

TRUSTS - SUMMER 2013 - PAVLICH

BASICS

HALLMARKS OF A TRUST

1. **Split Ownership:** separation of legal title (administration, management, and control) and equitable title (enjoyment, benefits).
2. **Fiduciary Duty:** through the split of ownership, the T - who holds legal title - is not entitled to enjoy the benefits of the property; the T must act in the upmost good faith towards the B; onerous requirements
3. **In Rem Characteristic:** with certain exceptions, equitable interests are property with *in rem* rights
 - B / plaintiff can call for the trust & obtain legal title (*Saunders v Vautier*)
 - property can be recovered from the fiduciary -- B is a preferential creditor in the event of trustee insolvency
 - can also be recovered from a 3rd party-- with the exception of a BFPVWN
 - B / plaintiff entitled to any increase in value the property may have accumulated

HISTORY

- CL created a system of property -- complete with legal ownership -- *ius utendi, ius fruendi, ius disponendi*
- over time -- individuals wished to split those interests for a variety of reasons -- CL did not recognize
- King allowed the Chancellor to moderate the strictness of the CL rule & allow segregation of interests on the basis of equity

REASONS FOR A TRUST

- tax avoidance // provisions for family settlements // incapacity // corporate -- JV's, insolvency // investments such as mutual funds // pension funds // RRSP's // estate administration upon death // charitable purposes // environmental protection

MAXIMS OF EQUITY

- **equity follows the law**
 - CL is applied first & prevails in the absence of an unjust outcome where it may be unconscionable to follow the strict application of CL rules; equitable principles mirror those of the CL
- **equity will not permit a wrong without a remedy**
 - emphasis is on substance vs form; will provide a remedy where none exists in CL
- **those who seek equity must do equity**
 - "clean hands" doctrine
- **equity assists the vigilant, not the tardy**
 - delays - equitable laches - minimize or negate a claim in equity
- **equity looks to the intent, not the form**
 - equitable remains available despite deficiencies of form (wording, formalities, etc) if the substance / intent is complete; equity is concerned with what parties intended to do
- **that which ought to be done, is done**
 - equity may view transactions as complete before they become valid under the CL; ex/ buyer of property gains equitable interest after the sale, but before formal registration
- **equity acts in personam**
 - equity acts on the conscience of an individual
- **equity will not assist a volunteer:**
 - equity, just as the CL, looks upon gifts with great scrutiny; when consideration is given, equity will try and ensure that the agreement is performed
- **equity will not fail for want of a trustee**
 - if no T is in place, one will be appointed by the court
- **if the equities are equal, the law will prevail**
 - legal interest usually takes precedence over an equitable interest if acquired for value without notice

EXPRESS TRUSTS

- An ET is created with intention by a S/T who wishes to gratuitously transfer property to be held by one for the benefit of another
- accomplished by a 2-way transfer --- LT must vest with the trustee & ET must pass to the beneficiary

VESTING OF TRUST PROPERTY

1. mere intention insufficient -- to be **valid & enforceable** (by the B) LT must "vest" with the trustee (for each asset)
2. before this occurs a trust is incomplete and must be **perfected**
3. vesting "cloaks" the holder of LT with the property rights comprising the *ius utendi* -- possession, management, and control
4. analysis of vesting must look at both the **form of dealing** and the **type of subject matter**
5. **equity follows the law** -- requirements of transfer will vary depending upon subject matter
6. **that which ought to be done, is done** -- depending on the circumstance substance will prevail over form
7. the law favors **early vesting**

PERSONAL DECLARATION OF TRUST

- S declares himself trustee -- also known as "automatic constitution" -- LT is presumed to already be held by the S (*Elliot*)
- B's need not be aware but to vest, the S/T must indicate an "*immediate and unconditional desire to be bound*"

TRUST VIA CONTRACT

- trust created once parties enter in contract, provided the contract for trust is **enforceable**

TRUST SETTLEMENT / DEED -- 3rd PARTY TRUSTEE

- LT to property must be transferred from the S/T to the trustee --> must then look at the **type of asset** being transferred
- **Personalty & Money** -- must change hands
- **Debts** - aka "choses in action" -- must be assigned
- **Land // Shares** -- transfer of title -- registration in LTO (*Mordo*) or registration of name in company registry (*Milroy, Re Rose*)
 - **test of transfer** -- S/T must do everything in their power to effect transfer (*Re Rose, Mordo*)

<p><i>Milroy v Lord - 1862 UK CAC</i></p> <ul style="list-style-type: none"> • equity can't protect an imperfect gift • all that can be done, must be done • depends on the nature of the asset 	<p>Medley gave Lord bank shares in trust for niece (E) // Lord never registered shares in his name // E receives benefits & buys other shares // M dies // M's estate claims shares on a RT // WINS in part // while there was an <u>intention</u> to create a trust, no vesting occurred // E gets to keep the company shares she purchased with the bank dividends</p>
<p><i>Re Rose - 1952 UKCA</i></p> <ul style="list-style-type: none"> • "everything necessary" test 	<p>H leaves shares on trust to W&S // transfer forms given to the company <u>outside</u> of the 5-year taxation period // company <u>completes</u> registration <u>within</u> the period where tax applies // court finds a VALID trust - not subject to tax // H did <i>all he could do</i></p>
<p><i>Carson v Wilson - 1960 ONCA</i></p> <ul style="list-style-type: none"> • donor must relinquish "dominion and control" of either LT or BT during life 	<p>T executed valid deeds to transfer property // retained control & benefit of land // after death, deeds delivered to donees // NO trust b/c no delivery of <u>either</u> LT of BT while alive // becomes a testamentary disposition -- void for failure to comply with <i>Wills Act</i> formalities</p>
<p><i>Mordo v Nitting - 2006 BCSC</i></p> <ul style="list-style-type: none"> • intention of transferor crucial • "substantially vested" 	<p>Family biz -- errant son // M creates trust w/ herself and D as B's -- warehouse as asset // M signs Form A & gives to trustee -- no registration // M retains LT // M dies, trustee registers transfer // S claims trust invalid // Court -- NO -- M's intentions clear // M signed Declaration of Trust -- <i>M held LT to the warehouse in trust for the trustee until transfer completed</i> // M had NOT reserved right to revoke, therefore had done <u>everything that was needed</u> by signing Form A</p>
<p><i>Ratner v LH Ratner - 2010 BCCA</i></p> <ul style="list-style-type: none"> • follows <i>Milroy</i> 	<p>Son gifts M shares for tax purposes // years later, has M sign document transferring shares back to him // M consult lawyer -- cancels "gift" // S sues to enforce gift -- claims M held shares on trust // Court - NO - M did NOT do "everything possible" to transfer the shares</p>

UNVESTED "IMPERFECT" GIFTS

- at times, the court may allow creation of a trust where vesting does not occur until later -- *The Rule in Strong v Bird*
 1. Donor makes *inter vivos* gift that is imperfect only b/c of incomplete (non-vested) transfer
 2. Donor demonstrates a continuing intention to give up until the time of death
 3. Donor appoints the donee as executor of the estate (can now combine LT and BT -- outright title)

<p><i>Strong v Bird - 1874 UK</i></p> <ul style="list-style-type: none"> • incomplete <i>inter vivos</i> gift perfected • subsequent appointment of donee as executor perfects the gift 	<p>SM lived with couple // borrowed \$\$ from SM -- repay in form of rent reduction // SM forgives debt informally // dies -- her estate tries to recover the rest of the debt // FAILS // SM made one of the couple her executor -- clearly indicated her "<i>continuing intention</i>" to forgive the debt // executor holds LT + subject matter of the gift = outright title</p>
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<p><i>Hiillard v Lostchuk - 1993 ON CJ</i></p> <ul style="list-style-type: none"> • application of S v B 	<p>3 kids // J & J each get a piece of land // H stays on farm to help parents // F dies, M clearly intends to give H <i>inter vivos</i> gift of property // zoning bylaw not changed until after M's death // but M appointed H executor // gift perfected under <i>Strong v Bird</i></p>
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THE THREE CERTAINTIES

For a trust to exist:

- **intention** to create a trust -- fragmentation of title -- holder of LT is limited -- will hold beneficially & assume the duties of trustee
- there must be clarity as to what **trust assets** will vest in the holder of LT, to be used beneficially for the holder of ET
- must be able to identify with sufficient clarity who are the **beneficiaries** of the trust

CERTAINTY OF INTENTION ("WORDS")

1. for gratuitous transfers, T/S can intend either an **out & out gift** or a **trust**
2. particular words are not required (*Hayman*) but intention must be indicated / inferred with "reasonable certainty" (*Royal Bank*)
3. words (especially precatory) must be examined wrt context & surrounding circumstances to discern T intention (*Hayman*)
4. a simple intention to benefit someone other than the transferee is too general to create a trust
5. where intention is uncertain courts will prefer an out & out gift (*Hayman*)

<p><i>Hayman v Nicoll - 1944 SCC</i></p> <ul style="list-style-type: none"> • precatory words -- meaning assessed in the context of the will as a whole • uncertain intention --> outright gift 	<p>M left funds to D "in full confidence that she will dispose of the same in accordance with the wishes I expressed" // D dies // NO money distributed -- NO wishes known // M's heirs claim on the basis of RT // Court finds NO trust due to nature of the language //</p>
<p><i>Royal Bank v Eastern Trust - 1951 PEI SC</i></p> <ul style="list-style-type: none"> • test -- "reasonable certainty" 	<p>C owes bank a debt // C sells property to S // C writes memo -- S is to "hold deed of property until C raises a mortgage to repay indebtedness at bank" // C can't pay bank so S sells // Bank claims memo means property was security against C's loan -- to be held by S on trust // LOSES // wording of memo too vague + Bank didn't act as though a trust existed</p>
<p><i>Elliot v Elliot Estate - 2008 ONSCJ</i></p> <ul style="list-style-type: none"> • personal declaration of trust • can establish certainty of intention through words and conduct 	<p>E had disabled child (B) // provided for B via trust agreement separate from will // executor (son) stated that a GIC from the estate was meant to be included in the trust // trust formed through personal declaration -- no issue with vesting // certainty of intention ascertained via conduct & words of the E's // E used the GIC's for the benefit of B <i>while she was alive</i></p>

CERTAINTY OF SUBJECT MATTER ("TRUST ASSETS")

1. trust assets & amount of beneficial interest must be **ascertained or ascertainable** at the time the T is created (*Re: Beardmore*)
2. if division of the assets between B's is unclear, the trust will fail for lack of certainty (*Sprange v Barnard*)
3. instructions which may be objectively interpreted by the court may be sufficient (*Re: Golay*)

<p><i>Sprange v Barnard, 1789 UKCC</i></p> <ul style="list-style-type: none"> • beneficial interest uncertain 	<p>W leaves H stocks in trust "for his sole use" // remainder -- "that he has not necessary use for" to W's siblings // H applied for entire payment // trustees refuse // court -- BI uncertain // no trust formed // H receives stocks in their entirety</p>
<p><i>Re: Beardmore Trusts, 1951 ONHC</i></p> <ul style="list-style-type: none"> • assets uncertain at the time the trust created 	<p>H & W separate // H sets up an express trust for the W to take effect on his death // W is to receive "3/5th's of the net estate" // H later changes mind & sues to have trust declared invalid // WINS // cannot determine w/ "sufficient exactness" at the time the trust was created</p>
<p><i>Re: Golay, 1965 UK CD</i></p> <ul style="list-style-type: none"> • vague term ok 	<p>Testator told executors that trustee may live on one property and "receive a reasonable income" from another // Court held this was objectively determinable</p>

CERTAINTY OF OBJECTS ("BENEFICIARIES")

- trust must have a **recognized person / group of persons / recognized charitable head** (hospitals, education, religion, relief of the poor) as B in order for the court to enforce the trust
- this is why "general purpose" trusts fail -- there is no discernible B to enforce the trust
- **test for certainty** depends upon the manner of selection and the strength of obligation on the trustee to choose a B
- *the more compulsory the duty to select is, the more certain the test must be*

FIXED TRUST

1. B's must be specifically identified // T can be compelled to distribute // group of B's must be completely listed
2. TEST: complete list test // class ascertainability test

DISCRETIONARY TRUST (TRUST POWER)

1. T empowered to select one or more B's from a group, but must pick someone ("trust" to exercise discretion)
2. **TEST**: "individual ascertainability" aka "is/is not test" (*Baden 1*)
3. **conceptual certainty** is required // debate around **evidential certainty** (*Baden 2*)
4. however, evidential uncertainty that leads to **administrative unworkability** will void the trust (*Baden 2*)

POWER OF APPOINTMENT

1. T can hold **power of appointment** -- OR can delegate to the **donee of the power of appointment** (who may not have FD's)
 - **general power**: power to select without restriction -- cannot be compelled to select
 - **special power**: "classify beneficiaries" -- power to select from described group -- cannot be compelled to select
 - **hybrid power**: "classify excepted group" -- power to pick, except from a described group -- can't be compelled to select
 - allows T's to **expand** the class of B's -- PRO: adapt to changing circumstances -- CON: may include an undesired B
2. T need not disclose power, but if exercised it must not be in a capricious manner (*Re Manisty's*)
3. Duties of a Trustee that can be **compelled** (*Hays*)
 - periodically consider whether to exercise the power
 - consider the range of objects of the power
 - consider appropriateness of individual appointments
4. no power can be uncertain merely b/c it is too broad (*Manisty's*)
5. **TEST**: "individual ascertainability" aka "is/is not test" --- gives more effect to the intentions of the S/T
6. **conceptual certainty** IS req'd --- **evidential certainty** is NOT -- power won't usually fail b/c of admin. unworkability (*Hays*)
7. degree of certainty req'd so that trustees can fulfill their duties & the courts can judge whether a trustee is in breach (*Manisty's*)

EVOLUTION OF THE RULE

- historically, the test for certainty for a discretionary trust was a "complete list" on premise that the court, if required, should be able to execute the trust by ordering an equal distribution among B's (*Broadway C's*)
- confirmed complete list for trust powers --- but Is/Is Not test adopted for mere powers (*Gulbenkian's*)
- Is/Is Not test also adopted for discretionary trusts (*Baden 1*)

HOW TO DETERMINE?

1. mandatory language + power of selection ---> discretionary trust (*Baden 1*)
2. Look at the wording [imperative, mandatory -- **trust power**] while [permissive, discretionary -- **power**]
3. Does the trust instrument give a property interest to ANY beneficiary? **power** -- B's have no property interest until given by the T
4. Gift-over indicates a **power** -- if no B is selected, the S/T indicates who will then receive ET

<p><i>Re Manisty's Settlement, 1974 UKCD</i></p> <ul style="list-style-type: none"> • intermediate power acceptable • powers can't be exercised capriciously 	<p>Trustee given power to select from a group relatives - EXCEPT those in a smaller set (S, wife, contributors, their wives) -- PLUS the power to add B's // T picks mother & widow of S // group of B's sue // LOSE // intermediate power NOT void for uncertainty merely b/c its ambit is too wide</p>
<p><i>Re Hay's Settlement, 1982 UKCD</i></p> <ul style="list-style-type: none"> • intermediate power 	<p>Trust + gift over // T has power to appoint -- but may not appoint S, her husband, and current of past trustees // T's execute deed</p>

<p><i>Baden 1, 1971 UKHL</i></p> <ul style="list-style-type: none"> • discretionary trust in favor of a class • test = Is/Is Not • administrative unworkability 	<p>DT in favor of employees, former employees, their relatives & dependents // executors of estate sue -- claim trust too uncertain & RT in favour of estate should arise // overturns <i>Gulbenkian's</i> // applies Is/Is Not to trust powers // <i>evidential certainty</i> not required so long as there is no administrative unworkability</p>
<p><i>Baden 2</i></p> <ul style="list-style-type: none"> • conceptual vs evidentiary certainty • broad categories may be conceptually certain 	<p>DT in favor of employees, former employees, their relatives & dependents // "relatives" NOT void for conceptual uncertainty //</p> <ul style="list-style-type: none"> • Sachs LJ -- all that's needed is conceptual certainty (most used) • Megaw J -- ok to have a number of uncertain persons if there are enough who are certain • Stamp J -- wants both conceptual & evidentiary certainty

PERPETUITY RULE

- CL does not like gaps in seisen -- RR's stipulate that any condition of vesting **must** be met while the previous estate is in existence
- this was circumvented through the *use* -- no issue with gaps in seisen b/c LT always vested with the trustee
- equitable FI's not subject to the CL RR's --> allowed property to be tied up for long periods --> RAP developed as a result
- *all ECFI's must comply with the RAP or be saved by remedial legislation --- all FI's in a will are equitable (Re Robson)*
- failure will result in the trustee holding the property on a RT for the S/T or their heirs

Non-Vested Contingent FI's as Property

- 1) condition must NOT be illegal // against public policy // or constitute an extreme restraint on alienation
- 2) condition must be certain using the relevant test for certainty
- 3) vesting of the condition must not violate the RAP -- or if it does, then it must be saved by remedial legislation

PROCESS

I. Is the equitable future interest vested or contingent?

- **vested future interest** -- presently-held (vested) future interest (not yet possessory) that is proprietary (can be sold)
 - to vest B must be ascertained & the interest ready to take effect -- prevented only by the existence of prior interest
 - **reversion**: A gives LE to B -- when B dies, the property reverts back to A
 - **remainder**: A gives LE to B, remainder to C -- when B dies, the interest passes to C
- **contingent future interest** -- future interest (not yet possessory) that is contingent (non-vested) on the occurrence of some future event --> when contingency occurs or limitation is realized, the interest becomes a (presently) **vested FI**

II. What type of contingency?

- **contingent remainder** - interest in a thing subject to a **condition precedent (if)** [happening of condition vests]
 - "To A for life, remainder to B if she turns 30" -- contingent (non-vested until 30) & future (no immediate possession)
- **right of entry** - interest in a thing subject to a **condition subsequent (but if)** [happening of condition UN-vests]
 - "To A, but if A marries, then to B"
 - A gets interest (FS) defeasible upon a condition subsequent
 - B gets **right of entry** -- contingent (non-vested until the contingency is met) future interest (no possession)
- **possibility of reverter** - determinable interest subject to divestment upon the happening of a **limitation**
 - **(so long as / while / though / when / until)**
 - "To B and his heirs so long as they do not drink alcohol"
 - grantor gets the **possibility of reverter** -- contingent (non-vested unless limitation met) FI (no possession)
 - B has the **determinable interest**

III. Is the contingency illegal / uncertain / against public policy / or a restraint on alienation?

IV. Does the contingency violate the Rule Against Perpetuities

- *The interest must vest, if it is to vest at all, within the lives in being + 21 years*
- if there is ANY chance of vesting outside the PP, the FI is disqualified as property
- NOTE: the RAP typically comes into play were there is a gift to unborn children or where the timeframe is remote

V. Can it be saved by remedial legislation?

- Capacity to have children (**s.14**) -- *rebuttable presumption*
 - males 14 and up
 - women 12-55
- Wait and see (**s.9**) + statutory lives in being (**s.10**)
 - see if contingency met by the time the last person alive at the time the interest was created dies
 - list of lives in being that may be used: grantor / trustee / beneficiaries / etc
 - wait and see must take place within **80** years -- or you can just pick an 80 year perpetuity period (**s.7**)
- Age reduction (**s.11**)
 - allows you to add 21 years to actual age of the B in order to meet the age contingency

FORMALITIES

- formalities protect both the transferor and the transferee when property (often very valuable) is being exchanged **gratuitously**
- so while **equity follows the law** wrt formality requirements, it also **looks to intent rather than form**
- rigid adherence to rules of formality in a trust environment can lead to unjust results, given the vulnerable position of the B

INTER VIVOS TRANSFERS

- no specific formalities for an *inter vivos* trusts that do not deal with land or interests in land -- may be made orally
- disposition of **legal interest in land** must be in writing (**s.59(3) LEA**)
- written disposition is not required to pass **beneficial interest in land** (**s.59(1) LEA**)
- whether a trust is *inter vivos* or testamentary depends on the **intention** of the S/T (*Mordo v Nitting*)
- a trust that takes **immediate** effect is *inter vivos* even if it's only to be performed after death of the S/T (*Mordo v Nitting*)
- transfer of **equitable estate** from a B to a 3rd party must be in writing (**s.36 LEA**)

PER MORTIS CAUSA - WILLS

- in general, intentions must be **clear & comply with formalities** -- stems from policy desire to avoid intestacies
- wills must be in writing (s.3 WA) signed and acknowledged by testator in the presence of 2 or more witnesses (**s.4 WA**)
- new legislation will allow those 16+ and mentally capable to make a will (**s.36 WESA**)
- two exceptions to formality rules wrt wills are the **fully & half secret trust**
- need for secret trusts may decline when the *Wills, Estates, and Succession Act* come into force
 - s.59** - courts may rectify a will based on :: errors arising from an accidental slip or omission // misunderstanding of the will-maker's instructions // failure to carry out the will-maker's instructions // extrinsic E may be admitted to establish the above

<p><i>Browne v Moody, 1936 UKPC</i></p> <ul style="list-style-type: none"> law prefers early vesting 	<p>A gift to the <u>remainder</u> will be treated as <u>vested</u> if postponed solely for the convenience of the estate or the creation of a prior interest, such as a life estate.</p>
<p><i>Mordo v Nitting, 2006 BCSC</i></p> <ul style="list-style-type: none"> intention of S/T is key trust that takes immediate effect is <i>inter vivos</i> 	<p>Family biz -- errant son // M creates trust w/ herself and D as B's -- warehouse as asset // M signs Form A & gives to trustee -- no registration // M retains LT // M dies, trustee registers transfer // S claims transfer is testamentary & therefore invalid due to lack of compliance w/ Wills Act // LOSES // Court finds that M intended the trust to have <u>immediate</u> effect</p> <ul style="list-style-type: none"> present tense language // present entitlement to benefits // M made trust irrevocable

FULLY SECRET TRUSTS

- T leaves gift to named legatee, with undisclosed intention that the legatee hold on trust for another, unnamed B
- during his lifetime the T must **communicate** that desire to the legatee (*Re Boyes*)
- the legatee must acquiesce or **accept** (*Hayman v Nicoll*)
 - if the named legatee has not accepted, they will take beneficially also -- outright title
 - if the named legatee only learns identity of the intended B after the T's death ---> RT in favor of the estate arises (*Re Boyes*)

<p><i>Re Boyes, 1884 UKCD</i></p> <ul style="list-style-type: none"> fully secret trust 	<p>B has C draw up will // B leaves all property to C, to be held & disposed of according to written instructions // no instructions found until <u>after</u> B's death // B's family sues // court finds no trust existed, b/c real <u>beneficiary</u> wasn't named prior to will</p>
<p><i>Ottaway v Norman, 1972 UKCD</i></p> <ul style="list-style-type: none"> fully secret trust -- "in suspense" during the life of the legatee 	<p>O Sr. leaves house & half his estate to H // H is to leave the home to O Jr. upon her death // but H leaves home to N's // O Jr. sues - claims house left on trust // WINS wrt the house & its contents, but not the money //</p>

HALF SECRET TRUSTS

- T leaves legacy to a legatee and discloses in the will his intention that it benefit another, unnamed B **Before or at the time the will is made** (*Blackwell*)
- the T must communicate to Y that he is to hold the property on trust for X
- the T must communicate the identity of the actual B to the named legatee
- the named legatee must accept

<p><i>Blackwell v Blackwell, 1929 UKHL</i></p> <ul style="list-style-type: none"> half secret trust 	<p>B names 5 trustees in will // T's are to hold capital & pay income to "to such person(s) indicated by me to them" // B's wishes communicated clearly prior to or contemporaneous to the will // trust is VALID</p>
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REVOCAION BY THE SETTLOR

Only the beneficiary can collapse a trust (*Saunders v Vautier*). Unless the settlor carves out a niche for themselves as a B, they are completely **out of the picture** once the trust is formed. This is true even if a trust is formed in favor of people who do not exist.

RESULTING TRUSTS

CATEGORIES :

1. ART - Surplus assets from a trust that has failed to take // only been partially fulfilled // surplus assets left over
2. PRT - Gratuitous transfers of property

- Grouped by Megarry in *Vandervell's Trusts (No 2)*
- RT's are "essentially property concepts" ---> that which a person doesn't dispose of is their own
- distinction is not doctrinally-fixed -- separating criteria is problematic --- both rely on a supposed, or **implied intention**

JUDICIAL RATIONALE

- I. **Implied Intention:** *inference* that the transferor intended to give legal title, but not equitable. Stems from a cultural bias against gratuitous transfers - ie/ giving away something for nothing. Maxim: **equity presumes bargains, not gifts**
- II. **Unjust Enrichment:** resulting back of ET in the case of a gratuitous transfer is automatic, since to do otherwise would confer upon the transferee a greater benefit than the one intended. // SCC has declined to interpret these situations using UE principles (*Nishi*)
 - *Critique:* if transferee goes bankrupt, the transferor gets *in rem* proprietary interest, preferred over other legitimate creditors, even though they were the architects of their own demise by handing over legal title in the first place!

AUTOMATIC RESULTING TRUSTS

- creation of an ART *does not depend* on the S/T having **intended** that the beneficial interest would revert to him
- ART's seek to fill a "**gap**" in the equitable title to property -- where otherwise the property would appear "ownerless"
- law prefers certainty of ownership, thus the jump-back is *automatic*

1. EXPRESS TRUST FAILS (*Broadway Cottages*)

- trust fails due to non-compliance with one of the 3 certainties
- equitable title can not pass to the B's - the trustee holds on ART for the S/T

2. EQUITABLE INTEREST NOT FULLY DISPOSED (*Re: West*)

- where LT is transferred to the trustee without fully disposing of the ET, the surplus is held by the trustee of a RT for the grantor
- trustee only holds ET if **explicitly granted** to them by the trust instrument
- POLICY: *fiduciary duty* of the trustee - paramount in the eyes of the court

- Contract Provisions // Trust Law (*Air Products*)

- look carefully to determine if a RT applies, or if the *terms of a K* state where surplus funds should go

- **Defined Contribution:** employees contribute X under their employment K // money held on trust // each B has separate account // funds, along with money made from funds, belongs completely to the B's // as such, there can be no "surplus" funds
- **Defined Benefit:** employee contributes X under the terms of a pre-existing agreement // upon retirement, employee gets paid Y, under the terms of the K // funds stay within company's control & the business has a contractual obligation to the employees

<i>Broadway Cottages</i> <ul style="list-style-type: none"> • express trust void 	Trust with a large & fluctuating class of objects // failed certainty test // trustees held LT on RT for the settlor
<i>Re: West</i> <ul style="list-style-type: none"> • Tee's do not get ET unless specified 	Testatrix leaves property on "trust for sale" to pay funeral expenses, etc // once trust performed, trustees claimed residual amount // court found for T's heirs
<i>Schmidt v Air Products, 1994 SCC</i> <ul style="list-style-type: none"> • DB pension fund surplus -- K provision • employer can lawfully take a contrib. holiday w/ surplus if permitted by the Plan documents (and legislation) 	Merger of 2 pension plans: DC & DB // company dissolves // surplus funds left after plan paid out // company claims on a RT // Court splits decision into each originating plan // the DC plan was a trust whose assets belonged <u>completely</u> to the B's // the DB plan was created under <u>contract</u> not trust --> the money at all times belonged to the company // Air Products receives as the successor co.

3. SPECIFIC LIMITATION UNFULFILLED - "Quistclose Trusts"

- QT offers another means of **creditor protection** -- *lender (settlor) retains an equitable interest in the money loaned*

- exception to the general rule that a lender retains no interest in money once advanced
- if funds are given for a specific purpose & under the guise of a fiduciary duty ---> this is “trust-like”
- all the characteristics of a trust then apply --> fiduciary duty // bifurcation of legal & equitable title // *in rem* rights
- KEY - intention of the parties with respect to the borrowed funds

PROCESS

- money advanced with the stipulation that it be used for a specific purpose
- upon failure of the primary duty (the requirement to fulfill the purpose) a secondary duty arises in favour of the lender
- secondary duty is **equitable** and functions like an ART
 - lender transferred only LT to the borrower under K
 - upon failure of the primary duty, borrower hold on RT for the lender

CRITICISMS

- PD is the functional equivalent of a purpose trust which are NOT allowed
- unclear who holds the beneficial interest before the PD fails

<p><i>Barclays v Quistclose, 1970 UK</i></p> <ul style="list-style-type: none"> • specific purpose not fulfilled • terms of loan create trust 	<p>Q lent RR money for the <u>specific</u> purpose of paying stock dividends // money deposited into <u>separate</u> fund at B's // B knew about special purpose // RR went into receivership <i>before</i> the \$ \$ was paid // B claimed && against overdraft accounts // Q won ---> terms of the loan created a trust in favor of Q</p>
<p><i>Twinsectra Ltd v Yardley, 2002 UK</i></p> <ul style="list-style-type: none"> • B owed L fiduciary duty 	<p>TS load Y \$\$ on the condition that it be secured by a solicitor's undertaking // Y used the \$\$ for other purposes // solicitor goes bankrupt // TS successfully claims trust // fiduciary duty owed to the lender by the borrower</p>
<p><i>Re: Westar Mining Ltd, 2003 BCCA</i></p> <ul style="list-style-type: none"> • QT can arise even after the borrower is unable to use the money for the specific purpose 	<p>Poscan gives W money to <u>pay mine's costs</u> (including wages) in return for % of profit // \$\$ was kept separate // W goes bankrupt // the BT gets \$\$ from P to cover unpaid operating costs // the mine's employees claim RT ---> the \$\$ paid by P to the BT was for a <u>special purpose</u> ---> employees get equitable estate</p>

4. SURPLUS OF FUNDS AFTER TRUST PURPOSE FULFILLED

- where trust purpose if fulfilled & surplus funds exist, a RT in favour of the S/T *may* occur
- NOTE: private purpose trusts are NOT allowed unless they fall within one of four exceptions (*Charitable Uses Act*)

DONATIONS TO A PURPOSE GROUP

- in general, when money is given for “good purposes”, any surplus is held on a RT for contributors by the organizers (“trustees”)
- known contributors -- surplus held on ART & distributed *pro rata* (*Red Cross Balkan Fund*)
- unknown contributors -- surplus put into court & donors must prove their contribution (*Re: Gillingham Bus Disaster Fund*)
 - any leftover funds went to the Crown as *bona vacantia*

UNINCORPORATED CLUBS

- method to create a purpose trust - 2 or more members + common purpose + rule (form K binding on members)
- funds are held in a **trust-like** manner --- what if club dissolves // no stipulation in the K regarding leftover funds
- **Court will look at the mechanism by which the money was contributed** (*Re: West Sussex Constabulary Fund*)
 - donations to collection boxes -- excess becomes *bona vacantia* (*Gillingham Bus Disaster Fund*)
 - legacies & major donations -- held on RT for the donors (*Red Cross Balkan Fund*)
 - street entertainment, etc -- seen as a K for entertainment -- surplus is *bona vacantia* (*Re: West Sussex*)

---> KEY POINTS (*Hanchett-Stamford*)

- property of an unincorporated association is the property of all the members
- members are **contractually** precluded from severing their share, except in accordance with the rules
- on dissolution, members are entitled to assets free from contractual obligations (so look at time of dissolution)
- this is essentially a “subspecies” of joint tenancy that takes effect subject to any contractual restrictions
- this is true even if there is only 1 remaining member

CLUBS FORMED UNDER STATUTE

- NOTE -- if a club is formed under statute, look to the statute to see if there are any provisions for dissolution
- ex/ leg. may require all the possible uses for the assets be stated -- if there's no mention of the funds passing to the members, then this would preclude the possibility (*Re: Bucks Constabulary*)

ONE MEMBER LEFT - 2 VIEWS

1. OLD --> Based on **contractual principles**: two or more club members can alter the terms of the K (Club Rules) to distribute any remaining funds upon dissolution to the members // but held that ONE member cannot do this -- can't contract with yourself. (*Re: Bucks Constabulary*)

2. NEW --> Limits the significance of a decline in membership past 2 // members hold the beneficial interest in club assets // no reason why there shouldn't be the same result upon dissolution as for only one surviving member (*Hanchett-Stamford*)

<i>Re: British Red Cross Balkan Fund</i>	donations by subscribers ---> RT for those who wished
<i>Re: Gillingham Bus Disaster Fund</i>	donations from street collections --> surplus paid into court // contributors must prove donation to get money back // left-over becomes <i>bona vacantia</i>
<i>Re: West Sussex Constabulary Fund</i>	unincorporated society // implied K b/w members governed by club rules // members have a beneficial interest // when a member leaves they sever their connection to funds // existing members can amend the K obligation to give themselves the surplus funds // at least 2 members are required to make this happen // undistributed funds in a moribund club are <i>bona vacantia</i>
<i>Re: Bucks Constabulary Fund</i>	registered society // governed by legislation // here, funds upon dissolution were distributed amongst the surviving members
<i>Hanchett-Stamford v AG</i> <ul style="list-style-type: none"> club w/ covenant to help animals way to get around "purpose" club 	unincorporated club // member's rights are <u>contractual</u> rather than equitable // membership declines to 1 // significant assets left // upon dissolution, club members have a beneficial interest in club assets // this is true even if only 1 member is left

PRESUMED RESULTING TRUSTS

- factual inference -- creates a *prima facie* conclusion based on the law's understanding of human behavior & social relationships
- even though society has changed greatly, the presumptions still operate wrt gratuitous transfers, albeit in limited form (*Peacore*)
- the presumption is rebuttable -- will yield to a clear intention otherwise
- PRT's apply when there
 - no clear evidence** about the transferor's intention and
 - a **gratuitous** transfer of property (ex/ land purchased by one, but put in the name of another)
- relevant maxim ---> **equity presumes bargains, not gifts**

PRESUMED RESULTING TRUST

- If destination of ET is unclear, a PRT is imposed -- bare LT vests in transferee & the transferor retains ET
- Clear evidence** (including conduct) that the transferor intended to give both LT & BT trumps the PIRT (*Standing v Bowring*)
 - "legal gift"** = intention of transferor to pass both LT & ET with no consideration (*Nishi v Rascal Trucking*)
- Onus of proof for rebutting the PIRT is on the transferee
- Contributor of the funds retains ET, in absence of evidence otherwise
 - Joint bank account** -- principles of PRT apply here (*Niles v Lake*)
 - Purchase of property** -- "purchase money resulting trust" (*Nishi v Rascal Trucking*)
- Standardized documents that do not reflect the transferor's intention are insufficient (*Niles v Lake*)
- Declaration by the depositor that their co-tenant is to receive funds upon death rebuts the PRT (*Russell v Scott*)
- In a **JBA** where A intends to retain **exclusive** control until death & only then transfer the remaining amount to B, the right of survivorship - both legal AND equitable - **vests immediately** when the JBA is opened & is therefore *inter vivos* in nature despite the ability of A to drain the account during their lifetime (*Peacore*)

<i>Standing v Bowring, 1885</i> <ul style="list-style-type: none"> Aunt transfers shares to N conduct can show actual intention formal acceptance not req'd 	Aunt transferred consols to nephew // registered <u>his</u> name along with hers // N was unaware // A tries to get LT back // N refuses & wins -- formal acceptance of the gift by the transferee not required so long as transferor has given up control
<i>Niles v Lake, 1947 SCC</i> <ul style="list-style-type: none"> standard forms not enough E to rebut PRT 	Two sisters, A & L // joint bank // bank forms --> joint tenancy w/ right of survivorship // A funds the JBA & L uses the \$\$ to pay A's living expenses // A dies // L claims funds // loses --> L holds fund on a PRT for A (A's heirs)
<i>Russell v Scott, 1936 AU HC</i> <ul style="list-style-type: none"> N given a "present right of survivorship" before A's death 	Aunt opens JBA w/ nephew // A funds account // told solicitor that after her death, the money would belong to N // A dies, leaving residue of estate to N & his brother to be shared equally // bro claims \$\$ in JBA forms part of the estate // loses on appeal // N declared a joint tenant w/ ROS (NOTE: <i>Wills Act</i> inapplicable)
<i>Young v Sealey</i> <ul style="list-style-type: none"> even if an arrangement is shown to be an effort to avoid the <i>Wills Act</i>, the PRT will still apply 	Aunt opens JBA with her nephew // evidence showed she intended that N have no beneficial interest while she was alive, but that upon her death he was to get any \$\$ left // while court said this was a clear effort to evade the <i>Wills Act</i> , judicial history of PRT's was so strong to go against --- see also <i>Mordo v Nitting</i>

<p><i>Nishi v Rascal Trucking, 2013 SCC</i></p> <ul style="list-style-type: none"> • R leases land -- doesn't pay taxes / gets friend to buy using money of a director • director claims RT 	<p>commercial case // RT leased S's land // terms of lease - any costs incurred would be borne by RT // RT owed money from fines & topsoil disposal // unpaid // property was foreclosed // RT's CEO (H) tries to buy from bank // bank says NO // so N, S's friend agrees to buy using \$\$ from H // while H initially tried to get a share of title, he eventually gave the \$\$ "free of conditions" // PRT does NOT apply</p>
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PRESUMPTION OF ADVANCEMENT

1. POA applies to:
 - a. **parent to child** -- includes both mothers and fathers, but only if the child is a minor (*Peacore v Peacore*)
 - b. **husband to wife** -- in most Canadian jurisdictions, this has been removed by legislation
 - in BC the POA may still be applied to what are considered "traditional" style marriages (*Mhetta v Mhetta*)
 - relatively easy to rebut -- mere acquiescence may not be enough -- positive E required (*Eisner v Baker*)
2. Rebuttable presumption - onus of proof for rebutting the presumption of advancement is on the transferor
3. Founded originally on the idea of obligation to support wife & dependent children

<p><i>Mhetta v Mhetta,</i></p>	<p>Family dies in Air India crash // dispute between H & W's estates as to where the assets given to the W by the H belong // POA upheld - traditional marriage</p>
<p><i>Peacore v Peacore, 2007 SCC</i></p>	<p>F gratuitously transferred the bulk of his estate to his D before death // D cared for her disabled H & was financially disadvantaged // F dies -- residue of estate was to be shared b/w D&H // couple breaks up // H claims the joint account is part of the estate via a RT</p>
<p><i>Eisener v Baker, 2007 BCSC</i></p> <ul style="list-style-type: none"> • gift will not be found by mere lack of thought -- must be clear intention 	<p>CL couple // B purchases property & E surreptitiously puts her name on title despite contributing nothing // B allows it to remain // they break up // E claims share on property // B claims RT -- POA not applicable b/c not married // court did not rely on EITHER as there was E of clear intention of the parties</p>

TIMING OF THE EVIDENCE

- general rule = E up to and including the transfer, or so immediately after the transfer that it forms part of the transaction, is admissible by either party (*Shepherd v Cartwright*)
- E after the transfer is only admissible as against the party who made the declarations / did the conduct (*Shepherd v Cartwright*)
- E **subsequent** to gratuitous transfer may be admissible if relevant to the transferor's true intention, and particularly so if given by impartial party (*Peacore*)
- judge must carefully assess its reliability especially if it seems self-serving or purports to show a change in intention
- the closer in time to the event, the more relevant (*Shepherd v Cartwright*)
- but it should be viewed with skepticism as it is often self-serving (*Nishi*)
- party must KNOW of the transaction in question at the time for them to use E of their conduct in favour or against (*Shepherd*)
- wrt to a contribution of funds -- relevant intention is intention of contributor at the time of contribution (*Nishi, Peacore*)

<p><i>Shepherd v Cartwright, 1955 UKHL</i></p> <ul style="list-style-type: none"> • E before or at the time of the TX, or so immediately after that it forms part of the TX is admissible 	<p>F buys shares in company in name of C & registers them without their knowledge // shares increase in value // 5 years later, F transfers LT out of C's names // F dies // C claim shares on basis of RT // successful // while a RT existed in favour of the F, the POA was not rebutted // E of the F's intention to regain legal control was too far in the past</p>
<p><i>Peacore v Peacore, 2007 SCC</i></p> <ul style="list-style-type: none"> • subsequent E must be relevant to the intention of the transferor 	<p>Peacore Sr told his lawyer, in the midst of drafting his will, that he was under the belief that the JBA had been dealt with & would not form part of the estate // E given by Peacore Sr's lawyer was <u>impartial</u> and therefore considered reliable</p>

ADMISSIBILITY OF EVIDENCE OF ILLEGALITY

- gratuitous transfers often occur in an attempt to facilitate an illegal scheme or to avoid tax (generally not seen as illegal)
- should the transferor then be able to rely on the doctrine of RT to recover ET?
- ironically, preventing E of the illegal motive may secure both LT & ET with a complicit, or equally guilty, individual
- **ex turpi causa** - cannot pursue a cause of action in connection with an illegal act
- **par delictum** - "clean hands" doctrine // a party shouldn't obtain relief from a court of law where his own actions are wrong
- **in pari delicto** - when both parties are mutually engaged in illegality // equally at fault
- **locus poenitentiae** - "opportunity to repent" // chance to revoke an illegal or immoral intention before the act occurs
 - NOTE: *Scheuerman* is still good law ---> this doctrine mitigates against the harshness of its application

- general exclusionary rule: no E of illegal intent is admissible to explain the transaction (*Scheuerman*)
- more recently, E of a bad motive does not decisively prevent the court from considering the E (*Goodfriend*)
- relaxing --> E of illegal intent may be admitted where:
 - scheme was never carried out - ie/ no creditors defeated (*Goodfriend*)
 - thereby leaving an opportunity to repent of the scheme (*Tribe*)
 - to not do so would create a disproportionate loss or gain for one of the parties (*Nelson v Nelson*)
 - the actual sanction for the illegal scheme is far less than the loss of the ET at stake (*Nelson*)
 - the policy behind the illegal scheme would not be defeated by enforcing the equitable rights (*Nelson*)
- NOTE: E of illegality will not necessarily harm a claimant's case if it can be made out on other, admissible, E (*Tinsley v Milligan*)

<p><i>Scheuerman v Scheuerman, 1916</i></p> <ul style="list-style-type: none"> • no E of illegal intent admissible 	<p>H put property into W's name to evade creditors // creditors never sued b/c H paid debts // W sold house // H sued on basis of RT and lost</p>
<p><i>Tinsley v Milligan, 1994 UKHL</i></p> <ul style="list-style-type: none"> • equity may assist recovery despite the existence of an illegal scheme 	<p>T & M each contributed \$\$ to buy house // house registered in T's name so that M could claim benefits // M repents // T claims entirety of house // M claims RT for both parties in equal shares --> WINS b/c contribution to the purchase entitled her to ET, despite the presence of the illegal scheme</p>
<p><i>Goodfriend v Goodfriend, 1971 SCC</i></p> <ul style="list-style-type: none"> • E of immorality / bad motive will not necessarily be inadmissible 	<p>W makes up false cause of action to scare H // H places home in W's name to avoid this imaginary consequence // breakup -- H wants house back // SCC allows E of the scheme to be admitted</p>
<p><i>Tribe v Soiseth</i></p> <ul style="list-style-type: none"> • locus poenitentiae 	<p>F purchases condo for D & her H // puts condo in D's name for tax purposes // D & H break up and H claims condo is part of joint estate (on POA pre-Peacore) // E of the tax-avoidance plan admissible b/c Tribe Sr "repented" of it - no harm done</p>

THE BENEFICIARY

NATURE OF EQUITABLE TITLE & INTEREST

- B - *cestui que trust* -- has ET in property - *ius fruendi* (enjoyment) --- *bundle of rights*
- ET is both *in personam* (rights enforceable against the trustee) and *in rem* (ability to trace as remedy) -- yet stops with a BFPV
- ET does not give the B power to exercise administrative or dispositive powers over trust property (*Schalit v Nadler*)
- not all equitable titles hold a beneficial interest
- B cannot assume the functions of a trustee (*Schalit*) unless allowed to act as agent to reduce expenses to the trust (*Re Bagot's*)
- B enjoys ET in **each** individual item comprising the trust assets (*Baker v Archer-Shee*)

<p><i>Schalit v Nadler - 1933 UKDC</i></p> <ul style="list-style-type: none"> • roles of B and T to be kept distinct 	<p>Corporate B attempted to distrain for unpaid rents from a building over which the B held ET // invalid // B cannot administer or manage trust property</p>
<p><i>Baker v Archer-Shee - 1927 UKHL</i></p> <ul style="list-style-type: none"> • ET held for each trust asset 	<p>Lady A-S was B of several properties // income from the fund never entered the UK // UK sought to tax based on "stocks shares rents" outside the UK // A-S claimed her ET rested in the bundle of personal rights b/w her and the T // NO // ET rests in each trust asset DISSENT -- T can extinguish LT in any one thing + items in a fund may rapidly fluctuate</p>

TRANSFER OF EQUITABLE INTEREST TO 3rd PARTY

- 1) B can assign ET directly to a 3rd party
- 2) B can direct the trustee to hold in trust for a 3rd party -- *writing required; rule in S&V must be met*
- 3) B can K with 3rd party to assign ET for valuable consideration -- *writing prudent but not req'd; vendor holds equitable interest on a CT for the purchaser as soon as the K is binding*
- 4) B can declare themselves trustee for the 3rd party -- "sub-trust" B holds "bare ET" and sub-B holds both ET & BT - *writing prudent*

ASSIGNMENTS OF CHOSSES IN ACTION

- B1 can dispose of their BT to B2 as a **chose in action** (personal rights of property which can only be claimed through court action)
- BC has no formality requirement for the *inter vivos* transfer of an equitable estate
- BUT if the chose in action is to be **enforceable by the new B against the T** then.... (**s.36 L&EA**)
 1. the transfer must be in **writing** and
 2. the trustee must be **notified** of the transfer
- compliance allows the assignee to sue in their name alone -- otherwise, the assignor is required to be a party to the action (*Di Guilo*)
- if the BT is assigned to multiple B2's the earlier in disposition is preferred (*Re Wasdale*)

PROTECTIVE TRUSTS -- RESTRAINTS ON ALIENATION

- **protective trust** -- S/T concerned that a B will be reckless or irresponsible with trust assets -- *sui juris* B's can call for the trust
 - attempts to prevent alienation by placing a **condition** on a trust is invalid (condition itself is invalid, based on public policy)
 - solution ---> give the B a **determinable life interest**
 - on the happening of the determining event, a secondary trust arises and vest the EI in a new class of B's
 - NOTE: **condition subsequent** -- not a good choice -- they're strictly construed and if struck down, the B gets gift outright

TERMINATION OF THE TRUST BY BENEFICIARY

Rule in Saunders v Vautier

1. the B must be *sui juris*
2. the interest must be fully vested (no contingency, or contingency only suspends enjoyment)
3. B or B's are the only ones entitled to the trust property

Vesting

- any contingency - if present - must only suspend enjoyment -- but the vested interest ****need not be possessory****
- presence of a **gift-over** implies the interest may not vest // contingency alone suggests only enjoyment is delayed (*Re Chodak*)
- if unclear, courts lean towards early vesting and rule in S&V will apply (*Re Lysiak*)

Discretionary Trusts

- many B's -- hard to satisfy absolute interest ---> where feasible the B's may combine & call for trust
 - all the B's must be identifiable under the trust
 - the decision must be unanimous (*Re Smith v Aspinall*)
 - this is true even if B's may be entitled in different amounts (*Re Chodak*)

<p><i>Re Lysiak - 1975 ONCJ</i></p> <ul style="list-style-type: none"> • court leans towards early vesting 	Distribution of residue postponed until the B's were not living under a politically oppressive regime // court found only <i>timing & manner of distribution</i> was specified // interest vested
<p><i>Re Smith v Aspinall - 1928 UKCD</i></p> <ul style="list-style-type: none"> • all objects can act in unison 	Discretionary trust // W and children want mortgage -- use beneficial interest as security // bank wanted payments to come from the trust but the T's didn't want to do that // objects acting in unison can direct / collapse the trust

Pension Trusts

- rule in *Saunders v Vautier* is not properly operational in the case of a pension (*Buschau*)
- hard to manage functionally // special wrt termination // pension legislation trumps CL rule

Buschau v RCI - 2006 SCC -- defined benefit PP // B's objected to RCI's use of surplus funds (contribution holidays, surplus reverts to RCI) // try to collapse the trust using S&V // NO // CL does not fit pension trusts well wrt termination by the B's (*although may if pension trust very small*) // legislation overrides CL // Plan clearly stated that it was the employer who could amend/terminate the plan

Division of Trust Assets

1. where property is *divisible* one or more B's may be able to call for their *share* of the property
2. this is so even if some of the B's are not *sui juris* (*Re Sandeman's*)
3. NO major reduction in value of remaining assets allowed (*Lloyd's Bank*) or undue hardship to the other B's (*Re Marshall*)
4. no entitlement to call for division if the property is land (*Re Marshall*)
5. in the alternate, the T can elect to sell the trust asset (land, shares) and distribute shares to each B (*Lloyd's Bank*)

Lloyd's Bank v Duker -- trust for shares // B's hold unequally // majority B wanted out // NO -- effect of his major shareholding would be too great

VARIATIONS OF TRUSTS

- ability of courts to vary a trust is limited to CL exceptions and trust variation legislation (*Chapman*)

COMMON LAW EXCEPTIONS

- unforeseen emergency**
 - where there is no provision to cover an event that the S/T *did not and could not have foreseen*
 - variation is limited to the trust's administrative terms -- **not quantum or type of benefits**
 - used to protect trust property & is rarely invoked (*Re New*)
- maintenance issue wrt B's** -- court can direct payments to allow B's to live in the manner provided for by the trust
- conversion** -- court may allow infant's property to be converted between realty and personalty
- compromise**
 - court can give approval for B's who aren't *sui juris* wrt a judicially-sanctioned dispute
 - the dispute must be real -- can't use a pretend dispute as an excuse to amend (*Chapman*)

LEGISLATION

- response to constantly-changing tax regimes the S/T could not have foreseen --> require adjustment of quantum & type of benefits
- allows courts to vary trusts if all the B's are in agreement (a single adult B in whom the entire trusts vests cannot apply for variation)
- **s.1 TVSA** -- court can also approve any arrangement proposed by any person on behalf of:
 - a. person not yet *sui juris* (infancy/incapacity)
 - b. unascertainable B's -- B's who have only an expectancy or who *may* become entitled in the future (*Bentall, Buschau BCCA*)
 - c. unborn persons
 - d. persons who interest arises through a discretionary power
- **s.2 TVSA** -- so long as it appears to be for the benefit of the above

Benefit -- determination is KEY to trust variation -- may include

1. advancement of financial interests (*Re Burns*)
 2. tax minimization (*Re Burns*) -- but not always! (*Re Weston*)
 3. educational and social interests (*Re Weston*)
 4. family cohesion (*Re Remnant's*) -- but not if it causes financial disadvantage to a B (*Re Harris*)
- **financial benefit test** = "good bargain" (*Bentall*)
 - prudent adult, motivated by self-interest, with long-term consideration of the benefits and risks
 - **other benefits test** = "prudent advisor" (*Russ*)

- court is NOT bound to preserve the **intention** of the S/T (*Russ*)
- but it may if the variation goes too far against what the S/T intended (*Re Steeds*)

<p><i>Re Burns - 1970 BCSC</i></p> <ul style="list-style-type: none"> • tax minimization 	<p>Settlor & trustees seek consent for variation to minimize tax implications // living B's agree -- court asked to consent for unborn // YES</p>
<p><i>Re Weston's</i></p> <ul style="list-style-type: none"> • social / educational benefit 	<p>Trustees want to move trust to Channel Islands to avoid tax // NO // Denning LJ refuses to consent for B's not <i>sui juris</i> due to social & educational interests of the infants</p>
<p><i>Re Remnant's</i></p> <ul style="list-style-type: none"> • any kind of benefit may be considered • more marriage prospects 	<p>T/S leaves money for kids & GK's -- so long as they're protestants // one sister marries a Catholic & her kids are Catholic // sisters apply for variation // court approved, despite financial <u>loss</u> to the protestant GK's (said they now had more marriage prospects!)</p>
<p><i>Re Harris</i></p> <ul style="list-style-type: none"> • non-financial benefit outweighed by disproportionate financial loss 	<p>H commits suicide // leaves disproportionate amount of estate to oldest son // W applies for variation on the basis of family cohesion // NO // would cause too much of a financial disadvantage to the eldest son</p>
<p><i>Bentall Corp v Canada Trust</i></p> <ul style="list-style-type: none"> • "good bargain" test for financial benefit • s.1(b) consent wrt a DC pension plan 	<p>application to vary a DC pension plan w/ surplus // 3 B's did not agree // court assented on their behalf // s.1(b) of TSVIA applied on the basis that pension member's interest was split:</p> <ul style="list-style-type: none"> • presently held interest (entitlement to funds available to pay pension) • future contingent interest (division of surplus upon termination)
<p><i>Buschau v RCI</i></p> <ul style="list-style-type: none"> • NO s.1(b) consent for missing B's wrt a pension trust 	<p>DB pension plan w/ actuarial surplus // members sought to collapse the trust under S&V and sought consent from the court for the missing B's // NO // s.1(b) does NOT apply -- the B's are persons now entitled to an interest (even though it is contingent & subject to revocation by the Member during their life) -- not only an expectancy or a possibility of an interest // also...not appropriate for court to consent on behalf of "missing" <i>sui juris</i> B's</p>

THE ROLE OF THE TRUSTEE

BASIC DUTIES

- 1) **Collect** the estate -- take whatever steps may be required, ex/ registration
- 2) **Maintain** the estate in accordance with the trust instrument
- 3) **Distribute** the benefits/revenues to the beneficiaries

APPOINTMENT / RETIREMENT / REMOVAL

General

- multiple trustees --- act unanimously unless the trust instrument allows for majority vote

Power to appoint new trustees (s.27 TA)

- dead // out of the country for > 12 months // wish to be discharged // refuses to act // or is unfit to act
- person nominated in the trust to appoint new trustees // or -- surviving trustees // heirs or personal rep's of the last surviving trustee // so long as no contrary intention is expressed in the trust

Appointments / removals at the request of B's

- anyone with a beneficial interest may apply for a court order wrt trustee appointment/removal (s.36 TA)
- court may remove trustee upon application of a majority of the B's -- workaround for unanimity req'd by S&V (s.30 TA)
- B's can call for the trust & remove the trustee under the rule in *Saunders & Vautier*

Transition b/w trustees

- appointment of new trustee ---> automatic vesting of trust assets (s.29 TA)
- multiple trustees hold as joint tenants // land must be registered in LTO // shares must be registered in company books
- retirement -- 2+ trustees --> one can serve the other with a deed declaring a desire to be discharged (s.28 TA)
- when when accepted that person ceases to be trustee & is divested of trust property (s.28 TA)

Court appointments

- court retains ultimate jurisdiction -- may appoint/substitute/add new trustee where expedient and where it would be "inexpedient, difficult, or impracticable" to do so w/out the assistance of the court (s.31 TA)
- factors court should consider when appointing trustees (*Re Tempest*)
 - wishes of S/T particularly with regard to desired characteristics
 - the interests of the B's (ie/ impartial trustees)
 - the efficient execution of the trust (ie/ business experience, etc)

Removal/appointment under trust instrument

- "protector/guardian" may be designated by S/T -- if given too much power, the trust may become invalid

Judicial removal of trustees

- governing criteria is the welfare of the B -- mere b/w the T & the B is insufficient reason to remove a trustee (*Conroy v Stokes*)
- mere disagreement b/w the T & the B is insufficient reason to remove a trustee (*Conroy v Stokes* - 2 of 5 B's apply for removal)
- acts/omissions --> endangerment of trust property // lack of honesty, appropriate capacity, or reasonable fidelity (*Conroy*)
- trustee **misconduct** not required (*Re Consiglio Trusts* - 3 trustees bitterly squabbling)
- court will act where the continued administration of the trust has become **impossible or improbable**

INVESTMENT MANAGEMENT

1. trustees no longer restricted to "authorized investments"
2. can invest in any form of property, so long as no conflict with the TI (s.15.2 TA)
3. standard is that of a **prudent investor** (s.15.2 TA) -- applies to both professional & non-pro trustees (*Fales*)
 - a. duty to seek advice on matters the trustee doesn't understand (*Cowan*)
 - b. and receive that advice with the same degree of prudence (*Cowan*)
4. test is a **financial one**
5. trustee *could* invest in accordance with ethical beliefs if the TI is silent & the standard is still that of a PB (*Cowan*)
6. trustee not liable if overall investment strategy consistent with the standard (s.15.3 TA)
7. trustee's performance will be judged using the standards/practices of the day (*Nestle*)
8. court may excuse trustee from liability if they acted **honestly & reasonably & ought to be fairly excused** (s.96 TA)

Fales v Wohlleben Estate - 1977 SCC <ul style="list-style-type: none"> • single objective standard • pro & non-pro trustee • traded hard-to-sell shares for shares in risky co -- held them too long 	H dies // appoints W & CPT as trustees // TI called for a distribution of assets -- req'd shares be sold // hard to accomplish // CPT has opportunity to trade for shares in a subsidiary -- backed by a major co // subsidiary shares held for prolonged period // CPT doesn't try very hard to convince W to sell // subsidiary tanks // B's sue CPT // CPT joins W as a co-defendant // CPT liable // W excused under s.96
Cowan v Scargill - 1985 UKCD <ul style="list-style-type: none"> • T's personal beliefs irrelevant 	Union didn't want their funds invested in companies they considered unethical // B's do not have right to direct investments // T must put interests of B's first
Nestle v NW Bank <ul style="list-style-type: none"> • T's will be judged by std's of the day 	Poor investment return // B's sue // trustees NOT liable // investment were found to be prudent -- at time of investment, shares seen as risky
Re Consiglio <ul style="list-style-type: none"> • appointment of trustee 	Father sets trust for each child // he was both S & Trustee //

OUSTING COURT JURISDICTION

- 1) cannot exclude the court's jurisdiction entirely -- against public policy & provision will be of no effect (*Re Wynn*)
- 2) despite an exoneration clause, trustees will be responsible for gross negligence (*Re Poche*)
- 3) court's power may be curtailed wrt determinations of **fact** by a 3rd party -- unless misconduct OR wholly unreasonable (*Re Tucks*)

- **questions of law** --> remain the jurisdiction of the courts
 - construction // administration of wills and estates (*Re Wynn*)
 - enforcing overriding legal duties imposed on trustees (*Boe v Alexander*)
- **determinations of fact** --> S/T may assign to a trustee / executor / 3rd party (*Re Tucks*)
 - court will not interfere unless there's misconduct or the decision is wholly unreasonable (*Re Tucks*)
- **attempts to shield the trustee**
 - privative clause will not prevent judicial review where the trustee has: (*Boe v Alexander*)
 - failed to act at all
 - acted dishonestly
 - failed to act with the prudence expected of a *reasonable businessperson*
 - failed to act impartially

Re Wynn, 1952 UKCD <ul style="list-style-type: none"> • attempt to completely exclude the courts will fail on public policy 	Testator attempted to avoid the impartiality rule & treat B's differently // gave the trustee a "conclusive and binding power" // void both as an affront to public policy & repugnant to the benefits conferred on the B's by the will
Re Tuck's Settlement, 1978 UKCA <ul style="list-style-type: none"> • 3rd party can decide disputes 	Trust "for the time being if and when and so long" as married to an "approved" Jewish wife // Rabbi can decide this question of fact // not conceptually uncertain
Boe v Alexander, 1987 BCCA <ul style="list-style-type: none"> • privative clauses 	Pension fund // trustees accepted contributions from employees -- not allowed by trust instrument // trustees ignored TJ's order due to privative clause // No Go
Re Poche, 1984 ABQB <ul style="list-style-type: none"> • exoneration clause 	Terrible trustee // court found gross negligence // despite exculpatory clause, trustee was found to be in breach of trust & was removed

DELEGATION

- CL rule was that no delegation was allowed ---> **delegatus non potest delegare** -- cannot delegate delegated powers
- rule relaxed as world has gotten more complex -- would be disastrous not to allow a trustee to delegate to accountants, etc etc

1. Trustee may NOT delegate the *confidence* reposed in him by the trust (*Speight v Gaunt*)
2. Trustees are personally responsible for the exercise of *judgement* -- can't escape by delegating (*Re Wilson*)
3. MAY delegate *administration* of the trust if done in the "regular course of business" & for benefit of the trust (*Speight v Gaunt*)

Legislative protections

- (**s.15.5 TA**) - **investments** -- T can delegate to the degree that a "prudent investor might" -- but can't where req'd to act personally
- (**s.7 TA**) - **solicitors / bankers** -- T can employ without being in breach for wrongs due simply to that appointment
- (**s.95 TA**) - **implied indemnity** -- T not liable when others are in control of properly-delegated funds, provided that the trustee is not in "willful default"

<i>Speight v Gaunt, 1883 UKHL</i> <ul style="list-style-type: none"> • “regular course of business” 	G (trustee) appointed a stockbroker and gave him \$\$ to invest // stockbroker ran off with the \$\$ // B sued for breach of trust // failed as this was standard business practice at the time
<i>Re Wilson, 1937 ONCA</i> <ul style="list-style-type: none"> • T cannot fully escape responsibility 	2 properties - 1 profitable, 1 not // Board let GM manage the estate // GM turned down offer to buy the bad property // court held delegation was unlawful -- Board discretion was needed

DUTIES

★ DUTY OF LOYALTY

----> the defining feature of the FIDUCIARY RELATIONSHIP

- act in utmost good faith
- must use all powers for the benefit of the B
- must not personally profit at the expense of the B
- cannot put personal interests in conflict with those of the B
- not advance other interest w/out B's informed consent
- only K with B where TX is fair & B is fully informed

CONFLICT OF INTEREST

1. general rule = trustees can't place their personal interests in possible conflict with the B's (*Keech v Sanford*)
2. relaxed rule = “real sensible possibility of conflict” / liability will depend on the facts of each case (*Boardman, dissent*)
3. due to modern complexities arising from “interlocking, subsidiary and associated corporations” (*Peso Silver v Cropper*)
4. a fiduciary won't be in breach of trust if:
 - the beneficial information was obtained outside the fiduciary role (*Peso Silver v Cropper*)
 - the conflict of interests was acted on with the fully informed consent of the B (*Canadian Aero Services*)
5. disgorgement of profits basis of rule == punitive

LIABILITY FOR BREACH OF TRUST

- inability of the trust to pursue the opportunity is irrelevant (*Keech v Sanford*)
- proof of actual conflict between duty and interest need not be shown (*Canadian Aero Services*)
- senior officers MAY be subject to the same fiduciary duties as board members (*Canadian Aero Services*)
- **contextual analysis** required (*Canadian Aero Services*)
 - was the opportunity “ripe”?
 - was the knowledge special or private?
 - circumstances under which the info was obtained
 - officer's position in the company
 - amount of knowledge possessed
 - time b/w termination of relationship & the breach

<i>Keech v Sanford, 1726 UK LCC</i> <ul style="list-style-type: none"> • conflict of interest - strict rule 	lease producing income for infant B // trustee tried to renew -- landlord refused // trustee leased for himself // B sues // wins // trustee only came to property through the trust
<i>Boardman v Phipps, 1967 UKHL</i> <ul style="list-style-type: none"> • non-conflict rule strictly applied even when NO harm to trust resulted 	B&P (trustee and lawyer) receive info -- deal to buy stocks in L&H (of which trust was a minority shareholder) // bring deal to trustees, who turn down offer // trustees allow B&P to purchase instead // B&P make L&H <u>very</u> profitable // trust benefits indirectly // but...another B sues // WINS // B&P must disgorge profits ---> remedy as deterrent (quasi-punitive) DISSENT -- should look at <i>real & sensible conflicts of interest</i> -- not just possible
<i>Peso Silver v Cropper, 1965 BCCA</i> <ul style="list-style-type: none"> • relaxation of strict rule -- accommodate modern business setting 	Peso evaluates mining claims // claims brought to board // C was a director on the board // C pursued an opportunity rejected by the board // board sues // LOSES // C found to have not even recalled the opportunity had been passed up by the trust DISSENT -- complexities of biz life even MORE reason to keep strict application of rule
<i>Canaero v O'Malley - 1974 SCC</i> <ul style="list-style-type: none"> • top management may be under FD in the right circumstances 	Top managers of Canaero leave // pursue biz opportunity in competition w/ Canaero and WIN // Canaero sues based on breach of FD & conflict of interest // WINS // top management may attract FD's // but...analysis contextual --> seems to validate <i>Peso</i>

SALE OF TRUST PROPERTY

- “**self dealing**” -- T on both sides on the equation // almost always void // may be OK in exceptional circumstances (*Holder*)
- “**fair dealing**” -- agreement b/w T and B to buy the equitable interest --> generally OK so long as there's **full disclosure**
- onus is on the T to disprove any conflict of interest (*Crighton v Roman*)

Holder v Holder - 1968 UKCA <ul style="list-style-type: none"> • self-dealing -- relaxed approach 	V appointed executor of estate // V wanted to buy estate property --> so he never assumed the duties of executor, didn't participate in the sale in any way, acquired <u>no special knowledge</u> // sale allowed // rule in <i>Keech v Sanford</i> relaxed // price paid for land was <u>fair</u>
Molchan v Omega Oil & Gas - 1988 SCC <ul style="list-style-type: none"> • relaxed approach adopted in Can law 	MAJORITY: no breach b/c ---> deal was in good faith // fair price paid // sale was in the best interests of the partnership // full disclosure -- would be <u>unjust</u> to not allow the sale

DUTY TO BE IMPARTIAL

- 1) does the trustee have to sell asset X?
- 2) what do they have to replace it with?
- 3) what happens in the meantime?

- trustees have a CL duty to act impartially with respect to ALL beneficiaries -- including those in succession
- however, will not apply where there is **evidence to the contrary** -- intention of the testator takes primacy
- certain types of trust assets may benefit one class of B's over another and therefore require *portfolio restructuring*
 - **wasting assets** -- anything that deteriorates (cars, gold mine) -- benefit income B's
 - **reversionary assets** -- property interests not immediately available (life insurance policy) -- benefit the remainder persons
 - **unauthorized assets** -- speculative/risky assets or assets outside the terms of the trust

Rule in *Howe v Lord Dartmouth*

1. where a testator leaves **residuary personality** by way of **succession** (LT and remainder)
2. and trust assets include wasting OR unauthorized assets (which benefit the IB at the expense of the CB)
3. trustee must **sell** the wasting assets and **invest** proceeds in authorized investments
4. then must **distribute** income to LT and **accumulate** capital for the benefit of the remainder person
5. **pending sale**, the trustee must not pay income *in specie* to the LT, but must **apportion** -- 2-7% to IB, remainder into capital

Rule in *Earl of Chesterfield's Trusts*

1. rule in *H&D* applies to reversionary assets (which benefit the CB at the expense of the IB)
2. **after sale** -- trustee must **compensate** the IB for the income lost between the time of the testator's death and the time of sale
3. compensation is roughly equal to the amount which would've had to have been invested each year -- using 2-7% per annum interest -- to yield the value of the asset at the time of sale

Real Estate

- rule does not apply to real estate (*Lottman v Stanford*) although it may if the TI stipulates ALL assets be sold (*Re Lauer*)
- in that case, the IB is entitled to income *in specie* until the real estate is sold (*Re Oliver*)

Powers & Trusts combined

- interpretation & construction can become complex when trust for sale are combined with powers to retain / postpone
- where a trust to convert is coupled with a power to postpone/retain ---> the conversion generally considered dominant (*Re Lauer*)
- KEY to assessing duty to act impartially -- is retention of assets a **trust** or a **power** (*Royal Trust*)

Impartiality wrt settled shares

- corps can distribute profits in the form of dividends (seen as income) OR shares (generally seen as capital)
- ordinarily the "*form is substance*" rule will apply (*Re Waters*)
- but courts may consider the intention when deciding what is income & what is capita (*Re Welsh*)

Lottman v Stanford - 1980 SCC <ul style="list-style-type: none"> • real estate -- TFS + PTP 	T left estate on trust for benefit of W as LT -- remainder to children // assets mainly real estate // all sold except one parcel of land leased to son at very low rate // W received NO income & had to pay land tax // W applies to court // NO GO -- H&D doesn't apply to RE
Re Lauer and Stekl - 1974 BCCA <ul style="list-style-type: none"> • TFS of ALL assets + wide PTP/PTR 	T left estate to D as LT -- remainder to grandchildren // mix of personalty and realty // trust to convert + wide power to retain and postpone // Court found the trust to convert dominant // H&D applied even though RE b/c of the <u>specific direction</u> of the testator
Royal Trust v Crawford - 1955 SCC <ul style="list-style-type: none"> • estate -- family biz -- most value came in good-will for the deceased • displacement of apportionment must be clear from the will & surrounding circ's 	T left estate to W at LT -- remainder to niece & nephew // bulk of estate shares in company with few assets // huge dividend declared -- paid to W // court found that <i>in specie</i> enjoyment did NOT apply and ordered apportionment
Re Smith - 1953 BCCA <ul style="list-style-type: none"> • PTS may be enough to trigger duty of impartiality and application of H&D 	T left income from shares to W // low return (2%) // W wanted trust co. to move into more profitable shares // trustees sided with son & declined // Court found they'd violated the duty to act impartially // NOTE: ex/ of H&D applied to <i>inter vivos</i> trust

<p><i>Re Welsh - 1980 ONCJ</i></p> <ul style="list-style-type: none"> • occasion where substance yields to form 	<p>T leaves income from shares to 2nd W as LT -- remainder to his kids // shares liquidated // dividend issued to the estate // W dies & her kids claim the dividend as income accruing to the W's estate // court says NO // this would create an absurdity (disinheritance of T's kids) + the company only issued dividend for income tax purposes</p>
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DISBURSEMENTS

- rule in *Allhusen v Whittel* restricted the funds available to pay debts to as *capital + 1 years income* -- delayed payment to the LT
- rule abolished -- all income available to pay debts, absent any contrary instructions from the testator (**s.10 TA** and **s.144 WES**)

★ DUTY TO PROVIDE INFORMATION

- B is not entitled to information/documents concerning the T's exercise of discretion -- includes minutes (*Re Londonderry*)
- but if a T acted in bad faith, disclosure can be compelled (*Re Londonderry*)

<p><i>Re Londonderry Settlements - 1965 UKCA</i></p> <ul style="list-style-type: none"> • B not entitled to see documents wrt discretionary matters 	<p>T's have discretionary power // B unhappy with proposed distribution // demands disclosure // T's refuse // B sues // LOSES // while B is entitled to see trust documents -- not entitled to see records of exercise of discretion -- unless bad faith established</p>
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★ DUTY TO ACCOUNT

- T must prepare and provide financial accounts for the trust (within 2 years from date of appointment) (**s.99 TA**)
- T must give B access, but is entitled to a "reasonable time" to prepare the account (*Sanford v Porter*) -- NOTE: this case was in 1889

RIGHTS

★ REMUNERATION

- T's statutorily entitled to **expenses** plus a "**fair and reasonable allowance**" not exceeding 5% of gross assets (**s.88(1) TA**)
- T's can also apply for an **additional "care and management fee"** of 0.4% of average market value (**s.88(2) TA**) (*Re Pedlar*)

<p><i>Re Sproule - 1979</i></p> <ul style="list-style-type: none"> • guidelines for remuneration 	<ul style="list-style-type: none"> • magnitude of trust // care & responsibility required // time occupied // T's skill & ability // success under the T's administration -- lump sum remuneration preferred
<p><i>Re Pedlar - 1982 BCSC</i></p> <ul style="list-style-type: none"> • factors for "care & management fee" 	<ul style="list-style-type: none"> • <i>Sproule</i> factors + "extraordinary service" on the part of the trustee • can be applied for on an annual basis

★ INDEMNIFICATION

- T as holder of LT may be liable for trust debts -- equity says the T should not be ultimately responsible for them
- however, T's will be liable for liabilities arising from their **unique** form of administration (*Hardoon*)
- T's receive indemnity for debts incurred as a result of administration (*Re Reid*) & funds required to meet K obligations (**s.95 TA**)

CONTROL OF THE TRUSTEE

BENEFICIARY

1. B's cannot compel a T to exercise, or manner of exercise, of a power (*Re Brockbank* - B's wanted to select replacement T)
2. *sui juris* B's can call for the trust (*Saunders v Vautier*)
3. B's cannot compel T's to reveal information about a company on whose board the T sits as a result of the trust (*Butt v Kelson*)
4. B's CAN compel a T to vote the shares held by a trust in a certain direction

COURTS

Courts WILL

- provide **directions** upon application (**s.86 TA**) -- not to be used to get court to judge a legitimate exercise of discretion (*Tempest*)
- T's won't be liable thereafter, unless the direction obtained via fraud/concealment (**s.87 TA**)
- intervene if a T exercise discretion for an **improper purpose** (*Schipper*)

Courts WON'T

- interfere with a discharge of trust powers unless there's **T deadlock/bad faith/true uncertainty** (*Re Wright, Billes*)

FIDUCIARY RELATIONSHIPS & THE CONSTRUCTIVE TRUST

CONSTRUCTIVE TRUSTS

- CT is a trust **imposed by law** at the discretion of the court -- based in necessity and **good conscience** (*Soulos*)
- used by the courts as a vehicle by which the holder of LT becomes required to hold the property beneficially for another
- accordingly, the CT (when applied as a remedy) requires assets upon which it can attach
- CT's confer **in rem** rights on the property || right to recover actual item // priority creditor status // capture any increases in value
- **NOTE** -- CT's do not always have certainty of subject

INSTITUTIONAL CT's

- over time, well-established and legally recognized "**institutional**" relationships were given the label of CT
- ex/ wrongs of faithless directors || vendor-purchaser rel || undue influencers || delinquent agents || separation of CL couples
 - arise once the legal requirements for the particular category have been est. // not dependent on judicial discretion
 - retrospective and operates from the date that the alleged facts generated the CT
 - new categories were added to accommodate changing social & economic demands
- **remedial CT's** --- new categories created due to changing social & economic demands
 - applied at the discretion of the court on a case-by-case basis
 - prospective effect --> ET in the claimed assets *becomes* vested in the plaintiff by way of a court order

THE CANADIAN APPROACH

UNIFYING ALL CT'S

- to provide certainty and predictability in the law in the face of changing social & economic considerations
- SCC sought overarching theory connecting all CT's (and arguably unifies ALL trusts)
- moved to the organizing theory of the **fiduciary** --> the relationship common to ALL trust & trust-like situations
- look to the **nature of the relationship** to assess if it's fiduciary (*Guerin*)

THE FIDUCIARY

- term is vague -- once called a "legal obligation in search of a principle" by LaForest J (*Hodgkinson v Simms*)
- analysis from the perspective of the fiduciary has many advantages
 1. **flexible** -- not all fiduciaries arise in the context of a trust (*Frame*) // court can *create* a CT relationship between parties to remedy injustices absent a traditional trust (*LAC, Hodgkinson*)
 2. **adaptable** -- using broader fiduciary principles -- court can remedy future unique unjust relationship and situation
 3. **property not required** -- unlike the CT as remedy which requires property upon which to attach, analysis from the perspective of the fiduciary can still provide a remedy if no property is available

WHAT MAKES A RELATIONSHIP FIDUCIARY?

- rules of trust based on the principles of **good conscience** -- Courts have gone back & forth
 - unjust enrichment?
 - vulnerability
- hallmark of the FR is the relative legal position of the parties such that one is at the mercy of the other (*Guerin*)
 - party has obligation to act for benefit of another + discretionary power --> that party is a fiduciary (*Guerin*)
- fiduciary relationship can exist outside the trust context (*Frame*)
- the existence of a K does not preclude the existence of a FR (*Hodgkinson v Simms*)

<p><i>Canadian Aero Services, 1974 SCC</i></p> <ul style="list-style-type: none"> • enrichment may not refer to a specific item of property • \$\$ damages an alternate remedy to a CT 	<p>Canero officers became aware of biz opportunity through their positions at C // their company, Terra, took the opportunity // Canero sues for breach of FD // WINS // enrichment unjust b/c the profits that accrued to T came at the expense of C // no specific property to attach to // corrective justice administered through damages // damages assessed according to T's gain</p>
<p><i>Pettkus v Becker, 1980 SCC</i></p> <ul style="list-style-type: none"> • UE lies at the heart of the CT remedy To establish Unjust Enrichment 1. unjust enrichment of D 2. corresponding deprivation of P 3. lack of juristic reason to explain or justify the enrichment 	<p>Long CL relationship // both P&B contribute to accumulation of assets // P holds LT // breakup // B sues // no common intention // but to leave B with outright title would result in his unjust enrichment at the expense of B // court instead imposes a CT // used remedially to correct the state of title // prospective effect // ET in the claimed assets becomes vested in the plaintiff by way of a court order</p>

<p><i>Guerin v The Queen, 1984 SCC</i></p> <ul style="list-style-type: none"> • hallmark of the FR: one party is “at the mercy of the other’s discretion” • follows <i>Pettkus</i> - no enrichment = no CT • FR may also arise where “one party is at the mercy of the other’s discretion” 	<p>RoyProc -- FN’s land inalienable except to Crown // once surrendered, Crown owes a fiduciary duty to the FN to deal w/ the land for their benefit // land sold for far less than market value // M sues // SCC couldn’t find a CT b/c the crown hadn’t been unjustly enriched (<i>Pettkus</i>) // but Cowed M a <i>sui generis</i> fiduciary obligation based on vulnerability</p> <p>----> signaled an upcoming willingness of the Court to expand the CT beyond situation of unjust enrichment!</p>
<p><i>Frame v Smith, 1987 SCC</i></p> <ul style="list-style-type: none"> • characteristics of an actionable FR • vulnerability seen as <u>essential</u> 	<p>DISSENT -- Wilson J -- 3 hallmark criteria of an actionable FR <u>outside</u> of the trust context</p> <ol style="list-style-type: none"> 1. F is entitled to exercise a discretion of power 2. F can unilaterally act in a way that affects the B’s legal or practical interests 3. B is particularly vulnerable / at the mercy of the F holding the discretion or power
<p><i>LAC Minerals v Corona, 1989 SCC</i></p> <ul style="list-style-type: none"> • concern about extending FR’s to “arms length” business transactions • Majority - vulnerability essential (adopts Wilson J’s 3 criteria from <i>Frame</i>) • Minority - expanded view of FR • CT -- applied instead of damages (too hard to calculate) 	<p>LAC huge co // Corona smaller co // C discovers gold // C tells L the confidential info for a JV // industry std - secret info given wrt a JV is confidential & not to be acted on by the other party // L buys property out from under C // L makes huge \$\$ // C sues for the LAND! // claims CT // no vulnerability so no FR // SCC finds <i>breach of confidence</i></p> <p>Majority - vulnerability essential // breach of confidence found // CT applied as remedy</p> <p>Minority - vulnerability not essential // damages as remedy</p> <ul style="list-style-type: none"> • La Forest - FR arises in circumstances of ascendancy, influence, trust, confidence, or dependence • Wilson - FR not initially there, but arose when confidential info was given to LAC
<p><i>M(K) v M(H) - 1992 SCC</i></p> <ul style="list-style-type: none"> • fiduciary law is not confined to economic interests 	<p>P sued D (father) in law of fiduciary for incest // her claims were statute-barred under other law // court -- being a parent is a unilateral fiduciary undertaking // as F, the P owed the D</p>
<p><i>Hodgkinson v Simms - 1994 SCC</i></p> <ul style="list-style-type: none"> • commercial context • “power-dependency” relationships • broadens the criteria • vulnerability is a “golden thread” but it’s not essential • DISSENT -- yes, vulnerability is still essential 	<p>Material non-disclosure by accountant that the MURBs he was selling benefited a developer the A knew // client invests // downturn in the economy // money lost -- client sues for breach of trust // NO equitable damages given // client was relatively experienced & informed about MURB’s // loss mainly due to <u>overall downturn</u> in the economy</p> <p>commercial rel’s not generally fiduciary //may become so if “given the surrounding circumstances, one party could reasonably have expected that the other party would act in the formers best interest”</p>
<p><i>Soulos v Korkontzilas - 1997 SCC</i></p> <ul style="list-style-type: none"> • CT applied as remedy for breach of confidence 	<p>Real Estate Agent scams client out of property // REA self property to W and then it’s transferred to him // client sues in both breach of contract and confidence // WINS // what will the damages be?</p> <p>K law -- damages are compensatory -- but no financial loss here -- only loss of unique property equity -- Court applies CT as remedy for breach of confidence</p>
<p><i>Kerr v Baranow - 2011 SCC</i></p> <ul style="list-style-type: none"> • Basis for CT lies in both UE and vulnerability <p>Joint Family Venture</p> <ol style="list-style-type: none"> 1. mutual effort 2. economic integration 3. actual intent 4. priority of the family 	<p>Breakdown of CL relationship // court will deal with these situation using the doctrine of UE and, where appropriate, the remedy of a CT // domestic services can lead to a claim of UE</p> <ol style="list-style-type: none"> 1. first consider monetary compensation -- may be impossible to calculate 2. where \$\$ award is insufficient or inappropriate court may award proprietary remedy <ul style="list-style-type: none"> • must be a “substantial and direct” LINK b/w the property & the contribution
<p><i>Sun Indalex v U’d Steelworkers, 2103 SCC</i></p>	<p>Co goes insolvent // owes conflicting FD’s -- one to plan members -- other to shareholders //</p>

REMEDIES FOR BREACH OF TRUST

- Trustees are under many DUTIES -- B principal person to enforce those duties -- fairly successful against trustees, any transferees who are volunteers, or even a BFPV who has notice of the trust -- all good candidates for the *in rem* remedy
- remedies may be applied to either **breach of trust/FD (equity)** or **breach of confidence (CL)**
- remedies can be
 - **personal / in personam** -- enforced personally against the party in breach, or who is about to breach -- equitable damages
 - origin --> Court of Chancery's jurisdiction to apply equitable damages as a **deterrent** against unconscionable behavior
 - **claimant must choose either equitable compensation OR disgorgement of profits**
 - **proprietary / in rem** - enforced against the trust assets -- restore equitable ownership -- commonly used where: asset has increased in value // full mitigation from an insolvent trustee via *in rem* rights & preferred creditor status
- **multiple remedies** may be combined so long as they
 - do not lead to double recovery
 - and are not mutually inconsistent

POLICY

- I. **protection** of parties owed an upmost duty of good faith by their fiduciary -- B's are in a vulnerable position
- II. **deterrence** of those who hold a fiduciary role from abusing their power

DEFENCES

- **equitable:** estoppel // laches (inequitable delay) // acquiescence
- **common law:** consent
- **legislative:** court has discretion to relieve a trustee from liability where they've acted *reasonably & honestly* and where it would be fair to do so (**s.96 - TA**) -- ex/ seen in *Fales* (trust company joined widow as defendant -- court excused her from liability)

PERSONAL REMEDIES

ADVICE & DIRECTION

- trustees may seek advice / direction from the courts -- trustees will not be liable if acting on order of the court - **SECTION??**

SPECIFIC PERFORMANCE / INJUNCTIVE RELIEF

- CL courts traditionally did not award this remedy -- now that the courts are joined (*Judicature Act*), this has been modified
- B's can apply to court to compel the trustee to **do / not do** something to **prevent** a breach of trust

COMPENSATION FOR LOSS

1. equitable monetary compensation will be applied where restitution *in specie* + an account of profit is not appropriate (*Canson*)
2. goal is still restitutionary -- **full compensation** ---> *the trust estate must be put in the same position it would've been in had the breach not occurred*
3. **equitable damages** awarded in lieu of a CT where trust asset is not available / difficult to determine / hard to locate (*Guerin*)
4. equitable remedies will NOT be limited by tort restrictions such as foreseeability or mitigation (*Canson*)
 - trustees only liable for loss flowing from the breach - "common sense causation"
 - no duty to mitigate --- but P's will not be compensated for their "unreasonable acts"
5. value of the remedy will be assessed at the date of **trial / restitution** not at the date of deprivation (*Canson*)
6. value of **lost opportunities** will also be included (*Guerin*)
7. under CL no **offset of profits against losses** allowed -- despite gains, trust estate must still be fully compensated (*Re Deare*)
8. changed by legislation -- offset allowed unless the breach is associated with **dishonesty** on the part of the trustee (**s.15.4 TA**)
 - **policy** -- since the list of "authorized investments" has been removed, the courts should take a look at the whole of the estate's portfolio to assess if the risk taken by the trustee is appropriate

<p><i>Guerin v The Queen, 1984 SCC</i></p> <ul style="list-style-type: none"> • compensation assessed with the "benefit of hindsight" • focus on LOSS to claimant • damages assessed at time of restitution to capture any increase in asset value 	<p>Federal govnt leases M's surrendered land to SGC // court found govnt had fiduciary rel w/ the M // CT couldn't be applied as the land was gone // court has to apply \$\$ damages for a lease that <u>never would've happened</u> // instead court looks at what the M <u>lost</u> -- the opportunity for a <i>real estate development</i> // compensation assessed <u>at the time of trial</u> // increase in the value of the land taken into account // NOTE: M do NOT need to prove the other opportunity would've been taken -- this is <i>presumed</i></p>
<p><i>Canson v Boughton, 1991 SCC</i></p> <ul style="list-style-type: none"> • "common sense" causation • equitable compensation not restricted by CL principles in the same manner as tort & contract damages 	<p>Real estate transaction // lawyer (fiduciary) failed to disclose 3rd party profit -- in breach // claimant suffers damages from subsequent 3rd party acts // seeks damages from the lawyer // Court -- NO // compensation will be limited to loss connected by "common sense" causation // not bound by CL considerations such as foreseeability --- the breach of fiduciary duty is a <u>wrong in itself</u></p>

ACCOUNTING FOR PROFIT

- fiduciaries will be required to account for profit made “within the scope and ambit” of their duties where (*Warman*)
 - there was a possible **conflict** of personal & fiduciary interest
 - benefit was obtained due to fiduciary position or knowledge derived from that position
- fiduciaries also owe B’s a **duty to account** -- provide accounts of their trust administration w/in a reasonable time
- basis of this remedy is to ensure fiduciaries act with the upmost care & to **deter unjust enrichment**
- not a defence to assert that the claimant was unwilling / unable to have realized the profits (*Boardman, Warman*)
- time** from which profits **start** and **end** can be difficult to pinpoint -- look at *reasonable approximation* (*Warman*)
- value** of profits may also be difficult to assess -- *reasonable approximation* of value sufficient (*Warman*)
- allowances in AFP may be made for **contributions of the D** such as skill, time, etc -- onus on D to prove (*Boardman*)
- still available where there has been **no loss** to the B, as the remedy is *in personam* (*Boardman, Warman*)
- but if the loss suffered **exceeds** the profits made, the claimant must elect a remedy: accounting OR compensation (*Warman*)
- trustee can’t retain profits from reinvestment -- B’s entitled to profits **at least** in proportion to trust contribution (*Scott*)

<i>Boardman v Phipps, 1967 UKHL</i> <ul style="list-style-type: none"> contributions by D deducted 	B&P took advantage of a biz opportunity declined by the trust // success // trust indirectly profits (no loss) // court orders disgorgement // minus contributions by B of time, skill, etc
<i>Warman Intl v Dwyer, 1995 AUHC</i> <ul style="list-style-type: none"> no loss by claimant required “reasonable approximation” ok for value & timing of profits 	D was manager of WI // D proposed joint venture but WI declined // B instead contracts with D for the joint venture // takes employees from WI // WI sued for an AFP // won // AFP assessed for a 2 year period -- estimated time WI distributorship would’ve lasted // NOTE: court was generous b/c of the policy goal of deterrence
<i>Scott v Scott, 1963 AUHC</i> <ul style="list-style-type: none"> can’t retain profits from reinvestment 	F inherits house w/ remainder to his kids // F sells house // uses part of profit to buy 2nd house // leaves 2nd house to wife // kids sue for proportional share of 2nd house // WIN

PROPRIETARY REMEDIES

- proprietary remedies are ONLY awarded wrt property that is directly related (or traceable) to a wrong (*Sun Indalex*)

REMEDIAL CONSTRUCTIVE TRUSTS

- the fiduciary law remedy of a CT may be applied in diverse situations:
 - non-marital spousal relations -- contribution of household services (*Pettkus, Peter v Beblow*)
 - commercial transactions (*LAC*)
 - non-economic personal relationships where action may be statute barred under K or tort law (*M v H*)
- 3 requirements** for a CT ---> (1) enrichment (2) *corresponding* deprivation (3) absence of juristic explanation (*Pettkus*)
 - causal connection in (2) ---> “special link to the property” (*Peter*)
 - (3) ---> enquiry into the *legitimate expectations of the parties* (*Peter*)
 - factors:: benefits conferred by P as a gift or obligation to D // P submit to or compromise D’s claim // public policy
- CT should be applied where monetary compensation is inadequate (or unavailable) & there is a link between the services rendered and the property over which the trust is claimed (*Peter*)
- CT vs Equitable Damages?? (*Peter*)
 - value received** (*quantum meruit*) ---> equitable damages
 - value survived** (*quantum valebat*) ---> CT -- % of the value of the property is attributable to the claimant’s contributions

<i>Peter v Beblow, 1993 SCC</i> <ul style="list-style-type: none"> 	CL couple // house in H’s name // W made substantial contributions in the form of household services // breakup -- W sues for CT on the home // wins // CT may be applied to real estate to compensate for household service
<i>Sun Indalex v United Steelworkers, 2013</i> <ul style="list-style-type: none"> 	SI had dual fiduciary duty to Plan Members & to shareholders // goes insolvent // Plan Members claim <i>in rem</i> right & preferential creditor status// FINISH

IN REM CLAIMS AND TRACING

- PROS:** recover property converted in form OR held by a 3rd party (except BFPVWN) // and gain any increase in value
- tracing is a **property law concept** & therefore does not rely on the presence of inequity (ex/ an unjust enrichment)
- tracing usually arises upon insolvency of a trustee who has :: misapplied trust assets OR misuses the proceeds that result
 - result is to confer an *in rem* right on the claimant -- along with all the associated benefits
- PREREQUISITES** :: breach of trust or FR // property in traceable form // no inequity would result

(1) BREACH OF TRUST / FR

- seems self-evident but has been questioned -- ex/ in CL spousal breakdown there's arguably no fiduciary relationship
- (*Chase v IBB* -- money mistakenly paid into account due to a clerical error, no fiduciary relationship, court allowed tracing on the basis of good conscience)

(2) PROPERTY IN TRACEABLE FORM

- claimants can recover trust assets converted into money (or other forms) so long as the money is identifiable
- but if the fiduciary dissipates trust money without mixing, the claimant loses right to trace in priority to other creditors
- unlike CL, equity allows **recovery of mixed funds** -- subject to the following --
 - if trustee **withdraws** money, they're presumed to have expended their money first -- B has proprietary right to the remaining funds to the amount of their claim (*Re Hallet's Estate*)
 - if trustee **adds** funds, those funds are not traceable as proprietary -- will be distributed among creditors (*Re Hallet's Estate*)
 - if trustee **invests** mixed funds, B can claim a charge against that asset for the value of their claim (*Re Oatway*)
 - where there's an **increase in value**, the B is entitled to proportionate share of that increase (*Scott v Scott*)
- **time** at which the trust funds mixed with the trustee's funds must be identified (*Foskett*)
- **multiple trusts?**
 - a. "money first in, money first out" (*Rule in Clayton's Case*)
 - b. ratable approach -- preferred -- tracers get interest in proportion to their "contribution" (*Ont Sec Com v Greymac Credit*)

(3) NO INEQUITABLE RESULT

- remedy must not produce inequitable result based on the maxim: *any person who comes to equity must do equity*

<p><i>Re Oatway, 1903 UKCD</i></p> <ul style="list-style-type: none"> • mixed funds used to buy asset -- B's can claim charge against the asset for the amount of their claim 	<p>O diverts trust money into personal bank account // mixed money used to buy shares // O dies & estate sells the shares // trust sues for the proceeds // wins // trust entitled to a charge on the shares despite the fact that at the time they were bought O had enough of his own funds to have purchased --> mixed funds gives rise to B right to trace & recover the new asset</p>
<p><i>Foskett v McKeown, 2001 UKHL</i></p> <ul style="list-style-type: none"> • KEY case -- availability of in rem remedy in the law of trusts 	<p>M pays for 2 of 5 insurance policy premiums w/ misappropriated funds // M dies // B's claim 40% of the \$1 mil policy // kids claim B's are entitled, at most, to the amount of the misappropriated funds // court finds the funds ARE in traceable form & applies a <u>ratable</u> remedy following -- CL (follow the thing, recover & get increased value) tracing -- equity goes further -- can recover <u>even if the things has been converted</u> - trace, recover including increased value</p>

** look at *Foskett* for **choses in action** -- interesting - they are an in personam contract but they can be bundled to become property -- combination of rights that fit together as a chose -- ex/ money in a bank is owned by the BANK (your money get mixed with others) but the bank owes YOU a *chose in action* (your money + agreement that they owe you money + interest) ---> really try hard to understand how a chose in action operates ---esp as it relates to tracing

ACTIONS AGAINST 3rd PARTIES

- 3rd parties (strangers) can become liable as fiduciaries or "constructive trustees" when they assume the role of trustee and purport to deal with trust assets -- regardless of whether they derive benefit

(1) TRUSTEES DE SON TORT "of his or her own wrong"

- assumes the role of trustee & deals with the trust property as if the trustee -- must have *possession & control* of the trust property
- see an example of this in *Boardman v Phipps*
- not liable for merely assuming duties -- but upon **breach** becomes fully liable as if a trustee
- standard is knowing or willful blindness

(2) RECEIVING / DEALING WITH TRUST PROPERTY "knowing receipt"

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(3) ASSISTING A TRUSTEE IN A DISHONEST TRANSACTION "knowing dealing"

- strangers become personally liable for breach of trust if they **knowingly participate** in a dishonest or fraudulent transaction
- the 3rd party must know about the trust AND know that what is being done is in breach of the trust
- "knowing" determined by an objective standard that includes being willfully blind to what would make a RP suspicious (*Nelson*)

STRANGER LIABILITY AS TRUSTEE

- must be a FR + harm is related to the breach + "knowing" --- actual knowledge & constructive knowledge (willful blindness)
 - generally agreed that innocent mistakes are not included

- same for all 3 categories of intermeddlers (???)
- “directing mind” of a corporate trustee liable for innocent/negligent breach of trust if they assisted scheme (*Air Canada*)
- taking a “knowingly wrongful risk” that results in prejudice to the B is enough to ground personal liability (*Air Canada*)
- knowledge requirement will be easily met when dealing with the director of a corporation (*Air Canada*)

<p><i>Nelson v Larholt, 1948 UKKB</i></p> <ul style="list-style-type: none"> • reasonable man (objective) standard to determine notice + WB 	<p>Trustee pays bookie w/ cheques from trust <u>clearly</u> labeled as belonging to the estate // funds untraceable // B sues bookie & wins // notice = “what a reasonable man would have known” // includes willful blindness of what a reasonable man would see as suspicious</p>
<p><i>Air Canada v M&L Travel, 1993 SCC</i></p> <ul style="list-style-type: none"> • “directing mind” -- owners liable • requirement = actual knowledge, recklessness, or willful blindness • receiving benefit infers knowledge 	<p>By K, M&L required to keep \$\$ received for tickets in a separate account on trust for AC // did not // corporation = trustee // AC sues <u>co-owners</u> (V&M) personally as strangers // WINS // V knew the agreement & why trust account needed // V had actual (obj) knowledge of the breach // conduct showed he was willfully blind or reckless // V also <u>benefited</u> from the breach --> infers that he knew</p>
<p><i>Royal Brunei Airlines v Tan, 1995 UK</i></p> <ul style="list-style-type: none"> • director’s state of mind imputed to a corporation 	<p>Facts similar to <i>AC v M&L</i> // lower court used a modified objective std // rejected by Privy Council // affirmed objective standard // not required to prove intent of a corporation -- can be imputed from the state of mind of its officers</p>
<p><i>Twinsectra v Yardley, 2002 UKHL</i></p> <ul style="list-style-type: none"> • willful blindness requires <u>some</u> degree of subjective knowledge 	<p>Y lends funds to Y for a specific purpose // Y asks for a lawyer to hold as security // Leach refuses, but Simms agrees // Y uses the \$\$ in general // Simms goes bankrupt // Leach sued as <i>stranger to the trust</i> // Court - NO - while Leach knew in general, he didn’t know the specifics of the deal</p>

EXPRESS TRUSTS OVERVIEW

VESTING

1. must have a trustee with title to the property
2. assets must be fully vested
 - a. personal declaration of trust -- almost always automatic vesting
 - b. trust settlement / deed by contract -- trust created once contract is enforceable
 - c. trust settlement / deed -- vesting depends on type of property
 - i. land -- registration in the LTO
 - ii. shares -- registration in company books
 - iii. personalty -- upon actual delivery

CERTAINTY OF INTENTION / WORDS

1. is the 3rd party in whom LT has been vested a *trustee* or merely the recipient of an out-and-out gift?
2. words are significant --- but surrounding circ's will also be considered if language is unclear or contradictory

CERTAINTY OF SUBJECT MATTER

1. clarity about the things that form the subject matter of the trust
2. TEST = is the trust property and the beneficial interest *ascertained* or *ascertainable* at the time the trust is created?

CERTAINTY OF OBJECTS

- *the degree of certainty required depends on the form of appointment of the beneficiaries*

1. Fixed Trust

- i. trustee must distribute to the named B's or class of B's in the manner indicated by the TI
- ii. TEST = "complete list test" or "class ascertainability test"
- iii. high level of certainty required

2. Discretionary Trust

- i. T has an obligation to distribute but the power to choose within a class of beneficiaries
- ii. TEST = "is/is not" or "individual ascertainability"
- iii. *conceptual certainty* is required -- debate around *evidential certainty* (*Baden 1*)
- iv. evidential uncertainty to the point of *administrative unworkability* will void the trust

3. Power

- i. T need not choose anyone -- must only *consider* whether to make a distribution
- ii. TEST = "is/is not" or "individual ascertainability"
- iii. *conceptual certainty* required -- no need for *evidential certainty* therefore *administrative unworkability* isn't an issue
- iv. **Types of Powers**
 1. General power - conceptually certain
 2. Special power - range of objects must be specified to sufficient degree of clarity
 3. Hybrid power - range of objects must be specified to sufficient degree of clarity

RULE AGAINST PERPETUITIES

- I. If there is a contingent equitable future interest, it must comply with the RAP -- *Any interest must vest, if it's to vest at all within lives in being + 21 years.*
- II. **Future Interests**
 1. **presently-held interest** (LE, EIFS -- vested in interest and possession)
 2. **vested future interest** (reversion; remainder -- vested in interest, but not in possession)
 3. **contingent future interest** (contingent remainder; right of entry -- interest subject to divestment upon condition subsequent -- possibility of reverter -- determinable interest)
 4. an ECFI will **not constitute property** if the condition is 1) illegal 2) against public policy 3) uncertain 4) places a restraint on alienation 5) violates the rule against perpetuities
- III. **Analysis of the perpetuity**
 1. does the interest vest within lives in being + 21 years?
 2. if it does not, can the future interest be remedied by the *Perpetuity Act*?

FORMALITIES

1. INTER VIVOS TRANSFERS

1. writing not required for transfer of ET from S to B
2. writing required for transfer of ET from B to a 3rd party + trustee must be notified (**s.36 LEA**)
3. writing required for dispositions of land (**s.59 LEA**)

2. WILLS

- a. must be in writing (**s.3 WA**); must be signed by testator; must be signed by two witnesses (**s.4 WA**)
- b. EXCEPTIONS ---> although these will become less significant in BC under the new *Wills Estates and Succession Act*
 - i. **secret trusts** --intention to benefit a B is NOT disclosed in the will
 - a. T intends that B named in the will shall hold property for the real beneficiary, C
 - b. T communicates this intention to B
 - c. B accepts or acquiesces
 - ii. **half-secret trust** - intention to benefit a B is disclosed in the will, but the B's identity is not
 - a. T communicates to B to hold property for C before the will is made
 - b. T communicate to B the identity of C before the will is made
 - c. B accepts before the will is made