

LAW 250 TRUSTS  
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BY

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Note: The materials here may not be in the same order as in the syllabus, but are arranged in the way that makes sense to me. I'm sure that you can work this out.

INTRODUCTION	9
EQUITY AND THE HISTORY OF THE TRUST	
MODERN TRUST	
ELEMENTS OF A TRUST	
TYPES OF TRUSTS	
POWER	
CLASSIFICATION OF TRUSTS	12
EXPRESS TRUSTS	
TRUSTS ARISING BY OPERATION OF LAW	
FIDUCIARY RELATIONSHIPS	15
CHARACTERISTICS OF A FIDUCIARY RELATIONSHIP	
<b>GUERIN V. THE QUEEN [1984] SCC</b>	
The list of fiduciary relationships is not closed	
<b>LAC MINERALS V. INTERNATIONAL CORONA RESOURCES LTD. [1989] SCC</b>	
Moving towards a flexibility in finding fiduciary relationships	
<b>HODGKINSON V. SIMMS [1994] SCC</b>	
Court will find a fiduciary relationship where X is expected to act solely for Y to the exclusion of X's own interest.	
<b>M.(K.) V. M.(H.) [1992] SCC</b>	
There is fiduciary duty for parents to care for, protect and rear children	
OBLIGATIONS IMPOSED ON FIDUCIARIES	
<b>GILES V. WESTMINSTER SAVINGS CREDIT UNION [2007] BCCA</b>	
Refusal to extend fiduciary obligations to this commercial relationship	
<b>STROTHER V. 33464920 CANADA INC. [2007] SCC</b>	
Fiduciary duties may include obligations which go beyond what the parties bargained for.	
CREATION OF EXPRESS TRUSTS	20
CAPACITY	
TRANSFER OF PROPERTY	21
DIRECT TRANSFER OF PROPERTY BY SETTLOR TO TRUSTEE	
TRANSFERS TO A THIRD PARTY	
<b>MILROY V. LORD [1862] HL</b>	
ST must do everything required to fully transfer the property	
<b>RE ROSE [1952] UK CA</b>	
Once ST had fulfilled his part of the transfer, it is deemed complete.	
<b>PENNINGTON V. WAINE [2002] UK CA</b>	
Equity will give effect to a transfer if it is against good conscience to not do so, even though equity will not assist the volunteer.	
PERSONAL DECLARATION OF TRUST	
<b>GLYNN V. COMMISSIONER OF TAXATION [1964] AU HK</b>	
A declaration of trust will be sufficient, especially when reinforced by facts that show intention.	
COVENANTS IN FAVOUR OF VOLUNTEERS	
<b>STRONG V. BIRD [1874] UK</b>	
When an incomplete gift is made during the donor's lifetime and the donor appoints the would-be recipient as executor, the vesting of the property in the donee as executor may be treated as completion of the gift.	
<b>RE HALLEY ESTATE [1959] NFLD SC</b>	

For *Strong v. Bird* to apply, the legal title and the equitable title must be given to the same person.

**MORDO V. NITTING [2006] BCJ**

The one to rule them all.

**THE THREE CERTAINTIES** 26

**CERTAINTY OF SUBJECT MATTER** 26

**CERTAINTY OF PROPERTY**

**RE BEARDMORE TRUST [1952] ON HC**

A trust can be created with "future property" only if that property is legally ascertainable

**CERTAINTY OF PORTION**

**BOYCE V. BOYCE [1849] UK**

Portion of property going to each BN must be clear, or TR must be vested with the discretion to decide each BN's portion.

**DOCTRINE OF REPUGNANCY**

**RE WALKER [1924] ON CA**

It is impossible to give an absolute interest in property that is coupled with an obligation to give that property to a third party

**CERTAINTY OF WORDS (INTENTION)** 29

**PROBLEMS ARISING IN DETERMINING INTENTION**

**NICOLL V. HAYMAN, HAYMAN V. NICOLL [1944] SCC**

Precatory language creates the presumption of an absolute gift. Documents are to be read as a whole.

**GLASSPOOL V. GLASSPOOL ESTATE [1998] BC**

Courts will consider the facts of the case to judge the intent of the settlor.

**CERTAINTY OF OBJECTS** 31

**PERSONS AS BENEFICIARIES** 31

**KIND OF TRUST**

**LINGUISTIC CERTAINTY**

**MCPhail v. Doulton (Baden's Deeds Trust No. 2) [1970] HL**

Courts will take the practical approach in determining linguistic certainty, reverting to the dictionary when needed. The onus is on the claimant.

**ASCERTAINABILITY**

**MCPhail v. Doulton (Baden's Deed Trust No.1) [1970] HL**

Only fixed (absolute) trusts need class ascertainability, every other trust can rely on the In/Out Test

**JONES V. T. EATON Co. LTD [1973] SCC**

Canada accepts the individual ascertainability test.

**ADMINISTRATIVE WORKABILITY**

**RE HAY'S SETTLEMENT TRUSTS [1981] UK CA**

Administrative workability is at issue with discretionary trusts

**TRUSTS FOR CHARITABLE PURPOSES** 35

**GENERAL PRINCIPLES**

*Law and Equity Act s.47 Charitable Trusts*

**DETERMINING WHETHER A PURPOSE IS CHARITABLE: THE NECESSITY OF PUBLIC BENEFIT**

**VANCOUVER SOCIETY OF IMMIGRANT AND MINORITY WOMEN V. M.N.R. [1999] SCC**

Charitable trusts must be limited to public benefit

**CHICHESTER DIOCESAN FUND V. SIMPSON [1944] HL**

A gift to trustees for distribution for charitable purposes does not make a charitable trust.

**OPPENHEIM V. TOBACCO SECURITIES TRUST CO. [1951] HL**

The public benefit is non-existent where the beneficiaries are connected by a personal relationship.

**DINGLE V. TURNER [1972] HL**

Affirmed the "poor relations/poor employees" exception.

**NATIONAL ANTI-VIVISECTION SOCIETY V. INLAND REVENUE COMMISSIONERS [1948] HL**

Political purposes do not provide benefit in the charitable sense.

**EVERYWOMAN'S HEALTH CENTRE SOCIETY V. M.N.R. [1992] FCA**

Purpose need not accord with public opinion in order to be a purpose beneficial to the community

**SPECIFIC HEADS OF CHARITY****THORNTON V. HOWE [1888] UK CA**

No matter how crazy your cult is, as long as it's somewhat Abrahamic, it will be ok.

**RE SOUTH PLACE ETHICAL SOCIETY [1910] UK CA**

Two of the essential attributes of religion are "faith in a god" and "worship of that god"

**BLAIS V. TOUCHET [1963] SCC**

Priest used to be able to get away with many a thing back in the good old days

**GILMOUR V. COATS [1949] UK CA**

A valid charitable purpose trust for the advancement of religion must have some public benefit.

**RE HOPKINS' WILL TRUSTS [1964] UK CA**

"Education" must be used in a wide sense, certainly extending beyond teaching

**RE PINION [1965] UK CA**

There must be some sort of benefit or utility derived from the education or art

**NATIVE COMMUNICATIONS SOCIETY OF BC V. M.N.R. [1986] FCA**

Fact that state has assumed special responsibility for the welfare of a group is relevant to the determination of whether an organization is charitable under the Fourth head.

**THE CY PRES DOCTRINE****FORMALITIES**

44

**INTER VIVOS AND TESTAMENTARY TRUSTS**

*Law and Equity Act s.59 Enforceability of contracts*

**WILLS: SECRET TRUSTS**

*Wills Act s.3 Writing required*

*Wills Act s.4 Signatures required on formal will*

**CHAMPOISE V. PROST [2000] BC CA**

Sets out the requirements for a secret trust

**CHINN V. HANRIEDER [2009] BC SC**

Lies will be shamefully exposed before the eyes of the law!

**FULLY SECRET TRUSTS ARISING UNDER A WILL****OTTAWAY V. NORMAN [1971] UK CA**

Certainty of objects is required. Silent acceptance will suffice.

**GLASSPOOL V. GLASSPOOL ESTATE [1998] BC PC**

Courts will consider the facts of the case to judge the intent of the settlor.

**HAYMAN V. NICOLL [1944] SCC**

An example of insufficient evidence of communication of intention

**HALF SECRET TRUSTS****RE GARDNER [1938] ON SC**

Secret trusts are not testamentary. Though this may be wrong.

**RE REES [1950] UK CA**

Whether it is a trust or a conditional gift will be established based on the intent in the will

**RE YOUNG [1950] SCC**

Secret and half-secret trusts are generally seen as separate from the will. Beneficiaries can sign the will

THE TRUST AND THE SETTLOR	49
RESULTING TRUSTS	51
AUTOMATIC RESULTING TRUST	51

**TRUST OR GIFT**

**RE WEST [1966] BC SC**

There is a rebuttable presumption that trustee shouldn't take beneficially

**RE FOORD [1922] UK CH**

If one can show evidence that the ST intended to make a gift of the surplus to the TR, then no resulting trust will arise.

**CONTRACT OR TRUST**

**RE WEST SUSSEX CONSTABULARY FUND [1971] UK CH**

If a member has received the stipulated benefit, then that member has no right to the disbursement based on resulting trust.

**RE BUCKS CONSTABULATORY FUND No.2 [1979] UK CH**

Unincorporated associations are treated as establishing a contractual relationship between members. Distribution of surplus amongst members should be equal (not proportional), regardless of contribution.

**PENSION TRUSTS**

**SCHMIDT V. AIR PRODUCTS CDN LTD [1994] SCC**

If employers and employees both contributed to fund and are both entitled to the surplus, then they should receive it proportionally, according to their contributions

PRESUMED RESULTING TRUST	55
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**THE GENERAL PRINCIPLES**

***BC Property Law Act s.19 Words of transfer***

**SHEPHARD V. CARTWRIGHT [1955] HL**

The acts and declarations of the parties before or at the time of the transfer, or so closely after it as to constitute a part of the transactions, are acceptable as evidence of the gift.

**MADSEN ESTATE V. SAYLOR [2007] SCC**

PL has evidentiary burden and burden of proof to rebut the presumption of resulting trust

**PRESUMPTION OF ADVANCEMENT: SPOUSES, PARENTS AND CHILDREN**

**MEHTA V. MEHTA ESTATE [2001] MB CA**

Presumption of advancement still applies in Manitoba and BC.

**PECORE V. PECORE [2007] SCC**

There is no presumption of advancement for adult children.

**JOINT BANK ACCOUNTS**

**NILES V. LAKE [1947] SCC**

Bank agreement does not govern relationship between the parties themselves and only apply to the relationship with the bank.

**COMMON INTENTION RESULTING TRUST**

**PETTKUS V. BECKER [1980] SCC**

For most purposes, unjust enrichment and constructive trust will be more useful instead of the common intention resulting trust.

## THE NATURE OF THE BENEFICIARY'S INTEREST

61

## THE GENERAL PRINCIPLE

**SCHALIT V. JOSEPH NADLER [1933] UK KB**

Beneficiary has no proprietary right in income of a trust. Beneficiary only has a right to accounting by the Trustee, and the right to bring an in personam action against the Trustee for breach of trust.

**BAKER V. ARCHER-SHEE [1927] HL**

Beneficiary has a proprietary interest in trust property, since they can point to trust income as "theirs"

## POSSESSION OF THE TRUST PROPERTY

## CONTROL OF TRUSTEES

**IN RE BROCKBANK [1948] UK CH**

Beneficiaries can't compel a trustee to resign or to appoint a new trustee if they are in breach of duty.

**BUTT V. KELSON [1952] UK CA**

Principles governing the disclosure of information to beneficiaries

## ALIENATION OF THE BENEFICIAL INTEREST

63

## METHODS AND FORMALITIES

*Law and Equity Act s.36 Assignment of debts and choses in action*

## PRIORITIES BETWEEN ASSIGNEES

## RESTRAINT ON ALIENATION

## TERMINATION OF A TRUST

65

## REVOCATION

## TERMINATION OF THE TRUST BY A BENEFICIARY

**SAUNDERS V. VAUTIER [1841] UK KB**

A beneficiary who is sui juris and whose interest is vested absolutely, is entitled to immediate distribution of the trust property, and thus, to terminate the trust prematurely.

**RE SMITH [1928] UK**

The Saunders v. Vautier also applies to discretionary trusts. All beneficiaries must be ascertainable, and must consent

## PARTIAL TERMINATION

**RE SANDEMAN'S WILL TRUSTS [1938] UK**

If trust can be divided into independent parts, and there is no prejudice to other beneficiaries, then one beneficiary may wind up their share of the trust.

**LLOYDS BANK V. DUKER [1987] UK**

Sandeman's doesn't apply where there are exceptional circumstances that would negatively affect other beneficiaries.

## TERMINATING CHARITIES AND PERPETUAL TRUSTS OF INCOME

**HALIFAX SCHOOL FOR BLIND V. CHIPMAN [1936] SCC**

Saunders will apply to express trusts, where one of the beneficiaries is a charity.

## VARIATION OF TRUSTS

68

## TRUST AND SETTLEMENT VARIATION ACT BC

*1 Court approval of variation*

*2 Benefit to parties interested*

*3 Public Guardian and Trustee*

*4 Deemed trust*

*5 Court appearances*

## BENEFICIARY FOR WHOM THE COURT MAY CONSENT

**BUSCHAU V. ROGERS COMMUNICATION INC. [2006] SCC**

Court cannot consent on behalf of those who hold contingent interests.

**THE ARRANGEMENT****RE HARRIS ESTATE [1974] BC SC**

The Act does not allow the court to approve an arrangement which would resettle trust property on terms which bear no relationship to original trust

**BENEFIT****RE BURNS TRUST [1970] BC SC**

Financial benefits will be considered.

**RE WESTON'S SETTLEMENT [1967] UK CA**

Non-financial benefits will be reviewed before the court would approve any variation.

**RE REMNANT'S SETTLEMENT [1970] UK**

Promotion of family harmony is a valid benefit to be considered.

**RE TWEEDIE [1976] BC SC**

Spectrum of defining "benefit" shifts with the remoteness of interested parties. If the benefit lost to the beneficiary is minor and unlikely, then the court is more likely to disregard it

**SETTLOR'S INTENTION****RUSS V. BC (PUBLIC TRUSTEE) [1994] BC CA**

Certainty of the benefit. Settlor's intent is irrelevant.

**ADMINISTRATION OF A TRUST**

73

**APPOINTMENT, RETIREMENT AND REMOVAL OF TRUSTEES**

73

**APPOINTMENT OF TRUSTEES**

*Trustee Act s.12 Powers of trustees may be exercised by survivor*

*Trustee Act s.27 Power to appoint new trustees*

*Trustee Act s.31 Power of court to appoint new trustees*

*Trustee Act s.32 Rights and powers of new trustees*

*Trustee Act s.33 Power of court to vest land in new trustees*

**RETIREMENT OF TRUSTEES**

*Trustee Act s.28 Retirement of trustee*

**REMOVAL OF TRUSTEE**

*Trustee Act s.30 Removal of trustees on application*

**CONROY V. STOKES [1952] BC CA**

Test for removal of trustees is whether it is in the interest "welfare of the beneficiaries of the trust estate"

**RE CONSIGLIO TRUSTS NO.1 [1973] ON CA**

Before making an order for removal of a trustee due to friction with co-trustees, court must be satisfied that the continued administration is impossible or improbable.

**DUTIES AND POWERS OF TRUSTEES**

76

**DUTY TO ADHERE TO THE TERMS OF THE TRUST**

*Trustee Act s.96 Jurisdiction of court to relieve trustee of breach of trust*

**FALES V. CANADA PERMANENT TRUST CASE [1977] SCC**

Trustees have an obligation to adhere to the terms of the trust. And a whole bunch of other duties.

*Trustee Act s.15.1 Investment of trust property*

*Trustee Act s.15.2 Standard of care*

*Trustee Act s.15.3 Trustee not liable if overall investment strategy is prudent*

**DUTY OF NO DELEGATION****SPEIGHT V. GAUNT [1883] UK CA**

Trustees can delegate to agents when in moral necessity, or in the regular course of business.

**RE WILSON [1966] ON CA**

Corporate trustees must make decisions on the director level, without delegating to employees

***Trustee Act s.7 Power to authorize receipt of money***

***Trustee Act s.15.5 Delegation of authority with respect to investment***

#### **DUTY OF LOYALTY**

#### **CONFLICT OF DUTY AND INTEREST**

**KEECH V. SANDFORD [1726] UK KB**

Trustee must hold lease on constructive trust and account for the profits that he received.

**BOARDMAN V. PHIPPS [1966] HL**

The duty of loyalty is very strict. Trustees may not profit from their position in any way.

**CANADIAN AERO SERVICES V. O'MALLEY [1974] SCC**

Strict view that if fiduciary uses info gained from their position, or any corporate opportunity appropriated, they must account for all profits made.

**MOLCHAN V. OMEGA OIL & GAS LTD. [1988] SCC**

A trustee may not purchase trust property, whether or not the sale is made honestly, at a fair price and in good faith

**CREIGHTON V. ROMAN [1968] ON CA**

Onus of proof is on Trustee to show three factors in a purchase of a beneficial interest

**COWAN V. SCARGILL [1984] UK CA**

The interest of the beneficiaries is more important than ethical considerations

**FOX V. FOX ESTATE [1996] ON CA**

Court will not interfere with a trustee's exercise of an absolute discretion so long as there is no fraud

#### **DUTY OF IMPARTIALITY**

**NESTLE V. NATIONAL WESTMINSTER BANK [1992] UK CA**

Trustees must understand their powers and duties. Favouring some beneficiaries over others is a breach of trust.

**LOTTMAN V. STANFORD [1980] SCC**

Trustee can convert wasting personal property in the trust. This does not apply to real property.

**RE LAUER V. STEKL [1976] SCC**

Where there is no express trust for sale power, the life tenant is only entitled to the actual income from the sale of the real property.

**RE SMITH [1875] UK CH**

A trustee must always maintain impartiality between income and capital beneficiaries, even in the presence of a discretionary power to retain or sell trust property.

#### **INFORMATION AND ACCOUNTS**

**SANDFORD V. PORTER [1889] ON CA**

Duty to account explained



## INTRODUCTION

### EQUITY AND THE HISTORY OF THE TRUST

In property there is a fundamental dichotomy between “legal” and “equitable” ownership, which arose from two parallel developments of property and jurisprudence in England.

Equity is a concept of rights distinct from legal rights, and is the body of principles constituting what is fair and right. It was the system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law when the two were in conflict.

- The Court of Chancery was instituted by the King in 13th century, creating a place where petitioners could get an equitable excuse to the otherwise rigid system of the common law rules.
- It was presided by the Chancellor, who was a quasi-ecclesiastic figure.
- Decisions of the Court of Chancery did not annul the rights given to petitioners under common courts, but issued to them a decision to not exercise those rights based on the circumstances, in the name on principles of fairness and christian morality.

**Seisin:** The legal possession of such an estate in land as was anciently thought worthy to be held by a free man.

**Use:** Recognition of the duty of a person, to whom property has been carried out for certain purposes, to carry out those purposes. It developed from equitable interest in land. From the concept of use developed the concept of trust.

- The doctrine of uses came about in 14th century.
- In order to avoid paying land taxes and other feudal dues (leftover incidents of tenure, such as feudal military service) lawyers developed a primitive form of trust called ‘the use’.
- This trust enabled one person (who was not required to pay tax) to hold the legal title of the land for the use of another person.
- The effect of this was that the trustee (feoffee) owned the land and held legal interest under the common law, but the beneficiary (*cestui qui use*) had a right to use the land and equitable interest under the law of equity.
- Henry VIII enacted the *Statute of Uses* in 1535 in an attempt to outlaw this practice and recover lost revenue. The Act effectively made the beneficiary of the land the legal owner, and liable for feudal dues.
- But lawyers quickly found ways to go around the *Statute*:
  - By creating a ‘use upon a use’. The *Statute* recognized only the first use, and so land owners were again able to separate the legal and beneficial interests in their land.
  - The statute only applied to passive trusts where there were no obligations imposed on the parties.
  - The statute does not apply to corporations and life estates/leaseholds
- In 17th century, the notion of use was converted into the concept of trust.
- Courts of Law and Chancery were fused into a single structure in the 19th century.
- The *Statute of Uses* was abolished in England in 1925, but may still be law in Canada, as it was never expressly abolished.
- But this is not as important, as most trusts these days are active, and are thus outside of the scope of the *Statute*.
- In some jurisdictions, there is still a need for proper semantic approach to the wording of express trusts.

### MODERN TRUST

**Trust:** An obligation imposed expressly, by implication, or by law, whereby a person is obligated to deal with property to which that person has title, for the benefit of people or for purposes or both.

**Obligation:** Something which a person is bound to do. In trust law, this is a duty imposed by law, as opposed to voluntary and mandatory obligations imposed by contract and tort law, respectively.

- The Trust is a fiduciary relationship imposing certain obligations on the person who holds title to the property.
- The relationship is fiduciary because, while the trustee (TR) has substantial control over the trust property, he is bound to act in strict confidentiality, with honesty and candour, and entirely in the interest of the beneficiary (BN). It is unique because it is a flexible tool for making dispositions of property.
- For the most part, this course discusses case law where someone transferred an asset to someone else. The key question is whether that transfer created a trust or whether that gift was an absolute gift. If the gift created a trust, then there are obligations imposed on the recipient. If the gift created an absolute gift, then the recipient gets the asset without any strings attached.

## 250.1 INTRODUCTION TO TRUSTS

- Obligations in a trust are imposed by Equity, whose principles were shaped with a view to prohibiting conduct, and providing relief against prohibited conduct.
- The obligation creates a relationship whereby trust and confidence are placed in a person to carry out duties by giving them certain assets.
- Note that a trust is a relationship, but it is not a separate legal person. TR holds the legal title in the property for the BN, who holds the equitable interest.

The law of trusts is a matter of private law, which makes it largely dependent on common law, but there are also some applicable statutes:

- *Trustee Act BC*
- *Law and Equity Act*
- *Trust and Settlement Variation Act*
- *Conflict of Law Rules for Trusts Act*
- *International Trusts Act*

- If the deed doesn't deal specifically with an issue, then the statutory provision in the *Trustee Act* is the default provision in a trust deed. But the language of the trust can override the statutory provision.

### ELEMENTS OF A TRUST

#### PERSONS OR PURPOSES

- A trust must have a defined object. These objects can include either a person or a purpose, such as charity. Definable objects lead to definable and ascertainable BNs.
- One must distinguish between a "trust for charitable purposes" and a "charitable organization"
  - Trust for charitable purposes, such as a trust for education, helping the poor, etc, is a trust, not a separate legal entity
  - Whereas a charitable organization like the Canadian Cancer Society is a separate legal entity

**Testator (TS):** If the trust is testamentary, then the ST is the TS.

**Settlor (ST):** The person who creates the trust. The ST or TS of an express trust intends to create the trust. In those trusts that arise by operation of law, such as resulting and constructive trusts, there is no ST in the sense of a person intentionally wishing to create a trust

**Trustee (TR):** The person who holds the title to the trust property for the benefit of the BNs. There may be one TR or more than one. The ST may also be the TR.

**Beneficiary (*Cestui que trust*) (BN):** The person for whose benefit the TR holds the trust property. There may be one or multiple BN. TR may also be the BN.

**Protector:** The person named in the Trust Deed by the ST, to oversee the TR. Certain powers can be given to the protector in the Trust Deed, such as the power of removing TRs.

#### TRUST PROPERTY

**Capital:** Initial property that is settled on the Trust.

**Income from the Trust:** Money that is earned from the capital.

- This is the subject matter of the Trust: the property that the TR holds for the benefit of the BN.
- A TR may hold either legal or equitable title to the trust property depending upon the nature of the property as it comes into the trust or as it is subsequently dealt with.
- The property can be real property, personal property (whether tangible or intangible, or both).
- There must be a transfer of property from ST to TR in order to completely constitute the trust. This transfer can be done via Form A, simple delivery, etc.
- The amount of property to be transferred is flexible. Token amount may be transferred at the beginning, so that the trust is established, and the remaining amount be transferred later. Sometimes, the entire amount is transferred at the very beginning.

## 250.1 INTRODUCTION TO TRUSTS

### TRUST INSTRUMENT

- In most situations, a trust is created by a document called a trust instrument, which vests the trust property in the TR and describes the rights and obligations of the parties. Those rights and obligations are called the terms of the trust.
- Typically, a trust instrument is either a deed or a will. Note that not all trusts are created by an instrument. Also, some jurisdictions require that some trusts, such as those involving land, to be made in writing.

### TYPES OF TRUSTS

#### BARE TRUST

- A trust exists whenever title to property is vested in one person to be held for the benefit of another, with no obligations.
- When the TR no longer has active duties to perform (that is, duties imposed by the creator of the trust), except to convey the trust property to the BNs upon demand, the trust is said to be a bare trust.

#### FIXED (ABSOLUTE) TRUST

- A trust in which each BN's interest is fixed, either by amount or as a proportion of the total. The TR has no discretion as to distribution: they must distribute the money as the trust dictates.
  - *"I leave my estate to my spouse for life & on his death, the capital shall go to my children in equal shares"*

#### DISCRETIONARY TRUST

- A trust in which the TRs are given a power to decide how income, capital, or both, should be distributed to a class of BNs.
  - *"I leave my estate to my husband for his life to hold as a TR for my children, with the capital to go to the children in such shares as the TR shall direct."*
- While a discretionary trust contains a power, it is a power coupled with a duty to distribute the entire subject matter of the power. Hence, it is a trust.
- The TRs are under a duty to appoint (to pay or distribute). They must pay out the trust property to BNs.
- However, TRs have a discretion of the amount any BN will receive, when BNs may receive it, and the choice of BNs.
- If a trust is discretionary, then the TR is permitted to pay as much money as is appropriate for the benefit of the BN. This means that the BN has no absolute right to the income/capital of the trust, because the discretion is vested in the TR to pay (or not to pay).
- If a power of appointment is not coupled with a duty to appoint - that is, if the TR has the discretion to appoint or not - the power is called a mere power to distinguish it from a discretionary trust.

#### FIDUCIARY TRUST

- A Fiduciary Trust identifies BNs and imposes a discretion to distribute to these BNs. A fiduciary TR is not required to distribute to BNs.
  - *"I leave my estate to my husband for life to hold as TR for my children if the TR so decides, but if there is no distribution to the children, then to the SPCA."*
- There is no obligation to distribute. At most, the fiduciary must consider whether to make a distribution or not.
- It is important to have an "ultimate distribution" clause in these trusts to avoid a resulting trust.
- There are two types of a fiduciary trust, based on the power of appointment:
  - Power of Appointment held by TR
    - TR may distribute to the BN, but is not obligated to
    - TR has discretion over the how much and when to distribute as well
  - Power of Appointment held by non-TR
    - Someone who is not a TR may have a power of appointment
    - Often this position may be taken by the Protector
    - *"ST grants assets to be held in trust for ST's wife for life and on wife's death, to such children as the wife appoints".*

### POWER

**Power:** In Trust Law, a power is an authority conferred upon a person to deal with, and dispose of, someone else's property. Powers are embedded in a trust. There may be one or more powers within a trust.

**Vesting:** A power is fixed, or settled, when it is vested. The right is immediate and not contingent.

## 250.1 INTRODUCTION TO TRUSTS

**Contingent:** A power is possible, but not assured. The vesting depends on some factor which may or may not occur.

**Donor:** The person who creates the power.

**Donee:** The recipient of the power.

**Potential BNs / Appointees:** The persons to whom the property may be appointed.

**General Power:** Enables donee to appoint to anyone, including himself

**Special Power:** Enables donee to appoint to anyone among named class of people.

**Hybrid Power:** Allows donee to appoint to anyone, except from named class of people.

**Power to Encroach:** Power of a TR or a specific BN to draw upon the capital.

Power of Advancement: Allows for the TR to draw on the capital to pay to the income BNs.

**Power of Appointment:** The ability to select a person who will be given the authority to dispose of certain property under the will or trust. This is generally different from a TR in that there is no obligation to manage the property for the generation of income, but need only distribute it.

**Power of Attorney:** An authorization to act on someone else's behalf in a legal or business matter. The person authorizing the other to act is the principal, grantor or donor (of the power), and the one authorized to act is the agent or attorney.

**Life Interest:** The right to the income from the trust during the lifetime of the person. This usually gives rights to income only, but sometimes includes a power to encroach.

### CLASSIFICATION OF POWERS ACCORDING TO PURPOSE

Whether a power is Administrative or Dispositive will impact the TR's actions and the certainty of objects rules.

- To determine whether a power is Administrative or Dispositive, examine the trust document to see what category the power is in
- Who has the power? TR or Non-TR? If TR, what is the category of trust? Absolute, discretionary, fiduciary?

#### Administrative Powers

- Powers conferred upon the TR by the trust instrument to manage the trust property, that is to sell, mortgage and invest.
- These powers come from the trust document and statute, and may be incidental to a will in a testamentary trust.

#### Dispositive Power

- These are the powers of the TR to pay or transfer money to the BN.
- Power of Appointment
- Power of Maintenance
- Power of Advancement/Encroachment:

## CLASSIFICATION OF TRUSTS

### EXPRESS TRUSTS

- An express trust arises when the person creating the trust has expressed his intention to have the property held by one or more persons for the benefit of another or others.
- The intention may be expressed orally, by deed, or by will, and may be either testamentary or *inter vivos*.
  - *From ST to TR in trust for BN.*
  - ST therefore transfers a property to a TR, intending that TR should hold it for the benefit of BN.
- All of these can be the same person, though TR can't be the sole BN, because then his rights to the property are absolute
- This allows ST to achieve some control over their assets over an extended period of time, while not actually holding it.

**Executed Trust:** ST has completely set out the beneficial interest in the trust deed.

**Executory Trust:** ST has established the trust by transferring the property to a TR, but has expressed only a general intention about who shall have the property. Final disposition is left to a later time, or to other persons, most often the TR. Such a trust may arise where a power of appointment is given, or in a discretionary trust.

There are many kinds of express trusts, but we will consider three main types.

# 250.1 INTRODUCTION TO TRUSTS

## TRUST FOR PERSONS

- These are also known as private trusts.
- Private trusts can be either *inter vivos* or testamentary.
- There are a number of situations where private trusts are usually created:
  - To protect family assets, but to allow assets to benefit a number of generations, with the income from the assets distributed to widow, children, etc.
  - To prevent a spoiled child-beneficiary from acquiring the asset outright and wasting it all on hookers and blow.
  - To hold assets for minors or disabled until the time that they are able to dispose of them properly.
  - Protecting assets from claims by creditors, spouses or family, because trust property is outside of insolvency reach.
  - Avoidance under the *Wills Variation Act*, because TS no longer holds legal title to their assets
  - Tax planning
  - Avoiding having to probate the will and the probate fees. Not all that important, as the fees are not that high.
  - Channeling funds to people or organizations in secret, since trust have stringent privacy requirements as opposed to wills which are always public.

**Probate:** The legal process of administering the estate of a deceased person by resolving all claims and distributing the deceased person's property under the valid will.

## COMMERCIAL EXPRESS TRUST

- Commercial express trusts are trusts set up for persons, but in a commercial setting. The fact that they are set up for persons distinguishes them from purpose trusts.
- A commercial trust can be set up with similar characteristics to a limited liability CO
- The benefit of this is that it allows investors to set up CO-like structures where they are exempt from liability and can pool assets, without having the strict regulations of the *Business Corporations Act*.
- Commercial trusts are also used as investment vehicles, such as Real estate investment funds, Mutual funds, Income trusts, Discretionary Income trust, Trusts for bondholders, Pension plans.

	CORPORATIONS	COMMERCIAL TRUSTS
OWNERSHIP OF ASSETS	Corporation	Trustee
MANAGEMENT OF ASSETS	Directors / Officers	Trustees
BENEFITS FROM ASSETS	Shareholders	Beneficiary
LIABILITY FOR DEBTS	Corporation / Directors	Trustees

## TRUSTS FOR PURPOSES

- In a Purpose trust, there is no BN, but instead a defined purpose which benefits from the trust, such as charity or cause.
- The main problem with such trusts is that there is no one to enforce the rights of the BNs or the obligations of the TRs.
- These can be split into two major groups:
  - Charitable purpose trusts that address a charity issued, such as education, saving african orphans, spreading godliness and all such crap. The provincial AG is designated as the person who enforces the trust.
  - Non-charitable purpose trusts cover anything from fox-hunting to spoon-playing. These are considered not charitable because the law does not regard their objects as of sufficient benefit to the public to be accorded advantages of charitable trusts. Generally void because no one to designated enforce the trust, but there can be exceptions.

## TRUSTS ARISING BY OPERATION OF LAW

Certain trusts are said to arise by operation of law because they are imposed by law regardless of the expressed intention of the parties. Most common of these are the resulting trust and the constructive trust.

## 250.1 INTRODUCTION TO TRUSTS

### RESULTING TRUST

**Resulting Trust:** A resulting trust is imposed in certain defined situations to return property to the person who gave it, and is entitled to it beneficially from someone else who has title to it. Thus, the property "results" to the true owner.

- There are generally two kinds of Resulting Trusts:
- Those in which an express trust fails in whole, or in part for any reason
  - This trust arises when the beneficial interest is not exhausted.
    - *From ST to TR in trust for BN for his life.* When BN dies, the trust is exhausted and reverts back to the ST.
  - It also arises when a trust fails for illegality, or other contravention of a rule of law.
  - The law rejects a hiatus in ownership of property. Therefore, because the trust deed has not effectively disposed of the beneficial interest forever and ever, the beneficial interest reverts back to the ST, because TR was not intended to have the beneficial interest.
- Another result trust will happen where a person makes an *inter vivos* gift (transfer without consideration)
  - This can arise when a person either makes a voluntary transfer of property to another, or purchases property and directs that title be taken in the name of another.
  - Equity presumed that when a person gifted property to another, the giftor did not intend to absolutely transfer the beneficial interest to the recipient because there was no consideration.
  - However, it is open to the recipient to rebut the presumption by showing that transfer of full ownership was intended. See the Presumption of Advancement.
  - Also, in the gift is between spouses or from parents to children then the presumption is reversed, and the conveyance is deemed a proper transfer, not a trust.

### CONSTRUCTIVE TRUST

- The Constructive Trust was designed as a remedy to prevent unjust enrichment. It gives someone an interest in the asset.
- They most often arise from a fiduciary relationship, although fiduciary relationship is not required.
  - Example: A owns a house and is its registered owner. B moves in with A. They live together for 10 years. B helps with mortgage payments, buys groceries, does renovations, and provides A sexual service. A & B split up. B can launch a suit for unjust enrichment: claiming that A was enriched by B's actions, B suffered unjustly, and for no juristic reason [that is, no contract, etc], therefore, B needs a remedy.
  - B could get either money or a constructive trust to give him an asset in house.
  - Even though A is the legal owner, a constructive trust is imposed to give B a proprietary interest in the property
  - See *Lac Minerals v. Corona Resources* for more on this.

### STATUTORY TRUST

- Trusts are also utilized in legislation. For example, the *EAA*, s.78 allows a personal representative (executor or administrator) to hold real and personal property of the deceased in trust, to pay the deceased's debts and distribute the remainder to the beneficiaries

### DEEMED TRUST

- Deemed trusts are imposed by legislation to ensure that employers do not avoid various revenue and social obligations.
- They are usually found in federal and provincial tax legislation and make certain monies "trust monies" by deeming the money collected to be held in trust for the federal government. For example, when an employer deducts tax and CPP from the employees paycheque, he does not send it to the CRA immediately, but holds it in a deemed trust until the end of the year.
- This is completely irrelevant for the purposes of this course.

### FIDUCIARY RELATIONSHIPS

There are three sources of obligations in the law

- Contracts - voluntary obligations that deal with the chances of risk or something going wrong in advance.
- Torts - involuntarily imposed obligations that deal with risk or something going wrong after it has already gone wrong
- Fiduciary duties - combines some elements of both contracts and torts. For example, an express trust is custom drafted like a K to fit the facts and the anticipated issues that will arise between the parties (contract approach); the general law of fiduciaries will say that if a relationship between people exists and it has certain characteristics, certain other obligations will arise, even if not specified in K
- Fiduciaries originated in Equity to explain the position of a person who, at law, was the owner of property - but who, because of Equity's intervention, had no right of personal enjoyment.
- Once this split occurred, you needed laws to govern the relationship between the Owner and the holder of the Equitable Interest. While Equity cannot override the rights of the Owner, it can impose obligations on the Owner. Thus, the Trustee then became personally liable to another for their actions.

**Fiduciary:** The person who owes the obligation.

**Beneficiary:** The person to whom the obligation is owed.

There are two situations where a fiduciary relationship occurs:

- Express, where a party agrees to take on role of fiduciary duty. This is an assumed role which puts one into status of fiduciary, such as TR who accepts their position, and in doing so, puts himself in status of fiduciary.
- Deemed or implied by operation of law. Given the relationship, law will deem a party to be a fiduciary because of the circumstances of the case. Some instances where specific parties are deemed to be fiduciaries:
  - Lawyers
  - Government to aboriginal people
  - Doctor
  - Directors of corporation
  - Partners in partnership

Issues to consider when studying Fiduciaries

- Characteristics of a fiduciary relationship
- Obligations imposed on fiduciaries
- Remedies available

#### CHARACTERISTICS OF A FIDUCIARY RELATIONSHIP

- A court will determine whether a relationship existed between the two parties in which one party reasonably placed his trust or confidence in the other or was dependent on the other in some significant way. See *Hodgkinson v. Simms* for the modern approach to determining whether a fiduciary relationship exists.

#### GUERIN V. THE QUEEN [1984] SCC

***The list of fiduciary relationships is not closed***

**Facts:** This was an appeal from the decision of the Federal Court of Appeal setting aside a decision of the Trial Division. The Trial Division found that the federal Crown was in breach of trust in respect of a lease of 162 acres of reserve land belonging to an Indian Band and awarded damages of \$10,000,000 against the Crown.

**Issue:** Is there a fiduciary relationship between the parties?

**Discussion:**

- Fiduciary Obligation originated long ago in the notion of breach of confidence, thus there is a link between confidence and breach of fiduciary obligation
- When examining a commercial situation, it is best to base an action on breach of confidence rather than fiduciary obligation. See *Lac* where the court was reluctant to impose a fiduciary relationship in commercial setting.
- This duty can come from statute, K or unilateral undertaking
- The categories of fiduciary should not be considered closed. While we have lots of established fiduciary relationships (solicitor-client, director-corporation, etc), it is possible to have new, as-yet-named, fiduciary relationships

**Ruling:** Appeal allowed.

### LAC MINERALS V. INTERNATIONAL CORONA RESOURCES LTD. [1989] SCC

#### *Moving towards a flexibility in finding fiduciary relationships*

**Facts:** This was an appeal and cross-appeal from the judgment of the ONCA dismissing an appeal from a judgment of the ONHC declaring that on payment by the respondent Corona of \$153,978,000 the appellant LAC should transfer 11 patented mining claims to it. This appeal and cross-appeal raised important issues relating to fiduciary duty and breach of confidence. Also at issue were the nature of confidential information and the appropriate remedy for its misuse. PL Corona was junior mining CO that entered into negotiations for a joint venture with D CO Lac. PL told D about their mining claims and research, and their intention to buy Williams property, which according to their predictions will be very lucrative. At no point in their discussion was there any mention of confidentiality in their discussions. D withdrew from the negotiations, and bought the property on their own, and went on to build on it the biggest gold mine in Canada. PL sued, saying that D was in breach of confidence, and a breach of a fiduciary relationship. For the remedy, they sought that D should hold the property in trust for them.

**Issue:** Can fiduciary obligations arise in the context of abortive arm's-length negotiations between parties to a prospective commercial transaction?

#### **Discussion:**

- Breach of Confidence
  - The court finds this to be breach of confidence.
  - Breach of confidence is different from breach of fiduciary duty, however as per *Guerin*, historical basis for fiduciary duty is breach of confidence.
  - Remedies available for breach of confidence: Damages, accounting for profits, injunction, or a constructive trust.
- Constructive Trust:
  - One must be careful when reading older cases on constructive trust because the language gets mixed in with discussion about unjust enrichment
  - There must be no particular relationship between the parties in order to get the remedy
  - Constructive trusts can recognize a proprietary interest that someone has, but they can also create a proprietary interest without one existing before.
  - One has to be able to show that there has been a wrong and there is a link to property that cannot be compensated in damages. There must be reason to grant the additional rights that flow from recognition of the right of property
  - Constructive trusts are not usually the appropriate remedy; damages are.
    - But when PL needs “additional rights” the constructive trust remedy is appropriate. An example of such rights is in bankruptcy moving PL from claim for damages to a claim of proprietary interest, which makes PL a secured creditor and more likely to be repaid.
    - Claiming proprietary interest is best with properties that might be worth more in the long run, getting the stream of revenue that this property would create over the years.
  - Here, Sopinka finds that damages are appropriate without much discussion
- Fiduciary relationship:
  - Court is reluctant to find a fiduciary relationship in a commercial setting because of the lack of vulnerability.
  - So, fiduciary relationship usually does not exist between commercial negotiators
  - Not all aspects of a fiduciary relationship are subject to fiduciary duties (i.e. director can be negligent and still not breach a fiduciary duty)
  - Sopinka for Majority finds that there was no fiduciary relationship:
    - Lac and Corona were neither dependent nor vulnerable otherwise everyone in negotiations is vulnerable.
    - Corona could have protected itself with a confidentiality agreement
    - Since the majority found a breach of confidence and constructive trust, there is no need to find fid. relationship to give proper remedy
    - No distinction for new classes, and the court should apply same principles regardless of whether they are trying to find a new relationship or examining facts for an existing relationship
  - La Forest for minority finds a new fiduciary relationship. This becomes majority in *Hodgkinson*.
    - The key question is whether there is an expectation that D will act solely for the benefit of the PL.
    - Vulnerability is the key
    - Industry practice in negotiations was to disclose info, which made PL vulnerable
    - It is irrelevant that PL could have gotten confidentiality agreement as PL shouldn't need one.

**Ruling:** Constructive trust in favour of PL



## 250.2 FIDUCIARY RELATIONSHIPS

### **HODGKINSON V. SIMMS [1994] SCC**

***Court will find a fiduciary relationship where X is expected to act solely for Y to the exclusion of X's own interest.***

**Facts:** The PL Hodgkinson was a stock broker who hired the D as an accountant to advise him with respect to long term investments that were secure and that provided a tax shelter. PL relied completely on the D's advice and invested in four real estate projects (MURBs) recommended by D. D failed to disclose to PL that he was also acting for the developers of these projects and that he received fees from the developers if his clients invested in these projects. PL would not have invested in these projects had he known of D's relationship with the developers. Of course, it would not be fun unless PL lost substantially when the market bottomed out. He sued D for breach of contract and breach of fiduciary duty.

**Issue:** Was this a fiduciary relationship, and if so, was there a breach of that fiduciary relationship?

#### **Discussion:**

- The relationship between the parties contained the elements of trust, confidence and reliance on skill and knowledge and advice that gave rise to fiduciary obligations.
- These expectations of fiduciary obligations arise from the following factors (see box below).
- A K does not preclude the existence of fiduciary duty: a contract may actually lead to a fiduciary relationship
- The Court can impose "reasonable obligations" upon the fiduciary, depending on the circumstances
  - Fiduciary Obligations include: skill, confidence, trust, loyalty, confidentiality
- Advisor-advisee relationships are different from CO-CO relationships as in *Lac*
- The standards set by the accounting profession also required D to disclose his interest with the developers to the PL.
- The reliance placed in the D was such that he assumed responsibility for the PL's choices and D effectively chose the investment for PL.
- This is a clear breach of K.
- The fiduciary duty in this case was the duty to disclose
- A fiduciary obligation existed between the parties and that this duty was breached by the D's failure to disclose his pecuniary interest with the developers.
- The PL was entitled to be put in the position he would have been in had the breach not occurred.
  - The proper quantum of damages was restitution: the return of capital, considering the tax benefits received from the investments, and all consequential losses including legal and accounting fees.

**Ruling:** Judgment for PL

#### **Key Factual Components of a Fiduciary Relationship:**

- Mutual understanding between parties
- Unilateral undertaking by X
- BN expecting X to act in their interests to the exclusion of their own
- Discretionary power in X
- The ability to exercise that power to affect the other's interest;
- Vulnerability on the part of BN
  - Vulnerability is not a required hallmark of a fiduciary relationship, but is an indicia of existence
  - If the BN has some control over situation, that does not preclude a fiduciary relationship.
  - But X must be in substantial control of decision-making
- Reasonable reliance by the BN on X.

### **M.(K.) v. M.(H.) [1992] SCC**

***There is fiduciary duty for parents to care for, protect and rear children***

**Facts:** The PL sued her father for damages for a perpetuated incestuous abuse, claiming a breach of fiduciary duty.

**Issue:** Is there a fiduciary relationship between parent and child?

#### **Discussion:**

- Extends fiduciary duty to prevent against incestuous assaults against the child
- Suggests that fiduciary duties are imposed in some situations even in absence of any unilateral undertaking, however find that being a parent fits within situation of a unilateral undertaking that is fiduciary in nature
- Extension of fiduciary duty to parents is a recognition that more than just economic interests can be protected by this relationship. The parent child relationship is one that falls within the first definition of fiduciary as provided in *Lac Minerals*, where certain categories of relationship, due to their inherent nature, will be seen as fiduciary.
- Nature of obligation will vary with circumstances

**Ruling:** Damages for PL

## 250.2 FIDUCIARY RELATIONSHIPS

### OBLIGATIONS IMPOSED ON FIDUCIARIES

- The law imposes a general duty of loyalty upon all fiduciaries. The duty of loyalty subsumes an obligation to act honestly, prudently, diligently, even-handedly, candidly and strictly in the best interests of the other person.
- A fiduciary is also precluded from making unauthorized profits, from delegating its responsibilities, and from placing itself in a conflict of interest. In short, a fiduciary cannot act in a self-interested fashion.

#### **Fiduciary Obligations:**

- Loyalty
- Skill
- Confidence
- Trust
- Confidentiality

### **GILES V. WESTMINSTER SAVINGS CREDIT UNION [2007] BCCA**

#### ***Refusal to extend fiduciary obligations to this commercial relationship***

**Facts:** PLs invested into a real estate CO. It was orally agreed that each investor would receive a certain return on their investment per annum. After this, some properties were sold without knowledge or consent of the investors or without giving them any profit. PLs claimed that there was breach of a fiduciary relationship because the properties were held in trust.

**Issue:** Were there fiduciary duties owed?

#### **Discussion:**

- Court states that there was no trust created in this situation
- So to find breach of duties of loyalty, would need to find that this relationship fits within elements of a fiduciary relationship
- Court comments favourably of the characteristics identified in *Hodgkinson*.
- While the facts here meet the three general characteristics of a fiduciary relationship described by Wilson J. in *Frame v. Smith*, the facts in the case do not include the critical component of a fiduciary relationship, namely the duty of loyalty, or the obligation to put the PL's interests above all others.
- Here, the PLs were entitled to specific, if rather ill-defined, benefits, but they also knew that the CO would use their money to advance its own ends.
- This was a commercial relationship which the trial judge described as that of debtor and creditor.
- It is not one of those rare occasions where the duties of a fiduciary should be grafted onto contracts that were essentially in the nature of loans.

**Ruling:** No fiduciary relationship found.

### **STROTHER V. 33464920 CANADA INC. [2007] SCC**

#### ***Fiduciary duties may include obligations which go beyond what the parties bargained for.***

**Facts:** D Strother was a partner at Davis LLP. Monarch was a CO that devised and marketed tax shelter investments ("TAPSF"). The structuring of such shelters was a key element of D's expertise. Retainer A between Monarch and Davis expressly prohibited Davis from acting for clients other than M in relation to the TAPSF schemes. Retainer A expired, but M continued as a firm client. In 1996, Minister of Finance announced his intention to amend the *ITA* to defeat the tax shelters. Subsequently, D advised M that he did not have a "fix" to avoid the amendments. By 1997, M's TAPSF business had been wound down and several employees were laid off, including defendant Darc. In early 1998, D was approached by Darc to discuss potential opportunities, and D agreed to attempt to obtain a favourable tax ruling, in exchange for a personal benefit. D later told his partners that he had an "option" to acquire up to 50 per cent of the common shares of a new CO called Sentinel. A favourable tax ruling was issued by CRA to Sentinel in late 1998. Throughout 1998 and into 1999, Davis continued to do some work for M under Retainer B. M executives later claimed they had relied on D to advise if there was a "way around" the amendments that would allow them to resume their TAPSF business. In late 1998, D wrote a memorandum to the management committee of Davis about a possible conflict of interest about acting simultaneously for M and Sentinel/Darc, though evidence later showed his disclosure was incomplete and inaccurate. The managing partner of Davis told D that he would not be permitted to own any interest in Sentinel. In 1999, D resigned from Davis and joined Darc as a 50 per cent shareholder in Sentinel. M learned of Sentinel's tax ruling through word of mouth some four months after the ruling was granted. M sues for breach of fiduciary duty, loses at trial but wins on appeal. D appeals from finding that he put his own financial interest in one client, Sentinel, ahead of his duty to another client, plaintiff M, in breach of his

## 250.2 FIDUCIARY RELATIONSHIPS

fiduciary duty, and from order requiring him to account for and disgorge to Monarch all benefits and profits he received from Sentinel.

**Issue:** Did the Retainer A agreement sufficiently confine the duty of loyalty, such that the duty ended in 1997 after the expiration of the agreement?

**Discussion:**

- The solicitor-client relationship created by retainer was overlaid with certain fiduciary responsibilities.
- Fiduciary duties provided a framework within which the lawyer performed the work and could include obligations that went beyond what the parties expressly bargained for, including the duty of loyalty, of which an element was the avoidance of conflicts of interest.
- There was no excuse for D not to advise M of the successful tax ruling when it was made public in 1998. Both he and Davis failed to provide proper legal advice in breach of the Retainer B.
  - However, M could not succeed in a claim for damages for breach of the K because it did not establish any damages flowing from the alleged breach.
- Nevertheless, D's personal interest in Sentinel did come into conflict with his fiduciary duty to avoid conflicts of interest in performing the contractual obligations assumed under the 1998 retainer.
- Davis and D were free to take on Darc and Sentinel as new clients once the "exclusivity" arrangement in the Retainer A expired.
- Yet D was not free to take a personal financial interest in the Darc/Sentinel venture.
  - Also, D's failure to revisit his 1997 advice in 1998 at a time when he had a personal, undisclosed financial interest in Sentinel breached his duty of loyalty to M.
- M wins with 5 (Binnie for majority) to 4 (McLachlin for minority). But D had to pay disgorgement damages, but only up to a certain point in time, getting to keep most of his money (\$31m out of \$34m originally made)
- Davis was vicariously liable under partnership law for D's acts.
- Note: When drafting retainer agreements, try to limit the duty of loyalty by imposing an expiration date.

**Ruling:** Judgement for M.

### **Summary of Fiduciary Relationships**

- There are existing categories of fiduciary relationships (*Lac*)
- But new categories of fiduciary relationships are possible (*Lac*)
- Fact-based approach to determining if this is a new category of fiduciary (*Hodgkinson*)
- There are three main characteristics for determining new categories of fiduciary relationship (*Frame v. Smith*, cited in *Lac*)
  - Reliance is also a fourth element that Osterhoff thinks is needed.
- It is rare to find this fiduciary relationship in a commercial setting (*Lac*)
- The remedy of restitution does not drive the presence of a fiduciary relationship (*Hodgkinson*)
- Even if a fiduciary relationship is present, not all bad activities done by the fiduciary are a breach of fiduciary duty. They may be negligence, breach of contract, etc. (*Lac*)
- There is a broader range of remedies available for breach of fiduciary duty, than of those available for breach of contract or negligence (*Hodgkinson*)
- Currently, fiduciary relationships focus on protecting non-economic interests. (*M.(K.) v. M.(H.)*)

### **Summary of the Differences between fiduciary relationship in general and trust:**

- Trust relationship will always be a fiduciary relationship, but not every fiduciary relationship will be a trust relationship
- In order to have a trust, there is a need the three certainties, which are not needed in fiduciary relationships in general
- Fiduciary relationship may not involve a "property" interest
- Criteria that have been discussed in the cases dealing with fiduciaries are more open ended than what must be present in order to have a trust.
- So trust is a less elastic concept, more criteria that are rigidly defined than with general fiduciary relationship which has fairly fluid elements.

## CREATION OF EXPRESS TRUSTS

### **Ground Rules for the Creation of an Express Trust:**

Not every transfer of property creates a trust. To create a working trust, the following conditions have to be met:

1. The ST (or TS), TR, and BN have to be of capacity.
2. The trust must be completely constituted. That is, property must be properly transferred into the trust, so that legal title must be in the name of the TR.
3. The trust must meet the three certainties:
  - Certainty of Property (Subject Matter)
  - Certainty of Intent (Words)
  - Certainty of Beneficiaries (Objects)
4. The trust document must meet any particular formalities for type of trust being created

A transfer that does not meet all three of these requirements, will lead to either a resulting trust or an absolute gift.

- Resulting Trust: The property results back to the ST or the ST's estate
- Absolute Gift: The transferee receives the property absolutely. They do not hold it in trust for anybody.

### **CAPACITY**

- Lack of capacity is a way to attack the validity of a trust.

#### CAPACITY OF THE SETTLOR

- ST creating an *inter vivos* trust must have the capacity to enter a contract.
- ST must be 19 years, and be able to understand the terms of the K, and form a rational judgement based on them.
- Elderly and mentally disabled must appreciate the transaction they are entering into.
- ST must not be under federal bankruptcy, and or provincial fraudulent preference or fraudulent conveyance legislation  
Any disposition of property within year of the bankruptcy is void. However this does not set aside transactions to bona fide purchasers - only when given for less than value because it seems as an attempt to prevent creditors.
- If a trust committee has been appointed, then it cannot do anything that benefits themselves

#### CAPACITY OF THE TESTATOR

- TSs must have capacity to enter to a will. Generally speaking, less capacity is needed for a will than a contract (but only slightly). There are four factors to determine capacity:
  - TS must understand that what they are signing is a will and understand where their assets are going
  - TS must comprehend the extent of their property
  - TS must understand claims of others who are excluded
  - TS's decisions must not based on misconception

#### CAPACITY OF A BENEFICIARY

- Can be anyone or any purpose, as long as it meets the Certainty of Objects test.
- Trust for benefit of spouse allows the deferral of taxes if the trust is not tainted by including other beneficiaries
- In the case of a joint partner trust, the trust must benefit only the ST and spouse while they are alive
- Unincorporated associations are not capable of being BNs because there is no separate legal person
- Usually the BN is the main person, but the money can be paid however to the parent or guardian to the benefit of the child (but do not make the parent the BN as the beneficial right should belong to the child).

#### CAPACITY OF A TRUSTEE

- Anyone capable of holding property is generally capable of being a TR.
- Corporations are capable of being a TR.
- Kids and mentally ill are not a good idea. Just saying.

### TRANSFER OF PROPERTY

Assuming that there is a ST/TS with capacity, it then has to be considered whether the trust has been completely constituted. It is critical to the creation of the trust that legal title to the property is put in the name of the TR.

Transfer of title to a TR has the same requirements as any transfer of title. It is grounded in two equitable maxims:

- Equity will not complete an incomplete gift, and the transfer must complete the gift according to CL rules;
- Equity will not aid a volunteer, that is someone who does not give consideration for asset

Normal property law rules apply in determining whether transfer is complete:

- In a Testamentary Trust, the will must be in writing, and two witnesses must be present.
- In an *Inter Vivos* Trust, the ST can transfer directly to TR, via a third party or make personal declaration.
  - Intention is key in *inter vivos* transfers. The question is whether ST intended to settle the legal title on the TR to hold for the benefit of another.
  - But note that a valid will allows the TS's estate to vest in the executor as a matter of a law
- There may also be situations where the law does not permit a transfer:
  - For example, where CO's constitution prevents it from transferring the assets into a trust.
  - If there is a joint tenancy, then there is a need to sever joint tenancy before one can transfer their interest.

Once a trust is completely constituted, the ST cannot revoke the trust unless there is an express power of revocation written into the trust document. In equity, the property now belongs to BN.

- If power of revocation is found, it is less likely for courts to find a trust, but rather, a life estate for the BN.

In case that due to an error the title does not vest in the TR, then the trust is an incompletely constituted trust.

- If the trust is not completely constituted, then someone else (a dashing rogue!) may have a claim against the property intended to be in the trust.
- If (through an omission) the property does not reach TR, there are two ways which the law can compel the transfer:
  - Where trust was set up through a contract with consideration (or under seal), the court may enforce specific performance.
  - Where ST declares an intention to create a trust, court can deem that he has converted himself into the legal owner holding for benefit of others. For this to work, there must be some very compelling evidence of intention.

#### **Three Ways To Constitute A Trust:**

- Direct transfer of the property by the trust's creator to TR
- Transfer of the property to the TR by a third party
- Declaration of self as TR

### **DIRECT TRANSFER OF PROPERTY BY SETTLOR TO TRUSTEE**

In order to vest title to property in TR, the property must be transferred properly from the ST to the TR. To transfer property, it is necessary to comply with the transfer requirements that exist for any particular type of property. This is all pretty straightforward.

- In a testamentary trust, the vesting of the assets in the name of the TR is not a problem because as a matter of law when you die, your assets vest in your personal representative; but this is subject to earlier statement that you must be able to dispose of the property.

Some property is transferred simply by physically transferring it with the appropriate intention.

- Most common example is money.
- Cheques require endorsement and delivery
- Shares may require execution of share transfer document and registration
- Whereas things like land take a whole lot more effort to transfer.

The requirements differ for all types of property, but they must be complied with to ensure that title (and not merely possession) has been transferred to the TR.

### TRANSFERS TO A THIRD PARTY

- On rare occasions, transfer of title actually involves a person other than the owner. For example, it may be that the transfer document must be registered elsewhere. In such a case, the Land Title Office is the third party.
- The law treats the transaction as being completed once the ST has done all that is within his power to divest himself of ownership.

### MILROY V. LORD [1862] HL

***ST must do everything required to fully transfer the property***

**Facts:** Medley wanted to transfer shares to Lord to hold in trust for Lord's daughter Eleanor, who was also Medley's niece. The process to transfer the shares required it to be recorded on the CO's register. This was not done before Medley died. However, a deed effecting the trust was signed and sealed. Dividends from the shares began to flow to the niece. Medley died. Medley's widow and bitch-par-excellence Milroy challenged the trust as not being completely constituted.

**Issue:** Was there a valid transfer of title in the shares to Lord?

#### **Discussion:**

- The rules of transfer and constitution are to be applied most strictly.
- In order to render a voluntary transfer valid, the transferor must do everything that is required in regards to the nature of that property.
- Once a transferor has attempted to make a transaction and failed, the court will not complete the transaction for him by imposing a constructive trust or inferring personal declaration.
- This case is still the law in BC today. See *Re Maitland* [1996] BCCA.
- Shares weren't in the trust, so niece doesn't get them.

**Ruling:** The bitch widow gets the cash.

#### **Exceptions to the First Rule in *Milroy v. Lord*:**

- As per *Re Rose*, equity will step in when the ST:
  - a. Has a clear intention to make a transfer of property
  - b. Has done all that he could do to bring about the transfer
  - c. But the transfer is frustrated by some external event
- *Law and Equity Act*, s.59: Deals with the enforceability of K, such as determining whether a transfer by proprietary estoppel gives an interest to the transferee, or whether a trust has been completely constituted with regards to land.
- *Donatio Mortis Causa* Doctrine: Not applicable to land transfers. Only valid if donor actually dies. But intention to transfer property on deathbed may be enforced if three conditions met:
  - Reasonable and immediate contemplation of death
  - Gift to take place only upon death
  - Dying ST makes some sort of effort (usually failed) indicating intention to get title across.

**Exception to the Second Rule in *Milroy v. Lord*:** The Rule in *Strong v. Bird* allows the Court to rescue a failed voluntary transfer.

### RE ROSE [1952] UK CA

***Once ST had fulfilled his part of the transfer, it is deemed complete.***

**Facts:** In March 1942, ST voluntarily transferred shares to his wife. He transferred them properly and delivered them to her. He told her to re-register the shares. Wife did not do this until June 1943. ST died in 1948. Tax law at the time held that the taxes would be imposed on everything in the estate which was voluntarily disposed of in past 5 years. So if the transfer took place in 1942, when he transferred them, then there are no tax consequences. If it took place in 1943, when she registered them, then taxes galore.

**Issue:** At which point did the transfer take place?

#### **Discussion:**

- The court modified *Milroy* by holding that the Court will impose a trust prior to the actual registration of title if the transferor has done everything they need to do in order to effect the transfer.
- TR must have been put in a position by ST, whereby they can complete the transfer without any assistance from the ST.
- If one executes a document transferring equitable interest, that document (operating and intending to operate as a transfer) will give rise to and take effect as a trust.

## 250.3 EXPRESS TRUSTS: TRANSFER OF PROPERTY

- So, intention to transfer, combined with proper documents will give rise to a trust, regardless of whether the actual transfer and/or registration took place.
- Transfer took place in 1942 upon the transfer to the wife.
- This case is considered to have tempered the orthodox position of *Milroy* in BC today.

**Ruling:** No taxes.

### **PENNINGTON V. WAINE [2002] UK CA**

***Equity will give effect to a transfer if it is against good conscience to not do so, even though equity will not assist the volunteer.***

**Facts:** Aunt wanted to give shares to nephew. Aunt did everything required to complete transfer, but a 3rd party failed to deliver documents to the company to formally complete transfer. On the death of the aunt, the nephew got another block of shares, if these were combined with the first block, the nephew would have controlling interest so really wanted to have interest in first block of shares.

**Issue:** Was the transfer completed?

#### **Discussion:**

- It is important to consider the intention of transferor.
- *Milroy* got it wrong and came up with this statement “the donor will not be permitted to change his or her mind if it would be unconscionable in the eyes of equity vis a vie the donee to do that”
- The principle that equity will not assist a volunteer at first sight looks like a hard edged rule of law ... the principle against improperly constituted gifts led to harsh and seemingly paradoxical results before long equity had tempered the wind to the shorn land
- Basically in time equity stepped in a little more to give some relief to donees
- Court found that there was a valid transfer of shares, thus making it a completed gift.
- It remains to be seen if it is applicable in BC context

**Ruling:** The first transfer is legit.

### **PERSONAL DECLARATION OF TRUST**

A trust may also be constituted by a personal declaration of trust.

- In such case, a ST has publicly declared himself the TR of something for another.
- Essentially, the ST divests himself of the equitable title while retaining legal title for the purpose of holding the property for the benefit of another
  - ST owns Blackacre and states "*I declare that I hold Blackacre in trust for X*".
- A simple Declaration of Trust creates a bare trust, that is one where TR has no duties or obligations, except to hold asset until given instructions from BN to transfer the property. TR will state when BN can do this in declaration.

As easy as this sounds, there can be some issues to sabotage this. If there weren't there would be no need for lawyers.

- There is no issue of whether trust is completely constituted because there is no need to transfer legal ownership
- As far as the certainties are concerned, the main issue is the intention: has the ST actually declared himself to be a TR?
  - No technical words need to be used to create a trust
  - But there must have evidence of intention to become a TR for a third person and create a trust that is binding and irrevocable. This inquiry is very fact-driven
  - BNs need not know that a trust has been created for them (*Glynn*)
  - Even though oral trusts are now enforceable in BC as per s.59 of *Law and Equity Act*, it's better to get a Personal Declaration of Trust in writing.
  - An oral declaration of trust is common in BC, because a formal transfer of property in the Land Title Office automatically triggers the property transfer tax, whereas a private oral declaration of trust is confidential.
  - Court will not “discover” a trust if facts show that what was intended was a gift. Intention to make a gift is not equivalent to declaring oneself to be a trustee for another.

### **GLYNN V. COMMISSIONER OF TAXATION [1964] AU HK**

***A declaration of trust will be sufficient, especially when reinforced by facts that show intention.***

**Facts:** A father, while his two sons were infants, purchased shares in a limited CO and had the certificates issued to himself "as TR for" each of his sons. The certificates were signed by the father "as TR for" the sons. They were approved by the CO and the shareholders' list reflected the father holding as TR. The father continued to collect the dividends, but never

## 250.3 EXPRESS TRUSTS: TRANSFER OF PROPERTY

accounted to his sons or informed them of the trust. The CO share register showed only the father as the owner of the shares. At some later time, the father died. Tax authorities argued that shares were held on trust by the father with a life estate for himself, remainder to the kids.

**Issue:** Are the shares part of the father's estate or did he create a trust for the sons despite them not knowing of it?

**Discussion:**

- The main issue is that the sons were not aware of the existence of the trust.
- Many people knew about the trust, which gives lots of evidence of personal declaration
- Father used the dividends money on sons. He was simply TR and ST of trust.
- BNs need not know that trust is created for them in order for a Personal Declaration of Trust to be valid.
- Retention of dividends does not negate trust, and does not lead to the creation of life estate for the father.
- If BN never received payment, that could mean that TR was in breach of trust.
- Transfer was a valid declaration of trust. Father held shares in trust for kids (no life estate for himself).
- A combination of facts and words will be sufficient to demonstrate intention for a personal trust.

**Ruling:** Another failed attempt by the tax man.

### COVENANTS IN FAVOUR OF VOLUNTEERS

Transfer of property to the someone without any consideration is treated as a gift. For the transfer to be successful, the gift has to be successful, according to the three elements.

**Successful Gift:** There are three necessary elements:

1. Intention
2. Acceptance
3. Delivery

- In the case that these three elements are not fulfilled, then the gift will fail, and the trust as a whole will not be constituted.
- The courts are not likely to intervene and complete the gift, based on the maxim that: Equity will not assist a volunteer.
- Therefore, when ST promises to settle funds on trust for a BN, but does not convey that property to the TR, and does not receive valuable consideration from the BN, equity will not normally compel the ST to carry out his promise.
- To see if the gift was completed, one must look at the facts
  - Delivery is sufficient for small-value gifts
  - Donor must have done everything that they have to do to transfer the gift

**“Equity will not assist a volunteer” Exceptions:**

- *Donatio mortis causa*
- The rule in *Strong v. Bird*
- **Covenant in Favour of Volunteers:** If the promise to transfer property is contained in a covenant, the courts may compel the performance of the promise. Covenant is a promise contained in a signed document under seal.
  - If BN is party to the covenant, then BN can sue for damages at common law.
  - If TR (but not BN) is party to the covenant, then common law may recognize TR's right to sue by virtue of the TR being a party to the covenant.
  - Contract law provides a basis for this action.

### STRONG V. BIRD [1874] UK

***When an incomplete gift is made during the donor's lifetime and the donor appoints the would-be recipient as executor, the vesting of the property in the donee as executor may be treated as completion of the gift.***

**Facts:** Stepmom loaned money to D. She later forgave the debt orally without receiving any consideration. Upon her death, D was named the executor of her estate. Legal title in her estate was vested to D, which made him both the creditor of the debt and the debtor.

**Issue:** What to do? Oh noes!

**Discussion:**

- In law, Bird ought to pay the debt. However, the Court applied the 4 conditions found in *Cope v. Keen* in which the Court was willing to accept that a valid transfer had been made:
  1. TS made purported immediate gift in her lifetime



## 250.3 EXPRESS TRUSTS: TRANSFER OF PROPERTY

2. TS failed to make the gift to the donee legal in an *inter vivos* transfer, whether by lacking consideration, or not having the gift under seal.
    - The intention of the stepmother was that she wanted to forgive the loan formally and complete the transaction
  3. TS's intention did not change before death:
    - When TS died, she still had the intention to donate the property
  4. Intended legal recipient became legal owner:
    - The Donee (D) became legal owner (i.e. executor of Stepmom's estate)
- As a matter of law, the debt is now extinguished as D became executor.

**Ruling:** Ruling for D.

### RE HALLEY ESTATE [1959] NFLD SC

**For *Strong v. Bird* to apply, the legal title and the equitable title must be given to the same person.**

**Facts:** Donor had indicated intent before his death to give a gift to his grandchild. He wrote a letter to investors mutual fund ltd. right before went into hospital, and wanted to deed the shares to the girl so she could use them for educational purposes. His daughter was to be the TR. But he kicked the bucket beforehand. It was argued that because mother was appointed executrix of Halley's will, the rule in *Strong v. Bird* applied.

**Issue:** On the donor's death, had a valid gift been made to Karen (grandchild)?

**Discussion:**

- The rule of *Strong v. Bird* centres around the idea that the intention of the TS to give the beneficial interest to the executor is sufficient to countervail the equity of the BNs under the will, the TS having vested the legal estate in the executor
- But for this to work, the person with the legal estate must also be given the beneficial interest
- Here though the beneficial interest is to go to the grandchild; so rule in *Strong v. Bird* doesn't apply
- But this case was a properly constituted trust; the shares then are not vested in the executors and they form no part of the estate.

**Ruling:** Ruling for D.

### MORDO V. NITTING [2006] BCJ

**The one to rule them all.**

**Facts:** PL was son of testatrix, and D Nitting was PL's sister. Prior to their deaths, PL's parents expressed intention to leave all of their assets to D. They feared PL would challenge any will favouring D, and thus took steps to ensure none of their assets would pass to their estates upon their deaths. By time of mother's death, all parents' substantial assets were held either jointly with D or in trust for her benefit. Some jewellery was subject of deed of gift in D's favour. PL challenged dispositions on basis that they were testamentary in substance and result of undue influence on part of D. PL also sought reimbursement of cost of car and chauffeur he provided for his mother prior to her death. PL was wealthy businessman and sought reapportionment on moral grounds only. PL's net worth was many times that of defendant's net worth, and he was estranged from family for many years. In short, he was a bit of a bastard. D enjoyed close relationship with parents at all times and cared for parents.

**Issue:** How much more of an ass can this guy be? And with a name like that?

**Discussion:**

- None of mother's assets passed by her will, and no assets thus in estate
- Trust respecting the warehouse in favour of D was formed by valid act of transfer and was properly constituted as inter vivos trust
- No undue influence of mother by sister. And transactions involving trust, condominium, joint accounts and deed of gift not invalidated by undue influence
- Trust not testamentary in nature
- Plaintiff not entitled to be reimbursed for driver and car provided to mother.
- Items were unconditional gift, as mother's will was consistent with moral obligation to provide for daughter
- PL had no claim on moral grounds to share in mother's estate.

**Ruling:** Action dismissed.

### THE THREE CERTAINTIES

Transfer of property alone is not sufficient to create a trust. Once it has been determined that there has been a valid transfer, there then needs to be determined if the three certainties have been met. They are as follows:

- Certainty of Subject Matter (Property and Portion)
- Certainty of Words (Intention)
- Certainty of Objects (Beneficiaries)

### CERTAINTY OF SUBJECT MATTER

**Certainty of Subject Matter:** Subject matter must be described with enough certainty that it is legally ascertained or ascertainable at the time the trust is created. There are three components to this:

- Property: Trust must have property that can clearly be identified as its subject matter.
- Portion: The terms of the trust must define the portion each BN is to receive, or must vest TR with the discretion to decide portion.
- Interest: The quality and type of interest given to each BN must be made clear, and not repugnant to public good.

### CERTAINTY OF PROPERTY

- All property is capable of being the subject matter of a trust.
- The word “property” includes all equitable and legal interests in realty or personalty.
  - Equitable interest under a trust is property and is capable of forming the subject matter of a further trust.
  - Benefit of a contract is a property right capable of forming the subject matter of a trust (i.e. rental income from a commercial lease)
- Subject matter must be properly described so as to be ascertained or ascertainable
- The subject matter is ascertained when it is a fixed amount or a specified piece of property.
- It is ascertainable when a method by which the subject matter can be identified is available from the terms of the trust or otherwise.
  - “Residue” of an estate is ascertainable as "the estate's assets minus debts and legacies"
- If the trust is established by will so that property will go into a trust upon the death of the TS, there is no uncertainty. The only issue is whether the TS actually owned the property.
- Future transfers into an *inter vivos* trust the trust must be made clear.

**Three ways to assure the Certainty of Property:**

1. Provide very specific reference to specific piece of property.
2. Provide reference to specific fund or a fixed amount (or proportion) in a specific fund.
3. Provide a formula to determine the amount in trust.

Problems arise in the following situations

- Uncertain wording, such as “*bulk of my estate*”; “*bulk of \$50,000*”; “*3/5 of my net estate upon my death*”
- The trust property is to be added in the future
  - A trust that is to be made up of “future property” can be created only if that property is legally ascertainable
- Personal declarations of trust

### RE BEARDMORE TRUST [1952] ON HC

***A trust can be created with "future property" only if that property is legally ascertainable***

**Facts:** ST had entered the agreement with his wife and the trust CO in connection with their separation and para.15 provided that the ST “hereby grants, transfers and assigns unto the TR (the said grant, transfer and assignment to take effect up on the husband's death and not at an earlier date) an amount or other assets equal to 3/5 of the husband's net estate.” Para.15 further provided that upon the death of the wife or her re-marriage the settled funds should be held for the benefit of their two children. The wife had died and the husband and his two adult children verified by affidavit that the agreement had been performed by the ST and his wife. The ST alleged that the trust failed for uncertainty of subject matter.

**Issue:** Was the description of 3/5 of future estate sufficiently certain to create the Certainty of Subject Matter?

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

### Discussion:

- In this case, "net estate" was not a legally ascertainable amount
- Therefore, "3/5 of my net estate" was not legally ascertainable.
  - "Residue" is an ascertainable amount - ∴ "3/5 of the residue of my estate" would have been okay
  - Alternatively, husband could have declared and constituted a trust with a nominal amount (i.e. \$5) and then entered into a Covenant to transfer 3/5 of his estate to the trust upon his death.
- Thus the subject matter of the trust was not described with sufficient exactness to permit that such matter be ascertained at the time the trust was created.
- The description of the trust in para.15 was not one to permit the identification of the trust res, and no valid trust was created and para.15 was, therefore, void.
- No certainty of subject matter, therefore deed not valid as *inter vivos* trust.

**Ruling:** Para.15 is void.

### CERTAINTY OF PORTION

- The portion of the property to be received by each BN must be made clear, or the TR must be vested with the discretion to decide each BN's portion.
- If the quantum of the beneficial shares is uncertain, then a trust will fail and the property will result to the ST the estate.

#### **Three ways to assure the Certainty of Portion:**

- Create a fixed trust by setting out specific amounts for each BN (i.e. B receives 10% of capital of trust)
- Include a formula for calculating amount each BN to receive
- Set up a discretionary trust and give the TR discretion to determine the amounts

Problems arise in the following situations:

- When BNs are given a Power of Selection, where they can choose what property they get
- When TR's Power of Appointment is not coupled with Duty to Appoint, that is TR has discretion to distribute, but is not obligated to distribute. It is not clear in these situations who is to get what.

### BOYCE V. BOYCE [1849] UK

**Portion of property going to each BN must be clear, or TR must be vested with the discretion to decide each BN's portion.**

**Facts:** A TS left his three houses to his widow in a trust for his daughters M and C. Daughter M had the bare power of selection, allowing her to pick one house of her choice. The remaining 2 houses would then go to his other daughter C. However, Maria died before choosing the house. The court held that C's gift depended on M's choice and therefore the gift failed as it was not possible to identify which two houses should be given to Charlotte.

**Issue:** What interest does C have in the estate? Is it acceptable to give the power of selection to a BN?

### Discussion:

- M had a bare power of selection. She could choose what portion of the trust property she received, and therefore, what portion of the trust property C was to receive.
- Since M was now dead, she could not be forced to choose a house. Therefore, no TR could effect the transfer mechanism that the ST had intended.
- Furthermore, the clause allowing M to choose a house was discretionary. She was under no obligation to choose a house.
- Where a BN has a discretionary power of selection that is not coupled with a duty of selection, the courts will not step in.
  - But if there had been a duty to select, then the court would assume that BNs receive equal amounts of the property.
- The transfer was thus held to be invalid due to lack of certainty. Because M never chose her house, it's not clear what houses C should get.
- Trust failed for uncertainty of subject matter. Resulting trust arose and the houses resulted back to ST's estate.

**Ruling:** Trust fails.

How to deal with the situation in *Boyce*:

- Expressly specify which houses go to which daughter
- Impose upon TRs an obligation to distribute trust property to BNs
- When giving BNs a discretionary power of selection, it is wise to provide for contingencies
- Always have a provision for ultimate distribution (default clause) to ensure that property doesn't result back to ST or ST's estate, and thus saddle the estate with tax, creditor, or *WVA* claims.

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

### DOCTRINE OF REPUGNANCY

- The Doctrine of Repugnancy is invoked by trust conditions that unduly interfere with or restrict the enjoyment of an absolute interest.
- The description of the trust property must not be repugnant in that it confers conflicting rights to different BNs
- “*I give an absolute interest in my estate to A, but upon A's death, the estate is to pass to B.*”
  - Absolute gifts are paramount. You cannot attach conditions to an absolute gift.
- “*Bequeath \$100,000 to A outright in order that she may help B through law school*”
  - Presumption of absolute gift (not trust) because of the wording “*may*” and not “*shall*”
  - The transfer of \$100,000 is not necessarily going to A so that she will help B
- “*Bequeath and give \$50,000 to C, and on her death, I direct her to distribute the sum among her children as she sees fit*”
  - Court could say that “*bequeath and give*” indicates an absolute gift (not trust) and that everything following that clause is repugnant.
  - More likely that C will be seen as having a life estate in the \$50,000, so she is both TR (for the kids) and BN (for herself as life tenant)

#### **Dealing with Repugnancy:**

- Give a Life Estate. If the intent is for A to benefit from the estate while A is alive, but the remainder to pass to B, then the formulation “*To A for life, with remainder to B*” is the most fitting.

### RE WALKER [1924] ON CA

***It is impossible to give an absolute interest in property that is coupled with an obligation to give that property to a third party***

**Facts:** John Walker gave and devised to his wife all his real and personal property (except certain portions which he disposed of specifically), “and also should any portion of my estate still remain in the hands of my said wife at the time of my decease undisposed of by her such remainder shall be divided as follows ...” No power to dispose of by will was given; and no other provision of the will required attention. The widow survived the TS for 19 years, and died in 1922, having first made her will, in which she devised and bequeathed all her estate to her executors upon certain trusts. Her executors, finding that her apparent estate included part of what she had received under her husband's will, desired the opinion of the Court. The claimants under J.W.'s will seek to have it declared that such of her estate as was received from J.W. should not be given to the executors but be divided in the manner provided for.

**Issue:** What is the nature of the wife's interest in the husband's estate?

#### **Discussion:**

- The gift to the wife on a proper construction of the will was an absolute gift and the limitation placed on the property undisposed of at death is invalid as being repugnant to the original grant.
- Other named beneficiaries had no interest in the husband's estate. Trust for the other named beneficiaries was void for uncertainty of subject matter.
- If an absolute interest in the husband's estate had vested in the wife after the husband's death, then only she could decide what happened with the property after her death.
- The transfer was void for repugnancy because it attempted to transfer an absolute interest to the wife that had conditions attached to it.
- Therefore, the trust was void for uncertainty of subject matter:
  - It was not clear what the third party BNs will actually receive, since the wife was now the absolute owner and could do whatever she wanted with the property.
- Controversial decision because according to the rules of construction, one is supposed to read the whole document, as opposed to simply ending the inquiry after seeing the word “gift,” which the Court apparently did here

**Ruling:** Trust is void and wife gets the swag.

### CERTAINTY OF WORDS (INTENTION)

- To satisfy the certainty of intention requirement, the Court must find an intention that the TR be placed under an imperative obligation to hold property on trust for the benefit of another.
- Thus what is needed is the intention to create a trust relationship. ST must express intention for
  - Another person to hold property on trust, or
  - For themselves to hold property on trust.
- The language or conduct of the ST must be sufficient to express this intent:
  - The language need not be technical, so long as intention to create trust can be found/inferred. That is there is no need to say "*I give Blackacre to X to hold in trust for Y*"
  - The Court will look at both the words and the document as a whole, considering the nature and manner of disposition.
  - Conduct, or written/oral evidence is admissible to determine intent.

If the Court finds that no certainty of intention exists:

- If ST intended "TR" to receive outright gift; then the "TR" will take the property absolutely rather than as TR. The rules determining ownership in this situation are those that govern gifts, not trust law.
- If ST intended "TR" to have a power of appointment over the property; then the persons entitled in default of exercise of the power will take the cake. In this situation, the rules that are relevant are those related to powers, not trusts.

### PROBLEMS ARISING IN DETERMINING INTENTION

**Precatory Language:** An expression, a wish, or advisory suggestion which does not have the force of a demand or a request which under the law must be obeyed. Thus "precatory words" in a will or trust would express a "*hope that my daughter will keep the house in the family*," but do not absolutely prevent her from selling it. Other examples are: "*in full confidence that she will use it*" "*in further belief*" "*further wish that*" "*hoping that*" "*in expectation that*"

**Precatory Trust:** A non-trust that results when some moron uses precatory language. This is not enforceable.

- Precatory Language.
  - Precatory words only impose a moral obligation, not a legal obligation. No intention. No trust.
  - The words must convey more than a moral obligation or mere wish. Mere wishes do not impose a legal obligation. Precatory words raise a presumption of an absolute gift (*Hayman v. Nicoll*)
- Intention Revoked
  - ST makes declaration of trust which complies with requirements of three certainties, but then manifests a contrary intention before constitution. No trust arises, even if title is transferred to the potential trustee. By the time that title is transferred, the requisite certainty of intention has been withdrawn.
- Personal Declaration of Trust
  - It may be unclear from a Personal Declaration whether the ST actually intended to create a Trust, and hold his property for another.
  - See *Glynn v. Commissioner of Taxation* where a father's purchase and signature to shares "as TR for his sons" was a valid personal declaration of trust, in that it displayed an intention to hold the shares in trust for his sons.
- Joint Tenancy
  - A joint tenant cannot dispose of his interest via will. If A and B hold property jointly, then upon the death of A, B's interest subsumes A's interest via the right of survivorship. A cannot dispose of his interest by will.

In her will, X leaves all her property to her spouse and states that her spouse is to "*pay my debts - and raise my family*." Must the spouse hold the property in trust for the children?

- If the language indicates that children are to take their shares upon reaching 21, then spouse gets life estate, with remainder to be held in trust for the children in equal shares.

Y leaves all his property to his spouse and states that if the spouse dies soon after Y does, the spouse is to leave all her property "*to my people and your people*." Is there certainty of intention, such that the spouse must hold the property in trust for the two families?

- If the language is precatory and attempts to direct how spouse should deal with all of her property, then spouse gets an absolute gift of Y's property with no trust arising.
- If the language is obligatory and only directs spouse to deal with Y's property, then spouse gets life estate in Y's property with remainder to be held in trust for the families.

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

### **NICOLL V. HAYMAN, HAYMAN V. NICOLL [1944] SCC**

***Precatory language creates the presumption of an absolute gift. Documents are to be read as a whole.***

**Facts:** Testatrix (who was also a dominatrix) drafted a will. In her codicil, she bequeathed money to her daughter Ina, "*in full confidence that she will dispose of the same in accordance with the wishes I have expressed to her.*" Ina died without having disclosed the trust and apparently without carrying out her mother's wishes, whatever they may have been. Testatrix also died. Her brothers and sisters then brought an action for a declaration that Ina's administrator held the money upon a resulting trust for the Testatrix's kinky estate.

**Issue:** What was the nature of Ina's interest in the testatrix's estate? Was there a communication and acceptance of a proper trust?

**Discussion:**

- The majority decision was that there was an intended trust, and that it must also consider the relevant circumstances in order to establish intention.
  - It found that it was never intended for the money to be for the daughter's benefit.
  - If it was meant to be for the daughter, why put in the words "in full confidence" - it must have meant something else.
- But the dissent is now more popular:
  - Testatrix's will did not create a semi-secret trust, because the testatrix had used precatory words, while other parts of the will demonstrated that she knew how to create an express trust by imperative language.
  - Therefore, Ina took absolutely, and did not hold the money on trust for the testatrix's estate.
- Precatory language creates the presumption of an absolute gift. Unless the Court can find evidence of:
  - Intention by the Transferor to establish a trust and
  - In the case of Secret Trusts, communication and acceptance by the TR of the obligation to hold the property in trust for others.
- To give effect to the real intention of the TS as that is to be gathered from the testamentary instrument as a whole, regardless of any particular words used or any rule related to them.

**Ruling:** There is no trust.

### **GLASSPOOL V. GLASSPOOL ESTATE [1998] BC**

***Courts will consider the facts of the case to judge the intent of the settlor.***

**Facts:** An application by PL John Glasspool for a declaration that he was entitled to mineral rights. Lawrence Glasspool, PL's father, died on January 12, 1996. In his will he left his entire estate to his companion, the Defendant Everett. The will did not mention PL. L's estate included a one-quarter share of mineral rights over property that had been left to him by his mother Ethel. He had been receiving royalties from these rights since his E's death in 1992. L had divorced when PL was six years old and had little contact with him. PL had been living on social assistance since 1974. He had no contact with L after that time. PL received \$1,400 from his E's estate. E had asked L to leave his share of the mineral rights to PL, and L agreed. E drew up a new will in 1985 dividing the mineral rights between L, his brother, and the brother's two sons. Her old will had indicated that the rights would be left to PL.

**Issue:** Was a valid secret trust had been created between E and L, requiring L to leave the mineral rights to PL?

**Discussion:**

- Although there was no mention of a trust in the E's will, the existence of a trust was not inconsistent with the will.
- Given that her original will had left all the mineral rights to PL, it was reasonable to infer that E had removed PL as BN because she was satisfied that she had an enforceable agreement with L that the latter would leave PL his share.
- The evidence indicated on the balance of probabilities that the E intended to create a trust.

**Ruling:** The trust is there.

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

### CERTAINTY OF OBJECTS

In order for a trust to be valid, the BNs must be described in clear enough terms that the trust obligations can be performed.

- If the court cannot enforce the terms of the trust, then the trust will be invalid.
- If a trust fails for lack of certainty of objects, the property will result back to the ST or the ST's estate.

#### **Two Components to the Certainty of Objects Requirement:**

- A Trust must be in favour of either persons or charitable purposes - not non-charitable purposes are allowed.
- The class of BNs in a private trust for individuals or COs must be described in sufficiently certain terms that the trust can be performed.

Certainty of objects is required for the following reasons:

- ST wants to make sure his intentions are being carried out properly.
- TR must know the BNs so they can fulfill their obligations properly.
- BN wants to ensure that he receives his interest.
- Court needs to be able to determine if the TR has breached their obligations.

### PERSONS AS BENEFICIARIES

#### **Main Issues in a Private Trust for Persons:**

- Who are the BNs?
- What benefits they are entitled to?
- How do they receive their benefits?

#### **Consider Four Factors:**

- What kind of trust is it?
- Is there linguistic certainty?
- What definition of ascertainability is required? Class ascertainability or Individual ascertainability?
- Can the trust actually function in practice?

### KIND OF TRUST

**Dispositive Power:** Power to distribute the assets in the trust to the BNs.

**Administrative Power:** Power to deal with the administrative issues of the trust, such as appointment of new TRs, taxes.

- The determination of what sort of trust this is will depend on the degree of dispositive powers the TR has.
- The type of trust will determine the definition of ascertainability required.
- There are four kinds of trusts:
  - Fixed/Absolute Trust: TR has no discretion in exercising his power. He must always do as the trust says.
  - Discretionary Trust: TR must distribute the capital/income, but has a discretion to the amount. Still, at some future time he must distribute the balance of the capital. If he fails this, the court can compel him to do thus.
  - Fiduciary Trust / Power of Appointment: TR may distribute to BN, but he has discretion as to persons and amounts. If he fails to do so, there will usually be a clause that the property goes to X.
  - Bare Trust: The full discretionary power is given to some individual who is not a TR, which gives them the control without the obligations of the TR. The court can't touch this.

### LINGUISTIC CERTAINTY

- Linguistic certainty is based on the words of the trust document.
- One must define the BNs with sufficient clarity, so that a TR can apply either the Class Ascertainability test or the Individual Ascertainability test to determine who the BNs are.
- One must use terms so that their definition can be arrived at. A definitions section in the trust can come in handy.
- If the trust document does not have linguistic certainty, the transfer is void and the property will result back to the ST.

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

LINGUISTIC CERTAINTY	NO LINGUISTIC CERTAINTY
<ul style="list-style-type: none"><li>• "To my three children: Jack, Jill, and John"</li><li>• "To all of my employees and their dependents and relatives"</li></ul>	<ul style="list-style-type: none"><li>• "to my children" - query whether "children" includes "stepchildren"</li><li>• "to my family"</li><li>• "to all of my colleagues"</li><li>• "to those to whom I owe a moral obligations"</li></ul>

### **Avoiding Linguistic Uncertainty:**

- If possible, use names. However, this closes the class of BN, so it may not be applicable in all circumstances.
- Make sure that the TR can make a complete list of all BNs for Class Ascertainability.
- Make sure that the TR can make a list of characteristics of a BN for the Individual Ascertainability.
- Don't use vague language when drafting a trust
- If possible, put the powers into the proper categories.
- Include definitions of the terms that you use

**Conceptual Certainty:** The term is clear enough so that a certain definition can be arrived at. This is different from the Evidentiary Certainty as described below.

**Evidentiary Certainty:** A question of fact to be considered in the Ascertainability Test. Is there evidence that the claimant can show to prove a connection to the term? Evidentiary uncertainty might exist as to whether a particular individual is a BN, but this does not void the trust for lack of linguistic certainty.

### **McPHAIL V. DOULTON (BADEN'S DEEDS TRUST NO. 2) [1970] HL**

***Courts will take the practical approach in determining linguistic certainty, reverting to the dictionary when needed. The onus is on the claimant.***

**Facts:** Mr Betram Baden executed a deed settling a non-charitable trust for the benefit of the staff of Matthew Hall & Co Ltd and their relatives and dependents. The *inter vivos* trust had the clause: "TR shall pay income, at absolute discretion, for benefit of present and former officers and employees of company, any of their dependents and any of their relatives". After the death of the TS, the validity of the trust was challenged, averring that the objects were insufficiently certain. After the first case determined the test, the question then becomes that of linguistic certainty.

**Issue:** Do the words "dependent" and "relative" have sufficient linguistic certainty?

#### **Discussion:**

- Court takes practical approach to determining linguistic certainty, and as a result individual ascertainability.
- Linguistic certainty in this case was established based on accepted definitions of "dependent" and "relative" (that is descending from a common ancestor).
- If there is linguistic uncertainty, then trust will fail.
- Evidentiary uncertainty might exist as to whether a particular individual is a BN, but this does not void the trust.
- When determining whether an individual is a BN in a discretionary trust, the onus is on the claimant to prove that he is a BN with evidentiary certainty.
  - On the facts of this case, a person is either a relative from a common ancestor or not. The burden is on the BN to prove that they are a relative.

**Ruling:** Something something.

### **ASCERTAINABILITY**

Ascertainability allows the TR to determine who is (or is not) a BN.

**Ascertainability Tests:** The applicability of the tests is different depending on the type of trust:

**Class Ascertainability:** TR must know each and every BN, so the TR can make a complete list of all BNs. This is also called the "List" Test.

- Example: "all grandchildren and companies owned by the TS"
- This is needed for fixed trusts, where the TR has not discretion in the use of power.

**Individual Ascertainability:** TR is able to say with certainty whether "any given individual is or is not a member of the BN class." This is also called the "In-Out test."

- This is needed for fiduciary trusts and discretionary trusts.



## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

The reason for the distinction between different tests applying to different trusts:

- A fixed trust is one in which the TR have no discretion to decide who the BNs are or in what proportions they are to take; the shares or interests of the BN are specified in the trust instrument or are ascertainable.
- If the TRs are to perform their duties, they must know the identity of each and every BN.
- Example: A trust of \$10,000 “to the members of my family in equal shares” is a fixed trust. Unless the TR know who all the family members are, they cannot distribute equally.

### **MCPHAIL V. DOULTON (BADEN’S DEED TRUST NO.1) [1970] HL**

**Only fixed (absolute) trusts need class ascertainability, every other trust can rely on the In/Out Test**

**Facts:** Mr Betram Baden executed a deed settling a non-charitable trust for the benefit of the staff of Matthew Hall & Co Ltd and their relatives and dependents. The *inter vivos* trust had the clause: “TR shall pay income, at absolute discretion, for benefit of present and former officers and employees of company, any of their dependents and any of their relatives”. After the death of the TS, the validity of the trust was challenged, averring that the objects were insufficiently certain.

**Issue:** Who were the BNs, and what type of trust was created?

#### **Discussion:**

- When the trust document imposes a Duty to Appoint in conjunction with a discretionary Power of Appointment - this creates a discretionary trust.
- In this case, the words “shall” created a trust because it imposes a legal obligation upon the TR to hold the property for the benefit of the BNs
- But the words “at absolute discretion” imposed a discretionary power to distribute
  - Courts do not need to enforce the selection of BNs for distribution because TR is not compelled to distribute.
  - The Court is only concerned about whether any one selection has been properly made.
- So, this is a discretionary trust.
  - In a such, the TRs are obligated to use reasonable tests to determine if someone is or is not part of the class of BNs.
- In/Out Test is sufficient: A discretionary trust is therefore valid if it can be said with certainty whether any individual is or is not a member of the class, and does not fail simply because it was impossible to ascertain every member of the class
  - There is no need for TR to be able to compile a complete list of BNs.
  - TR can make inquiries into whether a particular individual is a BN, and then distribute according to that individual's needs
- If TR fails to categorize, Court can enforce discretionary trusts in a manner best calculated to give effect to ST’s intentions by using the In/Out test
- Dicta: if linguistic certainty and individual ascertainability exist, but the list of Bs is so hopelessly wide, then the impossibility of administration may void the trust.

**Ruling:** This is a discretionary trust and the individual ascertainability test appropriate.

**Rule 10, BC Civil Rules:** Allows TR to make an application to Court for direction as to who the BNs are.

### **JONES V. T. EATON CO. LTD [1973] SCC**

**Canada accepts the individual ascertainability test.**

**Facts:** ST in his will bequeathed to the members of the T. Eaton Quarter Century Club in Toronto a sum to be paid out of the residue after the death of his wife which occurred in 1965. The clause read as follows: “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 Eaton Club, to be used by them as a trust fund for any needy or deserving Toronto members of the Eaton Club as the said Executive Officers in their absolute discretion may decide.” The decision of the lower court finding that the bequest was void on the ground of uncertainty was appealed to the ONCA which reversed the decision finding that the term “needy or deserving” had to be interpreted in conjunction and that in view of the fact that the bequest was included in a clause where all other purposes were charitable it showed a clear charitable intention of the deceased. The respondents appealed to the S.C.C.

**Issue:** Was this a trust for charitable purposes? Also, what ascertainability test should be use?

#### **Discussion:**

- The trust is charitable, but in case if it was not, the court goes on to wax about certainty of objects, considering what would be necessary to determine whether the class of needy or deserving was sufficient enough.
- The ST’s purpose was sufficient to qualify it as a charitable trust.

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

- So, unlike in personal trusts, certainty of objects was not necessary to establish the validity of the disposition.
  - However, certainty of objects is relevant to the actual distribution of the property, as without it the TR cannot determine who is to receive trust property.
  - If linguistic uncertainty exists in a charitable purpose trust, then the Courts will exercise the *cy pres* doctrine by redrafting the trust deed to ensure that the charitable purpose is met.
- Individual Ascertainability (in/out) test in Canada is acceptable for charitable purpose trusts.
  - But note that the SCC has not made it clear whether Individual Ascertainability (in/out) test is also good for private trusts for people.
- The fact that the possible BNs did not include every member of the public but only the TO members of the Eaton Club did not invalidate the charitable trust.
- Finally, the words "Toronto members" had to be taken as meaning those members of the association who were employed by the CO in Toronto at the time they became members and who had spent 25 years or more working for the CO.
- Based on the combination of the above factors, sufficient certainty of objects was established, such that distribution of trust property was possible.
- SCC also accepts "poor relations/poor employees" exception for charitable purpose trusts.

**Ruling:** The appeal was dismissed.

### ADMINISTRATIVE WORKABILITY

- Despite having both linguistic certainty and ascertainability, a trust may still fail if the definition of potential BNs is so wide as to be administratively unworkable.
  - Example: "*Trust for members of Greater London*"
- Workability is driven, to an extent, by the type of trust. While there are generally no problems of workability with fixed/bare/fiduciary trusts, there may be a problem of workability with discretionary trusts.
- This is because duties of a Discretionary TR are more stringent than the duties of a Fiduciary Trustee.

### RE HAY'S SETTLEMENT TRUSTS [1981] UK CA

#### *Administrative workability is at issue with discretionary trusts*

**Facts:** ST created a trust which held that the TR will "*hold property in trust for the entire world with some exceptions.*" Fucking brilliant. TRs executed a second deed which held that "*TRs were to stand possessed of the trust funds for such persons as chosen by the TRs.*"

**Issue:** Were the trusts, both the initial trust by ST, and second deed, workable?

#### **Discussion:**

- The Court found that the initial trust created by the ST was a fiduciary trust:
  - Linguistic certainty was present in "the whole world with some exceptions"
  - Appropriate ascertainability test was individual ascertainability: Does this claimant fall under one of the exceptions? If not, then he is "in" the class of potential BN
  - The court then went on to list the duties of the fiduciary TRs in appointing BNs, as in the chart below
- The Court found that the second trust created by the TR was a Discretionary Trust
  - The Court found that the Fiduciary Trust created by the Settlor only imposed a power of appointment
    - In this case, there was no Power of Delegation given by the 1st trust
    - The TRs were required to personally administer the fiduciary trust.
    - Therefore, the 2nd Trust set up by the TR was void because it held that the TRs had delegated their power - which they were unable to do, by the terms of the 1st Fiduciary Trust.
  - The court then went on to list the duties of the fiduciary TRs in appointing BNs, as in the chart below
- Because a Discretionary TR must essentially compare all potential BNs in order to establish priorities based on their individual needs, the class of BNs cannot be so wide as to be hopelessly unworkable.
  - Therefore, it is possible that a discretionary trust with the words "to the whole world with some exceptions" may have been administratively unworkable based on *Baden No. 1*
- On the facts of this case, even if the TRs had been permitted to set up a Discretionary Trust in order to distribute the property of the 1st Trust, it is arguable that the 2nd Trust would have failed because it would have subsumed the initial definition of BNs: "to the whole world with some exceptions".
  - While this definition would have been sufficiently certain and workable for a Fiduciary Trust, it is likely that it would have been administratively unworkable in the 2nd Discretionary Trust.

**Ruling:** First trust is OK, but the second fails.

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

DUTIES OF A FIDUCIARY TR IN DETERMINING BNS	DUTIES OF A DISCRETIONARY TR IN DETERMINING BNS
<ul style="list-style-type: none"><li>• <u>A Fiduciary TR is under no obligation to distribute</u>, as there is no duty to appoint.</li><li>• Therefore, the Court cannot compel a Fiduciary TR to distribute the trust property.</li><li>• This differentiates Fiduciary TR from Discretionary TR, who are under a duty to appoint, but have a discretionary power of appointment.</li><li>• In deciding who to give to and how much to give, the <u>TR must have considered the range and class of potential BNs</u> and must have considered exercising their power of appointment</li><li>• However, the TR does not need to worry about "heading off" potential claimants</li><li>• The TR need only make distributions by considering the <u>merits of a particular claimant</u></li><li>• There is no need to compare a claimant with other claimants.</li><li>• Therefore, there is no need to compile a complete list of objects.</li><li>• Therefore, the <u>basic "in-out" individual ascertainability test is sufficient</u>.</li></ul>	<ul style="list-style-type: none"><li>• <u>Discretionary TR have a duty to appoint</u> along with their power of appointment.</li><li>• The Discretionary TR <u>have a discretion as to who, when and how much</u>.</li><li>• While the Individual Ascertainability test allows a Discretionary TR to simply say "in-out" to any potential claimant, the <u>duty to appoint adds another layer to the Individual Ascertainability test for a Discretionary TR</u>.<ul style="list-style-type: none"><li>• The Discretionary TR must identify claimants by class and category.</li><li>• The Discretionary TR must then make inquiries about the classes of BNs, and the individuals within those classes.</li><li>• The Discretionary TR must then decide on some priority as between the classes and categories of BNs</li><li>• Then, the Discretionary TR must distribute trust property within the guidelines that they have established.</li><li>• This test thus <u>requires a Discretionary TR to compare potential BNs</u>.</li><li>• So while the Discretionary TR need not list all BNs, the TR must still be aware of all potential BNs.</li></ul></li></ul>

## TRUSTS FOR CHARITABLE PURPOSES

### GENERAL PRINCIPLES

- Purpose trusts are for the benefit of purposes, not people. No shit, eh?
- There are no different rules for purpose trusts in so far as the first two certainties are involved
  - Purpose Trusts only require linguistic certainty, in that the ST's intention must be clear. There is no need for ascertainability as the Court can create or direct a scheme setting out which objects will benefit from the trust.
- If it is a trust for purposes, the need for certainty of objects is not applicable
  - But there is certainty is as much as the description of the purpose cannot be so vague that the court cannot analyze the description
- When discussing a charitable purpose trust, remember that we are not talking about the situation where a particular charity is the beneficiary
- Purpose Trusts can be classified into two categories: charitable trusts and non-charitable trusts.
- Historically, the Courts disliked purpose trusts because of problems with enforcement, and potentially indefinite duration. However, this dislike has been relaxed in two categories:
  - Charitable trusts, which are trusts created by a ST for a purpose that is generally perceived as being for the public good.
    - A valid charitable trust may also have ancillary purposes that are non-charitable, so long as the primary purpose is charitable.
  - Certain Non-Charitable purpose trusts
    - Weird cases, such as trusts for maintenance of graves, care of animals.
    - Quistclose trusts
    - Trusts for non-charitable purposes which directly or indirectly benefit individuals or groups

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

### HISTORICAL BACKGROUND

The early common law was not concerned with charity because the churches tended to be responsible for charity. But then Henry VIII wanted to get divorced, got rid of the churches, and chopped some heads, thus causing charity to become a secular matter. Parliament enacted the *Statute of Charitable Uses (Statute of Elizabeth)* to regulate the administration of charitable trusts and to define the concept of "charity". Most of the Specific Heads of Charity come from the preamble of the Statute, though today, a more lenient approach to charity is apparent in the courts.

### ADVANTAGES OF CHARITABLE TRUSTS

- Charitable trusts need not comply with the strict requirement of Certainty
  - It is only necessary to determine whether the ST intended to give the property exclusively for charitable purposes
  - So long as the Trust was intended for charitable purposes, it does not matter that the purposes are not further - or poorly - defined
  - The Court has inherent jurisdiction to order a scheme which will list the purposes that should benefit from the trust
- The *cy pres* jurisdiction allows the Court to order a scheme when the charitable purposes intended by the ST are impossible or impracticable to carry out. The scheme carries out the intention of the ST by selecting objects as near as possible to those named.
- Charitable trusts are exempt from most perpetuity rules
- Charitable trusts receive income tax concessions and municipal tax concessions.

### EXCLUSIVITY

- A valid charitable purpose trust must be exclusively devoted to charitable purposes.
- If the ST intends the property to benefit both charitable and non-charitable purposes, or gives the TR discretion to appoint non-charitable objects, then the trust will fail.
  - *"I give money to be held in trust for charitable or benevolent causes, as the Trustee in their absolute discretion shall select"*
  - Benevolent does not equal Charitable, so this is a non-exclusively charitable trust.
  - The TR could choose a benevolent cause (which is not a charitable cause).
  - Therefore, the entire trust fails.
- Better clause:
  - *"I give money to be held in trust for charitable and benevolent causes, as the Trustee in their absolute discretion shall select"*
  - Then hopefully the object must be charitable in addition to being benevolent.

### **Saving Non-Exclusive Charitable Purpose Trusts:**

1. If the charitable clause can be severed from the non-charitable clause, then the charitable part of the trust will be valid
  - *Law and Equity Act, s. 47* will allow the court to sever the non-charitable purpose if it is vague or uncertain
2. If the main purpose of the trust is charitable, then an ancillary non-charitable purpose will not cause the trust to fail.
3. If a trust is not on its face prima facie charitable, but the ST has appointed a TR who is charitable or is a person whose work is generally charitable, then the trust may be a valid charitable purpose trust.

### ***Law and Equity Act s.47 Charitable Trusts***

*If a person gives, devises or bequeaths property in trust for a charitable purpose that is linked conjunctively or disjunctively in the instrument by which the trust is created with a noncharitable purpose, and the gift, devise or bequest would be void for uncertainty or remoteness, the gift, devise or bequest is not invalid as a result but operates solely for the benefit of the charitable purpose.*

### ENFORCEMENT

- The right to enforce a purpose trust is held by the Crown as an exercise of the Crown's *parens patriae* jurisdiction. A charitable trust benefits the public, so the state has an interest in seeing that the trust is administered according to its purposes.

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

### DETERMINING WHETHER A PURPOSE IS CHARITABLE: THE NECESSITY OF PUBLIC BENEFIT

#### **Public Benefit:**

A purpose is not charitable unless it is exclusively for the benefit of the public. There are two elements to the requirement of Public Benefit:

- That the public must benefit from the trust, and
- That there be actual benefit

When a trust is directly or indirectly for the purpose of an individual, the trust will fail in its charitable purpose, even if that individual is a charity. This means that a trust for SPCA is a personal trust, not a charitable one.

#### PUBLIC ELEMENT

- The Public element exists if a trust is for the benefit of the public or some sizeable/ important segment of the community.
- A trust for a purpose which would otherwise be charitable therefore fails if it is for the benefit of private individuals (but see "poor relations/poor employees" exception, specifically *Jones v. T. Eaton CO*).
- Historically, the public element did not exist where the BNs were connected by a personal relationship (*Oppenheim v. Tobacco Securities Trust Co.*). But see *Dingle v. Turner* where the court held in dicta that this requirement was too strict. Look instead at the purpose of the trust.
- The public element requirement varies according to the head of charity under which a particular purpose belongs.
  - Relief of Poverty: public element is non-existent
  - Advancement of Religion: slightly stronger requirement for public element
  - Advancement of Education: even stronger requirement for public element
  - Other Purposes Beneficial to the Community: especially strong requirement for public element

### **VANCOUVER SOCIETY OF IMMIGRANT AND MINORITY WOMEN v. M.N.R. [1999] SCC** ***Charitable trusts must be limited to public benefit***

**Facts:** Appeal by the Vancouver Society of Immigrant and Visible Minority Women from a decision of the Minister refusing its registration as a charitable organization under the *ITA*. The Society had four objects: (1) to provide classes to immigrant women to help them find employment, (2) to carry on political activities provided such activities were incidental to the above purposes, (3) to raise funds to carry out the above purposes, and (4) to provide serves and to do all things that are incidental or conducive to the attainment of the above stated objects. It was refused registration because the Society's objectives were too broadly and vaguely worded and Revenue Canada was not convinced it was constituted exclusively for charitable purposes as required by the Act. The FCA refused the Society's appeal and it appealed to the Supreme Court of Canada.

**Issue:** Do the objectives of the Society fulfill the public benefit criteria

#### **Discussion:**

- Under the Act, an organization had to define the scope of its activities as charitable and all its resources had to be devoted to these activities. The Society's activities as well as its purposes had to be charitable.
- "Charitable" was defined as a purpose that was for the benefit of the community or an appreciably important class of the community rather than for private advantage.
- Purpose (1) fell under the Advancement of Education and satisfied the public benefit test.
- Purposes (2) and (3) were ancillary to (1). Even the political activities were incidental to the educational ones, and so do not disqualify the society from obtaining registration as a charity
- But (4) stated "conducive" - this would allow the Society to engage in non-charitable activities (i.e. maintaining job skills directory) that would not be ancillary to the other purposes.
- Therefore, it did not qualify for registration.
- Dissent: Minority would have held the Society charitable on the ground that Object #1 fell under Education, and the 4th head of other purposes beneficial to the community. The other purposes were ancillary to the 1st purpose, so that the Society was exclusively charitable. Finally, the Society met the public benefit test.

**Ruling:** Appeal dismissed.

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

### CHICHESTER DIOCESAN FUND V. SIMPSON [1944] HL

*A gift to trustees for distribution for charitable purposes does not make a charitable trust.*

**Facts:** TS directed executors to apply residue for such charitable institution or benevolent purposes as they should select

**Issue:** Is this a valid charitable purpose?

**Discussion:**

- It is true than there is an exception to the rule that a TS in the terms of his will must himself dispose of his property and cannot direct TR to do the business for him; this exception is the charitable purpose exception
- But the use of the word benevolent makes it unclear because it does not mean the same thing as charitable
- The use of phrase charitable or benevolent is too vague to give certainty
- A gift to TRs upon trust to dispose of it as they think fit is too uncertain to be carried out by the Court and is void.

**Ruling:** Fail.

### OPPENHEIM V. TOBACCO SECURITIES TRUST CO. [1951] HL

*The public benefit is non-existent where the beneficiaries are connected by a personal relationship.*

**Facts:** ST directed that income from trust property be used to provide for the education of children of employees or former employees of the British American Tobacco CO and its subsidiaries. There were over 110,000 employees.

**Issue:** Is this for the benefit of the public?

**Discussion:**

- Public benefit must benefit the community or a section of the community in order to be charitable
- Problem is when the benefit for a class of persons at large; question is whether that class of persons can be regarded as such a section of the community as to satisfy the test of public benefit
- What section of the public most benefited here?
  - Section has no special meaning, but the BN must not be numerically negligible and the quality which distinguishes them from other members of the community, so that they form a section of it, must be a quality which does not depend on their relationship to a particular individual.
  - The public benefit will exist if the relationship between the BNs is an impersonal one.
  - Here the common quality is the relationship to a particular employer. Here then this class of people is not a segment of the public, but rather the community of people related to the TR.
- So it fails based on lack of public benefit.

**Ruling:** Not a charitable trust.

### DINGLE V. TURNER [1972] HL

*Affirmed the "poor relations/poor employees" exception.*

**Facts:** TS left part of his estate to his TR to hold in trust for certain pension fund. The TRs were to apply the income to pay the pensions of poor employees of E. Dingle & CO Ltd, who were either over 60 years old, or over 45 years old and unable to work because of physical or mental infirmity.

**Issue:** Is this a benefit to the public?

**Discussion:**

- Previous cases such as *Oppenheim* have found that no trust can be charitable where the potential BN has to show that he is related to some individual or that he is or was employed by some person or CO.
- However a distinction can be drawn when the purpose is for the relief of poverty, it does not need to be a public benefit
- In determining whether a trust is charitable, look both at the purpose of the trust, as well as the relationships between the class of BNs.

**Ruling:** Valid charitable trust.

#### **Poor Relations/Poor Employees Exception:**

- One exception to the public benefit requirement is the "Poor Relations" exception.
- These cases hold that a charitable trust for one's poor relations is charitable despite the BNs' personal nexus to the ST.
- The "poor relations" exception has also been extended to "poor employees". Therefore, in Canada, trusts in favour of needy employees of a CO are charitable despite the BN's personal nexus to the donor

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

### BENEFIT ELEMENT

- Benefit is assumed to exist in many situations so long as the trust extends to the public. But in some cases, the public element may exist while the benefit element is absent.
- Where a ST tries to set up a trust for political purposes, it will fail and the gift will either result back to the ST or constitute an absolute gift to the political organization.

### **NATIONAL ANTI-VIVISECTION SOCIETY V. INLAND REVENUE COMMISSIONERS [1948] HL**

***Political purposes do not provide benefit in the charitable sense.***

**Facts:** Trust created for the purposes of the society, which include the promotion of legislation prohibiting the vivisection of animals for medical or other research.

**Issue:** Was the trust a valid charitable purpose trust?

**Discussion:**

- One of the tests of whether a trust is charitable lies in the competence of the court to control and reform it.
- The AG is responsible for enforcing charitable purpose trusts.
- However, the AG cannot enforce trusts which seek to change the law, ergo he cannot enforce a political trust.
- Trusts which seek to influence Parliament to change the law to conform with the views of members of particular organizations are void.
- This is because the courts cannot determine whether a proposed change in the law will be of benefit to the public

**Ruling:** The trust fails.

### **EVERYWOMAN'S HEALTH CENTRE SOCIETY V. M.N.R. [1992] FCA**

***Purpose need not accord with public opinion in order to be a purpose beneficial to the community***

**Facts:** Appeal from a refusal of the D to register the PL Society as a charitable organization. The PL Society operated an abortion clinic. It provided first trimester abortions to all women regardless of race, ethnic background, religion or income level. It also provided some services, such as counselling, which were not available in a hospital. Women who could not afford to pay were not charged a fee. The PL had applied for charitable status to be exempt from taxation. The application was refused on the ground that there was no clear public policy or consensus on the abortion issue, and it could thus not be said that the PL's activities were beneficial to the community in a way the law regarded as charitable.

**Issue:** Is this purpose for the benefit of the community even if the object/purpose is controversial?

**Discussion:**

- Will not be charitable if objects are illegal or offends public policy
- An activity could not be said to be contrary to public policy where no such policy existed.
- In order for an activity to be contrary to public policy, there must be a clear and officially implemented policy.
- D filed no evidence that the PL's activities were not for the benefit of the community.
- Based on the evidence the court held that the appellant's activities and purposes were for the benefit of the community within the spirit of the preamble to the *Statute of Elizabeth*.

**Ruling:** Valid charitable purpose trust.

### **SPECIFIC HEADS OF CHARITY**

- Most of the Specific Heads of Charity come from the Preamble of the *Statute of Elizabeth*, though today, a more lenient approach to charity is apparent in the courts.
  - 1601 *Statute of Elizabeth* Preamble gave four: (1) relief of indigent (2) advancement of education (3) advancement of religion (4) or benefit of the public
  - In 1891 the language was modernized: (1) trust for relief of poverty (2) trust for the advancement of education (3) trust for the advancement of religion (4) other purposes beneficial to the community.
  - These were further outlined in *Special Purposes of Income Tax v. Pemsel*, [1891] AC, to which many cases refer.
- Usually it does not matter which head a charitable trust is classified under. However, there may be some situations in which it is significant, as the requirement of public benefit is much less for some heads than for others.
  - For example, the requirement of public benefit is much less for Relief of Poverty than for Other Purposes Beneficial to the Public.

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

### RELIEF OF POVERTY

#### **Relief of Poverty Requirements:**

- **Benefit Requirement:** The Court usually presumes benefit in this type of trust.
  - **Public Requirement:** It must still benefit the public, with the exception of the Poor Relations / Poor Employees Exception
- A charitable trust whose object is the Relief of Poverty must have as its primary object the relief of actual physical or economic need.
  - However, poverty is a relative term. There is no need to explicitly state "poor" in drafting. Other words include needy, indigent, destitute, limited means, distressed.
  - Private gift to a single poor person, or a trust for named poor persons are invalid.

### ADVANCEMENT OF RELIGION

#### **Advancement of Religion Requirements:**

- **Benefit Requirement:** In general, benefit is presumed once it is shown that the trust satisfies the "religion" test
  - **Public Requirement:** Generally, the law presumes that benefit exists. However, see *Gilmour v. Coats* where a gift to nuns who only prayed in the priory and never left was not charitable because it did not benefit enough of the public.
    - Religion is a matter of faith. Its efficacy and validity cannot be measured in a court of law.
    - A relatively small number of people may form a church, and it will still be held charitable.
    - Therefore, the public element is presumed unless you can show that the religion is not open to a sufficiently broad segment of society.
- Advancement of Religion was not explicitly included in the Preamble to the Statute of Elizabeth, because there was only one religion at the time - the Church of England.
  - The concept of religion is quite wide, embracing many faiths and sects.
    - Older English case law held that in order for a trust to be charitable under "advancement of religion", it had to promote some form of "monotheistic theism".
    - *Re South Place Ethical Society*: 2 essential attributes of religion are "faith in a god" and "worship of that god"
    - It is unclear how much these rules are accepted in Canada
  - Examples of valid charitable trusts for the advancement of religion:
    - Maintenance of houses of worship
    - Missionary work
    - Gifts to support ministers of religion

### **THORNTON V. HOWE [1888] UK CA**

***No matter how crazy your cult is, as long as it's somewhat Abrahamic, it will be ok.***

**Facts:** Testatrix bequeathed the residue of her estate in trust for printing the distributing of the writings of Joanna Southcote, a foolish and ignorant woman, who believed that she was with child by the Holy Ghost at an advanced age in life, that a second Messiah would be born of her, and that she was selected by the Holy Ghost to pass divine revelations on to mankind. Balls to the wall crazy, plain and simple.

**Issue:** does this constitute a trust for the advancement of religion?

#### **Discussion:**

- Even though the works of Southcote are largely incoherent and confused, they are written with a view to extend the influence of Christianity
- The Court makes no distinction between one sort of religion and another.
- Neither does the Court, in this respect, make any distinction between one sect and another.
- It may be, that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that if they are subversive of all morality, the Court will declare it to be void.

**Ruling:** The trust is valid.



## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

### RE SOUTH PLACE ETHICAL SOCIETY [1910] UK CA

*Two of the essential attributes of religion are "faith in a god" and "worship of that god"*

**Facts:** Trust set up to benefit an organization whose members were agnostics, but not atheists. The organization's objects were "the study and dissemination of ethical principles and the cultivation of a rational religious sentiment."

**Issue:** Is this a valid charitable purpose?

**Discussion:**

- To be a religious charity, need not be advancing Christianity
- Court does not agree that belief in something other than god (such as ethics and truth) can constitute a religion;
  - Need to have faith and worship in a god to qualify as religion
- Here there is no worship in this sense, as the society is more concerned with ethics and ideals
- However the court did find the society to be charitable for the advancement of education and for the public benefit.

**Ruling:** Not a religious charity.

### BLAIS V. TOUCHET [1963] SCC

*Priest used to be able to get away with many a thing back in the good old days*

**Facts:** TS was parish priest in SK who wrote his will in French. He appointed his bishop as executor and left him all his property "*pour ses oeuvres, mais pour les oeuvres qui aideraient la cause des Canadiens Francais dans son diocese*": for such of the works as would aid the cause of the French Canadians of his diocese

**Issue:** Is this the advancement of religion?

**Discussion:**

- The Court accepted the following literal translation of the words: "for his works, but for such of the works as would aid the cause of the French Canadians in his diocese."
- Is it likely that the priest in setting up the trust knew the religious responsibilities of the bishop
- By virtue of the bishop's office, the gift was limited to his charities or works arising from his religious duties as bishop.
  - The quoted words did not extend the purpose of the trust beyond religion.
- The court find that the priest did not step outside of the religious field even though he made the trust only operative for French Canadians

**Ruling:** Jubilate deo

### GILMOUR V. COATS [1949] UK CA

*A valid charitable purpose trust for the advancement of religion must have some public benefit.*

**Facts:** ST gave money to be held on trust for a Roman Catholic priory if its purposes were charitable, and upon trust for an alternate BN if they were not. The priory was a purely contemplative order - the nuns spent all of their lives in prayer, contemplation, and penance (in the kinky nun sort of way). They did not do any works outside the walls of the priory.

**Issue:** Is this charitable?

**Discussion:**

- A religion can be beneficial to the community without determining whether its beliefs are true
- However, in this case, the gift to twenty nuns who only prayed in the priory and never left was not charitable because it did not benefit enough of the public. Unless if they did their kinky "penance" stuff outside, for everyone to watch and enjoy.
- Therefore in this case, although it was argued that the women in the convent could be recruited from the public at large, the convent itself was not of a benefit to the community as a whole or a significant segment of it

**Ruling:** Not charitable.

## ADVANCEMENT OF EDUCATION

### **Advancement of Education Requirements:**

- Benefit Requirement: While the court generally presumes that "benefit" exists in educational trusts, sometimes it will investigate when the quality of the education proposed in the trust is questioned.
  - Trusts that have "subversion of morality" as their object will not be enforced as charitable purpose trusts.
- Public Requirement: The "public" element in charitable purpose trusts for education is often litigated, in terms of
  - Prohibition of relationship between donor and beneficiaries and
  - Educational trusts with political overtones. Trusts which appear to be educational, but are really political in purpose, will fail.

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

- Traditionally, this head of charity was limited to traditional classroom instruction and the promotion thereof.
- However, a modern approach to the definition of education has been developed.
- Education can be formal or informal instruction, practical or academic, but should be structured
- The following activities also fall under Advancement of Education today:
  - A trust in favour of a school whose object is to provide sporting or athletic facilities is charitable.
    - But amateur sports are charitable under the fourth head
  - Research that has its object as the increase and dissemination of knowledge is also charitable
    - The object of the research must be both the (1) increase of knowledge and (2) teaching and education.
  - Trusts which support the arts are also charitable under Education.
    - Purpose can be both pleasurable as well as educational - a trust does not fail simply because it benefits an organization which entertains, such as a symphony or a brothel.
  - Trusts which further the education of the learned professions are charitable.
    - However, gifts to professional bodies are not charitable as their purpose is to benefit the members of those bodies.

### RE HOPKINS' WILL TRUSTS [1964] UK CA

***"Education" must be used in a wide sense, certainly extending beyond teaching***

**Facts:** Testatrix left one third of residuary estate for Francis Bacon Society to be used in finding the Bacon-Shakespeare manuscripts, and if they have been found by the date of her death, for the general purposes of the society.

**Issue:** Does this qualify as the advancement of education?

**Discussion:**

- In order to be charitable, research must either be of educational value to the researcher, lead to something which will pass into the store of educational material, or improve communicable knowledge in an area which education might cover
- Education in the last context listed above, would extend to the formation of literary taste and appreciation, therefore having application to this case
- Could even fall under the general benefit to public category because the material is beneficial in the intellectual and artistic fields.

**Ruling:** Valid.

### RE PINION [1965] UK CA

***There must be some sort of benefit or utility derived from the education or art***

**Facts:** Pinion was a crummy, but wealthy painter. His "rambling and half coherent" will left his studio with his shitty paintings and ugly furniture to the Westminster bank as TR. The TR was directed to offer everything to the National Trust, with the intention that the studio be maintained as a museum. If the National Trust declined, then the TR was to appoint a family member to carry out TS's wishes to have a museum in honour of himself. The National Trust declined the kind offer. TR then applied for direction as to whether this was a valid charitable trust. Evidence showed that the collection was inferior and "atrociously bad" and not likely to be of benefit to the public. Trial judge held that although benefit to the public was slight, it was a valid charitable trust. TS's next-of-kin appealed (dear god, don't make me manage this crap!).

**Issue:** Is this for the purpose of advancing education?

**Discussion:**

- Court interpreted TS's intention not to educate anyone, but to perpetuate his own name and repute of his family
- "Strong body of evidence that as a means of education this collection is worthless"
- "I can conceive of no useful object to be served in foisting upon the public this mass of junk. It has neither public utility nor educative value."
- Not a valid charitable purpose trust. Next-of-kin was entitled to the residue of his estate. No need for them to start a crappy art museum.

**Ruling:** Down with degenerate art!

### OTHER PURPOSES BENEFICIAL TO THE COMMUNITY

**Fourth Head Requirements:**

- Benefit Requirement: These benefit the community or a sufficient segment of it directly or indirectly by providing services or facilities which otherwise would have to be provided by the state, or
- Public Requirement: The public benefit requirement is stronger under this head than all the others.

## 250.4 EXPRESS TRUSTS: THE THREE CERTAINTIES

- All of the objects that fall under the fourth head are of "general public utility", because they promote the mental, moral and ethical improvement of the public.
- Here is a non-exhaustive list of purposes which have been found under the 4th head:
  - Relief of the old and disabled, or care for the young and foolish
  - Benefit to the country, province or municipality, or locality
  - Administration of law
  - Promotion of health
  - Relief of suffering and distress
  - Promotion of agriculture
  - Recreational activities
  - The environment
  - Prevention of cruelty to animals
  - Foreign charities

### **NATIVE COMMUNICATIONS SOCIETY OF BC v. M.N.R. [1986] FCA**

***Fact that state has assumed special responsibility for the welfare of a group is relevant to the determination of whether an organization is charitable under the Fourth head.***

**Facts:** Once again, the organization sought registration under the *ITA*. As stated, its purposes were (1) to provide information on native issues, and (2) to train native communications workers.

**Issue:** Is this a charitable purpose of "other purpose beneficial to community"

**Discussion:**

- The purposes are beneficial to the Indian community of BC, within the spirit and preamble of the *Statute of Elizabeth*
- A charitable purpose must possess a charitable nature within the "spirit and intendment" of the preamble to the *Statute of Elizabeth*;
- The following are necessary preliminaries to determine whether a purpose can be regarded as charitable falling under the fourth head in the classification:
  - Purpose must be beneficial to the community in a way the law regards as charitable within the meaning of *Pemsel*
  - Whether a purpose would or may operate for public benefit is to be answered by the court on the basis of the record before it and in exercise of its equitable jurisdiction in matters of charity
    - Part of the record relevant to this case was the special legal position in Canadian society of indigenous people. Measure of protection for aboriginal people is provided for in s.35 of constitution act
    - Definition of charity is a moving subject, so must decide in the record whether in the circumstances, at this point in time, the purposes fall within those in *Pemsel*.

**Ruling:** It is charitable.

### **THE CY PRES DOCTRINE**

**Cy Pres Doctrine:** Is part of the court's inherent scheme-making power. Cy-pres jurisdiction only arises when the TS has defined specific charitable purposes, but those purposes are impracticable or impossible to carry out. The Court is then permitted to devote the property to charitable purposes as near as may be to what the trust's creator intended.

- The court may do this because the purposes stated by the TS cannot be carried out in a way that he intended by reason of impossibility or impracticability.
- Initial Impossibility or Impracticability arises if
  - The specified purposes are impossible to carry out, or there is no longer a need for the purposes the TS intended.
  - The named charitable institutions never existed or ceased to exist before the trust takes effect.

Two issues that must be determined by the courts in cases of initial failure:

- Whether the trust is impracticable or impossible, determined at the time the trust takes effect
- Whether there is a general charitable intention

## FORMALITIES

### INTER VIVOS AND TESTAMENTARY TRUSTS

#### **Law and Equity Act s.59 Enforceability of contracts**

(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 the contract 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...

- So inter vivos trust do not need to be in writing
- But the transfer of land into trust need to be in writing.
- Testamentary trust must be in writing; because they flow from another set of requirements namely that a testamentary document (will) must be in writing; as per s.4 of the *Wills Act* which sets out certain writing requirements; and s.3 which says a will is only valid if in writing
- The writing requirement means that there are strict rules about testamentary trusts that will not be enforced without it.
- But we do have dispensing power: if formalities are not complied with and if you can give the judge enough evidence that the judge is satisfied this is really what the person wanted, the judge could say that this document is a will; so maybe could stretch this far enough to allow an electronic document to be a valid will (even though it would not be signed)

### WILLS: SECRET TRUSTS

#### **Wills Act s.3 Writing required**

*A will is valid only if it is in writing*

#### **Wills Act s.4 Signatures required on formal will**

*Subject to section 5, a will is not valid unless*

- (a) *at its end it is signed by the TS or signed in the TS's name by some other person in the TS's presence and by the TS's direction,*
- (b) *the TS 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 TS.*

- A secret trust has no particular legal characteristics attached; it is simply a trust that is a secret
- Describes a situation in which there is property held in trust but do not say who the BNs are and in fact do not even state that there is a trust
- There are also half secret trusts, which we will talk about in a bit
- Keep secret trusts different from a power of appointment. In secret trust, the TR is told how to distribute the fund
- There are three possible ways for a secret trust to arise
  - Inter vivos. Oral trusts are allowed, because no writing formalities are required for inter vivos trust.
  - Intestate, in cases where a person dies without a will but had communicated to someone that once they get money under the estate administration act, they are to do something specific with the money;
    - There are no problems with this being oral either?

## 250.5 EXPRESS TRUSTS: FORMALITIES AND SECRET TRUSTS

- Testamentary. If A in a will is a BN of a specific asset or the residue of the estate and A promised orally to hold the property they get under the will, on trust for a certain person or purposes;
  - Once a will is probated, it becomes public,

### **CHAMPOISE V. PROST [2000] BC CA**

#### ***Sets out the requirements for a secret trust***

**Facts:** Appeal by Prost, the spouse of the TS, from a decision which found that a secret trust was created between the TS and PL in respect of two pieces of real property in favour of the TS's sons from her previous marriage. The sons had brought an action under the *Wills Variation Act*. The TS's will left all of her property to the PL. Having found the existence of secret trusts, the court held that the TS met her legal and moral obligations to her sons for purposes of the *Act*. Most of the deceased's assets passed directly to PL by way of survivorship under joint tenancies and included the two properties in question. After the death, PL transferred all of his interest in one property to the D's son Parris, and paid some of his debts. The other son was a ward of the state and was not involved in the disposition. The trial judge found that a secret trust in favour of Parris was created for the one property which was already transferred to Parris, plus one-half of the second property. PL appealed on the grounds that the secret trust applied only to one-half the value of the second property, and not the property itself as ordered. He claimed that transfer of the first property and payment of some of Parris' debts was paid out of the trust.

**Issue:** Huh?

#### **Discussion:**

- Reviews the basic principles of secret trusts.
- Such arises where people give property to someone, communicating an intention that the property be handled in a specific way on the happening of some event
- The essential elements are
  - Intention of donor;
  - Communication of intention to donee;
  - Acceptance of obligation by the donee (as we will see, acceptance is not really an issue, unless the donee expressly refuses)
- In addition to these requirements the three certainties necessary for any express trust must be there: words, subject, object
- Here, the trial judge's conclusion that there was a secret trust in respect of the second property was not supported by the evidence. There was no evidentiary basis to found a conclusion that the TS told PL that she intended to convey her one-half interest to be held in trust for Parris.

**Ruling:** Appeal allowed

### **CHINN V. HANRIEDER [2009] BC SC**

#### ***Lies will be shamefully exposed before the eyes of the law!***

**Facts:** Action by the PLs, for a declaration that mineral rights were held for their benefit in a secret trust. PLs were siblings and the only children of the TS and his first wife. D was the TS's second wife. TS held an interest in underground mineral rights. Earlier drafts of the will and correspondence between the TS and his lawyer evidenced an intention to bequeath the mineral rights to the PLs. PLs testified that their father and the wife made a special trip to each of them to confirm his attention. They testified that at the same time, the wife expressly disavowed any interest in the mineral rights, as she had sufficient finances of her own. PLs claimed that the TS created a secret trust whereby the wife would hold the mineral rights in trust for their benefit. The wife denied knowledge of any such agreement. PLs contended that the wife breached an agreement reached with her lawyer whereby she would transfer the mineral rights. The wife denied the existence of the agreement. Meanwhile, the mineral rights unexpectedly began producing significant income that went directly to the wife through a family trust. She testified that the TS had always wanted her to have the income from the mineral rights.

**Issue:** Is there a secret trust?

#### **Discussion:**

- Wife's evidence at trial contradicted her examination for discovery regarding conversations in her presence between the TS and the PL regarding the rights.
- Her evidence also contradicted her lawyer's notes regarding her claim to the rights.
- The wife was not a credible witness and her evidence was rejected.
- The evidence clearly established that the wife and the deceased agreed that upon his death, she held the mineral rights in trust for the PLs.
- So there is a secret trust, and she is in breach of it.

**Ruling:** Appeal to PLs.

### FULLY SECRET TRUSTS ARISING UNDER A WILL

#### BASIS FOR ENFORCEMENT

- These trusts are enforceable
- If the legatee refused to carry out the trust, equity will invoke the maxim that it will not allow a statute to be used as an instrument of fraud and will enforce the trust
- The same principle applies when an intestate successor agrees to carry out instructions with respect to property passing on intestacy
- They occur when there is an absolute gift on the face of the will, a communication outside the will by the TS to the donee that the property be holed on certain trusts, and the donee's agreement to carry out these wishes

#### TIME FOR COMMUNICATION

- The communication must be not only of the intention but also the objects and the subject of the trust
- Communication is one of the major issues in the case law of this area: not the fact of the communication itself, but the timing of the communication
- For fully secret trusts, communication must take place before you die
  - What if donee asks for the letter not to be opened until death; is this sufficient communication before death?
  - *Re Boyes* case finds this to be invalid. If the trust was not declared in the will, in order to make it binding, it should be communicated to the donee in the TS's lifetime and that he should accept the trust;
  - However it is possible that if you give someone the envelope, and tell the person the instructions were in there but to not open until death, this would be sufficient communication
- But for half secret trust communication of the details of the trust must be communicated before the will is signed.

#### TRUST MUST BE COMMUNICATED

- The communication must show clear intention, and must make it clear to the donee that the trust is created
- Words such as "it is my wish" lacks intention

### OTTAWAY V. NORMAN [1971] UK CA

***Certainty of objects is required. Silent acceptance will suffice.***

**Facts:** TS by will left his bungalow £1500, and one half the residue to his common law spouse. It had been agreed between wife, TS and PLs (son and daughter in law), that should she survive the son, the bungalow would be left to the PL. Wife made a will in which she left the house and its contents to D Norman and his wife. She leaves the residue of her estate equally to the PLs and the D. PLs sue Wife's estate, claiming that because of her promise to the TS, she held the house, its contents and the residue of the TS's estate in constructive trust for them.

**Issue:** Was there a secret trust communicated?

#### **Discussion:**

- Basis of doctrine of secret trust is the obligation imposed on the conscience of the primary donee; the donor intends that obligation to be carried out.
- Court found that TS intended wife to give the house and its contents to the PL, and that TS communicated that intention, and that wife accepted the obligation. There is sufficient certainty of objects for this.
- Court did not find sufficient evidence that TS intended wife to leave all of her own money to the PLs
- While the Court found some evidence that TS intended wife to give his own money to the PLs, there was no explicit requirement that wife keep his money separate from her money.
- Therefore, the money was outside of the PL's claim.

**Ruling:** Justice of Solomon

### GLASSPOOL V. GLASSPOOL ESTATE [1998] BC PC

***Courts will consider the facts of the case to judge the intent of the settlor.***

**Facts:** An application by PL John Glasspool for a declaration that he was entitled to mineral rights. Lawrence Glasspool, PL's father, died on January 12, 1996. In his will he left his entire estate to his companion, the Defendant Everett. The will did not mention PL. L's estate included a one-quarter share of mineral rights over property that had been left to him by his mother Ethel. He had been receiving royalties from these rights since his E's death in 1992. L had divorced when PL was six

## 250.5 EXPRESS TRUSTS: FORMALITIES AND SECRET TRUSTS

years old and had little contact with him. PL had been living on social assistance since 1974. He had no contact with L after that time. PL received \$1,400 from his E's estate. E had asked L to leave his share of the mineral rights to PL, and L agreed. E drew up a new will in 1985 dividing the mineral rights between L, his brother, and the brother's two sons. Her old will had indicated that the rights would be left to PL.

**Issue:** Was a valid secret trust had been created between E and L, requiring L to leave the mineral rights to PL?

**Discussion:**

- Although there was no mention of a trust in the E's will, the existence of a trust was not inconsistent with the will.
- Given that her original will had left all the mineral rights to PL, it was reasonable to infer that E had removed PL as BN because she was satisfied that she had an enforceable agreement with L that the latter would leave PL his share.
- The evidence indicated on the balance of probabilities that the E intended to create a trust.

**Ruling:** The trust is there.

### HAYMAN V. NICOLL [1944] SCC

*An example of insufficient evidence of communication of intention*

**Facts:** Testatrix (who was also a dominatrix) drafted a will. In her codicil, she bequeathed money to her daughter Ina, "*in full confidence that she will dispose of the same in accordance with the wishes I have expressed to her.*" Ina died without having disclosed the trust and apparently without carrying out her mother's wishes, whatever they may have been. Testatrix also died. Her brothers and sisters then brought an action for a declaration that Ina's administrator held the money upon a resulting trust for the Testatrix's kinky estate.

**Issue:** Was there a communication and acceptance of a fully-secret trust?

**Discussion:**

- Testatrix's will did not create a semi-secret trust, because the testatrix had used precatory words, while other parts of the will demonstrated that she knew how to create an express trust by imperative language.
- Therefore, Ina took absolutely, and did not hold the money on trust for the testatrix's estate.
- On the question of whether there was communication and acceptance of a fully-secret trust, the court held that there was insufficient evidence to establish either.
- No trust was created, daughter takes the gift outright

**Ruling:** There is no trust.

### HALF SECRET TRUSTS

- These arise when the existence of a trust appears on the face of a will but the objects of the trust are communicated to the TR outside the will
- Can only arise in a will, not on intestacy; and obviously can arise inter vivos.
- There is less risk of fraud in this case because it is known that a trust exists.
- But despite this, by and large the reasoning for enforcing these trusts is basically the same as that for fully secret trusts
- These have the same requirements as fully secret trust: intention, communication, acceptance and the the certainties.
- Difference is communication to and acceptance by TR must be prior to or at the same time as the making of the will

### ARE SECRET TRUSTS TESTAMENTARY?

- The starting principle is that a testamentary gift lapses if the donee dies before the TS.
- But, *Re Gardner* holds that an interest is vested in the intended BN upon the communication of the secret trust to the TR.
- Therefore, if the BN pre-deceases the TS, then the TS's estate is entitled to the gift of the secret trust.

### RE GARDNER [1938] ON SC

*Secret trusts are not testamentary. Though this may be wrong.*

**Facts:** Under her will dated March 18, 1936, the testatrix gave to her son "*the house which I now own and being known as House Number 11 Penetang St., Barrie*". At that time she was the owner of the house, but on January 8, 1937, she agreed to sell the house for \$1,500 payable in installments. The purchaser paid \$300 on account of the price to the testatrix in her lifetime, but the balance had not become due when she died on October 23, 1937. The executors applied for the advice of the court as to whether the devisee, the son, took anything.

**Issue:** Can the interest under the trust vest before the death of the testator?

## 250.5 EXPRESS TRUSTS: FORMALITIES AND SECRET TRUSTS

### Discussion:

- The court treated the will and trust as separate, to avoid running afoul of the writing requirements of wills
- It concluded that TS's interest vested before TS died (odd reasoning according to Ramsay)
- Normally though a secret trust does not take effect until the death of the TS and because of this normally secret trusts are revocable right up until the TS's death;
- Here however the judge made a funny line of reasoning to suggest that the interest vested at the time the husband assented to the wife's wishes.
- Ramsay suggests there is one problem that arises from this reasoning: what is the timing of the vesting of the BN interest?

**Ruling:** I have no clue what's going on here.

### IS THE TRANSFER A TRUST OR CONDITIONAL GIFT?

- This issue arises when the would-be TR receives an amount to give to an intended BN, but there is money left over after the BN has been paid out. For example, the BN may die before the money is all paid out.
- Conditional Gift: "\$100 to TR provided he pays \$5 per year to BN for life"
  - If any money left over in the gift when BN dies, then TR gets the money.
- Trust: "\$100 to TR on trust to pay \$5K per year to BN for life"
  - If any money left over in the trust when BN dies, then the money results to the ST's estate, as in the case below.

### RE REES [1950] UK CA

**Whether it is a trust or a conditional gift will be established based on the intent in the will**

**Facts:** Testator left his estate to his two executors, A and B, "*absolutely, they well knowing my wishes concerning the same.*" B, the surviving executor, was the TS's solicitor and drafter of the will. He testified that the TS told both himself and A that they were to make a number of payments to various persons and objects and keep the balance themselves. B therefore claimed the balance as survivor.

**Issue:** Was this a conditional gift or a trust? Who gets the remainder?

### Discussion:

- The gift, properly construed, was not a conditional gift (in which case B could have succeeded), but a trust.
  - To admit B's evidence would establish a conditional gift contrary to the will
- TRs should not place themselves in a position where their interest and duty conflict
- It would be contrary to the public interest to give the property to the solicitor as drafter of the will under a secret trust;
- If TS actually intended his solicitor to get the benefit and to draft the will, he should indicate this intent plainly in the will
- The use of the word "absolutely" does not confer the beneficial interest on the TRs, but instead defines the extent of the interest in the property given, so as to confer upon the TRs the property given to them, free of any fetter which would prevent them from carrying out his express wishes

**Ruling:** Absolutely.

### WHEN CAN A BENEFICIARY OF A SECRET TRUST SIGN A WILL AS A WITNESS?

- The *Wills Act* holds that beneficial gifts to the witness of a will, or the spouse of the testator, are void.
- Theoretically, a TR can sign the will as a witness because they do not take "beneficially", unless they have the authority to charge the estate for their services.
- Fully Secret Trust Situation
  - Because the would-be TR is taking absolutely on the face of the will, the TR cannot sign the will. If they sign the will, the gift to the trustee is void (and the would-be TR will not be able to carry out the secret trust).
  - However, the intended BN under the secret trust can sign the will because the will does not disclose a beneficial interest to them
- Half Secret Trust Situation
  - The would-be TR can sign the will because the will discloses that they are receiving the property in trust for an unnamed BN
  - Not totally clear whether the intended BN can sign the will



## 250.5 EXPRESS TRUSTS: FORMALITIES AND SECRET TRUSTS

### RE YOUNG [1950] SCC

**Secret and half-secret trusts are generally seen as separate from the will. Beneficiaries can sign the will**

**Facts:** Testatrix gave her entire estate to her husband, H, but continued, "it being a condition of this will that H leave the balance of my estate on his death by his will for the purposes he knows I desire it to be used for." TS had told H before making the will that she wanted him to leave \$25,000 to her housekeeper, M. H was happy to oblige, but M was a witness to the will. Under the *Wills Act*, a beneficial gift to a person who witnesses a will, or to the TS's spouse, is generally void.

**Issue:** Is M entitled to the \$25,000 after H dies?

#### Discussion:

- Secret and half-secret trusts are generally seen as separate from the will.
- Therefore, a secret and half-secret trust does not need to comply with the *Wills Act* in order to be valid.

**Ruling:** This makes more sense.

#### Proving the Secret or Half-secret Trust

- There are limits on evidence one can lead to prove the intention of the will maker
- This is because the will is supposed to speak for itself.
- There is a restriction on leading parole evidence
  - There are differing rules that apply to parole evidence court will accept when determining terms of trust vs. parole evidence court will accept to determine the meaning of a will
- But one can lead evidence on the surrounding circumstances, to put the judge in the viewpoint of the TS.
- Historically, if there was an action under the estate by a claimed BN, it would fail, unless if there was corroborative evidence. The word of the claimant BN alone would not suffice
  - This has been somewhat abolished by the *Evidence Act*.
  - But still, uncorroborated evidence alone will rarely meet the standard of proof.
  - This is why it's important to leave a paper trail

#### The Best Trick to Bulletproof Secret Trust:

- Get the trust in writing
- With signatures from trustee and testator and the date
- Within the writing, deal with the kinds of issues you would normally deal with in a trust
- Cover such contingencies as TR dying before TS

## THE TRUST AND THE SETTLOR

- *Bill v. Cureton* [1835] UK CA: A ST cannot revoke a trust, unless it expressly creates a clause that allows for revocation.
- Once a trust is constituted, the property has been given away and ST no longer has legal rights with regards to the property. The general implications of this is that:
  - ST can't direct TRs what to do
  - ST can't vary the terms of the trust
  - ST can't revoke it
  - ST can't enforce the terms of the trust. Only BN are allowed to do this.

But there are two ways a ST can retain a degree of control. One must keep in mind, however:

- There are tax implications of retaining ST control
- In the eyes of the court, it may look like a sham trust, if the ST simply controls property on a day-to-day basis. Could argue that ST is still the true legal owner of the property.

#### DIRECT CONTROL RETAINED BY SETTLOR

This can be done via a number of methods:

- While drafting, give ST broad powers to give directions or to veto decisions of TR.
- While drafting, give ST specific powers to vary or amend terms
  - Can be for specific aspects of a trust, or for the trust a whole
  - It's debatable as to whether a broad power to amend includes a power to revoke
- Give ST the power to revoke
  - One can make this an absolute power to revoke or a conditional power

## 250.5 EXPRESS TRUSTS: FORMALITIES AND SECRET TRUSTS

### INDIRECT CONTROL RETAINED BY SETTLOR

**Protector:** A person appointed in addition to the TR, and given certain powers by the ST, most commonly power of veto.

This refers to the situation where the ST is in the background pulling the strings.

- Appointment of a Protector
  - Often done in a discretionary trust, which would require the consent of the Protector for distribution decisions
  - Protector only has veto-type powers, and can't make appointments themselves
  - The presence of a protector raises a number of questions:
    - Is the legal status of the protector an agent of ST or the trust?
    - Does the Protector owe a fiduciary responsibility to ST or to the BNs?
- Letters of Wishes
  - A letter of wishes is a form letter that recognizes that the TRs have legal authority to administer the trust, but asks the TRs to consider certain issues in making decisions
  - It's generally alright for TR to consider Letter of Wishes so long as their final decision is come to independently.

## 250.5 IMPLIED OR RESULTING TRUSTS

### RESULTING TRUSTS

**Resulting Trust:** A resulting trust occurs when the legal owner of the property is found to hold the property for the benefit of someone else. This does not depend on the expressed intention of the ST.

There are two main situations in which a resulting trust can arise:

- Automatic Resulting Trusts: When an express trust fails in whole or in part;
- Presumed Resulting Trusts: When A either voluntarily transfers an asset to B, or purchases an asset and puts title in the name of B. In BC these are treated the same, but in other jurisdictions, this is not the case.
- Equity presumes bargains, not gifts, thus the court will presume an intention to vest the whole of the title where the property is acquired entirely with the A's money, or may find an intention to share proportionately where a smaller but direct financial contribution is made.
- Thus in the case of a presumed resulting trust, equity presumes that A did not intend that B should take the asset beneficially, and therefore B will hold the asset on resulting trust for A unless the presumption is rebutted.

Where a resulting trust arises, an obligation is imposed on the recipient to hold the property in trust for the original ST/donor. The property results back to the donor.

### AUTOMATIC RESULTING TRUST

**Automatic Resulting Trust:** Arises if an express trust fails and the ST is found not to intend to give the remaining trust assets to the TRs absolutely, that is he does not, or does not intend to, dispose of the entire beneficial interest.

When an express trust fails, in whole or in part, usual response is a resulting trust for the ST.

- Otherwise, TR would be unjustly enriched at ST's expense, because they would hold remaining assets free of any trust obligations.
- A resulting trust cannot arise unless trust assets have been properly transferred from ST to TR
  - Therefore, resulting trust cannot arise in Personal Declaration of Trust situations or where the trust has been incompletely constituted.

There are two types of scenarios where a trust fails:

- Complete failure of the trust, making the property revert back to the ST or ST's estate.
- Where a beneficial interest is properly created, but the BNs don't use all of the interest in the duration of the trust. Unless it can be shown that ST intended to give the surplus to the TR as an absolute gift, a resulting trust will arise.

**Two Governing Questions:**

- Did an express trust fail?
- If yes, then did the ST intend to give the surplus to the TR as an absolute gift?
- If he did not, then a resulting trust arises.

### TRUST OR GIFT

- If there is an express trust which fails to dispose of all the trust assets, then there is a surplus.
- The question then becomes whether the TRs keep the surplus for their own benefit, or do they hold it on resulting trust for the ST?
- If one can show evidence that the ST intended to make a gift of the surplus to the TR, then no resulting trust will arise
- If there is no evidence of a gift to the TRs, or evidence of conditions attached to the surplus, then the TRs will hold the surplus on resulting trust for the ST or ST's estate

### RE WEST [1966] BC SC

*There is a rebuttable presumption that trustee shouldn't take beneficially*

**Facts:** Executor was to sell TS's assets to pay debts. After debts were paid, a surplus existed. Executor claimed the surplus for himself. Next-of-kin argued that executor should hold the funds on resulting trust for them.

**Issue:** Does a resulting trust arise?

## 250.5 IMPLIED OR RESULTING TRUSTS

### Discussion:

- There is a rebuttable presumption that TRs should not receive a beneficial interest in the trust property.
- The will said "*to executors on trust to sell property*" (which indicated the creation trust) and that "*executors could reimburse themselves for expenses*" (therefore this was not a gift, as there is no need for reimbursement if it was a true gift)
- It is possible to rebut this presumption by looking at the ST's or TS's intention, as evidenced by the constitution of the will and any other relevant facts.

**Ruling:** There is a resulting trust for ST's estate.

### RE FOORD [1922] UK CH

**If one can show evidence that the ST intended to make a gift of the surplus to the TR, then no resulting trust will arise.**

**Facts:** TS dictated his own short will to his servant upon his deathbed and kicked the bucket. He left \$2000 and personal effects and furniture in China to his servant, and "*all my effects including rubber and other shares absolutely to my sister Margaret Juliet on trust to pay my wife £300 per year*". After the annuity was paid, there was an unrealized surplus.

**Issue:** Was the sister entitled to the surplus absolutely as a gift, or did she hold it on resulting trust for the TS's next-of-kin?

### Discussion:

- Judge chose to characterize the language as a conditional gift
- There are many things to indicate that a trust was not intended:
  - Use of the word absolutely, as it was used by someone without technical understanding of the law, it must have meant out and out, so that it carried the legal and beneficial interest;
  - The BN is referred to as "my sister" so TS was recognizing the relationship existing between them and was probably founding his generosity on the existence of that relationship;
  - There was indication that the trust only applied to some portion of the property

**Ruling:** Absolute gift to the sister.

## CONTRACT OR TRUST

Unincorporated associations cannot hold assets in their collective name, but must hold assets via TRs, who hold the assets for the purposes of the association. What happens to these assets when an unincorporated association dissolves?

- If the organization is charitable, the courts can use *cy pres* doctrine to distribute the surplus to similar organizations.
- If the organization is non-charitable, then the court can use the common law contractual approach to determine distribution of surplus:
  - Unincorporated associations are based on common law contractual principles between members, and not on equitable principles of trust.
  - If the society exists to provide benefits for its members or any others, the right to receive benefits as a result of making contributions is contractual
  - If all members or potential BNs are dead, or only one is left, then surplus goes to the Crown *bona vacantia*.
  - The rules of the association, which are used instead of the terms of the K, govern the distribution of the surplus.
    - If there are no rules of association, then surplus is divided among members upon dissolution equally, and not proportionally depending on contribution (*Bucks Constabulary Fund*)

### RE WEST SUSSEX CONSTABULARY FUND [1971] UK CH

**If a member has received the stipulated benefit, then that member has no right to the disbursement based on resulting trust.**

**Facts:** The purpose of the West Sussex Constabulary's Widows, Children and Benevolent Fund was to provide allowances for the widows and dependants of deceased members. Some of its revenue was derived from contributions from its own members. Some was also raised from outside sources, by entertainments, raffles and sweepstakes, collecting boxes, and donations, including legacies. The fund was wound up at the end of 1967, upon the amalgamation of the constabulary with other police forces, and the question arose as to how to divide it up. Police force then dissolved. Constables claimed the surplus. Widows/orphans argued that the constables held the money on resulting trust for them.

**Issue:** Is there a resulting trust?

### Discussion:

- Constables were the members of the association and the fund created a contract between the constables.

## 250.5 IMPLIED OR RESULTING TRUSTS

- The contributions of the members themselves were not held on resulting trust for them, since the money was paid on a contractual, rather than a trust basis. Further, since only third parties could benefit (widows and dependants), the fund could not belong to the members themselves.
- Those raised by categories were clearly intended to take effect as out and out gifts to the fund, and therefore the resulting trust doctrine did not apply to them.
- But surplus went to Crown *bona vacantia* because the members had received all they had contracted for.
- The outside contributions were held on resulting trust for the contributors. Note that all identifiable gifts to the association were made subject to a resulting trust.

**Ruling:** Take that, damned orphans!

### **RE BUCKS CONSTABULARY FUND No.2 [1979] UK CH**

***Unincorporated associations are treated as establishing a contractual relationship between members.***

***Distribution of surplus amongst members should be equal (not proportional), regardless of contribution.***

**Facts:** The fund, which was registered under the *Friendly Societies Act* 1896, was made up of voluntary contributions from its members, for the relief of widows and orphans of deceased members of the Bucks Constabulary. Under s.49(1) of the 1896 *Act*, property belonging to a registered friendly society was vested in TRs for the benefit of the members and those claiming through them. There was no provision for distribution of the assets of the fund in the event of the society being wound up. In April 1968 the Bucks Constabulary was amalgamated with other constabularies to form the Thames Valley Constabulary, and in October 1968 the society was wound up. TR applied to court to determine how the funds were to be distributed.

**Issue:** What to do with the surplus?

#### **Discussion:**

- The issue that arose here is essentially similar as *West Sussex*, although without the complication of outside contributions, as that which had arisen in that case.
- Police fund was a contract, as decisions were based on contract rather than equitable principles of trust.
- The court read in an implied term that surplus would be distributed to members upon dissolution. Court held that all members should take surplus equally, regardless of contribution.
- Merely because the benefit of the fund was intended for third parties, it did not follow (in the absence of valid trusts of the assets being declared in favour of the third parties) that the members themselves did not continue to control the assets, and could indeed collectively have divided them up among themselves had they so wished, before the dissolution.
- The surplus assets were held on trust for the members of the society at the time of its dissolution, to be distributed among them in equal shares.

**Ruling:** See above.

### **PENSION TRUSTS**

Sometimes pension plans end up with a surplus after all employees have been paid out. The issue of entitlement to pension plan surplus depends on whether the plan is a trust fund or not.

- If there has been some express or implied declaration of trust and an alienation of trust property to a TR for the benefit of employees, then the pension plan will be a "pension trust".
  - Pension trusts are express trusts for people, not trusts for purposes.
  - Therefore, pension trusts are subject to all applicable trust principles.
- Entitlement to surplus:
  - Employers are not entitled to surplus unless the terms of trust make employer a BN, or employer explicitly reserved power of revocation at the time the trust was created.
  - If the objects of the trust have been satisfied, the surplus may be subject to a resulting trust if STs did not intend the surplus to result to them
    - Usually, resulting trusts will not arise in a pension trust scenarios due to non-reversion clause, or fact that funds could still be used to benefit employees.
- The Rule in *Saunders v. Vautier* does not apply to pension trusts, thus pension plan BNs cannot wind up the trust.

### **SCHMIDT V. AIR PRODUCTS CDN LTD [1994] SCC**

***If employers and employees both contributed to fund and are both entitled to the surplus, then they should receive it proportionally, according to their contributions***

**Facts:** Appeal by the employer and cross-appeal by the employees from an order respecting the distribution of surplus of a pension plan and the employer's entitlement to take a contribution holiday. Two pension plans were amalgamated in 1983

## 250.5 IMPLIED OR RESULTING TRUSTS

when two COs, Catalytic and Stearns, merged to become Air Products. The C plan was a money-purchase plan and incorporated a trust fund administered by a TR. Until the plan was amended, no provision was made for the treatment of a surplus. The S plan gave the employer a discretion as to the distribution of any surplus. The amalgamated plan provided for the automatic reversion to the CO of any surplus. The employer had ceased to make contributions to the plan and met its contributions from the surplus. In 1988, Air Products sold its assets and terminates the pension plan. At that point, the surplus in the pension plan was almost \$10,000. Air Products wanted the surplus. The employees claimed that they were entitled to the surplus, and that they should also get even more money because Air Products improperly took a contribution holiday when they stopped paying into the fund and drew on the surplus instead. In the lower courts, the surplus traceable to the S plan was found to belong to Air Products, but the surplus traceable to the C plan was found to belong to the employees.

**Issue:** Who gets what?

### **Discussion:**

- Entitlement to surplus turns on whether the pension fund is a trust fund.
  - If it is a K, then look at the terms of the plan for further guidance. Most of the time, only those putting money into the plan will be entitled to the funds, as parties to the K. Others get shafted as third parties.
  - If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund.
  - Pension trusts are subject to all applicable trust principles.
  - Employers, as STs are not entitled to surplus unless terms of trust make employer a BN or employer explicitly reserved power of revocation at the time the trust was created
- If the objects of the trust have been satisfied, the surplus may be subject to a resulting trust if STs did not intend the surplus to result to them
- But it's important to note that the general amending power is not equal to the power of revocation.
  - Reservation by the ST-employer of an unlimited power of amendment does not include a power to revoke the trust
  - Revocation power must be explicitly reserved at the time of creation in order to be valid.
- In most pension trusts, a resulting trust will never arise.
  - Resulting trust will not arise if the ST demonstrates an intention to part with his money outright at the time of settlement.
  - Most pension trusts require a non-reversion clause to avoid tax consequences
- Objects of the trust can never be said to be fully satisfied so long as funds which could benefit the employees remain in the pension trust
  - In this case, the C plan created a trust of all contributions made by the employees and the employer for the benefit of the employees.
- The trust was not exhausted as long as money remained in the plan and there were some eligible employees.
- The amendment purporting to give the employer the power to distribute the surplus to itself was invalid.
- The S plan did not create a trust and, according to the plan's terms, the employer was entitled to take a contribution holiday and it was entitled to any surplus remaining in the S plan.

**Ruling:** Air Products was entitled to surplus from S plan. Employees were entitled to the surplus of the C plan.

### **If there is a pension trust problem:**

- Look at the provincial legislation
- Determine whether the pension fund is impressed with a trust
- Is it a trust, or a contract?
- Remember that pension funds are not purpose trusts.
- Has the ST reserved the explicit power to revoke?
- Funds remaining may be subject to a resulting trust. But it must be clear that all of the objectives have been fully satisfied.

*Re British Red Cross Balkan Fund* [1914] UK Ch:

- This was a fund raised by the Red Cross from known subscribers to provide relief during the Balkan War. Some subscribers agreed to allow the Red Cross to apply the surplus to general funds, while other requested a refund. The question was how much of their donation should be refunded, given that a large amount of the total donated money had been spent on war relief?
- The court held that the balance of the fund belonged to all subscribers on a resulting trust in proportion of their subscriptions.
- Surplus divided between STs proportionally, according to their contribution.

## PRESUMED RESULTING TRUST

### THE GENERAL PRINCIPLES

**Presumption of Resulting Trust:** If there is no special relationship between the parties, there is a presumption that the transferor lacked an intention to give the beneficial interest of the assets to the transferee, and the transfer is not seen as a gift, but as a resulting trust.

**Presumption of Advancement:** If there is a special relationship between the parties, the it s presumed that the transfer has been a gift. This applies to

- Married couples where the transfer is from husband to wife (not common law, as per *Macdonald v. Eckert*), but only in BC and MB. Everywhere in Canada, this seems to be disappearing, and it lacks some vigour that it has enjoyed in the past, especially prior to the division of marital property legislation.
- Parents and children. As per *Pecore*, this is limited in application to transfer by fathers and mothers to minor children. Elsewhere the Presumption of Resulting Trust arises.

- A presumption of resulting trust shifts the burden of proof to the recipient.
  - As per *Pecore*, the legal owner must prove that they also hold the equitable interest. Thus the burden is of proof, and not a mere evidentiary burden.
- Intention is paramount to overturning the presumption, which is rebuttable by evidence of a contrary intention.
- Standard of proof is the civil standard of BP.
- Presumption will be relied on only if it still not clear whether recipient was intended to have beneficial ownership, because the evidence is either unavailable or unpersuasive. This will most of the time arise where the transferor is dead.
- Presumption of Resulting Trust is raised if:
  - There is a voluntary transfer from one person to another, or
  - There is a purchase by someone who supplies the purchase money, but directs that title be taken in the name of another person.
  - The recipient is a stranger to the transfer or purchase, or
  - A person transfers assets to or purchases assets in the name of a CO.
  - The parties cannot resolve their difficulties.
- Presumption does not apply to testamentary gifts, and it is assumed that TSs intend to give away all of their assets.
- Canadian courts do not distinguish between real and personal property nor purchases and transfers
- It is more likely that a smaller amount transferred will be more likely to be seen as a gift.

### **Admissible Evidence:**

- The acts and declarations of the parties before or at the time of the transfer, or so immediately after it as to constitute a part of the transactions, are acceptable as evidence to refute or support the existence of the gift
- All statements and actions of the transferor, whether before, during or after the transfer, as long as they are relevant to the transferor's intention at the time of the transfer (*Pecore*)
- Oral evidence by the transferee is highly questionable.
- If there is a statement made at a later time by a party that is against their interest is admissible as well. (*Shephard*)

### **BC Property Law Act s.19 Words of transfer**

- (1) *In the transfer of an estate in fee simple, it is sufficient to use the words "in fee simple" without the words "and his heirs".*
- (2) *A transfer of land to a person without words limiting the interest transferred, or to a corporation sole by his or her corporate designation without the words "successors" passes the fee simple or the greatest estate or interest in the land that the transferor has power to transfer, unless the transfer expressly provides that a lesser estate or a particular interest is being transferred.*
- (3) *A voluntary transfer need not be expressed to be for the use or benefit of the transferee to prevent a resulting trust.*
- (4) *Subsections (1) and (2) do not prevent an instrument from operating by way of estoppel.*

- So, unless otherwise stated, a gift passes legal and equitable title, abolishing the presumption of the resulting trust.
- As per (3), one does not need to state that the transferee gets the beneficial interest in order to prevent the resulting trust
- Note that both the Presumption of Resulting Trust and the Presumption of Advancement have not been cancelled out by legislation in BC. They both still exist.
- There are some suggestion that in BC, because of indefeasible title, there are sections of the *Land Title Act* that prevent the creation of a resulting trust on land once the land is registered, since registration vests the title solely in one person. But this is still up in the air.

### **SHEPHARD V. CARTWRIGHT [1955] HL**

***The acts and declarations of the parties before or at the time of the transfer, or so closely after it as to constitute a part of the transactions, are acceptable as evidence of the gift.***

**Facts:** Father purchased shares in name of his wife and kids. Father then sold the shares and deposited proceeds in children's bank account. By 1936, father had spent all the kids' money (kids signed bank receipts as instructed by father). In 1949, the kids claimed that the shares were gifts to them and that the presumption of advancement should mean that they receive the proceeds. Kids claimed the amount of proceeds against the father's estate.

**Issue:** Does the presumption of advancement apply?

**Discussion:**

- This case is overruled by *Pecore*.
- Father's original intention was to provide for his children's permanent advancement - while this might have changed later, the Court refused to consider this evidence.
- Therefore, it was not admissible for the father to testify that he intended a resulting trust (as this would be in his interest)
- The presumption of advancement may be rebutted, but should not give way to slight circumstances.
- Because advancement is a question of intention, facts antecedent or contemporaneous with the transaction may be put in evidence to rebut the presumption or to support it.
- The subsequent acts and declarations of the parties cannot be used to support their positions but may be used against it.
- If there is evidence that shows that the intention was to benefit a child, then, of course, the presumption of advancement has not been rebutted but rather has been affirmed.

**Ruling:** Shares were a gift. Presumption of advancement not adequately rebutted by the father's estate.

### **MADSEN ESTATE V. SAYLOR [2007] SCC**

***PL has evidentiary burden and burden of proof to rebut the presumption of resulting trust***

**Facts:** Appeal by PL from decision that her father had not intended to gift joint bank accounts to her and that they should be included in the distribution of the estate. PL was made a joint account holder by her father. The accounts had a right of survivorship. PL's father also executed a power of attorney in her favour and she remained the named alternate executor under his will. PL's father retained control of the bank accounts and the funds were used solely for his benefit during his life. Under her father's will, PL and her two siblings were to share one half of her father's estate. Following her father's death, litigation was commenced by PL's siblings against PL as executor because she had not included the accounts in the distribution of the estate. Applying the presumption of resulting trust, the trial judge found that there was no evidence to support PL's position that her father intended to gift the joint accounts to her, and held that they should be included in the father's estate. The Court of Appeal affirmed this decision.

**Issue:** Is the presumption engaged?

**Discussion:**

- This is a companion case to *Pecore* and was released simultaneously.
- But this is not as significant as people thought that it would be.
- A presumption applied to the gratuitous transfer of assets by PL's father into the joint accounts with PL.
- The presumption of advancement had no application because PL was not a minor child of her father.
- PL had the burden of rebutting the presumption of a resulting trust by showing that her father intended to gift the assets in the accounts to her, on the BP.
- Even having regard to the financial institution documents and Brooks' testimony in relation to them, such evidence was insufficient to rebut the presumption of resulting trust.
  - This is in line with *Niles v. Lake* by suggesting that often banking docs will not inform the relationship between the parties.

**Ruling:** Appeal dismissed.

### **PRESUMPTION OF ADVANCEMENT: SPOUSES, PARENTS AND CHILDREN**

As mentioned above, the Presumption of Advancement applies in BC to:

- Parent-child relationships where the child under 19.
  - If the adult child is dependent, then there is no presumption of advancement. However, evidence of disability may be used to rebut the presumption of resulting trust.
    - The courts will determine on a case by case basis whether the child is dependent. The evidence of dependency does not create a presumption, but the dependency is evidence from which the court might conclude that there was an intention to create a gift.



## 250.5 IMPLIED OR RESULTING TRUSTS

- Independent adult children can no longer rely on the presumption of advancement.
- Legally married spousal relationships where the transfer is from husband to wife. Common law get the shaft.

### **Rebutting Presumption of Advancement:**

- It is sufficient to show an absence of intention to rebut the presumption of advancement. This includes:
  - Lack of awareness of the transaction,
  - Lack of capacity to make a gift,
  - Failing to turn their minds to the issue.

### **MEHTA V. MEHTA ESTATE [2001] MB CA**

***Presumption of advancement still applies in Manitoba and BC.***

**Facts:** Husband and wife were both killed in Air India crash. His estate claimed a half-interest in a RRSP which he had purchased in her name. Her estate claimed that it was given to her as a gift based on presumption of advancement.

**Issue:** Does the presumption of advancement applies in Manitoba?

#### **Discussion:**

- Strength of presumptions vary from case to case.
- There is little value in a marital property dispute where both parties are available to give evidence of their intentions.
- But if there is no marital dispute, and parties are unavailable to testify because they are dead or off fucking the dog somewhere, then presumption of advancement has great significance.
- Presumption of advancement applies if there is no applicable legislation abolishing this common law presumption.

**Ruling:** Wife gets the full interest.

### **Wife to Husband Transfers:**

The presumption of resulting trust applies to transfers by a wife to a husband. Note that this is based on outdated assumptions about a wife's (in)ability to provide for her husband. However, the common law presumptions have not been overruled by legislation in BC, as they have in other provinces, so it is arguable that a husband cannot rely on the presumption of advancement in arguing that a gift from his wife should vest fully in him.

### **PECORE V. PECORE [2007] SCC**

***There is no presumption of advancement for adult children.***

**Facts:** An ageing father gratuitously placed the bulk of his assets in joint accounts with his daughter PL. Upon the father's death, PL redeemed the balance in the joint accounts on the basis of a right of survivorship. PL later divorced M and a dispute over the accounts arose during their matrimonial property proceedings. M claimed that PL held the balance in the accounts in trust for the benefit of her father's estate and, consequently, the assets formed part of the residue and should be distributed according to the will. The trial judge applied the presumption of advancement in finding for PL.

**Issue:** Is there presumption of advancement or is there a resulting trust?

#### **Discussion:**

- The trial judge erred in applying the presumption of advancement.
- PL, although financially insecure, was not a minor child.
- The presumption of a resulting trust should therefore have been applied.
- The presumption of resulting trust was the general rule for gratuitous transfers and the onus was placed on the transferee to demonstrate that a gift was intended.
- The error did not affect the disposition of the appeal because the trial judge found that the evidence clearly demonstrated the intention on the part of the father that the balance left in the joint accounts was to go to PL alone on his death through survivorship.
- The finding regarding the father's actual intention showed that the trial judge's conclusion would have been the same even if he had applied the presumption of a resulting trust.

**Ruling:** Appeal dismissed.

## **JOINT BANK ACCOUNTS**

Joint bank accounts give their holders the following rights:

- Right to withdraw money and
- Right to take the balance on death of the co-owner.

## 250.5 IMPLIED OR RESULTING TRUSTS

- Creation of joint bank accounts does not in itself provide sufficient evidence to convey beneficial ownership nor is it necessarily evidence of intention to create a joint tenancy (*Niles v. Lake*).
- Therefore, a joint bank account holder who has not provided any funds to the bank account must rebut the presumption that the funds result back to the account-holder-who-did-provide-the-funds.
- A gift of a joint bank account is an *inter vivos* gift (not testamentary), as per *Pecore*. Therefore, it need not comply with wills legislation, and it can exist outside of the will.

### **Evidence to Consider in Joint Bank Account Situations:**

Though none of these are absolutely determining, these stack up:

- Bank documents, though there is some questioning about the position in *Niles v. Lake* that bank documents only evidence the relationship between the bank and individual customers, not between the two parties.
- Control and use of funds. If the donor does not use funds at all after transfer, that indicates an absolute gift.
- Granting power of attorney. Granting of both power of attorney and joint bank account authority rebuts the presumption, and shows the transferor is likely have intended to give the donee the money after death.
- Responsibility for paying taxes
- Statements (or agreements) made by the donor when the will is drafted

### **NILES V. LAKE [1947] SCC**

***Bank agreement does not govern relationship between the parties themselves and only apply to the relationship with the bank.***

**Facts:** A arranged with a bank to open a "joint account" in the names of herself and Lakes (a sister of A), in which A (who kept the bank-book) made the initial and other deposits from her own moneys and on which she issued cheques. She died within three months after the account was opened. Prior to A's death L made no deposits in, or cheques on, the account, nor did she know what deposits or withdrawals were made. When the account was opened, A and L, as required by the bank, executed under seal a document, in the bank's standard form, addressed to the bank, by which they "for valuable consideration (receipt whereof is hereby acknowledged)" mutually agreed "jointly and each with the other or others of us" and also with the bank, "that all moneys now or which may be hereafter deposited to the credit of the said account, and all interest thereon, shall be and continue the joint property of the undersigned with right of survivorship", and such. A died.

**Issue:** Is there joint ownership, or does the money result to A's estate?

### **Discussion:**

- The account, while commonly described as joint account, is strictly no joint account as money might be withdrawn by either of two parties and the survivor.
- Gratuitously putting B on the account, gives B a legal interest in the account, but no beneficial interest.
- The mere fact of the document in question being under seal does not prevent the PL from showing that there was no consideration. The fact that all the deposits were made by A from her own money raised the presumption of a resulting trust in her favour, and neither the terms of the document nor other circumstances in evidence served to rebut that presumption or to cut down A's beneficial interest raised in equity under it.
- The moneys in the account at A's death belonged to her estate. The mere fact that the document was under seal did not prevent it being shown that there was no consideration from L.
- The document should, under the circumstances and in its language, be construed as being for the protection of the bank and to facilitate its dealing with the account.
- None of this matters though, as this has since been overcome by *Pecore*.
- After *Pecore*:
  - Joint bank accounts create two sets of rights: when the transferor is alive, and after he is dead
  - Both parties can draw on the account when both are alive; another right that is created is right of survivor to take the balance on the death of the co-owner
  - During the life time, the funds are not gifted to the transferee
  - After the death, the transferee gets the right of survivorship
  - But you still have to show intent (???)
  - So WTF?

**Ruling:** Money to the estate.

### **Illegality:**

An ST who transfers property to a TR for an illegal or improper purpose can still invoke the presumption of resulting trust should that trust fail. Illegal intention is irrelevant in deciding whether there is a resulting trust.

### COMMON INTENTION RESULTING TRUST

This deals with the situation where the property is in one person's name, but contributions (money, time, effort, etc) are made to the property by a second person, such as a spouse.

- Most of the cases in this area arose before the *Family Relations Act* came into force, allowing spouses to have an interest in the property of the other spouse.

**Common Intention Resulting Trust Rule:** If both parties have a common intention that they will share property owned by one of them, the court will declare that the property is held in resulting trust for both parties in accordance with their intention. This common intention may be explicitly stated, or implied by conduct.

The "common intention" resulting trust has generally been replaced by marital property legislation and the constructive trust. After *Pettkus*, these situations are usually dealt with by either unjust enrichment, constructive trust, or *quantum meruit*.

- Unjust enrichment
  - There has to be both enrichment of one party and corresponding deprivation of other party
  - Lack of juristic reason
- Constructive trust:
  - There must be a clear link between contribution and assets to award constructive trust. This is usually a better remedy since the value of property has gone up.
  - Constructive trusts apply to common law spouses, and can argue has extended to close relatives and maybe even close friends
  - In BC, property division legislation only applies to married spouses; therefore constructive trusts are still relevant.
- Quantum Meruit
  - Monetary compensation for time and money spent.

- A constructive trust is one imposed by equity, most commonly as a remedy for unjust enrichment.
- It is situation based: it arises in a number of established specific instances, usually for common law couples.
- "Remedial" constructive trust has been developed to respond to situations of unjust enrichment
- In *Murdoch v. Murdoch* [1975] SCC, PL claimed an interest in the property of her husband, which was bought and developed on her blood, sweat and tears: partly on the financial contributions to the purchase of original property, partly on the indirect contributions through her work. Majority of SCC dismissed the claim and said that it was a mere loan to be repaid, but a dissent by Laskin CJ advocated a constructive trust imposition, to respond to unjust enrichment by PL's husband.
- From *Rathwell v. Rathwell* [1978] SCC, which had similar fact to *Murdoch*, SCC found a resulting trust based on common interest, but has accepted that one of the ways to remedy unjust enrichment is by creating a constructive trust in favour of the one who suffered from the unjust enrichment.
- A finding of unjust enrichment does not always result in a trust, sometimes monetary compensation is an option.

### PETTKUS V. BECKER [1980] SCC

**For most purposes, unjust enrichment and constructive trust will be more useful instead of the common intention resulting trust.**

**Facts:** Rosa Becker and Lothar Pettkus, two immigrants to Canada, met in 1955. They moved in together and lived as husband and wife, although they did not marry, and they had no children. Until 1960, B paid the rent and living expenses from her outside income and P deposited his income in a bank account in his name. In 1961, they bought a farm in QB. The money came from P's account and ownership ("title") was taken out in his name, as was the custom in those days. They shared the farm labour and both worked very hard. They turned their farm into a profitable bee-keeping operation. B also earned some income which was used for household expenses and to repair the farmhouse. Their savings went back into the farm or the P bank account. In 1971, with profits from the farm and more money from P's bank account, they purchased a property in ON and again registered it in his name. In 1972, B separated from P. He threw \$3,000 on the floor and told her to take it, along with a car and forty beehives with bees. At his request, she moved back in with him three months later. She returned with the car, deposited \$1,900 in his account, and the forty bee-hives without the bees. Shortly thereafter, with these returned assets, joint savings and proceeds from the sale of the QB land, they purchased another ON farm in P's name. They now had two valuable pieces of land, and in 1974 they moved and built a house upon one of them. They lived off their income from their thriving bee-keeping business. In the fall of that year, she left him for good, taking the car and \$2,600 in cash. She also sued for a one-half interest in the properties, bee-keeping business and assets acquired through their joint efforts. P and B had lived together as husband and wife for almost twenty years. Under ON legislation at that time, a

## 250.5 IMPLIED OR RESULTING TRUSTS

common law wife was not legally entitled to a share in any property owned by her husband. Therefore, any remedy for B would have to be based on the wholly equitable doctrine of constructive trust and principles of unjust enrichment

**Issue:** Is there enough evidence of common intention?

**Discussion:**

- Common intention resulting trust will arise where the court is satisfied based on the words and actions of the parties that there was a common intention that the assets are to be shared.
- Based on *Rathwell*, Presumption of resulting trust is sometimes explained as "the fact of contribution is evidence of an agreement". From this, the court said that it will look for common intention manifested in words or acts that the property is being acquired/kept in trust
- Unjust enrichment test must be satisfied to qualify for a constructive trust
- In this case, Dickson found that the requirements were satisfied and held that B was entitled to half the assets.
- He held that: "where one person, in a relationship tantamount to spousal, prejudices herself in the reasonable expectation of receiving an interest in property, and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it."
- Contributions made by non-titled people were not limited to legal spouses
- Majority did not find enough evidence of common intention, but provided a remedy based on the doctrine of unjust enrichment in conjunction with the constructive trust.

**Ruling:** Judgement for the husband.

**Unjust Enrichment Test:**

1. There is an enrichment
2. There is a corresponding deprivation
3. There is an absence of juristic reasons for enrichment
  - PL must first show that no previously recognized juristic reason to deny recovery applies at present case
  - D then bears an onus to establish that a juristic reason exist.

**Remedial Constructive Trust Test:**

1. There was unjust enrichment
2. Monetary compensation is inadequate
3. There is a connection between the services done and the property in dispute.

**Summary on Resulting Trusts:**

- Where there is a gratuitous transfer, the presumption of resulting trust applies.
- The presumption of advancement is only available for legally married spouses and minor or dependent children.
- Presumptions are raised immediately upon evidence of there being a gift - and not after evidence of intention is examined, and the intention is still unclear.
- Intention of grantor/ST/transferor is still the critical issue. Use the facts to support your case.
- As per *Pecore*, creating joint ownership with right of survivorship for sole purpose of having assets passed to the survivor on death is an *inter vivos* gift - not a testamentary gift. You can't raise *Wills Acts* issues.
- *Pecore* overrules *Shephard* in terms of evidence that can be raised to rebut presumption of resulting trust.

## THE NATURE OF THE BENEFICIARY'S INTEREST

### THE GENERAL PRINCIPLE

The basic principle involved in the creation of a trust is the separation of the legal and the beneficial title to goods. There is no such entity as "a trust," therefore it is merely a relationship between the legal owner and the beneficial owner. A trust relationship can be defined as "a fiduciary relationship between a TR and a BN that is recognized by equity."

Thus, there are two aspects to a BN right

- A personal right against the TR, and
- A direct proprietary interest in the trust assets themselves (sometimes)

### PERSONAL ASPECT OF BENEFICIARY'S RIGHT

- Since management and control of the trustee property is vested in the TR, the BN only has a personal right against the TR if the issue is whether the TR has improperly administered the estate, or whether the BN has direct access to the property.
- BNs are also not entitled to direct the TR.
- Therefore, a BN generally only has a right to accounting by the TR, and a right to bring an *in personam* action against the TR for breach of trust for the following remedies:
  - Order for specific performance
  - Injunction
  - Order to remove TR and have them replaced
  - BN may be able to get an order to allow to sue on behalf of trustee, or
  - right to proper administration of trust in accordance with general rules of trust law and terms of trust
- BN also has a right to accounting of profits

### SCHALIT V. JOSEPH NADLER [1933] UK KB

***Beneficiary has no proprietary right in income of a trust. Beneficiary only has a right to accounting by the Trustee, and the right to bring an in personam action against the Trustee for breach of trust.***

**Facts:** D was a lessee of property, part of which he sublet to the PL. In 1931 he made a declaration of trust, under which he declared that the property was held in trust for his CO, Joseph Nadler Ltd. Shortly after the CO purported to distrain for arrears of rent under the subtenancy. The PL issued proceedings for damages for illegal distress. The CO argued that as a BN it was a person entitled to receive the rents, and therefore under section 141(2) it was able to enforce the covenants.

**Issue:** Is the CO as a BN entitled to receive the rents and profits directly?

#### **Discussion:**

- Because BN has an equitable interest in the trust property, he can require TR to account for profits from trust property.
- However, BN does not have a proprietary interest in trust property - therefore, he cannot call upon the TR to give him the gross rent income directly.
- We cannot have people making possible conflicting transactions over property
  - BM is only entitled to the net rent income - not the gross rent income
  - TR may have other obligations in addition to paying BN rent income, such as paying property taxes, etc. If BN took all of the rental income, TR would have no income leftover to fulfill other obligations.
- Thus the CO did not qualify the ability of an absolute beneficial owner to recover rent.
- Section 141(2) did not by itself permit the BN of a trust of the landlord's reversionary interest to distrain for rent.

**Ruling:** Judgement for PL.

### PROPRIETARY ASPECT OF BENEFICIARY'S RIGHT

- Sometimes, the proprietary aspect of the BN's rights may predominate over the personal aspect.
- BN has the right to terminate the trust and call upon TR to convey property under rule in *Saunders v. Vautier* if BN has reached the age of majority and becomes solely entitled to the trust property
- BN also has the proprietary right to trace trust property which has been misapplied by TR, but retained in its original or converted form. This right also exists against anyone who received the trust property from the TR, provided transferee was volunteer or took the property with a notice of trust.
- Given that aspects of the BN's interest may be proprietary, BN's interest may also be taxable depending on tax legislation.

## 250.6 THE BENEFICIARY AND TERMINATION OF A TRUST

### **BAKER V. ARCHER-SHEE [1927] HL**

***Beneficiary has a proprietary interest in trust property, since they can point to trust income as "theirs"***

**Facts:** An American millionaire left the residue of his estate by will in trust to his daughter Frances for life, the remainder going to Columbia University. The trust was situated in NY, with NY TR, and with trust property consisting entirely of non-British securities. Frances, typical of nouveau-riche American industrialists, married to Old World blue blood in the form of Sir Archer-Shee, and lived in England. Her husband got assessed under British *Income Tax Act* for income paid to Frances' use from the trust since the marriage. This income had been paid into her NY bank account, and never forwarded to England. Statute held that share dividends owned outside of England were taxable, regardless of whether dividends were forwarded to England or not.

**Issue:** What is the nature of Frances' interest in the securities?

**Discussion:**

- Frances was found to be the beneficial owner of securities themselves, and Sir Archer-Shee was thus, taxable on income from the securities.
- But this is a random decision that seems to be inconsistent with the majority of case law on trusts, especially *Shalit* above.

**Ruling:** The tax man always wins.

#### **The Right of a Beneficiary Under a Will vs. a Testamentary Trust:**

- Until all the TS's debts have been paid, a BN under a will only has a personal right against the TR to compel them to carry out their duties and account for assets.
- But once the estate is fully administered, the BN under the will receives a proprietary right to any assets devised to them under the will.
- But, if the will says that the residue is to be held in trust, then the BN probably does not get a proprietary right in the residue, and only the standard right to call upon the TR to account for administration of trust as per *Schalit*.

### **POSSESSION OF THE TRUST PROPERTY**

*Re Bagot's Settlement* [1893] UK:

- PL was BN of farm property in trust for life, with remainder going to kids. PL thought that she should manage the property instead of the TR because the TR was not an expert in farming.
- Court was found to have an inherent jurisdiction to allow a BN to take possession of asset.
- This arose out of the Discretionary power of court:
  - Court may give BN an order of possession, usually with terms to ensure asset is preserved
  - BN would then act as a delegate/agent of TR, but could be removed at any time if they are found to not be acting in best interests of all the BNs
- TR has a duty to maintain trust property, whereas BN has no right nor responsibility to maintain property
- It is common to set out in trust instrument specific terms for BN to take possession of trust property
- If one BN fails to live up to terms, then other BNs with remainder interest may bring action to take possession of property

### **CONTROL OF TRUSTEES**

Unless a TR is in breach of his fiduciary duty, a BN cannot control a TR's actions by requiring them to resign or to appoint a new TR. A BN can only call upon a TR to account for his actions.

### **IN RE BROCKBANK [1948] UK CH**

***Beneficiaries can't compel a trustee to resign or to appoint a new trustee if the they are in breach of duty.***

**Facts:** The TS left the residue of his estate in trust for widow for life, remainder going to their children. TRs were W and B, and W was a lazy old bastard who wanted to retire. Widow and kids thought that this is a capital idea, and wanted to appoint Lloyds Bank as sole replacement TR, and thus getting rid of B. B refused to consent.

**Issue:** Can BNs have any control to force TR to retire?

**Discussion:**

- No
- Court refused to allow Lloyds Bank to be appointed as the new TR.

**Ruling:** No

### BUTT V. KELSON [1952] UK CA

#### *Principles governing the disclosure of information to beneficiaries*

**Facts:** D as TRs of a TS's will held most shares of a private CO. The voting power was vested in the ordinary SHs.

Pursuant to powers conferred on them by the will of the TS, Ds had appointed themselves to be the sole directors of the CO. PL, who was entitled under the TS's will to a life interest in a substantial portion of the TS's residuary estate, became dissatisfied with the manner in which the Ds had conducted the CO's business and in this action claimed a declaration that he, as a person beneficially interested in the property subject to the trusts of the will, was entitled to inspect all documents which came into possession or power of the Ds by virtue of their position as directors of the CO.

**Issue:** What right to information to BNs have?

#### **Discussion:**

- BNs were not entitled to call on TR directors to use their powers as directors as though such powers were held on trust for the BNs.
- BN will normally be permitted to inspect and take copies of essential trust documents on the basis of the proprietary right he holds over them.
- That normal right does not extend to detailed information about the affairs of COs owned by the trust. To obtain information of that kind, BN must make out a special case.
- In order to make out a special case, the BN must specify the documents that he or she wishes to see.
- There must be no valid objection by the TRs or directors, or (in special circumstances), BNs whom TRs consider should properly be consulted upon the matter.
- BN seeking disclosure must give proper assurances that he or she will not disclose the documents to anybody but his or her own legal or other advisers and will not make copies save as may be properly advised by his or her legal or other advisers

**Ruling:** Judgment for PL.

## ALIENATION OF THE BENEFICIAL INTEREST

- The question is how can the BN alienate their interest and their personal rights as a BN, and is this possible at all?
- It is important to distinguish between a specific interest and an interest dependent on the exercise of discretion by a TR.
- BN holds an intangible personal property right in their chose in action, and has two ways to alienate this right:
  - During BN's lifetime they can assign their rights to the beneficial interest to someone else;
  - Testamentary, BNs can assign their rights, either upon death or upon the death of another (*pur autre vie*)

### METHODS AND FORMALITIES

**Alienation / Assignment:** The transfer to a stranger of a beneficial interest in one's equitable rights arising under a trust.

**Methods of Alienating an Equitable interest** ( as per *Simpson's Executors v. Yerbury*):

- Assignment to third party directly (equitable or statutory)
- Direction to TR to hold property in trust for third party
- Contract with third party for valuable consideration
- Personal declaration of trust

### EQUITABLE ASSIGNMENT

Common law did not favour assignments of beneficial interest, due to privity of contract. To address this, equitable assignments were created.

- No particular form of words is necessary as long as the intention is clear that assignee is to have benefit of interest.
- The assignment may be either oral or written.
- The assignment results in vesting of interest from assignor to assignee.
- In order for the assignee to have an exclusive personal right to bring an action against the TR (as opposed to simply joining with the assignor), the assignment must be absolute.
- Once TR receives notice of this assignment, then TR assumes TR duties for the third party (new BN) in place of the old BN. Notice is not required, though it is a good idea.
- The assignee cannot end up with greater interest than assignor had.
  - So if assignor does not live up to terms of trust and is cut off by TR, then the assignee has no claim against the trust. Good idea for assignee to confirm with TR that there are no problems

## 250.6 THE BENEFICIARY AND TERMINATION OF A TRUST

### STATUTORY ASSIGNMENT

#### **Law and Equity Act s.36 Assignment of debts and choses in action**

- (1) An absolute assignment, in writing signed by the assignor, not purporting to be by way of charge only, of a debt or other legal chose in action, of which express notice in writing has been given to the ... trustee or other person from whom the assignor would have been entitled to receive or claim the ... chose in action, is and is deemed to have been effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this Act had not been enacted, to pass and transfer the legal right to the debt or chose in action from the date of the notice, and all legal and other remedies for the debt or chose in action, and the power to give a good discharge for the debt or chose in action, without the concurrence of the assignor.
- (2) If the ... trustee or other person liable in respect of the ... chose in action has had notice that the assignment is disputed by the assignor or anyone claiming under the assignor, or of any other opposing or conflicting claims to the ... chose in action, the ... trustee or other person
- (a) is entitled to call on the persons making the claim to interplead concerning the debt or chose in action, or
  - (b) may pay the debt or chose in action into court, under and in conformity with the Trustee Act.

- This does not repeal equitable assignments, but creates a new type of assignment that explicitly gives the assignee rights to bring action without joining assignor.
- There are three requirements:
  - Assignment must be absolute and for the whole interest of assignor
  - Assignment must be in writing and signed by assignor
  - There must be notice to the Trustee
- If these three requirements are met, then the assignee can sue TR without joining assignor.
- Even if there is failure to comply with these three criteria, there may still be a valid equitable assignment. Note that equitable assignments still exist in BC, though statutory assignments are more commonly used.

### DIRECTION TO TR TO HOLD PROPERTY IN TRUST FOR THIRD PARTY

- Assignor can direct TR to hold property in trust for a third party, and thus give right to their payments to the assignee.
- BN gives notice to TR to request that TR pays X (assignee) what BN would have normally received
- It is not clear if TR can be sued by assignee, or if assignor can revoke transfer to third party
- But assignor could make the transfer irrevocable

### CONTRACT WITH THIRD PARTY FOR VALUABLE CONSIDERATION

- This probably does not meet with statutory requirements because here there is no need to give notice.

### PERSONAL DECLARATION OF TRUST FOR THIRD PARTY

- BN could declare that they "hold in trust for X the payments I am receiving from trust".
- BN therefore becomes a secondary TR. But why such needless complication?
- The third party should give notice to the TR in order for this to enforce.

### PRIORITIES BETWEEN ASSIGNEES

#### MULTIPLE TRUSTEES

- If you have multiple TRs, notice must be given to all existing TRs at the time of assignment in order to establish priority.
- If new TRs come along after the assignment, BN (or the assignee) still maintains his priority despite not giving notice to new TRs.

#### MULTIPLE ASSIGNEES

- Assignment is generally given priority for claims based on timing of notice to TR
- Determining priority between assignees also depends on whether it is real or personal property
  - For Real Property first assignment takes priority and there is no notice requirement
  - For Personal Property, first assignment takes priority, but to maintain the priority, assignee must give notice to all TRs.
    - Notice to all TRs means that the priority is maintained forever
    - Notice to some TRs means that priority is only maintained for as long as the person told continues to be a TR.
- A subsequent assignee who gives notice has a better title in equity than an earlier assignee who does not give notice



### RESTRAINT ON ALIENATION

There may be cases where ST wants to place a restraint on alienation of the interests created by the trust.

- This is done as a way to prevent creditor on a bankruptcy from getting access to money
- Also to keep the money out of the hands of some unsavoury gold digging widow.
- There may be other uses, but these two are good enough for the time being.
  
- Generally speaking, beneficial interests are freely alienable unless donor has placed specific restrictions on alienation.
- There are four ways to place a prohibition on alienation:
  - Straight Prohibitions are void. A ST cannot make a straight prohibition against alienation as it is repugnant to the nature of the interest an contrary to public policy.
    - "I give my house to B, but B is not allowed to alienate it"
  - Conditional Prohibitions are also void based on the doctrine of repugnancy yet again.
    - "I give my house to B, but if B goes bankrupt, then to C"
  - Determinable Interests of Limited Duration are valid. the gift is not absolute and it is limited by its determination
    - "I give my house to B in trust for life or until he becomes bankrupt, then to C"
    - This is rare, as the wording can be tricky, and it's easy to make a mistake.
  - Discretionary Trusts are valid, ST can give the TR power to distribute if they see fit.
    - Therefore, TR can stop paying a BN if the BN tries to assign their rights
    - This is the most common way of going about this.

### TERMINATION OF A TRUST

There are three ways to terminate a trust:

- Revocation by ST via an express power of revocation.
- Trust naturally terminates when all trust property is distributed, or the time of the trust runs out.
- Termination by BN. This is the category that is most commonly litigated.

### REVOCAION

- Generally, once a trust is set up, it is irrevocable until it reaches its natural termination because the ST has parted with the trust property. So ST no longer has a legal interest in the property (unless he is also TR).
- ST may seek to have trust set aside because of circumstances leading up to the trust, such as ST being under duress, misrepresentation, fraud, etc.
- Power of Revocation in *inter vivos* trusts must be expressly stated in trust document. There are issues attached to this.
- But in the case of testamentary trust, TS may always revoke their will before they die.

### TERMINATION OF THE TRUST BY A BENEFICIARY

- By default, a BN cannot terminate a trust. But if they really want to try, BN may terminate a trust under either
  - The rule in *Saunders v. Vautier*
  - The *Trusts and Settlement Variation Act*.

#### **Rule in Saunders v. Vautier:**

BNs who are *sui juris* and whose interest is vested absolutely, are entitled to immediate distribution of the trust property, and thus, to terminate the trust prematurely.

- All BNs must be ascertained
- The BN (or BNs) must be absolutely entitled to the trust property.
  - The interests must be fully vested, and not be contingent
  - Together, their interests must account for all the interests in the trust property
- The BN (or BNs) must be *sui juris* - adult and of full mental capacity
  - Court cannot consent on behalf of BNs
- All BNs must be in unanimous agreement.

- This enables a BN to terminate a trust without court assistance or approval, prematurely, and possibly contrary to the wishes of the ST

## 250.6 THE BENEFICIARY AND TERMINATION OF A TRUST

- Thus, BNs get a proprietary interest in trust assets, as an indirect result of the operation of this rule. This is one of the few exceptions where this happens.
- BNs can compel the TR to convey the property to anyone whom the BNs direct.
- Note that BNs still have no control over TRs:
  - BNs must choose between either terminating the trust or abiding by its terms
  - BNs cannot direct TRs to exercise their powers in a certain way

### **SAUNDERS V. VAUTIER [1841] UK KB**

***A beneficiary who is sui juris and whose interest is vested absolutely, is entitled to immediate distribution of the trust property, and thus, to terminate the trust prematurely.***

**Facts:** TS dies leaving £2500 of shares in trust for great-nephew Vautier. PL was to take the money when he turned 25. When PL turned 21 (age of majority), he applied to the court to have all shares, plus accrued interest paid to him.

**Issue:** Is this possible?

#### **Discussion:**

- An equitable interest created under a testamentary trust vests upon the TS's death.
- So if the gift is not to be given until a certain point after the death, then all that is postponed is the actual enjoyment of the gift.
- As equitable ownership resides in the BNs, they should have the right to decide what to do with the property
- See box above for more details about the rule

**Ruling:** Judgment for PL

### **RE SMITH [1928] UK**

***The Saunders v. Vautier also applies to discretionary trusts. All beneficiaries must be ascertainable, and must consent***

**Facts:** TS died and left a quarter of estate was to be held in trust. TR had discretion under terms of testamentary trust to pay income and capital to A, and upon A's death, the remainder to A's children equally. A wanted to have all of the income paid to a CO to pay off his mortgage. She was a very uncomely spinstress, and it was pretty clear that she would not have any more kids. All BNs (A and her kids) agreed to wind up trust to pay mortgage.

**Issue:** Say what?

#### **Discussion:**

- All who could benefit were in agreement as to termination
- Even though this is a discretionary trust, it was possible to terminate, because all BNs were ascertainable and consented, and together, and they were entitled to the entire interest.
- If Trustees did not pay out to A, trust would accumulate & would end up w/ A's kids anyway
- All BNs who were entitled to the whole fund consented
  - You could have argued that A could have adopted, therefore, BNs not ascertainable

**Ruling:** Judgement for the spinstress.

### **PARTIAL TERMINATION**

A single BN may wish to sever their interest from the trust and call for the property that they are entitled to. In these cases, the BN must convince the court that they have an absolute right to a portion of the trust property, essentially, that there are separate and distinct trusts.

- Court will only divide when there is no uncertainty as to valuation, and so long as such division does not result in undue devaluation of other BN's property or create imbalance
- Note that trusts involving joint tenancies in land cannot be terminated partially, as joint owners of property have an "undivided interest in the whole".

### **RE SANDEMAN'S WILL TRUSTS [1938] UK**

***If trust can be divided into independent parts, and there is no prejudice to other beneficiaries, then one beneficiary may wind up their share of the trust.***

**Facts:** TS left half of residue of estate (in CO shares) to his son, with power in son to appoint BNs. The other half of the estate went to TS's daughter. Son dies and names his two kids as BNs. Son's kids desired their interest to be wound up.

**Issue:** Is partial termination possible?

## 250.6 THE BENEFICIARY AND TERMINATION OF A TRUST

### **Discussion:**

- Court found that there were two separate trusts for son and daughter.
- There is no prejudice in partial termination to other BN (daughter), so son's two kids were entitled to terminate son's part of the trust, under the principle in *Saunders v. Vautier*.

**Ruling:** Everybody wins.

### **LLOYDS BANK V. DUKER [1987] UK**

***Sandemans doesn't apply where there are exceptional circumstances that would negatively affect other beneficiaries.***

**Facts:** The TS held 999 of the 1000 issued shares in a private CO which owned a luxury hotel in Torquay. By his will, he appointed his wife and the PL bank as executors upon trust to sell or retain his residuary estate and directed them, inter alia, to pay his wife one half of the estate absolutely and beneficially and to divide the remaining half in certain proportions among other BNs. In the events which followed the TS's death, his residuary estate was subject to a partial intestacy and a deed of family arrangement which resulted in it becoming divisible among the BNs in fractions of 1/80. The TS's wife became entitled to 46/80 and the remaining 34/80 became divisible among the five D BNs in proportion to their entitlements. The wife called upon the PL to transfer to her 574 shares in the CO, being the nearest whole number to 46/80 of 999, but no transfer had been made by the time of her death. By her will she appointed the PL as her executor and left her entire estate to the first D who was now the managing director of the CO. He called upon the PL to transfer to him 574 shares in the CO.

**Issue:** Does PL have a duty to comply with the first D's request or to sell the shares on the open market?

### **Discussion:**

- The intention of trust was to balance benefit to all children equally, and early termination for one BN would create imbalance.
- For example, if one BN got voting control of shares, they could vote to give themselves a salary and not issue dividends.
- The block of 574 shares was worth more per share than any minority holding and it followed that their transfer to the first D would give him markedly more than 46/80 of the total value of all the share holdings.
- Accordingly, to ensure equality among the BNs the PL was under a duty to sell all the 999 shares on the open market so that the first D took 46/80 of the residuary estate by value.

**Ruling:** No go

### **TERMINATING CHARITIES AND PERPETUAL TRUSTS OF INCOME**

- The rule in *Saunders v. Vautier* does not apply to charitable purpose trusts, as there is no one to consent to the termination
  - Although in theory, you could get the AG to consent.
- However, if a Charity is one of the direct BNs in an express trust, then the rule in *Saunders v. Vautier* still applies.
- In such a case, the charity must agree to termination like all other BNs.

### **HALIFAX SCHOOL FOR BLIND V. CHIPMAN [1936] SCC**

***Saunders will apply to express trusts, where one of the beneficiaries is a charity.***

**Facts:** Property was left in trust to TR, the income of which was for the benefit of School Charity. School was the only BN and had a right to the whole income. Charity tried to invoke *Saunders* and to wind up the trust on the grounds that the Charity had the whole interest. TR told them to sod off.

**Issue:** Will the blind kids get the money?

### **Discussion:**

- Court considered the intention of the ST and found that the charity only had the right to income only, and not to capital.
- Therefore, no absolute interest in all trust property was given, and no termination was permitted.
- This does not really fit with *Saunders* which is not normally concerned with the ST's intention.
- It is unclear why rules is different for charities

**Ruling:** Now the blind are also poor.

- Rule in *Saunders v. Vautier* does not apply to pension trusts as per SCC decision in *Buschau v. Rogers Communications* [2006] SCC. So if all the pension trust BNs got together and wanted to end the trust, they could not do it.
- Pension plans are commercial uses regulated by statute.
- By contrast, a family trust is a stand-alone instrument. This may not be the case with pension plans.
- Employers establish pension plans because it is in their interests to do so. The Court should not interfere lightly with that.

## 250.6 THE BENEFICIARY AND TERMINATION OF A TRUST

### **Drafting to Defeat *Saunders v. Vautier*:**

- Create a defeasible interest so that it is not absolute: “interest to A until A reaches 25, but if A dies before 25, then to x” so that before A reaches 25, he cannot get the money. Before A turns 25, you can argue that it might still be possible for A to die at which point the interest will vest in X. So the interest does not vest fully until A turns 25.
- Make class of BNs so big that it is unlikely for all BNs to agree
- *Income to A until he reaches 40, then the capital to him, but if A does not reach age 40, then to his children.*
- Include at least one person who is not of full mental capacity - this way they will not be able to consent.
- Give contingent interests to children or future children so that it will take a while for all BNs to reach age of majority - *“interest to A for life, remainder to A's children, but if any of A's children predecease A, then to the children of A's children”*
- Give TR discretion to appoint other BNs. This is probably the easiest one to manage.

## VARIATION OF TRUSTS

### **TRUST AND SETTLEMENT VARIATION ACT BC**

- It is not clear whether *Saunders v. Vautier* can be used to vary a trust.
- Instead, to vary a trust, use the *Trusts and Settlement Variation Act*.
- The Act allows for adult BN to consent to any termination or variation
- It also allows the court to consent on behalf of the BNs that can't consent themselves
- The Act gives the Court the power to approve arrangements proposed by BNs:
  - This involves negotiations galore between parties as they need to propose an arrangement that the court will approve
  - But the court cannot order or create an arrangement that is of the court's own making.
  - The court has a degree of discretion, but it must ensure that the arrangement benefits all persons under the trust that are not yet at capacity, such as children or future children.

### **1 Court approval of variation**

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

- (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting.
- (b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of a specified description or a member of a specified class of persons,
- (c) any person unborn, or
- (d) any person in respect of an interest of the person that may arise by reason of a discretionary power given to anyone on the failure or determination of an existing interest that has not failed or determined,
- any arrangement proposed by any person, whether or not there is any other person beneficially interested who is capable of assenting to it, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.*

- This allows court to consent for potential future classes of BNs
  - Ascertainable beneficiaries who are underage or mentally incapacitated
  - Unascertained beneficiaries - whether adult or infants
  - Any as yet unborn beneficiaries
  - Potential beneficiaries under a protective trust
- Any person with a relationship with the trust can apply

Exceptions to this rules are:

- Therefore, Act cannot apply to charitable purpose trusts where the BN is not a legal entity
- Also, Court cannot consent on behalf of ascertainable BNs with contingent interests (*Buschau v. Rogers*)
- Arrangements cannot propose a new settlement or resettlement between the BNs that would have the effect of changing the disposition of assets (*Re Harris*)
- Arrangement cannot reduce (but can enlarge) the powers of the TR
- Does not allow court to override the objections of competent adults to arrangements. Thus, one BN is still able to frustrate a proposed variation of the trust
- If a ascertainable beneficiary goes missing, the court does not have power to give consent on his behalf

## 250.6 THE BENEFICIARY AND TERMINATION OF A TRUST

### **2 Benefit to parties interested**

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

- The issue then rest on the definition of Benefits
  - Financial benefit is usually tax driven, as in *Re Burns*.
  - Non-financial benefits, such as welfare of children, physiological, emotional and family benefits (*Re Weston's Settlements*)
  - Court does not allow non-financial benefits to outweigh the financial benefits, but will still consider them (*Harris*)
  - The possibility of obtaining an interest is also a benefit, as per (*Tweedle*)
  - Typical situation is unborn children or children who may get an interest
    - One typical instrument in these situations is the courts looking at interest of the child being protected by life insurance, where TR buys insurance on life of the BN so if they die, children will get insurance money in lieu of trust money.
    - Court may find this to be acceptable arrangement , as insurance neutralizes any losses that might occur in dispensing the trust in a different way then intended.
- How certain must the benefit be?
  - The benefit to be obtained on behalf of those whom the court is acting for must be equivalent to, or better than, the expected (or actuarial) benefit of the contingent interest in the original trust
  - Court is thus required to predict the likelihood of benefit. What degree of risk should be taken into account in assessing what the benefit might be?
  - The Court analyses this from the position of prudent adult when determining if this is an acceptable level of risk

### **3 Public Guardian and Trustee**

*If a person comes within section 1 (a) or (c), or if a person coming within section 1 (b) or (d) is a minor or is mentally disordered, notice in writing of an application under this Act together with a copy of the material filed in support of it must be served on the Public Guardian and Trustee not less than 10 days before the date of the application.*

### **4 Deemed trust**

(1) *The Supreme Court may exercise its powers under this Act in respect of land the ownership of which is the subject of a legal life interest.*

(2) *For the purposes of this section*

- (a) *the holder of the legal life interest is deemed to hold the land in trust for himself or herself and the holders of successive interests in the land, and*
- (b) *the beneficiaries of the trust are deemed to be incapable of consenting to the arrangement.*

- Allows a life interest to be treated in the same manner as a trust

### **5 Court appearances**

*The Public Guardian and Trustee is entitled to appear and be heard on the application and is entitled to any costs that the court orders.*

## **BENEFICIARY FOR WHOM THE COURT MAY CONSENT**

### **BUSCHAU V. ROGERS COMMUNICATION INC. [2006] SCC**

***Court cannot consent on behalf of those who hold contingent interests.***

**Facts:** PL were members of the Plan. The Plan and trust were established in 1974 as a defined benefit plan funded solely by the employer for the benefit of employees of a CO that D acquired in 1980. The Plan provided that, in the event of termination, the surplus remaining in the trust was to be distributed amongst the remaining members, but neither the trust agreement nor the Plan provided for termination of the trust by the employees. In 1981, D amended the Plan so that any surplus funds remaining on termination would revert to D and, in 1984, it closed the Plan to new employees. D began taking contribution holidays the following year and was refunded \$962,285 from a surplus that had developed. In 1992, it merged the Plan retroactively with other Rogers Communications pension plans. The Plan members initiated a first action against D; the court concluded that the merger was valid but did not affect the existence of the Plan established in 1974, and that Plan members were at liberty to institute proceedings to terminate the trust based on the rule in *Saunders v. Vautier*, to the extent that it was applicable. The court also ruled that the members retained the right of distribution of the surplus upon termination. The members initiated a second action and succeeded in obtaining an order terminating the Plan. The BCCA set aside a portion of that decision, finding that courts did not have the power under the *Trust and Settlement Variation Act* to consent on behalf of contingent *sui juris* BNs. The court concluded that, provided that all the required consents were

## 250.6 THE BENEFICIARY AND TERMINATION OF A TRUST

obtained, the members were at liberty to invoke the common law rule. It also found that the appellant could not amend the Plan to permit the addition of new members.

**Issue:** Can courts consent on behalf of contingent *sui juris* BNs?

**Discussion:**

- A BN with a contingent interest is not "somebody who may become entitled to an interest" as defined in s.1 because they already have an interest.
- Therefore, Court cannot consent on behalf of those who hold contingent interests.
- Also, the rule in *Saunders v. Vautier* does not apply to pension trusts.
- That rule was not easily incorporated into the context of employment pension plans.
- The *Pension Benefits Standards Act* dealt extensively with the termination of plans and the distribution of assets. It was clear from that explicit legislation that Parliament intended its provisions to displace the common law rule.

**Ruling:** Judgment for Rogers.

### THE ARRANGEMENT

#### RE HARRIS ESTATE [1974] BC SC

**The Act does not allow the court to approve an arrangement which would resettle trust property on terms which bear no relationship to original trust**

**Facts:** Father dies leaving estate in trust for kids, so that his first son got 5/8th and other three children got 1/8th each. All infants and mother apply for variation to give each kid 1/4 share, to avoid family dissent.

**Issue:** Can the court vary the trust?

**Discussion:**

- Arrangement is not approved because it proposed to make new disposition or resettlement of trust assets, as opposed to just changing investment powers or timing of payments
- Court saw this as asking for new trust rather than a true variation
- Non-financial benefits can be considered, but in this case, they did not outweigh the financial detriment.
- However, here there is no non-financial benefits to rearrangement of benefits (as the emotional benefit is unclear), and such a restructuring was to the detriment of the first son.

**Ruling:** No variation allowed.

### BENEFIT

#### RE BURNS TRUST [1970] BC SC

**Financial benefits will be considered.**

**Facts:** ST wanted to alter his *inter vivos* trust by broadening the investment powers of TR. Such a variation would achieve a tax benefit. Normally, ST cannot vary terms once trust is created, unless they have expressly reserved that right.

**Issue:** Can this be done?

**Discussion:**

- Financial benefits are acceptable
  - Here the benefit was to avoid estate tax and succession duty upon the death of the ST.
- The English approach was that it is appropriate to vary the investment powers but only when there are special circumstances for this court followed this approach because English approach was similar to law in BC.
- Court agreed that special circumstances existed here.
- But currently, *Trustee Act*, s.15 appears to change this rule:
  - The Act allows for investment in any form of property that a prudent investor would invest in, unless power is expressly limited. Therefore, you no longer need to prove special circumstances

**Ruling:** Variation allowed.

#### RE WESTON'S SETTLEMENT [1967] UK CA

**Non-financial benefits will be reviewed before the court would approve any variation.**

**Facts:** In 1964 the ST made two settlements, a marriage settlement for the benefit of his elder son and any children he might have, and a voluntary settlement for the benefit of his younger son, an infant, and any children he might have. The trust funds consisted in shares in a public CO of which the ST had formerly been chairman. The TRs were all resident in

## 250.6 THE BENEFICIARY AND TERMINATION OF A TRUST

UK. After the introduction of the capital gains tax, a very heavy tax liability would be incurred on a disposition of the shares which could be avoided if the majority of the TRs and all the existing BNs were neither resident nor ordinarily resident in the UK and if the general administration of the trusts was ordinarily carried on outside the UK. ST and the existing BNs thereupon took steps to move from UK to Jersey and acquired homes there.

**Issue:** Will this arrangement work?

**Discussion:**

- Denning goes on a rant about the overall welfare of the children in question.
- The function of the court is to protect those who cannot protect themselves.
- The court should consider the education and social benefits of the children. The children will suffer by being raised in such an inferior location as Jersey. This loss far outweighs the benefits of money. "Many a child has been ruined by giving too much".
- Heaven forbid children are forced to wander around the face of the world, avoiding taxes.

**Ruling:** Arrangement denied

### RE REMNANT'S SETTLEMENT [1970] UK

**Promotion of family harmony is a valid benefit to be considered.**

**Facts:** Intestate trust for infant grandchildren with forfeiture clause that none could convert or marry a Roman Catholic or attend a Roman Catholic service. This was put in because the grandmother was a rabid Protestant. There was also an immediate gift made in the trust to the grandkids. The case was an application to strike down the forfeiture clause.

**Issue:** Whatever happened to good old fashioned religious intolerance?

**Discussion:**

- There was non financial benefit to the parties and therefore their ought to be a variation.
- Variation would allow them to convert religion if they wanted or marry a Roman Catholic (which is a benefit, apparently) therefore promoting harmony in the family.
- Shows that non financial considerations can have an impact

**Ruling:** Variation allowed.

### RE TWEEDIE [1976] BC SC

**Spectrum of defining "benefit" shifts with the remoteness of interested parties. If the benefit lost to the beneficiary is minor and unlikely, then the court is more likely to disregard it**

**Facts:** The income BN under a testamentary trust applied to vary and revoke the trust and have the balance of the money in trust paid out to her. The TS had, in her will, made several specific bequests, established the \$10,000 trust in favour of the PL, her daughter, and left the balance of the estate to a second daughter B. If PL had no issue at the time of her death, then the remainder was to go to the B and her issues. The value of the trust property had seriously diminished. PL, being of modest means, was desirous of using the balance of the funds to discharge personal indebtedness, and all adult BNs agreed and apply to court. The application was opposed only by the Public Trustee on behalf of possible BNs (unborn grandchildren and infant BNs who held a contingent interest).

**Issue:** Will the unborn rule the living, and the undead?

**Discussion:**

- In the will of the deceased the trust was to be dividend equally and *per stirpes* among the issue of the applicant at her death. The term "issue" thus means descendants to the remotest degree.
- Here it was possible that a BN was not yet ascertainable and thus the trust could not be terminated solely on the basis of consents now filed and under the law of trusts.
- Under the *Act* the PL had to show some benefit to persons on whose behalf the Court was acting in approving the termination of the trust.
- The Court ought to so approve if, as here, the benefit and detriment balance so that a reasonable adult would approve.
- Here the most probable heirs consented. The classes on whose behalf the Court was asked to approve were losing nothing.
- But will somebody please think of the children!

**Ruling:** Application allowed

### SETTLOR'S INTENTION

#### **RUSS V. BC (PUBLIC TRUSTEE) [1994] BC CA**

*Certainty of the benefit. Settlor's intent is irrelevant.*

**Facts:** This was an appeal from the approval of an arrangement to vary a trust established by deed dated April 1945 which disposed of the ST's shares in a CO. Two of the ST's three children had died. The remaining one and her five daughters sought the variation to obtain greater control of the trust assets and to obtain an interim distribution. The children of the two deceased children were all over the age of majority. PL argued that the Court should have dismissed the petition as the proposed arrangement was incomplete and that the Court should not have amended the arrangement, that the Court should have held that there was insufficient evidence before it to determine whether the proposed arrangement provided any benefit to the persons concerned, and that the Court should have refused to approve the arrangement on the ground that it would not benefit all of the persons concerned.

**Issue:** I am confused.

#### **Discussion:**

- If the benefit is such that a prudent adult motivated by intelligent self interest, and sustained consideration of risk and expectations, would be likely to accept it, then the benefit is valid.
- The Court was not bound to approve or reject a proposal as originally presented.
- The judge below had sufficient information to make an assessment.
- The Court does not have to consider ST's intent when deciding whether to make the variation.
- He was aware of the differences in positions of the BNs.
- He considered the arrangement as a whole. It could not be said that he erred in exercising his discretion as he did. There was evidence to indicate that the arrangement was for the benefit of the infant and contingent interests.

**Ruling:** Appeal dismissed



## ADMINISTRATION OF A TRUST

### APPOINTMENT, RETIREMENT AND REMOVAL OF TRUSTEES

There are three sources of law for the administration of trusts

- Trust document
- Common law of trusts
- *Trustee Act* and other legislation relevant in the jurisdiction

While the statute and common law define the default terms for a trust, the trust document can alter these default provisions. Therefore, the statute and common law only apply if trust document is silent on the issue in question

- Most of these issues apply to executors as well as TRs.
- Role as Executor lies in the responsibility for immediate actions such as funeral, applying to court for letters of probate to get authority to “call assets” (transfer ownership of assets), paying debts, tax returns, performing specific distributions.
- Role as TR is to hold residue in trust as specified in will, subject to rules that apply to TRs

### APPOINTMENT OF TRUSTEES

- Appointment of the first TRs is usually made by the trust document
- Appointment of alternate and successor TRs is done either through trust document, statute, or court
- A new TR, whether appointed judicially or by the the document, has the same powers, authorities and discretions as if he had been the original TR.

### THE TRUST INSTRUMENT

- First TRs are normally appointed by the ST or TS in the trust document.
- A well-drafted trust document will also appoint alternate/substitute TR should the first TR be unable/unwilling to act.
- Note that appointment by the ST can be either explicit, whereby the TR is named in the trust instrument, or via a personal declaration of trust, or by implication, where ST transfer property to X with intention to create a trust, but without explicitly naming X as TR. Both are correct, but the first seems more prudent.

Considerations in appointing a TR

- TR must have integrity and should be able to carry out fiduciary duties according to ST’s intention
- TR must be readily available, and interested/willing in acting as a TR
- Age is an important consideration. TR should outlive ST and BNs (though latter can be challenging)
- Location and residency, as location of majority of TR is residence of trust for the purposes of taxation.
- Sometimes hiring a Corporate TR is a good idea, as they are experts and are insured, but this will cost money
- It may be important to consider a maximum or a minimum number of TRs
  - There is no statutory maximum, but it is wise to establish maximum number because TRs must act jointly

### NON-JUDICIAL APPOINTMENT OF TRUSTEES

- If the trust document does not address the issue of appointment, then the *Trustee Act's* non-judicial power to appoint substitute TRs applies.

#### ***Trustee Act s.12 Powers of trustees may be exercised by survivor***

(1) *If a power or trust is given to or vested in 2 or more trustees jointly, then, unless the contrary is expressed in any instrument creating the power or trust, it may be exercised or performed by the survivor or survivors of them for the time being*

#### ***Trustee Act s.27 Power to appoint new trustees***

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

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

## 250.7 ADMINISTRATION OF A TRUST

- (a) the number of trustees may be increased.
  - (b) a separate set of trustees may be appointed for a part of the trust property held on trusts distinct from those relating to any other part of the trust property, even though no new trustees are to be appointed for other parts of the trust property, and an existing trustee may be appointed or remain one of the separate set of trustees, or if only one trustee was originally appointed, then one separate trustee may be so appointed for the part of the trust property held on trusts distinct from those relating to any other part of the trust property,
  - (c) it is not obligatory to appoint more than one new trustee if only one trustee was originally appointed, or to fill up the original number of trustees if more than 2 trustees were originally appointed but, except in a case in which only one trustee was originally appointed, a trustee must not be discharged under this section from his or her trust unless there will be at least 2 trustees to perform the trust, and
  - (d) the assurances or things required for vesting the trust property or any part of it jointly in the persons who are the trustees must be executed or done.
- (3) A new trustee appointed under this section, as well before as after all the trust property becomes by law, by assurance or otherwise vested in the trustee, has the same powers, authorities and discretions, and may in all respects act as if he or she had been originally appointed a trustee by any instrument creating the trust.
- (4) The provisions of this section relating to
- (a) a trustee who is dead include the case of a person who is nominated a trustee in a will but who dies before the testator, and
  - (b) a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.
- (5) This section applies only if and as far as a contrary intention is not expressed in any instrument creating the trust, and has effect subject to the terms of that instrument.

- Under s.29, the new TRs are vested in all of the legal rights to the trust property.
- If TRs are given the power to appoint subsequent TRs, then it may be a good idea to consider a majority-rules clause for these decisions, rather than the common law unanimous clause.
- The power of appointment in surviving or continuing TR is a fiduciary power exercisable only with due regard to the interests of both the trust and BNs.
- BNs cannot compel TR to appoint their choice of nominee, if TR is not in breach of fiduciary duty or trust.
- BNs can only end trust under *Saunders v. Vautier*.

### JUDICIAL APPOINTMENT OF TRUSTEES

- The common law courts have an inherent jurisdiction to appoint and dismiss TRs.
- As per s.31, court has a statutory power to appoint substitute or additional TRs where it is in the best interests of the trust.
- 
- For the appointment of additional TRs, the court must consider the suitability of the proposed TR and whether circumstances warrant increase in number of TRs
- For substitute TRs, the court must consider suitability of proposed TR as replacement for existing TR. For example it is not appropriate to replace a corporate TR with an individual TR

#### **Trustee Act s.31 Power of court to appoint new trustees**

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

#### **Trustee Act s.32 Rights and powers of new trustees**

*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.*

#### **Trustee Act s.33 Power of court to vest land in new trustees**

*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.*

### RETIREMENT OF TRUSTEES

- Courts also have jurisdiction to discharge a TR.
- If trust instrument expressly provides for retirement of TR, then its terms will govern.
- If there are no such express provisions, then s.28 allows a TR to retire with the consent of his co-TRs, if there are more than two TR. This consent must be done by deed.

### **Trustee Act s.28 Retirement of trustee**

- (1) *If there are more than two trustees and one of them by deed declares that he or she wishes to be discharged from the trust, and if the co-trustees and any other person empowered to appoint trustees by deed consent to the discharge, and to the vesting in the co-trustees alone of the trust property, then the trustee who wishes to be discharged is deemed to have retired from the trust, and is, by the deed, discharged from the trust under this Act, without a new trustee being appointed in his or her place.*
- (2) *The assurances or things required for vesting the trust property in the continuing trustees alone must be executed or done.*
- (3) *This section applies only if and as far as a contrary intention is not expressed in any instrument creating the trust, and has effect subject to the terms of that instrument.*

### **REMOVAL OF TRUSTEE**

- If the trust instrument specifies a mechanism for removing a TR from office, then its terms will govern. An example of this may be a power given to Protector or other TRs to remove a TR.
- *Trustee Act* also allows TRs to be removed by use of non-judicial power to appoint TR
- Court has statutory power to remove a TR only when appointing a replacement, and when the original is a tool.

### **Trustee Act s.30 Removal of trustees on application**

*A trustee or receiver appointed by any court may be removed and a trustee, trustees or receiver substituted in place of him or her, at any time on application to the court by any trust beneficiary who is not under legal disability, with the consent and approval of a majority in interest and number of the trust beneficiaries who are also not under legal disability.*

- But the applicant must show that it would be inexpedient, difficult or impracticable to remove this TR without assistance of the court.
- Court has inherent jurisdiction to remove a TR without replacing them, under the power in s.31 above. This is also best if it is impossible to get the consent of the majority of adult BNs.
- There is also case law that an executor is not a TR under this section until they finish administering the estate.
- There is also s.97, which talks about court appointing a judicial TR, but this usually applies to public trusts.

### **CONROY V. STOKES [1952] BC CA**

**Test for removal of trustees is whether it is in the interest "welfare of the beneficiaries of the trust estate"**

**Facts:** Two TRs were appointed by a will. Two of the five BNs applied to court to have TRs removed, as they were dissatisfied with the manner in which the TRs were administering the estate. The sole ground for removal was "friction". No misconduct or breach of trust found on part of TRs. Trial judge replaced TRs with an independent TR. TRs appealed.

**Issue:** Was it in the power of BNs to replace the TRs absent a breach of fiduciary duty or misconduct?

#### **Discussion:**

- The main consideration in removal of TR is the "welfare of the BNs" as per *Letterstedt v. Broers*.
- Sufficient Grounds for dismissing TRs are:
  - Endangerment of trust property
  - Lack of honesty, or lack of reasonable fidelity
  - Incapacity to execute trust duties
  - Conflict of duty, but this is tied to endangerment of trust property
  - If X is both a TR and a BN and has to make a claim under *WVA*, he would have to dismiss himself as a TR first.
- Insufficient Grounds for dismissing TRs are:
  - Friction between BN and TR
  - Failure to account annually or pass accounts in a timely way, unless it is a persistent failure
- In this case there were no sufficient grounds shown for removal of original TRs.

**Ruling:** TRs reinstated.

### **RE CONSIGLIO TRUSTS NO.1 [1973] ON CA**

**Before making an order for removal of a trustee due to friction with co-trustees, court must be satisfied that the continued administration is impossible or improbable.**

**Facts:** The TRs were ex-husband, ex-wife, and independent party. Public TR applied for removal of the husband, as he was being a general asshole. Husband alleged that there was no misconduct on his part.

**Issue:** Must there be misconduct to warrant removal?

## 250.7 ADMINISTRATION OF A TRUST

### Discussion:

- Misconduct on the part of a trustee is not a necessary requirement to justify his removal by the Court.
- Where the continued administration of the trust becomes improbable with due regard to the interests of the BN because of misunderstandings and bitterness between the TRs, the Court is not only justified but compelled to order a TR's removal.

**Ruling:** Husband removed.

## DUTIES AND POWERS OF TRUSTEES

### **Main Duties of the Trustee:**

1. Duty to adhere to the terms of the trust
2. Duty to act personally and not delegate the powers
3. Duty to act honestly and with the skill of an ordinary person
4. Duty to adhere to the duty of Loyalty. It is the duty of loyalty that underlies all of the following duties:
  - Obligation to act impartially
  - Duty to invest trust assets
  - Duty to account
  - Duty to provide information
  - Duty to avoid conflicts of interest

- Of course, these duties can be overridden by the trust document. But there is some question in case law about waiving the duty completely - as opposed to just modifying it. See Struther at the beginning of the notes.
- When TR takes his position, he acquires a set of duties and powers.
  - A duty is an obligation that compels a TR to act (or not act) in a certain way, or to perform something.
    - Duties are usually not listed in the trust document, but are derived from common law
    - Instead, trust documents would usually draft out of the specific duties that are otherwise implied.
    - The general duties which all TR must perform arise by virtue of the fact that they are fiduciaries.
  - A power is the authority to do something, but it leaves the TR with discretion as to whether to do something.
    - There is always some discretion on the TR power. So if the TRs have power to invest trust assets, there is usually some decision making required to exercise this power, and it is the duties that set the guidelines for exercising these powers and making these decisions.
    - Powers can be classified in three ways according to the interest affected:
      - Common law powers are powers that is not in the trust, such as power of attorney
      - Statutory powers are those given by *Trustee Act* and such, like s.8 power to insure property or s.24 power to pay maintenance to BNs
      - Equitable powers effect the equitable or beneficial estate, such as power of appointment, most dispositive powers in the trust. These come about from the trust document or case law.
    - Another classification is based on the purpose of the powers:
      - Administrative powers
      - Dispositive powers
- Whereas TRs have both duties and powers, it is possible for some individuals, like the Protector, or any other donees, to have only the powers if they are not TRs.

### **DUTY TO ADHERE TO THE TERMS OF THE TRUST**

#### **Duty to Adhere to the terms of the Trust:**

TR's obligation is to collect the assets for the trust, ensure their safety, and then preserve and enhance their value. Upon appointment, TR must:

- Ascertain the terms of the trust
  - Acquaint themselves with the state of the trust property (and whether it is properly constituted)
  - Invest trust property in accordance with provisions of trust instrument or statute
  - Ensure that trust property is in proper custody
  - Take all reasonable steps to ensure there were no prior breaches of trust, if the trustee is a replacement trustee
- Failure to do any of these things amounts to a breach of trust.

## 250.7 ADMINISTRATION OF A TRUST

- Unless trust instrument provides otherwise, decisions of private trust TRs must be unanimous. If one TR fails to agree with her co-TRs, there is a deadlock.
- If multiple TRs are deadlocked, they should apply to court for direction.

### STANDARD OF CARE

- The standard of care is that of a person of ordinary prudence would use in managing his own affairs.
- Standard of care applies as soon as the appointment of the TR is made and accepted.
- TR must be alert to financial status of trust investments, even if TR has discretionary power to convert/retain, the TR must preserve trust assets. If investments are dropping in value, TR should consider selling.
- TR are jointly and severally liable for their actions, and there is no distinction between "active" and "passive" TRs

### ***Trustee Act s.96 Jurisdiction of court to relieve trustee of breach of trust***

*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.*

- In deciding whether to excuse, the court may consider whether the TR was a professional or lay person.
- But note that SCC has not been conclusive on whether a professional TR had a higher standard of care (*Fales*)
- Breaches that might qualify for relief under s.96
  - Technical mistake
  - Mistake of judgment
  - Result of sudden or unexpected depreciation of securities
  - Executive or administrative blunder
  - Judicious breach of trust (deliberate breach of trust)

### **FALES V. CANADA PERMANENT TRUST CASE [1977] SCC**

***Trustees have an obligation to adhere to the terms of the trust. And a whole bunch of other duties.***

**Facts:** TS was an officer and major SH of a small, but very profitable CO A. Upon death, he left his shares and assets in life estate to his wife, with the remainder divided equally among their four kids. The widow and Canada Permanent Trust were appointed as TRs with (1) the power to sell the trust funds and to invest proceeds into authorized investments, (2) the power to postpone conversion of trust funds, and (3) the power to join in any corporate reorganization, and accept shares in exchange for shares held by the trust. SHs of A (including the estate) were approached with a proposal to merge CO A with CO B. TRs accepted the merger, and exchanged the CO A shares for CO B shares. Then CO B's fortunes declined, but CPT failed to inform wife of this. Eventually, CO B went bankrupt and the estate's shares became worthless. The children BNs sued CPT. CPT in response sued wife for indemnity and contribution. Wife sued CPT for loss to life interest as result of CPT's mismanagement. Children BNs didn't sue mom. So it was pretty much an all-around Mexican Standoff of litigation.

**Issue:** Who is the last man standing?

### **Discussion:**

- TR's primary duty is the preservation of trust assets.
  - This duty informs the process, not the substance of the TR's actions.
  - It is more important to preserve assets that increase assets
  - Discretionary powers of investment in the do not relieve TR of this duty.
- TR must act with the diligence that a person of ordinary prudence would use in managing his own affairs.
  - Yet TR is not entitled to the same discretion in investment as a reasonably prudent businessman would have. It's closer to the same discretion in investment as a reasonably prudent businessman investing with someone else's money would have.
  - Trust document can release the TR from the "reasonably prudent investor" standard, but the Tr must still take care to preserve the trust assets.
  - Here, the CPT failed to meet this standard of care by holding the shares for as long as they did. CPT did not pay attention to trust instrument, which required TR to liquidate investments after a certain holding period.
- TR must be alert to financial status of trust investments
- Where the duty of TR is to sell or convert trust property to authorized investments, and a loss is suffered by reason of delay, the TR must show that the delay in selling was reasonable and proper.
- TR are jointly and severally liable for their actions.
- Thus, co-TRs have an obligation to inform fellow TR of financial status of trust

## 250.7 ADMINISTRATION OF A TRUST

- In deciding whether to excuse, the Court may consider whether the trustee was a professional or lay person.
  - But note that the SCC was not conclusive on whether a professional trustee had a higher standard of care, as they held that CPT failed to meet the default standard in any event
- CPT found in breach of trust for not selling, and not seeking judicial advice when the wife initially refused to sell.
- Damages for breach of trust are measured by the loss that the breach caused to the BNs.
  - Here, the damages were assessed at the average price of shares over the period from (1) their acquisition to (2) when they could have been sold advantageously.

**Ruling:** CPT is liable. Wife gets away under s.96,

There are recent additions to the *Trustee Act* which deal with the investment power more thoroughly.

### **Trustee Act s.15.1 Investment of trust property**

(1) *A TR 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.*

### **Trustee Act s.15.2 Standard of care**

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

### **Trustee Act s.15.3 Trustee not liable if overall investment strategy is prudent**

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

### **Basic Steps a TR Should Undertake:**

- Make sure that the trust is properly constituted, which usually only requires reviewing the document.
- Make sure that the property is legally vested into the TR. Make sure that the assets are safe and secure (insurance and such).
- Develop a short terms strategy for holding assets. Do not assume that the short term strategy is going to be good as a long term one.
- On a day to day basis, the TR should keep a paper trail. TRs are not supposed to take direction from BNs, but they do need to be able to justify to BNs their actions. Paper trail helps.
- If there are more than one TR, then need to work out a communication strategy.

## **DUTY OF NO DELEGATION**

### **Duty to Act Personally and not Delegate the Powers:**

As a general rule, TRs may not delegate any of their powers or duties to other people. The rationale for this is that when TRs accept office, they accept obligation to manage property for another person. They are not allowed to shift that obligation to other people.

Delegation is permitted in the following circumstances:

- If expressly authorized by statute or the trust instrument
  - If duties are not required to be performed personally
  - If it is clearly necessary - that is, no other practicable way for the TR to perform
  - If it is common business practice to delegate the particular power or duty.
- 
- This can involve: delegation to another TR (intra-TR delegation) and delegation by the TR to someone who is not a TR.
  - Almost all the rules that permit delegation, relate only to administrative powers;
  - Dispositive duties must be carried out by TR personally
  - Administrative powers are of two types:
    - Basic ministerial tasks in relation to administrative powers. These are acts the execution of which is without the need for independent judgment.

## 250.7 ADMINISTRATION OF A TRUST

- More serious trust business delegated out of necessity or in the ordinary course of business to an agent.

### EMPLOYMENT OF AGENTS

- Where delegation is permitted, a TR may use agents.
- However, the TR has ultimate responsibility for decision-making - all they are entitled to do is have the agent perform a particular duty or give advice.
- TR cannot delegate if the ST intended the trustee to act personally.
- Also, TR cannot delegate policy decisions that are central to the purpose of the trust and the ST's intention

### **SPEIGHT V. GAUNT [1883] UK CA**

***Trustees can delegate to agents when in moral necessity, or in the regular course of business.***

**Facts:** TS died and in will had appointed Gaunt as TR. Gaunt had no knowledge of investments and gave trust money to TS's stockbroker to purchase authorized investments. Stockbroker ran off with money to the East Indies and spent it all on opium and hookers. BNs sued TR for breach of trust to recover money.

**Issue:** Can a trustee delegate to a stockbroker a task of purchasing securities?

**Discussion:**

- There was no allegation that D was not acting honestly in his delegation to stockbroker
- In the administration of the trust TR may avail himself of the agency of the third parties such as bankers or brokers if he does so from a moral necessity or in the regular course of business;
  - TR must use prudence in selecting and supervising an agent
  - TR must act honestly and without exceptional risk.
- Regular course of business in stocks is to employ an agent (stock broker)
- If there is a loss to the trust fund, TR will not be liable unless some negligence or default of his led to the loss.
  - This suggests that you need to keep in mind that when selecting and supervising the agent you must do so reasonably to meet the standard of care
- Here a standard of care issue was whether the TR should have demanded some document to prove the shares has been bought. However court found it was not in the ordinary course of business to ask for this proof.

**Ruling:** No breach of trust.

- Proper delegation requires a TR to carefully select and supervise agents. The following principles are from *Fry v Tapson*
- In selecting an agent, the TR must ensure that the agent is used to perform work which the agent normally performs. The TR must exercise his own judgment in selecting and determining the agent's suitability. The TR must meet the general standard of care in selecting agents.
- In supervising an agent, the TR must monitor the agent's activities carefully and terminate the delegation when circumstances show that it ought not to continue. A TR who puts assets in the hands of an agent and takes no steps to ensure that the assets are properly dealt with has breached the duty to supervise. Note that the same obligation applies to the delegation of duties to co-TRs.

### CORPORATE TRUSTEES

In selecting a corporate trustee, the Settlor is accepting internal decision-making structure of the corporate trustee, so that employees of the corporate trustee can make decisions. Note that *Re Wilson* holds that the corporate trustee's board of directors must agree to all decisions, although *Ramsay* says this is wrong.

### **RE WILSON [1966] ON CA**

***Corporate trustees must make decisions on the director level, without delegating to employees***

**Facts:** Corporate TR wanting to delegate power to its employees. The issue concerned an offer to purchase some trust property. The general manager of the corporate trustee alone considered the offer and rejected it

**Issue:** Can corporate TR delegate decision to employee of trust CO, or must the decision be made at the director-level?

**Discussion:**

- TR is not allowed to do this;
- The power to deal with the property was conferred on the CO and as such, only the Board acting as agents could exercise this discretion

## 250.7 ADMINISTRATION OF A TRUST

- The better approach to this case is to assume that ST understands that when appoint a corporate TR, there will be some individuals making the decision within the corporate entity. One cannot assume that the Board will meet to make all of these decisions.
- And therefore Wilson is taking too strict a view of the non delegation powers of corporate trustees
- Ramsay says some question as to whether this is good law.

**Ruling:** Wrong.

### STATUTORY DELEGATION

#### **Trustee Act s.7 Power to authorize receipt of money**

- (1) *A TR may appoint a solicitor to be the TR's agent to receive and give a discharge for money, or valuable consideration or property receivable by the TR under the trust, and a trustee is not chargeable with breach of trust merely for having made or concurred in making that appointment.*
- (2) *A TR may appoint a banker or solicitor to be the TR's agent to receive and give a discharge for money payable to the TR under or because of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee is not chargeable with a breach of trust merely for having made or concurred in making that appointment.*
- (3) *This section does not exempt a TR from any liability the TR would have incurred if this Act had not been enacted, if the TR permits the money, valuable consideration or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor to pay or transfer it to the trustee.*
- (4) *This section does not authorize a TR to do anything the trustee is in express terms forbidden to do, or to omit anything the TR is in express terms directed to do, by the instrument creating the trust.*

#### **Trustee Act s.15.5 Delegation of authority with respect to investment**

- (1) *In this section, "agent" means any person to whom a trustee delegates investment responsibility.*
- (2) *A TR may delegate to an agent the degree of authority with respect to the investment of trust property that a prudent investor might delegate in accordance with ordinary business practice*
- (3) *A trustee who delegates authority under subsection (2) must determine the investment objectives for the trust and exercise prudence in*
  - (a) *selecting an agent,*
  - (b) *establishing the terms and limits of the authority delegated,*
  - (c) *acquainting the agent with the investment objectives, and*
  - (d) *monitoring the performance of the agent to ensure compliance with the terms of the delegation.*
- (4) *In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.*
- (5) *A trustee who complies with the requirements of subsection (3) is not liable to the beneficiaries or to the trust for the decisions or actions of the agents to whom the function was delegated.*
- (6) *This section does not authorize a trustee to delegate authority under circumstances in which the trust requires the trustee to act personally.*
- (7) *Investment in an investment fund referred to in section 15.1 (1) or a common trust fund referred to in section 15.1 (3) is not a delegation of authority with respect to the investment of trust property.*

### DUTY OF LOYALTY

#### **Duty of Loyalty:**

A TR must act wholly in the best interests of the BNs. The duty of loyalty arises wherever there is a fiduciary relationship, as per *Strother*. There are three elements in the duty of loyalty:

- TR must act in good faith:
  - Honest intention by TR to abstain from taking advantage of BN
- TR must act only in the interest of the BN
  - If there is a conflict of interest between TR and BN, or between the BN and a third party, then the TR must act solely to protect the BN's interest.
- Trustee must stay within terms of trust document in making discretionary decisions
  - Even if TR is given considerable or absolute discretion, court still has inherent power to step in
  - If TR fails to interpret language properly, they can be held liable for decisions

- Court will not intervene because of disagreement between TR and BN, but will intervene in the following circumstances:
  - If decision is so unreasonable that no honest, fair-dealing TR could come to that decision
  - Unfounded favouritism amongst BNs
  - If TR considers irrelevant factors (*Cowan v. Scargill*)



### CONFLICT OF DUTY AND INTEREST

**Conflict Rule:** TR must avoid situations in which her personal interests conflict with BN's interests (*Neil*). A possibility of conflict of interest is sufficient to ground a breach of fiduciary duty. Actual conflict of interest need not be present.

#### PROFIT OUT OF POSITION

- A TR must not profit personally from her position (*Boardman v. Phipps*, strict rule)
  - A TR who profits from her position as TR must hold the profits on constructive trust for the BNs, and account for any profits received (*Keech v. Sandford*)
  - If TR has converted profits into another form, the BN can trace the property
- TRs may be excluded from this rule if they receive consent from all the BNs or the Court, so long as the following three requirements are present
  - TR must fully disclose all information to BN to allow BN to make informed consent (duty of candour)
  - TR should advise BN to seek independent legal advice
  - TR must pay FMV for the property
- A TR is prohibited from selling or lending to the trust.
- A TR is prohibited from using confidential information gained by the virtue of being a TR
- A TR is precluded from obtaining for himself any property or business advantage either belonging to the trust or for which it has been negotiating.

#### KEECH V. SANDFORD [1726] UK KB

**Trustee must hold lease on constructive trust and account for the profits that he received.**

**Facts:** TR tried to renew lease for benefit of infant BN. Landlord refused to renew lease of building to an infant. TR then took the lease himself, as he figured that was not costing infant anything. The lease ended up being rather profitable, and TR kept the profits, which made the infant angry. Infant sued the TR for the profits from lease.

**Issue:** Can TR keep the profit.

#### **Discussion:**

- TR cannot let his personal interest conflict with their duty as TR. This extends to any profits or advantages from trust
- The TR used info and renewed lease on his own, which is a clear violation
- The issue is not what the BN lost. It is what the TR gained. The TR's gains should have been the BN's gain.
- The basis for relief was the need to deter a breach of fiduciary duty, not fraud, as the TR may not have acted fraudulently.
- There are ways to be excluded out of the operation of the rule, listed above.
  - In this case, TR couldn't contract out, as BN was infant and couldn't enter into contracts.

**Ruling:** Money is held on trust.

#### BOARDMAN V. PHIPPS [1966] HL

**The duty of loyalty is very strict. Trustees may not profit from their position in any way.**

**Facts:** TS set up testamentary trust, which included rather worthless shares in CO A. Phipps (BN) and Boardman (TR's solicitor) attended shareholders' meeting via proxies held by trust. On basis of info gained at the meeting, Ds learned that CO A was poorly run, and decided to purchase outstanding shares in the CO, take control, and improve its fortunes. Trust was prohibited from purchasing outstanding shares - so Ds decided to purchase shares in their personal capacity. They received some consent from 2 of the 3 TR. CO A got rich, so everyone was happy - value of trust's shares increase and Ds' shares increase too. But then another BN sued them for breach of fiduciary duty, on grounds that they had used confidential info obtained from the trust for personal gain.

**Issue:** Is using confidential info breach of trust?

#### **Discussion:**

- Ds held their shares on constructive trust for the PL and were personally liable to account for any profits they had earned, though court allowed them an "allowance for their work and skill" (in managing the CO successfully).
- TRs breaches fiduciary duty if they use information gained from the trust for personal gain.
- Possibility of a conflict of interest is sufficient to ground a breach of fiduciary duty.
- TR must obtain consent from either (1) all beneficiaries or (2) the court in order to profit from information gained as a result of their trust position.
- Honest intention doesn't matter if BN's consent and knowledge aren't present.

**Ruling:** Breach of fiduciary duty found.

## 250.7 ADMINISTRATION OF A TRUST

### CANADIAN AERO SERVICES V. O'MALLEY [1974] SCC

**Strict view that if fiduciary uses info gained from their position, or any corporate opportunity appropriated, they must account for all profits made.**

**Facts:** D and a few others were senior officers of PL CO. They were sent to South America by the PL to investigate a K to do aerial mapping of Guyana. While there were there, they made some business connections acquired important information about the K and the work in general. Upon their return to Canada, they quit their positions at PL, started their own CO and relied on their trip to set up business that competing with PL CO. PL claims that the D had improperly taken the fruits of a corporate opportunity in which PL had a prior and continuing interest.

**Issue:** Are D's in breach of fiduciary duty?

**Discussion:**

- Court found D's to be in fiduciary relationship and as such could not obtain for themselves, either in secret or without approval of the CO, any property or business advantage either belonging to the CO or for which it has been negotiating
- Found that even after Ds resigned, they were still under a fiduciary duty
- Liability for breach of fiduciary duty does not depend upon proof that, but for the breach, the CO would have been entitled to the business opportunity;
  - Nor must the CO establish what its profits would have been from the opportunity;
  - CO is awarded the price of the contract as damages
- Some have suggested that this strict rule does not apply to TRs, but Ramsay disagrees. A fiduciary is a fiduciary and so owes this duty regardless; so in the absence of something in the trust document to vary the obligations of the fiduciary, Ramsay thinks that all fiduciaries are held to this standard

**Ruling:** D is liable for profits.

**Appropriation of Opportunity as a Breach of Fiduciary Duty Test:** (as per *Canadian Aero Service Ltd. v. O'Malley*)

1. Does the opportunity belong to the CO?
  - **Maturity:** Has the CO done anything to develop opportunity? How close was it to acquiring it?
  - **Specificity:** Was opportunity defined by the CO? How precisely? Was it only in the same general business area? How closely does the appropriated opportunity resemble the opportunity that the CO was working on?
  - **Significance:** Would opportunity represent major component of CO's business if acquired? Was it unique or one of many?
  - **Public or Private:** Was the opportunity publicly advertised or widely known? Was it one to which fiduciaries had access only by virtue of their positions?
  - **Rejection:** Had the opportunity been rejected in good faith by the CO before the fiduciary acquired it?
    - Unless fiduciary did what was reasonably possible to get the Board to accept it and was not in a position to determine the outcome of the Board's vote, the rejection may not be sufficient. [*K.P. McGuiness*].
2. What is the relationship of the fiduciaries to the opportunity?
  - **Position:** The higher up in organization the fiduciary stands, the higher is level of duty imposed.
  - **Relationship between Fiduciary and Opportunity:** Was opportunity in an area of his responsibility? Did he negotiate for it on behalf of CO?
  - **Knowledge as a Fiduciary:** How much knowledge did the fiduciary acquire about the opportunity through his position?
  - **Involvement in Competing Business:** Did fiduciary acquire the opportunity through an existing business that was similar to or even competed with the business of the CO and in which the fiduciary was involved?
  - **Use of Position:** To what extent did the fiduciary accomplish the appropriation of the opportunity through his position?
  - **Time after Termination:** If fiduciary took the opportunity after he terminated his relationship with the CO, how long was it after termination? Did he leave voluntarily or was he fired? Did he leave for purpose or under inducement of pursuing the opportunity?

### PURCHASE OF TRUST PROPERTY BY TRUSTEE

**Self-dealing Rule:** A TR is prohibited from purchasing trust property without the consent of the BNs. If this is violated, the transaction will be voided and TR will hold property on constructive trust for BN

- This is even if TR bids at an open public auction for the property, and pays FMV
- The rule applies to all transactions where the TR and purchaser stand in a fiduciary relationship

There are exceptions to this:

- TR may purchase trust property where BNs consent
- *Trustee Act*, s.86: TR may apply to Court for approval of a purchase of trust property by a trustee
- Court may approve the sale of trust assets to a TR, both before and after a sale, if it is in the best interests of the trust.
  - If TR looks for retroactive approval, then property must still be in possession of TR (that is, the TR must still be the owner of the asset)
  - Court will look for evidence of:
    - Good faith on part of TR
    - Adequate consideration given for asset
    - Best interest of trust
- Terms of trust itself may allow TR to dispose of trust property at their discretion, i.e. by giving an option to purchase.

### **MOLCHAN V. OMEGA OIL & GAS LTD. [1988] SCC**

***A trustee may not purchase trust property, whether or not the sale is made honestly, at a fair price and in good faith***

**Facts:** D Hall established an oil and gas investment fund and incorporated the D Omega Oil & Gas Ltd. as a wholly-owned subsidiary of the D Omega Hydro-carbons. Hall formed a limited partnership to acquire, develop and operate oil, gas and other mineral properties in Canada. Hall was an officer of Oil & Gas and the general partner as well as an attorney for the limited partners. A prospectus for the issuance of units of the limited partnership and the plaintiff purchased a unit for \$25,000. After about two years the investment fund ceased to be active and Hydrocarbons offered to exchange all partnership units for its shares. PL was the only hold-out among 60 holders of limited partnership units. Hydrocarbons subsequently purchased the non-producing land owned by Oil & Gas, again without the plaintiff's consent. The plaintiff brought an action for breach of s. 55 of the *Partnership Act* and for an accounting, alleging that the defendants failed to act in the best interest of the unit-holders due to a conflict of interest arising from Hall's position with Oil & Gas and Hydrocarbons. The Trial Judge held that the defendants had committed an act making it impossible to carry on the ordinary course of business of the partnership and awarded damages to the plaintiff. The defendants appealed.

**Issue:** Something is rotten in the state of Denmark?

**Discussion:**

- Court allowed the transaction to stand and created a special circumstances exception. But the general rule is that a trustee may not purchase trust property, whether or not the sale is made honestly, at a fair price and in good faith
- In certain special circumstances a court of equity might approve the sale of the trust asset. This will likely occur when certain conditions are met (see below) and the purchase is in the best interests of the trust estate
  - No evidence of bad faith,
  - Adequate consideration,
  - Sale in the best interest of the partnership, and
  - Power in the trust to do what TR did
- But it will be a rare case where the court will approve a sale by trust property to TR
- Here the special circumstances exception are met.

**Ruling:** Good night, sweet Prince!

### PURCHASE FROM A BENEFICIARY

**Fair Dealing Rule:** A TR may purchase property from a BN, but he bears burden of showing that BN received full disclosure of all material facts, independent legal advice and a fair price.

- The rationale behind this is that while Self-Dealing Rule prohibits a TR from purchasing from trust property because the TR acts as both vendor and purchaser, a TR who buys from a BN transacts with a different person, which is permissible.

### **CREIGHTON V. ROMAN [1968] ON CA**

***Onus of proof is on Trustee to show three factors in a purchase of a beneficial interest***

**Facts:** Ramsay says not to worry about the fact pattern too much. In any event, it involved a TR who sought to purchase a beneficial interest from the BN.

**Issue:** Can this be done?

**Discussion:**

## 250.7 ADMINISTRATION OF A TRUST

- Onus of proof is on TR to show following 3 factors in a purchase of a beneficial interest:
    - No fraud, concealment or advantage taken by trustee of beneficiary
    - BN had independent legal advice
    - TR must have given adequate consideration
  - In this case, TR was unable to prove there was no fraud or concealment so the BN were successful in having the purchase of the beneficial interest prevented
  - Note: so if purchasing beneficial interest, be careful to keep these considerations in mind
- Ruling:** Transaction of some sort fails

### EXTRANEOUS CONSIDERATIONS

- The issue of Extraneous Considerations arises where a TR has a discretionary power.
- Extraneous considerations are those unrelated to the ST's intention or the TR's duties, or those against public policy.
- While a TR may have a discretionary power, they must fulfill the ST's intention and preserve and enhance the trust assets for the BNs. They should leave their personal views at the door. However, they may take non-financial benefits into account if they benefit the BNs, while keeping in mind the prudent investor standard
- A Court will not interfere with a TR's exercise of an absolute discretion so long as there is no fraud
  - However, where a TR has exercised their power in bad faith (less than fraud) or takes extraneous factors into consideration, then the Court will intervene.

### COWAN V. SCARGILL [1984] UK CA

*The interest of the beneficiaries is more important than ethical considerations*

**Facts:** A group of 10 TRs had broad investment discretion with regards to a Pension Fund. They held ethical views on coal mining & refused to invest in that area. BNs were a bunch of inconsiderate rednecks and sued for breach of loyalty.

**Issue:** Are TRs in breach?

#### **Discussion:**

- TR must fulfill the ST's intention and leave personal views at the door
- Objective of trust was the financial benefit of BNs, so TRs had to invest so as to maximize financial benefit
  - TR may take non-financial benefits into account if they benefit the BN
  - But they must not do so to the detriment of the financial interest of the BNs
- TRs can't refuse to invest in unethical funds if they will make beneficiaries rich
- Ramsay says that TRs may even have to act dishonourably (though not illegally) if the interest of their BNs require it

**Ruling:** Breach of the duty of loyalty.

### FOX V. FOX ESTATE [1996] ON CA

*Court will not interfere with a trustee's exercise of an absolute discretion so long as there is no fraud*

**Facts:** TS left life interest to his jewess wife with remainder to son. Wife was the TR and had power of encroachment in favour of grandkids. Son married a gentile, which pissed off mom, and she punished son by going on an encroachment binge on the trust in favour of the grandkids, leaving nothing for him. Son sought to have mom removed as TR, and directed her to account.

**Issue:** Was mom's binge justified by her discretion?

#### **Discussion:**

- Court will interfere if trustee's decision is influenced by extraneous considerations
- Considerations are extraneous if they are not related to the duties imposed on the TR by the trust instrument
  - Look at the ST's intention, and wording of the trust instrument for this.
- Considerations which offend public policy are also extraneous
- A TS's will is not subject to a court's oversight. However, a TR is always subject to a court's oversight. Therefore, a TS who chooses a TR to carry out his testamentary dispositions will be subject to a court's oversight.
- Here, the fact that son married a gentile was completely extraneous to the duty imposed on mother-trustee (to be concerned about the welfare of her grandkids).
- Disapproval of a marriage on religious grounds cannot be a consideration in exercising a trustee's discretion
- TR exercised her discretion in a fashion which offended public policy.

**Ruling:** Son wins.

## 250.7 ADMINISTRATION OF A TRUST

- Waters suggests this is the approach to take to determine when court will intervene to determine reasonableness
  - Look to the language to determine whether it is a duty or whether it is a discretionary power
  - Court will not intervene just because a BN or others don't agree with how the TR have exercised their discretion or on the basis that the court would have made a different decision themselves
  - However having said that, there are some circumstances where you might persuade the court to intervene:
    - If the decision of the TR is so unreasonable that no honest fair dealing trustee could come to that conclusion
    - Where the TRs have taken into account considerations which are irrelevant to their discretionary decision that they have to make;
    - Where the TR are unable to show that they have even considered whether to exercise their discretion

DEFENCES TO AN ALLEGED BREACH OF LOYALTY	
DEFENCES THAT WORK	DEFENCES THAT DO NOT WORK
<ul style="list-style-type: none"> <li>• Consent of BNs</li> <li>• Court order</li> <li>• Trustee Act, s.86</li> <li>• Supreme Court Rules, Rule 10(1)(d)</li> </ul>	<ul style="list-style-type: none"> <li>• TR claims he honestly purchased the benefit</li> <li>• Trust or BN suffered no loss</li> <li>• Trust did not want the benefit that the TR purchased</li> <li>• Trust could not have received the benefit that the TR purchased</li> <li>• TR resigned from fiduciary position before taking advantage of inside info</li> </ul>

### DUTY OF IMPARTIALITY

**Impartiality Rule:** TRs must act impartially when dealing with BNs. They must not give preferential treatment to any one BN or group of BNs unless authorized by trust instrument.

**Even-handed Rule:** TR must act even-handedly between income BNs and capital BNs.

- Unless rule of even-handedness is excluded, then failure to act impartially is breach of trust.

### NESTLE V. NATIONAL WESTMINSTER BANK [1992] UK CA

**Trustees must understand their powers and duties. Favouring some beneficiaries over others is a breach of trust.**

**Facts:** TS left life estate in trust wife, with remainder to children, and ultimately to grandchildren. Annuity (periodic payments) was to be paid to the wife out of a fund. When wife died, income was to go to the children who had powers of appointment and advancement to their spouses. Any remainder was to go to grandchildren (last in the line of succession for BNs). Grandchildren sued bank TR for not leaving enough money in trust for them, by having favoured the children over the grandchildren.

**Issue:** Damn grandkids.

#### Discussion:

- Bank found to be in breach of their duty of impartiality.
- Inexcusable that bank did not seek independent legal advice to understand scope of duties. Bank trustee failed to properly read and understand the scope of the investment power.
- What other factors can a Trustee consider in carrying out their investment power?
  - Inter vivos and testamentary tax consequences for income and capital beneficiaries
  - Current market conditions
  - Information about BNs that might impact on investment portfolio
- Trustee must read and interpret their powers correctly. Get legal advice on the scope of your duty. If unsure, get a direction from the court. Where there are successive interests involved, the prudent trustee must consider the current market conditions in carrying out power of investment.
- There is a need for a regular review of the circumstances.
  - If the tax situation of BN is changing, then TRs have to keep up with the information

## 250.7 ADMINISTRATION OF A TRUST

- The court should be cautious using hindsight to judge TRs
- But bank not held liable, because not enough proof of loss. Must prove actual loss.

**Ruling:** Bank guilty but not liable.

### TRUST OR POWER TO SELL / RETAIN

Disposing of the assets in the trust can be tricky in the context of the duty of impartiality.

Key Considerations is whether there is a Power to Sell. It can be either express or implied.

- TR has common law power to sell trust personalty if there no explicit power to sell and personalty is wasting or unproductive
  - Applies only to testamentary trusts
  - It also applies only to residual estate, not assets explicitly named in trust
- TR has common law power to sell trust realty only if explicit power to sell contained in the trust

### LOTTMAN V. STANFORD [1980] SCC

**Trustee can convert wasting personal property in the trust. This does not apply to real property.**

**Facts:** TS left income from residue of his estate to his wife with remainder to four kids. TRs also had power to encroach upon capital for wife's medical expenses. Trust contained power to sell. Wife was unhappy with amount of income given to her, and applied for TRs to carry out the trust for sale and for a declaration that she was entitled to 6% of value of unconverted assets from time of husband's death to her death.

**Issue:** Can the TRs sell the trust?

#### **Discussion:**

- Rule in *Howe v. Lord Dartmouth* is the basis for this: A TR is required to deal even-handedly between income and capital BNs by converting wasting or unproductive personal property and investing the proceeds of such conversion into authorized investments.
  - The Rule does not apply where a specific power to sell is given in the trust instrument
  - The Rule does not apply to real property
- Rule in *Re Earl of Chesterfield's Trusts*: Apportionment between capital and income of the proceeds of the conversion.
- Here, the wife was trying to apply the *Lord Dartmouth* rule to real property and failed miserably at it.

**Ruling:** I have no clue.

### INCOME PENDING SALE

A life tenant may be entitled to "notional income" while waiting for the proceeds from a trust for sale. This is going to be different for real and personal property.

#### Personal Property

- Where the these cases, the courts will impute a "notional income" to the income beneficiaries.
- There are 4 elements in setting a notional income scheme for personal property:
  - If the asset in question is already an income-producing investment, then the life tenant simply receives the income from the investment.
  - If the asset in question is personal property which has not yet been converted into authorized trust investments, then the life tenant is entitled to Notional Income pending the sale. In these cases, the Court will determine the income that would have been produced if it had been converted by obtaining the valuation of the property
  - If *inter vivos* trust, then valuation date is the date that the asset went into trust
  - In testamentary trust where there is no power of postponement, then the valuation date is 1 year after the date of death.
  - In testamentary trust with power of postponement, then valuation date is the "date of death"
    - Once the valuation is complete, the Court will set a percentage (usually between 3% - 9%), based on evidence.
    - The Court then applies this percentage to valuation of the asset, during which the asset was "wasted", and gives this amount to the income BN.

#### Real Property

- A life-tenant is entitled to a notional income (based on a percentage of the value of the unconverted real property during the period of postponement only if there is an express trust for sale power given in the trust instrument)
- Life tenant is allowed a sum equal to 4% of the value of the real property to be sold (*In Re Oliver*)
- Notional income to be paid out of the trust fund income

**RE LAUER V. STEKL [1976] SCC**

**Where there is no express trust for sale power, the life tenant is only entitled to the actual income from the sale of the real property.**

**Facts:** Express trust with explicit power to sell and power to postpone. Land did not produce income. Life tenant claimed she was entitled to a notional income while waiting for the land to be sold.

**Issue:** When is a life-tenant entitled to notional income from the postponed sale of real property?

**Discussion:**

- A life-tenant is entitled to a notional income (based on a percentage of the value of the unconverted real property during the period of postponement only if there is an express trust for sale power given in the trust instrument (duty to convert all assets of estate with power of postponement).
- Where there is no express trust for sale power, the life tenant is only entitled to the actual income from the sale.

**Ruling:** Court granted the life tenant a notional income

Practical Problems with giving Notional Income

- If there are insufficient funds in the trust to pay the notional income, then the income BN must wait until the sale is completed to be paid.
- If the actual income from an unauthorized investment is greater than the notional income, then the excess will be added to the capital of the trust
- If the actual income is less than the notional income, then the BN can get excess income from actual income in future years. Huh?

## DISCRETION TO RETAIN OR SELL

- Sometimes market conditions will make it prudent to sell or postpone a sale of the property. It is a good idea to allow TRs discretion in these matters. Such can be either express or implied.
- Express should be given in trust instrument
  - *"I authorize my trustee to hold any asset of my estate for as long as my estate trustee considers appropriate, whether it be by law an investment that my trustee may invest trust funds in"*
- But *Trustee Act*, s.15.1 may be sufficient to grant an implied discretion even if the trust document does not do this.

One thing to consider, however:

- Income BNs would want to maximize income-yielding assets because they are only entitled to whatever income arises from time to time
- Capital BNs want to maximize capital nature of assets
- There may be a tension between the two.
- Even where a TR has discretion, the TR must still follow the even-handed rule if not explicitly excluded by the trust instrument. TR must be impartial between income and capital beneficiaries.

**RE SMITH [1875] UK CH**

**A trustee must always maintain impartiality between income and capital beneficiaries, even in the presence of a discretionary power to retain or sell trust property.**

**Facts:** TS bequeathed shares in trust to his son, with residue of estate to wife. TS requested that son pay 1/4 of annual income from shares to his mother for her life. When son reached age of majority, son put 1/4 of shares in an *inter vivos* trust with mother as beneficiary for life, with remainder going to him. Trust deed gave TR power to retain trust fund in present form, whether producing income or not. Shares in trust did not do very well. Mother requested TR to sell shares. Son (as capital BN and original ST) refused to allow shares to be sold. Mother applied to court to have shares sold

**Issue:** Can the court solve this pickle?

**Discussion:**

- TR did not maintain even-hand as between income BN (mother) and capital BN (son).
- TR displayed improper deference to capital BN.
- TR removed. New TR appointed.
- Done and done.

**Ruling:** Wham bam.

## 250.7 ADMINISTRATION OF A TRUST

- The even-handed rule does not apply if trust document expressly obligates the Trustee to retain the asset.
- In drafting, it is better to expressly state that the TR has an obligation to retain, and then state that common law *Howe v. Lord Dartmouth* rule does not apply. This is often seen with particularly valuable real estate or investments with sentimental attachment (family home, etc).

### INFORMATION AND ACCOUNTS

#### INFORMATION

- TR should regularly give BNs accurate and full information and explanations for the state of the trust. They should also make available trust documents for inspection by the BNs.
- Traditional case law held that BNs had a proprietary right in the trust documents, and therefore a corresponding right to see these documents.
- However, today, BNs no longer have an absolute right to information
- Disclosure is Discretionary. Because BNs have no control over the actual administration of the trust, their only remedy against a TR is an action for breach of trust. Therefore, a BN has a right to information insofar as it allows them to see if the trust is being properly managed. Furthermore, the court's inherent jurisdiction to order access to information is related to its jurisdiction to administer trusts.
- Because trust instruments are meant to be private, a BN has no right to see the actual trust instrument.
  - Where an individual comes forward to see if they are a BN, there is an obligation show them that part of the trust.
- Where BNs do not actively request information, there is no positive obligation on the TRs to provide information.
- But better safe than sorry, and TRs should provide general information to the BNs quarterly or semi-annually.

#### ACCOUNTING

- TRs must keep proper accounts of how they deal with trust property, and must be ready to product them for inspection and examination by the BNs.
- If a TR causes expense through neglect or refusal to furnish accounts, the TR must bear the expense personally.
- Trustee Act governs the passing of accounts, in absence of explicit terms in trust document
  - Section 99 is a statutory codification of court's inherent jurisdiction to force passing of accounts
  - Under s.99(1), TR must pass all accounts to BN within 2 years from date of granting probate or appointment, unless TR has consent of all BNs to not do so.
- Supreme Court Rules also deal with this.
- Ramsay says the rules are a mess

#### **Duty to Account:** includes

- Inventory of trust property
- Account showing what original estate consisted of (opening balance, assets, liabilities)
- Account of all money received and disbursed (sale of assets, income of assets)
- Account of all property remaining (expenses, professional fees, executor fees)
- Statement of compensation requested

### **SANDFORD V. PORTER [1889] ON CA**

#### ***Duty to account explained***

**Facts:** Creditor demanded copies of accounts of assignee of debtor. Creditor did not express desire or make any attempt to inspect accounts, and did not wait reasonable time for copies - but instead brought an action for accounts.

**Issue:** Is there misconduct?

#### **Discussion:**

- The scope of the duty to account includes the following:
  - Have accounts always ready,
  - Provide reasonable facilities for inspection,
  - Give full information whenever required.
- TR must pass accounts within 1 month of receiving notice of request from BN.

**Ruling:** No misconduct here.