance with formalities:** itallow the assignee to sue alone, in his/her own right in any court without the need to interpose the assignor in an action(***Di Guilo v Boland***, OntCA 1958: if no compliance with s. 36, then common law prevails over “equitable assignments” and assignee needs to bring assignor when he wants to sue)
* **The Formality** (**Section 36 of the** ***Law and Equity Act*):** a written document signed by a beneficiary (B1) must be delivered to the trustee for an effective transfer or assignment of the equitable estate from B1 to B2 (so B2 may have a cause of action against the trustee without needing of B1).
* **Methods of Transfer that Comply with Formalities of s. 36 (*Timpson’s Executors v Yerbury*)**
  + The beneficiary can assign it to the third party directly **(writing required)**.
  + The beneficiary can direct the trustee to hold the property in trust for the third-party (**writing required)** (it follows from the rule in ***Saunders v Vautier*** provided requirementsare met)
  + The beneficiary can contract for valuable consideration to assign the equitable interest to the assignee (**writing is clearly prudent**, but it is **not clear if it is necessary** as the vendor holds equitable estate on a constructive trust for the buyer as soon as the contract is effective and binding - Constructive trusts arise by operation of law and need not be in writing. However, the arrangement does seem to fit within the purview of section 36).
  + The beneficiary can declare him/herself as beneficiary to be trustee for the transferee of such interest (sub trust) (i.e. with a trustee, a beneficiary with non-beneficial, equitable title and a sub-beneficiary with beneficial equitable title and the trustee still in charge). Although ordinarily there are no formalities in a declaration of trust, where a beneficiary declares himself/herself trustee for an assignee of the **equitable estate**, **writing not required though prudent** to ensure the original trustee’s powers are abrogated.
  + **Note:** Revocable mandate is not an assignment of equitable title **(*Timpson’s Executors v Yerbury***: I request and direct that the foregoing payments shall continue to be made until otherwise directed by me in writing.”)

### Priority among Assignees:

Priority between claimant assignees would be determined by time – the earlier being preferred (***qui prior est tempore, potior est jure***) (***In Re Wasdale* ChD 1899:** the fact that a trustee did not have notice of the first assignment did not defeat it).

## The Protective Trust

* **Purpose:** Settlor creates a trust which seeks to protect the beneficiaries from themselves (i.e.: losing all the money).
* At the heart of the “protective trust” is the **determinable** i**nterest.** The protective trust is, in reality, two trusts. The settlor transfers assets to a trustee:
  + **(1)** giving a **determinable life interest** in favour of the “principal beneficiary” (often a spendthrift or prodigal child), and providing that
  + **(2)** on the occurrence of a **determining** event the trust property is to be held on a second trust which is often a discretionary trust in favour of a class of objects (the principal beneficiary’s children or, perhaps, the settlor’s other children)
    - On the happening of the determining event the secondary, discretionary trust vests the equitable interest in the new class of beneficiaries and the trustees administer for them and appoint from them.
* **Alienation:** there is an issue when the adult child wants to collapse the trust.
  + A **restraint** couched as a **condition subsequent not to dispose of property is void**.
    - **Ex:** (“To my son Sid “on condition that…” “subject to”, “but if” he tries to dispose of the property, to his children”)
  + However, a restraint couched as a **determinable** **interest** is okay as it is simply defining the scope of the limitation.
    - **Ex:** (“To my son Sid “until”, “when”, “as long as”, “during” decides to dispose/he doesn’t dispose of property, to his children”)
* **When beneficiary wants to call for end:** by nominating themselves to take over as beneficiary when they die, court not likely to consent to variation because contrary to intention to make protective trust ***Re Steeds*.**

## Requirements for Beneficiary to Terminate the Trust – The Rule in *Saunders v Vautier*

* A beneficiary can **terminate** the trust by directing the trustees to direct legal title to the beneficiary provided that he is **sui juris** (i.e (s)he has met the following conditions.):
  + **S/he has attained majority** (in British Columbia it’s 19);
  + **is of sound mind “compos mentis”;** and
  + **is absolutely entitled to the trust property** (i.e. the interest must be vested though enjoyment of it could be postponed through contingency).
* Facts *Vautier:*The **interest** in the trust was **vested absolutely** in Vautier, even though the enjoyment (release of funds) was postponed. Thus, the intention of the testator concerning the payout date was ignored in preference to that of the beneficiary’s legitimate expectation to be immediately eligible at his/her choosing on the attainment of majority as a person with full legal capacity.
* Courts lean towards an interpretation that favours early vesting.
* **A gift over suggests that the interest is not absolutely vested.** 
  + **Examples**
    - **no gift over:** A gets property when 25. (vested in interest, not yet in enjoyment: rule applies and A can call for property)
    - **gift over:** A gets property when 25, but if A doesn’t reach 25 then to B.. (A doesn’t have absolute vested interest)
* absence of a gift over was a clear indication that the interest vested immediately on the creation of the trust ***Chodak***
  + The fact that the trust was discretionary did not affect the ability to call in the trust. ***Chodak***

### Policy Considerations of Rule in *Saunders v Vautier*

* + **Economy:** Outright ownership allows for freer use of property rather than tying it up for unduly long periods, which promotes free transferability of property for better and more efficient usage and maximizes use, enjoyment and disposition of property.
  + **Autonomy:** Desire to treat adults as **autonomous agents** able to care for themselves and a reluctance to allow testators to rule from the grave, although the court is generally supportive of owner intent.

### Application of the rule in *Saunders v Vautier* :

* **Can Terminate when Vested in Interest and not Enjoyment** (***Re Lysiak* (1975)**: A testator had bequeathed his estate to his wife and son living in Russia “until they are absolutely satisfied that the beneficiaries are free and unhindered to receive the said benefits without interference from the regime under which they are presently residing”; vested in interest (though not enjoyment) immediately on the death of the testator because the giving or vesting of the gift was not suspended, just the timing and manner of its distribution.)

### Application of the Rule in *Saunders v Vautier* in Discretionary Trusts

* Beneficiaries don’t all have absolute interest so it’s harder to terminate trust.
* However, beneficiaries can combine to call for the trust to end.
* **For beneficiaries to terminate discretionary trust:** (***Re Smith (Trustee) v Aspinall***, 1928, ChD): there was a life estate and a remainder, both of which wanted to terminate the trust.**)**
  + **They all must be identifiable** under the trust and they must act together and as ***sui juris*** combination; and
  + **Unanimously agree** to terminate the trust.
* The fact that the trustee has discretion to fix differing percentage of shareholding does not affect the ability to call in the trust. (***Re Chodak (1975 Ont HC)***)

### Termination When There will be a Reduction in Value of Trust Property .

* **If interest is to more than one B & not all of them are sui juris:**
  + B who is sui juris can call for their share, but **not if it will be deleterious** to the other Bs who want the trust to continue (***Loyds Bank v Duker:*** as controlling shareholder his shares would have been worth more than the remaining shares of the other beneficiaries and, moreover, he could control the company in way that hurt the minority shareholder/beneficiaries e.g. appoint himself manager, pay himself a salary and declare no dividends) and so not allowed. )
  + If you have a bunch of shares in the trust, you can divide the shares, to terminate the trust in respect of respective shares(***Sandeman*** a call for shares by sui juris beneficiaries was allowed even though it meant the trustees would no longer have control of the company)
* **Protective Trust:** Will not terminate when Court has to consent on behalf of spectral beneficiaries to end protective trust ***Re Steed***
* **Realty:** where the asset is realty, sui juris beneficiaries cant terminate for just their share because value of land will be diminished. ***Marshall***
* It doesn’t matter that the property is held on a trust for sale with a power to postpone sale – (***Re Marshall* (1914) Ch (CB 352) –** when it would take 20 to 30 years for all beneficiaries to be eligible, the trustees consider that the division would cause **undue hardship** on the other beneficiaries.

## Variation of Trusts

* At common law, courts had very limited jurisdiction to vary a trust (***Chapman v Chapman***, HL: even though all adults assent and, where the trust having minors and unborn children as beneficiaries too, the variation would obviously benefit them too).
* There were 4 (narrow) exceptions to Common Law, which are no longer the only exceptions to apply in BC since the enactment of the ***Trust and Settlement Variation Act***.
  + **Administrative terms and unforeseen emergency:**
  + **Maintenance issues around beneficiaries**
  + **Conversion**
  + **Compromise**
* **In BC, the *Trust and Settlement Variation Act* (s. 1):** the Supreme Court may, if it thinks fit, **approve any arrangement proposed by any person varying the powers of trustees to manage or administer the property on behalf of**:
  + (a) Persons (ascertained) who are not **sui juris** (infants, incapacitated)
  + (b) Unascertainable beneficiaries
  + (c)Unborn persons
  + (d)Persons whose interests arise through a discretionary power (usually to protect spouse and/or children of a beneficiary in a protective trust)
  + The court must act for the **benefit** of that person in (a), (b) (c) or (d). To decide on benefit look below:

## Definition of “Benefit” for the purpose of the *TSVA*:

**Acting for the “benefit” is not easy, the court must consider:**

* + **Whether to exercise court discretion:** to consent on behalf of a person without capacity is to act as a “**prudent advisor**.” ***Russ v Public Trustee*** 
    - not such a subjective and paternalistic as ***Re Steeds*.**
  + **Whether Advancing Financial interests of beneficiaries & tax minimizations is a benefit and court can approve variation** (***Re Burns***)
    - Court may give consent if it thinks it is a good bargain for everyone (intelligent self interest + consideration of risks (***Bentall***)
  + **Educational and social benefits should be considered (*Westin*** court would not give consent on behalf of children because it meant children would have to move, **Rationale**: “children [like our Constitution] are like trees: they grow stronger with firm roots”)
  + **Family harmony and marital choice**: (***Remnants*** trust that said Beneficiaries couldn't practice/ marry Catholics. Court varied so that the there was no family conflict)
    - BUT sometimes **emotional** & **psychological benefits** to a group of beneficiaries(which **may** not arise) is **outweighed by disproportionate** **financial disadvantages** that **would** flow to one of them if the trust was varied (***Re Harris*** dad’s will left trust in unequal amount to kids- mom wanted sharing & family harmony so equal division-court said no as would financially disadvantage the favoured B too much)
* May also consider **possibility of the unborn realizing a financial benefit** (***Re Tweedie*** in will, remote chance of unborn receiving benefit - all Bs sui juris & had agreed to variation which would give emotional benefit to one of the Bs, so court approved)

# Chapter 7: The Role of Trustee: Rights, Powers, Duties, Liabilities and Immunities in Administering the Trust

## Appointment Of Trustees

* The trust instrument (deed or will) usually sets out the appointment – the settlor has wide freedom to choose who and how many persons will act as trustee(s). Of course, the person(s) selected must have legal capacity.
* Trustees must act according to the laws of trusts (based on principles applicable to fiduciary relationships) and are subject to court supervision.
* Settlor/testator may choose **individuals or a trust corporation.**
  + Corporation empowered by its memo and articles to engage in trust administration and management.

### Protector:

* + Because of the impersonality of many trust corporations a large family trust established with a corporate trustee may also have a **“protector”** or **“guardian”.** 
    - **Scope of Power (protector):** trustees making decisions on certain topics will need the consent of the protector (e.g. appointment of beneficiaries in any one year, addition or removal if beneficiaries, to distribute capital or income, to vary the terms of the trust, to appoint or remove trustees).
    - **Caution:** do not invest guardians and protectors with too much power lest they be treated as trustees with all the obligations and liabilities of trustees.

### Trustees are Joint Tenants: if one dies the surviving trustees continue.

* Only when the **last dies does** the **trust pass to his/her personal representative**s who then become the trustee.
* **Unanimity** is required for all decisions unless the trust deed provides otherwise
* In order to be a trustee, you must **accept** an appointment.
  + The will/settlement usually sets out an alternative trustee in the event of refusal by a person to act as named trustees. If the settlement is silent, the court has inherent powers of appointment (**equity will not allow a trust to fail for want of a trustee).** Ultimately, the court will appoint the Public trustee
* **Governing Legislation for Appointment of Trustees: s. 27 of the *Trustee Act*,** RSBC 1996, c 464 deals with trustee appointments, subject to the court’s overriding power:
  + **Termination of Trustee Function:** dead, remains out of British Columbia for more than 12 months, wishes to be discharged, refuses or is unfit or incapable;
  + **Where the settlement/will is silent:** the continuing trustees or the personal representative of the last surviving trustee may appoint another trustee
  + **Beneficiaries’ Concerns over Appointment:** Anyone with a beneficial interest in the trust property to apply to court to raise concerns over the appointment of a person who may impede the execution of the trust (**s. 36**)
  + **Vesting** **of Assets in New Trustees:** There is automatic vesting in trustee when new one appointed, but not shares transferable by registration in a company’s stocks (**s 29**)
  + **Powers of the Court to Appoint:** If it is impracticable to appoint a new trustee without the courts assistance, they can be requested to do so **(s 31)**
    - When persons designated to appoint cannot do so because (mentally or physical unable) or have predeceased the testator/rix.
    - **Guiding Principles for Court to Consider (*Re Tempest*)**
      * Wishes of the settlor/testator(trix)
      * Persons who do not have an axe to grind (towards settlor or B(s))
      * Persons who will promote and not impede the execution of the trust

### Retirement of Trustee:

A trustee may through deed serve other trustees a declaration with a desire to resign, which once accepted divests the trustee from property, subject to terms of the trust (**s. 28**).

## Removal of Trustees

* **Removal** **of Trustees by “Protectors” under the** **trust instrument**
  + The settlor/testator may have provided the circumstances under which trustee removal can occur.
  + Usually - “power of removal” is given to “**protector” or “guardian**” (see appointment of trust corporation above).
* **Removal** **of Trustees under the** ***Trustee Act***
  + A ***sui juris*** beneficiary (with the support of a **majority** in interest and number) can apply to court to have a trustee removed for reasons that are “expedient” for the operation of the trust (**s. 30**)
    - This may be necessary because differences among the beneficiaries have precluded termination under (***Saunders v Vautier***)
  + The court will **also** remove trustees (application may be by one of the beneficiaries or a co- trustee where it is **clear that their continuance as trustees would be detrimental to the execution of the trust e.g. lack of competency or bankruptcy** etc.
* **Judicial** **Removal of Trustees**
  + **Criteria =Welfare of Beneficiaries:** court will look at whether the trustees actions are impairing the welfare of the beneficiaries. Applicant must to point to acts and omissions that endanger the trust property or show want of honesty, appropriate capacity or reasonable fidelity**.** (***Conroy v Stokes*** BCCA 1952:if no misconduct by trustees, only just friction between beneficiaries and trustee: not enough to remove)
    - **Example:** A singlefailure by a trustee to produce accounts would not amount to impairing the welfare of the beneficiaries - unless persisted (***Conroy v Stokes*** BCCA 1952)
  + **Inability of Trustees to Work Together:** court will removewhen the continued administration of the trust has by virtue of the situation between the trustees become impossible or improbable. **(*Re Consiglio Trusts*** OntCA 1973:virtually impossible for the trustees to agree on policies concerning the efficient management of the trust”).
    - Misconduct is not a prerequisite for a removal.

## Trustees Rights, General Responsibilities and Powers

* **Responsibilities:** Trustee, as legal owner, has the rights and powers to manage, use and administer all the property.
  + **Control** of the trust property,
  + **Protection** of value of the trust fund through prudent investment decisions that also are compliant with other trustee obligations
    - act impartially among the beneficiaries especially those in succession
  + **Distribution** **of income:** fairlyaccording to the trust settlement.
* **Good Conscience:** Trustee has fiduciary duty to beneficiary and must exercise his rights in “good conscience”.
  + Must act in good faith and advance the interests of the beneficiary
  + Not pursue his own interests in a way that does not accord priority to beneficiary.
  + Unique obligations on trustees in respect of **fair dealing and self-dealing with trust property in the course of administering the** trust assets

## Trustee Investment Duties and Powers

* The **settlor can set parameters** regarding the investment duties of the trustee

**Common Law Rule**

* **Trustee Investment Duties:** obligation to act as **a prudent person of business would act in managing his/her own affairs** - (***Speight v Gaunt*** 1883)
  + Not required to beat the market nor be responsible for a general downturn in it.
  + Must preserve capital from risk and yield a reasonable return.

### Statutory Standard of Care:

* A trustee **may invest property in any form** of property or security (**s. 15.1(1)**), exercising the care, skill, diligence and judgment that a **prudent investor** would exercise in making investments (**s. 15.2**), **subject to limitations imposed by the trust** (**s. 15.1(2)**).
  + A duty of care of an ordinary prudent person taking care of his/her investments mindful that those investments are to benefit person(s) for whom s/he is morally obliged to provide (***Re Whiteley***1886 ChD)
    - **Objective Standard:** rather than subjective (personal, honest best not enough)
    - **Diversified Portfolio** may be ordinarily required (i.e. spread risk) (***Fales***).
      * Look to the overall total return on investments for the benefit of the *cestui que trust*.
      * The practical outcome on the duty is the requirement of constant monitoring and appropriate change (***Nestle***)
    - **Speculative or Hazardous Investments:** unless permitted by the settlement, a trustee may avoid them as far as possible (Pavlich ch7).
    - **Honest Errors:** no liability while acting with reasonable care, prudence and circumspection (***Re Godfrey*** (1883) 23 ChD 483)
    - **Hindsight:** Performance must not be judged with hindsight (must be regarded as prudent at the time decision was made) (***Nestle*** ***v National Westminster Bank***, 1993 CA: prior to 1959 equities had been regarded as risky investments, although in the ‘60’s “the cult of equity began”)

### IF FIND STILL BREACH LOOK TO STATUTORY DEFENCE PROVISIONS

### (on next page)

### Statutory Defence:

* **Exempted where loss through plan and “reasonable assessment of risk and return” prudent investor would adopt**(**s 15.3**)
* **Individuals and Trust Companies have the same standard:** Section 15.2 does not alter this. (Dickson J in ***Fales v Canada Permanent Trust***  SCC 1974: All were found liable for breach of trust, though widow exempted under s 96. was a breach of trust to hold 60% of the trust assets in Inspiration and not actively spread the risk. CPT tried to excuse itself alleging roll had been hindered by the widow’s emotional attachment to Boyle shares. Court refused to accept this excuse – Rather than seriousness of risk) emphasizing that CPT could have sought a court order compelling sale and so circumvent requirements for trustee unanimity)
  + - But **Section 96** can relieve trustee of personal liability for breach whenever the trustee acted **honestly** and **reasonably** and thus act remedially in favour of trustees needing special consideration.
    - **Criticism:** the court says it holds individuals and trust companies to the same standard, but it looks like they are imposing a separate standard for the widow.

**Investments on Moral and Ethical Grounds**

* Trustees must make investments beneficial to beneficiaries, regardless of their own personal interests and views(***Cowan v Scargill***, 1985 Ch 270)
  + - **Exception:** Beneficiaries are *sui juris* and share trustees moral values (e.g. investment in tobacco) then it may be a benefit to beneficiaries not to invest in vehicles they agree are immoral. The trust can be so varied.
    - **Manitoba Law Reform Commission:** non-financial criteria could be considered, when the trust is silent, provided the predominant goal remains the securing of a reasonable financial return in accordance with the usual standard of prudent practice.

### Ousting Court Jurisdiction

* **Settlor cannot oust court jurisdiction** through trust instrument because of Public Policy (***Re Wynn*** 1952 Ch trustees actions “shall be conclusive and binding upon all persons interested under this my will…”a clause intended to exclude the rule of impartiality of treating classes of beneficiaries)
  + **Example:** Cannot prevent court from acting on trustees that actdishonestly, fail to exercise discretion or the prudence of a reasonable businessman, or to act impartially between or in prejudicial manner to beneficiaries (***Boe v Alexander*** BCCA 1987: the trustees unsuccessfully argued exclusive jurisdiction under the plan ignoring the final and binding determinations of the trial judge).
* **Settlements cannot shield the Trustee from liability (*Re Poche***, AltaQB 1984)
* **Questions of Fact:** a power to adjudicate a question of fact can be given exclusively to a trustee (***Re Tuck’s Settlement***:court upheld a Jewish faith clause where “the Chief Rabbi of London” was empowered to determine “conclusively”.

### Trustee’s Powers of Delegation

* **Old common law rule:** trustee cannot delegate powers (**“*delegatus non potest delegare*”**)]
* **Common Law Current Rule :** A trustee cannot delegate to others the confidence reposed in himself, but, if done from a moral necessity or in the regular course of business, a trustee may in the administration of trusts avail himself of the agency of third parties.(***Speight v. Gaunt*** 1893 HL): Involved administration of shares and stock broker)
* **Statutory Powers:**
  + The trustee may delegate to solicitors and bankers, without facing liability for wrongs performed by them**(s. 7)**
  + But trustee liable for breach of trust if proven to have been in **wilful default (s. 95)**
    - Rebutting the implied indemnity
  + **Corporate Trustees:** Unlike the result in ***Re Wilson,*** today, when a settlor selects a corporate trustee the settlor is implicitly choosing its decision-making structure/management style, which could be exercised through the board, a management committee or even the CEO.

### Fiduciary Duty (Duty of Loyalty; Duty to Act in Good Faith)

* The general principle is that the fiduciaries/trustees must not place themselves in a position where their interests **may conflict** with those of their principal/beneficiary.
* The scope-of-meaning attributed to “may” has changed with time. Speculate on the reasons for this change, if there has been a change...

**General Conflict of Interest:**

* + **CT may apply:** if a conflict of interest is found, the court is likely to apply a constructive trust so that the beneficiary gets equitable title over the property that the trustee has acquired legal title over in conflict. ***Keech v Sanford***
  + **Old Approach:** no conflict rule is strict and fulsome
    - ***Keech v Sandford*** 1726: trustee leased property himself because beneficiary under age, wasn’t acting in bad faith.
    - ***Boardman v Phipps*** 1967:trustee wanted trust fund to invest in shares; had knowledge about shares which they acquired in capacity of being trustees; board rejected opportunity; trustees bought shares in personal capacity. court still held they breached fiduciary duty)
      * Viscount Dilhorne and Lord Upjohn **dissented**. “The phrase “possibly may conflict”…means that the reasonable man would think that there was a **real sensible possibility of conflict**; not that you could imagine some situation which might, in some conceivable possibility.”
  + **Modern Approach:** “the no conflict principles are strict..., [but]…care should be taken to interpret them in the light of modern practice and way of life”(***Peso Silver Mines Ltd. v Cropper*** SCC 1966:directors refused mining claim. Later director launched own company and bought claim. Court said no conflict because company had said no and time had passed)
    - Senior managers cannot leave company/trust to pursue opportunity that the company/trust is also pursuing.(***Canaero*** SCC1974: top management quit to take advantage of opportunity company was after. they were placed in the same position as directors, even after resignation and even though they were not acting in bad faith and **Canaero could not have taken the opportunity.)**
    - **List of considerations (*Canaero*):** 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.”
  + **Policy Debate:**
    - Possibility that overly strict interpretation will prevent the best trustees from taking on the duty because they may have more connections and be vulnerable to conflict situations.
    - **Fully preventative approach** (Norris JA in ***Keech and Sandford and Boardman and Phipps***): in order that people may be assured of their protection against improper acts of trustees it is necessary that their activities be circumscribed within rigid limits
      * Historically, (18th and 19th centuries) courts wanted to discourage a widespread practice by trustees of purchasing assets from the insolvent estates they were required to liquidate.

### Self-Dealing (trustee sells the estate to himself):

* + **Rule:** Ordinarily, the self-dealing **renders voidable** any transaction where a trustee purchases trust property for himself, or more commonly, sells his/her property to himself as trustee (unless expressly authorized)
  + But, if trustee plays no part in negotiation, pays fair price and renounces position as trustee might not be void.**(*Holder v Holder* 1968:** according to **Harmon LJ,** found no conflict **Sachs LJ** held that an inflexible rule prohibiting all transactions is unnecessary and could itself lead to injustice; **Danckwerts LJ** held old rule was too severe)
  + **Holder Adopted in Canada** (***Molchan v Omega Oil & Gas Ltd*** SCC 1988): the majority approved ***Holder*** as Canadian law, the court (per Estey J) leaning (with Sachs LJ) against the “rigidity of rules as can cause patent injustice” (Wilson J dissenting and opting for the strict approach).
  + **Policy Issue:** has the trustee really served the interests of the beneficiaries well and secured the best price for them? It is a **structural conflict of interest** because the trustee wants personally to buy from the trust at the lowest price or sell personal assets to the trust at the highest price. But buying or selling personally places him at both ends of the transaction – an obvious conflict!

### Fair Dealing (trustee purchases reversionary (beneficial) interest from beneficiary)

* + **Rule:** Transaction voidable, onus on trustee to show that every possible security and advantage were given to the beneficiary and as much was gained from the transaction as could have been gained in any circumstances. (***Denton v Donner***)
    - the trustee 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 trustee; (2) that the beneficiary had independent advice, and every kind of protection, and the fullest information with respect to the property; and (3) that the consideration was adequate (***Crighton v Roman***)*.*

## Trustees’ Duty of Impartiality

* **Inter vivos trusts** Duty of impartialitydoes not apply to *intervivos* trusts: where settlor’s intention is demonstrated by assignation of assets)
* BUT if there is no intention in an inter vivos to be partial, the duty of impartiality applies (***Smith:*** in this case there was power of sale and power to retain)

### General

* Presumption of duty to be impartial subject to contrary evidence of settlor intention (***Howe v. Lord Dartmouth; Lottman***)
* Where there is more than one beneficiary, it is the duty of the trustee to act **impartially**, in accordance with the presumed testator’s intentions.
  + Especially where the trust deals with beneficiaries in succession; e.g. life tenants and remainder persons).
  + But, the settlor/testator can direct otherwise (i.e. prescribe partiality or indifference to it) and that instruction will prevail.
  + **Discretionary trusts:** the terms of the trust may empower trustees to choose which beneficiaries are to benefit at particular points in time (i.e.: higher education for a grandchild) including the ability to encroach on capital if needs be.

### Common situations which Raise Concerns about Partiality

* + **(a) Original Assets:** the mix of original trust assets transferred by the **settlor/testatrix** as trust property drives unequal treatment between classes of beneficiaries (life tenant versus remainders)
  + **(b) During Administration:** the asset mix assembled by **the trustees** under their investment powers drive the unequal treatment of a return that may include assets that are exhausted as both income and capital (e.g. a mine)
  + **(c)** **Characterization:** the trust property could be either capital or income according to the way the transferor has characterized it (certain kinds of shares see ***infra***). A trust portfolio that unduly emphasizes one over another means lopsided treatment of successive beneficiaries.

**IF FIND PARTIALITY, LOOK TO RULE IN *H v LD BELOW ON NEXT PAGE***

### Impartiality and the Rule in *Howe v Lord Dartmouth:*

* Where a **testator/testatrix** leaves residuary **personalty** to persons receiving by way of succession and the residue includes a **wasting asset** (one that is losing money over time)then the trustee must:
  + **Sell** the personalty that is a wasting (and unauthorized or reversionary) asset;
  + **Invest** the proceeds in **authorized investments** (non-speculative) the income of which is for the benefit of the life tenant beneficiary and the capital of the fund accruing for later use by the persons holding the remainder interest
  + **While there is still partiality**: (before he sells), he must apportion by giving 2-7% to life tenant and investing rest in capital of fund **(*Earl Chesterfield* (see below))**
  + **Contrary-Intention:** The application of the rule is subject to a **contrary** **intention** indicated by: ***Indicia* implying partiality of treatment:**
    - **Express** **provisions** in the will
    - Directions that can be **implied** such as
      * A trust to **“retain”** ;
      * Authorization to invest in speculative investments
      * That the life tenant beneficiary is to receive income***in******specie***
  + **Exception to Impartiality - Real Estate (*Howe v Lord Dartmouth***):only applies to personalty (***Lottman*** SCC: son paying little rent for land mother complaining) confirmed in ***Re Oliver***
    - **if the trust for sale covers entire estate** Real Estate will be included in whole estate for impartiality (all realty and personalty) (***Lauer v Stekl*)**
  + **When there is a Trust for Sale:** the income must be apportioned once the wasting, unauthorized investments, or reversionary assets have been sold (implies that testator desires **impartiality**). **Wasting=**depreciating **UA=**speculative
    - **Coupled with Power to Postpone:** implies intention by the testator that the life-tenant beneficiary enjoy the asset *in specie.*
      * **Trust for sale has priority over power to postpone** because it sits better with the common law rule to be impartial (  ***Lauer ; SCC 1980***)
    - **Coupled with Power to Retain:** A **power** to retain ***may*** also imply an ability to enjoy *in specie –* but less than a trust to retain. A **trust** to retain, implies an intention of partiality.
      * **Intention must be clear to displace requirement of impartiality:** if it says to sell when advantageous or at all, infer intention of testator to be impartial**(*Royal Trust v. Crawford*)**
  + **When power of sale:** it’s enough to trigger impartiality, though it will be overridden by a clear intention by the settlor/testator to the contrary ***Smith***

### Settled Shares in a Company: income or capital?

* + **Form= Substance:** Ordinarily, courts look to form to infer the intention of the company (***Waters v Toronto General Trusts Corp*** SCR 1956the shares were converted into preferred shares and the court said the trustee should treat as capital)
    - **Exception: “**Form is substance” yields to what was clearly the intention of the testator (***Re Welsh*** OntHC 1980:decision of company to sell capital and pay out in form of dividends would leave deceased’s children with no inheritance, which was clearly not his intention)

### Debts and other Disbursements:

* + **Problem:** The problem arises because the life tenant under a will is entitled to income soon after the testator dies.
  + **Old Rule:** Life tenant cannot be favoured in some way because the payments of debts take place after she gets income from the assets (***Allhusen v Whittel***)
  + **Abolished - *Trustee Act s 10*:** Unless testator says otherwise, all income is available for payment of debts etc. and is to be treated as part of the residuary estate.

## Trustee’s Duty to Provide Information

* A beneficiary has a right to require a trustee to provide information that will enable a judgment whether the trust is or is not being properly managed (such as trust accounts, investments, the trust document and all reasonable information concerning management of trust property; not all information).
* **Exemption:** Beneficiaries are not entitled to the reasons indicating why trustees exercised discretionary power in a certain manner.(***Re Londonderry’s Settlements* Ch 1965**: beneficiary concerned about distribution of income).
  + Courts could enforce disclosure if questions of bad faith are raised.
  + **Example:** agenda, correspondence between the trustees and the trustees and beneficiaries, minutes of trustee meetings.
* **Legal opinions:** disclosure is controversial and will depend on its purpose and solicitor-client privilege. Disclosure is now allowed when it is clearly dealing with issues of benefit to both trustees and beneficiaries (e.g. a direction on how to proceed based on a construction of a provision; not one on trustee breach of trust (***Camosun College Faculty Association v College Pension Board of Trustees*** BC 2004, ***Froese v Montreal Trust***, BC 1993)

### The Trustee’s Duty to Account

* In a deceased estate the trustee has ordinarily 2 years from date of appointment to file the accounts (**s. 99 of *Trustee Act***).
* Although beneficiaries are entitled to inspect accounts they are not entitled to an instantaneous response. While today, with reliance on computer technology, instantaneous transmission is not arduous, maintaining currency and accuracy on a daily basis may be (***Sanford v Porter*** OntCA 1889).

### Remuneration of Trustees

* **Rule of Equity:** a trustee acts **voluntarily and services are unpaid**. So the remuneration should be regulated **(i)** in the trust instrument, **(ii)** under contract w/ *sui juris* beneficiaries (vulnerable to an undue influence attack), or (iii) by the court (***Boardman and Phipps***).
* **Statutory Law (s. 88 of *Trustee Act*):** trustees are allowed **(i)** expenses, **(ii)** “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” **and** **(iii)** annual “care and management fee” not exceeding 0.4% of the average market value of the assets (***Re Sproule***, AltaCA 1979, ***Re Pedlar***BCSC 1954))
  + The court expressed a preference for lump sum remuneration and opined that the use of percentages would require special reasons.
  + Guidelines for remuneration:
    - The magnitude of the trust (explained in ***Re******Pedlar****,* below,as its value and complexity e.g. farm, portfolio of investment, realty, running a business)
    - The care and responsibility arising from it
    - The time occupied in performing the duties
    - The skill and ability displayed
    - The success that has attended the trustee’s administration of the trust assets.
  + To receive a care and management fee in addition to fair and reasonable remuneration, the trustee 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 cited in ***Re Sproule*** (***Re Pedlar***).

### Indemnity of Trustee:

The basic principle of equity (not law) is that the beneficiary who gets all of the benefit of the property should also shoulder its burdens

* **Rule:** Thus trustees 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; unless there is a good reason why the trustee as legal owner should personally bear the burdens incurred in carrying out their duties. ***Re Reid v Yorkshire and Canadian Trust***
  + **Example where trustee should bear burden: unfair to 1 B** (***Hardoon v Belilios*** AC 1901):trustees dividing the trust into several smaller trusts in favour of several beneficiaries; it would be unfair to cast the increased liabilities of those divided trusts onto say the one and only *sui juris* beneficiary.
  + **Example where Trustee shouldn’t bear burden: beneficiary benefiting** (***Re Reid v Yorkshire and Canadian Trust***):there was an attempt by beneficiaries to make trustee pay, but the trustee was owed an indemnity because the beneficiary is benefiting from the situation.

### Control of Trustees: who are trustees accountable to?

* The beneficiaries and the court are obviously foremost among those who can ensure that duties are properly performed.
* **Control by Beneficiaries – (generally refer to chapter 6 – The Beneficiary)**
  + **Limits on the power of beneficiaries to control trustee:**
    - **(a) Beneficiaries cannot appoint new trustees:** The fiduciary power of trustees to make trustee appointments is not controllable by beneficiaries (***Re Brockbank***, 1948: Beneficiaries have 2 options: either accept the trust as is with its discretionary power to appoint trustees or extinguish the trust under *Saunders v Vautier* (and accept any adverse tax consequences that may flow from that termination).
    - **(b) Beneficiaries cannot influence trustees more than any other shareholder** (***Butt v Kelsen*** 1952 CA: access company documents should not be treated differently from other shareholders even if trustees are directors).
      * **Policy concern** The beneficiaries have the same rights as shareholders – not more. However, beneficiaries can compel trustees to vote the shares as directed, even to change the articles. This is an odd conclusion - perhaps? The beneficiaries are not the shareholders. Beneficiaries have an equitable interest in the trust, but not legal title to the shares.
* **Control by the Courts**
  + **Advice and Opinion from the Court:** Trustees can apply to court in chambers for an opinion, advice or directions on a question of management and administration of the trust property (**s. 86 of the *Trustee Act***).
    - **Section 87** absolves trustees of responsibility where they are acting under court authority.
      * Unless trustee is guilty of fraud, willful concealment or misrepresentation by obtaining such opinion, advice or direction.
    - **Example - Serious Deadlock** among the trustees (***Re Billes***, OntHC 1983: “order sale of shares and advantageous and beneficial time”)
      * However, generally Courts also do not want to be overburdened with requests for advice, especially where, as is the usual context for applications for advice, there is stalemate in decision making among the trustees (***Tempest v Camoys*** 1882: trustees disagreed with beneficiaries; ***Re Wright***, OntHC 1976: half trustees refused sale and half consented)
  + **Court will intervene where the Trustee is acting outside trust purposes** (***Schipper v. Guaranty* *Trust Co of Canada*** OntCA 1989: purpose of trust was to take care of widow above all else. Trustee didn’t do this, but worried more about other beneficiaries).
  + **Where trustee fails to be even-handed (*Re Fleming*** OntHC 1973):the trustees, 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; the court ordered distribution as capital, considering:
    - adverse tax consequences of treating the surplus as income,
    - the prospects of future income enhancements for the life tenant from other sources,
    - income from enhanced capital, and
    - the need to be even handed between the life tenant and remainder persons.

# Chapter 8: The Constructive Trust

It’s a trust imposed by the courts, who will historically take jurisdiction based on good conscience, when certain circumstances are met

### Effects of Constructive Trust:

* It allows the successful plaintiff to recover property in the hands of a person characterized as a faithless fiduciary (P gets beneficial title in the property) with priority before many unpaid general creditors if they are not bona fide purchasers for value.
  + the declared trust can attach retroactive benefits to the existing asset.

### Decision to find for CT:

If court feels it should apply constructive trust it can either do so or award trust damages (much worse than contracts or tort damages).

* **Example where trust damages preferred over CT (*Guerin***: federal crown unjustly enriched when leased musquem land to shaugnessy golf course. Because shaughnesssy was 3rd person BFPV, court ordered trust damages instead of imposing constructive trust.)

### Institutional Categories where Constructive Trust Applies

**(**substantive requirements need to be established for imposition of constructive trust)

* + **(a)Where Trustees Breach Conflict Rules**
    - **Breach of trust or existing fiduciary duty, will result in assets held by person being put into a trust** (***Keech v Sanford***: trustee in breach of duty of loyalty to infant child by taking on renewal of lease, even where renewal would never be extended to trustee. Court said he held that interest on trust for child. This is a constructive trust)
    - **where directors breach fiduciary duty to company *Boardman & Phipps*** (shares in lester harris were taken over by boardman and Phipps, court held they shouldn’t have because it would’ve been a breach of trusts Court placed those assets into constructive trusts to distribute among beneficiaries)
    - **Faithless Directors**
    - **Agents not doing job properly**
  + **(b) Involvement in property inconsistent with the Trust (**ex: if you intermeddle into a trust,
  + **(c) Other Categories:** (contracts: insurance, real estate) (torts: trespass nuisance)

### Remedial (Constructive Trust without pre-existing fiduciary relationship):

* + **No longer just institutional categories, CT can be applied in other situations. look to nature of relationship. There doesn’t need to be pre-existing fiduciary relationship *Guerin***
  + **Example:** Non-spousal domestic relationships see (***Pettkus v Becker*** The court intervened in the relationship because not to do so would, given the 20-year cohabiting relationship between them, have resulted in the unjust enrichment of Pettkus at Becker’s expense. The court held that the principle of unjust enrichment lies at the heart of the CT.***)***
  + **The existence of a contract does not preclude the existence of fiduciary obligations *Hodgkinson***

### Expansion of the Remedial Constructive Trust in Canada

* **Court takes Constructive Trusts Beyond Institutional Categories**: in ***Pettkus v Becker*:**
* Dickson J set out three requirements for finding a constructive trust. There must be:
  + 1) an enrichment;
  + 2) a corresponding deprivation (causal connection between 1 and 2) ; and
  + 3) the absence of any juristic reason for the enrichment.

### Next Development: Expanding the Definition of “Fiduciary” *Guerin*

* + **CT should apply beyond Institutional Categories of Fiduciary:** ***Guerin*** said:“It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.” Dickson J 1984 SCC)
  + **Placing Unjust Enrichment within Constructive Trust:** In ***Guerin*** – the court stated that unjust enrichment by someone at the expense of someone else is at the heart of the Remedially applied Constructive Trust.
  + **Fiduciary First Defined: “**Where by statute, agreement, or…unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary”.***Guerin***

### Next Development in Determining Fiduciary: *Frame v Smith*

* + Wilson J dissenting in ***Frame v Smith*** defined in some detail the characteristics of an actionable fiduciary relationship that went beyond the trust.
    - The Fiduciary has Scope for the exercise of some discretion or power
    - The Fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests
    - The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power (first mention of “peculiarly vulnerable”)

### Vulnerability and the Fiduciary: *Lac Minerals*

* **Vulnerability is Essential:** Lamer CJ Sopinka and McIntyre JJ: find that vulnerability lies at the heart of the fiduciary relationship and that on the facts it was missing (Court found that the facts did not support a breach of a fiduciary duty – the breach lay in the tort of actionable breach of confidence. They found a breach of confidence, but no breach of a fiduciary duty because of the absence of “vulnerability” i.e. Corona was not vulnerable because its a multi-million $ company and had access to lawyers)
* **Vulnerability is an aspect, but not the only one:** They found that there was a fiduciary (breach of confidence gave rise to a fiduciary duty because **the form of negotiations** between LAC and Corona was one that developed into a relationship of trust and confidence (when Corona gave Lac confidential information) and a reliance on it and the industry practice expected. Ordinarily, he says, the fiduciary relation does not arise between commercial parties in arm-length contractual negotiations, but in this case a relationship of trust and confidence had developed ): (La Forest and Wilson J)
* **Laforest indicates 3 Categories of Fiduciary:**
* 1. The relationship is presumed in certain classes of relationship (directors, solicitors and clients, parents, trustees, agents/principals).
* 2. The relationship can arise as a “matter of fact out of the specific circumstances of a relationship”, even one where normally it would not be expected to arise (like here). The hallmarks making the specific circumstance fiduciary are: “ascendancy, influence, trust, confidence or dependence”. Where they give rise to a situation of “fiduciary expectation”
* 3. As “instrumental or facilitative”, i.e. achieving an appropriate result to remedy the Unjust Enrichment. The fiduciary relationship is used to justify a CT result and “reads equity backwards”, e.g. mistaken overpayment to a bank account.
* **Result in that Case:**. Laforest and Wilson found that LAC had been unjustly enriched through the acquisition of the William’s property at Corona’s expense and the CT was appropriate as a remedy Even though the majority found vulnerability is key, Lamer supported imposing a Remedial CT
* **Contradictory Outcome:** this decision to impose CT seems contrary to the majority’s finding (but has led to the continuation of the expansion of the fiduciary beyond vulnerability. (See ***Hodgkinson v Simms)***
  + - This has posed a difficulty because to follow *stare decisis* would mean not to follow the result in ***Lac***

### Policy Concerns over *Lac* “finding a fiduciary relationship”:

* pre-contractual negotiations in business - do we want fiduciary relationships and trust law governing here? Isn’t it even playing field?
* why not limit to parent-child priest-penitent, teacher-student etc? ie true fiduciary relationships?
  + La Forest emphasizes that broader definition of fiduciary is necessary to ensure the integrity of the marketplace (***Hodgkinson***)
* Industry standards - tort remedy available
* contracts between companies with sophisticated lawyers - is there vulnerability?
* differences between remedies in governed by trust law vs. those governed by contract, tort; Trust damages are much heavier.
  + ie. do we want trust law/remedies and findings of fiduciary available in uncertain, unpredictable business circumstances.
* ***Breen v Williams*** 1996 186 CLR 71) in approaches taken by the various common-law jurisdictions around the world. Mason CJ of the High Court of Australia lampooned Canadian developments as follows: “all Canada is divided into 3 parts: those who owe fiduciary duties, those to whom fiduciary duties are owed, and judges who keep creating new fiduciary duties.”!

### REFER TO HODGKINSON V SIMMS BELOW

### Vulnerability IS NOT Necessary for Fiduciary Relationship:

**In *Hodgkinson v Simms* La Forest J confirms *Lac minority* that:**

* It IS necessary for a fiduciary relationship that, “given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former’s best interests with respect to the subject matter at issue” Focus on the “nature of the breach rather than on the nature of the loss”(***Hodgkinson v Simms:*** accountant (S) did not disclose conflict relationship with developer of properties in which he was advising H to invest, H employed S through contract.Court found that H not vulnerable but there was a power dependency relationship because H placed reliance on S, so therefore there was a fiduciary duty)
* **Note no remedial CT was possible here:** as value of property severely deflated – through compensation from the respondent Simms.
* **Contracts:** The existence of a contract did not preclude the existence of fiduciary obligations
* **Fiduciary Duty is different than Duty of Care:** because of the “special elements of trust, loyalty and confidentiality that…in a fiduciary relationship give rise to a corresponding duty of loyalty”.

### Breach of Fiduciary Not only confined to Business Relationships and Trust scenario:

**On the issue of looking at CT and if there’s a fiduciary:** La Forest opined there “**need not be a unilaterial undertaking by the fiduciary”** to establish a fiduciary relationship.

* “being a parent comprises a unilateral undertaking that is fiduciary in nature.” **(*M v M:*** P sued father for damages on basis of incest. Father argued was shielded by limitations. It was probably statute barred by tort, but if it was breach of fiduciary duty)

### Result of Finding the Fiduciary:

Court exercises good conscience by remediating either by imposing a constructive trust or providing trust damages (way worse than torts or contract damages)

* **When to apply Trust Damages instead of CT:** Need to apply trust damages instead of Remedial CT when there is a 3rd party BFPV and you cannot take the property away from them
* **Difference between Trust damages and other damages:** is that trust damages are heavier than torts because do not depend on foreseeability and heavier than contracts because no duty to mitigate.