Ch 1 – Nature and History of Equitable Interests

1. distinction between legal and equitable interests in property and therefore the distinction between "common law" and the "law of equity" equity within the overall Canadian common-law system.
   - CL narrow meaning: law that was developed by courts of 12th C England - royal judges who took customs of England and Wales and wove them together. DOES NOT INCLUDE EQUITY
   - EQ narrow meaning: court of Chancellor (Chancery) was the "King's Conscience" - divine right left him in charge of doing justice. had jurisdiction over Eq: This allowed him to change a 'correct' CL decision in order to do justice between the parties -
   - King's auth reposed in chief official, Chancellor, office coalesced into system of rules and ct of it's own. Meant 2 separate/parallel court systems
2. systematization of "conscience" into the maxims of equity and rules of equity and the relationship of the law of trusts to the system of equity - developed **maxims**
   - **Equity will not permit a wrong without a remedy**
     - where the is a k for sale of land and you have not complied with statute of frauds eg k is void. But if there's been part performance you move into equitable remedy of part performance because unconscionable otherwise
   - **Equity follows the law**
     - absent an unconscionable outcome, equity will respect and give effect to CL rules.
     - This approach of equity is a compromised response following the spat between Lord Ellesmere VC and Sir Edward Coke CJ (settled in favour of the court of chancery decisions by James I) post the Earl of Oxford case
   - **Those who seek equity must do equity**
     - "clean hands" doctrine
   - **Equity assists the vigilant and not the tardy** - laches not rewarded
   - **Equity is equality**: proportionality among contributors
   - **Equity looks to the intent rather than the form**
     - substance trumps form
   - **Equity looks on that which ought to be done as being done**
     - eg: if you entered into a lease orally, and you move in but don't pay rent - even though there's no 'form' there is clearly because you moved in you should also be paying rent
   - **Equity acts *in personam***
     - the person is what counts most, but note increasing proprietary aspect of equitable interests
     - looks at personal situation (partic in constructed trust) - not hidebound in damages to actual losses could look at potential losses
   - **Equity will not assist a volunteer** (someone who has not given value)
   - **Equity will not fail a trust for want of a trustee**
     - If all the trustees die, the beneficiary can go to ct and ask for a new one/ones
3. importance and application of the distinction between legal interests on the one hand and equitable interests on the other and its operation in the social and economic realm of a prevailing culture including our own in these times
   - LEGAL TITLE concerned with 'use' ie control, management, administration
   - EQUITABLE TITLE concerned with benefit, enjoyment 'joys'
   - commentators out of university of Padua writing on ownership (Civil code) to articulate concept of ownership (unknown to CL where all was owned by King and ppl just had interests) These commentators said ownership was a collection of rights
     - ***ius utendi*** - use (trustee)
     - ***ius fruendi*** - enjoyment (beneficiary)

    - ***ius disponendi*** - disposition (both - beneficiary can transfer his equitable title)
- concept that if you had ownership, you had those 3 things, and you could always recover it:
    - ***ubi invenio, ibi vindico*** – where I find my thing there I can vindicate (recover) it
    - this was the creation of real rights - **"*in rem*" rights** (against the world) as opposed to *in personum* rights as in k against a person.

4. trust historically and today
    - "use" was vehicle that enabled the trust-like transfer:
        - to avoid the incidents of a holding of land under a feudal regime, a transfer of land, Blackacre, might be made by Snooks, the feoffor (now the settlor) to "Tewksbury the feoffee to uses (now called the trustee) tenet ad opus (i.e. holds for the benefit/work of) Bloggs", the cestui que use (now the beneficiary) (or cestui que trustent)."
        - Chancellor was the one who enforced the use: CL judges would not recognize/help
        - Henry VIII came in with *Statute of Uses* that said a use just pushed the legal title to hands of beneficiary - you could do it all you liked but it wouldn't work. Ppl developed sneaky ways to get around it such as the double use
        - by 18th C use was back under the name of trust
    - Medievally:
        - instrument for sorting out property regimes within a family - Germanic tribes used treuhand or salman (sala meant transfer), a concept of Germanic customary law, is the likely archetype for the medieval trust.
        - Monks - avoid breaking vow of poverty
        - avoiding incidents of tenure
        - Charitable
    - Modern: tax avoidance
    - 19th C: development of capitalism - partners would get together, get investors, hold the $$ in trust, and divide the money into shares and distribute them back to the investor.
    - Other: mutual funds, pensions, RRSPs, environmental protection, people with diminished capacity
5. historical development of equity and of the trust as an important doctrinal institution within our law rooted in "conscience" and derived from the chancellor of England from the 12th to the 19th centuries
    - Earl of Oxford case -1615 - Coke (CL) decided and def lost, went to Chancery, won an injunction from Ellesmere and Coke refused to acknowledge it.
    - The two courts became locked in a stalemate. It was referred to Attorney General Sir Francis Bacon By authority of King James I the common injunction was upheld and it was decreed that if there was a conflict between CL and Eq. equity would prevail. Eq's primacy in England was later enshrined in the Judicature Acts of the 1870s, which also served to fuse the 2 separate courts (although emphatically not the systems themselves) into one unified court system.
6. The reception of English common and equity into the provincial regimes in Canada
    - happened at different times in different places
7. The different types of equitable interests (trusts, mortgages, agreement for the sale of land) and how they arise

TRUST is equity's law of **property: relationship between people mediated by things**
what people?
- the trustee
- the beneficiary
- testator/settlor when not inter vivos gift
    - person who gives the things / conveys them to an individual
    - the legal title to the thing is precipitated by that event.

core idea is that the **trust involves things**. which is at the centre of property
- relationship reposed in

- trustee (LEGAL TITLE) - framed and found in laws around title in the CL
- and beneficiary (EQUITABLE TITLE) - as developed in cts of Equity

THREE HALLMARKS of TRUST
1. ability to split ownership - legal/use to trustee, equitable/enjoyment to beneficiary - disposition to both
2. **In Rem** rights - qualified in beneficiary's case not trustees'
3. Fiduciary duties

Ch 2 – Express Trusts - Vesting

Creation of an express trust requires: (*Elliott v Elliott Estate*)
1. The settlor and the trustee must have capacity
2. The three certainties must be met
3. The trust must be constituted (vested)
4. Any necessary formal requirements must be met.

Vesting

intended gifts or transfers of and equitable title using trust as the legal vehicle require legal title of the property (often described as the "subject" of the trust) to be vested in the trustee. At the conclusion of this chapter you should be familiar with the various ways property vests in a trustee and what is actually demanded in law to effect "completion" or "perfection". You should also be conversant with the reasons for vesting

in rem rights allows 3 things: terminate the trust
sell/mortgage interest
obtain trust assets or equivalent (tracing

Requirements for valid trust:
1. certainty of subject - this is "property" not people
2. certainty of words - intentions - that it is a trust that is wanted.
3. certainty of objects - this is the people

Before even that, equity "follows the law" so there is the question of vesting. Transferor has to transfer the property such that the legal rights are vested in the transferee: NO EFFECTIVE TRUST if all you have is a declaration. That's only effective in an 'automatically constituted trust" Whatever the property is, it has to be transferred in such a way that the **CL recognizes it has being vested**, rules vary: property = form A transfer, eg. Shares = registry. Money = access to account.

Trust of land needs to be evidenced in writing. Some jurisdictions require writing for transfer of equitable title but not BC. Legal title does.

The Express Trust is Created in 1 of 4 ways:

1. **Settlor's Personal Declaration of Trus**t:
   - declaring self trustee, holding legal title to the property - but now for benefit of the beneficiary (note the settlor changes his/her role to that of trustee and retains title)

***Elliott v. Elliott Estate*, [2008]**

F: J does not leave disabled daughter, B, anything in the will. Instead, other children instructed to contribute into a trust fund for B. Additionally, a GIC account was verbally set aside for B during J's life.

I: Is the GIC in trust for B, or part of the estate?
L: Requirements for the creation of a trust (see above). When the settlor declares themself as trustee, vesting is automatic. There must be evidence of intention to become a trustee, but no specific words are required. The trust may be made orally.
C: A trust with respect to the GIC was created. Although proof is harder in oral declarations of trust, it was present in this case.

Glynn v Federal Commissioner of Taxation (1964)

F: G declared a trust in favour of his minor sons. The transfer was recorded at the company, but the sons were never told. Additionally, the dividends were not paid to the sons (although they were used for their support).
I: Do the shares constitute part of G's estate?
L: The non-communication to the beneficiaries and the appropriation of the dividends do not prevent the creation of a trust.

- WHY DOES THIS WORK? because CL doesn't recognize fragmentation of Eq from Legal title and so there's no "law" for equity to "follow"

2. **Appointing a Third Party:**
   - as trustee of the property to direct him/her to hold the trust asset for a named beneficiary
   - unlike declaration, here gift must be more than a mere promise per CL
   - gift of equitable interest to a beneficiary to be held by a trustee requires conveyance of legal title to into the name of the trustee in order for the trust to be effective/completed – that is to say, "vested".
   - distinction btwn "choses in action" (intangibles) and "choses in possession" (tangible items). Eq follows Law which prescribes differing requirements for effective transfer from a grantor to grantee.
     - eg. conveying land (often in a land title office or registry) differs from that involving shares (usually in a company register) or money (handing over, say).

***Milroy v. Lord* UK Court of Appeal in Chancery(1862)**

F: Medley transfers shares to Lord to hold in trust for Eleanor (Milory) but Lord never registers shares, after Medley's death executor has shares
I: are the shares held in trust for E or are they part of Medley's estate?
R: the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property, and render the settlement binding
A: The shares, it is clear, were never legally vested in him, and the only ground upon which he can be held to have become a trustee of them is, that he held a power of attorney under which he might have transferred them into his own name; but he held that power of attorney as the agent of the settler
C: there had not been a proper transfer of the Bank shares to Lord and so there had not been an effective gift to Eleanor Dudgeon (later Milroy) as beneficiary

***Re: Rose* (1952)**

Eq will treat an intended "what ought to have been done as done"
F: Estate liable to pay tax on gifts made within 5 years of death. R transfers shares on trust more than 5 years before his death, but the transfer is only registered by the company later, within 5 years.
I: Was the beneficial interest transferred when R executed the transfer, or when the transfer was recorded.
L: Doing everything possible to effect the transfer is sufficient to create a trust. Pending transfer, the settlor is the trustee. (common-law rule that for an effective gift to be completed it is de facto loss of control over the thing is really what is at stake)
A: Distinguished from Milroy since the settlor in that case had not done everything possible.
C: The beneficial interest was transferred immediately upon the execution of the transfer deed.

***Ratner v. L.H. Ratner Construction Ltd* BC CA [2010]**

F: David Ratner transferred shares to his mother because of tax implications on understanding she would give them back, and she agreed to but didn't - she was using the income to pay med expenses
I: can Ratner reclaim the gift? Or was her agreement to return them valid as a gift
R: *Re Walke*r (1924): From the earliest time, the attempt has been made to accomplish the impossible, to give and yet to withhold, to confer an absolute estate upon the donee and yet in certain events to resume ownership and control the destiny of the thing given.
A: She did not vest the interest in the shares in him therefore no gift
C: Ratner is out of luck

***Mordo v. Nitting* [2006]**

F: M family thinks son, Alex, is a jerk and want to disinherit him. Mom, Eida, creates a trust in favour of herself and daughter Viviane. E prepares a Form A transfer of warehouse property and gives it to Tee (Wilson), but W doesn't register the transfer until after E dies. A wants the property under the trust.
I: Does the trust come into existence when the transfer from is given to W, or only after he registers it?
L: Have to look at legislation governing land transfers to determine what acts are necessary to validly transfer land. In BC, it is possible for a transfer to be valid against the transferor before it is registered, but the intention of the transferor is crucial: did the transferor intend to relinquish control of the property?
A: By giving the executed Form A to Wilison, E did everything necessary (see Re Rose) to create a valid trust.
C: The trust came into existence before E's death, and A cannot defeat it. execution of Form A transfer in respect of land-with-warehouse property) and handing it to the trustee sufficient to vest title even without registration in the Land Title Office.

***Carson v. Wilson* Ontario Court of Appeal [1960]**

F: Deeds to transfer were made and given to a solicitor with instructions to deliver them after the donor's death. The properties were managed and benefited the donor. These deeds would not be valid under the Wills Act.
I: Are these transfers valid or do they constitute a trust?
L: Similar to Mordo, there must be clear proof that the donor intended to forfeit control of the property. A delayed transfer cannot constitute a declaration of trust (Milroy).
C: No transfer took place and no trust was declared. Not effective. In contravention of Wills Act, and there was no intention to be immediately and unconditionally bound.

3. **Contract between Settlor and Beneficiary:** agreeing under k with a beneficiary that a t'ee be appointed to hold the trust property for the beneficiary
   - Contractual covenants (with consideration) are outside "volunteer" category - title to property in the beneficiary becomes enforceable through specific performance of the contract.
   - less clear where k is between the settlor and the t'ee and B is not a party to the transaction where the settlor does not have the property and is obliged under the contract to acquire it.

4. **Incomplete Gift Later Perfected** - eg a promise to give property - that later is perfected by transfer of title

Strong v. Bird (1871)

F: B borrows money from S, who is a tenant of B. S agrees to pay less as rent until the debt is paid back. After a few months, S declares that she forgives the debt, and resumes full payments. After she dies, her estate wants the rest of the debt. B is the executor.
I: Was the debt forgiven?
L: Her verbal forgiveness not sufficient to release the debt - but continuing payments were proof of **continuing intention** to forgive the debt. When B became executor that continuing intention met with the transfer of legal title and perfected the transaction.

***Hilliard v. Lostchuk* Ontario Court of Justice – General Division [1993]**

F: Julia gave 2 kids ppty, wanted to subdivide some for 3rd, but had to apply to city for rezoning - died before application - Harry claimed entitlement to the lands on an application of the rule in Strong v Bird.
I: can the gift be perfected such that title is vested in Harry
R: Strong v Bird "where a testator has made an imperfect gift of personal estate belonging to him, to one who upon his death becomes his executor, the intention continuing unchanged, the donee is entitled to hold the property for his own benefit."
A: i) Julia made a gift inter vivos to Harry of those lands described in the severance application;
ii) that inter vivos gift was incomplete at the death of Julia;
iii) until her death, Julia maintained her intention to make the gift to Harry;
iv) Harry's appointment as executor of Julia's estate perfected and completed her gift;
v) Harry is entitled to a conveyance of the subjects lands;
vi) Julia's will has no effect upon the subject lands.
C: Yes because testator did everything in power to effect transfer, no contrary intention was evident and son as executor can complete gift

To determine, one must investigate how the donor/settlor has intended to set up the trust - intention determined by reviewing all relevant evidence
- the document(s),
- the context of the writing with its surrounding circumstances
- who is the trustee.

Certainty of Intention/Words

It must be clear that a trust is intended. Need **intention to create a trust,** general intent to benefit is not enough. The word "trust" is not necessary. However, precatory words ("I wish", "I hope"...) usually do not indicate a trust. If I give Natalie a gift, and say "please be good to your brother and look after him" is it **precatory** or a **trust**? Have I actually charged her to give some of the benefit to her brother? Courts will examine the entire document to determine whether or not there is an intent to form a trust. The court will "look at the surrounding circumstances and the evidence as to what the parties intended, as to what was actually agreed and as to how the parties conducted themselves." (*Byers v Foley*, cited in *Elliott v Elliott Estate*).

***Hayman v Nicholl* SCC [1944]**

F: Lydia left to Ina, "in full confidence that she will dispose of [it] in accordance with the wishes which I have expressed to her." then Ina died - Lydia's other heirs argued that it was a trust so any money left belongs to Lydia and is claimable by Lydia's heirs.
I: was it a gift, or a trust. "Do the words of the codicil, then, create a trust or are they merely precatory, expressive of the wish of the testatrix but not intended to impose upon the legatee an imperative direction?
A: Trial judge said trust influenced by word "dispose". SCC disagrees, says Have to give effect to the real intention of the testator, gathered from the instrument as a whole. "In full confidence" is a wish, it does not create a trust.

***Royal Bank v. Eastern Trust Co* PEI SC in Bankruptcy [1951]**

F: Crossman owes money to RBC. He agrees to assign the bank rental income from his building. He later sells the building to his friend, Stetson, mentioning that money was still owed to RBC: "Gordon Stetson assumes a Mortgage of $10,000.00 and is to hold deed of Winsloe property until Crossman raises a Mortgage on it property to repay taxes and insurance premiums, and indebtedness at Royal Bank, Charlottetown;"

I: Does this create a trust on the property in favour of the bank?
L: An agreement between A and B to pay a third party, C, does not make C a beneficiary unless one of the parties to the agreement declares a trust. Once again, have to consider the intention of the parties to the agreement.
C: There is not enough evidence in the wording of the memo to create a trust. In addition, the bank's own actions (issuing a garnishee order) were inconsistent with the idea that a trust had been created. Therefore, the bank does not have in rem rights over the other creditors.

Certainty of Subject Matter

degree of clarity required by law to identify the subject matter or trust assets: Anything recognized by law as property can form the trust assets. In order for a valid trust to be created, the type and amount of beneficial interest must be described with "sufficient exactness". Compliance with this test is necessary so that trustees know what property their fiduciary obligations apply to.

***Sprange v Barnard* UK Chancery (1789)**
trust failed for lack of certainty of subject matter - T holds legal + beneficial title
F: S left an annuity to her husband "for his sole use and at his death the remaining part of what is left, that he does not want for his own wants and use to be divided between" certain named Bs.
A: No trust arose – uncertainty of subject. The husband took the annuity legally and beneficially.
Notes: Is this really a sufficient reason as a matter of policy to invalidate the trust? It is easy enough to see what property from the annuity is left for the Bs on the T's death. Now we have a more relaxed view of certainty.

***Re Beardmore Trusts* Ontario High Court [1951]**
Type of property and the amount of the beneficial interest must be sufficiently certain to constitute a trust – need to describe "with sufficient exactness"
F: Intervivos trust - result of a divorce - provided for child support to take effect on the settlor's death. - would be comprised of 2/3ds of the net estate.
A: *Contrary to Wills Act* and uncertainty of subject. At the creation of the trust, the subject matter (property) would not have been known.
Notes: Now, courts would probably find that this is certain enough...

***Re Golay; Morris v. Bridgewater* UK Chancery [1965]**
"reasonable" = certain
F: Executors directed to "let B enjoy one of my flats during her lifetime and receive a reasonable income…". Could be semantically or evidentially uncertain.
A: Not too uncertain.
Notes: Courts have created certainty for some words ("reasonable") - ascertainable at market rate?

Ch 3 – Express Trusts – Certainty of Objects.

The beneficiaries of the trust must be identifiable with sufficient certainty, depending on how they are appointed. There are two possible tests for certainty:
1. List certainty – The trustee could draw up a complete list of all the beneficiaries.
2. Individual Ascertainability – The trustee can say if a named person is or isn't a beneficiary.

There are three possible ways to appoint a beneficiary:
1. Fixed trust - specify who receives from the trust and in what proportions. List certainty.
2. Discretionary trust – The trustees MUST give, but can choose who from amongst the group to give to. List certainty until Baden, now Is/Is Not. Additionally, the trust cannot be "hopelessly wide".

3. Power – Trustees can give or not. Usually a gift-over is included. Is/Is Not (*Gulbenkian*). The class under a power cannot be capricious (*Manisty*; *Hay*).

There are three kinds of powers:
1. General – in favour of anyone.
2. Intermediate – in favour of anyone with certain exceptions.
3. Special – in favour of a class.

fixed trust
the objects of the trust must be identified in the trust instrument with such precision that that beneficiary can be individually named

discretionary trusts or **trust powers**
description of the class must meet the "individual ascertainability" or "is/is not" test,
- i.e. from language in the trust document, can it be said with certainty whether any given individual is or is not a member of the class.
- Range of objects must not be so "hopelessly wide" that the trust is administratively unworkable
- (i.e. cannot be properly supervised by a court because of extreme "evidential uncertainty" - words, without a task that is ridiculously burdensome, can you with certainty say whether any given individual is or is not a member of the class of beneficiaries?

powers:
individual ascertainability test also sufficient to satisfy the requirement

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

Powers of Appointment in Trust Settlement

Tests for certainty
"fixed trust" and where beneficiaries are chosen under "trust / discretionary powers"

IRC v Broadway Cottages (noted)
list certainty test applies to trust objects
F: Ts held property for the benefit of the S's wife, specific relations and a charity (the Broadway Cottages Trust).
A: Trust is void for certainty of object. Could not draw up a complete list of all the objects (but it was possible to determine whether any one person was a member of the class).
Note: held: "I am not at liberty to validate this trust by treating it as a power. A valid power is not to be spelled out of an invalid trust."

Re Gulbenkian Settlements (noted)

listable test applies for fixed trusts

HL held for powers of appointment, objects were sufficiently certain if any given individual could be said to be in, or not in, the class. (So this was more relaxed than list certainty, which requires everyone to be said to be in the class.) I

Baden 1

list certainty test does not apply to discretionary trusts. Instead, use is-or-is-not (follows *Gulb*)

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

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

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

Baden 2

3 ways to deal with the unknowns of is-or-is-not test

I: Does "relatives" cause the trust to be invalid since it is impossible to say with certainty that an individual is not a relative of someone else.

L: Sachs – Unknowns are in the 'is-not' category, but you can define 'relative' - difference between evidential and conceptual certainty

Megaw – With Sachs - you can have a substantial number of unknowns as long as there are a large number in the 'is' category

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

C: basically unknown is either no or irrelevant unless there are so many that it's ridonk.

Notes: court is not defeated by evidential uncertainty. Difficulties in determining whether someone is a dependent are evidential, and raises questions of fact, not law.

***Re Manisty's Settlement* UK Chancery 1974**

the hybrid/intermediate power exists. There is a duty to consider

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

A: *Gestetner, Gulbenkian*, & *Baden* cases say that a power is not uncertain merely because it is wide in ambit. Just like in special powers, the trustees will consider the intent of the settlor, considering all the terms of the settlement and the surrounding circumstances, and exercise their power in a sensible way. Trusts which are vague because they are capricious may be invalid since it will be impossible for a trustee to sensibly exercise the power.

- (this may also extend to the creation of a capricious power – eg. a power to benefit "residents of Greater London" – this negates sensible expectations of the S because it asks the Ts to consider a random conglomeration of persons. Don't confuse this with a wide ambit.)

***Re Hay's Settlements* UK Chancery [1982]**

what is required of T's when they are both a T and hold an intermediate power

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

A: T must:

1. Consider periodically whether or not he should exercise the power
2. Consider the range of objects of the power (just an "appreciation of the width of the field", not exact #s)

3. Consider the appropriateness of individual appointments – again, not exact calculation of whether X is more deserving than Y, but should determine whether it is appropriate

Notes: if there is a real problem in the execution/administration of a power, court may hold it to be invalid, but will be slow to do this. - admin unworkability does not render a trust

Jones v The T Eaton Co

F: "On the death of my wife or should she predecease me on my death, to pay the following legacies as soon as conveniently possible out of the residue of my estate: To the Executive Officers of The T. Eaton Company Limited, Toronto, to be used by them as a trust fund for any needy or deserving Toronto members of the Eaton Quarter Century Club as the said Executive Officers in their absolute discretion may decide, the sum of Fifty thousand dollars."

C: it IS a charitable trust (deserving/needy) (therefore mustn't fail for uncertainty) and it IS the discretion of the trustees

Evidential Uncertainty

and how it differs from conceptual certainty having regard to administrative unworkability

CONCEPTUAL/SEMANTIC UNCERTAINTY

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

Conceptual certainty is met if the criterion test (either is/is not or list certainty) can be successfully applied

EVIDENTIAL UNCERTAINTY

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

ADMINISTRATIVE UNWORKABILITY

- Occurs where range of potential Bs is so hopelessly wide that practically doesn't form anything like a real class of Bs
  - Baden No 1–said discretionary trust may be void in these circumstances
    - Discretionary trust will fail where the class of objects is too wide making the power too difficult to supervise and enforce
  - Morice–said trust can't be executed in these circumstances
- Usually created for tax avoidance–because it makes it difficult to place a value on the trust (Gulbenkian)
- Because administrative unworkability doesn't apply to powers but does to discretionary trusts – makes the tests for certainty of the two not identical
  - **A power will not fail because of administrative unworkability (*Re Hays*, *Re Manisty*)**
    - A power will be held invalid if it was exercised capriciously (*Re Manisty*)
- In a trust (including discretionary trust) the Tees must be able to formulate reasonable and clear criteria to guide their discretionary distribution to B's

Ch 4 – Express Trusts - Perpetuities and Formalities

vested future interests and **contingent future interests**

1. Stemming from social and economic considerations

    - ie to daughter until marriage whereas now restrictions on marriage tend to be to avoid types of marriage ie to prevent same-sex marriage or marrying out of race or religion
    - can establish conditions beneficiary must reach to in order to acquire
    - settlor / testator wanting B to benefit only under certain conditions
2. on their existence as legally-recognized property: remoteness of vesting, etc.
3. flowing from the common-law rule against perpetuities and thus you should be familiar with
    a. Perpetuity Act (refer Case Book)
    b. Its application and a critique and evaluation of that application

Definitions

- Present interest – current possession (eg leaseholder or life estate holder)
- Future interest – presently-held rights to future occupation/enjoyment. Held *in rem*. Could be vested or not (contingent)
    - Vested interest – A future interest that is presently held: only possession/enjoyment isn't held. Eg reversions and remainders
    - Legally recognized as property: can be bought and sold
        - Reversionary interest – what the fee simple owner keeps after transfering a lesser estate
        - Remainder interest – the reversionary interest after being transfered to a third party
    - Contingent interest – a non-vested future interest. At CL requires compliance with remainder rules
    - MAY be recognized as property if complies with RAP
        - Condition precedent – ("To Orville if he turns 30 years of age") "if"
        - Condition subsequent – (e.g. "rights of entry" – "To you, but if you cease to use property for educational purposes, then to Bloggs") "but if"; "subject to"; "on condition that"
        - Determinable limitation – (e.g. "rights of reverter" - "To Basil while you are married to Orscilla, when he are not, to Snooks")"while; "so long as"; "during"; "until"

Vesting

The law favours early vesting, so a future interest will be vested if:

- The person(s) entitled to the interest are ascertained
- The interest is prevented from taking effect by the existence of a prior legal estate.

Contingencies

Since common law didn't accept conditional gifts that allowed for a gap in seisen, the use (later, trust) was used instead. The circumstances described in the condition must be lawful and comply with the modern rule against perpetuities. Unlawful contingencies include restraints on alienation and anything against public policy, which is often determined by examining human rights legislation. Restraints must also be sufficiently clear; for example, "so long as X is a good Catholic" is unclear without a definition of what makes a good Catholic

In general, an invalid condition precedent means the gift fails while an invalid condition subsequent makes the gift absolute. This may change depending on how fundamental the condition is to the gift itself.

Contingent future interests (even though based on a contingency that may never happen) could qualify as l**egally-recognized property** if:

- The contingency does not effectively bar alienation of the thing
- it is not void for vagueness or contravention of public policy
- it complies with the rule against perpetuities – i.e. **vesting is not too remote**

Remainder is vested if 2 conditions satisfied:

1. **person(s) ascertained**
2. **interest ready to take effect forthwith and prevented only by prior legal interest (eg life estate)**

Rule Against Perpetuities

at CL: one must be able to say at the outset of the trust and with absolute certainty that under the terms of the trust, the vesting of equitable interests, if they were to occur, would do so within lives in being at the time of the creation of the trust plus 21 years. An additional 9 mos can be added for conceived unborn children

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

Perpetuity Act - Legislative response

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

s 9 (1) contingent interests are presumed valid until actual events show that the interest is incapable of vesting within the perpetuity period (at that point the interest becomes void – unless it fits exception in the Act)

(2) disposition giving general power of appointment is presumed valid until it becomes established by actual events that the power can't be exercised within the perpetuity period

(3) disposition giving general power of appointment is presumed valid; becomes void for remoteness if the power is not fully exercised within the perpetuity period

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

(a) section 14 (capacity to have children)

(b) section 9 (wait and see)

(c) section 11 (age reduction)

(d) section 12 (class splitting)

(e) section 13 (general cy pres)

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

- **S. 8-9**: allow for actual events to unfold - wait-and-see
    - solicitor practise: would put into a disposition (so that it wouldn't violate certainty of vesting) in effect said that rule you must be a certain age or whatever the contingency was based on, what you wrote in was "we understand the requirements and what we are telling you this interest is valid only if it vests within the existing Royal lives" - so you would wait to see when the last of that group dies (Kate's child right now - so if the contingency had not been met in that time it would be valid.)
- S. 14: recognize natural limitations on giving birth

        - 12-55 for women, 14-up for men
        - it is possible to prove infertility eg you can prove that there won't be another child if you can show infertility
    - S. 11: reduction of age contingencies
        - allowed to reduce the age, look at actual age, if the 2 yr old child is not vested until 30, the legislation will bring it down to 23 (2 plus 21)
    - s 12 class splitting
        - if some will have reached the age and some not, allows you to split the class to allow those who have attained the age.
    - S. 13: general *cy-pres*
        - modification to fit intent
    - S.7: allows settlor to choose 80 yr period as substitute for lives in being + 21
- Some other jurisdictions have abolished or amended the rule to something simpler:
    - Manitoba said, you know what fuck it, and it's worked out ok.
    - other jurisdictions not prepared to do that but BC 80 years, England 125 yrs
    - BC some statutory bodies are exempt (eg s 52 *University Act*)

Formalities the law imposes for transfer from settlor/testator to B

- contracts for sale of land must be in writing per *Statute of Frauds* / *Law and Equity* act s 59
- MB and BC only provinces to abolish formalities in creating / transferring eq interests in land inter vivos
    - but smart to put it in writing!
    - need formal transfer to vest in trustee, but no need for formality to create trust.

S 59 *Law and Equity Act* **CB 63**

Enforceability of contracts

59 (1) In this section, "disposition" does not include

(a) the creation, assignment or renunciation of an interest under a trust, or

(b) a testamentary disposition.

(2) This section does not apply to

(a) a contract to grant a lease of land for a term of 3 years or less,

(b) a grant of a lease of land for a term of 3 years or less, or

(c) a guarantee or indemnity arising by operation of law or imposed by statute.

3) A contract respecting land or a disposition of land is not enforceable unless

(a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,

(b) the party to be charged has done an act, or acquiesced in an act of the party alleging thecontract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or

(c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

(4) For the purposes of subsection (3)(b), an act of a party alleging a contract or disposition includes a payment or acceptance by that party or on that party's behalf of a deposit or part payment of a purchase price.

(5) If a court decides that an alleged gift or contract cannot be enforced, it may order either or both of

(a) restitution of a benefit received, and

(b) compensation for money spent in reliance on the gift or contract.

(6) A guarantee or indemnity is not enforceable unless

(a) it is evidenced by writing signed by, or by the agent of, the guarantor or indemnitor, or

(b) the alleged guarantor or indemnitor has done an act indicating that a guarantee or indemnity consistent with that alleged has been made.

(7) A writing can be sufficient for the purpose of this section even though a term is left out or is wrongly stated.

per mortis causa = will formalities
- require written will w/ witnesses etc. Two Eq exceptions - Secret and Half-Secret Trust

WILLS ACT
[RSBC 1996] CHAPTER 489

Writing required
3 A will is valid only if it is in writing.

Signatures required on formal will
4 Subject to section 5, a will is not valid unless
(a) at its end it is signed by the testator or signed in the testator's name by some other person in the testator's presence and by the testator's direction,
(b) the testator makes or acknowledges the signature in the presence of 2 or more attesting witnesses present at the same time, and
(c) 2 or more of the attesting witnesses subscribe the will in the presence of the testator.

[Note: As of 31 March 2014, the Wills Act, RSBC 1996, c 489 will be repealed. The statutory provisions dealing with the formalities and validity of wills will be governed by ss. 36 and 37 of the Wills, Estates and Succession Act, SBC 2009, c 13.]

WILLS, ESTATES AND SUCCESSION ACT
[SBC 2009] CHAPTER 13

Who can make a will
36 (1) A person who is 16 years of age or older and who is mentally capable of doing so may make a will.
(2) A will made by a person under 16 years of age is not valid.

How to make a valid will
37 (1) To be valid, a will must be
(a) in writing,
(b) signed at its end by the will-maker, or the signature at the end must be acknowledged by the will-maker as his or hers, in the presence of 2 or more witnesses present at the same time, and
(c) signed by 2 or more of the witnesses in the presence of the will-maker.
(2) A will that does not comply with subsection (1) is invalid unless
(a) the court orders it to be effective as a will under section 58 [court order curing deficiencies],
(b) it is a will recognized as valid under section 80 [validity of wills made in accordance with other laws], or
(c) it is valid under another provision of this Act.

Formalities

INTER VIVOS TRANSFERS
Contracts for the sale of land need to be in writing [Statute of Frauds/Law and Equity Act s 59]
- Statute of Frauds is inapplicable in BC with regards to an inter vivos transfer
- In BC the *Law and Equity Act* (**s 59**) overrides Statute of Frauds - a disposition that would ordinarily require writing does not in relation to a trust
  - s 59(1)(a) A disposition of land does not include the creation, assignment or enunciation of an interest in a trust

No writing requirement from S to B for transfer of equitable estate, but there is a writing requirement from B to third party of equitable estate

- Where B is transferring his equitable interest in the trust (a chose in action) Law and Equity Act s 36 governs.
- *Law and Equity Act* **s 36** – absolute assignment must be in writing; signed by assignor (B); express notice must be given to Tee

Secret and Half Secret Trusts

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

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

***Ottaway v Norman* 1972**

F: CL spouse agreed to hold property for her life then to son, but then revoked will and left everything to the Normans. Son William argued that there had been a trust, and court partly agreed - agreed about the house and the goods, but not the money

A: Essential elements of a secret trust:

1. The **intention** of the testator to subject the primary donee to an obligation in favour of the secondary donee
2. **Communication** of that intention to the primary donee
3. **Acceptance** of that obligation by the primary donee either expressly or by acquiescence

C: The will didn't ask her to account for her money separately so ridiculous to imply that all her money should go to son as well. 3 elements made out for the stuff but not the money, so that's all he gets.

Re Boyes

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

A: C is Tee for the next of kin instead

- If testator gives legatee a sealed envelope with trust instructions which legatee opens upon testator's death = communication and acceptance
- Where the trust is declared in an unattested paper discovered after the testator's death – the legatee might be a trustee, but the trust declared by that paper would not be good

In a **half secret trust** the will reveals that the person named in the will as beneficiary is actually receiving the property as a trustee for a real, but undisclosed, beneficiary

- Half secret trust = name the trustee but don't name the beneficiary

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

Requirements for a **half-secret trust**

1. A must communicate to B that he is to hold the property on trust for C **before the will is made**
2. A must communicate to B the identity of C **before the will is made**
   - PROF: no apparent, rational reason for this difference with fully secret trusts
   - But see Blackwell v. Blackwell: Lord Sumner held that parole evidence was allowed to enable proof of ID of the beneficiary indicated in the will - allowed because evidence did not serve to vary the will, simply to give effect to the testator's intent. Hence the terms of the will in this respect could be established in substantial part by oral evidence, despite the requirement of a writing naming heirs and legatees under the Wills Act.
3. B must indicate his acceptance **before or at the time** the will is made

Blackwell v. Blackwell

F: Mr. Blackwell left £12,000 to five friends to be held on trust, income and capital to be paid out "to such person or persons indicated by me to them with full power as they think fit." A memorandum was delivered to the trustees naming a certain lady and her son: the intended beneficiaries of the trust.
I: to what extent is it possible to give effect to testamentary intentions that are at variance with the provisions, first of the Statute of Frauds / Wills Act
R: If a testator... makes a gift to a named legatee who... has promised he will hold the benefit of the gift for certain defined and lawful purposes, the court will enforce against the legatee the trust in promised obedience to which he received the gift: *McCormick v Grogan*
A: "a testator having been induced to make a gift on trust in his will in reliance on the clear promise by the trustee that such trust will be executed in favour of certain named persons, the trustee is not at liberty to suppress the evidence of the trust and thus destroy the whole object of its creation"
"For the prevention of fraud equity fastens on the conscience of the legatee a trust, a trust, that is, which otherwise would be inoperative; in other words it makes him do what the will in itself has nothing to do with; it lets him take what the will gives him and then makes him apply it as the court of conscience directs, and it does so in order to give effect to wishes of the testator, which would not otherwise be effectual."
C: It is communication of the purpose to the legatee, coupled with acquiescence or promise on his part, that removes the matter from the provisions of the Wills Act and brings it within the law of trusts

Rectification of a Will - Effect on Secret Trusts

Section 59 Wills, Estates and Succession Act

The very wide powers vested in a court to give effect to testator intention likely reduce significantly the need to resort to the somewhat arcane rules of and seemingly unnecessary distinctions between secret and half-secret trusts.

Rectification of will

59 (1) On application for rectification of a will, the court, sitting as a court of construction or as a court of probate, may order that the will be rectified if the court determines that the will fails to carry out the will-maker's intentions because of

(a) an error arising from an accidental slip or omission,

(b) a misunderstanding of the will-maker's instructions, or

(c) a failure to carry out the will-maker's instructions.

(2) Extrinsic evidence, including evidence of the will-maker's intent, is admissible to prove the existence of a circumstance described in subsection (1).

(3) An application for rectification of a will must be made no later than 180 days from the date the representation grant is issued unless the court grants leave to make an application after that date.

(4) If the court grants leave to make an application for rectification of a will after 180 days from the date the representation grant is issued, a personal representative who distributes any part of the estate to which entitlement is subsequently affected by rectification is not liable if, in reasonable reliance on the will, the distribution is made

(a) after 180 days from the date the representation grant is issued, and

(b) before the notice of the application for rectification is delivered to the personal representative.

(5) Subsection (4) does not affect the right of any person to recover from a beneficiary any part of the estate distributed in the circumstances described in that subsection.

Revocation by Settlor of Express Trust

Settlor may include powers in the express trust for amendment or revocation. Without this reservation, settlor falls out the picture and only B can terminate the trust per *Saunders v. Vautier* (1889)

***Bill v Cureton* (1835)**

F: Pl created a trust in which her trustees with dividends to her for life, remainder to her husband for life, remainder to their children. Unmarried / childless, she and creditor sought to terminate the trust. Court held she could not because of the interests of the spectral spouse and children under the trust

A: Ct said no

Mordo v. Nitting

Family made declaration of trust & inter vivos beneficial transfer to daughter. Mother as settlor could call for trust as B- son argued it looked like it was only to become effective on her death and therefore an evasion of the wills act.

Justice Wedge - discusses ramifications of secret trust - goes through case law and shows that ability of a settlor to revoke trust doesn't make it any less of an effective trust and is not testamentary. Eida held on to ability as settlor to revoke, however "As settlor, Eida had no right to revoke the trust. (paragraph 1.4 of the Trust Indenture). Eida's right to call for Trust Property was a right she held as beneficiary. Eida as settlor had no ability to defeat the original transfer to Mr. Wilson as Trustee."

Ch 5 – Resulting Trusts

A resulting trust means that although legal title has been transferred, equitable title remains with the transferor. **Automatic** and **presumed** resulting trusts were described in *Re Vandervell's Trusts* #2. This is a helpful starting point, but some cases will fall between or outside these categories. A third category, common intention resulting trusts, was used to deal with property in non-spousal cohabitation. In Canada, this is instead dealt with by **constructive** trusts. The common intention resulting trust is not part of the law in Canada (*Pettkus v Becker*; *Kerr*).

Unjust enrichment has been used to explain the use of resulting trusts. A gratuitous transfer of equitable title would unjustly enrich the transferee. This is criticized because it gives in rem rights to the transferor which operate in preference to other creditors.

Do NOT depend on the expressed intention of a S Implied or resulting trusts – trusts which are based on unexpressed but presumed intention

- In the RT the equitable estate jumps back to the settlor/testator's estate
- AUTOMATIC: where the trust fails or doesn't exhaust the assets
- PRESUMED: where there is a gratuitous transfer
- CONSTRUCTIVE: court imposed where conscience demands it

REASONS FOR RESULTING TRUSTS

Traditionally, both ART and PRT considered to give effect to the common intention of the parties – it gives effect to settlor's intention not to give beneficially to the trustee PIRTs - the resulting trust is based on a presumed intention not to grant equitable title even though legal title has been transferred to a grantee. ARTs - the basis does not depend so much on the settlor having intended the beneficial interest to revert to him

Automatic Resulting Trusts

These arise when there is a gap in the equitable ownership of the property. Since equity is resistant to ownerless property, it "automatically" assigns the equitable interest to the transferor. ARTs are further divided into four sub-categories.

Common situations where ARTs occur can be grouped as follows:

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

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

ART will occur when an express trust fails for non compliance of one or more of the three certainties

IRC v Broadway Cottages (supra)

trust lacked certainty of objects and was therefore void; Tees were viewed as holding legal title on an ART for the settlor. So title reverted back to settlor

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

***Re West* (1900)**

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

R: Where proceeds from an estate are not fully exhausted trustees still hold legal title, but not the equitable estate unless specifically granted to them beneficially

A: test is whether tees for everything or only what's necessary to give away IF IT IS A TRUST AND NOT A GIFT WITH CONDITIONS then automatic resulting and residue goes back to estate

***Schmidt v Air Products Canada* 1994 SCC**

F: Stearns (contributory defined benefits plan) and Catalytic (contributory money-purchase defined plan incorporating a trust fund) merged to become Air Products, with contributory defined benefits and discretion as to distribution of surplus and automatic reversion to the company of any surplus once max member benefits paid out. CO argued that purpose trust means reversion of surplus to CO on fulfillment/ paying out of trust

I: can Air Products take all the surplus?
A: a court must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it. First it must determine, using ordinary principles of trust law, if the pension fund is impressed with a trust. If the pension fund, or any part of it, is not subject to a trust, then any issues relating to outstanding pension benefits or to surplus entitlement must be resolved by applying principles which pertain to the interpretation of contracts. Catalytic's was a trust and surplus goes to employees. Stearns wasn't and the k allowed for surplus to revert to CO.

Illustrates the need to carefully construe documents to ascertain whether there is a trust with governing trust principles and, if so, whether there are terms dealing with the disposition of surplus trust monies RT may arise if objects of trust satisfied and money remains in trust fund

- Normally remaining trust will revert to the S of the fund if there are surplus funds - this was CO's argument
- RT will not arise if at the time the trust is created the S demonstrates an intention to part with his money outright – ie. indicates that he will not retain any interest in any remaining funds
    - In most cases a non-reversion clause will be evidence of a permanent intention to part with the trust property and will therefore preclude the operation of the RT

Practical reality that factual circumstances which could trigger the operation of a RT will rarely occur in pension surplus cases
Where employers and employees (by virtue of their contribution) are Ss of the trust – surplus funds remaining on termination can revert on a RT to both employers and employees in proportion to their respective contributions
Analysis for pension funds:

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

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

Barclays Bank v Quistclose **1970 Eng HL**
F: Quistclose advanced funds to Rolls Razor Ltd. to allow it to pay a declared dividend. Quistclose confirmed to B Bank that the funds "will only be used to meet the dividend due...." RR went into liquidation

before the dividend was paid and the bank claimed the monies on behalf of creditors. HL held that the monies had to be returned to Quistclose because they were advanced exclusively for the payment of a dividend which could not be paid after the voluntary liquidation.
A: The advance of the funds for a specific purpose created an equitable right in Quistclose to see that the fund be applied for that purpose, and created a secondary trust in favour of Quistclose when that specific purpose could not be carried out.

Primary duty: to pay the dividend (discharge as promised)
Secondary duty if it fails, is keeping the money for the purpose of the loan
criticisms: appears to be a purpose trust which isn't allowed except to maintain your tomb or your pet if it isn't charitable.

Confirmed in *Twinsectra* and *Westar*:

***Twinsectra Ltd v. Yardley* 2002 UK HL**
F: Twinsectra agreed to loan Yardley £1 million on the condition that it was secured by a solicitor's undertaking, which is an unusual in a financing arrangement. Yardley persuaded Mr. Sims to give the undertaking which specified that the money was to be used only for the loan, however Sims took no other steps to ensure it would only be so used. But Yardley spent it on other crap and went bankrupt
I: was it a Quistclose trust?
A: The lender pays the money to the borrower by way of loan, but he does not part with the entire beneficial interest in the money, and in so far as he does not it is held on a resulting trust for the lender from the outset.
C: The money was never at Mr Yardley's free disposal. It was never held to his order by Mr Sims. The money belonged throughout to Twinsectra, subject only to Mr Yardley's right to apply it for the acquisition of property

***Re Westar Mining Ltd* 2003 BC CA**
F: Joint Venture btw Poscan and W - written agreement: P would pay money over to W and pay 20% of costs, and would get 20% of profits - clear that this money was not to be merged into gen assets of W - and W kept to that. At bankruptcy - trustee pulled in assets from P - eventually reached settlement.
A: ct found that money had been put in, not as a loan but as part of a specific obligation to pay employees and creditors: it was a "special purpose" and therefore like a Quistclose loan. Emplyees got an in Rem benefit and ct held that that money, irrespective of the arrangement between the trustee and the CO, must be paid to the employees

This is "going very far indeed!" says Pavlich

As North J explained in *Gibert v Gonard* (1884) 54 LJ Ch 439, 440:

"It is very well known law that if one person makes a payment to another for a certain purpose, and that person takes the money knowing that it is for that purpose, he must apply it to the purpose for which it was given. He may decline to take it if he likes; but if he chooses to accept the money tendered for a particular purpose, it is his duty, and there is a legal obligation on him, to apply it for that purpose."

4. SURPLUS OF FUNDS AFTER TRUST PURPOSE HAS BEEN ACHIEVED
Where the trust exhausts only some of the trust property leaving a surplus of funds after the trust purpose has been fulfilled, a RT for the transferror/settlor may arise in respect of the surplus. A trust analysis will determine the ultimate destination of legal title in the unused funds to the transferor [see Re British Red Cross and Gillingham Bus Disaster]

- Using RT principles (equitable title to the interest) – the unused funds vest in the transferor
- Using contract law analysis – destination of unused funds held to be bona vacantia (funds belonging to no one – and as such become the property of the Crown) [see *In re West Sussex Constabulary*]

***Re British Red Cross Balkan Fund* (1914)**

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

- Court held that the fund had come about through subscriptions (many large sums from individual donors) Could have said they were *bona vacantia*
    - Therefore, surplus was held on an ART for the individual subscribers (all known)
        - Donors received back the same proportion (not amount) they had contributed
    - Those who did not wish the funds to remain for the general purposes of the Society were entitled to their share of the surplus
        - Those who wanted to could leave money in fund for other general purposes of the Society

***Re Gillingham Bus Disaster Fund* (1959) Eng CA**

Found an ART for proceeds taken in from street collections - ct went with *Balkan* and said it goes back

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

***In re West Sussex Constabulary Fund,* [1971]**

Goff J finds that where surplus funds originated in:

1. Collection boxes, the givers intend to part with the money and so any surplus is bona vacantia ("vacant" or, more meaningfully, unclaimed goods).
2. Legacies and major donations — here purpose important so if achieved and there is an excess that excess is held on a resulting trust (automatic resulting trust).
3. In respect of contributions from street entertainments, raffles and sweepstakes, the relationship between collector and giver are founded in k, not trust.Here, contributors are not donating to a fund but paying for entertainment. (**?**) Surpluses from this source are neither gratuitous nor founded on a void settlement. They are simply surplus funds belonging to no one once the collecting association is moribund. Hence the funds belong to the Crown as *bona vacantia*.

***In Re Bucks Constabulary* (1979)**

Walton: it is contractually based and if it is moribund or terminated then the assets becomes the money of the members but you need two people. So if the membership dwindles to 2 people then those 2 people can agree to rearrange the organization and or terminate it, then can pay out the assets. But if the society has dwindled to one, because you can't enter into a k with yourself then the funds belong to the Crown as *bona vacantia*

***Hanchett-Stamford v. Attorney General* [2008]**

Lewison: Gifts made to the group (likely by persons who approve of and support its purposes take one of three forms:

1. A gift to the members who, at the time of the donation, are joint tenants so that any member may sever his/her share and claim it whether he continues as a member;
    - this would be ridonk, as everyone could say, "I opt out give me my money back"
2. A gift to existing members, not as joint tenants, but according to contractual rights – express and implied – that prevail among members under that governing agreement
    - **this is it, yo**
    - **A voluntary association which is not a CO., governed by k, trust comes in but holds money beneficially for all the members who, by k, can agree to change the k and give themselves the money.**
3. The terms and circumstances of the gift or the rules of the association (there according to contractual provisions on their constitution) may indicate that the gifted property is not to be at the disposal of the

members for the time being, but is to be held in trust for or applied for the purposes of the club conceived de facto as a "quasi-corporate body".
  - Here, the gift in trust is void as a direct, non-charitable purpose trust that the law does not allow

Presumptive Resulting Trusts.

- **presumed resulting trust**: rule of evidence that supplies the conclusion on the holding of equitable title in a gratuitous transfer of property - that transferor retains equitable title, transferee holds bare legal title
- That conclusion, however, is only prima facie: it creates a **rebuttable presumption** and will not govern where there is **actual evidence of a contrary intention**.
  - such intention may be inadmissible if an illegal scheme or purpose
- ONUS to rebut presumption of RESULTING TRUST is on the transferee / recipient
- Rothstein in *Pecore*: "I think the long-standing CL presumptions continue to have a role to play in disputes over gratuitous transfers. The presumptions provide a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. This may be especially true when the transferor is deceased and thus is unable to tell the court his or her intention in effecting the transfer. In addition... the advantage of maintaining the presumption of advancement and the presumption of a resulting trust is that they provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers."

Standing v Bowring (1885)
F: Pl had transferred shares to the D and herself. He was unaware of the transfer of the Consols into his name. She brought action seeking to have legal title re-transferred into her name alone. D learned of these events and refused to cooperate in the re-transfer.
A: The evidence showed she intended to benefit him personally, which evidence rebutted the PRT.

Nishi v. Rascal Trucking Ltd (2013) SCC
F: Rascal Trucking (Herringa) leased part of Ms. Sedalia and Mr Nishi's place, operated a stinky topsoil business. City told Rascal to stop and he refused so it stopped it itself. Rascal didn't pay money owed to city, which billed it as taxes, and CIBC had a mortgage - and moved to foreclose on the property. Mr. Herringa tried to buy the property for the cost of the outstanding amount of mortgage and fines and CIBC didn't want to sell it to him, but sold it to Mr Nishi who was the bf: Herringa said to Nishi, I'll give you the money but I want to become a co-owner - Nishi refused - then Herringa later said he'd just pay what he owed. And he did, but 7 yrs later says N is holding equitable title on trust for him based on his payment and wants title based on RT.
A: on the evidence, Herringa intended an out and out gift (ie to settle what he owed) which rebutted PRT

Niles v Lake 1947 SCC
F: Mrs. Arnott, widow in ill health opens joint bank account with sister Mrs. Lake - puts in $10k then dies,
I: so is it Lake's or Niles's heirs?
R: RIght of survivorship makes it Lake's but… ct says principles of resulting trust applies
A: evidence of intention: Who is feeding the account? Legal title may be vested in both, but if Arnott is giving the money, the benefit is on a resulting trust, and all the money is owed to the heirs. Application form which the bank made them fill out not viewed as evidence of intention as it was a necessary formality. Ct finds intention of Mrs. Arnott was NOT to make a gift
C: PRT rebutted

***Russell v Scott* (1936) HC Aus**
F: Testatrix (Mrs. Russell) opened joint bank account in name of herself and nephew Russell, to enable him to draw monies from it to look after her. She stated to solicitor's employee that the money would go to

Russell after she died. Will left residue of her estate to Russell and another nephew, Scott in equal shares. Scott claimed amount in the account at the time of her death formed part of the estate.
I: was there a RT or was this a gift?
A: Ct needs satisfactory proof of intention where there is no PA and here there was - her declaration to the solicitor

***Young v Sealey* 1949 UK Chancery**

F: Mrs. Jarman opened a joint bank account containing her money in the names of herself and her nephew. It was her intention that her nephew would have no beneficial rights during her lifetime, but that he would get all amounts in the account at her death. On her death her estate claimed the monies in the account.
A: giving effect to the testatrix's intent to fully transfer on her death did avoid the *Wills Act* but jurisprudence to recognize such outright transfers of legal and equitable title was too well established in England and Ontario to change it now - can Wills Act with impunity
C: Estate loses: Court found in favor of the nephew as the intention of PIRT had been rebutted by the evidence

Presumption of Advancement

- **Presumption of advancement (PA**) – creates rebuttable presumption that gratuitous transfers to family are meant to be gifts (beneficial interest transfers)
  - Historically: Father to child / husband to wife
  - Modern: parent to dependent (minor - Rothstein) child upheld
    - spouse to spouse abolished in most jurisdictions exc MB and BC held onto it for "traditional" marriages. But EASILY REBUTTED.
    - ONUS of rebutting on transferor

***Mehta Estate v Mehta Estate* MB CA 1993**

F: husband, wife and children died in Air India disaster: dispute between H and W estates. H estate claims half interest in assets of W estate (she was intestate) which were purchased with his employment income - based on PRT. W estate argues title in all assets in her estate based on PA. H was the major provider; W's employment pt and ill-paid, her major role was homemaker/mother
A: The strength of the presumption of advancement will vary according to the circumstances of the case
- Where the litigation doesn't arise from marital breakdown and where the spouses are unable to testify
- Particularly so in the context of a "traditional marriage"
- Under these circumstances it is entirely understandable that a husband would put assets in wife's name with the intent that they should be hers as gifts
- Court noted that the PA at CL extends to those in loco parentis and extends to W in all common- law provinces: "I do not quarrel with the view that the PA has little value in marital property disputes where the parties are available to give evidence as to their intentions, and in a social climate where equal division of marital property is the custom."

C: overturned lower ct decision, trial judge had held that PA no longer held between H and W.

***Pecore v. Pecore* 2007 SCC**

F: Paula's father left her and her husband the bulk of his estate, and she took possession by right of survivorship of their joint account - her siblings were well off and she was not, and was caring for a quadriplegic husband. They separated and he argued that the contents of the joint account should go into the estate and be distributed (to him, you see.)
I: Were the joint assets on a RT or did the PA apply?
A: Although the PA cannot apply to adult, independent children, there is evidence enough to rebut the PRT because Paula's father intended her to benefit from the right of survivorship on a BOP

***Eisner v. Baker* 2007 BC SC**

F: couple shacked up and she put her name on the documents pertaining to property he purchased.

A: Ct found she was pushy and he was a ninny so it was resulting trust and not advancement.

How to Rebut Presumptions

TWO IMPORTANT THINGS

1. **Timing**

- prior to the transaction and contemporaneous is relevant (*res gestae*) anything closely connected to the actual transaction is relevant. further away you move from the transaction, less relevant it becomes, per:

Shepherd v Cartwright

- father had allotted shares to children - in the share registry and memorandum etc. - then after 5 yrs got children to sign withdrawal slips and used money himself - children made claim against estate but gov't said no, resulting trust - but ct said father's action after 5 yrs was outside of the res gestae
- subsequent dealings only relevant against the parties - *contra preferendum* idea - "The acts and declarations of the parties before or at the time of the purchase or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration. But subsequent declarations are admissible as evidence only against the party who made them, and not in his favour." (Lord Simmonds, *Shepherd*)

2. relevance

- "evidence of intention that arises subsequent to a transfer should not automatically be excluded if it does not comply with the *Shephard v. Cartright* rule. Such evidence, however, must be relevant to the intention of the transferor at the time of the transfer: *Taylor v. Wallbridge* (1879)" (Rothstein, *Pecore*)

Illegality and Presumptions

If a transfer is made in order to avoid debts or for another unlawful purpose, should evidence of that intent be used to rebut presumptions? *Scheuerman*, 1916, strictly said that ex turpi applied regardless of the circumstances – any illegal intent, whether or not creditors were actually defrauded, will be inadmissible. Given the reduction in the scope of the presumption of advancement, often the presumption of resulting trust will apply to give the transferor their property back without needing to consider the illegal scheme – *David v Szoke* (drinking problem) *Gorog v Kiss*.(transfer to sister to avoid former business partner)

Four ways that courts can deal with illegality in relation to the presumptions:

1. ignore precedent
2. *locus poenitentiae*
3. hear the case but ignore the illegality portions
4. public conscience test

***Scheuerman v Scheuerman* 1916 SCC**

F: H transferred house to W to protect property from claims by creditors (claims never made and debts were actually paid out). W sold house and H tried to sue for price claiming W was trustee under PRT.
A: Court strictly applied *ex turpi causa* - no disgraceful matter can give rise to an action; invoked where a given plaintiff genuinely seeks to profit from his illegal conduct. Where this arises – court prefers the person in possession [***pari delictum* – where there is equal guilt the court prefers the possessor**]
Ct thus refuses to give effect to PRT because this would result in court participating in the illegal scheme
C: for the wife.

Rationale: to allow evidence of the illegal motive/intent that explained the transaction would enable a litigant to prosecute his/her case without clean hands [violates maxim: those who seek equity must do equity]

- Results in transferee gaining a windfall; even where they may have been complicit in the illegal transaction

- This result was viewed by early cases simply as an inevitable byproduct of the court justifiably refusing to deal with a case tainted by illegality.

***Goodfriend v Goodfriend* 1971 SCC**

F: For some years, the Goodfriends and the Coxes were into spouse swapping. As a putative precaution, Mrs. G persuaded Mr. to transfer a farm into her name because she feared Mr. Cox might sue Mr. G for "alienation of affections". There is no cause of action for this, and so no writ was ever issued. Mrs. G left Mr. G. Mr. G sought a declaration that he had the beneficial title (presumed resulting trust) and sought re-conveyance. She asserted legal and equitable title because of the presumption of advancement. To rebut the presumption of advancement he had to show that the transfer was done to enable him to be judgment-proof against Mr. C's putative "action" — a base motive/intent argued Mrs. G, on the authority of *Scheuerman*, and therefore inadmissible.
A: While there was illegal intent, this scheme could never be carried out to defraud anyone, therefore the court felt it wasn't enough to make evidence inadmissible: Spence J - there were no creditors "defeated, hindered or delayed" by the transfer. Laskin J - scheme to retransfer was hers and so she could not rely on the PA.
C: for Mr. G - SCC effectively overruled *Scheuerman*

***Tinsley v. Milligan* [1993] UKHL**

F: T and M, lesbian couple purchased a house - registered only to T, but both paid and common intention for tenancy in common. Title registered only to T so M could obtain social security benefits but M repented and reported. They separated; T left and sought to evict M, who gave evidence of her contributions to the purchase price asserting claim to beneficial title under PRT
R: Even in the case of illegality which was known to the courts a person could succeed in recovering the property if the case could be pleaded without the need to rely on the illegality
A: D could establish an interest in the house without relying on the illegal purpose – PRT gave her equitable title whether illegal purpose was revealed or not (ie there was no evidence with which T could rebut the PRT)
Dissent: held that once the court becomes aware of the illegality it will assist neither party (*Scheuerman* formulation)

All the judges overruled "public conscience" test put forward by the court of appeal - court would decide admissibility of tainted evidence after weighing the adverse consequences of granting relief against the adverse consequences of refusing it [*Nelson v Nelson* see below]

Tribe v. Soiseth

F: Father pays for daughter's condo but puts it into her name to avoid capital gains. The father's evidence was that he had no intention of making a meaningful gift to his daughter – at least at the stage of the transaction. On dissolution of the marriage, Mr. S claimed for 1/2 value of condo. Ms. T claimed she held no title. Mr. S claimed presumption of advancement from father to daughter, and inability to use illegal act to rebut.
A: "the documents drawn up at the time, the mortgage and, in particular, the option to purchase, both of which were registered, show an intention on the part of the parties that the true value of the land would be for the benefit of the parents. The effect of the documents signed by the daughter was to give the parents the means to ensure that that intention could be realized. These are not new or secret documents"

also: There is no modern case in which restitution has been denied in circumstances comparable to those of the present case where the illegal purpose has not been carried out

"*locus poenitentiae* ... enables the Court to do justice between the parties even though, in order to do so, it must allow a plaintiff to give evidence of his own dishonest intent. But he must have withdrawn from the transaction while his dishonesty still lay in intention only. The law draws the line once the intention has been wholly or partly carried into effect."

Doctrine applies whether the parties withdraw from the plan because they had a change of heart or because as matters turned out full execution of the plan was unnecessary
- Only able to repent if you have undone the damage – if no creditors were actually defrauded
- If creditors were defrauded you have to reimburse them before making this argument (repenting)

***Nelson v Nelson* (1995) HC Aus**
THIS ISN'T LAW, JUST INTERESTING - rejected in Tinsley v Milligan above
F: appellant mother provided the purchase price for the house that was conveyed into the names of her son Peter and her daughter Elizabeth, the respondents. Transfer was done in order to enable the mother to claim a subsidy under social legislation that denied eligibility to home-owners. The mother intended to retain the beneficial interest. The mother then called for legal title from son and daughter. The daughter was prepared to accede but subject to retaining a beneficial interest under a legally non-rebuttable presumption of advancement. The High Court agreed that the presumption of advancement had operated, but had also been rebutted, even though to rebut it involved evidence disclosing the mother's illegal purpose.
A: The question to ask, if illegality is to preclude effective enforcement, is whether the purpose of the scheme is an "affront to public conscience?" This requires application of these criteria:
1. Proportionality
2. the civil sanction must further the purpose of the statute and not willy-nilly impose further sanctions for the unlawful conduct. Thus a court needs to review the statute to see what sanctions are contemplated and its frame of reference. If the statute law does not over penalize then nor should the courts.

Ch 6 – The Beneficiary

- *Trust and Settlements Variation Act*, [R.S.B.C. 1996] c. 463

Nature of title and interest in equitable property

Owner's "real right" (in rem) to property has 2 hallmark characteristics:
- **Exclusivity of possession** extends to enforcement over third parties who receive the property
- **Priority** should the person currently in possession (borrower, say) become insolvent

Tee has **legal title** to the property = alone has all the legal rights and powers associated with the property
B has the **equitable title** in the property = personal rights against the trustee:
- Tee must comply with his/her duties under the terms of the settlement and,
- Tee must exercise all his powers over the property so as to advance the best interests of the B (because Tee is a fiduciary)
    - Performs these duties within parameters of trust instrument, or if it is silent, by law

B's equitable title limited - B only gets the right to enjoy the property (and no rights to manage/control) – therefore B can't exercise administrative or dispositive powers over the property in the trust [*Schalit v Nadler*]
Tracing = B has rights that enable the tracing of assets from trust fund into hands of a 3rd party:
Where the Tee has fraudulently parted with trust property and the third party is not a bona fide purchaser for value the beneficiary can recover from that third party.
This beneficial interest is proprietary or in rem - seemingly in each item
This remedy of the beneficiary is in addition to the B's personal right against the trustee for breach

***Schalit v Nadler* 1933**
F: B tried to distrain for unpaid rents against a property in which he had an equitable title under a trust.

A: Held to be an invalid distraint - Distraint = seizure of property to obtain payment for rent (right to distrain lies with the legal owner of the property in rem) B can't effect actions that only the legal owner has a right to effect (ie. the Tee has to levy this action)

B only has a personal right to bring action against the Tee for breach of trust – can't take over Tee's duties

In Re Bagot's Settlement
F: sole beneficiary in a trust of real property wanted to manage the rental arrangements.
I: can the B take on the role of the T in this way?
A: Ct, however, exercising its discretion, could allow her to act as an agent of the trustee and collect rents — it was a way of "reducing expenses to the lowest practicable limit". However as agent could be fired if not acting in best interests of the B's

Baker v Archer-Shee
F: Lady A-S, a UK resident, was the B in a trust of several properties (shares, stocks etc) outside of England. Income generated from the trust fund did not enter the UK. UK revenue authorities sought to tax the fund (administered in the UK) under legislation that, for UK residents, rendered taxable possessions that were "stocks, shares or rents" outside the U.K. Is the B, Lady A-S, the "owner" of the stock, shares or rents in the trust fund for tax purposes.
A: AS argued that the cluster of personal rights against the tee for proper administration is the property she owned and it was not taxable
C: the beneficiary has a **distinct equitable interest in the individual items of property** that make up the trust fund, and AS loses.

dissent: more accurate to view the beneficiary as having a proprietary interest in equity to the fund of (shifting) assets, rather than in each of the specific items that make up the fund at any given point in time that - however then how to deal with
1. in rem right to trace individual assets
2. ability to call the trust and acquire legal title

Transfer of the Equitable Interest to third party

Section 36 of Law and Equity Act

Assignment of debts and choses in action
36 (1) Assignment of legal chose in action requires: written document, signed by B, express written notice to Tee prior to assignment
(2) If Tee has notice that the assignment is being challenged by B, (a) Tee may call on persons making claim to interplead concerning the chose in action or (b) Tee may pay the chose in action into court in conformity with Trustee Act

A "chose in action" (a debt under a contract, say) is a form of property that describes "all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession". They include debts, company shares, negotiable instruments, copyrights, rights of action founded in torts or breach of contract etc. And, of course, equitable interests in a trust.

Where there is a sub trust it becomes important to distinguish "equitable" and "beneficial", even though the two terms are often used interchangeably. If Bloggs declares a trust in respect of his equitable title in favour of Biggles, Biggles holds the beneficial title (as well as equitable title) and Bloggs retains only the bare equitable title.

1. **under CL** cts did not recognize assignments in which an assignee attempted to sue the debtor (privity. Therefore, actions against the debtor (the trustee) had to be brought by the assignor (beneficiary1). Chancery intervened by issuing an injunction against the assignor (beneficiary 1) to facilitate actions brought by the assignee (beneficiary 2) against the debtor (trustee))
2. **in Eq** an assignee of the equitable interest under a trust or legacy took an equitable chose and could sue the debtor/trustee for specific performance/injunction in his/her own name (i.e. without the assignor) - provided the assignment was absolute (i.e. did not leave any rights with the assignor. If not absolute the assignor had to be a party in court proceedings.)

Compliance with section 36 enables B 2 to sue the trustee without doing so through B 1 who may have died or disappeared. At CL unilateral control by the assignee meant this was not possible where the interests were legal. However, in the court of equity it was possible. Section 36 clarifies and enables this area of law apropos formalities.

***Di Guilo vs Boland* 1958 ONCA**

Where there is no compliance with s. 36, Di Guilo holds that the common-law rules will prevail. Thus, a transfer ("assignment") by the assignor (beneficiary) to the assignee (new beneficiary) without formality compliance is an "equitable assignment" subject to the above rules.

Timpson's Executors v. Yerbury

F: no assignment had taken place; B had given to the sub-Bs (her children) – a "revocable mandate." Mrs. T had directed the trustees to make payments to her children from time to time; the money came from NYC to the UK to each child. Amount paid was included in Mrs. T's assessments. She argued that those sums had actually been alienated in NYC, did not belong to her and were not taxable in her hands
A: there are 4 ways a b can dispose of beneficial interest

1. B can assign it to the third party directly ("I, Orscilla, immediately and irrevocably assign my rights as the sole beneficiary of ABC Trust to Emmarentia"): writing required.
2. B can direct Tee to hold the property in trust for the third party — Writing required. Follows from the rule in *Saunders v. Vautier* provided requirements (e.g. sui juris or legal capacity, see infra) are met.
3. B can k, for valuable consideration, to assign the equitable interest to the assignee. Writing is **prudent**, but it not clear if it is necessary: vendor holds equitable estate on a constructive trust for the buyer as soon as the contract is effective and binding. (Constructive trusts arise by operation of law and need not be in writing but the arrangement does seem to fit within the purview of section 36.)
4. B can declare him/herself as beneficiary to be trustee for the transferee of such interest ("I, Bloggs, now hold my interest as beneficiary under the ABC Trust on trust for Biggles").
   - This is a sub trust (i.e. with a trustee, a beneficiary with non-beneficial, equitable title and a sub-beneficiary with beneficial equitable title and the trustee still in charge).
   - ordinarily there are no formalities in a declaration of trust, where a beneficiary declares himself/herself trustee for an assignee of the equitable estate, compliance with s. 36 is not required though **prudent** to ensure the original trustee's powers are abrogated.

C: ct found none of these methods were used. Instead, instructions to Tees was revocable mandate therefore not an assignment of equitable interest to the children. It did not give the Bs enforceable rights against the Tees

(A revocable mandate is a form of authority to act: an interest cannot pass until the mandate is acted upon. If the mandate is acted upon the mandate will be complete, if revoked before it is acted upon the assignment fails.)

Priority Among Assignees

***In Re Wasdale* CB 320**

Priority among assignees is determined by time – the first assignee gets priority

The fact that a trustee informed by the first assignee had died did not affect his priority even though the new trustee has not been given notice by him.

Restraints on Alienation and Protective Trusts

Restraints on alienation are generally not acceptable. If a settlor wants to make provision for a spendthrift child, it must be worded very carefully as a determinable life estate. For example, "to be held on trust for X, until he attempts to sell the equitable estate." If the determining event occurs, the property is held on another trust in favour of someone else – the beneficiary's children or the settlor's other children, for example. If the restraint is worded as a condition subsequent ("but if"; "on condition that"), then it will be invalid and the beneficiary will take with no conditions.

The Protective Trust
Protective trust ("spendthrift trust"): terminates B's right to income when something happens that the S sets out in the trust instrument
- After the event, both the capital and income of that B are shifted to new beneficiaries – usually the children of the original B as they attain the age of majority

Protective trust is, in reality, two trusts:
1. S transfers assets to Tee with **determinable** life interest in favour of principal B and providing that on the occurrence of a determining event the trust property is then held on a second trust which is often a discretionary trust in favour of a class of objects (ex. principal B's children)
2. On the happening of the determining event the secondary, discretionary trust vests the equitable interest in the new class of beneficiaries and the trustees administer for them and appoints from them

Use of determinable interest is important
- if restraint on alienation is worded as a condition subsequent it is void ("on condition that")
- if restraint on alienation is worded as a determinable interest it is ok ("until", "when")

Based on historical CL distinction between conditions subsequent and determinable interests:
- If found to be a condition subsequent – the condition is struck down and the gift remains without the condition
- Means the principal B takes without the protective instrument intended by S

S can't transfer property on a protective trust for himself; it's against public policy; restraint of alienation *[Re Brewers Settlement*]

Termination of the Trust by Beneficiary

B can terminate the trust by directing the Tees to direct legal title B
Requirements to terminate the trust (combination = sui juris):
1. B has attained the age of majority
2. B is compos mentis and
3. B is absolutely entitled to the trust property (there aren't contingencies)

- What counts as vested or contingent interest is a matter of proper interpretation of the will/grant
- Law leans toward an interpretation that favours early vesting (will find early vesting where they can) – if the language is unclear, will be interpreted to give early vesting. Why?

1. Preference for outright ownership because of policy preference for freer use of property
2. Preference against accumulation of property not in circulation (see 1)
3. Desire to give autonomy to competent adults and avoid rule from beyond the grave
4. B's absolute interest means no one else is being deprived of their interest
5. Chancery's understanding that property's most significant benefit was in the enjoyment not the title

***Saunders v Vautier* 1841 Chancellor's Ct**

F: Trust said at 25 V was to get capital and accumulated income. V turned 21 and wanted to terminate the trust

A: V was sole B; the interest had vested in him at the date of the gift; but enjoyment of capital and accumulated income was postponed until he was 25 – ie. he held an immediately vested indefeasible equitable interest in the capital with enjoyment (payment) postponed until he was 25. Because of vesting, intentions of the testator concerning pay out date were ignored in preference to those of the B: He could terminate the trust when he turned the age of majority = 21 years

***Re Lysiak* 1935 ON HC**

F: L had bequeathed his estate to his wife and son living in Russia. A clause postponing distribution of the residue by the trustees "until they are absolutely satisfied that the beneficiaries are free and unhindered to receive the said benefits without interference from the regime under which they are presently residing"

A: Court held that the giving/vesting of the gift wasn't suspended; just timing and manner of distribution (ie. the enjoyment) – therefore interest was absolutely vested and Bs could terminate the trust

- Court also held the clause was semantically uncertain – so held it void
- Discretionary aspects were too uncertain – therefore B entitled to the gift absolutely was held to be vested in interest (though not enjoyment) immediately on the death of the testator.

TERMINATION OF DISCRETIONARY TRUST

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

***Re Smith v Aspinall* 1928**

discretionary trust with equitable estates in succession

F: The testator gave trustees ¼ of his estate to pay, at their absolute discretion, the income for the maintenance of Mrs. A and or all or any one or more of her children for Mrs. A's life, remainder to the children. Mrs. A and her living 2 adult children and the personal representative of a deceased child combined and assigned the beneficial interest to Legal and General Assurance Company in order to secure a mortgage.

A: If all the objects entitled to both the income and capital act in unison and if they are sui juris they can terminate/direct trustee in a discretionary trust and can acquire/deal with the property for their benefit. Romer J: "you treat all the people [beneficiaries] put together just as though they formed one person for whose benefit the trustees were directed to apply the whole of a particular fund"

Re Chodak

F: testator bequeathed the whole of his estate to trustees for the benefit of Bs (children of siblings living in the Soviet Union.) Trustees instructed to send parcels to Bs : There is no gift-over in the event the parcels do not exhaust the estate.

A: Conditions are repugnant to an absolute gift. To prevent the beneficial interest from being vested, would need to make the gift entirely dependent on the trustees' discretion or provide for a gift over.

C: The judge alluded to the category distinctions of future oriented gifts that in reality are presently vested in interest gifts in which futurity is referable to enjoyment of that presently held interest and extended the

principle to discretionary trusts i.e. “those cases “where the gift does not take effect except on the exercise of a discretion given to an executor”.

- matter of **construction** whether the gift is vested in interest subject to a postponement of vesting in possession (and accordingly subject to the Saunders v. Vautier termination rules.
- if the vesting of the very interest is contingent on the happening of some future event then vesting only occurs on the realization of that event (age, eg) and the rule does not operate.
  - **presence of a gift over may indicate that the interest itself is intended to be contingent** and its absence (as in *Chodak*) that it is not so intended. *Saunders* will not operate in those circumstances where the vesting in interest is contingent.
  - cts favour early vesting and so construe the contingent words as referable to the vesting of enjoyment or possession, and not interest.

Lloyds Bank v Duker

L: A beneficiary cannot collapse his portion of the trust if doing so would cause a major reduction in value for the other beneficiaries.

In re Marshall

L: A beneficiary cannot collapse his portion of the trust if the trust property is land. Or if the division of other property would cause undue hardship on the other beneficiaries.

Buschau v. Rogers Communications

F: B one of 112 Rogers employees objecting to Rogers’ attempt to take pension surplus: petitioned ct to collapse the trust per *Saunders*. BC CA said ‘ok’
I: can the CL rule in Saunders overrule the specific pension regulation allowing for collapse of the trust
A: “the rule is not easily applicable to pension trusts” for many reasons:

1. the PBSA has regulations and requirements that are not accounted for in the BC CA’s order
2. pension trust serves only as a vehicle for holding and managing the funds required by the pension plan - not a standalone instrument as in SvV - ct allows for termination of trust, and yet termination of the Plan in accordance with the prevailing PBSA is a condition precedent to distribution.
3. ignores the employer’s interest in establishing the plan
4. Pension trusts funds,unlike legacy trusts are not gratuitous, the capital cannot be distributed without defeating the social purpose of preserving the financial security of employees in their retirement

ALSO: “Consenting to the termination of the Plan on behalf of future unascertainable spouses and common law partners (under 1 (b) would presumably not be in their best interests.

Variations of Trusts

- In *Chapman v. Chapman* 1958 HL the court declared it had no power to authorize a variation of the terms of a trust even though all adults assent and, where the trust having minors and unborn children as beneficiaries too, the variation would obviously benefit them too.

FOUR EXCEPTIONS to general inability of the courts to vary a trust at CL:

1. Inherent jurisdiction – to vary administrative terms in unforeseen emergency; unanticipated by S
   - Court can only vary Tee’s management powers
   - Not authorized to vary quantum or type of beneficiary interest under the trust
   - This power is not easily invoked - used to protect trust property in some way
2. Maintenance jurisdiction -
   - Where trust is to support maintenance and it is not achieving that purpose
   - Court can direct payments to Bs if they need money to live in manner appropriate to trust expectations

3. Conversion jurisdiction
   - Converts infant's trust property from realty to personalty and vice versa; where maintenance of child
   - requires asset mix to be changed
4. Compromise jurisdiction
   - enabled a court to give approval for those not sui juris in any judicially sanctioned compromise of a dispute.

Gap filled by legislation:

Trust and Settlement Variation Act (RSBC 1996) c 463

Court approval of variation
(1) if property is held in trust, the Supreme Court can approve on behalf of
(a) anyone who has an interest under the trust (direct, indirect, vested, contingent) who by reason of infancy or incapacity is incapable of assenting
(b) anyone, ascertained or not, who may become entitled, at a future date, to an interest under the trust
(c) anyone who isn't born yet
(d) anyone whose interest may arise through discretionary power exercisable after failure of existing interest
[protective trust]

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

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

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

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

Court appearances
(5) Public Guardian and Trustee is entitled to appear and be heard; and to any costs the court orders

Determining "benefit" is at the heart of the variation of trusts.

Re Burns 1970 BC SC
tax reduction as financial benefit
F: Settlor (with consent of Tees) seeks consent of unborn persons to an arrangement that would amend his trust settlement - defective because it gave the trustees no investment powers to enable minimization

of tax and succession duties. Proposed arrangement would enlarge the investment powers of the trustees that would include winding up of a family business — "Burns Holding Ltd".
C: Tax minimization and advancing the financial interests of the beneficiaries, was held to be one such appropriate arrangement.

Re Westin's Settlement
educational and social benefits
F: Lord Denning refused to consent on behalf of minor B's (under-age children of very wealthy settlor), to an arrangement that would appoint two new trustees from Jersey to enable resettlement of a UK trust into a Channel Island trust and a discharge of the English trust. Settlor was seeking to avoid capitals gains tax inaugurated in UK in 1965.
A: Denning: financial benefits are not the only consideration in determining what benefits a minor.
"I do not believe it is for the benefit of children to be uprooted from England…simply to avoid tax…. Are they to be wanderers over the face of the earth, moving from this country to that, according to where they can best avoid tax? I cannot believe that to be right..." Role of ct to protect: To live in England is more beneficial than money, especially for this very wealthy family where increased taxes would not affect the privileged lives of its members.

"The court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit."

Re Remnant's Settlement Trusts
F: Trust gives contingent interests to kids of two sisters. Trust contained forfeiture clause if they became; married; lived with Catholic. Dawn's kids are Protestants, Merrial's are Catholics. Arrangement proposed deletion of the forfeiture clause
- Court affirms that "benefit" in the Act is not confined to financial benefit – includes: benefit of any other kind
- Here the benefit of family harmony and marital choice was sufficient benefit to vary the trust and remove forfeiture clause
- Benefit framed as increasing marriage prospects for children

Variation clearly disregards intention of S – court's power to provide consent to variation is a strong power

Re Harris
limits using emotional benefit to get consent to variation
F: Mom of emotionally devastated family wanted to vary a trust under the will of estranged husband who had committed suicide; trust left 5/8th to eldest son and 1/8th to each of the other 3 kids (all children minors). Gift over to children's children in event any of them died before 21, leaving a child. Mom wanted family harmony by equal sharing.
A: court refused to consent to the proposed variation holding that arrangement didn't financially benefit the eldest son and his possible (as yet unborn) children
- Considerations other than financial may, and should, be taken into account
- But emotional and psychological well being, which may or may not occur in the future, isn't enough to justify a substantial variation to the trust

Russ v Public Trustee
Test for exercising discretion
TEST in exercising court discretion to consent on behalf of a person without capacity is that of a "prudent advisor"
- Court need not consider S's intentions - Many variations are actually at odds with that S's intention

PROF: case shows courts looking more to what benefits the Bs, than to S's intention

***Bentall Corp v Canada Trust* 1996 BC SC**

F: varying a pension plan set up as a defined contribution plan and carrying a $6.7m surplus. Bentall wants $2m to go to members, $3m to Bentall and $1.7 as a "contribution holiday" for 4-5 years.
A: s 1(b) allows court to consent to a variation on behalf of Bs whose interest is contingent

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

Buschau v. Rogers Communications

Newbury doesn't like consenting for sui juris B's But BC not SCC!
L: Bentall is wrong. A contingent interest is already vested, and s. 1(b) does not apply. The court may not consent for any beneficiaries who are sui juris. This leaves unclear what situations s. 1(b) does apply to: perhaps to the survivor of a group that includes unascertained beneficiaries.

Nolan v. Kerry

F: Co. changed pension plans, wanted to use surplus of DB to fund DC, and cover admin costs.
A: SCC said it was ok to do all that, because if was for the benefit of the B's
DISSENT: not OK – terminating the defined benefit plan has to be considered in the way it was in Schmidt – you can't just move the money into the new DC plan.

Ch 7 – The Role of Trustee

APPOINTMENT

Trust instrument usually sets out appointment S has freedom to choose who/how many as Tee(s)
S, unless self-appointed Tee (personal declaration of trust eg.) falls out of the picture

- unless by special terms retains right to revoke trust or powers to appoint new trustees.

S may choose individuals, of any sophistication level

- BUT person(s) selected must have legal capacity
- Tees must be people who live in the jurisdiction
- A trustee must accept an appointment - some individuals may not want to take on responsibility
  - wide discretionary powers subject to need for **prudence** in investing
  - position of trustee is a **fiduciary** relationship
- If one Tee refuses – trust instrument usually sets out an alternative trustee to be appointed
- If instrument is silent - court has inherent powers of appointment – equity will not allow a trust to fail for want of a trustee
- If all else fails - court will appoint the Public Trustee (entitled by law to charge for services) under s 27

If several Tees appointed - usually hold as joint tenants; if one dies surviving Tees continue

- Only when last Tee dies will trust pass to his personal representatives who then become Tee

Trustees don't have ability to delegate their responsibilities

CORPORATE TRUSTEE

Corporate Tee = a corporation empowered by its memo and articles to engage in trust administration and management (often called a trust corporation)

- If he doesn't know anyone with sufficient integrity, good judgment or management and investment capabilities - S may decide to use the services of a specialized corporate trustee
- Corporate Tee almost always used in major corporate-interest trusts

Because trust corps are so large, often S or Bs become appointed as "protector" or "guardian"

- Tees making decisions on certain topics need consent of the protector when exercising specified powers, examples:
  - To add or remove beneficiaries
  - To distribute capital or income
  - To vary the terms of the trust
  - To appoint or remove trustees

Protector can't act as Tee or they can become defacto Tee! and the trust will collapse! Beware!

Sections 27 – 37 of Trustee Act

Power to Appoint New Trustees

s 27 (1) If Tee is dead, out of jurisdiction for more than 12 mos, wants to be discharged, refuses, or is unfit to act in them, or incapable of acting in them then the person named in the trust instrument as the one to appoint new Tees (or if trust instrument is silent – the surviving or continuing Tees for the time being, or personal representatives of last surviving or continuing Tee) can by writing appoint a replacement Tee

(2) On appointment of a new Tee **(d)** the things required for vesting the trust property in the persons who are the new Tees must be executed or done

(3) Once trust property is vested in new Tee – they have same powers, authorities and discretions as original Tee

(4) (a) Tee who is dead – includes a person who is nominated as Tee in a will but dies before testator

(b) Continuing Tee – includes refusing or retiring Tee if willing to act execution of the provisions of this section

(5) Section applies only if there isn't a contrary intention expressed in the trust instrument

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

29 provides that on the declaration of new trustees, an automatic vesting of many trust assets (not shares transferable by registration in a company's books) occurs. The instrument of appointment acts as a vesting instrument too.

28 (1) if 2 or more Tees and one wishes to be discharged and co-trustees (and anyone else empowered to appoint Tees under the trust instrument) consent to discharge and vesting of trust property in co-Tees alone – the Tee who wants to be discharged is deemed to have retired

(2) vesting in the continuing Tees alone must be completed

(3) applies only if no contrary intention expressed in the trust instrument; it's subject to terms of trust instrument

Where there are 2 or more trustees, a trustee using a deed may declare a desire to be discharged.

- *That declaration must be served on the other trustees.*
- *If accepted he will cease to be trustee and will be divested of the trust property*
- *Remaining trustee(s) continue*

The founding trust instrument must not prescribe otherwise

Removal of trustees on application

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

Provides that sui juris B (with support of majority) can apply to court to have a trustee removed

• *May be necessary if differences among Bs have precluded termination under* Saunders v Vautier

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

Rights and powers of new trustees

32 The persons who, on the making of an order under section 31, are trustees have the same rights and powers as they would have had if appointed by a decree or judgment in a proceeding.

Power of court to vest land in new trustees
33 The court, on making an order appointing a new trustee, may, by that order or a subsequent order, direct that land subject to the trust vests in the person or persons who on the appointment are trustees for the estate that the court directs and the order has the same effect as if the persons who before the order were the trustees, if any, had duly executed all proper conveyances of the land for the estate.

Power of new trustees to transfer stock or chose in action
34 The court, on making an order appointing a new trustee, may, by that order or a subsequent order, vest the right to call for a transfer of a stock subject to the trust, or to receive the dividends or income of it, or to sue for or recover a chose in action subject to the trust, or any interest in respect of it, in the person or persons who on the appointment are trustees.

New trustees in place of persons convicted of indictable offence
35 (1) If a person is jointly or solely seised or possessed of land, or entitled to stock on a trust, and the person has been or is convicted of an indictable offence, the court may, on proof of the conviction, appoint a person to be a trustee in the place of the convict, and make an order for vesting the land, or the right to transfer the stock, and to receive the dividends or income of it, in the person appointed.

(2) An order made under subsection (1) has the same effect with respect to land as if the convict trustee had been free from any disability, and had duly executed a conveyance or assignment of his or her estate and interest in it.

Persons who may apply for orders
36 (1) An order under any of the above provisions for the appointment of a new trustee, or concerning land, stock or a chose in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock or chose in action, whether under disability or not, or on the application of a person duly appointed as a trustee of it.

(2) An order under any of the above provisions concerning land, stock or a chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

Old trustees not discharged from liability
37 The appointment by the court of new trustees, and any conveyance, assignment or transfer mentioned above, operates no further or otherwise as a discharge to a former or continuing trustee than an appointment of new trustees under a power for that purpose contained in an instrument would have done.

Re Tempest
Guiding principles for the court in appointing new Tees - Looking for broadminded, evenhanded people:

- Wishes of the settlor/testator – especially in respect of the characteristics set out as undesirable
- Persons who do not have an axe to grind – either towards the settlor or the B(s)
- Persons who will promote and not impede the execution of the trust

Conroy v Stokes

F: Two of five beneficiaries apply to have trustees removed and a new trustee appointed. The trustees were not negligent or in breach. However, there was friction between the beneficiaries and the trustees.

- **Removal requires an applicant to point to acts and omissions that endanger the trust property or show want of honesty, appropriate capacity or reasonable fidelity**
- Collectively these things point to acts that impair the welfare (or benefits) of the Bs

Applicable criterion for stepping in to remove trustees - welfare of the beneficiaries
Failure to produce accounts doesn't amount to impairing the welfare of the beneficiaries unless persistent

Re Consiglio Trusts

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

A: Misconduct by trustees is not a prerequisite for removal

- **It is enough "when the continued administration of the trust with regard to the B has, by virtue of the situation between the Tees becomes impossible or improbable"**
- Because there must be unanimity among Tees – where there is widespread disagreement, the trust can be ruined by inactivity
- Trustee issues which affect administration of the trust will affect welfare of the Bs

Investment Management:

"prudent businessperson" "ethical investments"

TRUSTEE DUTIES AND POWERS – GENERAL

Tee = legal owner of the property = all the rights and powers to deal with management, use and administration of all property entrusted initially and in the trust on a continuing/changing basis subject to lawful directions in the trust instrument

- Powers and duties are assembled to make sure Tee uses trust property to **promote benefit for B**
- Because of fiduciary responsibility to B - Tees must exercise rights and powers in good conscience
    - can't pursue his own interests or someone other than the B's in a way that doesn't give B priority

Tee requires measure of competence

- Issue of competence is considered by looking at what the objectives of the trust are
- Tees have no automatic right to be paid for their services – this must be agreed upon
    - Include a provision in trust instrument if Tees are supposed to be paid for their duties

Tees can't place themselves in a position where their interest conflicts with that of the B

- If they do – they have to disgorge those profits to the B
- Tees are prohibited from **"self dealing"** (purchasing trust property for personal use)
- However, a Tee can purchase the B's equitable interest under the **"fair dealing"** rules
    - ie. Tee at one end of transaction B at other end (voidable if there is power imbalance etc)

DUTY OF INVESTMENT

Tee has obligation to manage the property Tee - **as an ordinary prudent person of business would act in managing his own affairs** [*Speight v Gaunt* (1883)]

- Requires Tee to put his mind to the matter of investing the property; not required to beat the market; or be responsible for a general downturn in the market because of economic conditions

- Ordinarily this requires a diversified portfolio in which risk is spread
- Unless permitted by the settlement a trustee may not invest speculatively
- Trustees can seek advice from investment experts
- Tees must invest in compliance with ss 15.1, 15.2 of Trustee Act; unless settlement provides otherwise

Failure to act appropriately will result in a breach of trust

There are two broad aspects to trustee investment duty:
1. Capital fund is preserved from risk, but at the same time yields a reasonable return
2. Even handed return between different classes of Bs (ex. life tenant versus the remainder person)

Prior to 2002 the Trustee Act limited Tees to maximum % of specific types of investments and their location outside of Canada - "authorized investments" The matter is now less prescribed:

Trustees must invest in compliance with ss 15.1 and 15.2 of the Trustee Act unless the settlement provides otherwise. In BC trustees, now, as we have seen, can invest "in any form of property or security in which a prudent investor might invest" (s. 15.1) in respect of which they "must exercise the care, skill, diligence and judgment that a prudent investor would exercise" (s.15.2)

Section 15.1 Trustee Act

Investment of trust property

15.1 (1) A trustee may invest property in any form of property or security in which a prudent investor might invest, including a security issued by an investment fund as defined in the Securities Act.
(2) Subsection (1) does not authorize a trustee to invest in a manner that is inconsistent with the trust.
(3) Without limiting subsection (1), a trustee may invest trust property in a common trust fund managed by a trust company, whether or not the trust company is a co-trustee.

Section 15.2

Standard of care

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

***Speight v Gaunt* (1893),H.L.**

F: an action for breach of trust because the trustee (Gaunt), under a will, had appointed as an agent a stockbroker to purchase municipal bonds. stockbroker was crooked so Tee not liable.
A: Lord Fitzgerald: "I accept, then, as settled law, that although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may in the administration of the trust avail himself of the agency of third parties such as bankers, brokers and others, if he does so from a moral necessity or in the regular course of business. If a loss to the trust fund should be occasioned thereby, the trustee will be exonerated unless some negligence or default of his has led to the result."

s 7 allows for hiring solicitor/banker eg.

s 95 creates implied indemnity for Tees; Tee not liable for breach of trust when others are in control of trust monies properly delegated (under s 7 – to solicitors or bankers); unless Tee proven to have been in wilful default
(Tee should research the particular group being used as agent – to avoid liability)

Fales v Canada Permanent Trust

F: Estate, mainly shares in Boyles Brothers to W and kids in succession, trust administered by W and Canada Permanent Trust; CPT sued by the children Bs for breach of trust for holding on to useless BB stocks; CPT had W joined in the action

A: Because of gift to Bs in succession – there was no duty to retain; Tees under a duty to convert shares "as soon as advantageously possible" Standard of care and diligence required of a Tee in administering the trust is - that of a person "of ordinary prudence in managing his own affairs" **TEST** operates uniformly for all Tees: "every trustee has been expected to act as the person of ordinary prudence would act"

- W was exempted from liability under Trustee Act s 96 (she acted honestly, reasonably and was uninformed by co-Tee)

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

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

Nestle v National Westminster Bank
F: Beneficiary claims that trust assets were poorly invested.
L: Trustees performance cannot be judged with the benefit of hindsight. The failure to invest in equities was not a breach since equities were considered unwise investments at the time.

Ousting Court Jurisdiction

Trust terms that the Tee is empowered to make exclusively "binding and conclusive decisions" will be treated by courts as invalid – considered against public policy

Re Wynn
attempts to oust jurisdiction of the court are contrary to public policy - courts have the power "to construe and control the construction and administration of a testator's will and estate"

Re Tuck's Settlement
CA upheld a Jewish faith clause where "the Chief Rabbi of London" was empowered to determine "conclusively" whether an "approved wife" met the condition set out by the testator; BUT the court retained control where rabbi may misconduct himself or make decision that is "wholly unreasonable"

Boe v Alexander
privative clause will be ineffectual to prevent judicial review where Tees have:
1. Failed to exercise a discretion at all
2. Acted dishonestly
3. Failed to exercise level of prudence expected from a reasonable business person
4. Failed to act impartially between classes of Bs or acted in manner prejudicial to their interests

Re Poche
Settlements that shield the liability of the Tee through exculpatory clauses won't protect the Tee in cases where he has been dishonest, in willful breach of trust or grossly negligent

Delegation:

CL rule delegatus non potest delegare ("a delegate may not in turn delegate to another). However, given modern complexity, that would be almost impossible nowadays. Both modern common law and the Trustee Act give a scope for delegation. Specifically, s. 95 indemnifies trustees against losses to assets in the hand of proper third parties (eg. solicitors or bankers).

Speight v Gaunt

F: Trustee appoints a stockbroker to purchase bonds. The stockbroker claims to have bought the bonds but has actually absconded with the money.
I: Is the trustee liable for delegating the purchase?
L: This was the normal method of purchasing bonds and so the trustee is not liable. There is a difference between delegation of the discretion a trustee has and the use of third parties in the ordinary course of business. "If a loss to the trust fund should be occasioned thereby, the trustee will be exonerated unless some negligence or default of his has led to the result."

Re Wilson

F: estate to trust Co. for benefit of Bs. 2 properties: one profitable, other carrying charges exceeding income. Offer made on loss property; directed to GM who rejected it, didn't communicate decision to the Board (standard practice of that co); Board's failure to consider offer was breach of trust
A: Tee who is personally responsible for exercise of judgment can't escape responsibility by leaving the matter to another person

COMPARE *Fales* obiter: rejected that in trust co only directors can exercise discretionary powers – this is tantamount to treating the directors as trustees rather than the corporation
PROF: more likely that S has to look at governance structure of co (look at constituting documents); as S who appoints a corporate Tee you're expected to be aware of this

Duty of Loyalty

conflict of interest in fiduciary rel'ps (including express trusts)
consequences for breach
rules of fair dealing

Fiduciary Obligation

- Act in good faith. Not personally profit at the expense of the trust
- Not place self in position where duty and personal interest may conflict
- Not act for own benefit or that of a third person without informed consent of the principal/beneficiary
- Only contract with principal/beneficiary in transactions that are
  - fair and
  - in which there has been full disclosure of all matters material to the transaction

Keech v Sandford

F: Trustee tried to renew lease but landlord refused to deal with minor as leaseholder, despite only holding equitable title, so Tee took lease himself
C: "It may seem hard that the trustee is the only person of all mankind who might not have the lease, but it is very proper that the rule should be strictly pursued, and not in the least relaxed"

Boardman v Phipps

F: minority shares in Lester and Harris Ltd, poorly-managed - lawyer Boardman, representing Trust, gets all kinds of info, wants to buy out shares, other Tees disagree so buys them himself with own money and makes a killing (so do the B's)

A: B was acting on behalf of the trust, all the information he obtained…became trust property... And I see no reason why information and knowledge cannot be trust property….Out of such special position and in the course of such negotiations they obtained the opportunity to make a profit out of the shares and knowledge that the profit was there to be made. A profit was made and they are accountable accordingly.
C: but Boardman was compensated handsomely!

Peso Silver Mines Ltd v Cropper
F: directors bought claims, because CO. couldn't afford to. Directors formed new CO. Cross Bow and took them up and did well. Peso taken over by Charter Oil who don't like that CB has the claim and sued to have interest in claims handed over to Peso. 2 directors handed over but Cropper refuses.
I: was this a breach of fiduciary obligation
A: Ct says not done in bad faith, which is maybe too ready. If there had been a finding of bad faith, maybe different result (In CDA burden of proof is on pl: who would have to show the bad faith.)
C: Bull, JA (BC CA):
"the no conflict principles are strict..., [but]…in this modern day... I do not consider it enlightened to extend the application of these principles beyond their present limits…care should be taken to interpret them in the light of modern practice and way of life"
DISSENT: Norris JA:
"It seems to me that the complexities of modern business are a very good reason why the sale should be enforced strictly in order that such complexities may not be used as a smoke screen or shield behind which fraud might be perpetrated….In order that people may be assured of their protection against improper acts of trustees it is necessary that their activities be circumscribed within rigid limits….The history today of the activities of many corporate bodies has disclosed scandals and loss to the public due to the failure of the directors to recognize the requirements of their fiduciary position."

Canadian Aero Services v O'Malley (Canaero)
F: O'Malley and Z supposed to set up bid for mapping in Guyana, they resign, start their own CO and compete (and win) bid.
A: used information acquired in course of direction of CA. Not necessarily relevant: bona fides v male fides, Laskin sets out last word: 377-8: among them are:
1. position of office held
2. its ripeness and specificness
3. director or officers relation to it
4. amount of knowledge possessed
5. circumstances under which it was obtained
6. whether it was special or private
7. factor of time in continuation of fid duty (if breach occurs after termination of the rel'p with the CO)
8. whether terminated by retirement, resignation or discharge.

C: damages - not k basis of deprivation but on restitutionary basis of what other party gained!

Fair Dealing/Self Dealing

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

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

- Duty of utmost good faith still applies – so Tee must disclose everything to B

Denton v. Donner (1852)
Romilly MR explained the distinction between self-dealing and fair dealing:
"No doubt where a person is trustee for sale, and he sells the estate to himself, the transaction is absolutely and ipso facto void; but if a trustee purchases from his cestui que trust his reversionary interest…I do not assert it is absolutely void, but certainly the burden of proof lies on the trustee to show that every possible security and advantage were given to the cestui que trust, and that as much as possible was gained from the transaction as could have been gained under any circumstances.

***Holder v. Holder* 1968 Eng**
F: defendant was appointed one of the executors of his father's will. He subsequently renounced the position after performing a few minor tasks - was not part of the Tee decision to sell farms in the estate. Purchased at auction
R: The rule is not, that a trustee cannot buy from his cestuy que trust, but, that he shall not buy from himself.
A: D was not acting as executor when he bought, so he was not buying from himself

***Molchan v. Omega Oil & Gas* 1988 SCC**
majority (Wilson J dissenting and opting for the strict approach) **approved Holder as Canadian law**, the court (per Estey J) leaning (with Sachs LJ) against the "rigidity of rules as can cause patent injustice". The courts may approve a transaction of self dealing, even after the transaction has been made, as long as the lapse of time is not too great. Factors in favour of approving the transaction:
- No evidence of bad faith
- Adequate consideration paid
- The transaction was in the best interest of the beneficiary
- The trustee has power to dispose of the property

(Wilson distinguished Holder): To obtain approval after the transaction, there must be exceptional circumstances.

Crighton v Roman
if the beneficiary alleges a conflict the onus is on the trustee to disprove it. For "fair dealing" transaction to stand, Tee must show:
1. that there has been no fraud or concealment of advantage taken by him of information acquired by him in the character of Tee
2. that the B had independent advice, and every kind of protection, and the fullest information with respect to the property; and
3. that the consideration was adequate

Duty to be Impartial

- incumbent on a trustee to act impartially between beneficiaries
  - some of whom will benefit from the income of the trust assets (life tenant)
  - others on the capital side. (remainder)
- complications of rule of impartiality in commercial settings - advisable to deal with the matter of impartiality in the trust instrument.

It is duty of the trustee to act impartially between the beneficiaries
- Assumed that this is what the testator wants (where trust instrument is silent)
- Settlor/testator can direct partiality in trust instrument and that will prevail
- Partiality assumed in inter vivos settlements (because direct and specific)

- If S creates an inter vivos trust for successive Bs he will transfer specific assets to the trust - S through assigning the particular assets demonstrated his intention that those assets were to be enjoyed by the successive Bs in the form they took
- This precedent led to the position that in these circumstances there was no need for the Tees to put these assets into authorized investment form – it was construed that the S didn't intend that the assets be so converted

Discretionary trusts – Tees likely invested with powers allowing them to choose which Bs to benefit at particular points in time including the ability to encroach on capital if needed

- Terms of the trust will indicate, expressly or impliedly, if partial treatment among Bs is required

Duty requires the Tee to administer such that one B doesn't benefit at the other's expense

- May put special requirements on investment powers of Tee: the trust-asset portfolio may have to be (re) structured to enable impartiality

Property may produce uneven treatment for one of these reasons:

- The original trust assets transferred by the S
- The asset mix assembled by the Tees under their investment powers under the trust
- Income return may constitute both income and capital
- Property could be capital or income according to way the transferor characterized it

Duty of impartiality may impose obligations to sell some assets and convert to authorized investments that neither favour unduly the income account nor the capital account

- Tee may also have to apportion income to benefit the life tenant ("income" beneficiary) on the one hand and a remainder person ("capital beneficiary") on the other
- may do this by enhancing the capital fund by taking a portion of income generated and ploughing it into capital; or Tee may apportion capital sums received for the benefit of the remainder person by allocating some of it as income for the life tenant

First look at trust instrument: it may direct how Tee is to deal with the property

- Trust to retain property
- Trust for sale – property must be sold
- Trust for sale with power to retain – allows for sale at advantageous time - may imply an ability to enjoy in specie
- Trust for sale with power to postpone - must sell at some point
- Power to postpone with no trust for sale - implies an intention by the testator that the life-tenant beneficiary enjoy the asset in specie.

Howe v Lord Dartmouth

RULE: to be fair to both L/E holder and Remainder holder
Where a **testator**/testatrix - not a settlor (usually not inter vivos)
Leaves **residuary** (as opposed to in specie bequest)
Personalty (NOT real estate)
To persons by way of **succession** and
the residue includes a **wasting asset** (including unauthorized or reversionary — see infra)

then the trustee **must**:
Sell the personalty that is a wasting (and unauthorized or reversionary) asset
Invest the proceeds in **authorized investments**
the **income of which is for the benefit of the life tenan**t beneficiary and
the **corpus of the fund accruing for later use by the persons holding the remainder** interest

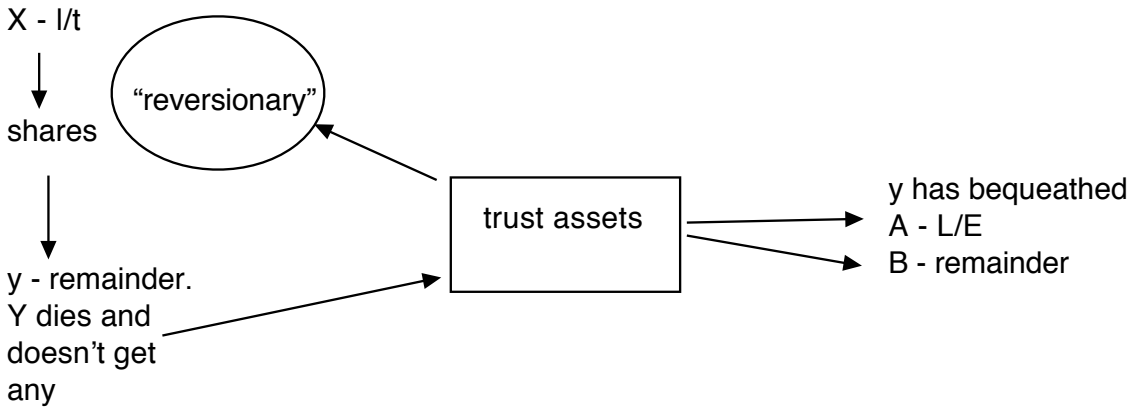
The application of the rule is subject to a contrary intention indicated by:

- Express provisions in the will may permit partiality either by express provision or asserting that Howe and Dartmouth does not apply
- Directions that can be implied such as

- A direction that the residue be kept or "retained"
- Authorization for the trustees to maintain unauthorized investments
- that the life tenant beneficiary is to receive income in specie

Life tenant gets income thrown off from property (rent) So if there is real estate, the rule in *H v LD* doesn't require sale of if. If it isn't income producing, then it isn't a benefit anymore and the life tenant might want to sell it, but the remainder might want to hang on to it. Point is if it's real estate it isn't residuary, rule in HvLD, Tee is bound only to sell wasting assets and transform into authorized investments (which were quite specific under the old Tee Act

So how to deal with that situation?



this will favour B! because A might never get anything.

Earl of Chesterfield's Trusts

RULE: to compensate the life estate holder for assets which are not income producing
sets out the rules on the applicable formula for the apportionment wasting assets (which generally are high yield and prejudice the life tenant over the remainder.) It's generally around 4% - now this would be extremely high, 30 yrs ago, would have been extremely low.

- Any excess ploughed into capital.
- Any less, when it is sold, tenant gets difference.

For example, if an asset is sold after 3 years for $10,000, determine how much would need to have been invested 3 years ago for the current value to be $10,000. Pay the difference to the income beneficiary and invest the rest.

***Lottman v Stanford* 1980 SCC**

F: express trust for sale with power to postpone. Testator left his estate ($65,000 personalty + real estate) to Tee for the benefit of his wife as life tenant and his 4 children in remainder. The trustees were required to sell "all of my personal estate…", but also given a wide discretion to postpone conversion.
A: ON CA said real estate should be treated like anything else, but the SCC overturned and said this would be "judicial legislation" Real estate is not/should not be counted as residuary assets.

Re Lauer and Stekl

Trust for sale with wide power to postpone and retain. left estate to a daughter as life tenant and grandchildren in remainder. His estate consisted of an asset mix of realty and personalty. There was a trust to convert (i.e. sell) all the estate, into money but there was also a wide power to postpone and

retain. The CA characterized the clause for conversion as primary and dominant and that the power to postpone was “not a power to postpone permanently”
1) Ordinarily, implies a duty of impartiality on Tee
2) Real estate is still in specie and not residuary to which duty of impartiality applies.
3) read the thing carefully, if you look at the language of the testator in *Lauer*, he specified “everything” was to be sold, and included Real Estate - Unlike *Lottman*.

Royal Trust v Crawford
trust for sale with wide powers of postponement of conversion and retention
F: Testator left heirs in succession (W as life tenant, nieces and nephews in remainder); huge dividend of $450,000 declared and paid to W
The law requires that the intention of the testator to displace apportionment must be clearly gauged from the will and surrounding circumstances
I: “whether the power to retain is a power to retain permanently, or only until the Tees can sell advantageously; in other words, whether the power to postpone and the power to retain are merely ancillary or subsidiary to the trust for conversion. If the latter, it is necessary to find some other indication to say that the life tenant is entitled to the income in specie
A: Testator wanted W to live in the comfort to which she was accustomed – even to the extent of encroachment of capital - this is not what he wanted above all else. Clauses required conservation of capital by the Tees, so in specie enjoyment was not intended and apportionment ordered
Dissent: construed a paragraph of the will granting W “any surplus income” as an in specie prerogative

In re Smith
F: **power to sell and power to retain**. inter vivos settlement of Imperial shares on Tee; father wanted son to care for mother by placing income from 1⁄4 of the shares for her benefit for life; son did this. Yearly income was 2.5%; insufficient. Canada Trust ignored her request for variation of investment portfolio which would enhance her income; son didn’t want to sell and Tee went along with that.
A: Tee had been partial to the remainder person - had erroneously construed the power to retain in the deed as a trust to retain, however Tee had discretion to retain and a duty to be impartial
C: a power of sale (rather than a trust for sale) may trigger duty of impartiality and H v LD rule

Re Waters Estate, [1956]
profits were capitalized into preferred shares and distributed to shareholders in place of dividends and so treated as capital when the preferred shares were placed in the custody of the trustee)

Re Welsh
F: W leaves life interest to his wife, remainder to his children from a previous marriage. Estate consists mostly of shares. All of the company's assets are sold and the profits distributed as dividends. The wife dies and her estate claims the dividends as "income" – form is substance! This means W's own kids get nothing.
I: Does "form is substance" hold in this case?
L: The rule is still subject to a testator's overridding intention.
A: Can be distinguished from *Re Waters* since that case was about distribution of surplus income whereas this is about distribution of capital. W could not have wanted his wife's estate to get everything and leave his own kids with nothing.

Disbursements:
Understand the legal basis for claims on this type of expenditure by trustees

Trust administration involves the paying of taxes, repairs, insurance, etc. *Allhusen v Whittel* set out a rule to balance these payments fairly between the income and capital tenants. It required the life tenant to pay back the excess income he received from assets that later were sold to pay disbursements. Section 10 of the Trustee Act abolishes the rule and allows all income to go to the life tenants.

a. Trustee Act s 10
b. Wills, Estate and Succession Act s144

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

Trustee Act s 10 / Wills, Estate and Succession Act s144

Abolition of rule in Allhusen v. Whittel
10 (1) unless the will contains an express contrary direction
(a) personal representative of deceased, paying debts, disbursements – can't apply income of the estate toward payment of the capital of those disbursements
(b) until payment of the debts, disbursements – income from the property required for their payment must be treated and applied as income of the residuary estate, provided that, in the case where the assets of the estate aren't sufficient to pay disbursements in full, the income must be applied in making up the difference
Unless testator says otherwise, all income is available for payment of debts etc. and is to be treated as part of the residuary estate Trustee must still keep impartiality in mind, unless terms of the agreement don't require it

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

Providing Information:

A beneficiary has the right to see trust accounts, investment porfolio and other information about the trust on reasonable notice.

Re Londonderry's Settlements

F: There is a discretionary trust in favour of about 20 people. The final distribution is proposed and one beneficiary is dissatisfied with the amount she got.
I: Is she entitled to the documents from the meeting at which the discretion was exercised?
L: Absent an allegation of bad faith, beneficiaries are not allowed to examine trustees' deliberations on the exercise of discretionary matters (agenda and minutes of trustee meetings). Correspondence between trustees or between a trustee and an individual beneficiary are not the property of all beneficiaries. On the other hand, solicitor's advice, paid for from the trust, are trust property and therefore rightfully belong to the beneficiaries and may be examined by them.

Duty to Account

Trustee Act s99

2 years to file accounts

Sanford v Porter

F: Beneficiaries want information about recent litigation the trust was involved in. The trustees told them it was being prepared and they required further information before being able to send the statement. Nevertheless, after about a month the beneficiaries sue.
L: The duty of a trustee is to provide accounts within a reasonable time. The trustee is not necessarily required to make copies and send them at the trust's expense, but they must be available for inspection. Each case depends on its own circumstances.
C: There was no wrongdoing in this case.

Indemnity and Remuneration of Trustees

section 88 of Trustee Act allows remuneration of the trustee. In essence it provides:
"trustees are allowed expenses plus "a fair and reasonable allowance" not exceeding 5% on the gross aggregate value of all the assets for their "care, pains and trouble" and administration." THey can also get 4% as care and management fee.

With regards to indemnity, the basic principle is that since the beneficiary gets all of the benefit, they should also shoulder all of the burdens. If there are trust debts or fees that the trustee must pay, they are entitled to indemnity from the trust fund, unless there is a good reason why the trustees should pay.

***In Re Sproule Estate* 1979**

guidelines in helping to set remuneration:

- The magnitude of the trust (explained in *Re Pedlar*, below, as its value and complexity e.g. farm, portfolio of investment, realty, running a business)
- The care and responsibility arising from it
- The time occupied in performing the duties
- The skill and ability displayed
- The success that has attended the trustee's administration of the trust assets.

also indemnification for out of pocket expenses. B is responsible

***Re Reid v Yorkshire and Canadian Trust* 1970 BC CA**

F: B argued that an indemnity of the UK — based trustee for taxes paid in the UK should be confined to the value of assets in the UK. Argued "good reason" Tee should have refused to pay the UK-based taxes: rule in *USA v. Harden,* "a foreign state is precluded from suing in this country for taxes due under the law of the foreign state."
A: CA said the rule applies only to actual attempts by a foreign state (as a pl) to extend its "sovereign authority" in B.C. Tee was personally liable because the UK legislation made the trustee liable, Tee had to pay, thus the trustee could seek indemnification from the BC beneficiary

Re Pedlar

The court accepted that (what is now) s. 88(2) permitted a care and management fee in addition to the s 88(1) "fair and reasonable remuneration". However, to succeed under section 88(2) the trustee needs to give a general summary of the estate and of his services performed in the care and management of the estate including the information cited in *Re Sproule*.

Control of Trustees by Beneficiaries and the Court

Appointment of Co-trustees.

***Re Brockbank* [1948]**

testator appointed his wife as the B of a life estate with remainder to children. 2 trustees with power to appoint a professional trustee. One of the Tees wished to retire and the Bs insisted a bank should take his

spot. Tees resisted and argued that they had full powers over trustee retirement, removal and app't. Bs sought an order from the court compelling the non retiring trustee to comply with their direction.
Ct affirms Tees' right: power of trustees to appoint trustees is not controllable by beneficiaries.

Trustees as directors.

***Butt v Kelsen* 1952**

Estate consisted of shares in a private company, and through their control of those shares, the trustees appointed themselves directors… B was unhappy with management, demanded to see all company documents. Trustees said as directors they had duties to the company and minority shareholders so that the beneficiaries were entitled only to those documents available to all shareholders. The court agreed with the trustees.

Advice and Opinion from the Court

Sections 86 and 87 of the Trustee Act allow a trustee to apply to the court for advice on management of the trust and be free from liability if they follow the advice, provided there was no fraud or misrepresentation in obtaining the advice. The courts do not want to be overburdened with requests under this section , especially for resolving stalemates in decision-making.

Trustee Act sections 86 and 87

86: you can apply for direction
87: absolves of responsibility when acting under ct authority - except in case of male fide

***Tempest v Lord Camoys* 1882**

F: Trustees disagree on whether to mortgage and sell trust properties.
L: The court cannot force a trustee to change his views.

Intervention by the Courts

Re Wright

Major asset of trust estate consisted of shares in Crown Life Insurance Co. 1975 Tees agreed to sell. An offer to purchase was rejected by 3 of the individual trustees because the price was, on the advice of experts, too low. Canada Permanent Trust (remember *Fales*?), the other trustee, applied to court for advice and directions and an order for sale.
A: Ct refused to intervene, asserting that trustees given a discretion should exercise it as they properly see fit and without interference — even from the court.

Re Billes

F: serious deadlock between the trustees. Estate comprised largely of Canadian Tire stock left to widow, children (and through them grandchildren) and some charities. On the deaths of the widow and children, capital was to be divided among 23 charities. Charities were dissatisfied with the income stream of 2.2%. Tee Nat/l Trust wanted to sell/diversify but was opposed by the son and widow, also trustees. The trustees were given an absolute power to convert and to retain the shares.
A: Ct, finding a "serious deadlock" adopted the proposal of National Trust to diversify - trustees are ordered to sell at "an advantageous and beneficial time".

Schipper v Guaranty Trust Co of Canada

F: GT has power to administer the trust for the benefit and comfort of the widow. She wanted to encroach on the capital and GT refused.
I: Should the court interfere?

L: Generally, court should not interfere with the discretion of a bona fide trustee. However, it must intervene if the trustee is attempting to achieve a purpose not intended by the trust.
C: The intention here was to provide for the wife. Preserving capital for speculative future beneficiaries is not an appropriate basis on which to exercise discretion. GT must encroach on the capital for the widow.

Re Fleming

- the court will not relieve trustees from the duty to exercise their discretion honestly and intelligently.

Testator bequeathed L/E to wife and appointed her one of the executors. She had renounced any right to encroachments on capital. Tees, faced with a surplus, could distribute that surplus either as income (overwhelmingly favouring the income beneficiary) or as capital in the form of redeemable preference shares. Given:

- the adverse tax consequences of treating the surplus as income, and
- the prospects of future income enhancements for the life tenant from other sources and income from enhanced capital, and
- the need to be even handed between the life tenant and remainder persons,

The court ordered the company to distribute the surplus as capital in the form of redeemable preference shares favouring the life-tenant wife who had hitherto been shortchanged by low-yield returns.

Ch 8 – Fiduciaries and The Constructive Trust.

third type of trust: imposed by law in the interests of justice.

The value of a constructive trust to a plaintiff is that he gets equitable, *in rem* rights to the property. This gives the plaintiff

- preference over other creditors,
- tracing rights and,
- since the constructive trust operates with retroactive effect, any increase in the value of the property.

Institutional constructive trusts emerged with respect to certain collapsed relationships where the courts of chancery felt a fairer distribution of property was required. These relationships included directors, agents, partners, corrupt officials, intermeddlers in trusts, etc.The list of possible institutional constructive trusts is not quite closed, and is long and varied.

- faithless directors; the delinquent agent in principal and agency relationships; overreaching partners; bribers and other similarly corrupt officials; undue influencers; breach of confidence tricksters; intermeddlers in trusts
- where formalities for transfer are inchoate /incomplete, but in substance the transaction is largely accomplished, following the maxim “equity will regard as done what ought to have been done” will treat the intended transferee as the effective owner with the **transferor holding legal title for him/her**.

The **remedial** constructive trust developed by Canadian courts extended these relationships to include ones where unjust enrichment occurs. This came up most frequently when dealing with the breakup of a common law relationship. However, unjust enrichment does not seem to apply to everything. To see what causes a constructive trust to be imposed, have to consider the "good conscience" that gives rise to them.
Beatty v Guggenheim: “the holder of legal title may not in good conscience retain the beneficiary interest”

- The remedial trust differs from the constructive trust of the first two categories in that the court in declares a trust and then the trust begins to operate with prospective effect. So the equitable title (and right to call for legal title) becomes vested in that plaintiff by way of the court declaration
- It is this characteristic of the court using the constructive trust to give a proprietary remedy that describes the constructive trust in this guise as “remedial”.

Dickson J laid down the criteria in which a constructive trust would apply if the evidence was supportive:

1. An enrichment by the defendant
2. A corresponding deprivation by the plaintiff
3. Absence of any juristic reason explaining or justifying the enrichment

Fiduciary Relationships

There is disagreement among the judges of the SCC on the scope of the conditions needed to create a fiduciary duty between the defendant and the plaintiff. Cases subsequent to LAC Minerals tip the balance in favour of the much broader formulation of La Forest J of the circumstances in which a fiduciary relationship will be found to exist.

Guerin v The Queen

L: A fiduciary duty arises out of the nature of the relationship, not just the standard categories of agent, trustee, director, etc. One hallmark of a fiduciary relationship is that due to their legal positions, one party is at the mercy of the other's discretion. A fiduciary relationship creates an obligation that is trust-like in character.
A: The requirement that Aboriginals surrender land to the Crown has the effect of giving the Crown discretion of where the best interests of the Aboriginals really lie.This transforms the Crown's obligation into a fiduciary one. It is impossible to say there was an express or implied trust at the time of surrender – the Aboriginal right to the land disappeared entirely upon surrender. There is no institutional constructive trust because the Crown was not unjustly enriched. However, the relationship gives rise to a trust-like obligation and so the land must be used for the benefit of the Band.

Boardman v Phipps

L: No person may keep profits acquired by reason of the opportunity or knowledge gained in a fiduciary position unless he had full and informed consent of the principal.
A: By acting as solicitor and/or agent for the trust (trustees?), Boardman was acting in a fiduciary manner. Obtaining a profit under these circumstances is strictly forbidden without consent, so accounting is required.

Canadian Aero Services v. O'Malley

L: Senior employees are properly characterized as being in a fiduciary relationship to the employer. This requires loyalty, good faith and avoidance of conflict. Liability to account for profits does not depend on actual conflict of duty or self-interest, nor upon the ability of the principal to obtain the profits for himself. Unjust enrichment does not require reference to a specific item of property.
C: Canaero does not need to establish that they would have profited but for the actions of O'Malley. They can compel the faithless fiduciaries to account for all of their profits.

Frame v Smith

L: Wilson, in dissent: A fiduciary obligation will be imposed when:

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

Lac Minerals v. International Corona Resources

F: Corona begins negotiations with LAC to purchase a piece of land a develop a gold mine on it together. C informs LAC of the geological study they have done that indicate gold is on the property. LAC purchases the property for themselves.

I: Was LAC in a fiduciary position towards Corona?

L: **La Forest** (there is dissent on this issue): **Vulnerability** is not a necessary agreement to finding a fiduciary relationship. Rather, the "issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other." The essence of the

fiduciary relationship is the "preservation of desired social behaviour and institutions." There are three categories in which a fiduciary relationship can arise:

1. Presumed, in certain classes of relationships (directors, trustees, agents)
2. Arising out of the facts of this specific relationship, like here.
3. An instrumental use of the term. Not appropriate because it "reads equity backwards".

Sopinka: Although not all of Wilson's characteristics (from Frame) are necessary, dependency/ **vulnerability** is absolutely required. The dependency that usually attracts a fiduciary duty is the parent-child or priest-penitent type scenarios. This may exist between corporations, but not between large, experienced businesses with access to experts and lawyers.

A wrongdoing that would arise in a fiduciary relationship does not cause a fiduciary relationship to exist – so a breach of confidence may be a breach of fiduciary duty where there is an existing fiduciary relationship (lawyer-client), but a breach of confidence alone does not CREATE a fiduciary relationship.

Lamer: Agrees with Sopinka regarding the existence of a fiduciary relationship.

Wilson: Although a fiduciary relationship may not exist between parties, a fiduciary duty may arise out of specific conduct engaged in by them. Thus, in this case, when Corona disclosed confidential information to LAC, LAC became subject to a fiduciary duty with respect to that information.

C: Sopinka's analysis of a fiduciary duty is in the majority.Wilson says the innocent party should be given the best remedy - La Forest says damages were too unreliable/problematic. **So remedy was fiduciary remedy RCT = in Rem right in property**

See below re: constructive trust.

Hodgkinson v. Simms

F: H goes to S for investment advice. S suggests MURBS that he has a personal interest in. H is nonetheless given complete and accurate information and was given (and took) time to investigate the investment personally; however, H is inexperienced in the industry and accepted all of S' proposals. At the time, MURBS were considered a good investment. The market goes into a downturn and the MURBS do poorly.

I: Was S in a fiduciary relationship with H, such that his personal interest is a "conflict".

L: All of the court: Reiterates warnings from LAC: "fiduciary" should not be used as "a conclusion to justify a result"; relationships which are fiduciary does not mean that every malfeasance in that relationship is a breach of the fiduciary duty – for example, a lawyer who is careless has breached his duty of care and skill, not his fiduciary duty.

LaForest: A fiduciary duty can arise out of “power-dependency relationships” whenever "one party could reasonably have expected that the other party would act in the former’s best interests with respect to the subject matter at issue”. The factors of discretion, influence, vulnerability, trust, and others must be considered in determining whether a fiduciary relationship exists. A fiduciary has duties of skill, competence, trust, loyalty and confidentiality.

Sopinka & McLachlin (dissent): Giving professional advice may give rise to a fiduciary duty if the advisee cedes effective power to the advisor. There must be "unilateral exercise of power by the alleged fiduciary and the correlative total reliance on that person by the beneficiary". Since H had not ceded his decision making powers to S, no fiduciary relationship is present.

C: Damages awarded in the amount of the lost capital plus consequential losses, minues the actual tax savings obtained.

Sun Indalex LLC v. United Steelworkers

F: Indalex becomes insolvent and ends up owing $5 million to the pension plans. It comes to an agreement in creditors' court that doesn't involve or help the pension plan members. The union, on behalf

of the members sues Indalex. The Pension Benefit Act expressly allows employer-corporations to be administrators of a pension plan.

I: What are the fiduciary obligations that plan administrators owe to their members?

L: Deschamps: If the company choses to administer the plan, its fiduciary obligations extend to all decisions it makes, even those made in its corporate capacity. If a conflict arises, a solution must be found: giving the members notice, appointing council, or finding a replacement administrator. The facts must be analyzed to determine at what point the conflict arose and thus what the amount of the remedy will be.

Cromwell: Fiduciary duties arise from and relate to specific legal interests at stake. The legal interests at stake must be referenced to the legal framework of the situation. A conflict of interest arises when there is a substantial risk that the employer-adminstrator's representation of the plan beneficiaries would be adversely affected by it's duties to the corporation. The conflict here should have been brought to the attention of the creditor court judge.

A: In going to court to give priority to a creditor over plan members, without any legal representation for the plan members, a conflict arose. The corporation's interest was to survive insolvency, but the plan members' interest was to ensure all contributions were paid into the plan. Indalex breached its fiduciary duty by failing to ensure the plan beneficiaries were fully represented in the insolvency proceedings.

Lebel (dissent): Fiduciary relationship is grounded in vulnerability. Indalex was in breach of duty as soon as it began proceedings (earlier than said by the other judges). A constructive trust is appropriate here.

C: A proprietary remedy is not available since Parliament has not provided for one in these circumstances.

M(K) v. M(H)

F: Daughter subjected to incest. Sues many years later, arguing breach of fiduciary duty in order to avoid Statute of Limitations in a tort action.

L: **La Forest**: Parent-child relationship is fiduciary. There need not be a unilateral undertaking by the fiduciary, but becoming a parent comprises a unilateral undertaking. Overview of fiduciary: Guerin, Frame, LAC. Non-economic interests are also protected by equity and the fiduciary relationship. Part of the fiduciary obligation is to protect the child's health and well-being.

McLachlin: Damages for a breach of fiduciary duty should be higher than those for a tort. This is because a breach of fiduciary duty damages the trust relationship and trustees must be held to a higher and stricter standard than tortfeasors.

Constructive Trust

- distinguish between “institutional” and “remedial” constructive trusts
- understand the circumstances in which the constructive trust operates.

Lac Minerals

I: Is a constructive trust the appropriate remedy?

L: **La Forest**: But for LAC's breach, Corona would have acquired the property. This makes restitutionary relief appropriate. Not every breach of a fiduciary obligation or situation of unjust enrichment gives rise to a constructive trust. There must be reasons for measuring the remedy by the defendant's gain at the plaintiff's expense as opposed to compensating the plaintiff for loss. Put another way, a constructive trust should only be awarded if there is a reason the plaintiff should have the additional rights that flow from a right of property.

Part of these reasons are policy-focused: what would be the message if restitution wasn't awarded? In this case, it would encourage breaches of confidence since the amount of compensation will only be what they would have had to pay anyways. Restoring the asset to the breached party acts as a deterrant to someone considering a breach of duty. An inability to accurately assess damages is also a factor in favour

of a constructive trust. Finally, the moral quality of the defendant's act should be considered – it may be appropriate to deny the defendant the right to retain the property. However, the focus should be on the plaintff.

Note that there need not be a special relationship between the parties or a pre-existing right of property. Rather, a constructive trust can both recognize and create a property right.

Sopinka (dissent on this issue): Outside of a fiduciary relationship, constructive trusts can only be awarded when the unjust enrichment occurs in the context of a pre-existing special relationship between the parties. They should only be awarded where other remedies would be inappropriate or unjust. The normal remedy for a breach of confidence is damages, and there is no reason to depart from that here. But for the breach, it is most likely that each party would have acquired half the property, therefore damages should be assessed on that basis.

Lamer: Agrees with La Forest on this issue.

Wilson: Elements to consider for awarding a constructive trust: adequacy and accuracy of damages; ensuring the wrongdoer does not benefit. A constructive trust could be awarded for a breach of confidence or a breach of fiduciary duty. "I believe that where the consequence of the breach of either duty is the acquisition by the wrongdoer of property which rightfully belongs to the plaintiff or, as in this case, ought to belong to the plaintiff if no agreement is reached between the negotiating parties, then the in rem remedy is appropriate to either cause of action."

Pettkus v. Becker

F: P & B in common-law relationship for 20 years. Both start with nothing and together they build up a beekeeping business. All property is in P's name, but B has contributed both money and labour.
I: What is B entitled to?
L: **Dickson**: The principle of unjust enrichment lies at the heart of the constructive trust. Unjust enrichment arises when there is an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. There must be a causal connection between the enrichment and the deprivation.
Martland: Extending unjust enrichment to cases of this sort is a Bad Thing. If judges can impose a trust whenever "justice and good conscience require it" (Denning, Hussey v Palmer), then they will be applying their individual perception of what is unjust. Constructive trusts should be restricted to institutional constructive trusts. Concurs with Ritchie on result.
Ritchie: A contribution by one partner that is accepted by the other gives rise to a rebuttable presumption of common intention resulting trust. Unjust enrichment and constructive trusts should be confined to situations where a person who has paid money and sues for its return. A resulting trust can be found on the facts.
A: (**Dickson**) P has had the enrichment of 19 years of labour and B has been deprived of those years and received little in return. When one person in a spousal-like relationship takes advantage of the other's reasonable expectation of receiving an interest in property it would be unjust to allow the recipient of the benefit to retain it.
C: B gets a one half interest in all the things!

Soulos v. Korkontzilas

F: K is a real estate broker for S. He begins negotiations for a building on S' behalf, but ends up purchasing the property for himself (through his wife). The market value of the property ends up decreasing by the time S realizes. S still wants the property. Trial court finds that K had a fiduciary duty of loyalty to S which he breached by failing to communicate a counter-offer to S.

I: Is S entitled to the property under a constructive trust?

L: Constructive trusts are not confined to situations of unjust enrichment. They can apply in order to condemn a wrongful act and maintain the integrity of relationships of trust. *Pettkus* does not function to confine constructive trusts to unjust enrichment.

The traditional constructive trust, used in English law to hold people to high standards and prevent them from keeping property that "good conscience" will not permit, remains available in Canadian law. *Beatty v Guggenheim*: "A constructive trust is the formula through which the conscience of equity finds expression. **When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee**."

Good conscience addresses both fairness between the parties and the integrity of institutions such as this one (real estate brokers). The law of fiduciaries includes an element of deterrence (*Hodgkinson*).

To impose a constructive trust in a situation where there is no unjust enrichment:

1. The defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his hands.
2. The assets must have resulted from the activities of the defendant that breached this obligation.
3. The plaintiff must show a reason for imposing a trust: either personal or deterring.
4. There can be no factors rendering a constructive trust unjust, such as other creditors.

Sopinka (dissent): Constructive trusts should only be availalbe in situations of unjust enrichment.

A: K was under an equitable obligation to pass on information from the negotiations. He breached this, resulting in the acquisition of the property. S wants the property for personal reasons, and a constructive trust will ensure future agents do not breach their duties. No third parties would be affected by this decision.

C: A constructive trust is imposed!

Kerr v. Baranow

L: In applying the test for unjust enrichment, the third stage requires full consideration of all the factors, including the autonomy of the parties and their legitimate expectations. There are established categories of jurisitic reasons include contract, disposition of law and donative intent. The defendant can attempt to raise and show another juristic reason to deny recovery.

A successful claim of unjust enrichment can give rise to damages or a constructive trust. Damages are usually appropriate and should be assessed flexibly. In order to obtain a constructive trust the plaintiff must show a substantial link between their contributions and the property at hand. Further, they must show why a monetary award would be insufficient. The extent of the interest should be proportional to the plaintiff's contributions.

Factors in determining whether there is unjust enrichment in a joint family venture: mutual effort, economic integration, actual intent, priority of the family.

Ch 9 – Remedies for Breach

Personal Remedies

B can sue Tee for breach (act or omission) or 3rd parties where in rem claims are being exercised.

in personam = actions focused on a delinquent defendent
in rem = attach or execute on trust assets or their substitute. (following or tracing)

specific performance and injunctive relief = trustee can be compelled to do or refrain from doing

Compensation for loss

In equity, full restitution is available to put the beneficiary in the position he would be in if the breach had not occurred. Damages tend to compensate more fully than those in tort or contract. This can mean assessing the value of the opportunity at the date of trial, rather than at the date of breach. Damages may be awarded when the trust asset is not available or execution against specific property is unsuitable.

At common law, if there are multiple breaches of trust and the" net result is a gain for the estate, the trustee was still liable for the losses: "a trustee could not set off the profit from one breach of trust against the loss resulting from the other". Section 15.4 of the Trustee Act provides that investment decisions should not be considered on an individual basis and that losses and gains may be set off unless the trustee is dishonest.

> "…the relief seeks primarily to protect a party owed a duty of utmost good faith from deleterious actions by the party owing the fiduciary duty. The vehicles by which the Court may enforce that duty are diverse and powerful, but are premised upon the same desire: to strictly and jealously guard against breach and to redress that breach by maintenance of the pre-fault status quo, where possible."

Guerin v The Queen

I: How are damages to be assessed?
L: **Wilson**: Damages in breach of trust are very different from those in breach of tort or contract. In particular, considerations of causation, foreseeability and remoteness are not very important. Rather, there is an obligation to make complete restitution, including for increases in market value. If the property cannot be restored in specie, the value is to be quantified as of the date of trial.
A: In equity, we can presume the band would have developed the property at the most favourable time. All the contingencies make it impossible to mathematically formulate an award. The trial judge correctly made an assessment as of the date of trial and his award of $10 million should not be disturbed.

Canson Enterprises v Boughton

F: Wollen, a solicitor with B, failed to disclose to C that a transaction profited a third party/client, Sun-Mark. Building that W purchased suffered extensive damage as a result of subsidence

I: Is W responsible for damages incurred due to the engineer's subsequent negligence?

L: Cannot use tort principles to determine damages from a fiduciary obligation. In tort, parties are seen as equal and both concerned with their own self-interest, and therefore the law has to balance competing interests. A fiduciary relationship is based on trust, not self interest. Thus, the balance is in favour of the person wronged and enforcing the trust. Since a fiduciary has superior information and control, it will be harder to detect and succeed in an action against the fiduciary. Therefore, the remedies should be higher in order to suffice as a deterrent.

What is the available compensation in equity? "[T]hat which makes restitution for the value of the loss suffered from the breach". Losses can be assessed at trial, with the full benefit of hindsight. Although legal proof of causation, limited by foreseeability, is not required in equity, the loss must still flow from the breach. Mitigation is also a more limited factor, but still applies after the plaintiff has had notice and opportunity of the loss and fails to take obvious steps.

> In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach. The plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach. Where the trustee's breach permits the wrongful or negligent acts of third parties, thus establishing a direct link between the breach and the loss, the resulting loss will be recoverable. Where there is no such link, the loss must be recovered from the third parties.

A: The breach resulted in the acquisition of the property. Applying a common sense view of causation, the losses sustained in the course of construction did not flow from the breach of fiduciary duty.

C: The loss from the breach consists of the difference in price represented by the secret profit and expenditures incidental to the acquisition.

Set Off

In re Deare (1895)

Trustees had breached the trust by keeping crap stock too long. But they had good stocks too! If you applied set-off the trust estate was actually ahead. The court refused to allow set off as “the rule is well settled that a trustee could not set off the profit from one breach of trust against the loss resulting from the other.”

However, in BC, the common law has been amended.

Section 15.4

15.4 (1) The rule of general trust law that requires the assessment of the decisions of a trustee on an investment by investment basis if the decisions are called into question is abrogated.
(2) The rule for the assessment of damages for breach of trust that prohibits losses from being off set by gains is abrogated except in respect of circumstances in which the breach is associated with dishonesty on the part of the trustee.

Accounting for Profit

This is available as an alternative to equitable compensation. The basis of the remedy is to prevent unjust enrichment and the essential purpose of the remedy is to have the faithless fiduciary disgorge all profits attributable to the fiduciary breach.

- Deterrence is at the heart of the remedy to account.
- NOT a defence: the PI was unwilling/unlikely/unable to have made the profits his/herself
- Ordinarily, fiduciary will be ordered to render an account of the profits made within scope of duty.
- Assessment is difficult and a “reasonable approximation” will do mathematical exactness not required
- if the loss exceeds the profits made by the fiduciary claimant must elect which: accounting or compensation.
- Defences are equitable in scope: **estoppel, laches, acquiescence and delay**.

Boardman v Phipps revisited

L: A fiduciary will be accountable for profits even if acted bona fide and in interests of the trust. PL need not show they suffered a loss. **Fiduciary can rc’v a generous allowance for the skill and effort** they put into the inappropriate venture.

Warman International v Dwyer

F: D is general manager of WI, distributor of Bonfiglioli gearboxes. B wants to set up joint venture with WI, but WI declines. B and D k, and D takes employees from WI to set up their business. However, the arranged between B and WI was not all sunshine and roses, and likely would have ended soon regardless of D's actions.

I: Is WI entitled to an accounting for profits?

L: The fiduciary must account if there is a conflict or possible conflict OR when he has profited by reason of his fiduciary position. The stringent rule ensures that fiduciaries conduct themselves with a high moral standard. It is no defence that the plaintiff didn't suffer a loss or that the fiduciary acted in good faith. (*Regal*, *Phipps*). Laches and other equitable principles apply. A PI cannot wait for fiduciary to make a profit and only then sue. The defendant can attempt to show it would be inequitable to account for the entire profits – if they have invested and risked a large amount personally, for example. Making an exact mathematical determination will often be impossible. Judicial estimation based on all available indications.

A: Given the likelihood that the contract between WI and B would have ended soon, a period of two years of profits is appropriate, less an appropriate amount for expenses, skill, effort and resources contributed by D.

Proportionate Share

Scott v Scott

L: When a profit is made with a combination of trust money and the trustees personal money, the beneficiary is entitled to profits in proportion to the trust contribution.

Defences:

1. consent
2. s 96 of the Trustee Act:

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